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Bowing to Authority: the COVID-19 Experience

The Covid-19 crisis is not only a subject of sadness and increasing worries but also a source of wonder and amazement. The incredible speed with which people adapted themselves to the new circumstances is one of the most remarkable features of the last few months. Much was made possible by technology (without the internet, a lockdown would not have been an option at all), but also regulation was drafted so swiftly that it seemed to mock the usual complaints about bureaucratic inertia.

Even more astonishing probably, especially for those whose job it is to reflect on law, is the amazing initial preparedness and willingness of people to comply with the rules. It is true that countries reacted differently, according to their tradition, political context, and historical experience. Some countries reacted with a more Draconian measure than others, and whereas in some countries people were literally banned from the streets, other countries boasted a more liberal attitude. But even in the latter, where there is a strong tradition to 'let people decide for themselves' and where governments admonished their citizens to make use of their common sense (as the Dutch Prime Minister never tired of pointing out), the infringement of human rights was massive. Even there, police entered private houses in order to impose fines on friends who had gathered there, as was the case with students who, though sharing the same flat, nevertheless were considered to belong to different households' and were fined for sharing their meals together. Nevertheless, in the first stages of the crisis, these measures met with very little resistance and it was only after the worst was over and infection rates dropped that the people started to express doubts and criticism. Then and only then, people started to organise protests against the measures.

It would be too simple to say that in times of emergency people naturally flock around their leaders and that as soon as the emergency is felt to be less threatening and acute, people start to think for themselves.The question is rather: *what kind* of reasons impel them to obey or violate the rules? Do they obey because their leaders are informed by experts and because the official guidelines they issue are based on scientific evidence?

Or do they obey because it is the Prime Minister who in the name of the government announces these rules on prime time television? And what fuelled the protests against governmental measures in the later stages of the crisis? A distrust in science or a distrust in politics?

Joseph Raz's theory can be of help here to shed light on the matter. Although he is a philosopher and not an empirical sociologist he introduJosced a conceptual distinction which enables us to get a proper view of what happened.[1]

Raz distinguished two types of reasons: first order reasons and second order reasons. First order reasons are reasons to act in a certain way. Should I go with Tom to the city to have fun? Or should I stay at home to finish this article? By balancing these conflicting first order reasons, I will finally decide on a specific course of action.

Second order reasons are reasons about reasons: second order reasons decide which reasons should and should not be taken into account. For instance, if I promised Tom yesterday that I would take him to the city centre, this very promise is a reason for me to *disregard* several conflicting first order reasons today such as that it will rain or that I want to finish my article. Promises are what Raz calls'preemptive reasons', reasons which prevent other reasons from being taken into consideration. Not only promises, but also rules, expert advice, decisions and agreements are all pre-emptive reasons.

Second order reasons often pertain to collective action, as is the case with agreements and rules, but they can also be individual: a promise I made to myself or a rule that I imposed on myself. For instance, if I decided that from now on I will exercise daily, that decision itself is a second order reason *not* to enter into a debate with myself every morning about whether I feel like it, or whether I have other pressing concerns. The fact that that is the rule that I decided upon is in itself sufficient reason to adhere to it. That is why we often speak about second order reasons in tautological terms: "a promise is a promise" or "rules are rules" or, unfortunately better known: "command is command".

Why do second order reasons exclude deliberation on first order reasons? Raz thinks that this is due to the fact that a second order reason is the *outcome of a deliberation* between first order reasons. In the case of my promise to Tom, it is assumed that my promise is not given light-heartedly but is given after some reflection on the relevant (first order) reasons, one of which is my wish to do him a favour and which is balanced against my wish to finish my paper and the probability that it will rain. The promise, therefore, is thought to be the outcome of balancing first order reasons and thereby *replaces* those

[1] JOSEPH RAZ, THE MORALITY OF FREEDOM (1986) 38-62.

reasons. Were I to allow them to play a role in the discussion, they would count double. That is why Raz calls these second order reasons 'pre-emptive': they make the first order reasons 'empty in advance'.

The better this process of deliberation (i.e. the more different considerations have been taken into account) the more weighty the resulting promises, agreements and rules. We might also say: the more "authoritative". The rule or statement issued by an authority is not just another first order reason for me to do or to refrain from a certain act, it is a second order reason for me not to act on first reasons, because I trust the authority to have balanced a plurality of (first order) reasons (values and interests) and that the rule was the outcome of such deliberation.

Authorities are not necessarily endowed with legal or political authority. Specialists can also enjoy authority if they are believed, on the ground of their expertise, to be better equipped to balance different first order reasons. If I treat a financial advisor as an authority I believe that her knowledge is more complete in financial matters than mine, which enables her to appreciate, consider, and balance more first order reasons than I can do myself; I defer my own judgement to her in the belief and trust that she will better take care of my financial resources than I am capable of myself. That means that her advice will preempt my own reasons to invest or borrow money. Obviously, I can also treat myself as an authority, as in the case of the daily exercise mentioned above. I then view the decision of my 'better' and more rational self as the result of a superior kind of balancing, which I am not able to perform late at night or when I have a headache. But more commonly, we rely on the authority of others.

But not unconditionally. As Raz pointed out, we can only speak of authority if it succeeds in balancing the different reasons (goals, interests and values) that apply to us *in a better way than we could do ourselves*. If the financial advisor repeatedly causes me to lose money, I will look for another one, even though I am not able to pinpoint the deficiencies in her expertise. Authorities who only act on first order reasons which apply to themselves, such as winning the coming election, and do not balance considerations that are relevant to their citizens, lose authority. The more we can rely on their balancing act (i.e. the more sensitive they are to different values and interests including mine) the more we will be moved to comply with their resulting rules.

So far so good. Going back to the Covid-experienc there are clearly two instances of authority at stake here: medical authority and political authority. At the outbreak of the virus the Dutch Prime Minister (and I think most Western European governments) explicitly and repeatedly asserted that governmental measures were and would be completely guided by scientific medical expertise. Being clearly unable to assess and

apply the various virological and epidemiological considerations by himself, our PM bowed to the authority of medical experts and left it to them to do the balancing. In the Netherlands, this led to the establishment of the so-called Outbreak Management Team (OMT) in which different medical disciplines participated. Virologists, epidemiologists, and intensive care specialists deliberated on different possible strategies, each of which can be seen as first order reasons for action. The result of their deliberations, the advice they finally gave to the government, was therefore received by the Cabinet as an authoritative second order reason: medical recommendations were followed to the letter and translated into governmental decrees without further ado.

The Cabinet might have thought that its total reliance on medical expertise would inspire confidence on the part of the public and be conducive to widespread compliance with the rules issued by the public authoritie and indeed, at the beginning of the crisis, this strategy was successful. It made people suddenly stop shaking hands and engage in strange dances in the streets to keep each other at the prescribed 1.5 metre distance. The unconditional surrender of politics to medical authority is presumably one of the factors that contributed to the quick and unreserved compliance of citizens. This degree of compliance that was not attained in countries such as the US and Brazil, where political leaders were in competition for the authority enjoyed by medical experts, as exemplified in the Fauci-Trump relationship.

So in the initial stage of the crisis, deference to medical authority was a success. But when the worst was over, it became clear that this strategy could be vulnerable and risky as well. In the first place because – as was to be expected – science did not speak with one voice. A number of scientists, who were not daily sitting at the Cabinet table, were quick to point out that the scientific evidence was far from conclusive on a number of issues, and revealed that even the most basic assumptions were a contested territory. They thus reopened deliberation on the various medical first order reasons and undermined the authority of the team. And rightly so! If science starts to issue second order reasons which do *not* allow for reconsideration and rebalancing, it removes itself from the scientific ideal of openness, ongoing discussion and essential refutability and revisablity of theories. By this, however, the authority of the Cabinet was undermined as well. Having claimed that its policies were entirely dependent on scientific medical advice, every attack on the official medical expertise simultaneously weakened the authority of governmental policies. Political authority became vulnerable to scientific refutation.

However, there was a second risk of this deference to medical authority, which materialized as soon as people came to realize that Covid was here to stay. The daily

consultations between the government and the OMT led to the situation in which the OMT started to identify itself with the task of the government. They started to take into account non-medical reasons as well. At least that is what happened in the Netherlands when medical experts said that it was not necessary to wear protective masks or that it was not dangerous to fly. They did not recommend this out of medical expertise but were also guided by other considerations: that there was a shortage of masks, and that airline companies faced bankruptcy.

Therefore, in a sense, medical experts overstretched their boundaries, taking into account first order reasons which they were probably *not* better able to weigh. This obviously ignited the debate on the composition of the team. If their advice was so authoritative, why did it only consist of medical experts? Why not include economists? Why not include behavioural scientists or ethicists? Or, let us be honest: *constitutional lawyers*? Didn't the deplorable state of the economy and the repeated violations of human rights call for an extension of expertise?

These questions are justified in the context of a government which has apparently outsourced its authority to weigh second order reasons to the OMT. In that context, it seems reasonable to require a composition of the team that would not exclusively focus on the virus and which would take into account the interests of small businesses, the wellbeing of schoolchildren and students, of old people in retirement homes, of the mentally retarded, as well as the requirements of the rule of law and respect for human rights.

At the same time, however, one might question the wisdom of extending an expert medical team to other expertises. Would it not be simpler and more democratic if the government resumed its responsibilities as an authority and weighed the various first order reasons itself? It is one thing to listen carefully to medical experts in the face of a pandemic, it is another thing to *substitute* political authority for scientific authority. It is one thing to treat medical reasons as very weighty and important first order reasons, it is another to take their recommendations as a second order reason which excludes inquiry into – other – first order considerations.

Maybe it is time to remind the governments of democratic societies of the Razian wisdom: that they enjoy authority insofar as they are better able to balance first order reasons than individual citizens, and that they only function on the basis of the confidence that they can engage in this complex task because of the fact that they represent the multiple voices, interests and values of the population at large. It might be the case that that is not enough and that additional expertise (medical, legal, ethical) is required in order to have a clear insight into the first order reasons that play a role. But

the government is the final instance that should do the balancing. If it tries to hide itself behind the tree of knowledge, it can only do so at the expense of losing its authority in the long run. No expert can remedy such a loss.

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†This contribution is inspired by a discussion I had with my colleague Kostiantyn Gorobets who is writing his PhD on authority in international law.

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The Eras of Extraterritoriality in the United States

ALINA VENEZIANO †

ABSTRACT

This article uses the research from Kal Raustiala's book, *Does the Constitution Follow the Flag? : The Evolution of Territoriality in American Law*, and the research from several of my articles on extraterritorial applications to explain how the United States has used the regulatory tool, extraterritoriality, since the time of the American Founding and how such use has differed as the United States gained power. The manner by which the United States has relied on extraterritoriality has differed depending on a particular era of history. For instance, this article articulates five eras that have characterized the U.S. decision-making process for extraterritoriality: cautionary, progressive, indiscriminate, withdrawal, and arbitrary. The United States within each era has embraced certain customary principles more than others such as sovereignty, territorialism, international comity, and global constitutionalism. Its reliance on these principles is volatile and changes in each era. What is remarkable is the extent to which the United States has and has not considered international issues as a part of its practice of utilizing extraterritoriality. As a young nation, the United States greatly clung to notions of sovereignty and territorialism and eschewed extraterritoriality because it was not strong enough to exert such power nor could it handle an invasion from another foreign power. Sovereignty and territorialism gave the United States the peace of mind and security against an uprising. International considerations were prominent and commonplace in the early eras. But as the nation grew in strength throughout each successive era, it no longer needed the bedrock of sovereignty and territorialism to safeguard it from other foreign powers. The United States instead sought to inject its laws extraterritorially and engage in global policing. Its rise in economic and political power gave it the strength to do so. Extraterritorial regulation was on the rise. However, the more its use of extraterritoriality rose, the more domestic struggles the United States encountered, which led to arbitrary judicial decisions and policy-making. Further, during the later eras, the United States relied less and less on international considerations and engaged in withdrawal tactics, causing some to view its behavior as hegemonic. There is a great imperative of examining history with the law. How U.S. history and politics can inform the future of the law is critical. The findings laid out within this article will serve a starting point for future research regarding potential future eras.

KEYWORDS

Extraterritoriality; International Comity; Regulatory Tool; Citizenship; U.S. Constitution

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INTRODUCTION

The United States is not the same country it was at the time of the Founding. It has grown substantially as a global power and leader. From asserting its independence to domestic funding to international policing, the United States is a pioneer country. A large part of its dominance, both internally and abroad, has been the proliferation of federal legislation beginning in the 1930s and the use of the regulatory tool, extraterritoriality.[1] Extraterritoriality involves the application and use of U.S. law to regulate foreign conduct. The key to this tool is that some part of the regulable conduct must take place outside the territory of the United States. As can be imaginable, extraterritorial applications create foreign friction, harm international relations efforts, and conjure up multiple issues with another state's sovereignty, determination, and territoriality. What is interesting about this article is that it tells the story of the United States' use of extraterritoriality in a series of stages – eras – each of which is accompanied by certain attendant circumstances such as evolved notions of territoriality and citizenship, differing attitudes about the international realm, and varying degrees of coordination and uncertainty between the U.S. branches of government.

This Article proceeds in the following manner. Part II presents the eras of extraterritoriality in the United States and describes the attendant circumstances associated with each era. The United States has proceeded through five eras: (1)

[1] For Kal Raustiala's book *see* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? : THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009). *See also* Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age,* 46 FORDHAM URB. L.J. 602 (2019) [hereinafter Veneziano, *Applying the U.S. Constitution Abroad*]; *see also* Alina Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws : What It Means for Foreign Investors, Foreign Markets, and Efforts at Harmonization*, 17 GEORGETOWN J.L. & PUB. POL'Y 343 (2019) [hereinafter Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws*]; *see also* Alina Veneziano, *A New Era in the Application of U.S. Securities Law Abroad : Valuing the Presumption Against Extraterritoriality and Managing the Future with the Sustainable-Domestic-Integrity Standard*, 23 ANN. SURV. OF INT'L & COMP. L. 79, 111 (2019) [hereinafter Veneziano, *A New Era in the Application of U.S. Securities Law Abroad*].

Cautionary with international focus, (2) Progressive with international focus, (3) Indiscriminate without international focus, (4) Withdrawal without international focus, and (5) Arbitrary without international focus. Part III explains the significance of classifying the United States into these eras of extraterritoriality. As will be demonstrated, it is important to understand how the United States began and continued to use extraterritoriality to regulate foreign conduct as well as how its use of this tool differed throughout history depending on factors such as power, attitudes on international law, security, and territoriality/citizenship. Lastly, Part IV presents the conclusions of this article.

1. PRESENTING THE ERAS OF EXTRATERRITORIALITY IN THE UNITED STATES

The history of the United States has proceeded through a series of eras regarding the judiciary's practice of utilizing the tool, extraterritoriality. Each era is characterized by a rise in global power and differing attitudes towards international law and relations. The eras are outlined below:

- Cautionary with international focus.
- Progressive with international focus.
- Indiscriminate without international focus.
- Withdrawal without international focus.
- Arbitrary without international focus.

These five era classifications are important because they demonstrate how the United States as a nation reacted to an increase in power and handled international considerations as it began and continued to use the regulatory tool, extraterritoriality.

1.1. CAUTIONARY WITH INTERNATIONAL FOCUS (FOUNDING – EARLY 1900s)

The Treaty of Westphalia of 1648 declared that each sovereign state has its own exclusive territory.[2] Little did many know at the time of the American Revolution, but America –

[2] *See* RAUSTIALA, supra note 1.

a new, unstable, and uncertain young nation – would slowly but progressively become a world dominator of politics, finance, and regulation. The year 1776 "foreshadowed a range of future rebellions by peoples who chafed under imperialism and sought ultimately to control their own political destiny".[3] And this is exactly what America sought to do. With only thirteen colonies, the nation arduously expanded by "conquest, purchase, and treaty".[4] This power to conquer territory was a power possessed by all states as a part of their sovereignty.[5]

The theory of strict territorialism and its limited constitutional reach dates back to the nineteenth century notion that the United States had no legal obligations outside its territory. At this time, the scope and extent of the "U.S. law" was more like the scope and extent of the U.S. Constitution. While extraterritorial applications were uncommon, it was not unheard of. The Constitution itself outlines several instances of authority for congressional regulation of matters beyond the U.S. territory. For instance, Article I grants Congress the power "to define and punish Piracies and Felonies committed on the High Seas".[6] This reference to such crimes "on the High Seas" certainly implies some authority to regulate beyond the territory of the United States.[7] Thus, the U.S. Constitution was both the symbol of the United States' power and a tool utilized for its increased regulation and expansion. Nevertheless, extraterritorial applications embraced a very cautionary approach. The impact of U.S. law took the same reasoning.[8] To extend a law extraterritorially at this time was seen as a "dangerous repudiation of Westphalian principles".[9] The Supreme Court has held in the early nineteenth century that U.S. law applies within the "full and absolute territorial jurisdiction"[10] of the United States; however, it had "no force to control the sovereignty or rights of any other nation".[11] International considerations were very much a top consideration.

Decisions on territorial expansions were not always to make. For instance, President Thomas Jefferson had doubts regarding the constitutionality of the Louisiana Purchase of 1803, despite its immense addition to the territory of the United States.[12] Throughout the decades (and centuries as we shall see later on), America was always plagued by territorial distinctions when expanding. Even as early as the 1800s, America

[3] *Id.* at 31.
[4] *Id.*
[5] *Id.* at 36.
[6] U.S. Const. art. I, § 8, cl. 10.
[7] *See* Raustiala, *supra* note 1, at 34.
[8] *Id.* at 239.
[9] *Id.*
[10] The Exchange v. McFaddon, 11 U.S. 116, 137 (1812).
[11] *The Apollon*, 22 U.S. 362, 370 (1824).
[12] Raustiala, *supra* note 1, at 37.

was facing tensions between its "global ambition and constitutional tradition".[13] But to expand globally, America had to be cognizant of international law. All its new territories became fully sovereign U.S. territory to other nations.[14] And once new territory was acquired, constitutional law came into play, meaning that the United States had to decide which rights applied in its newly acquired territories vis-à-vis its states. For instance, as the nation discovered all too well, an area where less constitutional rights apply allows the government to have more power and greater flexibility.[15] In other words, the fact that a territory was "unequivocally under U.S. control" did not automatically mean that the protections of U.S. law such as the guarantees of the U.S. Constitution were fully applicable.[16]

America's territorial expansion virtually eliminated the Indian tribes and soon created further internal territorial distinctions during the Civil War between the North and South, "slave" or "free".[17] Nevertheless, the nation's expansion after the Civil War displayed a "cautious approach" regarding other great foreign powers.[18] But simultaneously, the United States still managed to "engage more closely and forcefully in international relations" beginning in the years of the Reconstruction.[19] Further complicating matters at this point in this era was whether there were any exceptions to the applicability of U.S. law in foreign areas that are occupied by the U.S. military. In *Ex parte Milligan*, the Supreme Court held in 1866 that using military tribunals to try citizens during the Civil War, while civilian courts were still in operation, was unconstitutional.[20] But the applicability of the Constitution outside the territory of the United States was non-existent. In 1891, the Supreme Court in *In re Ross* held that "[t]he Constitution can have no operation in another country", meaning that U.S. nationals who are abroad cannot enjoy the same constitutional guarantees as U.S. nationals within the U.S. territory.[21] The Supreme Court adopted a "completely formalistic approach" to confine constitutional protections within the territory of the United States only.[22] Its outlook was cautionary, but nevertheless exhibited reference and care to international concerns.

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[13] *Id.* at 38.
[14] *Id.* at 44.
[15] *Id.* at 44, 46:

> From the vantage point of the outside world, the sovereignty of the United States enjoyed the greatest territorial ambit. But as an internal matter, American land was differentiated intraterritorially: there was a core where the Constitution and all laws applied fully, and there was a periphery where American law applied only partially.

[16] *Id.* at 32.
[17] *Id.* at 43.
[18] *Id.* at 27.
[19] *Id.* at 60.
[20] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[21] *In re* Ross, 140 U.S. 453, 464 (1891).
[22] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 610.

Between 1901 and 1922, the Supreme Court decided several cases that dealt with the status of territories that the United States acquired in and after the Spanish-American War, known as the *Insular Cases*.[23] These series of cases are significant because they articulated the distinction between incorporated and unincorporated territories and the types of constitutional protections that are applicable. Specifically, Justice White's concurrence described in detail that incorporated territories that are entitled to statehood have full constitutional rights while unincorporated territories only have those constitutional rights that are deemed fundamental.[24] The *Insular Cases* "played a critical role in America's move toward empire" by giving the federal government more territorial control even though the residents of such "unincorporated" territories had less constitutional rights than those in the colonies.[25]

Therefore, whether the United States could regulate a certain area depended on the location of the territory. These principles were consistent with the judiciary's stance on acquired territories. The Marshall Court has generally held that land acquired at this time traditionally retained its pre-existing law and was not automatically subject to the provisions of the U.S. Constitution.[26] At this time, it was not necessary to apply U.S. law everywhere indiscriminately. The limited and restricted approach still allowed America to expand. For instance, the executive branch was given flexibility, which helped fuel American expansion and its growth as a global power.[27] In other words and in a peculiar way, the *Insular Cases* "enabled American empire by limiting the reach of the Constitution",[28] albeit in a cautious manner.

As America expanded westward, it gained territory but not overseas territory.[29] Theories of the empire were gaining in popularity. Not only was the empire regarded as "force for good", but America's expansion of islands, as opposed to contiguous expansions, was very attractive.[30] However, whether this expansion or empire of the United States – American imperialism – would prevail in the long-run, was uncertain.[31] But following World War I, the United States retracted from its imperialistic attitude.[32] The nation had begun "a reallocation of territorial possessions" and "a reallocation of

[23] De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & P.R.S.S. Co., 182 U.S. 392 (1901).
[24] *See Downes,* 182 U.S. at 311-12.
[25] RAUSTIALA, *supra* note 1, at 87.
[26] *Id.* at 50.
[27] *Id.* at 24.
[28] *Id.*
[29] *Id.* at 72.
[30] *Id.* at 73, 75.
[31] *Id.* at 81.
[32] *Id.* at 90.

power in world politics".[33] The federal government grew stronger as a force of power in the lives of the American people.[34] This trend continued into the progressive era, as discussed in the next Part.

But again, this era was not devoid of considerations of international issues such as foreign states and foreign law. In fact, one can easily assert that this early era exhibited the highest preoccupation with international concerns compared with the later and present-day eras. Its focus on sovereignty, territoriality, and respect for international comity illustrates this assertion. A nation's sovereign jurisdiction was regarded as "exclusive and congruent with demarcated political borders".[35] Additionally, as a young nation, the United States focused much attention on both international law and strict territorialism. Westphalian territoriality provided the United States with security. Specifically, the nation could not handle an invasion at this time from either Britain or France and was thus comforted by international law, which "denied one sovereign influence or control in another".[36]

The strict territorialism approach also enabled America to grow as a global power because it prevented foreign powers, such as the stronger European powers, from "threaten[ing] to intrude on the domestic domain of the United States".[37] Had this approach not been the norm, it would have been both easy and legitimate for other nations to exert their dominance over America. In a sense, America greatly relied on strict territorialism and sovereignty to grow as a young nation until it no longer needed this security to expand.

American constitutionalism during this era demonstrated that the U.S. Constitution applied to anyone as long as they were on U.S. soil.[38] The trickier question was whether the U.S. Constitution followed the people – U.S. national or not – into an area that was not U.S. territory.[39] Thus, the U.S. Constitution was largely citizen-blind, but not territorially-blind. Any extensions of U.S. law beyond these mandates would not be a cautious means of regulation and would certainly cause international interference, something America could not risk at the time. Post-war U.S. practices used and viewed extraterritoriality differently and relied on different forms, the forms of which "reflected the dramatic extent of postwar U.S. hegemony".[40] The following Part elaborates on this successive era.

[33] *Id.* at 93.
[34] *Id.*
[35] *Id.* at 32.
[36] *Id.* at 137.
[37] *Id.* at 35.
[38] *Id.* at 57.
[39] *Id.*
[40] *Id.* at 91.

1.2. PROGRESSIVE WITH INTERNATIONAL FOCUS (EARLY 1900s – 1950s)

Beginning in the twentieth century, the United States had a firm footing as an international power. The Federal Government gained strength and took on a great role at mending the nation from the repercussions of the Great Depression. The New Deal under the Roosevelt Administration led a series of economic and industrial reforms and laws aimed at repairing America from the financial crisis.[41] However, these reforms were effectively a means of "subjecting economic and social activity to government power".[42] The notion that U.S. extraterritoriality was limited to U.S. territory was "a relic from another era".[43] This era struck the most impact around the mid-twentieth century with the "decline of strict interpretations of Westphalian territoriality and the rise of effects-based extraterritorial jurisdiction".[44] The nation had well begun a new era of progressive development characterized by a fuelled economy and desire for power. The United States' economic progress provided the necessary financial assistance by significantly funding the progression of American power internationally.

While the reach of U.S. law had expanded, it was accompanied by debates as to whether it should protect actors abroad.[45] At the time, it was very common for constitutional protections to vary depending on location and this was well-known. The same held true for federal legislation.[46] Sometimes U.S. nationals enjoyed different rights abroad compared to the rights guaranteed had they been on U.S. territory. This "more unusual form of extraterritoriality" involved the "fictional *projection* of U.S. territory abroad" by which U.S. law – constitutional or federal – was applied abroad to "insulate American citizens from foreign law".[47] Overseas policing was attractive for a variety of reasons but began to take force as federal courts became "increasingly solicitous" of the Constitution's reach over defendants' rights.[48] This attentive and considerate stance of U.S. regulation easily involved considerations of international law and foreign impact.

Specifically, such practice began as a policy and nationalistic decision. The United States ought to protect its nationals when they travel outside the territory of the United States by not only guaranteeing the protections of its law to those U.S. nationals abroad, but also by protecting those U.S. nationals against the possible application of

[41] RAUSTIALA, supra note 1, at 93-94.
[42] *Id.* at 94.
[43] *Id.* at 95.
[44] *Id.* at 28.
[45] *Id.* at 29.
[46] *Id.* at 6.
[47] *Id.*
[48] *Id.* at 29.

foreign law. The nation had the power and monetary means to accomplish this task via extraterritorial applications. This regulatory tool of extraterritoriality was a method "to control and manage the interests of Western powers in foreign lands".[49] It was certainly powerful and viewed as a progressive form of international regulation. But it was also more than a policy decision. As the United States realized that it could not or did not want to conquer foreign land, it resorted to "extraterritoriality" to achieve the same result, albeit to promote trade and protect its citizens abroad.[50]

While U.S. extraterritoriality may seem like it would disrupt the potential for harmonization of any sort, it was used to create consistency in the international realm or, in other words, to "manage and minimize legal difference".[51] On this point, scholars have noted that "[t]he desire for territorial security thus encouraged extraterritorial regulation".[52] Extraterritoriality would have no purpose if the laws of nations were already harmonized on a legal matter. Its use allowed the United States to inject its laws into a foreign state's – usually a weaker foreign state – sovereign territory.[53] The extraterritoriality experiment by the United States was a great success story, especially during the progressive era. The United States used this regulatory tool to weed out and eliminate differences that would have been applied against its own nationals. Therefore, because of this, U.S. nationals abroad were protected from "the strange, the different, and the dangerous" laws of the foreign nation to which they visited.[54]

The proliferation of legislation passed in this era beginning in the 1930s with the U.S. federal securities laws gave the United States ample options and "extensive opportunities" to regulate foreign actors and foreign conduct.[55] The primary focus of such regulation began with protecting U.S. markets and the economy.[56] Thus, foreign cartels that took advantage of U.S. markets were regulable under U.S. law in order to protect the economy of the United States. This phenomenon is most noticeable in the area of antitrust regulation, which took a progressive approach to foreign regulation. In *United States v. Aluminum Company of America*, decided by the Second Circuit in 1945, Judge Learned Hand discussed foreign agreements in restraint of trade under the Sherman Antitrust Act, such as monopolies, and held that any state may regulate conduct and actors outside its borders that have consequences within.[57] About four years later, the

[49] *Id.* at 20.
[50] *Id.*
[51] *Id.* at 21.
[52] *Id.* at 184.
[53] *Id.* at 21.
[54] *Id.*
[55] *Id.* at 117.
[56] *Id.* at 94.
[57] United States v. Alcoa, 148 F.2d 416, 427 (2d Cir. 1945).

Supreme Court in *Foley Brothers v. Filardo* stressed on the importance of employing the *presumption against extraterritoriality* when adjudicating cases with cross-border elements.[58] Simply put, the presumption is a judicially-invented tool that holds that courts must start with the presumption in cross-border cases that "Congress is primarily concerned with domestic conditions".[59] Use of the presumption was to prevent the abuses of applying a law abroad when this was not the intent of Congress. Another purpose was to uphold international comity and avoid instances where international friction could occur with the extension of U.S. law abroad. Therefore, international considerations were also a priority in this era. Additionally, as this is a presumption, it is also rebuttable.[60] The most common means of rebutting the presumption is by congressional indication in the statute to the contrary, though the presumption is frequently overcome, either because Congress' intent is not clear or courts loosen the presumption's standards.[61] Therefore, as will also be shown in the later era, the presumption is highly malleable.

When a nation extends its laws abroad to regulate the conduct of another nation, an interesting issue arises as to whether that area of law should be harmonized or whether it is better for the dominant nation to utilize extraterritorial application of its laws. Harmonization is usually accomplished by negotiating international agreements.[62] Logically, extraterritoriality is not a multilaterally agreed upon practice. It is instead better understood as "an alternative to more familiar cooperative efforts".[63] This alternative entails unilateral application. Many in this era considered the use of extraterritoriality to be "not only wrong, but dangerous" as well as a direct repudiation of the doctrine of territoriality, which had long been promoted as the optimal means to avoid infringements upon other nations' sovereignty.[64] Foreign nations did not consent to its practice and often found it an infringement of their sovereignty. The United States used it to influence its Western allies.[65] But instead of consent to regulate based on treaty power, it was based on statutes[66] – statutes with explicit provisions or judicially-implied provisions primarily for effects-based extraterritorial applications. During the 1940s, effects-based extraterritoriality was "a rational response" as the costs of this practice decreased, and the benefits increased.[67]

[58] Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).
[59] *Id.* at 285.
[60] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1.
[61] Raustiala, *supra* note 1, at 99.
[62] *Id.* at 120.
[63] *Id.* at 121.
[64] *Id.*
[65] *Id.* at 23.
[66] *Id.*
[67] *Id.* at 124.

Despite the common acceptance of U.S. extraterritoriality, its practice was nevertheless debated as a matter of policy and ethics. For instance, the U.S. Constitution's applicability outside the territory of the United States was an unsettled and debated issue, which made international issues very much a consideration in this era. And it had been the U.S. Supreme Court that took on the role of determining the limits and reach of U.S. extraterritoriality. The Supreme Court confronted the issue of the constitutionality of habeas petitions for captured enemy combatants in U.S. territory in *Ex parte Quirin* in 1942.[68] The German saboteurs' trial in the United States had to constitutionally provide the right to habeas; the trickier question was the extraterritorial reach of habeas, a question that was confronted later.[69]

In 1950, the Supreme Court decided *Johnson v. Eisentrager* where it held that German prisoners of war held in a U.S. prison located in Germany could not challenge their detention in U.S. courts.[70] While a foreign nation's presence on U.S. territory gives U.S. courts the authority to extend constitutional protections over those foreign nationals, the claimants in *Eisentrager* were at no time physically present on the territory of the United States.[71] This case articulated a citizenship distinction when individuals are not within the territory of the United States. *Eisentrager* stands for the proposition that the U.S. Constitution asserts a strong "territorial nexus over one based on citizenship".[72]

Seven years later, the Supreme Court confronted the issue of constitutional protections with respect to U.S. nationals abroad. In *Reid v. Covert*, the issue was whether civilian wives of military men were entitled to the constitutional right of a jury trial as opposed to being tried for the murders of their husbands overseas in a U.S. military court.[73] The Supreme Court in *Reid* held in a plurality opinion that the U.S. Constitution fully applies to U.S. nationals living abroad in a foreign state.[74] Justice Black's plurality opinion notably "reject[ed] the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights".[75] *Reid* was a seminal holding because it was an outright "abandonment of the strict, formalistic approach".[76] But despite the differing approaches between this era and the last, an international focus was still adhered to in policy-making and judicial decision-making.

[68] *Ex parte Quirin*, 317 U.S. 1, 20-21 (1942).
[69] Raustiala, *supra* note 1, at 135.
[70] Johnson v. Eisentrager, 339 U.S. 763 (1950).
[71] *Id.* at 771.
[72] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 613.
[73] Reid v. Covert, 354 U.S. 1, 3-5 (1957).
[74] *Id.* at 18-19.
[75] *Id.* at 5.
[76] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 614.

While the U.S. Constitution was citizen-blind when individuals are on U.S. territory, this blindness disappears and creates categories when abroad. As we shall see later, the notion that wartime detainees could not rely on the U.S. Constitution's protections when abroad "helped propel the strategy of offshore detention pursued in Guantanamo Bay".[77] But for now, suffice to say that World War II and its aftermath changed the extraterritorial jurisprudence by the United States in that it allowed it to become a progressive world leader and gave it "both the confidence and power to regulate extraterritorially".[78]

1.3. INDISCRIMINATE WITHOUT INTERNATIONAL FOCUS (1950s – 1990s)

The United States used extraterritoriality and favored it extensively as a new tool to increase its political and economic interests.[79] Its use became widely acknowledged during the second half of the twentieth century and paved the way for its indiscriminate application – an application that lacked consideration for international issues and the impact on foreign states.[80] Soon, extraterritorial regulations by the United States no longer regulated solely the weaker states but began to regulate its "coequal sovereigns".[81] It was not long before the United States' use of extraterritorial regulation became accepted.[82] The United States pursued this tool regardless of the resulting international frictions that it foresaw and ultimately created. Scholars have contended that the reason for this change in attitude by the United States was the change in its "global power relations".[83] Specifically, the rise in the United States' political and military power allowed it to play a central role in regulating the international realm.[84]

The United States made its mark with the new form of extraterritorial regulation by justifying everything based on the authority to regulate situations which caused effects within the territory of the United States. Thus, regardless of where such unlawful acts originated, the United States asserted the authority to regulate it if it caused an effect within its territorial borders.[85] Additionally, the United States was also able to justify its extraterritorial applications by conduct-based extraterritoriality. Both the effects and conduct-based forms of exterritoriality comprise the territoriality basis of prescriptive jurisdiction under international law. There are five bases of prescriptive

[77] Raustiala, *supra* note 1, at 137-138.
[78] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 612.
[79] Raustiala, *supra* note 1, at 35.
[80] *Id.* at 178.
[81] *Id.* at 95.
[82] *Id.* at 113.
[83] *Id.* at 121.
[84] *Id.*
[85] *Id.* at 95.

jurisdiction – the authority to prescribe a rule abroad – and they include territoriality (objective effects-based and subjective conduct-based), nationality, protective principle, passive personality, and universality principles.[86]

The use of the conduct and effects tests were over-inclusive.[87] Cross-border securities cases from this era serve as an excellent example of the indiscriminate use by the United States of extraterritoriality. Cases regarding cross-border securities law often used one form or another of the conduct and effects tests. For instance, the effects test found extraterritorial jurisdiction appropriate where foreign conduct injured U.S. investors.[88] The effects test was used in securities law cases such as where the unlawful conduct caused an adverse impact on the domestic capital markets in the United States.[89] The conduct test found extraterritorial jurisdiction where the conduct that occurred in the United States was an essential link in perpetrating the fraud or where substantial misrepresentations were made in the United States.[90] Decided on the same day and usually read together as one holding, *Bersch* and *Vencap* held that more than "merely preparatory" is needed to find U.S. extraterritorial jurisdiction,[91] while the "perpetration" of fraudulent conduct would be sufficient to find such extraterritorial jurisdiction.[92] In *SEC v. Kasser*, the Third Circuit articulated an approach that added the policy considerations involved in the case to determine that extraterritoriality necessary.[93] For instance, even though the fraud in *Kasser* had little to no direct impact on U.S. investors, the Third Circuit nevertheless applied the law extraterritorially because the defendant's activities were carried out in the United States.[94] *Kasser* was significant because the Third Circuit found extraterritorial application appropriate despite the "lack of domestic impact and little domestic conduct" present in the case.[95] Thus, the law applied abroad despite the international considerations that weighed against such a weak justification.

Therefore, it is easy to see the subjectivity and unrestrained approach in this era within the context of cross-border securities regulation and enforcement. Further, subsequent decisions in the cross-border securities context in the 1980s-90s resulted in "multiple judicially-created versions and standards of the conducts/effects tests".[96] The

[86] *See* Curtis A. Bradley, International Law in The U.S. Legal System 186 (2nd ed. 2015).
[87] Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[88] *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).
[89] *See* Des Brisay v. Goldfield Corp., 549 F.2d 133- 134 (9th Cir. 1977).
[90] *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335, 1337 (2d Cir. 1972).
[91] *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir. 1975).
[92] *See* IIT v. Vencap Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975).
[93] *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).
[94] *Id.* at 110.
[95] Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 124.
[96] *Id.* at 84.

Second Circuit stood as the "nationwide leader [in] securities litigation", as other circuit courts either adopted the approach used by the Second Circuit or formulated different standards.[97]

Sometimes, to avoid being encompassed by U.S. federal law or, more likely at this time, constitutional law, U.S. enforcement agents would move offshore to give themselves more flexibility.[98] This was common when referring to the mandates of the U.S. Constitution, which was more territorially-bound compared to the reach of federal statutes. Federal statutes, on the other hand, exhibited more of an extended geographic reach, as demonstrated by the cross-border securities law cases noted above. The United States could police foreign conduct and foreign actors who affected its markets, nationals, and other domestic interests via federal legislation.[99] During the Cold War, the nation's quest for self-determination increased its efforts to become a global superpower and developed the attitude that self-policing – inclusion policing that crossed international borders – was necessary.[100] This increase in the geographic scope of the U.S. was also controversial since it sometimes gave criminal suspect's legal protections outside of U.S. territory.[101]

Globalization made it necessary for the United States to enact more legislation and for federal agencies to enforce and police actors falling within the legislation's regulatory reach. Many in this era believed that to fail to apply a nation's regulatory rules outside U.S. territory "would weaken or even undermine the regulatory efforts taking place at home".[102] Thus, extraterritorial regulation was inevitable. After all, how could goods and services cross international borders at an increased rate – both legally and illegally – when regulations could not?[103]

Globalization and technology not only mandated increased international regulation but also facilitated innovative ways at circumventing regulatory requirements and engaging in new unlawful enterprises. But despite the significant impact of technology and globalization upon the United States' excessive use of extraterritoriality, the United States itself showed very little concern for international law and the rights of foreign states and foreign nationals. The rise of globalization after the war also brought with it an increase in international commerce.[104] This was beneficial for the United

[97] *Id.* at 125.
[98] Raustiala, *supra* note 1, at 159.
[99] *Id.* at 22.
[100] *Id.* at 21.
[101] *Id.* at 155.
[102] *Id.* at 177-78.
[103] *Id.* at 159.
[104] *Id.* at 179.

States and continued to fuel its international expansion and economic growth. But there was, and continues to be, a dark side of globalization. With the increase in international commerce came the increase in international crime.[105] For instance, international crime took precedence in the 1970s and necessitated foreign policing.[106] While a nation would normally be expected to cooperate with other nations to combat novel issues of transnational crime, unilateral options were more popular for the United States especially where "foreign law was more lax than, or simply different from, American law".[107] Thus, international issues became weak topics of consideration for the United States in its decision-making, even – if not especially – when tackling regulation and crime of an international character.

This was soon labelled "American hegemony" and was characterized by "a marked willingness to project power and law, sometimes unilaterally, within the territorial borders of other sovereign states to better control and deter transboundary threats".[108] Extraterritoriality in this era was "decidedly controversial" and created severe friction between the United States and its closest allies.[109] In a sense, the rise of the United States' global power and the increase in trade created a globalization movement that emphasized an extreme form of competitiveness over cooperativeness in the international realm. And it has been the United States, through its indiscriminate use of extraterritoriality, that has succeeded in this competitive environment. In short, "extraterritorial applications create[d] the golden ticket for U.S. dominance in the international sphere".[110]

1.4. WITHDRAWAL WITHOUT INTERNATIONAL FOCUS (1990s – 2010)

Despite the continued use of extraterritorial regulation, there has been "a moderate cut-back and cautionary approach" taken with respect to the extensions of U.S. law extraterritorially.[111] More generally, the United States in this era continued in its path towards world dominance but did so in a peculiar way that involved the withdrawal from international law issues, a steep cut-back in extraterritorial applications of U.S. law, and the adoption of formalistic standards in certain areas.

[105] *Id.*
[106] *Id.* at 162.
[107] *Id.* at 179.
[108] *Id.* at 180.
[109] *Id.* at 115.
[110] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 349.
[111] *Id.*

The United States in this era exhibited a curious behavior of lost interest in negotiating and concluding international agreements.[112] International withdrawal was high and extraterritoriality seemed to lose force – if only briefly, though inconsistently. The presumption against extraterritoriality was revived during this era to lessen the unintended extensions of U.S. law and, therefore, limit extraterritorial applications.[113] The most prominent case that articulated that revitalization was *EEOC v. Arabian American Oil Company* [hereinafter *Aramco*], decided in 1991.[114] In *Aramco*, the Supreme Court made clear that the presumption against extraterritoriality is a longstanding principle of American law and that Congress is primarily concerned with domestic conditions when it legislates.[115] Had Congress desired to include a provision for extraterritorial application, it should have been placed inside the statute; if Congress still wishes to do so, it can amend the statute accordingly.[116] Such an amendment in this era needed a clear statement of the congressional intent to apply that provision extraterritorially; if not, the presumption cannot, and will not, be overcome.[117]

Statutory interpretation has been very inconsistent where the Court has been faced with cross-border claims. Consider the extraterritorial application of the Sherman Act. In 1993, the Supreme Court in *Hartford Fire Insurance Company v. California*, held that the Sherman Act applies extraterritorially to foreign conduct and is not subject to the presumption,[118] but then held in 2004 in *F. Hoffmann-La Roche Ltd v. Empagran* that the Sherman Act does not extend to independent foreign harm.[119] Thus, "judges have sometimes applied a strict presumption only to render it completely meaningless in other similar cases".[120] This is harmful to foreign nations and does not involve an adequate and thorough consideration of international law issues.

While the extended reach of U.S. statutory provisions – or, shall we say, the reduced extraterritorial applications of statutory provisions – was an important part of this era, issues surrounding the geographic reach of constitutional provisions proved to be an even bigger feature in this era. The prior era saw expanded uses of U.S. extraterritoriality. But after the Supreme Court decided an opinion in 1990 – *United States v. Verdugo-Urquidez* – that significantly curtailed the reach of the Fourth Amendment to

[112] *Id.* at 350.
[113] *Id.* at 347.
[114] *See* EEOC v. Aramco, 499 U.S. 244 (1991).
[115] *See Aramco,* 499 U.S. at 248; *see also* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[116] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[117] *Id.*
[118] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 814, 818-20 (1993).
[119] *SeeF.* Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004).
[120] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 348.

foreign criminals searched outside the United States by U.S. agents,[121] America entered a new era. This new era of "traditional territoriality" and withdrawal from the international realm was "welcomed by the executive branch".[122] While it was certainly commonplace for U.S. law to regulate not only the weak states but also America's strong, foreign allies, it was also understood that the reach of the U.S. Constitution was confined within U.S. territory. The reason for this was that the United States desired "freedom from constitutional restraint" and "flexibility" when dealing with sensitive issues.[123] Such a stance ignored the concerns of other international powers. As two prominent examples, consider the war on terror and the U.S.-Mexican border.

As for the war on terror, the Supreme Court has decided several cases during this era that involved a retreat to territorialism and a blind-eye towards international law. The 9/11 terrorist attacks and conflicts in Iraq and Afghanistan "have led to a range of territorial quandaries" such as whether U.S. law applies to military companies outside the United States but working for the United States or, most notably, whether U.S. law applies to the foreign detainees at Guantanamo Bay.[124] Guantanamo Bay was chosen as the site to hold prisoners of war because it was thought to be "beyond the reach of the federal courts".[125] But the policy decisions, ethics, and constitutionality surrounding Guantanamo made it a very tricky issue, though ripe for judicial review. Cases shortly after the turn of the century centered on the "executive authority to designate individuals as enemy combatants and hold them without counsel or judicial review".[126] Cases in this era such as *Hamdi v. Rumsfeld*,[127] *Rasul v. Bush*,[128] *Hamdan v. Rumsfeld*,[129] and *Boumediene v. Bush*[130] are "notorious for their rejection not only of absolute territorialism, but also of the Executive's claim of power to detain these suspects without certain Constitutional restraints".[131]

In 2004, the Supreme Court in *Rasul* held that the federal habeas statute was applicable to detainees being held at Guantanamo.[132] After *Rasul*, Congress enacted the Detainee Treatment Act of 2005 [hereinafter DTA], which stripped the federal courts of jurisdiction from hearing habeas petitions from detainees at Guantanamo.[133] In *Rasul*,

[121] *See* RAUSTIALA, *supra* note 1, at 189.
[122] *Id.*
[123] *Id.* at 189-90.
[124] *Id.* at 29.
[125] *Id.*
[126] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 618.
[127] *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[128] *See generally* Rasul v. Bush, 542 U.S. 466 (2004).
[129] *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[130] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).
[131] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 618.
[132] *See Bush,* 542 U.S. at 484.
[133] *See* Pub. L. No. 109-148, §§ 1001–06, 119 Stat 2680 (2005).

the Court was able to find a "very narrow" reasoning for its holding by distinguishing the constitutional appeal right from the statutory right and, thereby, avoided the "thorny constitutional questions".[134] The takeaway from *Rasul* at this point was that the statute applied to citizens and aliens – including foreign prison of war detainees; whether there was a constitutional right possessed by the individual detainees at Guantanamo was "carefully avoided" by the Court and unsettled after *Rasul*.[135] As a last point, *Rasul* gave the executive exactly what it wanted: the power to have freedom and discretion over the detainees at Guantanamo without constitutional restraint.[136]

The Supreme Court decided *Hamdi* also in 2004; Hamdi was a U.S. national who was alleged to be an enemy combatant.[137] The Court's decision in *Hamdi*, also decided in 2004, was significant because it stood for the proposition that "threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator".[138] Two years later, the Supreme Court in *Hamdan* had to decide whether the military commission convened by the President was valid under congressional legislation and the laws of war as well as whether the procedures used to try Hamdan – a Yemeni national – violated international and martial law.[139] The Supreme Court held that the DTA of 2005 was inapplicable to cases that were pending at the time of the statute's enactment and that the procedures used by the military commission to try Hamdan violated the both the Uniform Code of Military Justice and Common Article 3 of the Third Geneva Conventions.[140] Again in response to a Supreme Court holding that Congress disfavored, Congress passed the Military Commission Act in 2006; Section 7 of this Act stripped the federal courts of jurisdiction over the pending habeas petitions by those individuals determined by the United States to be enemy combatants.[141]

These cases came to a peak in 2008 with the Supreme Court opinion, *Boumediene v. Bush*. The issue for the Court in *Boumediene* was whether the Suspension Clause applied to the detainees at Guantanamo.[142] The Supreme Court held that the detainees held at Guantanamo Bay have the constitutional right to challenge their detentions with writs for habeas in the U.S. district courts.[143] *Boumediene* was important because it meant that

[134] Raustiala, *supra* note 1, at 202.
[135] *Id.*
[136] *Id.* at 204.
[137] *See Hamdi,* 542 U.S. at 510.
[138] *Id.* at 535.
[139] *See* Hamdan v. Rumsfeld, 548 U.S. 567 (2006).
[140] *Id.* at 575–76; 613, 635.
[141] *See* 28 U.S.C. § 2241 (2008).
[142] *See* Boumediene v. Bush, 553 U.S. 732 (2008).
[143] *Id.* at 793, 795.

the U.S. government "was no longer exempt from judicial scrutiny"[144] and showed in many ways how the U.S. judiciary was "quite uncomfortable with the idea that the government can slip its constitutional fetters by choosing the location of detention or . . . us[e] international agreements of a dubious nature to allocate sovereignty".[145] What we began to see with these cases is a shift from an expanded reach of U.S. law to "a more domestic orientation" under the purpose of national security concerns.[146] As Kal Raustiala rightfully asserted, "[i]n a world in which suspects, soldiers, and special agents can be flown around the world in a matter of hours, the idea that legal rights would still be tethered to territory is likely to strike at least some members of the federal judiciary as highly problematic".[147]

The majority placed great emphasis on the fact that there is a difference between formal sovereignty and practical sovereignty. The majority in *Boumediene* noted that sovereignty was not a clear-cut status, and that it was possible for territory to be under one nation's formal sovereignty and under another nation's practical sovereignty.[148] Therefore, using a functional approach, the Court determined that Guantanamo could not in any sense be considered "abroad"; this made it easy for the Court to extend habeas to the area.[149] And it was the opinion here in *Boumediene* where the Supreme Court first held that a constitutional right was applicable to a foreign national held outside the United States.[150]

As for issues regarding the U.S.-Mexican border, it is important to note that extraterritorial policing was on the rise beginning before the turn of the twenty-first century. Focus at this time was on "the transnational movement of illegal drugs, migrants, and money".[151] Such scrutiny and context led to the arrest of Verdugo-Urquidez, a Mexican drug lord who trafficked drugs into the United States.[152] *United States v. Verdugo-Urquidez* concerned the extraterritorial application of the Fourth Amendment's prohibition on unreasonable searches and seizures.[153] In *Verdugo-Urquidez*, a Mexican national who was prosecuted for narcotics-trafficking into the United States and participating in murdering a Drug Enforcement Administration [hereinafter DEA] agent was seized by Mexican police and extradited to the United States.[154] DEA agents

[144] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 623.
[145] RAUSTIALA, *supra* note 1, at 235.
[146] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 610.
[147] RAUSTIALA, *supra* note 1, at 221.
[148] *Id.* at 215.
[149] *Id.* at 216.
[150] *Id.* at 218.
[151] *Id.* at 168.
[152] *Id.*
[153] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[154] *Id.* at 262–63.

searched his home without a warrant the next day and confiscated records that implicated him and his smuggling business.[155] The Supreme Court held that this was not a violation of the prohibition against warrantless searches and seizures under the Fourth Amendment because this constitutional provision only applies to "the people" of the United States and does not operate to limit the conduct of the federal government when it acts "against aliens outside of the United States territory".[156] What is interesting about this case is that Verdugo-Urquidez was on U.S. soil when his home was searched, yet the Supreme Court did not provide him the protections of the U.S. Constitution. This was hard to rationalize with the common notion that everyone within the territory of the United States – even a foreign national – has constitutional rights. The Court obviously placed a much greater emphasis on citizenship in this case, but justified its decision by noting that the Fourth Amendment does not constrain U.S. government agents when they act abroad. Because the search occurred in Mexico, it did not violate the Fourth Amendment.

Thus, the focus was on the U.S. actors and not the foreign national inside the United States. Domestic issues clearly played a greater role in this case. *Verdugo-Urquidez* is also heavily focused on territorialism. Kal Raustiala describes this case as "a return to older understandings of territoriality"[157] – one that is more formalistic and internationally withdrawn. Some have promoted *Verdugo-Urquidez* as a proper response to a perceived trend of "globalizing constitutional rights".[158] Others decried it as "an anachronistic retrenchment" – a rejection of a liberal reasoning of the Bill of Rights and return of the old and outdated territorialism that has been slowly fading throughout the twentieth century.[159] Kal Raustiala notes that extraterritoriality in this era "was increasingly common, though not always consistent".[160]

In addition to the Fourth Amendment, the Fifth Amendment's extraterritorial reach has also been interpreted very formalistically by the Court.[161] In 2017, the Court decided *Hernandez v. Mesa*.[162] *Hernandez* involved the extraterritorial application of the Fourth and Fifth Amendments. The facts of this case involve the fatal shooting of Sergio Adrian Hernandez Guereca in 2010 by a Customs and Border Protection agent.[163] The U.S. agent was on U.S. soil and Hernandez was on Mexican soil.[164] The Supreme Court in

[155] *Id.*
[156] *Id.* at 265–66.
[157] RAUSTIALA, *supra* note 1, at 172.
[158] *Id.* at 177.
[159] *Id.*
[160] *Id.* at 179.
[161] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 615.
[162] *See* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).
[163] *Id.* at 2004–05.
[164] *Id.*

this case held that the government had qualified immunity under the Fifth Amendment.[165] For the Fourth Amendment, the Court avoided determining the extent of extraterritorial application and instead noted that such a question is "sensitive and may have consequences that are far reaching".[166] Interestingly, the Supreme Court granted certiorari again on the facts of this case and has recently heard oral arguments on November 12, 2019 over the issue of whether federal courts can recognize a damage claim under *Bivens*[167] when the plaintiffs plausibly allege that a federal enforcement officer violated the Fourth And Fifth Amendments' rights with no other alternative.[168]

Accompanying the important characteristics of this era such as the reinvigoration of the presumption, Guantanamo, and the U.S.-Mexican border, the United States displayed a markedly potent aversion from international law. For instance, the Bush Administration's use of Guantanamo as a place beyond the reach of U.S. law stood as "a symbol of a larger American disregard for international law".[169] Despite the administration's arguments that this was Cuban and not American territory, the international community nevertheless recognized Guantanamo Bay as "American territory". It was not hard for the Court in *Boumediene* to hold that certain constitutional rights cannot be denied there.[170]

Upon reflection, it may seem difficult to articulate how to best proceed when dealing with cases of either constitutional or statutory extraterritorial applications. Regarding constitutional extensions, I had previously urged for a combination of the formalist approach from *Verdugo-Urquidez* and the functional approach of *Boumediene* to form a workable framework that "supports consistency in the application of the Constitution abroad, provides a clear standard for lower courts to follow, gives the Executive its needed flexibility in dealing with national security matters, respects foreign states' sovereignty by avoiding unnecessary infringements, and affords foreign claimants the fair administration of certain constitutional guarantees".[171] Nevertheless, whether America ought to extend the protections of its Constitution was and is ultimately based on the propriety for extending constitutional protections to foreign nationals outside of U.S. territory.[172] At this time, there was both tension and confusion as to U.S. territoriality and, as a result, the judiciary, namely the Supreme Court, has

[165] *Id.* at 2007.
[166] *Id.*
[167] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).
[168] *See* Hernandez v. Mesa, 2019 U.S. LEXIS 3691.
[169] Raustiala, *supra* note 1, at 190.
[170] *Id.* at 192.
[171] *See* Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 640.
[172] *Id.* at 629.

been hesitant to make sweeping holdings; hence, "strict territoriality remained attractive".[173]

The question of the Constitution's applicability and continued viability abroad will remain a pressing issue. As I have argued previously, the approach should ultimately turn on fairness and practicality but will depend in large part on an individual's deep-rooted opinions on the desirability of an expanded Constitution:

> If one views the Constitution as a rigid document impervious to change, then the United States will be forced to justify its decisions with rationales that are outdated and ill-suited for a modern world . . . . However, if one views the Constitution as a living document that changes with every judicial opinion, every president, or every major political era, then its vitality and strength as a governing document of stability will be severely undermined.[174]

1.5. ARBITRARY WITHOUT INTERNATIONAL FOCUS (2010 – PRESENT)

"The United States does not occupy the same position it did over 200 years ago"; it is now a global leader and easily asserts its dominance "economically, politically, and socially".[175] Under present-day realities of U.S. law and the extraterritorial applications thereof, territoriality is not rooted in international law, but is instead rooted in the notion that "Congress is primarily concerned with domestic conditions".[176] Within the first several years of the turn of the century, the United States still seemed to struggle "between its constitutional traditions and its global ambitions".[177] The increase by the United States in moving sensitive activities offshore demonstrates first-hand how manipulable territoriality is to a nation's advantage.[178] Never has this been so apparent than with the United States' behavior in Guantanamo, as the prior Part has shown. To this day, one cannot tell for certain where the United States' constitutional protections and territorial jurisdiction begins and ends, as its "constitutional and jurisdictional borders remain complex, messy, and contingent".[179] Such an arbitrary approach to regulating foreign conduct is characteristic of this era along with continued instances of disregarding international considerations.

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[173] Raustiala, *supra* note 1, at 185.
[174] Veneziano, *Applying the U.S. Constitution Abroad*, *supra* note 1, at 636-637.
[175] *Id.* at 635.
[176] *See* EEOC v. Aramco, 499 U.S. at 262 (quoting *Filardo,* 336 U.S. at 285).
[177] *See* Raustiala, *supra* note 1, at 29.
[178] *See id.* at 225.
[179] *Id.* at 224.

One of the most monumental decisions of this era was *Morrison v. National Australia Bank*. In *Morrison*, decided in 2010, a class action lawsuit was filed by foreign investors against National Australia Bank alleging violations of the antifraud provisions of the Exchange Act in connection with shares purchased on foreign exchanges.[180] The issue was "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges".[181] The Supreme Court held in an opinion by Justice Scalia that the antifraud provisions of the Exchange Act of 1934 do not apply extraterritorially. Specifically, the Court held that the presumption against extraterritoriality will be applied in all cases to preserve "a stable background against which Congress can legislate with predictable effects".[182] Because there is no affirmative indication in the Exchange Act that the antifraud provisions apply extraterritorially, the Court held that "it does not".[183] Petitioners still claimed domestic application because National Australia Bank's subsidiary in Florida, HomeSide, engaged in the deceptive conduct of manipulating HomeSide's financial records.[184] The Court in *Morrison* held that courts must look to the "focus" of the statute in question to ascertain if extraterritorial application is appropriate. Under the facts of *Morrison*, the Court determined that the focus of the Exchange Act "is not upon the place where the deception originated, but upon purchases and sales of securities in the United States".[185] Thus, the transactional test was articulated, whereby the Exchange Act applies only to "securities listed on domestic exchanges, and domestic transactions in other securities".[186]

Morrison is significant in a broader sense in that it foreclosed the possibility of foreign-cubed transactions being litigated in U.S. courts – a situation that arises when a foreign plaintiff(s) (or foreign class action suit) sues a foreign defendant(s) in connection with alleged unlawful foreign conduct. Nevertheless, *Morrison* created a situation where "foreign transactions by both domestic and foreign investors will fall outside the protections of *Morrison*".[187] In other words, a U.S. investor will not be able to rely on U.S. law when they transact on a foreign exchange regardless of where they concluded the transaction or where the harm was ultimately felt. Thus, *Morrison*'s protections "are

[180] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 250-51 (2010).
[181] *Id.*
[182] *Id.* at 261.
[183] *Id.* at 265.
[184] *Id.* at 266.
[185] *Id.*
[186] *Id.* at 267.
[187] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 349.

wholly independent of the degree of harmful effects, amount of conduct in the United States, and the citizenship of the investor".[188]

In 2013, the Supreme Court applied the presumption against extraterritoriality to a jurisdictional statute, the Alien Tort Statute 28 U.S.C. § 1350 (1789) [hereinafter ATS]. Chief Justice Roberts for the Court held that even though the presumption is usually applied to discern whether a statute applies abroad, courts are also similarly constrained when considering causes of action under the ATS.[189] The standard here articulated by the Court was that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application".[190] It was a very awkward holding when the Court applied the presumption to a clear and unambiguously jurisdictional statute. This is significant because the presumption againstextraterritoriality is a judicially-invented tool that regulates and safeguards against unintended extraterritorial applications only with respect to conduct-regulating statutes. Jurisdictional statutes are not meant to be covered here.

Implications for the future include the "continued manipulation of the laws" by various actors including the courts, the "increase in inconsistent litigation," and the "potential consequences on the state of Canada".[191] But the arbitrariness of the extensions of U.S. law did not stop there. In 2016, the Supreme Court decided *RJR Nabisco v. European Community*.[192] Here, RJR Nabisco allegedly participated in a "global money-laundering scheme" which was "orchestrated from their U.S. headquarters".[193] The complaint alleged a pattern of racketeering with RJR Nabisco as the Racketeer Influenced and Corrupt Organizations (hereinafter RICO) "enterprise".[194] All provisions in sections §1962(a)-(d) of RICO were alleged to have been violated by RJR Nabisco and resulted in harm to the European Community.[195] After a long procedural history that spanned about 16 years, the Supreme Court granted certiorari.[196] The Court held unanimously that the presumption against extraterritoriality had been overcome regarding the substantive provisions of § 1962 only if "each of those offenses violates a predicate statute that is itself extraterritorial"; however, the Court held 4-3 that the

[188] *Id.*
[189] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013).
[190] *Id.* at 124-25.
[191] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 358.
[192] *See* RJR Nabisco, Inc. v. European Community, 195 L. Ed. 2d 476 (2016).
[193] *Id.* at 489, 505.
[194] *Id.* at 490.
[195] *Id.*
[196] *Id.* at 489.

presumption was not overcome regarding the private right of action in § 1964(c) unless the private civil claimant proves "a *domestic* injury to its business or property".[197]

RJR Nabisco illustrates the severe confusion within the branches of the U.S. government when dealing with cases with a cross-border character. The RICO statute explicitly mentions that it reaches "interstate or *foreign* commerce"; how could the judiciary not see that Congress explicitly provided for extraterritorial application in this statute? Justice Ginsburg – who dissented in *RJR Nabisco* – stated that "[a]ll defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States"; thus, this case, Ginsburg asserts, "has the United States written all over it".[198] This was certainly far from a foreign-cubed transaction. Instead, the Supreme Court held that the presumption against extraterritoriality was not overcome with respect to the private right of action. It should have never gotten to this point because the presumption should never come into play when congressional intent is clear as to the geographic reach of the statute, as it was in RICO. But the Court in *RJR Nabisco* applied the presumption nevertheless to an express legislative private cause of action. This opinion is devoid of the consequences to international issues and the impact to foreign states. Nevertheless, *RJR Nabisco* is the law of the land now and lower courts are compelled to require those private civil RICO claimants in its jurisdiction to satisfy the domestic injury requirement first. As I have previously contended, this opinion and the lack of congressional action thereafter "impl[y] that the courts may have more power when deciding whether to apply a provision extraterritorially, even more so than congressional power".[199] The reason for this could simply be because congressional amendments are very unlikely in this modern era.

The United States has become increasingly hostile to international considerations. This is demonstrated in the *Morrison* and *RJR Nabisco* holdings. *Morrison*'s holding, for example, contains very few references to international law and comity.[200] Matters have gotten to the point where infringements between the political branches are out of control and repeatedly violate the competence of one another. In a previous commentary, I have argued that questions of extraterritorial application in congressional statutes that are silent as to their geographic reach should be political questions, and therefore, reserved to the executive and legislature to avoid these infringements.[201] As this is unlikely to happen, all that can be known for certain is that

[197] *Id.* at 495, 498.
[198] *Id.* at 508.
[199] *See* Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 347.
[200] *See* Veneziano, *A New Era in the Application of U.S. Securities Law Abroad, supra* note 1, at 111.
[201] *See generally* Alina Veneziano, *Should Extraterritoriality in the Midst of Congressional Silence Be a Political Question?*, 51 N.Y.U. J. Int'l L. & Pol. 637 (2019).

without further guidance, judicial discretion empowers the courts "to articulate its own standards and tests for which to decide cases involving cross-border claims".[202] And this trend is likely to continue.

2. SIGNIFICANCE OF THE ERA-CLASSIFICATIONS

The eras classifications teach us about the history of the United States, namely, what the power of one nation can do to the international world. This is not to say that power is a bad thing, but when a nation uses such power to become an international regulator who can craft its rules in a way that apply to actors abroad but not to its own federal agents abroad, then something unjust arises: hegemonic dominance. The United States was the underdog to become a world leader. The United States shocked the world as it swiftly evolved into an international leader in record time. But as it grew from its weak and newly formed position, it was accompanied by the growth of technology, globalization, and changes in global policy-making, politics, war, and mobility. All these factors dramatically influenced the way the United States utilized extraterritoriality to regulate foreign conduct and achieve its objectives.[203]

Throughout U.S. history, for example, extraterritoriality has appeared in many different forms.[204] For instance, what once began as an attempt to conquer more land, soon developed into cooperation efforts, and finally to bitter withdrawal from the international realm.[205] What these different purposes of extraterritorial applications had in common was "efforts to manage, minimize, or sometimes capitalize on legal differences".[206] The international order has decreased the barriers to using this regulatory tool and has also increased the incentives of the United States in using it.[207]

One must consider issues of extraterritoriality, including congressional intent about the geographic reach of statutes, the presumption against extraterritoriality, effects and conduct-based extraterritoriality; one must also consider intraterritoriality, including the domestic context used to facilitate growth such as federalism.[208] Kal Raustiala argues that we cannot understand the history and implications of the United

[202] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 357.
[203] *See* RAUSTIALA, *supra* note 1, at 7.
[204] *See generally id.* at 6.
[205] *Id.* at 7.
[206] *Id.*
[207] *Id.* at 238-39.
[208] *Id.* at 6-7.

States' presence without understanding the international and domestic circumstances behind every move the United States makes.[209] For instance, extraterritoriality and intraterritoriality are both domestic tools and national features of the United States. Raustiala asserts, "we cannot understand the evolution of extraterritoriality and intraterritoriality in U.S. law without understanding the broader international context".[210]

How can one best summarize the use of extraterritoriality by the United States? Raustiala articulates that these concepts within the United States "cannot be understood absent a global context".[211] He argues in his book that high levels of interdependence before World War I coincided with strict territoriality and the increase in effects-based regulation coincided with less economic interdependence.[212] My thesis here presents a similar inverse relationship: the United States placed more consideration and emphasis on international relations, international law, and international politics when its use of extraterritoriality was relatively low or in its infancy stages. As the United States grew in power and utilized extraterritorial applications more extensively, it relied upon and considered these international concerns much less frequently. "International politics has deeply shaped not only domestic politics, but also domestic law", Kal Raustiala asserts,[213] but somewhere in the middle, it must be added, there lies extraterritoriality.

The territoriality of the United States can be explained by the actions and experiences of other major foreign powers.[214] "[T]erritoriality has neither been static nor treated as a given".[215] There is no right or wrong way of handling territoriality. It changes based on the political, social, and economic exigencies of each successive era. It is also affected by the ideology of the individuals leading the political branches and the judiciary – the Supreme Court – of the United States. Whether international considerations are heeded depends on the context of each era. Sometimes, too, the domestic internal struggles can affect the United States' use of extraterritoriality, as demonstrated by the war on terror cases and issues with the U.S.-Mexican border from the Withdrawal Era. Therefore, more often than not – and this is becoming truer today – "before harmony within the international sphere can take place, the U.S. branches must work together to achieve domestic harmony".[216]

[209] *Id.* at 6.
[210] *Id.* at 7.
[211] *Id.* at 241.
[212] *Id.* at 239.
[213] *Id.* at 241.
[214] *Id.*
[215] *Id.* at 7.
[216] Veneziano, *Studying the Hegemony of the Extraterritoriality of U.S. Securities Laws, supra* note 1, at 347.

CONCLUSION

This article presented a series of eras that have characterized the practice of the United States in utilizing the regulatory tool, extraterritoriality. Throughout each era, we have seen how the United States grew as a world power and, simultaneously, changed the way it conducted internal and global affairs. Specifically, the United States no longer had the need to rely on strict notions of sovereignty and territoriality as it gained more power and stability in the international realm. Further, to advance its own goals, the United States over time has found it less necessary to consider foreign impact and evaluate international law considerations during its policy making and judicial decision-making.

The desire for economic independence and stability is not bad nor does it automatically cast the nation as a global dominator. But there comes a point where the greed for power becomes hegemony, and this is a thin line that the United States tends to straddle. What makes this trend dangerous for the United States' use of the regulatory tool, extraterritoriality, is its consistent denial to consider international comity and foreign friction possibilities in a world that is becoming increasingly globalized. To better align with the realities of today's interconnected world, the United States ought to return to an era where it fosters its economic and social progression but does so with a consideration of international-related concerns.

While this article has presented the facts of U.S. history along with supporting assertions of U.S. behavior, there is much research to be done to more fully understand the consequences of U.S. extraterritoriality and implications for the future. It is the hope that this article has laid a solid foundation for further research on this or subsidiary topics such as whether such use of extraterritoriality is limited to the United States, what this means for the future, whether the United States will enter another era soon (e.g., with the 2020 election), or information on what was happening to the major foreign powers in each successive era. Additional research into the law and history would reveal these responses.

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Video Surveillance of the Employees Between the Right to Privacy and Right to Property After López Ribalda and Others v. Spain

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ABSTRACT

The tension between safety and privacy has become an important issue in the modern world. Video surveillance systems are indeed powerful tools for fighting crime on the one hand, and for the protection of property from theft on the other. The European Court of Human Rights (ECtHR) has examined the issue of video surveillance in many of its decisions. In this work, the author analyses the issue of video surveillance over employees and its influence on fundamental human rights and freedoms. He elaborates upon the ECtHR's case of López Ribalda and Others v. Spain in order to identify the balance between the right to privacy and the right to property. This is a case from the civil law, but with elements that could may be used in the criminal proceedings. Furthermore, it is important to determine when exactly the video footage of employees may be used as evidence in criminal proceedings. After the introductory remarks, the author briefly deals with the facts of the above case and explains the basic applicable international legal acts. He then observes the issue of video surveillance from two points of view – those of Article 8 and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Finally, he concludes that the ECHR took the right direction in establishing the balance between the protection of property and the right to privacy.

KEYWORDS

Video-Surveillance; Employee; Illegally Obtained Evidence; Human Rights

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INTRODUCTION

As a child, I read two books that influenced me deeply: George Orwell's *1984* and Aldous Huxley's *Brave New World*. At the time, it seemed to me that those works told stories of an unimaginable future; yet, that future is now here. In recent times, the use of video surveillance by both the public authorities and the private sector is becoming increasingly common, and so are fear and distrust, as demonstrated by specific problems and public outrage aroused by Edward Snowden's recent disclosures.[1] Video surveillance, without a doubt, represents a valuable tool to protect people and property from damage and theft. Further, prosecuting authorities around the world have increasingly come to rely on the notion of seriousness to loosen the safeguards built into the criminal justice system, most notably around the protection that is usually granted to suspects, shifting towards a risk–security–seriousness paradigm, while simultaneously increasing the use of surveillance and closed-circuit television [hereinafter C.C.T.V.]; in turn, these are often at odds with the notion of respect for private life, as exemplified in Article 8 of the European Convention on Human Rights and Fundamental Freedoms [hereinafter Eur.Ct.H.R.].[2] As Mahmood Rajpoot and Jensen point out,

> . . . law enforcement agencies worldwide rely on closed circuit TV (C.C.T.V.) systems to help prevent, detect and investigate attacks against public safety. It is also used to detect and investigate attacks against property, e.g. vandalism. The private sector also uses C.C.T.V. to protect public safety in the private sphere mostly to protect against intrusions, theft and vandalism.[3]

The first video surveillance systems appeared in the 1950s and their development was then boosted by the invention of the video cassette in 1956; used by private individuals, these quickly became widespread in the following three decades.[4] However, the practice of visual surveillance is much older, originating in the late nineteenth century as a method to assist prison officials in the discovery of escape techniques.[5]

Today, video surveillance is most often used in public places and by institutions or companies, who operate C.C.T.V. systems composed of a set of cameras monitoring a

[1] Rachel C. Taylor, *Intelligence-Sharing Agreements & International Data Protection: Avoiding a Global Surveillance State*, 17 Wash. Univ. Glob. Stud. L. Rev. 731, 739 (2018).
[2] Anthony Amatrudo & Leslie William Blake, Human Rights and the Criminal Justice System 105 (2014).
[3] Qasim Mahmood Rajpoot & Christian Jensen, *Video Surveillance: Privacy Issues and Legal Compliance*, *in* Promoting Social Change and Democracy through Information Technology 69 (Vikas Kumar & Jakob Svensson eds., 2015).
[4] *See* Council of Europe, *Video Surveillance of Public Areas* (PACE, Working Paper No. 115, 2008).
[5] Anthony C. Caputo, Digital Video Surveillance and Security 1 (2010).

specific protected area, with additional equipment used for transferring, viewing and / or storing and further processing the C.C.T.V. footage.[6] As technological innovations invade all facets of life, and particularly as unobtrusive monitoring devices become more easily available, the tension between safety and privacy is becoming an important issue in the modern world.[7]

The right to privacy is a constitutionally well–recognized human right.[8] As stated above, the European Court of Human Rights [hereinafter Eur.Ct.H.R.] has examined the issue of video surveillance (in both public and private areas) in many of its decisions. On the one hand, the pervasive use of video cameras in public places captures the activities of people and allows officials to observe the daily activities of a target individual; such pervasive surveillance may have a negative impact on the people's democratic rights to freely express their thoughts and to associate freely in order to share those thoughts.[9] On the other hand, the video surveillance of employees in private companies raises numerous questions. Video surveillance technologies are inordinately intrusive into an individual's privacy, to an extent that they jeopardize personal autonomy.[10]

As judges De Gaetano, Yudkivska and Grozev pointed out in their joint dissenting opinion in the case of Lopez Ribalda and Others v. Spain which in itself demonstrates the growing influence and control that technology has in our world which in particular pertains to the collection and use of our personal data in everyday activities; in such circumstances, the Eur.Ct.H.R. needs to interpret the Convention as a living instrument, which means not only recognising the influence of modern technologies but also developing more adequate legal safeguards to secure respect for the private life of individuals.

The key judgment examined in this work is *López Ribalda and Others v. Spain*. In this judgment, the Eur.Ct.H.R. further elaborated on the proportionality of video surveillance measures in the workplace. This judgment is essentially a matter of labour law; at the same time, it raises the question of the use of video footage of employees as evidence in criminal procedures. The factors that have to be taken into consideration should be applied regardless of whether the case falls within the sphere of civil or criminal law. For the purpose of such considerations, we must first elaborate on the right to privacy and

[6] Dana Volosevici, *Some Considerations on Video-Surveillance and Data Protection*, 5 Jus et Civitas: J. Soc. & Legal Stud. 7, 9 (2018).
[7] Elizabeth G. Adelman, *Video Surveillance in Nursing Homes*, 2 Alb. L. J. Sci. & Tech. 821, 821 (2002); Quentin Burrows, *Scowl because you're on Candid Camera: Privacy and Video Surveillance*, 31 Val. U. L. Rev. 1079 (1997).
[8] David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. Marshall J. Comput. Info. L. 1, 3 (1999).
[9] Mahmood Rajpoot & Jensen, *supra* note 3, at 70.
[10] Christopher S. Milligan, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. Cal. Interdisc. L. J. 295, 299 (1999).

the right to a fair trial. First, the issue of the processing of personal data is integrated into Article 8 of the Eur.Ct.H.R., while the issue of evidence is integrated into Article 6 of the Eur.Ct.H.R.. The author believes that the court in Strasbourg will and should apply the same criteria regarding video surveillance of employees in matters of criminal law and of labour law.

Therefore, this work starts by examining the compliance of video surveillance with Article 8 of the Eur.Ct.H.R. and continues with analysing the issue of admissibility of such evidence under Article 6 of the Eur.Ct.H.R.. Before that, the author will briefly lay out the facts of the case. Next, this work shall deal with the basic international acts relevant to the subject.

1. FACTS OF THE CASE *LÓPEZ RIBALDA AND OTHERS V. SPAIN*

Here, the applicants were all working in a supermarket of the M. chain situated in Sant Celoni (Barcelona province); the first three applicants were cashiers, while the fourth and fifth applicants were sales assistants behind a counter. Starting from March 2009, the supermarket's manager noticed inconsistencies between the stock level and the sales figures, and in the following months, he identified losses of approximately 80,000 Euros. The manager started an internal investigation to shed light on the losses, and in that context, on June 15th, 2009, he installed C.C.T.V. cameras. Some cameras were visible, but others were hidden. It is important to note that the visible cameras were directed towards the entrances and exits of the supermarket, while the hidden cameras were placed at a certain height and directed towards the checkout counters. Three tills were covered by the range of each camera, including the areas in front of and behind the counters, and the exact number of tills being monitored was not stated by the parties. The documents in the file show that at least four tills were filmed. The manager called a meeting to inform the supermarket's staff of the installation of the visible cameras on account of the management's suspicions about thefts. However, the problem arose because of the hidden cameras. In this case, neither the staff nor the staff committee was informed of the existence of these cameras. The important fact for the management is that in 2007, the company had notified the Spanish Data Protection Agency that it intended to install C.C.T.V. cameras in its shops. Accordingly, the Agency emphasized the obligations to provide information under the legislation on personal data protection, while a sign indicating the presence of C.C.T.V. cameras had been installed in the shop

where the applicants worked. However, the parties did not indicate the location of the cameras.

Hidden cameras recorded footage and revealed thefts of goods at the tills by a number of employees. The management of the supermarket informed the union representative about that fact on June 25th, 2009. The representative watched the recordings and after that, on June 25th and 29th, 2009, all the workers suspected of theft were called for individual interviews. Fourteen employees were dismissed as a consequence, including the five applicants. Before the interviews, all suspected workers, including the applicants, had a meeting with the union representative. The union representative told them she had watched the video recordings. That was enough for some workers because during the meeting, a number of employees admitted that they had been involved in the thefts with other colleagues. In addition, the employees concerned were notified of their dismissal on disciplinary grounds with immediate effect and the dismissal letters indicated that the hidden C.C.T.V. cameras had filmed them. Cameras showed that on several occasions between June 15th and 18th, 2009, the workers helped customers or other supermarket employees to steal goods and stole goods themselves. Among the other facts, the letters clearly stated that the first three applicants worked at the tills. They had allowed customers and colleagues to go to the cash till and leave the shop with goods they had not paid for. Furthermore, they added that those applicants had scanned items presented at the checkout by customers or colleagues and had then cancelled the purchases, with the result that the goods had not been paid for. A comparison between the goods actually taken away by customers and the sales receipts had made it possible to prove everything. Finally, the cameras had reportedly caught the fourth and fifth applicants stealing goods with the help of their colleagues at the tills. According to the employer, and the law, these acts constituted a serious breach of obligations of good faith and loyalty required in the employment relationship, and justified the termination of the contract with immediate effect. For this work, it is particularly important that the applicants and other employees had appealed against their dismissals before the Employment Tribunal in Spain, the employer filed a criminal complaint against fourteen employees, including the five applicants on July 31st, 2009. Consequently, criminal proceedings were opened against them. However, the investigating judge decided to reclassify the charges as a minor offence (*falta*) on July 15th, 2011, finding that the investigation had not established that there had been any concerted action between the defendants in committing the offences and that the value of the goods stolen by each defendant had not exceeded 400 euros. In a decision of September 27th, 2011, the judge declared that the prosecution was time-barred on account of the statutory limitation of proceedings for that type of offence.

2. RELEVANT INTERNATIONAL ACTS IN THIS FIELD

The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8, and as the Eur.Ct.H.R. stated in *S. and Marper v. The United Kingdom* and recently, in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*.[11] Therefore, in this matter, the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [hereinafter the Personal Data Convention] plays a crucial role. This is the first legally binding international instrument that recognises the protection of individuals regarding the automatic processing of their personal data.[12] Under Article 2, personal data means any information relating to an identified or identifiable individual, while automatic processing includes storage of data, carrying out logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination. Then, as Article 5 prescribes,

> personal data undergoing automatic processing shall be (a) obtained and processed fairly and lawfully; (b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes; (c) adequate, relevant and not excessive in relation to the purposes for which they are stored; (d) accurate and, where necessary, kept up to date; (e) preserved in a form which permits identification of the data subjects for no longer than is required for he purpose for which those data are stored.

Regarding the Personal Data Convention, Article 8 is particularly important. It prescribes that:

> [A]ny person shall be enabled to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file; to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him of such data in an intelligible form; to obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic principles; to have a remedy if a request for confirmation or, as the

[11] S. and Marper v. The United Kingdom, App. Ns. 30562/04 and 30566/04, Eur.Ct.H.R. (2008); Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, App. No. 931/13, Eur.Ct.H.R. (2017).

[12] Dolores-Fuensanta Martínez-Martínez, *Unification of Personal Data Protection in the European Union: Challenges and Implications*, 27 El Profesional de la Información 185, 187 (2018).

> case may be, communication, rectification or erasure as referred to in paragraphs b and c of this article is not complied with.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in its relevant parts, provides numerous rights and obligations.[13] This Directive was repealed by the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. The Regulation (EU) 2016/679 has been applicable since 25 May 2018.[14] This

[13] The Council Directive 95/46, art. 7, 1195 O.J. (L 281) 1, 2 (EC) provided that personal data had to be

> (a) processed fairly and lawfully; (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards; (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified; (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

Further, the same article provides that

> . . . personal data could be processed only if: (a) the data subject has unambiguously given his consent; or (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or (d) processing is necessary in order to protect the vital interests of the data subject; or (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.

Among others, Article 10 of this Directive provided that

> . . . the controller or his representative had to provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it: (a) the identity of the controller and of his representative, if any; (b) the purposes of the processing for which the data are intended; (c) any further information such as the recipients or categories of recipients of the data or the existence of the right of access to and the right to rectify the data concerning him.

In the end, what is particularly important for these considerations is that legislative measures could be adopted to restrict the scope of the obligations and rights when such a restriction constitutes a necessary measure to safeguard national security; defence; public scrutiny; the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for regulated professions; an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters; a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e) and the protection of the data subject to the rights and freedoms of others.

[14] As Julia Hörnle pointed out, the comparison with the now superseded Directive 95/46/EC is important as it sketches the background and development of current data protection law, which is important for the wider context and in particular for showing how difficult coordination of national competences in this field has

Regulation was finally adopted more than four years after the European Commission proposed it.[15] It incorporates most of the provisions of Directive 95/46/EC and reinforces some of the safeguards contained therein. This Regulation has direct applicability in all EU member states, and is automatically integrated into the national legislation once it enters into force.[16]

According to Article 4, Point 1 of the Regulation (EU) 2016/679 personal data means

> any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Video-surveillance footage often contains images of people and the information can be used to identify these people either directly or indirectly, while recognizable facial images always constitute personal data.[17] According to Point 2, processing means

> any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.
>
> Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another

been. Julia Hörnle, *Juggling More than Three Balls at Once: Multilevel Jurisdictional Challenges in EU Data Protection Regulation*, 27 Int'l J. L. & Info. Tech. 142, 143 (2019). In the development of data protection, it is important to draw attention to the Directive 2016/680, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, 2016 O.J. (L 116/89).

[15] W. Gregory Voss, *European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting*, 72 Bus. Law. 221, 221-22 (2016).

[16] For example, Simona Chirica, *The Main Novelties and Implications of the New General Data Protection Regulation*, 6 Persp. Bus. L.J. 159 (2017).

[17] *See* Volosevici, *supra* note 6, at 8.

> natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child" (Article 6 Paragraph 1 of the Regulation (EU) 2016/679).[18]

[18]Furthermore, Point (f) of Regulation 2016/679, art. 6, 2016 J.O (L 119) 2-4 (EU) provides that

> . . . shall not apply to processing carried out by public authorities in the performance of their tasks. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations . . . . The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by Union law or Member State law to which the controller is subject. The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations . . . The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia: (a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing; (b) the context in which the personal data have been collected, in particular regarding the relationship between data subject and the controller; (c) the nature of the personal data, in particular whether special categories of personal data are processed or whether personal data related to criminal convictions and offences are processed; (d) the possible consequences of the intended further processing for data subjects and (e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Just to clarify, this Regulation under the pseudonymisation understands the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person, while - as provided by Regulation 2016/679, art. 4, 2016 J.O (L 119) 7,8 (EU) - controller is

> . . . the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

Restrictions are provided under Article 23 in a case of

> (a) national security; (b) defence; (c) public security; (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security; (f) the protection of judicial independence and judicial proceedings; (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions; (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g); (i) the protection of the data subject or the rights and freedoms of others; (j) the enforcement of civil law claims.

The next important international document is the opinion of the Venice Commission on "video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection", adopted at its 71st Plenary Session in 2007. According to it, the private sphere in a physical meaning is a place where those who own this private sphere can restrict access. Private spheres are not, in principle, open freely to the public and are not accessible indiscriminately. Rules governing the private sphere are mainly those related to private law and more specifically to the rights to privacy. The powers of the public authorities over these areas are more restricted than over public areas (point 15). The private sphere will also include workplaces and the use of video surveillance in workplace premises, which raises legal issues concerning the employees' privacy rights (point 18). As regards workplaces, the introduction of video monitoring requires respecting the privacy rights of the employees (point 52). Video surveillance would, in general, be allowed to prevent or detect fraud or theft by employees in case of a well-founded suspicion. However, except in very specific circumstances, videotaping would not be allowed at places such as toilets, showers, restrooms, changing rooms, or smoking areas and employee lounges where a person may trust to have full privacy (point 53). Moreover, and which is really important for these considerations, secret surveillance should only be allowed, and then only on a temporary basis, if proven necessary because of lack of adequate alternatives (point 54). As regards shops, camera surveillance may be justified to protect the property, if such a measure has proven to be necessary and proportional. It may also be justified at certain locations

in the shop to prevent and prosecute robberies under threat but, again, only if proven necessary, and no longer than necessary, and national legislation will have to clearly define the legal basis of the surveillance and the necessity of the infringement in view of the interests protected (points 57-58). In the concluding remarks, the Venice Commission emphasized that video surveillance has to respect the requirements laid down by Article 8 of the Eur.Ct.H.R. and at least follow the requirements laid down by Directive 95/46/EC. Finally, people have to be notified of being surveyed unless the surveillance system is obvious. This means that the situation has to be such that the person observed may be assumed to be aware of the surveillance, or has unambiguously given his /her consent.

At the 1224th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2015)5 on the processing of personal data in the context of employment. In Article 10, this Recommendation provides:

> 10.1. Information concerning personal data held by employers should be made available either to the employee concerned directly or through the intermediary of his or her representatives, or brought to his or her notice through other appropriate means. 10.2. Employers should provide employees with the following information: the categories of personal data to be processed and a description of the purposes of the processing; the recipients, or categories of recipients of the personal data; the means employees have of exercising the rights set out in principle 11 of the present recommendation, without prejudice to more favourable ones provided by domestic law or in their legal system and any other information necessary to ensure fair and lawful processing.

It also provides that

> 15.1. the introduction and use of information systems and technologies for the direct and principal purpose of monitoring employees' activity and behaviour should not be permitted and where their introduction and use for other legitimate purposes, such as to protect production, health and safety or to ensure the efficient running of an organisation has for indirect consequence the possibility of monitoring employees' activity, it should be subject to the additional safeguards. 15.2. Information systems and technologies that indirectly monitor employees' activities and behaviour should be specifically designed and located so as not to undermine their

> fundamental rights. The use of video surveillance for monitoring locations that are part of the most personal area of life of employees is not permitted in any situation.

Further, employers should "inform employees before the introduction of information systems and technologies enabling the monitoring of their activities"; "take appropriate internal measures relating to the processing of that data and notify employees in advance"; "consult employees' representatives in accordance with domestic law or practice, before any monitoring system can be introduced or in circumstances where such monitoring may change" and "consult, in accordance with domestic law, the national supervisory authority on the processing of personal data" (Article 21 of the Recommendation).

As an independent EU advisory body, the Data Protection Working Party was established under Article 29 of Directive 95/46/EC in order to contribute to the uniform implementation of its provisions. According to its Opinion 8/2001, on the processing of personal data in an employment context, any monitoring must be a proportionate response by an employer to the risks it faces, taking into account the legitimate privacy and other interests of workers. Further, any monitoring must be carried out in the least intrusive way possible and workers must be informed of the existence of the surveillance, the purposes for which personal data are to be processed and other information necessary to guarantee fair processing. In Opinion no. 4/2004, the Data Protection Working Party pointed out that surveillance should not include premises that either are reserved for employees' private use or are not intended for the discharge of employment tasks – such as toilets, shower rooms, lockers and recreation areas; that the images collected exclusively to safeguard property and/or detect, prevent and control serious offences should not be used to charge an employee with minor disciplinary breaches; and that employees should always be allowed to lodge their counterclaims by using the contents of the images collected. The information must be given to employees and every other person working on the premises. This should include the identity of the controller and the purpose of the surveillance and other information necessary to guarantee fair processing in respect of the data subject.

3. VIDEO-SURVEILLANCE OF THE EMPLOYEE AND THE RIGHT TO PRIVACY

According to Article 8 of the Eur.Ct.H.R., every person "has the right to respect for his private and family life, his home and his correspondence". Additionally,

> there shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well–being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 of the Eur.Ct.H.R. is therefore divided into four protected categories: private life, family life, home and correspondence. The concept of *private life* is a broad term, not suitable for exhaustive definitions, and essentially covering the physical and psychological integrity of a person. It can, therefore, encompass multiple aspects of the person's physical and social identity, as the Eur.Ct.H.R. stated in *Denisov v. Ukraine*.[19] In multiple judgments, the Eur.Ct.H.R. has dealt with the notion of private life, including issues related to personal identity, such as a person's name or image.[20] It should be noted that since 1992, the Eur.Ct.H.R. has gradually expanded the scope of coverage of Article 8 to other forms of interception of communications occurring in the workplace.[21] As Elena Sychenko emphasizes, cases on employee's privacy as adjudicated by the Eur.Ct.H.R. can be divided into two main groups - data protection, in which the Court deals with the legality of it being collected, used and disclosed; and the protection from interference with private life by activities such as workplace monitoring using video surveillance, searches of offices and equipment, and the interception of workplace telephone calls.[22] Video surveillance of the employees falls under the notion of Article 8 of the Eur.Ct.H.R. and under the right to privacy.[23] For these considerations, we will

[19] Denisov v. Ukraine, App. No. 76639/11, Eur.Ct.H.R. (2018).
[20] Schüssel v. Austria, App. No. 42409/98, Eur.Ct.H.R. (2002); Von Hannover v. Germany, App. No. 40660/08 and 60641/08, Eur.Ct.H.R. (2012).
[21] *See* Marta Otto, The Right to Privacy in Employment: A Comparative Analysis 76 (2016).
[22] Elena Sychenko, *International Protection of Employee's Privacy under the European Convention on Human Rights*, 67 Zbornik PFZ 757, 760 (2017).
[23] Some authors emphasize that many people feel that the negative effects of surveillance can be adequately countered by invoking the right to privacy, which has become one of the primary means of protection against surveillance and control. *See* Bart Willem Schermer, Software Agents, Surveillance, and the Right to Privacy: A Legislative Framework for Agent-Enabled Surveillance 71 (2007).

elaborate on three main judgments in this sphere: *Köpke v. Germany*,[24] *Bărbulescu v. Romania*[25] and *Antovic and Mirkovic v. Montenegro*.[26]

However, in the first place, we have to analyse the difference between positive and negative obligations in this sphere. It is very hard to draw clear boundaries around them and in contrast to negative obligations, positive obligations are not clear-cut.[27] The Eur.Ct.H.R. reiterated in *Palomo Sánchez and Others v. Spain*[28] that while the boundaries between the State's positive and negative obligations under the Eur.Ct.H.R. do not lend themselves to precise definition, the applicable principles are nonetheless similar, and in both contexts, regard must be had in particular to the fair balance that has to be struck between the competing private and public interests, subjected, in any event, to the margin of appreciation enjoyed by the State.[29] The video-surveillance measure in mentioned cases was imposed by the employers and cannot, therefore, be analysed as "interference", by State authority, with the exercise of Eur.Ct.H.R. rights. The applicants, nevertheless, took the view that the domestic courts had not effectively protected their right to respect for their private life. Although an object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.[30]

Positive obligations have been asserted by applicants in a wide range of contexts under the terms of this Article, and many of them have been upheld by the Eur.Ct.H.R..[31] The Eur.Ct.H.R. has held that in certain circumstances, the State's positive obligations under Article 8 of the Eur.Ct.H.R. are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context.

[24] Köpke v. Germany, App. No. 420/07, Eur.Ct.H.R. (2006).
[25] Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017).
[26] Antović and Mirković v. Montenegro, App. No. 70838/13, Eur.Ct.H.R. (2017).
[27] *See* Marie-Bénédicte Dembour, Who Believes in Human Rights? Reflections on the European Convention 87 (2006).
[28] *See also* Sánchez v. Spain, App. No. 28955/06, 28957/06, 28959/06 and 28964/06, Eur.Ct.H.R. (2011). Similarly, *see* Nunez v. Norway, App. No. 55597/09, Eur.Ct.H.R. (2011); Dickson v. The United Kingdom, App. No. 44362/04, Eur.Ct.H.R. (2007).
[29] Sánchez v. Spain, App. No. 28955/06, 28957/06, 28959/06 and 28964/06, Eur.Ct.H.R. (2011). The fair balance test originates from Rees v. The United Kingdom, App. No. 9532/81, Eur.Ct.H.R. (1986) and it is followed in numerous judgments. *See* Dimitris Xenos, The Positive Obligations of the State under the European Convention of Human Rights 59 (2012); Steven Greer, The European Convention on Human Rights: Achievements, Problems and Prospects 264 (2006).
[30] Ribalda v. Spain, App. No. 1874/13 and 8567/13, Eur.Ct.H.R. (2019).
[31] Alastair Mowbray, The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights 127 (2004).

The similar approach was displayed by the Eur.Ct.H.R. in *X and Y v. the Netherlands*[32], *M.C. v. Bulgaria*,[33], *K.U. v. Finland*[34] *Söderman v. Sweden*,[35] and *Codarcea v. Romania*.[36] Those protective measures are not only to be found in labour law, but also in civil and criminal law. As far as labour law is concerned, it must ascertain whether the respondent State was required to set up a legislative framework to protect the applicant's right to respect for his private life and correspondence in the context of his professional relationship with a private employer.[37]

In *Köpke v. Germany*[38], Eur.Ct.H.R. elaborated on the compliance of the video surveillance of the employee with Article 8. In *Köpke*, a video recording of the applicant's conduct at her workplace was made without prior notice on the instruction of her employer. The picture material obtained thereby was processed and examined by several persons working for her employer and was used in the public proceedings before the labour courts. Through this decision, the Eur.Ct.H.R. developed a balance between the human right to respect for the applicant's private life and both her employer's interest in the protection of his property rights, guaranteed by Article 1 of Protocol no. 1 to the Eur.Ct.H.R., and the public interest in the proper administration of justice. It is not disputable that the employee has a right to private life. However, the employer, on the other hand, had a considerable interest in the protection of his property rights under Article 1 of Protocol no. 1.[39] In the end, we have to emphasize that video surveillance by an employer in order to detect theft by employees was held to infringe Article 8(1),

[32] X and Y v. the Netherlands, App. No. 8978/80, Eur.Ct.H.R. (1985).
[33] M.C. v. Bulgaria, App. No. 39272/98, Eur.Ct.H.R. (2003).
[34] K.U. v. Finland, App. No. 2872/02, Eur.Ct.H.R. (2008).
[35] Söderman v. Sweden, App. No. 5786/08, Eur.Ct.H.R. (2013).
[36] Codarcea v. Romania, App. No. 31675/04, Eur.Ct.H.R. (2009).
[37] Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017).
[38] In Köpke v. Germany, App. No. 420/07, Eur.Ct.H.R. (2006), the applicant's employer noted in September 2002 that

> there were irregularities concerning the accounts in the drinks department of that supermarket, in that the sum of the till receipts for empty deposit bottles, which had been printed out, exceeded the total value of empty deposit bottles received by the supermarket. It suspected the applicant and another employee of having manipulated the accounts. Between 7 October 2002 and 19 October 2002 the applicant's employer, with the help of a detective agency, carried out covert video surveillance of the supermarket's drinks department. The camera covered the area behind the cash desk including the till, the cashier and the area immediately surrounding the cash desk. The detective agency made a video and examined the data obtained. It drew up a written report and produced several photos from the recording, which it sent to the applicant's employer together with two copies of the video (one concerning the applicant and one concerning the other employee monitored). On 5 November 2002, the applicant's employer dismissed the applicant without notice for theft. The applicant was accused of having manipulated the accounts in the drinks department of the supermarket and of having taken money (some 100 Euros during the period in which she had been filmed) from the tills for herself, which she had hidden in her clothes.

[39] *See* Köpke v. Germany, App. No. 420/07, Eur.Ct.H.R. (2006).

although the Eur.Ct.H.R. considered that it struck an appropriate balance, bearing in mind the rights of the employer and the probability of success in catching a dishonest worker. However, in rejecting the application, the Eur.Ct.H.R. said that this "might well be given a different weight in the future, having regard to the extent to which intrusions into private life are made possible by new, more and more sophisticated technologies".[40]

Bărbulescu judgment is directed towards the monitoring of the employees' communications.[41] In this case, the Eur.Ct.H.R. narrowed[42] its inquiry to the question "how the domestic courts to which the applicant applied dealt with his complaint of infringement by the employer of his right to respect for private life and correspondence in an employment context". In this case, the applicant was not informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual content of his messages. The warning from the employer must be given before the monitoring activities are initiated, especially where they also entail accessing the contents of employees' communications, and international and European standards point in this direction, requiring the data subject to be informed before any monitoring activities are carried out.[43] Therefore, there was a violation of Article 8.[44]

In *Antovic and Mirkovic v. Montenegro*, the Eur.Ct.H.R. dealt with a very specific issue nowadays[45] and in the first place, emphasized that video surveillance of an employee in

[40] Id.; William A. Schabas, The European Convention on Human Rights: A Commentary 377 (2015).

[41] The applicant in this case was employed in the Bucharest office of a Romanian private company, as a sales engineer. At his employer's request, for the purpose of responding to customers' enquiries, he created an instant messaging account using *Yahoo Messenger*, an online chat service offering real-time text transmission over the internet. It is important to note that he already had another personal *Yahoo Messenger* account. The applicant was summoned by his employer to give an explanation about the fact that he had used the internet for personal purposes, in breach of the internal regulations. The employer submitted a transcript of the messages, which the applicant had exchanged with his brother and his fiancée during the period when he had been monitored; the messages related to personal matters and some were of an intimate nature. The transcript also included five messages that the applicant had exchanged with his fiancée using his personal *Yahoo Messenger* account; these messages did not contain any intimate information (*see* Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017).). *See* further: Veronika Szeghalmi, *Private Messages at Work - Strasbourg Court of Human Right's Judgement in Barbulescu v. Romania Case,* 2016 Hungarian Y.B. Int'l L. & Eur. L. 293; Johannes Eichenhofer, *Internet Privacy at Work - the Eur.Ct.H.R. Bărbulescu Judgment*, 2 Eur. Data Prot. L. Rev. 266 (2016). This is a very important judgment, because the Eur.Ct.H.R. set out clear requirements for how domestic legal systems should protect the right to private life in the context of workplace monitoring. See Joe Atkinson, *Workplace Monitoring and the Right to Private Life at Work*, 81 Mod. L. Rev. 688, 693 (2018).

[42] It is unjustifiably, according to the Joint dissenting opinion of judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke.

[43] Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017).

[44] Case *Libert v. France* is similar, but in the same time different, because the interference was by a public authority and consequently, the complaint was analysed from the angle not of the State's positive obligations, as in the case of *Bărbulescu v. Romania*, but of its negative obligations. Libert v. France, App. no. 588/13, Eur.Ct.H.R. (2018). *See* more in Sebastian Klein, *Libert v. France: Eur.Ct.H.R. on the Protection of an Employee's Privacy Concerning Files on a Work Computer*, 4 Eur. Data Prot. L. Rev. 250 (2018).

[45] In this case, the Dean of the School of Mathematics of the University of Montenegro, at a session of the School's council, informed the professors teaching there, including the applicants, that video surveillance

the workplace, be it covert or not, must be considered as a considerable intrusion into the employee's private life and constitutes an interference within the meaning of Article 8.[46] Video surveillance was introduced in the present case to ensure the safety of property and people, including students, and for the surveillance of teaching. It was noted that the law at all as a ground for video surveillance did not provide for one of those aims, notably the surveillance of teaching. Furthermore, there was no evidence that either property or people had been in jeopardy, one of the reasons to justify the introduction of video surveillance.[47] Accordingly, there was a violation of Article 8 of the Eur.Ct.H.R..[48] Because of the sensitive nature of this problem, there were opposing arguments.[49] We consider, however, that the opinion of the majority was more persuasive.[50]

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has been introduced and that it was in the auditoriums where classes were held. He issued a decision introducing video surveillance in seven amphitheatres and in front of the Dean's Office that specified that the aim of the measure was to ensure the safety of property and people, including students, and the surveillance of teaching. The decision stated that access to the data that was collected was protected by codes, which were known only to the Dean. The data were to be stored for a year.

[46] Antović and Mirković v. Montenegro, App. No. 70838/13, Eur.Ct.H.R. (2017).

[47] *Id.* at § 59.

[48] *See e.g.,* Judges Vučinić and Lemmens in their Concurring opinion in a different way describe a relationship in classroom between professor and students:

> These interactions are of course not of a purely social nature. The setting is a very specific one. The teacher teaches students who are enrolled in his or her class. The relationship between teacher and students takes shape during the whole period of teaching (a year or a semester). In the auditorium the teacher can allow him- or herself to act ("perform") in a way he or she would perhaps never do outside the classroom. It seems to us that in such an interaction the teacher may have an expectation of privacy, in the sense that he or she may normally expect that what is going on in the classroom can be followed only by those who are entitled to attend the class and who actually attend it. No "unwanted attention" from others, who have nothing to do with the class. There may be exceptions, for instance when a lecture is taped for educational purposes, including for use by students who were unable to physically attend the class. However, in the applicants' case there was no such purpose. It seems to us that at least in an academic environment, where both the teaching and the learning activities are covered by academic freedom, the said expectation of privacy can be considered a "reasonable" one. Surveillance as a measure of control by the dean is, in our opinion, not something a teacher should normally expect.

However, they believe that video surveillance in an auditorium is possible, but, this means, among other things, that there must be a proper legal basis, that the scope of the surveillance must be limited, and that there are guarantees against abuse.

[49] In the view of the judges Spano, Bianku and Kjølbro, the university's video monitoring in the auditorium where the applicants were teaching as professors did not raise an issue as regards the applicants' private life. They believe it conclusive that the video monitoring took place at the university auditoriums, that the applicants had been notified of the video surveillance, that what was monitored was the applicants' professional activity, that the surveillance was remote, that there was no audio recording and thus no recording of the teaching or discussions, that the pictures were blurred and the persons could not easily be recognised, that the video recordings were only accessible to the dean and were automatically deleted after 30 days, and that the data or information was not subsequently used (Joint dissenting opinion of Judges Spano, Bianku and Kjølbro in Antović and Mirković v. Montenegro, App. No. 70838/13 (Nov. 28, 2017), http://hudoc.echr.coe.int/eng?i=001-178904).

[50] See more in Milica Kovač-Orlandić, *Video Surveillance in the Employer's Premises: The Eur.Ct.H.R. Judgment in Antović and Mirković v. Montenegro*, Collection Papers Fac. L. Niš, no. 82, at 165 (2019).

From the above, we can conclude that Article 8 leaves it to the discretion of the States to decide whether or not to enact a specific legislation on video surveillance or the monitoring of the non–professional correspondence and other communications of employees. Nevertheless, as the Eur.Ct.H.R. pointed out, regardless of the discretion enjoyed by States in choosing the most appropriate means for the protection of the rights in question, the domestic authorities should ensure that the introduction, by an employer, of monitoring measures affecting the right to respect for private life or correspondence of employees, is proportionate and is accompanied by adequate and sufficient safeguards against abuse.[51]

Since *Köpke* through *Bărbulescu*, the Eur.Ct.H.R. developed key principles in this sphere. These criteria must be applied while taking into account the specificity of the employment relations and the development of new technologies, which may enable measures to be taken that are increasingly intrusive in the private life of employees.[52] In that context, in order to ensure the proportionality of video-surveillance measures in the workplace, the domestic courts should take account of the following factors when they weigh up various competing interests:

> (i) Whether the employee has been notified of the possibility of video-surveillance measures being adopted by the employer and of the implementation of such measures. While in practice employees may be notified in various ways, depending on the particular factual circumstances of each case, the notification should normally be clear about the nature of the monitoring and be given prior to implementation.
>
> (ii) The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this connection, the level of privacy in the area being monitored should be taken into account, together with any limitations in time and space and the number of people who have access to the results.
>
> (iii) Whether the employer has provided legitimate reasons to justify monitoring and the extent thereof. The more intrusive the monitoring, the weightier the justification that will be required.
>
> (iv) Whether it would have been possible to set up a monitoring system based on less intrusive methods and measures. In this connection, there should be an assessment in the light of the particular circumstances of each case as to whether the aim pursued by the employer could have been achieved through a lesser degree of interference with the employee's privacy.

[51] *See* Köpke v. Germany, App. No. 420/07, Eur.Ct.H.R. (2006); Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017).
[52] *See* Ribalda v. Spain, App. No. 1874/13 and 8567/13, Eur.Ct.H.R. (2019).

> (v) The consequences of the monitoring for the employee subjected to it. Account should be taken, in particular, of the use made by the employer of the results of the monitoring and whether such results have been used to achieve the stated aim of the measure.
>
> (vi) Whether the employee has been provided with appropriate safeguards, especially where the employer's monitoring operations are of an intrusive nature. Such safeguards may take the form, among others, of the provision of information to the employees concerned or the staff representatives as to the installation and extent of the monitoring, a declaration of such a measure to an independent body or the possibility of making a complaint.[53]

Following the above principles, national courts should conclude whether video surveillance over the employees is in accordance with the Eur.Ct.H.R. or not. More precisely, the positive obligations imposed on the State by Article 8 of the Eur.Ct.H.R. required the national authorities to strike a fair balance between two competing interests, on the one hand, the applicants' right to respect for their private life and, on the other, the possibility for their employer to ensure the protection of his property and the smooth operation of his company, particularly by exercising his disciplinary authority.[54]

Therefore, in *López Ribalda and Others v. Spain*, the domestic courts first found that the installation of the video-surveillance had been justified by legitimate reasons, namely the suspicion put forward by the supermarket manager because of the significant losses recorded over several months, suggesting that thefts had been committed. They also took into account the employer's legitimate interest in taking measures in order to discover and punish those responsible for the losses, with the aim of ensuring the protection of his property and the smooth functioning of the company. The domestic courts then examined the extent of the monitoring and the degree of intrusion into the applicants' privacy, finding that the measure was limited as regards the areas and staff being monitored – since the cameras only covered the checkout area, which was likely to be where the losses occurred – and that its duration had not exceeded what was necessary in order to confirm the suspicions of theft. Further, as regards the extent of the measure over time, video-surveillance lasted for ten days and ceased as soon as the responsible employees had been identified. The length of the

[53] *Id.*; Bărbulescu v. Romania, App. No. 61496/08, Eur.Ct.H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-177082. *See* Caroline Calomme, *Monitoring of Employees' Communications: Eur.Ct.H.R. Spells Out Positive Obligations to Protect Employees' Privacy*, 3 Eur. Data Prot. L. Rev. 545, 547 (2017); Monica Gheorghe, *Considerations on the Conditions under Which the Employer May Monitor their Employees at the Workplace*, 7 Jurid. Trib., no. 2, at 62, 67 (2017).

[54] *See e.g.,* Ribalda v. Spain, App. No. 1874/13 and 8567/13, Eur.Ct.H.R. (2019).

monitoring does not, therefore, appear excessive in itself.[55] The employer did not use the video-surveillance and recordings for any purposes other than to trace those responsible for the recorded losses of goods and to take disciplinary measures against them. Then, the Eur.Ct.H.R. noted that the extent of the losses identified by the employer suggested that thefts had been committed by a number of individuals and the provision of information to any staff member might well have defeated the purpose of the video surveillance, which was to discover those responsible for the thefts but also to obtain evidence for use in disciplinary proceedings against them.[56]

We can therefore conclude that the disclosure of information regarding video surveillance is of great importance. In this case, the applicants had been informed of the installation of video surveillance. It was not disputed that two types of cameras had been installed in the supermarket where they worked: the visible cameras directed towards the shop's entrances and exits, of which the employer had informed the staff, and the hidden cameras directed towards the checkout area, of which neither the applicants nor the other staff members had been informed. The Eur.Ct.H.R. emphasized that while both the Spanish law and the relevant international and European standards do not seem to require prior consent of individuals who are placed under video surveillance, or more generally, of individuals who have their personal data collected, those rules still establish that it is, in principle, necessary to inform the individuals concerned, clearly and before the implementation of such systems, of the existence and conditions of such data collection, even if only in a general manner. The disclosure of information to the individual being monitored constitutes just one of the criteria to be taken into account in assessing the proportionality of such measures.[57] Therefore, under those circumstances, with regard to the weight of considerations justifying video surveillance, the Eur.Ct.H.R. concluded that the national authorities did not fail to fulfil their positive obligations under Article 8 of the Eur.Ct.H.R. such as to overstep their margin of appreciation. Accordingly, there has been no violation of that provision.

[55] *See* In *Köpke*, the duration of fourteen days was not found to be disproportionate. *See* Köpke v. Germany, App. No. 420/07, Eur.Ct.H.R. (2006).
[56] *See e.g.,* Ribalda v. Spain, App. No. 1874/13 and 8567/13, Eur.Ct.H.R. (2019).
[57] *Id.* at § 131.

4. WHETHER THE VIDEO-SURVEILLANCE OF THE EMPLOYEE IS ILLEGALLY OBTAINED EVIDENCE?

In *López Ribalda and Others*, the applicants further complained that recordings obtained in breach of their right to respect for their private life had been admitted and used as evidence by employment courts. Although this was a labour case, it opened an issue of illegally obtained evidence significant for criminal legal theory and practice. Academic workers around the world have long debated the normative and empirical arguments related to the admissibility of improperly obtained evidence.[58] Ölçer states that, while many national models for evidence exclusion can be clearly qualified as transplants from United States law[59], the same cannot be said of the Eur.Ct.H.R. model. Usually, the judge conducting a criminal trial has the power to exclude evidence obtained by unlawful or otherwise wrongful means, while legal systems have adopted different rationales for exclusion, resulting in variations in the scope of exclusionary power.[60] According to Article 6 of the Eur.Ct.H.R., everyone is entitled to a fair trial by an impartial tribunal in the determination of his civil rights and obligations or any criminal charge against him. As is well known, Article 6 guarantees the right to a fair trial[61], which is a recognisable feature of every significant international normative instrument charged with protecting human rights.[62] One of the areas of criminal procedure in which the Eur.Ct.H.R. has become quite active is rules regarding the admission and / or exclusion of illegally obtained evidence.[63] However, in numerous judgments, the Eur.Ct.H.R. repeated that this article does not lay down any rules on the admissibility of evidence as such, since this is primarily a matter of regulation under national law.[64]

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[58] *See* Andrew Ashworth, *The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence, in* Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions 145 (Paul Roberts & Jill Hunter eds., 2012).

[59] *See* Stephen C. Thaman, *'Fruits of the Poisonous Tree' in Comparative Law*, 16 Sw. J. Int'l L. 333 (2010). For example, Thaman points out that the notion that evidence obtained as a result of police violation of the constitution could not be used in a criminal trial was finally established nationwide and made applicable to the states during the years that Earl Warren was Chief Justice of the US Supreme Court. *See* Stephen C. Thaman, *Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules*, in Exclusionary Rules in Comparative Law 407 (Stephen C. Thaman ed., 2013).

[60] *See generally* Hock Lai Ho, *The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence*, in Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules 283 (Sabine Gless & Thomas Richter eds., 2019).

[61] In numerous judgments the Eur.Ct.H.R. often uses a standard phrase to stress the importance of the right to a fair trial: 'The right to a fair trial holds so prominently a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 of the Convention restrictively' (see more in Stefan Trechsel, Human Rights in Criminal Proceedings 82 (2005).

[62] *See e.g.,* Sarah Summers, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights 97 (2007).

[63] *See* Pinar Ölçer, *The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights*, *in* Exclusionary Rules in Comparative Law 372 (Stephen C. Thaman ed., 2013).

[64] *See e.g.*, Schenk v. Switzerland, App. No. 00010862/84, Eur.Ct.H.R. (1988) *See also* Ruiz v. Spain, App. No. 30544/96, Eur.Ct.H.R. (1999).

Accordingly, in *Bochan v. Ukraine (N.2)*[65] the Eur.Ct.H.R. emphasized that issues such as the weight attached by the national courts to given items of evidence or findings or assessments in an issue before them for consideration are not for it to review, and that the Eur.Ct.H.R. should not act as a court of the fourth instance, and will not, therefore, question the judgment of national courts under Article 6, unless their findings can be regarded as arbitrary or manifestly unreasonable. In other words, we can see that the admissibility of evidence is primarily governed by the rules of the domestic law, so it often remains difficult to conclude from the Eur.Ct.H.R.'s decisions whether the use of illegally obtained evidence constitutes a violation.[66]

However, it is not the role of the Eur.Ct.H.R. to determine whether particular types of evidence may be admissible. The Eur.Ct.H.R. has to answer the question whether the proceedings as a whole, including the way in which the evidence was obtained, were fair, and this involves an examination of the unlawfulness in question and, where the violation of another Eur.Ct.H.R. right is concerned, the nature of the violation found. In other words, as Ho pointed out, under Strasbourg jurisprudence, the question raised by unlawfully obtained evidence is not whether the domestic court should have excluded it as such; it is whether, in the light of all relevant factors, the use or admission of the evidence in the domestic proceedings rendered it unfair as a whole and hence in contravention of Article 6.[67] A domestic court must always make a thorough assessment as to whether or not the means by which particular evidence has been obtained would render unfair its use in the trial which it is conducting. After *Khan v. The United Kingdom*[68], there is a consideration that so long as the defendant has the possibility of challenging the authenticity of the evidence, and so long as the trial court has the discretion to exclude unfair evidence, the requirements of Article 6 may be considered satisfied.[69] This is a very disputable understanding of the concept of fair trial.[70] This

[65] Bochan v. Ukraine, App. No. 22251/08, Eur.Ct.H.R. (2015).

[66] *See generally* Laurens van Puyenbroeck & Gert Vermeulen, *Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU*, 60 Int'l & Compar. L. Q. 1017, 1019 (2011).

[67] *See* Ho, *supra* note 61, at 287.

[68] *See generally* Khan v. The United Kingdom, App. No. 35394/97, Eur.Ct.H.R. (2000).

[69] *See* Ashworth, *supra* note 58, at 156.

[70] Here, we can agree with the judge Loucaides, who argued in his dissent opinion that such reasoning defies the structure of the Eur.Ct.H.R.: " I cannot accept that a trial can be fair, as required by Article 6 if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention ". Judge Tulkens confirmed such understanding in his dissenting opinion in P.G. and J.H. v. The United Kingdom (no. 44787/98), Eur.Ct.H.R. § 76 (2001), where he stated:

> I do not think that a trial can be described as "fair " where evidence obtained in breach of a fundamental right guaranteed by the Convention has been admitted during that trial. As the Court has already had occasion to stress, the Convention must be interpreted as a coherent whole . . . . In concluding that there has not been a violation of Article 6, the Court renders Article 8 completely ineffective.

attitude is already grounded in *P.G. and J.H. v. The United Kingdom* and *Gäfgen v. Germany*.[71] While the use of evidence secured as a result of a measure found to be in breach of Article 3 always raises serious issues as to the fairness of the proceedings, it is important to answer the question of whether the use as evidence of information obtained in violation of Article 8 or domestic law rendered the trial unfair as a whole, contrary to Article 6; this has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. At this point, it is important to emphasize that Article 6(1), in conjunction with Article 3, requires all member states to adopt the categorical rule that evidence obtained by torture is inadmissible and cannot be used as proof of guilt in legal proceedings, but the Eur.Ct.H.R. has not adopted a similar categorical rule of exclusion for other types of unlawfully obtained evidence, such as evidence obtained by means that contravene the right of privacy in Article 8. It's also important to note that the Eur.Ct.H.R. has adopted the position that the use of illegally obtained evidence, particularly evidence obtained in violation of Article 8, which guarantees the right to respect for private life, does not necessarily lead to unfair proceedings.[72]

The quality of the evidence must be taken into consideration, as must the question of whether the circumstances in which it was obtained cast doubt on its reliability or accuracy.[73] The fact that is important for this consideration is that the principles concerning the admissibility of evidence were developed in the context of criminal law, although the Eur.Ct.H.R. applied them in a case concerning the fairness of civil proceedings.[74] The Eur.Ct.H.R. observed that, while the *fair trial* guarantees are not necessarily the same in criminal law and civil law proceedings, the States having greater latitude when dealing with civil cases, it may nevertheless draw inspiration, when examining the fairness of civil law proceedings, from the principles developed under the criminal limb of Article 6.[75] Thus, in *López Ribalda and Others v. Spain*, the Eur.Ct.H.R. took the view that the principles in question are applicable to its examination of the fairness of civil proceedings in the matter at hand.

[71] *See* P.G. and J.H. v. The United Kingdom, App. No. 44787/98, Eur.Ct.H.R. (2001); *see also* Gäfgen v. Germany, App. No. 22978/05, Eur.Ct.H.R. (2010).
[72] *See* Opinion of the EU Network of Independent Experts on Fundamental Rights on the "*Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union*", 2003 6.
[73] *E.g.*, Ribalda v. Spain, App. No.1874/13 and 8567/13, Eur.Ct.H.R. (2019); Schenk v. Switzerland, App. No. 00010862/84, Eur.Ct.H.R. (1988); P.G. and J.H. v. The United Kingdom, App. No. 44787/98, Eur.Ct.H.R. (2001); Gafgen v. Germanya, App. No. 22978/05, Eur.Ct.H.R. (2010).
[74] *See* Vukota-Bojić v. Switzerland, App. No. 61838/10, Eur.Ct.H.R. (2016).
[75] *See* Saliba v. Malta, App. No. 24221/13, Eur.Ct.H.R. (2016).

Essentially, the Eur.Ct.H.R. had to examine whether the use as evidence of the images obtained through video surveillance undermined the fairness of the proceedings as a whole.[76] The applicants did indeed have access to the recordings obtained using video surveillance and were able to contest their authenticity and oppose their use as evidence, but they did not at any time dispute the authenticity or accuracy of the footage recorded by means of video surveillance. Their main complaint was based on the lack of prior information about the installation of the cameras. Furthermore, the images obtained from the video surveillance system were not the only items of evidence in their case. Consequently, the Eur.Ct.H.R. took the view that the use as evidence of the images obtained by video surveillance did not undermine the fairness of the proceedings in the present case.[77]

The Eur.Ct.H.R.'s approach to the use of evidence obtained by a violation of Article 8 of the Eur.Ct.H.R. has been much criticized.[78] For the purpose of these examinations, we can conclude that, from a certain point of view, the admissibility of video surveillance evidence depends on the existence of a violation of Article 8. In this case, the applicants realistically had very low odds to succeed in their demand. At the very moment when the Eur.Ct.H.R. finds that video surveillance did not violate the right to privacy, the footage obtained by it becomes admissible as evidence. This is even more true when we analyse the issue of the fairness of the proceedings as a whole. The problem arises in situations where the Eur.Ct.H.R. determines that there has been a violation of Article 8, but not of Article 6 related to evidence obtained in violation of Article 8. Therefore, the Eur.Ct.H.R.

[76] We should note that the Court in Beuze v. Belgium, App. no. 71409/10, Eur.Ct.H.R. (2018) enumerated the non-exhaustive list of factors that should, when it is appropriate, be taken into account:

> (a) [W]hether the applicant was particularly vulnerable, for example by reason of age or mental capacity; (b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair; (c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use; (d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion; (e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found; (f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified; (g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case; (h) whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter; (i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and (j) other relevant procedural safeguards afforded by domestic law and practice.

[77] *See* Ribalda v. Spain, App. No. 1874/13 and 8567/13, Eur.Ct.H.R. (2019).

[78] *See* KellyPitcher, Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings 444 (2018).

has to establish a stronger connection between these two articles, as it did between Article 3 and Article 6. Essentially, the author agrees with the judges Loucaides and Tulkens in their opinion that a trial cannot be fair if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Eur.Ct.H.R..[79]

CONCLUSION

The video surveillance system is rightfully considered a powerful tool for fighting crime and for protection of property from theft. However, this is still a sensitive matter. From the perspective of human rights, this kind of surveillance does violate them to a certain degree. A balance must be established between the loss of privacy and the seriousness of threats that the system is installed to mitigate. This is the balance between the right to private life and the right to property. As stated above, it is indisputable that video surveillance of employees is a very sensitive matter. In this sense, the author agrees with the judges De Gaetano, Yudkivska and Grozev, who believe that the question of which alternative measures could have been used by the employer to pursue their legitimate aim – measures which would simultaneously have had a less invasive impact on the employees' right to respect for their private life – had to be taken into consideration. Accordingly, there is a danger of encouraging individuals to take legal matters into their own hands. Therefore, since *Köpke*, through *Bărbulescu*, to *López Ribalda and Others*, the judgments of the Eur.Ct.H.R. continue to develop key principles in this sphere, which must be applied with regard to the specific nature of employment relations and the development of new technologies. In the matter of evidence obtained by violations of the right to privacy, the author believes that, in the future, the decisions of the Eur.Ct.H.R. will have to establish the same criteria for the relationship between Article 8 and Article 6 as they did for the conjunction between Article 3 and Article 6. This judgment could be a step forward in that direction, but this does indeed depend on the interpretation. Nevertheless, we still have to take into consideration the interests of

[79] When we speak on inadmissible evidence, it is important to give the Ashworts's explanation:

> [T]he Court's prevailing view seems to be that violations of Article 8 and the requirements of Article 6 are two entirely separate matters. The appropriate way to deal with Article 8 breaches is to provide a remedy to the person whose right was infringed, a remedy that might be found in an award of damages or perhaps a reduction in sentence. But the criminal trial is something separate, with its own fairness criteria, and the questionable provenance of the prosecution's evidence will not compromise trial fairness just because other substantive human rights have been breached.

See generally Ashworth, *supra* note 58, at 157.

employers towards the protection of their property. While the balance between the protection of property and the right to privacy is not easily achieved, the author believes that the Eur.Ct.H.R. took the right attitude in this case.

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Ex Machina: Technological Disruption and the Future of Artificial Intelligence in Persuasive Legal Writing

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ABSTRACT

Technology is disrupting the practice of law and revolutionizing how lawyers work. This revolution is made more powerful because it is increasingly coupled with a rigorous and scientific approach to the law. In some ways, law is looking more like a Silicon Valley startup and less like the oak-paneled law firms of the last 200 years. As law, technology, and science merge, the implications for the profession are wide-sweeping. This article explores persuasive legal writing, offering new thoughts on what the future will hold. Specifically, this article pilots a method for applying technology and science to measure, analyze and improve persuasive legal writing, offering it as a proof of concept that anchors the article's broader, and perhaps more controversial assertion. Namely, more powerful and refined persuasive legal writing software tools, fueled by artificial intelligence, should and will disrupt and reshape significant portions of the legal space, including how legal writing is taught and how it is produced. The effect will be to view legal writing as more science, and less art. The next set of luminaries won't rely on anecdote or intuition to teach or create legal writing; they will rely on software and data.

KEYWORDS

Legal Technology; Legal Research; Legal Writing; Empirical

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INTRODUCTION

Empirical legal writing studies, powered by new technologies, will fundamentally disrupt and revolutionize how we think about persuasive legal writing. This article argues, through a pilot study that serves as a proof of concept, that, over the coming years, the fog of advice about persuasive legal writing style can largely be cleared by developing better tools to measure persuasive legal writing and better methods for studying the effect of legal writing on outcomes. It argues that, as persuasive legal writing becomes more science and less art, legal writing software powered by artificial intelligence[1] will disrupt a variety of fields, including how legal writers create briefs, the legal insurance industry, legal finance of cases in litigation, and how legal writing is taught to students.

We can and should move away from anecdote and assumption, and towards software and data. For years, professors (including me), legal writing gurus (like Bryan Garner who has made millions teaching legal writing), and judges (like the late Antonin Scalia) have talked about "how" to write effectively. But the truth is that this advice is largely untested – and as some law students would gladly tell you – too often inconsistent.

[1] A.I. is an umbrella term that covers a range of technologies that learn over time as they are exposed to more data. Pedro Nava et al., Artificial Intelligence: A Roadmap for California (Little Hoover Commission 2018), https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/245/Report245.pdf. A.I. is the quality of any computer system (data, algorithms, analytics, bots, etc.) the ability to sense, reason, adapt, learn, and understand just like humans can. *Id.* In the deeply developed sectors, A.I. technology can encompass the ability to reason through to conclusions and learn to adapt specific outputs or behaviors to circumstances. *Id.*

For years, I have told my law students that if you were to put ten world-renowned appellate lawyers in a room, gave them the same legal problem, and then had them write briefs, those briefs would be profoundly different. To be fair, some of this variation is a result of options in the legal analysis sphere. But assume for a moment you gave the attorneys the same cases, the same strategy, and the same frames. Assume you even gave them the general order in which the arguments would be presented. The briefs would diverge nonetheless. The writing style among the briefs would vary, sometimes significantly. To fully understand this notion, you only need to read a few briefs for the United States [hereinafter U.S.] Supreme Court. World-renowned attorneys with proven track records take markedly different approaches in their written advocacy, so much so that their styles are a sort of fingerprint and the author can be guessed by the style and tone alone.

The same variance occurs if you put ten legal research and writing professors in a room. Within my own department, we have engaged in rigorous debates about how students should be taught to write during our monthly meetings. We all think we know the "truth" about what lessons or writing methods work. The picture is no different if you read books on legal writing, or if you attend conferences dedicated to the art.

Why are there such marked disagreements? The pat answer is that legal writing is complex, and personal preferences dominate. We might even say authors have to be themselves, and find the approach that works for them. I take a different view. We see variance in what people treat as "good" legal writing because we suffer from a severe deprivation of data. Like ancient people performing rain dances because their understanding was limited by the availability of knowledge, we argue about what "works" in persuasive legal writing because we do not actually know. Sure, we have hunches. And to be fair, some of these are formed over years of experience, making them more like educated guesses or very crude statistical inferences. But there is little hard data upon which to draw any salient conclusions. And absent hard data, the best we can do is guess.

Law students reading this might be nodding along as they have sensed the inherent 'squishiness' (to use a technical term) of the advice their law professors give. Similarly, associates forced to write for more than one partner may too smile in agreement, as they have been forced to write in two styles to please two partners – both of which are sure they *know* how a good brief is written. Or maybe even the professors are quietly agreeing, as they have read books like Garner and Scalia's co-authored book on writing, *Making Your Case: The Art of Persuading Judges*, in which the authors openly disagree on a variety of stylistic choices.

We can do better. The remainder of this article explores these issues, suggests future work, and discusses what the future of persuasive legal writing should look like in the twenty-first century.

1. TECHNOLOGICAL REVOLUTION IN LAW

No matter where you look in the practice of law, a combination of technology and an increasing scientific rigor are changing how lawyers work. This change began before COVID-19, but the pace has accelerated as more lawyers work remotely, cases are increasingly decided on briefs and not oral argument, and in general, the practice of law embraces technology at a faster rate. A few examples make the point and help predict how technology will do the same to persuasive legal writing.

1.1. EXAMPLES FROM OTHER LEGAL SETTINGS

Deposition Transcripts: Highlighters and underlining depositions was the norm well into the 2000s. The more advanced lawyers cut depositions using Microsoft Word. Now, a new generation of lawyers uses Transcript Pad.[2] This application allows them to read a deposition on their iPad, tap the parts they want to highlight, assign them flags with topical names, and then print a report for any topic – or all topics.[3] That report identifies the page and line, and produces all the text.[4] For a practitioner creating one summary judgment, this could save two dozen hours of lawyer time.[5]

Focus Groups: For decades, before a trial, lawyers assembled focus groups. They presented their case, asked questions, and had the mock jurors deliberate. Today, massive online samples of on-demand workers are replacing these methods.[6] With big samples, precise measures of case value, A/B testing of trial strategy, and jury analytics identifying

[2] Virginia H. McMichael, *Using the Latest Technology to Tame the Appellate Record and Produce Better Briefs*, 41 Pa. Law. 48 (2019).

[3] Robert Ambrogi, *42 Essential Apps for Trial Lawyers in 2016,* Nat'l L. Rev. (Mar. 16, 2016), https://www.natlawreview.com/article/42-essential-apps-trial-lawyers-2016. *See also* Stephan Futeral, *From Toys to Tools Essential Tablet Apps for Lawyers*, 49 Tenn. Bar J. 14, 15 (2013) (mentioning the many apps available to lawyers to work on their iPad).

[4] Ambrogi, *supra* note 3 (the app "enables you to store, organize, review and annotate all your transcripts on your iPad...[fl]ag and highlight important sections and assign issue codes").

[5] Court requires parties to submit the page and lines for all cited depositions, but most courts prohibit including the entire deposition. In the past, cutting the depositions has consumers massive amounts of lawyer or paralegal time.

[6] Carol L. Bauss, Speech at the American Association for Justice 2018 National Convention: Technology Use in Focus Groups and Jury Selection (Jul. 27, 2018) mentioning two tech tools: (1) software, "Voltaire," which

ideal jurors is possible.[7] Emerging companies in this work, which has emerged in only the last three to five years, are already reporting involvement in over one-half billion in verdicts.[8]

Trial Presentation: For trial, lawyers often hired a videographer and a technologist for trial.[9] The videographer cut all the videos. The technologist set up the screen, ran the projector, organized documents to be displayed to the jury, and more. Meanwhile, the paralegals managed boxes of documents to be shown to witnesses, with copies for opposing counsel and another for the court. Fast forward to today, where a solo practitioner can download software on their laptop or an app on their iPad that will manage documents, allow for calling out documents on the screen, highlight text for witnesses, allow the attorney to label all exhibits, and to distribute them to the court and opposing counsel.[10]

Intellectual Property: Within the field of intellectual property, lawyers who evaluate patents now regularly rely on a variety of software to do their work.[11] They use programs that analyze the patent application language to determine how it compares to past granted and denied claims.[12] They analyze the grant rate by department and examiner, and they manipulate patent language to optimize the likelihood of success.[13]

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performs searches in databases and on the web of prospective jurors, and (2) online focus groups or surveys. "Both technologies save time and money and provide valuable insights into how jurors will view a case." *Id.*

[7] Ann T. Greeley, *New Online Methods for Jury Research*, ABA Prac. Points (Jul. 31, 2018), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/new-online-methods-for-jury-research/. *See also* Murray Ogborn & Theresa Zagnoli, *Future trends and potential of focus groups*, *in* 3 Litigating Tort Cases (2019).

[8] *See e.g.* www.empiricaljury.com.

[9] *See* Frank L. Branson, *Types of demonstrative evidence—Video*, *in* 4 Litigating Tort Cases (2019) (discussing the potential needs for a videographer);Philip Beatty, *The Genesis of the Information Technologist-Attorney in the Era of Electronic Discovery*, 13 J. Tech. L. & Pol'y 261, 262 (2008) (an older discussion on the use of technologists in a time where eDiscovery was just starting to ramp up).

[10] TrialDirector 6 for laptop and TrialDirector for iPad are both widely popular programs. L. David Russel & Jeffery A. Atteberry, *Pros and Cons of Trial Presentation Software Programs*, Law 360 (Apr. 7, 2014), https://jenner.com/system/assets/publications/12930/original/Russell_Atteberry_Law360_April_2014.pdf?1397055443. With TrialDirector 6, attorneys "can call up exhibits quickly and easily with the use of 'hot key' shortcuts"; they can "also 'call out' and highlight selected text, and make numerous other annotations on the fly." *Id.* The program handles documents well and can also be used for showing and editing deposition video. *Id.*

[11] Victoria Hudgins, *Eyeing Patent Market, Casetext Moves to Expand Its CARA Research Platform*, Law.com (Oct. 23, 2019), https://www.law.com/legaltechnews/2019/10/23/eyeing-patent-market-casetext-moves-to-expand-its-cara-research-platform/?slreturn=20200113163409(CARA Patent uses A.I. technology developed by Casetext to instantaneously reveal the most applicable cases and other IP guidelines).

[12] *Id.* Intellectual property A.I. programming takes the citations and key terms found within the patent and uses patent-specific motion filters, co-reference evaluation, and patterns in PTAB opinions to discover the most pertinent results.

[13] *Id. See also* Edgar Rayo, *A.I. in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, Emerj (Nov. 21, 2019), https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/ (discussing other A.I. in IP practice, like Lex Machina to analyze opponent's arguments).

Practice Management: The managing of a legal practice is a multifaceted and sometimes overwhelming aspect of any lawyer's job. The basic features needed to run a successful practice at any size include document and task management, time tracking, bookkeeping and billing, and keeping communications secure.[14] Most commonly, firms and solo practitioners have used separate software programs for each of these categories. However, practice management software is evolving to address all legal management needs in one platform.[15] Lawyers who have streamlined document assembly, automated workflow, and have access to useful reports increase their productivity significantly.[16]

From these examples, we see that a combination of technology and data analysis are driving change. The goals are simple: do better work in less time. Lawyers demand these products, and companies are increasingly happy to invest in making them, as they see an emerging, lucrative market.

1.2. REVOLUTION IN LEGAL RESEARCH AND WRITING TOO

Although it may not be obvious now, technology will similarly revolutionize legal research and writing. The influence is particularly strong in legal research. The revolution began before COVID-19, but the pandemic has certainly accelerated the pace. Some attorneys were early adopters who viewed technology as a way to save time and improve results. However, lawyers and the legal field are notoriously resistant to change. COVID-19 is changing that. Lawyers are forced to take depositions by video, stodgy judges are holding hearings by Zoom, and in general, attorneys are recognizing that technology is not a luxury – it is a necessity.

Regarding legal research, the first steps towards real change are happening now. A host of new tools are emerging to research legal questions.[17] Instead of searching for keywords and using Boolean terms to build the search logic, new programs work in

[14] Nicole Black, *The Ins and Outs of Law Practice Management Software,* ABA J. (2019), https://www.abajournal.com/news/article/the-ins-and-outs-of-law-practice-management-software.

[15] *See e.g.,* Clio, https://www.clio.com/. Clio has emerged as one of the most comprehensive practice management platforms available. Along with a robust list of typical management features, it offers client relationship management (client intake, appointment booking, email automation, etc.) and integrates seamlessly with other popular applications like Google Apps, email, and Dropbox.

[16] *See* Tom Caffrey, *Law Practice Management Systems,* 35 GPSolo 61, 62 (2018) (discussing technology options and principles of good practice management); Joe Forward, *Prioritize Efficiency, Maximize Time: The Economics of Law Practice*, 91 Wis. Law. 26, 33 (2018) (discussing a survey on how law offices have used legal management service providers to address client demands and time-use patterns).

[17] To name a few: Bloomberg Law, Casemaker, Casetext, Fastcase, Findlaw, Justia, LexisNexis, MyCase Inc., Ross Intelligence, Westlaw Edge, and so much more.

different ways.[18] They are rooted in algorithms and natural language recognition.[19] These processes pull context from uploaded documents and build connections to core issues.[20] The programs, many of which feature artificial intelligence [hereinafter A.I.], find patterns in facts, procedural history, and citations, all in a matter of seconds.[21]

Tools like Westlaw and Lexis have eschewed traditional searches where users build their own search terms, instead relying heavily on "natural language" searches rooted in algorithmic decision-making that functions like Google searches.[22] The algorithms examine language of cases, but they also consider what cases other lawyers have clicked on when running similar searches, the frequency of citation, and more to rank results.[23]

Using A.I. in legal research cuts the time spent sifting through case law, or the cases cited by an opponent, to a fraction of what it once was, all while being more efficient and relevant.[24] In this way, software is already improving the legal content of briefs.

Refined legal research is bleeding into the production of better briefs, by refining their legal content. Casetext's brief-analysis software, called CARA (Case Analysis

[18] An example of an A.I. feature in Westlaw is Folder Analysis, which is a feature that is driven by the researcher's interaction with the materials found that are placed into a research folder. Nicole Black, *Legal Research and A.I.: Looking Toward the Future*, Above the Law (July 27, 2017), https:abovethelaw.com/2017/07/legal-research-and-ai-looking-toward-the-future/. After the researcher has designated some documents to a specific folder, the contents of the folder are analyzed, and additional cases are recommended based on the key issues identified by the analysis.

[19] *Id.*

[20] Mike Whelan Jr., *What's Left for Lawyers?*, ABA TechReport (Dec. 11, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/casetextsponsored/.

[21] *Id.*

[22] Michael Mills, *Artificial Intelligence in Law: The State of Play 2016*, Thomson Reuters, (Mar. 24, 2016), https://www.neotalogic.com/wp-content/uploads/2016/04/Artificial-Intelligence-in-Law-The-State-of-Play-2016.pdf.

[23] Although there are several factors that go into ranking the search results in each database, there is a lot of secrecy when it comes to each platform's algorithm. Different research databases dispense strikingly different search results. Many speculate that relevancy, key terms, and other factors play a part in the algorithm, but no one truly knows. *See*Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 Law Libr. J. 387 (2017)(comparing search results using the search algorithms in Westlaw, Lexis Advance, Fastcase, Google Scholar, Ravel, and Casetext). Mart narrowed in on the issue that legal research has been a struggle, requiring redundancy in searching because these different algorithms yield vastly different results. *Id.* at 390. Mart attributes the variation in search results using the same search terms to the biases inherent in the algorithms, as humans are the ones who essentially code the algorithms and build bias into the systems. *Id.* at 394.

[24] *See* Stephanie Wilkins, *The Key to Crafting A Winning Argument? Context,* Above the Law (Jan. 25, 2019), https://abovethelaw.com/2019/01/the-key-to-crafting-a-winning-argument-context-2/?rf=1.
In 2018, LexisNexis launched Context, which analyzes the language of specific judges' opinions to detect cases and arguments each judge views as persuasive. Bob Ambrogi, *'Context,' Launching Today from LexisNexis, Applies Unique Analytics to Judges and Expert Witnesses,* LawSites (Nov. 29, 2018), https://www.lawsitesblog.com/2018/11/context-launching-today-lexisnexis-applies-unique-analytics-judgesexpert-witnesses.html. LexisNexis acquired Ravel Law, which initiated these original analytics; Ravel's tools are incorporated into Context within the Lexis Advance legal research platform. *Id.* Context originates the data from court documents and uses the data to predict how likely an argument is to prevail, how judges will rule on expert testimony, and to output language federal judges use most often to decide motions. *Id.*

Research Assistant), is a good example. Upon uploading any legal document into the program, latent semantic analytics[25] pull case law from a multitude of databases and produce results directly related to issues implicated by the document. [26] Importantly, this includes cases that have been overlooked or not cited in the text.[27] This is particularly helpful in drafting a response to briefs submitted by opposing counsel, as it quickly identifies cases they missed or intentionally omitted.[28]

Clerk from Judicata is another A.I.-powered brief analyzer, with a focus on evaluating the strengths and weaknesses of arguments in an uploaded document.[29] According to the advertisements, it is designed to "increase the chances of winning motions," Clerk assesses the arguments, drafting, and context of a brief compared to cases that have historically proven to be more favorable for one side or another.[30] The program aims to help lawyers craft briefs that present logically favorable cases, along with arguments that have a strong history of being followed.[31]

While CARA was the first A.I.-powered search feature to come onto the scene, many more have followed. Other brief analyzers include:

a. EVA from ROSS Intelligence—scans the brief to check the authority cited to determine whether all citations are still good law;[32]
b. Vincent from vLex—analyzes briefs in both English and Spanish, and is often used as a foreign-law resource;[33]
c. Quick Check from Thomson Reuters—advertises delivering a limited set of the most highly relevant results from uploaded briefs;[34] and
d. Brief Analyzer by Bloomberg.[35]

[25] *See* Shannon Brown, *Peeking Inside the Black Box: A Preliminary Survey of Technology Assisted Review (TAR) and Predictive Coding Algorithms for eDiscovery*, 21 SUFFOLK J. TRIAL & APP. ADVOC 221 (2016)(latent semantic analysis is a natural language processing technique that analyzes relationships between a set of documents and the terms they contain by producing a set of concepts related to the documents and terms).
[26] Pablo Arredondo & Chelsea Strauss, *Putting Casetext's CARA to the Test*, Stan. L. Sch. Blogs (Dec. 9, 2016), https://law.stanford.edu/2016/12/09/putting-casetexts-cara-to-the-test/.
[27] *Id.*
[28] *Id.*
[29] *See e.g.* Judicata, https://www.judicata.com/demo/clerk/report (last visited Feb. 8, 2020).
[30] Beth Hoover, *Introducing Clerk,* Judicata (Oct. 5, 2017), https://blog.judicata.com/introducing-clerk-848abbed8fd3.
[31] *Id.*
[32] *See* Ross Intelligence, https://rossintelligence.com/ (last visited Feb. 8, 2020). Not only does the system check all the authority for good law, but then the program generates its own legal research to find better cases to support the overall position.
[33] Bob Ambrogi, *Vincent Joins CARA, EVA and Clerk as the Latest A.I.-Driven Research Assistant,* LawSites (Sept. 20, 2018), https://www.lawsitesblog.com/2018/09/vincent-joins-cara-eva-clerk-latest-ai-driven-research-assistant.html.
[34] Bob Ambrogi, *A.I.-Driven Brief Analysis Comes to Westlaw, But Does It Differ from Competitors?,* LawSites (July 12, 2019), https://www.lawsitesblog.com/2019/07/ai-driven-brief-analysis-comes-to-westlaw-but-does-it-differ-fromcompetitors.html.
[35] *See* Bloomberg, https://pro.bloomberglaw.com/brief-analyzer/ (last visited Feb. 7, 2020).

Another area of continued innovation revolves around textual analysis software that focuses not on case law, but on identifying patterns with documents (or sets of documents).

The use of A.I. is most common in e-discovery.[36] Over the last few decades or more, the use of A.I. to sift through documents in discovery has grown exponentially. In that setting, A.I. lets lawyers work through tens of thousands of documents quickly by automatically searching for common language, buzz words, repetition, confidential information, and more.[37]

As e-discovery emerged, lawyers grappled with growing data volumes and the time-consuming job of reviewing that data. Technology assisted review [hereinafter T.A.R.] allows lawyers to review a "seed-set" of a large collection of documents after which the system will automatically go through the complete collection.[38] Not only does this save teams of lawyers' countless hours, but often T.A.R. systems return more accurate and complete results than a team of humans would.[39] E-discovery incorporates predictive coding and A.I. tools, like natural language capabilities and machine learning.[40] These tech improvements in review processing make reviewing more types of data possible, even those data sets that are unstructured.[41] The development of these complex textual analysis tools is essential for document review, but it is also innovation that has quickly carried over into new fields.

For example, a growing sector in "Legal Tech" deploys A.I. to examine contracts and to draft them.[42] At their core, these programs compare existing contracts to thousands of past contracts to identify similarities and differences, and they suggest core terms for new contracts.[43] But beyond that, they also "learn" from the contracts they review, so that the advice they offer evolves as contracts evolve.[44]

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[36] Sergio D. Becerra, *The Rise of Artificial Intelligence in the Legal Field: Where We Are and Where We Are Going*, 11 J. Bus. Entrepreneurship & L. 27, 39 (2018).

[37] Sharon D. Nelson & John W. Simek, *Running with the Machines Artificial Intelligence in the Practice of Law,* Or. St. B. Bull., Dec 2017, p 22, 23-24.

[38] Kent B. Goss et al., *Welcome to Your New War Room,* 34 Westlaw J. Corp. Officers Dir. Liab. (2019).

[39] *Id.*

[40] Jamie J. Baker, *2018 A Legal Research Odyssey: Artificial Intelligence as Disruptor*, 110 Law Libr. J. 5 (2017).

[41] Goss, *supra* note 38.

[42] Blake A. Klinkner, *Artificial Intelligence and the Future of the Legal Profession*, Wyo. Law., Dec 2018 p. 26, 28 ("Natural language processing and machine learning have allowed programs to be developed which may analyze large datasets of contractual documents and attendant datapoints, and then learn which contractual terms and conditions are best under certain conditions."). This inherently means that computers are drafting the entirety of contracts using data from clients, with the capability to flag potentially negative language in an opposing contract for a lawyer to review. *Id.*

[43] Nicole Black, *Here's the Lowdown on Contract Analytics Software*, ABA Journal, (Mar. 23, 2018), http://www.abajournal.com/news/article/heres_the_lowdown_on_contract_analytics_software.

[44] *Id.*

Document generation has entered the market with software programs that generate wills, real estate documents, incorporation documents, and promissory notes.[45] Take for example JPMorgan Chase, who introduced COIN, a contract intelligence system that reviews commercial loan agreements.[46] COIN reduces mistakes and cuts review time significantly. A due-diligence program created for mergers and acquisitions, DLA Piper, incorporates the same system.[47] Other programs like Kira and Lawgeex have the ability to suggest edits to contracts based on pre-defined parameters.[48]

But these are just early steps, steps that will look humble, even quaint in a few years – like looking at a Commodore 64 next to an iPhone. Technology has changed the legal market, and as technology progresses and expands, those changes will reach every corner of practice. This includes, as this article examines, the tone, style, and overall feel of briefs. It is beyond the scope of this article to discuss whether this disruption will replace lawyers. Those topics have been discussed at length by others.[49] But it is my opinion that as legal technology reforms our understanding of persuasive legal writing, we will all be better for it.

2. DEMYSTIFYING PERSUASIVE WRITING THROUGH TECHNOLOGY

Improving the way we think about persuasive legal writing is necessary if we are to move beyond anecdote and contradiction. Conventional wisdom about good legal writing abounds. Unfortunately, such wisdom is often untested and contradictory. For instance, as mentioned above, when Bryan Garner and former Justice Antonin Scalia co-wrote a book, on legal writing, the two brilliant writers could not agree on using contractions,

[45] Stephanie Wilkins, *Top 4 Documents Automation Software Tools for 2020 - Reviewed*, ABOVE THE LAW (Feb. 5, 2020), https://abovethelaw.com/?sponsored_content= top-4-document-automation-software-tools-for-2020-reviewed (reviewing four document generating tools—Documate, Formstack Documents, PandaDoc, and HotDocs—all of which were variations on automating contracts to streamline workflows and increase efficiency).

[46] Nelson & Simek, *supra* note 37.

[47] Nelson & Simek, *supra* note 37 ("DLA Piper is using artificial intelligence software for due-diligence document review in mergers and acquisitions. The software searches text in contracts and then creates a summary and an analysis.").

[48] Lisa Angelo et al., *Examples of Artificial Intelligence Systems in Legal*, TXCLE-ADVANCED Family L. 30-V (2018).

[49] Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of the Law,* 30 GEO. J. LEGAL ETHICS 501 (2017), SSRN, 1, 1- 2 (2015) (discussing the various examples of articles and literature that have been written on this robots taking over the role of lawyers). Another those in the camp concerned over the rise A.I. in legal practice warn that biases, deception, and malicious actions can occur in applying John Levin, *Big Data, Artificial Intelligence, and Legal Ethics*, CBA REC., 48, Apr.-May 2019.These individuals are that humans are still providing the codes and structures that make A.I. function, which can be a breeding ground for implicit bias that is even more difficult to uncover.

gender neutral nouns, or whether citations should be relegated to footnotes.[50] Similarly, some lawyers suggest that any use of legalese is unwise,[51] while others suggest that writing too simply makes a brief pedestrian.[52] And according to some appealing to emotion is foolish,[53] while opposing authorities emphasize storytelling as a means of persuasion.[54] So, who are we to believe? What styles dominate the upper echelon of legal writing, and perhaps more important, does writing style matter at all?

Because writing drives decision making, and as a result is one of the most valuable skills a lawyer can have, I started answering these questions using empirical methods to study writing style. The results are preliminary, yet promising. They suggest that with continued refinement of our methods, writing style and its implication on decision-making can be measured and understood.

This conclusion has implications for a variety of industries. For example, it suggests that companies that insure verdicts may produce refined analytical programs to better help them contemplate risk. It also suggests, that brief writers could use refined analytical tools to make their briefs better, potentially increasing chances of winning. For researchers, it suggests there is a great deal of interesting work we can do to develop tools and methods for examining persuasive legal writing more effectively. Finally, it suggests for those of us who teach legal writing that: (a) we can and should refine our teachings through the lens of hard data and; (b) that soon (or even now) we may provide tools to our students that will empower them to write better by leveraging technology.[55]

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[50] Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008).

[51] *See, e.g.,* Nancy L. Schultz & Louis J. Sirico Jr., Legal Writing & Other Lawyering Skills 90-91, 93-94 (5th ed. 2010).

[52] *See* Mark Adler, The Oxford Handbook of Language and Law 67 (Lawrence M. Solan & Peter M. Tiersma eds., 2012) ("lawyers have historically believed that traditional legalese is more precise and "plain language represents irresponsible over-simplification"). One study in the English education field suggests that such skepticism may be warranted. Rosemary L. Hake & Joseph M. Williams, *Style and Its Consequences: Do as I Do, Not as I Say*, 43 Coll. Eng. 433 (1981). The experiment detailed that a group of college English teachers gave higher grades to papers with syntactically complex writing than to papers written simply. *Id.* The researchers inferred that the writers of simpler prose may have been perceived as naive and less intellectual than the writers of the complex prose. *Id.* at 50-51.

[53] Todd E. Pettys, *The Emotional Juror*, 76 Fordham L. Rev. 1609 (2007) (discussing a large number in the legal profession have come to believe "emotions undercut rational decision making").

[54] *See* Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. Ass'n Legal Writing Dir. 1, 19–22 (2010), 7 J. Ass'n Legal Writing Directors 1, 19–22 (2010) (presenting empirical evidence that, as judges and lawyers progress in their careers and gain experience, they increasingly value the narrative in the case as a matter of persuasion). On appeal, it is not enough to simply craft a great legal argument. As Ninth Circuit Judge Alex Kozinski glibly notes, "[t]here is a quaint notion out there that facts don't matter on appeal-that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts." Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 330. In other words, an appellate brief must tell a good story.

[55] This can give instructors guidance when expectations to teach successful writing are compounded with first having to teach basic writing skills. Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. Baltimore L. Rev. 173, 209-10 (2010). Firms are beginning to conform practice sectors around technology and adopt innovative procedures, but technology does not play an integral role in

Before turning to the study and its implications, it is helpful to first understand some existing literature, both anecdotal and empirical. The following section provides a look at "conventional wisdom" for legal writing. Thereafter, an examination of the various ways empirical researchers are studying writing by lawyers and by judges is undertaken. In particular, that section addresses studies that consider whether writing style, measured in a variety of ways, impacts outcomes.

2.1. WHAT THE LEGAL WRITING EXPERTS SAY

Because of the prevalence of unappealing legal writing and the importance of writing to lawyers' work, many legal writing experts give advice for stylish legal writing. Bryan A. Garner has written numerous legal-style books and articles.[56] Other classic legal-style texts include *Plain English for Lawyers*[57] and *Thinking Like a Writer*.[58]

The extensive literature discussing legal writing lacks a systematic analysis of the fundamental qualities of good legal writing. However, there seems to be a consensus among the legal writing experts that the chief qualities of good legal writing are clarity and conciseness.[59]

Legal writing experts emphasize clarity and the avoidance of legalese.[60] Justice Benjamin Cardozo explains, "there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness."[61] To echo this point, in their book *Making Your Case*, Justice Antonin Scalia and Bryan Garner claim that "one feature of a good style trumps all others. Literary elegance, erudition, sophistication of expression—these and all other qualities must be sacrificed if they detract from clarity."[62] As Garner further explains, "A lawyer should keep in mind that the purpose of communication is to communicate, and this can not be done if the reader or listener does not understand the

most lawyers' education, which is a hurdle for the firm and the law student pining for a job. Survey Report, Wolters Kluwer, The Future Ready Lawyer: The Global Future of Law (2019).

[56] *See e.g.,* Bryan A. Garner, Legal Writing in Plain English: A Text With Exercises (2001). Garner describes an aspect of "poor legal writing" is "mak[ing] law students pore over ream upon ream of tedious, hyperformal, creaky prose" and fostering "them to pomposity." *Id.* at xvii-xviii. Lawyers "learn [their] trade by studying reams of linguistic dreck—jargon-filled, pretentious, flatulent legal tomes that seem designed to dim any flair for language." *Id.*

[57] Richard C. Wydick, Plain English for Lawyers 3 (5th ed. 2005).

[58] Stephen V. Armstrong & Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (3rd ed. 2008).

[59] *See generally id.*; Garner, *supra* note 56; Tom Goldstein & Jethro K. Lieberman, The Lawyer's Guide to Writing Well (1989); Wydick, *supra* note 57, at 58-60.

[60] Garner, supra note 56; Wydick, supra note 57, at 58-60; *see generally* Armstrong & Terrel, *supra* note 58; Tom Goldstein & Jethro K. Lieberman, *supra* note 59.

[61] Benjamin N. Cardozo, Law and Literature (1931), *reprinted in* Law and Literature and Other Essays and Addresses 7 (1986).

[62] Scalia & Garner, *supra* note 50, at 107.

words used."[63] Experts agree, mostly, that writing style full of intricate constructions and throat-clearing verbiage does not effectively persuade or connect the reader.

As many in the legal profession know, Bryan Garner is conceivably the leading legal writing expert, advocating for plain style in writing—clean, coherent, controlled, and commanding. Garner has likewise recommended that lawyers communicate their arguments in writing "honestly, clearly, unpretentiously," using a "natural voice."[64] He advises that lawyers use a "literate, precise, but relaxed style."[65]

Garner endorses the following as a "good test of naturalness: if you wouldn't say it, then don't write it."[66] He advises attorneys to "try reading your prose aloud" during editing "to see whether you'd actually say it the way you've written it."[67] Garner resounded this tactic in his book, *The Winning Brief*, where he offered 100 tips for the building blocks of brief writing.[68]

Garner argues that writing is effective and persuasive when clear, plain arguments are formulated in a concise manner.[69] "[T]he first and last secret of a good style consists in thinking with the heart as well as with the head."[70] Legal style is important and can affect the impression the writing leaves on the reader.

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[63] Bryan A. Garner et al., The Redbook: A Manual on Legal Style 183 (2d ed. 2002).

[64] *See* Bryan A. Garner, *An Approach to Legal Style: Twenty Tips for the Legal Writer,* 2 Scribes J. Legal Writing 1, 1 (1991) [hereinafter Garner, *An Approach to Legal Style*] ("Use words and phrases that you know to be both precise and as widely understood as possible."); *see also* Bryan A. Garner, *The Question of Voice How to Bring a More Conversational Style to Your Writing,* ABA. J. (Dec. 1, 2016), https://www.abajournal.com/magazine/article/garner_conversational_writing [hereinafter Garner, *The Question of Voice*]:

> The other day a lawyer asked me: "Isn't one of the hardest things about editing well learning to improve the writing while not changing the writer's voice?" I said no: When editing most lawyers' work, I have little regard for the writer's voice because most lawyers haven't cultivated a discernible voice. What all legal writers should strive for is to be the voice of reason.

[65] Garner, *An Approach to Legal Style*, *supra* note 64.

[66] Bryan A. Garner, *supra* note 56.

[67] *Id.*

[68] Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts 226 (3rd ed. 2014) (discussing Tip #28: never write a sentence that you couldn't easily speak; "Try to get your speaking voice in your writing . . . In talking, you tend to use short sentences, plain words, active voice, and specific details . . ." (*quoting* Daniel McDonald & Larry Burton, The Language of Argument 238 (Houghton Mifflin 1986))).

[69] Garner also advises that judges and lawyers should place citations in footnotes to ensure that readers aren't getting lost in clunky citations or unwieldy string citations with long explanatory parentheticals, but he is strongly repulsed by the use of substantive footnotes, like this one. Garner, *supra* note 63, at 176-99 (elaborating on Tip 24-Put all your citations in footnotes, while saying in the text what authority you are relying on. But ban substantive footnotes).But *see* Richard A. Posner, *Against Footnotes,* Ct. Rev., Summer 2001, at 24, 24 (taking issue with Garner's suggestion that all legal writers put citations in footnotes when drafting briefs or opinions).

[70] Garner, *An Approach to Legal Style*, *supra* note 64 (*quoting* Arthur Quiller-Couch, On the Art of Writing 291 (1916)).

Although none of these "truths" sound objectionable, it is notable that Garner does not provide citations for these truths. Indeed, he likely cannot. The research does not exist. It would be unthinkable in other fields to shape such an important part of that profession's work on anecdotes. Structural engineers do not rely on their gut. And we do not want doctors performing surgery based on what other doctors say is effective. We expect measures, analysis, and best practices. Why should it be any different for legal writing?

2.2. EARLY EMPIRICAL RESEARCH REGARDING LEGAL WRITING

The study of legal writing using empirical methods is growing and is likely to continue.[71] With the continued development of software that can gather briefs, analyze them, and be coded to engage in a variety of analyses, there are amazing new avenues to explore. Entire articles have been written explaining new methods, exploring those methods, and providing early, tantalizing results.[72] The existing research covers a variety of topics, including how the use of "intensifiers" impacts outcomes,[73] whether readability (measured by a few common, simple readability scores) predicts outcomes,[74] and whether citations predict results. Other articles have engaged in a more ambitious and creative analysis. For example, one article treated each precedent by a Supreme Court justice as their "output" and then measured the influence of that output by how often those cases are cited. It used that data to measure which justices, and categories of justices, have the most influence.[75] Other papers examine Supreme Court decisions using simple measures, such as opinion length.[76] Specific to the instruction of legal writing, there is even a textbook that attempts to root instruction in early findings, rather than shared (but often unexamined) beliefs among legal writing teachers. The book, *The Science Behind the Art of Legal Writing*, draws on a variety of studies.[77]

[71] *See* Shaun B. Spencer, *Using Empirical Methods to Study Legal Writing*, 20 J. Legal Writing Inst. 141 (2015). In his article, Spencer discusses empirical research methods that contribute to the growing field of research. *Id.* at 184. He highlights just how empirical research positively adds to learning and developing legal writing skills. *Id.*

[72] *See* Chad M. Oldfather, Joseph P. Bockhorst & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship,* 64 Fla. L. Rev. 1189, 1238 (2012).

[73] *See* Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers is Very Bad - Or Is It?*, 45 Idaho L. Rev. 171 (2008).

[74] *See* Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning on Appeal?*, 12. J. Appellate Prac. & Process 145 (2011).

[75] *See* William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges,* 27 J. Legal Stud. 271 (1998). (measuring the influence of particular judges based on the number of times their opinions are cited).

[76] *See* Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions,* 45 Houston L. Rev. 621 (2008).

[77] Catherine J. Cameron & Lance N. Long, The Science Behind the Art of Legal Writing (2015).

2.3. FOCUS ON JUDICIAL WRITING

An article on Supreme Court opinion length examined the causes of increased opinion length, noted that that growth was not linear but exhibits periods of growth and contraction, and concluded that longer opinions – controlling for many other factors – are cited more often and carry more precedential force.[78]

Another article examined how citation of opinions could measure the influence which authoring judges had with his or her peers.[79] It reached several interesting conclusions, including that older judges were more influential than younger judges,[80] that law professors are among the most influential judges,[81] and that whether a judge had served as a judge in another court did not alter influence.[82]

Yet another article provided tantalizing data about how courts use, or ignore briefs.[83] The authors explored whether courts are "responsive" to the briefs they read in a variety of ways, including measuring how often they cite cases first cited by the litigants.[84] The results were surprising, for example, they found that just roughly one-third of total citations can be found in the appellant/appellee briefs in the Circuit they studied,[85] and that courts adopt reply briefs the least, raising questions as to why.[86]

[78] Black & Spriggs, *supra* note 76, at 634-40 (showing a dramatic increase in the Supreme Court opinion lengths in the second half of the 20th century in comparison to historical norms). "While the median length of the Court's majority opinions hovered around 763 words for the first twenty years of its existence, the same quantity more than quintupled to 4,250 words for the most recent twenty-year period." *Id.* at 634. A contributing factor of this increase may exist in Justices feeling compelled to justify their position to offer the best guidance in comparison to other opinions and even refute those dissenting opinions. *Id.* at 629 (Justice Powell stated that he "prefer[red] 'lean' opinions, but [[that] it is important to meet honestly and fairly the serious arguments advanced by the losing side or by a dissenting opinion.").

[79] Landes, *supra* note 75, at 271-72.

[80] *Id.* at 279-80.

[81] *Id.* at 288. Twenty percent of the top twenty judges were former law professors, including the first and third judge. *Id.*

[82] *Id.* at 318-19.

[83] Oldfather, *supra* note 72.

[84] *Id.* at 1195.

[85] *Id.* at 1238 ("On average, only 35% of the authorities cited in the court's opinions were among those cited by the parties, and the court cited just over 16% of the authorities referenced in the briefs.").

[86] *Id.* at 1195.

2.3.1. INTENSIFIERS

Long and Christensen examined whether what they call intensifiers[87] (words like *clearly*, *obviously*, *certainly*) impacted outcomes in appellate cases.[88] They noted that many legal writing instructors and many manual books on legal writing suggest that intensifiers should not be used. They cited Chief Justice Roberts, who has condemned the use of such words in Supreme Court briefs.[89] The study measured what the authors called the intensifier rate (number of intensifiers per page).[90] The results were interesting, but muddy. Intensifiers did not correlate to losing more often, although the data hinted at the result without being statistically significant.[91] But, surprisingly, the authors identified situations in which increased use of intensifiers correlated with a higher win rate.[92] This occurred when the judicial opinion also exhibits a higher number of intensifiers.[93] The authors are candid about the limitations of these results, concluding they cannot draw a causal conclusion.[94] An apparent and potential explanation of the data is simply that some cases are actually obvious and clear. The author does not lose credibility to point to this truth for the court. And if the court agrees, and perhaps even views the other side's position as borderline frivolous, it scolds them with intensifiers. In this way, one would expect to see increased intensifiers in the appellate brief *and* in the opinion.

Regardless of the final takeaway of the study, it is an example of how statistical analysis can attempt to measure the effectiveness of legal writing, and perhaps a cautionary tale of just how complicated the results can be.[95]

[87] Lawyers' tendency to advocate in writing could lend to them using intensifiers (i.e. the lawyer really, really, really, wants to win for her client). *See* Elizabeth R. Frost, *Cutting the Clutter: Spring Cleaning for Writing*, 2013 Or. State Bar Bull. 15. ("Mark Twain, America's official authority on everything, advised writers to "substitute "damn" every time you're inclined to write "very"; your editor will delete it and the writing will be just as it should be.").

[88] *See e.g.*, Long & Christensen, *supra* note 73, at 180.

[89] Disapproving the use of the intensifier "clearly" in briefs for the Supreme Court, Chief Justice Roberts snarked that, if the case were that clear, it would not be before the Court. *Id.* at 172.

[90] *Id.* at 181.

[91] *Id.* at 173. "The degree of intensifier use by the writer of a legal brief is a function of the writer's perception of the strength of his or her own argument, relative to the opposing side's argument." *Id.* at 186.

[92] *Id.* at 181-82.

[93] *Id.* at 184, n. 55 ("It can even be argued that the high rate of intensifiers in judicial opinions, especially where the answer is not clear, serves as a model for high intensifier use by practitioners in similar situations.").

[94] *Id.* at 172.

[95] At any rate, correlation is not necessarily causation. However, the fact that intensifiers may correlate with losing briefs is enough to give a legal writer pause to avoid using language that lacks any real force or power. *See* Frost, *supra* note 87 (highlighting the unnecessary repetition in using the phrases "utterly convinced" and "very urgent").

2.3.2. READABILITY

Long and Christensen took on readability in a subsequent article. They used two common measures of readability[96] – the Flesch Reading Ease Scale,[97] and the Flesch-Kincaid Grade level scale.[98] Both scales function largely by measuring the length of words, and the length of sentences.[99] Shorter words and shorter sentences produce lower scores. Such scales have been roundly criticized as doing a poor job of measuring actual readability.[100] But the authors note they are not concerned about such criticism because they want to simply measure whether shorter sentences and shorter words correlate to better outcomes, reasoning that judges might find such sentences easier to read.[101]

The conclusion that "readability" does not correlate to outcomes would suggest appeals are decided on the merits, and that the method of delivery is largely irrelevant.[102] If this is true, it would suggest all lawyers should spend less time on how they write, and simply make sure the content is sound. The authors candidly suggest that readability may be "sound and fury signifying nothing."[103]

As explained in my results section, my findings are at least arguably at odds with this conclusion. Using more refined tools and measures, I conclude that some writing styles (which is a form of readability), do correlate with success. This is likely due to the difference in measurement tools. The "readability" statistics used by Long and

[96] *See* Long & Christensen, *supra* note 74, at 145.

[97] The Flesch Reading Ease scale (FRES) measures the readability of a text on a scale from 0-100 with higher scores indicating texts that are easier to understand: *FRES* = 206.835 - 1.015 Total Words Total Sentences - 84.6 Total Syllables Total Words *See, e.g.*, Rudolf Flesch, *A New Readability Yardstick*, 32 J. Applied Psych. 221, 223-33 (1948).

[98] The Flesch-Kincaid Grade Level (FKGL) measures the number of years of education typically required to read a text *FKRA* = 0.39 Total Words Total Sentences + 11.8 Total Syllable Total Words - 15.59. *Id.*

[99] *See* Norman O. Stockmeyer, *Using Microsoft Word's Readability Program,* Mich. Bar J., Jan. 2009, at 46. Both of these readability scales are found within Microsoft Word.

[100] *See* K.K. DuVivier, *Writing Help at Your Fingertips-Readability Scale*, Colo. Law, Mar. 2001, at 39.("The shortcoming of readability scales is that they can only measure the surface characteristics of words. They assume that reading is equivalent to understanding."). Duvivier explains that computers can count the number of words between periods with ease, but the real shortfall is a computer cannot distinguish citation sentences from grammatical sentences—the scales measure each period as the end of a sentence. *Id.* "Consequently, a citation sentence, such as 42 U.S.C. § 1983 (1994), is read as four short sentences, which can inaccurately boost a text's readability rating." *Id.*

[101] *But see* Long & Christensen, *supra* note 74, at 154.

[102] Although the study found no significant correlation between the readability and the success of the briefs, this conclusion could merely expose lower caseloads in a specific court and a larger number of law clerks to support appellate judges compared to the trial judges. Also, their conclusion could have been "impacted the logistic regression analysis, as the inferential logic requires variation in the dependent variable to draw a valid conclusion." see William D. Woodworth, *The Ethics and Science of the Legal Writing Art: An Interdisciplinary Approach*, 67 Syracuse L. Rev. 329, 341 (2017). *See also* Long & Christensen, *supra* note 74, at 156 (failing to control for other dimensions of narrative writing in the logistic regression).

[103] Long & Christensen, *supra* note 74, at 161.

Christensen are better termed "how-many-syllables-appear-in-a-sentence" tools, which are crude. For example, the word "intelligent" is far more understood and common than "apt". But the former would score as less readable than the second. Similarly, most people understand "phony" or "insincere" but might not know the word "glib." Beyond examples of short words, anything but simple or readable, the law complicates things further. Some legal words are terms of art. Failure to use them might shorten the sentence, but omitting the words would not improve the readability (or credibility) of the author. Finally, the Microsoft Word readability check scores legal citations as sentences.[104] The citations affect the readability score of the writing with the amount of punctuation.[105]

StyleWriter provides a more refined tool that measures how "readable" writing is in a variety of ways. This includes scoring words based on their generally accepted meaning, rather than their length. It also considers the use of active versus passive verbs, how often prepositional phrases are used, and the role of jargon.[106]

[104] *Id.*

[105] *See* Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 J. Legal Writing Inst. 61, 81 (2018). ("Removing the citations alleviates the risk that the awkward form of legal citation would undermine the reliability of the readability measures. When we took a small sample of briefs and ran several common readability tests with and without citations, the two sets of readability scores varied wildly and produced significantly different rank-ordering of the briefs.") Another factor to think about is the variation in the number or length of citations used. The citation lengths vary based on the number of sources cited and the various reporters used for any internal citation. *See also* Black & Spriggs, *supra* note 76, at 631 n. 36 ("[M]odern opinions are likely to cite several reporters for any given internal citation, whereas earlier opinions will have systematically fewer reporters because many did not yet exist."). Black and Spriggs compared the difference in total calculated length of the "original" opinion with the length of a "clean" opinion—to get this "clean" version the authors eliminated many of the citations within the opinion based on a list of about 150 reporter citation stems that appeared in their data. *Id.* The two authors found that prior to 1940, the "original" opinion "averaged roughly 65 more words than the cleaned version." *Id.* However, after 1940, the difference between the two versions of the opinion increased by a factor of approximately five, differencing about 315 words.

[106] I am not endorsing StyleWriter as the only tool that can do this work. But it proved effective for my needs. StyleWriter is one of the oldest writing analysis programs, and is currently in its fourth version. There are several alternatives to StyleWriter. For example, ProWritingAid and SlickWrite are similar to StyleWriter in that they produce reports which identify a variety of writing errors, i.e., alliteration, cliches, and poor word choice. These programs provide a readability score as well. PaperRater also seems to provide some similar analysis, but more limited in scale. It is also worth noting that there are other programs available that do not providing an analytical report of writing, but instead attempt to correct mistakes in real time. Wordrake, for example, is more business-writing based, edits for brevity and clarity, and is popular among lawyers. The Hemingway app will color code errors and offer corrections as a person writes.

3. THE PILOT EMPIRICAL STUDY

In this initial study, I sought to explore two core questions. First, I wondered whether, with refined tools, it was possible to better describe existing writing styles and differences among courts and authors. Second, I wanted to learn whether I could identify initial metrics that correlate with outcomes. I stress that this study is more proof of concept, than conclusive data. However, the results are promising, suggesting that with continued innovation we can more meaningfully measure writing styles, and learn what styles are the most effective. I explain the methods and results in the following sections. In these sections, I discuss a few potential uses of more refined measures of legal writing, and then I discuss some potential future studies that would develop and improve my methods to yield new insight.

When beginning my work, my core hypotheses were:

H1. *Writing style differs by court.*

H2. *The style at the United States Supreme Court is probably the most distinct, as those briefs are produced by some of the most highly respected and highly paid advocates in the country.*

H3. *In persuasive briefs, writing style matters. Content may be queen, but style is at least a princess.*

To investigate these hypotheses, I examined three courts of review—two final and one intermediate. Briefs are easy to gather for these courts, cases are randomly assigned to panels, and the overall load is small, meaning I could measure a large percentage of the workload.[107] I made a few other decisions to narrow and refine the work, which I offer as caveats here. Specifically, because my expertise lies in the civil realm, I focused the work on civil matters. I deleted cases with cross-appeals because they do not always produce a clear winner and loser, and I pulled only appellant opening briefs, scoring a reversal as a win. I selected 600 cases (200 from the U.S. Supreme Court, 200 from the Ninth Circuit Court of Appeals, and 200 from the California Supreme Court). To select the cases, I took the last 200 cases decided. I obtained the briefs in Word format, removed the materials that were not actual content meat (style, table of authorities, signature block), and scored the writing style of the brief's author.

To score the briefs, I needed a program that would produce meaningful, rich data. I tried existing tools in Word, but the metrics they produced were not refined enough for statistical work. For example, grade level was measured only to the whole grade (as opposed to the tenth or hundredth), making detailed differentiation difficult. The program had no settings for legal briefs, and it dealt poorly with things like citation. When I ran a first statistical analysis, it became clear that identifying meaningful

[107] The cases, information and measures are included in the Appendix.

differences would require data that could measure more aspects of writing and with more precision. Similarly, the reading level tests were overly simplistic.[108] After studying a variety of options, I settled on an innovative program called StyleWriter that measures specific writing characteristics, including:

a. average sentence—average number of words per sentence;
b. passive index—the percentage of sentences that contain passive verbs;[109]
c. style index—how well sentences are written as a whole, with a lower score indicating a better sentence;[110]
d. bog index—how easy sentences are to read;[111]
e. sentence bog—the length of the sentences;[112]
f. word bog—the difficulty of words;[113]
g. reading grade—the program eschews the familiar and relatively basic Flesh-Kincaid reading score and replaces it with a measure that considers the difficulty of the vocabulary, sentence length, and more;
h. jargon— overused and unnecessarily complicated terms, sometimes called "legalese";[114]

[108] In a pilot study, I selected one hundred briefs and scored them in Word. I then did some back of the envelope investigation about whether the measures might correlate with outcomes. I found no obvious correlations.

[109] *See New Features Guide: StyleWriter-4*, Editor Software 1, 11-12 (2020), https://www.editorsoftware.com/images/StyleWriter/StyleWriter4_New_Features.pdf. According to StyleWriter, the passive index measures one of the most common style faults in writing – overusing passive verbs. StyleWriter counts the number of passive verbs, divides them by the number of sentences and multiplies the result by 100 to give a Passive Index. *Passive Index* = Number of Passive VerbsNumber of Sentences × 100.

[110] Editor Software, *What is the Style Index?,* StyleWriter-4 Support (last visited February 7, 2020), http://www.editorsoftware.com/Faqs.html# (follow "Support" hyperlink; then follow the "What is the Style Index" hyperlink). StyleWriter indicates that "style" is a dated measure in its program. *Id.* It suggests that "Bog" is now a more complete measure. *Id.* For that reason, I've noted "style" but do not dwell on it. Here is StyleWriter's explanation:

> The Style Index was StyleWriter's measure of good writing before we designed the Bog Index. The Style Index measures all plain English problems in the text, including a weighted score for long sentences. It then converts this measure into an index. The best writing consistently scores below 20 – equivalent to two style faults for every 100 words. As the Bog Index also measures the plain English problems in the text, we recommend you use the Bog Index.

[111] *See New Features Guide, supra* note 109, at 15. According to StyleWriter, the Bog Index has three distinct parts, (1) Sentence Bog, (2) Word Bog, and (3) Pep. Bog is anything that detracts from easy reading (i.e. bogs a reader down). *Id.* Pep is anything that makes writing easier to read and more interesting (i.e. peps up writing). *Id. Bog Index* = [*Sentence Bog + Word Bog – Pep*].

[112] *A better readability formula: StyleWriter's Bog Index*, StyleWriter - USA (last visited Feb. 7, 2020), http://www.stylewriter-usa.com/stylewriter-editing-readability.php. [hereinafter *Style Writer's Bog Index*]. Sentence bog deals with the problem of sentence length. StyleWriter take the Average Sentence Length for the document, squares it, then divides the result by the Long Sentence Limit for the chosen Writing Task. This reflects the fact that some Writing Tasks demand shorter sentences. *Sentence Bog* = Average Sentence Length2Long Sentence Limit.

[113] *See New Features Guide, supra* note 109, at 20. Word Bog is the measure of word difficulty. StyleWriter's Bog Index measures: (1) word difficulty, (2) abbreviations and acronyms, (3) wordiness, (4) passive verbs, and (5) style issues. In measuring these factors, the program assigns a Bog value to each of these and expresses the result as the amount found in 250 words of the document. *Word Bog* = Style Problems +Heavy Words+Abbreviations+Specialist × 250 Number of words.

[114] *Id.* at 10. The StyleWriter program highlights three forms of jargon: (1) abbreviations and acronyms, (2) difficult words outside the understanding of most readers, and (3) jargon phrases.

i. glue—how well the sentences are pulled together;[115] and

j. pep—anything that makes writing easier to read and more interesting.[116]

The Bog Index is a better measure of readability because it captures the plain English attributes of writing (e.g., active voice, clarity), ather than presupposing that all words with multiple syllables are complex and less readable, as in computing the readability through Microsoft Word. The word familiarity used by StyleWriter determines the word complexity and is based on a wide lexicon of 200,000 words. Thus, the Bog Index measure of writing clarity overcomes the major criticism of other readability programs related to apprehending readability and complexity founded on syllable totals or passive verbs.

Besides these measures, I captured data regarding average word length and paragraph length. And to avoid confusion by citation or legal terminology, I set the program to "legal." The program still scored citation, but it did not count citation errors as such (or as a set of errors). Similarly, the legal setting did not flag all legal words as overly complicated, since many are terms of art. Admittedly, the setting was imperfect, but they were a marked improvement over many alternatives. To the extent it might still score some legal work poorly, those effects will probably be similar across the samples. Although the measures may contain errors compared to a hypothetical perfect scoring system for briefs, the relative measures between briefs are accurate.

Figure 1 is an image of how the output from a document appears in StyleWriter. The left side shows a visual depiction of a variety of measures. The right side shows notes, comments, and suggestions. The bottom left contains a measure of sentence length, along with distributing various sentence lengths. The very bottom shows the final raw scores for a variety of cumulative measures.

[115] *Id.* at 22.

> Glue words are the 200 or so most common words in the English language (excluding personal pronouns). They are necessary to link nouns, verbs, adverbs and adjectives in any sentence. Most writers use too many glue words and almost every document could benefit from running an editorial pen through unnecessary glue words.

[116] *See Style Writer's Bog Index*, *supra* note 112. Pep counts the features in the document that are the hallmarks of good writing. Pep reduces the overall Bog Index because it can ease the job of the reader and make the writing more enjoyable to read. Pep includes the following: names, interesting words, conversational expressions, personal pronouns, contractions, direct questions, and variation in sentence length. The program assigns a Pep value to each of the features listed and expresses the result as the amount found in 25 words of the document (1/10 of the effect from Bog). $\underline{Pep}$ = Names+Interest Words+Conversational×25Number of words+Sentence Variety $\underline{Sentence\ Variety}$ = Standard Deviation × 10 Average Sentence Length.

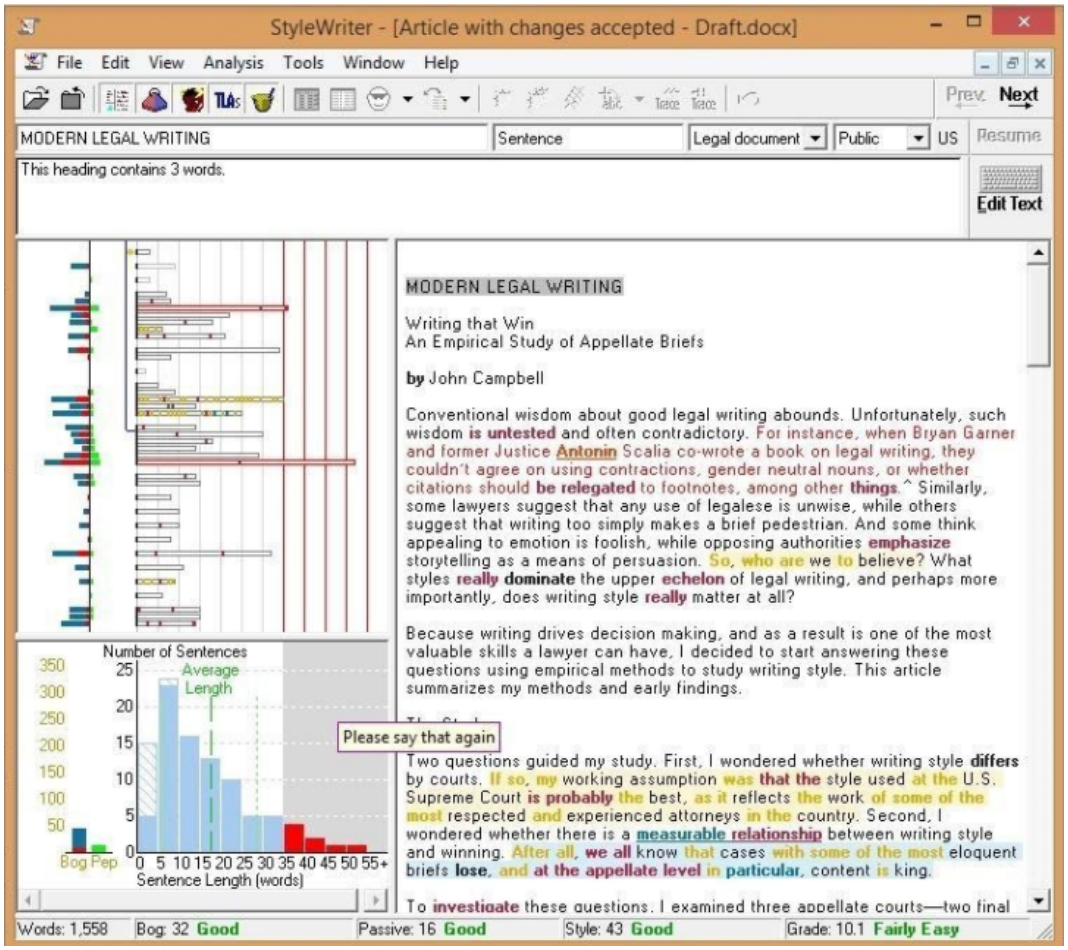

Figure 1: StyleWriter 4, Standard Edition developed by Editor Software Ltd (UK)

I recorded the data from each brief and analyzed it to determine whether: (1) the writing style in briefs differed by court; and, (2) any specific characteristic or combination of characteristics correlated at a statistically significant level with higher win rates. The data was analyzed using a variety of statistical measures and techniques.[117]

The results are discussed below.

[117] In determining whether courts were similar or different, we determined whether means and variances of the writing measures differ between pairs of courts in the three court data. The core steps required were: perform exploratory data analysis, plot densities of the writing measures for each court, assess the normality of the distributions of the measures in each court from the plots and using the Shapiro-Francia test, examine the correlations of the measures, compare the variances of the writing measures between pairs of courts, perform pairwise Brown-Forsythe tests on the measures between the courts as a non-parametric test of equality of variance, and report sample standard deviations to show direction and size of differences. We also examined whether writing characteristic correlated with positive outcomes by fitting logistic regression models of the case outcome on the writing measures of the brief. This required fitting models with each measure and the court identifier as predictive variables, examining the magnitude, direction, and significance of the association of the writing measure with the effect, identifying the best subset of predictors according to the A.I.C criterion, examining the predictive power of this model, and using a permutation test to assess the significance of the model.

3.1. UNITED STATES SUPREME COURT BRIEFS ARE SIMPLER

In this section, I have discussed my findings regarding how briefs compare across the selected courts of review. My fundamental findings challenge the existing notion that briefs are about the same is inaccurate. With a more refined measure, small, but statistically significant differences can be identified. This confirms my first hypothesis.

In a previous work, Long and Christensen concluded, using basic readability statistics, that briefs are all about the same.[118] That is not true when the tools are refined. Briefs differ at a statistically significant level from court to court, as shown in the charts below.

The differences show up in almost every style measure. The charts, Figures 2, 3, and 4 below demonstrate the differences.

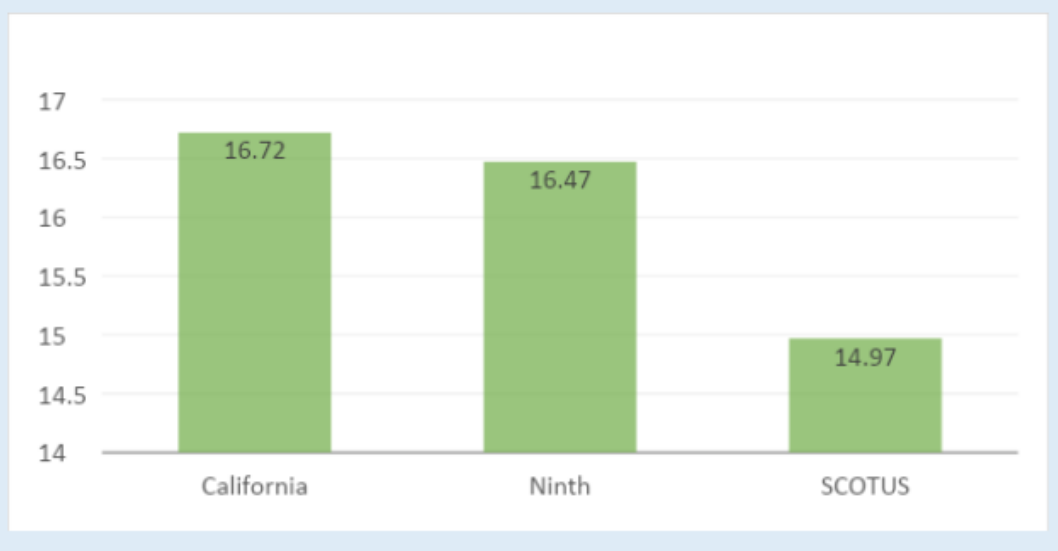

Figure 2

[118] *See generally* Long & Christensen, *supra* note 74, at 147.

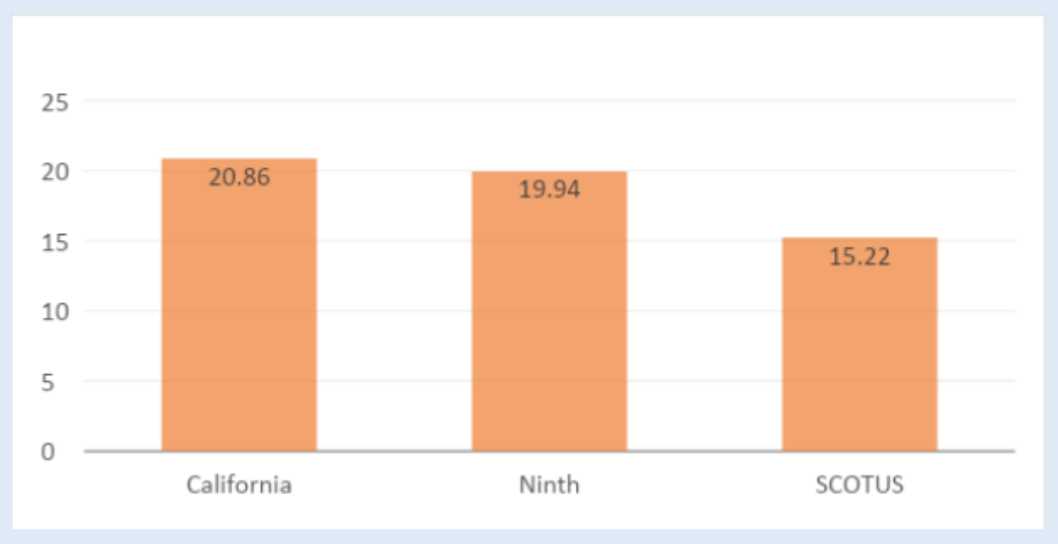

Figure 3

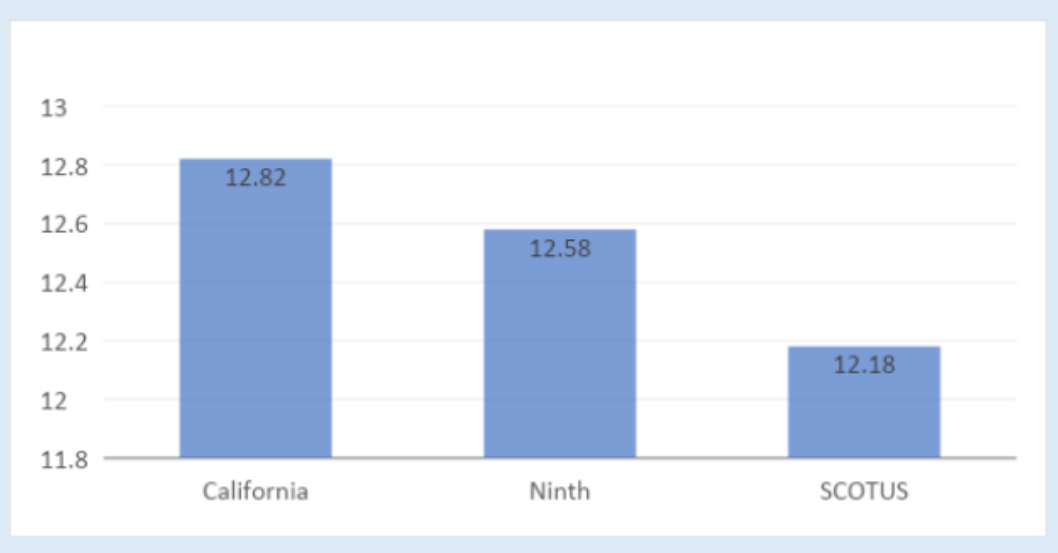

Figure 4

These are merely descriptive statistics, and the differences are, sometimes, small. For example, the difference in reading level between the United States Supreme Court and the California Supreme Court is only 0.60. To investigate whether these differences are statistically significant, a T-test was conducted.[119] The results are displayed in the table below.

[119] A t-test is a type of inferential statistic used to determine if there is a significant difference between the means of two groups, which may be related in certain features. A t-test is used as a hypothesis testing tool, which allows testing of an assumption applicable to a population.

Average scores with pairwise t-tests of equality of the means						
Measure	California	Ninth	SCOTUS	California v. Ninth	California v. United States	Ninth v. United States
Total words	8770.97	7334.07	12111.49	0.0000	0.0000	0.0000
Average sentence	16.72	16.47	14.97	0.3926	0.0000	0.0000
Passive index	20.86	19.94	15.22	0.1663	0.0000	0.0000
Style index	83.97	79.89	79.73	0.0069	0.0034	0.9117
Bog index	70.17	70.38	67.67	0.8436	0.0087	0.0096
Reading grade	12.82	12.58	12.18	0.1021	0.0000	0.0020
Jargon	0.0338	0.0404	0.0390	0.0000	0.0001	0.3648
Glue	0.4036	0.3934	0.3983	0.0001	0.0211	0.0289
Pep	12.21827	12.50	12.96	0.1197	0.0000	0.0039

Table 1: Comparing the court

The average scores for each court are reported in the first three columns. The lower the number, the simpler the brief. For example, the Bog Index score for the United States Supreme Court is 67.67, almost three points lower than the scores of the other courts. The light blue boxes indicate the simplest briefs, and the darker the box, the more complex the briefs. A visual inspection shows that the U.S. Supreme Court briefs are the least complex in most categories, and briefs in the California Supreme Court are the most complex. For the statistically minded, the last three "t-test" columns show whether the differences are statistically significant. The darker the green, the more significant the differences. White boxes indicate no significance. Scores below .05 are statistically significant. For example, in the far right column, the scores for the United States Supreme Court are compared to those of the Ninth Circuit. Almost all scores are far below .05. The differences between the U.S. Supreme Court briefs, when compared with the Ninth Circuit and California Supreme Court, are statistically significant for the majority of categories. The differences between the California Supreme Court and the Ninth Circuit are not statistically significant for most categories.

The U.S. Supreme Court briefs were, on the whole, simpler and clearer. Average sentence, passive index, bog index, style index, and reading grade[120] registered the simplest (lowest) scores. The briefs also scored best (highest) on pep, and were in the middle on jargon and glue. This confirms my second hypothesis.

The fact that the Supreme Court briefs are simpler might be surprising. The U.S. Supreme Court has a light caseload, the Court hand-picks the cases to hear, each justice has four clerks to assist them, the issues presented are all important, they are briefed by some of the largest firms in the country, and the average attorney has decades of experience. We might expect this to produce an advanced diction, complex sentences, and more focus on

[120] The reading level is driven down by citations. In experimenting with the program, I found that if I deleted citations and scored the same text, I often saw a grade level increase in reading level. Many other scores, including bog (considered a more complete measure of writing by StyleWriter) remained roughly the same. As such, it is possible that the reading grade level is driven down in the United States Supreme Court by heavy citation.

content than on style. The Court has plenty of time to discern the meaning of the briefs, and the issues themselves are complex. Instead, we see the opposite: style matters, and simplicity and clarity are the norm.

3.2. WRITING STYLE CORRELATES TO WINNING

But do simpler briefs win more? This answer is a little more difficult to discern from the data, but there are indications that it correlates significantly with winning. The scores from all briefs in all courts were considered, no single writing measure was a significant predictor of a successful outcome for the appellant. Statisticians typically want to see a "p-value" of less than 0.05. This can require a massive sample, as a "p-value" reflects both how much of a difference variables make and the number of data points. But, based on the briefs cases studied, there is trending evidence that good writing correlates to winning.

Table 2 shows the coefficient of each writing measure and its "p-value". A positive coefficient means that a higher score is associated with a greater probability of winning. Conversely, a negative coefficient indicates that a lower value of the measure is associated with a greater probability of winning. So, we would expect to see positive numbers for glue and pep (all indicia of good, clear writing), and lower scores for jargon, passive index, style, reading grade, and bog (all indicia of muddled, boring, or confusing writing). And this is just what we see.[121]

Summary of regressions with court indicator and single writing measure		
Measure	Coefficient	p-value
Average sentence	0.0056	0.8669
Passive index	-0.0182	0.2031
Bog index	-0.0133	0.1179
Reading grade	-0.0607	0.3565
Jargon	-6.8579	0.2457
Glue	3.1202	0.3919
Pep	0.0745	0.1490

Table 2

Here, we see that lower passive index scores, bog index scores, jargon, and reading level all correlate to better outcomes. The results are not statistically significant, but the "p-values" are much lower, suggesting a larger sample might yield statistically significant

[121] Average sentence length is a variable that doesn't fully fit my predictions. Longer sentences correlated with winning, though not at a statistically significant level.

results.[122] We also find that glue and pep correlate with positive outcomes, again with relatively low "p-values". The finding that does not fit the hypothesis is the measure of sentence length. It suggests that longer sentences correlate with winning, but the results produce a tremendously high "p-value", suggesting this result is likely just noise in the data. The data suggests the fact that good writing matters, but it is far from conclusive.

To further analyse, I hypothesized that, if writing does matters, it probably matters more in intermediate courts where the workload is higher, the issues are more mundane, the review is mandatory, the judges have less help from clerks, and on average, more cases are affirmed. There, the quality of writing style might have a significant impact on whether the brief is well received and understood because these courts aren't likely to have the time to dig through convoluted writing to uncover the deeper meaning. If this hypothesis is right, of the courts I studied, style should matter most in the Ninth Circuit.

And it did as in the Ninth Circuit, a low passive index correlated significantly to win rate, with a low bog index coming close to statistical significance.[123] This means that, in the Ninth Circuit, if you knew only the scores for passivity and bog, you could predict whether a case would be reversed or affirmed at a rate a little better than chance.[124] Being able to predict case outcomes on so little data is perhaps surprising, given one would know nothing of the issues, the firm, the attorney, the panel the case was assigned to, the quality of the content, the framing, or how oral argument went. Many might predict that without measuring content, or lawyer skill, prediction is impossible. But the data does not suggest that is true.

[122] P-values help decide if an effect is statistically significant. The smaller the difference observed, the larger the sample must be to be sure that the effect is real. For example, if you flip a coin 100 times, and get 51 heads and 49 tails, you cannot conclude the coin is unfair and slightly favors heads. The difference in the results is too small. But if you flipped it 10,000 times, and had 5,100 heads and 4,900 tails, the effect is likely real. The coin is probably imbalanced and favors heads. A p-value quantifies this idea, by considering the effect and the size of the sample. Here, in the data we see relatively low p-values, consistent with our other results. It is very possible that if we increased our sample, the differences we measured would persist, and they would test as statistically significant.

[123] I note here that at least one result across courts that I discovered was a bit confusing, at first glance. I found that overall, a higher style score (meaning the style is not good), correlated with winning. That is at odds with my overall findings. However, upon investigation, I learned that StyleWriter largely moved away from the style score, viewing the Bog index score as more complete. It kept the number because clients were used to it, but explained the Bog index score was a far better measure. The style score, it appears, may be driven higher by citation in legal writing, making it an unreliable measure for this study.

[124] The model only improves on chance by about 2%. But that is not surprising here, as there are large number of other potential explanatory variables that have not been coded or analyzed. In future work, with more detailed analysis, a combination of content analysis, style analysis, and consideration of other factors could combine to produce tools that successfully predict outcomes at a rate far in excess of chance. As discussed in this article, that has far reaching implications for a variety of industries.

Ninth Circuit Analysis		
Court coefficent	Estimate	p-value
Passive index	-0.0733	0.0079
Bog index	-0.0257	0.1226

Table 3

These findings suggest that writing style matters. Indeed, style alone can be used to predict outcomes – suggesting it either matters independently or that it somehow correlates heavily with other factors that drive resolution. If writing matters in the Ninth Circuit, it might be expected to matter even more in trial courts, where judges have more work, less time to dive into issues, and are therefore more reliant on briefs and the explanations provided by parties. I plan to test this hypothesis in a future study. That data will reveal whether, as court workloads increase and the issues become less earth-shattering, the importance of writing style increases.

4. IMPROVING THE METHOD AND TOOLS AVAILABLE

My early results suggest that precise measures of legal writing style are possible. The data also suggests that when we measure legal writing precisely, the style of legal writing can predict outcomes.[125] But, understanding whether legal writing style correlates with outcomes, or has a causal effect on them, requires better tools and replication.

With regard to refined tools, one could imagine a program developed specifically to measure legal writing. I hijacked a tool designed to make sure writing is clear and simple, however, a tool specifically designed to measure legal writing could identify citations, and, either exclude them from the measures, and/or count them effectively, as another metric to use when considering how writing style relates to outcomes. A legal-writing-specific analysis tool could identify legalese and differentiate it from terms of art. For example, it might treat "heretofore" as legalese, while viewing "proximate cause" as a term of art. This tool could be adjusted to consider elements like the frequency of headings, overall length of sections, whether an introduction is included, whether the writing contains intensifiers, and much more. This would provide additional real measures to potentially gain new insights into legal writing and persuasion.

[125] As noted *supra*, the most powerful predictive software will marry measures of style with measures of content and other factors.

Beyond a more refined tool to measure legal writing, future studies (mine and others) need to code for more information both to identify other explanatory variables and to more fully consider correlation versus causation. For example, I did not code my data for firm size, years of practice experience, past appellate wins, or several other characteristics that could explain the outcomes. And I did not measure legal content, which might be possible using some of the software discussed earlier in this article. Doing so would provide a whole new round of descriptive statistics and provide new answers to interesting questions. Do solo practitioners write differently than big firm lawyers? Do appellate attorneys with more years of experience change how they write? Does quality of content correlate with quality of style? And so on.

Similarly, one could imagine that what matters most in persuasive writing might be the delta between the two briefs. The process is adversarial, so maybe writing style matters most when there are pronounced differences between the two sides?[126] Or maybe writing style matters because it works better when it correlates with the "house style" of the court reading it. Or maybe, writing style is a proxy of sorts – a signal that correlates with more time spent on briefs, or more careful research, or more attorneys to work on the brief.

This merits further exploration. I hope the growing ranks of empirical legal researchers will, occasionally, focus their powerful tools on persuasive legal writing. And, as discussed below, I am virtually certain that even if they do not, venture capital will. There is a massive untapped market in legal writing.

5. IMPLICATIONS FOR THE PROFESSION IN THE FUTURE

Evolution in the ability to measure persuasive legal writing effectively and to understand its impact on outcomes will have broad impacts in a variety of fields, including software development for lawyers, insurance, legal finance, and the teaching of legal writing. I briefly discuss each below.

[126] In my first round, I scored the briefs of both sides for 200 briefs. We measured the delta between various writing measures and looked for any patterns or evidence that differences in style explained outcomes. We found no such evidence, but the work was preliminary and would benefit from further innovation. It is also possible that such differences would be far more pronounced in trial courts where there is likely to be both more variation and more importance placed on easy-to-read briefs, given the workloads of many courts and the relative lack of help. For example, in many state courts, judges have no clerks and make decisions on their ownunder significant time pressure.

Software Development: As tools for measuring persuasive legal writing are developed, as we understand how those measures relate to outcomes, text analysis software will become common place. If data reveals certain characteristics of persuasive writing cause better outcomes, it will become malpractice to fail to measure an attorney's work against the identified thresholds. Just as many companies inspect all written text they plan to publish with StyleWriter before they allow it to be released, one can imagine a day when law firms demand all briefs are "scored" using software before the briefs are submitted.

Small firms may buy software. Even today, a firm I am familiar with regularly uses a style software to measure briefs before they are filed. Large firms may well hire programmers and people trained in empirical methods to develop proprietary, in-house software. In a competitive legal market where big firms often compete with one another for clients, marketing that all persuasive legal writing is refined with proprietary software proven to improve results may produce a real edge.

The best software will not be static, either. It will deploy machine learning, a form of A.I., to constantly improve and update. A sophisticated, large firm could score all briefs, and then require that attorneys enter the outcome when the judge rules. The software would, over time, refine its algorithms, allowing it to provide evolving "advice". In large enough firms, with adequate time, such advice might even differ by court or by judge.

Insurance: Insurance for verdicts is a growing sector. When an attorney in a civil case obtains a large verdict, companies often approach the firm and offer the opportunity to insure the verdict. For example, if a plaintiff obtains a $10 million verdict, the company might offer to insure the verdict for $2 million. The plaintiff pays $2 million, and for that, they are guaranteed even if they lose, they receive $10 million.[127] This insurance works like all insurance – the company is estimating a claim, and then pricing across a book of cases. But how the insurance company scores reversal is harder to know. At a minimum, it involves evaluating the track record of the attorneys, the strength of the legal positions, the makeup of the reviewing court, the reversal rates from that court and more. The insurance companies could wait to offer insurance until opening and appellate briefs are filed if they wished, and gain an additional data point by scoring those briefs. Or, the insurance company could insure, but only upon a requirement that the submitted briefs are scored and pass various benchmarks shown to correlate, or partially cause, better outcomes.

Legal Financing: The number of businesses, attorneys, and banks willing to invest money in cases in exchange for a generous return on the investment is increasing and

[127] Some insurance companies I've encountered have far more complex formulas, for example providing sliding percentages of guaranteed recovery based on the premium. But I offer the example above for simplicity.

becoming mainstream. Websites like lexshare.com allow anyone to read about a case, investigate its strength, and then invest in exchange for a promised return if it settles or results in a favorable verdict.[128] Similarly, several funds have been established on Wall Street that invest in cases, and the American Bar Association has documented the growth of legal finance companies.[129] Those companies operate in several ways, but the two principal ways are: (a) to monetize existing legal assets (such as paying money to a company now based on its pending legal cases), or (b) loaning money directly to lawyers to fund their ongoing litigation (in which case the loans are often secured by a book of the lawyer's existing business).[130]

Companies in legal finance require detailed information to evaluate investments, and they typically require various forms of routine and regular updates on litigation. They hire lawyers and others to evaluate risk and to decide when and how to invest.[131] Much like the insurance section, software that scored persuasive legal writing and improved outcomes would be invaluable. Massive funds like Burford Capital, a legal finance company that has $3.3 billion to invest in legal matters, could develop its own software as a proactive way to improve its returns.[132] Or, it could at a minimum use existing software to score the work of firms and cases it invests in, including requiring all briefs filed to meet certain benchmarks.

Teaching Legal Writing: Perhaps the most promising innovations from improved measure and analysis of legal writing will occur in the teaching of legal writing. For centuries, legal writing has been taught based on hunches, personal experience, and instincts. Some schools relegate legal writing to adjuncts, who may be competent writers, but who may not have the time or training to consider the science of writing. Still others allow students to teach the course. Outside the academy, people like Bryan Garner have made millions of dollars selling legal writing advice based on their informed guesses about what works. And law professors, including me, often teach students the "truths" of legal writing. But I have learned when sitting in meetings and conferences with other legal writing teachers that my "truths" not always align with the truths of

[128] *See, e.g.*, LexShares, https://www.lexshares.com/cases (last visited Feb. 14, 2020).

[129] *See also* Mary E. Egan, *Other People's Money: Rise of Litigation Finance Companies Raises Legal and Ethical Concerns*, ABA J. (Dec. 1, 2018), https://www.abajournal.com/magazine/article/litigation_ finance_legal_ethical_concerns.

[130] *Id.*

[131] *See, e.g.*, Pravati Capital, https://pravaticapital.com/litigation-funding-services/ (last visited February 14, 2020) ("At Pravati Capital, the key to our success is in identifying cases that we know have a great chance at winning. When a large or small law firm brings its high probability cases to Pravati Capital, and our team of expert underwriters verifies precedent and likelihood of success, we invest in the case—and the firm—with a non-recourse cash advance or line of credit against the anticipated settlement.").

[132] Brian Baker, *In Low-yield Environment, Litigation Finance Booms*, MarketWatch (Aug. 21, 2018), https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17.

others, and vice versa. The same is true when I co-counsel with others on appellate briefs, or when I attend conferences for appellate lawyers. We all think we know what works – but we cannot all be right.

Data can clear this fog. With enough studies, we can *know* what works, and teach it. This is true for all teachers. Senior partners, people like Garner, and law professors would benefit immensely from empirical measures and analyses of persuasive legal writing. It would move the teaching from the twentieth century (to be generous) into the twenty-first century.

One could also imagine using advanced legal writing software as one method of "scoring" student work. Instead of deploying teaching assistants to check grammar and citations, sophisticated textual analysis software would do the work in seconds and produce a detailed report for the student. Although this technology could certainly measure writing style, one could also imagine a future in which it measures both style and content, producing a detailed report of which cases were cited, how that compares to the class as a whole or a model brief, along with a variety of measures of the style.

The natural outflow of this would be that students would adopt the software to improve their writing. Microsoft Word checks spelling and grammar. Many of us could not live without those red and blue lines. And students deploy Word to improve their work. The same will almost certainly become true with advanced software that measures legal writing. Students will deploy it to improve their own writing, making their work faster and less tedious, while improving its overall content. They could even compare their style to the leading styles in high courts, or the courts of their state. This would increase the quality of the work rapidly, and free up time to talk about more complex issues that cannot, at least to date, be automated.

CONCLUSION

In ten years, a legal writing textbook will not be filled with quotes from judges or anecdotes by lawyers. It will illuminate readers with charts and graphs and data, and in doing so, it will move the way we think about legal writing away from intuition and towards irrefutable findings. The continued evolution of legal research tools, the overlapping use of textual analysis tools to measure brief content, and a new set of tools to measure writing style will merge to produce new insights.

Efforts to study effective legal writing style remain in their infancy, but that is changing fast. In the next ten years, the measure of persuasive legal writing style will become more precise, more powerful, and more predictive. As it does, long unanswered questions about the role of style, and the ideal approach to persuasive legal writing will emerge. At first, those may be general answers. But as technology improves, and researchers and firms alike begin to measure thousands upon thousands of briefs and track them against outcomes, the lessons will slowly become more granular. This progress will be accelerated by A.I., and in particular, machine learning. Briefs will be analyzed, and results tracked. The machine will learn. It will refine its suggestions for writing, and lawyers will adapt. And as they do, the feedback cycle will accelerate. Those of us invested in creating legal writing, and in teaching it, should embrace the change. It is an opportunity to challenge our own assumptions, and in doing so, become better.

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A "Legal Eccentricity": The European Parliament, its Non-binding Resolution, and the Legitimacy of the EU's Trade Agreements

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ABSTRACT

The European Union (EU) is pursuing an ambitious trade agenda despite increased controversy over the negotiating process and substance of trade agreements. This controversy raises questions about the legitimacy of trade agreements, as Cecilia Malmström, former European Commissioner for Trade, has acknowledged. This article seeks to evaluate the legitimacy of the EU's agreements, with a focus on the role of the European Parliament as a legitimating actor. It argues that the Treaties do not provide for sufficient legitimacy and then considers whether Parliament has been able to use its informal governance tools, particularly the non-binding resolution, to narrow the legitimacy deficit.

KEYWORDS

Legitimacy; Trade; European Parliament; Soft Law; Resolution

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The world is changing, creating two major new challenges that demand new responses from trade policy makers. First, we must keep up with economic developments . . . The second major challenge to trade policy is about legitimacy. [1]

INTRODUCTION

Generating sound trade policy presents significant challenges to policymakers, both in terms of substance and procedural development. This article takes up one of the challenges identified by former Commissioner Malmström and explores the legitimacy of a critical piece of the European Union's [hereinafter EU] trade policy: trade agreements. The public is concerned about whether trade agreements promote economic growth while not compromising their values,[2] rendering it increasingly important to consider their legitimacy. A key player in any legitimacy analysis is the European Parliament [hereinafter Parliament], both as an institution elected to serve as the democratic representative of EU citizens[3] and as one of the institutions that must consent to any proposed trade agreement. The impact of the first role on the second may take on a new

[1] Cecilia Malmström, European Commissioner for Trade, Liberal International's Isaiah Berlin Lecture at the Yale Club of New York: Liberalism, Free Trade and Other Values (Sept. 24, 2015), https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153813.pdf.

[2] *Id.*

[3] Consolidated Version of the Treaty on European Union art. 10(1)-(2), June 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU]; *see also* Francis Snyder, *Soft Law and Governance: Structure and Process in the European Union Experience*, *in* The Challenge of Soft Law (Luo Haocai ed., 2009).

– or renewed – significance for the other EU institutions during the von der Leyen Commission's mandate. More precisely, the 2019 Parliamentary Elections had a turnout of over fifty percent for the first time in over twenty years.[4] This makes it "very difficult" to conclude that Parliament is not a representative of the public and therefore makes it increasingly important that the other EU institutions consider Parliament's views.[5]

This article seeks to assess Parliament's influence on the legitimacy of trade agreements to date, taking into consideration the relatively limited role provided for it in the Treaties as well as how it has sought to expand its role via informal governance tools, particularly the non-legislative, non-binding resolution. The non-binding resolution is of particular significance for several reasons. First, it is one of the most public "soft law" tools available to Parliament, as it is generally debated and voted upon in open sessions. Soft law is defined here as "[r]ules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects."[6] Second, the resolution is voted on in plenary and reflects the majority view of Parliament. Third, it is often used by Parliament to seek commitments from the other EU institutions prior to as well as during negotiations despite the fact that the Treaties do not give Parliament a formal role during these stages. To put it bluntly, the non-binding resolution is something of a "legal eccentricity."[7]

To undertake this evaluation, the article first introduces the concept of legitimacy and sets out how legitimacy will be measured. Next, it explores whether the Treaties sufficiently legitimise the EU's trade agreements. Coming to the conclusion that they do not, the article subsequently analyses whether and how the European Parliament's use of the non-binding resolution has affected this legitimacy deficit. To identify the relevant resolutions, searches of Eur-lex and the European Parliament's website were performed using the phrases "trade & resolution," "trade & [country]," and "investment & resolution." All resolutions meeting the following criteria were included in the study: (1) they were about a particular agreement or addressed trade in a broader context and (2) they addressed trade policy or negotiations begun or continued after the Treaty of Lisbon went into effect, as this is when Parliament gained the power of consent with regard to trade agreements. The contents of these resolutions were then compared to the texts of the agreements and to other public documents released by the European

[4] *Voter Turnout Rises for First Time Ever in EU Elections, Breaking 50%*, Euronews (May 28, 2019), https://www.euronews.com/2019/05/27/voter-turnout-rises-for-first-time-ever-in-eu-elections-breaking-50 (last visited June 28, 2020).
[5] Interview 5 (C). See *infra* note 8 for an explanation of the author-conducted interviews.
[6] Francis Snyder, Soft Law and Institutional Practice in the European Community, *in* The Construction of Europe: Essays in Honour of Emile Noël 197, 198 (Stephen Martin ed., 1994).
[7] Interview 3 (EP).

Commission [hereinafter Commission] and Council of the European Union [hereinafter Council] to assess their impact on the legitimacy deficit. Further insight into their potential effect was obtained by way of ten semi-structured interviews with individuals affiliated with the institutions directly involved in the negotiation and conclusion process: the Parliament, Commission and Council.[8]

1. THEORIES OF LEGITIMACY

When assessing the legitimacy of a political system, "two main methods" are used, with one using normative criteria and the other undertaking an empirical analysis.[9] This article adopts the normative approach, which has generally recognised "identity, representation and accountability, and performance" as the criteria by which to judge legitimacy.[10] Not only are these criteria applied extensively in the literature, but their appropriateness is supported by some empirical evidence indicating that "[c]itizens appear to use the criteria of democracy, identity and performance when evaluating the EU."[11]

The literature classifies identity, representation and accountability as "input legitimacy" and performance as "output legitimacy."[12] As defined by Scharpf, input legitimacy asks whether a system or governing process is "responsive to the manifest preferences of the governed."[13] In other words, it asks whether a system includes citizen and representative participation in decisions taken by the relevant institutions. Output legitimacy asks whether the "policies adopted . . . effectively solve common problems" and whether the system is arranged in a manner that prevents abuse of power.[14] Few scholars rely solely on output legitimacy when assessing the EU's legitimacy. Those that do submit that the technocratic nature of the EU provides it with sufficient legitimacy by guaranteeing more centrist and efficient outcomes than might result from more political

[8] All interview participants are anonymised and referred to by a randomly selected number and an abbreviation to indicate the institution with which they are affiliated: EP = European Parliament; COM = Commission; and C = Council. The interviews were conducted by telephone and in person in Brussels, Belgium, between April and May 2019.

[9] Ronald Holzhacker, *Democratic Legitimacy and the European Union*, 29 J. Eur. Integration 257, 259 (2007).

[10] *Id.* (citing David Beetham & Christopher Lord, Legitimacy and the European Union : Political Dynamics of the European Union (1998)).

[11] Piret Ehin, *Competing Models of EU Legitimacy: the Test of Popular Expectations*, 46 J. Common Mkt. Stud. 619, 632 (2008).

[12] Christopher Lord & David Beetham, *Legitimizing the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?*, 39 J. Common Mkt. Stud. 443, 444 (2001).

[13] Fritz W. Scharpf, *Problem Solving Effectiveness and Democratic Accountability in the EU* Max Planck Institute for the Study of Societies, Mpifg Working Paper, No. 03/1(2003), https://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html.

[14] *Id.* at 1, 3.

processes.[15] By contrast, other scholars contend that output legitimacy cannot sufficiently legitimise the EU because, if the institutions are not designed to respond to the public's changing views, once-agreeable solutions may not be acceptable as time passes.[16] The system, therefore, must provide opportunities for input to ensure that the relevant actors are responsive.[17]

Additionally, some literature includes a third variable known as "throughput legitimacy," which addresses how governance processes shape decision making.[18] This variable examines "the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation *with* the people."[19] It is viewed as an essential component of any legitimacy analysis because poor throughput "regularly undermines public perceptions of the legitimacy of EU governance regardless of how extensive the input or effective the output."[20]

As stated above, the public appears to appraise the EU based on notions of democracy, identity and performance. Therefore, this article adopts the input and throughput variables as a means of measuring legitimacy. Output legitimacy, while significant, is outside the scope of this article, as such an examination merits a more extensive empirical analysis than can be completed here.[21] Furthermore, in relying on Scharpf's theory of input legitimacy, the article focuses primarily on identifying whether and where there may be input deficiencies rather than outlining the precise conditions for sufficient legitimacy. This is largely because Scharpf's theory does not provide a clear answer as to when a process is sufficiently responsive (e.g., how much input is enough?)

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[15] *See, e.g.*, Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. Common Mkt. Stud. 603, 603 (2002); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 Eur. L.J. 5, 5 (1998).

[16] *See, e.g.*, Furio Cerutti, *Why Political Identity and Legitimacy Matter in the EU*, *in* The Search for a European Identity, Values , Policies and Legitimacy of the European Union (Furio Cerutti & Sonia Lucarelli eds., 2008).

[17] Jens Steffek, *The Output Legitimacy of International Organizations and the Global Public Interest*, 7 Int' L Theory 263, 276 (2015); Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. Common Mkt. Stud. 533, 549 (2006).

[18] *See, e.g.*, Vivien A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, 61 Pol. Stud. 2 (2013); Thomas Risse & Mareike Kleine, *Assessing the Legitimacy of the EU's Treaty Revision Methods*, 45 J. Common Mkt. Stud. 69 (2007).

[19] Schmidt, *supra* note 18.

[20] *Id.* at 3, 9.

[21] It has been posited that defining the public interest for purposes of measuring whether a decision comports with that public interest must be determined by counterfactual and "ex negativo." Steffek, *supra* note 17, at 272-73. Given that trade agreements affect different sectors and individuals in divergent ways, and in the absence of a uniform definition of public interest, measuring this aspect of output legitimacy is exceptionally complex. Consider the disparate views set forth during the European Parliament's debate on the EU-Canada Comprehensive and Economic Trade Agreement, during which even members of the same political group could not agree on whether CETA should be approved. European Parliament, Debate: EU-Canada Comprehensive Economic and Trade Agreement – Conclusion of the EU-Canada CETA-EU-Canada Strategic Partnership Agreement (Feb. 15, 2017), https://www.europarl.europa.eu/doceo/document/CRE-8-2017-02-15-ITM-004_EN.html (last visited June 28, 2020).

or how to weigh the value of different inputs. Applying the theory is therefore context-specific and arguably more amenable to application when identifying insufficient input and output as opposed to identifying sufficient input and output. Thus, this article seeks to identify if and where there may be insufficient inputs and analyse whether the European Parliament can or has played a role in reducing some of these insufficiencies.

2. LEGITIMACY DEFICIT? THE TREATIES' ALLOCATION OF COMPETENCES

Applying the input/throughput variables described above, this part analyses whether the formal allocation of powers between the EU institutions sufficiently legitimises the EU's trade agreements.

2.1 THE LEGAL CONTEXT

The authority to negotiate and conclude trade agreements is derived from articles 207 and 218 of the Treaty on the Functioning of the European Union [hereinafter TFEU]. As set out in article 218, the Commission submits recommendations to the Council for a decision to authorise negotiations, and the Council adopts negotiating directives addressed to the negotiator (here, the Commission).[22] When negotiations have concluded, the Commission sends a recommendation to the Council for a decision to authorise the signing and, "if necessary," provisional application, of the agreement.[23] Once the Council has adopted such a recommendation, the agreement is submitted to the Parliament for consent, and if obtained, the Council adopts a final decision concluding the agreement.[24] If the agreement includes areas in which the EU does not have exclusive competence, so-called "mixed agreements," the Member States must also approve it.[25]

As part of the process, Parliament must "be immediately and fully informed at all stages," including "the authorisation to open negotiations, the definition of the

[22] Consolidated Version of the Treaty on the Functioning of the European Union art. 218(2)-(3), June 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU].
[23] TFEU art. 218(5).
[24] TFEU art. 218(6).
[25] *See* Op 2/15 [2017] ECLI:EU:C:2017:376 (May 16, 2017); Op 1/94 [1994] ECLI:EU:C:1994:384 (Nov. 15, 1994).

negotiating directives, the nomination of the Union negotiator ... the completion of negotiations, the authorisation to sign the agreement, where necessary, the decision on the provisional application ... and the conclusion of the agreement."[26] As part of this obligation, the Commission must report regularly to Parliament.[27]

In addition, the EU institutions must, "by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views," and must "maintain an open, transparent and regular dialogue with the representative associations and civil society."[28] Further, the Commission must "carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."[29]

2.2 AN ASSESSMENT

With regard to input legitimacy, the Treaties envision some opportunities for EU citizens and stakeholders to participate in the negotiation of trade agreements, as set out in article 11 of the Treaty on European Union [hereinafter TEU]. Nevertheless, the form and frequency of consultations and civil society dialogues are not specified, suggesting that the Treaties themselves do not inherently guarantee meaningful levels of citizen participation.

Parliament's opportunities to provide input present a more complex puzzle, but the powers granted to Parliament in the Treaties – power to consent or veto a final agreement and the right to be informed – do not provide for sufficient legitimacy. First, one might contend that Parliament's ability to approve or veto decisions to enter into trade agreements provide adequate input legitimacy, as Parliament legitimises an agreement by approving it or provides input by rejecting it. However, as reflected in the controversy about the substance of trade agreements and lack of transparency in trade negotiations, improving input legitimacy requires a process that provides Parliament and the public with meaningful access to information and a more nuanced ability to communicate policy preferences than a yes-no vote. Fundamentally, the process should reflect more "government by discussion."[30] Consent or a veto may be part of that discussion, but cannot replace more specific and constructive discussions. More precisely, consent alone fails to reflect the compromises and concerns Parliament may

[26] Case C-263/14, European Parliament v. Council of the European Union, 2016 E.C.R. 76.
[27] TFEU art. 207(3).
[28] TEU art. 11(1)-(2).
[29] TEU art. 11(3).
[30] Scharpf, *supra* note 13, at 1.

have notwithstanding its approval; similarly, a veto itself says little about the specific concerns that led Parliament to issue a vote of disapproval.

Additionally, relying on Parliament to exercise its veto power to ensure that its views, and indirectly, the views of EU citizens, may be considered overly optimistic. Between January 2010 and December 2012, for example, Parliament considered ninety-nine agreements and vetoed two (and has not vetoed any trade agreements since then).[31] While this suggests that the veto remains important, it also suggests that Parliament may feel constrained in exercising it, given the amount of time and effort – often years if not decades – involved in concluding trade negotiations and the political cost to the EU in attempting to reopen negotiations with a trade partner. Aside from the most extreme cases, it may be that the Parliament will accept an agreement for political reasons, even if it would prefer not to, on substantive grounds, which undermines the view that a veto ensures that EU citizens' policy concerns have been considered and voiced through Parliament to the Commission.

Parliament's right to be informed is also significant but the TFEU's brief presentation of this right similarly suggests little of the "government by discussion" necessary for adequate input legitimacy. The ability to offer input about trade negotiations reflects "the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly."[32] Thus, although Parliament may not be a full participant in negotiations – the Commission alone presents the EU's position to trade partners – it must be capable not only of receiving information but also of sharing its views with the Council and Commission. The Treaties are silent as to how this should happen, which is increasingly problematic as trade has become more controversial, thereby making input legitimacy and Parliament's ability to engage with the other EU institutions all the more relevant.[33]

The Treaties also address some aspects of throughput legitimacy, but the relevant articles are too vague to ensure that such legitimacy is realised in practise. On the positive side, the Treaties delineate some lines of accountability. Each EU institution is allocated a particular role in the process, theoretically making it simple to identify

[31] Youri Devuyst, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J. Int'l & Bus l. 259, 314 (2013).

[32] Case C-658/11, Eur. Parl. v. Council, 2014 E.C.R. 81; Laura Feliu & Francesc Serra, *The European Union as a "Normative Power" and the Normative Voice of the European Parliament, in* The European Parliament and its International Relations 17, 25 (Stelios Stavridis & Daniela Irrera eds., 2015).

[33] Other countries have similar executive-legislative divisions of responsibility during negotiations. Despite a recognition that a trade partner must be able to negotiate with a single voice, the EU is not alone in facing concerns about lack of input from elected representatives of the people during negotiations. *See, e.g.*, Kimberly Ann Elliott, *The Process for Negotiating U.S. Trade Agreements Needs a Facelift*, World Pol. Rev. (Feb. 19, 2019), https://www.worldpoliticsreview.com/articles/27458/the-process-for-negotiating-u-s-trade-agreements-needs-a-facelift.

which actor is responsible for the conduct at issue. Moreover, Parliament is accountable to the citizens via elections, and members of the Council are accountable to their duly elected national governments. Accountability of the Commission rests with Parliament,[34] and the obligation to fully inform Parliament is one way of ensuring that accountability is realised. However, the Treaties offer no clarification as to the meaning or method of implementing the obligation to fully inform Parliament. On a narrow reading, all that is required is a one-way interaction, with the Commission providing information to Parliament, indicating the Treaties do not inherently promote processes conducive to effective monitoring and oversight. Similarly, although the institutions have a general obligation to "ensure that [their] proceedings are transparent,"[35] there is no guidance on how to implement it.

A final, but significant, issue to consider is whether the participation of national parliaments in the development of trade policy may compensate for some of the Treaties' shortcomings. From one perspective, Member States must consent to mixed agreements, and the approval of each Member State's government, on behalf of its public, may lend these agreements an added layer of legitimacy. From another perspective, this approval may not sufficiently compensate for lack of guaranteed input during the negotiation of trade agreements. The Treaties themselves do not prescribe how national parliaments ought to be involved or informed during negotiations. Thus, domestic law plays a significant role in shaping the influence of national legislatures, and most EU Member States provide only a "limited role" for their legislatures in this area.[36] Moreover, although some national parliaments have sought a stronger role,[37] others question the parliaments' interest or ability in playing a sustained and larger role in trade policy. In particular, some EU officials have suggested that national parliaments lack significant expertise in the area,[38] and "are not really reaching out to their European colleagues" for information or to collaborate.[39]

Given the limited legal role that national parliaments have in EU trade policy and lack of consensus as to how meaningful a role these legislatures may play, the voice of national parliaments arguably cannot compensate for the Treaties' inability to guarantee

[34] TEU art. 17(8).
[35] TFEU art. 15(3).
[36] Guillaume Van Der Loo, *National Parliaments and Mixed Agreements: Exploring the Legal Bumps in a Rocky Relationship, in* The Democratisation of EU International Relations Through EU Law 210, 215 (Juan Santos Vara & Soledad Rodríguez Sánchez-Tabernero eds., 2019).
[37] *See* Jan Wouters & Kolja Raube, *Rebels with a Cause? Parliaments and EU Trade Policy After the Treaty of Lisbon*, *in* The Democratisation of Eu International Relations Through Eu Law195, 202-04 (Juan Santos Vara & Soledad Rodríguez Sánchez-Tabernero eds., 2019).
[38] Interviews 4, 6 (COM).
[39] Interview 7 (EP).

sufficient input and throughput legitimacy. These parliaments also cannot, therefore, substitute for the European Parliament as a legitimating force. Much could (and should) be written about the role of national parliaments as legitimating actors, but given the central role of the European Parliament in all EU trade agreements, this article will focus solely on the European Parliament.

In conclusion, the EU's trade agreements cannot be legitimated solely from the processes and obligations established in the Treaties. It is therefore necessary to consider whether the manner in which the EU institutions behave in practise affects the agreements' overall legitimacy.

3. FILLING THE GAPS: SOFT LAW AS A MEANS OF ENHANCING LEGITIMACY?

If the Treaties do not guarantee meaningful levels of participation in the decision making process and do not inherently promote good governance practises, can soft law alleviate some of the input and throughput legitimacy deficits? More precisely, for the purposes of this article, can Parliament use its non-binding resolution to improve legitimacy? As described above, the non-binding resolution is a significant instrument used by Parliament – perhaps the most significant, as suggested by several individuals affiliated with the Parliament and Commission[40] – to express its views on trade policy. While specific requests in these resolutions are not necessarily "red lines,"[41] they nonetheless provide "political guidance" as to what a final trade agreement should include and how Parliament would like the Council and Commission to conduct the process.[42] As set out below, resolutions feature prominently in how the institutions communicate on trade policy, suggesting that they are one way of expanding opportunities to provide input and of promoting better governance processes. However, the impact of the resolutions is often limited or dependent on a number of practical and legal factors. This part will discuss both how the resolutions affect legitimacy as well as the limits of their influence.

[40] Interview 1 (EP); Interviews 4, 6 (COM).
[41] Interview 2 (EP); Interview 6 (COM).
[42] Interview 2 (EP).

3.1 INPUT LEGITIMACY

Input legitimacy addresses those who are involved in the decision making process, emphasising direct citizen and representative participation. As discussed above, the Treaties oblige the EU institutions to permit citizen participation and to be transparent, which enhances the quality and expands the opportunity for direct participation,[43] but the Treaties fail to explain how these obligations are satisfied. They also require the institutions to fully inform Parliament, but the content of this duty is not explained, thus leaving it unclear as to how, or if, it satisfies the need for representative participation. This section assesses how the non-binding resolution has been used to address these issues, focusing on Parliament's efforts to enhance its and the public's opportunities to provide input on trade negotiations and evaluating whether such opportunities have proven meaningful.

3.1.1 IMPROVING OPPORTUNITIES FOR PARTICIPATION

Parliament has attempted to improve its and the public's opportunities to participate in negotiations by calling for increased transparency and development of practises allowing for greater input.

Transparency is critical to input legitimacy as a means of ensuring that the public and Parliament have sufficient information to understand and participate in the process. Parliament has been vocal about disclosure, in a number of non-binding resolutions. For example, in 2011, Parliament issued a resolution reminding the Commission to conduct negotiations with "openness" and "to take account the interests of EU citizens," while also criticising it for not updating Parliament about negotiations with Canada "even though these negotiations commenced in October 2009."[44] These complaints persisted into 2014, with Parliament passing another resolution demanding to be "informed in advance by the Commission of its intention to launch an international negotiation" and "at all stages of the procedures for concluding international agreements," and thus to "be given access to the Union's negotiation texts" so that Parliament's decisions on trade agreements could be taken after "meaningful" consideration of all relevant documents.[45] In the face of Parliamentary criticism, as well

[43] Alberto Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, 39 Eur. L. Rev. 72, 88-89 (2014).

[44] European Parliament resolution of 8 March 2011 on EU agriculture and international trade, July 7, 2012, para 57, 2012 O.J. (CE 199) 48.

[45] European Parliament resolution of 13 March 2014 on the Implementation of the Treaty of Lisbon with Respect to the European Parliament, Sept. 9, 2017, paras 43, 45, O.J. (C 378) 218.

as criticism from the public and European Ombudsman,[46] the Commission published, for the first time, some of its draft negotiating directives and initial negotiating proposals.[47] Amidst further calls from Parliament to improve its efforts,[48] it eventually institutionalised these publication practises in its Trade for All strategy.[49] The Commissioner for Trade also acknowledged that the Commission needed to "work very closely" with Parliament, as members of Parliament [hereinafter MEPs] "represent our citizens and they are essential for our work."[50] To that end, the institutions negotiated a binding Framework Agreement, pursuant to article 295 TFEU, that permits all MEPs, rather than only members of the Committee on International Trade [hereinafter the INTA Committee], to access the negotiating documents under specified conditions.[51]

Given how important transparency is for participation in the decision making process, perhaps it is not surprising that Parliament continues to raise the issue with the Commission.[52] This reflects the view of some MEPs that current levels of transparency are insufficient, as officials who want to review the texts must go to designated reading rooms, cannot make copies and have limited time to review the documents. Such strict procedures can make it difficult to develop an opinion about the final agreement,

[46] European Ombudsman, Cases OI/10/2014/RA and OI/11/2014/RA (Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership ('TTIP') Negotiations), https://www.ombudsman.europa.eu/en/opening-summary/en/5463textsc1.

[47] *See* James Crisp, *TTIP Papers Published as EU Ombudsman Demands More Transparency*, Euractiv (Jan. 14, 2015), https://www.euractiv.com/section/trade-society/news/ttip-papers-published-as-eu-ombudsman-demands-more-transparency/ (last visited June 28, 2020).

[48] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para. 2(e)(i), 2017 O.J. (C 265) 35.

[49] European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (Oct. 2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf [hereinafter *Trade for All*].

[50] *See* Cecilia Malmström, European Commissioner for Trade, Statesmen's Forum (May 4, 2015), https://www.csis.org/events/statesmens-forum-dr-anna-cecilia-malmstrom-eu-trade-commissioner (last visited June 28, 2020).

[51] European Parliament Press Release, All MEPs to Have Access to Confidential TTIP Documents (Dec. 2, 2015), http://www.europarl.europa.eu/news/en/press-room/20151202IPR05759/all-meps-to-have-access-to-all-confidential-ttip-documents (last visited June 28, 2020).

[52] *See, e.g.*, European Parliament resolution of 16 November 2017 on the EU-Africa Strategy: a boost for development, Oct. 4, 2018, para. 34, 2018 O.J. (C 356) 66; European Parliament resolution of 25 February 2016 on the opening of FTA negotiations with Australia and New Zealand, Jan. 31, 2018, para 12, 2018 O.J. (C 35) 136; European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 12, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 13, 2018 O.J. (C 346) 219; European Parliament resolution of 15 January 2015 on the annual report on the activities of the European Ombudsman 2013, Aug. 18, 2016, paras 24-25, 2016 O.J. (C 300) 14; European Parliament resolution of 16 September 2015 on the Commission Work Programme, Sept. 22, 2017, para 82, 2017 O.J. (C 316) 254; European Parliament resolution of 21 January 2016 on the activities of the Committee on Petitions 2014, Jan. 12, 2018, para 23, 2018 O.J. (C 11) 105; European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 8, 2018 O.J. (C 101) 30.

especially as the documents "can be a bit out of context and you have to [know] to ask for certain documents."[53] Moreover, these officials cannot reveal what is in the documents and the public cannot use the reading rooms, leading some to criticise the arrangement as ineffective at improving public understanding and awareness.[54]

The debate as to the appropriate amount of transparency continues and is outside the scope of this article, but there may be a fundamental divergence in Parliament and the Commission's views based, in part, on their respective roles in negotiations. Transparency comes with benefits, but it also imposes costs. For instance, while transparency may permit more informed public participation, it may also limit the EU's negotiating flexibility because its trade partners may know or easily determine the EU's "redlines."[55] In other words, Parliament may view transparency primarily as a public (and parliamentary) participation tool, but the Commission may adopt a narrower view of "sufficient" transparency to preserve its bargaining power and strategic discussions.[56] There may well be a "middle ground" between the maximalist view of some parliamentarians and the Commission's position. However one views the ongoing debate, it is evident that Parliament has played a significant role in encouraging the Commission to improve disclosure of relevant documents so the public and MEPs can participate in the process on a more informed basis, which is critical to improving the input legitimacy of trade agreements.

With respect to its own opportunities to provide input, Parliament has also attempted to comment on draft negotiating directives since the opening of the EU-Japan negotiations, when Parliament requested that the Council delay the vote to authorise the mandate until it could state its views.[57] This practice reflects Parliament's understanding that making its views known early provides it with a greater chance of influencing the content of the agreements, as resolutions that come toward the end can be problematic for, and viewed as less credible by, the Commission.[58]

[53] Interview 9 (EP).

[54] *See, e.g.*, Matthias von Hein, *TTIP Reading Room: A small step toward transparency*, Deutsche Welle (Jan. 29, 2016), https://www.dw.com/en/ttip-reading-room-a-small-step-toward-transparency/a-19012651 (last visited June 28, 2020).

[55] *See, e.g.*, Eugénia C. Heldt, *Contested EU Trade Governance: Transparency Conundrums in TTIP Negotiations*, 18 Comp. Eur. Pol.L. 215 (2019); *see also* Niels Gheyle & Ferdi De Ville, *How Much is Enough? Explaining the Continuous Transparency Conflict in TTIP*, Pol . & Governance, no. 3, 2017, at 16.

[56] *See* Panagiotis Delimatsis, TTIP, CETA, TiSA Behind Closed Doors: Transparency in the EU Trade Policy, *in* Mega-Regional Trade Agreements: Ceta, Ttip, And Tisa: New Orientations for Eu External Economic Relation 216 (Stefan Griller, Walter Obwexer & Erich Vranes eds., 2017).

[57] European Parliament resolution of 13 June 2012 on EU trade negotiations with Japan, Nov. 15, 2013, 2013 O.J. (CE 332) 44.

[58] Interview 6 (COM); Interview 7 (EP).

Negotiation	Date Resolution Adopted	Date Mandate Adopted
United Kingdom	12/02/2020 [59]	25/02/2020 [60]
Australia	26/10/2017 [61]	22/05/2018 [62]
Chile	14/09/2017 [63]	10/11/2017 [64]
Indonesia	05/07/2016 [65]	18/07/2016 [66]
Japan	25/10/2012 [67]	29/11/2012 [68]
New Zealand	26/10/2017[69]	22/05/2018 [70]
United States	23/05/2013 [71]	14/06/2013 [72]

Table 1

[60] Council Decision 2020/26, 2020 O.J. (L 58) 53 (Euratom).

[61] European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, 2018 O.J. (C 346) 212.

[62] Outcome of the Council Meeting (3618th Council Meeting) (May 22, 2018), https://data.consilium.europa.eu/doc/document/ST-9102-2018-INIT/en/pdf.

[63] European Parliament recommendation of 14 September 2017 to the Council, the Commission and the European External Action Service on the negotiations of the modernisation of the trade pillar of the EU-Chile Association Agreement, Sept. 20, 2018, 2018 O.J. (C 337) 113.

[64] Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations, on behalf of the European Union, on the provisions that fall within the competence of the Union, of a modernised Association Agreement between the European Union and its Member States, of the one part, and the Republic of Chile, of the other part (Nov. 10, 2017), https://data.consilium.europa.eu/doc/document/ST-13553-2017-INIT/en/pdf.

[65] European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, 2018 O.J. (C 101) 30 (note that Parliament did not make any substantive requests, but stated only its support for the negotiations).

[66] Outcome of the Council Meeting (3481st Council Meeting) (July 18, 2016), https://data.consilium.europa.eu/doc/document/ST-11338-2016-INIT/en/pdf.

[67] European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan, Mar. 11, 2014, 2014 O.J. (CE 72) 16.

[68] Council of European Union Press Release IP/16919/12, Council Agrees to Launch Free Trade Negotiations with Japan (Nov. 29, 2012), https://data.consilium.europa.eu/doc/document/ST-16919-2012-INIT/en/pdf.

[69] European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, 2018 O.J. (C 346) 219.

[70] Outcome of the Council Meeting (3618th Council Meeting), supra note 62.

[71] European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, 2016 O.J. (C 55) 108.

[72] Council of European Union Press Release IP/10919/13, Council Approves Launch of Trade and Investment Negotiations with the United States (June 14, 2013), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137485.pdf.

To date, a number of resolutions have been passed in advance of the Council's decisions to authorise negotiating mandates: This chronology may suggest that the Council intentionally gives the Parliament an opportunity to make its views heard.[74] However, the Council's view is that it generally does not wait for Parliament; rather, Parliament is simply able to act more quickly than the Council.[75] For the Council to wait is an exception based on political considerations, such as with the recent decision to authorise negotiations with the United States for limited agreements on industrial goods and conformity assessment[76] (although, in this case, Parliament failed to pass a resolution on the negotiations).[77] In this respect, Parliament has clearly had less success with the Council than the Commission with regard to shaping practises that affect input legitimacy. Some of the tension on this point appears in an aggressively worded resolution stating that Parliament has the "prerogative to ask the Council not to authorise the opening of negotiations until the Parliament has stated its position on a proposed negotiating mandate."[78] Despite this inter-institutional tension, there may be some improvements in the future. As suggested in the introduction, given the results of the 2019 parliamentary elections, the Council may feel more politically constrained with regard to when it can avoid giving Parliament the chance to comment.[79]

Beyond attempting to increase its input opportunities, Parliament has also sought to protect its input opportunities by seeking to limit the provisional application of trade agreements. Provisional application prior to a Parliamentary vote has been increasingly viewed as undermining the power of Parliamentary consent,[80] potentially because Parliament understands that affected parties rely on the new agreement and withholding consent may cause undue legal and market uncertainty.[81] Thus, at the beginning of 2010, Parliament began passing resolutions, and using other governance tools to seek commitments from the Commission with regard to provisional application. In 2010, Parliament asked Commissioner De Gucht during a hearing not to provisionally

[74] Interviews 1, 7, 9 (EP).
[75] Interview 5 (C).
[76] *Id.* This is almost undoubtedly the case with the decision to open negotiations with the United Kingdom, which are arguably more politically sensitive than negotiations with the United States.
[77] European Parliament, Procedure File on Opening of Negotiations between the EU and the US (2019/2537(RSP)), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2019/2537 (last visited June 28, 2020).
[78] European Parliament resolution of 13 March 2014 on the Implementation of the Treaty of Lisbon with Respect to the European Parliament, Nov. 9, 2017, para 42, 2017 O.J. (C 378) 218.
[79] Interview 5 (C).
[80] Devuyst, *supra* note 31, at 305.
[81] As suggested above, Parliament may already feel somewhat politically constrained in exercising its ability to disapprove decisions to conclude trade agreements. Provisional application may further exacerbate this political constraint.

apply the EU-Korea agreement prior to Parliamentary consent.[82] Subsequently, Parliament passed several resolutions requesting the same approach for the proposed EU-India and EU-Vietnam agreements.[83] It also requested Commissioner Malmström to commit to the same practise via written questions, and she agreed.[84] Commissioner Malmström's promise notwithstanding, Parliament continues to raise the issue in resolutions. For example, in its July 2016 resolution on a new trade and investment strategy, Parliament demanded the Commission not "request provisional application of trade agreements, including trade chapters of association agreements" and of mixed agreements prior to Parliamentary consent, and requested this practise be included in an interinstitutional agreement [hereinafter IIA].[85] Parliament made the same demands in resolutions on the proposed agreements with Australia and New Zealand.[86] Much of Parliament's emphasis on the issue reflects a suspicion that the Trade Commissioner will unilaterally change the policy and from the fact that no Commissioners other than Trade Commissioners have adopted the practise.[87]

Despite Parliament's efforts, the Commission does not seem receptive to codifying its provisional application practices in an IIA. This reluctance likely stems from two related issues. First, Parliament has already extracted some binding concessions with regard to provisional application. Not only has the Trade Commissioner made guarantees with regard to the issue, but also the Commission has agreed, in a 2010 Framework Agreement, to inform Parliament whenever it believes provisional application is necessary.[88] The Commission as a whole may consider these concessions

[82] *See* Andrei Suse & Jan Wouters, *The Provisional Application of the EU's Mixed Trade and Investment Agreements*, *in* The Conclusion and Implementation of EU Free Trade Agreements 176, 184-86 (Isabelle Bosse-Platière & Cécile Rapoport eds., 2019).

[83] European Parliament resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations, Dec. 7, 2012, para 36, 2012 O.J. (CE 377) 13; European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement, Dec. 22, 2017, para 1, 2017 O.J. (C 443) 64.

[84] Suse & Wouters, *supra* note 82, at 9-11; Cecilia Malmström, Answers to the European Parliament: Questionnaire to the Commissioner-Designate 6 (2014), https://www.europarl.europa.eu/hearings-2014/resources/questions-answers/Hearings2014_Malmstr%C3%B6m_Questionnaire_en.pdf.

[85] European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, paras 36-37, 2018 O.J. (C 101) 30.

[86] European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 21, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 24, 2018 O.J. (C 346) 219.

[87] Interviews 7, 8 (EP). This dynamic appears to have continued into the von der Leyen Commission, with Parliament asking for similar commitments from the proposed Trade Commissioners. Phil Hogan, Answers to the European Parliament: Questionnaire to the Commissioner-Designate (2019), https://www.europarl.europa.eu/resources/library/media/20190927RES62441/20190927RES62441.pdf; Valdis Dombrovskis, Reply to the EP's Written Questions by Executive Vice-President (EVP) for an economy that works for people, Valdis Dombrovskis, https://www.europarl.europa.eu/news/files/commissionners/valdis-dombrovskis/en-dombrovskis-written-questions-and-answers.pdf.

[88] Framework Agreement on Relations between the European Parliament and the European Commission, Annex III, para 7, Nov. 20, 2010, 2010 O.J. (L 304) 47.

sufficiently respectful of Parliament's right of consent and that placing the Trade Commissioner's practices in an IIA that binds the whole Commission may severely limit its authority, especially if no exception is made for urgent cases.

Second, it is not ultimately the Commission that decides whether to provisionally apply an agreement. The Commission proposes provisional application, but the Council must approve it.[89] This dynamic may go far in explaining the Commission's hesitance to accept Parliament's position. Since the adoption of the 2010 Framework Agreement, the Council has objected to how the Commission has limited its own discretion, believing it is allowing Parliament to unlawfully modify the competences set forth in the Treaties.[90] Not only that, but the Council remains concerned that the decisions taken by the other institutions will limit the Council's autonomy, even threatening to take them to the Court of Justice if their actions "would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the Treaties."[91] Given this pushback from the Council, the Commission may well be reluctant to further limit its own discretion on an issue that implicates the Council's as well.

These case studies of Parliamentary efforts to improve opportunities for it and the public to provide input suggest a positive, but not altogether successful, record. First, by "channeling public concern … and expressing these in its recommendations to the Commission,"[92] Parliament can play a significant role in encouraging greater transparency, which may allow it and the public to contribute more effectively to the substance of policy debates.[93] Second, by commenting on negotiations by using resolutions prior to approval of a mandate, Parliament has been able to provide input at the early stages of negotiations and thereby expanded the opportunities for representative participation in the process, albeit on an *ad hoc* basis. Third, by using resolutions as well as other governance tools, Parliament has, on a Commissioner-by-Commissioner basis, largely succeeded in limiting the provisional application of agreements, thereby protecting its consent authority.

[89] TFEU art. 218(5).
[90] Framework Agreement on Relations between the European Parliament and the Commission, Oct. 23, 2010, 2010 O.J. (C 287) 1.
[91] *Id.*
[92] Ramses A. Wessel & Tamara Takács, *Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament*, 28 Eur. Bus. L. Rev. 103, 114 (2017).
[93] *See generally* Patrick R. Hugg & Sheila M. Wilkinson, *The 2014 European Parliament Elections and the Transatlantic Trade and Investment Partnership: Economics and Politics Collide,* 24 J. Transnat' L L.& Pol'y 117 (2014-15).

3.1.2 HAVE PARLIAMENT'S EFFORTS PROVED MEANINGFUL?

Although Parliament has significantly expanded its and the public's access to information about trade agreements, access alone does not create opportunities to participate. Furthermore, any such opportunities must be meaningful to positively impact input legitimacy. This part considers how Parliament's efforts have affected the opportunities for Parliamentary and public input. First, with regard to Parliamentary input, the discussion above indicates that the Parliament has increased its opportunities to provide input via resolutions, but the question remains as to whether the opportunities are meaningful. This section measures the meaningfulness of these opportunities by assessing whether the non-binding resolutions about the substance of trade agreements have been taken into account by the other EU institutions, as evidenced by public documents and statements, as well as information from interviews conducted by the author. In particular, this article uses several reactions as evidence that Parliament's views have been taken into account: (1) substantive changes in position by another EU institution; (2) public statements addressing Parliament's position; and (3) public debate with Parliament. While not a perfect measure of causation, this method provides indicators of Parliamentary influence on trade negotiations and the behaviour of the other institutions - i.e., whether the institutions respond to the concerns of the governed. A review of the Commission's recent approach to trade policy, reflected in the Trade for All strategy,[94] indicates that it has been shaped, at least in part, by Parliament's influence, primarily in the fact that it no longer reflects "a purely economic approach", but includes a "social and sustainable angle."[95] This can be seen in a number of issues repeatedly raised in non-binding resolutions and which now appear routinely in trade agreements. For example, the provisions on anti-corruption and human rights, as well as chapters on small and medium enterprises and trade and sustainable development are regularly requested[96] and included in

[94] *See, e.g.*, *Trade for All*, *supra* note 49.

[95] Interview 4 (COM); Interview 2 (EP); Wessel & Takács, *supra* note 92, at 113.

[96] *See, e.g.*, European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, paras 6, 64, 2018 O.J. (C 101) 30; European Parliament resolution of 25 February 2016 on the opening of FTA negotiations with Australia and New Zealand, Jan. 31, 2018, para 7, 2018 O.J. (C 35) 136; European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, paras 14, 19(f), 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, paras 15, 20, 2018 O.J. (C 346) 219; European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(xii), 2017 O.J. (C 265) 35.

agreements.[97] This suggests that the Commission carefully considers and often incorporates Parliament's preferences into trade negotiations.[98]

Parliament has also expressed disappointment that "the Commission does not address the gender dimension of trade negotiations" in its Trade for All strategy, and requested the inclusion of gender-sensitive provisions in future trade agreements.[99] The Commissioner for Trade agreed to add gender-specific provisions to the Commission's draft negotiating directives and draft texts for the trade chapter of the EU-Chile Association Agreement.[100] As explained by the Commissioner, the EU's trade "policies are gender neutral, but they are not always gender sensitive."[101] Some of Parliament's concerns have also spilled over to complete agreements. For instance, the EU-Canada Comprehensive Trade and Economic Agreement [hereinafter CETA] does not contain gender-specific provisions, but the CETA Joint Committee on Trade and Gender issued a recommendation in September 2018 to "increase women's access to and benefit from the opportunities created by CETA."[102]

Another example suggesting that increased public and Parliamentary input has influenced trade negotiations is the reform of Investor-State dispute settlement [hereinafter ISDS] mechanisms. As early as 2011, Parliament expressed reservations about ISDS, notably stating in a resolution on CETA that a State-State mechanism and domestic courts should be used to resolve investor-State disputes, although adding that if an ISDS mechanism were considered, it should not "inhibit future legislation in sensitive policy areas."[103] In October 2014, in response to continued Parliamentary and public concern, then-Commissioner De Gucht initiated a consultation on the ISDS

[97] *See, e.g.*, Comprehensive Economic and Trade Agreement, Can.-Eur., artt. 18.8, 19.4(4c), Jan. 14 2017, 2017 O.J. (L 11) 23 [hereinafter CETA]; Strategic Partnership Agreement, Can.-Eur., artt. 2, 28(3), Dec. 3, 2016, 2016 O.J. (L 329) 45; Agreement between the European Union and Japan for an Economic Partnership, Eur.-Japan, chs. 16, 20, Dec. 27, 2018, 2018 O.J. (L 330) 3; Strategic Partnership Agreement, Eur.-Japan, artt. 2, 43, Aug. 24, 2018, 2018 O.J. (L 216) 4; EU-Mexico Agreement (in principle) chs. 16, 30, 36, https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 (last visited June 28, 2020).

[98] *See* Interviews 3, 8 (EP).

[99] European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 22, 2018 O.J. (C 101) 30.

[100] *Joint Recommendation for a Council Decision Authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to Open Negotiations and Negotiate a Modernised Association Agreement with the Republic of Chile* (May 24, 2017), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017JC0019 (last visited June 28, 2020); Draft Provisions on Trade and Gender Equality in the Context of the Modernisation of the EU-Chile Association Agreement, COM, http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156962.pdf.

[101] Cecilia Malmström, European Commissioner for Trade, speech at the plenary session of the European Round Table of Industrialists (ERT): Changes in Trade (May 28, 2018), https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156894.pd .

[102] CETA Joint Committee on Trade and Gender, Recommendation 002/2018 of 26 September 2018, http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157419.pdf.

[103] European Parliament resolution of 8 June 2011 on EU-Canada trade relations, Dec. 11, 2012, para 11, 2012 O.J. (CE 380) 20.

reform,[104] with his successor, Cecilia Malmström, acknowledging that "ISDS is now the most toxic acronym in Europe."[105] Following the consultation, the INTA Committee held a public hearing with the Commissioner to share its views on how to reform ISDS.[106] Several months later, the Commission created a Concept Paper, outlining an Investment Court System,[107] and Parliament soon, thereafter, passed a resolution endorsing the approach and calling for the full replacement of ISDS in the proposed Transatlantic Trade and Investment Partnership [hereinafter TTIP].[108] Commissioner Malmström responded to the vote, stating: "What today's vote also signals is that the old system of investor-state dispute settlement should not and cannot be reproduced in TTIP – Parliament's call today for a 'new system' must be heard, and it will be."[109] Thereafter, the Commission formally released its proposed Investment Court System,[110] which is now included in several trade agreements.[111]

Aside from Parliamentary influence over the Commission's policy, a review of available draft directives, resolutions and final directives shows that, while there is often significant policy convergence between the Parliament and the Council,[112] several of Parliament's requests have been incorporated into the final mandates, suggesting some level of Parliamentary influence within the Council. For example, Parliament requested that the draft mandates for Australia and New Zealand be amended to reference the sectoral Organisation for Economic Co-operation and Development [hereinafter OECD] guidelines and United Nations Guiding Principles on Business and Human Rights and to

[104] *See* European Commission Press Release, European Commission Launches Public Online Consultation on Investor Protection in TTIP (Mar. 27,2014), http://europa.eu/rapid/press-release_IP-14-292_en.htm (last visited June 28, 2020).

[105] Malmström, Statesmen's Forum, *supra* note 50.

[106] *See* European Parliament Committee on International Trade, Draft Agenda for 18-19 March 2015,http://www.europarl.europa.eu/doceo/document/INTA-OJ-2015-03-18-1_EN.pdf, European Parliament Committee on International Trade, Excerpt of Debate on ISDS (Mar. 18, 2015), https://www.youtube.com/watch?v=ybs5TDEuGzE (last visited June 28, 2020).

[107] *See generally Concept Paper: Investment in TTIP and Beyond - the Path for Reform*, COM (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[108] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(xv), 2017 O.J. (C 265) 35.

[109] European Commission Press Release ST/15/5327, Statement by EU Trade Commissioner Cecilia Malmström on the European Parliament's vote on the TTIP Resolution (July 8, 2015), http://europa.eu/rapid/press-release_STATEMENT-15-5327_en.htm (last visited June 28, 2020).

[110] European Commission Press Release IP/15/6059, European Commission Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), http://europa.eu/rapid/press-release_IP-15-6059_en.htm (last visited June 28, 2020).

[111] *See, e.g.*, CETA ch. 8; EU-Mexico Agreement (in principle) ch. 19; Council Decision 2018/1676, 2018 O.J. (L 279) (EU) (EU-Singapore Investment Protection Agreement ch. 3); Council Decision 2019/1096, 2019 O.J. (J175) (EU) (EU-Vietnam Investment Protection Agreement ch. 3).

[112] Parliament's convergence with the views of other EU institutions may serve as a legitimising force. For instance, if Parliament expresses approval in a resolution of a Commission position, such approval from the representatives of the EU public arguably provides the position additional legitimacy.

include provisions requiring that attention be paid to the interests of the overseas countries and territories and the outermost regions.[113] The final negotiating directives incorporated part of the first request regarding the OECD guidelines and also adopted the second.[114] Similarly, Parliament requested an express reference to the Paris Agreement on Climate Change in the EU-Chile Association Agreement,[115] which the Council included in the final mandate.[116] Parliament also successfully requested the exclusion of audio-visual services from TTIP.[117] Aside from Parliamentary input, there remains the question of whether Parliament's efforts, particularly with regard to transparency, have created meaningful opportunities for public input. Parliament's influence has arguably increased transparency vis-à-vis the public with regard to its efforts to encourage the Council and the Commission to release selected negotiating documents. However, greater transparency alone does not always translate to improved or more opportunities for public input, especially since information about trade agreements is not always generated in accessible language, such that the public may feel more engaged with and capable of offering informed views about trade policy.[118] Thus, Parliament's transparency efforts must be considered in conjunction with its efforts to increase the Commission's engagement with the public. In resolutions, Parliament has reminded the Commission of its obligation to engage with EU citizens and encouraged the Commission to expand its outreach beyond civil society organisations and industry

[113] European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, paras 19(h), (m), 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, paras 20(h), (m), 2018 O.J. (C 346) 219.

[114] European Council, Negotiating Directives for a Free Trade Agreement with Australia 3, 6, 17 (May 22, 2018), http://data.consilium.europa.eu/doc/document/ST-7663-2018-ADD-1-DCL-1/en/pdf; European Council, Negotiating Directives for a Free Trade Agreement with New Zealand 3, 6, 18 (May 22, 2018), http://data.consilium.europa.eu/doc/document/ST-7661-2018-ADD-1-DCL-1/en/pdf.

[115] European Parliament recommendation of 14 September 2017 to the Council, the Commission and the European External Action Service on the negotiations of the modernisation of the trade pillar of the EU-Chile Association Agreement, Sept. 20, 2018, para 1(x), 2018 O.J. (C 337) 113.

[116] Council, Directives for the Negotiation of a Modernised Association Agreement with Chile 29 (Nov. 10, 2017), https://www.consilium.europa.eu/media/32405/st13553-ad01dc01en17.pdf.

[117] European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, para 11, 2016 O.J. (C 55) 108; European Parliament resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs, Mar. 9, 2016, para 60, 2016 O.J. (C 93) 95; European Council, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America para 21 (June 14, 2013), http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf; Lore Van den Putte, Ferdi De Ville & Jan Orbie, *The European Parliament as an International Actor in Trade*, *in* European Parliament and Its International Relations 25, 55 (Stelios Stavridis & Daniela Irrera eds., 2015).

[118] *See* Heldt, *supra* note 55, at 217 (transparency improvements in TTIP negotiations "did not help public perception").

stakeholders.[119] However, Parliamentary influence in this area appears to be relatively limited. On the one hand, the Commission's continued engagements with civil society dialogues and consultations converge with Parliament's concerns. On the other hand, the Commission often limits participation in these forums to civil society organisations and industry stakeholders – the public cannot always participate by offering input or by attending.[120] This selective form of public engagement appears to be problematic given that the effectiveness of these forums as a means of ensuring input remains debated. Consultations occur, but somewhat infrequently; for example, the Commission opened negotiations with Australia in 2018 and held only one consultation to date.[121] Furthermore, the timing and contents of consultations have not always been well-considered. The 2014 public consultation on the ISDS, for instance, "virtually coincided" with the end of the CETA negotiations and "confounded the necessary debate" by merging the debate about including the ISDS in the CETA and in the TTIP into a single consultation.[122] Despite this somewhat limited outreach, the Commission deserves credit for announcing a study in April 2020 into the effectiveness of its civil society dialogue process[123] and publishing documents attempting to explain the contents of trade agreements, indicating the Commission is aware of the "disconnect" between trade policy and the public.[124]

[119] *See, e.g.*, European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(d)(vi), 2017 O.J. (C 265) 35. Parliament has also raised this issue in resolutions in other contexts, including WTO negotiations. *See, e.g.*, European Parliament resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA), para. Q(1)(i)(iv), https://www.europarl.europa.eu/doceo/document/TA-8-2016-0041_EN.pdf.

[120] *See* European Commission, Consultations, https://trade.ec.europa.eu/consultations/#_tab_2020 (last visited June 28, 2020) (the target audience for free trade agreement [hereinafter FTA] consultations is often limited to industry stakeholders); European Commission, Consultation: Questionnaire on the Modernisation of the Trade Pillar of the Modernisation of the EU-Chile Association Agreement (2018), https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156407.pdf ("This questionnaire is targeting European Union (EU) business (companies/business organisations) and is not intended to be an open public consultation."); European Commission, Civil Society Meetings, https://trade.ec.europa.eu/civilsoc/meetlist.cfm#year-2020 (last visited June 28, 2020) (note attendees must be "civil society organisations"); Vivien A. Schmidt, *The European Union: Democratic Legitimacy in a Regional State?*, 42 J.Common Mkt. Stud.975, 983 (2004) ("the Commission is mostly concerned with the politics of organized interests" – i.e., "civil society").

[121] *See* European Commission, Consultations, https://trade.ec.europa.eu/consultations/#_tab_2018 (last visited June 28, 2020) (2018 consultation on EU-Australia FTA).

[122] *See, e.g*, Delimatsis, *supra* note 56, at 12-13.

[123] *See* European Commission Press Release, Study on the European Commission Trade Department's Civil Society Dialogue (Apr. 28, 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2134&title=Study-on-the-European-Commission-trade-departments-Civil-Society-Dialogue (last visited June 28, 2020).

[124] *See, e.g.*, European Commission, *Guide to the EU-Vietnam Trade and Investment Agreements* (updated Mar. 2019), https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf; European Commission, *EU-Australia Trade Agreement Factsheet* (June 2018), https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156941.pdf; European Commission, *EU-Mexico: Questions and Answers* (Apr. 2018), https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156874.pdf.

In other words, Parliament's influence in this area has not brought about marked changes thus far, but, continued pressure – in conjunction with the Commission's willingness to rethink the issue – may well be worth the effort.

In conclusion, a review of the substantive policies adopted by the Commission and Council demonstrates that the opportunities for Parliamentary input have not been wasted. Rather, the input received has often been taken into account, in part or in full, which strongly suggests that Parliament's efforts have enhanced the input legitimacy of the EU's trade agreements in this respect. However, Parliament's attempts to encourage the Commission to increase its openness to public input have been met with less success. Opportunities for public input remain relatively limited although continued Parliamentary attention to the issue may encourage the Commission to continue refining its approach to public involvement.

3.1.3 CONTEXTUALISING PARLIAMENTARY INFLUENCE

The discussion above indicates that Parliamentary pressure, particularly via the non-binding resolution, has influenced the negotiating process and the substance of trade agreements, but this dynamic must be appropriately contextualised. First, the non-binding resolution has power only because the Parliament can refuse to give consent to a trade agreement, as the Parliament often reminds the other institutions[125] - "we can sink it, and they know it."[126]

Second, the receptiveness of the other institutions limits Parliamentary influence. With regard to the Council's mandates, the contents do not reflect Parliament's concerns simply because Parliament asked. There is often significant policy convergence between the Council and Parliament, and it is therefore not always clear when Parliament has an impact.[127] Furthermore, "the Commission and Commissioner and DG-Trade have their policy and their own policy agenda" and will adopt only the positions that they are "convinced about."[128] To illustrate this, consider the issue of ISDS reform. As can be seen from the sequence of events, it was not only Parliament driving

[125] *See, e.g.*, European Parliament resolution of 19 January 2011 on the Interim Partnership Agreement between the EC and the Pacific States, May 11, 2012, para 7, 2012 O.J. (CE 136) 19; European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 21, 2018 O.J. (C 346) 212; European Parliament resolution of 5 May 2010 on the upcoming EU-Canada Summit on 5 May 2010, Mar. 15, 2011, para 9, 2011 O.J. (CE 81) 64; European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, Feb. 12, 2016, para 25, 2016 O.J. (C 55) 108.

[126] Interview 3 (EP).

[127] *See, e.g.*, Van den Putte *et al.*, *supra* note 117, at 52-69.

[128] Interview 3 (EP).

the debate, but also the Commission, which held a consultation on the issue prior to Parliament formally rejecting the use of ISDS in all future agreements. Thus, while Parliamentary pressure played a role in shaping the debate, this is also an instance in which the views of a Parliamentary majority and the Commission were ultimately aligned.[129]

By contrast, consider the debate about whether to incorporate sanctions into trade agreements to enforce Trade & Sustainable Development [hereinafter TSD] chapters. Regarding the trade agreement between the EU, Peru and Colombia, in 2012, Parliament passed a resolution expressing regret that the TSD standards were not subject to the sanctions mechanisms,[130] and later suggested that the parties to this agreement consider sanctions as an enforcement tool.[131] Parliament asked for similar consideration in its resolution on the opening of trade negotiations with Australia.[132]

To date, the Commission has declined to adopt a sanctions-based approach, which arguably reflects a certain lack of openness to Parliament's position. Nonetheless, the debate around the issue shows a more nuanced dynamic at work. In response to Parliament's focus on the issue, the Commission launched a debate on how to reform TSD chapters[133] and issued a fifteen-point plan to improve them.[134] For some, the lack of sanctions in the plan is "disappointing" because "it falls far short of what a lot of the Parliament was actually asking for," and, in their view, proves that the Commission "want[s] to be seen to give us something [without] actually going all the way to meet Parliament's expectations."[135]

From the Commission's perspective, however, there was no majority support for a sanctions-based approach in Parliament and thus no convincing political reason to abandon the position.[136] The Commission's view of Parliamentary support for sanctions

[129] Wessel & Takács, *supra* note 92, at 117.

[130] European Parliament resolution of 13 June 2012 on the EU trade agreement with Colombia and Peru, Nov. 15, 2013, para 1, 2013 O.J. (CE 332) 52.

[131] European Parliament resolution of 16 January 2019 on the implementation of the Trade Agreement between the European Union and Colombia and Peru, para 18(d), https://www.europarl.europa.eu/doceo/document/TA-8-2019-0031_EN.pdf.

[132] European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 19(g), 2018 O.J. (C 346) 212.

[133] *See Commission Non-paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (Nov. 7, 2017), http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf; European Parliament, Debate: Trade and sustainable development chapters in EU trade agreements (Jan. 16, 2018), https://www.europarl.europa.eu/doceo/document/CRE-8-2018-01-16-ITM-015_EN.html (last visited June 28, 2020).

[134] *See* European Commission Press Release, Commissioner Malmström Unveils 15-Point Plan to Make EU Trade and Sustainable Development Chapters More Effective (Feb. 27, 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1803 (last visited June 28, 2020).

[135] Interview 8 (EP).

[136] Interview 6 (COM); Interview 1 (EP).

finds some backing in the language of the resolutions. Rather than stating the Commission "must" include a sanctions-based approach, a number of resolutions request that the Commission should "consider, among various enforcement methods, a sanctions-based mechanism."[137] Moreover, if a sanctions-based mechanism were something that Parliament "badly wanted" in recent and future trade agreements, "we would have had to say no to the agreement" at the consent stage, and this has not yet happened.[138] For the purposes of evaluating input legitimacy, this demonstrates that even when the institutions have different policy preferences, the Commission may still make a serious effort to engage with Parliament. In other words, input legitimacy is not inherently stymied when the institutions disagree.

The question of interpreting the resolutions sheds light on another limitation on Parliament's influence. Sometimes, the resolutions include geopolitical statements rather than actual demands. For example, the Parliament twice suggested its support for TTIP would be "endangered" if the United States continued its "blanket mass surveillance activities" and failed to adequately respect data privacy rights.[139] However, because the audience for the resolution was the public, refusal to grant consent based on these issues seemed "not likely."[140] While such strong statements are unusual, their symbolic value may impair the other EU institutions' ability to interpret when and why Parliament will actually withhold its consent, indicating that Parliament should exercise caution when deciding what to include in its resolutions lest it undermines its own credibility. Of course, the value of a resolution to Parliament may not rest in its influence on the other EU institutions, but in the political signals it transmits to certain constituencies in the European public. The Commission is undoubtedly aware of this, and as seen in the debate about sanctions for TSD chapters, is capable of discerning when a parliamentary majority is demanding substantive changes. But what if the Commission is mistaken in its view of the message Parliament intended to send? Such a situation may

[137] *See, e.g.*, European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 19(g), 2018 O.J. (C 346) 212.

[138] Interview 2 (EP). Indeed, Parliament approved the FTA between the EU and Vietnam despite continued concern about enforcement of TSD chapters, as stated in a non-binding resolution accompanying its approval of the FTA. European Parliament non-legislative resolution of 12 February 2020 on the draft Council decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, para 20, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0027_EN.pdf; *see also* Council Decision 2019/753, 2020 O.J. (L 186) 1 (EU).

[139] European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, Nov. 9, 2017, para 74, 2017 O.J. (C378) 104; European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership, Aug. 11, 2017, para 2(b)(xiii)2017 O.J. (C 265) 35.

[140] Interview 9 (EP).

not occur often, but leaving the Commission to sort through the symbolic versus substantive may limit Parliament's ability to affect policy changes.

A potentially less significant, but nonetheless real limitation on Parliament's influence may be the personalities involved in the policy debates. For example, parliamentary staffers from across the political spectrum commend Commissioner Malmström for her efforts to engage constructively with Parliament.[141] Even some of those who remain critical overall – suggesting that she was sometimes too flippant, even "mocking," in her exchanges with the INTA Committee – believe that the Commission and Parliament's working relationship improved from that with the prior Commissioner who may have given some MEPs the impression that "he looked down on the European Parliament."[142] Strained relationships may lead to fewer efforts to communicate as well as less regard for the views of the other institutions. Not only could this diminish Parliament's respect for or trust in the Commission, but it may also result in a loss of Parliamentary influence within the Commission.

Additionally, the significance of the non-binding resolution is curtailed to some extent by the fact that it is not used frequently throughout the entire negotiating process. Understanding that negotiations are fluid, Parliament prefers not to issue resolutions while negotiations are ongoing, except when circumstances have changed or political developments merit a response.[143] This cautious approach sometimes also reflects reluctance to commit to a position and an awareness that politically sensitive mistakes can be made. For example, in a resolution on palm oil and sustainability, Parliament included statistics about Indonesia's industry.[144] On a visit to Indonesia, several Indonesian officials showed the resolution to the European delegation, stated that the figures were incorrect and asked why they were not consulted about their own industry as part of "a serious process" before Parliament adopted the resolution.[145]

During periods when MEPs prefer not to issue resolutions, Parliament uses its other tools to convey its views. The INTA Committee holds public hearings, as in the above example of ISDS reform, and has created monitoring groups - unique to this committee - that hold *in camera* meetings on a monthly basis, during which MEPs discuss trade negotiations with the Commission and, occasionally, representatives from third countries. Although the full contents of the *in camera* meetings remain confidential, which permits the participants to "have a very frank exchange of views,"[146] MEPs

[141] Interview 1 (EP); Interview 3 (EP); Interview 7 (EP); Interview 8 (EP); Interview 10 (EP).
[142] Interview 9 (EP).
[143] Interviews 2, 7, 8 (EP).
[144] European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests, Aug. 23, 2018, 2018 O.J. (C 298) 2.
[145] Interview 3 (EP).
[146] Interview 4 (COM).

provide public summaries to the full committee with details of participants and general topics discussed.[147] In addition, MEPs ask the Trade Commissioner to answer oral questions and send letters or written questions. Oral questions can prove most effective when a Commissioner is faced with a unanimous view of the INTA Committee or when she may be forced to make a commitment on the record.[148] Moreover, submitting oral questions and thereby provoking a debate itself provides Parliament an opportunity to ensure the Commissioner listens to its views. For instance, in 2015, the Chair of the INTA Committee and MEP Schaake sent oral questions to Commissioner Malmström on behalf of the entire committee, which the Commissioner then agreed to debate with Parliament during a plenary session.[149] Letters may also prove effective at ensuring the Commission takes notice of Parliament's concerns. As several Commission officials noted, although resolutions are "number one" in terms of Parliamentary influence, a letter from the INTA Committee or a cross-party group might be "number two" in influence – "we would take that very seriously."[150] For example, in 2018, a cross-party group of thirty-two MEPs sent a letter to Commissioner Malmström and High Representative Mogherini to express concern about the EU-Vietnam Free Trade Agreement given the deteriorating human rights situation in Vietnam.[151] Although the letter did not resolve the debate, the Commission took notice, with Commission officials mentioning this letter as significant.[152] That these other tools may influence the Commission's policies sometimes more and sometimes less than non-binding resolutions is not surprising. These other tools have the advantage of speed and, for oral questions, direct communication with the Commissioner. However, resolutions often reflect a majority view of the Parliament while letters or questions from subgroups of Parliament may not. As one interviewee explained, even if the Commissioner debates an oral question with Parliament, "you don't normally know where this is going to lead," as the MEPs engaged in the debate may

[147] *See, e.g.*, Eur. Parl. Committee on International Trade Committee Meeting (Feb. 19, 2020), https://multimedia.europarl.europa.eu/en/inta-committee-meeting_20200219-1500-COMMITTEE-INTA_vd (last visited June 28, 2020) (reports on monitoring groups begins at 16:47). The agenda of the meeting can be found at Eur. Parl. Doc. Inta(2020)0219_1 and its minutes at Eur. Parl. Doc. inta_pv(2020)0219_1.

[148] Interviews 1, 9 (EP).

[149] Committee on International Trade on "Question for oral answer O-000116/2015 to the Commission", (Sept.30,2015) (remarks of Bernd Lange and Marietje Schaake), https://www.europarl.europa.eu/doceo/document/O-8-2015-000116_EN.pdf; *See also* Eur. Parl. Deb. (2821) (Nov.23, 2015), https://www.europarl.europa.eu/doceo/document/CRE-8-2015-11-23-ITM-012_EN.html (last visited June 28, 2020).

[150] Interviews 4 and 6 (COM).

[151] Letter from 32 MEPs to High Representative Federica Mogherini and Commission Cecilia Malmström (Sept. 17, 2018), http://tremosa.cat/noticies/32-meps-send-joint-letter-mrs-mogherini-and-commissioner-malmstrom-ask-more-human-rights-progress-vietnam (last visited June 28, 2020).

[152] Interviews 4 and 6 (COM).

not represent a majority position.[153] Given the different advantages and limits of these tools, they might be best described as complementary to, but not substitutes for, the non-binding resolution.

Finally, binding law also limits Parliamentary influence. For an action to improve legitimacy, it must be legal, as otherwise the action would itself not be legitimate.[154] When an institution doubts the legality of Parliament's request, it is, unsurprisingly, not willing to take Parliament's requests on board. For instance, Parliament has requested that the Council wait for it to comment on draft mandates before approving them, and the Council has sometimes done so. However, the Council refuses to guarantee that it will wait due to concerns about protecting its own discretion and preventing Parliament from, in its view, attempting to modify the Treaties' allocation of competences.[155] To overcome this resistance, it may be necessary to amend the Treaties to ensure that Parliament has a voice at the opening of negotiations, although this solution comes with significant political and practical challenges.[156]

Despite these limits, the non-binding resolution has proved a significant tool with which Parliament has enhanced its ability to influence the substance of trade policy. While Parliament does not always achieve its goals, as with its attempts to increase the public's ability to participate more directly in negotiations, it generally receives a response from the Commission[157] and has arguably influenced the Council's final mandates. For input legitimacy purposes, this responsiveness is critical and demonstrates that Parliament has narrowed, but not eliminated, the legitimacy deficit.

[153] Interview 6 (COM). This dynamic is further complicated by the multifaceted aspect of trade agreements. Specific topics raised may not lead to a veto, as many other considerations enter Parliament's calculus. The EU-Vietnam debate provides a good illustration. Although a number of MEPs, including the Chair of the INTA Committee, raised human rights as a concern on several occasions, Parliament voted 401-192 (with 40 abstentions) to approve the EU-Vietnam FTA, which does not include more comprehensive enforcement mechanisms for TSD chapters than other EU FTAs. After the vote, the Chair of the INTA Committee indicated that Parliament ultimately decided that approving the agreement and thereby gaining more economic leverage with Vietnam outweighed the remaining concerns, which could be addressed via good implementation. *See* European Parliament Press Release, Parliament Approves EU-Vietnam Free Trade and Investment Protection Deals (Feb. 12, 2020) https://www.europarl.europa.eu/news/en/press-room/20200206IPR72012/parliament-approves-eu-vietnam-free-trade-and-investment-protection-deals (last visited June 28, 2020).

[154] *See* Linda Senden, Soft Law In European Community Law 26 (2004).

[155] Interview 5 (C).

[156] *See* Devuyst, *supra* note 31, at 292.

[157] *See* Heldt, *supra* note 55.

3.2 THROUGHPUT LEGITIMACY

Throughput legitimacy addresses how decisions are made and the quality of the decision-making processes. As argued above, the Treaties do not provide for sufficient throughput because there is no explanation of how Parliament holds the Commission accountable, and they do not guarantee openness or transparency in negotiations. Lack of such throughput may not only lead to policy that the public views as illegitimate, but can also undermine the EU's efforts to finalise trade agreements. For example, "[t]here is in fact a general belief that the failure to agree on [the Anti-Counterfeiting Trade Agreement] was a consequence of the lack of good communication."[158] Thus, more systematic and open practises that enhance communication between the institutions and with the public are essential to developing better throughput legitimacy. This section addresses whether and how Parliament's non-binding resolution has affected throughput, first addressing accountability and then, openness and transparency.

3.2.1 IMPROVING ACCOUNTABILITY

Of relevance to trade negotiations is Parliament's role in holding the Commission accountable. One of the most important tools for promoting accountability is article 218(10) TFEU, which states that Parliament is entitled to be "immediately and fully informed at all stages of the procedures." To affect throughput legitimacy, this reporting obligation must improve Parliament's ability to perform its oversight and legislative duties. In other words, there must be processes for dialogue between the institutions as a means of ensuring that the Commission responds to Parliamentary concerns about any information transmitted to it.

Parliament has repeatedly demanded improved communication from and with the Commission via non-binding resolutions. As detailed above, some of these resolutions address MEP access to negotiating documents. In response, the Commission has institutionalised controlled access to these documents in its Trade for All strategy and in a framework agreement, which enhances Parliament's ability to exercise its oversight authority. However, as with input legitimacy, MEP access to documents must be coupled with an actual dialogue between the institutions to substantially improve throughput. As can be seen from the shift in the Commission's trade policy and its willingness to debate Parliament on issues such as ISDS and TSD enforcement, the

[158] Letter from the President of the European Parliament to the European Ombudsman, Eur. Parl. Doc (SEC 2392/2011/RA) (Jan. 10, 2014), https://www.ombudsman.europa.eu/en/correspondence/en/53286 (last visited June 28, 2020).

resolution remains a powerful tool for creating such a dialogue. That said, other tools play an equally (if not more) important role in promoting throughput, particularly the hearings held by INTA and its monitoring groups. These regular hearings promote constant communication between the institutions and are rated highly among Parliamentary staffers. "We still have some asks as to how it could work even better, but . . . we are way better served than many other committees by their respective counterparts."[159]

Overall, Parliamentary pressure via the non-binding resolution has improved its ability to hold the Commission accountable, particularly through the institutionalisation of improved transparency practises. However, the resolution has played a supporting role in promoting communication with the Commission during the negotiation process, with regular hearings by INTA and its monitoring groups playing a leading role. Nonetheless, the influence of the non-binding resolution is not insubstantial, particularly as it has been deployed quite successfully to improve Parliament's access to information, without which its oversight capability is significantly impaired.

3.2.2 IMPROVING OPENNESS AND TRANSPARENCY

Governance processes that promote openness and transparency are essential to throughput legitimacy.[160] As described above, Parliament has repeatedly called for the Commission to increase public and MEP access to documents relevant to trade negotiations. In response, the Commission has adopted standard practises in its Trade for All strategy and routinely disclosed its draft negotiating directives and negotiating texts to the public. Given this dynamic, it seems reasonable to conclude that Parliamentary pressure has played a significant role in shaping these practises, thereby improving throughput legitimacy.

Parliament's apparent influence on the Council has been more limited, with its non-binding resolution playing a much weaker role in encouraging institutional change. First, with respect to Parliament's ability to comment pre-mandate, the Council has not promised to provide Parliament with such an opportunity for all negotiations. Not only is the Council concerned about limiting its own discretion, but it may also be unsure about how such a commitment would work in practise. Because the Treaties provide no role for the Parliament at the pre-mandate stage, it is unclear how differences between the institutions should be resolved and what the legal basis would be for potentially

[159] Interview 2 (EP).
[160] *See* Schmidt, *Democracy and Legitimacy in the European Union Revisited*, *supra* note 18.

giving precedence to Parliament's views over the Council's.[161] Moreover, Parliament is not always interested in commenting on draft mandates. For instance, Parliament first offered its support for updating the EU-Mexico agreement only after the Council approved the negotiating directives and, even then, did not make substantive comments on the contents of the agreement.[162] Thus, even if the Council were inclined to guarantee Parliament the right to comment on proposed draft mandates, any mechanism would need to address how to handle those situations, potentially by imposing a time limit on Parliament's right to comment.

Second, Parliament has been active in urging the Council to publicly disclose final negotiating mandates. Unlike with other transparency issues, however, a significant amount of the pressure on the Council initially came from the Commission, as part of its own concerns about the lack of transparency, and from the European Ombudsman, who called on the Council to publish the TTIP negotiating mandate.[163] Despite initial reluctance from some Member States who were concerned that disclosure would "diminish the Commission's range of [. . .] discretion during negotiations,"[164] the Council eventually voted to release the mandate.[165] Parliament soon thereafter issued a resolution expressing its support for the Council's decision[166] and subsequently called on the Council to "publish all previously adopted and future negotiating mandates without delay."[167] Although the Commission has since institutionalised its practice of disclosing its draft mandates,[168] the Council has actively resisted doing so. In the Council's view, "[s]uch a decision is exclusively for the Council to make on a case-by-case basis,"[169]

[161] *See* Devuyst, *supra* note 31, at 315 (proposing the institutionalisation of a procedure to allow Parliament to comment on draft directives with a mechanism to resolve differences between the institutions).

[162] European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 48, 2018 O.J. (C 101) 30.

[163] *See* Heldt, *supra* note 55, at 11; *see generally* European Ombudsman, Case OI/11/2014/RA, Public Disclosure of the Transatlantic Trade and Investment Partnership Negotiating Mandate, https://www.ombudsman.europa.eu/en/summary/en/58303 (last visited June 28, 2020); Letter from European Commissioner for Trade to Minister for the Economy, Investment and Small Business, SEC (2017) (May 24, 2017). https://ec.europa.eu/carol/index-iframe.cfm?fuseaction=download&documentId=090166e5b28a816d&title=CM_signed (last visited June 28, 2020) (requesting disclosure of EU-Japan mandate).

[164] Heldt, *supra* note 55, at 13.

[165] *See* Council of European Union Press Release ST 14095/14, TTIP Negotiating Mandate Made Public (Oct. 9, 2014), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf.

[166] European Parliament resolution of 15 January 2015 on the annual report on the activities of the European Ombudsman 2013, Aug. 18, 2016, para 25, 2016 O.J. (C 300) 14.

[167] European Parliament resolution of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment, Mar. 16, 2018, para 9, 2018 O.J. (C 101) 30.

[168] *See Trade for All*, *supra* note 49.

[169] Draft Council Conclusions on the Negotiation and Conclusion of EU Trade Agreements, Brussels European Council, at para 8 (May 8, 2018), http://data.consilium.europa.eu/doc/document/ST-8622-2018-INIT/en/pdf, *adopted in* Council of European Union Press Release 9102/18, Outcome of the Council Meeting (May 22, 2018), *supra* note 62.

which is one of the reasons for which the negotiations between all three EU institutions on updating the Interinstitutional Agreement on Better Lawmaking[170] collapsed.[171]

The Council's concerns are aggravated by the fact that it also views the Commission's practise of disclosing draft mandates as illegal: all decisions regarding disclosure belong solely to the Council.[172] Furthermore, as indicated above, disclosure may limit the Commission's bargaining power during negotiations, as some literature suggests.[173] This concern notwithstanding, however, there may well be reason to believe that even if the Council does not authorise public disclosure, "negotiating partners will probably get a copy of it somehow."[174] Additionally, it does not appear that trade partners have been able to unfairly use the mandates, especially as the EU institutions publicly release a significant amount of information anyway.[175] The debate over public disclosure will undoubtedly continue; indeed, Parliament has continued to stress disclosure, most recently in resolutions on opening negotiations with Australia and New Zealand.[176] As the 2019 elections may lead the Council to feel more obligated to consider Parliament's requests, the full effect of Parliament's efforts on this issue is likely yet to be seen. However, given the Council's deep-seated concern about protecting its own authority, as well as its belief that its position is legally correct, even Parliament's increased political and normative power may be insufficient to overcome the Council's resistance.

Nonetheless, Parliamentary pressure on the Council may have contributed to improved institutional procedures in a more limited respect. In prior years, after approving a mandate, the Council forwarded the decision to Parliament with a note that the mandate was included in an annex. However, the annex itself was not attached. If the Parliament wanted to see the mandate, it had to submit a written request.[177] In recent years, however, the Council revisited its policy, and is now attaching the final negotiating directives to the decision transmitted to Parliament.[178] The revised policy

[170] Interinstitutional Agreement on Better Law-Making, May 12, 2016, 2016 O.J. (L 123) 1.
[171] Interview 5 (C).
[172] *Id.*
[173] *See, e.g.*, Heldt, *supra* note 55.
[174] Interview 5 (C).
[175] *Id.*
[176] European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia, Sept. 27, 2018, para 12, 2018 O.J. (C 346) 212; European Parliament resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand, Sept. 27, 2018, para 13, 2018 O.J. (C 346) 219.
[177] Interview 5 (C); *see also* Letter from Bernd Lange to Jeppe Tranholm-Mikkelsen and Marten Van den Berg, COM (2016)11117/16 (June 2, 2016), https://data.consilium.europa.eu/doc/document/ST-11117-2016-INIT/en/pdf.
[178] Interview 5 (C).

may be attributed in part to the use of the non-binding resolution, but also underscores that the resolution is often secondary to, or more powerful when used in conjunction with, other tools. In this case, at the same time that Parliament was passing resolutions related to disclosure of mandates for trade agreements, Parliament prevailed in several disputes alleging that the Council failed to "immediately and fully inform" it about the agreements negotiated under the Common Foreign and Security Policy.[179] The combination of these parliamentary tactics may have influenced the Council's decision to automatically forward all the final negotiating mandates for trade agreements to Parliament.

Overall, parliamentary pressure has improved the transparency and openness of the EU institutions' governance processes and thereby improved throughput legitimacy, but markedly more so with respect to the Commission than the Council. Given the remaining tension between Parliament and the Council, it is not surprising that MEPs sometimes describe their relations as "one-way traffic."[180] Thus, although Parliament's efforts have influenced the establishment of improved governance practises, there remains significant work to be done towards resolving the debates about how much transparency and openness is required or ideal. Until there is a consensus among the EU institutions, Parliament's influence will remain somewhat inconsistent. Nonetheless, that Parliament's efforts have been institutionalised or approved on an *ad hoc* basis suggests it possesses substantial capacity to encourage the other institutions to adopt practices that will improve throughput legitimacy.

CONCLUSION

Assessing and solving the legitimacy deficit that, amongst other things, makes trade agreements so controversial is a continuing challenge. The European Parliament, in its role as the democratic representative of the public, has played a significant role in attempting to address the issue. In particular, its use of the non-binding resolution has proven a powerful normative and political tool for encouraging the other institutions to adapt their practises in ways that have improved input and throughput legitimacy on an *ad hoc* or systematic basis.

[179] *See* C-263/14, *supra* note 26; C-658/11, *supra* note 32.
[180] Interview 8 (EP).

To date, the Commission has proved an especially receptive partner, not only heeding Parliament's requests for greater openness, but also institutionalising new disclosure and transparency practises, thus allowing Parliament and, to a lesser extent, the public to offer input on negotiations in a more consistent and informed manner. Although there is no guarantee that the von der Leyen Commission will follow suit throughout its five-year mandate, given the highly fragmented Parliament that has already displayed an attitude of assertiveness vis-à-vis the Commission,[181] it is difficult to imagine that a retreat from the Juncker Commission's approach would prove politically sustainable.[182]

When the Commission has resisted adopting Parliamentary requests, a significant factor appears to be the Council's resistance to adopting any practise that would curb the Council's discretion or potentially allow Parliament to use soft law to modify the Treaties, as can be seen in the debate about provisional application of trade agreements. The Council's resistance can also be seen in the debates about public disclosure of negotiating mandates and Parliament's ability to comment on draft mandates. Nonetheless, it is unfair to tag the Council as anti-transparency, as its hesitation reflects reasonable differences of opinion about policy and legality. Moreover, the Council has been influenced to some extent by Parliamentary pressure, releasing mandates on an *ad hoc* basis and occasionally waiting for Parliament to comment on draft mandates before voting to approve them.

In sum, Parliament has demonstrated a growing awareness of its own power and increasing political savvy in deploying its informal governance tools to influence the conduct and substance of trade negotiations. However, its ability to affect the legitimacy of trade agreements is especially limited when the other institutions believe

[181] *See, e.g.*, Maia de la Baume, *Von der Leyen to Change some Commission Titles, Social Democrats Claim Win*, Politico (Nov. 13, 2019), https://www.politico.eu/article/von-der-leyen-to-change-some-commission-titles-social-democrats-claim-win/ (last visited June 28, 2020); *European Parliament Rejects 2 of von der Leyen's Commission Candidates*, Deutsche Welle (Sept. 30, 2019), https://www.dw.com/en/european-parliament-rejects-2-of-von-der-leyens-commission-candidates/a-50642274 (last visited June 28, 2020); Alex Barker & Mehreen Khan, *Ursula Von Der Leyen Survives Tight Vote to Win EU Top Job*, Fin. Times (July 16, 2019), https://www.ft.com/content/138afa0e-a7df-11e9-984c-fac8325aaa04.

[182] Over time, this may be particularly true due to the loss of the United Kingdom's MEPs, which may reduce the number of MEPs likely to support the EU's current trade policy. *See* Mehreen Khan, *How Life After Brexit Will Get Uncomfortable for Von Der Leyen*, Fin. Times (Jan. 27, 2020), https://www.ft.com/content/599d631c-40b2-11ea-bdb5-169ba7be433d (last visited June 28, 2020). However, this potential effect has not been immediately apparent. For example, Parliament approved CETA in February 2017 by a vote of 408-254, with 33 abstentions, and approved the EU-Vietnam FTA and Investment Protection Agreements in February 2020 by a vote of 401-192, with 40 abstentions. European Parliament Press Release, Parliament Approves EU-Vietnam Free Trade and Investment Protection Agreements (Feb. 12, 2020), https://www.europarl.europa.eu/news/en/press-room/20200206IPR72012/parliament-approves-eu-vietnam-free-trade-and-investment-protection-deals (last visited June 28, 2020); European Parliament Press Release, CETA: MEPs back EU- Canada Trade Agreement (Feb. 15, 2017), https://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement (last visited June 28, 2020).

Parliament's demands conflict with or shift the allocation of competences set out in binding law. To resolve some of the remaining debates about transparency and Parliamentary input, Treaty amendments may ultimately be the best way forward. Until that becomes a realistic option, however, Parliament should continue engaging with the other institutions on issues affecting the legitimacy of the EU's trade agreements.

In particular, Parliament should consider means of "normalising" certain relationships or lines of communication, including by revisiting the idea of creating an interinstitutional agreement to cover issues like provisional application (especially if it feels more empowered vis-à-vis the Commission than during the Juncker mandate) and improving the use of its governance tools. As described above, the Parliament possesses a number of tools through which it may provide input and oversight of trade negotiations. However, using them effectively can prove challenging given the number of demands on Parliament's attention,[183] and Parliament should evaluate how best to consistently use its tools to ensure its views are considered and responded to by the other institutions. For example, while Parliament holds regular hearings, it may wish to consider whether a more constant use of other oversight tools (e.g., letters from the INTA Committee, regular written questions to the Commissioner) could improve input to and influence on the other institutions. Although these informal governance tools, including the non-binding resolution, cannot alone eliminate the legitimacy deficit, their ability to diminish it should not be underestimated, especially as Parliament improves its ability to strategically deploy them. Perhaps most importantly, use of these tools offers the opportunity for continued reflection and debate among the institutions about how they can or should engage with the public and with each other.

[183] *See, e.g.*, Interview 8 (EP) ("[T]he monitoring role of the Parliament through these resolutions and follow-up has been probably quite weak in the last couple of years, so it could be better ... in terms of consistency, in terms of involvement, and in terms of resources as well.").

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Malaysian Personal Data Protection Act, a Mysterious Application

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ABSTRACT

Malaysia is a pioneer in drafting and executing personal data protection law among the ASEAN countries. However, the adequacy of this protection regime is questionable. This study is aimed at evaluating the aptitude of the Personal Data Protection Act (2010) (P.D.P.A.) from the application perspective. The evaluation and analysis of the application and scope of the P.D.P.A. through comparative and descriptive approaches shows that the Act has provided for a narrow scope with wide exemptions. This approach may hinder a standard personal data protection legal system for the protection of individuals' privacy. Moreover, the P.D.P.A. will fail the adequacy test of the developed nations such as the European Union Member States.

KEYWORDS

Compliance; Information; Privacy; Personal Data Protection Act; General Data Protection Regulation

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INTRODUCTION

Malaysia, as a developing country, is impacted by new technologies. Hence, it is essential to understand if the present data protection laws and regulations are adequate to protect personal data of individuals Legal analysis and benchmarking of the Personal Data Protection Act [hereinafter P.D.P.A.] will explore whether it can protect the personal data, solve the related legal disputes justly, and recover the damages completely.[1] However, the first and important step in the evaluation of a legislation is understanding its scope and application. An analysis of the objectives, scope and principles of the P.D.P.A. clarifies the need for a reform considering the change in circumstances and the fact that the Act was drafted many years ago.

1. OBJECTIVES OF P.D.P.A.

The P.D.P.A. commences with "*An Act to regulate the processing of personal data in commercial transactions and to provide for matters connected therewith and incidental thereto*". The P.D.P.A. clarifies that it will protect the individuals' personal information through governing the entire processing of such data from collection to deletion, with respect to commercial transactions only. Hence, the main objective of the P.D.P.A. is the protection of individuals' personal data.

2. SCOPE OF P.D.P.A.

Under Section 2 of the P.D.P.A.,[2] it applies to the data users directly and to the personal data of individuals indirectly. Section 2(1) specifies that the P.D.P.A. applies to a person who processes the data or a person who has control over the information or authorizes

[1] The effectiveness of data protection laws will affect the consumers' confidence and trust. For more information, *see* Gabriela Kennedy et al., *Data Protection in the Asia-Pacific Region*, 25 Comput. L. & Sec. Rev. 59 (2009); Hamed Armesh et al., *The Effects of Security and Privacy Information on Trust & Trustworthiness and Loyalty in Online Marketing in Malaysia*, 2 Int'l J. Mktg Stud. 223, 223-234 (2010); Viviane Reding, *The Upcoming Data Protection Reform for the European Union*, 1 Int'l Data Priv. L. 3 (2011).

[2] Personal Data Protection Act § 2 (2012) provides that

> (1) This Act applies to — (a) any person who processes; and (b) any person who has control over or authorizes the processing of, any personal data in respect of commercial transactions. (2) Subject to subsection (1), this Act applies to a person in respect of personal data if — (a) the person is established in Malaysia and the personal data is processed, whether or not in the context of that establishment, by that person or any other person employed or engaged by that establishment; or (b) the person is not established in Malaysia, but uses equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia . . . .

the processing. Personal information includes either manual data (filing system),[3] or electronic personal data, collected and used merely for the purpose(s) of commercial transactions by the private sector users. Personal information must be attached to the individuals, who are natural persons. The act applies solely to commercial transactions. Under Section 4 of the P.D.P.A., a commercial transaction means any commercial dealing of contractual or non-contractual nature,[4] with respect to supply or exchange of goods and services.[5] The relation between the employee and the employer under the employment contract also bears a commercial nature and falls under the governance of the P.D.P.A., although little attention has been paid to these types of data subjects. For the purpose of the Act, non-contractual transactions comprise informal or oral agreements. This definition is more or less similar to the interpretation of the Electronic Commerce Act (2006).[6]

Under section 2(2) of the P.D.P.A., subject to sub-section (1), the legislation applies to a "person" who is a data user and:

a. is established within the territory of Malaysia and processes personal information "whether or not in the context of that establishment";
b. is established in Malaysia and process the personal data by employing a third party; and
c. is not established in Malaysia, however, he bases his equipment in Malaysia to process the personal information.

Under Sub-section 2(3), this equipment must operate under an established representative in Malaysia to comply with the purposes of the P.D.P.A.. The important logical point under this provision is that the data user, especially a foreign data user, shall own the said equipment, so that he or she can be easily identifiable.[7] However, under Section 2(2) (b), a company which merely has equipment in Malaysia to transit personal data, is exempted from application of the Act. Although the term "transit" will fall under the ambit of "collection" of personal data, the P.D.P.A. has exempted these

[3] Filing system means paper based which is an old system of data recording.
[4] Most of the times, contractual transactions appear in the clearer form of written contracts.
[5] Personal Data Protection Act § 4 (2012) explains that

> commercial transactions means any transaction of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance, but does not include a credit reporting business carried out by a credit reporting agency under the Credit Reporting Agencies Act (2010).

[6] Electronic Commerce Act § 5 (2006) on interpretation of the terms provided that: ""commercial transactions" means a single communication or multiple communications of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance."
[7] Abu Bakar Munir & Siti Hajar Mohd Yasin, Personal Data Protection in Malaysia : Law and Practice 78 (2010).

types of companies. This may be due to the encouragement to forge investments, especially of cloud companies. The P.D.P.A. exclusively applies to the private sector companies established in Malaysia or those that use equipment in the country. However,the term "equipment" has been criticized as being problematic.[8] Private sector includes all types of companies, such as Search Engine Marketing Companies.[9] In fact, the P.D.P.A. has provided for a "territorial jurisdiction".[10]

Under the P.D.P.A., much concern has been given to the place of establishment, which is Malaysia. "Establishment" has been clarified in four circumstances by Section 2(4) to include:

a. an individual who is physically being in Malaysia for more than one hundred and eighty days in one calendar year;
b. a legal entity incorporated under Companies Act;[11]
c. a partnership or any unincorporated association which is founded under any Malaysian legislation; and
d. except the above mentioned categories, a person who maintains an office, branch or agency to conduct any activity within Malaysia or maintains a regular practice in Malaysia.

It would be more appropriate to use the phrase "data user" instead of "person" under Section 2. Hence, the P.D.P.A. regulates the whole processing operations of personal data for commercial transactions.

3. APPLICATION EXEMPTIONS

The exemptions are classified as total and partial exemptions.[12] Total exemptions mean that the P.D.P.A. will not apply totally, whereas, partial exemptions mean[13] only certain privacy principles will not apply to an activity. P.D.P.A. has provided certain total

[8] Abu Bakar Munir & Siti Hajar Mohd Yasin, *The Personal Data Protection Bill* 2009, 1 MALAY. L. J. CXIX-CXL, CXXVI (2010).

[9] Under the Australian Privacy Act (1988) and Japan Personal Information Protection Act (2003), small businesses are exempted. For more information, *see* Graham Greenleaf, *Malaysia: ASEAN's First Data Privacy Act in Force,* 126 PRIV. L. & BUS. INT'L REP. 12 (2013).

[10] Data protection laws usually apply three different approaches in order to determine their applications. Some of them rely on the location data user, some may rely on the location of the equipment used for processing and the rest consider the location of the individuals whom their data was processed. *See* Ustaran Eduardo, *The Scope of Application of E.U. Data Protection Law and Its Extraterritorial Reach, in* BEYOND DATA PROTECTION 135, 135-156 (Noriswadi Ismail & Edwin Lee Yong Cieh eds., 2013).

[11] Companies Act, 1965, (Publ. L. No. 125/1965).

[12] Munir Abu Bakar, *Personal data protection act : Doing well by doing good*, 1 MALAY. L. J. lxxxvii (2012).

[13] Personal Data Protection Act §45 (2012) has specified partial exemptions to the principles of the Act.

exemptions or non-application areas in order to limit the scope of the legislation (Table 1). There are two exemptions provided under Section 3 to specify delimitations of the P.D.P.A.:

a. The Federal and state government; and
b. Data processed wholly outside Malaysia.[14]

The Federal Government means the Government of Malaysia, including the Prime Minister's Office, Departments and all Ministries. The State Government is the government of a state which includes organizations such as the state secretary's office, state department, land and district offices and local authorities. However, the commercial companies owned by the Government are subject to the Act,[15] for instance, Khazanah Nasional Berhad[16] and Government Linked Companies.[17] Under Section 3(2), any personal data processed outside Malaysia is not subject to the Act, unless "intended" for further processing in Malaysia.

NO.	EXEMPTION	P.D.P.A. REFERENCE
1	Federal and State Government	Section 3(1)
2	Non-Commercial Activities	Section 2(1), Section 4 definition of "personal data"
3	Personal, Family or Household Affairs, Recreational Purposes	Section 45(1)
4	Credit Reporting Agencies	Section 4 definitions of "personal data" and "commercial transactions"
5	Information being processed outside Malaysia	Section 3(2)

Table 1: Non-application of P.D.P.A.

Under Section 4[18], the personal data processed by credit reporting agencies are exempted from the application of the P.D.P.A., since credit reporting agencies are governed by a separate Act called Credit Reporting Agencies Act (2010) [hereinafter

[14] Personal Data Protection Act § 3 (2012) states that: "(1) This Act shall not apply to the Federal Government and State Governments. (2) This Act shall not apply to any personal data processed outside Malaysia unless that personal data is intended to be further processed in Malaysia".

[15] Greenleaf, *supra* note 9, at 11-12.

[16] Noriswadi has examined the status of the K.N.B. as an investment fund body of the government. He explains that K.N.B. assigned the responsibility of holding and managing the commercial assets of the Malaysian Government and to deal with strategic investments. Since the K.N.B.'s portfolio of companies is an incorporated body under the Companies Act 1965 and executes the "commercial transaction", hence the P.D.P.A. applies to it. Noriswadi Ismail, *Selected Issues Regarding the Malaysian Personal Data Protection Act (P.D.P.A.) 2010*, 2 Int'l Data Priv. L. 105, 109 (2012).

[17] Khazanah investment holding structure includes 54 companies. For more information, *see*: http://www.khazanah.com.my/Home.

[18] Personal Data Protection Act § 4 (2012) has excluded the credit reporting agencies under interpretation of the terms "personal data" and "commercial transactions".

C.R.A.A.].[19] Under Section 2(1) and Section 4 on definition of "personal data", the P.D.P.A. only applies to the commercial transactions; hence, non-commercial activities of the private sector are totally exempted from the scope of P.D.P.A.. Non-commercial or non-profit activities by the private sector like charities, churches and non-profit organizations are excluded from the term "commercial transitions". However, if a private company, which has been established for non-commercial activities, processes personal data for a commercial purpose, it will be subject to the P.D.P.A. for that operation even if the profit from that activity is used for non-commercial purposes.

Section 45(1) of the P.D.P.A.[20] has exempted personal, family and household affairs and recreational purposes from its application. For instance, a personal telephone notebook containing the names and phone numbers of friends, relatives or others will fall under this exemption. These affairs are not commercial in nature, and non-commercial activities are excluded from the ambit of the Act. This approach is similar to the Asia-Pacific Economic Cooperation Privacy Framework,[21] and Directive 95 that has excluded the processing of personal information by individuals "in the course of a purely personal or household activity".[22] Furthermore, under Section 45, the P.D.P.A. has provided for partial exemptions for some kinds of activities in which some principles or provisions of the P.D.P.A. will not apply. For instance, processing of personal data for journalistic, literary or artistic activities is partially exempt from application of six principles of the Act.[23] It seems that the said exemption is in line with the freedom of expression and also freedom of press. According to Greenleaf, this exemption has been carefully drafted and is not a blanket media exemption.[24] Nevertheless, its application will be a complex issue.[25] The processing of personal data for prevention or detection of crime, investigation, apprehension or prosecution of offenders, taxation, physical or

[19] Credit Reporting Agencies Act , 710 (2010) entered into force on 15 October 2014.
[20] Personal Data Protection Act § 45(1) (2012) states that: "There shall be exempted from the provisions of this Act personal data processed by an individual only for the purposes of that individual's personal, family or household affairs, including recreational purposes".
[21] Asia-Pacific Economic Cooperation Privacy Framework § 10 (Nov. 2004) provides that: "[I]t also excludes an individual who collects, holds, processes or uses personal information in connection with the individual's personal, family or household affairs".
[22] Council Directive 95/46, art. 3(2), 1995 OJ (L 281).
[23] Personal Data Protection Act § 45(2) (f) (2012).
[24] *See* Graham Greenleaf, *Limitations of Malaysia's Data Protection Bill*, 104 Priv. L. & Bus. Int'l Newsl. 5 (2010).
[25] Greenleaf, *supra* note 9, at 3.

mental health, statistics or carrying out research,[26] order or judgment of a court and discharging regulatory functions are partial exemptions provided under Section 45.

Although partial exemptions are broad to a certain extent, there is no blanket exemption from security principle, data integrity principle, and retention principle.[27] Furthermore, six exemptions are stated under Section 6(2) on General Principle.[28] Processing of personal data for performance of a contract to which the individual is a party, request of data subject to enter into a contract, legal obligation, protecting vital interests of data subject, administration of justice and performance of functions granted by individual or any law are exempted from the application of the general principle. However, the phrase "vital interests of the data subject" is vague and may cause legal conflicts. Moreover, under Section 46, the Minister is empowered to impose further exemptions, in addition to Section 45. The Minister, upon the recommendation of the commissioner, may exempt a data user or a class of data users from the application of any principles or any provision of the Act, and the Ministerial order must be published in the Gazette.

4. CRITIQUE

A question arises as to whether a Data Protection Act, including these areas of exemption, can protect the personal information of the citizens properly? The P.D.P.A. has been criticized on the grounds that it has a narrow scope affected by wide limitations.[29] According to Graham, the P.D.P.A. applies to a part of private life, and has several exceptions.[30] He argues that the exemption of the government from application

[26] Oscar and Orville written a paper to address how can balance the right to privacy and the need for research to advance science to be headed by scientific community. They have discussed and examined seven principles to address the issue of growing imbalance between the need for research and privacy. *See* Oscar M. Ruebhausen & Orville G. Brim, *Privacy and Behavioral Research*, 65 Colum. L. Rev. 1184 (1965).

[27] *See* Greenleaf, *supra* note 24, at 5; Greenleaf, *supra* note 9, at 3.

[28] Personal Data Protection Act, § 6(2) (2012):

> Notwithstanding paragraph (1)(a), a data user may process personal data about a data subject if the processing is necessary — (a) for the performance of a contract to which the data subject is a party; (b) for the taking of steps at the request of the data subject with a view to entering into a contract; (c) for compliance with any legal obligation to which the data user is the subject, other than an obligation imposed by a contract; (d) in order to protect the vital interests of the data subject; (e) for the administration of justice; or (f) for the exercise of any functions conferred on any person by or under any law.

[29] For more information, *see* Sidi Mohamed & Sonny Zulhuda, *Data Protection Challenges in the Internet of Things Era: An Assessment of Protection by P.D.P.A. 2010*, Int'l J. Gov't Commc'n, Dec. 2019, at 1; Greenleaf, *supra* note 9; Greenleaf, *supra* note 23.

[30] Greenleaf, *supra* note 9, at 11.

of the P.D.P.A., together with the concept of commercial transaction, will grant freedom to the courts and the Commissioner to interpret the scope of the Act.[31] Moreover, excluding the Government from the application of the legislation is against the main purpose of the P.D.P.A..[32] This approach was severely criticized by data protection law professionals, as Malaysia and Singapore are the only countries who exempted the government from the data protection regime.[33] These criticisms have been enhanced by an ongoing legal debate about the definition and boundaries of the Federal Government, and the categorization of departments under the State Governments.[34]

The silence of the P.D.P.A. has only added to this controversy. However, the Interpretation Acts of 1948 and 1967 have defined the Federal Government and State Government. Under Interpretation Acts 1948 and 1967, the Federal Government means the Government of Malaysia, including all the Ministries and the Prime Minister's Department. The State Government means a government of a state, including some organizations like the State Secretary's office, State Department, land and district offices and local authorities. The Government Proceedings Act 1956 has the same definition of Government.

The presence of these definitions suggests that the wide criticism of the exemption of the Federal and State Governments from the application of the Act is perhaps a political issue with no legal concern.[35] However, the exemption remained a contentious issue since the moment of drafting of the Personal Data Protection Bill (2001). At the time, Mohamed Nor, the officer responsible for the data protection in the Ministry, had stated that the public sectors, with regard to the privacy issues, are adequately governed by the Official Secret Acts (1972) [hereinafter O.S.A.], Section 4 of the Statistics Act (1965), Section 19 of the National Land Code and Section 139 of the Consumer Protection Act (1999). Additionally, there are indirect protections of the data subjects by means of the disciplinary legislation and the administrative measures.[36]

[31] *Id.* at 12.

[32] Although most of governments collect a huge amount of individuals' data to develop their statistical bases through which, they will be able to plan and execute the governmental duties, however they have to observe and protect individuals' right over their personal data.

[33] Blume believes that a separate data protection law for the private and public sector at this situation would be a proper mechanism in order to empower the data subjects in protection of their personal data. *See* Peter Blume, *The Inherent Contradictions in Data Protection Law,* 2 Int'l Data Priv. L. 24, 24-33 (2012).

[34] Under the Interpretation Acts of 1948 and 1967, Federal Government means the Government of Malaysia including all ministries and Prime Minister's Department. The State Government means a government of a state including some organizations like the state secretary's office, state department, land and district offices and local authorities.

[35] Moreover, legally the nature and value of the personal information is the same whether uses by private or by the government.

[36] *See* Sarabdeen Jawahitha, Mohamed Ishak & Mohamed Mazahir, *E-Data Privacy and the Personal Data Protection Bill of Malaysia*, 7 J. Applied Sci. 732, 740 (2007).

The former Information, Communications, Culture and Arts Minister, Datuk Seri Dr Rais Yatim, also justifies the exemption of the government from the P.D.P.A. on the ground that the alternative rules and measures, such as O.S.A. and the laws pertaining to creditors, control the government.[37] Defenders believe that the Government exemption provides a right to process citizens' information for legal-administrative objectives. However, it was argued that O.S.A. applies to the government to protect official secrets like official documents, information and material for national security reasons, which has different scopes and objectives.[38]

The Singaporean model would be a good solution in order to minimize ambiguities and inconsistencies in the present model. The Ministry of Communications and Information of Singapore has developed the Personal Data Protection (Statutory Bodies) Notification 2013, which had entered into force on 20 March 2013.[39] It listed 67 public agencies which are exempted from the application of the Singapore Personal Data Protection Act 2012. In contrast, Section 45(2) (e) of the P.D.P.A. provided a broad exemption, which can be used as a measure to exempt government-owned companies from some of the provisions of the P.D.P.A..[40] Moreover, exclusion of the government could stem from the general exemption of non-commercial activities, which seems to be a defect of the P.D.P.A., and is not common under personal data protection laws.[41] This solution will result in confusion in practice. For example, a charity foundation engages in any commercial activity in order to provide scholarship funds for poor students. Sometimes, it is difficult to distinguish between commercial and non-commercial activities.[42] Moreover, social media are widely used by Malaysians. If we limit the P.D.P.A. to only commercial purposes, social media will be exempted, unless they are used for commercial activities.

The C.R.A.A. exemption under Section 4 on interpretation of the terms is not an appropriate position. It would be more appropriate to include this exemption under Section 3 which pertains to non-application of the Act. Furthermore, the business of Credit Tip Off Services Sdn. Bhd (CTOS), a big credit information agency and the primary source of credit referencing information before the C.R.A.A., has been criticised for opposing the P.D.P.A. principles. Moreover, it lacks the consent of the individuals for disclosure of their personal information, and they do not have access to their data.[43]

[37] *See* Sarabdeen Jawahitha, Mohamed Ishak & Mohamed Mazahir, *E-Data Privacy and the Personal Data Protection Bill of Malaysia*, 7 J. Applied Sci. 732, 740 (2007).
[38] *See, e.g.*, Zuryati Mohamed Yusoff, *The Malaysian Personal Data Protection Act 2010: A Legislation Note*, 9 N.Z. J. Pub. & Int'l L. 119, 133 (2011).
[39] This document is accessible at: http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:51ad3f3a-ae52-4a17-9a26-4b08ca7f88a4.
[40] *See* Greenleaf, *supra* note 9, at 3.
[41] The limitation of the efficacy of the Act to commercial transactions was not in the first Bill.
[42] *E.g.,* Munir, *supra* note 8, at cxxvii.
[43] *See* Ismail, *supra* note 16, at 110.

Although the exclusion of credit reference agencies from the application of the P.D.P.A. has been criticized since the individuals may lose in the process of collection and sharing of the personal information by these companies, according to Deputy Finance Minister Datuk Dr Awang Adek Hussin, these companies will be monitored by the Companies Act and the P.D.P.A. 2010.[44] However, the scope, features and adequacy of the credit reference agencies to protect personal data of individuals which typically constitute important information, is out of the scope of this research. Malaysian data processors are not subject to the P.D.P.A. and only data users are responsible. This will affect the adequacy requirement provided under Article 25 of the European Union Directive. It is also inconsistent with the EU General Data Protection Regulation [hereinafter G.D.P.R.]. The legal status of anonymous data is a challenging issue under the P.D.P.A, since it remains unclear whether the P.D.P.A. applies to such data. These issues will be analyzed under the definition of the personal data.

P.D.P.A. does not recognize extra territorial jurisdiction. In fact, the P.D.P.A. does not apply to the personal data of Malaysians that have been processed and used abroad. However, it has been suggested to include the phrase "personal data of Malaysians" under Section 3(2) on data processed abroad, in future amendments to the Act. Secondly, the term "intended" is not precise since the mere intention of further processing in Malaysia will not change the legal status of a foreign company to fall under the application of the P.D.P.A.. In fact, by virtue of mere intention, the P.D.P.A. will not apply to a foreign jurisdiction, as the P.D.P.A. does not recognize extra territorial jurisdiction, and it does not have any extraterritorial enforcement mechanism. Hence, it is suggested to amend this provision by omitting the phrase "is intended".

The Commissioner is also not empowered under the P.D.P.A. in line with his extensive duties. On the other hand, he is not answerable to the Parliament. This may be considered as a barrier against recognition of Malaysia as a safe country.[45] Zuryati argues that the reason why the Commissioner is not answerable to the Parliament is due to the doctrine of separation of powers under the Malaysian Constitution.[46] However, in most countries, the Commissioners are independent bodies and they are answerable to the parliaments.

[44] *See* Yusoff, *supra* note 38, at 124.

[45] Independence of data protection authorities plays a key role in complete execution of the data protection laws around the world especially in Europe. *See generally* Laima Jančiūtė, *European Data Protection Board: A Nascent E.U. Agency or an "Intergovernmental Club?"*, 10 Int'l Data Priv. L. 57, 57-75 (2020); Philip Schütz, *Accountability and Independence of Data Protection Authorities — A Trade-Off?, in* Managing Privacy Through Accountability 233, 233-60 (Daniel Guagnin et al. eds., 2012); Graham Greenleaf, *Independence of Data Privacy Authorities (Part II): Asia-Pacific Experience*, 28 Comput. L. & Sec. Rev. 121 (2012); Alexander Balthasar, *Complete Independence of National Data Protection Supervisory Authorities-Second Try: Comments on the Judgment of the C.J.E.U. of 16 October 2012, C-614/10 (European Commission v. Austria), with Due Regard to Its Previous Judgment of 9 March 2010, C-518/07 (European Commission v. Germany)*, 9 Utrecht L. Rev. 26, at 26 (2013).

[46] *See* Yusoff, *supra* note 38, at 128.

The 23rd International Conference of Data Protection Commissioners in September 2001 Paris, provided for "Criteria and Rules for Credentials Committee and the Accreditation Principles".[47] According to its accreditation principles, a data protection commissioner must be a public body to be independent and empowered legally and practically. Asia Pacific Privacy Authorities has also set similar requirements for the Commissioners, in order to fulfill the above mentioned accreditation principles. There is a question as to whether the personal data protection Commissioner of Malaysia is subject to the Act. In some countries, like the United Kingdom, Canada and New Zealand, the privacy regulators have displayed a privacy notice in their websites. It seems that the Malaysian Commissioner Office is a department under the Ministry, and moreover, the Commissioner's Office does not collect personal data for economic purposes. However, a long time after the establishment of the Commissioner's Office website, they have displayed a short, incomplete and vague privacy policy which is mostly regarding the use of the website.

The limitation of the P.D.P.A. to the private sector, and private sectors with respect to commercial transactions, can be regarded as defeating its purpose. Since there are many legal debates on the scope of the Federal and State government, there is a serious need to survey the laws and regulations to define the limits of the Federal and State Government. Perhaps there are some executable solutions before the amendments of the Act. It would be most helpful to follow the Singaporeans' mechanism to enumerate the authorities and departments that fall under the category of the Federal and State government through an order issued by the Commissioner. Furthermore, implementation of a code of practice on privacy protection to be applied by the Federal and State governments may reduce these concerns.

REMARKS

Nowadays, data protection is a global concern, and Malaysia is not an exception. Under the data protection law, it is an individual's discretion to allow the data users to collect his/her data or not. If an individual consents, then he/she has the control right over his/her personal data during the processing stages. Although the Malaysian government has initiated the data protection legislation timely, the broad limitations provided under

[47] Amended in the 24th International Conference of Data Protection and Privacy Commissioners, September 2002, Cardiff (UK).

the P.D.P.A., along with the long time interval between drafting of the Bill, enactment and the late enforcement, have made the law problematic.

One of the most debatable and questionable parts of the P.D.P.A. is its application. The P.D.P.A. applies to the Malaysian private data users, or the data processed in Malaysia merely for the purpose of commercial activities. The P.D.P.A. has provided for total and partial exemptions. The Federal and State Governments, non-commercial activities, personal, family or household affairs, recreational purposes, credit reporting agencies, and information being processed outside Malaysia are exempted from the P.D.P.A. application.

These broad and vague total and partial exemptions were criticized as serious defects of the P.D.P.A. especially when compared to the EU approach. The P.D.P.A. has a very limited scope, which will eventually result in a weak personal data protection mechanism. Even if we forget about the explicit exclusion of the government, there are many exemptions, which, in practice, could exempt the government from certain principles.[48] For example, it seems that the exclusion of non-commercial activities from the application of the P.D.P.A. was another attempt to exclude the government. In the absence of any definition, it is highly suggested that the Minister or the Personal Data Protection Commissioner issue a clarification guideline defining the boundaries of the Federal and State Governments under the P.D.P.A.. Moreover, there is no blanket exemption from the security principle, data integrity principle, and retention principle for those broad partial exemptions.

The P.D.P.A. applies to private companies and for commercial activities only. Again, the definition and examples of commercial activities and non-commercial activities are another defect of the P.D.P.A. in practice. Moreover, the lack of any compensation for the victims of data breach and the lack of administrative fine to be applied by the Commissioner, are other shortcomings of the Act. While the popular approach all around the world is the independence of the commissioners, the Malysian Commissioner is not independent under the P.D.P.A.. He must report to the Minister and is not accountable to the Parliament.

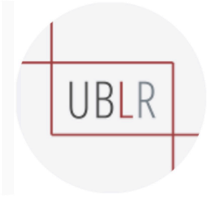
The Article 29 Working Party, which was an EU advisory body until the enforcement of the G.D.P.R. on 25 May 2018, has also provided for the adequacy requirements in its Working Paper-12. Based on these requirements, Malaysia lacks the adequacy criteria to be recognized as a safe country, although it holds some of those factors. According to the Working Party, a data protection law must apply to all organizations and individuals; however, the P.D.P.A. has excluded the Federal and State

[48] *See* Personal Data Protection Act, § 45 (2012).

Governments. Moreover, the law must apply to all kinds of processing, while the P.D.P.A. only applies to commercial transactions. An independent authority must monitor and supervise the compliance with the law; however, the Commissioner is not independent under the P.D.P.A.. Finally, the law must contain both compensation and sanctions, but the P.D.P.A. lacks any civil remedy mechanism.[49]

It is recommended that the enforcement of the G.D.P.R. must be considered by the Malaysian legislature in order to amend the P.D.P.A. provisions in line with the new technologies. However, a faster and an easier method is to include such new mechanisms under the Ministerial Orders. This will not affect the important function of the Commissioner to provide interpretations and guidelines and promote the P.D.P.A. through different training programs for both private sector and citizens. The development of data breach notification, appointment of data protection officer, compensation mechanism as well as data protection Impact Assessment would ultimately strengthen the adequacy and functions of the P.D.P.A..

[49] For more information on adequacy test issues see Edwin Lee Yong Cieh, *Limitations of the Personal Data Protection Act 2010 and Personal Data Protection in Selected Sectors*, *in* Beyond Data Protection 65 (Noriswadi Ismail & Edwin Lee Yong Cieh eds., 2013); Paul. M. Schwartz, *Global Data Privacy: The E.U. Way*, 94 N.Y.U. L. Rev. 771 (2019); Alex Boniface Makulilo, *Data Protection Regimes in Africa: Too Far from the European "Adequacy Standard"?*, 3 Int'l Data Priv. L. 42 (2013); Alex Boniface Makulilo, *One Size Fits All: Does Europe Impose Its Data Protection Regime on Africa?,* 37 Datenschutz und Datensicherheit 447 (2013).



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