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ARTICLES

FROM CARBON EMISSIONS, DATA PRIVACY, TO SELF-DRIVING: HOW TRANSNATIONAL CORPORATIONS SHAPE GLOBAL TECHNICAL STANDARDS AND GOVERNANCE

I-CHING CHEN*

I. INTRODUCTION

Global issues, including climate change, cyber-attacks, pandemics, and financial crises, traverse state boundaries, necessitating international cooperation to address them. However, International Organizations (IOs) often struggle to keep pace with these problems.¹ On the other hand, transnational corporations (TNCs) are important potential players in dealing with these urgent issues because of their power and expertise.² They control sectors within Global Value Chains (GVCs) by providing economic incentives, contracting,³ and distributing resources,⁴ forming *de facto* mandatory in the global sphere.⁵ In addition, TNCs can influence the decisions made by state governments via negotiation, lobbying, and experience sharing.⁶

For instance, the United States (US) and the European Union (EU) began automated vehicle programs to collaborate with corporations to collect information and design the regulation of the Automated Driving System (ADS).⁷ TNCs closely interact with IOs at the international level and are viewed

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1. James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 965 (1998).

2. David L. Levy & Aseem Prakash, *Bargains Old and New: Multinational Corporations in Global Governance*, 5 BUS. & POL. 131, 145 (2003).

3. PETER HERTENSTEIN, MULTINATIONALS, GLOBAL VALUE CHAINS AND GOVERNANCE: THE MECHANICS OF POWER IN INTER-FIRM RELATIONS 5 (2020).

4. *See id.* at 8.

5. Michael M. Du, *The Regulation of Private Standards in the World Trade Organization*, 73 (3) FOOD & DRUG L.J. 432, 433 (2018).

6. Philipp Pattberg, *The Influence of Global Business Regulation: Beyond Good Corporate Conduct*, 111 BUS. SOC. REV. 241, 246 (2006).

7. *See* James C. Owens, *Highly Automated Vehicles: Federal Perspectives on the Deployment of Safety Technology*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Nov. 20, 2019),

as the governors of international orders.⁸ Automotive TNCs, for example, work with IOs like the United Nations Economic Commission for Europe (UNECE), which sets international standards for the automotive industry.⁹ Their expertise grants them access to public rulemaking, enhancing their influence over social order. However, their involvement in public rulemaking has been criticized for lacking proper regulation and potentially undermining legitimacy.¹⁰

The influence of TNCs on society has drawn scholars' attention for years and is still a heated subject. Some scholars focus on understanding the interactions and power within GVCs, revealing the incentives and structures TNCs apply to control suppliers.¹¹ Others begin with "orders" and emphasize that private actors, like TNCs, will interfere with traditional nation-states' legal order and thus play critical roles in transnational legal ordering (TLO).¹² Another school focuses on public and private interactions, constructing a "transnational business governance interaction (TBGI) analytical framework" to classify different types of interactions.¹³

While these approaches could enrich our understanding of the interactions between TNCs and other actors, several questions remain unanswered. Although public and private interactions have existed for a long time, little research has been done to analyze the dynamic of their interactions, which could illuminate why private power expands and how to prevent adverse outcomes. Most existing studies focus on the interaction dynamic between TNCs and domestic governments or emerging global institutions rather than traditional IOs.¹⁴ Despite criticisms of the effectiveness of IOs, their ongoing interactions with TNCs offer ample evidence to investigate these dynamics. Furthermore,

<https://www.nhtsa.gov/congressional-testimonies/highly-automated-vehicles-federal-perspectives-deployment-safety>[<https://perma.cc/65A9-B2CW>]; *About L3Pilot*, L3 PILOT DRIVING AUTOMATION, <https://l3pilot.eu/about.html> [<https://perma.cc/F2UP-7UV5>] (last visited Aug. 6, 2024); *Safe and Connected Automation in Road Transport*, EUR. COMM'N, <https://trimis.ec.europa.eu/project/safe-and-connected-automation-road-transport> [<https://perma.cc/EX6M-SLUV>] (last visited Aug. 6, 2024).

8. See Raymond Saner & Lichia Yiu, *Business — Government — NGO Relations: Their Impact on Global Economic Governance*, in *GLOBAL GOVERNANCE AND DIPLOMACY* 85, 93-94 (Andrew F. Cooper et al. eds, 2008).

9. See the analysis in the section II.

10. Muhammad Budiana, *The Influence of Multinational Corporations on Global Political Decisions*, 1 J. STUDENT COLLABORATION RES. 106, 107 (2024).

11. Private governance and power theory fall within this category. Cf. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 913 (2007); Mark P. Dallas, Stefano Ponte & Timothy J. Sturgeon, *Power in Global Value Chains*, 26(4) REV. OF INT'L POL. ECON. 666, 667-668 (2019).

12. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders in TRANSNATIONAL LEGAL ORDERS* 3, 23 (Terence C. Halliday & Gregory Shaffer ed., 2015).

13. The six elements are "agenda-setting, norm formation, implementation, monitoring and information-gathering, enforcement, and evaluation and review." Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1, 6 (2014).

14. See REBECCA SCHMIDT, *REGULATORY INTEGRATION ACROSS BORDERS: PUBLIC — PRIVATE COOPERATION IN TRANSNATIONAL REGULATION* 15 (2018).

the increasing interactions underscore the irreplaceable role of IOs globally, warranting further research.

In the technological era, TNCs have increased opportunities to engage with public actors on a global scale. Their technological knowledge often acts as a golden ticket for them to enter the rulemaking process, but how does this become a determining factor contributing to the expansion of private power? Or is expanding private power an illusion since our reliance on TNCs in public rulemaking has long persisted? In addition, could the involvement of TNCs, which are without a democratic foundation, undermine the legitimacy of the process and the outcome? If so, how could we hold these actors accountable and mitigate the risk resulting from the interaction?

Global Administrative Law (GAL) provides sufficient ground to answer these questions. Introduced by Benedict Kingsbury et al., GAL conceptualizes global society as a “global administrative space,”¹⁵ and establishes a legitimacy framework to examine the output and the procedure. According to GAL, international agents have already executed administration without state delegation,¹⁶ extending beyond the Westphalian international system.¹⁷ GAL recognizes private actors as global agents who could perform public authority.¹⁸ Based on these assumptions, GAL identifies five types of global administrations: formal international organizations, international treaties and arrangements, governmental networks, hybrid administration, and private bodies.¹⁹ However, these structures may produce legitimacy and accountability problems, requiring further research.²⁰ GAL applies traditional administrative law tools, including due process, transparency requirement, etc.,²¹ to analyze these administrative processes, which are divided first into three layers: institutional design, norms and decisions, and procedure rules.²² The concept of legitimacy in GAL originated in legal positivism, combined with Lon Fuller’s “inner morality of law.”²³ This concept has been transformed into basic principles, such as participation, transparency, and accountability, which global

15. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 1 (2006).

16. Christoph Möllers, *Constitutional Foundations of Global Administration*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 107, 109 (Sabino Cassese ed., 2016).

17. Ming-Sung Kuo, *Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law*, 10 INT’L J. CONST. L. 1050, 1052 (2012).

18. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW. & CONTEMP. PROBS. 15, 19-20 (2005).

19. Ming-Sung Kuo, *Law-Space Nexus, Global Governance, and Global Administrative Law*, in THE OXFORD HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION 328, 331 (Diane Stone & Kim Moloney eds., 2019).

20. Krisch & Kingsbury, *supra* note 15, at 1.

21. Kuo, *supra* note 17, at 1052.

22. Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 34-36 (2009).

23. Kuo, *supra* note 17, at 1061.

actors are expected to follow when performing administrative functions.²⁴

This article uses automotive TNCs, such as BMW, Daimler, and Volkswagen, as a case study to explore the dynamic of their interactions with international organizations. The automotive industry has existed for over a century and has become one of the world's largest manufacturing sectors.²⁵ Their car production has profoundly influenced various aspects of society—from personal safety to environmental protection. Cars are dominant tools in worldwide transportation and their structures and designs directly impact life safety. The integration of automated driving technologies, which involves artificial intelligence (AI), data collection, and cybersecurity, raises concerns about personal privacy and digital security.

Furthermore, the design of AI systems is still a controversial issue, implicating safety, fairness, and ethics. These concerns become transnational when automotive TNCs produce and sell faulty design cars worldwide. From a societal perspective, car production has long been labeled as a leading contributor to carbon emissions and is required to reduce emission by design.²⁶ In addition, governance over automated driving systems—a relatively advanced AI application—may set precedents for governing other AI applications. Owing to their far-reaching influence on society and strong power over supply chains, the author believes that automotive TNCs serve as an appropriate representation of TNC power. They also provide abundant evidence for researching the interactive dynamics between TNCs and IOs. Given the extensive experience of automotive TNCs in participating in public standard-setting processes, their interactions specifically are examined with the World Forum for Harmonization of Vehicle Regulations (WP.29), a permanent regulatory forum under UNECE that is in charge of establishing technical frameworks for motor vehicles and their equipment.²⁷ As part of the UN system based on traditional international law, WP.29 serves as a valuable context for understanding how conventional international agents respond to the growing influence of private power.

Data used here have been sourced from “GlobalAutoRegs.com,” a database that collects and classifies meeting documents launched by WP.29.²⁸ This research supposes that the volume of documents submitted by TNCs to WP.29 positively correlates with the closeness of their relationship. In addition to quantitative analysis, the author applied GAL legitimacy principles to evaluate

24. Krisch & Kingsbury, *supra* note 15, at 4-5.

25. Jason F. Bell & Lorenza Monaco, *Power and Supply Chain Development in the South African and Thai Automotive Industries: What Lessons Can be Learnt?*, 33 J. INT'L DEVELOP. 457, 461 (2021).

26. Samuel Klebaner, *Isolated Car Manufacturers? The Political Positions of the Automotive Industry on the Real Driving Emissions Regulation*, 18 INT'L J. AUTO. TECH. & MGMT. 119, 120 (2018).

27. WP.29 – Introduction, U.N. ECON. COMM'N FOR EUR., <https://unece.org/wp29-introduction> [<https://perma.cc/AWA4-CPZE>] (last visited Aug. 6, 2024).

28. *About Us*, GLOBALAUTOREGS, <https://globalautoregs.com/about> [<https://perma.cc/7ECR-JD8E>] (last visited Aug. 6, 2024).

the quality of standard-setting procedures involving TNC participation. Finally, it offers suggestions for mitigating legitimate risks associated with TNC involvement.

II. HOW TRANSNATIONAL CORPORATIONS STEER INTERNATIONAL STANDARD-SETTING

The rise in international trade has made it essential for countries to harmonize regulations, leading the international community to establish institutions to establish common standards.²⁹ Drawing on its expertise in coordinating different legal instruments in Europe, UNECE has taken this responsibility and the lead in circulating relevant regulatory activities at the international level.³⁰ It established the Inland Transport Committee to deal with the cross-border issues arising from transportation. WP.29, a global forum under the Committee, harmonizes standards and procedures associated with vehicle type approval among countries.³¹ Establishing such standards and procedures requires understanding background knowledge of technology, thus creating room for TNCs to engage in this process.

i. Automotive TNCs in UN Global Technical Regulations

According to three UN agreements adopted in 1958, 1997, and 1998,³² WP.29 is responsible for maintaining UN Regulations, UN Global Technical Regulations (UN GTRs), and UN Rules.³³ UN Regulations are under the 1958 agreements, focusing on vehicle safety and environmental issues.³⁴ The regulatory instruments built by the UN Regulations are: performance-oriented test requirements, type approval, the conformity of production, and the mutual recognition of the type approvals among Contracting Parties.³⁵ UN GTRs under

29. Joseph A. Clougherty & Michał Grajek, *International standards and international trade: Empirical evidence from ISO 9000 diffusion*, 36 INT'L J. INDUS. ORG 70, 70 (2014).

30. *Mission*, U.N. ECON. COMM'N FOR EUR., <https://unece.org/mision> [<https://perma.cc/3DSF-V7EQ>] (last visited Feb. 11, 2025); *United Nations Economic Commission For Europe (UNECE)*, U.N. INDUS. ORG., <https://hub.unido.org/multilateral-agencies/unece> [<https://perma.cc/X5DD-GQTN>] (last visited Feb. 11, 2025).

31. *WP.29 – Introduction*, *supra* note 27.

32. Agreement concerning the Adoption of Harmonized Technical UN Regulations for Wheeled Vehicles, Equipment and Parts which can be Fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these UN Regulations [hereinafter 1958 Agreement], Mar. 20, 1958, 335 U.N.T.S. 211; Agreement Concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of Such Inspections, Nov. 13, 1997; Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles, June 25, 1998, 2119 U.N.T.S. 129.

33. *WP.29 – Introduction*, *supra* note 27.

34. 1958 Agreement art. 1 ¶ 1, Mar. 20, 1958, 335 U.N.T.S. 211.

35. *WP.29 – Introduction*, *supra* note 27.

the 1998 Agreement, in contrast, provide a system with harmonized performance-related requirements as well as test procedures without type approvals and their mutual recognition process.³⁶

The UN Rules establish standards for periodic technical vehicle inspections and create a certificate mechanism for contracting parties to recognize reciprocally.³⁷ These three regulatory instruments cover numerous technical topics. Therefore, WP.29 created six permanent Working Parties (GRs) to handle these issues: Noise and Tyres (GRBP), Lighting and Light-Signaling (GRE), Pollution and Energy (GRPE), Passive Safety (GRSP), General Safety Provisions (GRSG), and Automated and Connected Vehicles (GRVA).³⁸ These Working Parties assist WP.29 in preparing regulatory proposals and conducting research on their respective topics.³⁹ In addition to these permanent bodies, WP.29 can set up Informal Working Groups (IWGs) to tackle specific technical issues. Depending on the missions, these IWGs may belong to GRs or directly work with WP.29.⁴⁰

WP.29 frequently needs to amend or develop regulations to maintain the three legal instruments. When such a need arises, GRs do primary research and provide progress reports to WP.29. Upon receiving these reports, WP.29 instructs the GR to conduct detailed research.⁴¹ Once the GR completes tasks assigned by WP.29, it provides regulatory recommendations to WP.29.⁴² In practice, initial regulatory proposals usually come from IWGs and are delivered to GRs as informal documents.⁴³ If the GR agrees to consider proposals, these documents are rewritten into a formal format.⁴⁴ After thorough review and deliberation by the GRs, the documents are submitted to WP.29 for discussion and approval.⁴⁵

WP.29 sessions adopt a consensus approach to decision-making, except for immediate decisions which require a simple majority vote when consensus cannot be reached.⁴⁶ The GRs also adopt a consensus approach during the decision-making process.⁴⁷ If they cannot reach a consensus, they can consult

36. *Id.*

37. *Id.*

38. *Id.*

39. See *Working Party on Noise and Tyres – Introduction*, U.N. ECON. COMM'N FOR EUR., <https://unece.org/transportvehicle-regulations/working-party-noise-and-tyres-introduction> [<https://perma.cc/7TGP-5BX7>] (last visited Aug. 6, 2024).

40. *WP.29 – Introduction*, *supra* note 27.

41. *WP.29 – Meetings*, U.N. ECON. COMM'N FOR EUR., https://unece.org/transport/vehicle-regulations/wp29-meetings#accordion_4_6 [<https://perma.cc/35X2-6FDG>] (last visited Aug. 6, 2024).

42. U.N. ECON. COMM'N FOR EUR., WORLD FORUM FOR HARMONIZATION OF VEHICLE REGULATIONS (WP.29): HOW IT WORKS - HOW TO JOIN IT, at 15, ECE/TRANS/289/Rev.1, U.N. Sales NO. E.22.II.E.8 (4th ed, 2022).

43. *WP.29 – Introduction*, *supra* note 27.

44. *Id.*

45. *Id.*

46. *Id.*

47. *WP.29 – Meetings*, *supra* note 41.

WP.29.⁴⁸ As for IWGs, WP.29 does not explicitly mention their decision-making approach.⁴⁹ However, later research noted that they also use a consensus approach according to their meeting records.⁵⁰

As an organ of the UN, a state-based international organization, WP.29 only considers state members as official participants with the right to make decisions.⁵¹ Non-state actors can only “participate in a consultative capacity” in WP.29.⁵² Thus, they can express their opinions in forums but not participate in decision-making. Furthermore, WP.29 only allows those actors accredited by the Economic and Social Council of the United Nations (ECOSOC) to participate in forums.⁵³ In principle, only non-governmental organizations, non-profit organizations, or voluntary organizations are qualified to receive ECOSOC accreditation.⁵⁴ Additionally, these organizations must adopt a democratic constitution and have transparent decision-making to be assigned consultative status by ECOSOC.⁵⁵ Only a few accredited non-state actors (ranging from six to fifteen, depending on the issue) participate in WP.29 sessions, and even fewer are involved in its GRs and IWGs.⁵⁶ The International Organization for Standardization (ISO), the Society of Automotive Engineers (SAE), and the International Organization of Motor Vehicle Manufacturers (OICA), for example, often participate in WP.29.⁵⁷

While TNCs are neither state representatives nor accredited actors, they can still find ways to participate in WP.29. Based on the *Terms of Reference and Rules of Procedure of the World Forum for Harmonization of Vehicle Regulations (WP.29)*, two approaches exist for actors without consultative status to engage.⁵⁸ One is through proactive engagement, where TNCs can apply directly to the WP.29 secretariat.⁵⁹ The other is through a reactive approach, where TNCs can participate if they receive an invitation from the chairperson of the meetings.⁶⁰

48. *WP.29 – Introduction*, *supra* note 27.

49. *See WP.29 – Meetings*, *supra* note 41.

50. *See* section II(ii) in this article.

51. U.N. ECON. COMM’N FOR EUR., WORLD FORUM FOR HARMONIZATION OF VEHICLE REGULATIONS (WP.29): TERMS OF REFERENCE AND RULES OF PROCEDURE 2, ECE/TRANS/WP.29/690/Rev.2, rule 1 (d) (e), at 3 (1999).

52. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 1.

53. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: TERMS OF REFERENCE, *supra* note 51, at 5.

54. *Introduction to ECOSOC Consultative Status*, U.N. ECO. & SOC. COUNCIL [ECOSOC], <https://ecosoc.un.org/en/ngo/consultative-status> [<https://perma.cc/HBJ3-3Q7A>] (last visited Aug. 6, 2024).

55. *Id.*

56. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 1.

57. ECOSOC, List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as of 31 December 2022, E/2022/INF/5 (Apr. 4, 2023).

58. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: TERMS OF REFERENCE, *supra* note 51, at 5.

59. *Id.*

60. *Id.*

WP.29 adheres to traditional international law, from organization construction to participatory mechanisms, emphasizing centralized, hierarchical, and state-based institutions. The philosophy behind such an institution is to ensure states with democratic foundations make final decisions and be held accountable.⁶¹ The decision made by democratic representatives is believed to contribute to the legitimacy of IOs. In this model, WP.29 offers non-state actors' roles in providing technical references and opinions but excludes them from decision-making. Moreover, ECOSOC accreditation ensures that non-state actors in forums represent the public interest rather than their personal agendas.⁶²

However, the practical operations of IOs have evolved beyond these state-based institutions. Their administrative structures have expanded and intertwined with different global actors, challenging the democratic delegation theories to fully explain the legitimacy of IOs and their outputs.⁶³ While WP.29 restricts TNCs from participating in WP.29 sessions and GRs, they can be activated in IWGs, where initial regulatory proposals hatch.⁶⁴ Evidence presented in the following section demonstrates that TNCs not only participate in WP.29, but also have the potential to influence regulatory proposals within the organization.

ii. An Empirical Assessment on Automotive TNCs in WP.29

This section discusses the actual interaction between TNCs and WP.29 during the standard-setting process by examining the situation of their participation rather than through OICA, an international industry association. While OICA is generally viewed as representing the industry's voice, the meaning of its participation differs from that of TNCs.⁶⁵ Therefore, such situations are excluded from the discussion.

A. Historical Trajectories of the TNCs' Participation

The article analyzes the materials submitted by TNCs to WP.29 and found

61. Grace Skogstad, *Global Public Policy and the Constitution of Political Authority in* OXFORD HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION 23, 26-28 (Diane Stone & Kim Moloney eds., 2019).

62. See Economic and Social Council Res 1996/31, Consultative relationship between the United Nations and non-governmental organizations, ¶ 8 (Jul. 25, 1996).

63. Möllers, *supra* note 16, at 107.

64. See Section II(ii)(B) in this article.

65. In fact, OICA is required to follow certain prerequisite set by the UN to achieve ECOSOC accreditation, such as the alignment of institutional goal with the UN and establishing democratic constitution and transparent decision-making process in the institution. These requirements transform the nature of OICA from representing only private interest and thus differ from the participation of TNCs.

the following facts (*see* Figure 1).⁶⁶ The TNCs submitted the first document in 2007, which was written by BMW to IWG (Informal Working Group on Tyre Pressure Monitoring, hereinafter TPM).⁶⁷ A slight increase in submissions occurred in 2011 because BMW, Daimler, GM, and Volvo all submitted documents.⁶⁸ A spike occurred in 2015, followed by a steep decline in 2016.⁶⁹ In 2015, BMW was a significant contributor, submitting half of the materials to WP.29, followed by Volkswagen, who submitted almost a quarter of the

66. This research focuses on automotive TNCs listed below: BMW, Daimler, GM, Ford, Volkswagen, Volvo, Honda, Hyundai, Mercedes-Benz, Toyota. These TNCs not only cover nearly all submission in WP.29 but also possess significant market share dominance in the automotive industry.

67. BMW, *TBW, a TPMS Alternative, CO2 Reduction by Correct and Constant Tyre Pressure as a First Step, Proposal for Justification*, 1st Informal Working Grp. on Tyre Pressure Monitoring [TPM] session, TPM-01-03 (Dec. 3, 2007).

68. *e.g.*, BMW, *Hydrogen Storage System Qualification Requirements and Testing*, 11th Informal Working Grp. of Hydrogen and Fuel Cell Vehicle Safety [SGS] session, SGS-11-05 (Feb. 11, 2011); DAIMLER, *Proposal for Structuring the RESS Safety Requirements: Revision 2*, 2nd Informal Working Grp. of Rechargeable Energy Storage Sys. [REESS] session, REESS-02-02/Rev.2 (Jan. 7, 2011); VOLVO GROUP et al., *Swedish stakeholders' Concerns with RESS Safety Requirements Proposal*, 4th Informal Working Grp. of Rechargeable Energy Storage Sys. [REESS] session, REESS-04-13 (Jun. 23, 2011).

69. The statistic was based on the documents listed in: *Submissions–BMW Group*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/278-bmw?show=latest_documents [<https://perma.cc/BGQ7-29T2>] (last visited Aug. 6, 2024); *Submissions–BMW Research & Innovation Center*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/132-bmw-fiz?show=latest_documents [<https://perma.cc/HN2L-DLEE>] (last visited Aug. 6, 2024); *Submissions–Daimler AG*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/100-daimler?show=latest_documents [<https://perma.cc/RM3C-DFT9>] (last visited Aug. 6, 2024); *Submissions–General Motors Corporation*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/84-gm?show=latest_documents [<https://perma.cc/C723-7ZG>] (last visited Aug. 6, 2024); *Submissions–Ford Motor Company*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/233-ford?show=latest_documents [<https://perma.cc/A4HL-9YYM>] (last visited Aug. 6, 2024); *Submissions–Volkswagen AG*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/234-vw?show=latest_documents [<https://perma.cc/SE89-428Y>] (last visited Aug. 6, 2024); *Submissions–Volvo Cars*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/437-volvo-cars?show=latest_documents [<https://perma.cc/CGU9-KVXR>] (last visited Aug. 6, 2024); *Submissions–Volvo Group*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/188-volvo-group?show=latest_documents [<https://perma.cc/2LRW-P48>] (last visited Aug. 6, 2024); *Submissions–Honda Motor Co., Ltd.*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/256-honda?show=latest_documents [<https://perma.cc/V9BR-W3EX>] (last visited Aug. 6, 2024); *Submissions–Hyundai Motor Company*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/276-hyundai?show=latest_documents [<https://perma.cc/CTG5-BH5U>] (last visited Aug. 6, 2024); *Submissions–Mercedes-Benz*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/290-mercedes-benz?show=latest_documents [<https://perma.cc/9U42-CWHF>] (last visited Aug. 6, 2024); *Submissions–Toyota Motor Corporation*, GLOBAL AUTO REGS, https://globalautoregs.com/participants/388-toyota?show=latest_documents [<https://perma.cc/Q4L8-STHU>] (last visited Aug. 6, 2024). The total number of documents in 2015 was 41, but it declined to 9 in 2016.

documents.⁷⁰ After 2016, submissions steadily increased, reaching a peak in 2018 and 2019 before slightly declining in 2020.⁷¹ During this period, BMW and Ford submitted the most documents in 2018, though their submission volume was only marginally higher than those of other corporations.⁷² In 2019, GM was the leading corporation to submit documents to WP.29, but these contributions accounted for less than one-third of the total submissions.⁷³

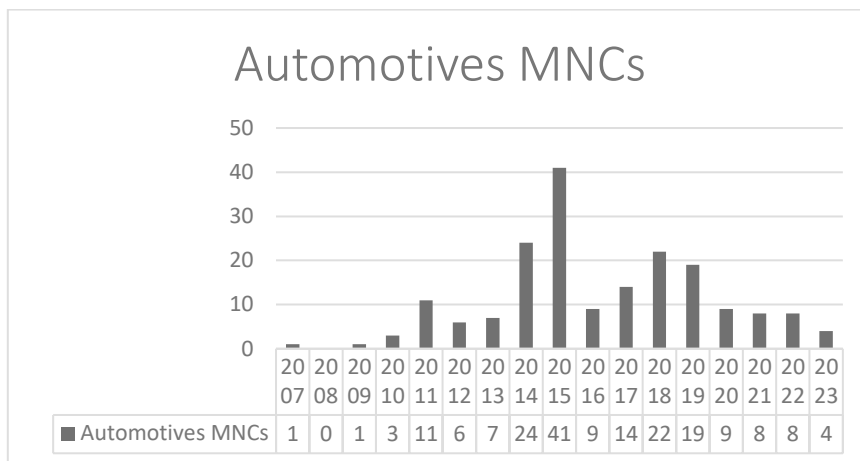


Figure 1: The number of documents submitted by TNCs.

B. Forms and Natures of Interaction Between TNCs and WP.29

The trend of TNC participation demonstrated that TNCs successfully penetrated state-based IOs. Additionally, certain corporations, such as BMW, Daimler, and Volvo were invited to WP.29 almost annually, demonstrating an intensive interaction between TNCs and WP.29.⁷⁴ A closer examination of these documents uncovered the unique features of their interactions, which contributed to realizing the roles and powers of TNCs in WP.29.⁷⁵

70. Based on the calculation described in footnote 69. In 2015, BMW (including the BMW Research & Innovation Center) submitted 20 documents, while Volkswagen submitted 10 documents.

71. Based on the calculation described in footnote 69. The total number of documents in 2018 was 22 and 19 in 2019, but it declined to 9 in 2020.⁶¹

72. Based on the calculation described in footnote 69. BMW (including the BMW Research & Innovation Center) and Ford both submitted 6 documents in 2018.

73. Based on the calculation described in footnote 69. GM submitted 6 documents in 2019.

74. See *supra* note 69 (listing documents by GLOBAL AUTO REGS).

75. See the analysis in the Section II(iii) in this article.

1. *TNCs Participated in Diverse Controversy Topics but Remained in Informal Meetings*

When examining the documents submitted during peak periods, distinct topics emerge, generating abundant discussion. For example, Daimler and Volvo separately submitted proposals to the IWG for Rechargeable Energy Storage Systems, proposing safe methods to utilize electric energy in 2011.⁷⁶ Concurrently, BMW participated in the IWG of Hydrogen and Fuel Cell Vehicle Safety to provide testing methods on hydrogen storage systems.⁷⁷ These IWGs handled the technical issues around reducing CO₂ emissions, viewed as a “prior mission by the global automotive industry.”⁷⁸ OICA made such a claim to respond to the pressure from worldwide governments, though it also asserted that regulating the automotive industry was not adequate to achieve the goal.⁷⁹

The second peak occurred from 2014 to 2015, during which WLTP addressed vehicle emissions. This period saw significant interaction among TNCs, likely due to the controversy between TNCs and state governments over emissions reduction policies. In 2014, the EU constructed a framework on climate and energy, stating that greenhouse gas emissions should be reduced by at least 40% by 2030.⁸⁰ Similarly, the UN adopted Sustainable Development Goals (SDGs) to urge worldwide governments to protect the environment.⁸¹ The comment from BMW to the EU, arguing that the EU policy was merely a political statement without scientific support, accentuated the ongoing disagreement between TNCs and state governments.⁸²

From 2017 to 2019, the final peak saw TNCs engaging in IWGs focused on vehicle emissions and software updates. According to the OICA 2018 Statement, many countries have adopted environmental policies.⁸³ These put pressure on the automobile industry, but such pressure became an extreme

76. See BMW, *Hydrogen Storage System*, *supra* note 68.

77. *Id.*

78. Press Release, Int’l Org. of Motor Vehicle Manufacturers [OICA], Patrick Blain Elected President Of The International Organization Of Motor Vehicle Manufacturers (OICA), at 1 (Feb 23, 2011), <https://oica.net/wp-content/uploads/pb-press-release.pdf> [<https://perma.cc/C7K2-KM9Z>].

79. *Id.*

80. *EU Leaders Agree 2030 Climate and Energy Goals*, EUR. COMM’N (Oct. 24, 2014), https://climate.ec.europa.eu/news-your-voice/news/eu-leaders-agree-2030-climate-and-energy-goals-2014-10-24_en [<https://perma.cc/7G6N-K6AV>].

81. *What are the Sustainable Development Goals?*, U.N. DEV. PROGRAMME, <https://www.undp.org/european-union/sustainable-development-goals> [<https://perma.cc/GY3R-5XZM>] (last visited Aug. 6, 2024).

82. BMW, *WLTP: BMW Comment on Drive Trace Correction*, 8th WLTP session, WLTP-08-46 (Dec. 9, 2014).

83. OICA, Statement Delivered by OICA President Matthias Wissmann at the OICA Press Conference in Geneva on March 7, 2018, at 1-2 (Mar. 7, 2018), <https://www.oica.net/wp-content/uploads/Press-Release-OICA-Conference-Geneva-March-2018.pdf> [<https://perma.cc/QX58-R6XG>].

challenge to the industry when developing the technology.⁸⁴ Therefore, the automobile industry appealed to governments for a balancing policy on environmental protection and economic development.⁸⁵ A statement in 2019 further mentioned that the automobile industry was facing challenges regarding data privacy, cybersecurity, and new mobility technologies.⁸⁶ These comments reflected the industry's perspective on government policies and its responses to them. From those cases, we infer that TNCs become more actively engaged in IOs when a controversy arises between the industry and governments.

An analysis of individual company participation shows that companies were invited to different IWGs and were responsible for distinct tasks within those groups. For instance, BMW participated in the IWG of Worldwide Harmonized Light Vehicles Emissions Test Procedure (hereinafter WLTP) from 2014 to 2018, producing forty documents to assist with the standard-setting process.⁸⁷ In addition, during 2014 and 2015, nearly all of BMW's submissions were related to WLTP.⁸⁸ After 2018, BMW shifted its focus to the IWG of the Particle Measurement Programme (PMP).⁸⁹ Likewise, Volkswagen was involved in WLTP from 2014 to 2018 and began engaging in PMP as early as 2015, but its document amounts were lower than BMW's.⁹⁰ Ford also participated in WLTP but diversified its efforts into PMP, the Informal Working Group on Vehicle Interior Air Quality (VIAQ), and the Informal Working Group on Automated Vehicle Signaling Requirements (AVSR) after 2018.⁹¹

In contrast, GM contributed to the IWG of Software Update Processes and Management Systems (hereinafter TFCS) and became the main participant in

84. *Id.*

85. *Id.* at 4.

86. OICA, *Mr FU Bingfeng Elected President of the "World Organization for the Automotive Industry" OICA* (Nov. 28, 2019), <https://www.oica.net/wp-content/uploads/OICA-press-release-GA-November-2019.pdf> [<https://perma.cc/6CZQ-GZNX>].

87. *WP.29 – Contracting Parties and Contributors*, GLOBAL AUTO REGS, <https://participants/278-bmw> [<https://perma.cc/QKJ6-JAFS>] (last visited Aug. 6, 2024).

88. BMW GROUP, *Submissions2014*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/278-bmw?show=documents&year=2014> [<https://perma.cc/VF4T-XSYQ>] (last visited Aug. 6, 2024); BMW GROUP, *Submissions2015*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/278-bmw?show=documents&year=2015> [<https://perma.cc/HRR5-XPU4>] (last visited Aug. 6, 2024).

89. *Id.*

90. *About VW*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/234-vw> [<https://perma.cc/NY4N-FTTQ>] (last visited Aug. 6, 2024).

91. *Submissions–Ford Motor Company–2018*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/233-ford?show=documents&year=2018> [<https://perma.cc/8385-PTL9>] (last visited Aug. 6, 2024); *Submissions–Ford Motor Company–2019*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/233-ford?show=documents&year=2019> [<https://perma.cc/4C9N-EYW9>] (last visited Aug. 6, 2024); *Submissions–Ford Motor Company–2021*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/233-ford?show=documents&year=2021> [<https://perma.cc/V8SB-2DQE>] (last visited Aug. 6, 2024).

WLTP in 2019.⁹² Other corporations, such as Daimler, Hyundai, and Toyota, played roles in other IWGs.⁹³ Meeting documents demonstrated that TNCs rarely joined the same IWGs, instead contributing to different technical aspects and standard-setting processes.⁹⁴ Additionally, TNCs were allowed to present ideas, make statements, and comment on proposals in these groups.⁹⁵

Despite their deep involvement in multiple IWGs, TNCs rarely participated directly in formal meetings, such as the GRs and WP.29 sessions.⁹⁶ In exceptional cases, documents prepared by TNCs were submitted to the GR, but TNCs were still not invited to these formal meetings.⁹⁷ BMW is one of the few companies with such an experience. In 2014, BMW collaborated with ISO to prepare slides recommending ISO testing standards to the GRBP.⁹⁸ According to the meeting record of the GRBP session, BMW was not on the participant

92. WLTP had four meetings in 2019. According to the meeting documents listed in: *Meeting Documents – Worldwide Harmonized Light Vehicles Emissions Test Procedure | Session 25 | 7 Jan 2019*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/1243?show=documents> [<https://perma.cc/5PC9-9HB7>] (last visited Aug. 6, 2024); *Worldwide Harmonized Light Vehicles Emissions Test Procedure | Session 26 | 15-18 Apr 2019*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/1299?show=documents> [<https://perma.cc/DA6K-T55Y>] (last visited Aug. 6, 2024); *Worldwide Harmonized Light Vehicles Emissions Test Procedure | Session 27 | 20-21 May 2019*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/1359?show=documents> [<https://perma.cc/5STJ-F8GA>] (last visited Aug. 6, 2024); *Worldwide Harmonized Light Vehicles Emissions Test Procedure | Session 28 | 23-27 Sep 2019*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/1373?show=documents> [<https://perma.cc/GS8R-6GF3>] (last visited Aug. 6, 2024).

93. *Submissions–Toyota Motor Corporation*, GLOBALAUTOREGS, https://globalautoregs.com/participants/388-toyota?show=latest_documents [<https://perma.cc/AX8T-35YY>] (last visited Aug. 6, 2024); *Submissions–Hyundai Motor Company*, GLOBALAUTOREGS, https://globalautoregs.com/participants/276-hyundai?show=latest_documents [<https://perma.cc/458R-PTRM>] (last visited Aug. 6, 2024); *Submission–Daimler AG*, GLOBALAUTOREGS.COM, https://globalautoregs.com/participants/100-daimler?show=latest_documents [<https://perma.cc/3QA2-4YKV>] (last visited Aug. 6, 2024)

94. *e.g.*, In the meeting of Informal Group on Rechargeable Energy Storage Systems, you could find Daimler’s proposal but no other companies. *Meeting Documents–Informal Group on Rechargeable Energy Storage Systems | Session 6 | 10-12 Jan 2012*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/273?show=documents> [<https://perma.cc/N9WE-2QHZ>] (last visited Aug. 6, 2024). In the Global Technical Regulation for Quiet Road Transport Vehicles Informal Group, you could find only Ford, Daimler, and Mercedes-Benz. *Meeting Documents–Global Technical Regulation for Quiet Road Transport Vehicles Informal Group | Session 3 | 16-18 Apr 2013*, GLOBALAUTOREGS, <https://globalautoregs.com/meetings/429?show=documents> [<https://perma.cc/K8AR-WQ6S>] (last visited Aug. 6, 2024).

95. *e.g.*, Toyota, Presentation: Electric Vehicles: Heavy Duty Vehicle Requirements for HFCV Discussion, 2nd GTR13 session, Doc. GTR13-02-12 (Feb. 05, 2018); Daimler, Proposal: Daimler Proposal for RESS Vibration Test, 4th REESS session, Doc. REESS-04-04 (June 30, 2011).

96. According to the document lists for each company *supra* note 69, BMW submitted documents to GRs. See International Organization for Standardization, ISO 362-3: Indoor-testing of pass-by noise, 60th GRB session, Doc. GRB-60-09 (Aug. 29, 2014).

97. *Id.*

98. *Id.*

list, and ISO presented the slides.⁹⁹

2. *The Function of TNCs in WP.29: Initiate the Regulatory-developing process and Set the Tone*

TNCs prepare three types of documents for WP.29: technical presentations, regulatory proposals, and proposal comments.¹⁰⁰ The majority were technical presentations containing experiment reports, testing methods elaborations, and technological investigations.¹⁰¹ Volkswagen's validation report on the testing method for WLTP fell into this group.¹⁰² The second-largest group was regulatory proposals, which aimed to integrate new techniques or testing approaches into existing regulations.¹⁰³ Consequently, the scope of amendments tended to be small and specific. These regulatory proposals frequently targeted GTR. For example, in 2014, BMW proposed a draft GTR provision for WLTP to add a new road-load testing method.¹⁰⁴ Building on the technique proposed by BMW in 2017, Ford issued new proposals to WLTP to revise the requirements based on its experimental data.¹⁰⁵ In cases where the proposal addressed issues partially outside the scope of existing regulations, it may cover a broader range of modifications. For example, GM and Tesla jointly submitted

99. U.N. Econ. Comm'n for Eur., Report of the Working Party on Noise, U.N. Doc. ECE/TRANS/WP.29/GRB/58 (Feb. 14, 2014).

100. *e.g.*, technical presentation: Volkswagen, WLTP Electric Vehicles: Calculation of All-Electric Range City Mode (AERcity)-UBE determination, 10th WLTP-SG-EV session, Doc. WLTP-SG-EV-10-06 (Sept. 25, 2015); Volkswagen, Proposal: WLTP Electric Vehicles: Combined Approach Interpolation Family Criteria, WLTP-SG-EV Session 8, Doc. WLTP-SG-EV-08-04 (Apr. 13, 2015); Volkswagen, Comment: UN R10: Comments on eCall (AECS) Draft Provisions, 40th Electromagnetic Compatibility [EMC] session, Doc. EMC-40-04/Rev.1 (Oct. 13, 2023).

101. *e.g.*, Volvo Group et al., Experiment Reports: Report on the Heavy-Duty Hybrid Validation Test Program 2, 14th Informal Group on Heavy-Duty Hybrids [HDH] session, Doc. HDH-14-04 (May 31, 2013); Honda, Testing Methods Elaborations: Validation of Pedestrian Lower Limb Injury Assessment Using Subsystem Impactors, 4th Informal Group on GTR 9-Phase 2 [GTR9] session, Doc. GTR9-04-20 (Sept. 12, 2012); Volvo Group, Technological Investigations: Presentation on the European Modular System for Improving Transport Logistics and the DUO2 Research Project for Duo2 for Long (32 m) and Heavy (up to 80 tons) Truck Combinations, 1st Modular Vehicle Combinations [MVC] session, Doc. MVC-01-05 (Jul. 2, 2014).

102. Volkswagen & UTAC, Progress Report on the Validation Program for the WLTP Wind Tunnel Method, 10th Informal Working Group of Particle Measurement Programme [WLTP] session, Doc. WLTP-10-15e (Apr. 7, 2015).

103. *e.g.*, BMW, Improvement of Family Definitions: WLTP New Issues Task Force, 20th WLTP session, Doc. WLTP-20-15/App.4/Rev.1 (Sept. 20, 2017).

104. BMW, WLTP Wind Tunnel Method: Draft GTR Provisions, 8th WLTP session, Doc. WLTP-08-25e (Nov. 12, 2014).

105. Ford Motor Co., Proposed Coastdown Wind Speed Requirement Updates for WLTP, 20th WLTP session, Doc. WLTP-20-15e/App.10 (Oct. 2, 2017), https://wiki.unece.org/pages/worddav/preview.action?fileName=WLTP-20-15e_appendix-10_Windspeed+Updates.pdf&pageId=51972941 [https://perma.cc/23PW-LX8N].

to TFCS, suggesting new rules on software updates, with amendments ranging from changes in definitions to evaluation methods.¹⁰⁶ The least common type is comment on proposals, where TNCs provide opinions on proposals prepared by other participants. TNCs provided suggestions on technological problems with their subjective views in such documents.¹⁰⁷ For instance, BMW was asked to comment on an EU proposal related to harmonizing specific rules between the EU and GTR.¹⁰⁸ BMW responded that the proposal had not been extensively discussed technically and was not yet mature.¹⁰⁹

Proposals prepared by the TNCs generally have been adopted by IWGs and have been the foundation for developing regulations. Although the proposals may be questioned, they can still be adopted in subsequent meetings once TNCs address the concerns. For instance, BMW proposed a draft for WLTP to add a new road-load testing method in 2014,¹¹⁰ but Japan's representative challenged this draft during the meeting.¹¹¹ Therefore, BMW revised the proposal, and WLTP adopted the change in 2015.¹¹² Ford's 2017 proposal (mentioned previously) became an agenda for WLTP to plan future works on regulatory development.¹¹³ The proposal from GM and Tesla, on the other hand, became a foundation to address the issue, leading multiple actors, like state representatives and OICA, to take further action to expand the draft.¹¹⁴

Based on the materials submitted by TNCs, it is evident that they were usually required to review regulations and provide amendments to IWGs. These regulatory recommendations often prompted IWGs to begin the regulatory-developing process. For example, the draft for the software update proposed by GM served as a primary resource for TFCS, enabling the construction of a discussion framework and assigning tasks to different participants to proceed with the regulatory development process.¹¹⁵ Moreover, certain TNCs voluntarily assessed and reported on regulations that needed to be revised to ensure alignment with technology development.¹¹⁶ For instance, Ford reported to WLTP that some amendments they had submitted two years earlier needed revision because the old version was ambiguous and could result in unnecessary

106. Gen. Motors Corp. [GM] et al., Software Updates: Proposal to Amend the Draft Regulation, 16th Informal Working Group of Software Update Processes and Management Systems [TFCS] session, Doc. TFCS-16-05 (Sept. 18, 2019).

107. See BMW, *WLTP: BMW Comment*, *supra* note 82.

108. *Id.*

109. *Id.*

110. BMW, Road load family validation program and proposal (Open issue item 1b-2), Doc. WLTP-08-19 (Nov. 14, 2014).

111. WLTP, Minutes of the 10th WLTP IWG Meeting, 10th WLTP session, Doc. WLTP-10-42e, at 3 (Mar. 17, 2015).

112. WLTP, Wind Tunnel Method – Validation Test Program, Progress Report, 12th WLTP session, Doc. WLTP-10-15e (Mar. 17, 2015).

113. Ford Motor Co., WLTP-20-15e/App.10, *supra* note 105, at 5.

114. GM et al., *supra* note 106, at 4.

115. *Id.*

116. See Ford Motor Co., WLTP-20-15e/App.10, *supra* note 105.

test for the companies.¹¹⁷ This report caused WLTP to initiate a new process for modifying regulations.¹¹⁸ It seems that TNCs do not merely act as consultants, waiting to answer IWGs' questions; they actively influence regulatory-developing processes in IWGs by reporting questions and submitting proposals to initiate proceedings.

3. *BMW Dominates the Interaction Between TNCs and WP.29*

Although BMW was not the first corporation to submit documents to WP.29, it played a significant role in WP.29 by contributing a significant amount of the total documents submitted. In particular, the peaks observed in 2015 and 2018 were primarily a result of BMW's involvement. Beyond quantity differences, the evolution of its document content also sets BMW apart from other TNCs. Notably, BMW submitted the highest number of regulatory proposals to WP.29.¹¹⁹ Initially, BMW submitted various documents to the IWGs; however, it later prioritized proposal development, playing a crucial role in facilitating regulatory amendments.¹²⁰ This shift resulted in BMW having a unique position in WP.29. Additionally, BMW was among the few corporations that engaged directly with a formal group within WP.29, namely GRBP.¹²¹

It can be inferred that BMW's interaction with GRBP was related to two factors: (1) the president of BMW concurrently serving as the chair of OICA; and (2) BMW's collaboration with ISO to recommend ISO testing standards to GRBP. Moreover, BMW led the testing project, which contributed to this standard proposal to GRBP.¹²² This case illustrates that TNCs' increased activities within the global network enabled them to gain more opportunities to influence international standard-setting.

4. *The Emerging Role of Non-traditional TNCs in WP.29*

The evidence shows that WP.29 invited the automotive industry to address technical issues and allowed emerging technology players to enter the regulatory development process. For instance, from 2014 to 2016, Qualcomm

117. *Id.*

118. UNECE WLTP Int'l Working Grp., 20th WLTP IWG Meeting Minutes, Doc.WLTP-20-27/Rev. 1, at 4 (Oct. 10, 2017), https://wiki.unece.org/download/attachments/51972941/WLTP-20-27e_rev1_Minutes.pdf?api=v2 [<https://perma.cc/NM4L-9LYV>].

119. During 2017-2018, most of the documents submitted by BMW contained proposals for revised provisions. *Submissions-BMW Group-2017*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/278-bmw?show=documents&year=2017> [<https://perma.cc/7LS7-5XGX>] (last visited Aug. 6, 2024); *Submissions-BMW Group-2018*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/278-bmw?show=documents&year=2018> [<https://perma.cc/95QY-6C62>] (last visited Aug. 6, 2024)

120. *Id.*

121. See ISO & BMW, GRB-60-09, *supra* note 96.

122. *Id.*

submitted eleven documents on communication and positioning systems.¹²³ Between 2018 and 2019, Tesla submitted fourteen documents, including comments on Electric Vehicle (EV) and draft regulations for software updates and cybersecurity.¹²⁴ Intel also submitted two documents related to Automated Vehicle (AV) safety in 2019 and 2020.¹²⁵

Moreover, the roles of these non-traditional TNCs are evolving, with some reaching a level of involvement comparable to that of established automotive TNCs within IWGs. In 2015, Qualcomm contributed technical expertise and regulatory guidance to AECS, though it was not requested to submit proposals at the time.¹²⁶ This situation changed with Tesla's involvement. In 2018, the IWG of the Electric Vehicle Safety Group (hereinafter EVS) invited Tesla to comment on testing methods relevant to EVs. These testing methods were proposed by formal participants in WP.29, including the testing proposals from Japan,¹²⁷ Korea,¹²⁸ OICA,¹²⁹ and China.¹³⁰ Initially, Tesla's role was similar to that of Qualcomm, acting as a consultant to assist IWGs in realizing new technology and identifying problems with regulations.

However, Tesla's role evolved significantly the following year. The company provided detailed feedback on cybersecurity regulations and suggested amendments to TFCS,¹³¹ impacting the discussion within the meeting.¹³² In addition, Tesla cooperated with GM to propose a draft regulation

123. *Qualcomm Inc.*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/347-qualcomm> [<https://perma.cc/2VYJ-NGQ4>] (last visited Jun. 13, 2022).

124. *Tesla Inc.*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/409-tesla> [<https://perma.cc/G43Z-Y5LK>] (last visited Jun. 13, 2022).

125. *Intel Corporation*, GLOBALAUTOREGS, <https://globalautoregs.com/participants/507-intel> [<https://perma.cc/D23J-ZZKS>] (last visited Jun. 13, 2022).

126. Ian Blair, UNECE Informal Working Grp. on Accident Emergency Call Systems [AECS], GNSS Requirement Aspects for the Draft AECS Regulation, Doc. AECS-10-06 (Sept. 23, 2015), <https://wiki.unece.org/download/attachments/27459667/AECS-10-06%20%28Qualcomm%29%20GNSS%20Comments.pdf?api=v2> [<https://perma.cc/BGM5-25ZV>].

127. UNECE 15th Informal Working Grp. of Electric Vehicle Safety [EVS] Session, EVS: Tesla Comments on Japan Research into Thermal Propagation Testing (EVS-15-32/611), Doc. EVS-15-68/611-4 (Mar. 20, 2018), <https://wiki.unece.org/download/attachments/54428762/EVS1568-611-4%20%5BTesla%5D%20Tesla%20comments%20on%20EVS-1532-611.pp.tx?api=v2> [<https://perma.cc/G9GY-BED5>].

128. Tesla, Tesla Comments on the Korea Statistical Analysis of Water Immersion Tests, 15th EVS session, Doc. EVS-15-69/101-2 (Mar. 20, 2018).

129. Tesla, Tesla Comments on the OICA Thermal Propagation Topics, 15th EVS session, Doc. EVS-15-72/613-3 (Mar. 20, 2018).

130. Tesla, Tesla Comments on the China thermal propagation research update, 15th EVS session, Doc. EVS-15-73/616-3 (Mar. 20, 2018).

131. UNECE 15th TFCS Session, Recommendations for the Cybersecurity Regulation Interpretation Document, Doc. TFCS-15-08 (Jul. 29, 2019), <https://wiki.unece.org/download/attachments/81888976/TFCS-15-08%20%28Tesla%29%20Interpretation%20document%20for%20Regulation%20on%20Cyber%20Security.docx?api=v2> [<https://perma.cc/SYU9-JGXC>].

132. UNECE Task Force on Cyber Security 15th TFCS Session, Minutes of the Test of the Test Phase Coordination Meeting 2 of the UN Task Force on Cyber Security and OTA Issues,

on software updates, initiating the regulatory-development process within TFCS.¹³³ Tesla also prepared a technical report on automated vehicles, which was presented at GRVA with the European Association for Electromobility.¹³⁴ While Tesla did not participate in the meeting, its technical report showcasing its expertise in automated driving systems, successfully persuaded GRVA to revise regulations in accordance with technological development.¹³⁵

iii. The Growing Power of TNCs in WP.29: Rationales and Risks

According to the *Terms of Reference and Rules of Procedure of the World Forum for Harmonization of Vehicle Regulations (WP.29)*, the participation of TNCs is considered an “exceptional” condition, indicating that TNCs are not considered regular participants in WP.29.¹³⁶ However, empirical evidence demonstrates that TNCs not only continuously engage in IWGs but also make substantial contributions to the regulatory development processes.¹³⁷ The role of TNCs in WP.29 has shifted from one of knowledge providers to one with multifunctional actors capable of initiating regulatory development processes and shaping the content of regulations. Despite a seemingly cautious approach toward TNCs’ participation, the increasing influence of TNCs within WP.29 suggests a growing acceptance and reliance on their contributions, particularly regarding technical regulations.¹³⁸

A. Rationales

WP.29 emphasizes the technical standards under UN Regulations, UN GTRs, and UN Rules are “optional, and do not carry any legal implication” until member states encode them into state law.¹³⁹ As such, WP.29 distinguishes these technical standards from formal laws and emphasizes their “soft” laws nature.¹⁴⁰

Doc. TFCS-15-02/Rev.1, at 7 (Aug. 16, 2019), <https://wiki.unece.org/download/attachments/81888976/TFCS-15-02%20%28Chair%29%20Minutes%20of%20the%20second%20coordination%20meeting%20rev1.docx?api=v2> [<https://perma.cc/D9UR-HA4F>].

133. GM et al, *supra* note 106.

134. Tesla & Eur. Ass’n for Electromobility, UN R79 requirements and real-world driving behavior, 4th Automated and Connected Vehicles [GRVA] session, Doc. GRVA-04-53 (Sept. 26, 2019).

135. UNECE, Rep. of the Working Party on Automated/Autonomous and Connected Vehicles on Its Fourth Session, Doc. ECE/TRANS/WP.29/GRVA/4, at 7 (Nov. 14, 2019), <https://unece.org/DAM/trans/doc/2019/wp29grva/ECE-TRANS-WP29-GRVA-04e.docx> [<https://perma.cc/M56C-GVLT>].

136. *See* U.N. ECON. COMM’N FOR EUR., WORLD FORUM: TERMS OF REFERENCE, *supra* note 51, at 5.

137. *See* the analysis in the section II(ii) in this article.

138. *See* U.N. ECON. COMM’N FOR EUR., WORLD FORUM: TERMS OF REFERENCE, *supra* note 51, at 5. A detailed explanation about the cautious approach WP.29 adopted to treat TNCs could be seen in the section II(i) of this article.

139. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 14.

140. *See id.*

In this context, it could be inferred that the development of technical standards within WP.29 may not always adopt rigorous procedures.¹⁴¹ This flexibility allows WP.29 to use TNCs' drafts as a basis for open discussion despite the risk that TNCs may blend their self-interest into the texts.¹⁴²

Another reason WP.29 accepts TNCs' drafts is that these standards meet the requirements of the content framework. The framework lists five "must-consider" factors while formulating standards, which are objectives of the process, including: the best available technology; potential benefits caused by technology and regulations; monetary and social costs arising from rules; and interaction with other regulations administered by WP.29.¹⁴³ Achieving these factors necessitates extensive technological knowledge and industry experience, which state governments struggle to grasp and implement without TNCs' assistance.¹⁴⁴

TNCs are at the forefront of technology, providing the most up-to-date information on the best available technology.¹⁴⁵ Moreover, TNCs excel in cost-benefit analysis at the global level, dealing with cross-border governance as part of their daily operations, which involves resource allocation, cost calculations, and risk assessments along their supply chains.¹⁴⁶ The expertise on technological knowledge and supply chain governance enables TNCs to produce convincing recommendations for public actors, effectively helping WP.29 develop standards aligned with the "must-consider" factors.¹⁴⁷ On the other hand, the participation of TNCs can enhance the legitimacy of the standards-setting process by involving the most affected stakeholders. From providing technical knowledge to enhancing legitimacy, it is conceivable that TNCs will be invited into WP.29. However, the expansion of their influence within WP.29 can pose risks to international standard-setting processes.

B. Risks

It could be seen that TNCs' regulatory proposals often form the foundation

141. See Gary E. Marchant & Braden Allenby, *New Tools for Governing Emerging Technologies*, 73 BULL. OF THE ATOMIC SCIENTISTS 108, 112 (2017).

142. See WLTP, Minutes of the 22nd WLTP Session, 22nd WLTP session, Doc. WLTP-22-14/Rev.3, at 10 (June 5, 2018).

143. U.N. ECON. COMM'N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 14-15.

144. *e.g.* Tesla & Eur. Ass'n for Electromobility, GRVA-04-53, *supra* note 134; Volkswagen & UTAC, WLTP-10-15e, *supra* note 102. The technical presentation documents provided by TNCs to WP.29 (Annex I) illustrate WP.29's reliance on actors with specialized knowledge and expertise to support the standard-setting process.

145. See Magnus Blomström & Ari Kokko, *Multinational Corporations and Spillovers*, 12 J. ECON. SURV. 247, 249-50 (1998).

146. Roberta Pellegrino et al., *Supply Chain Finance: A supply chain-oriented perspective to mitigate commodity risk and pricing volatility*, 25 J. PURCHASING & SUPPLY MGMT. 118-19 (2018).

147. See *e.g.* BMW, *WLTP Wind Tunnel Method*, *supra* note 104.

of formal regulations, enabling TNCs to implicitly shape the discussions within WP.29.¹⁴⁸ If the opportunities for submitting proposals were equally distributed among various corporations, concerns about regulations disproportionately benefiting specific companies might be mitigated.¹⁴⁹ In reality, prominent corporations, such as BMW, are more likely to acquire these opportunities, resulting in a monopoly on representation.¹⁵⁰ With its famous branding and extensive global networking, BMW possesses more channels to engage with public actors, thus increasing its visibility to IOs.¹⁵¹ Although BMW may indeed have the capacity to research “the best available technology” for WP.29, BMW’s proposed standards may intentionally or unintentionally reflect its own preference.¹⁵²

Conflicts arose from the drafts submitted by BMW, thus indicating evidence of favoritism.¹⁵³ For example, Japan is known for its automotive expertise and dissented from proposals issued by BMW.¹⁵⁴ Japan objected to specific provisions drafted by BMW and even directly claimed their non-support for BMW’s revisions, leading to heightened tensions between Japan and BMW.¹⁵⁵ In a later meeting, BMW urged WLTP to accelerate the standard-setting process, but the Japan association remained dissatisfied with the proposal and delayed the process.¹⁵⁶ The heightened tensions persisted into a 2018 meeting led by Japan and TNO (an independent not-for-profit research organization). BMW asserted that the requirements outlined in the draft were grounded in existing technical knowledge and free from political considerations.¹⁵⁷ Accordingly, BMW urged WLTP to expedite the draft’s approval.¹⁵⁸ Japan responded by agreeing with the proposal’s concept but insisting on a thorough review of the revised sections.¹⁵⁹ The EU concurred with Japan, saying they

148. Abdul Mu’eez A. S. et al., *Agenda Setting and Power in Policy Making: A Case Study of Tobacco Policy in Developing Countries*, 5 INT’L J. PUB. HEALTH & CLINICAL SCI. 1, 3 (2018).

149. See Diana Panke, *The Institutional Design of the United Nations General Assembly: An Effective Equalizer?*, 31 INT’L REL. 1, 6-7 (2017).

150. See the section (II)(ii)(B)(3) of this article.

151. See Doudou Sidibe, *Business Diplomacy: Asymmetry and Symmetry of Power in Negotiations Between Multi-nationals and Governments in the Case of Areva and Niger*, 3 INT’L J. DIPLOMACY & ECON. 219, 224-26 (2017).

152. U.N. ECON. COMM’N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 14.

153. See WLTP, Minutes of the 18th WLTP IWG Meeting, 18th WLTP session, Doc. WLTP-18-25e13 (May 10, 2017), <https://wiki.unece.org/download/attachments/262471956/A-LCA-SG4-18-04%20Meeting%20Minutes.pdf?api=v2> [<https://perma.cc/8XSR-3HNJ>].

154. *Id.*

155. *Id.*

156. According to the record of WLTP 20 Session, it concluded that if Japan association agreed with the proposal, this proposal will be passed to GRs. WLTP, Minutes of the 20th WLTP Informal Group Sessions, 20th WLTP session, Doc. WLTP-20-27/Rev.1, at 4 (Oct. 10, 2017) (concluding the proposal would be passed if the Japan association agreed with the proposal).

157. BMW, GTR 15: Proposal for a Mid Vehicle Concept for Pure ICE Vehicles, 22nd WLTP session, Doc. WLTP-22-11/App.12 (Apr. 16, 2018).

158. *Id.*

159. WLTP, WLTP-22-14/Rev.3, *supra* note 142.

needed to consult their experts before approving the proposal.¹⁶⁰

Despite agreeing with the proposal's concept, Japan expressed that the Japanese industry was not satisfied with the testing method formulated in BMW's proposal.¹⁶¹ The objection from Japan revealed a conflict of interest between BMW, and at least presented that the proposal from TNCs may not always accommodate the interests of all parties.¹⁶² Therefore, the closer examination by stakeholders is necessary to uphold the legitimacy of WP.29.¹⁶³

BMW's influence on standard-setting extended beyond simply proposing drafts; its practices can also determine the feasibility of standards. For instance, in WLTP, BMW showed that its practical data could not meet the standard requirements, leading to the revised standard.¹⁶⁴ These results demonstrate the complex relationship between BMW and WP.29 and its expanding influence on processes. While BMW played a significant role in the regulatory development process, WP.29's over-reliance on the company raises concerns that BMW may leverage the standard-setting process to its advantage, potentially leading to an uneven playing field.¹⁶⁵ This reliance highlights the risk that international organizations may fail to recognize unequal participation in regulatory decision-making and the adverse consequences that such disparities may produce.¹⁶⁶

Furthermore, most TNCs hold the most advanced technology and seek to embed this technology into international standards, disadvantaging non-developed countries.¹⁶⁷ In response to the proposal presented by BMW, India repeatedly requested detail information.¹⁶⁸ The request of detailed information demonstrates that India may be unfamiliar with the testing technique presented by BMW. If such proposal becomes formal standard, India may need to spend resources to help their industries to meet the requirements, including bargaining with TNCs, which are holding these critical techniques. It is inevitable that India needs to do some resources exchange for these critical techniques. In this case, India successfully defended its interests in the early stages by requiring BMW to disclose additional information about the testing methods in the meeting it chaired. However, it is uncommon for developing countries to chair the meeting

160. *Id.*

161. *Id.*

162. *See id.*

163. Robert A. Phillips, *Stakeholder Legitimacy*, 13 BUS. ETHICS Q. 25, 26 (2005).

164. BMW, WLTP Road Load Improvements: Identified Ambiguities and Proposals to Resolve, 18th WLTP session, Doc. WLTP-18-22 (Apr. 18, 2017).; WLTP, WLTP-22-14/Rev.3, *supra* note 142, at 11.

165. H. Jeffrey Leonard, *Review: Multinational Corporations and Politics in Developing Countries*, 32 WORLD POL. 454, 464 (1980).

166. *See* Hortense Jongen & Jan Aart Scholte, *Inequality and Legitimacy in Global Governance: An Empirical Study*, 28 EUR. J. INT'L REL. 667, 688 (2022).

167. Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World—Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 477 (2007).

168. WLTP, Agenda of the 8th WLTP IWG Meeting, 8th WLTP session, Doc. WLTP-08-02-rev3e, at 6 (Nov. 20, 2014); WLTP, WLTP-10-42e, *supra* note 111, at 10.

in WP.29, raising concerns about their ability to fully participate in the early stages of standard-setting processes.¹⁶⁹ If TNCs continue to expand their influence over various standard-setting mechanisms, developing countries may face greater challenges in safeguarding their interests.¹⁷⁰ The adoption of biased standards could create an uneven playing field, disadvantaging other corporations and further undermining the legitimacy of WP.29 and its decisions.

Due to their expertise in technology, it is conceivable that WP.29 and even other public actors will continue to rely on TNCs to establish standards.¹⁷¹ This reliance indirectly grants TNCs more power to influence international organizations and their decision, resulting in a legitimacy problem.

III. BEYOND WP.29: AUTOMOTIVE TNCs' ROLES IN INTERNATIONAL ORGANIZATIONS AND THEIR IMPLICATIONS FOR LEGITIMACY AND ACCOUNTABILITY

Normatively, WP.29 follows traditional international law, which considers private actors' secondary participants with limited rights to contribute to standard-setting.¹⁷² However, in practice, WP.29 leaves room for TNCs to join the process and contribute to the complex interaction between TNCs and public actors. Such complex interaction demonstrates that the relationship between TNCs and IOs is moving from a public-dominated institution to a quasi-hybrid structure, creating a power shift between the two organizations.¹⁷³ While the involvement of TNCs increases the regulatory capability of IOs, their self-interested actions could undermine the legitimacy and accountability of IOs. TNCs may discreetly influence global standards, exclude competitors, and insert their preferences into the process without transparency. Furthermore, their professional appearance makes public authorities unaware of their preference. Their professional expertise often conceals these intentions from public authorities, contradicting the foundational purpose of IOs—to find fair,

169. WP.29, WP.29: Working Parties, Informal Working Groups and Chairs on 15 February 2023, 189th WP.29 session, Doc. WP.29-189-01/Rev.1 (Mar. 7, 2023), <https://unece.org/sites/default/files/2023-03/WP.29-189-01r1e.pdf> [<https://perma.cc/3GSL-EYNM>].

170. Jan Wouters, *Corporations and the Making of Public Standards in International Law*, in *THE EVOLUTION OF TRANSNATIONAL RULE-MAKERS THROUGH CRISES* 66, 74 (Panagiotis Delimatsis, Stephanie Bijlmakers & M. Konrad Borowicz, eds., 2023).

171. e.g., United Nations, Roadmap for Digital Cooperation, U.N. Doc. A/74/821 (June 2020), https://www.un.org/en/content/digital-cooperation-roadmap/assets/pdf/Roadmap_for_Digital_Cooperation_EN.pdf [<https://perma.cc/D5HJ-UM9W>]. The major tech companies, including Microsoft and Facebook, are engaged in discussions about the UN Global Digital Compact, which aims to create a regulatory framework addressing digital issues.

172. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 944-45 (2004).

173. This article argues that the standards and knowledge discussed in IWGs are led by TNCs. See generally Leslie A. Pal, *Standard Setting and International Peer Review: The OECD as a Transnational Policy*, in *OXFORD HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION* 491, 495 (Diane Stone & Kim Moloney eds., 2019).

consensus-driven solutions to global problems. This not only damages the credibility of IOs but also weakens the legitimacy of their outputs. To address these challenges, it is essential to systematically evaluate the impact of TNC involvement on the legitimacy and accountability of IOs, both of which are critical to maintaining their credibility.

Legitimacy and accountability are primary concerns in GAL when discussing exercise global administration.¹⁷⁴ GAL divided these activities into three categories and offered corresponding principles to ensure these elements remain global. These categories are: (1) institutional design and legal constitution of the bodies; (2) norms, and decisions made by entities; and (3) procedural norms for decision-making.¹⁷⁵ The discussion of procedural norms focuses on the interaction between parties, which is closely related to the issue of this article. Therefore, the following section adopts the procedural principles listed in GAL as a framework to analyze the interaction between TNCs and IOs.

i. Challenges

According to GAL, the core of legitimacy is “publicness,” meaning that law and legal rules should come from the whole society or must deal with public concern.¹⁷⁶ The principles of publicness cover both substantive and procedural administrative law, including “the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights.”¹⁷⁷ These principles illustrate that while public participation is vital for legitimizing decisions, specific mechanisms must be in place to ensure the legitimacy of the process. These mechanisms enhance legitimacy by ensuring that the procedure incorporates accountability, informational transparency, and openness.¹⁷⁸ As regulatory structures evolve, GAL has distilled these procedural requirements into the following principles: reasoned decision, participation, transparency, and reviewing process.¹⁷⁹

Requiring rule-makers to make reasoned decisions is crucial to secure legitimacy and accountability.¹⁸⁰ To justify their decision, rule-makers should prove that they have carefully considered the relevant information, which relies on professional knowledge to access and evaluate. When issues involve complex technology, regulators can hardly access and evaluate information themselves and require actors possessing the knowledge to supplement their vacant capacity. TNCs are actors who possess in-depth knowledge of the issue

174. Krisch & Kingsbury, *supra* note 15.

175. Kingsbury et al., *supra* note 18, at 34.

176. Kuo, *supra* note 19, at 1061-62.

177. *Id.* at 1063.

178. Skogstad, *supra* note 62178, at 25.

179. Kingsbury et al., *supra* note 18, at 37-39; *accord* Kingsbury, *supra* note 22, at 25.

180. Cynthia Couette, *Epistemic Competition in Global Governance: The Case of Pharmaceutical Patents*, 15 GLOB. POL'Y J. 516, 519 (2024).

area, making them valuable information providers to public actors during the standard-setting process.¹⁸¹ Furthermore, they offer valuable expertise in turning abstract concepts into practical rules.¹⁸² The capability of TNCs may provide legitimate grounds for them to participate in public standard-setting processes.

In the case of WP.29, the content framework clearly states that the standard-setting processes should consider the best available technology, benefit, and monetary and social costs. These factors demonstrate the importance of abundant knowledge and experience, indicating that WP.29 believes knowledge could legitimize its decisions. The documents submitted by TNCs, ranging from technical presentations to regulatory proposals, underscore their suitability in providing relevant information. The scarcity of adequate internal knowledge also highlights WP.29's reliance on TNCs.

Reliance on the knowledge of TNCs presents significant risks as they are gradually empowered to influence standard-setting. As discussed in section II, the influence of BMW on WP.29 serves as an example. BMW not only affected agenda-setting by making proposals but also used experimental data to determine the feasibility of these standards.¹⁸³ This reliance on outsourced knowledge has contributed to BMW's dominance in the processes.¹⁸⁴ However, this behavior poses a danger: public actors may oversimplify knowledge, treating it as a single, unified result without recognizing that different sources produce different types of knowledge.

Moreover, the knowledge used here often centers on technology, developed to fulfill private interests. The conflict between BMW and the Japanese automotive industry underscores this issue. While knowledge requirements are necessary for functional operation, they are not the sole factor that legitimizes decisions. Public actors must be aware of the diverse sources and implications of the knowledge they rely on.¹⁸⁵

Participation enhances legitimacy because it displays the features of democracy.¹⁸⁶ The fundamental purpose of participation is to promote deliberative democracy by allowing every stakeholder to participate and voice

181. Rozaimah Zainudin, Nurul Shahnaz Mahdzan & Norzulkarnien Nor Mohamad, *Internationalisation and Financial Performance: In the Case of Global Automotive Firms*, 31 REV. INT'L BUS. & STRATEGY 80, 84 (2021).

182. Michael M. Du, *The Regulation of Private Standards in the World Trade Organization*, 73 (3) FOOD & DRUG L. J. 432, 433 (2018); Richard M. Locke, Ben A. Rissing & Timea Pal, *Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains*, 51 BRIT. J. INDUS. REL. 519, 531 (2013).

183. BMW, WLTP Road Load Improvements: Identified Ambiguities and Proposals to Resolve, 18th WLTP session, Doc. WLTP-18-22, at 11 (Apr. 18, 2017).

184. See Fabrizio Cafaggi, *Transnational Private Regulation: Regulating Private Regulators*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 212, 235 (Sabino Cassese ed., 2016).

185. See Möllers, *supra* note 16, at 109.

186. Jan Aart Scholte, *Towards Greater Legitimacy in Global Governance*, 18 REV. INT'L POL. ECON. 110, 115 (2011).

their opinion in the regulatory process.¹⁸⁷ In addition, participation helps public actors construct an informed decision-making structure, legitimating their decisions.¹⁸⁸ Participation further enhances accountability when using the tools of transparency (such as information recording and disclosing).¹⁸⁹ Although the participatory mechanism of WP.29 seems to limit the involvement of stakeholders (typically NGOs) and prevent private interests from unduly influencing decisions, it still leaves room for TNCs to participate in the standard-setting through IWGs.

However, the ambiguous WP.29 mechanism poses a risk to institutional legitimacy. Without proper restrictions, parties with more resources, such as BMW, can monopolize the decision-making mechanism. Such a monopoly reduces the diversity of representatives in the meetings, counteracting the purpose of inclusive participation. The unbalanced participation of TNCs further aggravates the problem of inequality between the global north and the global south.¹⁹⁰ René Fernando Urueña Hernandez highlighted that global regulatory bodies are more accessible to countries with more power and resources.¹⁹¹ For countries lacking expertise or those incapable of connecting to the world, the sophisticated process embedded in the global regulatory bodies is too complicated to approach.¹⁹² This problem is framed as “tunnel vision,” emphasizing that knowledge (or perception) from the global north, especially from Western countries, is more easily input into the global standard-setting and thereby receives a surface legitimacy to rule the world.¹⁹³

“Tunnel vision” exacerbates issues within global regulatory bodies developed to resolve specific issues.¹⁹⁴ For instance, GLOBAL GAP claims its standard-setting process is open to all stakeholders.¹⁹⁵ Still, it remains controlled by Western countries due to a lack of a proper procedural framework considering the region’s representativeness.¹⁹⁶ Similarly, countries without abundant expertise struggle to have meaningful discussions in Codex.¹⁹⁷ In the

187. Stepan Wood et al., *Transnational Business Governance Interactions, Regulatory Quality and Marginalized Actors: An Introduction* (Transnat'l Bus. Governance Interactions, Working Paper, Paper No. 38, 2019), https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1496&context=fac_pubs [<https://perma.cc/9864-6FVW>].

188. Möllers, *supra* note 16, at 121.

189. *Id.* at 120-21.

190. Sundhya Pahuja, *Corporations, Universalism, and the Domestication of Race in International Law*, in *EMPIRE, RACE AND GLOBAL JUSTICE* 74, 75-76 (Duncan Bell ed., 2019).

191. René Fernando Urueña Hernandez, *Global Administrative Law and the Global South*, in *RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW* 392, 394 (Sabino Cassese ed., 2016).

192. *Id.*

193. *Id.* at 396.

194. *See id.* at 397.

195. Richard B. Stewart, *Global Standards for National Societies*, in *HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION* 175, 208 (Diane Stone & Kim Moloney eds., 2019).

196. *Id.*

197. Marco Macchia, *The Rule of Law and Transparency in the Global Space*, in *RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW* 261, 270 (Sabino Cassese ed., 2016).

case of WP.29, the participation of TNCs also builds a Western “tunnel” for WP.29 in its standard-setting process. The TNCs active in WP.29 are primarily from the U.S. and EU (shown in Table 1), with few from Asia. Notably, all these TNCs are from the global north, but none are the countries that produced the most significant number of cars.¹⁹⁸ Furthermore, the documents related to the core of the standard-setting process, such as test procedures or regulatory proposals, continued to be dominated by the U.S. and EU TNCs.¹⁹⁹ However, knowledge from the global north does not always provide the best solution globally; otherwise, India would not raise doubts about the proposal submitted by BMW and require it to give more details.²⁰⁰

TNCs	BMW	Ford	Volkswagen	Daimler	GM	Volvo	Hyundai	Toyota	Honda
Originated Region	EU	US	EU	EU	US	EU	Korea	Japan	Japan
Document amounts	65	24	22	19	18	18	13	4	1

Table 1: The number of documents submitted from different automotive TNCs.

Transparency serves as an essential tool to maintain accountability in public administration.²⁰¹ Various measures can be implemented to achieve transparency, with publicity being the most vital. Publicity refers to the open availability of any law or legal decision to the public,²⁰² which not only legitimates publicized laws and decisions but also encourages public review of the acts of governors.²⁰³ The notice-and-comment procedure in public informal rulemaking aligns with the notion of publicity.²⁰⁴ Besides making laws and decisions public, opening up the decision-making process is crucial to fostering informed public discussion.²⁰⁵

While WP.29 stipulates that parties should “ensure openness and transparency during the sessions,” it does not specify concrete actions to achieve

198. The country which produced the greatest number of cars in 2023 was China, and India was the fourth greatest producing country. *Motor Vehicle Production Volume Worldwide in 2023, by Country*, STATISTA (Mar. 28, 2024), <https://www.statista.com/statistics/584968/leading-car-manufacturing-countries-worldwide/> [https://perma.cc/Q2Q6-UBDE].

199. *e.g.*, BMW, Distribution of Payload: Definition and Proposal for Adoption (version 4), 20th WLTP session, Doc. WLTP-20-15/App.5/Rev.2 (Oct. 2, 2017); Ford, AV External Communications, 2nd AVSR session, Doc. AVSR-02-13 (Dec. 14, 2018).

200. WLTP, WLTP-20-27/Rev.1, *supra* note 153, at 3.

201. *See* Krisch & Kingsbury, *supra* note 15, at 1.

202. Kingsbury, *supra* note 22, at 48.

203. *Id.* at 49.

204. Krisch & Kingsbury, *supra* note 15, at 1.

205. Möllers, *supra* note 16, at 120.

this goal.²⁰⁶ In practice, WP.29 has implemented transparency measures, such as publicizing documents and opening the decision-making process.²⁰⁷ However, there is room for improvement to ensure legitimacy. Developing technical standards, in which TNCs participate, is often considered less significant than the formal law-making process, but it profoundly impacts the global industry. This influence benefits those who control the process and thereby attract TNCs. To avoid monopoly and ensure fair access, WP.29 needs to pursue meaningful transparency rather than formal transparency. While WP.29 discloses all meeting documents on its website, the inconsistent format and disorganized information make it challenging for stakeholders to identify crucial details and hold the process accountable.

Reviewing process is essential to prevent decision-makers from taking arbitrary and capricious actions, which not only contradict institutional legitimacy but also violate democratic values. The reviewing process typically involves judicial bodies or independent institutions examining the output of administrative bodies.²⁰⁸ With independent review, administrative bodies can be accountable for their actions and adjust improper measures. This mechanism has been considered a necessary pillar in domestic governance and exists in most countries.²⁰⁹ In contrast, only a few reviewing mechanisms are embedded in the global administrative space to govern specific issues, and they struggle to maintain their function.²¹⁰ In other words, not every institution in the global administrative space has a reviewing mechanism. WP.29 falls within this category.

Despite the lack of independent bodies to review the process, mechanisms are available to modify decisions. In the standard-setting process within WP.29, review occurs when proposals are delivered through a hierarchical institution.²¹¹ From IWGs to assembly, proposals have several chances to be revised once problems are identified. This approach is an *ex-ante* review due to its role in adjusting actions. In terms of *ex-post* review, it is executed by TNCs.²¹² TNCs can report outdated standards and propose revised versions to IWGs.²¹³ Thus, they serve as regulatory patrols and initiate the process of updating standards. This action helps WP.29 modify its decisions to keep pace with technological developments, performing one function of the reviewing process. However, TNCs excel in detecting and resolving problems from technology evolution but

206. See World Forum for Harmonization of Vehicle Regulations (WP.29), Terms of Reference and Rules of Procedure 2, ECE/TRANS/WP.29/690/Rev.2, rule 1 (1) (i), at 4 (1999).

207. *Open UNECE*, U.N. ECON. COMM'N FOR EUR., <https://unece.org/open-unece-1> [<https://perma.cc/A9AN-7478>] (last visited Aug. 6, 2024).

208. Krisch & Kingsbury, *supra* note 15, at 40.

209. *Id.* 15 at 4-5.

210. *See id.* at 40.

211. U.N. ECON. COMM'N FOR EUR., WORLD FORUM: HOW IT WORKS, *supra* note 42, at 15.

212. *e.g.*, Ford, WLTP: Onboard Anemometry Methodology Proposals, 11th WLTP session, Doc. WLTP-11-14 (Jun. 3, 2015).

213. *Id.*

are less sensitive to the social issues caused by the standards. Indeed, state parties are there to address social issues, yet it takes a long time for them to detect and address problems, decreasing the overall effectiveness of standard revision.

ii. Accountability Problems

Accountability measures are essential for supervising entities with public power to ensure their actions meet public expectations. Traditionally, only state or government-based bodies enjoy public power; therefore, they must follow accountability rules.²¹⁴ However, they are not the only actors who exercise public function and have the power to influence others. The interaction between TNCs and WP.29 demonstrates that TNCs, initially positioned as consultants to provide opinions, have extended their role beyond merely offering advice.²¹⁵ They now actively formulate standards and review outdated provisions, significantly increasing their influence on society.²¹⁶ These quasi-public actions enrich TNCs' power to influence society.

TNCs also have significant control over agenda-setting. In WP.29, the proposals TNCs submitted often became the default version in the standard-setting processes.²¹⁷ Namely, the entities whose proposals are selected substantially control the process by framing the agenda, defining problems, and proposing solutions.²¹⁸ In this way, they help them consolidate their interests and exclude others from the standard-setting processes.²¹⁹ The conflict arising from BMW between Japan and India concretizes the agenda-setting power possessed by TNCs when they participate in IOs.²²⁰

In addition, the agenda-setting and material power of TNCs are mutually reinforcing when TNCs participate in public standard-setting. Their material power enables them to influence the behavior of others due to the resources they hold.²²¹ TNCs carry economically solid resources and networks, rendering them *de facto* governors in GVCs.²²² Although research suggests that TNCs' governance power over GVCs is contract-based, Peter Hertenstein argued that TNCs construct orchestration systems to mold behaviors within GVCs, which are driven by profit, reputation, resource, and knowledge dissemination.²²³ By

214. Krisch & Kingsbury, *supra* note 15, at 7.

215. *e.g.*, Volkswagen & UTAC, *supra* note 102.

215. BMW, WLTP-08-25e, *supra* note 104

216. *e.g.* GM et al., TFCS-16-05, *supra* note 106.

217. BMW, WLTP-08-19, *supra* note 110.

218. Manuel Cruz Ortiz de Landázuri, *Power in Global Governance: Power without Rulers?*, 18 NEW GLOB. STUD. 19, 30 (2024).

219. Janne Mende, *Business Authority in Global Governance: Companies Beyond Public and Private Roles*, 19 J. INT'L POL. THEORY 200, 211 (2023).

220. *Id.*

221. *Id.*

222. *See* Bell & Monaco, *supra* note 25, at 459.

223. HERTENSTEIN, *supra* note 3, at 111.

providing knowledge and resources, TNCs enhance the capacities of their suppliers but require them to participate in periodic reviews, directly shaping the behavior of the suppliers.²²⁴ This vigorous compliance enforcement empowers TNCs with strong bargaining power over public actors and reinforces their agenda-setting power in public standard setting. In the meantime, exercising agenda-setting power in IOs strengthens TNCs' compliance by earning more trust from suppliers. In the WP.29 case, BMW's dominance in standard-setting processes arose because of its material power.

Beyond public actors and suppliers, TNCs could affect society by exercising ideational power so that a TNC can deliver and strengthen concepts via its products, services, and other activities toward society. Its conduct could shape individual thinking and change the social construction.²²⁵ The higher the esteem TNCs gain, the more quickly they can operate ideational power. As for reputation, it is often acquired through agenda-setting and material power.²²⁶ Although TNCs possess the power to influence society at multiple levels, they are still excluded from the scope of international institutions' accountability. In WP.29, TNCs are acquiesced to develop public standards with sufficient oversight, creating an accountability gap in the public standard-setting process.²²⁷

iii. Ever-Expanding Private Power in Global Governance

The participation of TNCs was a double-edged sword, enriching decisional reasonableness but risking process accountability. If the risk cannot be addressed, participation of TNCs could still damage the legitimacy of the decisions made by IOs. Additionally, technology development forces public actors to rely on actors who carry relevant knowledge, contributing to expanding private power in global space.

A. Private Power Expansion in the Age of Technology

In the WP.29 case, the intensive interaction between TNCs and IOs happened when significant social issues occurred. However, TNCs may hold inverse positions compared with public actors (private interest v. public interest). Yet their technical knowledge is crucial for tackling these issues, forcing WP.29 to rely on TNCs, who create and control technology and depend on their ability to draft standards despite their private-oriented nature. The speed of technological development will enlarge the knowledge gap between TNCs and public actors, thereby increasing the reliance on TNCs on standard-setting processes. Such reliance will, in turn, enrich the power of TNCs.

224. *Id.* at 123.

225. Mende, *supra* note 21919, at 211.

226. *Id.*

227. *See* Stewart, *supra* note 195, at 208.

The participation of Tesla in WP.29 perfectly demonstrates how knowledge empowers TNCs in the standard-setting processes. With advanced technology in electricity and automated vehicles, Tesla quickly earned trust, transitioning from a consultant role to a standard drafter.²²⁸ Besides, Tesla submitted its reports to formal groups in WP.29, where most traditional automotive TNCs had yet touched.²²⁹ These experiences improved Tesla's reputation for public cooperation and social responsibility, leading to more opportunities to participate in regulatory activities.²³⁰ In fact, relying on TNCs for standard-setting has not been limited to specific issues, but extends across various areas requiring "reasoned decisions."²³¹

Without hierarchical enforcement, laws and regulations produced at the international level are considered "soft" if states do not commit to adopting them.²³² However, it does not mean IOs have lost their function in governing issues. Their roles have shifted from being Utopian regulators to knowledge aggregators in the age of technology. IOs collect and distill knowledge and then transform it into regulation. Concurrently, states outsource regulatory solutions due to the high cost of addressing complex issues.²³³ This supply and demand relationship endows IOs' authority to govern global problems.²³⁴ To maintain this authority, IOs must assemble more knowledge, leading to increased interaction with epistemic communities.²³⁵

"Epistemic communities" encompass experts from diverse backgrounds, including academia, industry, and government.²³⁶ In this context, TNCs have multiple identities—stakeholders and experts—when participating in standard-setting processes. However, their role as an interest group is also overlooked when they perform as experts, delivering relevant knowledge in forums. Furthermore, the idea of engineering information conveyed by TNCs is deemed to be knowledge when IOs deal with the issue of emerging technology.²³⁷ Neglecting the potential private interests in this information can be problematic. Unfortunately, the conflated identities of TNCs may become normalized due to

228. See Tesla, Tesla Comments on the China thermal propagation research update, 15th EVS session, Doc. EVS-15-73/616-3 (Mar. 20, 2018); GM et al., TFCS-16-05, *supra* note 106.

229. Tesla & Eur. Ass'n for Electromobility, GRVA-04-53, *supra* note 134.

230. See Mende, *supra* note 219, at 212.

231. See Kirsten Mogensen, *Legitimacy Issues in Corporate Public Diplomacy*, in HANDBOOK OF BUSINESS LEGITIMACY 1277, 1282-83 (Jacob Dahl Rendtorff ed., 2020).

232. See Krisch & Kingsbury, *supra* note 15, at 3-4.

233. See generally Rianne Mahon & Stephen McBride, *Standardizing and Disseminating Knowledge: The Role of the OECD in Global Governance*, 1 EUR. POL. SCI. REV. 83, 88 (2009).

234. See Clarke A. Miller, *Democratization, International Knowledge Institutions, and Global Governance*, 20 GOVERNANCE 325, 327 (2007).

235. Mahon & McBride, *supra* note 233, at 86.

236. See Ole Jacob Sending, *Knowledge Networks, Scientific Communities, and Evidence-Informed Policy*, in THE OXFORD HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION 383, 385 (Diane Stone & Kim Moloney eds., 2019).

237. See Benedict Kingsbury, *Infrastructure and InfraReg: on rousing the international law 'Wizards of Is'*, 8 CAMBRIDGE INT'L L.J. 171, 172 (2019).

technological advancements, contributing to more extensive and intensive interactions between TNCs and IOs.

Moreover, TNCs could be diffusers, disseminating their preferred interaction mode to other issue areas. Due to their transnational nature, TNCs could directly interact with public actors at different levels and countries. Once they experience preferred interaction with public actors, they may proactively propagate these modes to other public actors, spreading them across different regions and issue areas.²³⁸ The necessity of knowledge to legitimize decision-making creates an opportunity for TNCs to participate in the standard-setting process in IOs. The reliance on IOs enriches the power of TNCs. The power of TNCs scales up due to the demand for knowledge on addressing the issue from emerging technologies and the diffusion of interaction mode. However, the conflated identities of TNCs in standard-setting and the misunderstanding about the information they provide create a risk to global society.

B. Risk of Over Expansion

The expansion of private power at the global level arises from our belief in the absoluteness and neutrality of knowledge. Still, such belief will make us overlook the bias inherent in the knowledge-producing process. The rationality behind relying on expert opinion stems from the assumption that experts will reach a consensus on knowledge and approach the absolute truth.²³⁹ However, the neutrality of expertise is under dispute. Controversy arises over who possesses genuine knowledge and who qualifies as an expert.²⁴⁰ These questions imply that different sources, beliefs, and cognition will affect the viewpoints behind knowledge.²⁴¹

The subjectivity embedded in knowledge when addressing the issue of emerging technologies is exacerbated. Although technological knowledge presents an objective symbol, its development process is often driven by profit motives to maximize private interests. Therefore, once regulators permit knowledge from specific companies, they may indirectly facilitate the profit-earning progress of companies. This consequence decreases the credibility of decisions made by regulators.²⁴² Furthermore, once TNCs exploit this pattern to pursue profit and scale up their power, it will pose severe risks at the global level.

To maximize their interests, TNCs may attach their regular practice in the standard drafts with the intention of future compliance costs and optimizing their interests.²⁴³ In addition, standard-setting processes are the symbol of

238. Pattberg, *supra* note 6, at 250.

239. Couette, *supra* note 180, at 516.

240. *Id.* at 520.

241. *Id.* at 519.

242. *See id.* at 519.

243. Zainudin et al., *supra* note 181, at 82.

legitimacy and thus could strengthen the power of those who control the processes.²⁴⁴ This power enables TNCs to manage their supply chains comprehensively, earn consumer trust, and dominate markets. Additionally, by controlling standard-setting processes, TNCs can facilitate their global expansion by unifying worldwide regulations and mitigating transnational compliance barriers. With the control of the public standard-setting process, TNCs can construct favorable playing fields for themselves, excluding competitors from gaining profit or limiting the global market share of rivals.

Although legal principles mitigate power asymmetry in public decision-making,²⁴⁵ identifying where and how power asymmetry occurs remains a significant challenge, especially with technological advancements. Aside from our belief in the objectivity of knowledge, the interwind of technology and society causes the formulation of technical specifications to involve value judgments,²⁴⁶ thereby increasing the difficulty of distinguishing whether TNCs' standards embed their preferences. Furthermore, verifying these issues is challenged by the opaque process through which TNCs produce drafts, as their true intentions can be easily concealed by afterward explanations.²⁴⁷ With solid authority but limited capability to address private interests, IOs will face a crisis of being degenerated as instruments for TNCs to pursue their benefit.

When TNCs weaponize IOs, it not only disrupts the level playing field in the global market but reinforces neo-colonialism at the global level. When IOs adopt standard proposals submitted by TNCs without fully considering their potential influence on vulnerable countries, they inadvertently support TNCs in unequally distributing global resources.²⁴⁸ TNCs use standards to distribute resources within their supply chains to enlarge profit.²⁴⁹ Consequently, cost reduction, profit generation, and benefits exchanges are often embedded in their standards and codes of conduct.²⁵⁰ Companies in third-world countries are more likely to be unequally treated, and their resources are usually sacrificed. Hence, if IOs directly adopt standards proposed by TNCs, they may assist TNCs in exacerbating economic and capacity disparities between companies in advantaged and disadvantaged countries. Unequal resource distribution within global supply chains is a leading cause of reinforcing and exacerbating economic disparities between Western and third-world countries.

Automotive TNC, which originated in Western countries and favors

244. See Magnus Boström & Kristina Tamm Hallström, *Global Multi-Stakeholder Standard Setters: How Fragile are They?*, 9 J. GLOB. ETHICS 93, 100 (2013).

245. Fiona Kinniburgh et al., *When Private Governance Impedes Multilateralism: The Case of International Pesticide Governance*, 17 REGUL. & GOVERNANCE 425, 433 (2023).

246. Pattberg, *supra* note 6, at 258.

247. See Wood et al., *supra* note 187, at 6.

248. The IGLP Law & Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LOND. REV. INT'L L. 57, 60 (2016).

249. PAUL VERBRUGGEN, ENFORCING TRANSNATIONAL PRIVATE REGULATION: A COMPARATIVE ANALYSIS OF ADVERTISING AND FOOD SAFETY 12-13 (2014).

250. *Id.*

deploying production lines in third-world countries,²⁵¹ demonstrates the appearance of neo-colonialism. Although automotive TNCs are dedicated to investing in local industries in third-world countries, they still control essential knowledge that secures their positions within supply chains.²⁵² Without critical knowledge, industries in third-world countries can only depend on TNCs for survival,²⁵³ thereby maintaining the hierarchy within automotive supply chains,²⁵⁴ demonstrating the material power of TNCs to control industries in other countries. Furthermore, their comprehensive control over local industries in third-world countries enriches their agenda-setting power over public authorities. When TNCs control local industries, they control the national economy of these countries, strengthening their agenda-setting power to shape their policies and regulations.²⁵⁵ Moreover, the solid economic incentives behind TNCs could intensify their ideational power and allure local industries to bypass state regulation, thereby threatening state authority.²⁵⁶

The power of TNCs can substantially control local industry, affect national policies, and even threaten governments' authority in third-world countries. This phenomenon has been criticized as "neo-colonialism," which means rebuilding the colonial empire by exploiting and exacerbating the disparities in the global economy.²⁵⁷ Ideally, neo-colonialism can be restrained by adopting legal principles built within IOs, including participation requirements, to safeguard the production of these standards.²⁵⁸ However, the truth is that participation mechanisms in IOs have tunnel vision and the complexity of technical knowledge conceals the private interest within the standards, continuously placing third-world countries at risk.²⁵⁹

IV. REBALANCING GLOBAL TECH STANDARD-SETTING WITH TNCs PRIVATE GOVERNANCE

The participation of TNCs in WP.29 illustrates the rise of private power and the importance of IOs in governing technological issues. The functions of IOs have evolved beyond maintaining "world peace" to include significant

251. Paul Nieuwenhuis, *Car Manufacturing*, in *THE GLOBAL AUTOMOTIVE INDUSTRY* 41, 44 (Thomas Kurfessed., 1 ed. 2015).

252. Inge Ivarsson & Claes Göran Alvstam, *Technology Transfer From TNCs to Local Suppliers in Developing Countries: A Study of AB Volvo's Truck And Bus Plants in Brazil, China, India, and Mexico*, 33 *WORLD DEV.* 1325, 1326 (2005).

253. Sundhya Pahuja & Anna Saunders, *Rival Worlds and the Place of the Corporation in International Law*, in *THE BATTLE FOR INTERNATIONAL LAW SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA* 141, 161 (Jochen von Bernstorff & Philipp Dann eds., 2019).

254. HERTENSTEIN, *supra* note 3, at 13.

255. Bell & Monaco, *supra* note 25, at 467-68.

256. Locke et al., *supra* note 182, at 532.

257. Pahuja & Saunders, *supra* note 253, at 145.

258. See Urueña Hernandez, *supra* note 191, at 39.

259. *Id.* at 397.

responsibilities in technological governance.²⁶⁰ Thus, problem-solving and standard setting have become essential for IOs.²⁶¹ To convince their state members, IOs require abundant knowledge to prove their decisions are reasoned and well-founded.²⁶² As a result, knowledge becomes an imperative source for IOs to establish their authority.²⁶³

Meanwhile, social expectations on IOs have moved from unifying worldwide regulations to ensuring global plurality and cultural diversity in regulatory development.²⁶⁴ Legal principles mandate that IOs build participatory institutions to gather diverse opinions and create inclusive and representative decision-making processes.²⁶⁵ However, these institutions often suffer from tunnel vision.²⁶⁶ The involvement of TNCs in these participatory processes can exacerbate the problem of tunnel vision.²⁶⁷

In traditional international law, TNCs have been viewed as informal participants, yet their influence on global society extends far beyond that of public authorities.²⁶⁸ They can provide knowledge to produce “reasoned decisions” in the public standard-setting process, supporting the authority of IOs.²⁶⁹ They also hold the power to enforce standards on the global supply chains, accomplishing truly transnational governance.²⁷⁰ However, such influential actors are excluded from international institutions, enjoying power without legal restriction.²⁷¹ Their power will likely grow as they continue participating in regulatory development processes.²⁷²

The participation of TNCs in the standard-setting processes underscores the inadequacy of current legal principles within IOs regarding legitimacy during

260. See generally CHARLES S. MAIER, *THE PROJECT-STATE AND ITS RIVALS: A NEW HISTORY OF THE TWENTIETH AND TWENTY-FIRST CENTURIES* 88-104 (2023).

261. See Jan Klabbers, *Theorizing International Organizations*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 618, 624 (Anne Orford & Florian Hoffmann eds., 2016).

262. Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 *EUR. J. INT’L L.* 23, 47 (2009).

263. Thomas Conzelmann, *The Politics of Peer Reviewing: Comparing the OECD and the EU*, in *THE POLITICS OF INFORMATION* 49, 49 (Tannelie Blom & Sophie Vanhoonacker eds., 2014).

264. Gayl D. Ness & Steven R. Brechin, *Bridging the Gap: International Organizations as Organizations*, 42 *INT’L ORG.* 245, 246-48 (1988).

265. Krisch & Kingsbury, *supra* note 15, at 4-5.

266. See Urueña Hernandez, *supra* note 191, at 397.

267. See SCHMIDT, *supra* note 14, at 206-07.

268. Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 *FLA. J. INT’L L.* 1, 31-32 (2007).

269. See Britt Blackwelder et al., *The Volkswagen Scandal (Case Study)*, UNIVERSITY OF RICHMOND: ROBINS SCHOOL OF BUSINESS 2016, <https://scholarship.richmond.edu/robins-case-network/17/> [https://perma.cc/4AJ8-VVB3].

270. Du, *supra* note 182, at 443.

271. See Oreste Pollicino & Giovanni De Gregorio, *Constitutional Law in the Algorithmic Society*, in *CONSTITUTIONAL CHALLENGES IN THE ALGORITHMIC SOCIETY* 3, 22 (Hans-W. Micklitz et al. eds., 2022).

272. SCHMIDT, *supra* note 14, at 62.

decision-making.²⁷³ In an age dominated by technological advancements, preventing TNCs from entering the public standard-setting process is impossible.²⁷⁴ However, viewing them as secondary participants and ignoring their influence and risk to global society is also unfeasible.²⁷⁵ Therefore, the pressing issue will be how to construct (or repair) mechanisms within IOs to ensure legitimacy when interacting with TNCs and properly hold TNCs accountable when they influence public decision-making processes.²⁷⁶

i. Internalize Legitimacy Factors in the Practice of TNCs

With the power to shape the social order, TNCs are no longer seen as simply private actors.²⁷⁷ Their power stems from the interaction between different actors. Moreover, TNCs can provide public goods, such as research funding, war prevention, and charity building.²⁷⁸ These activities demonstrate that TNCs have transcended their purely private character—affecting only limited individuals and acting solely in their interest—and have assumed a specific societal authority.²⁷⁹ It is apparent that greater authority requires more significant duty and responsibility, but TNCs often evade such obligations.²⁸⁰ However, it is also an oversimplification to equate TNCs with public actors, as this approach disregards their profit-oriented nature and unique relationship with democratic and legal systems.²⁸¹ Therefore, a balanced approach is needed—one that aligns TNC operations with principles of legitimacy while acknowledging their profit-driven motives and flexibility. Besides, this approach could more comprehensively address the problems caused by the participation of TNCs in public standard-setting processes.²⁸²

Preventing TNCs from participating in standard-setting processes would be impractical and unwise, given their capacity to provide crucial knowledge that enhances the legitimacy of decision-making in IOs. Therefore, this research advocates for an approach that internalizes legitimacy factors within TNC practices. Such a solution would balance various considerations and foster practical cooperation between TNCs and IOs.

273. Jochen von Bernstorff, *Procedures of Decision-Making and the Role of Law in International Organizations*, 9 GERMAN L.J. 1939, 1947 (2008).

274. *See id.* at 185.

275. *See* Kinleya1 & Tadaki, *supra* note 172, at 944-45.

276. Andreas Georg Scherer et al., *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance*, 16 BUS. ETHICS Q. 505, 519 (2006).

277. Mende, *supra* note 219, at 201.

278. *Id.* at 213.

279. *Id.* at 204.

280. Pollicino & De Gregorio, *supra* note 271, at 15-16.

281. Mende, *supra* note 219, at 204.

282. *See* Subhabrata Bobby Banerjee, *A Critical Perspective on Corporate Social Responsibility: Towards a Global Governance Framework*, 10 CRIT. PERSP. ON INT'L BUS. 84, 92 (2014).

A. Corporate Social Responsibility

Allowing TNCs to participate in the standard-setting process in the early stages has its benefits. IOs could gain knowledge from TNCs, and their involvement also increases the willingness of TNCs to comply with the standard.²⁸³ However, the complexity of knowledge may conceal the preferences of the TNCs from public awareness, whether such preference contains intention or not.²⁸⁴ To address this issue, TNCs must build self-awareness by discovering their self-preference and avoid guiding the public standard-setting process toward a direction that benefits them and harms society.²⁸⁵ The internalization approach aims to form a primary method for TNCs to interact with different actors across different issue areas, aligning with legitimacy factors and mitigating risk.²⁸⁶ This approach corresponds with the concept of Corporate Social Responsibility (CSR).²⁸⁷

CSR emerged in response to the criticism that TNCs have increasingly exerted environmental and social externalities,²⁸⁸ and its core concept was to require corporations to take responsibility for their impact.²⁸⁹ The notion of “responsibility” in CSR extends beyond accountability and focuses on self-reflection and realization of their duty.²⁹⁰ Through the CSR institution, corporations internalize requirements and harmonize them with their self-interested goals, forming new organizational cultures.²⁹¹ The aim is to shape internal corporate governance and instill motivation for social responsibility. In this context, CSR law functions as a consciousness-building principle rather than a strict compliance mechanism, encouraging corporations to integrate social responsibility into their core operations.²⁹²

CSR is chiefly debated within the domestic context, where its design relies on a central authority to push the mechanism.²⁹³ However, the domestic-based

283. Pattberg, *supra* note 6, at 250.

284. See Valentin Jeutner, *The Quantum Imperative: Addressing the Legal Dimension of Quantum Computers*, 1 MORALS & MACHINES 52, 55 (2021).

285. See Peter Pruzan, *From Control to Values-Based Management and Accountability*, 17 J. BUS. ETHICS 1379, 1383 (1998).

286. See Mende, *supra* note 219, at 212.

287. See Sifan Xu & DaJung Woo, *Key Players in Corporate Social Responsibility (CSR) Institutionalization: An Analysis of Multinational Companies' Interorganizational Positioning via CSR Reports*, 37 MGMT. COMMUNICATION Q 3, 4 (2023).

288. Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONOMICA 1, 2 (2010).

289. Gary Gereffi & Joonkoo Lee, *Why the World Suddenly Cares About Global Supply Chains*, 48 J. SUPPLY CHAIN MGMT. 24, 25 (2012).

290. Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in HUM. RTS. AND CORPORATIONS 31, 42 (David Kinley ed., 2009).

291. *Id.* at 43.

292. *Id.* at 31-33.

293. Anselm Schneider & Andreas Georg Scherer, *State Governance Beyond the 'Shadow of Hierarchy': A social mechanisms perspective on governmental CSR policies*, 40 ORG. STUD. 1147, 1152 (2019).

mechanism cannot perfectly address global issues caused by TNCs, including north-south inequality and climate change.²⁹⁴ In addition, global society lacks central power and law enforcement institutions due to the respect for national sovereignty and cultural diversity.²⁹⁵ Therefore, an alternative mechanism is needed to apply CSR globally while ensuring flexibility to suit different contexts. In this regard, “meta-regulation” emerges as a promising solution. Meta-regulation aims to create a governance structure based on informal and negotiated processes, improving value internalization without compromising flexibility.²⁹⁶ This approach supports self-regulation among participants by providing non-law measures, such as guidelines, networks, or dialogue.²⁹⁷ Its informal and conscious-building features make it well-suited for applying CSR principles to TNCs globally, accommodating diverse contexts. The UN Global Compact (UNGC) stands out for its relatively comprehensive institutional structure that internalizes legitimacy factors in TNC practices.

B. UNGC as an Opportunity to Internalize Legitimacy Factors

UNGC is a platform created by the UN Secretariat where the UN directly collaborates with TNCs, excluding the intervention of state members.²⁹⁸ UNGC governs TNCs through common principles and allows them to create compliance measures that fit their situations.²⁹⁹ While its ten principles and progress reporting are widely recognized, the governance structure of UNGC is comprised of five actions to help corporations integrate the principles into their management models.³⁰⁰ These actions are principled business, strengthening society, leadership commitment, reporting progress, and local action.³⁰¹ “Principled business” means that UNGC provides ten principles for corporations to follow, which cover human rights, labor, environment, and anti-corruption.³⁰² “Strengthening society” indicates that corporations should consider the societies surrounding them and take action to support and

294. *See id.* at 1149.

295. *C.f.* Danielle S. Petito, *Sovereignty and Globalization: Fallacies, Truth, and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139, 1142-44 (2001).

296. *Id.* at 37.

297. Christine Parker, *Self-Regulation and the Not-for-Profit Sector 3* (Melbourne L. Sch. Legal Stud. Rsch. Paper No. 372, 2007), <http://dx.doi.org/10.2139/ssrn.1337278> [<https://perma.cc/P4AS-UUAY>].

298. David Coleman, *The United Nations and Transnational Corporations: From an International to a “Beyond-state” Model of Engagement*, 17 GLOB. SOC’Y 339, 339 (2010).

299. Nathan Andrews, *The UN Global Compact: An Overview of the Promise and Pitfalls*, in THE PALGRAVE HANDBOOK OF CORP. SOC. RESP. 865, 867 (David Crowther & Shahla Seifi eds., Springer 2021).

300. *See* DELOITTE & UN GLOBAL COMPACT, UN GLOBAL COMPACT MANAGEMENT MODEL 9 (2010), <https://unglobalcompact.org/library/231> [<https://perma.cc/43VD-D6GY>].

301. UN GLOBAL COMPACT, GUIDE TO CORPORATE SUSTAINABILITY 6 (2014), https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN_Global_Compact_Guide_to_Corporate_Sustainability.pdf [<https://perma.cc/U55D-JK5N>].

302. *Id.* at 8.

collaborate with them.³⁰³ “Leadership commitment” requires corporation leaders to demonstrate a willingness to respect responsibility in their organizations, triggering all sectors to comply proactively with UNGC guidance.³⁰⁴ “Reporting progress” is a monitoring process in UNGC that demands corporations submit a Communication of Progress (CoP) report on their efforts and achievements in implementing the ten principles.³⁰⁵ “Local action” is forming regional networks to assist corporations in adapting and applying the principles in accordance with local contexts and needs.³⁰⁶

While ideally, an “eleventh principle” could be added to UNGC to connect legitimacy factors, negotiating such a new principle would require considerable effort and time. In addition, a new principle requires a new set of compliance measures, further delaying corporations’ internalization of these factors. The existing UNGC actions have already provided potential niches to emphasize legitimacy factors. The “strengthening society” action focuses on the interaction between corporations and stakeholders, shifting corporate values from purely self-interested pursuits to creating common goods.³⁰⁷ To achieve this goal, the UNGC set up projects targeting specific dimensions, including peace, poverty, education, and the rule of law.³⁰⁸ Among these projects, the rule of law has a particularly strong connection to legitimacy factors.

Business for the Rule of Law initiative is at the heart of the UNGC’s rule of law project, developed in collaboration with the UN Secretary-General’s Rule of Law Unit.³⁰⁹ This initiative provided a framework for corporations to respect and support the rule of law. The framework defines the rule of law as a principle that requires entities to have “supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”³¹⁰ These elements reflect core values, such as accountability, fairness, participation, and transparency. Based on this definition, the framework divides two levels of corporate actions: “respect” and “support” rule of law. Respecting the rule of law is a passive requirement, obligating corporations to comply with legal standards and avoid causing harm to society.³¹¹ This must-do action needs to be upheld both domestically and internationally, ensuring that corporations do not impair the execution of justice or accountability.

303. *Id.*

304. *Id.* at 9.

305. *Id.* at 40.

306. *Id.* at 9.

307. *Id.* at 32.

308. *Id.* at 33.

309. *Id.*

310. UN GLOBAL COMPACT, BUSINESS FOR THE RULE OF LAW FRAMEWORK 7 (2015), https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Frule_of_law%2FB4ROL_Framework.pdf [<https://perma.cc/HB6N-A2MZ>].

311. *Id.* at 8.

On the other hand, support for the rule of law involves actions by corporations to help build legal frameworks or accountability institutions.³¹² The framework considers support as an “optimal” action, encouraging corporations to provide a positive effect on legal systems. Support action is divided into core business, strategic social investment and philanthropy, and advocacy and public policy engagement.³¹³ Corporations develop products or services that enhance the rule of law in their core business.³¹⁴ “Strategic Social Investment and Philanthropy” focuses on corporate interactions with governments, international organizations, academic institutions, and NGOs, providing financial or physical aid, such as funds, expertise, volunteering, training, or mentoring.³¹⁵ “Advocacy and public policy engagement” highlight that corporations can enrich the substance of the rule of law by organizing collective actions to address challenges in complying with legal standards and assisting public actors to improve legal frameworks.³¹⁶ They can also advocate for responsible and transparent participation in public affairs, supporting the development of inclusive, responsive, participatory, and accountable institutions in decision-making processes.³¹⁷

Support for the rule of law aims to ensure key legitimacy factors that might be compromised by TNCs in public standard-setting processes. While it provides examples of how businesses can respect the rule of law, it offers little detail on how to do so actively, rendering “support for the rule of law” more of a catchphrase.³¹⁸ The concept mentioned in support of the rule of law is too abstract for corporations to implement effectively. Therefore, providing specific, practical, and measurable guidance will help corporations understand and internalize these legitimacy factors in their actions. Rather than establishing new principles, these legitimacy factors should be integrated into the guidance for existing concepts within the framework.

Due to several key features, UNGC offers a promising training ground for TNCs to become more aware of legitimacy factors. First, it establishes a comprehensive foundation for meta-regulation aimed at value internalization.³¹⁹ By forming accountable institutions for TNCs and establishing direct channels for IOs to influence the global market,³²⁰ the UNGC overcomes the limitations

312. *Id.* at 10.

313. *Id.* at 10-12.

314. *Id.* at 10.

315. *Id.* at 11.

316. *Id.* at 12.

317. *Id.*

318. *See generally id.*

319. *See* Iuliia V. Bulgakova & Sergei D. Nabok, *The United Nations Global Compact as a Global Governance Mechanism of Corporate Social Responsibility and Sustainable Development*, in *PROCEEDINGS OF THE INT’L SCI. & PRACTICAL CONF. ON SUSTAINABLE DEV. OF REG’L INFRASTRUCTURE* (ISSDRI 2021) 59, 64 (2021), <https://doi.org/10.5220/0010586100590064> [<https://perma.cc/D7YH-J5RL>].

320. Andrews, *supra* note 299, at 873.

of state-based governance at the international level.³²¹ Even though UNGC is based on a soft law approach, its commitment mechanisms, network structures, and reporting institutions form a sufficient framework to moralize corporations. The Global Compact Board Program aims to embed sustainability and responsibility consciousness in corporate leadership and on boards, thereby leveraging internal business power structures.³²² The UNGC, therefore, has fully considered who the audience is and advanced its influence by utilizing the power structure within the business. The well-known CoP mechanism embodies a grading system that classifies CoP into GC Advanced and GC Active according to the degree of disclosure,³²³ enhancing transparency.

Second, UNGC is a recognized and stable platform with 25,493 participants worldwide,³²⁴ including early adopters (since 2000) from the automotive industry.³²⁵ Its widespread adoption suggests that its design and communication resonate well with businesses.³²⁶ The UNGC does not seek to eliminate private interests but to integrate social values and find a balance within corporations. By using familiar business language and governance concepts, the UNGC increases the willingness of companies to participate.³²⁷ Effective communication and thoughtful institutional design are crucial for global governance without binding forces to impose regulation.³²⁸

Third, UNGC was founded on a legitimate basis and continues to increase legitimacy in global governance. Originating from international law through the UN Secretariat and its principles, the UNGC is rooted in adequate legitimate ground.³²⁹ Its communication-based and transnational nature allows it to pool the voices of non-governmental actors, increasing global dialogue reflecting universal value and inclusive participation, which enriches its legitimate value.³³⁰ Additionally, UNGC is dedicated to moralizing global private actors and enhancing legitimacy in global governance.³³¹ Without a central authority

321. *Id.* at 866.

322. UN GLOBAL COMPACT, GUIDE TO CORPORATE SUSTAINABILITY, *supra* note 301, at 36.

323. *Id.* at 40.

324. UN GLOBAL COMPACT, <https://unglobalcompact.org/> [<https://perma.cc/Z78P-S5H2>] (last visited Aug. 6, 2024).

325. *Id.*

326. Guido Orzes et al., *United Nations Global Compact: Literature review and theory-based research agenda*, 177 J. CLEANER PROD. 633, 634 (2017).

327. Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE SPECTRUM OF INT'L INSTITUTIONS* 52, 56-57 (Kenneth W. Abbott & Duncan J. Snidal eds., 1st ed. 2021).

328. SAROSH KURUVILLA, PRIVATE REGULATION OF LABOR STANDARDS IN GLOBAL SUPPLY CHAINS: PROBLEMS, PROGRESS, AND PROSPECTS 236 (2021).

329. See Tomáš Kristek, *The UN Global Compact: A New Perspective – the Dynamic Cyclical Spiral Evolutionary Model*, 67, 70 (22d Int'l Joint Conf. Central & E. Eur. in the Changing Bus. Env't: Proceedings, 2022), https://ceeconference.vse.cz/proceedings-2022/page_67-77/ [<https://perma.cc/CY76-635L>].

330. Andrews, *supra* note 299, at 872.

331. Scholte, *supra* note 186, at 116.

to secure legitimacy, global governance relies on the inner morality of laws,³³² necessitating a heightened moral consciousness among actors formulating global rules. Institutions that could reify morality into principles and cultivate global actors will enhance overall legitimacy at the global level, and the UNGC happens to be such an institution.

Fourth, UNGC can create an accountability network with other global initiatives. By leveraging business reputations to hold TNCs accountable,³³³ the UNGC's impact is amplified through its influence on corporate reputations.³³⁴ While UNGC is a soft institution, its potential to link with other initiatives provides a chance to bolster pressure on TNCs. UNGC collaborates with other initiatives or frameworks, including the Global Reporting Initiative (GRI), Carbon Disclosure Project (CDP), and ISO 26000, to complement content, extending its influence through a broader network.³³⁵ Besides, the shared values established across these frameworks form broader accountability networks, encouraging TNCs to internalize and respond to these values. This repetitive reach of values helps TNCs internalize them effectively.

Lastly, UNGC is an open platform and can contribute to balancing the voice in the public standard-setting process.³³⁶ By not setting thresholds for corporate participation, the UNGC attracts many Small and Medium Enterprises (SMEs), with nearly half of its participants being SMEs.³³⁷ This inclusivity makes the UNGC a valuable source of diverse participants for global governance. A vital issue presented in the participation of TNCs in the public standard-setting process is that IOs often invite well-known corporations yet undermine the balance of different voices.³³⁸ The opinions of SMEs are particularly susceptible to being diluted when transitioning from domestic to international levels.³³⁹ The UNGC's participant list provides a reference for IOs to invite diverse actors, ensuring a balanced representation of voices.³⁴⁰

While UNGC has significant potential to shape the behavior of TNCs, its soft-law nature still raises some doubts. It is frequently criticized for being ineffective, and although it indicates that long-term implementation of the

332. Kingsbury, *supra* note 22, at 38; Scholte, *supra* note 186, at 116.

333. See Mende, *supra* note 219, at 213.

334. Orzes et al., *supra* note 326, at 651.

335. UN GLOBAL COMPACT, *supra* note 323, at 40.

336. Andreas Rasche & Dirk Ulrich Gilbert, *Institutionalizing Global Governance: The Role of the United Nations Global Compact*, 21 BUS. ETHICS: EUR. REV. 100, 108 (2012).

337. *Id.* at 107.

338. See Peter J. Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 VAND. J. TRANSNAT'L L. 1101, 1103 (2013).

339. See José Manuel Alvarez Zárate, *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?*, 59 B.C. L. REV. 2765, 2775 (2018); John Gillespie, *Localizing Global Rules: Public Participation in Lawmaking in Vietnam*, 33 LAW & SOC. INQUIRY 673, 696 (2008).

340. *C.f.* Dirk Ulrich Gilbert, *The United Nations Global Compact as a Network of Networks*, in THE UNITED NATIONS GLOBAL COMPACT 340, 341 (Andreas Rasche and Georg Kell eds., 2012).

UNGC leads to higher acceptance of social responsibility in business,³⁴¹ others argue that its weak enforcement renders the UNGC a “bluewashing” machine.³⁴² The UNGC relies on CoP to monitor corporations driven by stakeholder pressure and business reputation, but it lacks rigorous audit procedures to review compliance.³⁴³ This “toothless” institution allows corporations to enjoy a reputation for claiming their participation in UNGC without changing harmful behavior.³⁴⁴ Although UNGC delists corporations that do not submit periodic reports, the low threshold for delisting makes this action rare.³⁴⁵ In addition, the UNGC does not tailor standards or codes of conduct for each principle, merely recommending that corporations follow the instructions from related organizations, which leads to uneven compliance between principles.³⁴⁶

A second major criticism surrounds participating entities. Researchers believe that US-based TNCs are less willing to join UNGC due to fears that participation could provide compelling evidence of lawsuit non-compliance.³⁴⁷ However, it is worth mentioning that these TNCs are still involved in the initiative despite their absence of commitment to UNGC,³⁴⁸ reflecting the influential position of UNGC and these corporations being unable to ignore its formation and growth. The extended problem will be representation in UNGC. Research indicates that it is insufficient when discussing particular issues on behalf of stakeholders, such as labor organizations.³⁴⁹ Additionally, gender inequality within the UNGC has been highlighted.³⁵⁰ Even though UNGC is relatively open to all actors, scholars have warned of the necessity of being aware of power inequality between TNCs and other actors.³⁵¹

While it contains several risks, UNGC can serve as a base for developing a comprehensive mechanism for internalizing legitimacy factors into the practice of TNCs. Given its scale, structure, and influence, UNGC deserves to be strengthened and improved to guide TNCs in performing better in their interactions with society.

341. Andrews, *supra* note 299, at 872.

342. Rasche & Gilbert, *supra* note 336, at 106.

343. Orzes et al., *supra* note 326, at 640.

344. Rasche & Gilbert, *supra* note 336, at 106.

345. Until now, only 29 businesses are delisted from UNGC. *Delisted Participants*, UN GLOBAL COMPACT, <https://unglobalcompact.org/participation/report/cop/expelled/> [<https://perma.cc/S794-8QLQ>] (last visited Aug. 6, 2024).

346. *C.f.* Ruth Jebe, *Sustainability Reporting and New Governance: South Africa Marks the Path to Improved Corporate Disclosure*, 23 CARDOZO J. INT'L & COMP. L. 233, 256 (2015).

347. Rasche & Gilbert, *supra* note 336, at 108.

348. Bulgakova & Nabok, *supra* note 319, at 63.

349. Rasche & Gilbert, *supra* note 336, at 107.

350. Orzes et al., *supra* note 326, at 640.

351. Bulgakova & Nabok, *supra* note 319, at 63.

*ii. Policy Recommendations to Strengthen Transparency,
Legitimacy, and Accountability*

Reshaping the behavior of TNCs is a crucial step toward positive public-private interaction, but modification within IOs is necessary to mitigate the risk of the interaction.

A. Raising Awareness of the Nature of Standards and the Roles of TNCs

Although international standards must await state enactment to gain binding force, this does not justify a lax approach to the standard-setting process.³⁵² Standards established by IOs are highly likely to be adopted by states, transitioning from soft law to formal law.³⁵³ Once these standards are codified, rectifying flaws resulting from a lenient process becomes challenging.³⁵⁴ Therefore, these standards should be approached with the same rigor as binding rules from the outset, necessitating thorough procedures in their development. IOs should also be aware of knowledge-making processes involving complex techniques or knowledge.³⁵⁵ In the WP.29 case, the absence of safeguards to ensure knowledge neutrality leaves room for TNCs to manipulate the standard-setting. As civilization rapidly advances, rules and standards will inevitably become more intricate and closely tied to complex knowledge. IOs must establish safeguards at the knowledge-making stage, especially when knowledge has become one source of legitimacy to IOs.

Additionally, IOs should redefine the roles of TNCs in the processes. IOs with state-based institutions will find inconsistencies between their normative ideology and actual practice when interacting with TNCs. For instance, according to WP.29 rules, TNC participation is deemed “exceptional,” allowing the units to provide opinions without decision-making rights.³⁵⁶ However, TNCs frequently influence the standard-setting process from its early stages.³⁵⁷ This inconsistency amplifies TNC power without accountability. Updating accountability mechanisms is crucial, with IOs needing to stop viewing TNCs as mere sub-participants and instead defining appropriate roles. The emergence of the pacing problem implies that public-private interactions will inevitably change from top-down to collaboration because of the need for expertise and resources. Public actors, thus, should not maintain an overly optimistic attitude toward private actor participation. Instead, as these public actors explore more diverse modes of cooperation, they should be more conscious of the associated risks. Determining specific collaboration modes and TNC roles is complex and

352. See Kuo, *supra* note 17, at 1058.

353. See Krisch & Kingsbury, *supra* note 15, at 3-4.

354. See Kingsbury, *supra* note 22, at 38-39.

355. Miller, *supra* note 234, at 350.

356. See U.N. ECON. COMM'N FOR EUR., WORLD FORUM: TERMS OF REFERENCE, *supra* note 51, at 5.

357. See the section II(ii)(B) in the article.

requires further research.

B. Improving Transparency Through Meaningful Disclosure

Transparency is crucial for IOs to become aware of risks and enhance accountability regarding the actions of TNCs. However, the approach to pursuing transparency can vary based on the purpose and target audience. Although WP.29 has emphasized the importance of transparency and commitment to fulfill this goal, it lacks a comprehensive and meaningful plan. Like most IOs, the measure WP.29 attempts to achieve transparency by publicizing laws and opening information related to decision-making.³⁵⁸ While such a measure increases public accessibility, superficial disclosure fails to foster public debate and meaningful accountability.

In the WP.29 case, documents related to the standard-setting process are available online but lack a unified format. Documents from formal meetings (GRs and WP.29 forums) generally have consistent formats and contain more details, such as participant lists, discussion results, and decision reasons.³⁵⁹ These details are valuable for the public to understand the decision-making process, review its legitimacy, and assess the reasonableness of decisions, the representativeness of participants, and the equality within the meetings. In contrast, documents from IWGs vary in format and often provide only rough descriptions of discussion processes, making meaningful public review difficult.³⁶⁰

The discussion processes within IWGs, considered knowledge-making processes or pre-decision-making processes, attract less attention from WP.29 but involve significant public-private interactions, creating a hole for TNCs to inject their private interest and shape the standard-setting processes from the early stages. Although GRs review decisions made in IWGs, they may not always identify the potential risks.³⁶¹ Uncovering private intentions becomes more challenging when decisions are cloaked in technical or knowledge-based justifications. Thus, disclosing relevant information, including proposers, participants, and reasons, not only increases the possibility for the public to

358. U.N. ECON. COMM'N FOR EUR., *Open UNECE*, *supra* note 207.

359. *See e.g.* Working Party on Automated/Autonomous and Connected Vehicles [GRVA], UNECE, *Report of the Working Party on Automated/Autonomous and Connected Vehicles on Its Fourteenth Session*, ECE/TRANS/WP.29/GRVA/14 (Dec. 9, 2022).

360. *See e.g.* UNECE Task Force on Cyber Security 23rd TFCS Session, Minutes from the 23rd Cyber Security/Software Updates Task Force Session, Doc. TFCS-23-06 (Oct. 19, 2022).

361. *See e.g.* Working Party on Automated/Autonomous and Connected Vehicles [GRVA], UNECE, *Report of the Working Party on Automated/Autonomous and Connected Vehicles on its Sixth Session*, ECE/TRANS/WP.29/GRVA/6, at 3-4 (May 1, 2020); Working Party on Automated/Autonomous and Connected Vehicles [GRVA], UNECE, *Report of the Working Party on Automated/Autonomous and Connected Vehicles on its Fifth Session*, ECE/TRANS/WP.29/GRVA/5, at 6-8 (Apr. 18, 2020). Although GRVA discussed the proposal submitted by TFCS, which was originally prepared by GM and Tesla, this information was not officially documented in the meeting records.

capture harmful intentions³⁶² but also lures more stakeholders to join the discussion, balancing the outcome.³⁶³

IOs should host meetings and serve as information hubs, giving the public access to rulemaking processes.³⁶⁴ They can contribute positively to accountability and democracy by establishing meaningful disclosure mechanisms. Publicizing all documents in the meetings could merely count as bottom-line transparency. A fundamental aspect of this mechanism should be publishing all relevant documents in a unified format. A standardized format not only aids public information searches but also ensures that essential messages, such as proposers, participants, and reasons, are captured. These messages enhance public review by reconstructing decision-making processes and identifying consequences.

Furthermore, analyzing these messages can reveal inherent patterns and unintentional biases in the decision-making process. For instance, WP.29 could identify its reliance on certain corporations and take steps to mitigate bias by analyzing detailed messages. This could foster efficient self-censorship in decision-making processes, reducing the risk associated with expanding private power. Therefore, this article suggests that IOs should move from bottom-line transparency to meaningful disclosure and promote public discussion and accountability.

C. Enhancing Accountability by Supporting Value Internalization for TNCs

Reviewing processes from third parties is a primary measure to secure legitimacy and hold agents accountable. However, such a measure is difficult to build in a space that lacks a centralized power structure,³⁶⁵ necessitating the development of different accountability mechanisms. In addition, there is still no stable public-private collaboration model to effectively hold private actors accountable when they pose risks to public affairs. To break through this dilemma, IOs could link with UNGC, strengthening its pressure-based accountability on the action of TNCs. If it is difficult for IOs to hold TNCs accountable when they participate in the standard-setting process, they could at least select the quality of participants. IOs could set up rules prioritizing TNCs committed to UNGC, encouraging more corporations to commit and broadening its coverage. The more corporations commit to the initiative, the more robust a network will be formed, thereby gathering more sources and power to push corporations to be responsible for their action. Namely, IOs and UNGC could mutually benefit from such collaboration.

362. Urueña Hernandez, *supra* note 191, at 399.

363. See Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L. 323, 326 (2021).

364. See Mahon & McBride, *supra* note 233, at 86-87.

365. Möllers, *supra* note 16, at 113.

Furthermore, meaningful disclosure can strengthen the pressure-based accountability behind UNGC. The pressure from stakeholders, including investors, bankers, and consumers, will push corporations to adopt UNGC. However, information disclosure is required to verify whether their actions align with these principles and relevant values. Meaningful disclosure offers evidence for the public to validate corporate actions. NGOs and activists who positively contribute to CSR adoption, specifically in business,³⁶⁶ can use this evidence to supervise corporations and trigger punishments, such as disinvestment and boycotts, when corporate behavior contradicts their UNGC commitments. Additionally, information disclosure may attract media, further strengthening pressure-based accountability by increasing reputational costs for corporations that act against their commitments.³⁶⁷

V. CONCLUSION

With the rapid development of technology, IOs will continuously rely on actors who can provide expertise and opinions to resolve governance issues on technology jointly. This reliance gives TNCs significant opportunities to participate in public standard-setting processes, enhancing their influence on societal norms. However, IOs designed based on state-centric logic may undermine the risk posed by the increased TNC involvement. This analysis uses WP.29, the organs of the UN system, as a case to reveal its interaction with TNCs and the resultant challenges. It also applies the GAL framework to analyze the legitimacy problems within the interaction between WP.29 and TNCs, demonstrating that existing mechanisms within WP.29 fail to hold TNCs accountable despite their significant impact on standard-setting.

On the other hand, the thirst for knowledge in global governance will lead to a more significant expansion of private power in different issue areas. Without proper safeguards, it will pose risks to society. While a blanket ban on private participation will be the most straightforward measure, it will damage legitimacy by impeding reasoned decision-making and participatory values. Building third-party reviewing processes at the global level is also challenging. One method for handling this dilemma is, as noted above, valuing internalization in the practice of TNCs, which can form an essential safeguard to maintain legitimate value in the operation of global governance.³⁶⁸ UNGC is an eligible foundation for developing value internalization at the global level. UNGC sits between soft and hard law and goes beyond state governments to directly communicate with corporations,³⁶⁹ providing opportunities to create efficient governance. Additionally, IOs must understand TNC roles better, implement meaningful disclosure practices, and support UNGC and its

366. Orzes et al., *supra* note 326, at 363.

367. *See id.*

368. *See* Kingsbury, *supra* note 22, at 25.

369. Kristek, *supra* note 329, at 68.

accountability framework.

However, several limitations still exist, as do areas for further research. Firstly, the case study in this article focuses on interactions between TNCs and traditional, state-centric organizations, which may not reflect the dynamics in government-based or network-based organizations. Further research is needed to explore TNC roles in different organizational contexts. Even though some scholars have asserted that IOs are dysfunctional at this age, they still influence states. Additionally, the continuous participation of TNCs in organizations reflects their crucial roles in global governance. Technology keeps blurring state boundaries, increasing the need for optimal global governance. Continued research into IO operations may offer insights for improving governance practices.

Secondly, while this article critiques procedural legitimacy, the comprehensive GAL framework also encompasses substantive analysis. Examining the quality of outcomes could provide a deeper understanding of current practices and inform better governance strategies. Thirdly, the roles of TNCs need to be redefined, but this is a complex issue requiring further exploration. The traditional public-private binary inadequately captures TNC roles, complicating the development of effective accountability mechanisms. Therefore, more research is needed to define these roles more precisely and establish appropriate accountability structures. Lastly, although the UNGC is a potential platform to enhance legitimacy, questions about its further improvement remain.



STATE RESPONSES TO THE COVID-19 PANDEMIC AND THEIR IMPACT ON HUMAN RIGHTS IN SOUTH AFRICA

JOHN MUKUM MBAKU*

ABSTRACT

The COVID-19 pandemic came to South Africa in early 2020 and the country chose to rely on existing laws, which included its national constitution, statutory laws, and the country's obligations under international and regional human rights instruments, to provide the government with the tools to fight the spread of the virus and protect public health. However, civil society and its organizations became worried that the interpretation of existing laws might offer the government the opportunity to act opportunistically and violate citizens' human rights. South Africa declared a state of disaster in May 2020 to enhance the government's ability to minimize the spread of the virus and its impact on people's health. The state of disaster was followed by lockdowns, which severely restricted South Africans' ability to exercise their right to freedom of movement and of association. In addition, schools and businesses were closed. School closures made it extremely difficult for learners, including especially those with disabilities, to exercise their right to basic education. Citizens and non-governmental organizations challenged various COVID-19-related measures and their enforcement in court, arguing that they infringed on the human rights of various individuals within the country's jurisdiction. In their decisions in these cases, the courts held that in all its activities, the government must ensure that the rights of learners with disabilities are safeguarded and enforced. In addition, the courts affirmed the democratic dispensation established by South Africa's 1996 Constitution and held that the law is supreme and that all state functionaries, including members of the executive, must perform their functions in conformity with the law and that they must respect and uphold the constitution, even during officially declared emergencies.

I. OVERVIEW OF AFRICA'S RESPONSES TO PUBLIC HEALTH EMERGENCIES

In the summer of 2020, Human Rights Watch (HRW) issued a report in which it stated that the COVID-19 pandemic had exposed significant gaps in the provision of healthcare services in many African countries.¹ HRW advised

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1. HUM. RTS. WATCH, *Africa: Covid-19 Exposes Healthcare Shortfalls*, (June 8, 2020), <https://www.hrw.org/news/2020/06/08/africa-covid-19-exposes-healthcare-shortfalls>

African governments to “urgently address [their] healthcare deficiencies [in order] to meet the demands of the COVID-19 pandemic and ongoing healthcare needs of their populations.”² In addition, HRW advised African governments to act urgently to ensure that all the people under their jurisdictions are able to realize their right to health as enshrined in various international and regional human rights instruments, including the African Charter on Human and Peoples’ Rights (Banjul Charter).³ At the time, Carine Kaneza Nantulya, the Africa advocacy director for HRW, had advised member states of the African Union (AU) “to carefully analyze the current state of their healthcare infrastructure and make meaningful investments to improve access to quality health care.”⁴

Human Rights Watch interviewed many African healthcare experts as well as human rights defenders.⁵ From these interviews, HRW learned that “a chronic lack of investment in healthcare infrastructure and equipment has made it harder for African nations to retain skilled healthcare workers, provide essential medicines, and reduce the mortality rates of perennial diseases like malaria.”⁶ Solomon Dersso, chairperson of the African Commission on Human and Peoples’ Rights (African Commission), the entity tasked with “promoting and protecting human rights on the continent,” has “said that the COVID-19 pandemic underscores the fact that health is a fundamental human right and that its realization and fulfillment is not just for the health of individuals but for the society as a whole.”⁷ He added that “[u]ltimately, the right to health is a policy choice” and that “[g]overnments have the primary responsibility to be at the forefront of preventive and palliative measures.”⁸

Article 16 of the Banjul Charter guarantees the right of every individual “to enjoy the best attainable state of physical and mental health.”⁹ In addition to the fact that this is a fundamental right under international human rights law, it is also an important part of the U.N. Sustainable Development Goals (SDGs).¹⁰ The right to health which has also been recognized by the constitutions of many African countries, is a key goal of the African Union’s Agenda 2063.¹¹

In its 2020/2021 annual report, Amnesty International noted that the COVID-19 pandemic had exposed many African countries’ “terrible legacy of deliberately divisive and destructive policies that have perpetuated inequality,

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. African Charter on Human and Peoples’ Rights art. 16, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereinafter “Banjul Charter”).

10. HUM. RTS. WATCH, *supra* note 1.

11. *Id.*

discrimination, and oppression” across the continent.¹² Throughout the continent, the impacts of violent armed conflicts in countries, such as Ethiopia, Mozambique, Cameroon, and Nigeria, were exacerbated by the pandemic.¹³ This was due to the fact that many countries in the region had “weaponized” the pandemic in order to “crack down on human rights,” particularly those of members of opposition political parties and historically marginalized individuals and groups (e.g., women and girls, older persons, persons with disabilities, refugees, asylum seekers, and migrants, and ethnic and religious minorities).¹⁴

In addition to the fact that the COVID-19 pandemic hit “those shackled by oppression hardest thanks to decades of inequalities, neglect and abuse,” it also created opportunities for opportunistic political leaders to oppress their citizens and violate their human rights and fundamental freedoms.¹⁵ Since March 2020, 46 African countries have enacted legislation to respond to the COVID-19 pandemic and this includes 41 countries, which have “either fully or partially prohibited gatherings.”¹⁶ The International Center for Not-for-Profit Law (ICNL) identified “187 new measures by governments responding to the COVID-19 pandemic in 46 African countries” and “[t]hese include legislative action (passage of laws and regulations, orders/decrees), executive orders/decrees, and other practices that have not been codified.”¹⁷ The ICNL also determined that there were “at least 189 extensions of various measures, as well as a further 67 actions taken to ease measures.”¹⁸

Unfortunately, some of these legislative responses to the COVID-19 pandemic actually enhanced the ability of incumbent regimes in these countries to entrench themselves and continue to monopolize power.¹⁹ ICNL found that, under the pretext of managing the pandemic, many African governments enacted legislation or implemented policies that actually enhanced the ability of the incumbent government to violate the rights of their citizens. For example, ICNL found 39 declarations of a state of emergency, a national health emergency, a state of national disaster or calamity, or a state of health alert in

12. AMNESTY INT’L, *Sub-Saharan Africa: The devastating impact of conflicts compounded by COVID-19*, (April 7, 2021), <https://www.amnesty.org/en/latest/news/2021/04/subsaharan-africa-the-devastating-impact-of-conflicts-compounded/> [<https://perma.cc/JPV6-UGAM>].

13. *Id.*

14. *Id.*

15. AMNESTY INT’L, *COVID-19 hits those shackled by oppression hardest thanks to decades of inequalities, neglect and abuse*, (Apr. 7, 2021), <https://www.amnesty.org/en/latest/press-release/2021/04/annual-report-covid19-decades-of-oppression-inequality-abuse/> [<https://perma.cc/2HUS-G9LF>].

16. INT’L CTR. FOR NOT-FOR-PROFIT L., *African Government Responses to COVID-19*, <https://www.icnl.org/post/analysis/african-government-response-to-covid-19> [<https://perma.cc/9F8T-6TLE>] (last visited Feb. 12, 2025).

17. *Id.*

18. *Id.*

19. *Id.*

31 countries that significantly increased the power of incumbent regimes.²⁰ These states of emergency negatively affected the rights to freedom of assembly and of association of individuals living in these countries. For example, in an open letter (hereinafter “Freedom House Joint Statement”) to the Southern Africa Development Community (SADC), several organizations expressed “their concern about restrictive government measures in response to COVID-19,” which they argued, were having “a significant impact on citizens’ rights and livelihood” and called all the governments of SADC “to adhere to applicable human rights standards in addressing crisis.”²¹

The Freedom House Joint Statement (FHJS) noted that states of emergency were declared in Angola, Botswana, Eswatini, Lesotho, Mozambique, and Namibia.²² It stated that it was quite concerning that “unduly prolonged periods or extensions of states of emergency [had] been declared in some countries where parliamentary oversight is not guaranteed without providing reasons to justify the length.”²³ The FHJS indicated that during the period of these pandemic-induced emergencies, only Botswana and Namibia had subjected their declarations of states of emergency to parliamentary oversight.²⁴ Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states that:

[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.²⁵

States Parties, however, are not allowed to derogate from articles 6, 7, 8 (¶¶ 1 & 2), 11, 15, 16 and 18 of the ICCPR.²⁶ Article 6 guarantees the right to life.²⁷ Article 7 prohibits torture, cruel, inhuman or degrading treatment or

20. *Id.*

21. The organizations were Advancing Rights in Southern Africa (ARISA); Southern Africa Human Rights Defenders Network (SAHRDN); Southern Africa Litigation Centre (SALC); Amnesty International (AI); and Freedom House. See *SADC: Restrictive COVID-19 Regulations Presenting Concerning Ramifications for Enjoyment of Human Rights, Including Livelihoods*, FREEDOMHOUSE (May 27, 2020), <https://freedomhouse.org/article/sadc-restrictive-covid-19-regulations-presenting-concerning-ramifications-enjoyment-human> [https://perma.cc/23S8-YD6R] (hereinafter “Freedom House Joint Statement”).

22. *Id.*

23. *Id.*

24. *Id.*

25. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 1057 (hereinafter “ICCPR”).

26. *Id.* at art. 4(2).

27. *Id.* at art. 6(1).

punishment.²⁸ Article 8 prohibits slavery and the slave trade in all their forms as well as servitude.²⁹ Article 11 prohibits sending people to prison for failing to meet their contractual obligations.³⁰ Article 15 prohibits *ex post facto* laws or retroactive punishment.³¹ Article 16 guarantees everyone “the right to recognition everywhere as a person before the law.”³² Finally, Article 18 guarantees everyone “the right to freedom of thought, conscience and religion.”³³ According to Article 4(2), none of the rights guaranteed in Articles 6, 7, 8 (paragraphs 1&2), 11, 15, 16, and 18 shall be derogated from, even in times of national emergencies or states of disaster.³⁴

When African countries declared states of emergency as a way to respond to the COVID-19 pandemic, they were not supposed to violate any of the rights enshrined in the ICCPR or derogate from the articles mentioned in Article 4(2).³⁵ Research has determined that lockdown measures taken by some African countries to minimize the spread of the pandemic “often resulted in increased levels of domestic violence against women and girls, leading UN Women to coin a new term—‘shadow pandemic’—to refer to the severe intensification of all forms of gender-based violence that occurred during the pandemic.”³⁶

The right to life (Article 6(1) of the ICCPR) and the prohibition against torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR) together constitute what has been codified in international human rights law as the right to the integrity of the person. This right, which is considered a fundamental human right protected by international human rights law, protects an individual’s mental and physical well-being and, according to the ICCPR, and cannot be derogated from or restricted in times of a public emergency, even if that emergency is legally declared. In its comments on the non-derogable

28. *Id.* at art. 7 (“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

29. *Id.* at art. 8 (1&2).

30. *Id.* at art. 11.

31. Article 15 states that “[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision was made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” *See id.* at art. 15.

32. *See id.* at art. 16.

33. *See id.* at art. 18.

34. *See id.* at art. 4(2); *see also* Hum. Rts. Comm., General Comment No. 29, U.N. Doc. CCPR/C/21/Rev/1/Add.11 (Aug. 31, 2001).

35. These articles are 6, 7, 8, (¶¶ 1 & 2), 11, 15, 16 and 18. *See* ICCPR, *supra* note 25, at art. 4(2).

36. Valentina Carraro, *The effects of the COVID-19 pandemic on violations of the right to integrity of the person*, 9 J. INT’L HUM. ACTION 5, 6 (2024); *see also* About us, UN WOMEN, <https://www.unwomen.org/en/about-us> [<https://perma.cc/XYW7-H5NV>] (last visited Sept. 19, 2024) (explaining that U.N. Women is the U.N. Entity for Gender Equality and the Empowerment of Women; it is a U.N. entity charged with working for gender equality and the empowerment of women).

rights in the ICCPR, the U.N. Commission on Human Rights stated as follows:

No State [P]arty shall, even in time of emergency threatening the life of the nation, derogate from the [ICCPR]'s guarantees of the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.³⁷

Elements of the right to integrity of the person include protection from torture and ill-treatment, protection from arbitrary detention, protection from medical experiments, respect for bodily integrity, and respect for free and informed consent.³⁸ Unfortunately, the COVID-19 pandemic provided opportunities for opportunistic politicians to enact new laws or interpret existing ones to enhance their ability to monopolize power and, at the same time, violate the rights of their citizens, as well as for non-state actors to engage in various forms of human rights violations. For example, there was a significant rise in “intimate partner violence” during the COVID-19 pandemic.³⁹ Although domestic violence had been a major problem in many countries in Africa before the COVID-19 pandemic, it was significantly exacerbated by mandatory lockdown laws. In Ethiopia, for example, it was determined that just in two months during COVID-19 lockdowns, over 100 girls were raped, many of them by close family members.⁴⁰

But why did the COVID-19 pandemic and associated lockdowns create a significantly heightened risk for victims of domestic violence? It has been argued that these mandatory lockdown regulations or laws forced many people to spend more time at home, significantly increasing their vulnerability to abuse

37. Hum. Rts. Comm., Status of the International Covenants on Human Rights, U.N. Doc. E/CN.4/1985/4, ¶ 58 (Sept. 28, 1984).

38. These rights are enshrined in major international and regional human rights instruments, including the ICCPR, the Banjul Charter, the European Convention on Human Rights, and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

39. Mearg Eyasu Kifle, Setongnal Birar Aychiluhm & Etsay Woldu Anbesu, *Global prevalence of intimate partner violence during the COVID-19 pandemic among women: systematic review and meta-analysis*, 24 BMC WOMEN'S HEALTH 127, 128 (2024).

40. *Id.*

by relatives and other family members.⁴¹ The U.N. Office on Drugs and Crime determined that restricting the mobility of women and girls, as COVID-19 regulations did, significantly increases their “risk of victimization by intimate partners or family members.”⁴² The UNODC study determined that

[l]ockdown measures can potentially affect violence against women in two conflicting ways: by increasing strain in the home (as women spend more time in isolation with violent partners and family members they are more exposed to domestic violence); and by reducing exposure to crime committed outside the home (as social interaction is reduced, women have less exposure to the interpersonal violence that affects them).⁴³

In many African countries, violations of the physical integrity of the individual also occurred while state security officers were enforcing public health measures that had been imposed to minimize the spread of COVID-19 virus.⁴⁴ For example, in April 2020, the BBC reported that Nigeria’s security forces, which were enforcing lockdown measures in several parts of the country, had killed more people than the COVID-19 virus itself.⁴⁵ In order to “ensure strict implementation of containment measures” designed to minimize the spread of COVID-19, some law enforcement officials had engaged in behaviors that involved “the perpetration of torture and ill-treatment or even deprivation of the right to life of civilians.”⁴⁶

Second, research by Amnesty International (AI) determined that in many countries in Africa, “[a]busive policing and excessive reliance on law enforcement to implement COVID-19 response measures have violated human

41. *Id.*; see also U.N. OFFICE ON DRUGS AND CRIME (UNODC), RESEARCH BRIEF: WHAT CRIME AND HELPLINE DATA SAY ABOUT THE IMPACT OF THE COVID-19 PANDEMIC ON REPORTED VIOLENCE AGAINST WOMEN AND GIRLS, 1 (Nov. 20, 2020), <https://reliefweb.int/report/world/research-brief-what-crime-and-helpline-data-say-about-impact-covid-19-pandemic-reported> [<https://perma.cc/GFP4-CZ85>].

42. *Id.*

43. *Id.* at 2.

44. Sophia A. Zweig, et al., *Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19*, 23 HEALTH & HUM. RTS. J. 173, 173 (2021).

45. *Coronavirus: Security forces kill more Nigerians than Covid-19*, BBC NEWS (Apr. 16, 2020), <https://www.bbc.com/news/world-africa-52317196> [<https://perma.cc/NKS8-UTLB>]; see also *UN raises alarm about police brutality in COVID-19 lockdowns*, ALJAZEERA (Apr. 18, 2020), <https://www.aljazeera.com/news/2020/4/28/un-raises-alarm-about-police-brutality-in-covid-19-lockdowns> [<https://perma.cc/K5Q6-TFQK>] (noting that the U.N. had raised the alarm that many countries, including Nigeria, South Africa, and Morocco, were “flouting the rule of law in the name of fighting coronavirus” and that these countries “risk sparking a ‘human rights disaster’”).

46. Carraro, *supra* note 36, at 10.

rights and in some instances made the health crisis worse.”⁴⁷ In a briefing which AI released in December 2020, it noted that it had “documented cases of human rights violations related to law enforcement and the COVID-19 pandemic in 60 countries in all regions of the world.”⁴⁸ This, according to AI, includes “cases where people were killed or severely injured for allegedly breaching restrictions, or for protesting against detention conditions.”⁴⁹ In the first five days of Kenya’s COVID-19-related curfew, noted AI, “at least seven people were killed and 16 hospitalized as a result of police operations” related to the enforcement of lockdown restrictions.⁵⁰

AI determined that throughout many countries, security forces were involved in violating international law during the pandemic by using excessive, unnecessary, and disproportionate force to implement government mandated lockdowns and curfews.⁵¹ In doing so, security forces committed “horrific abuses” under the pretext of “fighting the spread of COVID-19” and these abuses include, for example, “Angolan police shooting a teenage boy in the face for allegedly breaking curfew.”⁵² AI also found that “[i]n South Africa, police [had] fired rubber bullets at people ‘loitering’ on the streets on the first day of lockdown” and that “at least 16 people were killed by security forces in Wolaita Zone in Ethiopia in August 2020 following protests against the arrests of local leaders and activists, allegedly for holding a meeting in contravention of COVID-19 restrictions.”⁵³

Although under international human rights law States can lawfully place certain restrictions on the right to freedom of peaceful assembly in order to protect public health or other legitimate interests, these restrictions “must be provided by law and [they must] be necessary and proportionate to a specific aim.”⁵⁴ However, AI has determined that some States were imposing “blanket bans on protests, prohibiting or restricting protests where other public gatherings of similar sizes remained unaffected; or using force against peaceful protesters.”⁵⁵ Thus, in enacting legislation or interpreting existing laws to protect public health during the COVID-19 pandemic, States were required to be mindful of the non-derogable nature of certain human rights enshrined in the ICCPR and to place “human rights at the centre of all considerations.”⁵⁶

47. AMNESTY INT’L, *Governments and police must stop using pandemic as pretext for abuse*, (Dec. 17, 2020), <https://www.amnesty.org/en/latest/press-release/2020/12/governments-and-police-must-stop-using-pandemic-as-pretext-for-abuse/> [<https://perma.cc/2RAA-QRCB>].

48. AMNESTY INT’L, *COVID-19 crackdowns: Police abuse and the global pandemic*, (Dec. 17, 2020), <https://www.amnesty.org/en/documents/act30/3443/2020/en/> [<https://perma.cc/6HTR-933T>].

49. AMNESTY INT’L, *Governments and police must stop*, *supra* note 47.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

In many African countries, public health emergencies and natural disasters have often provided incumbent governments with the opportunity to either interpret existing laws or enact new ones to enhance their ability to oppress citizens and violate their human rights. For example, the outbreak of Ebola in Guinea, Liberia, and Sierra Leone in 2014 led to quarantines, which significantly affected the people's rights to freedom of assembly and of association. Governments in all three States imposed lockdowns on homes, neighborhoods, villages, and even entire administrative regions.⁵⁷ Responding to Ebola quarantines and lockdowns in Guinea, Liberia, and Sierra Leone at the beginning of the pandemic in 2014, Human Rights Watch declared as follows:

International human rights law requires that restrictions on human rights in the name of public health or public emergency meet requirements of legality, evidence-based necessity, and proportionality. Restrictions such as quarantine or isolation of symptomatic individuals must, at a minimum, be provided for and carried out in accordance with the law. They must be strictly necessary to achieve a legitimate objective, the least intrusive and restrictive available to reach the objective, based on scientific evidence, neither arbitrary nor discriminatory in application, of limited duration, respectful of human dignity, and subject to review. When quarantines are imposed, governments have absolute obligations to ensure access to food, water, and health care.⁵⁸

Thus, while States may be able to impose restrictions on the exercise of human rights in order to deal with public health and other public emergencies, the measures that they employ must be legal, necessary, and proportional. In 2020, for example, U.N. experts indicated that they were alarmed that the government of Uganda was using "COVID-19 emergency laws to target gay, lesbian, bisexual[,] and transgender people and urged the government to strictly limit the use of emergency power to public health issues."⁵⁹ The U.N.'s group of experts reported that they had learned that local government authorities had raided an LGBT shelter in Kyengera, a small town in the Wakiso District of Uganda, just 10 kilometers from Kampala, the country's capital.⁶⁰ The raid of the shelter, the experts learned, was "based on the perceived sexual orientation or gender identity of the residents, who were then charged for allegedly

57. *West Africa: Respect Rights in Ebola Response*, HUM. RTS. WATCH (Sept. 15, 2014), https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response?gad_source=1&gclid=Cj0KCQjwurS3BhCGARIsADdUH53n22VyOHlcEewSfKNffh9TTyQN0RdpvhQjb116yelc3zjwkE2HWT8aAknNEALw_wcB [https://perma.cc/QL37-YPQL].

58. *Id.*

59. Press Release, Office of the U.N. High Commissioner for Human Rights, UN rights experts fear Uganda is using COVID-19 emergency powers to target LGBT people (Apr. 27, 2020), <https://www.ohchr.org/en/press-releases/2020/04/un-rights-experts-fear-uganda-using-covid-19-emergency-powers-target-lgbt> [https://perma.cc/FC2T-FWJL].

60. *Id.*

disobeying coronavirus regulations on physical distancing.”⁶¹

The U.N. experts explained that pursuant to international human rights law, “[e]mergency powers to combat crises, such as COVID-19, derive their strength and legitimacy from strict adherence to their object and purpose” and that “[a]ny emergency powers linked to COVID-19 must be proportionate, necessary and non-discriminatory.”⁶² When governments misuse emergency powers, for example, to target their perceived political enemies or competitors, instead of protecting public health or other public interests, they undermine their democratic institutions, threaten the rule of law, and create opportunities for state and non-state agents to violate human rights.

Government responses to the COVID-19 pandemic “generated common challenges and tensions, particularly concerning the relationship between public health measures on the one hand and the need to protect human rights and secure livelihoods on the other.”⁶³ For example, the decision of many African governments to “resort to lockdowns” in order to minimize the spread of the pandemic “jeopardized the protection of human rights, including the right to life, dignity, liberty, freedom of assembly and privacy.”⁶⁴ It was reported in 2022 that in Kenya, the police had taken the COVID-19 lockdown “as an opportunity to increase violent harassment of [Nairobi’s] citizens” and that since 2020, police had “killed more than 326 people,” including 13-year-old Yassin Moyo.⁶⁵ Similarly, in April 2020, Reuters reported that security forces in Nigeria had killed “18 people in two weeks while enforcing lockdowns imposed to halt the spread of the new coronavirus.”⁶⁶ The pandemic had significant impact on the “social and economic well-being” of many Africans, particularly “vulnerable and marginalized groups,” and pushed the latter deeper into poverty.⁶⁷

Legal scholars and human rights defenders have argued that “these challenges have played out in distinctive local, national and transnational settings in which developments have been shaped by underlying structural factors and situation-specific dynamics and responses.”⁶⁸ The responses of various actors, including especially governments, to the COVID-19 pandemic, have been undergirded by both national and international law.⁶⁹ Outside national

61. *Id.*

62. *Id.*

63. Ebenezer Durojaye et al., *Introduction: COVID-19 and the Law in Africa*, 65 J. AFR. L. 173, 173–74 (2021).

64. *Id.* at 174.

65. Jaclynn Ashly, *Kenyan Police Have Killed Hundreds During the Pandemic. Yassin Moyo Was One of Them*, JACOBIN (Jan. 19, 2022), <https://jacobin.com/2022/01/nairobi-covid-19-brutality-murder-duncan-ndiema> [<https://perma.cc/H465-SRES>].

66. *Nigerian security forces killed 18 people during lockdowns—rights panel*, REUTERS (Apr. 16, 2020), <https://www.reuters.com/article/world/nigerian-security-forces-killed-18-people-during-lockdowns-rights-panel-idUSKCN21Y266/> [<https://perma.cc/3TY8-QQJ6>].

67. Durojaye et al., *supra* note 63, at 174.

68. *Id.*

69. *Id.*

constitutional law, regional and international human rights instruments have framed the various legal issues that have arisen from responses to the COVID-19 pandemic, including the need for States to be cognizant of their obligations under international law.⁷⁰

Thus, the measures that African countries take to deal with public health emergencies must not violate the State's obligations under international and regional human rights instruments. One way to determine the nature of the legal frameworks through which African countries responded to COVID-19 is to examine the experiences of individual countries. In the next section, this article will provide a brief overview of the legal framework for the Republic of South Africa's response to COVID-19.

II. THE LEGAL FRAMEWORK FOR SOUTH AFRICA'S RESPONSE TO COVID-19

South Africa's response to the COVID-19 pandemic was couched in terms of its obligations under national constitutional law and international human rights law. The discussion begins with an overview of how international law is given effect in South Africa's courts. With respect to how international law is given effect in its domestic courts, the Republic of South Africa is generally considered a dualist country. According to § 231(2) of the Constitution of the Republic of South Africa, "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."⁷¹ However, pursuant to § 231(4), "a self-executing provision of an agreement that has been approved by Parliament is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament."⁷²

Further, Section 234(4) makes clear that in order for an international agreement to create rights that are justiciable in South Africa's domestic courts, it must be domesticated by national legislation.⁷³ Unless it is inconsistent with the Constitution or an Act of Parliament, customary international law is law in South Africa.⁷⁴ With respect to the interpretation of legislation, the Constitution of the Republic of South Africa prescribes that when interpreting any legislation, "every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."⁷⁵

While South Africa's Bill of Rights, enumerated in Chapter 2 of the Constitution,⁷⁶ guarantees such fundamental rights as freedom and security of

70. *Id.*

71. S. AFR. CONST., 1996 § 231(2).

72. *Id.* at § 231 (4).

73. *Id.*

74. *Id.* at § 232.

75. *Id.* at § 233.

76. *Id.* at ch. 2.

the person,⁷⁷ as well as freedom of movement,⁷⁸ it also enshrines justiciable socioeconomic rights, such as access to adequate housing, access to healthcare services, and access to social security.⁷⁹ With respect to the interpretation of Chapter 2 provisions, a court, tribunal, or forum “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”; “*must* consider international law”; and “*may* consider foreign law.”⁸⁰

Section 36 of South Africa’s Constitution regulates how the rights in the Bill of Rights can be *limited* and states that these rights may be limited:

only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose and the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.⁸¹

The declaration of states of emergency is governed by the provisions in § 37.⁸² Section 37 also covers the derogation of rights, provides a table of non-derogable rights and judicial overview of states of emergency.⁸³ Section 37 provides that a state of emergency may be declared only “in terms of an Act of Parliament” and only “when the life of the nation is threatened by war, general insurrection, disorder, natural disaster or other public emergency” and “the declaration is necessary to restore peace and order.”⁸⁴ Some rights are specifically listed as rights that cannot be derogated from, even when a state of emergency has been legally declared.⁸⁵ In 1997, South Africa enacted the State of Emergency Act (64 of 1997) to supplement the provisions provided in the Constitution.⁸⁶

The first case of COVID-19 was reported in South Africa on March 5, 2020.⁸⁷ Unlike many other countries in Africa, South Africa chose not to declare a state of emergency to grant the government the powers to manage the

77. *Id.* at § 12.

78. *Id.* at § 21.

79. *Id.* at § 27.

80. *Id.* at § 39(1)(a–c) (emphasis added).

81. *Id.* at § 36(1).

82. *Id.* at § 37.

83. *Id.*

84. *Id.* at § 37(1).

85. *Id.* at § 37 (Table of Non-Derogable Rights).

86. State of Emergency Act 64 of 1997.

87. *COVID-19 Response in South Africa: Country Brief*, WORLD HEALTH ORG. (Sept. 21, 2024), <https://www.afro.who.int/countries/south-africa/publication/covid-19-response-south-africa-country-brief> [<https://perma.cc/9GF3-5DYT>].

pandemic.⁸⁸ Instead, the South African government opted to respond to the pandemic under a legal framework for disaster management undergirded by existing law, including the Bill of Rights and other constitutional provisions. Under this legal framework, certain rights may not be derogated from as made clear in § 37 of the Constitution in the course of the government's response to the pandemic and, in addition, any limitation of rights in the Bill of Rights during this period must comply with the provisions of § 36 of the Constitution.⁸⁹

Although South Africa did not introduce any general law to provide emergency powers to the government to respond to COVID-19, there existed at the time the first case was reported in March 2020, a basic legal framework that could be utilized to deal with the pandemic. This was the Disaster Management Act (57 of 2002), which was designed to provide for “an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centers; disaster management volunteers; and matters incidental thereto.”⁹⁰

In 2015, South Africa amended the Disaster Management Act (2002) through the Disaster Management Amendment Act (16 of 2015).⁹¹ Among other things, the amended Act provided for the South African National Defense Force (SANDF), the South African Police Service (SAPS), and any other organ of the State to participate in and assist the various disaster management structures.⁹² A disaster is defined as “a progressive or sudden, widespread or localized, natural or human-caused occurrence which—(a) causes or threatens to cause—(i) death, injury or disease; (ii) damage to property, infrastructure or environment; or (iii) disruption of the life of a community.”⁹³ Although it does not specifically mention COVID-19 or provide for the management and control of infectious diseases, “disaster” as defined in the Disaster Management Act (2002) can be applied to the pandemic.⁹⁴ The Act, however, can be seen as providing “a broad framework and conferring the executive powers necessary for the coordination and management of a wide range of natural and man-made disasters.”⁹⁵ Although infectious diseases in South Africa are controlled and managed by Regulations Pertaining to the Surveillance and Control of Notifiable Medical

88. Petronell Kruger et al., *Republic of South Africa: Legal Response to Covid-19*, in THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2023), <https://oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e6?rskey=CBXjHY&result=1&prd=OXCON> [<https://perma.cc/F8UN-A3CU>].

89. S. AFR. CONST., 1996 § 36.

90. Disaster Management Act 57 of 2002 pmbl. (S. Afr.); *see also* Kruger et al., *supra* note 88, at para. 19.

91. Disaster Management Amendment Act 16 of 2015 (S. Afr.).

92. *Id.* at pmbl.

93. Disaster Management Act 57 of 2002 art. 1(a)(i-iii) (S. Afr.).

94. *Id.*

95. Kruger et al., *supra* note 88, at para. 20.

Conditions, which were promulgated “pursuant to section 90 of the National Health Act (61 of 2003),” the latter regulations did not play a significant role in South Africa’s management of COVID-19.⁹⁶

Pursuant to the Disaster Management Act (2002), states of disaster can be declared to the national, provincial, and municipal levels by the relevant designated official (minister of the national government; premier of the province; or a leader of the municipality).⁹⁷ With respect to a national state of disaster, it must be declared “where a disaster involves more than one province or cannot be managed effectively by a single province.”⁹⁸ Section 27(5) of the Act provides that once a state of disaster has been declared, it “lapses three months after it has been declared;”⁹⁹ it “may be terminated by the relevant Minister through a notice in the Government Gazette before it lapses or it may be extended by the Minister for 30 days at a time.”¹⁰⁰

On March 15, 2020, South African President Cyril Ramaphosa announced that the country’s “Minister of Cooperative Governance and Traditional Affairs had declared a national state of disaster, across the entire Republic, in terms of section 27(1) of the Disaster Management Act 2002” to respond to the COVID-19 pandemic.¹⁰¹ South Africa’s initial state of disaster lapsed on June 15, 2020 and it was subsequently “repeatedly extended” for 30 days until midnight on April 4, 2022 when the final state of disaster came to an end.¹⁰² Section 27 also empowers the relevant Minister to make regulations, issue directions, or authorize the issuing of directions concerning various aspects of the national state of disaster.¹⁰³ In carrying out this duty, the Minister is expected to consult with other relevant members of the Cabinet.¹⁰⁴

In South Africa, all law and executive action, including that dealing with the management of the COVID-19 pandemic, are subject to judicial review to determine their compliance with the provisions of the constitution and the principle of legality. In fact, as will be made clear later in this article, some of the regulations and executive actions that were implemented to provide the government with the tools to manage the COVID-19 pandemic were challenged in the courts for allegedly infringing rights in the Bill of Rights and also for allegedly failing to meet the requirement of rationality.¹⁰⁵ To ensure the proper and effective management of the pandemic nationally and in various provinces

96. *Id.*

97. *Id.* at para. 21.

98. *Id.* at para. 22.

99. Disaster Management Act 57 of 2002 art. 27(5)(a) (S. Afr.).

100. Kruger et al., *supra* note 88, at para. 23.

101. *Id.* at para. 24; *see also* Wendell Roelf, *South Africa’s Ramaphosa declares state of disaster over COVID-19*, REUTERS (Mar. 15, 2020), <https://www.reuters.com/article/world/south-africas-ramaphosa-declares-state-of-disaster-over-covid-19-idUSKBN21214A/> [<https://perma.cc/9DAZ-ZRH7>].

102. Kruger et al., *supra* note 88, at para. 24.

103. *Id.* at para. 27.

104. *Id.* at para. 29.

105. *Id.*

and municipalities throughout South Africa, various government departments “published guidelines on the implementation of Covid-19 related executive regulations.”¹⁰⁶ These guidelines, however, were only “advisory in nature” and did not have “the force of law, though their implementation [constituted] administrative action” and hence, could “be subjected to judicial review.”¹⁰⁷

At the behest of President Ramaphosa, the government of South Africa established the National Coronavirus Command Council (NCCC) in March 2020 to serve as a “centre for decision making in government’s response to curb the spread of Covid-19 and to deal with the consequences of the pandemic.”¹⁰⁸ Although the NCCC was expected to serve as a “consultative and coordinating forum to ensure effective communication over the national response to Covid-19,” it appeared to be duplicating “the functions intended for the [National Disaster Management Centre] in terms of the Disaster Management Act 2002.”¹⁰⁹ Doubts about its “legality, legitimacy, and accountability” emerged shortly after its creation.¹¹⁰ Its constitutionality was eventually challenged before the High Court of South Africa (Western Cape Division, Cape Town) in *Esau and Others v. Minister of Co-operative Governance and Traditional Affairs and Others*.¹¹¹

Before the Court, the Applicants had argued that the establishment of the NCCC was outside the President’s constitutional powers and that the NCCC had “no legal validity and no decision-making” authority even though it had “seemingly managed and made decisions affecting all South Africans’ rights.”¹¹² In addition, the Applicants averred that “the President and the National Executive [had] usurped Parliament’s powers unlawfully by establishing and granting powers to the National Coronavirus Command Council (‘NCCC’) that ought to vest with the National Disaster Management Centre.”¹¹³ The Court dismissed the constitutional challenge and upheld the argument by the President that § 85 of the Constitution “grants Cabinet the power to regulate its own process as it does not prescribe how Cabinet can arrange itself, meet and determine their *modus operandi*” and that the NCCC was a legitimate committee of the Cabinet and hence, could be held

106. *Id.* at para. 31.

107. *Id.*

108. Qaanitah Hunter, *What exactly is the National Coronavirus Command Council?*, NEWS24 (May 13, 2020), <https://www.news24.com/news24/explainer-what-exactly-is-the-national-coronavirus-command-council-20200513> [<https://perma.cc/GR5A-9Q3Y>]. Membership in the NCCC initially consisted of the President and a few members of his cabinet. Eventually, however, the NCCC came to be staffed by all members of the President’s cabinet. See Kruger et al., *supra* note 88, at para. 32.

109. Kruger et al., *supra* note 88, at para. 32.

110. *Id.*

111. *Esau and Others v. Minister of Coop. Governance and Traditional Affs. and Others* 2020 (11) BCLR 1371 (WCC) (S. Afr.).

112. *Id.* at para. 4.

113. *Id.* at para. 5.

accountable.¹¹⁴

During the period of March 26, 2020, to April 5, 2022, South Africa's response to the COVID-19 pandemic was based on and undergirded by "a risk-adjusted approach" or "alert system" in which "the reach of restrictive public health measures was graded according to the spread of Covid-19 and the 'readiness' of the health system."¹¹⁵ Five alert levels were employed, "with Alert Level 5 representing a high Covid-19 spread and low health system readiness (high risk)," while Alert Level 1 represented "a low Covid-19 spread with high health system readiness (low risk)."¹¹⁶ While alert levels were determined by the Minister of Health pursuant to advice from the Ministerial Advisory Committee on Coronavirus Disease 2019 ("MAC"), the government did acknowledge, however, that other factors, which included the economic and social impact of the pandemic, "also impacted on the determination of alert levels."¹¹⁷

South Africa's COVID-19 alert system was designed to operate at the national, provincial and municipal levels.¹¹⁸ On April 5, 2022, South Africa officially terminated its state of disaster and put in place transitional regulations which elapsed without further legislation on May 5, 2022.¹¹⁹ However, some public health measures, which included the mandatory wearing of masks in public, were retained pursuant to an amendment to the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions, which had been promulgated under the National Health Act (61 of 2003).¹²⁰ These measures remained in effect until June 22, 2022.¹²¹

In South Africa, as was the case with other countries around the world, a major and extremely controversial part of the government's response to the COVID-19 pandemic was the mandatory or "hard lockdown[s]," which were in effect from March 26 to April 31, 2020, and in which "all persons throughout the country were fully confined to their places of residence, except for providing or obtaining essential services or goods, collecting a social grant, seeking emergency medical treatment, or obtaining chronic medication."¹²² On May 1, 2020, the restrictions on the movement of persons were relaxed slightly and people were allowed, for example, "to walk, run, or cycle within kilometres of their place of residence from 06:00 to 09:00 daily."¹²³ Then, on June 1, 2020, the government relaxed restrictions on movement of persons significantly and extended the times people could engage in exercise to "between 06:00 and 18:00

114. *Id.* at paras. 62–64.

115. Kruger et al., *supra* note 88, at para. 62.

116. *Id.* at para. 62.

117. *Id.*

118. *Id.* at para. 63.

119. *Id.* at para. 66.

120. *Id.*

121. *Id.*

122. *Id.* at para. 67.

123. *Id.* at para. 68.

daily, with no specific geographic restriction.”¹²⁴ On December 30, 2021, the government lifted the national curfew and did not reinstate it.¹²⁵

Many of South Africa’s restrictions on the movement of persons during the COVID-19 pandemic were eventually challenged in court. However, the courts, including the Constitutional Court, the country’s highest court, upheld and enforced them.¹²⁶ Nevertheless, the constitutional challenge to restrictions

associated with Alert Levels 3 and 4 was initially upheld in *De Beer N.O. and Others v. Minister of Cooperative Governance and Traditional Affairs*, where the Pretoria High Court found that an unspecified number of restrictions were irrational and accordingly fell afoul of the constitutional requirements for the reasonable and justifiable limitation of rights under Section 36 of the 1996 Constitution.¹²⁷

However, this judgment was eventually overturned by the South African Supreme Court of Appeal.¹²⁸ Nevertheless, its effects were “soon to be rendered moot” when the government relaxed restrictions “in accordance with a reduction in alert level, to Level 2.”¹²⁹

In general, South Africa’s system for the management of COVID-19 involved restrictions on individual mobility, international or internal travel, public and private gatherings and events, and the opening of schools, shops, parks, churches, and sports facilities.¹³⁰ The regulations also dealt with physical distancing, the use of face coverings or personal protective equipment, isolation of infected persons and quarantine of individuals who were suspected of having been infected, testing, treatment, and vaccination, and contact tracing.¹³¹

In responding to COVID-19, South Africa did not introduce any new general law to grant the government emergency powers. Instead, the government relied on its existing constitutional law (e.g., the Bill of Rights) and statutes (e.g., the Disaster Management Act (57 of 2002)), as well on international human rights law to guide its decision making. In carrying out its functions in response to the pandemic, the government was expected to respect all its obligations under national and international law and refrain from violating the rights of all individuals within South Africa’s jurisdiction—that is, the rights enshrined in the Constitution and those guaranteed by international and regional human rights instruments to which South Africa is a State Party. One way to

124. *Id.* at para. 69.

125. *Id.* at para. 72.

126. *Id.* at para. 73.

127. *Id.* at para. 73. *See also De Beer N.O. and Others v. Minister of Coop. Governance and Traditional Affs.* 2021 ZAGPPHC 67 (Gauteng Division, Pretoria) (S. Afr.).

128. *Id.*

129. *Id.*

130. *Id.* at paras. 74–87.

131. *Id.* at paras. 88–108.

determine how and the extent to which the government's COVID-19 response impacted human rights is to examine cases that were brought by human rights-defending institutions and individuals against the government's various pandemic measures. In the section that follows, this article will examine some of South Africa's jurisprudence on government responses to the COVID-19 pandemic and how measures designed to help the State manage and control the spread of the virus impacted human rights.

III. SOUTH AFRICAN JURISPRUDENCE ON GOVERNMENT RESPONSE TO THE COVID-19 PANDEMIC

A. Introduction

After the government began taking measures to manage the COVID-19 pandemic and minimize its spread, as well as its impact on the people and on the economy, human rights defenders became worried that some of the measures were violating human rights. In addition, human rights defenders feared that anti-COVID-19 measures were creating conditions within which both state- and non-state actors were violating human rights and subsequently sought the intervention of the courts. For example, in the case of *Community of Hangberg and Another v. City of Cape Town*, the High Court of South Africa (Western Cape Division, Cape Town) ordered the City of Cape Town to rebuild an informal home that it had destroyed "in contravention of the prohibition of evictions."¹³² In *South African Human Rights Commission v. City of Cape Town*, the South African Human Rights Commission was granted an interdict effectively restraining the City of Cape Town from evicting people living in informal settlements, "in compliance with the Covid-19 regulations."¹³³ In *Centre for Child Law v. The Minister for Basic Education and Others*, the Centre for Child Law approached the High Court and requested that the Court invalidate "regulations that allowed for [COVID-19-related] school closures as they failed to cater for the needs of learners with disabilities" and "[t]he Court granted the order and instructed [the] government to include arrangements for these [vulnerable] learners in amended regulations."¹³⁴

In another case, *C D and Another v. Department of Social Development*, divorced parents of two children obtained an order from the High Court of South Africa (Western Cape Division, Cape Town) "allowing their children, who were visiting their grandparents in another province when the COVID-19-related

132. *Id.* at para. 130. See also *Community of Hangberg and Another v. City of Cape Town* 2020 ZAWCHC 66 (Western Cape High Court) at para. 14 (S. Afr.).

133. Kruger et al., *supra* note 88, at para. 130. See also *City of Cape Town v. South African Human Rights Comm'n* 2021 ZASCA 182 (SCA) at para. 13 (S. Afr.).

134. Kruger et al., *supra* note 88, at para. 170. See also *Ctr. for Child L. v. The Minister of Basic Educ. And Others* 2020 ZAGPPHC (Gauteng Division, Pretoria) (S. Afr.).

lockdown was implemented, to return home.”¹³⁵ In *Skole-Ondersteuningsentrum NPC and Others v. Minister of Social Development and Others*, the High Court of South Africa (Gauteng Division, Pretoria) held “that the blanket closure of Early Education Centers was unlawful.”¹³⁶ In addition, “[a] subsequent challenge against provincial Departments of Social Development’s withholding of subsidies to Early Education Centers also succeeded, thereby enabling them to reopen.”¹³⁷

There were also other challenges to the government’s lockdown policies. For example, “[i]n *Khosa and Ors v. Minister of Defence and Military Defence and Military Veterans and Others*, the applicants approached the Pretorial High Court for a declaration of rights stipulating that all law enforcement agencies had to respect the constitutional rights to dignity, life, and not to be tortured or punished in a degrading manner, during the enforcement of COVID-19 lockdown regulations.”¹³⁸ *Khosa and Others* “was brought [before the Pretoria High Court] after the death of Collins Khosa, who was assaulted by members of the South African National Defence Force (SANDF) when they found (prohibited) alcohol on his premises.”¹³⁹ In addition, “[t]he applicants also requested that there should be an easily accessible mechanism through which to report abuse by law enforcement authorities during the lockdown period.”¹⁴⁰ After the Court granted the applicants’ request, “the South African Police Service added extra capacity to the National Service Complaints Centre, to enable the public to report any allegations of wrongdoing against law enforcement officials.”¹⁴¹

In the sub-section that follows, this article will examine some of these cases to provide greater insight into how South African courts provided the guidance that the executive branch of government needed to avoid acting illegally or unconstitutionally in its measures to deal with the pandemic. Where human rights defenders believed that the government’s actions and measures violated human rights, they were able to call upon the courts to intervene and rule on the constitutionality of the measures in question. The first case that this article will examine is *C D and Another v. Department of Social Development*.

B. C D and Another v. Department of Social Development

Writing for the Cape Town High Court, Justice Meer explained that on April

135. Kruger et al., *supra* note 88, at para. 173. See also *C D and Another v. Dep’t of Social Dev.* 2020 HIPR 129 (WCC) (S. Afr.).

136. Kruger et al., *supra* note 88, at para. 172. See also *Skole-Ondersteuningsentrum NPC and Others v. Minister of Social Dev. And Other* 2020 (4) All SA 285 (GP) (S. Afr.).

137. Kruger et al., *supra* note 88, at para. 172.

138. *Id.* at para. 148.

139. *Id.*

140. *Id.*

141. *Id.* at para. 148. See also *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 144 (S. Afr.).

6, 2020, the Applicants, C D and M D, applied to the Court, “for the Regulations published by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27 (2) of the Disaster Management Act no 57 of 2002 (‘the Act’) on 2 April 2020, prohibiting the movement of persons between the provinces during the Lockdown, to be dispensed with.”¹⁴² Justice Meer explained further that the main purpose of the application was to “enable the First or the Second Applicant to travel from Cape Town to Bloemfontein and back, to fetch their children L D aged 10 and M D aged 7 (‘the children’) from their grandparents’ home.”¹⁴³

The children were on holiday and had travelled from Cape Town (Western Cape Province) to Bloemfontein (Free State Province) on March 22, 2020 for a brief visit to their grandparents and “were expected to return to Cape Town before the start of the school term on 31 March 2020.”¹⁴⁴ However, the government’s mandatory Lockdown “intervened at midnight on 26 March 2020 and the children found themselves locked down with their grandparents in Bloemfontein.”¹⁴⁵ The parents of the two children, C D and M D, who were divorced, had devised a parenting plan that allowed the children to move between the two parents.¹⁴⁶ Justice Meer then provided an overview of the relevant regulations governing the movement of persons during COVID-19 lockdowns.¹⁴⁷ According to these regulations, “[f]or the period of lockdown— (i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving or chronic medical attention.”¹⁴⁸

Justice Meer noted that “[t]he movement of children between holders of parental responsibilities during the Lockdown was specifically regulated by Directions in terms of the Act emanating from the Minister of Social Development.”¹⁴⁹ In a first set of directions issued by the Minister on March 30, 2020, the movement of children between co-holders of parental responsibilities during the lockdown period had been prohibited.¹⁵⁰ However, on April 7, 2020, the directions were amended, permitting the movement of children in certain circumstances.¹⁵¹ Specifically, the amended directions read as follows:

- (i) Movement of children between co-holders of parental responsibilities and rights or a caregiver as defined in Section 1(i) of the

142. *C D and Another* 2020 HIPR 129 at para. 1.

143. *Id.*

144. *Id.* at para. 2.

145. *Id.*

146. *Id.*

147. *Id.* at para. 3.

148. *Id.*

149. *Id.* at para. 4.

150. *Id.*

151. *Id.*

Children’s Act is prohibited, except where arrangements are in place for a child to move from one parent to another in terms, of, (aa) a court order; or (bb) where a responsibilities and rights agreement or parenting plan, registered with the family advocate is in existence, provided that, in the household to which the child is to move, there is no person who is known to have come in contact with, or is reasonably suspected to have come into contact with, a person known to have contracted, or reasonably suspected to have contracted, COVID-19; (ii) the parent or caregiver transporting the child concerned must have in his possession, the court order or the agreement referred to in sub-items (aa) and (bb), respectively, or a certified copy thereof.¹⁵²

These regulations and directions, concluded Justice Meer, are the legal context within which the matter before the Court will be decided.¹⁵³ In an opposing submission, the Respondent, Department of Social Development, argued that the “Amended Direction does not create an exception relating to movement of children from a parent to a caregiver or vice versa” and that “between 3 and 27 March 2020, no arrangements were made to move the children, and that the application was only launched on 6 April.”¹⁵⁴ Justice Meer explained that she had heard the application on April 8, 2020 and she had determined that “there was no prohibition on the movement of the children as they fell within the exception of the Amended Direction, given that there is a court order with arrangements in place for their movement, as per the decree of divorce referred to above.”¹⁵⁵ Subsequently, she granted “an order in terms of the exception authorising *inter alia* the First Applicant to travel to Bloemfontein to fetch his children and return to Cape Town with them.”¹⁵⁶

In her order, Justice Meer also held that “[t]he children will subsequently only be allowed to travel from the First Applicant’s address to the Second Applicant in the event that the Second Applicant is in possession of a certificate by an independent medical practitioner indicating that she has tested negative for the Covid-19 virus.”¹⁵⁷ She also ordered the Applicants to “comply with the current provisions of the current Regulations and Directions that have been issued by the Minister of Transport . . . pertaining to the transportation of persons in private vehicles,” as well as “the provisions of any Regulations and/or Directions that may be issued by the Minister of Transport during the period of the lockdown.”¹⁵⁸ Finally, she ordered the Applicants to “undertake to ensure the safety of the children at all times and to ensure, in the event of either of them working at any time, to follow the relevant health guidelines upon their return

152. *Id.*

153. *Id.*

154. *Id.* at para. 5.

155. *Id.* at para. 6.

156. *Id.*

157. *Id.*

158. *Id.*

home to minimize the risk of exposing the children to the COVID-19 virus.”¹⁵⁹

Justice Meer then proceeded to explain the reasons for her order. First, she explained, the Applicants are the biological parents of the children and that pursuant to the divorce order that terminated their marriage, “arrangements and a parenting plan are in place as envisaged in the Amended Direction, for the children to move between the Applicants.”¹⁶⁰ Second, while the Applicants and the children live in Cape Town, the First Applicant’s parents (i.e., the grandparents of the children) live in Bloemfontein.¹⁶¹ Third, in his founding affidavit, the First Applicant explained that his parents, the children’s paternal grandparents, are not equipped to take care of the children during long periods of time and that should they fall sick of COVID-19, they would not be able to look after the children, supervise them, ensure that they complete their school work, and generally provide for their needs.¹⁶² The First Applicant, who is a medical doctor, expressed concern for the children’s health and well-being and noted that he was better equipped to deal with the children’s needs than his parents.¹⁶³ Also, averred the First Applicant, “even though the Applicants [had] heard of the Lockdown travel ban, they were under the impression that they would be permitted to travel to Bloemfontein to fetch the children and were not aware of the strict extent to which the travel ban would be enforced.”¹⁶⁴

Fourth, a memorandum written by the Family Advocate on April 7, 2020, to support the movement of the children from Bloemfontein to Cape Town pointed out that there had not been any mention of whether the grandparents were taking the necessary precautionary measures to keep themselves or the children safe from contracting COVID-19 and that the children needed regular monitoring to ensure that they were “abiding by the precautionary requirements of Covid-19 relating to good hygiene, regular sanitizing and social distancing.”¹⁶⁵ Fifth, a report produced by Laura Baartman, who had conducted a video conference interview with the children and their grandparents at the request of the Respondent, urged that the children should be returned to their parents in Cape Town.¹⁶⁶

Through the interview, Ms. Baartman had learned that the grandmother was afflicted with chronic ailments, including arthritis and backpain, which made it difficult for her to take proper care of the children.¹⁶⁷ In addition, the Lockdown had prevented her “daily house help” from coming to work, the grandfather could only provide limited support, and that the grandmother was physically

159. *Id.*

160. *Id.* at para. 7.

161. *Id.*

162. *Id.* at para. 8.

163. *Id.*

164. *Id.*

165. *Id.* at para. 9.

166. *Id.*

167. *Id.* at para. 9.1.

exhausted and could no longer adequately take care of the children.¹⁶⁸ Finally, Ms. Baartman’s interview with the children revealed that they had become “heartbroken for not being with their parents” and looked forward to going home to Cape Town.¹⁶⁹ Ms. Baartman, however, was not able to determine whether the children were “at risk in terms of hygiene or that their levels of hygiene [were] optimal as required.”¹⁷⁰

After this critical and informative overview, Justice Meer then proceeded to determine whether the movement of the children from Bloemfontein to Cape Town was permitted in terms of the Amended Direction 1(c)(i).¹⁷¹ First, she cited § 39(2) of the Constitution, which provides that “[w]hen interpreting any legislation, . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”¹⁷² She then noted that the relevant section of the Constitution that the Court had to interpret in regards to the case at bar was § 28(2), which provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.”¹⁷³ Second, she explained that the Amended Direction did not specify “that movement of children can only take place in terms of a pre-existing court order as alluded to by the Respondent” and that her “reading of the direction does not prevent a court from making an order as required, presumably in circumstances of urgency, and for movement of children to take place in accordance with arrangements put in place by such an order.”¹⁷⁴ Finally, in granting permission for the children to travel from Bloemfontein back to their parents in Cape Town, she explained that they would only be “permitted to travel to the Second Applicant on proof being provided that she has tested negative for COVID-19.”¹⁷⁵

Justice Meer then remarked that there was “unrefuted evidence” that the grandparents were already having difficulties taking care of the children and that this problem would only get worse in the long run.¹⁷⁶ Under these circumstances the “well-being and physical health of the children” were being put at risk.¹⁷⁷ The situation with the children was getting worse and required urgent action by the court.¹⁷⁸ Justice Meer then concluded that “[t]he best interests of the children would undoubtedly be served if permission were to be granted for them to be fetched to travel from Bloemfontein to Cape Town.”¹⁷⁹

In *C D and Another*, the Court made clear that the measures taken by the

168. *Id.*

169. *Id.* at para. 9.1-9.3.

170. *Id.* at para. 9.3.

171. *Id.* at para. 10.

172. *Id.* at para. 11.1; S. AFR. CONST., 1996 § 39(2).

173. *Id.* at para. 11.1; S. AFR. CONST., 1996 § 28(2).

174. *Id.* at para. 11.2.

175. *Id.* at para. 12.

176. *Id.* at para. 13.

177. *Id.*

178. *Id.*

179. *Id.*

government to respond to COVID-19, which included forcing children to remain in situations where their well-being and physical health was threatened, created an untenable situation. Citing §§ 39(2) and 28(2) of the Constitution, Justice Meer then held that allowing the children to return to their parents would be in their best interests. As made clear in this judgment, ensuring that people's rights, especially those of vulnerable groups, such as children, are adequately protected in times of emergencies, is an important function for the State.

The rights of vulnerable groups (e.g., children, women, and persons with disabilities) are usually at risk of being violated. However, in situations of public emergencies (such as the COVID-19 pandemic), threats to the rights of these individuals and groups increase significantly and exponentially. In these situations, governments are expected to be extremely vigilant in order to ensure that the rights of these vulnerable groups are not trampled either by measures that the government takes to deal with the emergency or by those enforcing these measures. In the subsection that follows, this article will examine a case from the High Court of South Africa, Gauteng Division, Pretoria, that deals with the violation of the rights of learners with disabilities during the implementation of lockdown measures to tackle the spread of the COVID-19 virus.

C. *Centre for Child Law v. Minister for Basic Education*

This case, *Centre for Child Law v. Minister for Basic Education*, was brought before the High Court of South Africa, Gauteng Division, Pretoria, by the Centre for Child Law (CCL) (the Applicant), a registered law clinic based in the Law Faculty at the University of Pretoria.¹⁸⁰ In *Centre for Child Law*, the CCL approached the High Court and requested that the Court invalidate regulations that allowed for school closures as they failed to cater to the needs of learners with disabilities. Specifically, the CCL was requesting the Court to declare invalid “the directions published on 23 June 2020 in terms of Regulation 4(5) of the Regulations made under the Disaster Management Act 57 of 2002” to the extent that “[t]he Directions fail to provide guidelines for learners with physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities.”¹⁸¹ In the Notice of Motion, it was indicated that an affidavit presented by Anjuli Leila Maistry, an admitted attorney of the High Court of South Africa, who was practicing at the CCL, was duly authorized “to depose to [the] [founding affidavit] and to bring [the] application on the CCL’s behalf” and that the founding affidavit would be used to support the CCL’s

180. *Centre for Child Law v. Minister for Basic Educ.*, Case No. 31213/20 (Pretoria High Court), at para. 22 (S. Afr.). The Court noted that “the CCL works towards the realisation of democratic and human rights values as enshrined in the Constitution” and that its main objective is “to contribute within its means to establish and promote the constitutional rights of children in the South African community, more particularly to use the law as an instrument to advance such rights.” *Id.* at para. 23.

181. *Centre for Child Law v. Minister for Basic Educ.: Notice of Motion*, Case No. 31213/20, at para. 2 (hereinafter “*Centre for Child Law Notice of Motion*”).

application.¹⁸²

In the founding affidavit, the CCL noted that, over the previous months, its personnel had been in regular contact with “a number of organisations for persons with disabilities (OPDs) in order to seek their assistance in understanding the impact of the COVID-19 lockdown on learners with disabilities.”¹⁸³ As part of the overview of the case, the CCL noted in the founding affidavit that the COVID-19 pandemic had “inspired drastic and unprecedented action by countries around the world,” including South Africa, which had invoked “emergency powers under section 27 of the Disaster Management Act 57 of 2002” and that the government had passed laws and implemented policies that had “made unprecedented inroads into the fundamental rights and economic freedoms of ordinary South Africans in an attempt to address the pandemic.”¹⁸⁴

The CCL noted that in efforts to “curb the spread of the pandemic,” the government had not spared the right to basic education, which is “associated with the paramountcy of the best interests of the child.”¹⁸⁵ As part of its response to the COVID-19 pandemic, the CCL explained in the founding affidavit, the government of South Africa ordered that all schools in the country be closed.¹⁸⁶ The government’s closure order, which applied to all schools, including “special schools,” was expected to last for a period of just under twelve weeks.¹⁸⁷ The CCL noted, however, that this 12-week period would include two weeks that would have “constituted the normal closure of schools for the Easter holidays.”¹⁸⁸ The mandatory school closures, the CCL explained, meant that “millions of learners’ access to teaching and learning had been suspended during this period.”¹⁸⁹

South Africa’s learners with disabilities do not attend regular schools. They, however, attend special schools where, in addition to having access to “teaching and learning,” they can be provided with the “specialised care and support services” that are only available at “special schools and special school hostels” and which learners with disabilities need.¹⁹⁰ The CCL noted further that the specialized services provided to learners with disabilities at the special schools include “a range of therapies, access to assistive devices and technology, school feeding schemes, and access to personal care items” and that these form “an essential component of learning and development for learners with disabilities”

182. *Id.* at 3–4; see also *Centre for Child Law v. Minister for Basic Education: Founding Affidavit*, Case No. 31213/20, at paras. 1-2 (hereinafter “*Centre for Child Law Founding Affidavit*”).

183. *Centre for Child Law Founding Affidavit*, Case No. 31213/20, at para. 5.

184. *Id.* at para. 10.

185. *Id.* at para. 11.

186. *Id.* at para. 12.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at para. 13.

in South Africa.¹⁹¹

Thus, the CCL concluded, it was incumbent upon the Minister for Basic Education not only “to prioritise and plan for the provision of continued learning and support for learners with disabilities remaining at home,” but also to put in place adequate plans for these learners to return to school and for the government to resume providing them with necessary services.¹⁹² The safe reopening of schools would “require mitigation, prevention, adaptation and measures to specifically address learners with disabilities within the context of a declared National Disaster” and that “[t]his requires practical, feasible guidelines to provide for amongst others, sanitation, personal protective equipment (*PPE*) and social distancing measures unique to the context of various disabilities.”¹⁹³

In the government’s response to the COVID-19 pandemic, the CCL noted in its founding affidavit, “learners with disabilities—a particularly marginalised and vulnerable group—were disproportionately affected” and that they “should have been afforded considerable and meaningful support.”¹⁹⁴ The CCL declared that in its observations, it had found that the Minister for Basic Education had “provided inadequate support for learners with disabilities during this period and continued to neglect them during the planning for the phased re-opening of schools.”¹⁹⁵ Although the Department of Basic Education (DBE) had developed, published and disseminated various directions and guidelines, which “generally regulated the phased re-opening of schools,” the “DBE [had] failed to develop adjusted (and specialised) guidelines that provide for all learners with disabilities.”¹⁹⁶

The government, the CCL noted, developed guidelines for only three categories of disability and excluded others.¹⁹⁷ It was on this basis, stated CCL, that it brought action to have the High Court “review and set aside or declare invalid” several of the directions that had been published in terms of regulations that were made under the Disaster Management Act 57 of 2002 and then remitting the directions to the Minister for Basic Education “to cure these defects.”¹⁹⁸ The relief that CCL was praying for was “aimed at ensuring that the Minister [for Basic Education] complies with her constitutional obligations to ensure the safe return to schools of *all* learners with disabilities in the wake of the COVID-19 pandemic.”¹⁹⁹

The Respondent in this action is the Minister for Basic Education (MBE) who, in her capacity as a member of the national executive, has responsibility

191. *Id.*

192. *Id.* at para. 14.

193. *Id.* at para. 15.

194. *Id.* at para. 16.

195. *Id.*

196. *Id.* at para. 17.

197. *Id.*

198. *Id.* at para. 18.

199. *Id.* at para. 19 (emphasis in original).

for the promulgation of the Directions that were impugned in the CCL's application to the Court.²⁰⁰ In promulgating the Directions, noted the CCL, the MBE "exercised a public power in terms of the regime for disaster management prescribed in the Disaster Management Act 57 of 2002."²⁰¹ These Directions, asserted the CCL, "have directly and adversely affected the rights of learners with disabilities to basic education and to have their best interests taken into account in all matters concerning them."²⁰² The CCL concluded that the Directions constituted "administrative action under the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*)" and that they also "governed the principle of legality" and that the CCL was bringing its application to the Court "both in terms of the provisions of *PAJA* and the principle of legality."²⁰³

The application before the High Court, the CCL declared, was being brought "in terms of section 38(b) of the Constitution on behalf of all learners with disabilities whose rights to basic education (under section 29(1)(b) of the Constitution), and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution) have been violated by the Directions that have been promulgated."²⁰⁴ Children with disabilities, noted the CCL, "are a particularly marginalised and vulnerable group that require[s] a high degree of protection" and that the plight of this group, "particularly in the context of COVID-19, has recently been confirmed by [UNESCO]."²⁰⁵ The CCL also noted that similar conclusions, as those of UNESCO, have been reached by the Global Action on Disability network and the World Health Organization.²⁰⁶

As part of the measures taken to combat COVID-19, South Africa's President announced that "all schools, including ordinary, full service and special schools, would close on 18 March 2020" and that they would remain closed for 12 weeks with two of those twelve weeks falling during scheduled school holidays.²⁰⁷ The school closure meant that learners were no longer able to "access or continue formal education in the classroom environment" but were now encouraged to learn remotely.²⁰⁸ Although the Department of Basic Education (DBE) provided materials to enhance remote learning, the CCL explained that those materials were "not adapted to provide adequate resources for learners with disabilities."²⁰⁹ As an example, the CCL cited visual materials

200. *Id.* at para. 27.

201. *Id.* at para. 28.

202. *Id.*

203. *Id.* at para. 29.

204. *Id.* at para. 33.

205. *Id.* at para. 34. The CCL quoted UNESCO as saying that "[t]he COVID-19 pandemic is having a disproportionate impact on learners with disabilities who were already experiencing social and educational disadvantage." *Id.*

206. *Id.* at paras. 35–36.

207. *Id.* at paras. 38–39.

208. *Id.* at para. 41.

209. *Id.*

which, it argued, were not adapted for use by “blind and partially sighted learners” and, in addition, “no subtitles or sign language interpretation was added to audio visual materials for the benefit of Deaf learners.”²¹⁰ The CCL reiterated that the DBE did not provide alternative forms of support for learners with disabilities.²¹¹

The CCL noted that the school closure did not only suspend teaching and learning, but also disrupted the supply of “all the additional support services normally provided by special schools, special school hostels and special care centers.”²¹² Learners with disabilities usually attend special schools where they are provided the “specialized care and support” that they need to enhance their “well-being and full development.”²¹³ However, during the government-mandated school closures, they were no longer able to have access to these critical and important support services and, as a consequence, their well-being and development were “gravely affected by the interruption of these [support] services.”²¹⁴ These learners with disabilities were forced to return to environments where there were no specialist teachers and therapists to cater to their special needs.²¹⁵

The CCL noted that in exercising her power under the Disaster Management Act to deal with the impact of COVID-19 on teaching and learning, the Minister for Basic Education (MBE) should have developed and implemented programs to address the special needs of learners with disabilities during the lockdown and afterwards when schools were finally re-opened.²¹⁶ The CCL concluded that the MBE had “failed to meet either of these obligations.”²¹⁷

An important concern of the CCL was to ensure that the rights of learners with disabilities were adequately protected during the lockdown. During the lockdown period, “learners with disabilities remained without access to adequately adapted materials and without access to any other forms of necessary support”²¹⁸ and, as the DBE prepared for schools to re-open and for learners to return to school, there still were no concrete measures to address “the different circumstances of learners with disabilities.”²¹⁹ For example, the CCL noted that:

[a]lthough [the directions for re-opening schools issued by the DBE] contained a tabulated schedule for returning learners which differentiated between schools of skills, schools for learners with severe intellectual disabilities, and special care centres for learners with severe

210. *Id.*

211. *Id.*

212. *Id.* at para. 42.

213. *Id.* at para. 43.

214. *Id.*

215. *Id.*

216. *Id.* at para. 44.

217. *Id.* at para. 45.

218. *Id.* at para. 50.

219. *Id.* at paras. 57–58.

and profound intellectual disabilities, [these directions] failed to outline measures to protect learners with disabilities who were returning to school, and to support those who still remained at home.²²⁰

The CCL explained that the DBE's omission was particularly evident in the provisions that dealt with the wearing of face coverings (e.g., masks).²²¹ Educators and school officials had been provided with "cloth masks" and in doing so, the government had not taken into account the specific needs of deaf learners "who lip read and for whom cloth face masks would make it impossible for them to communicate."²²² Thus, in approaching the Court, the CCL was "gravely concerned that the particular needs of [learners with disabilities] had not been adequately addressed in the May [2020] Directions."²²³ The CCL noted that although the DBE had published amended Directions on June 1, 2020, these modified directions "failed to include any further measures tailored to assist learners with disabilities" and that these omissions "again demonstrated the DBE's continued failure to adequately plan for learners with disabilities during the lockdown as well as during the phased re-opening of schools which cater for these learners."²²⁴

On June 23, 2020, the DBE published a new set of Directions, which form the subject matter of the CCL's application to the Court.²²⁵ The CCL noted that while the new Directions addressed some of the issues that the CCL had raised with the DBE regarding the rights of persons with disabilities, they "failed to address the full spectrum of disabilities faced by learners."²²⁶ The CCL noted that on the same day, the Minister for Basic Education held a virtual meeting with "representatives of schools with learners with special education needs ahead of the learners' return to school during level 3 of the national lockdown."²²⁷ The CCL had determined that "[t]he national state of readiness was, however, incomplete because it still failed to account for the full spectrum of disabilities and the different approaches that must be taken to cater for learners with different disabilities."²²⁸

The CCL indicated that despite its many requests to the Minister for Basic Education to directly and specifically address issues related to the failure of the DBE to provide measures that were tailored to meet the needs of learners with all types of disabilities, the adjusted or specialized guidelines had not been

220. *Id.* at para. 58.

221. *Id.* at para. 59.

222. *Id.*

223. *Id.* at para. 60.

224. *Id.* at paras. 63–64.

225. *Id.* at para. 73. The Directions promulgated on June 23, 2020, replaced those published in May 2020 and the amended Directions promulgated on June 9, 2020. *See id.* at paras. 69 & 73.

226. *Id.* at para. 73.

227. *Id.* at para. 74.

228. *Id.*

developed to “cater to other categories of disability.”²²⁹ Despite the Minister for Basic Education’s public declarations that the DBE’s directions were “mindful of the needs of learners with disabilities,” the CCL determined that these directions were not actually mindful of the “plight of *learners with physical disability, intellectual disability, epilepsy, and severe to profound intellectual disability*.”²³⁰

The CCL concluded that the failure of these directions to address the needs of “these excluded group of learners”²³¹ “is irrational” and “is unlawful, and otherwise unconstitutional, in that it contravenes the protection given to such children in terms of their rights to receive basic education (under section 29(1)(b) of the Constitution, and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution).”²³² Finally, the CCL prayed the Court to review the Directions and “set them aside or declare[] them invalid to the extent that they fail to cater for the needs of the excluded categories of learners with disabilities under: the principle of legality which requires all exercises of public power to be lawful and rational; and sections 6(2)(f)(i), 6(2)(f)(ii), 6(2)(h) and 6(2)(i) of PAJA.”²³³

The CCL noted that in South Africa, some learners with disabilities, particularly in rural areas, live in hostels (or boarding houses) owned by their schools during the school term.²³⁴ The CCL explained that these hostels “assume responsibility for the complete care of learners, including, homework support, feeding, personal care (bathing, toileting, teeth cleaning, where necessary), administration of medication, supervision and accommodation.”²³⁵ However, the CCL noted that given the fact that the DBE Guidelines do not cover “the excluded categories of learners with disabilities,” if these hostels are allowed to open, “this poses a direct and imminent danger to the health and well-being of the learners in the excluded categories because they require different and specialised guidelines in order to make education possible for them under a COVID-19 pandemic situation.”²³⁶

A major challenge faced by hostels is that they would not be able to accommodate all learners with disabilities if they must adhere to rules on social distancing.²³⁷ Given that the DBE had not made provision for additional infrastructure to accommodate all learners with disabilities while adhering to

229. *Id.* at para. 81.

230. *Id.* at para. 84 (emphasis added).

231. The excluded learners are those with *physical disability, intellectual disability, epilepsy, and severe to profound intellectual disability*. See *id.* at para. 89 (emphasis added).

232. *Centre for Child Law Founding Affidavit*, Case No. 31213/20, at para. 91 (sub-paras. 91.1 & 91.2).

233. *Id.* at para. 92 (sub-paras. 92.1 & 92.2). PAJA refers to the Promotion of Administrative Justice Act 3 of 2000 (S. Afr.).

234. *Id.* at para. 93.

235. *Id.*

236. *Id.* at para. 96.

237. *Id.* at para. 98.

the COVID-19 social distancing requirements, the CCL prayed the Court review and set aside as invalid under the principle of legality the DBE's Directions.²³⁸ Learners with disabilities, the CCL noted, require much higher sanitation requirements—for example, “all personal and shared assistive devices, wheelchairs, crutches, etc., need to be sanitised.”²³⁹ In addition, schools and hostels for learners with disabilities require “additional communication devices, therapy equipment, and specialised seating, etc.[.] in order to minimize the sharing of these as much as reasonably possible in a learning environment catering for learners with disabilities.”²⁴⁰

The CCL noted that since the DBE's Guidelines were designed to provide “the requirements to enable schools to maintain hygiene during the COVID-19 pandemic,” failing to provide guidelines that specifically cater to the special needs of learners with disabilities is not rational.²⁴¹ For example, guidelines for hand washing are not appropriate for certain categories of learners with disabilities who are physically incapable of actually washing their own hands “in the manner detailed in the DBE Guidelines because they are unable to turn on and off taps, unable to rub palms together or between fingers.”²⁴² Thus, the DBE should have developed “specific guidelines for how hand washing for these learners [with disabilities] should take place.”²⁴³ The CCL concluded that failing to cater for the “specific and different needs of learners with disabilities also violates their rights to receive basic education and to have their best interests taken into account in all matters concerning them.”²⁴⁴ Thus,

[t]o the extent that the Directions refer to and incorporate the DBE Guidelines to set the standards for hygiene at schools, hostels and offices, but fail to provide measures designed to ensure the health and safety of learners with disabilities, they fall to be reviewed and set aside or declared invalid under the principle of legality.²⁴⁵

With respect to the reliefs prayed for, the CCL explained that “[w]hen courts review unlawful administrative action or find that conduct is in conflict with the principle of legality, they exercise a broad remedial discretion under section 172(1)(b) of the Constitution (and section 8(2) of PAJA) to grant a remedy that is just and equitable in the circumstances.”²⁴⁶ The CCL then proceeded to list the reliefs prayed for, which included asking the Court to, “in respect of each ground of invalidity,” set aside or declare the impugned Directions invalid and

238. *Id.* at para. 101.

239. *Id.* at para. 106.

240. *Id.* at para. 108.

241. *Id.* at para. 111.

242. *Id.* at para. 112.

243. *Id.*

244. *Id.* at para. 113.

245. *Id.* at para. 114.

246. *Id.* at para. 126.

remit them to the Minister of Justice “to cure the defects in them within a period of three weeks.”²⁴⁷ In doing so, the CCL reminded the Court of the urgency of the matter. Specifically, the CCL told the Court that “[t]he harm that learners with disabilities will suffer if the adjusted (and specialised) safety measures are not put in place is acute,” especially given the fact that by July 8, 2020, “South Africa’s COVID-19 infection rate [had] surpassed that of countries such as France and Germany, with South Africa recording in excess of 10 000 new infections over a 24 hour period.”²⁴⁸

On August 4, 2020, Judge Fourie (High Court of South Africa, Gauteng Division, Pretoria) issued the Court’s order. He declared that after “[h]aving read the papers filed,” he had made the order “by agreement between the parties.”²⁴⁹ First, the Court ordered the Respondent, the Minister for Basic Education, to revise the Directions that had been provided to guide school operations during the COVID-19 pandemic in order to provide more specific and carefully tailored “guidelines for learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities”—these were what the CCL referred to as the “excluded categories” of learners.²⁵⁰

Second, the Court ordered the MBE to prepare a draft amendment to paragraph 9 of the Directions in order to address issues of readiness of the special school hostels to open and receive learners (these are the facilities which take care of the excluded categories of learners), ridding the Directions of the requirement that special school hostels must close in their entirety once they have reached the limit of the number of learners who can be accommodated “while observing the social distancing rules.”²⁵¹ The MBE was also ordered to “make provision for additional infrastructure capacity to be provided to special school hostels where alternatives do not provide for the reasonable accommodation needs of learners with disabilities residing in school hostels.”²⁵²

Third, the Court ordered the MBE to prepare a draft amendment to the DBE Guidelines for Schools on Maintaining Hygiene during the COVID-19 Pandemic in order to provide measures that will ensure the health and safety of learners with disabilities at schools, hostels and offices.²⁵³ Fourth, the Court ordered the MBE to prepare a draft amendment to subparagraph 8(8) of the Directions. The purpose of this amendment was “to provide guidance to Heads of Department to ensure that learners with disabilities who are not able to return to school are provided with appropriate learning and teaching support material, assistive (i.e.[,] education-specific) devices and therapeutic services to access

247. *Id.* at para. 127 (sub-para. 127.1).

248. *Id.* at para. 128.

249. *Centre for Child Law v. Minister for Basic Education*, Case No. 3123/2020: Order (Aug. 4, 2020), at pmb1 (hereinafter “*Centre for Child Law: Order*”).

250. *Id.* at para. 1.1.

251. *Id.* at para. 1.2.

252. *Id.* at para. 1.2.3.

253. *Id.* at para. 1.3.

basic education while they remain at home.”²⁵⁴

Finally, the Court ordered the MBE to publish all the “draft amended Directions and DBE Guidelines” for public comments within 10 days and then issue the final amended Directions and DBE Guidelines within six weeks of the day the Court’s order was issued.²⁵⁵ The Court’s order was issued on August 4, 2020.²⁵⁶

In addition to the fact that governments may use public emergencies to directly abuse their powers and violate the rights and fundamental freedoms of their citizens, they may also do so by omission. As made clear in *Centre for Child Law*, South Africa had decided not to enact new legislation to manage the COVID-19 pandemic. Instead, the government chose to rely on existing law—Disaster Management Act 57 of 2002, as well as other laws, including the Bill of Rights. Thus, on March 15, 2020, South Africa’s “government declared a national state of disaster in terms of the Disaster Management Act 57 of 2002.”²⁵⁷

As part of measures taken to manage teaching and learning during the COVID-19 pandemic and pursuant to the national state of disaster, the MBE had issued Directives and Guidelines, which were supposed to help teachers and school administrators function legally during the state of disaster, respect the rights of their learners, minimize their learners’ exposure to COVID-19, and ensure that learners continued to have access to basic education. However, as made clear by *Centre for Child Law*, the MBE’s measures failed to include guidelines for safely educating the group of learners with disabilities who were referred to in this case as “the excluded categories”—learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities.²⁵⁸ By failing to include guidelines specifically directed at this extremely vulnerable group of learners, the MBE had inadvertently created a situation in which the rights of these learners could be violated.

The second lesson that can be gleaned from this case concerns the role that civil society organizations, such as the Centre for Child Law at the University of Pretoria, can play in ensuring that the rights of all citizens, including especially those of vulnerable groups (e.g., children in general and children with disabilities in particular) are not violated, either by state- or non-state actors, in normal times or in times of public emergencies. It was the CCL that brought this matter to the Court, allowing it to craft an order that led to amendments to the DBE’s Directions and Guidelines. Finally, the courts, which have powers to determine the constitutionality of laws and regulations, must ensure that teachers, administrators, and other staff members at South Africa’s schools did

254. *Id.* at para. 1.4.

255. *Id.* at para. 2.

256. *Id.* at pmb1.

257. Geo Quinot, *Justification, Integration, and Expertise: South Africa’s Regulatory Response to Covid-19*, 73 ADMIN. L. REV. 105, 110 (2021). See also DECLARATION OF A NATIONAL STATE OF DISASTER, GN 313 OF GG 43096 (March 15, 2020) (S. Afr.).

258. *Centre for Child Law: Order*, Case No. 3123/2020, at para. 1.1.

not continue to violate the rights of learners with disabilities through measures designed to help manage the pandemic and minimize the spread of the virus.

In many countries throughout Africa, “while governments in the region have declared restrictions on social gathering, in a bid to upend the deadly contagion, rights violations of vulnerable groups by law enforcement officials are on the increase.”²⁵⁹ In South Africa, members of the SAPS, the SANDF, and various Metropolitan Police Departments (“MPDs”) were alleged to have failed to respect South Africans’ constitutional rights to dignity, life, and not to be tortured or punished in a degrading manner, during efforts to enforce COVID-19-related lockdown regulations. These allegations were officially revealed in *Khosa and Others v. Minister of Defence and Military Veterans and Others*,²⁶⁰ a case that was brought before the High Court of South Africa, Gauteng Division, Pretoria. Below, this article will examine that case.

C. *Khosa and Others v. Minister of Defence and Military Veterans and Others* (*High Court of South Africa, Gauteng Division, Pretoria*)

Writing for the High Court, Judge Fabricius began the analysis of the case by providing an overview of the “social contract” between the people and a “legitimate government.”²⁶¹ After making reference to several scholars of legal philosophy, such as Bentham and Rawls, Judge Fabricius then explained that the social contract that exists between the South African people and its government was established by and defined in the Constitution, which came into force in 1994.²⁶² He cites § 1, which defines the Republic of South Africa as “one, sovereign, democratic state,” which is founded on, inter alia, values, such as “human dignity, the achievement of equality and the advancement of human rights and freedoms.”²⁶³ Judge Fabricius explained that the Bill of Rights is the “cornerstone of democracy” in South Africa and “enshrines the rights of all people and affirms its democratic values of human dignity, equality and freedom which must be respected, protected, promoted and fulfilled by the state and all organs of state.”²⁶⁴ He then noted that the application before him “is of an unusual nature in as much as on a first reading it only seeks me to restate the law” and that the law in this context “would be the relevant provisions of the said Constitution, the Disaster Management Act 57 of 2002.”²⁶⁵

259. Solomon Amadasun, *COVID-19 palaver: Ending rights violations of vulnerable groups in Africa*, 134 *WORLD DEV.* 105054, 105054 (2020).

260. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 144 (S. Afr.).

261. *Id.* at para. 1.

262. *Id.* (This was the interim Constitution. The permanent Constitution came into force in 1996. See S. AFR. (INTERIM) CONST., 1993 and S. AFR. CONST., 1996. The latter is the permanent constitution).

263. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (NO. 108 OF 1996), at § 1(a).

264. *Khosa and Others* 2020 (5) SA 490 at para. 1; see also S. AFR. CONST., 1996.

265. *Khosa and Others* 2020 (5) SA 490 at para. 2.

In the context of § 39(1)(b), which provides that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum—(b) must consider international law,”²⁶⁶ the following international instruments are relevant: the UDHR, the ICCPR, the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), as well as the South African Police Act 68 of 1995, the Defence Act 1942 of 2002, the Criminal Procedure Act 51 of 1977, the Military Ombud Act 4 of 2012, and the Independent Police Investigative Directorate Act of 2011.²⁶⁷

With respect to the application before the High Court, Judge Fabricius explained that the application before the Court consisted of 1,300 pages and that these were delivered to him on the afternoon of May 2, 2020 for a hearing that was scheduled for May 5, 2020.²⁶⁸ After concluding that the process “is not the usual one as envisaged by the Rules of Court relating to urgency and the particular Practice Manual of this division pertaining to the same topic,” he decided to “condone all non-compliance because of the nature of the application and the relief sought,” which, in his view, “had to be considered carefully and properly and urgently in the context of the state of affairs that now exists under the Disaster Management Act 57 of 2002, as well as the state of the South African economy” as it existed before and during the measures taken to fight the COVID-19 pandemic.²⁶⁹

Judge Fabricius stated that during the immediate past, international rating agencies had downgraded South Africa’s investment grade to junk and severely disrupted its financial markets.²⁷⁰ In addition to negatively affecting the Rand (the country’s currency), the downgrade made it very difficult and costly for the country to access international money markets.²⁷¹ In addition, these events had caused significant unemployment in the country, “substantial inequality between various groups of [the country’s] population, lack of basic facilities such as electricity and water, the supply of electricity, and very little foreign investment which could have alleviated the situation.”²⁷² He noted further that before COVID-19 and the problems that accompanied its appearance in South Africa, the economy had problems (e.g., the insolvency of many parastatals), which were exacerbated by the downgrading of South Africa’s investment rating to junk.²⁷³

Judge Fabricius then explained that the case before the Court did not concern the question “whether or not any of the Regulations promulgated are

266. S. AFR. CONST., 1996.

267. Judge Fabricius noted that South Africa had ratified and domesticated the ICCPR, and the Torture Convention and hence, their provisions were thus part of South African law. *See Khosa and Others 2020 (5) SA 490 at para. 2.*

268. *Id.* at para. 3.

269. *Id.*

270. *Id.* at para. 4.

271. *Id.*

272. *Id.*

273. *Id.* at para. 4.

unlawful and thus invalid because they are not rationally related to their purpose,” which was to arrest the “spread of the coronavirus.”²⁷⁴ As part of the analysis of the case, he stated that “[t]he populace must be able to trust the government to abide by the rule of law and to make rational Regulations to promote their stated purpose.”²⁷⁵ He explained that these regulations can violate the rights of natural and legal persons, and that if they do, the government should seek the least restrictive measures and communicate them to the public. In return, the government can “justifiably expect the citizens to co-operate for the common goal, take responsibility to ensure their own safety and that of others.”²⁷⁶

With respect to the social contract that Judge Fabricius had mentioned in his introductory remarks to the Court, he stated that it “will then take its rightful constitutional place for the benefit of the nation and the State” and that if “such community of interest” cannot be achieved, then “the whole exercise and purpose of a lock-down will fail and a waste land and social unrest awaits” all South Africans.²⁷⁷ While exercising his or her right to freedom to choose, each citizen must take the responsibility to achieve the common goal of fighting the COVID-19 pandemic and minimizing its spread.²⁷⁸

Judge Fabricius explained that the founding values of South Africa’s post-apartheid Constitution “include a democratic government based on the principles of accountability, responsiveness and openness.”²⁷⁹ Public administration, then, “must be accountable and transparency must be fostered by providing the public with timely, accessible, accountable and accurate information.”²⁸⁰ He noted, however, that if the government of South Africa is held to these constitutional obligations and the trust of citizens in their government and institutions is restored, and, in addition, “lawful rational Regulations are obeyed,” then “the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found.”²⁸¹

With respect to *Khosa*, the case before the Court, Judge Fabricius provided information on the ten respondents, the nature of their duties and constitutional responsibilities, as defined by South African laws. These respondents included the Minister of Cooperative Governance and Traditional Affairs, who, pursuant to the Disaster Management Act No. 57 of 2002, had declared the national state of disaster in South Africa in response to the COVID-19 pandemic.²⁸² He noted that the Socio-Economic Rights Institute of South Africa (SERI)—a non-profit

274. *Id.* at para. 5.

275. *Id.* at para. 7.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at para. 8.

280. *Id.*

281. *Id.* at para. 9.

282. *Id.* at para. 16.

human rights organization that works “with communities, social movements, individuals and other non-profit organisations in South Africa and beyond to develop and implement strategies to challenge inequality and realise socio-economic rights”²⁸³—was admitted as *amicus curiae*.²⁸⁴ Judge Fabricius indicated that in his consideration of the merits of the case, he considered the “written heads of argument” given to the Court by SERI and that no oral arguments were necessary.²⁸⁵ The Fair and Equality Society of South Africa also applied to be admitted as an applicant but, for a variety of reasons, was not successful.²⁸⁶

As he proceeded with an examination of the merits of the case, Judge Fabricius reiterated his earlier views on the significant levels of distrust among South Africans in the government, particularly with respect to the “functions of the respondents and how they treat the persons throughout South Africa in the context of the Regulations made under the Disaster Management Act” and that fear among South Africans at the time was not just due to the heightened probability of being infected with the COVID-19 virus, but what would happen to them “after the national lockdown is called off.”²⁸⁷ For example, he explained that there was great fear among South Africans that the country’s lockdown measures would cause “massive unemployment” resulting in the inability of many people to provide basic “sustenance and income” to their families.²⁸⁸

He also noted that the lockdown would most likely cause many of the country’s small businesses to fail and never to become viable again.²⁸⁹ In addition to the high level of insecurity and despair created among South Africans by the COVID-19 pandemic and the issuing lockdown measures, the government had told the people that the lockdown had significantly reduced public revenue collections.²⁹⁰ Such reductions were expected to negatively affect the government’s ability to provide critical public services to the people.²⁹¹ While agreeing with counsel for both parties before the Court that a lockdown was necessary as one of the tools to fight the spread of COVID-19, he, nevertheless, added that the public was entitled to be treated with dignity and respect, and their rights—which are enshrined in the Bill of Rights—were not to be violated.²⁹²

Judge Fabricius then provided an overview of some of the rights enshrined in Chapter 2 of the Constitution (Bill of Rights), as well as § 36 of the

283. *About Us*, SOCIO-ECON. RTS. INST. OF S. AFR., <https://www.seri-sa.org/> [<https://perma.cc/XV6M-W7YJ>] (last visited Oct. 2, 2024).

284. *Khosa and Others* 2020 (5) SA 490 at para. 18.

285. *Id.*

286. *Id.*

287. *Id.* at para. 19.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

Constitution, which states that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,”²⁹³ the most important of which, for the case at bar, “is the question whether or not the State has introduced less restrictive means to achieve the purpose of any particular Regulation made in terms of the management of the Disaster Act (Section 36(1)(e)).”²⁹⁴ According to the Bill of Rights, “the right to equality, human dignity, life, freedom of security of the person and arrested and accused and detained persons, may not be derogated from even in a state of emergency.”²⁹⁵

Judge Fabricius explained that these rights,

may be enforced by anyone in their own interest or acting on behalf of another who cannot act in their own name, or acting as a member of, or in the interest of group or class of persons or acting in the public interest by approaching a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may then grant appropriate relief including a declaration of rights.²⁹⁶

Declaratory orders, which can serve as a “flexible remedy” that assists “in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values,” are “discretionary and flexible” and in issuing them, courts must consider all relevant circumstances.²⁹⁷ The remedy is flexible as it “can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values.”²⁹⁸ South African courts are granted the power to rule on constitutional issues and in carrying out this function, they are bounded by § 172(1). According to this section, “[w]hen deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable.”²⁹⁹

Further, the relief sought by the applicants concerns the need for the government to respect the rights of South Africans, even during a declared national emergency.³⁰⁰ Some of these rights include the right to human

293. *Id.*

294. *Id.*; see also S. AFR. CONST., 1996.

295. *Khosa and Others* 2020 (5) SA 490 at para. 19.

296. *Id.* at para. 20.

297. *Id.*

298. *Id.*

299. S. AFR. CONST., 1996, ch. 8 § 172(1)(a & b).

300. *Khosa and Others* 2020 (5) SA 490, at para. 23.

dignity,³⁰¹ the right to life,³⁰² the right not to be tortured in any way,³⁰³ and the right not to be treated or punished in a cruel, inhuman or degrading way.³⁰⁴ He also noted that certain sections of the Constitution of South Africa also require that security forces “must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa].”³⁰⁵

Judge Fabricius thoroughly reviewed the reliefs prayed for by the applicants and then explained that the case before the Court concerns the alleged violation of the rights of citizens by members of South Africa’s security forces who were tasked with enforcing “restrictions on civilian movement and activity, imposed by Government to combat the spread of the COVID-19 Coronavirus pandemic.”³⁰⁶ He also noted that the case was brought by the family of an individual named Mr. Khosa, “who was brutalized, tortured and murdered by members of the security forces, at his home, on 10 April 2020” and that “[t]wo of the applicants were themselves also brutalized and tortured on the same occasion.”³⁰⁷

The learned judge explained that the rights mentioned had been significantly reduced and adversely impacted nearly “every business, every private household and every person whilst it is a trite law that when rights are restricted or derogated from it should happen within the confines of section 36(1)(e) which provides, for a less restrictive means enquiry to achieve the stated purpose.”³⁰⁸ The Disaster Management Act created “offences and penalties” and that on Day 42 of the lockdown, as many as 20,000 persons had been made criminals.³⁰⁹ The applicants did not seek to have the Court strike down any “particular Statute or Regulation . . . as being invalid on grounds of irrationality.”³¹⁰

The first case of COVID-19 was confirmed in South Africa on March 5, 2020.³¹¹ The World Health Organization (WHO) declared COVID-19 to be a public health emergency of international concern on January 30, 2020 and on March 15, 2020, the South African government declared “a state of national disaster and announced measures to combat the spread of this virus.”³¹² On March 25, 2020, South Africa’s Minister of Cooperative Governance and Traditional Affairs, acting pursuant to § 3 of the Disaster Management Act No. 57 of 2002, issued regulations “implementing measures where movement would

301. S. AFR. CONST., 1996, at ch. 2 § 10.

302. S. AFR. CONST., 1996, at ch. 2 § 11.

303. S. AFR. CONST., 1996, at ch. 2 § 12(1)(d).

304. S. AFR. CONST., 1996, at ch. 2 § 12(1)(e).

305. *Khosa and Others* 2020 (5) SA 490 at para. 23.

306. *Id.* at para. 24(1).

307. *Id.* at para. 24(5).

308. *Id.* at para. 25.

309. *Id.*

310. *Id.*

311. M. Modisenyane et al., *COVID-19 response in South African communities: Screening, testing, tracing and movement modelling*, 112 S. AFR. MED. J. 366, 366 (2022).

312. *Khosa and Others* 2020 (5) SA 490 at paras. 26, 28.

be severely restricted through a ‘lock-down.’”³¹³ These measures were based on “justified concerns about the growing spread of COVID-19 infections in South Africa since the first notification of a positive case.”³¹⁴

On March 25, 2020, after the lockdown was declared, South African President Cyril Ramaphosa, issued the President’s Minute 78 of 2002 authorizing the SANDF to be deployed to assist the SAPS to enforce the lockdown regulations.³¹⁵ He set the period of deployment as March 26, 2020 to June 26, 2020.³¹⁶ That same day, the President also informed the Chairperson of the Joint Standing Committee on Defence, Parliament of the Republic of South Africa, about the deployment.³¹⁷ The second applicant, who was authorized “to make the founding affidavit on behalf of the other applicants[,] described the torture and murder of Mr. Khosa.”³¹⁸

In their Founding Affidavit, the applicants had adduced that had the “Commanding Officers . . . responded promptly and effectively to the incidents of lock-down brutality” and expeditiously developed and implemented an appropriate “Code of Conduct” and removed the security officers implicated in the violence from the scene and thus, reminding the security forces of their legal obligations, “the deponent’s life-partner might still be alive and his children might not [be] orphaned.”³¹⁹ The deponent had stated that the Minister of Police (MOP) and the Minister of Defense (MOD), who both have “executive authority over the security forces” had failed to take appropriate and effective steps to stop the forces’ extralegal behavior and actions.³²⁰ Judge Fabricius stated that after the death of Mr. Khosa, the Minister of Defense’s response to the violation of the deceased’s right to life was that “the public should not ‘provoke’ the soldiers.”³²¹

The deponent had adduced that the MOD had made public statements that implied that in enforcing the lockdown, the security forces would not hesitate to violate the rights of South Africans.³²² In addition, the deponent had also concluded that such statements from the MOD do not support the unconditional condemnation of “police and military brutality” that should come from a member of the government nor do they “promote the spirit and purport of the Bill of Rights and the Constitution in general.”³²³ According to the MOD, South Africa’s is a democratic dispensation until a member of the public provokes the

313. *Id.* at para 28.

314. *Id.*

315. *Id.* at para. 29.

316. *Id.*

317. *Id.* at para. 30.

318. *See id.* at para. 34.

319. *Id.* at para. 35.

320. *Id.* at para. 36.

321. *Id.*

322. *Id.* at para. 37.

323. *Id.* at para. 38.

security forces.³²⁴ In other words, there would be circumstances in which the security forces could brutalize South Africans with impunity.³²⁵ Lastly, the deponent argued that the MOD granted the security forces powers to punish alleged violators of the law instead of allowing the courts to do so after conviction through a fair trial.³²⁶

Judge Fabricius then explained that the deponent quite correctly stated that the lock-down regulations did not grant permission or authorize “law enforcement officials to cause damage to property owned or occupied by civilians.”³²⁷ On April 16, 2020, the MOD mentioned that Mr. Khosa’s death was being investigated.³²⁸ However, she later told South Africans “not to venture out of their homes to check what soldiers and law enforcement were doing ‘or even provoke them.’”³²⁹ The MOD added that the measures that the government was taking with respect to the lockdown did not imply that theirs was a “mean government” or that it was “being insensitive.”³³⁰ Instead, the MOD argued that the government had taken those decisions because it had become necessary for public officials to do so in order to arrest the spread of the COVID-19 pandemic.³³¹ Judge Fabricius concluded that the MOD’s statements clearly indicated she was blaming “civilians for ‘provoking’ the soldiers,” and that she was either unwilling or unable to “make unequivocal statements condemning violence,” while also failing to condemn “the lock-down brutality.”³³² Before the present application was brought before the Pretoria High Court, counsel for the applicants had written to the MOD demanding that the SANDF and the Johannesburg Metropolitan Police Department (JMPD) provide the applicants with “full details of the particular incident including the names of the members [of the security forces] who were present and also involved in the assault.”³³³ In the letter, the counsel also demanded that the President of South Africa, the MOD, and the Chief of the JMPD publicly condemn the actions of the security forces.³³⁴ The applicants also demanded that the SANDF and the JMPD reveal to the public what steps these government institutions had taken to discipline their members who were implicated in the brutalization of civilians, including the killing of Mr. Khosa.³³⁵ With respect to Mr. Khosa’s minor children, they sought financial and psychological support for them, including money to pay their medical expenses for treatment related to the injuries that

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at para. 43.

328. *Id.* at para. 44.

329. *Id.*

330. *Id.* at para. 44.

331. *Id.*

332. *Id.* at para. 46.

333. *Id.* at para. 50.

334. *Id.*

335. *Id.*

they had incurred during the enforcement of the lockdown measures, which included the killing of their father.³³⁶

The next issue the Court examined was South Africa's obligations under the U.N. Convention against the Torture Convention, which South Africa ratified on December 10, 1998.³³⁷ Article 2(1) of the Torture Convention imposes an obligation on the State to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."³³⁸ Article 12 requires South Africa, as a State Party to the Torture Convention, to "ensure that its competent authorities proceed to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."³³⁹ Finally, Judge Fabricius explained that Article 13 requires South Africa to "ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."³⁴⁰

Article 2(2) of the Torture Convention states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."³⁴¹ Judge Fabricius explained that "[i]t is clear from section 12(1)(c), (d) and (e) of the Constitution [of South Africa], interpreted in the light of international law, especially the Torture Convention and the Torture Act that State brutality is juridically regarded as especially egregious form of harm."³⁴² When state brutality "takes the form torture, cruel or inhuman treatment or punishment," it is legally singular for two specific reasons: (i) it is committed by a public official; and (ii) it is committed for "'purposes' ulterior to legitimate law enforcement, such as to 'punish' people, who have not been afforded a fair trial before a competent and independent tribunal or indeed any trial at all."³⁴³

The next issue examined by the Court was the relationship between domestic laws and the limits of the use of force. Judge Fabricius noted that the constitutional guarantee of freedom from brutality perpetuated by the State is "also given effect to by the provisions of [] the [] Defence Act, the SAPS Act and the Criminal Procedure Act."³⁴⁴ Specifically, he examined the Criminal

336. *Id.*

337. *Id.* at para. 54; see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1994, Dec. 10, 2984, 1465 U.N.T.S. 85 (hereinafter "the Torture Convention").

338. The Torture Convention, 1465 U.N.T.S. 85 at art. 2(1).

339. *Id.* at art. 12.

340. *Id.* at art. 13.

341. *Id.* at art. 2(2).

342. *Khosa and Others* 2020 (5) SA 490 at para. 55.

343. *Id.*

344. *Id.* at para. 57. The SAPS Act governs the SAPS and Metropolitan Police Departments (MPDs) and places limits on the existence of their powers and functions. *Id.* at para. 58.

Defence Act's definition of "force" and "deadly force,"³⁴⁵ and explained that the SAPS Act "does not give police officers a general license to use force in the execution of their duties."³⁴⁶ Members of the SANDF "are also not exempt from these limitations on the use of force."³⁴⁷

He then summarized what the law's position is on the use of force by members of the SAPS and the SANDF, explaining that members of the SAPS and the SANDF may not use force, but if they have to, they must use only "minimum force."³⁴⁸ If a member of either of these state institutions intends to "secure the arrest of a person, force may only be used where it is reasonably necessary and proportional" and deadly force must only be used "where there is a threat to life."³⁴⁹ Finally, he noted that except for these two "strict circumstances, there is no general license for the SANDF or the SAPS to use force."³⁵⁰

After this review of the law governing the use of force by state security forces in South Africa, Judge Fabricius then explained that "the applicants seek a declaratory relief notwithstanding the declaration of the State of Disaster and the lock-down under the Disaster Management Act."³⁵¹ Declaratory relief is appropriate in four instances.³⁵² First, "appropriate relief" in terms of Section 38 of the Constitution.³⁵³ Second, "where law or conduct is declared unconstitutional under Section 172(1)(a) of the Constitution."³⁵⁴ Third, where declaratory relief is "just and equitable in terms of Section 172(1)(b) of the Constitution."³⁵⁵ Fourth, it is "discretionary relief in terms of Section 21(1)(c) of the Superior Courts Act 10 of 2013."³⁵⁶

Judge Fabricius explained that § 38 of the Constitution contains two substantive requirements. First, an applicant must allege that a right in the Bill of Rights has been infringed or threatened with infringement. Second, a court is entitled to or may grant appropriate relief, including a declaration of rights.³⁵⁷ He then concluded that the applicants in the case at bar had satisfied both

345. *Id.* at paras. 59–60.

346. *Id.* at para. 61.

347. *Id.* at para. 63.

348. *Id.* at para. 64(1).

349. *Id.* at para. 64(2).

350. *Id.* at para. 64(3).

351. *Id.* at para. 66.

352. *Id.* at 36 para. 67.

353. *Id.* at 36 para. 67. Section 38 deals with the enforcement of rights and states that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." S. AFR. CONST., 1996, at § 38. Section 38 then provides a list of persons who can approach a court to seek relief if a right in the Bill of Rights has been infringed. *See id.*

354. *Khosa and Others* 2020 (5) SA 490 at 36 para. 67.

355. *Id.*

356. *Id.*

357. *Id.* at 37 para. 69. *See also* S. AFR. CONST., 1996 at § 38.

requirements.³⁵⁸ Subsequently, Judge Fabricius cited *Fose v. Minister of Safety and Security* in which the Constitutional Court of South Africa (ZACC) held as follows:

Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.³⁵⁹

Judge Fabricius then explained that although the ZACC made this ruling in 1997, it was still relevant 23 years later in 2020, when the case at bar was decided.³⁶⁰ The ZACC’s decision in *Fose* applies particularly to the case before the Court given the facts and “the state in which the society lives at present.”³⁶¹ South Africa is “a democratic society under the rule of law,” and the country’s Bill of Rights is “a modern and effective tool and it must be used without fear or favour where appropriate within the bounds of the Constitution.”³⁶² With respect to “appropriate relief,” Judge Fabricius cited *Hoffmann v. South African Airways*, a case in which the ZACC held that “‘appropriate relief’ must be construed purposively, and in the light of section 172(1)(b) of the Constitution, which empowers the Court, in constitutional matters, to make ‘any order that is just and equitable.’”³⁶³ With respect to appropriate relief, the ZACC held in *Hoffmann* that it must be “fair and just in the circumstances of the particular case” and that “[a]ppropriateness . . . imports the elements of justice and fairness.”³⁶⁴ The Hoffmann Court also held that:

[t]he determination of appropriate relief, therefore, calls for the

358. *Khosa and Others* 2020 (5) SA 490 at 37 para. 69.

359. *Fose v. Minister of Safety and Security* 1997 (3) SA 786, at 88 para. 69 (S. Afr.).

360. *Khosa and Others* 2020 (5) SA 490 at 37–38 para. 70.

361. *Id.*

362. *Id.*

363. *Id.* at 38 para. 71. See also *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC), at 31 para. 42 (S. Afr.).

364. *Hoffmann* 2001 (1) SA 1 at 31 para. 42.

balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.³⁶⁵

The learned judge reiterated that security forces “are only entitled to use the *minimum* force that is reasonable to perform an official duty.”³⁶⁶ In addition, he noted that appropriate relief must be “future looking” and hence, must be designed to “deter future violations” of rights.³⁶⁷ In addition to acknowledging the violation of rights for which the relief is being sought, declaratory relief also sets out “the obligations” and deters “future violations.”³⁶⁸ Noting that this is the right approach to determining and granting relief under the Constitution, Judge Fabricius concluded that he will adopt and utilize it for the case at bar.³⁶⁹ Pursuant to § 38 of the Constitution, the applicants only have to “establish that their rights have been infringed or threatened with infringement.”³⁷⁰ After examining the facts adduced by the applicants, Judge Fabricius determined that the rights of the applicants had indeed been infringed and that their right to dignity had been “grossly infringed.”³⁷¹ In addition, he explained that the applicants’ right “not to be subjected to torture or cruel unusual punishment” had also “been established on the facts.”³⁷²

Judge Fabricius then explained that the right to dignity is “a foundational right in the [Bill of Rights] which must be respected by all organs of state” and that “it is the essence of the Bill of Rights and a court should not tolerate an infringement especially not by those that are created to protect the human dignity of citizens and all persons in this country.”³⁷³ The irony is that the institutions that have been created “to safeguard and protect the population from crime and violence” are the very ones that have failed to hold accountable those individuals who have violated the rights of citizens.³⁷⁴ However, those who lead these institutions “have the audacity to tell a court that it has no function in the matter and ought not even to hear” a case against alleged transgressors.³⁷⁵

365. *Id.* at 33 para. 45.

366. *Khosa and Others* 2020 (5) SA 490 at 39 para. 74 (emphasis in original).

367. *Id.* at 40 para. 75.

368. *Id.*

369. *Id.*

370. *Id.* at 40–41 para. 76. *See also* S. AFR. CONST., 1996, at § 38.

371. *Khosa and Others* 2020 (5) SA 490 at 40–41 para. 76.

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

Next, he examined § 172(1) of the Constitution, which states that “[w]hen deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable.”³⁷⁶ With respect to how South African courts have interpreted § 172, Judge Fabricius cited *Bengwenyama Minerals (Pty) Ltd & Others v. Genoral Resources (Pty) Ltd and Others*,³⁷⁷ a case in which the ZACC stressed that § 172 is undergirded by the rule of law.³⁷⁸ Writing for the ZACC in *Bengwenyama*, Justice Froneman held:

I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.³⁷⁹

Agreeing with the applicants that § 172(1)(b) grants courts the power to provide any relief that is just and equitable, Judge Fabricius rationalized that the order is not dependent on the finding of invalidity.³⁸⁰ Judge Fabricius then cited *Corruption Watch NPC and Others v. The President of the Republic of South Africa*, a case in which the ZACC held as follows: “[t]he operative word ‘any’ is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity.”³⁸¹ He noted that the holding in *Corruption Watch NPC* was echoed in *Economic Freedom Fighters and Others v. Speaker of the National Assembly and Others*, where the ZACC held that:

[the] Court’s remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable.

The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the

376. *Id.* at 41 para. 77; S. AFR. CONST., 1996, at § 172(1).

377. *Bengwenyama Minerals (Pty) Ltd v. Genoral Resources (Pty) Ltd* 2011 (4) SA 113 (CC) (S. Afr.).

378. *Khosa and Others* 2020 (5) SA 490, at 41 para. 78. *See also Bengwenyama Minerals* 2011 (4) SA 113 at 52 para. 85.

379. *Bengwenyama Minerals* 2011 (4) SA 113 at 52 para. 85.

380. *Khosa and Others* 2020 (5) SA 490 at 41 para. 79.

381. *Corruption Watch NPC v. The President of the Republic of South Africa; Nxasana v. Corruption Watch* 2018 (2) SA 442 (CC) (S.Afr.), at 33 para. 68.

notice of motion or some other pleading.³⁸²

Judge Fabricius concluded that under both §§ 38 and 172 of the Constitution, the Court can “grant an order that is appropriate or just and equitable.”³⁸³ After examining the competence of declaratory relief in terms of §§ 38 and 172 of the Constitution, he then examined it in terms of § 21(1)(c) of the Superior Courts Act 10 of 2013.³⁸⁴ He began the analysis by explaining that the respondents in the case at bar appear to believe that § 21(1)(c) of the Superior Courts Act had “displaced the remedial power of this court which is contained in sections 38 and 172 of the Constitution.”³⁸⁵ Stating that the respondents are mistaken, he explained that § 21 is “additional and not exclusive,” but it should not delay the decision in the case because the applicants did not rely on it.³⁸⁶ He then cited *Competition Commission of South Africa v. Hosken Consolidated Investments Limited and Another*,³⁸⁷ where the ZACC endorsed the two stage approach to determining appropriate relief.³⁸⁸ According to this approach, the Court must first be “satisfied that the applicant has interest in a future, existing or contingent right or obligation,” and “may then exercise its discretion either to refuse or grant the order sought.”³⁸⁹

However, Judge Fabricius noted that “[t]he existence of a live dispute is not a prerequisite” for relief to be granted by the Court.³⁹⁰ He explained that according to the submission to the Court, the reasons adduced to support the granting of the declaratory order include the following: “to vindicate the rule of law” and because “the conduct of the security forces threatens or has in fact violated the . . . Bill of Rights.”³⁹¹ He then referred to descriptions of how the deceased, Mr. Khosa, the two applicants, and two witnesses had been subjected to “assault, torture and invasion of their bodily integrity in breach of the Constitution.”³⁹² And given that no alternative version of the facts was tendered by the respondents, the honorable judge concluded that “there can be no doubt” that various fundamental rights had been infringed.³⁹³

Instead of addressing the claims made before the Court by the applicants, the Minister of Defense stated that “any answer to these [claims] will cause

382. *Econ. Freedom Fighters v. Speaker of the Nat’l Assembly* 2018 (2) SA 571 (CC), at 87 paras. 210–211.

383. *Khosa and Others* 2020 (5) SA 490 at 42 para. 81.

384. *Id.* at 42 para. 82.

385. *Id.*

386. *Id.*

387. *Competition Commission of South Africa v. Hosken Consolidated Investments Limited*, 2019 (3) SA 1 (CC) (Feb. 1, 2019).

388. *Khosa and Others* 2020 (5) SA 490 at 43 para. 83.

389. *Id.*

390. *Id.*

391. *Id.* at 43 para. 84.

392. *Id.* at 43 para. 84(2).

393. *Id.*

prejudice to the pending investigation.”³⁹⁴ In a similar manner, he also noted that the Minister of Police had claimed that the matter was under investigation.³⁹⁵ Judge Fabricius concluded, however, that these submissions were “legally untenable.”³⁹⁶

With respect to whether any accused members of the security forces should be suspended and placed off duty while they were being investigated, Judge Fabricius noted that the respondents had claimed that any accused member of the security forces “can only be placed off duty and disarmed after they have been found guilty in a thorough investigation which,” according to the respondents, was underway.³⁹⁷ He disagreed with this reasoning and explained that South African courts have ordered precautionary suspensions where there existed “a prima facie case of abuse of public authority.”³⁹⁸ He explained further that these orders are designed “to prevent a culture which is a State’s duty to prevent.”³⁹⁹ Finally, even though this is not “a drastic measure at all,” its implementation would significantly improve public confidence in government/public institutions.⁴⁰⁰

With respect to “commands and warnings” to security services, Judge Fabricius then referenced § 199(5) of the Constitution, which states that “[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”⁴⁰¹ This, of course, is a continuous duty. The defense had already accepted that “these prayers accurately ‘[restate] legal obligations’ but claim that these had already been fulfilled and thus the orders sought ‘are not necessary.’”⁴⁰²

However, the applicants had argued to the Court that these orders were necessary for several reasons.⁴⁰³ First, these commands and warnings had allegedly already been given but were not obeyed and that they were “ignored or defiled, not just by one deviant soldier acting alone, but a group acting in concert.”⁴⁰⁴ Second, the directive did not appear to have been designed “to support SAPS in policing civilians,” but was written in the “form of a military combat engagement against hostile forces.”⁴⁰⁵ The directive defined the operation by expressions, such as “battle” the “enemy” until it is “defeated and

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.* at 44 para. 85.

398. *Id.* See also *South African Broad. Corp. Soc. Ltd. and Others v. Democratic All.* 2016 (2) SA 522 (SCA) (Oct. 8, 2015).

399. *Khosa and Others* 2020 (5) SA 490, at 45 para. 86. See also *Nat’l Comm’r of the SA Police Serv. v. South African Hum. Rts. Litig. Centre* 2014 (12) BCLR 1428 (CC) (Oct. 30, 2014).

400. *Khosa and Others* 2020 (5) SA 490 at 45 para. 86.

401. S. AFR. CONST., at ch. 11 § 199(5).

402. *Khosa and Others* 2020 (5) SA 490 at 45 paras. 87–88.

403. *Id.* at 45 para. 88.

404. *Id.*

405. *Id.*

neutralized.”⁴⁰⁶ Third, the directive further states that among the residents of Alexandra community, Johannesburg, where the incident took place, “there is a few that is resistant towards SANDF because of the fact that they support illicit activities within Alexandra.”⁴⁰⁷ Thus, concluded Judge Fabricius, the security forces were being instructed to go into the community, not with an open mind, but with the expectation that they would likely encounter “resistance from some residents in Alexandra” and hence, should be prepared to overcome it.⁴⁰⁸

Fourth, the directive instructed the security forces “to channel non-compliant [community] members and to allow harsh measures of the law to take course” and that “[c]ommanders[‘] core function may be applied to find, fix and neutralize the non-compliers.”⁴⁰⁹ Judge Fabricius then noted that it was clear from this reason that when Mr. Khosa stood up for his rights and insisted on being treated “as a normal human being,” he had effectively become one of the “non-compliers” that the security forces had to “neutralize.”⁴¹⁰ Fifth, since the contents of the directive were saturated with “military language and orientated towards military combat,” there was need for commanders to issue “louder” and more explicit “commands and warnings” about how the “SANDF members” were expected to deal with “civilians.”⁴¹¹

Finally, the MOD had spoken with a “forked tongue” and “issued mixed messages about the use of force during the operation Notlela,” and that she never explained under what circumstances members of the SANDF could use force or deadly force.⁴¹² Judge Fabricius noted that while the MOD had expressed regret at the death of Mr. Khosa, and had “condemned unlawful conduct on the part of the SANDF,” she nevertheless condemned what she referred to as “conduct that disobeys the lockdown Regulations.”⁴¹³ The MOD’s proclamations, he stated, appear to implicate some kind of “moral or legal equivalence between civilians disobeying, and soldiers violating constitutional, international and statutory provisions on the excessive use of force.”⁴¹⁴ Judge Fabricius concluded that there is “no such legal or moral equivalence.”⁴¹⁵ He explained that the MOD did not adequately instruct members of the SANDF on how to interact with and treat civilians while they perform their duties, nor did she fully condemn the SANDF units for their brutality towards civilians.⁴¹⁶

With respect to the conduct of members of the SAPS during the lockdown, Judge Fabricius cited § 199(5) of the Constitution, which states that “[t]he

406. *Id.*

407. *Id.*

408. *Id.* at 45 para. 88(3).

409. *Id.* at para. 88 (3 & 4).

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at para. 89.

414. *Id.*

415. *Id.*

416. *Id.* at paras. 91–92.

security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”⁴¹⁷ In the context of the analysis of the brutal treatment of civilians by the security forces, he also stated that it would be useful “to keep in mind the founding provisions of the Constitution,” especially “section 1(c) of the Constitution read with section 7(1) thereof and (2) thereof.”⁴¹⁸ Judge Fabricius concluded that these provisions, including those in the Defence Act and the Police Act, speak clearly and explicitly to the duty of the security forces, which, in the context of the case at bar, is “to aid and assist [the] population of South Africa and of course to provide for law and order subject to its duties to act lawfully.”⁴¹⁹

He then considered standards set by international law that are relevant to the facts adduced in the case at bar.⁴²⁰ Judge Fabricius made specific references to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Torture Convention”).⁴²¹ He stated that Articles 12 and 13 “are particularly clear” in the context of the case at bar. Article 12 requires each State Party to “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”⁴²² Article 13 imposes an obligation on each State Party to “ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”⁴²³ In addition, Article 13 also states that States Parties must take steps “to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”⁴²⁴

The provisions of Articles 12 and 13 of the Torture Convention, Judge Fabricius noted, were “echoed” in the Robben Island Guidelines,⁴²⁵ which were adopted by the African Commission on Human and Peoples’ Rights to guide

417. *Id.* at para. 118.

418. *Id.* at para. 119. Section 1(c) states that the Republic of South Africa was founded on certain values and one of them is the “supremacy of the Constitution and the rule of law.” S. AFR. CONST., at § 1(c). Section 7(1) states that “[t]he Bill of Rights is a cornerstone of democracy in South Africa” and Section 7(2) states that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.” See S. AFR. CONST., at § 7(1) & (2).

419. *Khosa and Others* 2020 (5) SA 490 at para. 119.

420. *Id.* at para. 131.

421. The Torture Convention, 1465 U.N.T.S. 85.

422. *Id.* at art. 12.

423. *Id.* at art. 13.

424. *Id.*

425. *Afr. Comm’n on Hum. and People’s Rts. (Afr. Comm’n), Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, adopted by the African Commission in 2002.

African States in giving effect to Article 5 of the Banjul Charter.⁴²⁶ Noting that the Torture Convention does not provide any provisions dealing with “the lodging and investigation of complaints of torture,” he explained that in South Africa, the Independent Police Investigative Directorate (IPID) is the only institution empowered to investigate torture complaints against members of the SAPS and MPD.⁴²⁷ The U.N. Committee Against Torture (UNCAT), the treaty body of human rights experts that monitors the implementation of the Torture Convention by States Parties, had determined through its investigations, that “South Africa’s existing investigative bodies ‘[had] not been performing’ and that they currently did not have the capacity ‘to perform the ‘prompt and impartial’ investigation required by the Torture Convention.’”⁴²⁸

The case at bar, concluded the opinion, appears to support the assessment made by the UNCAT about the situation in South Africa regarding the country’s failure to adequately, effectively and expeditiously investigate alleged incidents of torture.⁴²⁹ For example, the applicants and the deceased, Mr. Khosa, were assaulted on April 10, 2020.⁴³⁰ However, there was “no proper investigation in progress” and no one from any agency of the State had “medically examined the applicants nor interviewed the surviving victims or any witnesses until after the Court hearing.”⁴³¹ Judge Fabricius noted that “[t]his alone shows that the existing investigative bodies are either not competent or not committed to comply with article 12 of the Torture Convention.”⁴³²

He then examined what he referred to as the inadequacies of the IPID, the public institution that is empowered to investigate torture complaints against members of the SAPS and MPD.⁴³³ First, he explained that the IPID had complained that it did not have the funding and the trained personnel to promptly and efficiently investigate complaints.⁴³⁴ Second, based on affidavits presented to the Court, it was determined that the IPID, during the duration of the lockdown, did not even have a permanent executive director who could act and function independently as required by the ZACC in *McBride v. Minister of Police and Another*.⁴³⁵ In *McBride*, the ZACC had declared certain provisions

426. Article 5 of the African Charter on Human and Peoples’ Rights (Banjul Charter) prohibits all forms of exploitation and degradation, particularly “slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.” African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/ 3 rev. 5, 21 I.L.M. 58 (1982), at art. 5.

427. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) at para. 132 (S. Afr.). SAPS is South African Police Service and MPD is Metropolitan Police Department. *See id.* at pmb1.

428. *Id.* at para. 136.

429. *Id.* at para. 137.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at para. 138.

434. *Id.*

435. *Id.* *See also McBride v. Minister of Police and Another* 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (S. Afr.).

of the IPID Act unconstitutional because they undermined the IPID's independence from the executive,⁴³⁶ and then directed Parliament to cure those defects within 24 months of the order.⁴³⁷ However, Judge Fabricius explained, 44 months later, Parliament had not yet enacted legislation to amend the IPID Act and cure the defects as directed by the ZACC and that no explanation had been given for the delay.⁴³⁸

Finally, he examined the inadequacy of the Office of the Military Ombud, which was the 8th respondent.⁴³⁹ He began the analysis by noting that although no relief was sought against this respondent, there was an explanatory affidavit filed on its behalf.⁴⁴⁰ However, there were several problems "relating to this respondent."⁴⁴¹ First is that the Ombud "is not empowered to investigate" members of SAPS and MPD and that this alone effectively renders these institutions incompetent to perform the relevant functions provided in the Torture Convention.⁴⁴² Second, since the Ombud is required to have at least 10 years of military experience, Judge Fabricius concluded that this was "not institutionally impartial."⁴⁴³ Third, there was no procedural safeguard to prevent the premature removal of the Ombud by the President of South Africa.⁴⁴⁴

Fourth, the Ombud's budget was determined by the MOD and the Ombud is accountable to the MOD rather than to Parliament.⁴⁴⁵ Fifth, the Ombud's "method and conduct of investigation are prescribed by ministerial Regulations" and as a consequence, the Ombud "cannot investigate promptly, effectively and independently" and that this is apparent from the Ombud's "own annual activity report for 2018/2019."⁴⁴⁶ Judge Fabricius determined that the Ombud's office did not have "sufficient human resource capacity and funding to deal with the existing caseload."⁴⁴⁷ During the lockdown in South Africa the number of armed soldiers policing South African streets was the largest deployment of the defense force in the country's post-apartheid history.⁴⁴⁸ Unfortunately, the Ombud "simply does not have the capacity" to deal expeditiously and promptly "with the hundreds of civilian complaints that this unprecedented deployment may generate."⁴⁴⁹ This office, Judge Fabricius concluded, is "institutionally and practically incapable of conducting the 'prompt and impartial' investigation

436. *McBride* 2016 (2) SACR 585 at para. 58(1).

437. *Khosa and Others* 2020 (5) SA 490 at para. 138 (S. Afr.); see also *McBride*, 2016 (2) SACR at para. 58(2).

438. *Khosa and Others* 2020 (5) SA 490 at para. 138.

439. *Id.* at para. 139.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at para. 140.

448. *Id.*

449. *Id.*

required by the Torture Convention and thus by section 12(1)(d) and (e) of the Constitution.”⁴⁵⁰ Further, he agreed with the applicants’ counsel that there was “no existing mechanism [in South Africa] capable of conducting prompt, impartial and effective investigations of lock-down brutality” and that the Court had “the duty and power to order the Defence Minister and the Police Minister to establish one urgently” and that such a mechanism must not only be independent but must also be seen by the public to be independent.⁴⁵¹

With respect to the Court’s order, Judge Fabricius explained that the draft order “is designed to ensure that South Africa complies with its Constitutional and international obligations.”⁴⁵² With respect to the issue of separation of powers, he cited *Democratic Alliance v. South African Broadcasting Corporation Limited and Others* where the Court held that “the rule of separation of powers cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to a litigant who successfully raises a constitutional complaint.”⁴⁵³ In addition, similar relief as that requested by the applicants in the case at bar has been granted by courts in South Africa in several cases.⁴⁵⁴

Thus, Judge Fabricius explained, the applicants in *Khosa* were not requesting that he “supplant or undermine existing institutions.”⁴⁵⁵ Instead, the applicants were requesting that the Court “order the respondents to enhance the existing institutions and to give them what they currently lack but constitutionally require” and that is “the necessary competence, independence and capacity to receive and investigate complaints of torture, and brutality promptly, impartially and effectively.”⁴⁵⁶ The relief requested in *Khosa* “is competent, justified, appropriate and above all just and equitable as required by the Constitution [of South Africa]” and that “[l]ockdown brutality requires a remedy” and the order sought by the applicants represents and provides that remedy.⁴⁵⁷

Judge Fabricius then cited *Mahomed and Another v. The Republic of South Africa and Others*,⁴⁵⁸ a case in which President Chaskalson, writing for the ZACC, quoted the decision of Judge Brandeis in *Olmstead et al. v. U.S.*:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people

450. *Id.*

451. *Id.* at para. 141.

452. *Id.* at para. 142.

453. *Id.*; see also *Democratic Alliance v. S. African Broad. Corp. Ltd.*, 2015 (1) SA 551 (WCC) at para. 99 (S. Afr.).

454. *Khosa and Others* 2020 (5) SA 490 at para. 143.

455. *Id.* at para. 144.

456. *Id.*

457. *Id.*

458. *Mahomed v. Republic of S. Afr.*, 2001 (3) SA 893 (CC) (S. Afr.).

by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.⁴⁵⁹

The honorable judge then listed the reliefs granted to the applicants. First, he stated that the application “is heard as one of urgency in terms of Rule 6(12), the ordinary requirements of the Rules in respect of notice, service and time periods being dispensed with, and the applicants’ departure therefrom being condoned.”⁴⁶⁰ Second, in terms of §§ 38 and 172(1)(b) of the Constitution of South Africa, read with § 21(1)(c) of the Superior Courts Act 10 of 2013, the Court declared that “during and notwithstanding the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002: all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency”:⁴⁶¹

- the right to human dignity (section 10 of the Constitution);
- the right to life (section 11 of the Constitution);
- the right not to be tortured in any way (section 12(1)(d) of the Constitution);
- the right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e) of the Constitution).⁴⁶²

Third, the Court held that “under section 199(5) of the Constitution, the South African security services . . . must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa].”⁴⁶³ Fourth, all organs of the State, which include the SANDF, the SAPS and any MPD, “are obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights, including those enumerated above.”⁴⁶⁴

Fifth, security services “remain bound by section 13(3)(b) of the South African Police Service Act 68 of 1998 (read with section 20(1)(a) of the Defence Act 42 of 2002), to use only the minimum force that is reasonable to perform an official duty.”⁴⁶⁵ Sixth, “members of the SANDF, the SAPS and any MPD . . . are bound by the provisions of the Prevention and Combating of Torture of Persons Act 13 of 2013, and the United Nations Convention against Torture and

459. *Id.* at ¶ 69. See also *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

460. *Khosa and Others* 2020 (5) SA 490 at ¶ 146(1).

461. *Id.* at ¶ 146(2.1).

462. *Id.* at ¶146(2.1.1–2.1.4).

463. *Id.* at ¶ 146(2.2).

464. *Id.* at ¶ 146(2.3).

465. *Id.* at ¶ 146(2.4).

Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.”⁴⁶⁶

The rest of the reliefs concern orders that are directed at the various respondents.⁴⁶⁷ For example, the Court ordered the “first to fourth respondents to, within their respective areas of authority” and “within five days” of the order, and “pending the outcome of disciplinary proceedings, place on precautionary suspension, on full pay, all members of the SANDF who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020.”⁴⁶⁸

Although there are many lessons that can be gleaned from *Khosa*, the most important one is that the law is supreme. Therefore, no one, not even individuals holding important government positions, such as executive members, is above the law. In performing their jobs, civil servants and political elites must be accountable to the constitution and they must do so in an open and transparent manner. That means that in addition to respecting, protecting, promoting and fulfilling the Bill of Rights, all State agents must provide the public with timely, accessible, accountable and accurate information about their activities and actions. Most importantly, certain fundamental rights (e.g., the right to life), which are enshrined in the ICCPR and the Bill of Rights of many countries, including South Africa, cannot be derogated from, even in time of a public emergency (e.g., the COVID-19 pandemic). *Khosa* is a very important case, and the High Court of South Africa’s decision represents an important addition to Africa’s growing jurisprudence on the protection of human rights, especially during times of public emergencies.

When COVID-19 came to South Africa in 2020, the country opted not to enact new laws to provide the government emergency powers to manage the pandemic.⁴⁶⁹ Instead, the government used existing constitutional law (e.g., the Bill of Rights) and statutes (e.g., the Disaster Management Act 57 of 2002), as well as binding international human rights law. In taking measures to arrest the spread of the virus and minimize its impact on the people and the economy, civil society and its organizations expected the government to respect its obligations under international law and refrain from violating the laws of South Africa, including the Bill of Rights. Civil society organizations and individuals in South Africa challenged the constitutionality of the various COVID-19-related measures and their enforcement, and argued that they infringed on the human rights and fundamental freedoms of various individuals and groups within the country.⁴⁷⁰ These challenges provided the courts the opportunity to clarify the

466. *Id.* at ¶ 146(2.5).

467. *Id.* at ¶ 146(3–6).

468. *Id.* at para. 146(3–3.1) (This is the street in the Alexandra community where the incident took place).

469. Kruger, *supra* note 88, at para. 18.

470. Kruger, *supra* note 88, at para. 171. An example of such a legal challenge of COVID-19-related school closures is *Equal Education and Others v. The Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP)

State's obligations under international and regional human rights instruments, as well as under the national Constitution, especially as it is related to the recognition and protection of human rights and fundamental freedoms.

V. SUMMARY AND CONCLUSION

In the summer of 2020, Human Rights Watch reported that the COVID-19 pandemic exposed serious gaps and significant inequalities in access to health care services in many African countries.⁴⁷¹ HRW urged African governments to address these deficiencies in their healthcare systems to more effectively deal with the demands of the COVID-19 pandemic and the on-going healthcare needs of residents of African countries.⁴⁷² HRW also urged African governments to ensure that all the people within their jurisdictions realize their right to health that is enshrined in various international and regional human rights instruments, including the Banjul Charter.⁴⁷³

Article 16 of the Banjul Charter guarantees the right of every person “to enjoy the best attainable state of physical and mental health.”⁴⁷⁴ The right to health is a fundamental right under international human rights law, it is an important part of the U.N. Sustainable Development Goals, and it is guaranteed as part of the bills of rights of many countries, including those in Africa.⁴⁷⁵ For example, § 27(1)(a) of the Constitution of the Republic of South Africa states that “[e]veryone has the right to have access to—(a) health care services.”⁴⁷⁶ The right to health is also a key goal of the African Union's Agenda 2063.⁴⁷⁷

In its 2020/2021 annual report, Amnesty International explained that COVID-19 exposed the legacy of extremely “destructive policies,” which “perpetuated inequality, discrimination, and oppression” in many countries throughout the continent.⁴⁷⁸ In many African countries, governments “weaponized” the pandemic in an effort to “crackdown on human rights.”⁴⁷⁹ Particularly at risk during this period were members of opposition political parties and of vulnerable groups (e.g., women and girls; persons with disabilities; refugees, particularly refugee children; and ethnic and religious

(July 17, 2020). In this case, three civil society organizations asked the High Court of South Africa, Gauteng Division, Pretoria, to order South Africa's Minister for Basic Education and several provincial ministries of education to provide “a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Covid-19 pandemic.” *See id.* at para. 1.

471. HUMAN RTS WATCH, *supra* note 1.

472. *Id.*

473. *Id.*

474. Banjul Charter, *supra* note 9, at art. 16.

475. HUMAN RTS WATCH, *supra* note 1.

476. S. AFR. CONST., 1996 at ch. 2, § 27.

477. AFRICAN UNION, AGENDA 2063: THE AFRICA WE WANT 2 (2015), <https://au.int/en/agenda2063/overview> [<https://perma.cc/3ZC4-HHH5>].

478. AMNESTY INT'L, *Sub-Saharan Africa*, *supra* note 12.

479. *Id.*

minorities).⁴⁸⁰ AI determined that the COVID-19 pandemic hit Africans who had been “shackled by oppression hardest thanks to decades of inequalities, neglect and abuse.”⁴⁸¹ However, the pandemic also created the wherewithal for opportunistic political elites to oppress their citizens and violate their human rights and fundamental freedoms.⁴⁸²

Article 4 of the ICCPR provides that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” States Parties may take measures “derogating from their obligations under the [ICCPR] to the extent strictly required by the exigencies of the situation.”⁴⁸³ However, these measures must conform or be consistent with each State Party’s “obligations under international law” and must not be discriminatory.⁴⁸⁴

In addition, States Parties must not derogate from articles 6, 7, 8 (¶¶ 1 & 2), 11, 15, 16 and 18.⁴⁸⁵ When countries in Africa declared states of emergency or states of disaster in response to COVID-19, they were not supposed to interfere with or violate their people’s human rights and fundamental freedoms.⁴⁸⁶ However, research has determined that lockdown measures implemented in some African countries to arrest the spread of the virus contributed to an increase in levels of domestic violence against women and girls.⁴⁸⁷ Certain rights were especially susceptible to being negatively affected by measures taken to manage COVID-19. Among these are the right to freedom of movement and of association, the right to life, and the right to be free from torture, cruel, inhuman or degrading treatment or punishment.⁴⁸⁸

COVID-19 pandemic lockdowns significantly heightened the risk of domestic violence because the mandatory lockdown regulations or laws forced many people to spend more time at home, significantly increasing their vulnerability to abuse by relatives and other family members.⁴⁸⁹ In addition, the violation of the physical integrity of the individual also occurred when the police

480. *Id.*

481. AMNESTY INT’L, *COVID-19*, *supra* note 15.

482. *Id.*

483. ICCPR, *supra* note 25, at art. 4(1).

484. *Id.*

485. *Id.* at art. 4(2).

486. *See, e.g.*, OFFICE OF THE U.N. COMM. HUM. RTS, *COVID-19: States should not abuse emergency measures to suppress human rights—UN experts*, (March 16, 2020), <https://www.ohchr.org/en/press-releases/2020/03/covid-19-states-should-not-abuse-emergency-measures-suppress-human-rights-un> [<https://perma.cc/2UBX-46Z7>] (stating that “emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals” or “as a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders”).

487. Carraro, *supra* note 36.

488. U.N. Comm’n Hum. Rts., *supra* note 37. *See also* OFF. OF THE U.N. COMM. HUM. RTS, *supra* note 485 (noting that “[t]he use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies when fundamental rights including movement, family life and assembly are being significantly limited”).

489. U.N. OFF. DRUGS & CRIME, *supra* note 41.

and other state security officers were enforcing public health measures that were implemented to minimize the spread of the COVID-19 virus.⁴⁹⁰ Amnesty International also determined that in many African countries, security forces were involved in the violation of international human rights during the pandemic by employing excessive, unnecessary and disproportionate force to implement government mandated lockdowns and curfews.⁴⁹¹

Although international law allows States to place certain restrictions on the rights to freedom of movement and of peaceful assembly in order to protect public health or other legitimate interests, these restrictions must be provided by law and they must be necessary and proportionate to a specific aim or purpose.⁴⁹² However, it was determined that some African States were using excessive force against peaceful protesters and allowing their security forces to violate, with impunity, the human rights of their citizens.⁴⁹³ Thus, in passing laws or interpreting existing ones to enhance the ability of governments to deal with the COVID-19 pandemic, States were expected to be mindful of the non-derogable nature of certain human rights enshrined in the ICCPR and to place “human rights at the center of all considerations.”⁴⁹⁴

One way to understand how African countries responded to the COVID-19 pandemic is to examine the experiences of individual African countries. One such country that was examined in this article is the Republic of South Africa, which couched its pandemic response in terms of its obligations under national constitutional law and international human rights law.⁴⁹⁵ The first case of COVID-19 was reported in South Africa on March 5, 2020.⁴⁹⁶ However, South African authorities chose not to enact new legislation to empower the government to deal with the virus.⁴⁹⁷ Instead, the country chose to respond to the COVID-19 pandemic within a legal framework for the managing of disasters that was undergirded by existing law, which consisted of the national constitution, particularly, the Bill of Rights, and international and regional human rights instruments, which were binding on South Africa.⁴⁹⁸ With respect to the declaration of a state of disaster, South African authorities relied on the Disaster Management Act 57 of 2002, a law that was designed to provide for “an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters,” as well as mitigating their

490. Zweig et al., *supra* note 44.

491. AMNESTY INT’L, *Governments*, *supra* note 47.

492. *Id.*

493. *Id.*

494. *Id.*

495. Kruger, *supra* note 88, at Section II: Applicable Legal Framework.

496. NAT’L INST. FOR COMMUNICABLE DISEASES, *First Case of Covid-19 Coronavirus Reported in SA*, <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/> [<https://perma.cc/9VZ5-64FK>] (being an address to the public by Dr. Zweli Mkhize, Minister of Health, declaring that a case of COVID-19 has been detected in South Africa that day, March 5, 2020).

497. Kruger, *supra* note 88, at para. 18.

498. *Id.* at Sections I & II.

severity.⁴⁹⁹

South Africa declared a national state of disaster across the entire country in terms of § 27(1) of the Disaster Management Act 57 of 2002 on March 15, 2020.⁵⁰⁰ That initial declaration lapsed on June 15, 2020.⁵⁰¹ However, this was repeatedly extended for 30 days until midnight on April 4, 2022, when the final state of disaster came to an end.⁵⁰² After the government of South Africa began implementing measures to manage COVID-19 and minimize its spread and its impact on the people and the economy, human rights defenders became worried that some of these measures and the way they were being implemented were violating human rights and fundamental freedoms, and subsequently sought the intervention of the courts. For example, in *Community of Hangberg and Another v. City of Cape Town*, the High Court of South Africa (Western Cape Division) ordered the City of Cape Town to rebuild an informal home that it had destroyed in contravention of the prohibition of evictions.⁵⁰³ In another case, *C D and Another v. Department of Social Development*, the divorced parents of two children obtained an order from the High Court allowing their children, who were visiting their grandparents in Bloemfontein (Free State Province) when the lockdown was implemented, to return to their parents in Cape Town (Western Cape) (Cape Town High Court).⁵⁰⁴

C D and Another is one of the three South African cases that were examined in this article. In this case, the applicants, C D and M D, parents of two minor children, had approached the Cape Town High Court on an urgent basis to seek permission from the Court to allow either the first or second applicant to travel from Cape Town to Bloemfontein and back so as to fetch their children from their grandparents' home.⁵⁰⁵ The two children, who were on holiday, had travelled from Cape Town to Bloemfontein on March 22, 2020, to visit their grandparents and were expected to return to Cape Town on March 31, 2020.⁵⁰⁶ However, the government's mandatory lockdown intervened, and the children were effectively locked down with their grandparents in Bloemfontein and could not return home.⁵⁰⁷

The main issue that the Court was called upon to decide was whether the movement of the children from Bloemfontein to Cape Town was permitted in

499. Disaster Management Act 57 of 2002 at pmbl. (S. Afr.).

500. Kruger et al., *supra* note 88, at para. 24.

501. *Id.*

502. *Id.* See also S. AFR. GOV'T, *President Cyril Ramaphosa: South Africa's response to Coronavirus COVID-19 pandemic*, (April 4, 2022) <https://www.gov.za/news/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-04-apr> [<https://perma.cc/FWJ8-DXJW>], being a speech to the nation by South African President Cyril Ramaphosa announcing an end to the declaration of a state of disaster on April 4, 2022.

503. *Cnty. of Hangberg v. City of Cape Town* 2020 SA 66 (ZAWCHC) at para. 14 (S. Afr.).

504. *C D v. Dep't of Soc. Dev.* 2020 SA 25 (ZAWCHC) at para. 1–2 (S. Afr.).

505. *Id.*

506. *Id.*

507. *Id.*

terms of the government's Amended Direction 1(c)(i).⁵⁰⁸ Writing for the Court, Justice Meer cited § 39(2) of the Constitution, which states that “[w]hen interpreting any legislation, . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”⁵⁰⁹ With regards to the case at bar, Justice Meer explained that the relevant section of the Constitution that the Court had to interpret was § 28(2), which enshrines the child's best interests as the standard for dealing with all issues pertaining to children.⁵¹⁰ Second, Justice Meer explained that the Amended Direction did not specify that “movement of children can only take place in terms of pre-existing court order as alluded to by the Respondent.”⁵¹¹ In addition, she noted that her “reading of the direction does not prevent a court from making an order as required, presumably in circumstances of urgency, and for movement of children to take place in accordance with arrangements put in place by such an order.”⁵¹²

Finally, Justice Meer explained that in granting permission to the children to travel from Bloemfontein to Cape Town, the children would only be permitted to go to the home of the Second Applicant (M D, the children's mother) if it is proven to the Court that M D has tested negative for COVID-19.⁵¹³ She then held that the best interests of the children would be properly served if they were permitted to travel from Bloemfontein to Cape Town to be with their parents.⁵¹⁴ In *C D and Another*, the Court made clear that any measures taken by the government to respond to COVID-19, which include restricting children's right to freedom of movement, including remaining in situations where their well-being and physical health are threatened, is not tenable. Thus, according to the High Court's judgment in *C D and Another*, it is the function of the State to ensure that the rights of all people under a State's jurisdiction, including those of vulnerable groups, such as children, are adequately protected in times of public emergencies. A State, then, must not use states of emergency or disaster as a pretext to violate the rights of its citizens.

The second case examined in this article is *Centre for Child Law v. Minister for Basic Education*. This case was brought before the High Court of South Africa, Gauteng Division, Pretoria, by the Centre for Child Law (CCL) at the Law Faculty at the University of Pretoria. The CCL had prayed the High Court to invalidate regulations that allowed for school closures as they failed to meet the needs of learners with disabilities.⁵¹⁵ They had alleged that the government's Directions, which had been issued pursuant to the Disaster Management Act 57 of 2002 to provide the tools to manage the pandemic, had failed to provide

508. *Id.* at para. 11.

509. *Id.* at para. 11.1; S. AFR. CONST., § 39(2).

510. *C D v. Dep't of Soc. Dev.*, 2020 SA 25 (ZAWCHC) at para. 11.1; S. AFR. CONST., § 28(2).

511. *C D v. Dep't of Soc. Dev.*, 2020 SA 25 (ZAWCHC) at para. 11.2.

512. *Id.*

513. *Id.* at para. 12.

514. *Id.* at para. 13.

515. *Centre for Child Law Notice of Motion*, Case No. 31213/2, *supra* note 181, at para. 2.

“guidelines for learners with physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities.”⁵¹⁶

The CCL noted that in an effort to minimize the spread of COVID-19, the government of South Africa had ordered that all schools in the country should be closed.⁵¹⁷ The order to close all schools, included the country’s “special schools,” which catered to learners with special needs.⁵¹⁸ The school closures, the CCL explained, meant that millions of South Africa’s learners would be unable to have access to “teaching and learning.”⁵¹⁹ South Africa’s learners with disabilities do not attend regular schools; instead, they attend special schools, where they are provided access to *teaching and learning* and, in addition, they are also provided with *specialized care and support services*, which significantly enhance their ability to learn.⁵²⁰ These specialized care and support services can only be found and are only available at special schools and special school hostels and which are critical to the effective education of learners with disabilities.⁵²¹

The services that the specialized schools offer learners with disabilities include “a range of therapies, access to assistive devices and technology, school feeding schemes, and access to personal care items.”⁵²² These services form an essential and critical “component of learning and development for learners with disabilities” in South Africa.⁵²³ The CCL concluded its presentation to the Court by stating that it was critical for the Minister for Basic Education to prioritize learning, not just for all learners, but this must be done especially for learners with disabilities who were forced to remain home because of the COVID-19 lockdown.⁵²⁴ The safe reopening of schools, the CCL noted, would require the government to address the special needs of learners with disabilities within the context of the declared National Disaster.⁵²⁵ This, the CCL explained, requires that the government provide “practical, feasible guidelines to provide for amongst others, sanitation, personal protective equipment (*PPE*) and social distancing measures unique to the context of various disabilities.”⁵²⁶

The Court noted that the matter before it would be analyzed and decided in terms of § 38(b) of the Constitution on behalf of all learners with disabilities whose right to access basic education ([§ 29(1)(a)] of the Constitution of South Africa), as well as their right to have their best interests taken into account in

516. *Id.* at para. 2.1.

517. *Centre for Child Law Founding Affidavit*, Case No. 31213/2, *supra* note 182, at para. 12.

518. *Id.*

519. *Id.*

520. *Id.* at para. 13.

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.* at para. 14.

525. *Id.* at para. 15.

526. *Id.*

matters concerning them (§ 28(2) of the Constitution) have been violated by the Directions that were promulgated by the government to deal with the COVID-19 pandemic.⁵²⁷ Children with disabilities, the CCL noted, are “a particularly marginalized and vulnerable group that require[s] a high degree of protection” and that their level of suffering, “particularly in the context of COVID-19, has recently been confirmed by [UNESCO].”⁵²⁸

The CCL argued that the failure of the government’s directions for dealing with the COVID-19 pandemic to address the needs of “these excluded group of learners” is totally “irrational, because the Directions aim to address, prevent and combat the spread of COVID-19 and yet do not cater for categories of learners who are most at risk of contracting the disease.”⁵²⁹ Also, the failure or inability of the Directions

to address the position of these excluded categories of learners . . . is unlawful, and otherwise unconstitutional, in that it contravenes the protection given to such children in terms of their rights to receive basic education (under section [29(1)(a)] of the Constitution, and to have their best interests taken into account in matters concerning them (under section 28(2) of the Constitution).⁵³⁰

The CCL then prayed the Court to review the Directions and “set them aside or declare[] them invalid to the extent that they fail to cater for the needs of the excluded categories of learners with disabilities under: the principle of legality.”⁵³¹

The Court’s order in this case was issued on August 4, 2020, and in it, Judge Fourie declared that after having reviewed the evidence adduced by both parties, the Court ordered the Respondent, the MBE, to revise the Directions it had promulgated to guide school operations during the COVID-19 pandemic and provide more carefully tailored guidelines for learners with various types of disabilities—physical disabilities, intellectual disabilities, epilepsy, and severe to profound intellectual disabilities.⁵³² An important lesson from this case is that by failing to include guidelines specifically designed to protect the rights and meet the needs of *the excluded categories* of learners, the MBE had inadvertently created a situation in which the rights of these learners could be violated.

Another lesson that can be gleaned from this case is that civil society organizations, such as the Centre for Child Law, can play a very important role in ensuring that the rights of citizens, including especially those of extremely

527. *Id.* at para. 33.

528. *Id.* at para. 34.

529. *Id.* at para. 91(91.1–2).

530. *Id.*

531. *Id.* at para. 92 (92.1 & 92.2).

532. These were the learners that the CCL had referred to as the “excluded categories.” *See id.* at para. 2.1.

vulnerable groups (e.g., children in general and children with disabilities in particular) are recognized and protected, even in times of public emergencies. The courts, of course, are also an important mechanism to protect human rights. Courts are constitutionally empowered to adjudicate cases, peacefully resolve various conflicts, and determine the constitutionality of legislative enactments. It was these courts that ensured that teachers, administrators, and other staff members at South Africa's schools did not continue to violate the rights of learners with disabilities through measures designed to help manage the COVID-19 pandemic and minimize the spread of the virus.

The third case examined in this article was also from South Africa and it is *Khosa and Others v. Minister of Defence and Military Veterans and Others*.⁵³³ Writing for the High Court of South Africa, Gauteng Division, Pretoria, Judge Fabricius explained that the case before the Court did not concern the question “whether or not any of the Regulations promulgated [by the government] are unlawful and thus invalid because they are not rationally related to their purpose,” which is to minimize the spread of the COVID-19 virus.⁵³⁴ He then explained that if government regulations violate the rights of citizens, the government should seek the least restrictive measures and communicate them to the populace.⁵³⁵ In return, the government can expect that citizens will cooperate for the maximization of common goals and objectives, and take responsibility to ensure their own safety and that of other individuals and groups.⁵³⁶

After explaining that the founding values of post-apartheid South Africa include a democratic government that is based on the “principles of accountability, responsiveness and openness,” Judge Fabricius then concluded that public administration in South Africa “must be accountable” and that “transparency must be fostered by providing the public with timely, accessible, accountable and accurate information.”⁵³⁷ In addition, he stated that if South Africa's government is held to these constitutional obligations, the trust of citizens in their government and institutions is restored, and “lawful rational Regulations are obeyed [by the people], then the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found.”⁵³⁸

As part of the examination of the merits of *Khosa*, Judge Fabricius provided an overview of some rights enshrined in South Africa's Bill of Rights, as well as § 36, which deals with limitation of these rights.⁵³⁹ After explaining the relief that was sought by the applicants and that it concerned the need for the

533. *Khosa and Others v. Minister of Def. and Mil. Def. and Mil. Veterans and Ors* 2020 (5) SA 490 (GP) (S. Afr.).

534. *Id.* at para. 5.

535. *Id.* at para. 7.

536. *Id.*

537. *Id.* at para. 8.

538. *Id.* at para. 9.

539. *Id.* at para. 19.

government to respect the rights of South Africans, even during a declared national emergency or state of disaster, Judge Fabricius then noted that certain provisions of the Constitution of South Africa also require that the country's security forces, while performing their functions, "must act, and must instruct their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa]."⁵⁴⁰

After providing an overview of the reliefs prayed for by the applicants, Judge Fabricius then examined their heads of argument and noted that the case at bar concerned "torture and brutality committed against civilians by members of the South African security forces, in the course of the nationwide joint operation to enforce the unprecedented restrictions on civilian movement and activity" and which had been imposed by the government to provide the legal framework within which to combat the spread of the COVID-19 pandemic.⁵⁴¹ In addition, noted Judge Fabricius, the case was brought by the family of Mr. Collins Khosa, who was alleged to have been "brutalised, tortured and murdered by members of the security forces, at his home, on 10 April 2020."⁵⁴²

After citing the U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Judge Fabricius then summarized what the law's position is on the use of force by members of the SAPS and SANDF.⁵⁴³ In general, he explained that members of the SAPS and SANDF may not use force but that if they must do, they must use only "minimum force."⁵⁴⁴ If it becomes necessary for a member of either of these institutions to "secure the arrest of a person," deadly force must only be used "where there is a threat to life."⁵⁴⁵ In addition, except for these two "strict circumstances, there is no general license for the SANDF or the SAPS to use force."⁵⁴⁶ After examining the law regulating the use of force by state security forces in South Africa, Judge Fabricius explained that the applicants seek "a declaratory relief notwithstanding the declaration of the State of Disaster and the lock-down under the Disaster Management Act."⁵⁴⁷

Then Judge Fabricius cited § 38 of the Constitution and explained that it contains two substantive requirements, namely, that *the applicant must allege that a right in the Bill of Rights has been infringed or threatened to be infringed* and second, that *a court is entitled to or may grant appropriate relief, including a declaration of rights.*⁵⁴⁸ Finally, he concluded that the applicants had met or satisfied both requirements and the relief prayed for by the applicants "is

540. *Id.* at para. 23.

541. *Id.* at para. 24(1).

542. *Id.* at para. 24(5).

543. *Id.* at para. 64(1).

544. *Id.*

545. *Id.* at para. 64(2).

546. *Id.* at para. 64(3).

547. *Id.* at para. 66.

548. *Id.* at para. 69.

competent, justified, appropriate and above all just and equitable as required by the Constitution” and that “[l]ockdown brutality requires a remedy.”⁵⁴⁹

Specifically, Judge Fabricius noted that the Court had considered the application as “one of urgency” and held that in terms of §§ 38 and 172(1)(b) of the Constitution of South Africa, read with § 21(1)(c) of the Superior Courts Act 10 of 2013,

during and notwithstanding the declaration of the State of Disaster and the Lockdown under the Disaster Management Act 57 of 2002: all persons present within the territory of the Republic of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency: including the right to human dignity[], the right to life[], the right not to be tortured in any way[], and the right not to be treated or punished in a cruel, inhuman or degrading way[].⁵⁵⁰

The Court also held that § 199(5) of the Constitution of South Africa mandates that “[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic [of South Africa].”⁵⁵¹ The Court reiterated that all organs of the State are “obliged, under section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights.”⁵⁵² While the Court granted the applicants in *Khosa* several reliefs, the overall lesson from this case is that the law, as enshrined in the constitution, is supreme and that no one, not even those who hold important positions in the government, and that includes members of the executive, is above the law.⁵⁵³ Thus, in performing their jobs, political elites and civil servants, such as members of the SAPS, SANDF, and all MPDs, must be accountable to the constitution and they must do so in an open and transparent manner. That implies that in addition to respecting, protecting, promoting and enhancing the realization of the rights enshrined in the Bill of Rights, all State agents must provide the public with timely, accessible, accountable, and accurate information about their activities and actions.⁵⁵⁴ The Court also made clear that fundamental rights (e.g., the right to life), which are enshrined in the Bill of Rights and various international and regional human rights instruments (e.g., ICCPR and the Banjul Charter), must not be derogated from, even in time

549. *Id.* at para. 144.

550. *Id.* at para. 146(2.1–2.2).

551. These security forces include the SAPS, all Metropolitan Police Departments, and the SANDF. *See* S. AFR. CONST. 1996, at para 199(5).

552. *Khosa and Others* 2020 (5) SA 490 at para. 146(2.3).

553. *Id.* at para. 146(2).

554. *See, e.g.,* John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT’L L. 959, 993–1000, 1011–22 (2013).

of a public emergency.⁵⁵⁵

When COVID-19 pandemic came to South Africa, the country chose to rely on existing laws and its obligations under international and regional human rights instruments to provide the government with the legal tools to fight the spread of this virus. However, civil society, generally, and human rights defenders, in particular, worried that the interpretation of existing laws might offer the incumbent government the wherewithal to act opportunistically and violate the human rights and fundamental freedoms of South Africans. An important measure that South Africa took to minimize the spread of the virus and its impact on the health of its citizens was to declare a state of disaster, which was then followed by lockdowns that restricted citizens' ability to exercise their right to freedom of movement and of association. Subsequently, schools and businesses were closed, making it extremely difficult for learners, especially those with disabilities, to exercise their right to basic education.

Individuals and civil society organizations challenged the constitutionality of the various COVID-19-related measures and their enforcement, arguing that they infringed on the human rights and fundamental freedoms of various individuals and groups within the country. For example, in *C D and Another*, the Court made clear that in enforcing COVID-19-related measures, such as lockdowns, the government must make the best interests of the child a paramount consideration. The rights of child learners, particularly those of learners with disabilities, were under consideration in *Centre for Child Law v. Minister for Basic Education*. These children are especially vulnerable to exploitation and neglect and hence in *Centre for Child Law*, the Court instructed the government to make certain that in all public policies, especially those that affect learners with disabilities (e.g., the closing of schools in response to the COVID-19 pandemic), special attention must be paid to ensuring that the rights of this extremely vulnerable group are not violated. Finally in *Khosa*, the Court reminded South Africans that the political dispensation introduced by the 1996 Constitution is democratic and undergirded by the rule of law and respect for and the protection of human rights. Hence, the law is supreme and all state functionaries, including members of the executive, must perform their functions in conformity with the law and, in addition, they must respect and uphold the constitution.

International and regional human rights instruments, as well as the Constitution of South Africa, enshrine various protections for the human rights and fundamental freedoms of citizens. These legal instruments also impose obligations on the government to ensure that these rights are not violated with impunity. While both international law (e.g., the ICCPR) and national constitutional law permit the limitation of rights, this can only be done in "terms of law of general application to the extent that the limitation is reasonable and

555. Rights that cannot be derogated from, even in a state of emergency, include the right to equality, human dignity, life, freedom of security of the person and arrested and detained and accused persons. *Khosa and Others* 2020 (5) SA 490 at para. 19.

justifiable in an open democratic society.”⁵⁵⁶ With respect to public emergencies that threaten the life of the nation “and the existence of which is officially proclaimed,” the State may “take measures derogating from [its] obligations under [international law] to the extent strictly required by the exigencies of the situation.”⁵⁵⁷ However, the measures taken must not be “inconsistent with [the State’s] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion and social origin.”⁵⁵⁸ Nevertheless, even in situations of a public emergency, the State must not derogate from protecting certain rights (e.g., the right to life and the prohibition against being subjected to torture or to cruel, inhuman or degrading treatment or punishment).⁵⁵⁹

As the discussion in this article has made clear, States must not use law designed to deal with public emergencies to violate human rights. Hence, in all their activities, civil servants, political elites, and other state functionaries must respect and uphold the constitution, the country’s obligations under international law, as well as promote and protect human rights and fundamental freedoms, even in situations of public emergencies.

556. S. AFR. CONST., 1996 at para. 36(1).

557. ICCPR, *supra* note 25, at art. 4(1).

558. *Id.*

559. A full list of rights that States cannot derogate from is given in article 4 of the ICCPR. See ICCPR, *supra* note 25, at art. 4(2).



HARMONIZING JUSTICE: UNRAVELING THE COMPLEXITIES OF THE EUROPEAN ARREST WARRANT IN THE PURSUIT OF CROSS-BORDER SECURITY AND HUMAN RIGHTS PROTECTION

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Abstract: The European Arrest Warrant (EAW) stands as a pivotal instrument within the framework of the European Union (EU), aiming to streamline and expedite cross-border judicial cooperation in criminal matters. This article delves into the intricate web of legal, procedural, and human rights challenges associated with the implementation of the EAW, shedding light on its impact on both the pursuit of cross-border security and the protection of fundamental human rights. At its core, the EAW represents a paradigm shift in transnational law enforcement, fostering a seamless extradition process among EU member states. However, this efficiency has not come without its complexities. The article navigates through the diverse legal systems of member states, exploring the challenges posed by differing legal traditions, procedural safeguards, and evidentiary standards. It examines the delicate balance required to ensure a harmonized approach to justice while respecting the autonomy and diversity of national legal systems. One of the critical aspects addressed is the potential tension between the expeditious nature of the EAW process and the imperative to safeguard individual rights. The article scrutinizes issues such as proportionality, the presumption of innocence, and the right to a fair trial, probing how these fundamental rights are preserved or potentially compromised within the EAW framework. Emphasizing the need for a delicate equilibrium, the article proposes strategies to enhance procedural safeguards and uphold human rights standards, promoting a system that is both efficient and just. The article contributes to the ongoing discourse surrounding the delicate interplay between cross-border security imperatives and the protection of individual rights within the European Union.

Keywords: *European Arrest Warrant, Transnational Law Enforcement, Cross-Border Judicial Cooperation, Human Rights Protection, Procedural Safeguards, EU Criminal Law, Extradition Mechanism.*

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INTRODUCTION

In the contemporary landscape of transnational crime and evolving security challenges, the European Union has embarked on a mission to forge a seamless and effective system of cooperation in criminal matters among its member states. At the heart of this endeavor lies the European Arrest Warrant (EAW), a mechanism designed to streamline extradition procedures across borders, promoting both the swift administration of justice and the safeguarding of fundamental human rights.¹ This scientific article aims to dissect the intricate web of legal, procedural, and human rights dimensions inherent in the implementation of the EAW, shedding light on its complexities and implications for the pursuit of cross-border security and human rights protection within the European Union (the “EU” or “Union”).

The EAW, established through the Framework Decision 2002/584/JHA, represents a paradigm shift in the realm of extradition within the EU. The objective was clear – to create a mechanism that transcends the traditional hurdles associated with cross-border criminal proceedings, fostering a harmonized approach to justice. This ambitious endeavor reflects the Union’s commitment to overcoming jurisdictional barriers, thereby promoting the efficient prosecution of criminal offenders while respecting the core values enshrined in the Charter of Fundamental Rights. The cornerstone of the EAW lies in its principle of mutual recognition, reflecting the confidence placed by member states in each other’s legal systems. However, this confidence is not absolute, and the delicate balance between mutual trust and the protection of individual rights forms the crux of the challenges surrounding the EAW. As we navigate through the intricacies of this legal instrument, it becomes imperative to scrutinize the balance struck between the expeditious surrender of individuals for criminal prosecution and the preservation of their fundamental rights, especially given the potential disparities in legal systems and human rights protections across the Union.

One of the key focal points of this article is the examination of the legal standards embedded within the EAW order. The evolution of case law by the Court of Justice of the European Union (CJEU) in interpreting and refining the contours of the EAW has been instrumental in shaping its implementation. An in-depth analysis of landmark CJEU decisions will serve to illuminate the nuances surrounding issues such as dual criminality, proportionality, and the potential infringement of fundamental rights, providing a comprehensive understanding of the legal landscape within which the EAW operates. Furthermore, this article will delve into the practical challenges faced by member states in executing EAWs, ranging from the potential abuse of the system for political purposes to concerns about the condition of detention in

1. Elies van Sliedregt, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law: Introduction. The European Arrest Warrant: Extradition in Transition*, 3 EUROPEAN CONSTITUTIONAL L. REV. 244, 244-52 (2007).

requesting states. By critically assessing the real-world application of the EAW, we aim to identify areas that require refinement and propose solutions that ensure the continued pursuit of justice without compromising human rights standards.

In conclusion, the EAW stands as a pivotal instrument in the pursuit of cross-border security and human rights protection within the European Union. This article seeks to unravel the multifaceted nature of the EAW, exploring its legal intricacies, the challenges faced in its implementation, and the delicate balance required to harmonize justice across diverse legal landscapes. Through a rigorous examination of legal principles, case law, and practical considerations, this scientific endeavor aspires to contribute to the ongoing discourse surrounding the evolution and efficacy of the European Arrest Warrant in the complex tapestry of European criminal law and human rights protection.

I. ON EXTRADITION IN THE COUNTRIES OF THE EUROPEAN UNION (BEFORE EAW)

Extradition, as one of the most ancient instruments of international legal cooperation in criminal matters, represents the transfer of an alleged perpetrator from one state to another, facilitating the individual's trial or execution of a prison sentence in the latter jurisdiction. Historically, it has been viewed as a crucial component of national sovereignty, often established through bilateral agreements between states.² Warbrick and McGoldrick posit the identification of foundational principles that underpin numerous international extradition treaties, constituting established global standards. These principles encompass the doctrine of double criminality, rooted in the *nulla poena sine lege* principle (no penalty without law), the principle of specialty, and the principle of *ne bis in idem* (preventing double jeopardy), the prohibition of extradition for political crimes, and the principle against the extradition of one's own citizens.³

The *doctrine of double punishment* or *double incrimination* mandates that the criminal act for which an individual's extradition is sought must be recognized as a criminal offense under both the legal framework of the requesting country and that of the state from which extradition is sought. This foundational principle ensures that the alleged conduct is punishable in both jurisdictions, providing a basis for the extradition request. Similarly, the *principle of specialty* entails a specific obligation on the part of the requesting state. It requires that the requesting state, having obtained approval for the extradition of the accused or convicted individual, limits the criminal

2. Boriša Lučić, *Evropski nalog za hapšenje – Nastanak, razvoj i funkcija*, 70 VOJNO DELO 52, 55 (2018); see generally Saša Knežević, *Zabrana dvostruke ugroženosti u evropskom pravu*, 11 EVROPSKO ZAKONODAVSTVO 79, 79 (2005).

3. See Colin Warbrick et al., *Extradition and the European Union*, 46 INT'L. & COMP. L.Q. 948, 948 (1997).

prosecution or punishment exclusively to the offense for which the extradition was granted by the requested state. This principle guards against potential abuse of the extradition process, ensuring that the individual is held accountable only for the specified crime. The principle of *ne bis in idem*, translated as “not again in the same,” embodies the concept of prohibiting double jeopardy. This principle prevents the retrial of an individual for the same criminal offense, grounded in the principles of fairness, legal certainty, and the protection of the defendant’s interests. The establishment of this principle reflects a commitment to safeguarding individuals from enduring repeated legal proceedings for the same alleged misconduct, fostering a legal system that upholds justice and respects the rights of the accused.

The prohibition of double jeopardy, as encapsulated by the *ne bis in idem* principle, finds its roots in considerations of fundamental fairness and legal certainty. By preventing multiple trials for the same offense, this principle ensures that individuals are shielded from undue harassment by the legal system and promotes confidence in the integrity of legal proceedings. It operates in the best interest of the defendant, contributing to a legal framework that values the protection of individual rights. In essence, these extradition principles – double punishment, specialty, and *ne bis in idem* – form the bedrock of international cooperation in criminal matters. Their implementation ensures a fair and just extradition process, safeguarding the rights of the accused while promoting legal certainty and cooperation between sovereign states. These principles are essential components of extradition treaties, contributing to the establishment of a harmonized and principled framework for handling cross-border criminal cases. More on these principles will be discussed later in the text of the article.

Historically, the extradition process involved two phases: a judicial phase, wherein the criminal court evaluated the extradition request, and a political phase, where political authorities rendered a decision on extradition. European integration has significantly influenced extradition matters, notably with the adoption of the European Convention on Extradition in 1957 under the Council of Europe.⁴ Despite initial skepticism among certain countries, this convention is recognized as a foundational step in establishing a multilateral basis for extradition, marking it as the “first regional treaty on extradition.”⁵ The Convention included provisions aligning with contemporary extradition treaties, acknowledging challenges related to double criminality and the non-extradition of one’s citizens. Political crimes, as defined by the requested party, were exempted from extradition, with reservations permitted by contracting parties.⁶

The European Convention on the Suppression of Terrorism in 1977 and the

4. European Convention on Extradition, E.T.S. No. 024, Dec. 13, 1957. Treaty open for signature by the member States and for accession by non-member States.

5. Gjermund Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, The Nordic Arrest Warrant and Beyond*, 79 NORDIC J. INT’L L. 1, 3 (2010).

6. See generally Saša Knežević, *Ekstradicija u evropskom pravu* [*Extradition in European Law*], 8 EVROPSKO ŽAKONODAVSTVO 7, 7 (2004).

Schengen Convention in 1990 further impacted extradition within the EU, enhancing efficiency through the establishment of the Schengen Information System.⁷ Subsequent conventions in 1995 and 1996 aimed to streamline extradition procedures, reducing obstacles and timeframes.⁸ However, these efforts faced criticism for retaining elements of the traditional system. Recognizing the limitations of prior conventions, the Framework Decision on European Arrest Warrant and Surrender Procedures, adopted on June 13, 2002, replaced the traditional extradition system within the European Union. This decision marked a transformative shift, supplanting the earlier conventions and instituting the European Arrest Warrant as the new extradition mechanism.⁹

II. FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT

Before delving into the specific circumstances and events that shaped the creation and development of the Framework Decision on the European Arrest Warrant, it is crucial to underscore a preliminary observation. The EAW Framework Decision is frequently regarded and scrutinized as an instrument designed primarily, at the time of its inception, to supplant the pre-existing extradition system. This former system was perceived as sluggish and ineffective, notably failing to account for the pressing terrorist threat prevalent in the international community during that period. To comprehend the origins and evolution of the EAW adequately, a meticulous examination of all influencing circumstances and events becomes imperative.¹⁰ A seminal event pivotal to the adoption of the Framework Decision on EAW occurred during the European Council (the “Council”) summit held on October 15 and October 16, 1999, in the Finnish city of Tampere. This summit laid the groundwork for the creation of the EAW, as reflected in the summit’s conclusions. The official stance presented during the summit emphasized the need to replace the existing extradition procedures, especially for individuals evading justice subsequent to legal convictions. The Council, in its conclusions, proposed the abolition of the

7. European Convention on the Suppression of Terrorism, ETS No. 90, Jan. 27, 1977; Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders – Schengen Agreement (1985) & Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (1990).

8. Vojislav Đurđić, *Evropski nalog za hapšenje*, 46 ZBORNIK RADOVA PRAVNOG FAKULTETA U NOVOM SADU 21, 22 (2012); Vanda Božić et al., *Evropski nalog za hapšenje kao mehanizam ekstradicije u međunarodnoj krivičnopravnoj saradnji*, 57 ZBORNIK RADOVA PRAVNOG FAKULTETA U NIŠU 15, 17-18 (2018).

9. See Michael Plachta, *European Arrest Warrant: Revolution in Extradition?*, 11 EUR. J. OF CRIM. CRIM. L. & CRIM. JUST. 178, 178-79 (2003); see also ALEKSANDRA ČAVOŠKI & MARIO RELJANOVIĆ, *IDEJA O STVARANJU KRIVIČNOG PRAVA EU 75* (Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije 2011).

10. See Lučić, *supra* note 2, at 58.

formal extradition process for such individuals. Simultaneously, for other cases, the Council advocated an expedited procedure, prompting the European Commission to be tasked with proposing relevant measures. This directive aimed to streamline extradition procedures and enhance judicial cooperation.¹¹

The Council in Tampere specifically endorsed “the principle of mutual recognition” of court decisions and designated it as a cornerstone for future collaboration in civil and criminal matters.¹² The principle of mutual recognition advocates treating foreign court decisions with as little scrutiny and as expeditiously as possible, akin to decisions made by domestic judicial authorities. This approach was intended to facilitate efficient cooperation and streamline the recognition and execution of foreign court decisions, aligning them with domestic judgments within a brief timeframe. In essence, the Tampere summit laid the conceptual foundation for the Framework Decision on EAW and emphasized the imperative to replace antiquated extradition mechanisms with a more responsive and cooperative approach grounded in mutual recognition. This marked a significant shift in the paradigm of judicial cooperation and set the stage for the comprehensive evolution of the EAW as a pivotal instrument within the EU’s legal framework.¹³

The program outlining measures for the implementation of the principle of mutual recognition of decisions in criminal matters was formally adopted on November 30, 2000.¹⁴ Initially, the program’s objectives were somewhat unclear. Fichera noted that one of the measures mandated the adoption of an arrest warrant, with this measure being given “priority rating 2 “and restricted to the most significant criminal offenses specified in Article 29 of the Treaty on European Union.¹⁵ However, at that juncture, not all necessary conditions for the subsequent adoption of the Framework Decision on the EAW had been established. Disagreements among member states persisted on critical issues, such as the abolition of the principle of double criminality and the role of executive authorities in the extradition procedure, which led to a lack of preparedness to implement the program.¹⁶

According to various authors, the pivotal event that significantly influenced the adoption of the Framework Decision on EAW was the terrorist attack on the United States on September 11, 2001. Plachta refers to this event as a “necessary

11. Božić et al., *supra* note 8, at 18.

12. Presidency Conclusions, Tampere European Council, 15-16 Oct. 1999, Eur. Council, SN 200/99.

13. Đurđić, *supra* note 8, at 24; *see generally* Dragana S. Čvorović & Hrvoje J. Filipović, *Implementation of the European Arrest Warrant*, 66 STRANI PRAVNI ŽIVOT 97, 97 (2022).

14. Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, 2001 O.J. (C 12) 10 (Jan. 15).

15. Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 EUR. L.J. 70, 71 (2009).

16. Davor Krapac, *Okvirna odluka Vijeća [Europske Unije] od 13. VI. 2002. o Europskom uhidbenom nalogu (EUN) i postupcima predaje između država članica (2002/584/PUP)*, 64 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 955, 955-58 (2014).

political momentum,¹⁷ while Panainte asserts that the events in the USA accelerated the decision-making process.¹⁸ Fichera observed that the political landscape shifted after the Twin Towers attack, making the adoption of the Framework Decision on EAW a priority.¹⁹ Jimeno-Bulns underscores that the popularity of the Framework Decision surged after the distressing attacks on September 11, 2001, as it was perceived as an effective mechanism in the fight against terrorism.²⁰

At the EU level, an unparalleled level of unity and responsiveness emerged after September 11, 2001, showcasing a collective readiness for joint opposition to terrorism. Within a few days, packages of anti-terrorist measures were swiftly adopted, underpinned by principles of coordination and a multidisciplinary approach.²¹ Just one week after the terrorist attack, the European Commission presented the Framework Decision on EAW. During an extraordinary session of the Council in Brussels from September 20 to September 21, 2001, the proposal for the framework decision was integrated into the European Action Plan for combating terrorism. Formally submitted on September 25, 2001, to the Council, political negotiations on the pre-log extended over the following three months. The negotiations involved the Council, the European Parliament, and the European Commission, focusing on amendments and additions to the proposed Framework Decision on EAW.²² Fennelly highlights that a concrete agreement was not reached until the session of the Council convened in 2001 in Laeken.²³ Marin, in her works, delineates the sequence of events leading up to the pivotal meeting in Laeken. According to the author, the initial attempt to reach an agreement on the Framework Decision on the EAW took place during a meeting held from December 6 to December 7.²⁴ However, the Italian Minister of Justice exercised a veto, objecting to the list of thirty-two criminal acts.²⁵ Subsequent political negotiations unfolded on December 11 in Rome, involving the Prime Minister of Belgium and the Prime Minister of Italy, Mr. Berlusconi. During these negotiations, an agreement was reached to lift the veto.²⁶ The final

17. Plachta, *supra* note 9, at 179.

18. Rodica Panainte, *Considerations on The European Arrest Warrant*, 2 J. OF PUB. ADMIN. FIN. & L. (SPECIAL ISSUE) 157, 159 (2015).

19. Fichera, *supra* note 15, at 72.

20. Mar Jimeno-Bulnes, *The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK*, 15 EUR. J. OF CRIME, CRIM. L. AND CRIM. JUST. 263, 264 (2007).

21. Panainte, *supra* note 18, at 159.

22. Lučić, *supra* note 2, at 60.

23. Nial Fennelly, *The European Arrest Warrant: Recent Developments*, 8 ERA FORUM 519, 520 (2007).

24. Luisa Marin, *The European Arrest Warrant in the Italian Republic*, 4 EUR. CONST. L. REV. 251, 252 (2008).

25. See Outcome of the Council Meeting, Justice and Home Affairs, 6–7 Dec. 2001, at 3, 14639/01 (Presse 441), (Dec. 7, 2001) (Council of the EU). See also Valsamis Mitsilegas, *The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice*, 6 NEW J. EUR. CRIM. L. 457, 457-80 (2015).

26. Marin, *supra* note 24, at 253.

consensus materialized at the Council meeting in Laeken, held from December 14 to 15, 2001.²⁷

The Framework Decision on the EAW and surrender procedures, crucial for extradition processes among member states, was ultimately adopted on June 13, 2002, and came into force on January 13, 2003.²⁸ It was officially applied across the EU starting from January 1, 2004, representing a groundbreaking implementation of the principle of mutual recognition.²⁹ Plachta emphasizes that June 13, 2002, stands as a “significant moment in the modern history of extradition,”³⁰ as the adoption of the Framework Decision on EAW replaced the conventional extradition system, which was perceived as slow, political, interstate, and lacking efficacy within the realms of freedom, security, and justice. The traditional system was supplanted by a novel extradition paradigm, characterizing a transformative shift in the basic values, standards, procedures, and language of extradition within the EU.³¹

Following the adoption of the Framework Decision on EAW, the subsequent trajectory of the EAW unfolded through the implementation process at the national level. Member states enacted implementation laws and made amendments to their constitutions in line with the evolving extradition landscape. European reports concerning this process are closely tied to the evaluation conducted by the commission overseeing its implementation.³² The final provisions of the Framework Decision on EAW mandated member states to implement the decision by December 31, 2003, and submit the text of the provisions transferring the obligation to their domestic legislation to the relevant EU body. However, only twelve states adhered to the deadline, with the remaining member states doing so by November 1, 2004, except for Italy, which completed the implementation process in 2005. The initial implementation of the EAW within the EU was not uniform, as member states adopted specific legislation and, in some cases, amended their constitutions to accommodate its execution.

III. THE CONCEPT AND FUNCTION OF THE EUROPEAN ARREST WARRANT

A. The Concept of the European Arrest Warrant

The EAW marks a groundbreaking legal instrument grounded in the foundational principle of mutual recognition of decisions in criminal matters among EU member states. This innovation brings about a transformative shift

27. *Id.*

28. Plachta, *supra* note 9, at 178.

29. Isabelle Pérignon & Constance Daucé, *The European Arrest Warrant: a growing success story*, 8 ERA FORUM 203, 203 (2007).

30. Plachta, *supra* note 9, at 183.

31. Mark Mackarel, *The European Arrest Warrant - the Early Years: Implementing and Using the Warrant*, 15 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 37, 43 (2007).

32. Lučić, *supra* note 2, at 61.

in the established paradigm inherent in the traditional European extradition system, replacing it with a new framework based on the mutual recognition of court decisions and the partial abrogation of double punishment. The procedural overhaul encompasses the judicialization by column, the facilitation of the extradition process, and the expeditious nature of proceedings.³³

In essence, the EAW permits the transfer of one's own citizens to another member state, streamlining and expediting the extradition procedure. Aligned with the principles and objectives of integration within common judicial realms, it introduces a novel form of cooperation founded on mutual trust among member states.³⁴ The EAW represents a judicial decree (judicial decision) originating in one member state with the objective of apprehending a sought-after individual within another member state and subsequently transferring them to the issuing state. The primary aims of this legal instrument encompass facilitating criminal prosecution and the execution of a prison or detention sentence. The distinctive attributes of this innovative legal mechanism, designed to enhance cooperation in criminal justice, are encapsulated within the confines of this precisely articulated term.

Operationally, the EAW represents a court decision originating from the competent judicial authority of the issuing member state. The term "judicial authority" extends beyond conventional definitions to encompass public prosecutions, excluding the police or any other administrative entity. This decision contrasts with the court decision made in the country of issuance, where two distinct judicial decisions are rendered: the initial court decision in a criminal proceeding forming the legal basis for the arrest and the subsequent decision by the competent judicial authority, as dictated by national law, to issue the EAW.³⁵

The primary objective of the court decision authorizing an EAW is to prompt the judicial authorities of another member state (the executing state) to apprehend and surrender the requested person to the state that issued the warrant (the issuing state).³⁶ This amalgamation of arrest and surrender requests in a single instrument distinguishes the EAW from the traditional extradition system, wherein temporary arrest and extradition are discrete stages in the extradition process. Further differentiating the EAW is its ultimate aim, which centers on criminal prosecution or the enforcement of a sentence of imprisonment or detention. The competent court authority in the issuing state holds the discretion to issue an arrest warrant, albeit without any obligation to do so. This discretion, however, does not preclude the issuance of an arrest warrant, and the definition of detention aligns with provisions from the

33. Đurđić, *supra* note 8, at 25.

34. See Council Framework Decision 2002/584, 2002 O.J. (L 190) 1 (EU), on the EAW and the surrender procedures between member states. For statements made by certain member states on the adoption.

35. See *id.* at 5.

36. See *id.* art. 1, at 2

European Convention on Extradition of 1957. Moreover, the EAW can be issued not only for the purpose of criminal prosecution but also for the execution of a legally binding judgment in a pre-trial phase.³⁷ The initiation of the procedure in the issuing state necessitates the fulfillment of all legal prerequisites for restricting personal freedom and determining detention. In this context, the EAW fundamentally embodies four obligations for the member state to which it is directed: search, arrest, detention, and surrender of the requested person.³⁸

B. The Function and Scope of Application of the European Arrest Warrant

Within the Framework Decision, the parameters delineating the applicability of the EAW are meticulously aligned with the principle of mutual recognition of court decisions among member states. The scope of this instrument in criminal justice collaboration is demarcated by the gravity of the offense, as normatively manifested in the prescribed or adjudicated sentence's level, establishing a threshold below which the EAW does not operate. In contrast to the traditional European extradition system, the field of the EAW's applicability has been expanded through the partial elimination of the principles of double criminality and specialty. This expansion has also played a role in lifting the prohibition on issuing warrants for nationals of the issuing state.

The determination of the lower limit for applying the EAW is contingent upon the severity of the criminal offense or the imposed sentence. This lower limit is established through the application of a general clause, specifying the lesser of either the legal maximum of the potential sentence or the minimum duration of the imposed prison sentence. An EAW may be issued for offenses wherein the law of the issuing country stipulates a maximum penalty of at least twelve months of imprisonment, or if a prison sentence of at least four months has been imposed, or if, subsequent to sentencing, detention has been ordered. It is crucial to note that the criteria of the minimum maximum threatened and minimum imposed prison sentences are not cumulative but rather alternative prerequisites for the obligation of an EAW.³⁹

Within this specified framework, additional limitations for utilizing the EAW are intricately linked to double criminality – a principle deeply ingrained in the classical extradition system that prevails among European countries.⁴⁰ The principle of double jeopardy, a cornerstone of the traditional extradition paradigm, has been set aside for offenses specifically delineated in the Framework Decision.⁴¹ These offenses are characterized by the prospect of

37. *See id.* art. 1, at 2.

38. *See* Đurđić, *supra* note 8, at 26-27; Božić et al., *supra* note 8, at 20.

39. *See* Council Framework Decision 2002/584, *supra* note 34, art. 2, sec. 1, at 2; *see* Miodrag N. Simović, Milan Blagojević & Vladimir Simović, *Međunarodno krivično pravo* [INTERNATIONAL CRIMINAL LAW] 543 (3rd ed. 2023).

40. Massimo Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* 93 (1st edition, 2011).

41. Bas van Bockel, *Ne Bis in Idem in EU Law* 65-89 (Cambridge Univ. Press 2016).

imprisonment for a minimum duration of at least three years or the issuance of a detention order. In essence, the eradication of the principle of double criminality, as applied to offenses enumerated in the Framework Decision, hinges on two key elements: the severity of the penalty and the legal characterization of the crime.⁴² For the mutual criminality to remain unconfirmed in the country executing the warrant, the international law of the country issuing the warrant – the member state initiating the EAW – serves as the criterion.⁴³ Under these explicitly defined conditions, the surrender of individuals based on EAWs, without the need for double criminality verification, becomes obligatory, according to Article 2, Section 2 of the Framework Decision, for the following crimes: (1) participation in a criminal organization; (2) terrorism; (3) trafficking in human beings; (4) sexual exploitation of children and child pornography; (5) illicit trafficking in narcotic drugs and psychotropic substances; (6) illicit trafficking in weapons, munitions and explosives; (7) corruption; (8) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; (9) laundering of the proceeds of crime; (10) counterfeiting currency, including of the euro; (11) computer-related crime; (12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; (13) facilitation of unauthorized entry and residence; (14) murder, grievous bodily injury; (15) illicit trade in human organs and tissue; (16) kidnapping, illegal restraint and hostage-taking; (17) racism and xenophobia; (18) organized or armed robbery; (19) illicit trafficking in cultural goods, including antiques and works of art; (20) swindling; (21) racketeering and extortion; (22) counterfeiting and piracy of products; (23) forgery of administrative documents and trafficking therein; (24) forgery of means of payment; (25) illicit trafficking in hormonal substances and other growth promoters; (26) illicit trafficking in nuclear or radioactive materials; (27) trafficking in stolen vehicles; (28) rape; (29) arson; (30) crimes within the jurisdiction of the International Criminal Court (ICC); (31) unlawful seizure of aircraft/ships; and (32) sabotage.⁴⁴

For any criminal offense falling within the specified nomenclature outlined in the Framework Decision, wherein the country issuing the arrest warrant prescribes a maximum penalty of at least three years of imprisonment, the executing state is obligated to surrender the requested individual. This obligation persists irrespective of whether the act does not qualify as a criminal

42. See Marta Ramat, *The Court of Justice and the Assessment of Double Criminality Under the European Arrest Warrant Framework Decision*: KL, 7 EUROPEAN PAPERS 993 (2022), <https://www.europeanpapers.eu/europeanforum/court-of-justice-assessment-of-double-criminality> [<https://perma.cc/6SS9-E6M4>].

43. *Id.*

44. See Council Framework Decision 2002/584, *supra* note 34, art. 2, sec. 2, at 3.

offense under the legislation of the executing state.⁴⁵ Furthermore, even if the act is punishable in the executing state, the surrender is mandatory, without consideration for the severity of the threatened penalties.⁴⁶ Article 2, Section 3 of the Framework Decision grants the Council of the European Union the power to expand the list of offenses through a unanimous decision, following consultation with the European Parliament. In practice, this discretionary power has evolved into a de facto obligation. Pursuant to Article 34, Section 3 of the Framework Decision, upon receipt of the Commission's report on the implementation of the European Arrest Warrant, the Council is required to evaluate whether there is a need to revise or expand the enumerated categories of criminal offenses.⁴⁷

C. Content of the European Arrest Warrant

The EAW is designed to provide essential data and information in a standardized format, allowing judicial authorities in the place of arrest to execute the order without the need for additional documentation, except in exceptional cases. The standardized mandatory elements and form of the EAW aim to streamline and expedite the processing of orders in the country of execution, as evidenced by the practical application of the EAW in its initial five years.⁴⁸ For EU member states, the average time from arrest to the decision on surrender, in cases where the requested person does not agree to surrender, demonstrated the following trends: 2005 – 47.2 days, 2006 – 51 days, 2007 – 42.8 days, 2008 – 51.7 days, 2009 – 48.6 days, 2010-2013 – data not readily available, 2014 – 64.98 days, 2015 – 59.02 days, 2016 – 51.72 days, 2017 – 41.86 days, 2018 – 45.0 days, 2019 – 55.75 days, 2020 – 72.45 days, 2021 – 53.72 days, 2022 – 57.29 days, and 2023-2024 – data not yet published.⁴⁹

45. Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 2007 E.C.R. I-03633. See *Ramat*, *supra* note 42.

46. It is crucial to note that the list of crimes exempted from the principle of double criminality is not exhaustive.

47. See *id.* art. 34, sec. 3, at 12. See Čvorović & Filipović, *supra* note 13, at 99-100.

48. Article 8(1) of the Council Framework Decision 2002/584 outlines the mandatory information that must be included in an EAW.

49. *Report from the Commission Based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2006) 8 final (Jan. 24, 2006); *Report from the Commission to the European Parliament and the Council on the Implementation Since 2005 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2007) 407 final (July 11, 2007); *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM (2011) 175 final (Apr. 11 2011); *Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2020) 270 final (July 2, 2020); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on*

Year	Average Days (Non-Consent Cases)
2005	47.2
2006	51.0
2007	42.8
2008	51.7
2009	48.6
2010-2013	Data not readily available
2014	64.98
2015	59.02
2016	51.72
2017	41.86
2018	45.0
2019	55.75
2020	72.45
2021	53.72
2022	57.29
2023-2024	Data not yet published

Key Observations:

- i. 2005–2009: The average duration fluctuated between approximately 43 and 52 days, reflecting early efforts to streamline the EAW process.
- ii. 2018–2019: A noticeable increase occurred, with the average rising

the Practical Operation of the European Arrest Warrant – Year 2014, SWD (2017) 320 final (Oct. 17, 2017); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2015*, SWD (2017) 319 final (Oct. 17, 2017); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2016*, SWD (2019) 320 final (May 22, 2019); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2017*, SWD (2019) 320 final (Aug. 28, 2019); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2018*, SWD (2020) 320 final (July 2, 2020); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2019*, SWD (2021) 320 final (Aug. 4, 2021); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2020*, SWD (2022) 320 final (Dec. 8, 2022); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2021*, SWD (2023) 320 final (July 20, 2023); *Report Commission Staff Working Document, Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2022*, SWD (2024) 320 final (May 29, 2024).

- from 45.0 days in 2018 to 55.75 days in 2019.
- iii. 2020: The average peaked at 72.45 days, likely influenced by the COVID-19 pandemic's impact on judicial proceedings.
 - iv. 2021–2022: A downward trend resumed, with averages decreasing to 53.72 days in 2021 and slightly increasing to 57.29 days in 2022, indicating a gradual return to pre-pandemic efficiency levels.

When the wanted person agrees to surrender, the average time until the surrender decision is much shorter: 2005 – 14.7 days, 2006 – 14.2 days, 2007 – 17.1 days, 2008 – 16.5 days, 2009 – 16 days, 2010–2013 – data not readily available, 2014 – 21.81 days, 2015 – 20.13 days, 2016 – 16.81 days, 2017 – 15.45 days, 2018 – 16.4 days, 2019 – 16.7 days, 2020 – 21.25 days, 2021 – 20.14 days, 2022 – 20.48 days, and 2023–2024 – data not yet published.⁵⁰

Year	Average Time (in days)
2005	14.7
2006	14.2
2007	17.1
2008	16.5
2009	16.0
2010-2013	Data not readily available
2014	21.81
2015	20.13
2016	16.81
2017	15.45
2018	16.4
2019	16.7
2020	21.25
2021	20.14
2022	20.48
2023-2024	Data not yet published

50. Đurđić, *supra* note 8, at 34–35. See *Commission Report Based on Article 34*, *supra* note 49; *Commission Report to the Parliament and the Council*, *supra* note 49; *Commission Report based on Article 34*, *supra* note 49; *Commission Report to the Parliament and the Council*, *supra* note 49; *Report Commission Staff Working Document – 2014*, *supra* note 49; *Report Commission Staff Working Document – 2015*, *supra* note 49; *Report Commission Staff Working Document – 2016*, *supra* note 49; *Report Commission Staff Working Document – 2017*, *supra* note 49; *Report Commission Staff Working Document – 2018*, *supra* note 49; *Report Commission Staff Working Document – 2019*, *supra* note 49; *Report Commission Staff Working Document – 2020*, *supra* note 49; *Report Commission Staff Working Document – Year 2021*, *supra* note 49; *Report Commission Staff Working Document – Year 2022*, *supra* note 49.

Key Observations:

- i. 2005–2009: The average duration remained relatively stable, ranging between 14.2 and 17.1 days.
- ii. 2018–2019: Slight increases were observed, with averages of 16.4 days in 2018 and 16.7 days in 2019.
- iii. 2020: A noticeable increase to 21.25 days occurred, likely influenced by the COVID-19 pandemic's impact on judicial proceedings.
- iv. 2021–2022: A downward trend resumed, with averages decreasing to 20.14 days in 2021 and slightly increasing to 20.48 days in 2022, indicating a gradual return to pre-pandemic efficiency levels.

The content of the EAW is specified in Article 8 of the Framework Decision, and its form and mandatory elements are defined in accordance with the Annex attached to this decision.⁵¹ The EAW must include the following information:

- i. identity and citizenship of the requested person;
- ii. name, address, telephone and fax number, and email address of the judicial authority issuing the order;
- iii. evidence of an enforceable judgment, warrant of arrest, or any other executive court decision falling under the scope of Articles 1 and 2 of the Framework Decision;
- iv. the nature and legal qualification of the criminal act, particularly in relation to Article 2 of the Framework Decision;
- v. description of the circumstances in which the criminal offense was committed, including time, place, and degree of participation of the requested person;
- vi. the imposed sentence, if a final judgment exists, or the prescribed penalties according to the law of the country issuing the order; and
- vii. if possible, other consequences of the criminal act.⁵²

The EAW must be written or translated into the official language or one of the official languages of the country of execution or any other language accepted by that country.⁵³ Member states have the option to declare acceptance of a translation into one or more official languages of the EU.⁵⁴

To achieve the standardization goals of the European Arrest Warrant, the procedure for handing over the requested person is detailed in Chapter 2 of the Framework Decision.⁵⁵ The procedure encompasses several stages, including sending the EAW to the executing state, arresting the requested person, communicating their rights, deciding on detention, obtaining the requested person's consent for surrender or conducting a hearing, deciding on the

51. See Council Framework Decision 2002/584, art. 8, 2002 O.J. (L 190) 1 (EU).

52. *Id.*

53. Council Framework Decision 2002/584, *supra* note 34, art. 8, sec. 2.

54. *Id.*

55. *Id.* at ch. 2.

surrender, and notifying the state that issued the EAW.⁵⁶ These stages collectively ensure the effectiveness of the European Arrest Warrant while safeguarding the basic rights of the requested person.

IV. IMPLEMENTATION PROCEDURE OF THE EUROPEAN ARREST WARRANT

The procedural framework governing the application and execution of the EAW encompasses several sequential stages, commencing with the issuance of the warrant, followed by its transmission to the relevant member state(s), as determined by the decision of the requested member state. Ultimately, the process culminates in the execution of the extradition procedure. The initiation of the act issuance process is of paramount significance, remarkably influencing the overall outcome of the entire procedure. This stage presupposes the satisfaction of both material and procedural prerequisites requisite for the commencement and application of the warrant.

The *substantive legal prerequisites* for the issuance of the EAW are predicated upon the authority entrusted with this responsibility.⁵⁷ Typically vested in the judiciary, the competent authority for EAW issuance is designated by each signatory state, with notification to the General Secretariat of the EU.⁵⁸ Variations may exist based on constitutional determinations, structural configurations, and organizational frameworks of each nation, potentially extending competence to other organs and entities.⁵⁹ Geographically, an EAW, once issued, holds validity across the territories of all EU member states.⁶⁰

The instances prompting the issuance of an EAW encompass the following: (a) investigation into a committed criminal offense, (b) enforcement of an imposed sentence, and (c) implementation of a detention decision. In instances of an ongoing investigation, wherein the individual remains unconvinced, the pre-criminal proceedings ascertain the suspect's status (perpetrator, co-perpetrator, accomplice, instigator, or organizer). In cases of sentence execution, legal proceedings culminate with a conviction, and the sought individual is wanted due to their unavailability to state authorities, often being in fugitive status. Concerning the execution of a detention decision, a pre-criminal process results in a custody determination, yet the person remains elusive, typically evading authorities within the territory of another state. With regard to the gravity and legal classification of criminal offenses, EAWs are issued under specific circumstances: (a) for a prison sentence of four months or a detention decision of the same duration, (b) for an offense carrying a maximum one-year prison sentence, and (c) when the offense is inculcated in both the

56. *Id.*

57. *See* Council Framework Decision 2002/584, 2002 O.J. (L 190) 1 (EU).

58. *See id.* at art. 6, sec. 1.

59. *See id.* ("The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.").

60. *See id.* at art. 1, sec. 2.

issuing and requested countries. Fulfillment of the conditions for EAW issuance is envisaged as a cumulative prerequisite, absent any legal impediments.⁶¹

Professional and logistical assistance to member states in the implementation of the EAW can be provided by the European Justice Network (EJN). The network enables members to use the capacities of the telecommunications systems of EJN, Interpol and the Schengen Information System in the implementation of the EAW and in the optimal time frame.⁶²

Procedural prerequisites for the issuance of the EAW pertain to the comprehensive process involving the issuance, implementation, and oversight of acts. The procedural protocol for EAW issuance dictates that the warrant is issued by the competent judicial authority of the requesting state. Transmitted through official channels, the order is dispatched to the state where it is presumed that the sought individual, or other implicated parties, are situated, typically at the behest of the requesting state, as facilitated by international organizations such as the Schengen Information System or Interpol.⁶³

Upon receipt, the requested state is obligated to expeditiously apprehend the individual if located within its jurisdiction and determine the so-called extradition detention. Within this context, the process involves verifying the identity of the detained person, adhering to legal safeguards encompassing the right to defense, notification of family and the competent authorities, provision of medical assistance, and the use of the mother tongue, in addition to the official languages of the involved states. The security authorities of the requested country operate under the authority of a court order from another jurisdiction, treating it akin to a domestic court decision or a decision of a competent body. Subsequently, a preliminary hearing ensues where the detainee is apprised of their rights and obligations in the procedure, and they declare the content of the EAW.

In cases where there is an insufficient basis for decision-making, a supplementary submission is made to the issuing country, addressing any formal deficiencies. The main hearing before the competent judge is conducted within a reasonable timeframe, with the objective of scrutinizing the EAW for execution, confirming the validity of requested supplements, and examining the existence of legal impediments to execution.⁶⁴

The requested state reserves the right to refuse EAW execution in the presence of *absolute obstacles*, such as amnesty (the country where the person

61. See Božić et al., *supra* note 8, at 20-21; Đurđić, *supra* note 8, at 28-29; Simović et al., *supra* note 39, at 543-44. See also Council Framework Decision 2002/584, *supra* note 34, arts. 1, sec. 1, 2 secs. 1-4.

62. SAŠA ĐORĐEVIĆ, EVROPSKI NALOG ZA HAPŠENJE: DESET PITANJA, DESET ODGOVORA 6-8 (Beogradski centar za bezbednosnu politiku 2011).

63. SAŠA GAJIN, PRAVO I POLITIKA EVROPSKE UNIJE IZ PERSPEKTIVE DOMAĆIH AUTORA 30 (Centar za unapređivanje pravnih studija 2009).

64. See Božić et al., *supra* note 8, at 22-23. See also Council Framework Decision 2002/584, arts. 5, 10-15, 2002 O.J. (L 190) 1, 2-3 (EU); VALSAMIS MITSILEGAS, EU CRIMINAL LAW 121-58 (Hart Publ'g 2009).

was arrested could have prosecuted that person, but that crime is covered by amnesty in that country), the principle of *ne bis in idem*, and the age of a potential defendant (minors or the person has not reached the age of criminal responsibility in the country of arrest).⁶⁵ *Relative obstacles* serve as optional grounds for non-execution and include factors such as the absence of double criminality, ongoing criminal proceedings in the executing country for the same criminal offense, a final judgment (*ne bis in idem* modality), legal proscription of criminal prosecution or punishment, and a definitive conviction for a criminal offense.⁶⁶ Ultimately, the authorized judge renders a decision, against which an appeal is admissible.⁶⁷

The examination of the *ne bis in idem* principle as an absolute obstacle represents a particularly intriguing, intricate, and contentious inquiry, demanding specialized elucidation. Rooted in Roman law, the *ne bis in idem* principle stands as one of the fundamental tenets contributing to legal certainty and fairness in criminal law matters. It posits that an individual cannot be subjected to multiple prosecutions or sentences for the same criminal offense. Article 3 of the Framework Decision on the EAW expressly incorporates *ne bis in idem* as a mandatory ground for rejecting the extradition request from other member states. Alternatively, according to Article 3, Section 2 of the Framework Decision, a national court is obliged to decline an extradition request if it is aware that the person in question has been finally sentenced in a member state for the same criminal offense, provided that, in case of sentencing, the sentence has been served or is currently being served, or can no longer be executed according to the law of the country whose court imposed the criminal sanction.⁶⁸ In addition to the stipulation in the aforementioned article of the Framework Decision, *ne bis in idem* serves as a basis for rejecting an extradition request and can also be identified in Article 4, Section 2, and Section 3 of the Framework Decision. However, in these instances, it assumes a non-binding, discretion-based role at the discretion of the acting national court. Article 4, Section 2 of the Framework Decision grants the court the discretion to refrain from acting on the extradition request if the person in question is already subject to criminal proceedings for the same offense.⁶⁹ This discretionary element underscores the nuanced application of the *ne bis in idem* principle, allowing for flexibility in its consideration by the national court.

The CJEU has articulated and refined the *ne bis in idem* principle, initially establishing it as a general right within the framework of Union rights and subsequently contextualizing it within specific regulations. The Court's historical jurisprudence demonstrates that the *ne bis in idem* principle, as

65. See COUNCIL FRAMEWORK DECISION 2002/584, art. 3, 2002 O.J. (L 190) (EU).

66. See *id.* at art. 4.

67. Božić et al., *supra* note 8, at 23.

68. ANDRÉ KLIP, EUROPEAN CRIMINAL LAW 457-68 (3d ed. 2016); FICHERA, IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT, *supra* note 40, at 182-90. See Council Framework Decision 2002/584, art. 3, sec. 2, 2002 O.J. (L 190) 1, 1 (EU).

69. See Council Framework Decision 2002/584, *supra* note 34, at art. 3, sec. 2.

articulated in Article 50 of the Charter of the EU on Fundamental Rights, Article 54 of the Convention on the Implementation of the Schengen Agreement, and the Framework Decision of the Council dated June 13, 2002, concerning the EAW and surrender procedures between member states, is to be construed as an autonomous concept within the realm of European Union law.⁷⁰ Even though the Court has rendered decisions on the application of the *ne bis in idem* principle in various contexts, its judicial practice underscores that the interpretation of this principle is contingent upon the specific legal framework in which it is applied, including both the Schengen Agreement and the Framework Decision. The Court's jurisprudential approach to the *ne bis in idem* principle can be categorized into two main strands: first, that which pertains to the temporal application of the principle (*rationae temporis*); and second, that which relates to the substantive scope of the principle.⁷¹

The latter category can be further subdivided into considerations regarding the existence of a person's identity,⁷² the presence of a final decision (*bis*),⁷³ the continuation of proceedings based on the same facts (*idem*),⁷⁴ the execution of a decision,⁷⁵ and the nature of the preceding procedure,⁷⁶ particularly whether it was of a criminal nature. The Court's nuanced examination of the *ne bis in idem* principle in these various dimensions reflects its commitment to providing comprehensive and context-specific interpretations within the framework of EU law.

As already said, the *ne bis in idem* rule, serving as a mandatory ground for non-execution of a EAW, is enshrined in Article 3, Section 2 of the Framework

70. Igor Materljan & Gordana Materljan, *Europski uhiđbeni nalog za napredne korisnike: Odluka o neizvršenju naloga zbog obustave istrage in rem (načelo ne bis in idem) i ispitivanje njezine zakonitosti*, 26 HRVATSKI LJETOPIS ZA KAZNENE ZNANOSTI I PRAKSU 59, 77 (2021); See generally John A. E. Vervaele, *Europsko kazneno pravo i opća načela prava Unije*, 12 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU 855, 874-875 (2005).

71. See MILJANA BUHA, *NE BIS IN IDEM U KAZNENIM POSTUPCIMA* 177-97 (Fac. of L., University of Banja Luka 2021).

72. See Case C-217/15 & C-350/15, *Criminal Proceedings Against Orsi & Baldetti*, ECLI:EU:C:2017:264 (Apr. 5, 2017).

73. See Joined Cases C-187/01 & C-385/01, *Criminal Proceedings Against Gözütok & Brügge*, ECLI:EU:C:2003:87 (Feb. 11, 2003); Case C-469/03, *Criminal Proceedings Against Miraglia*, ECLI:EU:C:2005:156 (Mar. 10, 2005); Case C-150/05, *Van Straaten v. Staat der Nederlanden & Republiek Italië*, ECLI:EU:C:2006:614 (Sept. 28, 2006); Case C-467/04, *Criminal Proceedings Against Gasparini et al.*, ECLI:EU:C:2006:610 (Sept. 28, 2006); Case C-491/07, *Criminal Proceedings Against Turanský*, ECLI:EU:C:2008:768 (Dec. 22, 2008); Case C-486/14, *Criminal Proceedings Against Kossowski*, ECLI:EU:C:2016:483 (Jun. 29, 2016).

74. See Judgment, Case C-288/05, *Criminal proceedings against Jürgen Kretzinger*, ECLI:EU:C:2007:441 (Jul. 18, 2007); Judgment, Case C-367/05, *Criminal proceedings against Norma Kraaijenbrink*, ECLI:EU:C:2007:444 (Jul. 18, 2007).

75. See Case C-288/05, *Criminal proceedings against Jürgen Kretzinger*, ECLI:EU:C:2006:759 (Dec. 5, 2006); Judgment, Case C-288/05, *Criminal proceedings against Jürgen Kretzinger*, ECLI:EU:C:2007:441 (Jul. 18, 2007).

76. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105 (Feb. 26, 2013).

Decision.⁷⁷ In accordance with this provision, the judicial enforcement authority is obligated to refuse the execution of an EAW if it becomes aware that such a warrant has been issued concerning the requested person based on a final judgment in a Member State for the same facts.⁷⁸ This refusal is contingent on the condition that, in the case of a sentence, it has been served, is currently being served, or can no longer be enforced according to the laws of the member state where it was pronounced.⁷⁹ The initial prerequisite of the *ne bis in idem* principle necessitates the existence of *final verdicts* concerning the requested person. The term “judgment” should be interpreted broadly, encompassing not only convictions or acquittals following criminal proceedings, but also decisions made by entities involved in the implementation of criminal proceedings, even if such decisions do not take the form of a traditional judgment.⁸⁰ This can include out-of-court settlements between the accused and the state attorney or decisions to suspend proceedings due to a lack of evidence.⁸¹

The CJEU, in alignment with its jurisprudence, extends the application of this provision to acts by bodies participating in criminal proceedings, even if those bodies do not render judgments.⁸² Examples include decisions acquitting the accused due to insufficient evidence or rejecting accusations because they have become obsolete. Conversely, the Court has rejected arguments regarding the existence of a “final judgment” in cases where the court decided to suspend proceedings without establishing the illegality of acts against the accused; when the police, after determining the performance for the old and evaluating the evidence, decided to postpone criminal prosecution; or when the state attorney decided to suspend the criminal prosecution without conducting a valid

77. Council Framework Decision 2002/584/JHA, art. 3, sec. 2, 2002 O.J. (L 190) 1. *See also* Case C-261/09, Gaetano Mantello, ECLI:EU:C:2010:683, 2010 E.C.R. I-11477.

78. Case C-665/20 PPU, X (Mandat d'arrêt européen – *Ne bis in idem*), ECLI:EU:C:2021:339 (Apr. 29, 2021).

79. Materljan & Materljan, *supra* note 70, at 78.

80. In the case *Gözütok and Brügger* (C-187/01 and C-385/01), the CJEU ruled that the *ne bis in idem* principle applies not only to judgments rendered by courts but also to decisions made by public prosecutors that definitively terminate criminal proceedings. Specifically, the Court held that a prosecutorial decision to discontinue proceedings, without judicial involvement, can constitute a “final judgment” for the purposes of the *ne bis in idem* principle. Further, in *Kossowski* (C-486/14), the CJEU emphasized that the term “judgment” should be understood in a broad sense to encompass any decision that definitively closes criminal proceedings, even if it is not adopted by a court in the form of a traditional judgment. This includes decisions that terminate proceedings without a detailed investigation, provided they result in a definitive conclusion of the case. This broad interpretation aligns with Article 3(2) of Framework Decision 2002/584/JHA, which mandates that the executing judicial authority must refuse to execute an EAW if the requested person has been finally judged by a Member State in respect of the same acts. The CJEU’s case law ensures that the principle of *ne bis in idem* is upheld, even when decisions are made by entities other than traditional courts, thereby reinforcing the protection of individuals’ rights within the EU legal framework.

81. *See Gözütok*, C-187/01; *Brügge*, C-385/01; *Gasparini*, C-467/04.

82. *See* C-508/18 & C-82/19 PPU, OG & PI, ECLI:EU:C:2019:456; *see also* Joined Cases C-203/15 & C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Sec’y of State for the Home Dep’t*, ECLI:EU:C:2016:970.

investigation.⁸³ In such instances, the court has maintained a strict interpretation of the *ne bis in idem* principle, requiring a more formalized and conclusive resolution in order to constitute a “final judgment.”⁸⁴

Consequently, the application of Article 3, Section 2 of the Framework Decision presupposes the existence of a criminal procedure in a broader sense, encompassing investigations that precede the decision concluding such proceedings. From the jurisprudence of the CJEU, it is evident that the decisive factor is not the identity of the body making the decision but rather the quality of the procedure leading to that decision.

Another prerequisite is the identity of the person involved, meaning that the prior proceedings were conducted against the requested person.⁸⁵ A notable case in this context is the judgment in *Gasparini* case, rendered within the framework of implementing Article 54 of the Convention on the Implementation of the Schengen Agreement.⁸⁶ In this case, the defendant faced accusations of importing olive oil from Tunisia and Turkey to Portugal and selling it in Spain using forged documents to create the false impression that the goods originated from Switzerland.⁸⁷ Criminal proceedings in Portugal against the individual concluded due to the statute of limitations, and simultaneously, proceedings were initiated in Spain against the same person. The question arose as to whether, based on the principle of *ne bis in idem*, it is permissible to invite the person against whom an acquittal has not been passed. The CJEU, in the *Gasparini* judgment, clarified that this principle encompasses not only final judgments but also decisions determining the onset of the statute of limitations.⁸⁸ Although the issue of limitation is not harmonized at the Union level, the Court maintained that the application of Union law is not contingent on the harmonization of criminal law regulations.⁸⁹ It emphasized that the principle of mutual trust necessitates member states to recognize each other’s criminal justice systems, irrespective of potential divergences in criminal proceedings that might yield different outcomes.⁹⁰ The critical factor, as emphasized by the Court, is the existence of the person’s identity, permitting the invocation of the *ne bis in idem* principle only by the person against whom the criminal procedure in the member state has been legally concluded.⁹¹

The CJEU provided clarification on the issue of the identity of a person in

83. See *Miraglia*, C-469/03.

84. See *Turansky*, C-491/07; *Kossowski*, C-486/14; *Miraglia*, Case C-469/03. See also BUHA, *supra* note 71, at 180-81.

85. See Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2006:165, ¶ 34 (May 9, 2006).

86. See Case C-467/04, *Gasparini and Others*, ECLI:EU:C:2006:610, ¶¶ 27–30, where the Court discusses how decisions rendered without a substantive examination of the case may not preclude further prosecution in another Member State.

87. *Id.*

88. See Case C-467/04, *Gasparini and Others*, ECLI:EU:C:2006:610, ¶¶ 23-24, 29-30, 35-37.

89. *Id.*

90. *Id.*

91. *Id.*

the judgment of *Orsi and Baldetti*. This case did not pertain to the execution of a European arrest warrant but rather focused on the application of the *ne bis in idem* principle in the context of double punishment. The defendants in this case were owners of companies implicated in criminal offenses related to value-added tax (VAT) evasion. The same tax amounts were subject to discussion in an administrative procedure before tax authorities, resulting in penalties imposed on these companies. The central issue revolved around the question of whether a national regulation allowing for a dual procedure concerning the same facts aligns with Article 50 of the Charter of the European Union on Fundamental Rights. The CJEU affirmed. Making reference to Article 50, which prohibits the retrial of the same person in criminal proceedings or the re-punishment in criminal proceedings of the same person for the same criminal offense, the Court found that, in the specific case, the requirement for the identity of the persons was not satisfied. This was because the procedure conducted before the tax authorities was directed against the trading companies rather than against the individuals themselves.⁹²

In the adjudication marked as *AY*, the CJEU expounded upon the applicability of the *ne bis in idem* principle, specifying that it exclusively pertains to individuals for whom a conclusive determination has been rendered within a member state.⁹³ Consequently, inquiries *in rem*, directed at unidentified offenders, fall outside the purview of the aforementioned provision.⁹⁴ The CJEU expressly asserted that the *ne bis in idem* principle does not extend to decisions arising subsequent to investigations conducted against unknown perpetrators, wherein the subject individual lacked the status of a suspect or defendant, being solely interrogated in the capacity of a witness.⁹⁵ Hence, for the *ne bis in idem* principle to serve as grounds for rejecting the execution of an EAW, the ascertainability of a person's identity becomes imperative. The individual must occupy a distinct role in criminal proceedings, indicative of the fact that legal processes were initiated against them. In the specific case, it is evident that the investigative proceedings conducted in Hungary against an unknown perpetrator, wherein *AY* was merely questioned as a witness, preclude the satisfaction of the constitutive condition regarding the identity of the person for the application of the *ne bis in idem* principle.⁹⁶

Another essential criterion for the *ne bis in idem* principle's application is the finality of the decision referenced by the requested person. In this context, it merits emphasis that the CJEU has established a standard whereby the criteria for finality must be ascertained in accordance with the national law of the member state in which the decision was rendered. The decision should possess

92. See Case C-217/15, *Orsi and Baldetti*, ECLI:EU:C2017:264, ¶¶ 17-18.

93. See Case C-268/17, *CJEU Judgment AY*, ECLI:EU:C:2018:602, ¶¶ 44-46.

94. *Id.*

95. *Id.*

96. See Boris Tučić, *Načelo ne bis in idem u kontekstu evropskog naloga za hapšenje: Pogled kroz jurisprudenciju Suda pravde EU*, 11 *CIVITAS* 149, 152-54 (2021).

a nature that precludes the further criminal prosecution of the requested person within the member state of origin. The CJEU deems a mere formal determination of the procedure's completion inadequate. Instead, when deciding on the non-execution of an EAW, it becomes imperative to assess the quality of the conducted criminal procedure. In the *AY* case, the CJEU reaffirmed its stance that a mere investigation is insufficient, emphasizing the necessity to scrutinize the specific circumstances of each case in which a decision to suspend criminal prosecution is rendered.⁹⁷ In light of its prior jurisprudence, the criteria employed by the court in evaluating the quality of the investigation and the overall procedural conduct in individual cases can be discerned.⁹⁸

In the case of *Miraglia*, the court determined that a decision to suspend proceedings, triggered by the withdrawal of charges by the state attorney of a member state solely because criminal proceedings were initiated against the same defendant for identical facts in another member state, lacks validity.⁹⁹ This deficiency arises from the absence of specified circumstances of the case, as well as the omission of a detailed factual description levied against the defendant, thereby failing to constitute a legitimate decision concerning that individual within the framework of Article 54 of the Convention on the Implementation of the Schengen Agreement.¹⁰⁰ This interpretative stance derives from the court's prioritization of the overarching goal and purpose enshrined in the aforementioned provision, rather than being influenced by procedural or purely formal considerations, which may vary among individual member states. The ultimate objective is to ensure the comprehensive effectiveness of the provision. Notably, the jurisprudential underpinning asserts that Article 54 of the Convention on the Implementation of the Schengen Agreement aims to prevent individuals from facing prosecution for the same offenses across multiple member states merely for exercising their right to freedom of movement.¹⁰¹

However, applying this article to a member state's decision to suspend criminal proceedings, where the substantive examination of the case's circumstances related to the commission of a criminal offense has not occurred, poses challenges. Such an application could impede, or even render impossible, the actual prosecution of the defendant for a criminal offense in another member state. This potential consequence arises from the risk that the initiation of criminal proceedings in another member state, based on the same facts, might lead to the suspension of proceedings by the state attorney in the first member state. Such an outcome would run counter to the fundamental purpose outlined in Article 2 of Title VI of the Treaty on European Union,¹⁰² emphasizing the

97. See Case C-268/17, CJEU Judgment *AY*, ECLI:EU:C:2018:602, ¶¶ 44-46.

98. See Materljan & Materljan, *supra* note 70, at 80-81.

99. See *Miraglia*, C-469/03, ¶¶ 30-34.

100. *Id.* ¶¶ 30-31.

101. *Id.* ¶¶ 32-34.

102. Treaty on European Union, opened for signature Feb. 7, 1992, 1992 O.J. (C 191) 1 (entered into force Nov. 1, 1993).

preservation and development of the Union as an area of freedom, security, and justice, ensuring the free movement of persons, alongside measures aimed at preventing and suppressing crime.¹⁰³

In the *Turanský* case, the assessment of the finality of the decision revolved around the perspective of the police authority's determination to terminate the criminal proceedings.¹⁰⁴ It concluded that, as this decision does not definitively resolve the suspension of the criminal proceedings, it cannot be deemed a conclusive judgment rendered in relation to a specific person within the framework of Article 54 of the Convention on the Implementation of the Schengen Agreement. The court articulated that, while Article 54 of the Convention on the Implementation of the Schengen Agreement aims to secure the freedom of movement for individuals who have completed their sentence or have been acquitted by a final decision in a member state, it does not intend to shield a suspect from the possibility of subsequent investigations being conducted against them for the same facts in multiple states that are contracting parties to the convention.¹⁰⁵ Consequently, the individual sought in the proceedings can only invoke a decision that effectively precludes any further criminal prosecution against them in the member state wherein it was rendered.¹⁰⁶

A notable illustration emphasizing the requisite quality of an investigation, particularly its thoroughness, is evident in the *Kossowski* case, serving as a prominent instance wherein the CJEU elucidated its stance.¹⁰⁷ In this pivotal judgment, the Court scrutinized the circumstances of the case and asserted that a decision to suspend criminal prosecution, characterized by the fact that the public prosecutor's office opted not to proceed due to the defendant's refusal to provide a statement and the alleged residence of the victim and witness in Germany, thereby impeding their participation in the investigative process, failed to meet the standard of a thorough evaluation.¹⁰⁸ The Court emphasized that the absence of a more exhaustive inquiry to collect and scrutinize evidence rendered such a decision inadequate, stating that it did not represent a determination preceded by a comprehensive assessment of the case's merits.¹⁰⁹

At the heart of the Court's reasoning, as articulated in the *Kossowski* case, is the assertion that decisions issued by the public prosecutor's office – such as the one under scrutiny in the present matter, which leads to the suspension of criminal prosecution and the termination of the investigative procedure – cannot be regarded as determinations following a comprehensive evaluation of the substantive merits of the case. Consequently, such decisions do not qualify as final decisions within the meaning of Article 54 of the Convention on the

103. See *Miraglia*, C-469/03, ¶¶ 32-34; see also BUHA, *supra* note 71, at 182-83.

104. See *Turanský*, C-491/07, ¶¶ 40-45.

105. *Id.*

106. *Id.*

107. See *Kossowski*, C-486/14, ¶¶ 48-53.

108. *Id.*

109. *Id.*

Implementation of the Schengen Agreement. This is especially pertinent when the explanation accompanying the decision reveals that a comprehensive investigation was not undertaken, thereby raising concerns about the mutual trust among member states. The failure to hear both the victim and potential witnesses, as highlighted in the main proceedings, serves as a tangible indicator that a thorough investigation was lacking in the case at hand.

The grounds for potential non-execution of the EAW are delineated in Article 4, Section 3 of the Framework Decision. This provision explicitly states that the executing judicial authority may refuse the execution of the EAW if “the judicial authorities of the executing Member State have discontinued criminal prosecution for the offense for which the EAW was issued, have decided to suspend the proceedings, or if the requested person has been definitively sentenced in a Member State for the same criminal offense, thereby precluding further punishment or proceedings.”¹¹⁰ This provision outlines three distinct grounds upon which the execution of the EAW may be refused.

The first rationale pertains to situations where the judicial authority of the member state of enforcement has relinquished prosecution for the criminal offense specified in the EAW. The second rationale is pertinent to scenarios wherein the judicial authority of the executing member state opts to suspend proceedings due to the criminal offense outlined in the EAW. In the case of the Framework Decision, this rationale is of particular importance. A detailed analysis of the provision requires careful consideration of the phrase criminal offense for which the EAW has been issued.¹¹¹

Certain scholars advocate for a broader interpretation of the provision in question, positing that it extends beyond the scope of Article 3, Section 2. This perspective hinges on the language used in Article 4, Section 3, which specifically references the “criminal offense for which a European arrest warrant has been issued,” as opposed to explicitly mentioning the “requested person.” In the analysis of these scholars, the text of Article 4, Section 3 does not expressly mandate that criminal proceedings must be initiated against the requested person.¹¹² Nevertheless, they acknowledge that interpreting this provision to encompass situations where the same facts are involved but different individuals are implicated may be overly expansive.¹¹³ According to this line of thought, for Article 4, Section 3 of the Framework Decision on Waiver of Prosecution or Criminal Proceedings to be applicable, there should be a suspension of criminal proceedings. This suspension should relate to the requested person, even though formal designation as a defendant or suspect may not be necessary. The crux lies in the examination of the possibility that the

110. Council Framework Decision 2002/584/JHA, art. 4, sec. 3, 2002 O.J. (L 190) 1, 2 (EC).

111. See EUROPEAN CRIMINAL BAR ASSOCIATION, E.2 OPTIONAL REFUSAL GROUNDS – HOW TO DEFEND A EUROPEAN ARREST WARRANT CASE, ECBA EAW HANDBOOK, available at <https://handbook.ecba-eaw.org/e-2-optional-refusal-grounds/> [<https://perma.cc/F8FF-W935>].

112. See Council Framework Decision 2002/584/JHA, art. 3, 4 & 5, 2002 O.J. (L 190) 1, 2 (EC).

113. Materljan & Materljan, *supra* note 70, at 84.

requested person may have committed the specified criminal offense.¹¹⁴

However, the CJEU did not subscribe to this line of reasoning. In reference to its prior judicial precedents, the Court underscored that the refusal to execute the EAW constitutes an exception, necessitating a narrow interpretation of the grounds for non-execution.¹¹⁵ Specifically, the Court emphasized that if the rejection of the EAW's execution were permissible merely because a prior decision was made regarding the same criminal act, irrespective of the individual against whom the proceedings were initiated, such an interpretation would be overly broad and pose a risk of evading the obligation to execute the EAW. Citing Article 1, Section 1 of the Framework Decision, the Court in *Piotrowski* reiterated that the primary objective is the apprehension and surrender of the sought-after person.¹¹⁶ Consequently, the EAW must be issued not only in relation to the criminal offense but also with regard to the requested person.¹¹⁷ Drawing on its previous case law, the Court clarified that the purpose of the provision in question is not to shield an individual from the prospect of prosecution for the same offense across multiple member states.¹¹⁸ The Court contended that the free movement of persons is intricately tied to measures aimed at preventing and suppressing crime. Therefore, the second ground for non-execution outlined in Article 4, Section 3 of the Framework Decision should be construed in light of the imperative to advance the objectives of crime prevention and suppression. Given that the investigation was conducted against an unknown perpetrator and the decision to suspend the investigation was not made in relation to the requested person, i.e., the requested person was not actively involved in criminal proceedings in the broader sense as an accused, such a decision cannot form the basis for refusing to execute the EAW within the purview of Article 4, Section 3 of the Framework Decision.¹¹⁹

To substantiate its position, the CJEU invoked the historical context surrounding the creation of the Framework Decision and referred to the original proposal put forth by the European Commission.¹²⁰ This proposal, as per the Court's interpretation, indicates that the initial segment of Article 4, Section 3 of the Framework Decision mirrors the language of the European Convention on Extradition dated December 13, 1957, and specifically draws from its Article 9.¹²¹ The explanatory report accompanying the aforementioned convention clarifies that this provision addresses situations where a decision has been made concerning an individual, preventing further criminal proceedings or leading to

114. *Id.*

115. See Case C-367/16, Criminal proceedings against Dawid Piotrowski, Judgment, ECLI:EU:C:2018:27, ¶ 48 (Jan. 23, 2018); see *AY*, C-269/17, ¶ 52.

116. See Council Framework Decision 2002/584/JHA, art. 1, § 1, 2002 O.J. (L 190) 1, 2 (EC). See also *Piotrowski*, Case C-367/16.

117. See Case C-269/17, *Niemeyer v. Brussels Airlines*, ECLI:EU:C:2018:48, ¶¶ 53-55.

118. *Id.*

119. *Id.* ¶¶ 56-58

120. See Case C-404/15, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198 (Apr. 5, 2016).

121. See European Convention on Extradition, art. 9, Dec. 13, 1957, 359 U.N.T.S. 273.

the suspension of ongoing proceedings.¹²² Consequently, the Court contended that a decision to suspend an investigation, particularly when it was not made in relation to the requested person, cannot serve as grounds for rejecting the EAW within the ambit of Article 4, Section 3 of the Framework Decision.¹²³

The third rationale for refusing to execute the EAW pertains to instances where the requested person is present in a member state, having received a final judgment for the same criminal offenses that precludes further criminal proceedings. The CJEU, in relation to this ground, merely asserted that the specific conditions for its application are not met in the given situation.¹²⁴ In conclusion, according to the CJEU's perspective, Article 4, Section 3 of the Framework Decision embodies the *ne bis in idem* principle.¹²⁵

The *effective implementation* of the EAW involves crucial elements such as *implementation and execution control*. Because of that, the implementation and execution control within the EAW framework are pivotal components that ensure the smooth operation of cross-border criminal justice mechanisms. In this procedure, where the focus lies on the warrant itself, the evaluation centers around formal elements and technical facts relevant to the extradition process.¹²⁶ Unlike a trial, evidence concerning the guilt or innocence of the accused is not the primary consideration. Instead, the competent judicial body of the requested country scrutinizes whether the conditions for extradition, as outlined in the warrant, are met.¹²⁷ This process emphasizes expediency, with the court mandated to render a decision on the (non)extradition of the individual within a time frame of 60 days from the day of arrest.¹²⁸ A noteworthy feature of the EAW process is the expedited path in cases where the arrested person consents to extradition. In such instances, the decision must be reached within a shorter timeframe of ten days from the moment of obtaining the individual's consent.¹²⁹ This acceleration is designed to streamline the procedure when cooperation between the requested and requesting states is mutual.¹³⁰ Following a decision,

122. See Explanatory Report on the European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273.

123. See Igor Materljan & Gordana Materljan, *Europski uhidbeni nalog za napredne korisnike: Odluka o neizvršenju naloga zbog obustave istrage in rem (načelo ne bis in idem) i ispitivanje njezine zakonitosti [European Arrest Warrant for advanced users: Decision not to execute a warrant due to the discontinuation of an investigation in rem (ne bis in idem principle) and review of its legality]*, 26 HRVATSKI LJETOPIS ZA KAZNENE ZNANOSTI I PRAKSU [CROATION Y.B. CRIM. SCI. PRACT.] 59 (2019); Boris Tučić, *Načelo ne bis in idem u kontekstu evropskog naloga za hapšenje: Pogled kroz jurisprudenciju Suda pravde EU [The Principle of Ne Bis in Idem in the Context of the European Arrest Warrant: A Perspective Through the Jurisprudence of the Court of Justice of the EU]*, 11 CIVITAS 149, 152-54 (2021); AY, C-269/17, ¶ 59.

124. See AY, C-269/17, ¶ 62.

125. See generally KLIMER LIBOR, EUROPEAN ARREST WARRANT 159 (2015).

126. Božić et al., *supra* note 8.

127. *Id.*

128. *Id.*

129. Council Framework Decision 2002/584/JHA, art. 17, § 2, 2002 O.J. (L 190) 1, 8 (EC).

130. See Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261 (May 3, 2007).

the court in the requested country initiates communication with the competent authority of the EAW issuer. This communication is a crucial step where details regarding the handover of the individual to the claimant state are meticulously determined. It sets the stage for the subsequent phases of the extradition process, emphasizing coordination and cooperation between judicial authorities.

Turning attention to the financial aspect, the costs associated with executing an EAW are multifaceted. They include expenses related to the engagement of personnel and technical resources for the execution of orders. These expenditures encompass various facets, such as arrest operations, accommodation and guarding, security measures, nutrition, medical care, legal aid, enforcement, and transfer logistics.¹³¹ In the EU practice, a general principle prevails: the requesting state bears the majority, if not all, of the incurred costs.¹³² However, it is important to note that certain expenses are shouldered by the acting state until the person subject to the EAW is conclusively handed over to the requesting country.¹³³ This financial distribution is aimed at ensuring a fair and balanced approach to sharing the burdens associated with transnational law enforcement efforts.¹³⁴

The meticulous oversight of the execution of EAWs is intricately outlined in Recital 8 of the Framework Decision. This regulatory provision delineates a comprehensive framework that relies on the inherent competence of judicial bodies.¹³⁵ It draws inspiration from the legal standards observed in developed EU countries, particularly with regard to the principles of judicial independence and the autonomy of courts in decision-making processes. Under this framework, decisions rendered by first-instance courts become subject to scrutiny and control by second-instance judicial bodies within the requested state. The emphasis on judicial oversight rooted in the principles of independence and freedom of the courts signifies a deliberate effort to insulate the judiciary from undue political influence. This approach is pivotal in ensuring that the execution of EAWs is unequivocally entrusted to judicial authorities.

As highlighted by Palmieri, this framework operates as a safeguard, liberating the judiciary from potential external pressures and confirming that the execution of EAW remains firmly within the purview of the judicial domain.¹³⁶ This commitment to judicial control not only upholds the integrity of the legal process but also reinforces the principles of the rule of law within the EU. The multi-tiered system, where decisions at the first-instance level undergo review by second-instance judicial instances, adds an additional layer of scrutiny to safeguard against potential errors or biases. It establishes a mechanism where

131. See Council Framework Decision 2002/584/JHA, art. 26, 2002 O.J. (L 190) 1, 9 (EC).

132. *Id.*

133. See *Report on the implementation of the European Arrest Warrant*, COM (2005) 63 final (Feb. 23, 2002).

134. *Id.*

135. Council Framework Decision 2002/584/JHA, rec. 8, 2002 O.J. (L 190) 1, 9 (EC).

136. Marco Palmieri, *The European Integration in Criminal Field: The European Arrest Warrant*, 8 TEMIDA, ČASOPIS O VIKTIMIZACIJI, LJUDSKIM PRAVIMA I RODU 37, 38 (2005).

legal standards and procedural fairness are upheld, contributing to the overall effectiveness and legitimacy of the EAW execution process. In essence, the regulatory provisions encapsulated in Recital 8 of the Framework Decision not only outline the legal framework for the execution of EAWs but also serve as a testament to the EU's commitment to upholding judicial independence, ensuring the unfettered operation of the legal system, and fostering a climate where the execution of EAWs is conducted with utmost adherence to legal principles.¹³⁷

To thwart potential abuses in the implementation of the EAW and safeguard against discriminatory practices, Recital 12 of the Framework Decision incorporates a crucial clause explicitly prohibiting discrimination. This clause becomes particularly relevant when there are reasonable grounds to suspect that an EAW was issued with the intention of persecuting or punishing an individual based on certain protected characteristics. These protected characteristics encompass gender, race, religion, ethnic origin, nationality, language, political position, or sexual orientation. The inclusion of this prohibition serves as a vital mechanism to ensure that the issuance and execution of EAWs remain grounded in the principles of fairness, equality, and respect for human rights. Specifically, it aims to address instances where the very act of seeking extradition may be driven by discriminatory motives. In such cases, the clause acts as a protective shield for individuals who find themselves in a vulnerable position due to the potential violation of their rights based on the mentioned characteristics.¹³⁸

It is crucial to underscore the heightened vulnerability and jeopardized rights of individuals within the application procedure when these prohibited grounds for discrimination come into play. The clause serves as a robust legal safeguard, alerting authorities to scrutinize EAWs closely when suspicions arise regarding their issuance for discriminatory purposes. This proactive approach aligns with the broader principles of justice, ensuring that the extradition process does not become a tool for the unfair targeting or persecution of individuals based on inherent characteristics. In essence, the inclusion of the prohibition of discrimination clause in the EAW Framework Decision reflects a commitment to upholding fundamental rights and preventing the misuse of extradition procedures for discriminatory ends. By explicitly addressing the potential abuse of the EAW on the basis of protected characteristics, the legal framework seeks to reinforce the values of equality and non-discrimination in the administration of justice within the European Union.

The refusal to execute an EAW is a prerogative granted to the requested state under specific circumstances. This discretion comes into play when there is a substantial and legitimate apprehension that the individual subject to extradition may face grave consequences, including the imposition of the death penalty or exposure to torture, inhumane treatment, humiliating punishment, or degrading conditions. This protective mechanism is rooted in the fundamental commitment to uphold human rights and prevent the complicity of any state in

137. Council Framework Decision 2002/584/JHA, rec. 8, 2002 O.J. (L 190) 1, 6 (EC).

138. *See* Council Framework Decision 2002/584/JHA, rec. 12, 2002 O.J. (L 190) 1, 6 (EC).

actions that contravene internationally accepted standards. The requested state, exercising this discretion, retains the authority to seek additional guarantees concerning the status and rights of the individual in question. This provision establishes a crucial avenue for the requested state to ensure that the extradition process aligns with its domestic legal framework and conforms to universal European standards. As highlighted by Đurđić, this approach reflects a commitment to safeguarding the rights and well-being of individuals, even in the context of extradition proceedings.¹³⁹ The refusal to execute an EAW under these circumstances serves as a safeguard against potential human rights abuses. By allowing the requested state to scrutinize the conditions awaiting the individual in the requesting state, the legal framework seeks to prevent extradition in situations where there is a credible risk of severe violations of fundamental rights. This not only underscores the significance of international human rights norms but also reinforces the collaborative commitment to justice, fairness, and the protection of individuals across European borders. The option for the requested state to seek additional guarantees further emphasizes the importance placed on ensuring that the extradition process is conducted in accordance with the principles of justice, respect for human rights, and adherence to both national and international legal standards.

V. PROBLEMS IN THE PROCEDURE OF IMPLEMENTATION OF THE EUROPEAN ARREST WARRANT

The principles underlying the EAW have, from the outset, given rise to numerous challenges affecting both its effectiveness and application. The elimination of the requirement for double criminality, while ostensibly streamlining extradition procedures, has introduced a legal quandary concerning the safety of individuals residing within the territory of EU member states. This is particularly evident in situations where a person may be extradited for an act that is not deemed a criminal offense in the country of their current location.

The immediate consequence is a potential threat to the cherished principle of legality (*nullum crimen, nulla poena sine lege*), a cornerstone safeguarded, among other instruments, by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁴⁰ The broad and imprecise definitions of criminal acts outlined in Article 2, Section 2 of the Framework Decision, further exacerbate this threat to the principle of legality. The mutual recognition of criminal judgments, which is foundational to the efficacy of the EAW, assumes the absence of double punishment.¹⁴¹ Therefore, it necessitates agreed-upon definitions of criminal offenses for which extradition is carried out. However, the listed categories of criminal offenses for which double jeopardy

139. See Đurđić, *supra* note 8, at 24.

140. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, with 16 additional protocols, art. 7.

141. Charter of Fundamental Rights of the European Union, art. 49, 2012 O.J. (C 326) 391.

has been abolished might be perceived as “empty boxes” devoid of legal value *per se*. This is due to terms like “corruption,” “terrorism,” “rape,” or “sabotage” lacking precise legal definitions, leaving it to individual states to fill these “empty boxes” with appropriate definitions based on their legal systems.¹⁴² The consequence of this situation is evident, especially for certain serious criminal acts such as murders, rapes, and racketeering. Harmonizing a common denominator in the definition of behaviors exempt from double criminality becomes a challenging task. The abolition of the principle of double punishment for specific categories of criminal acts potentially jeopardizes guaranteed human rights and the interests protected by criminal incriminations. Simultaneously, the possibility of introducing a double criminality clause for certain acts into national regulations outside the list stipulated in the Framework Decision raises concerns about the equality of citizens before the law and the prohibition of discrimination. This dynamic creates a delicate balance between the facilitation of cross-border law enforcement and the imperative to uphold fundamental legal principles and human rights within the EU legal framework.¹⁴³

The CJEU undertook a comprehensive assessment of various critical issues pertaining to the Framework Decision on the EAW. This evaluation was part of a broader examination of the validity of the Framework Decision, initiated by the Belgian Constitutional Court in response to a request from the bar association *Advocaten voor de Wereld*, seeking a constitutional assessment of the Belgian regulations governing the implementation of the EAW.¹⁴⁴ Emphasizing the foundational principles of the EU, such as the rule of law and the respect for human rights in accordance with the ECHR, the CJEU clarified its approach to evaluating human rights violations.¹⁴⁵ The Court stated that it assesses these violations based on the standards established by the ECHR. In its decision, the Court rejected the contention put forth by Belgian lawyers that the general enumeration of broad and imprecise criminal offenses, without the requirement for double criminality, violates the principles of legality.¹⁴⁶ The Court held that the purpose of the Framework Decision is not to harmonize the features of criminal offenses and prescribed penalties across member states.¹⁴⁷ Instead, it affirmed that all member states are obligated to uphold the principle of legality in criminal law.¹⁴⁸ The Court distinguished between the regulation of

142. See Council Framework Decision 2002/584/JHA, art. 2, § 2, 2002 O.J. (L 190) 1, 3 (EC).

143. See Massimo Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice at 102-3* (2009) (Ph.D. dissertation, University of Edinburgh).

144. Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261 (May 3, 2007).

145. See European Convention on Human Rights, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; see also Charter of Fundamental Rights of the European Union, arts. 47, 2012 O.J. (C 326) 391.

146. See *Advocaten voor de Wereld VZW*, Case C-303/05.

147. *Id.*

148. *Id.*

the executing state on the implementation of the EAW and the definition of the criminal offense and appropriate punishment, which are governed by the law of the issuing country.¹⁴⁹ Consequently, the Court asserted that the application of criminal law regulation, in accordance with the principle of legality, extends to the individual sought by the EAW.¹⁵⁰ This application is justified by the obligation of all member states, including the issuing state, to adhere to the principle of legality.¹⁵¹

Addressing concerns related to the principle of equality and non-discrimination, the Court took the position that differential treatment of individuals in similar situations is permissible if objectively justified. The Court contended that the list of criminal offenses in the Framework Decision, for which double punishment is not required, compared to those where double criminality may be a condition, is justifiable due to the weight of the criminal acts listed. Notably, these acts inherently carry a potential sentence of at least three years in prison.¹⁵² Therefore, in the Court's view, the Framework Decision does not violate the principle of equality and prohibitions against discrimination. This legal stance underscores the Court's commitment to balancing the facilitation of cross-border law enforcement with the preservation of fundamental legal principles and human rights within the EU.¹⁵³

Despite the unequivocal stance taken by the CJEU, affirming the absence of violations concerning the principles of legality in criminal law, as well as the principles of equality and the prohibition of discrimination, a doctrinal interpretation of the emerging legal frameworks for criminal law cooperation reveals challenges. These challenges, coupled with practical difficulties encountered in the application of the EAW by judicial authorities across member states, inevitably evoke the impression that the new system for the deprivation of liberty and the transfer of individuals to another EU member state may be premature. The assumption underlying this impression is that it presupposes a significantly higher degree of harmonization of criminal law regulations. The abandonment of the traditional model signals a departure from established practices, suggesting that while a fully-fledged new system might be premature, reverting to the old model is no longer a viable option.¹⁵⁴ The transitional phase appears to be marked by complexities stemming from both doctrinal interpretations of the novel legal mechanisms introduced by the Framework Decision and practical hurdles faced in the day-to-day application of the EAW.¹⁵⁵

149. *Id.*

150. *Id.*

151. See Zlata Đurđević, *Europski sud pravde i legitimitet europskog uhidbenog naloga [The European Court of Justice and the Legitimacy of the European Arrest Warrant]*, 14 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU 1021, 1024–26 (2007).

152. *Id.*

153. *Id.*

154. Fichera, *supra* note 15, at 97.

155. Đurđić, *supra* note 8, at 31.

This perception gains further credence when examining the European Commission's report on the application of the EAW.¹⁵⁶ The report highlights areas where improvements in the transposition and application of the Framework Decision are warranted. Specifically, it emphasizes the need to elevate the protection of basic rights to a central position within the EAW system. Acknowledging these challenges and potential improvements is essential for fostering a system of cooperation that not only facilitates cross-border law enforcement but also ensures the protection of fundamental rights. While the CJEU has provided legal clarity on the compliance of the EAW system with fundamental principles, the pragmatic challenges observed in its application underscore the ongoing need for refinement and enhancement. The collective commitment to addressing these challenges will be instrumental in establishing a robust, effective, and rights-respecting EAW system that aligns with the evolving dynamics of criminal law cooperation within the EU.

Concerning the scope of the EAW, it's crucial to note that its jurisdiction has been expanded compared to the previous extradition system, notably through the removal of the clause prohibiting the extradition of one's own citizens.¹⁵⁷ Initially, the Framework Proposal indicated that the exclusion of one's own citizens would no longer be permissible, with nationality no longer being the primary criterion.¹⁵⁸ Instead, the residence of the requested person, especially in relation to the execution of the sentence, was highlighted as a key factor. However, it is important to recognize that in many continental European countries, the extradition of one's own citizens is constitutionally prohibited, with some exceptions. This prohibition is grounded in the safeguarding of citizens from trial under foreign law and in a foreign language.¹⁵⁹ It carries a certain "sentimental" or "patriotic" value in many continental legal systems.¹⁶⁰

156. *Id.*

157. In many continental European countries, constitutional prohibitions against the extradition of nationals have remained, despite the EAW framework. These prohibitions are rooted in the principle of national sovereignty and protection against forced removal to foreign jurisdictions. However, the EAW allows for certain exceptions or negotiated alternatives (e.g., serving the sentence in the requested state) to overcome these barriers.

158. See *Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States*, COM (2001) 522 final (Nov. 11, 2001) (The Framework Proposal laid the groundwork for the EAW, introducing key reforms, including the elimination of the nationality clause).

159. See Bedanna Bapuly, *The European Arrest Warrant under Constitutional Attack*, 3 ICL J. 4, 14-15 (2017).

160. The phrase "sentimental or patriotic value" in the context of constitutional principles in continental legal systems often refers to the deep-rooted cultural and historical significance attached to national constitutions. In many European countries, these documents are not merely legal texts but symbols of national identity, collective memory, and shared values. For instance, in Germany, the concept of constitutional patriotism (*Verfassungspatriotismus*) emerged post-World War II as a means to foster democratic identity without relying on ethnic or cultural homogeneity. This idea emphasizes loyalty to democratic principles and the constitution itself, rather than to a particular national or ethnic identity. Jürgen Habermas and other theorists have

The non-extradition of one's own citizens is seen as an expression of state sovereignty and individual rights. On one hand, the state asserts its authority to judge its citizens for criminal acts they commit, while, on the other hand, individuals retain the right not to be removed from their natural jurisdiction (*ius de non evocando*). This also safeguards individuals from the excessive jurisdiction of another state. At the onset of its implementation, constitutional courts in several member states declared the regulations implementing the EAW into their national laws as unconstitutional.¹⁶¹ This led to significant challenges in transposing the Framework Decision, creating almost insurmountable difficulties. Over time, constitutional changes, adjustments in norms, and regulations related to the implementation of the Framework Decision occurred, bringing the national laws of these countries in line with EU law. This harmonization aimed at enabling the effective application of the EAW.

Notably, dilemmas emerged during the implementation of the EAW, particularly in cases involving the extradition of a country's own citizens, as exemplified in Ireland.¹⁶² Some countries took a more assertive stance, with their constitutional courts deeming certain solutions incorporated into national legislation, corresponding to the Framework Decision, as unconstitutional or illegal.¹⁶³ In the explanations provided by these highest judicial instances, arguments emphasizing fundamental constitutional principles, such as legality and the prohibition of extraditing domestic citizens to a foreign country, prevailed.¹⁶⁴ These instances underscored the delicate balance between the objectives of the EAW and the constitutional principles held sacrosanct by individual member states.¹⁶⁵

A significant concern arises in the potential *politicization* of cases involving

discussed this concept extensively, highlighting its role in unifying diverse populations under a common commitment to democratic values. See Jan-Werner Müller, *CONSTITUTIONAL PATRIOTISM* (2008). Similarly, in the European Union, constitutional patriotism serves as a foundation for a shared European identity. Given the Union's lack of a single shared history or culture, this form of patriotism focuses on allegiance to the EU's constitutional values, such as democracy, human rights, and the rule of law. It allows citizens to maintain their unique national identities while fostering a sense of unity and commitment to common European principles.

161. See BVerfG [Federal Constitutional Court], 2 BvR 2236/04, July 18, 2005 (Ger.), https://www.bverfg.de/e/rs20050718_2bvr223604en.html [<https://perma.cc/C3Z4-239S>]; Trybunał Konstytucyjny [Constitutional Tribunal], K 18/04, Apr. 13, 2005 (Pol.); Supreme Court of Cyprus, Case 227/2015, Judgment of June 7, 2016, available at <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vhmfyo2jijxs> [<https://perma.cc/6LX2-823M>]. See also Corte Costituzionale, July 6, 2023, n. 178, *Gazzetta Ufficiale* 2023, parte 1, n. 31, colonna 45726 (It).

162. Minister for Justice, Equality and Law Reform v. Stapleton, [2006] SC 30 (Ir.).

163. BVerfG, 2 BvR 2236/04, July 18, 2005.

164. Trybunał Konstytucyjny [Constitutional Tribunal] P 1/05, Apr. 27, 2005, OTK-A 2005/4/42 (Pol.), <https://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym> [<https://perma.cc/8YFG-F6Y3>].

165. See Daniel Sarmiento, *The European Arrest Warrant and the Quest for Constitutional Coherence*, 6 INT'L J. CONST. L. 171, 171-83 (2008).

the issuance of EAW.¹⁶⁶ This refers to the apprehension that EAWs might be politically motivated, targeting individuals deemed undesirable by the requesting state. However, the very purpose of the EAW is to serve as a depoliticized substitute for extradition, free from any extralegal influences or pressures on authorities in both the requesting and requested countries. One facet of this problem is the fear that EAWs may be issued with political motivations, wherein the legal process becomes a tool for pursuing political objectives. The aim of the EAW, as envisioned, is to be insulated from political considerations, ensuring that the extradition process is guided solely by legal criteria and safeguards. This principle seeks to prevent the misuse of the EAW as a means to exert political influence or settle political scores. Conversely, instances of politicization can also occur when the requested state, without a valid legal reason, fails to comply with a proper EAW. A notable example is Ireland's refusal to extradite one of its nationals to a claimant country, Hungary, following an incident where the individual was involved in a vehicular accident resulting in the tragic death of two children.¹⁶⁷ This refusal, without a clear legal basis, raises concerns about potential political influences impacting the execution of the EAW.¹⁶⁸

Mitigating the politicization of EAW cases is critical for upholding the integrity of the legal process and ensuring that the extradition system remains in accordance with legal principles rather than becoming a tool for political agendas. Striking a balance between legal procedures, safeguarding individual rights, and preventing undue political interference is essential to maintaining the

166. *See exempli gratia* case of *Carles Puigdemont and Catalan Leaders* (following the 2017 Catalan independence referendum, Spanish authorities issued EAWs for former Catalan President Carles Puigdemont and other leaders. Critics argue that these warrants were politically motivated, aiming to suppress political dissent rather than address criminal conduct. Fifteen Members of the European Parliament (MEPs) from various countries denounced Spain's actions, labeling them as an "opportunistic" use of the EAW system. They highlighted concerns about the withdrawal and reissuance of warrants based on political calculations rather than legal grounds), *Marcin Romanowski Case* (in a recent development, Hungary granted political asylum to Marcin Romanowski, a former Polish deputy justice minister wanted in Poland on corruption charges. Poland's government criticized Hungary's decision, viewing it as a politically motivated act that undermines judicial cooperation. The European Commission reminded Hungary of its obligation to execute EAWs, emphasizing the importance of mutual trust among EU member states), and case of *Karenzi Karake Arrest* (in 2015, the UK arrested Rwanda's intelligence chief, Karenzi Karake, based on a Spanish EAW accusing him of war crimes. Rwanda's government condemned the arrest as politically motivated, arguing that it was an abuse of the EAW system. The incident strained diplomatic relations and highlighted the potential for EAWs to be perceived as tools for political agendas). Valsamis Mitsilegas, *Politicisation of the European Arrest Warrant Is Dangerous and Unnecessary*, QUEEN MARY U. LONDON (Oct. 7, 2017), <https://www.qmul.ac.uk/media/news/items/hss/politicisation-of-the-european-arrest-warrant-is-dangerous-and-unnecessary.html> [<https://perma.cc/5DY3-PRJT>]; *15 MEPs Denounce Spain's Misuse of European Arrest Warrant to EU*, CATALAN NEWS (Mar. 24, 2021), <https://www.catalannews.com/politics/item/15-meps-denounce-spain-s-misuse-of-european-arrest-warrant-to-eu> [<https://perma.cc/4HRS-YNDT>].

167. *Minister for Justice, Equality and Law Reform v. Tobin*, [2012] SC 37 (Ir.).

168. *See* GAJIN, *supra* note 63, at 82-85.

credibility and effectiveness of the EAW. This requires continuous scrutiny and adherence to established legal norms to prevent the erosion of trust in the cross-border cooperation facilitated by the EAW.

Divergent practices in the implementation of the EAW are evident among EU member states, reflecting variations in the temporal and substantive scope of application.¹⁶⁹ Notably, some countries, such as the United Kingdom and the Netherlands, have delimited the temporal and material reach of the EAW.¹⁷⁰ In contrast, others, like Poland and Belgium, have expanded the Catalog of Criminal Offenses to which the principle of mutual criminality is applied.¹⁷¹ Italy, on the other hand, has retained the application of the principle of mutual criminality in its national legislation concerning the Catalog of 32 criminal acts outlined in Article 2 of the Framework Decision.¹⁷² Denmark has taken a unique approach by designating a specific executive body as competent for issuing and executing EAWs, deviating from the explicit recognition of judicial authorities and procedures outlined in the Framework Decision.¹⁷³ Malta and other countries have cited various reasons for refusing to execute EAWs, including concerns related to national security, political considerations, and personal or family circumstances of the individuals sought.¹⁷⁴ Another layer of complexity arises in the increased number of mandatory reasons for refusing the enforcement of EAWs, thereby constraining the discretionary decisions of judicial authorities.¹⁷⁵ Furthermore, challenges persist in the transmission and receipt of orders issued through the EU channel (SIS), as certain EU countries remain outside the Schengen area and continue to rely on available Interpol

169. See Council Framework Decision 2002/584/JHA, pmbl. paras. 5-7, 2002 O.J. (L 190) 1 (EU) (emphasizing the need for uniform implementation across Member States).

170. See *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, at 3.1.1, COM (2005) 63 final (Feb. 23, 2005) (noting variations in implementation among Member States).

171. See *id.* at 3.1.1 (discussing differences in the application of mutual recognition principles among Member States).

172. See Franco Impalà, *The European Arrest Warrant in the Italian Legal System: Between Mutual Recognition and Mutual Fear Within the European Area of Freedom, Security and Justice*, 1 UTRECHT L. REV. 56, 66-67 (2005) (analyzing Italy's implementation of the EAW and its retention of the double criminality principle).

173. See Corinne Gay, *The European Arrest Warrant and Its Application by the Member States*, ROBERT SCHUMAN FOUNDATION (Jan. 22, 2006), <https://www.robert-schuman.eu/en/european-issues/16-the-european-arrest-warrant-and-its-application-by-the-member-states> [<https://perma.cc/Q72X-D4CT>] (noting Denmark's designation of an executive organ as the competent authority for EAW matters).

174. See *European Arrest Warrant*, EUROPEAN E-JUSTICE PORTAL, https://webgate.ec.europa.eu/e-justice/90/EN/european_arrest_warrant [<https://perma.cc/945S-CZMW>] (listing optional grounds for refusal, including national security and personal circumstances).

175. See *id.* (outlining mandatory grounds for non-execution of EAWs, which limit judicial discretion).

channels.¹⁷⁶

Addressing these challenges necessitates heightened monitoring and control measures in the application of the EAW across all EU member states. This scrutiny is particularly crucial for both the claimant state issuing the order and the requested states responsible for executing these orders. Harmonizing these diverse practices and ensuring consistent adherence to the principles outlined in the Framework Decision are essential for fostering trust and effectiveness in the cross-border cooperation facilitated by the EAW. It underscores the need for ongoing collaboration and coordination among EU member states to strengthen the efficiency and reliability of the EAW.

CONCLUSION

The EAW has brought about a profound transformation in the traditional extradition system, characterized by its formal, political, and interstate nature. Governed by conventions that permitted member states numerous reservations leading to extradition bans, the antiquated procedure was notoriously sluggish and ineffective. The cornerstone of the new extradition paradigm is mutual trust in the legal systems of member states, facilitating the substitution of subjects within the process. Unlike the previous system, where member states were central to the extradition procedure, the EAW has shifted the focus to the courts of member states, which now automatically recognize each other's decisions on arrest warrants, thus judicializing the process.

The depoliticization of the new extradition procedure is evident through the abolition of numerous reservations that member states could invoke, removing major obstacles to extradition. Key changes include the elimination of the principle of double jeopardy for serious crimes, a ban on the extradition of one's own citizens, and a prohibition on extradition for fiscal and political crimes. The efficiency of the procedure for surrendering individuals based on a EAW is noteworthy, with the average time from issuance to surrender reduced to seven weeks, and a mere fifteen days when the requested person consents. However, challenges have emerged in safeguarding the basic human rights of requested persons due to insufficiently harmonized criminal justice systems, particularly concerning the abolition of double punishment and imprecise definitions of repealed criminal acts, posing threats to legality and equality before the law. Some critics argue that the EAW is premature, suggesting a return to the old, classic extradition system.

The genesis of the EAW stemmed from the necessity to expedite and simplify the traditional extradition system within the EU. Although the classic

176. *See id.* (discussing the use of the Schengen Information System (SIS) and alternative channels like Interpol for EAW transmissions). *See also* Josip Šule & Danka Hržina, *Primjena europskog uhidbenog naloga u Republici Hrvatskoj – očekivanja i stvarnost [The Application of the European Arrest Warrant in the Republic of Croatia – Expectations and Reality]*, 20 HRVATSKI LJETOPIS ZA KAZNENO PRAVO I PRAKSU 715, 721-24 (2013).

mechanism was sophisticated when established, its political and interstate nature over time rendered it inefficient and slow. The conventions underpinning the classic system allowed member states to make reservations, highlighting the procedural limitations that hindered any meaningful improvement. As an instrument grounded in the principle of mutual recognition of court decisions, the EAW has significantly revamped the extradition process. Notably, procedural and bureaucratic obstacles in communication between member states have been minimized, with direct communication established among competent judicial authorities. Precise deadlines and standardized forms have expedited the procedure, and traditional grounds for rejecting surrender requests have been eliminated, allowing for the surrender of one's own citizens. The elimination of the principle of double incrimination for 32 specified criminal offenses stands out as a pivotal innovation. Furthermore, the adoption of the EAW has fostered solidarity among member states, replacing historical mistrust with cooperation and mutual trust among competent authorities. Implementation of the Framework Decision on the EAW has contributed to a modest yet significant degree of harmonization in criminal legislation at the EU level.

The EAW has evolved into a crucial factor in European security, playing an essential role in the internal security of the EU. Cooperation within the EU, leading to freedom, security, and justice, finds expression in the EAW as a vital element. The future trajectory of this mechanism and its adaptation to changes within the EU, such as the United Kingdom's withdrawal, remains a subject of observation in the years to come.

NOTES

LABOR COURTS: PAST THE POLARIZATION OF THE NATIONAL LABOR RELATIONS BOARD AND TOWARDS STABLE LABOR LAW IN THE UNITED STATES

FARRAH GOODALL*

INTRODUCTION

The passing of the National Labor Relations Act of 1935 (NLRA) was a critical turning point in labor law within the United States (U.S.). The NLRA and subsequent creation of the National Labor Relations Board (NLRB/Board) was put into place in an effort to promote labor peace and give employees the right to organize labor unions to collectively bargain with employers about a variety of issues including wages, hours, and working conditions.¹ Since its creation, the implementation of the NLRA has failed employees and employers alike because the NLRB is an ineffective governing body.

THESIS

The NLRB is an independent administrative agency tasked with implementing the NLRA and protecting employees' rights.² The NLRB is not an effective way to carry out the primary goals of the NLRA—labor peace, rights for workers, good working conditions, and higher wages. The ineffectiveness of the NLRB has led to a confusing labor law landscape with negative effects on employers, employees, and the economy. The very structure of the NLRB has increased polarization and resulted in inconsistent decisions. In order to develop a more consistent and stable field of labor law, the U.S. should attempt to remove political agendas from the decision-making process by establishing labor courts. Creating labor courts and removing the need for

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1. See Frank E. Gumbinger, *Collective Bargaining—Is it Working*, 4 LOY. U. L. A. L. REV. 361, 364-365 (1971).

2. NAT'L LAB. RELS. BD., *About NLRB*, <https://www.nlr.gov/about-nlr/who-we-are/the-board> [<https://perma.cc/H679-MT5J>] (last visited Nov. 3, 2023).

the NLRB would allow appointments to the labor courts to be merit-based and would eliminate the reliance on the political allegiance of Board members to influence labor law.

ROADMAP

This Note in Section I will provide a brief overview of the history of labor law in the U.S. while observing the path that has led to the highly partisan, polarized Board experienced today. In Section II, to demonstrate the polarization of the Board in recent years, this Note will walk through examples of both President Trump's Board, during his first term, and President Biden's Board. This Note will not attempt to cover all the decisions made by the NLRB in these past two terms. Rather, it will highlight the cases that demonstrate the notion that each Board seeks to achieve an agenda that is dependent on political allegiance. Next, Section III will provide an overview of the labor court systems in several countries paying close attention to Sweden's Labor Court and the resulting high union participation rates in other countries that have also adopted a system of labor courts. Additionally, Section III will recommend that the U.S. adopt a federal system of labor courts modeled after the federal bankruptcy courts to eliminate the need for the NLRB and largely remove politics from labor law decisions.

I. HISTORY

The NLRA was unique to other labor acts particularly because of Section 7 which provides "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."³ Unlike previous legislation, Section 7 gave employees the right to self-organize and collectively bargain. The NLRB was created because there was a need for implementation and enforcement of Section 7 along with other parts of the NLRA. The hope was that the NLRB would focus on the enforcement of rights including appropriate bargaining units, unfair labor practices, and appropriate remedies. If the NLRB focused on the enforcement of rights instead of mediation, it was supposed to avoid the implementation issues experienced with the National Recovery Administration.⁴

The NLRA passed in 1935 making it clear that workers had the right to form unions and collectively bargain. Rather than forcing employers to self-regulate like the National Industrial Recovery Act (NIRA), the NLRA sought to protect

3. National Labor Relations Act § 7, 29 U.S.C.S. § 157 (2018).

4. G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AMERICA? (2013), http://whorulesamerica.net/power/history_of_labor_unions.html [https://perma.cc/ZK55-MGY3].

workers' rights. The NLRA included provisions for the creation of the NLRB. The NLRB's purpose is to enforce and maintain the rights provided by the NLRA. The constitutionality of the NLRA was upheld in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*⁵

Some other notable legislation in the aftermath of the NLRA includes the Fair Labor Standards Act of 1938 (FLSA) and the Taft-Hartley Act of 1947. The FLSA established a minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector in Federal, State, and local governments.⁶ Similar to the NLRB, the Department of Labor is responsible for implementing the FLSA and can participate in rulemaking as an administrative agency that updates or revises the regulations of the FLSA.

The Taft-Hartley Act "made major changes to the Wagner Act [NLRA]. Section 7 remained, but new language was added to provide that employees had the right to refrain from participating in union or mutual aid activities except that they could be required to become members in a union as a condition of employment."⁷ The Taft-Hartley Act defined six additional unfair labor practices and provided for four new types of election.⁸

The NLRA, the Taft-Hartley Act, the FLSA and other legislation after a history of labor strife in the U.S. were enacted to resolve that strife and create a balance between employer and employee rights, however the NLRB has not accomplished those goals.

NATIONAL LABOR RELATIONS BOARD COMPOSITION

The NLRB is made up of a five-person Board and a General Counsel (GC). Section 3 of the NLRA establishes the Board.⁹ Board members and the GC are appointed by the President with the consent of the Senate.¹⁰ Board members serve a five-year term with a member's term expiring every year. The GC is appointed to a four-year term and is independent of the Board, tasked with administering the agency's field operations.¹¹ The GC is responsible for investigating charges that employers or unions have violated federal labor law and for prosecuting violations; the Board then decides those cases. Although the GC has no independent, investigative authority, workers are dependent on the

5. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

6. U.S. DEP'T OF LAB., *Wages and the Fair Labor Standards Act*, <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/L99Q-3PFG>] (last visited Nov. 5, 2023).

7. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1947-taft-hartley-substantive-provisions> [<https://perma.cc/E7X4-BEXC>] (last visited Nov. 5, 2023).

8. *Id.*

9. National Labor Relations Act § 3, 29 U.S.C.S. § 153; see Gumbinger, *supra* note 1.

10. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, *supra* note 7.

11. *Id.*

GC to prosecute their case.¹² If the GC chooses not to prosecute a certain case, then there is no redress for that employee. Similar to other administrative agencies, the NLRB has the capacity to engage in formal and informal rule-making processes. However, unlike most agencies, the NLRB relies on case-by-case adjudications to shape the labor law landscape.¹³ In fact, the NLRB has only engaged in rulemaking eight times.¹⁴ The reliance on case-by-case adjudications has allowed the GC and the NLRB to pursue political agendas during their terms which has resulted in a confusing labor law landscape because the “rules” change depending on the case adjudications each term.

Furthermore, decisions by the Board can be appealed to an appropriate U.S. Court of Appeals, and eventually to the U.S. Supreme Court.¹⁵ The GC has empowered twenty-six regional offices with headquarters located in Washington, D.C.¹⁶ Regional officers at these offices investigate and prosecute alleged violations of the NLRA under the authority of the GC.¹⁷ Once a Regional Director issues a complaint, an Administrative Law Judge (ALJ), will hear the case and make a decision.¹⁸ That decision, by the ALJ, can be appealed to the Board in Washington, D.C., and the decision by the Board can be appealed to the appropriate court.¹⁹ While the decisions of an ALJ are not binding legal precedent unless adopted by the Board, decisions by a U.S. Court of Appeals or the U.S. Supreme Court are binding on the NLRB and can further mystify the labor law landscape if the appellate courts decide to overturn Board decisions.²⁰ The very “interpretation and application of the [NLRA] by the [U.S.] Supreme Court, has led to the evolution of a confused national labor policy that does not effectively serve any of the basic social, political, or economic values” often associated with the NLRA.²¹

12. Celine McNicholas et al., *Unprecedented: Trump NLRB's attack on workers' rights*, ECON. POL'Y INST. (Oct. 16, 2019), <https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/> [<https://perma.cc/HDL8-XKUU>].

13. Blake Phillips, *NLRB Case Surge: What it Means and What the Board Can Do About It Right Now*, GEO. J. ON POVERTY L. & POL'Y (Feb. 16, 2023), <https://www.law.georgetown.edu/poverty-journal/blog/nlr-b-case-surge-what-it-means-and-what-the-board-can-do-about-it-right-now/> [<https://perma.cc/WW6C-8A2G>].

14. *Id.*; see Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

15. NAT'L LAB. RELS. BD., *About NLRB*, *supra* note 2.

16. NAT'L LAB. RELS. BD., *Introduction to the NLRB*, <https://www.nlr.gov/about-nlr/b-what-we-do/introduction-to-the-nlr> [<https://perma.cc/ZTF7-ZEUI>] (last visited Feb. 11, 2024).

17. *Id.*

18. NAT'L LAB. RELS. BD., *Administrative Law Judge Decisions*, <https://www.nlr.gov/cases-decisions/decisions/administrative-law-judge-decisions> [<https://perma.cc/A3R9-5PTP>] (last visited Feb. 11, 2024).

19. *Id.*

20. NAT'L LAB. RELS. BD., *Decide Cases*, <https://www.nlr.gov/cases-decisions> [<https://perma.cc/648D-ZP6G>] (last visited Feb. 7, 2024).

21. Joan Baker, *NLRA Section 8(a)(3) and the Search for a National Labor Policy*, 7 HOFSTRA LAB. L. J. 71 (1989).

II. DISCUSSION

The very structure of the NLRB has created a ripe environment for a political game of ping-pong.²² The appointment of a new Board with each President combined with a general increase in polarization has changed the objectives of the NLRB. Overtime Board members' status as political appointees became apparent and it has become a "long-standing practice that a majority of sitting NLRB members are politically aligned to the current Presidential administration."²³ Instead of focusing on employee's rights under the NLRA, the NLRB focuses on reversing precedent and decisions of the previous Board. Since its enactment, "the [NLRA] has never required any kind of balance between Democrats and Republicans," a stark statutory difference from other types of regulatory legislation.²⁴ However, for many years, there was a political balance on the Board. An unspoken "tradition" encouraged presidents to achieve a 3-2 balance once the Board was expanded to five members after the Taft-Hartley Act; for example, "President Truman deliberately appointed one so-called liberal Senator... and one 'management person.'"²⁵ Since there was no actual rule regarding partisanship, though, the Eisenhower administration saw the first shift in policy regarding the NLRB. The Eisenhower administration realized its opportunity to influence labor policy when presented with three vacancies within the first year of President Eisenhower's term.²⁶ The Eisenhower Board favored employer free speech rights and made a few decisions undermining the previous Roosevelt-Truman Board.²⁷

The Kennedy Board solidified this shift in policy for the NLRB as the Kennedy Board worked to combat the issues decided by the Eisenhower Board. This pattern continued supported by the increase in political polarization during Reagan's presidency.²⁸ Although the policy of the NLRB had shifted, it was not clear until the Clinton administration that the NLRB had also been severely affected by polarization. The first example of polarization of the Board was in the 1980s which led to the "batching" of Board member appointments during the Clinton administration; batching had not been seen since the expansion of the Board under the Taft-Hartley amendments.²⁹ In addition to batching of

22. See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. REV. 347 (2010).

23. Daniel Pasternak & Scott Held, *The NLRB and Employers' Terrible, Horrible, No Good, Very Bad Week: A Deep-Dive Analysis of Recent Activist NLRB Decisions (US)*, SQUIRE PATTON BOGGS (Sept. 14, 2023), <https://www.employmentlawworldview.com/the-nlr-and-employers-terrible-horrible-no-good-very-bad-week-a-deep-dive-analysis-of-recent-activist-nlr-decisions-us/> [<https://perma.cc/476A-CBXF>].

24. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507 (2015).

25. *Id.*

26. *Id.* at 1508.

27. *Id.*

28. *Id.* at 1513.

29. *Id.* at 1522.

appointments, administrations began to delay confirmations, choose not to appoint members to fill vacancies on the NLRB, and participate in other strategic, political moves to influence labor policy. These moves by various administrations surrounding the Board began to set a pattern of reversing previous, opposing political party decisions, leaving the NLRB stagnant and the labor law landscape confused.

Similar to their predecessors, both the Trump and Biden Boards focused and continue to focus on overturning decisions of the previous, opposing partisan Boards. Generally, Republican-leaning Boards focus their efforts on pro-employer decisions while Democrat-leaning Boards focus their efforts on pro-employee decisions.³⁰ However, the focus on overturning previous Boards' decisions creates an unstable labor law environment and leaves the NLRB stagnant. Employers are left to wonder what behavior will count as anti-union efforts or unfair labor practices, and employees are left to wonder what rights they hold in the workplace. Realistically, the NLRB does not advance any portion of labor rights whether for employers or employees because each Board simply reverses the decisions of the previous Board.

Polarization coupled with the NLRB's adjudicatory approach to rulemaking has encouraged this flip-flopping with each new administration. "Unlike federal judges, who are appointed for life, NLRB members are appointed for only five-year terms, and when a Board member's appointment is about to expire, it is not uncommon for the Board to release a large number of decisions on significant legal issues."³¹ The common flurry of important decisions at the end of a Board's term strengthens the observation that the focus has shifted to overturning politically-opposed precedent. In turn, this observable shift incentivizes litigators to file cases with substantially similar issues in the hopes of getting a different decision.³² This has led to situations in which employers and employees alike participate in strategic delay in order to get a more desirable decision by a new Board.³³

A. Recent Major Decisions

Unit Size—Trump Board

In *PCC Structurals, Inc.*, the Trump Board overturned *Specialty Healthcare* to give employers more say in bargaining unit determinations.³⁴ The NLRA

30. See Gould, *supra* note 24; see also Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedures Act, and Chevron: Now and Then*, 64 EMORY L.J. 1529 (2015).

31. Pasternak & Held, *The NLRB and Employers'*, *supra* note 23.

32. Phillips, *supra* note 13.

33. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html> [<https://perma.cc/WG4Q-5WSK>].

34. McNicholas et al., *supra* note 12.; *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017); *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 934 (Aug. 26, 2011).

gives workers the right to collectively bargain with their employer in “a unit appropriate.”³⁵ When employees want to form a union, they must file a petition with the NLRB seeking an election. In that petition, the employees must specify the group that is organizing. Typically, the NLRB will approve that group as the bargaining unit. However, the Obama Board ruled in *Specialty Healthcare* that the bargaining unit sought by employees would be presumptively appropriate if the employees shared a “community of interest.”³⁶ In other words, the burden was put on the employer to show why the bargaining unit was not appropriate, or else the bargaining unit would be approved. This decision created push-back from employers because it allowed for “micro-units” to be an appropriate bargaining unit which deviated from the traditional standard for bargaining units.

The ruling in *PCC Structural, Inc.*, overruled the standard of *Specialty Healthcare* and reinstated the original standard—three guiding benchmarks—for determining bargaining units mandated by the NLRA. First, Section 9(a) of the NLRA provides that “employees have a right to representation by a labor organization...in a unit appropriate for such purposes.”³⁷ This appropriateness is determined by looking at the purposes of representation. Second, in Section 9(b), Congress contemplated the questioning of a unit’s appropriateness and determined that, in that event, the Board would conduct a “meaningful evaluation.”³⁸ Essentially, a unit’s appropriateness cannot be a blanket rule because it depends on the “employer unit, craft unit, plant unit, or subdivision thereof” in each case.³⁹ Therefore, the appropriateness of a bargaining unit must be determined in each case by the Board when a dispute over the bargaining unit arises.

Third, Section 9(b) of the NLRA resulted because of intentional choices by Congress giving the Board a role in determining appropriate bargaining units. The earlier versions of the Act were not as specific as the existing NLRA, which gives the Board a direct role in determining bargaining units. Because of Section 9, throughout most of history, “the Board applied a multi-factor test” when determining the appropriateness of a bargaining unit.⁴⁰ Although Democratic Boards and their supporters have argued that the ruling in *PCC Structural, Inc.* gives employers a “greater ability to thwart workers who wish to form a union,” the ruling reverts to the statutory mandate of the NLRA involving the NLRB in the bargaining unit decision and adheres more closely to the traditionally accepted standard.⁴¹

35. McNicholas et al., *supra* note 12.

36. *Id.*

37. *PCC Structural*, 365 NLRB No. 160.

38. *Id.*

39. *Id.*

40. *Id.*

41. McNicholas et al., *supra* note 12.; *see PCC Structural*, 365 NLRB No. 160.

Unit Size—Biden Board

In *American Steel Construction, Inc.*, the Biden Board overruled *PCC Structurals, Inc.*, and reinstated the rule from *Specialty Healthcare* decided by the Obama Board.⁴² The new-old rule holds that a bargaining unit will be presumptively appropriate if the workers share a “community of interest.”⁴³ This ruling, again, allows for unions to organize “micro-units” of employees and puts the burden on the employee to show the Board why a particular bargaining unit is inappropriate.⁴⁴

The Board has interpreted Section 9(b) of the NLRA to deem a bargaining unit appropriate if the petitioning employees have a sufficient “community of interest.”⁴⁵ The Board considers departments, skills and training, job functions and overlap in job descriptions, contact with other employees, distinct terms and conditions of employment, and whether employees are separately supervised to determine if there is a community of interest. Additionally, if the potential unit has a subdivision of employees the unit must be homogeneous, identifiable, and sufficiently distinct.⁴⁶ Employers will likely challenge the “sufficiently distinct” element of the unit, but the burden will be on the employers to show that any excluded employees have an “overwhelming community of interest” with the employees in the unit.⁴⁷

Ultimately, the Board reverted to a standard that does not require the Board to decide in each disputed case whether a bargaining unit is appropriate even though this language can be found in the NLRA. It allows unions to seek convenient, small groups of employees and places the burden on the employee to overcome the presumption that the bargaining unit is appropriate. Any challenges by employers are likely to be decided in the union’s favor or not pursued by the GC because this ruling suits the Biden Board’s political agenda.

Management Rights Clauses—Trump Board

Other notable decisions from the Trump Board involved management rights clauses and enhancing employers’ property rights. In a string of management rights clauses cases, the Trump Board overturned “precedent to make it easier

42. *PCC Structurals*, 365 NLRB No. 160; *See Specialty Healthcare*, 357 NLRB 83; *Am. Steel Constr. Inc.*, 372 NLRB 23 (2022).

43. Daniel Pasternak & Scott Held, *NLRB Issues Flurry of Blockbuster End-of-Year Decisions (With More to Come?) (US)*, SQUIRE PATTON BOGGS (Dec. 21, 2022), <https://www.employmentlawworldview.com/nlr-issues-flurry-of-blockbuster-end-of-year-decisions-with-more-to-come-us/> [<https://perma.cc/X4DA-RTXE>].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

for employers to adopt rules, policies, and handbook provisions.”⁴⁸

Management rights clause cases deal with the legality of various employer policies. Employer policies are often challenged for restricting activities that are protected by Section 7 of the NLRA. The Trump Board in *Boeing* overruled the previous standard regarding workplace rules from *Lutheran Heritage*.⁴⁹ However, *Boeing* has been subsequently overturned by the Biden Board.

Employers’ property rights have always been a contested issue when pitted against employees’ union activity rights. Several cases have dealt with when, where, and how employees and non-employees can talk to employees about unionization on the employer’s property. The Trump Board sought to strengthen employers’ property rights in *Bexar*.⁵⁰ The Trump Board held that off-duty employees could not handbill or engage in other union-organizing activity in nonwork areas of the workplace if their employer was a contractor at the workplace rather than the owner of the property.⁵¹ The case involved off-duty orchestra musicians who were handing out material outside of the concert hall where they spent their working hours. While this temporarily enhanced employers’ property rights, the Biden Board later refused to uphold this decision in *Bexar II* in 2022.⁵²

Management Rights Clauses—Biden Board

In *Bexar II*, the Board held that an employer had violated the NLRA by prohibiting employees from protesting on its property.⁵³ The Board refused to follow its previous decision in 2019 which held that the employer could prohibit that same activity on their property. Employers only had to permit access if the contractors “regularly and exclusively” worked at the property.⁵⁴ Now, unless an employer can show that its property interests are greater than the Section 7 interests of the employees of contractors, the employer will commit an unfair labor practice if they prohibit employees from protesting or other union activities on their private property.⁵⁵

The Biden Board still has a few notable pending cases. These pending cases follow the theme of the decisions already handed down by the Board—to

48. McNicholas et al., *supra* note 12.; *see e.g.*, *MV Transp., Inc.*, 368 NLRB 66 (2019); *The Boeing Co.*, 365 NLRB 154 (2017); *Raytheon Network Centric Sys.*, 365 NLRB 161 (2017).

49. NAT’L LAB. RELS. BD., *NLRB Establishes New Standard Governing Workplace Policies, and Upholds No-Camera Policy in Boeing*, (Dec. 14, 2017), <https://www.nlr.gov/news-outreach/news-story/nlr-establishe-new-standard-governing-workplace-policies-and-upholds-no> [<https://perma.cc/Q3K3-7DNX>]; *see The Boeing*, 365 NLRB 154; *Martin Luther Mem’l Home, Inc.*, 343 NLRB 75 (2004).

50. *See Bexar Cnty. Performing Arts Ctr. Found.*, 368 NLRB 46 (2019).

51. McNicholas et al., *supra* note 12.

52. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43.

53. *Id.*; *Tobin Ctr. for the Performing Arts*, 372 NLRB No. 28 (2022) (colloquially known as *Bexar II*).

54. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43.

55. *Id.*

enhance employees' rights regardless of precedent or employers' rights.⁵⁶ The Board's decisions are guided by the GC and "are part of an effort...to overturn roughly 50 board precedents."⁵⁷

Other Major Decisions—Biden Board

In *Thryv, Inc.*, the Board expanded the remedies available for relief for unfair labor practices.⁵⁸ The NLRA authorizes the NLRB to order "make-whole" relief remedies for unfair labor practices, but the Board cannot provide additional remedies that exceed that "make-whole" threshold like damages for emotional distress, pain and suffering, or punitive damages.⁵⁹ Disregarding this limitation, the Board held in *Thryv, Inc.*, that employers who violate the NLRA can be required to compensate employees "for all direct or foreseeable pecuniary harms suffered as a result of the [employer's] unfair labor practice."⁶⁰ The Board found that an employer had wrongfully laid off six employees before bargaining to an impasse with their union, and considered whether the employer should be required to pay damages in addition to back pay and reinstatement, the traditionally accepted remedy, and whether those additional damages could be added to the "make-whole" standard.

Section 10(c) of the NLRA authorizes the NLRB to remedy unfair labor practices by taking "such affirmative action including reinstatement of employee with or without backpay."⁶¹ Reinstatement and backpay have long been held to be an appropriate remedy for wrongful termination. The *Thryv, Inc.*, majority did not adopt the term "consequential damages," but it did substantially broaden the remedy that the Board can order by holding that "make-whole relief encompasses, at a minimum . . . direct or foreseeable pecuniary harms that are a consequence of" an employer's unfair labor practice.⁶² Seemingly, medical expenses, credit card interest, rental car expenses, and other losses can now be included in a remedy for wrongful termination.⁶³ These expanded remedies are available "in every case in which [the Board's] standard remedy would include make-whole relief, regardless of the egregiousness of the violation."⁶⁴ Likely, employers will be liable for all direct or foreseeable damages resulting from an unfair labor practice, but it is

56. *See id.*

57. Andy O'Brien, *Biden's National Labor Relations Board Issues Groundbreaking Decision to Strengthen Organizing Rights*, MAINE AFL-CIO (Sept. 1, 2023), <https://maineaflcio.org/news/bidens-national-labor-relations-board-issues-groundbreaking-decision-strengthen> [<https://perma.cc/FB45-2LD8>].

58. *See Thryv, Inc.*, 372 NLRB No. 22 (2022).

59. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43.

60. *Id.*; *Thryv*, 372 NLRB No. 22.

61. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43; *Thryv*, 372 NLRB No. 22; National Labor Relations Act § 10, 29 U.S.C. §160(c).

62. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43; *Thryv*, 372 NLRB No. 22.

63. Pasternak & Held, *NLRB Issues Flurry*, *supra* note 43.

64. *Id.*; *Thryv*, 372 NLRB No. 22.

uncertain how far these damages will extend.

In August 2023, the NLRB disregarded and overturned more than fifty years of precedent in *Cemex*.⁶⁵ Historically, unions have two routes to representing private sector employees: 1) unions can request voluntary recognition from employers when they present proof that a majority of the employees want to be in a union; 2) unions can file a petition for a secret ballot election with the NLRB and hope to win a majority of valid employee votes in the election.⁶⁶ For over fifty years, employers could decline a request from a union for voluntary recognition and require the union to follow the NLRB election process. Typically, employers have opted for the secret ballot option. However, the *Cemex* decision overturned the cases allowing employers to refuse voluntary recognition and requiring the union to go through an election. Now, if a union presents proof that a majority of employees want to be part of a union, the employer must voluntarily recognize the union or file an election petition within two weeks.⁶⁷ Again, the burden has been placed on the employer. Instead of requiring the union to seek an election, the burden of refuting the union's proof of representation rests on the employer.

Additionally, if an employer files a petition for an election but engages in any conduct, deemed serious enough to set the election results aside, the employer's petition will be dismissed and the employer will be forced to recognize and bargain with the union.⁶⁸ Prior to *Cemex*, an election could be rerun rather than foregone altogether if the employer engaged in any serious, wrongful conduct. This decision incentivizes unions to encourage employees to sign authorization cards even though employees may not understand that signing a card could mean more than merely indicating interest in learning about unionization; the new rule allows for union representation without an election ever being held.⁶⁹ Furthermore, the decision encourages filing unfair labor practice charges after an employee has filed a petition for an election.

The GC also asked the Board to reintroduce the *Joy Silk* standard with *Cemex*.⁷⁰ The *Joy Silk* standard would have denied an employer the right to refuse a request for voluntary recognition of a union unless the employer had "an evidence-based 'good faith doubt' as to the union's claim of majority status."⁷¹ The Board declined to reinstate this rule—a small win for employers, but it demonstrates the clear agenda of the Biden Board to increase employees' rights at all cost to employers' rights.⁷²

65. Pasternak & Held, *The NLRB and Employers'*, *supra* note 23; *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 2 2023).

66. Pasternak & Held, *The NLRB and Employers'*, *supra* note 23.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

ANALYSIS

As demonstrated by the cases highlighted under both the Trump and the Biden Board, the NLRB, after over eighty years since its creation, continues to be an ineffective agency that encourages strife in labor law. Instead of advancing the principles of the NLRA, the NLRB fails employees and employers alike. Without engaging in formal or informal rulemaking, the NLRB uses case-by-case adjudications to capitalize on labor disputes, creating more work for themselves while not developing any real, concrete labor rules. If an employee or employer is disadvantaged by one or more of the current Board's decisions, they can comply and simply wait until the next Board overturns the decision in their favor. The reliance on case-by-case adjudications encourages employers and unions alike to file cases with similar facts to those already decided in hopes that a new Board will deliver a more favorable decision.⁷³ Furthermore, each GC of the NLRB can carefully select only the cases that will achieve their Board's policy agenda.⁷⁴

For example, in 2014, Sean Caldwell attended a rally that was fighting to raise the minimum wage to fifteen dollars in Philadelphia.⁷⁵ At the time, Caldwell worked for a McDonald's as a janitor and had worked there for two years.⁷⁶ At the rally, Caldwell handed out fliers in support of the fifteen-dollar minimum wage and a union.⁷⁷ Shortly after the rally, Caldwell was late to his shift and subsequently terminated despite attempting to call in to report that he would be late.⁷⁸ Caldwell suspected he had been fired for participating in union organization rather than the stack of violations for tardiness and other infractions.⁷⁹ The Service Employees International Union, which was in support of the recent rally, took Caldwell's case, along with other complaints to the NLRB.⁸⁰

Under the NLRA, it is unlawful to terminate workers for union participation and organizing.⁸¹ In December 2014, the Obama GC assembled the cases for a trial against McDonald's and its franchisees.⁸² The ALJ trial started in 2016, with McDonald's arguing that they were not responsible for the firing because Caldwell worked for a local franchise, and the NLRB arguing that McDonald's jointly employed Caldwell and helped discourage the minimum wage efforts.⁸³ Despite the start of arguments, McDonalds launched objections and canceled

73. *Id.*

74. *Id.*

75. Bazon, *supra* note 33.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

hearing dates in an effort to delay proceedings.⁸⁴ The trial was still ongoing after the inauguration of President Trump and the appointment of a new GC.⁸⁵ In January 2018, Trump's GC proposed a new settlement which was rejected by an ALJ.⁸⁶ However, the Board overruled the ALJ's decision in McDonald's favor.⁸⁷ McDonald's went on to resolve the matter further.⁸⁸

While this example demonstrates an employer's strategic use of delay until the appointment of a new Board and GC, this tactic can be used by employers and employees alike. The Board's reliance on case-by-case adjudication combined with increased polarization since Eisenhower has provided and encouraged this behavior.⁸⁹

III. RECOMMENDATION

At their core, unions were established to protect employees' rights and maintain a safe working environment that profited both employers and employees.⁹⁰ To an extent, the NRLA has achieved its initial goals, however, as evidenced by the Trump and Biden Boards and their predecessors, the NLRB has become stagnant and politicized. The NLRB's focus has shifted and no longer advances the goals of the NLRA or develops labor law. The solution to this is to remove politics and the ever-increasing polarization from labor law by creating independent labor law courts at the federal level in the U.S.

A. Sweden

Sweden was one of the first countries to establish a labor court system in 1929.⁹¹ In Sweden, the Labor Court holds primary jurisdiction over labor issues, and other courts must refuse to take cases falling under the jurisdiction of the Labor Court.⁹² Any decisions by the labor courts are final and not appealable, however the Supreme Court in Sweden can grant a new trial in cases decided by the labor court if there is gross miscarriage of justice, new evidence of a decisive character, or the like.⁹³ A chairman and seven members, appointed by the King, sit on the Labor Court.⁹⁴ The normal terms are three years and members are usually reappointed, but only the chairman's position is full time.⁹⁵ There are

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*; Phillips, *supra* note 13. See Bazelon, *supra* note 33.

90. NAT'L LAB. RELS. BD., *1947 Taft-Hartley Substantive Provisions*, *supra* note 7.

91. R. W. Fleming, *The Labor Court Idea*, 65 MICH. L. REV. 1551, 1551 (1967).

92. *Id.* at 1552.

93. *Id.*

94. *Id.*

95. *Id.*

three “public” members of which the chairman and vice-chairman are required to have legal and judicial experience while the third public member must have special knowledge and experience in the labor field.⁹⁶ The other members of the Labor Court are laymen—three members represent labor, and the other two members represent management.⁹⁷ The laymen do not all sit on a case at the same time. Rather, the Labor Court only acts when one layman from each side is present, and the make-up of which laymen hear a case will change depending on whether the case involves salaried employees.⁹⁸

The nature of Sweden’s Labor Court is representative of how labor is organized within the country.⁹⁹ Sweden has more organizations in need of representation, but despite who they represent, Court members are expected to be objective.¹⁰⁰ Members are not expected to further the agenda of their representatives.¹⁰¹ Rather, the Swedish Labor Court aims to use the specialized knowledge of its members to create a connection between the Court and major employer and employee organizations.¹⁰²

Overall, the caseload of the Labor Court averages about 120 cases per year.¹⁰³ Once Sweden was able to establish key principles in labor law, many employer and employee federations could settle disputes without going to court.¹⁰⁴ Many of the cases still going to court, today, involve small employers with contracts with unions, but those employers are not members of the overarching employers’ federation.¹⁰⁵ One facet of the Swedish Labor Court, lacking from the U.S. labor system, is that an employee in Sweden can, individually, pursue their case even if their union decides not to take their case.¹⁰⁶

Additionally, it is important to note that the Swedish labor system and industrial relations are based more on agreement than actual legislation.¹⁰⁷ Essentially, one big bargaining association represents each side—the Swedish Employer’s Confederation (SAF) for the employers and the Swedish Confederation of Trade Unions (LO) for employees.¹⁰⁸ However, similar to the creation of unions in the U.S., Sweden experienced strife-ridden years after the

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1554.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1555; see Linda L. Rippey et al., *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 VAND. L. REV. 627, 647-54 (1988).

108. Fleming, *supra* note 91, at 1555.

creation of both confederations.¹⁰⁹ This led to a “December Compromise” which was incorporated into legislation in 1936.¹¹⁰ This Compromise recognized the mutual right to organize, a strong right of employers to dismiss an employee regardless of their membership in a union, and an understanding between the confederations that they would fix wages and other terms of employment through free bargaining.¹¹¹ This Compromise has been updated over the years, but it remains significant in the types of cases that appear before the Labor Court.¹¹² These Confederations have a large impact on the labor sphere, but Sweden has also held that a collective bargaining contract is binding on the organizations as well as its individual members.¹¹³ Enough contract violations eventually led to the creation of the Labor Court in 1929.¹¹⁴

Fundamentally, there are stark differences between the labor system in Sweden and the labor system in the U.S. Notably, the jurisdiction of the Labor Court is broad and often handles issues that would normally go to arbitration in the U.S.¹¹⁵ Additionally, there is no NLRB equivalent in Sweden—all of those cases go to the Labor Court.¹¹⁶ The Labor Court also covers cases that would fall under federal court jurisdiction because those issues would be covered by the Fair Labor Standards Act in the U.S.¹¹⁷

From these differences, the Swedish Labor Court system could not be perfectly transplanted to the U.S. The caseload of the Labor Court in Sweden is likely very low in comparison with what the U.S. would expect to see.¹¹⁸ Rather than just having one court, the U.S. would likely have to establish a system of federal courts to handle labor issues.

Furthermore, industrial relations in Sweden vary from what is accustomed to in the U.S.¹¹⁹ The Confederations represent a centralized power in collective bargaining, and the U.S. does not have anything similar.¹²⁰ However, the Labor Court does much more than simply resolve differences over the interpretation of collective bargaining contracts by also resolving cases that concern what the U.S. refers to as “unfair labor practices” (ULPs).¹²¹ Private arbitration is a less common option in Sweden because it cannot be used as a way to circumvent the Labor Court in cases of contract breach or invalidation.¹²² In essence, the Labor Court in Sweden has broader jurisdiction than the NLRB does in the U.S., but

109. *Id.* at 1556.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1557.

114. *Id.*

115. *Id.* at 1558.

116. *Id.*

117. *Id.*

118. *Id.* at 1555.

119. *Id.*

120. *Id.* at 1557.

121. *Id.*

122. *Id.* at 1558.

it does not always see the same types of cases that the NLRB routinely handles.¹²³ For example, seniority in collective bargaining agreements is often a contentious issue within the U.S., but seniority issues would never come before the Labor Court in Sweden because it is not a concept that is commonly practiced in Sweden.¹²⁴ Additionally, the December Compromise established the right of an employer to dismiss employees at the employer's discretion regardless of membership in a union.¹²⁵ The Labor Court interpreted "right" to mean that a terminated worker cannot bring the termination issue to the Labor or any other court.¹²⁶ Therefore, the Labor Court never handles discharge cases.¹²⁷ This idea would likely meet strong resistance in the U.S. because one of the foundational benefits of a collective agreement is thought to be the protection against arbitrary termination.¹²⁸

Ultimately, the U.S. would have to decide which labor issues would fall under labor court jurisdiction if a labor court system was established. However, if this system was implemented at the federal level, it would allow FLSA as well as NLRB issues to fall within that jurisdiction since those issues are both governed by federal law.¹²⁹

While Sweden's Labor Court does not map perfectly onto the U.S. labor system, there are important lessons that can be gleaned from its success. First, partisanship plays little role in the decisions of the Labor Court and in the appointment of Labor Court members.¹³⁰ Objectivity is expected of members and there is heavy reliance on the expertise of Court members within the labor field both judicially and as a litigator.¹³¹ Secondly, Sweden allows an individual to pursue their case even if their union is unwilling to do so.¹³² Incorporating these lessons into the U.S. labor law landscape would be the first step to adopting a labor court system.

The differences between Sweden's labor law landscape and U.S. labor law should not be a deterrence for implementing labor courts in the U.S. While the structure would differ, the idea is the important takeaway.

123. *Id.*; see Clyde Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 *BUFF. L. REV.* 210, 219-20 (1996) (Section 8 of the NLRA, a source of much litigation, does not have an exact equivalent in other countries. Sweden has something similar, but many countries, including France, Italy, Belgium, and Holland have not created such a rule).

124. Fleming, *supra* note 91, at 1559.

125. *Id.* at 1560.

126. *Id.*

127. *Id.*

128. *Id.*

129. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201-219; see generally National Labor Relations Act, 29 U.S.C. § 157.

130. Fleming, *supra* note 91, at 1563.

131. *Id.*

132. *Id.*

B. Success of Labor Courts Globally

Labor law reform is a topic in many countries. If the U.S. implemented labor courts, they would be on par with several other countries in Europe and Latin America as well as Mexico.¹³³ In fact, some of the countries with the highest union participation rates also have a system of labor courts including Iceland, Denmark, and Sweden.¹³⁴ In comparison, the U.S. has one of the lowest unionization rates of advanced economies.¹³⁵ While low union participation cannot be directly tied to the lack of labor courts, it is notable that almost all of the countries in the top half of union participation rates do have labor courts, except for the United Kingdom.¹³⁶ Admittedly, some other possible factors that might contribute to the low union participation in the U.S. are Right-to-work laws in many states, worker classification rules, and changes to the NLRB regulatory power.¹³⁷

Regardless, labor courts seem to have a positive effect on countries'

133. Eusebi Colás-Neila & Estela Yélamas-Bayarri, *Access to Justice: A Literature Review on Labour Courts in Europe and Latin America*, <https://www.ilo.org/static/english/intserv/working-papers/wp006/index.html>

[<https://perma.cc/6XYC-N2MS>] (last visited Mar. 25, 2025); Oscar Margán Vega & Natalia Merino Morena, *Labor Courts Are Now a Reality in Mexico*, OGLETRE DEAKINS (Oct. 19, 2022), <https://ogletree.com/insights-resources/blog-posts/labor-courts-are-now-a-reality-in-mexico/> [<https://perma.cc/9V58-JZCD>].

134. Jeff Goldstein, *How the US compares to the world on unionization*, ECONOGRAPHICS (Oct. 28, 2022), <https://www.atlanticcouncil.org/blogs/econographics/how-the-us-compares-to-the-world-on-unionization/> [<https://perma.cc/Q5F5-UMZH>] (Iceland ranks first in union participation with 90.7%, Denmark is second with 67%, and Sweden ranks third with 65.2%.)

135. *Id.* (the U.S. has a 10.3% union participation rate ranking above only four other countries—Turkey, Hungary, Lithuania, and Estonia.)

136. *Id.* (the UK has 23.5% union participation rate, doubling that of the U.S., but still ranking far below other European countries.)

137. *Id.*; PB MARES, LLP, *What is a Right-To-Work State?*, (Sept. 17, 2022), <https://www.pbmares.com/insights-what-is-a-right-to-work-state/> [<https://perma.cc/3E5W-EVSJ>] (In right-to-work states, private-sector employees have the option to choose whether they would like to join a union. In non-right-to-work states, a person can be required to join a union if they are applying for a job where the employees are unionized.); Nicole Fortin, Thomas Lemieux & Neil Lloyd, *Right-To-Work Laws, Unionization, and Wage Setting*, NAT'L BUREAU OF ECON. RSCH, (June 2022), https://www.nber.org/system/files/working_papers/w30098/w30098.pdf [<https://perma.cc/NJ82-S9XL>] (Workers covered under a collective bargaining agreement in a right-to-work state do not have to pay union dues even when they receive the same benefits as those workers who pay dues since they can choose whether to join the union. The Right-to-Work Doctrine was established under the Taft-Hartley Act in 1947.); Rachel M. Cohen, *The coming fight over the gig economy, explained*, VOX (Oct 12, 2022, 7:30 AM), <https://www.vox.com/policy-and-politics/2022/10/12/23398727/biden-worker-misclassification-independent-contractor-labor> [<https://perma.cc/RA3S-GDDU>] (highlighting another ideological struggle between the Biden and Trump Boards dealing with worker classification rules.); Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and NLRA*, PETERSON INST. FOR INT'L ECON. (June 2021), <https://www.pie.com/publications/working-papers/2021/do-us-firms-have-incentive-comply-flsa-and-nlra> (arguing that employers have to incentive to comply with the FLSA and NLRA which leads to lower unionization rates.).

economies and unionization rates.¹³⁸ Each of the countries that have adopted a system of labor courts has adjusted the labor court model to fit their unique industrial relation needs.¹³⁹ The U.S. may not want high unionization rates, so the implementation of labor courts might have no effect on union participation. However, labor courts would influence the ultimate goal of depoliticizing labor law in the U.S.

C. Bankruptcy Courts in the U.S.

From examining Sweden's Labor Court, we can see that it is not easy to simply transplant their model to the U.S. However, it is equally clear that there are severe issues with the current labor law process in the U.S. because of the structure and polarization of the U.S. One way in which the U.S. could implement a system of labor courts is by modeling them after the federal bankruptcy courts.

The federal bankruptcy courts in the U.S. are outlined under Title 11 of U.S. Code.¹⁴⁰ Article I, Section 8 of the U.S. Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies."¹⁴¹ Under this authority, Congress enacted the "Bankruptcy Code" in 1978.¹⁴² The Bankruptcy Code is codified as Title 11.¹⁴³ Although the Bankruptcy Code has been amended several times since its enactment, it remains a uniform federal law that governs

138. Goldstein, *supra* note 134.

139. Many countries, in addition to Sweden, in Europe have a system of labor courts including France, Austria, Germany, Belgium, Norway, Denmark, and Finland. Fleming, *supra* note 91, at 1564 (The jurisdiction of these courts, as seen in Sweden, is broader than the jurisdiction of the NLRB or arbitration in the U.S. European countries recognize that employers are free to terminate employees, and courts cannot reinstate discharged employees. While an employee may be entitled to severance pay, the traditional remedy of reinstatement and backpay in the U.S. is not available in European labor courts. Labor court members are expected to be objective, and the make-up of members includes representation for both employers and employees with a focus on expertise in the field. Individuals can usually pursue their own case regardless of their union. In part, this is because the benefits provided by collective agreements in the U.S. are codified in labor legislation in European countries. Individuals have an avenue of recourse even if their union declines to take their case because the right is provided for by applicable laws); See Rippey et al., *supra* note 107 (Germany's labor system rests on "co-determination" in the form of employee representation on corporate boards. Like the U.S., Germany went through several different legislative acts surrounding labor law. By 1976, Germany created a detailed statutory system that established participation and the shop floor and management levels. Parts of Germany's labor law is included in their constitution. Like Sweden's Confederations, Germany's "Work Councils" are an organized body for negotiations between management and workers for individualized enterprises.).

140. United States Bankruptcy Code, 11 U.S.C. § 101-112.

141. U.S. CTS., *Process – Bankruptcy Basics*, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> [https://perma.cc/7CJ9-TYXT] (last visited Mar. 26, 2025); U.S. CONST. art. I § 8.

142. U.S. CTS., *supra* note 141.

143. *Id.*

all bankruptcy cases.¹⁴⁴ The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure, “Bankruptcy Rules,” and the local rules of each bankruptcy court.¹⁴⁵ The Bankruptcy Code and Rules along with local rules set forth the formal legal processes for dealing with the debt problems of individuals and businesses.¹⁴⁶ Almost every one of the ninety-four federal judicial districts handle bankruptcy matters. As of May 2023, there are ninety federal bankruptcy courts.¹⁴⁷ The federal districts of Guam, the Northern Mariana Islands, and the Virgin Islands handle their bankruptcy cases directly rather than through a specific bankruptcy court, and the Eastern and Western districts of Arkansas share a single bankruptcy court.¹⁴⁸ All other federal districts have their own bankruptcy court.¹⁴⁹

Under Article I, section 8 of the U.S Constitution, bankruptcy judges’ offices are created.¹⁵⁰ Bankruptcy courts are “legislative courts” as opposed to Article III courts deriving their power from Article III of the Constitution.¹⁵¹ Bankruptcy judges are appointed by the federal circuit courts to fourteen-year, renewable terms.¹⁵² Generally speaking, bankruptcy judges are appointed by a majority vote of the circuit judges in that jurisdiction.¹⁵³ However, each circuit is free to shape its selection process, but across circuits, the selection process is merit-based.¹⁵⁴

For example, in the Fifth Circuit, a merit panel presents the top candidates to the Judicial Council for the Fifth Circuit.¹⁵⁵ The merit panel consist of a Fifth Circuit judge, a bankruptcy attorney, and a district court judge.¹⁵⁶ Applicants fill out a form requiring them to detail their competency in bankruptcy, notable cases, bar activities, and community service.¹⁵⁷ The attorney on the merit panel collects the applications and assesses the merits of each applicant.¹⁵⁸ Once the applicants are selected for interviews and interviews are conducted, the panel

144. *Id.*

145. *Id.*

146. *Id.*

147. U.S. BANKR. CT., Northern District of Indiana, BALLOTPEDIA (May 31, 2023), https://ballotpedia.org/United_States_bankruptcy_court,_Northern_District_of_Indiana [<https://perma.cc/9E27-6FXG>].

148. *Id.*

149. *Id.*

150. Craig A. Gargotta, *Who are Bankruptcy Judges and How Did They Become Federal Judges?*, THE FED. LAW. 11 (April 2018), <https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf> [<https://perma.cc/8JFN-MTD7>].

151. *Id.*

152. *Resources for Aspiring Bankruptcy Judges*, BRENNAN CTR. FOR JUST. (Sept. 26, 2019), <https://www.brennancenter.org/our-work/research-reports/resources-aspiring-bankruptcy-judges> [<https://perma.cc/SEH4-ZM78>].

153. *Id.*

154. Gargotta, *supra* note 150, at 11-12.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

usually selects the top two candidates.¹⁵⁹ The circuit judge on the panel then presents the Judicial Council for the Fifth Circuit with those candidates.¹⁶⁰ The Judicial Council consists of Fifth Circuit judges and a district judge from each judicial district in the Fifth Circuit.¹⁶¹ Once the merits of the candidates are discussed, the circuit judge member makes a recommendation, and all of the members vote on which candidate should be appointed.¹⁶² After the candidate is selected, the candidate undergoes a detailed background check and vetting with judges and attorneys.¹⁶³ The process can take several months to complete.¹⁶⁴

There are several differences between Article III judges and bankruptcy judges.¹⁶⁵ An Article III judge is appointed for a life term by the president and confirmed by the Senate.¹⁶⁶ Bankruptcy judges have a term of fourteen years and can be removed for incompetence, misconduct, neglect of duty, or physical or mental disability.¹⁶⁷ Unlike Article III judges, bankruptcy judges do not enjoy lifetime tenure or salary protection.¹⁶⁸ A bankruptcy judge's salary is determined under §225 of the Federal Salary Act of 1967.¹⁶⁹

Jurisdictionally, federal district courts have original jurisdiction over all bankruptcy and adversary proceedings, but district courts "refer" bankruptcy cases to bankruptcy judges.¹⁷⁰ Bankruptcy courts have no independent jurisdiction and only hear matters that are "referred" to them by district courts.¹⁷¹ Yet, bankruptcy judges rely on statutory authority from Title 28 of the U.S. Code, the Bankruptcy Code at Title 11 of the U.S. Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Evidence, and any local rules.¹⁷² Bankruptcy judges are recognized for their expertise and Article III judges rely on bankruptcy courts to apply the Bankruptcy Code.¹⁷³ Under the current law after the Bankruptcy Amendment and Federal Judgeship Act of 1984, original bankruptcy jurisdiction lies with the district courts.¹⁷⁴ Under 28 U.S.C. § 157(a) each district court may issue an "order of reference" which can refer "any and all cases" to the bankruptcy court.¹⁷⁵ The bankruptcy court can determine "core" matters and render a final order or judgment, while "noncore" matters can be

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 12.

175. *Id.*; 28 U.S.C. § 157(a).

heard by the bankruptcy courts but then their findings of fact and law are required to be submitted to the district court for *de novo* review.¹⁷⁶

Orders from the bankruptcy courts can be appealed, but in order to have standing to appeal, a party must be a “party aggrieved” by that party.¹⁷⁷ The requirements to be “aggrieved” are more stringent than the requirements for Article III courts.¹⁷⁸ The requirements are supposed to be a limitation to avoid endless bankruptcy appeals.¹⁷⁹ Generally, district and circuit courts can hear appeals from bankruptcy court if they so choose.¹⁸⁰ Yet, the time limits for bankruptcy appeals are shorter than other federal appeals.¹⁸¹ A notice of appeal is required within ten days of the entry of the order or judgment appealed, and the ten days include holidays and weekends.¹⁸² There can be exceptions, but, again, the stricter limits are intended to avoid endless bankruptcy appeals and allow most bankruptcy proceedings to be final.¹⁸³

D. Labor Courts in the U.S.

The model of the federal bankruptcy courts would be a good model for establishing labor courts in the U.S. for several reasons.

First, the merit-based approach to judicial appointments, demonstrated in the bankruptcy courts, would solve the polarization issues illustrated by the NLRB. The establishment of labor courts would eliminate the need for the NLRB because all disputes falling under the Board’s jurisdiction could be given to the labor courts. Much like Sweden’s Labor Court and the merit panel for U.S. Bankruptcy Courts, labor courts within the U.S. could create a panel made up of attorneys and judges with experience in labor and employment law to select and vet applicants. Then, the top candidates could, ultimately, be chosen by the circuit judges in each jurisdiction. Similarly, each candidate could be required to detail their competency in labor law, notable cases, bar activities, and community service. Instead of relying on presidential appointments and political allegiance, the judiciary of the labor courts would be appointed based on their merit and politics would be largely removed from labor law decisions.

Secondly, jurisdictional issues between the FLSA and the NLRB could be resolved by creating a labor code codified in the U.S. Code. Like Sweden’s Labor Court, labor courts in the U.S. could have a broader jurisdiction than the NLRB does today. Some relief could be provided to other federal courts by making the jurisdiction of labor courts include “all things labor” including wages, leave, and termination. Ultimately, jurisdiction, currently, divided

176. Gargotta, *supra* note 150.

177. *Resources for Aspiring Bankruptcy Judges*, *supra* note 152.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

between federal courts and the NLRB would fall under the jurisdiction of the U.S. labor courts to create one forum for resolution. Additionally, the creation of separate labor courts would allow for the option that individuals could pursue their own cases regardless of their union's willingness to take the case. As long as an individual can find recourse under the labor code, they would be entitled to bring their case before the labor courts. Furthermore, like bankruptcy courts, limitations could be placed on appeals by strict standing requirements and shorter time limits to prevent endless appeals and recognize the legitimacy of the labor court decisions.

Third, labor courts would provide the stability that the labor law landscape has been lacking. Employers and employees alike would know what to expect from labor court decisions based on the labor code. Litigation would be more effective and predictable. There would likely not be the drastic shift that the Board experiences at the end of each term because labor courts would not be pursuing a political agenda by choosing which cases to hear like the GC of the NLRB. Rather, if recourse was provided under the labor code, labor courts would hear the case. Ultimately, labor law would not be guided by politics so the pendulum would not be swinging widely back and forth.

IV. CONCLUSION

The NLRA and subsequent creation of the NLRB were put into place in an effort to promote labor peace and give employees the right to organize labor unions to collectively bargain with employers about a variety of issues including wages, hours, and working conditions. Since its creation, the implementation of the NLRA has failed employees and independent administrative agencies tasked with implementing the NLRA and protecting employees' rights.¹⁸⁴ The NLRB has failed to create a balance between employer and employee rights. Rather, the NLRB has focused on shifting the scales in favor of the employer or the employee depending on political allegiance within any given term.

The NLRB is not an effective way to carry out the primary goals of the NLRA—labor peace, rights for workers, good working conditions, and higher wages. The ineffectiveness of the NLRB has led to a confusing labor law landscape with negative effects on employers, employees, and the economy. The very structure of the NLRB has increased polarization and resulted in inconsistent decisions. In order to develop a more consistent and stable field of labor law, the U.S. should attempt to remove political agendas from the decision-making process by establishing labor courts. Creating labor courts and removing the need for the NLRB would allow appointments to the labor courts to be merit-based and would eliminate the reliance on the political allegiance of Board members to influence labor law. In the meantime, the NLRB should engage in formal rulemaking rather than relying on case-by-case adjudications

184. NAT'L LAB. RELS. BD., *About NLRB*, *supra* note 2.

to shape the labor law in the U.S.

This Note has attempted to provide an overview of labor law in the U.S. while observing the path that has led to the highly partisan, polarized Board experienced today. Then, to demonstrate the polarization of the Board in recent years, this Note walked through examples of both President Trump's Board, during his first term, and President Biden's Board. This Note did not attempt to cover all the decisions by the NLRB in these past two terms. Rather, it highlighted the cases that demonstrated the notion that each Board seeks to achieve an agenda that is dependent on political allegiance. Next, this Note provided an overview of the labor court systems in several countries paying close attention to Sweden's Labor Court and the resulting high union participation rates in other countries that have also adopted a system of labor courts.

Lastly, this Note recommended that the U.S. adopt a federal system of labor courts modeled after the federal bankruptcy courts to eliminate the need for the NLRB and largely remove politics from labor law decisions.



BACON BUSINESS: AN INTERNATIONAL COMPARISON BETWEEN THE UNITED STATES AND EUROPEAN UNION IN LIGHT OF EVOLVING PIG CONFINEMENT STANDARDS

ALEXANDRA STANGE-WEIG*

“The raising of pigs is a perfectly lawful and respectable business. Doubtless it will remain so as long as the human palate craves the thin cut of juicy ham and the crisp slice of breakfast bacon.” – Clark v. Wambold 165 Wis. 70, 160 N.W. 1039 (1917).

I. INTRODUCTION

The United States Supreme Court decided a case in 2023 which has since sparked interest in the fate of beloved bacon and inspired further conversation regarding the use of gestation crates and legislation for pig welfare.¹ This Note seeks to make a timely recommendation inspired by the recent United States Supreme Court decision in *National Pork Producers Council v. Ross*, regarding the operation of laws, regulations, and policies seeking to better the experience of pigs, consumers, and producers in the industry through an international comparison to the pig welfare laws in the European Union.²

Consumers, policymakers, and lawyers do not need expertise on pigs to be curious about the effects of the recently enacted pig welfare law, Proposition 12 (“Prop. 12”).³ People may generally find interest in knowing the quality of their food sources and have a desire to participate in what they consider to be moral treatment of animals raised for consumption. Furthermore, pork production is an industry where human livelihood is affected; from the barn to the grocery store, there are many actors involved with ensuring a certain standard is met. Thus, decisions about how to regulate the raising of pigs should be considered with great care to account for all of the important workers involved. Producers are the fundamental starting point of a great slice of bacon, as well as the essential stewards of a pig’s life. Consumers are the end point; they desire a quality slice of bacon they can feel good about eating, not just because it tastes good, but because that animal was given a humane life, that their pork came

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1. *See generally* Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023); Proposition 12 (now codified in California’s Health & Safety Code §§ 25990-25994) also sets restrictions for laying hens and veal calves, which this Note does not discuss.

2. *See* Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023); *See infra* Part III.

3. CAL. HEALTH & SAFETY CODE §§ 25990-25994 [hereinafter Prop. 12]; Animal welfare generally may ideally be defined as freedom: (1) from hunger and thirst, (2) from discomfort, (3) from pain, injury and disease, (4) to express normal behavior, and (5) from fear and distress. Jessica Axberg, *Impact of EU-Regulation on Pigs’ Welfare During Transport*, 486 SWEDISH UNIV. AGRIC. SCI. 2, 3 (2014).

from a safe facility, is environmentally conscious, and sustainably priced.⁴

The United States should adopt a legal command at the federal level, overriding *National Pork Producers Council v. Ross*, which sets minimum standards for pig welfare, and would be regulated by the United States Department of Agriculture (“USDA”). A congressional delegation of authority to the USDA would unify and clarify guidance to an industry that is already being overseen by the USDA, making the United States’ legal methods more equitable and economical to consumers, and certain pigs, across the United States. Although California’s Prop. 12 has commendable intentions to protect pig welfare, the means seem to frustrate the ends. The European Union’s pig welfare law certainly is not perfect, but perhaps it is a better guide to United States’ regulations than the California-state law by avoiding state-to-state discrepancies and unequal application of the dormant Commerce Clause doctrine by United States’ courts. Any criminal and civil sanctions for animal cruelty should be backed with technical guidance and expertise to promote a better, more predictable outcome for producers, consumers, and pigs.

The recommendations for this Note may give the impression of an adversity to California’s fight for animal welfare, that is not the intention. By no means should living and feeling animals be subjected to cruel treatment, but the legislation and policies which protect pigs should foremost be taking into consideration the well-being of the people who work tirelessly for the husbandry of those pigs, and the people who will eventually take money out of their pockets for a high-quality source of protein.

Prop. 12 was born as a ballot initiative, it grew into a state statute, and then graduated to the federal judiciary where it was eventually held constitutionally valid by the United States Supreme Court. California was not the first state to fasten its ethical concerns with animal cruelty to a legal chariot. Florida was the original actor in spearheading restrictions on animal confinement standards in the United States via ballot initiative in 2002, which transpired to amending Article Ten of the Florida State Constitution, accordingly titled “Limiting cruel and inhumane confinement of pigs during pregnancy.”⁵ Amending the Florida Constitution did not affect the pork production in, or distribution from, other states; Floridians’ democratic action resulted in only regulating conduct within the Sunshine State. Quite differently, California’s state law, Prop. 12 is constructively regulating out-of-state actors and thus needs to be addressed as a pressure on free trade. Before jumping ahead to the arguments, a foundation about Prop. 12 will be laid in Part II.

4. See Dr. Susan Brewer, *Consumer Attitudes: What They Say and What They Do*, PORK INFO. GATEWAY (Apr. 9, 2010), <https://porkgateway.org/resource/consumer-attitudes-what-they-say-and-what-they-do/> [<https://perma.cc/QA3F-MJ39>].

5. *Do You Have Something to Add to ‘Pregnant Pigs’? Now’s Your Chance!*, USA TODAY (Aug. 25, 2017), <https://www.floridatoday.com/story/opinion/2017/08/25/do-you-have-something-add-pregnant-pigs-nows-your-chance-our-view/602026001/> [<https://perma.cc/VM83-M6L8>]; FLA. CONST. art. X, § 21.

II. PIG WELFARE BACKGROUND

The similar economic structures of the European Union and United States make for a reliable comparison in analyzing pig welfare laws because of the impact that expanding stall space has on the pork market. The European Union is an economic and political association of 27 countries (also known as “member-states”), those countries enjoy free trade with one another, like the states of the United States. Most distinguishable, however, is that there exists a Constitution for the United States which intertangles them in a federalist union, whereas the countries of the European Union are bound by treaties and do not follow the same preemptive regime. A regulation in the European Union is similar to that of a federal administrative regulation in the United States. The secondary laws of the European Union (after the primary treaties) include directives, regulations, decisions, recommendations, and opinions.⁶ Like a federal law in the United States would apply to all the states, the European Union Regulations are “binding in their entirety on all EU countries.”⁷ Directives are more lenient than Regulations and they give the Member States guidance to achieve a binding end, but the means are left to the Member States. Therefore, the Member States can choose how they would like to go about achieving the goals that a certain directive sets out and then tell the European Commission about their plans to do so.⁸

Similar to the United States Supreme Court, The European Court of Justice has supremacy over European Union law, and individuals have the right to file suits related to compliance with the European Union’s fundamental treaties.⁹ Regarding the legislative arm, the European Parliament and European Council work together “to adopt and amend legislative proposals and to decide on the EU budget,” and supervise the work of the European Commission much like how the bicameral Congress does for the United States.¹⁰ The European Council holds “thousands of meetings among national officials, ministers, and heads of state and government . . . resulting in hundreds of pieces of legislation.”¹¹ The European Commission “is the EU’s politically independent executive arm” that is responsible for posing legislation and implementing the European Parliament and European Council’s decisions” like how the administrative agencies do in

6. *Types of EU Law*, EUR. COMM’N, https://commission.europa.eu/law/law-making-process/types-eu-law_en [https://perma.cc/4Z9D-G9X2] (last visited Jan. 20, 2024).

7. *Id.*

8. *Id.*

9. Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 162 (Kalypso Nicolaidis & Robert Howse eds., 2001).

10. *Welcome to the European Parliament*, EUR. PARL., <https://www.europarl.europa.eu/about-parliament/en/home> [https://perma.cc/HVA4-DGY9] (last visited Dec. 30, 2023).

11. Moravcsik, *supra* note 9, at 162.

the United States under the executive branch.¹²

A. California's Prop. 12 Ballot Initiative

California's Proposition 2 was the precursor to Prop. 12; by comparing and contrasting these two strikingly similar state animal welfare laws, reasonable predictions can be made on how Prop. 12 will affect the pork market and pork growers. In 2008, Californians used their state's ballot initiative process to amend the California Health and Safety Code by way of Proposition 2, which proposed requiring that veal calves, egg-laying hens, and pregnant pigs only be confined in a way that would allow them to "lie down, stand up, fully extend their limbs and turn around freely," with limited exceptions for "transportation, rodeos, fairs, 4-H programs, lawful slaughter, research and veterinary purposes."¹³ Proposition 2 proposed that there should be "misdemeanor penalties, including a fine not to exceed \$1,000 and/or imprisonment in jail for up to 180 days."¹⁴ Unlike Prop. 12., Proposition 2 attracted criticism mainly for its restrictions on laying hens as California is one of the United States' top egg-producing states.¹⁵ But like Prop. 12, the opponents to Proposition 2, which consisted largely of egg producers and agricultural organizations, criticized the initiative for the expense that it would have on consumers and California egg farmers.¹⁶

Ten years after Proposition 2, Prop. 12 proposed "new minimum space requirements for confining veal calves, breeding pigs, and egg-laying hens."¹⁷ Animal rights organizations labeled Prop. 12 on the ballot as anti-cruel and being a step in the right direction for pork consumers' health in California by preventing foodborne illness from pork products derived from animals confined

12. *European Commission*, E.U., https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission_en [<https://perma.cc/Q965-JU3L>] (last visited Dec. 30, 2023).

13. Proposition 2, Standards for Confining Farm Animals, Initiative Statute, approved Nov. 4, 2008, Gen. Elec. (Cal. 2008) (effective Jan. 1, 2015) (ratified via referendum vote as Prop. 2 in the Nov. 4, 2008, election).

14. *Id.*

15. Kristine A. Tidgren, *Whatever Happened to that Egg Case?*, IOWA STATE UNIV. (Mar. 18, 2015), <https://www.calt.iastate.edu/blogpost/whatever-happened-egg-case> [<https://perma.cc/2BEC-US3D>].

16. Paige M. Tomaselli, *California's Proposition 2: Good for Chickens and Good for You*, CTR. FOR FOOD SAFETY (Jan. 8, 2015), <https://www.centerforfoodsafety.org/blog/3688/californias-proposition-2-good-for-chickens-and-good-for-you> [<https://perma.cc/S7FN-X3B8>]. As of 2014, Proposition 2 caused brokers supplying the California market to offer higher prices to egg producers in order to meet California's new egg rules. Dan Charles, *How California's New Rules Are Scrambling the Egg Industry*, NPR (Dec. 29, 2014), <https://www.npr.org/sections/thesalt/2014/12/29/373802858/how-californias-new-rules-are-scrambling-the-egg-industry> [<https://perma.cc/2VAR-L2H2>].

17. Prop. 2 (Cal. 2008); Proposition 12, Prevention of Cruelty to Farm Animals Act (Cal. 2018) (effective Jan. 1, 2022) (ratified via referendum vote as Prop. 12 in the Nov. 6, 2018, election).

in close spaces.¹⁸ This campaigning was successful, and California voters passed Prop. 12 by a majority of almost sixty-three percent.¹⁹ Now what was formerly Prop. 12, or the “Prevention of Cruelty to Farm Animals Act,” is codified in California’s Health and Safety Code.²⁰ The crucial differences between Proposition 2 and Prop. 12 is that Prop. 12 made it illegal for non-California producers to sell non-compliant pork within the state, and Proposition 2 largely affected California’s agricultural production whereas Prop. 12 affects almost exclusively out-of-state pork production.²¹

B. California’s State Law – Prop. 12

The Prevention of Cruelty to Farm Animals Act (a.k.a. Prop. 12) says that a “farm owner or operator within the state shall not knowingly cause any covered animal to be confined in a cruel manner.”²² The California Code of Regulations compliments this Act that:

Commencing January 1, 2024, any person engaged in business in the state as a pork producer, or any out-of-state pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat, from the breeding pig or its immediate offspring, for human food for commercial sale in California, shall hold a valid certification issued pursuant to Article 5 of this Chapter as a certified operation.²³

The specific requirements for California and non-California producers, distributors, and retailers is that they may not “knowingly engage in a commercial sale . . . of whole pork meat . . . if the whole pork meat is the product of a breeding pig, or the product of the immediate offspring of a breeding pig.”²⁴

The exceptions to these confinement requirements for when a person does

18. Kitty Block & Sara Amundson, *Inside our campaign for Proposition 12, the strongest law for farm animals*, HSUS (Nov. 12, 2021), <https://www.humanesociety.org/blog/inside-our-campaign-proposition-12-strongest-law-farm-animals> [<https://perma.cc/VYU5-5T54>]; Valerie Baron, *YES on Prop 12: Improving Food Animal Welfare in CA & Beyond*, NATURAL RES. DEF. COUNCIL (Oct. 17, 2018), <https://www.nrdc.org/bio/valerie-baron/yes-prop-12-improving-food-animal-welfare-ca-beyond> [<https://perma.cc/X4L5-UYAH>].

19. *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTOPEDIA, [https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)) [<https://perma.cc/2PL8-QWHX>] (last visited Jan. 29, 2024).

20. Throughout this Note, “Prop. 12” refers to California’s state law, not the ballot initiative, because the name “Prop. 12” stuck with this legislation after it was codified.

21. “California’s 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market.” Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1173 (2023) (Kavanaugh, J., concurring & dissenting).

22. CAL. HEALTH & SAFETY CODE § 25990(a) (2023).

23. CAL. CODE REGS. tit. 3, § 1322.1(b) (2022).

24. *Id.* at § 1322.1(a) (2022).

not need to comply are: (a) during medical research, (b) for veterinary purposes, (c) transportation, (d) rodeo exhibitions, state or county fair exhibitions, 4-H programs, and similar exhibitions, (e) during slaughter, as this is covered by federal statute, (f) during the five-day period prior to the breeding pig's expected date of giving birth, and when the pig nurses her piglets, and (g) during period for animal husbandry purposes which cannot exceed more than six hours in any one day, and no more than an entire day in a month.²⁵

There are particular definitions to be laid out by the statute that direct its application: (1) "breeding pig," and (2) "whole pork meat." First, a "breeding pig" is "any female pig . . . kept for the purpose of commercial breeding who is six months or older or pregnant," meaning this definition includes gilts and sows, but excludes boars.²⁶ Second, "whole pork meat" specifically refers to:

Any uncooked cut of pork, including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole pork meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.²⁷

The California Department of Food and Agriculture ("CDFA") is the state agency put in charge of the implementation and enforcement of Prop. 12. Since the Supreme Court's upholding of Prop. 12, the CDFA has been busy educating in-state and out-of-state producers, retailers, and distributors for what they need to do if they want to sell whole pork meat to California consumers.²⁸ Before Prop. 12, there were already stations set up on the California border to prevent certain agricultural products from crossing; these stations will now be able to check the transporters of whole pork meat to ensure that the products they carry contain a "PROP 12 Complaint" packing slip.²⁹ The CDFA can enforce the regulations on out-of-state actors without overextending its police powers or abrogating federal law by: (1) certifying third party agents to check non-California producers; (2) requiring shipping documentation, and (3) an audit trial as a means of recordkeeping to verify the non-California producer has not

25. CAL. HEALTH & SAFETY CODE § 25992 (2023).

26. A gilt is a female pig that has not had an offspring, whereas a sow has offspring. *Id.* at § 25991(a).

27. *Id.* at § 25991.

28. *Animal Care Program*, CA DEP'T FOOD & AG., <https://www.cdfa.ca.gov/AHFSS/Animalcare/StakeholderResources/> [<https://perma.cc/2TF3-5XPN>] (last visited Feb. 9, 2024) (for education materials).

29. *See California Border Protection Stations (BPS)*, C.A. DEP'T FOOD & AG., https://www.cdfa.ca.gov/plant/PE/ExteriorExclusion/borders_map.html [<https://perma.cc/CC5Y-7NR3>] (last visited Feb. 8, 2024).

violated the statute.³⁰

The CDFA lists its accredited certifying agents on its website.³¹ Under the California statute, accredited agents cannot be just anyone, they must “have sufficient expertise in covered animal production and covered product distribution techniques to fully comply with and implement the terms and conditions of the certification program.”³² Accredited agents are charged with inspecting and deciding whether to certify an out-of-California “breeding pig” operation as compliant to the California Health and Safety state law.³³ This provision allows California to regulate out-of-state actors through a third party.

Next, the California Code of Regulations Title 3, Division 2, Chapter 10, Article 3, Section 1322.4 lays out the requirements for the shipping documentation that must be included with “whole pork meat” to be distributed and sold in the state of California from out-of-state distributors and producers. Specifically, this section dictates that:

All documents of title and shipping manifests for shipments of whole pork meat entering the state or transported within the state for commercial sale in California shall include the statement ‘Pork CA Prop 12 Compliant’. The statement shall be clearly legible and plainly printed or stamped.³⁴

Then, for a pig operation to maintain good standing certification, it “must maintain records concerning the production and distribution of covered animals and/or covered products.”³⁵ Those records must then be kept for two or more years.³⁶

Lastly, there are also criminal and civil penalties attached to those found in violation of California’s amended Health and Safety Code’s Farm Animal Cruelty provisions. Chapter 13.8, Section 25993(b) reads:

Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment . . .³⁷

30. CAL. CODE REGS. tit. 3, § 1322 (2022).

31. *Accredited Certifying Agents*, C.A. DEP’T FOOD & AG., <https://www.cdfa.ca.gov/AHFSS/AnimalCare/AccreditedCertifyingAgents.html> [<https://perma.cc/6ZAW-K9XB>] (last visited Jan. 20, 2024).

32. CAL. CODE REGS. tit. 3, § 1326.10(a) (2022).

33. *Id.* at § 1326.10(a)(4).

34. *Id.*

35. *Id.* at § 1326.2(a).

36. *Id.* at § 1326.2(a)(3).

37. CAL. HEALTH & SAFETY CODE § 25993(b) (2023).

Although California does not violate its state police power, opposition to the statute argued that the Golden State was out of line and unlawfully making its way into discriminatory state protectionism under the doctrine of the dormant Commerce Clause. A more effective way to ensure state-to-state conformity with pig welfare standards would be a federal law that imitates the enforcement mechanism of the European Pig Directive (discussed further in Part II, Section D).

C. Prop. 12 Goes to Court

After Californians voted in favor of Prop. 12, the National Pork Producer's Council and American Farm Bureau Federation took judicial action in federal court to have the state statute enjoined from officially becoming a part of California's code and declared unconstitutional. On behalf of their constituents, these two agricultural organizations saw Prop. 12 as an overextension of California's ability to influence the pork industry outside of its own borders, most poignantly because California produced a small fraction of pork while substantially consuming it, partially thanks to having the highest state population.³⁸ Ultimately in the spring of 2023, the Supreme Court voted against the agricultural organizations' arguments to find Prop. 12 unconstitutional, but not without some interesting discussion regarding the outcomes of allowing the law to stand.

Here we have a mix of conservative and liberal justices in a 5-4 majority for California, with five written opinions. The Supreme Court held that "there is no per se rule under dormant Commerce Clause forbidding enforcement of state laws that have practical effect of controlling commerce outside the State, when those laws do not purposely discriminate against out-of-state economic interests."³⁹ Additionally, the Supreme Court held that California's Prop. 12 was not subject to the *Pike* Balancing Test to determine the weight of legitimate state interests against burdens on interstate commerce.⁴⁰ Furthermore, there was no substantial burden imposed onto interstate commerce by Prop. 12; thus, it fails to show a violation against the dormant Commerce Clause.⁴¹ This Note disagrees with the majority holdings and contends that there was in fact a substantial burden on interstate commerce which can be remedied by a federal law similar to that of the European Union's Pig Directive.

38. Scott McFetridge, *California Bacon Law Takes Effect. Why Pork From Farms Using Cages Will Still be on Shelves*, OTTAWA CITY NEWS (Jun. 30, 2023), <https://ottawa.citynews.ca/2023/06/30/california-bacon-law-takes-effect-but-pork-from-farms-using-cages-will-still-be-on-shelves/> [<https://perma.cc/3B3K-5KWJ>] ("California . . . consumes roughly 13% of the nation's pork but produces almost none of it.").

39. *Nat'l Pork Producers Council*, 143 S. Ct. at 1143.

40. *Id.*

41. *Id.*

D. The Supreme Court's Analysis & the Dormant Commerce Clause Doctrine

The dormant Commerce Clause is a doctrine benched in the United States Congress's plenary commerce powers deriving from the Commerce Clause in Article 1, Section 8.⁴² The Supreme Court has substantiated fundamental principles from dormant Commerce Clause jurisprudence to articulate the principles of this judge-made doctrine.

There is a two-part balancing test to analyzing dormant Commerce Clause issues: (1) whether the state's statute is economically discriminatory against out-of-state residents, and (2) if the statute is discriminatory under the first part, then whether the burden imposed on commerce is excessive. The dormant Commerce Clause is meant to prevent state protectionism to keep state economies from being inequitably powerful against one another.⁴³ However, the logical first part of a court's decision-making is determining if the statute is offensive on its face or as applied. Usually, a facial challenge will put the entire statute's validity at stake, and the as-applied challenge just more narrowly construes the state's statute through interpretation by the court. If the state statute is facially discriminatory, then it is typically struck down because only United States federal laws have the constitutional ability to tell more than one state what to do under Congress's interstate Commerce Power.⁴⁴

In *National Pork Producers Council v. Ross*, California's statute was facially neutral because it was not clear at first blush that Prop. 12 discriminated against other states, since the statute applied to both in-state and out-of-state pork equally. In practice though, the agricultural organizations argued that Prop. 12 did in fact unequally discriminate against out-of-state pork because most of the pork in the United States is raised outside of the state of California. However, the Court's majority agreed with California because Prop. 12 "applie[d] only to sales inside California, moreover, producers outside California [were] free to confine animals however they choose for products sold outside the State."⁴⁵ Writing for the majority, Justice Gorsuch added that the Supreme Court "has long recognized that virtually all state laws create ripple effects beyond their borders," leaving unresolved the question of how substantial an effect has to be to be considered a wave instead of a ripple.⁴⁶

California's Secretary of Agriculture stated that the restriction of certain animal products for the purpose of preventing their consumption and "complicity in a practice that the State has deemed cruel" is far from unusual.⁴⁷

42. U.S. CONST. art. 1, § 8, cl. 3.

43. *Nat'l Pork Producers Council*, 143 S. Ct. at 1144, 1153.

44. U.S. CONST. art. 1, § 8, cl. 3.

45. Brief in Opposition for Intervenor Respondents at 1, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct., 1142 (2023). (No. 21-468).

46. This Note considers the question and concludes that Prop 12 is likened to a wave with a wake. *Nat'l Pork Producers Council*, 143 S. Ct. at 1144.

47. Brief for Respondents at 24, *Nat'l Pork Producers Council*, 143 S. Ct., 1142 (2023) (No. 21-468).

Moreover, that “Proposition 12 has local health-related justification,” that California voters adopted “Proposition 12 as a precautionary measure addressing any potential ‘threats to the health and safety of California consumers, and the “close confinement may . . . ‘lead to the increased risk of the spread of disease between hogs.’”⁴⁸ The Supreme Court thought these concerns were deemed “legitimate,” which this Note does not contest.

I. Notable Dissenting Points

Justice Kavanaugh writes in his concurring and dissenting opinion that “the Framers in Philadelphia . . . adopted a new Constitution . . . [to] create a national economic market and overcome state restrictions on free trade – and thereby promote the general welfare.”⁴⁹ Markedly, in agreeing with the agricultural-organization petitioners, Justice Kavanaugh writes that:

Importantly for this case, the vast majority of pig farms are located in States other than California – such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. And the vast majority of pork is likewise produced in States other than California. In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production throughout the United States.⁵⁰

If states’ pig welfare statutes (which produce little pork themselves) are constructively controlling those states that do, the United States should be setting the standards so that states cannot “lay any Imposts or Duties on Imports or Exports.”⁵¹ As of April 2024, the United States decision in *National Pork Producers Council v. Ross* served as the closest existing national decision on stall size restrictions for breeding pigs.

E. The Path to the European Union’s Pig Directive

The European Union and United States’ regulations for pig welfare laws, and restrictions on stall sizes happened approximately during the same timeframe. The European Union has a more progressive approach to farm animal welfare than the United States, but the European Union has been met with some criticism for low rates of compliance to those laws.⁵²

48. *Id.* at 22.

49. *Nat’l Pork Producers Council*, 143 S. Ct. at 1172–73 (Kavanaugh, J., concurring & dissenting).

50. *Id.* at 1173 (Kavanaugh, J., concurring & dissenting).

51. See U.S. CONST. art. 1, §. 10, cl. 2.1.

52. NEIL DULLAGHAN, DO COUNTRIES COMPLY WITH EU ANIMAL WELFARE LAWS?, RETHINK PRIORITIES 2 (2020), https://rethinkpriorities.org/wp-content/uploads/2020/08/Do-Countries-Comply-Report_RethinkPriorities.pdf [<https://perma.cc/5DN6-QZ5P>].

There was a “flurry of legislative activity in the 1990s,” but the European Union animal welfare laws’ genesis was really in 1974 concerning the slaughter of animals.⁵³ Legal action regarding breeding pigs did not occur until the mid-2000s when the European Union required that there be group housing for pregnant pigs.⁵⁴ Sweden was the first member state of the European Union to ban gestation stalls for sows, and was followed shortly by (then member state) the United Kingdom, and then in 2013 the European Union decided to fully ban gestation stalls.⁵⁵ In contrast, the United States where individual states, like California, have enacted their own gestation stall restrictions, but no bans.⁵⁶ Despite the European Union’s ban, its enforcement mechanisms lack torque, which the United States would need to take into considerations should it decide to pass national legislation on breeding pig gestation stall restrictions. Nevertheless, the European Union provides a model of what a United States federal act and regulations could utilize.

F. European Union Pig Confinement Laws

In 1976 the Council of Europe created the “European Convention for the protection of animals kept for farming purposes,” which laid out minimum standards for all the Member States to protect farm animals.⁵⁷ As a result of this Convention, in 2008 the European Commission passed the central Council Directive 2008/120/EC (the “Pig Directive”), which mandated the requirement that pregnant sows be kept in groups instead of individual stalls came into force in 2013.⁵⁸ The Pig Directive states that “a balance should be kept between the various aspects to be taken into consideration, as regarding welfare, including

53. Nicholas K. Pedersen, *Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn*, ANIMAL L. & HIST. CENTER (2009), <https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn> [<https://perma.cc/5TBY-U4DU>]; Sophie Hild & Louis Schweitzer (eds.), *Animal Welfare: From Science to Law*, LA FONDATION DROIT ANIMAL 59 (2019), <https://www.fondation-droit-animal.org/documents/AnimalWelfare2019.v1.pdf> [<https://perma.cc/7PKD-K4GR>].

54. *Id.* at 61–62.

55. *Gestation Crates: A Growing Financial Risk*, FAIRR (Feb. 22, 2022), <https://www.fairr.org/policy/issue-briefings/gestation-crates> [<https://perma.cc/JE6R-DCB8>].

56. In 2016 Massachusetts, like California, passed restrictions on pork sales by ballot initiative – called Question 3 (“Q3”). “Notably, the legislation not only applied to animals raised within Massachusetts, but also to . . . pork . . . raised outside the state.” John G. Dillard, *Massachusetts Delays Enforcement of Question 3 Pork Restrictions*, OFW (Aug. 11, 2022), <https://ofwlaw.com/massachusetts-delays-enforcement-of-question-3-pork-restrictions/> [<https://perma.cc/ECW9-U39Q>].

57. European Convention for the Protection Of Animals Kept for Farming Purposes, Sept. 10, 1976, 1978 O.J. (L 323) (amended 1992).

58. *Food Safety; Pig Welfare*, EUR. COMM’N, https://food.ec.europa.eu/animals/animal-welfare/animal-welfare-practice/animal-welfare-farm/pigs_en [<https://perma.cc/J4A4-M5CM>] (last visited Jan. 28, 2014).

health, economic and social considerations, and also environmental impact.”⁵⁹

The European Union’s Pig Directive gives standards for floorspace based on the weight of the pigs, for example if a pig in weaning or rearing weighs more than 100 kilograms (220.5 pounds), then 1,00 m² “unobstructed floor area” should be available.⁶⁰

The total unobstructed floor area available to each gilt after service and to each sow when gilts and/or sows are kept in groups must be at least 1,64 m² and 2,25 m² respectively. When these animals are kept in groups of fewer than six individuals the unobstructed floor area must be increased by 10%. When these animals are kept in groups of 40 or more individuals the unobstructed floor area may be decreased by 10%.⁶¹

The most similar provisions of the European Union’s Pig Directive to that of Prop. 12, are the requirements that Member States ensure flooring spaces for female breeding pigs be “equal to at least 0,95 m² per gilt and at least 1,3 m² per sow, must be of continuous solid floor of which a maximum of 15% is reserved for drainage openings.”⁶² The European Union’s stipulations are very similar to California’s since 2,25 m² is approximately twenty-four feet squared.⁶³

To enforce the Pig Directive, Member States ensure “that inspections are carried out under the responsibility of the competent authority in order to check that the provisions of this Directive are being complied with,” by taking a sample in their jurisdiction, and that every two years the Member States “shall inform the Commission of the results of the inspections.”⁶⁴ The USDA could conduct similar surveys in the United States by asking states to report on the compliance from certain areas, comparable to a tax audit.

The European Union’s pig welfare retained in the Pig Directive stems from the European Convention for the Protection of Animals Kept for Farming Purposes, which exists across all the Member States thanks to the European Union’s primary treaties.⁶⁵ The Pig Directive sets out minimum standards for the member states to abide by. They can either stick with the standards as recommended or make them stricter to restrict producers’ freedom over confinement of breeding pigs.

59. Council Directive 2008/120, pmb1. ¶ 12, 2008 O.J. (L 47) 5 (EC) [hereinafter “Pig Directive”].

60. *Id.* at art. 3(1)(a).

61. *Id.* at art. 3(1)(b).

62. *Id.* at art. 3(2)(a).

63. METRIC CONVERSIONS, <https://www.metric-conversions.org/area/square-feet-to-square-meters.htm> [<https://perma.cc/3726-7YEW>] (last visited Sept. 21, 2024); CAL. CODE REGS. tit. 3, § 1322.1(a)(2) (2022).

64. Pig Directive 2008/120, art. 8, 2008 O.J. (L 47) 8 (EC).

65. *See* Council Directive 78/117, 1978 O.J. (L 323) 1 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1978:323:FULL> [<https://perma.cc/CJE2-NYCT>] (last visited Apr. 14, 2025).

III. ARGUMENT FOR A NATIONAL PIG WELFARE LAW IN THE UNITED STATES

Producing pork is essential to a global consumer base that seeks a tasty, safe, economical, and ethical protein choice. A federal law that sets the baseline for animal confinement expectations but allows for states to be more restrictive of producers within that jurisdiction, while preempting any restrictions on interstate commerce, is a better approach to pig welfare in the United States. This federal law would partially replicate the Pig Directive by setting a uniform minimum threshold requirement for gestation crates and would prevent state laws like Prop. 12 from trendsetting for other states through state-specific ballot initiative processes. The USDA would be in a better position than the nine academic figureheads of the Supreme Court to determine the answer regarding the welfare of pigs, health of pork meat consumers, and the pork economy.

There are two overarching reasons ascertained from a comparative review of the Pig Directive that may be guiding principles for a federal law in the United States: (1) promoting free market through interstate commerce, which is better for long-term sustainability; and (2) balancing health, socio-economic, and environmental impacts into the law through scientific guidance. First, in the recitals, the Pig Directive acknowledges “[d]ifferences which may distort conditions of competition interfere with the smooth running of the organization of the common market in pigs and pig products.”⁶⁶ Second, the Pig Directive states that “[a] balance should be kept between the various aspects to be taken into consideration, as regarding welfare including health, economic and social considerations, and also environmental impact.”⁶⁷ Although California’s statute laudably seeks to regulate pig welfare in the United States, Prop. 12 is not an equitable law because of the practical applicability for the law over major pork-production states. The European Union provides a template for a national pig welfare law in the United States. The Pig Directive is a promising template for the United States to follow because of its uniformity and equitable treatment of each member state in the European Union. As opposed to the consequences for pigs and the pork industry resulting from the disparate application of the dormant Commerce Clause in *National Pork Producers v. Ross* by the United States Supreme Court.⁶⁸

A. The Global Pork Market & International Pig Welfare

What the United States and European Union choose to do regarding the treatment of female breeding pigs in their respective jurisdictions affects more than just their own citizens, making the topic of regulating pig welfare by gestation crates internationally interesting on its own regarding global trade. Californians provide a perfect case study for this very sentiment. With the

66. *Id.* at recital (6).

67. *Id.* at recital (12).

68. See *Nat’l Pork Producers Council*, 143 S. Ct. at 1142.

United States and European Union playing such an important role in the global pork market, it is pressing to look at how the more restrictive confinement stall standards in each of these locations is affecting all the involved parties. As the global population grows, it is ever more important to make the legal standards surrounding the supply chain of pork products economical, moral, and concerned with safety.⁶⁹ The needs of each involved actor should be weighed to make the system of breeding and raising pigs “manageable, economically viable, sustainable and socially acceptable.”⁷⁰

In modern times, pork is either the most, or one of the most consumed meats in the world.⁷¹ Both the United States and European Union are major exporters in the worldwide production of pork.⁷² The business of producing pork products is economically important to the United States and European Union. In 2022, the United States produced eleven percent of the world’s total pork, at a value of over \$7.7 billion, making it the third largest producer of pork products.⁷³ The European Union beats the United States in pork production, taking the number two spot behind China for global production.⁷⁴ The European Union exports about 4.4 million tons per year.⁷⁵

It has been accepted that animal welfare and international trade are inextricably linked.⁷⁶ For example, the European Union has restricted imports of animal furs from countries that use leg-hold traps international trade of furs

69. *Population*, U.N., <https://www.un.org/en/global-issues/population> [<https://perma.cc/9VTL-9AGS>] (last visited Feb. 3, 2024) (The United Nations predicts that the world population will reach 8.5 billion in 2030).

70. Emma M. Baxter et. al, *Transitioning from crates to free farrowing: A roadmap to navigate key decisions*, 9 FRONTIERS VET. SCI. 15 (Nov. 14, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9701704/pdf/fvets-09-998192.pdf> [<https://perma.cc/V6K5-EPW8>].

71. M. Shahbandeh, *Meat consumption worldwide 1990-2023*, STATISTA, <https://www.statista.com/statistics/274522/global-per-capita-consumption-of-meat/#statisticContainer> [<https://perma.cc/YRN5-5JHC>] (last visited Sept. 5, 2024); Michael E.R. Dugan et. al., *Pork as a Source of Omega-3 [n-3] Fatty Acids*, 4 J. CLIN. MED. 1999 (2015), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4693156/pdf/jcm-04-01956.pdf> [<https://perma.cc/QM3K-444R>].

72. Elżbieta Jadwiga Szymańska, *The Development of the Pork Market in the World in Terms of Globalization*, 16 J. AGRIBUSINESS & RURAL DEV. 843, 849 (2017).

73. *Facts & Statistics*, PORK CHECKOFF, <https://porkcheckoff.org/pork-branding/facts-statistics/> (last visited Feb. 2, 2024); *Global Pork Production in 2022 and 2023, by Country*, STATISTA, <https://www.statista.com/statistics/273232/net-pork-production-worldwide-by-country/> [<https://perma.cc/6AL7-Y76T>] (last visited Feb. 7, 2024).

74. *Global Pork Production in 2022 and 2023, by Country*, STATISTA, <https://www.statista.com/statistics/273232/net-pork-production-worldwide-by-country/> [<https://perma.cc/6AL7-Y76T>] (last visited Feb. 7, 2024).

75. *Pigmeat*, EUR. COMM’N, <https://agridata.ec.europa.eu/extensions/DataPortal/pigmeat.html> [<https://perma.cc/N9VS-49AJ>] (last visited Jan. 28, 2024); *Agriculture and Rural Development; Pork*, EUR. COMM’N, https://agriculture.ec.europa.eu/farming/animal-products/pork_en [<https://perma.cc/GL7C-SLPP>] (last visited Jan. 28, 2024).

76. “Debates in the international community about the relationship between trade rules and non-economic values, including environmental and animal protection, have shaped understandings of how trade rules should be interpreted and applied.” Katie Sykes, *Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection*, 5(1) TRANSNAT’L ENV’T L., 55, 72 (2016).

is affected by the animal welfare consideration from the European Union.⁷⁷ Similarly, banning gestation stalls has put additional weight onto the already burdened European pork market, causing the European Union to shift its focus away from global exports because it could no longer compete with other major exporters like Brazil and the United States.⁷⁸ Additionally, like Americans, Europeans are increasingly concerned with environmental and health issues revolving around pork production, which “are expected to limit the production growth” of the pork industry in the European Union.⁷⁹ In 2023, with the collision of the Pig Directive, disease, COVID-19 recovery, and market demands, pork producers in the European Union “fear an overhaul of EU livestock regulations . . . will cost billions and price EU pork out of export and domestic markets.”⁸⁰ It was estimated that “ending sow stalls swiftly by 2025 would cut pork production by nearly a quarter and raise prices by almost half.”⁸¹ If the United States has a uniform policy for gestation crates, instead of a mixed policy across the states, this allows for predictable exportation and quality of United States pork products. The USDA, as a national agency, is the best choice to provide for the regulation of pig gestation crates as a means of promoting pig and consumer health and wellbeing.

B. Science-Backed Decisions

Like the European Union’s reliance on the European Food Safety Authority (“EFSA”), the United States could use the USDA to provide an expert viewpoint that is substantiated in widely accepted research and technical guidance, and the USDA may then use a technical sub-agency for the ongoing regulation of pig and farm animal welfare.⁸² The Pig Directive relies on veterinary expertise and assistance from the EFSA and states that based on the EFSA’s expert opinion, the Commission *shall* draw up a report that accounts for “the socioeconomic consequences, the sanitary consequences, the environmental effects and different climatic conditions.”⁸³ The EU Reference Centre for Animal Welfare

77. Council Regulation (EEC) 3254/91, 1991 O.J. (L 308) 1 (EU).

78. *Id.*

79. Christos Tzanidakis et al., *An Overview of the Current Trends in Precision Pig Farming Technologies*, 249 LIVESTOCK SCI., 104530 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S1871141321001384> [<https://perma.cc/ND9L-VF73>].

80. Gus Trompiz, *EU Pork on a Lean Streak as Higher Standards Drive up Costs*, REUTERS (June 12, 2023), <https://www.reuters.com/markets/commodities/eu-pork-lean-streak-higher-standards-drive-up-costs-2023-06-12/> [<https://perma.cc/9VZ6-G83Q>].

81. *Id.*

82. California has been criticized in other cases that implicate the agricultural industry for relying on science that is not widely accepted. See *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021); see also, Glenn G. Lammi, *Monsanto v. Hardeman*: Solicitor General’s Brief Unwittingly Makes Strong Case For Supreme Court Review, FORBES, (Jun. 1, 2022), <https://www.forbes.com/sites/wlf/2022/06/01/monsanto-v-hardeman-solicitor-generals-brief-unwittingly-makes-strong-case-for-supreme-court-review/> [<https://perma.cc/QH58-RAJ2>].

83. Pig Directive 2008/120, art. 7, 2008 O.J. (L 47) 8-9 (EC).

(“EURCAW”) has published factsheets to notify producers of indications that they need to intervene for the welfare of pigs, whereas California may set a state-specific requirement, but cannot further advise out-of-state producers in as meaningful of a way like the USDA could.⁸⁴

With the already substantiated breadth of resources available to the USDA to regulate pig welfare through minimum stall requirements, this agency is suitable to implement a national law in the United States, similar to the Pig Directive of the European Union. The USDA is already the delegated authority over the welfare of pigs, and health of consumers by the Animal Welfare Act,⁸⁵ Twenty-Eight Hour Law,⁸⁶ Animal Health Protection Act,⁸⁷ Swine Health Protection Act,⁸⁸ Federal Meat Inspection Act,⁸⁹ and Humane Methods of Slaughter Act.⁹⁰ The USDA also has relevant sub-agencies: (a) the Food Safety and Inspection Service, (b) Agricultural Research Service, (c) Animal and Plant Health Inspection Service, (d) Economic Research Service, and (d) Foreign Agricultural Service.⁹¹ The USDA can effectively use its vast resources to properly obtain data driven recommendations for a minimum space standard comparable to the Pig Directive which sets a minimum floorspace based on the weight of a pig, for a bare minimum of 0,15 square meters (approximately 10.8 square feet).⁹²

Like the European authority, EFSA, the USDA would be in the best position to compile and weigh research and hear public opinion on how to set welfare standards for breeding pigs and the use of gestation stalls to promote their quality of life. In its ballot initiative, California listed the concerns for health that result from gestation crates. If this is a legitimate issue for consumer health, then it should be a nationwide health measure. Undeniably, concerns for health were valid for California consumers to have, but the scientific support is contested. The American Public Health Association filed an amicus curiae brief supporting these contentions for the health interests of Californians by making the statement that “intensive confinement of sows poses a profound danger to food safety and public health in California.”⁹³ However, if there are serious health concerns for consumers, there should be a national standard to guarantee consumer food safety which is already being regulated by the USDA’s sub-agencies. The size of an operation and health outcomes for pigs and people are

84. Ruis Schubbert, *Group-housing and mixing of sows, Vulva lesions*, EURCAW PIGS (2020), <https://edepot.wur.nl/540108> [<https://perma.cc/MK6V-4TGL>] (last visited Apr. 25, 2025).

85. Although, the Animal Welfare Act exempts farmed animals. 7 U.S.C. 54 §§ 2131-2159.

86. 49 U.S.C. § 80502; 9 C.F.R. Part 89.

87. 7 U.S.C. §§ 8301-8317.

88. 7 U.S.C. 69 §§ 3801-3813.

89. 21 U.S.C. 12 §§ 601-695.

90. 7 U.S.C. § 1901; 9 C.F.R. Part 313.

91. *FDLP Resource Guides*, USDA, <https://libguides.fdlp.gov/us-department-of-agriculture/agencies-of-the-usda> [<https://perma.cc/8MEB-ZPG7>] (last visited Apr. 25, 2025).

92. See Pig Directive 2008/120, art. 3, 2008 O.J. (L 47) 6 (EC).

93. Brief for Respondents at 8, *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 46 (2022) (No. 21-468).

correlated as well as other factors.⁹⁴

C. Cookin' with Grease – Pork Farm Consolidation

The regulation of gestation crates has logical consequences that are better understood with some historical context on the tension between small and large farming operations. State statutes such as Prop. 12 may lead to more consolidation, which could be negative for pigs and producers in the long-term.⁹⁵ In the short time Prop. 12 has been valid, it has collided with the already happening pork farm consolidation, forcing the race to the bottom to be expedited, and increasing the difficulty for smaller farms to compete.⁹⁶

Those concerned with consolidation will often also point to the industrialization of agriculture that comes about when farms consolidate and grow to a certain point to be scaled at a large commercial level.⁹⁷ The legal term for these large animal operations is “Confined Animal Feeding Operation” (“CAFO”). The United States Environmental Protection Agency (“EPA”) defines a “large CAFO,” specifically for swine, as one that has: (1) at least 2,500 swine each weighing fifty-five pounds or more, or (2) 10,000 swine each weighing less than fifty-five pounds.⁹⁸ The USDA reports that CAFOs have brought “concerns regarding facilities’ air and water quality, occupational health, and waste management.”⁹⁹ The growth of pig operations has led to consumer concern with the safety and morality of their pork, as reflected by the Prop.12 ballot initiative. This underlying concern with consolidation and industrialization of the farming industry has affected the thinking of American and European consumers about the quality and ethical sourcing of their food.¹⁰⁰

94. See *infra*. Part II.C.

95. See Christina Nuñez, *What’s better for the world: local farms or large agribusiness?*, GLOB. CITIZEN (Feb. 16, 2015), <https://www.globalcitizen.org/en/content/whats-better-for-the-world-local-farms-or-large-ag/> [<https://perma.cc/RH3V-JY7Y>].

96. Dr. Barry K. Goodwin, *California’s Proposition 12 and its Impacts on the Pork Industry*, 1 (Oct. 5, 2023) <https://nppc.org/wp-content/uploads/2023/11/Goodwin-Prop-12-Final.pdf> [<https://perma.cc/JSE3-WK6A>].

97. See Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 175–91 (2002).

98. 40 C.F.R. § 122.23(b)(4)(iv), (v) (2017).

99. Mildred Haley, *Hogs & Pork – Sector at a Glance*, USDA ECON. RSCH. SERV. (Jan. 8, 2025), <https://www.ers.usda.gov/topics/animal-products/hogs-pork/sector-at-a-glance/> [<https://perma.cc/YL54-J6TP>].

100. However, recent research has suggested consumers prioritizing pig welfare over environmental impacts of large farming operations. *Pig welfare outweighs climate concerns for consumers*, SCIENCEDAILY (Oct. 25, 2023), <https://www.sciencedaily.com/releases/2023/10/231025110607.htm> [<https://perma.cc/KML4-323D>]; Steve Banker, *Do Consumers Care About Ethical Sourcing?*, FORBES (Oct. 5, 2021), <https://www.forbes.com/sites/stevebanker/2021/10/05/do-consumers-care-about-ethical-sourcing/?sh=95984985f503> [<https://perma.cc/357F-VEZ9>]; *Strong European Consumer Demand for Sustainable Food*, YARA (Feb. 28, 2023),

The Humane World for Animals uses the term “factory farms” to describe the consolidation, and explicitly uses this term in a negative context to point out the previously mentioned critiques of larger agricultural operations.¹⁰¹

In both the United States and European Union, the number of farms overall has decreased significantly, and the pig industry is concentrated in certain areas which lines up with the overall trending agricultural consolidation. In the United States, the number of pig farms dropped by more than seventy percent from the years 1992 to 2009, while the number of pigs remained the same.¹⁰² The pork industry is apparently no exception to the trending consolidation and is highly concentrated in certain regions of both the United States and European Union. In 2013, United States pig farms with over 2,000 head of pigs account for eighty-seven percent of the national herd.¹⁰³ In 2023, Iowa has by far the most pig operations, with its contiguous neighbor Minnesota coming in second, then North Carolina, Illinois, Indiana, and Nebraska respectively.¹⁰⁴ Basically the entirety of the United States pork production happens in this central, southeastern region. In the European Union the pork industry is similarly concentrated, three countries make up half of the total pork production (Germany, Spain and France), and over seventy-five percent of pork production comes from eight member states.¹⁰⁵ International demands consistent with a growing world population have increased the need to produce for meat products which has resulted in intensification of operations.¹⁰⁶

Despite the negative viewpoints of consolidation, there is also a perspective that “larger farms are in many ways conducive to better environmental outcomes and labor conditions than their mid-sized counterparts.”¹⁰⁷ Larger farms, like

<https://www.yara.com/corporate-releases/strong-european-consumer-demand-for-sustainable-food/> [<https://perma.cc/3UKC-PR7B>].

101. See *Farmed Animal Welfare*, HUMANE WORLD FOR ANIMALS, <https://www.humaneworld.org/en/issue/farmed-animal-welfare> [<https://perma.cc/D5DT-BBXR>] (last visited Feb. 24, 2025).

102. William D. McBride and Nigel Key, *U.S. Hog Production From 1992 to 2009: Technology, Restructuring, and Productivity Growth*, USDA ECON. RSCH. SERV. (Oct. 23, 2013), <https://www.ers.usda.gov/publications/pub-details/?pubid=45151> [<https://perma.cc/CQE3-WXJ7>].

103. Lee Schulz, Catherine Hayes & Dermot Hayes, *United States Pork Production*, IOWA STATE UNIV. (2013), https://www.card.iastate.edu/products/presentations/files/hayes_us_pork_production.pdf [<https://perma.cc/7M3L-UV9U>].

104. *Top 10 U.S. states by inventory of hogs and pigs as of March 2023 (in 1,000s)**, STATISTA, <https://www.statista.com/statistics/194371/top-10-us-states-by-number-of-hogs-and-pigs/> [<https://perma.cc/UEF8-27T9>] (last visited Feb. 8, 2024).

105. *Pigmeat, supra* note 75; *Animal welfare in EU's pork sector: What's wrong?*, BRUSSELS TIMES (Nov. 28, 2021), <https://www.brusselstimes.com/195429/animal-welfare-in-eus-pig-meat-sector-whats-wrong> [<https://perma.cc/RRP6-U9TC>].

106. MARY JANE ANGELO, JASON J. CZARNEZKI, & WILLIAM S. EUBANKS, *FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW* 66 (2013).

107. Caroline Grunewald & Alex Smith, *Big Farms, Bad Rap*, BREAK. INST. (Oct. 25, 2019), <https://thebreakthrough.org/issues/food-agriculture-environment/big-farms-bad-rap> [<https://perma.cc/RT92-FM3J>].

any big business, usually have more sophisticated management, economical balance, and accountability to their clientele which could stand to reason why they may sometimes be better than those smaller operations. Despite the overwhelmingly unfavorable views, agricultural industrialization may also be comprised of more efficient ways of raising animals by using calculated space requirements which are correlated with the animal's economic value. However, these benefits of larger operations are outweighed by negative implications for the environment, pig welfare, and human health.¹⁰⁸ More specifically, consolidation has been criticized for leading to unethical treatment of livestock, reducing farmer choice, suffocating healthy rural communities, inequitable effects on black and indigenous farmers, and degradation of the environment.¹⁰⁹

1. Larger Farms Turning Smaller Farms into Bacon Bits

Major adjustments to how pigs should be housed affects the viability of smaller operation in the United States. State statutes like the one debated in *National Pork Producers Council v. Ross* will likely result in the “exit of smaller hog operations” from the industry entirely, further contributing to consolidation of pig farms.¹¹⁰ Since the United States is a free market, the market naturally adjusts to new state laws by bifurcating for a short time, in that adjustment period is when the bottom falls out and bigger pig farms live while the smaller ones die off.¹¹¹ Thus, the USDA should be the regulator for pig welfare reform, because of the negative implications that state statutes like Prop. 12 may have on smaller hog operations and contributing to agricultural consolidation. To substantiate a more equitable market for producers, and promote the best

108. Industrialization can be defined as “the continued consolidation of farms and . . . vertical integration among input suppliers, lenders, agricultural producers, processors, and distributors of food and fiber products, domestically and globally.” Pete J. Barry, *Industrialization of U.S. Agriculture: Policy, Research, and Education Needs*, 24 AG. & ECON R. 128 (1995); ANGELO, CZARNEZKI, & EUBANKS, *supra* note 106.

109. Consolidation can be defined more narrowly than industrialization as: “shifts in production to larger farms and firms; in the context of mature, slow-growing industries, such shifts also imply fewer farms and firms.” James M. MacDonald, *Consolidation, Concentration, and Competition in the Food System*, 102 FEDERAL RESERVE BANK KANSAS CITY, 85, 88 (2017); See Hannah Andrew, *Addressing Consolidation in Agriculture*, VERMONT L., (Jul. 2022), <https://www.vermontlaw.edu/sites/default/files/2022-07/Addressing-Consolidation-in-Agriculture.pdf> [<https://perma.cc/V48P-D4EL>]; Siena Chrisman, *Bigger Is Not Better: The High Cost of Agribusiness Consolidation*, ACTIONAID USA, 27–32 (Sept. 2021), <https://www.actionaidusa.org/publications/bigger-is-not-better-the-high-cost-of-agribusiness-consolidation/> [<https://perma.cc/3AM8-4A44>]; See Leo Horrigan, Robert S. Lawrence, & Polly Walker, *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110 NAT'L LIB MED, 445, 445–456 (2002); See *Bigger Farms, Bigger Problems: Farmland Consolidation is Harming US Rural Communities – and Better Policies Can Help*, UCS (Apr. 14, 2021), <https://www.ucsusa.org/resources/bigger-farms-bigger-problems> [<https://perma.cc/C6HX-58CV>].

110. Goodwin, *supra* note 96, at 1.

111. *Id.* at 34.

humane practices for breeding pigs, there should be a federal law in the United States as there is in the European Union. Transitioning from the industry-standard gestation crates to operations that allow more space for breeding pigs is a costly, time-consuming transition that pushes producers out to create more humane space for breeding pigs. In Europe, every country was required to comply with the minimum space requirements of the Pig Directive. However, in the United States the application of the dormant Commerce Clause in *National Pork Producers Council v. Ross* has created a “50-state patchwork of legislation for hog producers,” which will disparately affect smaller pig farms, and ultimately work against decreasing consolidation of the industry.¹¹² Globally, the demand for meat products is continuously growing while the number of pig farm companies is shrinking; this results in bigger companies becoming bigger and “less time spent by the farmer for animal condition assessment.”¹¹³

The Pig Directive came into full effect in 2013, in the summer of 2012 “[p]ig herds were reportedly shrinking . . . in all main pig producing countries.”¹¹⁴ As of 2024, Producers in the United States face increased costs if they are needing to increase their stall spaces to meet the twenty-four square feet of space required by Prop. 12.¹¹⁵ Producers who are not in California may find themselves needing to comply with the California requirements because the packing plant the producer sells to has decided to continue distributing to the California market.¹¹⁶

“While California is the largest pork-consuming state in the U.S., a growing amount of the nation’s pork is being sent overseas, lessening the impact of Prop 12 on many large producers,” thus leaving the smaller hog operations at the whim of market volatilities.¹¹⁷

D. A Federal Act – USDA Authorization

With the application of the dormant Commerce Clause in *National Pork Producer’s Council v. Ross*, California, a state that produces less than 1% of the nation’s pork, was able to set the standard for what the rest of the country should

112. John McCracken & Ben Felder, *With California’s Prop 12 Now Law, Pork Producers Adapt While Lobbying Groups Continue to Fight*, INVESTIGATE MIDWEST (Mar. 6, 2024), <https://investigatamidwest.org/2024/03/06/with-californias-prop-12-now-law-pork-producers-adapt-while-lobbying-groups-continue-to-fight/> [https://perma.cc/7M7T-YEPS].

113. Tzanidakis et al., *supra* note 79, at 249.

114. DULLAGHAN, *supra* note 52, at 17.

115. Baxter et al., *supra* note 70.

116. “Some local hog farmers with compliant pens have found an opportunity to sell into a new competitive market, while those with non-compliant operations have balked at the new standards, claiming it would be too expensive to comply with or is against their principles.” McCracken & Felder, *supra* note 112.

117. *Id.*

be doing in terms of pork welfare.¹¹⁸ It is inequitable for any one state to have such power over the economies of its sister states whose economies actually rely on pork production. The administrative process of notice-and-comment rulemaking is more democratic and equitable than an inconsistent state-by-state implementation of pig welfare laws because under notice-and-comment rulemaking citizens of every state have the opportunity to submit their concerns and suggestions before a final rule is published. The Agricultural Improvement Act (“Farm Bill”) comes up for reauthorization every five years, and has the potential to be a vehicle for a federal program on pig welfare.¹¹⁹ Congress could put the USDA in charge of regulating pig welfare by passing legislation in the Farm Bill that delegates the USDA as the authority over pig welfare regulations.¹²⁰

The Pig Directive has enforcement mechanisms, that despite the lesser-binding effect of a Directive, have resulted in gradual, successful transition to compliant gestation arrangements for breeding pigs.¹²¹ The Pig Directive provides specific pig welfare goals for each country to implement within their national jurisdiction. Every five years the European Commission (“Commission”) makes a report and proposals to the leaders of each country, and the countries report their findings to the Commission.¹²² As an attempt to gain compliance, the Commission will increase financial distributions to producers for good behavior, and for bad behavior will suggest penalties. The penalties cannot be set by the Commission through a directive, and so it is up to each of the member-states to enforce their set penalty for violating pig welfare laws.¹²³ Like the European Union the USDA may set “stick and carrot” enforcement provisions such as fines and greater farm assistance for compliance without imposing criminal sanctions as Prop. 12 does.

Finally, there has been effort to create a federal mandate in response to Prop. 12. A clear example is the introduction of the Ending Agricultural Trade Suppression Act (the “EATS” Act) to “restrict[] state and local governments from imposing certain standards or conditions on the preharvest production of agricultural products sold or offered for sale in interstate commerce.”¹²⁴ However, in the current political climate, the same issues plague the successful

118. CAL. PORK PRODUCERS ASS’N, *Commodity Fact Sheet: Pork*, <https://cdn.agclassroom.org/ca/resources/fact/pork.pdf> [<https://perma.cc/7P3S-SZZ6>] (last visited Apr. 25, 2025).

119. See generally *Farm Bill 101*, FARMAID (Mar. 22, 2023), <https://www.farmaid.org/issues/farm-policy/farm-bill-101/> [<https://perma.cc/E72F-59KX>].

120. It is important to note that the Chevron doctrine has been (debatably) overruled, thus taking power away from federal agencies in the context of judicial review. USDA rulemaking decisions are likely subject to more judicial interference.

121. *Update on EU compliance*, <https://web.archive.org/web/20120519235501/http://www.countdownto1-1-13.co.uk/compliance.asp> [<https://perma.cc/2D2F-EE2E>] (last visited Apr. 25, 2025).

122. DULLAGHAN, *supra* note 52, at 6; Pig Directive 2008/120, art. 8, 2008 O.J. (L 74) 8 (EC).

123. DULLAGHAN, *supra* note 52, at 10.

124. Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023).

legislative agreement for an act such as the EATS act, as they do any other piece of federal legislation. Moreover, if there is to be a federal law which preempts states, the federal law should be more expansive than the EATS act and delegate the USDA to guide animal welfare standards across the United States. A federal act could lay out minimum space requirements and the USDA may effectively specify and provide guidance via federal administrative regulations so that there is a uniform and predictable law to better the outcomes for pigs and those who rely on the pork market.

IV. CONCLUSION

The United States should enact a federal law to preempt the majority decision of *National Pork Producers Council v. Ross*. In doing so, the United States may follow the rubric of the European Union's Pig Directive to (1) encourage free trade through interstate commerce, which is better for long-term sustainability; and (2) balance health, socio-economic, and environmental considerations into the law through the USDA's scientific guidance and regulations.

Giving federal, regulatory authority to the USDA for the confinement of breeding pigs is a step in the right direction to unify and clarify guidance to an industry that is already effectively regulated by the USDA. California's efforts to protect pig welfare have been noteworthy in taking initiative to increase the quality of life for pigs. However, a state-by-state approach is not the best method to achieve these ends, and rather a national law similar to the Pig Directive is a better approach for American legislation. Allowing the Supreme Court to apply the dormant Commerce Clause doctrine has resulted in economic consequences to the pork industry which is pushing out smaller operations that are ultimately better for effectuating consumer demands like environmental consciousness and sustainable pricing. Free trade is an economic principal desired by the United States and European Union, and has been mistakenly overlooked by the Supreme Court's decision. Thus, a federal law could follow the Pig Directive's lead and include recognition of "[d]ifferences which may distort conditions of competition interfere with the smooth running of the organization of the common market in pigs and pig products."¹²⁵

Consolidation of the pork industry is a concern for the United States and European Union; it is a trend that threatens the best outcomes for consumers, producers, and pigs. A federal legislature and the USDA should consider consolidation into its decision making and be mindful of "[a] balance . . . between the various aspects to be taken into consideration, as regarding welfare including health, economic and social considerations, and also environmental impact."¹²⁶ Major pork operations allow for less producer face time with their animals, increased environmental issues, and the possibility of increased health

125. Pig Directive 2008/120, recital (6), 2008 O.J. (L 74) 5 (EC).

126. *Id.* at recital (12).

risk to people. If a socio-economic and environmental balance is not considered alongside pig welfare, state laws such as Prop. 12 may not be marrying their desired means and ends.

A federal act is certainly possible and there have been efforts to create legislation that preempts Prop. 12, and any similar state statutes.¹²⁷ Interested parties may be wise to consider basing a federal act on the European Union's Pig Directive, and consider in their lawmaking: (1) the effect of pig welfare laws on global exports and national markets; (2) the concerns around further consolidation of the pork industry; (3) appointing the USDA as an agency which has scientific resources available to make technical regulations.

127. *See* Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (2023).

