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INTERPRETING INTERPRETATION: TEXTUAL, CONTEXTUAL, AND PRAGMATIC INTERPRETATIVE METHODS FOR INTERNATIONAL TRADE LAW

Raj Bhala and Eric Witmer+*

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Abstract

The conventional wisdom as to how the World Trade Organization (WTO) Appellate Body must interpret disputed terms in a treaty is incomplete, and even potentially misleading. The conventional wisdom says the Appellate Body is restricted to the tools provided by Articles 31-32 of the 1969 *Vienna Convention on the Law of Treaties*. The key tool is a mechanical, lexicographic hammer, namely, finding the plain meaning of a word or phrase at issue in a case between two WTO Members, with occasional recourse to surrounding passages, and if pressed, to the purpose of the treaty in which the disputed term is located. But those Articles amount to a larger tool kit than the conventional wisdom recognizes.

In truth, those Articles allow for three wide categories of techniques, Textualist, Contextualist, and Pragmatic, for interpretation. These techniques are rich, nuanced tools familiar in American Jurisprudence and English Literary Theory. A complete and transparent account of the tools the Appellate Body has at its disposal to make decisions should acknowledge this tripartite taxonomy, and thereby appreciate the intra- and inter-disciplinary nature of international trade treaty interpretation that, at least in theory, is possible.

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INTRODUCTION

A. Tripartite Taxonomy: Textual, Contextual, and Pragmatic

How does the World Trade Organization (WTO) Appellate Body interpret international trade treaties?¹ The conventional wisdom is the Appellate Body must apply the rules of Articles 31-32 of the 1969 *Vienna Convention on the Law of Treaties* (*Vienna Convention*).² This wisdom imperceptibly slips from objective to subjective, insofar as the Appellate Body intimates that robotic application of Articles 31-32 is how the Appellate Body ought to make decisions.³ *We argue the conventional wisdom is not wrong, but rather incomplete.* In truth, the process of legal interpretation in international trade law necessarily extends beyond mechanical, lexicographic analysis, and extends outside the four corners of a treaty.⁴ Conceptually, the work of the Appellate Body, in interpreting a disputed text, entails multiple methodologies to decide close questions. All of the different methodologies are best classified into one of three categories: *Textual*; *Contextual*; or *Pragmatic*.

We define “*Textual*” to cover methods that derive the meaning of a disputed term internally, from within a legal text, with no reference to any extrinsic source other than common sense and a dictionary. “*Textual*” methodologies are the narrowest of all, as they look for nothing more than the ordinary or plain meaning of a controversial term.

“*Contextual*” methodologies may be internal or external to a text. We classify a method as “*Contextual*” if it looks to uncover the meaning of a disputed term by examining the position of that term in its sentence, paragraph, provision, or surrounding provisions of its treaty. We also include as “*Contextual*” methodologies ones that view the term outside of its immediate treaty, but within a network of related treaties, and ones that look to the history and circumstances surrounding the drafting of that text, including the intention of the drafters.

¹ The legal literature on interpretation, and what it means to “interpret,” is broad and deep. *See generally* Frédéric G. Sourgens, *Truth in Method – Book Review of The Interpretation of International Investment Law: Equality Discrimination and Minimum Standards of Treatment in Historical Context*, by Dr. Todd Weiler, 29 ICSID REVIEW 1 (2013) [hereinafter Sourgens] (analyzing the role of critical, contextual, historical analysis in resolving international disputes).

² Vienna Convention on the Law of Treaties, art. 31–32, May 23, 1969, 1155 U.N.T.S. 331. The Convention entered into force on 27 January 1980. RICHARD GARDINER, *TREATY INTERPRETATION* (2nd ed. 2015) [hereinafter GARDINER] (providing a detailed analysis of the Convention).

³ *See e.g.*, ASIF H. QURESHI, *INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES* 3 (Cambridge University Press, 2nd ed., 2015) [hereinafter QURESHI] (referring to a statement by the Appellate Body in its Report, *United States – Standards for Reformulated and Conventional Gasoline*, about the application of Article 31 that is “religiously cited in other WTO cases”).

⁴ Thus, for example, the New Haven School of international law “conceives of an agreement as a continuous process of communication between the parties and is critical of the preoccupation in the VCLT (Vienna Convention on the Law of Treaties) with the text of the treaty, emphasizing instead the need to approximate the interpretation to the actual shared expectation of the parties arising from the agreement.” *Id.* at 4. The classic expression of this school, as Professor Qureshi cites, is M.S. McDougal et al., *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (1994). Professor Qureshi argues that concerns about developing countries, fairness, human rights, and justice, some of which post-date the *Vienna Convention*, as well as the reality that the *Convention* was drafted before the burst of multilateral treaties, such as those of the WTO, suggest “[t]he need for a continued re-evaluation of the principles of treaty interpretation generally, and in particular as they apply to the WTO Agreements, continues.” *Id.* at 4–5.

“*Pragmatic*” is our broadest category. It captures any method for imparting meaning to a disputed term that is beyond the text or context of that term. Pragmatic tools are value-based, or normative, lenses through which to look at international trade law such as Marxism, Feminism, Post-Colonialism, or Queer Theory. In other words, at the core of a Pragmatic methodology is a paradigm for thinking about the world to advance a value. Examples are the interests of the proletariat over capitalists, as in Marxism, rectifying inequities faced by women and lesbian, gay, bisexual, transgender, queer (or questioning), and other (LGBTQ+) persons, as in Feminism or Queer Theory, or repositioning developing and least developed countries in the global economic order, as in Post-Colonial Theory. Whatever it is, that paradigm, or dubbed differently, that ideology (as in a coherent system of beliefs) does not come from the text itself, nor can it be wholly understood solely by reading the text. While the paradigm is affected by contextual forces, it moves beyond the historical context that shaped it, to analyze current events critically and identify prescriptive outcomes for the future. Those prescriptions may range from steadfast reaffirmation of the status quo to radical demands for its overthrow, *i.e.*, from obedience to reality, on the one hand, to revolution to negate reality, on the other hand.

Thus, the conventional wisdom about international trade treaty interpretation is incomplete because it over-emphasizes Textualism, under-emphasizes Contextualism, and largely ignores Pragmatism. In truth, Articles 31-32 of the *Vienna Convention* embrace methods in all three categories. That is a truth that exists at least in theory. In practice, the Appellate Body is disinclined to call upon interpretative methodologies that it perceives (or misperceives) not to be sourced in the *Convention*. Regardless of how close such methodologies may resemble the strictures of Articles 31-32, the Appellate Body (understandably) fears criticism of judicial activism on account of reasoning processes that ostensibly stray beyond what the *Convention* permits.

That fear is understandable. A central criticism of the Appellate Body by the United States Trade Representative (USTR) is that it strays beyond the plain meaning of the text with which it is charged to interpret, and issues judicially active holdings and rationales. As the USTR puts it, “[t]he most significant area of concern has been Panels and the Appellate Body adding to or diminishing rights and obligations under the *Agreement Establishing the World Trade Organization (WTO Agreement)*,”] and that concern arises because of interpretative methodology:

[WTO] dispute [settlement] Reports have added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, and countervailing duties; standards (under the *WTO Agreement on Technical Barriers to Trade (TBT Agreement)*); and safeguards. For example:

- The United States and several other Members have expressed significant concerns with a number of Appellate Body interpretations that would significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a significant threat to the interests of all market-oriented actors.
- In a number of disputes, the United States has expressed concerns with the Appellate Body’s interpretation of the non-discrimination obligation under the *TBT Agreement* which calls for reviewing

factors unrelated to any difference in treatment due to national origin. The United States has pointed out that this approach could find that identical treatment of domestic and imported products could nonetheless be found to discriminate against imported products due to differences in market impact. There is nothing in the text or negotiating history of the *TBT Agreement* to support that Members had ever negotiated or agreed to such an approach.

- The United States disagreed with Panel and Appellate Body Reports in the [2000] *U.S.-FSC [Foreign Sales Corporation]* dispute, which resulted in an interpretation under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly. This dispute disregarded the broader perspective that, in the GATT [General Agreement on Tariffs and Trade], Members had agreed to an understanding that a country did not need to tax foreign income, and there was no evidence that the U.S. FSC distorted trade or was more distortive than the territorial tax system used by most other WTO Members.
- In a number of disputes, the United States has expressed concerns that the Appellate Body's non-text-based interpretation of Article XIX of the GATT 1994 and the *Safeguards Agreement* has seriously undermined the ability of Members to use safeguards measures. The Appellate Body has disregarded the agreed WTO text and read text into the Agreement, applying standards of its own devising.
- Another area of concern is that the Appellate Body in effect created a new category of prohibited subsidies that was neither negotiated nor agreed by WTO Members (*U.S. – CDSOA, i.e., the 2003 Byrd Amendment* case, WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003)). “The U.S. Congress had made a policy decision to assist industries harmed by illegal dumping and subsidization, and no provision in the *WTO Agreement* limits how a WTO Member might choose to make use of the funds collected through antidumping and countervailing duties.”⁵

“It has been the longstanding position of the United States that Panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that *adheres strictly to the text* of those agreements, as negotiated and agreed by its Members. Over time, U.S. concerns have increasingly focused on the Appellate Body's disregard for the rules as set by WTO Members. ... [T]he problem has been growing worse, and not better.”⁶

⁵ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 23 (2018) [hereinafter 2018 Trade Policy Agenda].

⁶ *Id.* at 24.



This criticism (*inter alia*) has caused the United States to block consensus by the WTO Membership of new Appellate Body members to replace those judges whose terms are expiring. Indeed, unless this blockage is lifted, the normally seven-strong Appellate Body will fall below the minimum three judges it needs to hear a case, and thus cease to function. The USTR's criticism, of course, is premised on the conventional wisdom about how the *Vienna Convention* constrains the Appellate Body.

But, that fear, or more precisely the attack by the USTR on the Appellate Body, rests on dubious grounds. To help bridge the gap between the narrow theory of interpretation to which the USTR says the Appellate Body must adhere, on the one hand, and the practice of the Appellate Body in behaving all too creatively, on the other hand, ***we further argue that the conventional wisdom is misleading*** because it implies treaty interpretation under the *Vienna Convention* is an entirely different exercise from ascertaining the meaning of words in a domestic legal text, such as a constitution or statute, or indeed a work of fiction. ***In truth, the tools in the toolbox of the Appellate Body are akin to interpretative methodologies familiar to American Jurisprudence, particularly Constitutional and Statutory Interpretation, and to techniques in Literary Theory, that is, critical analysis of English prose and poetry.*** Put differently, what the Appellate Body does (and could do) is not exactly what the Appellate Body says it does. The reality of its interpretative behavior transcends the *Vienna Convention*, and extends to ways of looking at words in other areas of law, and indeed in non-law disciplines.

Table I summarizes our two-pronged thesis that the conventional wisdom about Appellate Body decision-making is both incomplete and misleading. As per the Table, ours is a tripartite taxonomy of methodologies. The core of this Table is a three-by-three matrix. The horizontal axis presents our three categories of interpretative methods, Textual, Contextual, and Pragmatic. The vertical axis shows the three sources of those methodologies, the *Vienna Convention*, American Jurisprudence, and Literary Theory. The nine cells in the matrix are populated by the specific methodologies. The essence of our argument is that all of these methodologies are ways to interpret WTO texts, even though the conventional wisdom regards most of them as foreign. For convenience, the Table also lists the Part of our article in which the methodologies are discussed.

To be sure, the Appellate Body does not necessarily intentionally reach for and use every methodology in the toolbox in every case, nor does it subtly seek to subvert the *Vienna Convention*. Rather, it couches its analyses according to the tools of Articles 31-32. But, those tools are comparable to ones used in American Constitutional Law and Statutory Interpretation, and in English Literary Theory. Accordingly, ***we provide a taxonomy of legal interpretative methodologies, an identification of the intra- and inter-disciplinary tools in the tool kit of the Appellate Body, to define words and phrases.*** Our doing so is a more complete and honest account of the interpretative techniques the Appellate Body has at its disposal than the standard rhetoric about the constraints Articles 31-32 ostensibly impose.

Table I: Categories, Sources, and Classification of Interpretative Methodologies

Category  Intra- and Inter-Disciplinary Sources 	<i>Textual Methodologies</i>	<i>Contextual Methodologies</i>	<i>Pragmatic Methodologies</i>
<i>Methodologies the Vienna Convention Identifies</i> Part II	Article 31:1 “Ordinary meaning”	Article 31:1 “in their context” Article 31:2 “preamble,” “annexes,” and “agreement relating to the treaty” made by all parties “in connection with the conclusion of the treaty,” and “instrument ... made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as ... related to the treaty.” Plus, Article 31:3 “subsequent agreement,” “subsequent practice,” and “relevant rules of international law” Article 32: “supplementary means of interpretation,” specifically, “preparatory work of the treaty and the circumstances of its conclusion”	Article 31:1 “in the light of its object and purpose” Article 32: “supplementary means of interpretation” other than “preparatory work of the treaty and the circumstances of its conclusion”

Methodologies in American Jurisprudence	Constitutional Interpretation: Textual	Constitutional Interpretation: Contextual, Intentionalist, Historical	Constitutional Interpretation: Prudential, Responsive, Structural, Doctrinal
Part IV (Constitutional Interpretation)	Statutory Interpretation: Textualist Theories	Statutory Interpretation: Intentionalist Theories	Statutory Interpretation: Dynamic Theories
Part V (Statutory Interpretation)			
Methodologies in English Literary Theory	Russian Formalism	Historicism	Marxism
	New Criticism	Phenomenology	Post-Colonial Theory
Part VI	Structuralism Deconstructionism	Structuralism Deconstructionism	Feminism Queer Theory

A correct inference from our thesis is that a uniform mode of interpretation across all cases in the docket of the Appellate Body is a disservice to adjudication. This suggestion concerns what the Appellate Body “should” do. The premiere manner for the Appellate Body to interpret a problematic term or phrase in an international trade treaty is to be practical and search the tool box of interpretative methodologies for the most appropriate technique that best respects the disputed text, and best resolves the problem, not only for the complainant and respondent in the case, but also for the entire WTO Membership.

Confessedly, the “covered agreements” over which the Appellate Body has jurisdiction are treaties to which it must apply Articles 31-32 of the *Vienna Convention*, namely, the *WTO Agreement*, multilateral trade agreements in Annexes 1-3 to that *Agreement*, including GATT, plus plurilateral trade agreements in Annex 4 to the *Agreement*.

Yet, understanding methodologies familiar in American jurisprudence may help explain how and why the Appellate Body reaches the interpretative results it does. In Statutory Interpretation, methodologies can be grouped into Textualism and Realism. In Constitutional Interpretation, they can be grouped into three species of Originalism (Historical Understanding, Textualism, and Contextualism), plus five species of Non-Originalism (Structuralism, Doctrinalism, Differences in Classification, Ethical Interpretation, and Prudential Interpretation). Interpretative methodologies common to Literary Theory can help appraise critically the challenges the Appellate Body faces. Indeed, 10 of the major Literary Interpretative methodologies can be organized along Textual, Contextual, and Pragmatic lines. They are Formalism, Structuralism, and New Criticism (all Textual), Historicism, Phenomenology, and Deconstructionism (all Contextual), and Marxism, Post-Colonial Theory, Feminism, and Queer Theory (all Pragmatic).

So, we claim the additional tools from American Statutory and Constitutional Interpretation and Literary Theory have found their way into the Appellate Body toolbox, and occasionally, however subtly, are pertinent in analyzing what the Appellate Body does and should do. Indeed, we might say these tools always were in the toolbox, because Textual, Contextual, and Pragmatic methods are inherent to the process of legal interpretation. The questions “Why examine American Jurisprudence and Literary Theory when the *Vienna Convention* tells it what to do?,” and “Is such examination nothing more than an exercise of legal and literary imagination?,” may be answered thusly: the Appellate Body, though it wraps itself in Articles 31-32 of the *Convention*, has these tools at its disposal, because these tools, like those Articles, allow for Textual, Contextual, or Pragmatic analyses of disputed words and phrases in a trade treaty. Ironically, to stay within the confines of these Articles is to live in an imaginary courtroom.

Thus, the Appellate Body, and scholars, students, and practitioners of international trade law, would be enlightened, and multilateral trade jurisprudence would be more transparent, perhaps strengthened, by opening that toolbox fully, and studying its contents. In brief, the conventional wisdom is that “GATT-WTO textual interpretation is and, indeed, should be mechanical under the *Vienna Convention*.” We set out the challenge to “stop pretending that interpretation is robotic and other tools are not relevant,” and call for an appreciation that the rich traditions in American Jurisprudence and Literary Theory may be helpful to improve the interpretative process and outcomes.

B. Organization

Spotting outside-the-box techniques presumes an understanding of those other techniques, and that is what much of our discussion concerns. Part II briefly reviews the techniques mandated by Articles 31-32 of the *Vienna Convention*. It shows how these techniques, on which the conventional wisdom focuses, are comprehensible as “Textualist,” “Contextualist,” or “Pragmatic.”

Part III sets out a taxonomy of techniques used in American Constitutional Interpretation. It shows the relationship of these techniques to Articles 31-32 of the *Vienna Convention*, offers a few illustrations from WTO cases of their use by the Appellate Body, and identifies them as “Textualist,” “Contextualist,” or “Pragmatic” approaches.

Part IV critiques the American Constitutional and Statutory Interpretation Methodologies.

Part V tracks Parts III and IV, providing a taxonomy of techniques familiar in American Statutory Interpretation, and showing how they have cropped up in certain Appellate Body cases.

Part VI tracks Parts III, IV, and V. That is, Part VI sets out a taxonomy of the most renowned schools of Literary Theory. It then shows how they fit into the Textualist, Contextualist, or Pragmatic taxonomy. It also shows how some of the interpretative methods from Literary Theory exist in how lawyers think about international trade issues, and how they interpret trade treaties.

Part VII summarizes our arguments and their implications. It also offers a self-critique, that is, we set out the limitations of our thesis. In response to these limitations, we suggest possible fruitful research avenues.

In sum, this article is a call to pay less attention to the rhetoric of what the Appellate Body says it does, and to imagine conceptually what it does—or, at least, could and perhaps should do. The Appellate Body says it adheres in practice scrupulously to the *Vienna Convention*. But, in theory, how it reads GATT-WTO text is across-the-board.

C. Four Disclaimers

To be clear, four disclaimers are essential. First, our article is *not* about the *Vienna Convention per se*. Our interest is in what the *Convention* theoretically permits by its own terms. We do not offer an extended exegesis of its Articles 31-32. There is no need for one, because those Articles are plain enough: they call for examination of (1) text, (2) context, and (3) object and purpose of treaty terms. So, the Appellate Body examines these three areas to define disputed terms in an international trade treaty. Likewise, lawyers and literary critics examine these three areas, albeit using different rubrics, in American Jurisprudence and English Literary Theory, respectively. If the Appellate Body studies the same three areas to interpret words in a GATT-WTO treaty as do lawyers with respect to the Constitution and statutes, and as do critics with respect to novels, poems, and drama, then does the Appellate Body have access to the same interpretative methodologies as do those lawyers and critics? Our answer is “logically, yes.” Indeed, this answer motivates the three intra- and inter-disciplinary categories we offer: Textual, Contextual, and Pragmatic. This answer is theoretical: that the Appellate Body could, within the confines of the *Convention*—draw upon these methodologies does not mean that it does or should do so in practice. A negative answer—denying this possibility—is the conventional wisdom that we find incomplete and misleading.

Second, we stress our two-pronged argument is more theoretical than empirical. That is, we do *not* expend much time mining Appellate Body Reports to adduce examples of Textualist, Contextualist, or Pragmatic methodologies. That empirical analysis is for another article. We focus on explaining the methodologies (some of which are complicated and laden with academic jargon) and proving why they fit into one of these three categories. Our most basic aim is to show that international trade treaty interpretation is not a hermetically sealed exercise under Articles 31-32 of the *Vienna Convention*, but rather resembles the discernment of meaning in a constitutional, statutory, or literary text. The different specialties use different labels for their methodology. But, cognitively—the analyses they call for—have much in common. Seeing that theoretical reality is enriching in itself, and potentially empowering for the Appellate Body.

Third, we do *not* argue the Appellate Body intentionally adds tools to its kit beyond Articles 31-32 of the *Vienna Convention* mandate, nor that it enthusiastically endeavors to make new law with tools from American jurisprudence and Literary Theory. Nor does the article take the normative position that Appellate Body members ought to transform themselves into radical judicial activists. Though the United States criticizes Appellate Body members for already having crossed that threshold, the article rebuts that accusation with the reality of the task they are faced, namely, defining vague or ambiguous terms in WTO

treaties.⁷ It is not so much that the Appellate Body seeks to legislate, for that is the task ultimately of the Ministerial Conference. Rather, it is that in the absence of legislative action not every vague or ambiguous term can be interpreted in a simple, rigid, lexicographic manner in slavish adherence to the Convention. Like it or not, the use of Contextual and Pragmatic Methodologies is inevitable and, indeed, desirable.

Fourth, we concede that the possibility the Appellate Body might be reading a text using a methodology familiar in American constitutional or statutory law may seem remote, and that it may do so in respect of Literary Theory may seem absurd. Yet, words and phrases with uncertain meanings exist in the charters and codes of every country, and in the world fiction and poetry. The Appellate Body faces the same interpretative problem that domestic courts, and literary critics, face: what do those words or phrases mean?

Across the 19th, 20th, and now 21st century, three fields—international trade law, American Jurisprudence, and Literature—have developed techniques to answer this question. The conventional wisdom about Appellate Body decision-making is those techniques are quite different, and the GATT-WTO rules forbid it from anything other than a mechanistic application of the tools of Articles 31-32 of the *Vienna Convention*, tools familiar to trade law scholars and practitioners. Yet, with exposure to “outside the box” techniques of textual interpretation, it is possible to spot how, and maybe even why and to what end, the Appellate Body looks to these other interpretative methodologies—whether it knows it is doing that, or not.

I. CONVENTIONAL WISDOM ABOUT GATT-WTO TREATY INTERPRETATION UNDER VIENNA CONVENTION ARTICLES 31-32

A. Textualism Reveals Contextualism and Pragmatism

The conventional wisdom about the Appellate Body is it applies Articles 31-32 of the 1969 *Vienna Convention on the Law of Treaties* to determine the meanings of words and phrases in a GATT-WTO text. They state:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.
2. The *context* for the purpose of the interpretation of a treaty shall comprise, *in addition to the text, including* its preamble and annexes:

⁷ There is a technical distinction between “ambiguity” and “vagueness.” “Ambiguity,” as the prefix *ambi-* indicates, refers to having two meanings. As with “ambivalent” or “two strengths,” the original Latin implies the two are equals. Hence, being ambivalent is feeling equally as strong about two alternatives. Similarly, ambiguity not only suggests that there are two meanings, but also that both meanings are equally plausible. *Ambiguity*, EYTMONLINE, <https://www.etymonline.com/word/ambiguity>. “Vagueness,” on the other hand, simply means uncertain. A vague treaty term could have no discernible meaning at all, or so many possible meanings as to render the term useless. *Vague*, EYTMONLINE, <https://www.etymonline.com/word/vague>.

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, *together with the context*:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.⁸

Article 32

Supplementary means of interpretation

Recourse may be had to *supplementary means* of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.⁹

Reinforcing this wisdom is the familiar rhetoric of the Appellate Body, manifest in most of its reports. The Appellate Body reiterates *ad nauseum* that it adheres to the *Vienna Convention*, staying squarely within the confines of the mechanical job which it is commanded to do by Article 3:2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, and not interpret words in any active way.¹⁰

⁸ Vienna Convention on the Law of Treaties, *supra* note 2, at art. 31 (emphasis added).

⁹ *Id.* at art. 32 (emphasis added).

¹⁰ The second sentence of DSU Article 3:2 states: "The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law*." Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3:2, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (emphasis added). The Vienna Convention is generally accepted, including by the United States, which is not a party to the Convention, as embodying such rules. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 10–11 (2000) [hereinafter AUST]; GARDINER, *supra* note 2, at 7. For a critique about the embodiment of customary international law by the Vienna

So, the Appellate Body supposedly is supposed to operate in the most mechanical of ways, using the dictionary—typically the *Oxford English Dictionary (OED)*—as much as possible. The conventional wisdom is not wrong, but rather incomplete and misleading. In truth, the Appellate Body has in its tool kit techniques found in American Jurisprudence and English Literary Theory. That is, in theory, the Appellate Body behaves in a both intra- and inter-disciplinary way. When it faces a problematic term, it has within its interpretative methodological toolkit techniques evident in Constitutional Law or Statutory Interpretation, and from Literary Theory.¹¹

This truth starts from the *Vienna Convention* itself. The above-italicized language clearly offers three possibilities: “ordinary meaning,” “context,” and “supplementary means.” “Ordinary meaning” matters, because, as Anthony Aust, the former Deputy Legal Advisor to the United Kingdom Foreign and Commonwealth Office (FCO), explains, “it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended.”¹² Yet, these three sources for interpretation are not mutually exclusive; to the contrary, as Aust points out: “[t]he determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*.”¹³ Likewise, as Professor Asif Qureshi summarizes, “[t]he overwhelming authority and weight in the WTO is given to the view that the correct approach is the holistic approach,” meaning Article 31 should not be read “sequentially” with a preference for a “textual/literal” approach, but rather “holistically,” with a preference for a “teleological approach to interpretation.”¹⁴ Most importantly, these three possibilities refer to interpretative methodologies we call Textualist, Contextualist, and Pragmatic.

That is, to mandate attention to “ordinary meaning” is inherently a Textualist approach. To consider “context” is obviously “Contextualism.” To allow for “supplementary means” is to open up to Pragmatic concerns. Of course, Article 31:2-3 identify what “context” means.¹⁵ Likewise, Article 32 sets out examples of supplementary references.¹⁶ However, Article 31:2-3 is reasonably broad in what qualifies as context, with a tendency to allow for

Convention *see* QURESHI, *supra* note 3, at 10–14 (asking “whether it is appropriate, indeed permissible, to freeze in time such customary rules to those encapsulated in the VCLT,” and noting “the general codified principles in the VCLT are in danger of being considered in isolation from the un-codified principles of treaty interpretation under customary international law,” and *vice versa*).

¹¹ Interpretative techniques have evolved in other areas of American Jurisprudence, such as Contract Law. They may be appealing in the international trade law arena. Trade treaties may be analogized to bargains, and thus pragmatic ways in which private parties interpret a contract may be helpful in thinking about how best to understand terms and phrases in a GATT-WTO text. Those ways also may avoid fixating on Originalism. However, to keep the scope of the present inquiry manageable, theories of interpretation from Contract Law are not considered herein.

¹² AUST, *supra* note 10, at 188.

¹³ *Id.* (explaining that “object and purpose” can be “elusive,” but “[f]ortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context, and, in practice, ... more for the purpose of confirming interpretation,” because “[i]f an interpretation is incompatible with the object and purpose, it may well be wrong.”).

¹⁴ QURESHI, *supra* note 3, at 24. Note the sequential approach is distinct from the “hierarchical” approach, which prioritizes text over context, and context over objects and purposes. *Id.* at 25.

¹⁵ For the standard understanding of “object and purpose,” “context,” and examples under Article 31:2–3 *see* AUST, *supra* note 10, at 188–96; QURESHI, *supra* note 3, at 27–50.

¹⁶ For the standard understanding of “supplementary means” and examples under Article 32 *see* AUST, *supra* note 10, at 197–202; QURESHI, *supra* note 3, at 50–56.

contemporaneous and/or subsequent history and practice. Article 32 is explicitly non-exclusive in its list. The point, then, is the distance between “ordinary meaning” and the Textualist methodologies we identify is small, if there is any at all. The distance between “context” and our Contextualist methodologies, and “supplementary means” and “Pragmatic methodologies,” may vary depending on the methodology, but overall may be less wide than appears at first glance, especially given the jargon associated with some of those methodologies.

Ironically, it is our Textualist reading of Articles 31-32 that reveal not only the Textualist tools in the kit of the Appellate Body, but also the Contextualist and Pragmatic tools in that kit. That is, the ordinary meaning of the above-highlighted language makes plain that the Appellate Body can move beyond the disputed word in a text, and apply Contextualist and supplementary, or Pragmatic, approaches to discern the meaning of that word.

B. Radical and Not Radical

The above discussion intimates why *our thesis both is and is not radical*. It is radical in that international trade lawyers might be uncomfortable with the revelation that how the Appellate Body looks at words in a covered agreement, under the guise of the *Vienna Convention*, is not entirely different from how literary scholars examine fiction or poetry. Surely that indicates “anything goes” when it comes to treaty interpretation. That suggestion, however, is false. Literary criticism affords a disciplined set of tools to analyze words, and those tools are not all that different from traditional methodologies used by lawyers to impart meaning to words.

So, our thesis is *not* radical in that law (*i.e.*, legal texts, including the *WTO Agreement* and its Annexes) are a species of literature. The proposition of law “as” literature is understood by scholars of Law and Literature. Courses and scholarship in that field are moving beyond the important, but limited, boundary of law “in” literature, whereby the entire focus is on the examination of themes such as justice in prose and poetry. Law is seen as generating non-fiction texts, which contain their own “narratives.” A “narrative” is an “ordering of events,” a temporal and spatial “exercise[] in logic” of cause and effect, which “emerges from a perspective about what has happened, is happening, might happen, or will happen, yet which is “always focalized” in that it “allow[s] one to see, but ... limit[s] what one sees.”¹⁷ The limit occurs because a narrative is a “selective construct[],” that is, not an entire account from all vantage points, but a partial rendition from a particular perspective.¹⁸ Narratives—and their “motifs” (recurring elements within a single story) and “functions” (recurring elements found in multiple stories, *i.e.*, patterns)—are the subject matter of Literary Theory.¹⁹ Hence, the analysis of legal narratives is susceptible to analysis using methodologies well-known to literary scholars.

¹⁷ MICHAEL RYAN, AN INTRODUCTION TO CRITICISM: LITERATURE-FILM-CULTURE 11 (2012) [hereinafter RYAN].

¹⁸ *Id.*

¹⁹ *Id.* at 11–12.

II. CONSTITUTION, STATUTE, AND/OR TREATY?

Why look to interpretative methodologies used in constitutional, statutory, and literary analysis for insights into understanding disputed terms in a trade treaty? Certain such treaties are akin to constitutions of multilateral trade. That is most obvious with respect to GATT. GATT was the constitutional document, albeit skeletal, for world trade from its signing on 30 October 1947 until it joined the other multilateral trade agreements (MTAs) on goods agreed to during the 1986-94 Uruguay Round and located in Annex 1A of the *WTO Agreement*.²⁰ As of and since 1 January 1995, the *WTO Agreement* has played the role of the constitution of international trade law. Moreover, both GATT and the *WTO Agreement* contain constitution-like language: plenty of broad, trade-liberalizing principles, but rather fewer technical, detailed rules. However, appreciating the possibilities afforded by constitutional interpretative tools also is relevant for those provisions in hard-core trade agreements that are wide, open-ended, and thus open to variant definitions.

As for recourse to statutory interpretative methodologies, they are a natural fit for the many intricate, particularized trade rules and treaties, including all of the accords in Annex 1A to the *WTO Agreement* (including the rule-like provisions of that *Agreement*, and GATT). They also are sensible in the context of interpretative problems for the Annex 1B and 1C accords, namely, the *General Agreement on Trade in Services (GATS)* and *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*, respectively, as well as such problems in the remaining annexed agreements, namely, the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, in Annex 2), *Trade Policy Review Mechanism (TPRM)*, in Annex 3), and plurilateral agreements (principally the *Agreement on Government Procurement*, or *GPA*, in Annex 4).²¹

Studying the methods developed in literary theory for fiction seems furthest afield from interpreting GATT-WTO agreements. Yet, when law is seen “as” literature, that is, as a species of written texts, the gap closes. Legal words can be seen through the lens of any of the methods used to understand non-legal texts, namely, fiction, drama, and poetry, because law is a type of communication designed to order and make sense of relations, to preserve the status quo, and, on occasion, to effect evolutionary or revolutionary change. Moreover, law is the product of culture, just like non-legal literature. Both tell a story, that is, both are narratives that reflect views of a group, or groups, about how the world is, and how it ought to be.

Of course, in considering this question—why look to constitutional, statutory, and literary theory?—we could respond that the question itself neglects our point: the methodologies from all three areas may be classified into one of three types. The better question is whether a trade agreement is a constitution, statute, or narrative, and the best answer is that a trade agreement contains elements of all three types of text. So, in a sense, it does not matter whether constitutional, statutory, or literary methodologies are examined. All three fields have tools that are Textual, Contextual, or Pragmatic, and tools in all three

²⁰ RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE LAW AND POLITICAL ECONOMY OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND OTHER WORLD TRADE ORGANIZATION AGREEMENTS*, Volume I, Chapter 1 (2nd ed., 2013).

²¹ For an analysis of the structure of the *WTO Agreement* and its four Annexes see RAJ BHALA, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK*, Volume One, Chapters 16, 18 (5th ed., 2019).

categories are permissible under the *Vienna Convention*. We choose to cover all three areas to be comprehensive, and to show the intra- and inter-disciplinary nature of international trade treaty interpretation.²²

Interpretation is one of the most intellectually fascinating and practically vexing topics not only in the world trading system, but in any legal system—international or domestic—and in the realm of literature. No small amount of literature exists on judicial interpretation in these varying contexts. *Our thesis synthesizes thinking by cutting across literature from the Vienna Convention and American Jurisprudential contexts, and integrating literature from English Literary Theory*. That is why we urge that the work of the Appellate Body, in theory, is both intra- and inter-disciplinary in nature: its methodologies come from within and outside the law, and our taxonomy makes this truth transparent.

III. AMERICAN CONSTITUTIONAL INTERPRETATION: TAXONOMY OF INTERPRETATIVE METHODOLOGIES

To interpret the different modes of WTO Appellate Body interpretation of treaty texts, it is essential to create consistency and clarity in terms. Only then is a clean analysis of what the Appellate Body does, in relation to what it says it does in terms of applying Articles 31-32 of the *Vienna Convention*, possible. The initial difficulty, then, is to define simply, but not simplistically, a taxonomy of interpretative techniques in legal jurisprudence, and in literary theory.²³ With that task complete, the different techniques can be applied to WTO decisions, or rather, it becomes possible to see how the Appellate Body—albeit without saying so, and possibly unconsciously—applies those techniques to resolve key issues.

The first step of the process is to determine which analogs apply to GATT-WTO texts. This section compares the GATT to a constitution. The first way in which the GATT is like a constitution is the process for amending either document is difficult and rarely done.²⁴ The other way in which the two types of documents are alike is typified in the later section on structuralism, particularly in the context of the 2004 *China Rare Earths* case. Suffice it to say, the GATT sets up an organization, creates a structure and outlines functions in the way a constitution typically does.²⁵ Thus, some comparisons to constitutional interpretation can be made and analysis of constitutional interpretative methods is useful, although hardly straightforward.

²² We confess that we omit, for lack of space, inclusion of techniques of contractual interpretation (and note that in Public International Law, treaties are sometimes viewed as contracts among nations), and of biblical interpretation (and observe that the careful exegesis of sacred scriptures may yield fruitful insights for secular agreements).

²³ The taxonomies discussed herein are representative of the leading interpretative techniques and their uses, with an audience of scholars, students, and practitioners of international trade law. Experts in American Constitutional Law or English Literary Theory may find the taxonomies helpful by way of review, or to fill in gaps, but the discussion admittedly does not cover the full depth and application of all their methodologies. For that depth, the citations presented herein (beyond Bobbitt, Post, Linder, and the LII) may be helpful.

²⁴ WORLD TRADE ORGANIZATION, *General Agreement on Tariffs and Trade* in THE WTO AGREEMENTS SERIES 2, https://www.wto.org/english/res_e/booksp_e/agrmtseries2_gatt_e.pdf.

²⁵ Some GATT Articles which could serve as exemplars of this function are: Article XXXVI: Principles and Objectives, Article XXXVII: Commitments, and Article XXXIII: Accession.

Different scholars use different terminologies, and different categories. The literature has an appalling lack of consistency from one author to the next, or one guide to the next. Doug Linder, Professor of Law at the University of Missouri-Kansas City, breaks out constitutional interpretation into two categories: Originalist and Non-Originalist.²⁶ The Legal Information Institute at Cornell University Law School breaks constitutional interpretation out into six categories, saying “[t]he six forms, or ‘modalities’ as he refers to them, are drawn from P. Bobbitt, *Constitutional Fate—Theory of the Constitution* (1982) and P. Bobbitt, *Constitutional Interpretation* (1991). Of course, other scholars may have different categories, but these largely overlap these six forms.”²⁷

Taking the Legal Information Institute at its word, other scholars such as Robert Post, author of *Theories of Constitutional Interpretation*, should overlap the six forms to which P. Bobbitt refers. Synthesizing Post’s Historical, Doctrinal, and Responsive interpretations with the Originalist/Non-Originalist split, and the six categories Bobbitt identifies, is no easy task.²⁸ The end benefit is to boil down American approaches to constitutional interpretation into a final, tightly packaged form. Chart I does so.²⁹ This Chart reduces the chaos, minimizes redundancies, and depicts one model, or one template, from which to work. The sources underlying this Chart are used not because they are authoritative, but because they are (1) representative of several other authors with similar viewpoints, and (2) particularly well-written, *i.e.*, convincing, accessible, and even fun to read. For example, the controversial late Justice Antonin Scalia forever changed the U.S. Supreme Court’s relationship to Originalist interpretations.³⁰ Linder is one eminent scholar to recognize this shift and his breakdown into Originalist and Non-Originalist interpretations is marvelously accessible.³¹

²⁶ Doug Linder, *Theories of Constitutional Interpretation*, <http://law2.umkc.edu/faculty/projects/ftirls/conlaw/interp.html> (last visited Jan. 6, 2020) [hereinafter Linder].

²⁷ Legal Information Institute, *Limitations on the Exercise of Judicial Review*, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/limitations-on-the-exercise-of-judicial-review> (last visited Jan. 6, 2020) [hereinafter LII].

²⁸ Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990).

²⁹ The Chart overlays the terms used by three sources. The sources are coded by black-and-white patterns: (1) Linder is dotted; (2) Bobbitt is vertical lines; (3) Post is horizontal. Terms common to Bobbitt and Post (*i.e.*, where these two sources overlap) are a grid formed by vertical and horizontal lines.

³⁰ John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 747–48 (2017).

³¹ There is disagreement on whether some methods of judicial interpretation fall under the Originalist or Non-Originalist headings. For example, Linder says in his breakdown that an Originalist favors heavy reliance on “originalist sources” and gives five possible such sources. They are: “(1) The text and structure of the Constitution. (2) Intentions of those who drafted, voted to propose, or voted to ratify the provision in question. (3) Prior precedents (usually judicial). (4) The social, political, and economic consequences of alternative interpretations. (5) Natural Law.” But, Linder also notes there is some controversy about the weight of each of these. Linder, *supra* note 26.

Indeed, other authors may place some of these, particularly (3) and (4), into Non-Originalist categories. Post describes prior precedents in his section on the Doctrinal approach and does not disclaim them as Originalist in the way Linder does. The consequences of one decision versus its alternative is typically a consideration for the Prudential or Responsive approach, says Post. According to Linder, a Pragmatist mixes Doctrinal with Prudential, defining a Pragmatist as one “who gives substantial weight to judicial precedent or the consequences of alternative interpretations, so as to sometimes favor a decision ‘wrong’ on originalist terms because it promotes stability or in some other way promotes the public good.” *Id.*

By way of explication, the top of the Chart reflecting Linder's binary breakdown is straightforward. Originalist and Non-Originalist interpretations also support the Legal Information Institute's claim that the work of other scholars can map onto Bobbitt's classifications. If Bobbitt's "Historical" and "Textual" approaches are considered as "Originalist," then the two scholars match up. Linder's "Non-Originalist" interpretation can also be broken into four subcategories, namely Bobbitt's "Structural, Doctrinal, Ethical, and Prudential." Coincidentally or intentionally, Post names two of his three methods of interpretation using Bobbitt's names. They both refer to "Historical" and "Doctrinal," although Post's "Responsive" and Bobbitt's "Prudential" may be viewed as loosely the same methods with different names.

A. Originalists: Historical Interpretation

Putting the various theories of judicial interpretation on top of each other in this overlay more or less results in a coherent framework that hopefully incorporates the various theories and locks in the discussion. The first method of Originalist Interpretation breaks out into two subgroups: Historical and Textual Interpretation. Historical Interpretation has its own subparts.

1. *Historical Intent and Historical Understanding*

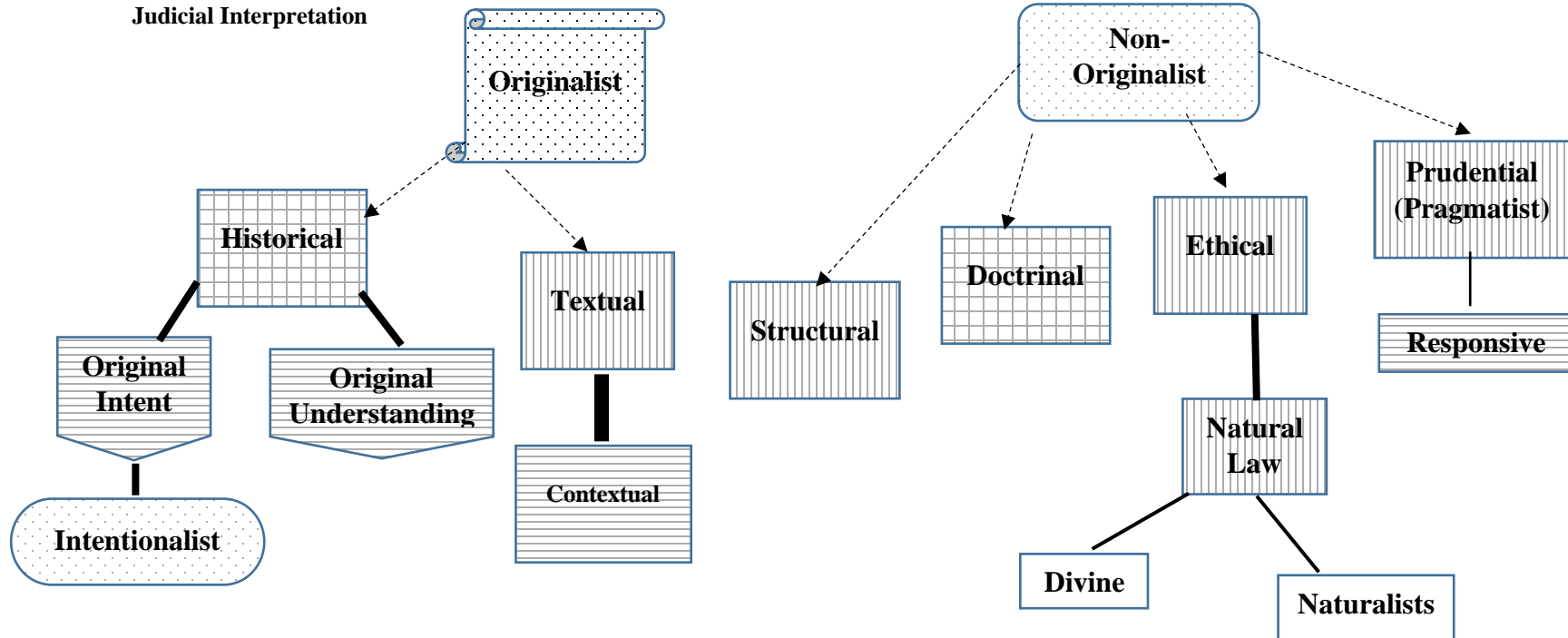
The first division of Historical interpretation is Original Intent versus Original Understanding. In the context of the U.S. Constitution's Bill of Rights, this means looking at two different perspectives from 1791. On the one hand, there is the intention of the Founding Fathers, the legislators who wrote the Constitution, and its first 10 Amendments.³² On the other hand, officers of the law, judges, and lower bureaucrats had to enforce or implement the laws in 1791, and their understanding would exert some control over the law. When deciding the original or historical meaning of the law, should we look primarily to evidence of legislative intent, or evidence of how the law was implemented? In many cases, it may not make a difference, as the evidence points to the same interpretation. But where legislative history does not match governmental practice, two originalists may disagree, hence the split between Original Intent and Original Understanding.

The wild card, as it were, is (5), Natural Law. A Natural Law Theorist is one who believes that higher moral law ought to defeat inconsistent positive law. *Id.* But whether Natural Law is a form of Originalist or Non-Originalist interpretation seems to depend on where one believes Natural Law originates. If an author believes Natural Law comes from God or gods, then that author puts it as an Originalist view of judicial interpretation, one that seeks to interpret the first laws from the creation of the universe. If an author believes Natural Law is the inevitable result of social creatures having to interact due to their collectivist nature, then that author is more likely to group Natural Law in with Responsive interpretation, that form of Non-Originalist interpretation which assumes a law responds to the needs of the society which agrees to be governed by this law.

For our purposes, we deem prior precedents to support Doctrinalism more than any Historical approach. Post clearly juxtaposes Historical and Doctrinal methodologies as being counter to one another. Therefore, we describe Historical Interpretations as Originalist, and list Doctrinal as Non-Originalist.

³² Constitutional interpretation as it applies to individual rights is not necessarily the same as it is with respect to separation of powers, or other issues. For example, interpretative methodologies may be used to allow for a broad approach to individual rights, but a narrow one on the powers of the executive branch. Such differences are beyond the scope of the present article.

Chart I:
Judicial Interpretation



In illustrating this point, Post cites *Marsh v. Chambers*, 463 U.S. 783 (1983), which disputes the constitutionality of opening legislative sessions with a prayer, particularly one led by a chaplain paid a state salary.³³ One arguing Original Intent might review the Establishment Clause (“Congress shall make no law respecting an establishment of religion”) with reference to how the words of the clause were defined at the time.³⁴ The principle, as stated by Justice Scalia, would be that “words mean what they conveyed to reasonable people at the time they were written[.]”³⁵ Original Intent might then show the Founding Fathers intended for legislatures to not be seen as promoting one religion over another.³⁶ It would follow that a Presbyterian minister offering an opening Christian prayer at legislative sessions for fourteen years may be too close to “establishing” a religion.

Conversely, one arguing Original Understanding would point out that on September 22, 1789, three days before approving the First Amendment which contains the Establishment Clause, Congress enacted a statute providing for the payment of congressional chaplains.³⁷ Based on this evidence, the Framers originally understood the Establishment Clause as not in conflict with the practice of congressional chaplains, a practice which has continued for over 200 years.

Ultimately, in *Marsh v. Chambers*, this Original Understanding of “establishing a religion” won out, with the Supreme Court ruling that legislative prayers must have been constitutional since the Founders who ratified the First Amendment also employed legislative chaplains.³⁸ But was it because the practice was longstanding or widespread, that is, historically grounded or contemporarily commonplace? The Supreme Court may have been a tad disingenuous when citing a long history instead of broad current practice.³⁹

The actual cause of the ruling may have been the problem of acquiescence. Will the general population be outraged by a ruling which does away with something popular? The opinion itself hints that too many state and municipal legislative sessions opened with a prayer for the Supreme Court to just abolish the practice suddenly.⁴⁰ The Court may have decided the case the way it did because any other outcome could lead to open revolt, public outrage, or at least an undermining of the Supreme Court’s credibility.⁴¹ A law only governs the public to the extent the public consents to be governed. Taking away prayer would have taken away what the population wanted, and so perhaps the case could only be decided one way.⁴² Any other rationale may have been a post hoc excuse to explain why the inevitable is also legitimate. If that is the case, then the U.S. Supreme Court’s ruling in *Marsh v. Chambers* could serve as a model for the WTO Appellate Body—an adjudicatory forum that

³³ *Marsh v. Chambers*, 463 U.S. 783 (1983).

³⁴ Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [hereinafter Posner] (describing textual originalism as “new dictionaries for new texts, old dictionaries for old ones”).

³⁵ *Id.* (quoting ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

³⁶ Post, *supra* note 28, at 13.

³⁷ *Id.* at 17.

³⁸ *Id.*; *Marsh*, 463 U.S. at 792.

³⁹ *Marsh*, 463 U.S. at 800–01 (Brennan, J., dissenting).

⁴⁰ *Id.* at 792; Post, *supra* note 28, at 29.

⁴¹ Post, *supra* note 28, at 30.

⁴² *Marsh*, 463 U.S. at 792.

depends on the acquiescence of its constituents, namely, the WTO Members specifically, and the international trade community in general.

2. *Authority of Consent*

If a ruling is made because that is the outcome the populace can accept, then Post says the ruling relies on the “authority of consent.”⁴³ The consent of the people gives authority to the Constitution, and therefore judges should use Historical interpretation to divine what the people have consented to follow. Post notes this theory of judicial interpretation has severe limits.

The story of consent may itself be too simplistic. “The Framers of the Constitution proposed a compact to limit the power of government; the people signified their agreement to that compact by their ratification of the Constitution, and that agreement is what gives the Constitution its authority.”⁴⁴ Historical Intent would lie in what the Framers thought they were proposing and Historical Understanding would be what “the people” believed they were agreeing to.

One problem with Historical Intent is it is so restrictive that it leads to absurd results. For example, the U.S. Constitution, Article I, Section 8, Clause 14 gives Congress the power “to make Rules for the Government and Regulation of the land and naval forces.” The fact that the Constitution does not use the word “military” makes this clause a great learning point. “It can be said with complete certainty that no one in the eighteenth century had the intent to endow Congress with the power to make rules for the regulation of an air force. But no reasonable person would conclude from this undisputed fact that Congress does not now have this power.”⁴⁵ The same can be said for Historical Understanding as well as Intent, in that no one in the eighteenth century would have understood the clause as extending to an air force. Originalist and Supreme Court Justice Scalia spoke of “the understanding that general terms may embrace later technological innovations.”⁴⁶

But Historical Interpretation is limited by its most obvious factor: time. As the United States is almost 200 years older than the WTO, an example from American history can illuminate the impact of the passage of time on the WTO. First, even in the present, “[i]t is hard enough to ascertain the intentions of a living individual.”⁴⁷ The problem is compounded when time prevents us from inquiring into the intent of not one but several individuals.⁴⁸ “If [authority of consent] is understood to arise at the moment of the Constitution’s ratification, then no living person has ‘consented’ to the First Amendment, or indeed to most of the Constitution.”⁴⁹ Thus, even if we knew what the Founding Fathers were thinking, that knowledge would only provide a greater understanding of the Constitution, but not increased

⁴³ Post, *supra* note 28, at 21.

⁴⁴ *Id.*

⁴⁵ *Id.* at 21–22.

⁴⁶ Posner, *supra* note 34.

⁴⁷ Post, *supra* note 28, at 22.

⁴⁸ State ex rel. Kalal v. Circuit Court for Dane Cty., 271 Wis. 2d 633, 672–77 (2004) (Abrahamson, C.J., concurring).

⁴⁹ Post, *supra* note 28, at 23.

authority. “Why, it may be asked, should the consent of our predecessors have authority over us?”⁵⁰ Further, who were these predecessors that consented to the Constitution?

First, not all the population could vote to ratify the Constitution. Only white land-owning males could vote. But, the general public did not vote directly on ratifying the Constitution.⁵¹ Instead, representatives voted. In a representative democracy, the body politic voices its will through choosing between two candidates running for election with opposing platforms. For instance, one candidate promises to ratify the newly written Constitution and one promises to vote it down. By voting for the pro-Constitution candidate, a voter could indirectly express the desire to ratify the Constitution. However, that is not how it happened.

As the Constitution was ratified through the States from 1787 through 1790, the representatives voting for it had, in many cases, already held office.⁵² There would have been no opportunity for the candidate to announce his pro-Constitution platform to the voters, as the issue was not on the table prior to his election. In some cases, the notion of changing from the Articles of Confederation to a Constitution arose, was voted on, and passed all within the tenure of a single representative. The voters may have voiced their opinions to the press and in town halls, but they did not vote on whether to ratify the Constitution.⁵³ In the final analysis, it was 1,071 white, land-owning male representatives (opposed by 577 nay-voting, white, land-owning males) who consented to the Constitution on behalf of the rest of the population and all those to come.⁵⁴ Compare this to the Members of the WTO and their agreements. What percentage of the global population truly participated in reaching agreements during the Uruguay Round? Judicial interpretation that rests on this “authority of consent” theory may at times need to be bolstered by other theories, such as Doctrinal or Prudential interpretations.

3. *In an International Trade Context*

The examples of Historical Intent and Historical Understanding above are strictly within an American framework, yet this mode of judicial interpretation is not only applicable to the U.S. Constitution. The WTO Appellate Body has employed Historical methods in some decisions, either in deciding one element or the overall outcome of a case. Virtually no judiciary can ignore history and reach a correct outcome in every case, and the Appellate Body is no exception.

One case is especially useful for seeing Historical Interpretation at play, particularly because *European Communities—Export Subsidies on Sugar* uses both Historical Intent and Historical Understanding.⁵⁵ This 2005 case centers around the different categories of sugar and how they are subsidized in the European Communities (EC). The categories of A and B

⁵⁰ *Id.*

⁵¹ Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544 (2011) (reviewing Pauline Maier, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010)) [hereinafter *The Founding Revisited*].

⁵² *Id.* at 550–51; *State-by-State Ratification Table*, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/resources/ratification/overview/>.

⁵³ *The Founding Revisited*, *supra* note 51, at 557–58.

⁵⁴ *State-by-State Ratification Table*, *supra* note 52.

⁵⁵ Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R (adopted May 19, 2005) [hereinafter 2005 *EC Sugar*].

sugar fall within certain production quotas. Category C is any sugar above that quota. Category C sugar cannot be sold within the EC the year it is produced, and must either be exported or carried over into the next year's production quotas. Australia, Brazil, and Thailand all had similar complaints related to this subsidy scheme. The EC attempted to say "too little, too late" by claiming the Complainants had been estopped from bringing suit because of their silence on the matter of sugar subsidies until that time.

Australia, Brazil, and Thailand rebutted the EC's claims of estoppel with two attacks. First, the EC made subsequent modifications of its sugar regime, which would have changed the factual basis upon which the estoppel rested.⁵⁶ Second, it is not clear that estoppel applies to WTO dispute settlements. The Appellate Body answers this second question of estoppel with Historical Intent:

Similarly, Thailand maintains that the Panel was correct in concluding that the principle of "estoppel is not mentioned in the WTO *Agreement*, or the *DSU*, and that it has never been applied by any panel or the Appellate Body." . . . Moreover, according to the United States, "[e]stoppel is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body."⁵⁷

While looking for the word "estoppel" in the WTO *Agreement* is an approach close to Textualism, it does not rely on what is written, but rather on what is omitted and what the omission was intended to communicate. Therefore, this analysis is better classified as an Historical Intent approach. At the time the WTO *Agreement* was drafted, the WTO did not intend for estoppel to be a defense in litigation.

Unfortunately, the Appellate Body never issues a clear ruling on the use of estoppel generally, deciding the outcome on other grounds.

Even assuming, for the sake of argument, that the principle of estoppel has the meaning that the European Communities ascribes to it, and that such a principle applies in WTO dispute settlement, we are not persuaded, in the circumstances of this case, that the Complaining Parties would be estopped from bringing claims against C sugar.⁵⁸

But the Appellate Body does go on to specify why estoppel is not warranted in this case, invoking the Historical Understanding approach to judicial interpretation, even explicitly claiming this method of interpretation.

More specifically, it was the respondent, EC, which first posited a "shared understanding" at the end of the Uruguay Round and the formation of the WTO. The argument was essentially that when the EC gave its *Schedule of Concessions* in 1994, no one complained. That must have meant they were amenable to the *Schedule of Concessions* and its provisions on sugar. The Appellate Body disagreed:

We recall that the Panel found no evidence of any such "shared understanding" in this case. Thus, as we see it, the European Communities has no basis on which to now assert that it could have legitimately relied

⁵⁶ *Id.* at ¶ 54.

⁵⁷ *Id.* at ¶ 311.

⁵⁸ *Id.* at ¶ 313.

upon such alleged “shared understanding” in deciding not to include exports of C sugar in the base quantity levels in its Schedule.⁵⁹

In this case, silence does not equal acquiescence and the Complaining Parties are not estopped from bringing claims against the EC. In reaching this conclusion, the Appellate Body relies in large part on the facts that: (1) the contracting parties to the Uruguay Round never expressed an intent for the doctrine of estoppel to apply in WTO disputes, and (2) a footnote several pages deep in one *Schedule of Concessions* of one WTO Member is not enough to support a “shared understanding” among all Members.

B. The Other Originalists: Textual Interpretation

Textual interpretation is the professed love of many judges, including Justice Scalia. The central tenet of textual interpretation is that the meaning of a statutory, constitutional, or treaty provision is right in front of the reader, in the text. All one needs to do is read it. However, if law were so simple, then there would be no need for law schools, lawyers, or even judges. If all could read plainly every law, then parties in a lawsuit would have nothing to litigate. Post, in *Theories of Constitutional Interpretation*, offers a compelling criticism of this theory of interpretation.

1. It Is Not a Theory

The alleged benefit of textual interpretation is that judges employing the theory are less likely to be accused of legislating from the bench. “Yet, strictly speaking, the approach is not a theory at all; it is instead a description of what happens when constitutional meaning is not problematic.”⁶⁰ The reason decisions based on textual interpretation may go un-criticized is because no interpretation is actually employed. The meaning is obvious to all:

But if for any reason that meaning has become questionable, it is no help at all to instruct a judge to follow the “plain meaning” of the constitutional text. A meaning that has ceased to be plain cannot be made so by sheer force of will.... [F]or example, either the meaning of the Establishment Clause with respect to the issue of legislative prayer is “plain,” or it is not. If the latter, the question of constitutional meaning cannot be resolved by staring harder at the ten words of the clause.⁶¹

Rarely are judges faced with such an easy challenge of interpretation that it can be resolved through recourse to a strict, Textualist approach.

Consider the constitutional provision on how the U.S. Senate is to be structured as an example where Textualism would suffice:

Article I, Section 3, Clause 1 of the [U.S.] Constitution, for example, states that “the Senate of the United States shall be composed of two Senators from each State.” If a third California Senator should one day present herself for accreditation in Washington, D.C., no court in the country would think twice before disapproving of the application. From a phenomenological point of

⁵⁹ *Id.* at ¶ 316.

⁶⁰ Post, *supra* note 28, at 14.

⁶¹ *Id.*

view, there would be no question of “interpreting” the constitutional language, for its meaning and application would appear clear and obvious.⁶²

Thus, textual interpretation seems to be the most credible approach, because it removes judicial discretion, interpretation, and other practices which bring the accusation of legislating from the bench. Yet, it is also the most useless approach, because of its reliance on the obvious. Taking Post’s example: has a third Senator ever presented herself to represent a state in the Senate? Again, if the issue is obvious enough to employ solely textual interpretation, then there is often nothing to litigate in the first place.

2. *Textualism and Contextualism*

Chart I (*supra*) shows Originalism branching out into Historical approaches and Textualism. A Textualist review of the original text of a constitution may not be the same as approaching the text from an historical point of view. In *United States v. Eichman*, Justice Scalia voted with the majority to hold a federal statute banning the burning of the U.S. flag to be unconstitutional.⁶³ But at the time the First Amendment was ratified, its guarantee of “freedom of speech” contemplated only speech in the form of words, not actions like flag burning.⁶⁴ Thus, “an understanding of free speech that embraces flag burning is exceedingly unoriginalist,” though is textualist in how it relies on the text of the First Amendment.⁶⁵ Historical approaches to interpretation require a review of past perspectives in a way in which Textualism might not, so the differences between textualism and Historical approaches are reflected in the Chart. However, that alignment is an attempt to reflect a uniquely American attitude known as “textual originalism.”⁶⁶ In the WTO context, as reflected in the *EC Sugar* example above, Historical approaches would fall into the Contextual method in our tripartite classification, while Textualism stands alone.

Just as Historical Intent and Historical Understanding are two approaches to Historical interpretation, Textualism can become more useful and more layered by taking different approaches than staring harder and longer at words in a clause. However, there are two drawbacks to expanding from Textualism to Contextualism. First, Contextualism comes with accusations of judicial activism.⁶⁷ Second, the methods are more akin to English graduate students interpreting poetry than judges reading statutes or treaties, and so require interdisciplinary approaches that not every judge would feel comfortable invoking.

Textualism, in its strictest sense, accomplishes little. However, a broader definition of Textualism allows for consultation of not just the text within the four corners of the statute, constitution, or treaty that is being interpreted. Expanded Textualism consults other sources to determine the meaning and application of language. To illustrate through comparison, Historical interpretivists might look to previous drafts to determine intent. Responsive

⁶² *Id.*

⁶³ Posner, *supra* note 34.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ This article does not take a position on Critical Legal Theory and its proposition that judges know the decisional outcome they seek to reach, and then work backwards, or reverse engineer, their opinion to achieve that outcome. Whether, for example, some Appellate Body members approach cases with the *OED* in hand, seeking a lexicographic rationale to produce the result they want, is beyond the scope of the present inquiry.

interpretivists might look to other legislation to view an overall scheme of progress coming from the legislature. But a Textualist loves reading legislation for the definition sections of statutes.⁶⁸ Strict Textualists accomplish little with their staring at a word or phrase, but Expanded Textualists can develop meaning through a methodical approach to consulting multiple sources, expanding outside of the text at hand, to other texts that act as companions, to well-trusted dictionaries, or even to definitions of words which appear in other contexts, from municipal codes to other courts' opinions.

By comparison, Contextualism is a more holistic—indeed, literary—approach to a statute, constitution, or treaty. Contextualists look to the whole purpose of the law at issue and incorporate ideas from preambles, comments, and even chapter titles before beginning analysis of the section at the heart of litigation. In a sense, legislators or treaty drafters attempt to tell a story of the law, and the Contextualist tries to understand the story. A complete understanding is vital, because the end of the story is written by the Contextualist, for instance, in a judicial opinion or Appellate Body report.

To understand how the terms “Textualist” and “Contextualist” have been co-opted in international trade disputes, consider again Article 31:3 of the *Vienna Convention*. Entitled “General rule of interpretation,” Article 31 contains a three-step approach. Step 1 reads: “A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*” (emphasis added). It is clear the ordinary meaning of a term must be placed in context and viewed in light of the purpose of a treaty, but the order in which these tasks are to be performed is not set. Must one understand the “object and purpose” of the treaty first, before looking at the “ordinary meaning” of terms? Or is it preferable to determine the “ordinary meaning” of a term, and then adjust it according to the “object and purpose” of the treaty?

Starting from the beginning of the sentence, a Textualist “top-down” approach would be to establish a meaning for a term (usually through consultation with a dictionary), then place the term in its context, and then view the object and purpose of the treaty overall. A Contextualist would follow a “bottom-up” approach to the same sentence, starting at the end of this sentence from Article 31. First, a Contextualist would try to ascertain the object and purpose of the treaty as a whole, then read the term as it is used in context, and then clear up any ambiguity by finding the ordinary meaning of the term in, perhaps, a good dictionary. Proposing that Contextualists start at the end of the sentence is applicable only to this particular sentence in the *Vienna Convention*. It may be more useful in other situations to think of Contextualists as looking at the big picture of the treaty first, then zooming in to the context of a given term, and then zooming in further to isolate the term itself and determine its ordinary meaning. Textualists start with a single word, zoom out to the context, and zoom out further to the big picture of the treaty's purpose.

Both approaches have flaws. Contextualists perhaps infer too much and attempt to decipher legislative intent, albeit without consulting legislative history. Intent is only inferred from the Contextual reading of the statute. Even a judge who guesses correctly at such intent may be assailed with the criticism that she took too much on faith. But Textualists begin with minutiae and often never leave it. The written decision may never demonstrate a final “zooming out” to see the big picture of the object and purpose of the treaty.

⁶⁸ See *Bond v. United States*, 572 U.S. 844, 870–71 (2014) (Scalia, J., concurring).

Of the two approaches, in international trade law, Textualism is the greater evil. Contextualism at least starts within the legal world of the controlling document, be it a constitution, statute, or treaty. Textualism, at least as practiced at the WTO Appellate Body, starts with the meaning of a word completely divorced from its legal context and legal sense. Often, the textual analysis begins with the consultation of a dictionary. As opposed to Contextualism, the obsession with Textualism and dictionary definitions places, frankly, too much legal power in the hands of the lexicographers at Oxford.⁶⁹

The Textualist approach of the Appellate Body is characterized by a heavy reliance on the *OED*, despite protestations to the contrary.⁷⁰ In response to the criticism that the Appellate Body treats the *OED* as another “covered agreement” of WTO Members, the Chairman of the Appellate Body in 2003 said:

Yet we *do* work with words on the Appellate Body. We *do* try always to discern the meaning of words. The meaning of words is discerned in how they are defined. And the words of the English language are nowhere better defined, in my view, than in the *OED*.⁷¹

Definitions are crucial in Appellate Body reports, and if the Panel decides a case using a definition the Appellate Body does not like, it has no qualms reversing.

For example, in *U.S.—Anti-Dumping and Countervailing Duties (China)*, the Appellate Body took the Panel to task on its definition of “public body.” The Panel settled on a definition used across four different jurisdictions as a matter of practice. On appeal, the Appellate Body reviewed this non-dictionary definition and found it unsatisfactory. But, seemingly to sidestep criticism, the Appellate Body was careful to note, “we recall dictionaries are not, as the Appellate Body has previously recognized, the sole source of information for determining the meaning of a treaty term.”⁷² Yet the Appellate Body included in its Report dictionary definitions of both “public” and “body,” only eschewing dictionary use after these definitions proved unhelpful.

Perhaps the most galling instances of the Appellate Body’s use of textualism over Contextualism are instances of playing what might be called “Dueling Dictionaries,” such as in *U.S. — Softwood Lumber IV* (2004).⁷³ In that case, the Appellate Body employs three dictionaries: the *OED*, *Black’s Law Dictionary*, and the *Collins Dictionary of the English Language* for the meanings of “goods” and “provides.” The winning dictionary decided the outcome of the case. The worst example of Dueling Dictionaries was in the *U.S. — Subsidies on Upland Cotton* (2005) case, wherein the Appellate Body’s beloved *OED* lost out to the definition in the *Merriam-Webster Dictionary*, the dictionary of those colonial upstarts in

⁶⁹ For a more thorough analysis of the dangers of overreliance on dictionaries see Eric Witmer, *Lexicographers as Law-Makers: The World Trade Organization Appellate Body and the Oxford English Dictionary* (forthcoming, manuscript on file with author). [hereinafter *Lexicographers*].

⁷⁰ See Dongsheng Zang, *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 SYRACUSE J. INT’L L. & COM. 393, 426, 429–430 (2006) [hereinafter Zang].

⁷¹ *Id.* at 438.

⁷² Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, at ¶ 335 (adopted Mar. 25, 2011) [hereinafter 2011 *China Tyres*].

⁷³ Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted Feb. 17, 2004) [hereinafter 2004 *Softwood Lumber*].

America.⁷⁴ The *OED* relied on geography in defining the word “market.” But one entry in *Merriam-Webster* defined “market” not as an area of geography, but as “the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices.”⁷⁵ This definition, used in *Softwood Lumber* as well, helped convince the Appellate Body that there is indeed such a thing as a “world market.”⁷⁶ But it also shows that the weakness of Textualism lies in picking the correct dictionary definition, which in itself is more the work of lexicographers than of lawyers.⁷⁷

Finally, Textualism and Contextualism are often useful only as starting points. Textualism reads the plain meaning of a disputed term in a constitution, statute, or treaty. But Contextualism does nearly the same, only with more focus on the greater overall meaning and purpose of the text. Both are useful for judiciaries that are concerned about judicial activism. These two interpretations carry the lowest risk of legislating from the bench and its concomitant criticisms, which may bear upon the Appellate Body’s insistence it relies on the ordinary meaning of the text.⁷⁸ However, this pair, Textualism and Contextualism, are sometimes the least useful methods of judicial interpretation, and recourse is necessary to what we identify (*infra*) as Pragmatic methods.

C. Non-Originalist Interpretations

In its purest (or most extreme) form, Originalism focuses only on the moment of conception for the document being interpreted. In its purest (or most extreme) form, Textualism views as important only what was first written, with no other input unless a dictionary is needed. Historical Interpretation considers other factors to help interpret the text, but only those sources that are contemporary with the text. The drawback to these approaches is that the present is ruled over by a past with an iron fist. The only meanings that hold true, even today, are those meanings that were true at the moment the document was written.

Non-Originalists take a different view, often going beyond the text and its history in some way. “Federal judges interpreting the Constitution typically consider not only the constitutional text and its historical background, but also its subsequent interpretational history, related constitutional developments, and current societal facts.”⁷⁹ Non-Originalist interpretations vary widely from each other with vast disagreements between the approaches. Indeed, Judge Richard Posner points out that the term “Non-Originalism” is not an ideal term, but rather a straw man label Originalists would use when describing interpretive approaches that go beyond “textual originalism.”⁸⁰ Yet, all Non-Originalists agree that a

⁷⁴ Appellate Body Report, *United States–Subsidies on Upland Cotton*, WT/DS267/AB/R (adopted Mar. 21, 2005) [hereinafter 2005 *Upland Cotton*].

⁷⁵ *Id.* at ¶ 404–05.

⁷⁶ *Id.* at ¶ 405–06.

⁷⁷ Posner, *supra* note 34 (stating: “Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless”).

⁷⁸ *Id.* (stating: “The fact that loose constructionists sometimes publicly endorse textualism is evidence only that judges are, for strategic reasons, often not candid”).

⁷⁹ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) [hereinafter Eskridge, *Dynamic*].

⁸⁰ Posner, *supra* note 34.

document must be understood as operating in the present, a living constitution, statute, or treaty that is relevant today.

1. *Structuralism*

Of the four Non-Original approaches to interpretation, Structuralism is closest to the Originalist points of view, hence its position in Chart I (*supra*). Structuralism stands for the proposition that the drafters of a constitution, statute, or treaty created a framework. The framework is set in its original position, as it was crafted at the time. But the way modern society interacts with the framework is not set.

In a U.S. Constitutional context, there is no better explanation of the structural approach to judicial interpretation than Charles Black's book *Structure and Relationship in Constitutional Law* (1969). Of course, Black discusses only the U.S. Constitution, while the concern here is about international trade law. Hence, selected WTO Appellate Body reports help elucidate what Structuralism means in the trade context.

Consider 2014 *China Rare Earths*.⁸¹ There is relevant language in the Appellate Body's report that stresses the Structural approach taken by the Appellate Body. In paragraph 5.74, the Appellate Body explains that the outcome must be based on "customary rules of treaty interpretation and the circumstances of the dispute."⁸² So, the "analysis must start with the text of the relevant provision in [the Chinese] *Accession Protocol* and take into account its context," including relevant provisions in the *Accession Working Party Report* and *WTO Agreements*, and consider "the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements."⁸³

The approach in this case follows the same "zooming out" from the narrowest to broadest as a Textualist would use. But unlike Textualism, the "zooming out" does not concern the language in one GATT Article or a single WTO Agreement. Rather, the "zooming out" in *China Rare Earths* is from the smallest text to the largest system. The Appellate Body looks at the *Accession Protocol* for one country (and its legislative history, the *Working Party Report*) before zooming out to view how the terms of accession fit within the grander WTO structure. How do the agreements interact? When there is a conflict between the two, can a GATT Article prevail over an *Accession Protocol*? These questions, which the Appellate Body poses and addresses, illustrate a Structuralism analysis.

⁸¹ Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, (adopted 7 Aug. 2014) [hereinafter 2014 *China Rare Earths*]. Also note the element in the full title is spelled "molybdenum," not "molybdenium." Cf. *Lexicographers*, *supra* note 69.

⁸² 2014 *China Rare Earths*, *supra* note 81, at ¶ 5.74.

⁸³ *Id.* at ¶ 5.62.

2. *Doctrinalism*

Doctrinal interpretation is the method of judicial interpretation that grows by accretion. Doctrine is built like the stone walls of a sturdy fortress through the mechanism of *stare decisis*, or standing by one's prior decision. One precedent piles on top of another until a decision-making foundation is built. The most recent decision is the controlling one, but that decision is most useful when it incorporates all the prior decisions on the topic. "The vast majority of [U.S.] constitutional decisions rely primarily upon doctrinal interpretation."⁸⁴

The American Supreme Court relies on *stare decisis* as a means of ordering society. The Court's implicit obligation to remain faithful to its own prior determinations "plays an important role in enabling courts to create stable and predictable rules upon which persons can rely in the arrangement of their lives and institutions."⁸⁵ However, the focus on prior decisions results in an objectively strange approach to constitutional interpretation. "Novices are often quite struck by the relative absence of the [U.S.] Constitution from constitutional opinions, which seem oriented toward specific doctrinal 'tests,' . . . derived from prior judicial decisions."⁸⁶ If there could be an opposite to Historical Interpretation, Doctrinal would seem to be the best fit.

Doctrinal interpretation should be viewed through a cost-benefit lens, with the cost of Doctrinalism being a loss of credibility. Significantly, Post's example case of *Marsh v. Chambers*⁸⁷ does not apply doctrinal interpretation. In a line of cases culminating in *Lemon v. Kurtzman*, the U.S. Supreme Court developed a method for determining the application of the Establishment Clause ("Congress shall make no law respecting an establishment of religion") to the facts in a case.⁸⁸ This doctrinal approach is known as the "*Lemon test*," and neither the majority nor the dissent applies it in *Chambers*.⁸⁹ Instead, the Court uses the Originalist approach of Historical Understanding, pointing out the drafters of the Constitution employed legislative chaplains.⁹⁰ The Court may have done so for reasons related to credibility. When the U.S. populace observes a dearth of citations to constitutional provisions in a constitutional opinion, it loses faith in the writers of the opinions and assumes the outcome is based on sources other than the Constitution, such as personal opinion.⁹¹

However, in an international trade case, a court or even a single judge could rule that a disputed term, such as the word "market," must mean one geographical area, yet ten years later, a different adjudicator could rule that a "market" can be global. If the original text contains only the word "market," and *stare decisis* does not exist in a formal (*de jure*) sense as a source of law, then each judge is free to interpret the terms of the text. Wait another decade, and one may find a judge who reads the original document and again determines there is no global "market," but only geographically limited "markets." Doctrinal interpretation, employing *stare decisis*, ensures this kind of judicial chaos does not arise. A

⁸⁴ Post, *supra* note 28, at 20.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁸⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁹ Post, *supra* note 28, at 16–17.

⁹⁰ *Id.* at 17.

⁹¹ *See id.* at 35.

court employing Doctrinal interpretation has as its goal replacing instability and uncertainty with consistency by remaining faithful to its own prior determinations to create stable, predictable rules.⁹² In turn, reliance on stable, predictable rules takes on special importance in the WTO, where Member nations account for 96 percent of world trade.⁹³

3. *Ethical Interpretation*

Ethical Interpretation primarily looks at constitutions, statutes, or treaties with an eye toward deep philosophical rules. Linder says Natural Law, a form of Ethical Interpretation, is Non-Originalist simply because it does not look directly to the text or the drafters' intentions.⁹⁴ The Legal Information Institute notes "[e]thical arguments derive rules from those moral commitments of the American ethos that are reflected in the Constitution."⁹⁵ But within American Jurisprudence, courts rarely employ Ethical Interpretations, particularly Natural Law and Higher Law, in the analysis of a case. Cases from the WTO Appellate Body that rely on Ethical Interpretation are nonexistent.

And yet, principles of justice and fairness play a role in international trade disputes. Ethical considerations often are "in the air," as it were, in Appellate Body cases, such as when a respondent invokes a GATT Article XX(a) public morality defense of its measure that violates a free-trade obligation such as the most favored nation (MFN) or national treatment rules in Articles I and III, respectively. No Appellate Body holding says anything like, "We find for the Respondent because their argument proffers a rule that most comports with God's Higher Law." Nor could the Appellate Body say such a thing, given the competing religious beliefs within the WTO. However, the Appellate Body could employ a more social approach to Natural Law, invoking the necessity of fundamental fairness in natural human interactions. The essence of a ruling in this fashion could be: "We find for the complainant because the actions of the respondent, if allowed, are so unfair as to erode trust among WTO Members. If every Member were to behave as respondent has, the very notion of world trade based on reciprocal, mutually advantageous terms and conditions would break down, and the purpose of the WTO would be defeated." That the Appellate Body has not expressed its rationale in any of its reports to date in such stark terms is likely because of concern about accusations of judicial activism. Yet, its doing so might actually bespeak its efforts at impartial guardianship of the WTO system through its jurisprudence.

⁹² *Id.* at 20.

⁹³ *Handbook on Accession to the WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm.

⁹⁴ Linder, *supra* note 26.

⁹⁵ LII, *supra* note 27.

4. *Prudential Interpretation*

Ethical Interpretation transitions easily to Prudential Interpretation. With the Ethical Interpretation, a court says “this rule is the only one that the nature of human interactions can support.” Prudential Interpretation is similar in that “[p]rudential arguments seek to balance the costs and benefits of a particular rule,”⁹⁶ and arrives at the rule that best supports society. Prudential Interpretation is more utilitarian in approach than Textualism or Historical Interpretation. Whichever interpretation of the rule maximizes pleasure and minimizes pain, to borrow the phrasing of Epicurus, is the best Prudential interpretation of the rule.⁹⁷ Prudential Interpretations, however, contain more than one category, just as Historical Interpretation encompasses both Historical Intent and Historical Understanding.

Indeed, the flavors of Prudential Interpretation are befuddling, in that different authors change terminology without signaling a shift. For example, Post prefers the term “Responsive,” and considers “Responsive” as the larger category within which “Prudential” would fall.⁹⁸ Linder uses the rubric “Pragmatist.”⁹⁹ The terms Bobbit and LII use for Prudential Interpretation are designed to cover a category where the focus of the judicial interpretation is on the outcomes of the law or the judicial ruling.¹⁰⁰ The terms (*i.e.*, “Responsive,” “Pragmatist”) are not interchangeable, however, and signify more than an arbitrary preference, as each term provides a unique shade of meaning to the method of interpretation.

Post sees Responsive Interpretation as directly contrasting Historical and Doctrinal interpretation. Those interpretations purport to submit to a Constitution whose authority is independent and fixed. But Responsive Interpretation focuses on the relationship between the Constitution and those currently interpreting the Constitution.¹⁰¹ That is, this interpretation of the law “responds” to the needs of the society governed by such law. Post urges that Responsive Interpretation rests on the “authority of ethos.” The court’s authority rests on taking the framework of the Constitution as representative of the “fundamental nature as [the American] people” and determining which rule best aligns with the ethos of America.¹⁰² To illustrate his point, Post returns to the example of the establishment of religion, legislative prayer, and the case of *Marsh v. Chambers*. In his dissent in *Chambers*, Justice Brennan says the twin principles of “separation between church and state” and “neutrality” as between diverse religions should respond to the deepest contemporary purposes of the people.¹⁰³ How can today’s Americans, he asked, maintain a government’s neutrality toward (and therefore non-interference with) religious practice? Post uses Justice Brennan’s dissent in *Chambers* as an example of Responsive Interpretation, illustrating the needs of the present conflicting with the words of the past.

⁹⁶ *Id.*

⁹⁷ Julia Annas, *Epicurus on Pleasure and Happiness*, 15 *PHILOSOPHICAL TOPICS* 5, 5 (1987).

⁹⁸ Post, *supra* note 28, at 25 (“Responsive interpretation is in fact a vast umbrella sheltering a myriad of different approaches to the Constitution.”).

⁹⁹ Linder, *supra* note 26.

¹⁰⁰ LII, *supra* note 27.

¹⁰¹ Post, *supra* note 28, at 30.

¹⁰² *Id.* at 24.

¹⁰³ *Id.* at 17.

Post notes that Responsive interpretation has an important vulnerability. “[R]esponsive interpretation portrays courts instead as arbiters of the fundamental character and objectives of the nation.”¹⁰⁴ Post then asks a question referring to courts within the United States that takes on even stronger meaning when asked of the WTO Appellate Body. “[W]hy, it may be asked, should courts be entrusted to act in that capacity, particularly when in doing so they set aside alternative versions of the national character and objectives propounded by the democratically elected branches of government?”¹⁰⁵ In the WTO context, who is the Appellate Body to determine the fundamental character and objectives of the WTO, rather than the Members themselves? This point helps to explain why no adopted Report of the Appellate Body rests its holding on a form of Post’s Responsive interpretation. Yet.

In a section he titled “The inevitability of responsive interpretation,” Robert Post points to a method of interpretation similar to Responsive called “Noninterpretivism” and defines it as reading a text (the U.S. Constitution in his case, GATT in ours) and applying “society’s fundamental values rather than...the document’s broader themes.”¹⁰⁶ Whether Prudential, Pragmatic, Responsive, or now Noninterpretive, the forms of judicial interpretation which look to the needs of the present more than the will of the past have a common goal. “[T]he ambition and challenge of responsive interpretation is to determine which aspects of our contemporary ethos may be regarded as legitimate ‘growth from the seeds which the fathers planted,’ and hence as bearing ‘the essential content and the spirit of the Constitution.’”¹⁰⁷

In the WTO context, the seed planted was the GATT, and the fruit of that seed is the modern multilateral trading system.¹⁰⁸ Trade develops, parallel to Post’s argument that a nation develops, with changes in technology, changes in allegiances, renegotiations of free trade agreements (FTAs), and the rise of trade barriers. Rules that do not change with the times lose the consent of the people, the authority on which the rules rest. Otherwise, WTO Members are stuck following outdated rules that no longer reflect modern trade: “repressive law” that gives “short shrift to the interests of the governed.”¹⁰⁹ The risk associated with this warning is that Members could even decide to leave the WTO if the Appellate Body interprets Agreements in static ways that do not reflect new attitudes toward international trade.

As Post points out, the danger of Responsive Interpretation is that it always places a court in an exposed position, purporting to speak for the fundamental ethos of the contemporary community, but that position can also be a platform for a special form of leadership.¹¹⁰ The Appellate Body may be at a crossroads where the traditional values of the WTO, promoting free and fair trade, clash with a surge of nationalism and protectionism within Members. Post’s toolkit for judicial interpretation, with its focus on meeting the needs

¹⁰⁴ *Id.* at 25.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 31.

¹⁰⁷ *Id.* at 32.

¹⁰⁸ RAJ BHALA, *National Treatment Problems in China (GATT Articles III:1–2, 4) and Extensions of National Treatment and Non-Fiscal Measures to Technical Barriers to Trade (TBT) (WTO TBT Agreement Articles 2:1 and 12)*, in 1 INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK (5th ed. 2019).

¹⁰⁹ Post, *supra* note 28, at 33.

¹¹⁰ *Id.* at 30.

of the present society, may help preserve the WTO to meet the unique challenges presented in each new case.

V. AMERICAN STATUTORY INTERPRETATION: TAXONOMY OF LEGAL INTERPRETATIVE METHODOLOGIES¹¹¹

A. Textualism

Textualism is central to judicial interpretation of statutes, with courts generally starting and sometimes never going beyond this approach.¹¹² Some scholars tend to include Textualism as one part of a blended process of interpretation.¹¹³ Others, such as Post, view Textualism as a starting point, with other interpretative modes fleshing out meanings that cannot be read in the literal text. However, Textualism is not the historical starting point, i.e., the oldest method, for interpreting statutes, as the historical overview from Professor William Eskridge bears out.

As pre-Textualist methodologies, Eskridge references three examples from early English jurisprudence, beginning with the Mischief Rule from Heydon's Case in the Court of Exchequer in 1584.¹¹⁴ The Mischief Rule asks what defect or mischief existed in the commonwealth that needed to be remedied, and what remedy Parliament intended to apply in creating the statute. This decidedly Intentionalist rule comes before the two Textualist rules.

The first Textualist rule is the "Golden" Rule, which instructs a court to interpret a statute "giving the words their ordinary signification," unless an absurd result is produced. Eskridge cites a case decided by Lord Blackburn in the House of Lords in 1877 for the "Golden" Rule. The Literal Rule is last, with citation to two cases, one from 1884 and one from 1913, both in the House of Lords. The premise of the Literal Rule is that a statute be read literally, regardless of an absurd result. The Literal Rule assumes it is not the job of a court to avoid an outcome the legislature did not desire. If the legislature intended a different result, then the legislature must draft new legislation which is more carefully worded. The Literal Rule relies on the plain meaning of the statute, regardless of intent.

¹¹¹ Statutory interpretation is a large subject and could fill an entire textbook or several books. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRET & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (5th ed. 2014) [hereinafter ESKRIDGE ET AL.]; SIR RUPERT CROSS, JOHN BELL & SIR GEORGE ENGEL, *STATUTORY INTERPRETATION* (3rd ed. 2005) [hereinafter CROSS STATUTORY INTERPRETATION]; *see also* COLIN MANCHESTER, DAVID SALTER & PETER MOODIE, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION* (2d ed. 2000) (providing a textbook treatment of English and statutory interpretation and its European influences). Thus, the truncated approach here is confessedly inadequate.

Moreover, one rule of statutory interpretation is the Rule to Avoid Surplusage, i.e., every word in a statute should be given effect. Katharine Clark, Matthew Connolly, Suraj Kumar & Taylor Beech, *A Guide to Reading, Interpreting and Applying Statutes*, GEORGETOWN LAW WRITING CENTER, <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Appling-Statutes-1.pdf> [hereinafter Clark & Connolly]. No interpretation should cause any word to be rendered duplicate to another so that one of the words has no consequence. Thus, this rule is also called the Rule to Avoid Redundancy. ESKRIDGE ET AL., *supra* note 111, at 677. The irony of this rule having two names typifies the inconsistent and even quirky approaches of theorists of statutory interpretation.

¹¹² *See* Posner, *supra* note 34.

¹¹³ CROSS STATUTORY INTERPRETATION, *supra* note 111, at 33.

¹¹⁴ ESKRIDGE ET AL., *supra* note 111, at 480–81.

The fact that Eskridge pulls examples that seem to put the intentionalism of the Mischief Rule before the Textualism of the “Golden” and Literal Rules is not an artifact of editorial choice in textbook writing. The order of the rules is an artifact of history. Both the “Golden” and Literal Rules depend on a shared, agreed-upon ordinary signification or plain meaning of a word, an approach which could only exist after the invention of the dictionary. Heydon’s Case, decided in 1584, necessarily could not use this approach, as the first English dictionary was Robert Cawdrey’s *A Table Alphabeticall* published in 1604.¹¹⁵ Even then, this short and slender book only contained roughly three thousand of what Cawdrey considered “hard usual” words.¹¹⁶ But by 1877, Lord Blackburn could recite the “Golden” Rule because he would have been able to point to the “ordinary signification” of a word from Samuel Johnson’s 1755 *Dictionary*, in its comprehensive two-volume set.¹¹⁷ Thus, Intentionalism is an older approach to statutory interpretation than Textualism, leaving open an argument to be made that it could also be the purer form, both because it came first, and because it relies solely on the functions of law undiluted by the opinions of lexicographers.

Despite being the younger methodology for interpreting law written in English, Textualism is justifiably the starting point for statutory interpretation.¹¹⁸ Textualism may indeed be the simplest and most intuitive approach to discerning the meaning of words in a statute, as it happens concomitantly with reading the statute.¹¹⁹ A statute cannot be analyzed until it is read. “Textualism” arguably is the best word for describing the understanding formed in the reader’s mind as the reader is reading.¹²⁰

Also, Textualism applies to both constitutional and statutory interpretation, a flexibility that cannot necessarily be said of all other interpretive approaches. For example, the same Justice who concerns herself with Historical Interpretation when it comes to a constitution may be unconcerned with the legislative history of a statute.¹²¹ But Textualism is applicable to both constitutions and statutes. That makes it a handy tool for the WTO Appellate Body, insofar as they are interpreting international trade treaties that bear similarities to, and differences from, both types of legal texts.

For instance, certain GATT Articles are both constitutional and statutory in nature, though GATT in its entirety is neither purely a constitution, nor purely a statute. For example, GATT Article XXVI: Principles and Objectives, is largely aspirational, a trait more akin to constitutions, and lacks the specific prescriptions and proscriptions of a statute. However, Article X: Publication and Administration of Trade Regulations has a level of specificity parallel to statutes.

¹¹⁵ Robert Cawdrey’s *Table Alphabeticall*, BRITISH LIBRARY, <http://www.bl.uk/learning/langlit/dic/caw/1613cawdrey.html> (last visited Jan. 6, 2020).

¹¹⁶ Robert Cawdrey’s *A Table Alphabeticall of Hard Usual English Words (1604)*, UNIV. OF TORONTO (Dec. 5, 1994), https://extra.shu.ac.uk/emls/iemls/work/etexts/caw1604w_removed.htm (last visited Jan. 6, 2020).

¹¹⁷ 1755–Johnson’s *Dictionary*, BRITISH LIBRARY, <https://www.bl.uk/learning/langlit/dic/johnson/1755johnsonsdictionary.html> (last visited Jan. 6, 2020).

¹¹⁸ See James Maxeiner, *Scalia & Garner’s Reading Law: A Civil Law for the Age of Statutes?*, 6 J. OF CIV. L. STUD. 1, 2 (2013).

¹¹⁹ See Post, *supra* note 28.

¹²⁰ See *id.*

¹²¹ See *id.*

B. Intentionalism

Of course, there is one additional proposition common to GATT and all other international trade treaties, as well as to treaties, constitutions, and statutes.¹²² The drafters must have intended meaning behind their words. Intentionalists focus on the meaning the legislature intended to give the statute they negotiated, drafted, and enacted.¹²³ For the Intentionalist, the plain meaning of a statute still is Step One, the beginning of analysis, and if the meaning is plain, the end of analysis as well.¹²⁴ Step Two is where Intentionalists diverge from Textualists, and as Professor Thomas Merrill argued, Intentionalists may take the more honest path.

Intentionalism mandates an “archeological” excavation of the past, producing opinions written in the style of the dry archivist sifting through countless documents in search of the tell-tale smoking gun of congressional intent. Textualism, in contrast, seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute.¹²⁵

Thus, the Intentionalist digs through legislative history, such as conference committee reports, to reconstruct the intent behind a statute, or the Mischief the statute was intended to remedy.¹²⁶ This approach differs from textualists. “In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning.”¹²⁷

Although not authoritative, a particularly well-written explanation of Intentionalism and Textualism was penned by Wisconsin State Supreme Court Chief Justice Shirley Abrahamson in 2004.¹²⁸ “[T]he purpose of statutory interpretation is to determine and give effect to the intent of the legislature in enacting a particular statute.”¹²⁹ Chief Justice Abrahamson first acknowledges the capacity of a legislative body to have a single intent is something of a fiction.¹³⁰ She then explains, “discerning and giving effect to the ‘intent’ of the legislature is an exercise in logic in which a court determines what a reasonable person in the position of a legislator enacting the statute would have said about the legal issue presented in a given case.”¹³¹ Abrahamson argues the main weakness of Textualism is the inherent ambiguity in language, quoting Justice Oliver Wendell Holmes: “A word is not a

¹²² See ESKRIDGE ET AL., *supra* note 111, at 596.

¹²³ See Clark & Connolly, *supra* note 111, at 11.

¹²⁴ See *id.* (“When statutes are unambiguous, the interpretive task typically ends with the plain meaning of the words.”).

¹²⁵ Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U.L.Q. 351, 372 (1994).

¹²⁶ See Clark & Connolly, *supra* note 111, at 11.

¹²⁷ See ESKRIDGE ET AL., *supra* note 111, at 1093.

¹²⁸ State ex rel. Kalal v. Circuit Court for Dane Cty., 271 Wis. 2d 633, 670–86 (2004) (Abrahamson, C.J., concurring).

¹²⁹ *Id.* at 672.

¹³⁰ *Id.*

¹³¹ *Id.*

crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”¹³² Thus, resort may be had to legislative history, even to verify that a seemingly unambiguous statute only has one meaning.¹³³ Chief Justice Abrahamson’s concurrence serves as a cogent and enjoyable mini-treatise on the Intentionalist view of statutory interpretation.

C. Dynamic Theories

A range of Non-Textualist, non-Intentionalist interpretative methodologies exist. Eskridge groups them into a catch-all category, preferring the term for this category “Dynamic” over the other possibilities: purposive, pragmatic, or responsive.¹³⁴ A “Dynamic” theory is any approach that interprets statutes “in light of their present societal, political and legal context.”¹³⁵ Within Dynamic Statutory Interpretation, the overall sense is one of an agent attempting to fulfill the desire of a principal.¹³⁶

Eskridge likens a court carrying out a legislature’s intent to the household servant carrying out his master’s intent with the phrase “fetch me the soup meat.”¹³⁷ Eskridge cycles through the various obstacles which may arise in fulfilling that purpose: the butcher is closed, or the master forgot to give the servant sufficient funds, or one of the children is discovered to be allergic to a spice in the regular soup meat, and so on.¹³⁸ The central idea of Dynamic Statutory Interpretation is that there exist endogenous and exogenous meta-policies behind the words of a given statute, and even beyond the legislature itself.¹³⁹

As the social context changes, judges respond to the new circumstances. In Eskridge’s example, the change in circumstances could be the butcher shop going out of business.¹⁴⁰ But for the WTO Appellate Body, the change could be a shift in India from developing to developed economy, and a loss of GSP status.¹⁴¹ In this sense, the best interpretation of the statute, or the GATT, pragmatically approaches current problems of statutory fairness and workability, rather than historical choices supposedly made at the time of drafting.¹⁴² The document being interpreted is not read as static, but rather is responsive to changing circumstances.

In turn, this bottom-line practicality is why Dynamic Statutory Interpretation may be considered a Pragmatic methodology in our typology. To be sure, the categorization is not perfect. Not every Dynamic approach has an ideological bent, as some simply may examine the context of the text at issue, suggesting that Contextualism is an appropriate classification.

¹³² *Id.* at 676 (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

¹³³ *Id.* at 678.

¹³⁴ ESKRIDGE ET AL., *supra* note 111, at 515.

¹³⁵ Eskridge, *Dynamic*, *supra* note 79, at 1479.

¹³⁶ See ESKRIDGE ET AL., *supra* note 111, at 515.

¹³⁷ *Id.*

¹³⁸ *Id.* at 515–17.

¹³⁹ *Id.* at 517.

¹⁴⁰ *Id.* at 515.

¹⁴¹ Press Release, Office of the United States Trade Representative, United States Will Terminate GSP Designation of Indian and Turkey (Mar. 4, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp>.

¹⁴² See ESKRIDGE ET AL., *supra* note 111, at 95.

V. LITERARY THEORY: TAXONOMY OF LITERARY INTERPRETATIVE METHODOLOGIES¹⁴³

A. Textual Methodologies

1. Russian Formalism

Russian Formalism is a text-based way of analyzing meaning because it looks at (as its name suggests) the form and technique an author uses, rather than at the author herself, her intent, or her circumstances.¹⁴⁴ Rather than asking what the author says in a passage, Russian Formalists look at the literary devices she uses to convey meaning. They focus on “how” an author creates meaning, as distinct from what the author is saying.¹⁴⁵ They do so because “the practical dimension of art, the way it is executed and constructed...can tell stories or make meanings.”¹⁴⁶ Those devices may be adventures chronicled in a novel, or twists in a sonnet.

We classify this methodology as Textualist methodology because “Russian Formalists argued the language of literature should be studied in and of itself, without reference to meaning.” Stressing the narration—the way a story is told rather than proceeding straight to the ideas in the story inherently—inherently text-based. There are plenty of options for organizing and constructing a narrative, for example:

(1) Evolution?

How does the narrative unfold? For example, does the text rely on “hypotaxis,” i.e., stating events or persons in subordinate clauses joined by a relational or temporal link, such as “after,” “although,” or “when”?¹⁴⁷ Hypotaxis heightens interest in a text, and diversifies its variety, but risks obscuring patterns because of the breaks

¹⁴³ By no means is this discussion a comprehensive treatment of all the schools of literary criticism. We endeavor to provide an account of the schools that are most pertinent to interpreting disputed terms in international trade treaties, and also to avoid some of the subtle (but often ferocious) disputes among literary critics over nuances and distinctions in their approaches that are not relevant to this interpretative task. Thus, we have omitted Psychoanalysis, and covered only one strand of Post-Structuralism (namely, Deconstructionism). We also have omitted Ecocriticism, though a case can be made that reading a text for what it teaches about the relationship between humans and the environment is of ever-greater importance owing to climate change and its anthropomorphic causes. We suggest the omitted methodologies could be categorized within our typology, for instance, Psychoanalysis as Contextual (because it looks to the psychological state of the author for interpretative insights) and Ecocriticism as Pragmatic (because it advances environmentalist values and opposes exploitative outcomes). For more on these omitted literary schools see, e.g., JONATHAN CULLER, *LITERARY THEORY: A VERY SHORT INTRODUCTION* 142, 144 (2011) [hereinafter, CULLER]; RYAN, *supra* note 17, at 42–58.

¹⁴⁴ See CULLER, *supra* note 143, at 136. Among the leading scholars of Russian Formalism are Boris Eichenbaum and Roman Jakobson. *Id.*

For additional treatments of Russian Formalism see, e.g., PETER BARRY, *BEGINNING THEORY: AN INTRODUCTION TO LITERARY AND CULTURAL THEORY* 164–65 (4th ed. 2017) [hereinafter, BARRY]; LOIS TYSON, *CRITICAL THEORY TODAY: A USER-FRIENDLY GUIDE* 135 (3d ed. 2015) [hereinafter, TYSON]. For primary source excerpts from Russian Formalists see *LITERARY THEORY: AN ANTHOLOGY* Part One, 3–128 (Julie Rivkin & Michael Ryan eds., 2017) [hereinafter, RIVKIN & RYAN].

¹⁴⁵ See RYAN, *supra* note 17, at 1 (stating: “Formalists pay attention to the ‘how’ in ‘how things are done,’ and to “the way something is done’ as opposed to ‘what it [the text] is about’ or ‘the story being told’”).

¹⁴⁶ *Id.* at 1–2.

¹⁴⁷ *Id.* at 4.

between clauses. Or, does the text use “parataxis,” which lists elements “in a sequence of simple phrases,” linked by the conjunctive “and,” disjunctive “or,” or variants such as “but”?¹⁴⁸ “Parataxis,” found in the Old Testament and Ernest Hemingway’s *The Old Man and the Sea* (1952) can be dry, even insipid, but its simplicity, neatness, and minimalism make for a crisp narrative with raw contrasts and little ambiguity.

(2) Perspective?

From what perspective is the narration? For example, is the narrator a character participating in events, like a country actively involved in trade negotiations and disputes? Or, is the narrator an independent observer who may, or may not, be rightly suspected of biases, such as a WTO Director General? Is the narrator both, an outside observer of events, but also a participant called upon to make a decision, such as an Appellate Body member?

(3) Technique?

What narrative technique is used? Does the text use a meditative technique (as Marcel Proust does in *Remembrance of Things Past* (1913-1927)), which is orderly and ponderous, or a stream of consciousness (as James Joyce does in *Ulysses* (1922)), which flows freely making emotional, even irrational, associations?¹⁴⁹ Does the text contain soliloquies (as Shakespeare does in *Hamlet* (1599-1602) and *Othello* (1603)), that is, reflective and predictive statements made alone, with no witnesses (or at least none known to the speaker)?

(4) Imagery?

Does the text contain imagery or figurative language, that is, symbols, particularly for comparisons and contrasts (as Nathaniel Hawthorne does in *The Scarlet Letter* (1850), with the letter “A”), for example, similes and metaphors (as Shakespeare does in Sonnet 130, “My mistress’ eyes are nothing like the sun”)?¹⁵⁰

(5) Juxtaposition?

Does the text employ paradox, that is “bring[] opposed ideas together” (as in the Shakespearean line “reason in madness”) and irony, that is, use a word, phrase, or proposition to undermine another one, whereby what is said and meant are different, or whereby intended and actual consequences diverge?¹⁵¹

(6) Sound?

¹⁴⁸ *Id.* at 4, 11.

¹⁴⁹ *Id.* at 2.

¹⁵⁰ WILLIAM SHAKESPEARE, SONNET 130 (1609), <https://poets.org/poem/my-mistress-eyes-are-nothing-sun-sonnet-130>; RYAN, *supra* note 17, at 2, 12–13 (regarding *The Scarlet Letter*).

¹⁵¹ RYAN, *supra* note 17, at 6.

How does the text sound when read (silently or aloud)? To what extent is a text embodied in a prescribed form, such as a sonnet, or repetition and rhyme (as Shakespeare does), and likewise a particular meter?¹⁵²

These techniques involve deliberate choices about how something is said to convey meaning, as distinct from the content of what is said. The “how” choice can be as or more important than the “what” content, because it not only implicitly conveys content, but also can either complement or undermine explicit textual content. Indeed, with its focus on this choice, on “how stories are told,” Formalism sometimes is called “narratology.”¹⁵³

While the rubric of “Russian Formalism” may be unfamiliar to international trade lawyers, the traditional distinction between form and substance is not.¹⁵⁴ The above questions are all about form, not substance. Legal interpretation respects a foundation on which Formalism rests: “[i]f content is not possible without form, form is also radically separable from content.”¹⁵⁵ Indeed, interpretation flows from the same axiom: the techniques (devices and procedures) used to construct a legal text, specifically, to raise an issue, convey an argument, or offer a rationale, can be studied separately from the content of that text. Thus, trade lawyers look to the form of the rules: are they in a binding agreement, such as a treaty, or a non-binding arrangement, such as a memorandum of understanding (MOU)?¹⁵⁶ Are the rules in a so-called “Side Letter” or treaty? The formal structure of rules conveys meaning about the degree to which those rules are obligatory and enforceable.

Additionally, canons of statutory interpretation, which also are used to define treaty language, bear a resemblance to Russian Formalistic analysis. These canons focus on sentence structure, diction, and syntax, making them text-based in nature. Consider the two canons of word association, *Noscitur a Sociis* (“a thing shall be known by its associates”) and *Ejusdem Generis* (“of the same kind”).¹⁵⁷ The first is a presumption that “when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.”¹⁵⁸ The second says that when a general word follows specific words, that general word is construed to embrace only objects similar in nature to those the preceding specific words enumerate.¹⁵⁹

¹⁵² Consideration of poetic meter would seem to be far afield from interpreting international trade law, and so it is in most cases. However, as a rhetorical device in oral presentations designed to persuade an audience about the virtues or vices of a proposed or existing trade agreement, or to argue for or against free trade or protectionism, the metric form of the lines in a speech can contribute to its power because of the rhythm of the meter. That also is true of melody, which through alliteration and assonance can enhance the rhetorical force of a presentation. For a review of poetic meter see *id.* at 4.

¹⁵³ *Id.* at 9.

¹⁵⁴ See, e.g., PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987).

¹⁵⁵ RYAN, *supra* note 17, at 2.

¹⁵⁶ See Raj Bhala & Cody N. Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights Through Free Trade Agreements*, 47 GA. J. INT'L COMP. L. 299 (May 22, 2019) [hereinafter, Bhala & Wood].

¹⁵⁷ See ESKRIDGE ET AL., *supra* note 111, at 261.

¹⁵⁸ *Id.* (quoting 2A Sutherland, *Statutes and Statutory Construction* § 47.16, at 183 (Norman Singer ed., 5th ed. 1992)).

¹⁵⁹ *Id.* at 261–62 (quoting 2A Norma J. Singer, 2A Sutherland, *Statutes and Statutory Construction* § 47.17, at 188 (5th ed., 1992)).

Viewed broadly, both canons are techniques that keep an international trade lawyer inside the text and impart meaning. Likewise, the canon of negative implication, *Inclusio (Expressio) Unius est Exclusio Alterius* (“the inclusion (expression) of one thing suggests the exclusion of all others”),¹⁶⁰ is a text-based interpretative tool. To decide if an object is within the boundaries of a rule, the lawyer is not supposed to go outside the terms of that rule and examine its author and her circumstances.

2. *New Criticism*

In contrast to Historicism (discussed *infra*), New Criticism—which dates to the 1930s—holds that the meaning of a text is more than the product of historical forces.¹⁶¹ Meaning comes from the interaction of multiple aesthetic devices, such as irony,¹⁶² paradox, imagery, and even ambiguity. These devices are found within the text, which is an aesthetic object in itself, and is in unity with, or integrated with, other such objects of similar genres (e.g., prose, poetry, and drama).¹⁶³ Each device contributes to the form of the text.

New Criticism sometimes is classified as a school of “Formalism,” along with, but distinct from, Russian Formalism. In contrast to Russian Formalism, New Criticism is premised on the view that “literature embodie[s] universal truth in concrete form,” and is an “organic unity,” hence the form of a literary text and the ideas conveyed in it “are inseparable.”¹⁶⁴ Each text concretely embodies a universal (possibly spiritual) truth.¹⁶⁵ New Criticism is fundamentally a text-based approach to interpretation in which the verbal features of the text, not the historical intention or circumstances of its author, convey and even complicate meaning. Likewise, New Criticism does not apply extrinsic economic, political, or social ideologies to a text so as to infuse meaning in that text. Thus, New Criticism distinguishes itself from Contextual or Pragmatic methodologies.

International trade lawyers may find an analogy with the stylistic and substantive components of a memo or brief that contribute to a reasoned, persuasive whole. They certainly will find an analogy with a defining and enduring principle of New Criticism, namely, “close reading.”¹⁶⁶ Rich insights about interpreting a text come from scrupulous reading of, and meditation about, words in that text.

¹⁶⁰ *Id.* at 263.

¹⁶¹ See CULLER, *supra* note 143, at 136. Among the leading scholars of the New Criticism School are Cleanth Brooks and John Crowe Ransom in the U.S., and I.A. Richards and William Empson in England. *Id.* For additional treatments of New Criticism see, e.g., BARRY, *supra* note 144, at 17, 74; TYSON, *supra* note 144, at 129–61. For primary source excerpts from New Critics, see RIVKIN & RYAN, *supra* note 144, at 3–128.

¹⁶² “Irony” occurs when “two very different things are said in the same statement.” RYAN, *supra* note 17, at 2; see also CHRIS BALDICK, OXFORD DICTIONARY OF LITERARY TERMS 187 (4th ed. 2015) [hereinafter, BALDICK] (distinguishing different types of irony, and defining “verbal irony” as “a discrepancy between what is said and what is really meant”).

¹⁶³ The term “genre” refers to “[a] group of artistic works that share certain traits,” and is easily translatable from the literary to the legal realm, for example, from the above-mentioned examples to treaties, statutes, and cases. RYAN, *supra* note 17, at 4; see also BALDICK, *supra* note 162, at 150 (defining “genre” as “a type, species, or class of composition,” that is, “a recognizable and established category of written work employing such common conventions as will prevent readers or audiences from mistaking it for another kind”).

¹⁶⁴ RYAN, *supra* note 17, at 2–3 (emphasis added).

¹⁶⁵ Associated with this view is Cleanth Brooks, who in *The Well-Wrought Urn*, argued each poem is a paradox, because it contains a specific idea or image suggestive of a spiritual meaning. *Id.* at 7.

¹⁶⁶ CULLER, *supra* note 143, at 136.

3. *Deconstructionism*

In response to Structuralism (which we classify and discuss below as a Contextual Methodology), Post-Structuralism holds that signifying conventions are not immutable across time and space. Rather, these conventions have different meanings in different texts, and those meanings are entangled with subjects. Subjects and signs do not exist independently of one another; rather, subjects produce signs, and infuse biases into the meanings of signs. Ironically, scholars initially tagged as “Structuralists,” such as Roland Barthes and Michel Foucault, showed the “impossibility of describing a complete or coherent signifying system,” because “systems are always changing.”¹⁶⁷ Objective knowledge, and the ability of a subject to know herself, is a pillar of Structuralism against which Post-Structuralism strikes. Whereas a Structuralist seeks to detect underlying, enduring patterns common to all texts, Post-Structuralism contends there are no such patterns, and thus urges a specific, text-based inquiry about the meaning of a particular sign based on its relationship to the subject that produced the sign. Simply put, Structuralism looks for patterns that Post-Structuralism breaks down.

Without using these terms, international trade lawyers are familiar with the Post-Structuralist project whenever they debate the universality of the meaning of a term. Consider the concept of dumping in international trade law. In a Structuralist sense, the “dumping” signifies a practice of selling in a foreign market of merchandise at a low price, typically below the cost of its production. So, whenever below-cost sales are observed, those transactions are “dumped.” Post-Structuralism, however, corrects this generic characterization, observing that the purported pattern of “dumping” does not necessarily exist across all markets. Rather, each individual transaction must be examined to see if Normal Value (the price of the foreign like product in the home market of the exporter) is above Export (or Constructed) Price (the price of the subject merchandise in the importing country market), regardless of the cost of production (of either the foreign like product or subject merchandise). The subjects—the respondent producer-exporter (of the foreign like product and subject merchandise) and importer (of the subject merchandise)—are intertwined with setting prices (Normal Value and Export (or Constructed) Price), and thus with the signification of “dumping.”

“Deconstructionism” is a species of Post-Structuralism, famously associated with Jacques Derrida’s 1970 critique of Structuralism, *The Languages of Criticism and the Sciences of Man*.¹⁶⁸ The patterns detected in a Structuralist reading of a text are, for a Deconstructionist, based on “warring forces of signification within a [i.e., that] text.”¹⁶⁹ Those forces are oppositional concepts placed in a hierarchy, such as inside versus outside, literal versus metaphorical, and form versus substance. Deconstructionism holds that these

¹⁶⁷ CULLER, *supra* note 143, at 139.

For additional treatments of Deconstructionism see, e.g., BARRY, *supra* note 144, at 61–82; TYSON, *supra* note 144, at 235–66. For primary source excerpts from Deconstructionists see RIVKIN & RYAN, *supra* note 144, at 445–563.

¹⁶⁸ CULLER, *supra* note 143, at 140. For a biting critique of Deconstructionism, essentially—and, as argued herein, wrongly—concluding it has little to offer lawyers in solutions to interpretative problems see RICHARD A. POSNER, LAW & LITERATURE 276–285 (3d ed. 2009).

¹⁶⁹ CULLER, *supra* note 143, at 140 (quoting Barbara Johnson).

contrasts are neither natural nor inevitable. Rather, they are social constructs to advance a particular discourse that relies on hierarchical opposition.¹⁷⁰ The Deconstructionist project, as the rubric indicates, is to probe deeply within the text, identify a constructed concept, its opposition, and the hierarchy between the two, and then “dismantle” the hierarchical opposition.¹⁷¹

Note, then, that extrinsic matters—such as the author’s biography, her intent, historical factors that might have influenced her, or economic, political, or social perspectives, as well as the author’s or reader’s consciousness—are largely divorced from the effort to understand what a text signifies. Indeed, influenced by Derrida, the “Yale School” of Deconstructionist literary criticism that flourished in the mid-1960s through the 1980s argued that texts are “unreadable” because the reference between language and the world is problematic, that is, “[r]eference always ends in...an irresolvable contradiction between the supposed presence of the thing the text refers to and the fact that to grasp the thing one needs language.”¹⁷²

Deconstructionism is perhaps the literary interpretative methodology that is most difficult to slot as “Textual” or “Contextual.” (“Pragmatic” is not a viable option: Deconstructionism challenges the grounds for truth and absolute, immutable meanings, but does not propose a political or ideological program.) Arguably, it could be viewed as “Contextual.” Oppositional concepts within a text may arise or evolve across time and space, intimating a reference to discourses, that is, to see that “bodies of thought” give authors substantive ideas and stylistic writing conventions.¹⁷³ Moreover, “Derrida noted that a text supposedly refers to an author, but in fact, if the difference principle [discussed below] holds, then what the text refers to is something that refers to something else in order to be what it is.”¹⁷⁴ This insight calls for an examination of connections between a word and other words across texts—a Structuralist inquiry. Deconstructionism rejects the “principle of identity,” which is the rationalist philosophical approach to assign to a concept a singular, stable self-contained identity, such as “justice” or “corruption.” Deconstructionism asserts the principle of difference, not identity, is the primary source to generate meaning: neither “justice” nor “corruption” are absolute in character. Rather, “justice” is knowable by differentiating it from “injustice” or “unfairness,” while “corruption” is knowable by distinguishing it from

¹⁷⁰ *See id.*

The term “discourse” refers to “[a] coherent body of statements about something, such as an event, an object, or an issue,” which “is generated by rules for making statements that produce consistency and uniformity across different statements.” Those rules not only assure the statements indeed are a coherent body, but also delineate “boundaries between statements internal to the discourse and statements that fall outside the range.” RYAN, *supra* note 17, at 3–4; *see also* BALDICK, *supra* note 162, at 99–100 (defining “discourse” generally as “an extended use of speech or writing,” but specifically as “any coherent body of statements that produces a self-confirming account of reality by defining an object of attention and generating concepts with which to analyze it,” such as “legal discourse,” and observing that “the increased use of this term ... arises from dissatisfaction with the rather fixed and abstract term ‘language,’” because “by contrast, ‘discourse’ better indicates the specific contexts and relationships [e.g., connections between ideas and persons addressed] involved in historically produced uses of language”). Written and oral statements dominate the subject matter of legal interpretation. But, no rule of discourse says statements must be textual or verbal to qualify for a discourse. Demonstrative evidence is part of discourse in various legal settings.

¹⁷¹ CULLER, *supra* note 143, at 140.

¹⁷² RYAN, *supra* note 17, at 78.

¹⁷³ *Id.* at 79.

¹⁷⁴ *Id.* at 77.

“integrity” or “transparency.” Further, these distinctions are unstable and temporarily fixed, but re-set over time and space. Thus, Deconstructionism is a Contextualist methodology—albeit in a manner different from Historicism or Phenomenology.

And yet, Deconstructionism is best suited to the Textualist classification. How concepts are manifest within a text, and the intra-textual tensions those concepts create, matter in a Deconstructionist approach. This approach follows three steps, verbal, textual, and linguistic, and each step stays squarely within the text.¹⁷⁵

Step 1: Verbal

This step entails a close reading of the text, looking in particular for internal contradictions (i.e., a logically inconsistent statement because it indicates both truth and falsity¹⁷⁶) or paradoxes (i.e., a statement that ostensibly contradicts itself, but upon reflection is true¹⁷⁷) that suggest words in the text are slippery and unreliable, and also for conventional binary oppositions. In the terminology of Structuralism and Deconstructionism, this exercise “show[s] the ‘signifiers’ at war with the ‘signified,’” thus “revealing” the “repressed unconscious” of the text.¹⁷⁸

For example, in Act I, Scene 1 of Shakespeare’s *Macbeth*, the Three Witches chant “Fair is foul, and foul is fair.” Read literally, that statement refutes itself: “fair” and “foul” are traditionally understood as antonyms, not synonyms, but if they are interchangeable, then the meaning of each word is indeterminate. They are typically defined by their opposition, and the Witches’ chant obliterates the distinction and is a contradiction. However, the chant may be regarded as a paradox, insofar as the Witches are revealing two different standards of justice: what people regard as “fair” is what Witches see as “foul,” and conversely, what Witches deem “fair,” people see as “foul.” The co-existence of these two standards challenges, and potentially flips, the conventional binary opposition that equates “fair” with goodness and “foul” with evil.

Step 2: Textual

This step moves from a close analysis of individual words and phrases to the overall document in which they are encased. The search is for contradictions and paradoxes on a large scale, “taking a broad view of the text as a whole,” that is, for discontinuity, meaning breaks in the narrative.¹⁷⁹ There may be shifts in diction (i.e., the type of vocabulary used), tense (e.g.,

¹⁷⁵ See BARRY, *supra* note 144, at 76–79.

¹⁷⁶ See *Contradiction*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/contradiction>.

¹⁷⁷ See *Paradox*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/paradox>; see also BALDICK, *supra* note 162 (defining “paradox” as “[a] statement or expression so surprisingly self-contradictory as to provoke us into seeking another sense of context in which it would be true (although some paradoxes cannot be resolved into truths, remaining flatly self-contradictory, e.g., *Everything I say is a lie*),” and observing Wordsworth’s line “‘The Child is father of the Man,’ and Shakespeare’s ‘the truest poetry is the most feigning’” are notable literary examples of paradox) (emphasis in original).

¹⁷⁸ BARRY, *supra* note 144, at 77.

¹⁷⁹ *Id.*

changes among past, present, and future verb conjugations), pace (i.e., passage of events per unit of time), time (e.g., from a chronological to a circular or even stream of consciousness presentation), tone (e.g., from soft and empathetic to harsh and domineering), attitude (e.g., positive to negative), focus (e.g., from outward and worldly to inner and spiritual), or point of view (e.g., from one character to another). Any such shift may indicate “instabilities,” and thus “the lack of a fixed and unified position.”¹⁸⁰

Shakespeare’s *Othello* contains multiple dramatic shifts, most notably concerning Othello himself. This courageous and humble soldier for Venice, and loving and faithful husband to Desdemona, erodes into a jealous murderer of his wife. That shift occurs because of the plotting of Iago, whom Othello trusted and realizes only too late betrayed him. Most agonizingly, the reasons for Iago’s betrayal are neither fixed nor unified: he seethes with hatred for “the Moor” (his disparaging term for Othello), but in suggesting multiple motives for his plotting, he conveys none.

Step 3: Linguistic

This third step calls for examination of a text to see where “the adequacy of language itself as a medium of communication is called into question.”¹⁸¹ Such points arise in the text when the text makes an “implicit or explicit reference to the unreliability or untrustworthiness of language.”¹⁸² Examples of the unreliability of language include articulating a concept having said it could not be stated, describing a concept having said it was ineffable. An illustration of the untrustworthiness of language occurs when a word is used to describe an idea or object, even though it was agreed that the word is false, misleading, or otherwise inaccurate in its description.

Coupled with contradictions and paradoxes that Step 1 reveals, and the discontinuities that Step 2 uncovers, Step 3 shows that language itself fails to sum up “deconstructive pressures,” and the text is “fractured,” that is fragmented, dis-unified, and incoherent.¹⁸³

In sum, whereas conventional close readings of a text, including under the *Vienna Convention*, aim to show its underlying determinacy and unity, the end goal of a Deconstructionist critique is to show disharmony—contradiction, disunity—within a text, based on the language of the text itself, to show the text at war with itself. The aim is not to set the text against the context it purports to embody, nor against an ideological goal it purports to advance, i.e., the text does not gain meaning by reference to its circumstances or pragmatic pursuits. Rather, the goal is to go against the grain of the text, to set the text against itself, and thereby show text itself holds no firm meanings.

International trade lawyers engage in Deconstructionist analysis of terms when they challenge a concept or rank ordering of concepts. For example, a Structuralist understanding

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 78.

¹⁸² *Id.*

¹⁸³ *Id.* at 79.

of the GATT-WTO treaty system might see the unifying pattern of “free” trade based on the value of “efficiency.” Deconstructionists might probe those treaties for the oppositions between “free” versus “fair” trade, and “efficiency” versus “equity,” and question why “free” trade and “efficiency” are preferred. What gives the treaty and its terms meaning is not the unchanging concept of “free” trade as manifest through the dismantling of tariff and non-tariff barriers, and the imposition of disciplines on trade remedies, to maximize “efficiency.” Rather, meaning springs from the contest between trade liberalization in pursuit of efficiency, on the one hand, and protectionism in pursuit of equity, on the other hand.

B. Contextual Methodologies

1. Historicism

As its name suggests, Historical Criticism regards a text as a historical document, not as an aesthetic object.¹⁸⁴ The context in which the text is written is what produces meaning. Because “[h]istorical information can...provid[e] meaning for events and characters that is not locatable within the text itself,”¹⁸⁵ this methodology is inherently in the Contextual Category, and clearly distinguishable from the aforementioned Textualist approaches:

Some meanings are internal to a text and have to do with structure and form. But at some point, even a good formal analysis reaches a point where history has to take over. It adds something that Formalist analysis cannot explain. What it adds is a larger field of meaning in which a text can and should be situated in order to be understood fully.¹⁸⁶

History shapes the choice of words—why and how they are used, and what they mean—in a text. Historical Criticism connects texts to the institutions, power structures, and discursive practices of the period in which they are written in order to understand better these choices and their implications.

In doing so, this methodology does not presume any particular definition of what constitutes “history,” that is, the perspective from which history ought to be viewed. The conventional approach of focusing on economic and political forces, from a top-down approach (in the sense of looking at dominant powers during the 1875-1914 Age of Empire, or the Post-Modernist period of globalization following the 1939-45 Second World War) is acceptable.¹⁸⁷ So, too, is the attention to cultural and religious influences (such as 16th and 17th century English Protestantism and Puritanism, or extreme right and left wing movements, Fascism and Marxism, respectively, in the 1919-1945 post-First World War and Great Depression era), whereby practices and beliefs, and perspectives from lower classes and outcasts, are evaluated.¹⁸⁸ Indeed, an eclectic approach is best, memorialized in a timeline that identifies all pertinent developments that occurred during the period when a text was drafted. “History is what humanity sees when it looks over its shoulder,” and “also

¹⁸⁴ See CULLER, *supra* note 143, at 136, 144–145.

For additional treatments of Historicism see, e.g., BARRY, *supra* note 144, at 175–93; TYSON, *supra* note 144, at 267–301. For primary source excerpts from Historicists see RIVKIN & RYAN, *supra* note 144, at 711–889.

¹⁸⁵ See RYAN, *supra* note 17, at 32.

¹⁸⁶ *Id.* at 36.

¹⁸⁷ See *id.* at 32–35.

¹⁸⁸ See *id.* at 34–35.

what we see when we look around in the present.”¹⁸⁹ Studying a text in its historical context thus entails an examination of what the author perceives looking over her shoulder while writing, and what she notices when she pauses to look at her surroundings.

For some texts, the relationship is causal: the meaning of a text can be attributed to the circumstances of its writing, as if the meaning is the dependent variable in a mathematical equation wherein the circumstances are the independent variables. For other texts, the relationship is antagonistic: the text is “not...a reflection or product of a social reality,”¹⁹⁰ but rather a “dialectic” between economic, political, or religious ideologies, on the one hand, and subversion of those ideologies, on the other hand. For yet other texts, the relationship may be a reverse dialectic: the text is ostensibly subversive, so rather than manifesting an authentic, radical critique of historical circumstances, the text contains radicalism.

International trade lawyers are trained to start their analyses by developing a timeline of factual events and characters, as in a commercial transaction or criminal case. Indeed, they are schooled in Historical Criticism, albeit not with that rubric, in all three senses: causal, antagonistic, and reverse dialectic. Whenever they look to the preparatory work for a treaty (such as that done by the 1946-47 GATT Preparatory Conferences), or the legislative history of a statute implementing a treaty (such as the Statement of Administrative Action for the Uruguay Round Agreements), they are inquiring about the contextual factors that led to the use of that term. Such factors, reflected in the legislative history, international economic trends (e.g., currency misalignments leading to calls for rules against currency manipulation, as occurred with respect to the *Trans Pacific Partnership (TPP)*), and intellectual paradigms (e.g., free trade to realize comparative advantages, which dominated U.S. trade policy for much of the post-Second World War period, until the Administration of President Donald Trump). In some instances, the contextual factors may be causal, that is, they may explain why a term or provision exists in a trade agreement. In other instances, they may be oppositional, in so far as they explain that a term or provision exists to counter a reality deemed inefficient or unjust. In yet other instances, the contextual factors may have produced a term or provision in a trade agreement that supposedly alters a status quo against which there had been opposition, but in reality does so only marginally, so as to avoid radical change. The point is that in all such instances, lawyers are endeavoring to situate a text within the times in which it was produced, and explain the relationship between the text and its times.

International trade lawyers also are trained in another feature of Historical Criticism, which sometimes is called “New Historicism.” New Historicism places a literary text into a “larger discourse[],” and recognizes that the purpose of the larger discourse may be to “solidify a social reality by fostering belief,” and/or to “contend with another discourse.”¹⁹¹ Consider the protagonist in Albert Camus’ *L’Étranger (The Stranger)*, Meursault. His dispassionate, even thoughtless, responses to poignant events like the death of his mother or the offer of spiritual guidance before his execution run counter to the conventional moral understandings about human interaction. Yet, he stands liberated from those norms because he sets himself outside the mainstream, an alienated, courageous anti-hero. The discourse

¹⁸⁹ *Id.* at 36.

¹⁹⁰ CULLER, *supra* note 143, at 144.

¹⁹¹ RYAN, *supra* note 17, at 37, 42.

Meursault embodies challenges prevailing social realities by asking whether his callous behavior might be appropriate.

Similarly, contemporary multilateral trade negotiations evince two discourses, one bigger and one smaller, and their inversion. That is, the story of Doha Round texts, starting with the November 2001 Ministerial Declaration through the last major drafts in December 2008 and April 2011, can be interpreted in a New Historicist manner.¹⁹² Their drafters wrapped themselves in the narrative of a post-9/11 “Development Agenda” whereby new multilateral trade rules would help boost economic growth and alleviate poverty, with the follow-on consequence of reducing the size of marginalized communities in developing and least developed countries from which Islamist extremist groups like Al-Qaeda recruit. Developed countries, therefore, would subordinate their commercial self-interests to advance these goals. By the mid-2000s, however, the discourses flipped: the use of trade liberalization rules as tools in the wars against poverty and extremism was challenged by demands for market access with respect to exports, coupled with a reluctance to shed protections against imports. The mind-numbingly detailed rules that populated proposed agreements on agricultural trade and non-agricultural market access (NAMA) had little to do with advancing the interests of poor countries and fighting extremism, and more to do with securing and/or solidifying the export and import interests of rich countries. Constituent lobbying (e.g., American cotton producers opposing an end to cotton subsidies that injured their African competitors) explained such rules, thus making the Doha Round texts a product of their times—the quintessential insight of Historical Criticism. Moreover, in respect of the New Historicist emphasis on linking a text to a particular discourse and showing its argument against a different discourse, rich countries seemed to re-write history. They promoted the view that the traditional, give-and-take economic nature of trade negotiations always had been the reality of the Doha Round, and it had been a mistake to designate the negotiations as a “Development Agenda” in the Ministerial Declaration.

2. Phenomenology

Separating consciousness from the world, or a subject from its object, is a problem with which the famed philosopher, Edmund Husserl, grappled in the early 1900s. “Husserl sought to find a way to make sure the mind was grasping truth with ideas,” to “locate[] the grounds of truth in the mind’s reasoning,” and used the term “phenomenon” to refer to “the mental representation of a thing,” that is, an “image that appears in the mind when we perceive something in the world.”¹⁹³ Husserl argued that “[t]o make sure a phenomenon in the mind was absolutely true,” it is necessary to “purge” that phenomenon “of all worldly connections

¹⁹² See the Doha Round Trilogy: (1) Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy—Agricultural Tariffs and Subsidies*, 9 U. SAINT THOMAS L. J. 5 (2011); Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy—Non-Agricultural Market Access and Services Trade*, 44 CASE W. RES. J. INT’L L. 1 (2011); Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy—Trade Remedies and Facilitation*, 40 DENV. J. INT’L L. & POL’Y 238 (2012).

¹⁹³ RYAN, *supra* note 17, at 75, 79. For additional treatments of Phenomenology and Reader-Response criticism see, e.g., TYSON, *supra* note 144, at 161–97. For primary source excerpts from Phenomenologists and Reader Response critics see RIVKIN & RYAN, *supra* note 144, at 297–444.

so that the idea” becomes “a pure idea, something only in the mind,” a “formal entity without any real-world connections or content,” “transcendental (untouched by contact with the world of everyday experience) and capable of being true as only a pure idea can be true.”¹⁹⁴

At first glance, Husserl’s work to decouple an idea from worldly associations would appear to put Phenomenology—the study of the “cognitive conditions of knowledge”¹⁹⁵—properly in the Textualist, not Contextualist, category. However, inspired by Husserl, some literary theorists took the position that a text is not an independent, objective reality divorced from the reader or the reader’s environment.¹⁹⁶ Rather, a text describes a world in the consciousness of the author. Rather than extrapolate from a text issues about ultimate reality of the world, or ask whether that reality, if it exists, is knowable, Phenomenology emphasizes the description of the world as perceived by the author. This methodology is not strictly Textual, because it looks beyond the Text, not to historical circumstances (as does Historicism), but rather to the consciousness of the author and the reader. A full appreciation of the author’s perception may require looking beyond a single work of an author, to the entire range of the author’s output. Moreover, how the reader experiences a text is what gives meaning to, and produces meaning from, the text. The text is not an objective, independent truth, but rather a consciousness created in the mind of the reader as the reader moves progressively through the text. That is, what a text means is the sum total of the connections the reader makes from what the author has described. This experience—or process—is known as “Reader Response Criticism.”¹⁹⁷

International trade lawyers implicitly appreciate Phenomenology when they ask their colleagues, “how do you read that language?” The question, common in everyday legal interpretation, implicitly acknowledges the possibility of no single, underlying truism, and the reality of multiple, diverse consciousnesses created by the text. The treaty, constitution, or statute is being examined partly for what it does not say and requires lawyers to fill in gaps. That work involves anticipation and conjecture—how might a judge perceive the text?

3. *Structuralism*

Structuralism, whose origins in Literary Theory date to the 1950s, looks for signifying conventions that are common across time and space in all texts.¹⁹⁸ There is no effort to discover a new meaning in a text, that is, to interpret a text in a different way. Rather, as the term “Structuralism” suggests, the effort is to plug a text into a systematic account of many, even all, texts based on the constituent elements and patterns in the text at hand. A Structuralist approach emphasizes not an individual event, which occurs only once, but rather an enduring, invariant pattern of which that event represents—to find “the structure hidden

¹⁹⁴ RYAN, *supra* note 17, at 75–76.

¹⁹⁵ *Id.* at 79.

¹⁹⁶ See CULLER, *supra* note 143, at 137. Among the leading scholars in the Phenomenological approach to literary criticism are J. Hillis Miller and Georges Poulet. *Id.*

¹⁹⁷ Among the leading advocates of Reader Response Criticism are Stanley Fish and Wolfgang Iser. *See id.*

¹⁹⁸ *See id.* at 137–39. Among the leading scholars of Structuralism are France’s Roland Barthes and Roman Jakobson. For additional treatments of Structuralism *see, e.g.,* BARRY, *supra* note 144, at 40–60; TYSON, *supra* note 144, at 198–234. For primary source excerpts from Structuralists *see* RIVKIN & RYAN, *supra* note 144, at 131–293.

in the event.”¹⁹⁹ Familiar structures include struggles between good and evil (as in John Milton’s *Paradise Lost* (1667)), truth and perception (Herman Melville’s *Moby Dick* (1851)), rich and poor (*The Grapes of Wrath* (1939)), alienation and society (J.D. Salinger’s *The Catcher in the Rye* (1951)), aristocrats and the *nouveau riche* (William Dean Howells, *The Rise of Silas Lapham* (1885)), human civility and animalistic nature (Joseph Conrad’s *Heart of Darkness* (1899)), justice versus mercy (Shakespeare’s *The Merchant of Venice* (1596-98)), loyalty and betrayal (Shakespeare’s *Othello* (1603)), and adherence to the letter of the law versus breaking the law to avoid betrayal of the heart (Nathaniel Hawthorne’s *The Scarlet Letter* (1850)).²⁰⁰ A journey such as a hero leaving home to solve a problem, and then embarking homeward, is a widely recognizable structure,²⁰¹ found famously in Homer’s *Iliad* and *Odyssey*. *Metamorphoses* by Ovid, another famous ancient author, tackles another structure, namely, that all things inevitably change.

So, in a Structuralist approach, meaning is produced not from the description of an author and experience of the author and their consciousness (as Phenomenology asserts), but rather from those “underlying structures.”²⁰² Those structures are signifying conventions that are unconscious to the author and reader. Identifying them, and uncovering how they are created and imposed, is the task of Structuralism, and what reveals meaning in a text, and what connects an individual text to, or situates it within, a broad literary discourse. Structuralism is inherently interdisciplinary. Its origins lie in anthropology, linguistics, history, and Marxism.²⁰³

Moreover, Structuralism identifies meaning through what is called the “differential principle.”²⁰⁴ No single word “has meaning in and of itself,” but rather “each word is determined by its difference from other words,” and “the identity of any one part of language is made possible by its difference from other parts.”²⁰⁵ A word exists in relation to other words, parts of language, and things, so that the identity of that word is defined by its connections or relations. Succinctly put, “identity is difference,” i.e., “the structure of a work of literature – the relations between parts – is what generates meaning in the literary work.”²⁰⁶ For example, contrasts make for meaning—the rashness of Achilles against the cunning of Odysseus make for two different types of heroism in the Homeric epics, and the evil scheming of Iago against the innocent virtue of Desdemona in *Othello* make transparent their natures.

The difference principle is not exactly a principle about dialectics, in that it does not state that a word is known only by its opposite. Rather, it calls for knowledge of distinctions, which require a study not only of contrasts, but other, possibly non-contrasting, linkages.

¹⁹⁹ See RYAN, *supra* note 17, at 19–20.

²⁰⁰ Each of these classics, of course, contains multiple significant themes.

²⁰¹ See RYAN, *supra* note 17, at 19.

²⁰² CULLER, *supra* note 143, at 138.

²⁰³ The leading Structuralist theorists from these fields, respectively, are Claude Lévi-Strauss, Ferdinand de Saussure, Michel Foucault, and Louis Althusser. *Id.* at 137–39. In particular, Structuralism originated in France in the 1950s, particularly in Linguistics with a theory of language known as Semiotics (or Semiology), which is the study of signs used in communication, developed by Saussure (and other scholars), and extended (for example) to Anthropology with the work of Lévi-Strauss, History with Foucault, and Marxism with Althusser. See *id.* at 138.

²⁰⁴ RYAN, *supra* note 17, at 20.

²⁰⁵ *Id.* at 20–21, 76.

²⁰⁶ *Id.* at 20–21.

The principle states that the meaning of word (including a word connoting gender, such as “feminine,” or sexual orientation, such as “heterosexual”) is defined not from an essential or ideal type, but rather from its relation to another or other words. “Everything comes into being through its difference from something else,” from its dependence or contingency on other terms, thus there are no stable, determinate enduring meanings.²⁰⁷ This type of inquiry, along with a search for underlying structures, that is, the effort to find “the enduring, universal aspect of the human experience as that manifests itself in literature,”²⁰⁸ indicates Structuralism is a Contextual rather than Textual methodology. Studying the text is necessary, but not sufficient to unlock its meanings.

Each text is its own system of words (or “linguistic signs,” as explained below), and “relations between terms or parts of the system” matter, because the “meaning or significance” of each word “arises from their interrelations within the system,” and “[t]he structure of relations between parts in a literary text can...assist in interpreting it [the text] properly.”²⁰⁹ Those relations include spatial and temporal ordering. Spatial ordering is familiar to international trade lawyers: a trade liberalizing rule is presented first in a GATT-WTO agreement, followed by exceptions to that rule. GATT Article XI:1 contains the rules against quantitative restrictions, while Article XI:2 contains the exceptions. This ordering signifies a meaning: the preferred, even morally superior policy is free trade; protectionism is minimally tolerated in limited circumstance. Lawyers also are familiar with temporal ordering, through narration within a text. In setting the legal criteria for safeguard relief, GATT Article XIX sets out a logically sequenced progression of events, which if they occur, trigger the legal consequence of a safeguard remedy.²¹⁰

Thus, Structuralism demands an examination of words within the text in which they are housed, making it appropriate to categorize it as a Contextualist methodology. However, it lacks an ideological lens. There is no effort to hunt for meanings with a particular cultural, economic, or political bias—simply to uncover those meanings by looking at a word in relation to other words. Thus, we do not regard Structuralism as a Pragmatic methodology.

The difference principle is used to reveal underlying structures in a literary text. Specifically, words in a text convey structures, because words are signifying elements, that is, signs. Each word is a “linguistic sign,” and each sign consists of a “signifier,” which is its sound image, and a “signified,” which is its mental image.²¹¹ When a word is spoken (or, read silently), “it evokes a mental image of a particular object in the world”—the sound-image is attached, or matched up, with a mental image. That process of association of a signifier and a signified occurs thanks to the differential principle. A sign has meaning because it is different from other signs, in that the association of signifier and signified is

²⁰⁷ *Id.* at 94, 97.

²⁰⁸ *Id.* at 22.

²⁰⁹ *Id.* at 28–29.

²¹⁰ This sequence, in GATT Article XIX:1(a), is: “If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products”

²¹¹ RYAN, *supra* note 17, at 21–22. As explained above, Semiotics is particularly important to interpreting the definition of a word (linguistic sign) through the differential principle and reference to a code.

distinct. “Dumping” in international trade law connects with a mental image of the dumping margin formula, not a mental image about computing the net subsidization rate.

Moreover, the meaning of a linguistic sign occurs because each sign is part of a code. That is, a code that manifests itself in a word. The code itself is a “set of connected terms that provide the sign with meaning and allow it to function in communication.”²¹² So, for example, the signs “dumping” and “subsidy” relate to the code of trade defense instruments. “Dumping” and “subsidy” have meaning because of their difference from each other, and because of their participation in a code of remedies against unfair trade, those codes are in the *Antidumping* and *SCM Agreements*. A code “resembles a dictionary:” it is the rules and conventions that ensure words are not a pile of unconnected signs, but rather part of a “self-enclosed system,”²¹³ that is, a language, such as international trade law, which allows for the ordering and regulation of import-export transactions by distinctive pairings of a signifier with a signified.

Note that the association between the signifier and signified elements of a sign is arbitrary: the word “dumping” could be used to connote “subsidization.” The fact it is not used in that manner is not because there is a natural, absolute, or mandatory link between “dumping” and the dumping margin formula. Rather, it is because of the two devices—the differential principle and coding—that give “dumping” its widely-accepted association. These devices are “rules and conventions” that facilitate everyday communication among international trade lawyers. But they also may reflect meanings imposed by countries that are dominant in negotiating and drafting trade treaties. The associations they champion reflect their interests, and the task for peripheral countries may be to re-code associations between the signifiers and signified elements of key words to invert conventional meanings in ways that favor their interests. An example is the struggle between the U.S. and India over public stockpiling of food. The U.S. sees such “stockpiling” as a linguistic sign that manifests a code about “subsidization,” namely, India’s efforts to bail out inefficient farmers, and masks its problems of decrepit storage infrastructure. So, the U.S. has fought India’s efforts to associate “stockpiling” with an entirely different code, “food security,” which millions in India lack.²¹⁴

Every time international trade lawyers look for patterns across legal texts, they can draw an analogy to a Structuralism in Literary Theory. A quintessential example is the hero-villain contrast. In an opening or closing argument, a prosecutor and defense attorney may seek to cast the personalities in their case in terms of an opposing narrative about who is the “good guy” and who is the “bad guy” in the case. Another instance is rich versus poor, a structure into which a large, faceless multinational corporation is depicted as mercilessly exploiting the environment to the detriment of indigenous persons and slumdweller. Still another underlying structure that may fit with certain cases is the return of a long-lost character, akin to the New Testament Parable of the Prodigal Son.

Likewise, when international trade lawyers forge signifier-signified associations in a technical term in the self-enclosed language of their specialty, embodied (for instance) in GATT-WTO treaties, using the difference principle and evaluating that term in relationship

²¹² *Id.* at 23.

²¹³ *Id.* at 23, 25.

²¹⁴ See BHALA, *supra* note 21, at Volume One, Chapter 46, Section III.

to the code of those treaties, they are engaged in a Structuralist endeavor. They are trying to make sense of the term by ensuring its meaning is sensible and exclusive, and thereby using the term to facilitate a discourse about regulating cross-border trade. This effort is akin to focusing on the computer program that makes possible a video game, rather than the characters in the game itself.²¹⁵ Examining associations and codes is a deeper level, independent inquiry from any particular import-export deal. In turn, that inquiry can lead to profound systemic questions about problems created by associations and codes.

For instance, are the GATT-WTO treaties coded with neo-classical free trade economics, paternalism, and/or racism? If so, then how are these patterns established and enforced? Linguistic signs like “most favored nation” in GATT Article I:1 or “treatment no less favorable” in GATT Article III:4 may be interpreted as codes to exalt efficiency-driven free trade over egalitarian-based fair trade. They also may relegate social justice concerns such as the effects of free trade on communities traditionally marginalized in the world trading system, such as the poor, women, or LGBTQ+ persons. These questions are akin to ones Structuralists ask when they consider why certain forms of literature (e.g., authored by female or non-Western writers) are relegated or excluded from so-called mainstream discourse. They also are akin to the Structuralist inquiry of evaluating linguistic signs for their negative characterization of distinct groups of people (such as the word “terrorists” to plug into a pejorative code about “Muslims”) or places (such as the word “desert” to conjure a mental image of “economically underdeveloped”).

C. Pragmatic Methodologies

1. *Marxism*

Questioning the existence, or at least knowability, of objective knowledge and the independence of signs from the subjects that create those signs, and thus breaking down patterns that purportedly exist in all texts, is more than just the Post-Structuralist project. It also is what Marxist, Post-Colonial, and Feminist interpretative methodologies call for in attempting to discern meaning in those texts. By definition, therefore, these approaches are not Textual. To the contrary, they demand moving beyond a search for a plain or ordinary meaning of a term based on lexicography within the four corners of the document in which that term is located. They also are not Contextual, as they demand moving beyond the surrounding sentences or paragraphs of a term, the document, and indeed beyond the network of documents (e.g., WTO treaties) in which that document (e.g., GATT) is found. Marxism, Post-Colonialism, and Feminism all are Pragmatic, in that they interpret a term through an explicit ideological lens.

Typically, that lens relies on hierarchies and oppositions.²¹⁶ Indeed, these three methodologies share the common Post-Structuralist insight that patterns that supposedly exist across all texts are based on rank orders and dialectics. Illustrations include capitalists over the proletariat (Marxism), First World over Third World (Post-Colonial Theory), and men over women (Feminism), none of which is either natural or inevitable. As an interpretative technique, Marxism relates all aspects of human life, including cultural

²¹⁵ See RYAN, *supra* note 17, at 24.

²¹⁶ CULLER, *supra* note 143, at 139.

products like literary texts, to an “economic base.”²¹⁷ That base calls for public ownership of the factors (or means) of production, which are labor, land, (both physical, as in machine tools, and human, as in brain power), and technology, i.e., for Communism, as well as the means of exchange and distribution (e.g., through command-style central planning), as distinct from Capitalism, which, of course, is the economic base in which all of the means of production, exchange, and distribution are privately owned. The Marxian economic base is sometimes called the “structure” on which the “superstructure” of a society rests, and the latter includes culture, law, and politics.²¹⁸ So, the Marxist approach is materially deterministic: the economic conditions of the structure establish those of the superstructure.

To be sure, “all humans are creative beings,” as Marx acknowledged, but Capitalist and other pre-Communist societies are divided by classes.²¹⁹ Marxists argue that relations between the factors of production, particularly between capitalists (owners of capital) and landlords (owners of land), on the one hand, and workers (owners of labor), on the other hand, are inherently exploitative. This vital feature of the structure determines the nature of the superstructure. Capitalists and landlords conspire with one another and their political representatives, and even invoke the military, to maximize the extraction of surplus value from laborers (i.e., the excess of what a worker puts into a product versus what she receives). Oppressed workers whose wages may be driven down to around subsistence levels, who are alienated from what they produce, i.e., “workers’ life energy, their creative power, is alienated from them in the course of the labor process,” meaning this power “is taken out of them and turned into a thing, a manufactured good or a value that is then sold on the market as a commodity.”²²⁰

That value, more specifically, the surplus value of labor, is what capitalists exploit, extracting as much as possible from workers “over the cost of producing goods.”²²¹ “In this labor theory of value, the source of capitalist wealth is the unpaid labor of workers.”²²² After all, “income from the sale of the good must be more than the cost of producing it, so workers’ wages must be kept as low as possible for capitalism to function properly,” and the “interaction” between capitalists and workers “consists of the extraction by capital from labor of a surplus value over the cost of producing goods.”²²³ That exploitation is facilitated, and thus the misery of workers is exacerbated, by the presence of a reserve army of the unemployed: anyone standing outside the factory gates hoping for a job could replace a disgruntled worker on the other side. In short, “capitalism is ... a species of theft,” because

²¹⁷ *Id.* at 143. For additional treatments of Marxist literary criticism see, e.g., BARRY, *supra* note 144, at 159–74; TYSON, *supra* note 144, at 51–78. For primary source excerpts from Marxist literary critics see RIVKIN & RYAN, *supra* note 144, at 711–889.

²¹⁸ See BARRY, *supra* note 144, at 160–61.

²¹⁹ RYAN, *supra* note 17, at 59.

²²⁰ *Id.* (explaining that in particular, in a Capitalist marketplace, the “use” value of a good [which Marx called a “commodity”]—the utility that good has to a person — is converted into an “exchange” value, and the extraction of surplus implicates both types of value. A Capitalist profits by selling a good in the market for more than the value of the labor and other inputs the good incorporates, because the good is useful to the buyer. By paying the workers who made the good less than the value of their labor they exerted to make the good, the Capitalist extracts surplus in comparison with the exchange value for which the good was sold). *Id.* at 63.

²²¹ *Id.* at 62.

²²² *Id.* at 60.

²²³ *Id.* at 59, 62.

capitalists “pay workers less than the value of their labor,”²²⁴ so that capitalists can sell merchandise at above the cost of production, *i.e.*, at a profit, and thereby add to their wealth—and exacerbate the class schism.

All workers—on both sides of the gates—ought to band together in a proletarian revolution against this oppressive socioeconomic structure. In this structure, Marx argued, “[s]ocially produced wealth becomes ... private wealth.”²²⁵ The collective value of workers “is converted into the private property of the owners of the means of production.”²²⁶ To the extent workers revolt, their logical aim is to reassert control over what they create and own.²²⁷ Indeed, such revolts are emblematic of class struggle, of the Marxist theory of history as class struggle, a “fight between those with wealth and power and those whose labor sustains society.” In Ancient times, farmers struggled against oppressive dynastic rulers; in the Middle Ages, serfs and peasants battled aristocratic, militaristic landlords; and in the Capitalist era, the working class resists “the investment of accumulated wealth in production that exploits workers, extracts value from their labor, and turns it into profit and more wealth for capitalists.”²²⁸

But, to the extent the underclass does not revolt, aside from their powerlessness to do so when confronted with the overwhelming coercive force of the upper class and the instruments of police and military it controls, they may be deceived by false consciousness. Workers may be duped into accepting a “ruling idea,” that is, an idea “that induces workers to voluntarily participate in their own subjugation because that idea makes the inequities and inequalities of society seem justified.”²²⁹ Workers may believe that stations in life are not fixed, as they were between peasants and landlords, serfs and nobles, in medieval times. They may think they, too, are potentially upwardly mobile, that they, too, could escape the wage labor trap and become capitalists. After all, Capitalism champions free trade, hence workers may sense they can be enriched by free competition on a level playing field. This sense is false, however: the freedom of workers is not real, as long as capitalists retain control over the means of production and have at their disposal instruments of power and suppression. They also may be narcotized by religion, which Marx famously decried to be an opiate of the masses.

Looked at through a Marxist lens, a text may be studied for how economic conditions determine cultural, social, and political circumstances, what it reveals about class status and relations and worker consciousness, and how it represents economic relations within a society and its cultural, social, and political systems. For instance, a text may portray entrepreneurship as a virtue. Yet, it may downplay ethical trade-offs entrepreneurs make to succeed, and thereby promote a utilitarian calculus that growth-enhancing profitable ends

²²⁴ *Id.* at 60.

²²⁵ *Id.* at 62.

²²⁶ *Id.* at 60.

²²⁷ *Id.*

²²⁸ *Id.* at 60–61.

²²⁹ *Id.* at 61. Put differently, workers may be deceived by “ideology,” by which Marx meant “the ruling ideas of the ruling class” that “allow one group to dominate a society by making such rule seem just, right, reasonable, natural, and, in some instances, perfectly divine.” *Id.* at 63, 65. For Marx, “ideology” referred to “ideas like ‘freedom’ [that] operate in people’s minds to ensure that they themselves contribute to their own domination,” to “those practices of thought that ensure that we ourselves keep the locks on our chains firmly shut.” *Id.* at 68.

justify non-transparent, extractive, and corruptly political means, even if those ends yield greater social inequality.

Doing so also reveals tensions and contradictions among oppositional hierarchies inherent in Capitalism. For instance, a text that deals with agricultural products or industrial goods, but which does not treat the labor input into that merchandise, commits “commodity fetishism.”²³⁰ The text ignores the surplus value exploited from the farm or factory worker by the landlord or capitalist, respectively. A Marxist reading would not tolerate the sale of the merchandise at an efficient equilibrium price determined by market demand and supply. Rather, it would reveal this exploitation. It would point out that merchandise has no market value but for the labor input it embodies. Revealing this truth, the Marxist approach would highlight a dialectical, or dynamic conflictual relationship. That is, it would reveal the incongruity between the working class and the concealed value of its efforts, on the one hand, and the capitalist class that conceals and extracts this value, on the other hand.

The dialectical method of determining the meaning or identity of a term, developed both by Marx and G.W.F. Hegel, could be a justification to classify Marxism as a Contextual approach to interpretation (as above with respect to Structuralism). After all, under this method, the meaning of a term depends on another term to which it is related, and together a totality of understanding results. “Quantity” is distinct from “quality,” and together they yield a holistic view of (for example) a shipment of imported goods.²³¹ The associated terms can be specific and concrete versus general and theoretical, such as “duty-free” in relation to “free trade,” which show the particular identity “presupposes a universal idea” about unfettered market access, and together the specific and general terms allow for the comprehension of the whole.²³² Yet, the ideological nature inherent in the Marxist use of dialectics, that is, the impulse of Marxists to set dialectical relationships between terms in the context of power relationships (*e.g.*, between classes) in the international political economy, distinguishes Marxism as a Pragmatic interpretative tool.²³³ Indeed, its prescriptive aspect—the establishment of a communist economy in which the means of production are publicly, not privately, owned—is the last step of the dialectical method of the thesis-antithesis relationship between exploited workers and enriched capitalists.

International trade lawyers do not routinely proclaim themselves to be “Marxist,” nor do they call for a proletarian overthrow of the Capitalist order. The label is pejorative, in part because of the monstrous human rights deprivations across the 20th century when Marxist prescriptions were followed under the Soviet and Chinese Communist Parties. And, the Marxist proposition that there are inherent contradictions within capitalism—namely, the dialectic of a minority of capitalists exploiting masses of labor, which would be resolved logically and inevitably by the larger group (workers) taking over “the means of production in a nationalized socialist economic system”—is dubious.²³⁴ But, the analyses by lawyers of proposed or actual trade rules occasionally are informed by Marxist perspectives. Whenever they look beyond the *prima facie* reality they perceive in a marketplace filled with imported

²³⁰ *Id.* at 61.

²³¹ *Id.* at 63.

²³² *Id.*

²³³ For a discussion of the dialectic between “free” and “fair” trade see Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT’L L. 159 (1997).

²³⁴ RYAN, *supra* note 17, at 62.

and domestically produced goods, and consider the factors of production used to make the merchandise for sale, the returns to those factors, and the powers that control those returns, their analysis examines capitalism for its exploitative underpinnings. That is what Marx did. Succinctly put, lawyers eschew the “Marxist” label, embrace some of the diagnoses concerning class struggle, but prefer as a prescription evolutionary legal change over revolution.

Such occasions are whenever an international trade lawyer sees embedded in a rule “the clash between those who own wealth and the means of manufacturing goods and those who own nothing but their labor power and must sacrifice their lives to the making of wealth for others in order to survive.”²³⁵ Thus, hints of Marxist perspectives are found in analyses that highlight the impact of trade liberalization rules on the jobs, incomes, and employment conditions of workers. For example, among the issues in negotiating the second iteration of the *North American Free Trade Agreement*, *NAFTA 2.0*, the *United States – Canada – Mexico Agreement (USMCA)*, were (1) rules of origin (ROO) to mandate that at least 40 percent of the value of an automobile had to be made with labor paid at least U.S. \$16 per hour, (2) protecting the right of Mexican workers to unionize, and (3) enhancing the efficiency of dispute settlement mechanisms to resolve claims of alleged worker rights abuses. Worker rights advocates found the *Labor Side Agreement* associated with the first iteration of *NAFTA* as a failure: it contained no wage-related ROOs, and neither addressed anti-union practices in Mexico, nor yielded even a single successful prosecution of a worker rights case. The diagnoses of problems workers faced under *NAFTA 1.0* were consistent with Marxist theory, but their consequent demands for *NAFTA 2.0* stayed within Capitalist boundaries, prescribing changes to the treaty rather than a proletarian revolution to overthrow the Capitalist trading system.

Notably, the search for economic inequality need not be limited to international trade in goods. Evaluating the effects of trade liberalization in services, particularly through foreign direct investment—so-called “Mode III” under *GATS* and FTAs like *NAFTA 1.0* and *2.0*—is an example. International trade lawyers may look to the terms of these treaties to see whether opening services markets in developing and least developed countries to banks, insurance companies, securities firms, and telecommunication companies from developed countries may result in a kind of neo-colonialism. Might the influx of these entities entail exploitation by the financial capitalist class in rich countries, which own and operate them in collaboration with elites in poor countries? That question reflects a concern about the perpetuation and expansion of inequality beyond manufactured goods, whereby services consumers in poor countries are dependent on service suppliers from rich countries. Here, too, though the diagnosis about the text of the trade treaty and its repercussions may be rendered through a Marxist lens, the prescription need not be Marxist. Lawyers may call not for the abandonment of services trade liberalization, but rather for managed trade in services through appropriate provisions in *GATS* and FTAs. For instance, to avoid exploitation, they may advocate for poor countries to phase-in obligations over time, and to declare certain protective, non-conforming measures (known as “NCMs”) to limit the degree of investment from services businesses in rich countries.

²³⁵ *Id.* at 61.

2. *Post-Colonial Theory*

By no means is discourse about developed, developing, and least developed countries limited to Marxists. The concern about relationships between “First” World (rich) and “Third” World (poor) countries is the core of Post-Colonial Theory. To study literature through the lens of Post-Colonial Theory is to seek to learn about the experience of non-western societies and peoples in the aftermath of domination and subordination by the West, principally European and American, but also Japanese, powers.²³⁶ This methodology proposes that post-colonial life, that is, the experience of and within countries after those countries gained independence, is “entangled with the discursive practices of the West.”²³⁷ Institutions and individuals in Africa, Asia, and Latin America are deeply influenced by “the hegemony of Western discourse,” and presented with opportunities of “resistance.”

A key premise of Post-Colonial Theory is that societies are divided along ethnic and/or racial lines, each ethnicity creates a unique, distinct culture, and stereotypes about culture facilitated colonialism—the “forced occupation of entire nations by other nations who exploited the colonized country economically.”²³⁸ Professor Edward Said’s concept of “Orientalism” encapsulates this premise. “Orientalism” refers to attitudes “that fostered and supported the colonization of the ‘Orient,’ from the Middle East to China.”²³⁹ Those attitudes stereotyped the Orient by “erasing the detail of life there, ... turning the East into a simple, easily grasped category that was understandable within the western scheme of knowledge.”²⁴⁰ From these stereotypes, nationalism followed: westerners believed their own countries and cultures to be superior, looked at other countries and cultures defensively, and saw in colonialism a logical mission to civilize the “other,” while at the same time avoiding too much “cultural mixing.”²⁴¹

One example of Orientalist stereotyping that directly relates to textual structure is the narrative form. A complete, linear narrative characterizes western literature and legal culture, but contrasts with the circular, fragmentary forms common in Indian and other non-western texts. Posited as natural and logical, a thorough, straight narrative was seen as superior. Yet, Indian stories “are usually fragmentary and multiple, and ... [depict] lives that have been displaced from a single linear development toward self-fulfillment by the traumas of

²³⁶ Post-Colonial critiques have evolved through three phases, sometimes called “Adopt,” “Adapt,” and “Adept.” BARRY, *supra* note 144, at 198. In the first phase, the focus was on adverse effects of imperial dominance, namely, the displacement of the cultures and cultural expressions of subjugated peoples. In the second phase, the voice of non-western writers was discovered (or re-discovered), but the western canon of literary classics, and the structures and styles they embodied, was accepted as the benchmark for non-western authors. In the third phase, that canon, perceived as a yoke, was cast off, “universalism” was rejected, and non-western criteria for judgment were developed and applied. *Id.* at 195, 200–01. In this third phase, “a new ‘international style’ in writing” emerged that transcends local barriers, and thereby reaches a multi-ethnic audience. *See, e.g.*, KIRIN DSAI, *THE INHERITANCE OF LOSS* (2007); JHUMPA LAHIRI, *THE NAMESAKE* (2003); RYAN, *supra* note 17, at 121. For additional treatments of Post-Colonialism, *see, e.g.*, BARRY, *supra* note 144, at 194–204; TYSON, *supra* note 144, at 398–447; ROBERT J.C. YOUNG, *POSTCOLONIALISM—A VERY SHORT INTRODUCTION* (2003). For primary source excerpts from Post-Colonial critics, *see* RIVKIN & RYAN, *supra* note 144, at 1099–1251.

²³⁷ CULLER, *supra* note 143, at 144.

²³⁸ RYAN, *supra* note 17, at 110.

²³⁹ *Id.* at 111, 116.

²⁴⁰ *Id.* at 111.

²⁴¹ *Id.*

disinheritance.”²⁴² That “disinheritance” is the (1) “depriv[ation] of property by [European colonial] conquest,” (2) exclusion from “an economic world monopolized by other ethnic groups,” and ultimately, (3) subordination of Indian culture to “no secure past that can be the basis for a secure narrative move into the future.”²⁴³

Manifestly, whereas Marxism emphasizes the economic structure upon which features of a society’s superstructure are based, Post-Colonial Theory treats ethnicity and/or race as the base upon which the culture of the superstructure rests. Yet, this Theory is sympathetic to Marxism insofar as colonialism meant capitalism. That is, western colonialist powers were capitalist, and in their pursuit of new markets, they exploited African, Asian, and Latinx peoples. The Theory, however, examines the cultural consequences of capitalist exploitation, particularly the imposition of western norms and creation of a narrative that they are superior to indigenous, non-western ones. In other words, economic imperialism led to “cultural imperialism,” “the dominance of one nation’s culture over the culture of other nations,” and in some instances, to “cultural appropriation,” “[t]he borrowing or use of the forms of one culture by another, usually a culture that is in a more dominant position.”²⁴⁴

International trade lawyers concerned about the impact of legal terms on developing and least developed countries essentially practice Post-Colonial Theory, without necessarily categorizing their interpretative endeavors as such. They do so both retrospectively and prospectively, inquiring about whether a treaty might prefer (either in a *de facto* or *de jure* manner) one ethnic and/or racial group and thereby stigmatize another, perhaps by asserting one ideology over another (such as free over fair trade), with the result of empowering one group and marginalizing another one.

Looking back, international trade lawyers may locate a word of a text in the history of western colonial dominance, as where they source a word in an international treaty in English jurisprudence, and treating that word as natural and universally applicable, even though it is the product of one legal culture. “Reasonably foreseeable,” that is, “unforeseen developments,” as a criterion for imposing safeguards against a surge of imports under GATT Article XIX:1(a) might be an example. Looking forward, lawyers may inquire about the potential effects of free trade commitments championed by western developed countries on non-western developing and least developed ones. An illustration would be asking whether enhanced market access for service suppliers from rich to poor countries under the WTO *General Agreement on Trade in Services* might be neo-colonialist, with those suppliers dominating the new markets (in terms of market share) and exploiting the people (both employees and customers) in them.

In both a retrospective and prospective sense, perhaps nowhere is this process of ethnocentric interpretation more evident in multilateral trade law than with respect to special and differential (S&D) treatment. The generosity, or lack thereof, of programs designed to benefit poor countries, such as the *African Growth and Opportunity Act*, depends on the use and interpretation of technical terms and criteria set out in (for example) rules of origin (ROOs).²⁴⁵ Indeed, the definition of “developing” country within the WTO system, which is

²⁴² *Id.* at 112.

²⁴³ *Id.*

²⁴⁴ *Id.* at 110–11.

²⁴⁵ Raj Bhala, *The Limits of American Generosity*, 29 FORDHAM INT’L L.J. 299 (2006).

a gatekeeper term for eligibility for S&D treatment, requires Post-Colonial Theory to challenge the efforts of the Trump Administration to circumscribe the number of countries that can claim this status.²⁴⁶

Simply put, whenever an international trade lawyer empathizes with how a culture other than her own might perceive words in a treaty, and imagines how they might affect other peoples, that lawyer accepts (tacitly or explicitly) a central pillar of Post-Colonial Theory: multiple viewpoints must not be subordinated to a single, mono-ethnic one; to the contrary, there is no central, dominant way to approach a text. Likewise, whenever a lawyer adopts an “international frame of reference”—they are part of “an educated cultural elite that can appreciate allusions to the hills of Tuscany and the islands of Greece while understanding what it means to be Korean in Japan or Japanese in Switzerland”²⁴⁷—they are practicing the Theory. Trade texts do not have such allusions, but they do deal with trade in Italian wine, tourism to Greece, Korean inputs in Japanese-made goods, and Japanese-inputs in Swiss-made merchandise. Those texts arise in the context of “how vexed boundaries can be in a culture of enormous commonality across highly diverse populations,” and their provisions endeavor to cross those boundaries, that is, to liberalize trade in goods and services across them.²⁴⁸ But, such crossings—made possible by the rules of trade treaties—create “the possibility of anonymous predatory brutality” against ethnic minorities by erstwhile colonial forces that threaten to harmonize culture through sophisticated capitalist mechanisms under the guise of healthy globalization.²⁴⁹

²⁴⁶ See [Proclamation](#) Vol. 84 No. 147, 84 Fed. Reg. 37555 (July 26, 2019).

²⁴⁷ RYAN, *supra* note 17, at 121.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

3. *Feminism*

The binomial gender-based distinction between male and female, with superiority ascribed to men, is a long-standing, indeed ancient, hierarchical opposition at which Feminist interpretative methodologies take aim.²⁵⁰ There are two targets. The first one questions the premise of traditional sexual orientation and gender identity (SOGI), and differentiates between (1) physiology: biological sexuality and the biological binary between male-female, and (2) psychology: sexual identity and cultural norms and ideals about masculinity and femininity.²⁵¹ Why is heterosexual intercourse between a man and a woman “normal,” whereas all other intimacy (namely, gay sex, lesbianism, and bisexuality), and all other status categories (e.g., transgender, queer, or questioning) deviant? Is it conceivable that heterosexuality is compulsory, that is, that men and women are forced to be heterosexual, even if they are homosexual, and prefer homosocial (i.e., same sex) bonding relationships?²⁵²

The second target is discrimination against women *per se*. Why are women’s identities not championed in public life (but rather, only in domestic, that is, household, endeavors, and as sexual partners to men), and their voices for equality, and for recognition as capable and powerful, in ways comparable with men, not heard? “Feminist scholars argue that women’s lives have been limited by constraints placed on them by male-dominated societies,” and “men largely control political and economic life.”²⁵³ For instance, women “have been prevented by law from working in the professions ... assigned secondary roles such as ‘home-maker,’ despite being as talented as men at more public occupations.”²⁵⁴ In some countries, they are essentially compelled to sacrifice their career aspirations, marry at a young age to older men, and even don head-to-toe veils. They are stereotyped positively as caregivers to men, who are the masculine (i.e., powerful, strong, aggressive, and independent), not effeminate (i.e., frail, weak, subservient, and dependent), and also

²⁵⁰ See CULLER, *supra* note 143, at 140. There are multiple Feminist Literary Theory approaches, and while our focus is on “a version of poststructuralism,” we acknowledge that this multiplicity bespeaks “less a unified school than a social and intellectual movement and a space of debate.” *Id.* In the quintessential, early Feminist critique, *A Vindication of the Rights of Woman* (1792) by Mary Wollstonecraft, the “first wave” of Feminism appears, “pos[ing] the question of why women had fewer rights than men and why they were excluded from public life.” RYAN, *supra* note 17, at 93. This wave stayed within patriarchal boundaries, whereas in the second wave, feminist critiques discovered (or re-discovered) the rich history of women writers. Yet, the boundaries still were male dominated, for example, ordered, grammatical discourse, and metrics for evaluating writing. In the third wave, ideas of a distinct feminine voice, unchained by literary parameters and benchmarks set by men, took hold. So, too, did a strand of Feminism, which grew from French Post-Structuralism, applying the difference principle to argue there is no essential, ideal-type, stable, determinate identity (e.g., feminine writing), because an identity is constructed by, and depends on, its relations to (that is, difference from) other identities, which thus are reciprocally defined, and which may change. *Id.* at 93, 96–97; BARRY, *supra* note 144, at 123–27, 134–35. For additional treatments of Feminist literary criticism see, e.g., *id.* at 123–40; TYSON, *supra* note 144, at 79–128. For primary source excerpts from Feminist literary critics, see RIVKIN & RYAN, *supra* note 144, at 893–1095.

²⁵¹ See RYAN, *supra* note 17, at 90 (noting “gender” is also a concept that allows for a distinction between biological traits, on the one hand, and temperament and proclivity, on the other hand).

²⁵² “Homosexuality” is a concept pioneered by Judith Butler in *Gender Trouble – Feminism and the Subversion of Identity* and Eve Kosofsky Segwick in *Epistemology of the Closet*. They envisage “a continuum between practicing homosexuals and the non-practicing, repressed homosexuality of the all-male bonded group.” *Id.* at 96.

²⁵³ *Id.* at 87.

²⁵⁴ *Id.*

negatively as a “threat to male power and potency.”²⁵⁵ At the same time, feminist scholars explore and celebrate an identity of women that is distinct from that of men (and thereby avoid making what is male the benchmark), and argue, for example, “that female identity is more relational and less characterized by boundary anxiety,” *i.e.*, more empathetic and self-sacrificing, than that of men.²⁵⁶

Emphasizing the depiction of women in texts, Feminist Literary Theory asks these questions. In doing so, it challenges underlying male assumptions that exclude or downplay the experience of women, and which result in patriarchal discourse (*i.e.*, a discourse ruled by men) and misogynist (*i.e.*, chauvinistic) definitions. This approach necessarily moves beyond textual lexicography and documentary, economic, political, or social contextuality. Inherently, it examines terms with a practical goal in mind—to right gender-based wrongs. The interpretative process involves not only an examination of the history of women and their oppression, but also the cultural idea of the “feminine” and the need to subordinate women if a patriarchal culture is to prevail.²⁵⁷

Women play a vital, and sometimes leading, role in the economic development of the communities in which they live. Yet, until two recent FTAs—the *USMCA* and the *Comprehensive Economic and Trade Agreement (CETA)*, to which Canada is a Party in both, and the European Union (EU) to *CETA*—women went largely unmentioned in trade agreements.²⁵⁸ Trade deals memorialized patriarchal economic and political structures, and reified roles based on traditional stereotypes about comparative advantages based on biological gender, regardless of the true shared, equal competencies of men and women. No multilateral trade agreement (MTA)—that is, neither the GATT nor any of the other treaties in the four annexes to the *WTO Agreement*—addresses women, the roles they play, and the discrimination they suffer. That new, 21st century agreements expressly mention women, at least in connection with labor rights and social justice topics they cover, is a strong reason to examine disputed terms in trade agreements from feminist perspectives. Depending on how such agreements are crafted and interpreted, they may allow for strong, independent roles for women so they can participate not only in public life and contribute to economic development generally, but also specifically in the benefits of trade liberalization.

Thus, for example, provisions to ensure equal rights under contract, property, and inheritance law; labor law guarantees for maternal and paternal leave; and equal opportunities and compensation, are essential. Such provisions potentially help women to assume roles that are autonomous and strong, for instance, as owners and managers of import-export companies, and thus move beyond subordinate positions in male-run businesses. The *USMCA* and *CETA* contain provisions against gender-based employment discrimination, but the terms in those provisions are typically vague or ambiguous. Interpreting them through Feminism, as they specifically address women, is why this methodology is pragmatic.

²⁵⁵ *Id.* at 88, 93.

²⁵⁶ *Id.* at 90, 92. This difference sometimes is ascribed to the expectation that boys must separate from their mothers.

²⁵⁷ *Id.* at 90–91.

²⁵⁸ See Bhala & Wood, *supra* note 156, at 302, 334–39.

4. *Queer Theory*²⁵⁹

Queer Theory challenges the common understanding that heterosexuality is the norm against which SOGI should be judged. That long-standing benchmark has cast homosexuality as marginal, and victimized LGBTQ+ persons, whereas this Theory “assumes that all sexuality is infused with homosexuality and ... there is no normative heterosexual center around which cluster marginal identities.”²⁶⁰ The term “gender” is vital: Queer Theory distinguishes biological gender, that is, physiological sexuality, from cultural identity. For most persons, physiological gender as a male or female is given at birth, but for all persons, culture shapes behavior, and “gender culture is often at odds with biology” (*e.g.*, where “some women love women as sexual objects and romantic partners”).²⁶¹

Drawing on historical evidence (*e.g.*, from Ancient Greece, where homosexual practices were regarded as normal) and contemporary social life (*e.g.*, bonding in single-sex clubs and sports teams), Queer Theory “assumes that no gender category is stable or normative,” but rather “[a]ll are contingent and malleable.” What appears to be natural and fixed—heterosexuality—is “merely held in place” by “conservative intolerance” that prevents persons “from acting on bisexual or homosexual impulses,” adherence to reproductive norms (*i.e.*, having children), and *de facto* and *de jure* discrimination.²⁶² So, in interpreting a text, Queer Theory aims “[t]o queer” that text, to blur lines and disrupt it by challenging the reigning notion that SOGI is not fluid or indeterminate, but rather the result of repressive norms that suppress true orientations and identities.²⁶³ Interpretation ought to reveal authentic sexual desires, showing SOGI has “no real ground or substance,” “that all gender categories are contingent rather than being derived from a natural ground that makes them immutable.”²⁶⁴

Queer Theory is not (yet, anyway) part of the canon of interpretative methodologies in international trade law. Thoughts of examining the construction of gender relations in a text as equal or unequal, privileged or oppressed, and “queering” a text by pointing out the unstable nature of SOGI, are distant from conventional readings to what at first glance, and indeed typically are, technically complex provisions on topics such as tariff phase out periods, product-specific rule of origin applications to determine eligibility for a preference, tariff-rate quota administration under safeguard actions, deductions in a dumping margin or net countervailable subsidization computation. Yet, looking at an international trade

²⁵⁹ A prior (and welcome) development, which compliments the present discussion and application of LGBTQ Theory to international legal texts, was the establishment in 1983 of the American Association of Law Schools (AALS) Section on Sexual Orientation and Gender Identity (initially titled the Section on Gay and Lesbian Legal Issues). *See generally*, Symposium, *The Founding of the AALS Section on Sexual Orientation and Gender Identity Issues*, 66 J. LEGAL EDUC. 456 (2017) (containing seven narrative essays about the leaders of this Section and their efforts to advance equality and justice).

²⁶⁰ RYAN, *supra* note 17, at 88. For additional treatments of Queer Theory *see, e.g.*, BARRY, *supra* note 144, at 141–58; TYSON, *supra* note 144, at 302–42. For primary source excerpts from Queer Theory critics *see* RIVKIN & RYAN, *supra* note 144, at 893–1095.

²⁶¹ RYAN, *supra* note 17, at 94.

²⁶² *Id.* at 89.

²⁶³ *Id.* at 89, 97.

²⁶⁴ *Id.* at 89, 96.

agreement from the perspective of SOGI is—and rightly should be—a standard approach to defining meaning.

That is because at least one major FTA, the *USMCA*, has an express provision (Article 23:9) covering the Lesbian, Gay, Bisexual, Transgender, Queer, and other communities.²⁶⁵ Therefore, even in the hard-headed, commercially-oriented world of negotiating, drafting, and implementing trade agreements, no longer can it be said that “what has been set aside as perverse, beyond the pale, radically other” is off limits.²⁶⁶ To the contrary, trade deals are questioned for the “cultural construction of sexuality;” specifically, the presumption of “heterosexual normativity,” on which they rest.²⁶⁷ More generally, just as feminist interpretation highlights the secondary roles to which men assign women, the dangers men perceive from women outside those roles, which blurs the lines between assumed traits and ostensible opposites, Queer Theory does so for heterosexual *vis-à-vis* LGBTQ+ persons. Looking at how a text potentially impacts LGBTQ+ persons can reveal ways in which the presumption in textual language of heterosexual normality might reinforce their unequal status, barring or limiting the sharing of economic resources and political power with them—at least unless they stay in the closet behind the door of a “don’t ask, don’t tell” culture. If the point of trade liberalization is (as per standard classical and neoclassical economic theory) to produce net social welfare gains for a society through the specialization of production based on comparative advantage, and increased consumption opportunities at lower prices, then Queer Theory helps disaggregate the groups in society to which those gains are distributed. Rather than regard the standard three trade-impacted groups, namely producers, consumers, and the government, the Theory asks whether SOGI affects the enjoyment of the gains, and thus whether a presumed patriarchal and heterosexual monopoly within each group skews the distribution for its own ends.

One example of the repressive structures against LGBTQ+ persons came in Spring 2019, when the Sultan of Brunei announced he would enforce traditional Islamic Law punishments for homosexual acts.²⁶⁸ Brunei is a *CPTPP* Party, and the Sultan’s decision—which fortunately was suspended—put on the global stage the question of what FTAs said about protections for non-heterosexual persons, and whether an FTA with a country unwilling to afford robust protections for them should be pursued.

VI. LEGITIMACY THROUGH HONESTY ABOUT WTO INTERPRETATION

We have distilled the various philosophies, approaches, pontifications, definitions, and perspectives on judicial interpretation into a comprehensible taxonomy. When one WTO member finds the actions of another member difficult to swallow, what tool or tools can the Appellate Body prescribe? How are these tools similar, and how do they differ, from one another? The tools are associated with American Jurisprudence, particularly Constitutional law. The audience for this article, therefore, is not only the international trade community,

²⁶⁵ See Agreement between the United States of America, the United Mexican States, and Canada, Can.-Mex.-U.S., Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23_Labor.pdf. This provision is analyzed in Bhala & Wood, *supra* note 156, at 337–45.

²⁶⁶ CULLER, *supra* note 143, at 146.

²⁶⁷ *Id.*

²⁶⁸ See RAJ BHALA, *TPP OBJECTIVELY: LEGAL, ECONOMIC, AND NATIONAL SECURITY DIMENSIONS OF CPTPP 500-01* (2d ed., 2019).

but also all scholars, students, and practitioners interested in how adjudicators interpret controversial terms in a legal text.

The tools also come from Literary Theory. The “Law and Literature” movement in the United States presents not only legal themes “in” fiction and poetry, but also posits legal texts “as” literature. “As” a species of literature, a literary act, a legal text—including a treaty such as GATT-WTO agreement—is susceptible to interpretation using any one or more of the schools of Literary Theory. Thus, the audience extends to the law and literature community, which can appreciate the topography, *i.e.*, the mapping out of the different schools of literary criticism to legal texts “as” literature, and thus see not only the power of those schools and the power of the techniques those schools provide, but also their similarities and differences *vis-à-vis* the methodologies familiar in American Jurisprudence.

One worry in discussing American jurisprudence is that excess focus is on both the United States and its Constitution. Originalism, famously associated with the Supreme Court Justice Antonin Scalia, is a somewhat recent and peculiarly American phenomenon. Across the two centuries of Supreme Court jurisprudence, Originalism is not the dominant mode of discourse. It also is distinctly not European, as Continental scholars would speak of “Legal Hermeneutics,” and regard Originalism as unnatural, even bizarre. Canadian legal scholars, too, tend to regard Originalism as strange, though one Supreme Court Justice purports to apply this methodology.

Thus, emphasizing Literary Theory not only balances the overall discussion of interpretation of international trade texts, but also liberates that discussion from an American-centric, or Constitutional-centric, treatment. And, of course, even if the Appellate Body is not technically free to apply explicitly the Literary methods, or even the American ones, identifying all such schools of thought sets up the possibility that its opinions may be read fruitfully from different perspectives—and, as highlighted in this article, reveals that the Appellate Body (at least implicitly) uses techniques familiar in American Jurisprudence and Literary Theory.

We have engaged in an exercise in taxonomy, classifying the dizzying array of schools amidst confusing (if fancy) academic legal and literary jargon. Simply to provide a clear, precise sense of what each methodology is in theory, and how it works in a practical sense, adds value. International trade lawyers can appreciate that the toolbox of interpretative methodologies is large. Indeed, they can come to see that the job of interpretation is to resolve cases with the tools available to yield the best possible results. This pragmatic approach, which Judge Richard A. Posner (among others) suggests, helps lawyers appreciate there is no one interpretative methodology appropriate for all problematic texts, and to realize that to think otherwise for the sake of academic consistency can lead to extremist consequences.

Just as it would make little sense to prescribe the same tool for all repair work, or the same medication for all illnesses, there is no single method of judicial interpretation that works for all WTO cases. We have synthesized and cut across methodologies from the *Vienna Convention*, American Jurisprudence, and English Literary Theory to show that there are three broad categories of interpretative tools: Textualist; Contextualist; and Pragmatic. Whatever source a tool has, and whatever fancy name it is called, that tool can be put into one of these three categories.

Starting with the *Vienna Convention*, we showed how its Articles 31 and 32 call for recourse to the text (that is, the ordinary meaning of a disputed word), then the context of

that text (*i.e.*, the surrounding words, sentences, and paragraphs of that word), and finally the purpose of the treaty in which that text is found (which opens up a pragmatic approach to the text). Turning to American Jurisprudence, particularly Constitutional Law and Statutory Interpretation, we observed there exist roughly six categories for approaches to judicial interpretation.²⁶⁹ We boiled each down to its essence to make sense of what can often appear to be gibberish (and sometimes is). With the various approaches to judicial interpretation clarified, we proffered the methods most applicable for the WTO Appellate Body, showing that these six categories can be distilled into Textualist, Contextualist, or Pragmatic approaches. Finally, we turned to English Literary Theory, explaining the nine major interpretative techniques it offers to find meaning in fiction. Here, again, we classified these techniques as Textualist, Contextualist, or Pragmatic. Presuming law to be a species of literature, we suggested the applicability of these techniques to international trade law texts.

The end result of our analysis is a challenge to the conventional wisdom about WTO Appellate Body decision making. A transparent and complete account of how these judges in Geneva make decisions should acknowledge this tripartite taxonomy, and thereby appreciate the intra- and inter-disciplinary nature of the vital international trade treaty interpretation in which they are engaged.

A. It's Not (Just) Mechanical Lexicography under the *Vienna Convention*

Greater understanding about how the Appellate Body defines the meaning of unclear words and phrases in GATT-WTO texts may help clarify and elucidate its rationales for its decisions. In turn, understanding how interpretation both does and can occur may support new, creative ways of looking at past Appellate Body decisions, and improve future jurisprudence. Adjudicating disputes in international trade law is all about interpretation of vital words and phrases in support of, or against, outcomes. This article interprets those interpretative techniques, thereby bringing the Appellate Body reasoning process out from the shadows of the conventional wisdom. In that sunlight, the Appellate Body might look a bit more legitimate than at present. Ultimately, a decision by any adjudicator is, or is not, persuasive to the winning and losing parties, third parties, and the legal and non-legal community at large. Persuasiveness depends on the quality of the reasoning and the methodology by which an adjudicator decided what disputed words or phrases mean.

²⁶⁹ LII, *supra* note 27.

B. Further Research

Do Appellate Body members differ in their use of interpretative techniques based on the legal cultures in which they originate? For example, are Common Law trained members more conscious about scrupulous adherence to the *Vienna Convention*, whereas Civil Law trained ones are more flexible about glancing at other techniques beyond the *Convention*? Because three members sign every Report, there is no way to correlate their interpretative approach with their legal culture, unless they offer a concurring or dissenting opinion. That is a rare occurrence. Theoretically, a correlation might be possible if there are enough Reports issued by three members from one culture to juxtapose with several Reports penned by three other members from a different culture. But, the three members that decide any given case almost invariably hail from two or more legal systems. So, linking legal interpretation to legal culture likely is impossible.

Besides, the inquiry implicitly assumes correlations that may not exist: with experience, most judges evolve in how they decide cases. They may not stick with what they learned in law school. It is unfair to presume an American Appellate Body member will demand attention be given only to the ordinary meaning of a term, as per Article 31 and the *OED*, while a European judge may be inclined to look to the context of that term, and even supplementary means of interpretation, as per Articles 31-32 and beyond.

Accordingly, the more fruitful and fair inquiry may lie not in personalizing interpretative approaches, which seems to have cursed the American political discourse of Supreme Court justices and nominees. Rather, the better path may be toward exploring ways to allow the Appellate Body to be overtly pragmatic in how it decides cases—that is, to permit it to open its tool box, study the tools in it, apply the best one to the interpretative problem at hand, and be transparent about the entire job.



TOWARDS A CARBON-FREE, DECENTRALIZED, AND DEMOCRATIZED
SYSTEM OF ENERGY GENERATION

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Abstract

In line with the European Union's energy and climate targets for 2030, the European Commission has put forward a vision of an integrated energy system capable of delivering energy efficiency and a low-carbon economy. The increasing digitalization of the energy system will serve as the vehicle to a carbon-free, decentralized, and democratized system of energy generation and transmission. The introduction of smart grids across EU Member States will contribute to the shift towards a more sustainable energy system. This article will assess the eligibility and readiness for the implementation of smart grids in three jurisdictions of the European Union: Hungary, Cyprus, and Lithuania. The main focus of the article is the electricity market in these jurisdictions. It is in this context that the article will assess the extent to which the regulatory framework in these countries is favorable to the successful implementation of smart-grid technology.

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INTRODUCTION

There are projects in the European Union (EU) that aim at an integrated energy system capable of delivering energy efficiency and a low-carbon economy. It is expected that the increasing digitalization of the energy system will serve as the vehicle to a carbon-free, decentralized, and democratized system of energy generation and transmission. The introduction of smart grids across EU Member States will contribute to the shift towards a more sustainable energy system. This article will assess the eligibility and readiness for the implementation of smart grids in three jurisdictions of the European Union: Hungary, Cyprus, and Lithuania. The main focus of this article is the electricity market in these jurisdictions. The aim of this article is to assess the extent to which the regulatory framework in these countries is favorable to the successful implementation of smart-grid technology.

After this short introduction, Section I analyzes the electricity market in Hungary, Section II provides an analysis of the situation in Cyprus, and Section III offers an analysis of Lithuania's electricity market, before the conclusions.

I. HUNGARY

A. Introduction

The European Union has developed sophisticated policies to promote the shared and collective interests of its members to, among other things, energy security.¹ To that end, energy policy at the EU level is by no means limited to the external aspects of energy – including exports, imports, trade deals, trade tariffs, broader energy diplomacy – but also extends to internal issues, including the attainment and optimization of a well-integrated internal electricity system and market² in line with other – not directly energy-related – EU policy objectives, including the "greening" of the EU economy, the empowerment of citizens/consumers, decentralization, digitalization, and the resilience of the economy. A diversity of EU policies is in place, including such that impose positive obligations on Member States of varying degrees of compulsion. An example is the promotion of smart grids at the national and EU-wide levels.

This article examines the realities surrounding Hungary's electricity sector vis-à-vis broader EU policy in relation to the "smartening" of electricity systems. The purpose of this review is to provide useful insights concerning Hungary's electricity sector and critically assess the extent to which its state is conducive to EU "smart grid" objectives. To that end, the article opens with an exposition of the principal contours of Hungary's electricity sector, includes an exposition of the "smart grid-" related features of its network, and concludes with a set of recommendations for policy makers concerning legal, regulatory, and other issues.

¹ Rafael Leal-Arcas & Andrew Filis, *Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective*, 36 FORDHAM INT'L L.J. 1224, 1227 (2013).

² Rafael Leal-Arcas & Andrew Filis, *The Energy Community, the Energy Charter Treaty and the Promotion of EU Energy Security* (Queen Mary School of Law Legal Studies Research Paper No., 203/2015, 2015).

B. Hungary's Electricity Market

1. Key Figures Concerning Energy and Electricity in Hungary

Energy consumption in Hungary has for the most part been fairly stable between 1990 and 2016. For instance, total (final) energy consumption in 1990 stood at 20,689 kilotonne of oil equivalent (ktoe) and in 2016, at 19,387 ktoe. While there has been some variation in the composition of the energy mix over that period, the share of hydrocarbons, for the most part,³ has been stable and dominant in the mix. For instance, in 1990, oil and natural gas consumption figures stood at 7,117 ktoe and 6,200 ktoe, respectively, while in 2016, at 6,486 ktoe and 6,095 ktoe, respectively.⁴ On a more positive note, coal consumption dropped, while, conversely, consumption of biofuels rose markedly.⁵ It should be noted that Directive 2009/28/EC requires that Hungary derives at least 13% of its gross energy consumption from renewables by 2020. Hungary has raised this target to 14.65% in its National Reform Program, and is generally on track to meet it.⁶

As part of that energy mix, in 2016, *electricity consumption* indicates a modest increase (ca., +17.4%) *vis-à-vis* 1990 figures – namely, 3,192 ktoe v. 2,717 ktoe, respectively.⁷ What is more, electricity accounts for ca. 16% of total *energy consumption*, with industry being the principal consumer, followed by households, and other commercial sectors.⁸ Presented differently, total electricity consumption stood at 35.5 terawatt hours (TWh⁹) in 1990, ca. 31 TWh in 1993, ca. 40 TWh in 2008, ca. 37.8 TWh in 2009, and ca. 41 TWh in 2016.¹⁰ Unsurprisingly, drops in consumption have followed disruptive events as, undoubtedly, were Hungary's socio-political and economic transition during the early

³ *Statistics Data Browser*, INT'L ENERGY AGENCY, <https://www.iea.org/statistics/?country=HUNGARY&year=2016&category=Energy%20consumption&indicator=TFChySource&mode=chart&dataTable=BALANCES> (follow “Statistics” hyperlink; search energy topic field for “Energy supply” and search indicator field for “Total primary energy supply (TPES) by source”) (last visited Jan. 7, 2020) (noting that while coal consumption has dropped significantly—namely, from 2,360 ktoe in 1990 to 333 in 2016—oil and natural gas consumption has remained largely steady. IEA World Energy Balances 2018).

⁴ *Id.*

⁵ *Id.* (stating that in 1990, coal and biofuels consumption stood at 2,360 ktoe and 618 ktoe, respectively. In 2016 this was 333 ktoe and 2,155 ktoe, respectively).

⁶ Joint Research Centre (EC), Demand Response Status in EU Member States, at 93 (2016), <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC101191/Idna27998enn.pdf>.

⁷ *Statistics Data Browser*, *supra* note 3.

⁸ INT'L ENERGY AGENCY, ENERGY POLICIES OF IEA COUNTRIES: HUNGARY 2017 REVIEW 67 (2017), <https://euagenda.eu/upload/publications/untitled-94763-ea.pdf>.

⁹ *What is a kWh, What is a TWh?*, ENERGY RESOURCES (June 30, 2018, 2:01 PM), <https://www.confusedaboutenergy.co.uk/index.php/energy-resources/756-what-is-a-kwh-what-is-a-twh> (explaining that a Watt (W) is 1 joule per second (j/s)—it is a unit of *power*—and a joule is a unit of *energy*. For instance, a device marked as 1W is expected to run for 1 hour if supplied with 1 Wh of energy. In that sense, *power* and *energy* are different concepts. The latter has to do with the energy that is ultimately available for consumption whilst the former with the capacity to deliver that energy. A *teraWatt hour* relates to a unit of power which is the capacity to deliver one trillion Wh. For further information on units and terminology).

¹⁰ *Statistics Data Browser*, *supra* note 3 (providing Diachronic (1990–2016) figures based on the International Energy Agency (IEA) World Energy Balances 2018 publication).

90s,¹¹ and the 2008 Financial Crisis. In terms of electricity consumption *per capita*, figures for 1990 stood at 3.43 Megawatt hours (MWh) /capita, and for 2016, at 4.18 MWh/capita.¹²

For its part, *electricity generation* has exhibited very modest growth (ca. +8.6%) when comparing 1990 and 2016 figures. In 1990, it stood at 28,436 Gigawatt hours (GWh)¹³ and in 2016, at 30,896 GWh.¹⁴ Official figures for 2017 and 2018 suggest generation to have been ca. 32,871 GWh and 31,905 GWh, respectively.¹⁵ While domestic generation has not increased *per se*, demand has remained stable and met by domestic generation and imports.

Historically, domestic electricity generation has predominantly relied on nuclear and hydrocarbon sources. In relation to the 28,436 GWh of electricity generated in 1990, 13,731 GWh came from nuclear means, 8,669 GWh from coal, and 4,473 GWh from gas. This trend did not change much in 2016 where, in relation to the 30,896 GWh of electricity generated, more than half – namely, 16,054 GWh – came from nuclear means, 5,758 GWh from coal, and 6,479 GWh from gas.¹⁶ The latest figures (2017) compiled by, MAVIR, the national transmission system operator (TSO), suggest that up to 50% of electricity generation came from nuclear power, up to 40% from hydrocarbons (oil, gas, coal, lignite), and up to 10% from renewables.¹⁷ Renewables have historically accounted for a meager fraction of electricity generation in Hungary. For instance, in 1990, they represented a mere 0.6% of total electricity generation while in 2016 ca. 3.7%.¹⁸

The latest Eurostat figures (2018) indicate that the total *electricity supply* in Hungary stood at 44,157 GWh of which an estimated 40,801 GWh was *domestically* consumed. Total gross electricity production in Hungary stood at 31,905 GWh while total net production at 29,809 GWh. Electricity *imports* for 2018 stood at 18,613 GWh while exports at 4,265 GWh.¹⁹

¹¹ *Electricity Report on Hungary*, GLOB. ENERGY NETWORK INST., http://www.geni.org/globalenergy/library/national_energy_grid/hungary/09-hun.htm (last visited Jan. 7, 2020) (“After 1990, and most markedly in 1992, imports from the Soviet Union were reduced because of increasingly unattractive prices and unfavorable terms but also because of unreliable supply. One year later, Ukraine suspended all exports to Hungary due to domestic shortages”).

¹² *Statistics Data Browser*, *supra* note 3.

¹³ *Glossary: Gigawatt hours (GWh)*, EUROSTAT, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Gigawatt_hours_\(GWh\)](https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Gigawatt_hours_(GWh)) (last visited Jan. 7, 2020) (explaining that Gigawatt hours, abbreviated as GWh, is a unit of energy representing *one billion watt hours / one million kilowatt hours*). (Gigawatt hours, abbreviated as GWh, is a unit of energy representing *one billion watt hours / one million kilowatt hours*).

¹⁴ *Statistics Data Browser*, *supra* note 3.

¹⁵ *4.2 Annual Data on Gross Electricity Production, 2014–2018*, HUNGARIAN ENERGY AND PUB. UTIL. REGULATORY AUTH., <http://www.mekh.hu/annual-data> (last visited Jan. 7 2020).

¹⁶ *Id.*

¹⁷ MAVIR, DATA OF THE HUNGARIAN ELECTRICITY SYSTEM 23 (2017), http://www.mavir.hu/documents/10262/222691710/MAVIR_VER_2017_web_2.pdf/072248af-03f6-e6ed-9079-767d2000c71b.

¹⁸ *Statistics Data Browser*, *supra* note 3 (concerning 28,436 GWh of electricity generated during 1990, only 178 GWh came from renewable sources (namely, hydro). Concerning 30,896 GWh of electricity generated during 2016, only 1,144 GWh came from inexhaustible renewables (namely, 259 GWh from hydro, 201 GWh from solar, and 684 GWh from wind)).

¹⁹ *Energy Balances-Early Estimates*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Energy_balances_-_early_estimates#Electricity_.26_heat (last visited Jan. 7, 2020) (looking at the figures exported from the Excel file titled “2018 early estimates for electricity”).

Furthermore, it is worth noting that during 2018 ca. 3,355.8 GWh of electricity was lost during distribution²⁰ – the figure for 2017 stood at ca. 3,456 GWh.²¹ This represents ca. 7.6% in relation to the total electricity supply for 2018 (namely, 44,157 GWh), and, as such, remains within normal levels,²² nonetheless, the efficiency of the transmission and distribution networks – including their capacity for efficient distribution, responsiveness, storage, loss prevention – is relevant to Hungary’s attempts to attain a “smart grid,” and, more generally, its energy security interests.

2. *Key Characteristics and Structure of Hungary’s Electricity Market*

Hungary’s domestic electricity market has undergone substantial reforms since the mid-90s, including privatization, marketization, and the relative unbundling between its generation, transmission, distribution, wholesale trade, and supply aspects. Consequently, according to Hungary’s electricity regulator, electricity transmission and distribution are, for the most part, conducted by separate actors to those involved in generation. Power plants – mainly private although some are state-owned (or otherwise subject to state control – for instance, through minority, albeit “golden” – i.e., controlling – shares concerning mergers and acquisitions) – produce electricity that they sell to wholesale traders and suppliers who, in turn, resell it on the wholesale market or directly to consumers. Transmission and distribution are generally performed by private companies not ordinarily involved in generation or supply.²³

Previously, the bulk of the electricity market had been state-owned and operating, for the most part, outside market conditions.²⁴ Currently, while much of the electricity market is privately-owned, state-ownership is present across the entire spectrum of the domestic electricity market – not just in relation to transmission and distribution. However, this is broadly compliant with the free-market and Hungary’s liberalization obligations *vis-à-vis*

²⁰ *Databank*, THE WORLD BANK (Oct. 28, 2019), <https://databank.worldbank.org/reports.aspx?source=2&type=metadata&series=EG.ELC.LOSS.ZS> (concerning distribution losses, the World Bank defines these as “[e]lectric power transmission and distribution losses include losses in transmission between sources of supply and points of distribution and in the distribution to consumers, including pilferage”).

²¹ *Energy Balances-Early Estimates*, *supra* note 19.

²² *Id.* (stating that the distribution loss v. total electricity supply 2018 figures concerning France, Germany, and the United Kingdom stood at c. 7.3%, 4.8%, and 8%, respectively. NB., values based on raw data at each country’s profile on the Eurostat Excel file titled “2018 early estimates for electricity”); *Electric Power Transmission and Distribution Losses (% of output)*, THE WORLD BANK (2018), <https://data.worldbank.org/indicator/eg.elc.loss.zs> (last accessed Jan. 7, 2020) (suggesting that while there is room for improvement, Hungary’s electricity distribution grid is far from the inefficiency witnessed in other countries); *Electric power transmission and distribution losses (% of output)-Europe*, INDEX MUNDI, <https://www.indexmundi.com/facts/indicators/EG.ELC.LOSS.ZS/map/europe> (last accessed Jan. 7, 2020) (providing an interactive map based on IEA/World Bank et al. figures (2014)).

²³ *Electricity*, HUNGARIAN ENERGY AND PUB. UTIL. REGULATORY. AUTH., <http://www.mekh.hu/electricity> (last visited Jan. 6, 2020) (according to the Hungarian Energy Authority—the electricity market and other utilities—regulator, transmission and distribution “are to be performed by independent companies that cannot be involved in electricity generation or supply.” This however is not entirely in line with the Hungarian reality, given that the state-owned electricity distributor and supplier—namely, MVM Zrt—is also heavily involved in generation).

²⁴ *Electricity Report on Hungary*, *supra* note 11 (providing an extensive Electricity Report on Hungary for a detailed account of Hungary’s pre-EU Accession era electricity market).

the EU. For instance, Hungarian Electricity Ltd. (MVM Zrt) – the leading entity within MVM Group, i.e., an entirely state-owned Hungarian energy and utilities conglomerate –²⁵ is involved in the generation,²⁶ wholesale trade, retail market,²⁷ distribution, and transmission aspects of the electricity market. Notably, MVM Zrt has also been party to various power purchase agreements (PPAs) with other power generation plants, which the European Commission investigated between 2005 and 2008 and found to amount to prohibited state-aid due to their anticompetitive effects.²⁸ Consequently, such PPAs have now been brought in line with EU rules.

Despite the substantial liberalization of Hungary's electricity market over the last three decades, the state is far from absent. Not only does the state own some entities across the electricity market spectrum, but in more recent years, the state has also intervened in setting electricity prices, primarily for household consumers, to address high energy costs to family budgets in the post-2008 Financial Crisis landscape. More specifically, household prices were slashed by 10% in 2013, followed by cuts in 2013 and 2014 resulting, overall, in a 26% reduction in relation to pre-2013 tariffs.²⁹

In relation to the foregoing, the Hungarian electricity retail market is structured in two segments: a *universal service* segment and a *competitive market* segment. Consumers

²⁵ *The Mission of MVM*, MVM GROUP, <http://mvm.hu/tevekenysegek-en/the-mission-of-mvm/?lang=en> (last visited Jan. 7, 2020).

²⁶ MVM GROUP, INTEGRATED REPORT 2017 (2017) http://mvm.hu/download/Evesjelentes_2017_EN_v4.pdf/?lang=en (stating that one of MVM's power plants—namely, Paks—generated a “record quantity of electricity of 16,097.6 gigawatt hours in total last year [i.e., 2016], which accounted for 50 per cent of the domestic output, with the highest availability value in its history”); *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*, EUROPEAN COMM'N, http://ec.europa.eu/competition/antitrust/procedures_102_en.html (last accessed Jan. 7, 2020) (providing that a dominant position, if abused, could attract scrutiny and penalisation under, *inter alia*, EU competition rules, including Article 102 TFEU).

²⁷ INT'L ENERGY AGENCY, *supra* note 8, at 72 (according to the IEA, MVM is a dominant player in the retail market with an 80% market share though operating in various aspects of the market).

²⁸ Commission Decision C 41/05 of Aug. 27, 2009, *State Aid Awarded by Hungary through Power Purchase Agreements*, 2009/609/EC (instigating a formal investigation in 2005 under EC Treaty state-aid rules (Article 88(2)) into Hungary's long-term PPAs concluded between MVM Zrt—the state-owned electricity network operator—and power generators. Under the PPAs generators are guaranteed risk-free returns. Given that up to 80% of the Hungarian electricity generation market had been within the scope of such PPAs, the Commission was of the view that they presented barriers to new market entrants and a potential obstacle to market liberalisation. In the end, the Commission reached a decision in 2008 that the PPAs amounted to prohibited state-aid and were anticompetitive); Matthew Levine, *ICSID Tribunal Dismisses Final Claim for Compensation in Relation to Hungary's 2008 Termination of Power Purchase Agreement*, INVESTMENT TREATY NEWS (Feb. 29, 2016), <https://www.iisd.org/itn/2016/02/29/icsid-tribunal-dismisses-final-claim-for-compensation-in-relation-to-hungarys-2008-termination-of-power-purchase-agreement-electrabel-sa-v-republic-of-hungary-icsid-case-no-arb-07-1/> (noting a resulting ICSID arbitral decision (*Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/1) which, in sum, did not find host-state Hungary's termination of a PPA, pursuant to its implementation of the Commission's Final Decision, to amount to an expropriation nor to be contrary to Hungary's fair and equitable treatment obligations under the Energy Charter Treaty); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, <https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf> (detailing the arbitration award).

²⁹ IAEA *Country Nuclear Power Profiles: Hungary*, IAEA, <https://cnpp.iaea.org/countryprofiles/Hungary/Hungary.htm> (last visited Jan. 7, 2020); INT'L ENERGY AGENCY, *supra* note 8, at 9–81 (expressing concern as to the scope that such tariff reductions create for tariff deficits).

entitled to universal service (i.e., cheaper power rates) have their requirements met mainly by former public utility service providers licensed for that segment. Consumers not entitled to universal service rates may only access rates available on the competitive market. What is more, universal service providers are exempt from the requirement to purchase renewable feed-in generation. This dichotomy is an important structural feature of the national electricity market, and has been criticized as being cost-ineffective, causing financial loss to utility companies,³⁰ and for contributing to Hungary ranking low (twenty-second among twenty-nine countries during 2015) in terms of electricity retail market competitiveness.³¹

In terms of the electricity generation sector, there are currently thirteen companies operating power plants of 50 MW or higher capacity. There are an additional 200 companies that operate more than 300 small power plants under 50 MW.³² That said, one nuclear power plant alone has provided up to 50% of electricity generated in Hungary.³³

High voltage electricity is transmitted on a single common transmission line network owned and operated by a subsidiary of MVM Zrt, namely, MAVIR Zrt. In line with Hungary's market liberalization efforts in 2005, MVM Zrt established an independent transmission operator/transmission system operator (ISO/TSO) by transferring its transmission activities and assets to MAVIR Zrt, which is licensed for its system operation and transmission activities. This unbundling, completed in 2009, aimed at providing the domestic electricity market with a TSO/ISO that would guarantee independence, transparency, and non-discrimination in the transmission market concerning market participants.³⁴ In that regard, it operates in accordance with the Independent Transmission Operator (ITO) model³⁵ whereby MAVIR Zrt owns and operates the transmission network,³⁶ is responsible for grid management and system security, and guarantees equal access to all participants. Incidentally, MAVIR Zrt is under mutual assistance obligations with the TSOs of neighboring states – a good indicator of its interconnectivity with surrounding networks.³⁷

Given that almost half of Hungary's electricity supply is imported, it is evident that the degree and effectiveness of the interconnectedness of Hungary's electricity network to

³⁰ *Id.* at 72, 81–83.

³¹ FINAL REP. ON RANKING THE COMPETITIVENESS OF RETAIL ELECTRICITY AND GAS MKTS.: A PROPOSED METHODOLOGY, IPA ADVISORY LTD. 79 (2015), https://www.acer.europa.eu/en/Electricity/Market%20monitoring/Documents_Public/IPA%20Final%20Report.pdf.

³² IAEA *Country Nuclear Power Profiles: Hungary*, *supra* note 29.

³³ MVM GROUP, *supra* note 26, at 5.

³⁴ *Transmission, System Operation: Information on Changes Relating to the Transmission Activity*, MVM GROUP, <http://mvm.hu/tevekenysegek-en/transmission-system-operation/?lang=en> (last visited Jan. 7, 2020) (providing an exposition of the background to and function of MAVIR Zrt, i.e., the Hungarian Transmission System Operator, whose responsibilities include: the management of grid assets, their development for security of supply purposes, the harmonisation of the transmission system with the grids of neighbouring countries, and the grid development strategy).

³⁵ IAEA *Country Nuclear Power Profiles: Hungary (2018)*, IAEA, <https://cnpp.iaea.org/countryprofiles/Hungary/Hungary.htm> (last visited Jan. 7, 2020) (according to such model, it must operate “independently of the other economic operators that use the transmission network, and its independence is prescribed by legislation”).

³⁶ *The Manager of Power*, MAVIR, <http://www.mavir.hu/web/mavir-en/mavir-ltd> (last visited Jan. 7, 2020).

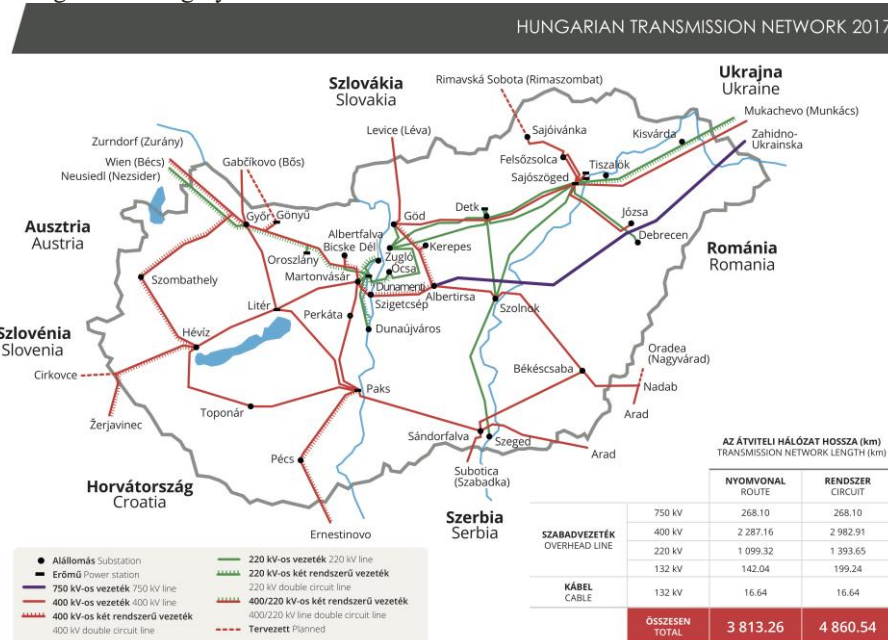
³⁷ MVM GROUP, *supra* at note 26, at 25.

those of its import partners are crucial to Hungary's energy security. Overall, Hungary's transmission system is well-integrated with that of its neighbors (see Figure 1) and with the broader regional and continental European systems, with multiple existing interconnections with neighboring countries (Austria, Croatia, Romania, Serbia, the Slovak Republic, and Ukraine), and with plans for cross-border capacity extensions with the grid of Slovenia.³⁸ In relation to Ukraine, notably, Hungary's transmission system is well-connected, despite the fact that previously, following the collapse of the Soviet Union, Hungary had made its grid incompatible with that of Ukraine by adapting it to Western standards in order to integrate with Western European transmission systems.³⁹

³⁸ *Id.*; see also Electricity Interconnections with Neighbouring Countries: Second Rep. of the Comm'n Expert Group on Electricity Interconnection Targets, at 12–14, EC (2019), https://publications.europa.eu/en/publication-detail/-/publication/785f224b-93cd-11e9-9369-01aa75ed71a1/language-en?WT.mc_id=Searchresult&WT.ria_c=37085&WT.ria_f=3608&WT.ria_ev=search.

³⁹ *Electricity Report on Hungary*, *supra* note 11. Hungary had previously been integrated with the United Power System/Integrated Power System (UPS/IPS) that connected the Soviet Union and its neighbouring partners within the context of the Council of Mutual Economic Assistance (COMECON). At the beginning of the 1990s, Hungary took steps to connect to the Western European 'UCPTE' (*Union pour la coordination de la production et de la transmission de énergie électrique*) system, along with the Czech Republic, Poland, and the Slovak Republic. Such synchronisation required the disconnection with UPS/IPS. For a detailed account of Hungary's pre-EU Accession electricity sector *see id.*

Figure 1: Hungary's transmission network



Source: MAVIR Data of the Hungarian Electricity System 2017 report (p. 6)⁴⁰

Subsequently, in 2010, in line with liberalization efforts, MAVIR for its part, established a subsidiary, the Hungarian Power Exchange Company Ltd. (HUPX) to promote the *liquidity* of Hungary's electricity market, as a leading market within the broader region of Central and Eastern Europe, by seeking to provide a transparent and unified market mechanism to facilitate trade and investment in the electricity market and sector.⁴¹ Broadly, HUPX activities are organized around Day-Ahead Market (DAM), Intraday Market (IDM), and Physical Futures (PhF) trading,⁴² and also relate to coupling with the neighboring electricity markets of the Czech Republic, Romania, and Slovakia,⁴³ in line with EU objectives concerning greater electricity market liberalization and

⁴⁰ MAVIR, *supra* note 17, at 23 (providing a range of illustrative info-graphics and key data concerning the national transmission network and its trans-boundary connections to other networks, including that of its neighbours and of the broader network of continental Europe).

⁴¹ Official information, HUN. POWER EXCH., <https://hupx.hu/en/about-us/company-info#> (last visited Jan. 7, 2020).

⁴² MAVIR, *supra* note 17, at 41 (according to the MAVIR Data of the Hungarian Electricity System 2017 report, during 2017 c. 24.3 TWh of electricity was traded on the DAM, IDM, and PhF markets, amounting to 53.95% of gross domestic electricity consumption. Since its establishment (2010), c. 96.2 TWh have been traded within the context of HUPX).

⁴³ For more information on the coupling of neighbouring electricity markets see *History of the Market Coupling*, HUN. POWER EXCH., <https://hupx.hu/en/market-coupling/history> (last visited Jan. 7, 2020).

integration through, among other means, market liquidity. Such market coupling has resulted in gradual market price convergence in the region, and more effective use of interconnector capacities, which has encouraged further plans to expand regional market coupling between those four markets and those of North-western European and Central-eastern European regions.⁴⁴

Concerning *electricity distribution*, there are six regional distribution companies responsible for operating networks (120 kV and below) and supply for consumers.⁴⁵

3. Policy Responsibility and Regulation

Overall responsibility for energy policy in its broader sense, and the electricity sector and market more specifically, rests with central government, shared between various departments at the highest political level, including the Prime Minister's Office, the Ministry of National Development, the Ministry of Foreign Affairs and Trade, and the Ministry of National Economy. Following the 2018 parliamentary elections, there have been developments to energy governance with the Ministry for Innovation and Technology currently assuming, or, at least sharing, responsibility for energy matters.⁴⁶

The National Research, Development and Innovation Office and the Hungarian Central Statistical Office are relevant institutions answerable to the PM's Office, while the Hungarian Atomic Energy Agency and the Hungarian Office for Mining and Geology are answerable to the Ministry of National Development.⁴⁷

Moreover, the Hungarian Energy and Public Utility Regulatory Authority (HEA)⁴⁸ is the key body involved in, among other things, Hungary's electricity market,⁴⁹ as successor to the erstwhile Hungarian Energy Office.⁵⁰ The HEA establishes electricity network access rules and fees, distributor rates, and criteria for, and rates of, electricity connection fees.⁵¹ In that respect, it carries out competition regulation and enforcement functions, and thus complements the work of the Hungarian Competition Authority (GVH).⁵² It is also

⁴⁴ INT'L ENERGY AGENCY, *supra* note 8, at 74.

⁴⁵ IAEA *Country Nuclear Power Profiles: Hungary*, *supra* note 29.

⁴⁶ Cf. *id.*; see also Ministry of Innovation & Tech., *Leading News*, WEBSITE OF THE HUNG. GOV'T, <https://www.kormany.hu/en/ministry-for-innovation-and-technology> (last accessed Jan. 7, 2020).

⁴⁷ INT'L ENERGY AGENCY, *supra* note 8, at 21.

⁴⁸ *Magyar Energetikai És Közmű-Szabályozási Hivatal*. For an introduction see, HUNGARIAN ENERGY AND PUBLIC UTILITY REGULATORY AUTHORITY, <http://www.mekh.hu/introduction> (last visited Jan. 10, 2020).

⁴⁹ Act XXII of 2013 on the Hungarian Energy and Public Utility Regulatory Authority, ch. 1, art. 1, §1, 2013 (Hung.), http://www.mekh.hu/download/c/1b/10000/act_xxii_of_2013_on_the_hungarian_energy_and_public_utility_regulatory_authority.pdf (stating that the HEA is responsible for "duties related to electricity, natural gas, district heating supply and water utility services of the state, as well as preparation of price regulation related to public waste management services").

⁵⁰ *Id.* at ch. 3, art. 23, §1.

⁵¹ *Id.* at ch. 2, art. 12(a).

⁵² See *The Responsibilities of the Authority*, Gazdasági Versenyhivatal [Hungarian Competition Authorities] http://www.gvh.hu/en/gvh/responsibilities_of_the_gvh (last visited Jan. 7, 2020). According to the Gazdasági Versenyhivatal ("GVH"), the HEA "plays a very important role in the operation of the regulated and competitive

instrumental in overseeing the implementation of the price-setting policy of the electricity retail market (cf., *universal segment*, discussed earlier).

A key policy blueprint issued in 2012 by the Hungarian government is the National Energy Strategy 2030 (NES 2030). Among various policies aimed at Hungary's energy security, the government lists the need for closer integration with Central European electricity networks and the further expansion or construction of the necessary cross-border connections.⁵³ Specific aspects of Hungarian energy policy pertaining to the electricity market, the deployment of new tools and technologies, and decentralization shall be explored in subsequent parts of the present case study.

As expected, EU rules further condition Hungary's policy development on those aspects of energy policy that engage sole or shared EU competence.⁵⁴ That said, it should be noted that far-reaching structural and other reforms to Hungary's electricity market actually predate Hungary's EU accession, having commenced in the early 1990s, albeit with a view to Hungary's greater economic integration with Western Europe, and to Hungary becoming a key regional player given its geostrategic position. In that sense, key EU energy policies are highly pertinent, as are various EU bodies, to Hungary's energy including electricity-related policy. Consequently, the relevant *acquis communautaire* is a source of regulation over Hungary's electricity market.

4. Geopolitical Considerations

As briefly mentioned earlier, Hungary's location is geostrategic, and its power system is well-connected and integrated not just with those of all its neighbors, but also with the broader Central, Eastern, Southern, and overall continental European systems. Imports compete with domestic electricity generation, and the country has become more dependent on electricity imports in recent years, while domestic electricity generation has stagnated, if not declined. In 2014, Slovakia was the largest electricity exporter to Hungary (ca. 49% of net imports) followed by Ukraine (ca. 29%). With regard to Hungary's electricity exports, 78% were destined for Croatia while 22% for Serbia.⁵⁵

Notably, in addition to Hungary's evident commitment to integrating its electricity system with that of its neighbors – predominantly EU members – Hungary's system is well-integrated with that of Ukraine. What is more, Hungary pursues energy diplomacy

markets (the electricity and natural gas market have been liberalized during the recent years) by issuing licenses for market players, regulating companies which act as natural or legal monopolies and at the preparation of decisions on prices and by supervising the market. The purpose of the agreement between the GVH and the [HEA] is the following: strengthening the competition in the wire/pipeline energy market, enforcing the protection of market operations, increasing the efficiency of the regulation and promoting uniform law enforcement.” For additional information see *Hungarian Energy Office, Gazdasági Versenyhivatal* [Hungarian Competition Authority], http://www.gvh.hu/en/gvh/cooperation_agreements/hungarian_energy_office (last visited Jan. 7, 2020).

⁵³ MINISTRY OF NAT'L DEV., NATIONAL ENERGY STRATEGY 2030 7 (2012), <https://2010-2014.kormany.hu/download/7/d7/70000/Hungarian%20Energy%20Strategy%202030.pdf>.

⁵⁴ See Rafael Leal-Arcas & Andrew Filis, *Conceptualizing EU Energy Security Through an EU Constitutional Law Perspective*, 36 FORDHAM INT'L L.J. 1224, 1224–1300 (2013) for an exposition of the complexity at play, and a full rundown of EU competence concerning energy policy).

⁵⁵ INT'L ENERGY AGENCY, *supra* note 8, at 70.

with Russia beyond the purposes of merely securing access to Russian gas and crude oil, upon which Hungary's energy imports heavily rely.⁵⁶ This is unsurprising given that both Ukraine and Russia are not only energy-significant (cf., energy endowment and transit capacity, respectively), but also given that, like Hungary, they have both experienced deep structural transformation from command economies towards market-based systems. What is more, Hungary and Russia have concluded agreements for technical and financial support to expand nuclear energy generation capacity, according to which Russia commits to providing a credit line to the tune of EUR 10 billion along with technical support.⁵⁷

Furthermore, internal political developments also set the tone of Hungary's international discourse. The rise of right-wing nationalist populism in Hungarian politics over the last decade or so has led to a more assertive, often antagonistic, tone. For instance, Hungarian government ministers have expressed some resentment at what the Hungarian government perceives as the existence of double standards on the part of the European Commission concerning pipeline projects that benefit different parts of the EU (e.g., the developed, more affluent, core v. the developing, post- or intra-transition, periphery).⁵⁸

⁵⁶ *Id.* at 13, 24, 102, 109–10, 119.

⁵⁷ INT'L ENERGY AGENCY, *supra* note 8, at 13, 102–03 (stating that Hungary and Russia signed an agreement in January 2014 for the construction and technical support of two units with 1,200 MW(e) at the existing Paks site. A further agreement was signed in March 2014 whereby Russia provides 80% of the costs of the project while Hungary assumes the remaining 20%).

⁵⁸ For instance, at a Eurasian energy security forum in Belgrade, Hungarian Minister of Foreign Affairs and Trade, Péter Szijjártó declared that “close cooperation is required in central, eastern, and southern parts of Europe to enable the realization of those projects that serve the region's energy security [...] it must be made clear that the countries of Central and Eastern Europe have exactly the same rights and must be treated exactly the same way as Western European countries [...] Gazprom is constructing two Turkish Stream pipelines, one for the Turkish market, and one, which we hope will serve the Balkans and Central Europe. This pipeline will transport gas via Bulgaria and Serbia to Hungary, and from there to Slovakia and Austria [...] if the European Commission has no objection to the Western European gas pipeline, why has it objected to the smaller pipeline planned by the countries of Central Europe?” Furthermore, the Minister was dismayed at what he perceived as the unfair treatment of Central and Eastern European countries which he considers are often criticized for cooperating with Russia within the field of energy while it is in fact Western European countries that cooperate much more closely with Russia in energy matters etc. Péter Szijjártó, *Close Cooperation is required in the Central, Eastern and Southern parts of Europe within the field of Energy Security*, WEBSITE OF THE HUNG. GOV'T (Oct. 26, 2018, 1:18 PM), <https://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/close-cooperation-is-required-in-the-central-eastern-and-southern-parts-of-europe-within-the-field-of-energy-security>.

C. How “SMART” is Hungary’s Electricity System?

Under EU legislation, Member States, including Hungary, are under the obligation to encourage the modernization of their distribution networks, including through the introduction of “smart grids,” in a manner that encourages energy efficiency and the decentralization of energy generation. The European Commission’s Energy 2020 Communication⁵⁹ contains a number of priorities including the integration of electricity systems, the fostering of technological and innovative developments, energy security and affordability, and the empowerment of consumers. Efforts to “smarten” the electricity networks through the development and application of diverse technologies that facilitate and/or enhance different aspects of electricity systems – e.g., generation, transmission, distribution, storage – are certainly potent instruments in addressing such priorities.

Much that pertains to developing optimal energy networks – including smart grids – has to do with endowing them with dynamic processes that, among other things, allow the flow of relevant information – not just power – between all connected participants, including power generators (including micro-producers), TSOs, Distribution System Operators (DSOs), traders, consumers. Such data flows can be conducive to greater responsiveness in the overall system, and this may result in greater efficiencies for all participants. This may require setting up suitable infrastructure, and in the case of existing infrastructure, depending on its state, may require retrofitting or replacement to allow for greater interoperability, including transmission of key data through smart metering and other systems, across its expanse. Predictably, such efforts may require substantial capital investments that are unlikely to ordinarily materialize through the market due to low levels, or a lack, of profitability. In such cases, substantial public – be it state or supranational – funding may be necessary. While government policy cannot ordinarily create profitable conditions, it plays a role in injecting some certainty and predictability into the landscape in so far as regulation goes, given that the presence of uncertainty – including regulatory uncertainty – could compound this issue.⁶⁰

In the case of Hungary, as discussed earlier, the entire electricity market has been restructured along unbundling and broader liberalization lines, with efforts commencing well ahead of Hungary’s 2004 EU accession involving considerable infrastructural adjustments aimed at integrating Hungary’s electricity system with that of Western Europe. However, as shall be mentioned in subsequent parts of this article, Hungary has sought substantial financial support in piloting smart-grid-related projects (namely, Hungary’s smart-metering pilot project managed by its TSO).

The various aspects of Hungary’s smart-grid policy and practice are enumerated and explored below.

⁵⁹ *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Energy 2020 A strategy for Competitive, Sustainable and Secure Energy*, COM (2010) 639 final (Nov. 10, 2010).

⁶⁰ MINISTRY OF NAT’L DEV., *supra* note 53, at 15. (acknowledging that the renewal of its energy infrastructure (power plants, grid, metering appliances, etc) is “investment-intensive, the predictability of the investor environment and a system of institutions ensuring rapid administration must be established. The failure of the above may prevent the projects indispensable for a long-term security of supply”).

1. *Research and Development – Investments and Funding*

At the EU/EFTA level, up to EUR 5 billion were dedicated to 950 smart-grid-related research and development (R&D) projects across the EU, Switzerland, Norway, and other third-party states involving projects shared with an EU/EFTA member. There is a great divergence between Member States due to particular market and other factors. Private investment remains the most important source of such projects, although EU and national public funding is also present and pivotal in attracting private investment. The highest R&D investment is administered by DSOs and is dedicated to smart network management, demand-side management, and the integration of electricity generation and storage.⁶¹

According to the IEA, Hungary has no specific *energy technology* research, development, and innovation (RDI) strategy per se, and the NES 2030 contains no specific energy tech-related and innovation goals or objectives per se. That said, Hungary's "National Smart Specialization Strategy" (S3) is organized in three general rubrics – namely, systems science, smart production, and sustainable society – within which, conceivably, energy, including electricity, matters aptly sit.⁶² Energy is also listed as one of the eight national priorities in the S3, therefore, only projects engaging at least one of those priorities may qualify for funding. A range of sectoral priorities is also highlighted in S3, including the promotion of clean and renewable energy, energy efficiency, and the reduction of energy dependency.⁶³

In relation to fostering a sustainable environment, an energy-related S3 objective pertains to Hungary's digital transformation aimed at, among other things, "efficient energy networks." In relation to attaining intelligent transport systems in the vehicle industry or "smart city" in the energy domain, energy-related objectives pertain to "efficient energy networks and low energy computing," "intelligent intermodal and sustainable urban areas ('smart cities')," and the "Internet of Things" (e.g., "connected devices, sensors, and actuator networks"). In relation to clean(-er) and renewable energy, the objectives pertain to reducing energy dependency, promoting the sustainability of locally-produced energy, and greater use of renewable energy including from bio-energy sources. The attainment of such objectives engage digital transformation means towards efficient energy networks and low-energy computing.⁶⁴

⁶¹Joint Research Centre (EC), *Smart Grid Projects Outlook 2017: Facts, Figures and Trends in Europe*, at 2–3 (2017), https://ses.jrc.ec.europa.eu/sites/ses.jrc.ec.europa.eu/files/u24/2017/sgp_outlook_2017-online.pdf. The European Commission's 2017 database suggests that between 2004 and 2015 there was a total of 950 projects across 800 sites in 36 countries, 626 of which are national projects, and 324 are multinational projects with an average of 14 countries per project. 540 projects relate to R&D while 410 to demonstration. Investments peaked in 2012 (EUR 936 million) and incrementally fell by 2015 (EUR 634 million for 2013, 608 million for 2014, and 472 million for 2015). *Id.*, at 3, 10.

⁶²*Cf.* INT'L ENERGY AGENCY, *supra* note 12, at 152.

⁶³*Id.*, at 154.

⁶⁴*Smart Specialisation Program: Eye@RIS3: Innovation Priorities in Europe*, EUR. COMM'N, http://s3platform.jrc.ec.europa.eu/map?p_id=captargmap_WAR_CapTargMapportlet&captargmap_WAR_CapTargMapportlet_non-eu-country=true&captargmap_WAR_CapTargMapportlet_non-eu-region=true&captargmap_WAR_CapTargMapportlet_regionids=499 (last visited Jan. 7, 2020) (showing Hungary's country profile on the European Commission Smart Specialisation Platform re Innovation Priorities in Europe which visualises public investment priorities for innovation across the EU).

Data for 2012 suggest that energy-related R&D spending was in the region of EUR 86 million (which is almost double the IEA median – namely, 0.088% v. 0.048% GDP, respectively), the overwhelming part of which from 2008 onwards has been dedicated to “energy efficiency” and to a lesser extent to “renewables.”⁶⁵

For its part, MVM dedicates funds to RDI (ca., USD 10 million) for financing R&D activities including the development of green technologies. More recently, it established Smart Future Lab Ltd. to be responsible for supporting R&D and innovative technologies, and, to that end, to serve as incubator for domestic start-ups and to provide seed financing.⁶⁶

The Hungarian government could certainly do more to encourage smart-grid related R&D investment from the private sector by placing national smart grid objectives more prominently in its national agenda and thus attract investors who are looking for assurances that their involvement in Hungary’s electricity market is strategically important to the state. To such end, Hungary could clearly define and fund its priorities for energy-tech RDI, integrate its research and innovation (RI) programs into international co-operation frameworks, develop more robust evaluation processes to assess its RI outcomes, and better integrate its energy-related research program with the programs of other relevant policy areas.

2. *Smart Grids*

The term “smart grids” may mean different things to different people. While various definitions are in circulation, that proposed by the European Energy Regulators Group for Electricity and Gas (ERGEG) and espoused by the Council of European Energy Regulators (CEER) is certainly serviceable – namely, that a smart grid “is an electricity network that can cost-efficiently integrate the behavior and actions of all users connected to it – generators, consumers and those that do both – in order to ensure economically efficient, sustainable power systems with low losses and high levels of quality and security of supply and safety.”⁶⁷

The Hungarian government in its 2012 energy policy blueprint (viz., NES 2030, mentioned earlier) notes that the spreading of smart grids and meters must be encouraged, and that it should set an example, particularly with regard to smart building and grid solutions in the public sector with regard to “smart Cities” related objectives in promoting smart buildings and smart transport systems.⁶⁸ As early as 2012, Hungary was of the view that its primary and main distribution grids already qualified as smart grids, and considers

⁶⁵ Compare INT’L ENERGY AGENCY, *supra* note 8, at 151, 155 with the fact that overall R&D in Hungary, at c. 1.37% GDP in 2014, is ‘significantly below the OECD average.’ *Hungary: STI Outlook 2016 Country Profile*, INNOVATION POLICY PLATFORM, <https://www.innovationpolicyplatform.org/www.innovationpolicyplatform.org/content/hungary/index.html> (last visited Jan. 7, 2020).

⁶⁶ For figures concerning 2016 to 2020 see MVM GROUP, *supra* note 26, at 37, 55.

⁶⁷ COUNCIL OF EUROPEAN ENERGY REGULATORS, CEER STATUS REVIEW ON EUROPEAN REGULATORY APPROACHES ENABLING SMART GRIDS SOLUTIONS 10 (2014), <https://www.ceer.eu/documents/104400/-/-/f83fc0d2-bff9-600b-3e0f-14eccad7a8d8>.

⁶⁸ MINISTRY OF NAT’L DEV., *supra* note 53, at 100, 103.

the development of the distribution grid as indispensable to decentralizing power generation.⁶⁹

Overall, Hungary's attitude towards the attainment of a smart grid is positive, lauding its potential, among other things, to optimize electricity consumption, promote decentralized power generation, facilitate decarbonization efforts, and empower consumers.⁷⁰ That said, there is very little information concerning whatever "smart" aspects of Hungary's grid exist.⁷¹ Moreover, Hungary approaches the attainment of a Europe-wide smart transmission grid with some trepidation, as it considers any "mandatory feed-in of certain energy products" to be a risk.⁷²

MAVIR, the national TSO, initiated a large-scale Smart Grid pilot project for the purposes of introducing smart metering and smart grids in Hungary. The Ministry of National Development sought EUR 38 million from the EU for the pilot project, and nominated MAVIR as project executor. MAVIR set up a subsidiary, KOM Central Smart Metering Ltd. (KOM), to prepare for the introduction of smart metering and smart grids in Hungary. KOM received grants to implement the Smart Grid Pilot Project from 2015 to 2017.⁷³

There is a real dearth of official information, however, MAVIR states that a description of the Model for the Smart Network Central Operator has been prepared with further detail on the Operating Model proposed, and that it is consulting widely with electricity sector "key players."⁷⁴ A European Commission decision allocated EUR 20.9 million for smart metering to MAVIR/KOM managing the pilot project.⁷⁵

3. *Smart Metering*

The EU aims to replace at least 80% of electricity meters with smart meters by 2020, wherever this is cost-effective (i.e., by subjecting this to cost-benefit analysis (CBA)),

⁶⁹ *Id.* at 39.

⁷⁰ *Id.* at 25, 39, 73, 100.

⁷¹ There is no mention of Hungary in the May 2016 (2d ed.,) National and Regional Smart Grids initiatives in Europe: Cooperation opportunities among Europe's active platforms, nor in the Bridge Horizon 2020 Cooperation between Horizon 2020 Projects in the fields of Smart Grids and Energy Storage: The BRIDGE initiative and project fact sheets (June 2017). Also, there is a real dearth of information in official EU publications on smart grid development in Hungary. SMARTGRID, EUR. UNION, NATIONAL AND REGIONAL SMART GRIDS INITIATIVES IN EUROPE: COOPERATION OPPORTUNITIES AMONG EUROPE'S ACTIVE PLATFORMS (2d ed. 2016); *see also* BRIDGE HORIZON 2020, COOPERATION BETWEEN HORIZON 2020 PROJECTS IN THE FIELD OF SMART GRIDS AND ENERGY STORAGE: THE BRIDGE INITIATIVE AND PROJECT FACT SHEETS (June 2017) (EC).

⁷² *See* MINISTRY OF NAT'L DEV., *supra* note 53, at 73.

⁷³ MVM GROUP, *supra* note 26, at 43, 48.

⁷⁴ *SMART Programme*, MAVIR <http://www.mavir.hu/web/mavir-en/smart-programme> (last visited Jan. 7, 2020).

⁷⁵ INT'L ENERGY AGENCY, *supra* note 8, at 78.

which, along with smart-grid rollout, may result in up to 9% EU emissions and household energy consumption reductions.⁷⁶

In 2012, under its NES 2030, Hungary lauded smart metering as empowering consumers to adopt energy-efficient behavior, access the benefits of market competition and avoid those most vulnerable from running into debt. It also lauded the job-creation aspects of the introduction and roll-out of smart metering mainly in relation to domestic manufacturing of smart-metering appliances,⁷⁷ although the consistency of any such aspiration with EU and WTO rules is far from certain. In the same breath, however, the government stated that smart metering should be postponed until conclusions may be drawn from the Hungarian pilot projects and international experiences.⁷⁸

Hungary – as is the case for its EU peers – is required to introduce smart-metering systems in line with EU Directives 2009/72/EC and 2009/73/EC subject to CBAs of, among other things, smart-metering models at the national level. Hungary notified the Commission of its CBA in December 2013.⁷⁹ Again, these objectives are subject to CBAs concerning market participants.⁸⁰ DSOs in Hungary have implemented smart-metering pilot projects in 2013 and 2014 aimed at, among other things, data collection and research. However, these projects are not universal. As stated earlier, KOM is involved in the implementation of smart-metering pilot project, which is in the closing phase.

In line with the leeway afforded to Member States (namely, through CBAs), according to the CBA submitted by Hungary, the key assumptions were that between 2015 and 2023 smart metering would have covered 80% of electricity meters, and would be likely to reduce electricity consumption by 1.5% and electricity pilfering by 50%.⁸¹

4. Demand-side Policies/Demand Response

Briefly, Demand Response (DR), within the context of greater energy efficiency, pertains to policies – typically through some tariff or program – aimed at incentivizing changes in electricity consumption patterns in response to changes in the price of electricity

⁷⁶ *Smart Grids and Meters*, EUR. COMM’N, <https://ec.europa.eu/energy/en/topics/markets-and-consumers/smart-grids-and-meters/overview> (last visited Jan. 7, 2020). According to the information listed at that webpage, “close to 200 million smart meters for electricity . . . will be rolled out in the EU by 2020. This represents a potential investment of €45 billion. *Id.* By 2020 . . . almost 72% of European consumers will have a smart meter for electricity. On average, smart meters provide savings of €309 for electricity per metering point (distributed amongst consumers, suppliers, distribution system operations, etc.) as well as an average energy saving of 3%. *Id.*

⁷⁷ MINISTRY OF NAT’L DEV., *supra* note 53, at 94 (stating that increased smart-meter penetration would lead to the scrapping of about 15 million appliances and their replacement with appliances which could be manufactured, installed, and serviced by Hungarian businesses thus benefitting domestic industry).

⁷⁸ *Id.* at 61–62, 97.

⁷⁹ *Report from the Commission, Benchmarking Smart Metering Deployment in the EU-27 with a Focus on Electricity*, at 4 n.8, COM (2014) 356 final (June 17, 2014).

⁸⁰ See *Smart Grids and Meters*, *supra* note 76.

⁸¹ ICCS-NTUA, ATHENS & AF MERCADOS EMI, MADRID, STUDY ON COST BENEFIT ANALYSIS OF SMART METERING SYSTEMS IN EU MEMBER STATES 62 (June 25, 2015), <https://ec.europa.eu/energy/sites/ener/files/documents/AF%20Mercados%20NTUA%20CBA%20Final%20Report%20June%202015.pdf>.

over time or to incentivize payments aimed at inducing lower electricity use during high price periods or when grid reliability is unstable.⁸²

Under the Energy Efficiency Directive (2012/27/EU),⁸³ Member States are required not only to remove whatever disincentives exist to electricity supply, DR participation, and to overall energy efficiency in generation, transmission, and distribution, but to further ensure that network operators are incentivized to improve energy efficiency including DR (cf., Art. 15.4). Further provisions require that Member States take particular regulatory and technical steps to facilitate DR and DR participants (cf., Art. 15.8).

The requirements of Article 15 could be arranged in four themes – namely: DR should be encouraged to participate within aspects of the electricity market in a way that supply does; TSOs and DSOs must treat DR providers – including aggregators – in a non-discriminatory manner and on the basis of their technical capabilities; national regulators should set clear technical rules and modalities for DR providers' market participation; and that specifications should enable aggregators.⁸⁴

In relation to Hungary, its command-economy past casts a long shadow in terms of attitudes towards DR Hungary's electricity system – in fact its broader energy system – has historically focused on supply overcapacity. Incidentally, what had historically come close to DR within the context of Hungary's past, had been *demand restraint* as an administrative tool ranging from the imposition of restrictions on vehicular use for short distances, reductions in building temperatures, speed restrictions, brief driving embargos, to the introduction of quotas on fuel.⁸⁵ Consequently, DR in relation to the electricity *market* is a relatively alien notion to policy makers, and public perception is low, as historically, capacity concerns have not featured much. In that sense, there has been very little basis for DR and associated smart solutions and renewables tech that are mainly driven by EU policy.⁸⁶ As a result, the European Commission regards Hungary – along with Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Italy, Latvia, Lithuania, Malta, Portugal, Slovakia, and Spain – as having yet to earnestly engage in DR reforms. While the mandatory parts of relevant EU law may have been transposed, very little has been done to facilitate DR. Consequently, DR may be *legally* possible in Hungary, but there are "no defined means for aggregators to offer the demand-side resources, no way to measure or pay for the resources and no markets in which consumers or aggregators can sell the resources."⁸⁷

More specifically, within the Hungarian electricity system, while DR is allowed to join the network, licensing is frequently turned down on questionable grounds. As a result, very few applications participate in DR, and there is very little market pressure for DR expansion. For instance, dynamic pricing does not exist, primarily due to the fact that smart

⁸² *Demand Response Status in EU Member States*, *supra* note 6 at 2.

⁸³ Directive 2012/27, of the European Parliament and of the Council of 25 October 2012 on Energy Efficiency and Amending Council Directives 2009/125/EC and 2010/30/EU and Repealing Council Directives 2004/8/EC and 2006/32/EC.

⁸⁴ *Demand Response Status in EU Member States*, *supra* note 82, at iii–iv.

⁸⁵ *Id.* at 94–95.

⁸⁶ *Id.* at 92–93.

⁸⁷ *Id.* at iv.

metering is not extensive, which would otherwise have assisted in this regard.⁸⁸ In terms of technical barriers, a 2016 comparative report for the European Commission found that the structurally built-in load-management system used for DR is "out-dated" and a "key barrier" to DR in Hungary.⁸⁹

5. *Self-Generation*

A fundamental goal of the European Commission's Clean Energy Package is to make households active participants in the electricity system and to decentralize electricity generation. To such end, the European Commission's Clean Energy Package encourages *residential electricity generation*, storage, and consumption real-time data sharing (e.g., re smart metering).

In Hungary, as of 2017, subsidization of projects concerning electricity generation from renewable sources takes place within the context of the METÁR program – a fundamental reform of the previous feed-in tariff (FIT) system (namely, the KÁT system) – that the government expects to result in a cost-effective, less expensive, and more predictable system.⁹⁰ Both programs run side-by-side, but new entrants are to be admitted under the latest. MAVIR (i.e., the national TSO, discussed previously) manages the program.⁹¹

Under the METÁR, renewable electricity generators, save for non-wind power plants under 0.5 MW and those already in receipt of a FIT, may sell power on the market. Different market premiums apply according to power plant capacity, namely: 0.5 MW and below (save for wind energy), the generated power is purchased by MAVIR which, in turn, sells it on the wholesale market exchange (HUPX, discussed previously). This arrangement protects small producers from market risks; in relation to producers of 0.5-1 MW capacity, a premium is paid with no need for competitive bidding; and, lastly, for larger producers (i.e., 1 MW and above), a premium is paid subject to competitive bidding through the HEA. Such tendering exercises engage EU rules, and Hungary's METÁR program attracted the attention of the European Commission which, in the event, confirmed in 2017 that it complies with EU state aid rules.⁹²

In relation to the number of applications under METÁR, notably the bulk related to generation capacity of 0.5 MW and below, which have positive implications for the self-

⁸⁸ *Id.* at 94.

⁸⁹ *Id.* at 126, 128.

⁹⁰ The METÁR is made up of four different options depending on power generation capacity and/or particular renewable/recyclable source. MVM GROUP, *supra* note 26, at 20.

⁹¹ A detailed account of Hungary's FIT program is available at the RES LEGAL Europe professionally edited database (i.e., a European Commission initiative). John Szabo, *Feed-in tariff*, LEGAL SOURCES ON RENEWABLE ENERGY (July 1, 2019), <http://www.res-legal.eu/search-by-country/hungary/single/s/res-e/t/promotion/aid/feed-in-tariff-10/lastp/143>.

⁹² European Commission Press Release IP/17/1983, State Aid: Commission Approves Hungarian Support Scheme for Renewable Electricity (July 11, 2017), http://europa.eu/rapid/press-release_IP-17-1983_en.htm.

generation and decentralization goals associated to a more responsive and efficient grid system.⁹³

Additionally, renewable energy plants are given priority grid connection and access, and the connection costs and grid expansion may be borne by the grid operator should the producers qualify for this support.⁹⁴

6. *Electric Vehicles*

At the EU level, there are particular commitments to decarbonize the economy dramatically – namely, GHG emission reduction by 80-95% over 1990 levels by 2050. With regard to transport, a 2011 White Paper aim is to reduce GHG emissions by 60% over 1990 levels, and for the use of conventionally-fueled vehicles in urban transport to be halved by 2030 and to be entirely phased out by 2050.⁹⁵ Take-up of zero- and low-emission vehicles⁹⁶ is clearly indispensable to such aspirations.

What is more, the European Commission in its strategy publication for low-emission mobility calls for a variety of measures to encourage this transition, including supporting low- and zero-emission mobility innovation, raising consumer awareness, and incentivizing take-up re larger vehicles (lorries, buses, and coaches), by, among other things, introducing robust sustainability targets re public procurement.⁹⁷

Encouragingly, according to the International Renewable Energy Agency (IRENA), dramatic reductions in EV battery costs are leading to substantial increases in EV take-up. For instance, the cost of an EV battery dropped by 73% when comparing 2010 and 2016 prices. By the end of 2016, the total stock of EVs was ca. 2 million – cf., with 1 million in 2015. What is more, the total stock of two- and three-wheel EVs is ca., 250 million, while China alone has ca., 300,000 on its roads.⁹⁸

In relation to charging points, the total number has increased rapidly over recent years to ca. 92,000 public charging points across the EU/EFTA plus Turkey region. That said, they are not distributed evenly. Across the Netherlands, there are 23,000 points, Germany in excess of 14,000, France ca., 13,000, and the UK ca., 11,500. However, there are fewer than 40 charging points in Bulgaria, Cyprus, Iceland, and Lithuania combined. There had

⁹³ During 2018 the number of applications stood at c. 231 covering a capacity of over 110MW with a total 2 billion Hungarian forint (c., EUR 6.1 million) made available under METÁR. HUNG. INV. PROMOTION AGENCY, INTRODUCTION TO THE HUNGARIAN ENERGY MARKET, http://www.investhipa.hu/images/hipa_kiadvany_intro_greenenergy_web_201808.pdf.

⁹⁴ Hungary: *Overall Summary*, RES LEGAL, <http://www.res-legal.eu/search-by-country/hungary/> (last visited Jan. 7, 2020).

⁹⁵ The 7th Environment Action program (EU, 2013) pertains to the overall commitment, and the 2011 Transport White Paper (EC, 2011) to the latter. EUR. ENVTL. AGENCY REP., ELECTRIC VEHICLES IN EUROPE 7 (2016), <https://www.eea.europa.eu/publications/electric-vehicles-in-europe>.

⁹⁶ *Id.* at 17–22.

⁹⁷ *Communication from the Commission, A European Strategy for Low-Emission Mobility*, at 6–9, COM (2016) 501 final (July 20, 2016), https://eur-lex.europa.eu/resource.html?uri=cellar:e44d3c21-531e-11e6-89bd-01aa75ed71a1.0002.02/DOC_1&format=PDF.

⁹⁸ IRENA, ELECTRICITY STORAGE AND RENEWABLES: COSTS AND MARKETS TO 2030 6 (2017), https://www.irena.org/media/Files/IRENA/Agency/Publication/2017/Oct/IRENA_Electricity_Storage_Costs_2017_Summary.pdf?la=en&hash=2FDC44939920F8D2BA29CB762C607BC9E882D4E9 (last visited Jan. 7, 2020).

been proposals in the past for charging point quotas per Member State, which would have resulted in up to 8 million charging points by 2020 with at least 800,000 available to the general public, but these were shelved during negotiation in favor of governments designing their own national action plans placing at their discretion the appropriate number of points. Also, under EU Directive 2014/94, it is recommended that there be at least one public charging point for every ten electric vehicles.

Furthermore, under the EU's Trans-European Transport Network (TEN-T) program, 115 high-power recharging points have been deployed on a pilot basis across Central European roads aimed at the sustainability and decarbonization of long-distance driving.⁹⁹

The precise number of charging points available to the public in Hungary is not entirely clear. According to ChargeMap – a EU-wide EV-user community online resource – it would appear to be fewer than 710.¹⁰⁰ While the relative dearth of charging points must be addressed by the Hungarian government given how it may discourage EV take-up, other incentives exist under the E-mobility Program (the Jedlik Ányos Plan)¹⁰¹ for EV take-up and for increasing the number of EV charging stations. Additionally, the government intends to introduce green license plates for low- and zero-emissions' EVs, permit the use of bus lanes, and to introduce parking and road tax incentives.¹⁰² For instance, exemptions or reductions of up to 100% for registration fees/taxes and road/circulation tax are available in Hungary.¹⁰³

In terms of other initiatives, Smart Charging Ltd. – a company partially owned by Smart Future Lab Ltd., a start-up incubator and seed financing MVM subsidiary, discussed earlier – is involved in the development of applications regarding route planning and battery charge level to assist EV users.¹⁰⁴

In sum, while Hungary should develop a plan to exponentially increase the number of charging points available to the public, incentives exist in the form of registration and road/circulation tax exemptions, and practical support such as permitting access to bus lanes.

7. Storage

Technological developments and drops in associated costs have facilitated greater take-up of electricity generation from renewable sources. Moreover, technological solutions have risen to the historical challenge of electricity storage. Traditionally, electricity has not been amenable to storage. Electricity generation is typically planned to meet projected demand, and this inherent uncertainty, on occasion, could lead to outages, unstable supply quality concerning voltage and frequency, and other disruptions.

⁹⁹ EUR. ENVTL. AGENCY REP., *supra* note 95, at 29, 34.

¹⁰⁰ CHARGEMAP, <https://chargemap.com/map> (use mouse to move map over to Hungary) (last visited Jan. 7, 202019) (suggesting there are 707).

¹⁰¹ 1487/2015. (VII. 21.) Korm. határozata Jedlik Ányos Tervhez kapcsolódó jogalkotási feladatokról [Government Decision on legislative tasks related to the Jedlik Ányos Plan] (Hung.).

¹⁰² INT'L ENERGY AGENCY, *supra* note 8, at 67 61.

¹⁰³ EUR. ENVTL. AGENCY REP., *supra* note 95, at 60, 64.

¹⁰⁴ MVM GROUP, *supra* note 26, at 44

Longitudinal projections concerning the increased share of renewable sources in electricity generation make the cause of storage all the more pressing.

The International Renewable Energy Agency (IRENA) estimates that by 2050 at least 80% of global electricity could quite plausibly come from renewables, and, more specifically, that solar and wind could provide as much as 52%.¹⁰⁵ Storage-related technological solutions would be necessary to facilitate such projections, to permit greater system flexibility, and to accommodate the notorious changeability of generation through weather-dependent sources. Storage issues are key to such decarbonization efforts, and as such, should receive due levels of attention in terms of R&D funding priorities given that resulting storage developments could facilitate rapid decarbonization.¹⁰⁶ Currently, electricity can be stored in electric vehicles (EV), and in such solar home systems and mini-grid systems that generate their own electricity. As mentioned earlier, significant drops in EV battery costs have translated in greater take-up of EVs¹⁰⁷ and the potential for further cost reduction is likely to have positive implications for the further development of storage solutions.¹⁰⁸

The Hungarian government in its NES 2030 energy policy blueprint recognizes that Hungary's lack of electricity storage capabilities represents a weakness in its efforts to promote its energy security and that more must be done to improve system controllability, particularly by developing storage capacity. It recognizes that the intended increases in the shares of nuclear and renewable sources vis-à-vis electricity generation necessitate serious efforts at the national and regional/collective level to address storage needs. Moreover, the government recognizes that some economic compulsion through legislative means may be necessary to incentivize electricity generators to invest in storage development.¹⁰⁹

8. *Data Privacy and Protection Considerations*

Developments in smart grid-related technology have implications for other policy areas. For instance, the data privacy and protection aspects of such technologies may give rise to concern as it is not always clear how the latter might compromise consumer/user privacy interests, nor whether existing data protection suffices to address any such risk. Moreover, the fact that a breach of any section of a decentralized smart grid network could involve a leak of data that could potentially facilitate the identification of natural persons and the further vulnerability of sensitive data warrants serious consideration.

In the case of smart meters, interoperability between terminals at either end of the distribution network – typically, between the end user and the distributor/supplier – allows for the exchange of data including those pertaining to user consumption. Such data gathering and processing are subject to EU data protection rules as they involve data that can be linked to identifiable individuals/natural persons.

¹⁰⁵ INT'L ENERGY AGENCY, *supra* note 8, at 10.

¹⁰⁶ *Id.* at 11–12.

¹⁰⁷ *Id.* at 27.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ MINISTRY OF NAT'L DEV., *supra* note 53, at 42, 73, 78–79.

As is the case with all EU Member States, the principal source of data protection regulation in Hungary¹¹⁰ is Regulation 2016/679,¹¹¹ the EU's new General Data Protection Regulation (GDPR), which regulates the processing by an individual, a company, or an organization of personal data relating to individuals in the EU.

At the EU level, under data protection rules, personal data may be collected and processed to the extent that there is consent on the part of the data subject – i.e., the individual to whom the data pertain – or some other applicable ground under the current rules, including to the extent that processing is necessary to execute a contract involving the data subject, ensure compliance with legal requirements, or to protect the vital and/or legitimate interests of third parties.¹¹² Incidentally, what constitutes personal data is according to the rules, an objective question that turns on the fact of whether the information relates to an identified or identifiable natural person.¹¹³

Under current rules, it is possible to circumvent the requirement for consent or the other applicable grounds in so far as the data are truly anonymized, as that this would rule out the possibility of the data subject's identification. Extra care should be taken to ensure that the data are entirely anonymized and not pseudoanonymized – i.e., potentially attributable to a natural person by use of additional information.¹¹⁴

In relation to smart metering, consumer/user consent to personal data gathering and processing could be sought from the outset accompanied by assurances that the data will be processed in line with the declared purposes for which they are collected – e.g., for real-time cost estimates, to analyze consumption patterns, for supply efficiency and so on. Some consumers may be skeptical but their fears could be allayed by efforts to raise public awareness about smart metering, data protection, and the relatively low probability for data breaches and/or misuse. In that respect, it would be for Hungary to ensure that those involved in the installation and marketing of such technologies are being transparent about their purposes. Hungary could also target potentially resistant consumers with focused campaigns to publicize the perceived benefits of smart metering and other smart grid technologies that engage personal data, and to explain how personal data are protected under national and EU rules.

¹¹⁰ Hungary, DATA PROTECTION LAWS OF THE WORLD, <https://www.dlapiperdataprotection.com/index.html?t=law&c=HU> (last updated Jan. 10, 2019).

¹¹¹ Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data on the Free Movement of Such Data and Repealing Directive 95/46/EC.

¹¹² Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and of the Free Movement of Such Data, art. 6.

¹¹³ *Id.* at art. 4 §1.

¹¹⁴ *Id.* at art. §26.

II. CYPRUS

A. Introduction

In line with the European Union's energy and climate targets for 2030, the European Commission has put forward a vision of an integrated energy system capable of delivering energy efficiency and a low carbon economy.¹¹⁵ The increasing digitalization of the energy system will serve as the vehicle to a carbon-free, decentralized and democratic system of energy generation and transmission. The introduction of smart grids across EU Member States will contribute to the shift towards a more sustainable energy system.

This article will assess Cyprus's eligibility and readiness for the implementation of smart grids. The main focus of the article is the electricity market in Cyprus. It is in this context that the article will assess the extent to which the regulatory framework in the country is favorable to the successful implementation of smart grid technology. It is anticipated that the findings contained therein will be applicable and of interest to states within and outside the EU facing similar issues, or states and private entities wishing to invest in energy projects in the EU or Cyprus, in particular. In the light of our findings, we will offer recommendations to policy makers to enable them to adopt policies conducive to the faster and more efficient deployment of smart grid technology, as well as provide an insight into the current state of smart grid deployment on the island, to enable future investors to make the right decisions.

In particular, we will focus on the legal and regulatory framework in the country, assessing the extent to which it has enabled the liberalization of the electricity market and the establishment of an effective data and consumer protection regime. We will then look at the current state of smart meter deployment on the island and offer recommendations on how this process can be expedited and/or rendered more efficient, to support ongoing efforts of smartening the grid. Finally, we will look at smart vehicle deployment and grid integration, as well as available storage options on the island. Appropriate recommendations will be made to assist policy makers and potential investors.

B. The "SMART" Grid: A Vehicle to a More Sustainable Energy System

The European Commission defines smart grids as energy networks that can automatically monitor energy flows and adjust to changes in energy supply and demand accordingly. When coupled with smart metering systems, smart grids reach consumers and suppliers by providing information on real-time consumption. With smart meters, consumers can adapt – in time and volume - their energy usage to different energy prices throughout the day, saving money on their energy bills by consuming more energy in lower price periods. Smart grids can also help to better integrate renewable energy. While the sun does not shine all the time and the wind does not always blow, combining information on energy demand with weather forecasts can allow grid operators to better plan the integration of renewable energy into the grid and balance their networks. Smart grids also

¹¹⁵ *Commission Communication for an Energy Union Package for A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, COM (2015) 80 final, (Feb. 25, 2015), https://setis.ec.europa.eu/system/files/Communication_Energy_Union_en.pdf.

open up the possibility for consumers who produce their own energy to respond to prices and sell excess to the grid.¹¹⁶ The smart grid is defined in *Data Privacy for the Smart Grid* as “the modernization of electric, natural gas and water grid infrastructure...the convergence of remote monitoring and control technologies with communications technologies, renewables generation, and analytics capabilities so that previously non-communicative infrastructures like electricity grids can provide time-sensitive status updates and deliver situation awareness.”¹¹⁷

C. Cyprus’ Electricity Market

Due to its isolated geographical position¹¹⁸ and the lack of primary sources of energy domestically, Cyprus’ electricity market is still emerging. The Mediterranean state is one of the EU countries with the lowest percentage of electricity generated by renewable sources. In fact, only 8.6% of the country’s electricity is generated from renewable sources,¹¹⁹ and the island is heavily dependent on oil/petroleum imports for the production of electricity, which makes it highly susceptible to price unpredictability¹²⁰ and impedes the effective and prompt reduction of carbon emissions. However, a wave of recent natural gas discoveries in the Cypriot Exclusive Economic Zone (EEZ) in the Mediterranean brings the promise of diversification through the use of natural gas for electricity generation.¹²¹ This development is likely to strengthen the need for smart grid technology with a view to enabling the electricity sector to absorb more renewables in a smart and efficient manner, making the adoption of smart grids a priority for policy makers. The discovery of natural gas in the EEZ has also placed Cyprus on the map as a major emerging player in the field, increasing opportunities for investment in clean energy projects and smart grid technologies in the field of electricity.

1. Key players

The Electricity Authority of Cyprus (EAC) is an independent semi-governmental utility established by the Development of Electricity Law, Cap 171. The EAC had a monopoly on the generation and supply of electricity throughout the island until the accession of Cyprus to the EU in 2004. [4] The other major players in the electricity market include the TSO, which was established following the decision to liberalize the electricity market in the country (the body functions independently from the Distribution System

¹¹⁶ *Smart Grids and Meters*, *supra* note 76.

¹¹⁷ REBECCA HEROLD & CHRISTINE HERTZOG, *DATA PRIVACY FOR THE SMART GRID* (2015).

¹¹⁸ Pavlos Nikolaidis et al., *Renewable Energy Integration Through Optimal Unit Commitment and Electricity Storage in Weak Power Networks*, 38 INT’L J. SUSTAINABLE ENERGY 398 (2018).

¹¹⁹ 30% of Energy Generated from Renewable Sources, EUROSTAT (Sept. 21, 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180921-1>.

¹²⁰ THE ENERGY REGULATION AND MARKET REVIEW 115–126 (David L. Schwartz ed., 6th ed. 2017).

¹²¹ Kaitlin Lavinder, *Cyprus Offshore Gas Discoveries Hold Promise for Diversification & Clean Energy*, SOUTH EU SUMMIT (Mar. 20, 2018), <https://www.southeusummit.com/europe/cyprus/cyprus-offshore-gas-discoveries-hold-promise-diversification-clean-energy/>.

Owner and Operator (DSO) which is the EAC),¹²² and the Ministry of Energy, Commerce, Industry and Tourism (MCIT), the relevant competent ministry under which a number of governmental authorities are based.

However, a number of challenges remain; these will need to be addressed before Cyprus can successfully implement smart grid technology and make full use of it in its emerging electricity market.

2. *Legal and Regulatory Framework*

A series of legal and regulatory changes following Cyprus' accession to the EU in 2004 have aimed at aligning the existing regulatory framework with EU policy. It is anticipated that the relevant changes will provide for a legal and regulatory environment that is conducive to the implementation of smart grids, as they aim to create an open and competitive market. However, some of these changes have not yet taken full effect and are still in the "trial and error" phase. Policy makers are currently in the process of formulating new policies that will boost competitiveness by introducing lower electricity prices and issues still remain in respect to EAC's control over distribution. In addition, no regulatory or legal action has yet been taken to encourage investment in smart grid technology.

The legal framework governing the electricity market in Cyprus is made up of three interrelated pieces of legislation. The first one is the Electricity Law, Cap 170, which regulates the generation, transmission, and distribution of energy on the island. The Development of Electricity Law, Cap 171 (as subsequently amended) regulates the relationship between the EAC, the state, and consumers. Finally, the Electricity Market Regulation Law 122(I) 2003 (subsequently amended) (the Electricity Law) has sought to align the internal electricity market of the Republic of Cyprus with EU policy and has amended and repealed a number of sections of the Electricity Law and the Development of Electricity Law mentioned above.^{123 124}

The Cyprus Energy Regulation Authority (CERA), an independent national regulatory authority, was established in 2003 pursuant to the provisions of the Electricity Law. CERA has a number of executive powers and responsibilities, such as the power to grant, amend or revoke licenses, the power to advise competent authorities (such as the Ministry of Energy, Commerce, Industry and Tourism) on all matters relating to electricity, the power to ensure compliance with transmission and distribution rules and electricity market rules, and the power to regulate tariffs, charges, and other conditions applied in relation to licenses.¹²⁵

¹²² CYPRUS ENERGY REGULATORY AUTH., 2017 NATIONAL REPORT TO THE EUROPEAN COMMISSION, JULY 2016 – JULY 2017 (2017), https://www.ceer.eu/documents/104400/5988265/C17_NR_Cyprus-EN.pdf/ff6348c4-9372-e9ff-7cb1-ea607ecaa3d2.

¹²³ The provisions of the Electricity Directive have been effectively transposed into domestic legislation by the Regulation of the Electricity Market Law. The Electricity Market Regulation Act, 2003 (Act No. 122(I)/2003) (Cyprus), as amended (the Electricity Market Law).

¹²⁴ HERBERT SMITH FREEHILLS, EUROPEAN ENERGY HANDBOOK: A SURVEY OF THE LEGAL FRAMEWORK AND CURRENT ISSUES IN THE EUROPEAN ENERGY SECTOR (10th ed. 2017).

¹²⁵ *Id.*

A large number of the legislative and regulatory changes in the field of electricity were driven by the desire to create an even playing field in the electricity market, stimulate competition, and ensure the uninterrupted supply of electricity to consumers. For example, the relevant changes introduced by the Electricity Law permit possible competitors of the EAC to enter the domestic market; full third-party access to the transmission and distribution systems is now authorized by the relevant legislation in place.¹²⁶ In addition, the establishment of an independent Transmission System Operator (the CTSO) whose role is to regulate access to the grid is aimed at enabling independent energy producers to operate in a properly regulated environment and ensuring an uninterrupted supply of electricity to all consumers.¹²⁷ The establishment of CERA as an independent regulatory body with the power to grant licenses aims to ensure that the market is open, transparent and competitive.

3. *Liberalization of the market and the status of unbundling in the country*

Despite the regulatory overhaul which has taken place on the island, the electricity market is still dominated by the EAC, with no new providers on the market yet. Full liberalization of the electricity market is expected to take place sometime in 2020-2021. The CTSO is the agency tasked with writing up the rules for full liberalization, but it has failed to deliver on the various timetables set for full liberalization; as a result, the deadline for full liberalization has been pushed back multiple times.¹²⁸ CERA's proposal for the full opening up of the market entails a "net pool" model where the operations of the state-owned EAC are completely unbundled; production and supply operations are to be separated and the EAC would then enter into bilateral agreements with suppliers for the sale of energy at regulated prices.¹²⁹ These plans have been further stifled by unions in the country, as they are perceived as moves which could force the privatization of the state-owned power company.¹³⁰ In fact, following the recession and the bailout in 2013, the privatization of EAC was approved by the Council of Ministers, as one potential avenue of improving the country's financial position. The plan to privatize, however, has not proceeded as planned, as it has been vehemently opposed by workers' unions and government opposition.¹³¹

Although the CTSO is an independent body,¹³² the EAC is the owner of both the transmission and distribution systems in the country, and also holds the power to designate

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Elias Hazou, *Anger at the House as Liberalised Electricity Market Delayed Again*, CYPRUS MAIL (Apr. 9, 2019), <https://cyprus-mail.com/2019/04/09/anger-at-the-house-as-liberalised-electricity-market-delayed-again/>.

¹²⁹ THEODOULOS MESIMERIS, ET AL., REPUBLIC OF CYPRUS, CYPRUS' DRAFT INTEGRATED NATIONAL ENERGY AND CLIMATE PLAN FOR THE PERIOD 2021–30 (2019) [hereinafter CYPRUS' DINECP].

¹³⁰ *Id.*

¹³¹ THE ENERGY REGULATION AND MARKET REVIEW, *supra* note 120.

¹³² The Cabinet decided on December 7, 2017 to proceed with the full independence of the Cyprus Transmission System Operator. Editorial, *Larnaca Marina Investors Given More Time*, CYPRUS PROPERTY NEWS (Oct. 29, 2018), <https://www.news.cyprus-property-buyers.com/2018/10/29/larnaca-marina-investors-more-time/id=00154901>.

the Distribution System Operator (DSO).¹³³ Cyprus has also decided not to apply the provisions of the Electricity Directive with respect to the unbundling of distribution system operators, transmission systems, and transmission system operators. Although the decision to do so is understandable given the small isolated system which the EAC is serving, this raises the question of whether the CTSO and DSO are sufficiently independent to enable the transition to smarter grids to take place effectively. For example, in late September 2018, the EAC reportedly declined a tender concerning specialized software to be purchased by the DSO for the purpose of operating a new system designed to match supply and demand and fix contract prices for when the market is fully liberalized.¹³⁴ This event highlights the need for stricter regulation to ensure that the competencies of the CTSO, the DSO and the EAC are clearly defined and separate.

Regulatory changes are needed to encourage DSO participation in the process of smartening the grid (i.e. by incentivizing DSOs to test and innovate), while ensuring that consumers are protected from excessive charges by a DSO, especially where state-owned.¹³⁵ As DSOs hold a crucial role in the implementation of smart grid technology, they need to be able to make independent decisions in relation to tenders for new technology and investment opportunities, which will eventually enable the effective introduction of smart grid technology. This can only happen if the legislative and regulatory framework in place allows for this degree of autonomy. Cypriot policy makers and legislators need to focus on the formulation of laws and policies to effectively mitigate or minimize the impact of EAC's control over distribution and improve competition in the sector. Effective DSO participation is further hindered by the fact that there are currently no incentives in place aimed at encouraging the DSO to adopt and fund smart grid projects.¹³⁶ In most European countries, incentives are provided through a number of regulatory mechanisms, initiatives sponsored by the government, and other EU initiatives.¹³⁷

Furthermore, as TSOs have overall responsibility for system security, the role of the CTSO in the implementation of smart technology is crucial in a system where consumers will gradually become more involved in the production of electricity. Pursuant to the Electricity Market Law, the EAC currently provides the personnel of the CTSO, and the CTSO budget is covered by the EAC's budget. Changes need to be made to the CTSO's internal structure and the way it receives its funding to ensure its full independence from the EAC. Finally, as confidence in the CTSO management has significantly waned due to the agency's failure to adhere to different liberalization timetables, it may be necessary to restructure the management team and review the methods by which the relevant timeframes are calculated and set.

¹³³ The EAC is the country's DSO. THE ENERGY REGULATION AND MARKETS REVIEW, *supra* note 120, at 118.

¹³⁴ Elias Hazou, *Deadline to Liberalise Energy Market Passes Again*, CYPRUS MAIL (Sept. 18, 2018), <https://cyprus-mail.com/old/2018/09/18/deadline-to-liberalise-energy-market-passes-again/>.

¹³⁵ Rafael Leal-Arcas, Feja Lasniewska & Filippas Proedrou, *Smart Grids in the European Union: Assessing Energy Security, Regulation & Social and Ethical Considerations*, 24 COLUM. J. EUR. L. 291, 330 (2018).

¹³⁶ *Id.* at 328.

¹³⁷ *Id.*

4. *Energy Security Dimension*

As seen above, Cyprus is a small isolated energy system, heavily reliant on oil products for its energy needs. Recent natural gas discoveries in the Eastern Mediterranean have unlocked newfound potential for the island to diversify its energy supply and become more energy independent through the use of renewable energy sources. The discovery of natural gas, however, has intensified existing geopolitical tensions between Cyprus and Turkey, particularly in relation to the rights of the Turkish Republic of Cyprus (TRC) to the natural gas reserves, given its questionable status in international law. While the Secretary General of the UN has expressed the view that the natural gas reserves belong to both sides, the issue continues to be politically fraught, significantly slowing down any process of exploration of the reserves, especially since there continues to be disagreement regarding the relevant rights of the various parties involved. Some projects are currently underway; the Aphrodite natural gas field¹³⁸ contractor and the Republic of Cyprus are in discussions regarding the finalization and agreement on the Aphrodite Development and Production Plan.^{139 140}

A number of legal and political issues arise out of the exploration of the various blocks within the Exclusive Economic Zone which – although outside the scope of this paper – have an impact on efforts to commence exploratory drilling in the area.¹⁴¹ It is anticipated that the production and export of natural gas will significantly decrease Cyprus' dependence on petroleum imports, catering for an environment that is conducive to the implementation and successful operation of smart grid technology.¹⁴² However, success is largely dependent on the effective resolution of the political deadlock that is currently obstructing further efforts to commence exploratory drilling. The status of the TRC in international law is a sensitive political and legal issue that has been at the forefront of Cypriot politics for a significant period of time. Unless the legal rights of the Republic of Cyprus (RoC) and the TRC with respect to the relevant areas in the EEZ are clearly defined and demarcated, further efforts to exploit the natural gas reserves will be stifled for years to come, and this will undoubtedly have a negative impact on the effective implementation of smart grid technology on the island.

¹³⁸ The Aphrodite gas field is an offshore gas field off the southern coast of Cyprus located at the exploratory drilling block 12 in the country's maritime Exclusive Economic Zone.

¹³⁹ The Aphrodite field gas, according to the proposed DPP, is going to be transmitted to Egypt, mainly to Idku LNG Terminal for liquefaction and re-export as well as for the domestic market. Moreover, in February 2018, the ENI / Total joint venture completed the first exploratory well "Calypso 1" in Block 6, which resulted in a gas discovery. The ExxonMobil/ Qatar Petroleum Consortium proceeds with its plans for two exploration wells in Block 10 in late 2018 - early 2019. CYPRUS' DINECP, *supra* note 129, at 53.

¹⁴⁰ *Id.*

¹⁴¹ For example, Turkey threatened to mobilize its naval forces should Cyprus proceed with its plans to commence drilling in the Aphrodite field gas (also known as Block 12).

¹⁴² The introduction of renewable energy sources in the field of electricity will increase the need for flexible smart grids, encouraging policy makers to consider the introduction of smart grid technology and take the relevant measures to enable their effective implementation.

5. *Electricity Interconnections*

Another aspect of energy security, particularly in the field of electricity, is the existence of interconnections with neighboring states. Stable electricity interconnections are vital to the gradual *smartening* of the electricity network, as security of supply needs to be maintained while new technologies are adopted and tested. So far, the electricity system in Cyprus has been operating without cross-border links. The position is set to change with the introduction of the “EuroAsia Interconnector Project,” which is promoted as a Project of Common Interest (PCI).¹⁴³ The project was proposed for the electricity interconnection between Israel, Cyprus and Greece, and it consists of three distinct projects: Israel - Cyprus, Cyprus - Crete and Crete - Attica. It is anticipated that the implementation of this project will bring an end to Cyprus’ energy isolation. The project is also expected to contribute to the achievement of EU goals for the integration of the internal electricity market, security of supply, energy efficiency and better backup supply in emergencies.¹⁴⁴

Interconnections with other states will become more attractive once Cyprus begins to produce and export natural gas. Apart from increasing energy security, contributing to more affordable prices in the internal market, as well as reducing environmental impact, a well-interconnected grid will naturally need to be *smartened* in order to operate more efficiently and cost-effectively in the future. It is thus anticipated that the existence of a well-connected grid system will inevitably strengthen the need for smart technology; a growing and more complex grid system with multiple interconnections would certainly benefit from modern technology aimed at making it more easily manageable and efficient.

D. *Smart Metering Systems*

Smart meters are essential for the digitalization of the energy sector, enabling households to control their consumption and participate more actively in the energy market. There are three main domains of applications for the smart grid network: the High Voltage (HV) network used for the electricity transmission, the Medium Voltage (MV) network used for the electricity distribution, and the Low Voltage (LV) network used to provide electricity to end users. Smart metering is a key part of the LV network, as it contributes to transmission, energy consumption/generation data towards the utilities and information data towards the smart meters.¹⁴⁵ Therefore, smart meters play a key role in energy management and saving.

However, Cyprus has decided against a national rollout meter plan.¹⁴⁶ This decision runs contrary to EU requirements to introduce smart metering in Member States, with a

¹⁴³ *Official Support for EuroAsia Interconnector*, EUROASIA-INTERCONNECTOR, <https://www.euroasia-interconnector.com/at-glance/the-big-picture/official-support/> (last visited Jan. 7, 2020).

¹⁴⁴ CYPRUS ENERGY REGULATORY AUTH., 2018 NATIONAL REPORT TO THE EUROPEAN COMMISSION FOR THE YEAR 2017 AND THE FIRST HALF OF 2018 19 (2018).

¹⁴⁵ Nikoleta Andreadou, Miguel Olariaga Guardiola & Gianluca Fulli, *Telecommunication Technologies for Smart Grid Projects with Focus on Smart Metering Applications*, 9 ENERGIES 375, 375–76 (2016).

¹⁴⁶ Frédéric Simon, *Smart Meter Woes Hold Back Digitalisation of EU Power Sector*, EURACTIV (last updated Jan. 30, 2019), <https://www.euractiv.com/section/energy/news/smart-meter-woes-hold-back-digitalisation-of-eu-power-sector/>.

view to achieving the 80% target agreed on by all EU countries for 2020.¹⁴⁷ One of the reasons why some states, including Cyprus, have been reluctant and/or slow to introduce smart metering is because the requirements set by the EU are not legally binding. Although there is currently no official national rollout plan, steps have been taken by EAC for the gradual introduction of smart metering in the country. In 2014, EAC announced its plans to launch a smart metering initiative; it launched a tender for the purchase of 3000 smart meters to be installed in various households and businesses around the island.¹⁴⁸ More recently, a comprehensive design for the installation of 400,000 smart meters to replace existing ones was prepared based on a Decision by CERA; the project is anticipated to be completed in the next eight years, and represents a step in the transformation of the distribution system into a smart network.¹⁴⁹

Despite recent developments, the process of smart meter deployment has been slow. As mentioned above, one of the reasons is because the requirements for deployment are not strictly enforceable, which offers states significant leeway and flexibility. It is perhaps time for policy makers (both domestically and at the EU level), to consider the implementation of stricter policies and requirements, in an effort to speed up the process. Another reason why the deployment of smart meters has not necessarily been at the top of policy makers' to-do lists, is because the experience from other EU Member States has been that end users are not as involved in the process as they should or were anticipated to have been.¹⁵⁰ This could make policy makers reluctant to deploy smart meters if end users are not particularly interested in learning how to make use of them effectively. One solution to this problem - which might be easier to implement in a relatively small market such as Cyprus - would be to educate users on the efficient use of smart meters before deployment (if deployment was effected in tranches). This could be done through online tutorials or leaflets sent to end users' home addresses.

To further speed up the process of smart meter deployment, policy makers need to ensure that vulnerable and low-income households are provided with adequate support to enable them to benefit fully from a technological advancement that does not, on its own, automatically benefit them.¹⁵¹ Studies conducted in other EU Member States have revealed that smart meters in themselves do not automatically lead to energy savings in the residential sector without additional support, advice, and feedback mechanisms such as accompanying in-home displays.¹⁵² Energy poverty has not yet been officially defined; however, the first official definition adopted by the United Kingdom (1991) - which is still

¹⁴⁷ *Smart Grids and Meters*, *supra* note 76.

¹⁴⁸ *EAC Explores Smart Metering Initiative*, GOLD NEWS (July 10, 2014), <http://www.goldnews.com.cy/en/energy/eac-explores-smart-metering-initiative>.

¹⁴⁹ *Speech by the Chairman of the EAC Board of Directors*, CYPRUS PROFILE (Dec. 31, 2018), <https://www.cyprusprofile.com/en/articles/speech-by-the-chairman-of-the-eac-board-of-directors/>.

¹⁵⁰ Anca Gurzu, *Smart Meters Undercut by Human Nature*, POLITICO (June 3, 2018, 7:04 PM), <https://www.politico.eu/article/smart-meters-undercut-by-human-nature/>.

¹⁵¹ *New Research Reveals Importance of Additional Support in Engaging Vulnerable Consumers in Smart Metering*, EU ENERGY POVERTY OBSERVATORY (July 9, 2018), <https://www.energypoverty.eu/news/new-research-reveals-importance-additional-support-engaging-vulnerable-consumers-smart-0>.

¹⁵² *Id.*

unofficially used by other countries - is that "a household is said to be fuel poor if it needs to spend more than 10% of its income on fuel to maintain an adequate level of warmth."¹⁵³

While there is no precise official definition, and the concept of energy poverty is measured by reference to a number of different variables and indicators, studies have shown that Cyprus is among the EU states with the highest levels of energy poverty.¹⁵⁴ To ensure optimum results from the upcoming mass deployment of smart meters, Cypriot policy makers must ensure that consumers, especially those in low-income households and the elderly, are provided with the relevant tools and knowledge to understand their energy consumption and make use of new technology in the most efficient way.

1. Demand Response

Demand Response can be defined as the changes in electric usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity over time.¹⁵⁵ In the context of the electricity market, the concept of demand response involves the targeted reduction of electricity during high peak and demand periods. Hence, the primary concern of those looking at demand response programs is how to introduce lower electricity prices for consumers.¹⁵⁶

However, the current market conditions in Cyprus do not permit the implementation of demand response measures; a pre-condition is the full and actual liberalization of the electricity market, a development that has been continuously postponed since 2009.¹⁵⁷ The government has announced its plans to implement various demand response measures by 2022, starting with a revision of the regulatory framework to define the technical modalities for the participation of Demand Response in the electricity market.¹⁵⁸ There are also plans to introduce a system based on "supplier compensation."¹⁵⁹ It is anticipated that Demand Response services will be provided by Demand Response Service Providers and will include the participation of aggregated loads.¹⁶⁰ The preliminary timeframe given by the government is 2022.¹⁶¹ In order to successfully implement effective demand response measures, the government must first ensure that the relevant market conditions are in place. The primary goal of policy makers should thus be to open up the electricity market to demand response, so as to ensure that independent aggregators will be able to compete on a level playing field.

¹⁵³ *Share of Households' Expenditure on Electricity, Gas and Other Housing Fuels*, EUR. COMM'N (2012), <https://ec.europa.eu/energy/en/content/share-households-expenditure-electricity-gas-and-other-housing-fuels>.

¹⁵⁴ DAGMARA STOERRING, *ENERGY POVERTY* 8 (2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/607350/IPOL_STU\(2017\)607350_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/607350/IPOL_STU(2017)607350_EN.pdf); Alexandru Maxim et al., *Implications and Measurement of Energy Poverty Across the European Union*, 8 SUSTAINABILITY 483 (2016).

¹⁵⁵ Athina C. Tellidou & Anastasios G. Bakirtzis, *Agent-Based Analysis of Capacity Withholding and Tacit Collusion in Electricity Markets*, 22 IEEE TRANSACTIONS ON POWER SYS. 1735 (2007).

¹⁵⁶ *Id.* at 1739.

¹⁵⁷ *Demand Response Status in EU Member States*, *supra* note 6, at 111.

¹⁵⁸ CYPRUS' DINECP, *supra* note 129, at 60.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

2. *Data Protection*

The decentralized nature of smart grids makes the grid less susceptible to physical attacks such as terrorist attacks.¹⁶² However, the use of ICT in network management also renders the system more vulnerable to new types of threats, such as cyber-attacks, which could undermine the functionality of the entire grid, or lead to leaks of sensitive personal data. In order to optimize the benefits of smart grid technology and minimize ICT-associated risks, strong cyber security and data protection measures must be adopted.

a. *Current Legal Framework*

As with all EU Member States, the Cypriot data protection framework is governed and shaped by the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), the European Union law which entered into force in 2016, and after a transition period of two years, became directly applicable in all European Member States on May 25, 2018.¹⁶³ There are more than fifty areas where Member States are allowed to legislate differently, thus there is wide scope for different interpretation in different Member States.¹⁶⁴ In addition, the NIS Directive (Directive on security of network and information systems) provides legal measures to boost the level of cyber security in Europe (see below); it is the first piece of EU-wide legislation on cyber security.¹⁶⁵ The Directive was adopted by the EU Parliament on July 6, 2016 and entered into force in August 2016;¹⁶⁶ it has been fully transposed in Cyprus.¹⁶⁷ On July 31, 2018, Cyprus enacted the Protection of Natural Persons Regarding the Processing of their Personal Data and the Free Movement of such Data Law 125 (I) of 2018 (the 2018 Law). The purpose of the 2018 Law was to supplement the GDPR and offer a tailored approach to data protection.

b. *Third-party Control*

Third-party control of and access to personal data is restricted to individuals and/or bodies that fall under the definition of “data processor” under the GDPR, recognized foreign jurisdictions,¹⁶⁸ third-party organizations, such as businesses that are not based in

¹⁶² MARILYN A. BROWN & BENJAMIN K. SOVACOO, *CLIMATE CHANGE AND GLOBAL ENERGY SECURITY: TECHNOLOGY AND POLICY OPTIONS* (2011).

¹⁶³ *Data Protection Laws of the World*, DATA PROTECTION LAWS OF THE WORLD, <https://www.dlapiperdata.protection.com/index.html?t=law&c=CY> (last updated Jan. 10 2019).

¹⁶⁴ *Id.*

¹⁶⁵ *The Directive on Security of Network and Information Systems (NIS Directive)*, EUR. COMM’N, <https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive> (last updated July 15, 2019).

¹⁶⁶ *Id.*

¹⁶⁷ *Implementation of the NIS Directive in Cyprus*, EUR. COMM’N, <https://ec.europa.eu/digital-single-market/en/implementation-nis-directive-cyprus> (late updated Nov. 7, 2019).

¹⁶⁸ Transfers of personal data by a controller or a processor to third countries outside of the EU (and Norway, Liechtenstein and Iceland) are only permitted where the conditions laid down in the GDPR are met (Article 44). The European Commission has the power to make an adequacy decision in respect of a third country, determining

an EU Member State, but are subject to EU Law, or international agencies and organizations, provided that the appropriate safeguards are in place.¹⁶⁹ A data processor is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.¹⁷⁰ In the context of smart electricity grids, this could be any natural or legal person, who acts as an intermediary or processes data in some way on behalf of the data controller.¹⁷¹ The term "data processing" has a wide definition; it is defined as any operation or set of operations, which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.¹⁷²

It is clear from the above broad definitions and the numerous qualifications to third-party data sharing that a number of third parties could – subject to certain conditions being met – have access to personal data. The degree and extent of control over such third parties depends partly on whether they fall under the definition of "data processor" or qualify in some other way under one or more of the prescribed exceptions under the GDPR. For example, a higher degree of control can be exercised over a "data processor" based in the EU or subject to EU Law. On the other hand, a third party based in a non-EU jurisdiction with analogous duties to those of a data processor is by default outside the ambit of the GDPR. The development of further interconnectors in combination with the smartening and expansion of the grid opens up the possibility for data transmission across borders into non-EU territory. The smarter, more interconnected and more intricate the grid becomes, the higher the risk of "data spillage" into jurisdictions not covered by the GDPR. The current legal framework may need to be refined or supplemented in order to ensure that the personal data of consumers will not simply be lost in the grid or cross over into a foreign jurisdiction without adequate safeguards.

that it provides for an adequate level of data protection, and therefore personal data may be freely transferred to that country (Article 45(1)). Transfers to third countries are also permitted where appropriate safeguards have been provided by the controller or processor and on condition that enforceable data subject rights and effective legal remedies for the data subject are available. *See Data Protection Laws of the World, supra* note 163.

¹⁶⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 44–50, 2016 O.J. (L 119) 1, 41–48 [hereinafter *GDPR*].

¹⁷⁰ *Id.* at art. 4(8).

¹⁷¹ The data controller, as defined in Article 4 (7) of the GDPR, is the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. *Id.* at art. 4(7).

¹⁷² *Id.* at art. 4(2).

c. The Effects of Smart Metering on the Current Legal Framework

To facilitate the development of smart grids, the European Commission has encouraged the deployment of smart meters across all EU Member States.¹⁷³ A closer look at the impact smart metering has had (if any) on the Cypriot data protection framework will enable policy makers to paint a clearer picture of some of the issues that may arise in the context of operating and managing smart grids. Even though Cyprus has not published official rollout data, plans are in place for the deployment of a significant number of smart meters on the island. As these plans are currently underway and are expected to take a number of years to come to full fruition, there is presently no official data on the impact of smart metering on the current data protection framework. However, some potential effects can be anticipated based on data gathered from other European Member States.

Smart meters use the latest digital technologies, update information regularly and provide two-way electronic communication between consumers and the grid.¹⁷⁴ Smart meters record how much electricity is used and send that automatically to the energy supplier. Through a "home display," which is part of most smart meters, the user can monitor their energy use, how much is spent on electricity, and other information about the user's energy use.¹⁷⁵ Because of the way information is transmitted, it can be anticipated that the deployment of smart meters will highlight certain shortcomings in the existing data protection framework in Cyprus. Pilot schemes introduced at the early stages of deployment in other EU Member States have highlighted key concerns surrounding the deployment of smart meters, namely the risk of user profiling through high frequency data reading.¹⁷⁶ To minimize the risk of user profiling, the first step for policy makers is to ensure that the relevant legal framework is clear and comprehensible, and that it minimizes the risk of data leakage and the misuse of personal information.

For example, as smart meters process large amounts of data, it is yet unclear whether all information processed by these devices will qualify as "personal data"¹⁷⁷ for the purposes of the applicable law in Cyprus. Policy makers may need to focus on clarifying the boundaries between information that is classed as "personal data" for the purposes of the GDPR and information or data that does not fall under the definition, considering the vast amount of energy data that will flow between the grid and consumers. This will minimize the risk of user profiling and will secure public trust in smart metering technology.

¹⁷³ ALEX WILSON, SMART ELECTRICITY GRIDS AND METERS IN THE EU MEMBER STATES 1 (2015), http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/568318/EPRS_BRI%282015%29568318_EN.pdf.

¹⁷⁴ *Id.*

¹⁷⁵ *Smart Meters*, CTR. FOR SUSTAINABLE ENERGY, <https://www.cse.org.uk/advice/advice-and-support/smart-meters> (last visited Jan. 7, 2020).

¹⁷⁶ *Commission Report on Benchmarking Smart Metering Deployment in the EU-27 with a Focus on Electricity*, at 7, COM(2014) 356 Final (June 17, 2014).

¹⁷⁷ *GDPR*, *supra* note 170, at art. 4(1) (defining personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person").

In addition, as the implementation of smart meters will involve a number of different actors who will interact with each other and the grid in novel and complex ways, the allocation of responsibilities between them might not be clear at first. For example, there may be an overlap between the duties and responsibilities of “data controllers” and “data processors;” this might require amendments to the current legal framework to ensure that clearer lines are drawn to delineate the duties of the different actors involved.

d. Consumer protection

Smart grids hold the potential to transform the way consumers interact with the grid, by allowing customers to respond to dynamic prices or network needs, and deliver distributed generation.¹⁷⁸ Their deployment, however, raises concerns about the impact on vulnerable consumers, especially low-income households, the handicapped,¹⁷⁹ and the elderly. A robust consumer protection framework can mitigate some of the relevant risks associated with the smartening of electricity grids, such as the impact of high prices on those who are most susceptible.

Consumer protection laws were not particularly developed on the island until Cyprus’ accession to the European Union, when a number of developments took place through various European initiatives;¹⁸⁰ the Cypriot consumer protection framework is mostly based on and has largely been shaped by EU Law in the area. The relevant consumer protection laws are enforced by the Consumer Protection Service (CPS), a division within the Ministry of Energy, Commerce and Industry.¹⁸¹ There are laws in place on, *inter alia*, unfair commercial practices,¹⁸² consumer protection, protection from misleading and comparative advertising, product guarantees and pricing, and unfair contract terms.¹⁸³ For the purposes of the Unfair Commercial Practices Act 2013, a “product” is defined as “every good or service, including real estate or immovable property.” The General Product Safety Law 2004 (No. 41(I) of 2004)¹⁸⁴ defines a product as “any product - including in the context of providing a service - which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned and irrespective of whether it is supplied in the course of rendering services.” The advent of smart grids and the increased involvement of consumers through the use of bidirectional communication will raise a number of questions, such as whether “energy” is a product or a service, and hence whether

¹⁷⁸ GRAYSON GEFFNER, SMART GRID—SMART CUSTOMER POLICY NEEDS 517 (2011).

¹⁷⁹ *Id.*

¹⁸⁰ Marina Himoni, *Cyprus: Consumers’ Protection Under Cyprus Law*, MONDAQ, <http://www.mondaq.com/cyprus/x/538746/Consumer+Trading+Unfair+Trading/Consumers+Protection+Under+Cypus+Law> (last updated Oct. 27, 2016).

¹⁸¹ *Mission*, MINISTRY OF ENERGY, COMMERCE AND INDUSTRY, http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/page01_en/page01_en?OpenDocument (last visited Jan. 7, 2020).

¹⁸² *Legislation*, MINISTRY OF ENERGY, COMMERCE AND INDUSTRY, http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/page24_en/page24_en?OpenDocument (last visited Jan. 7, 2020).

¹⁸³ *Id.*

¹⁸⁴ General Product Safety Law, 2004 No.41(I) § 2 (Cyprus).

it is covered by all the protections afforded by national consumer protection laws. In the future, Cypriot courts may need to clarify the definition of "product" and/or "service" as adopted in the relevant legislative text.

As seen above, the experience of some EU Member States with smart metering has highlighted certain issues in respect of affordability and other relevant risks associated with high pricing which could affect the experience and rights of consumers. If these issues are emerging in the context of deployment and operation of smart meter technology, then they will most likely persist throughout the gradual process of smartening the grid, and could significantly impede its future development. To ensure that the process will be as smooth as possible, and to safeguard the rights of consumers, adequate legal protection needs to be provided. At present, the Cypriot consumer protection regime does not directly cater for the rights and needs of vulnerable consumers, such as those in low-income households, the handicapped, and the elderly; it is those individuals who may under-heat their homes, reduce their consumption of other essential goods and services, or go into debt to meet their energy needs.¹⁸⁵ It is for this reason that a more robust and targeted legal framework needs to be put in place to guarantee their rights.

e. Protection from Cyber Attacks

The emergence of commercial trends, such as the industrial internet of things (IoT) and the smartening of electricity grids are part of a larger shift towards the use of cyber physical systems to enable optimization and better management. From a security perspective, the wave of such changes poses a number of challenges.¹⁸⁶ Smart grids will use ICT to enable the faster integration of renewable energy and provide faster and more advanced energy services. As the internet will be used to enable the operation of smart grids, all known cyber security risks could potentially arise in the context of smart grid operation; the societal impact of potential cyber security breaches in the context of smart grid operation, however, is much more severe due to the scale of such operations and the impact on people's lives. For this reason, EU Member States need to introduce technologies and legislation that will offer robust protection against potential cyber security threats.¹⁸⁷

Cyprus's cyber security capacity maturity has been assessed by the Global Cyber Security Capacity Centre, which rates cyber security capacity as "start-up,"¹⁸⁸

¹⁸⁵ Vulnerable Consumer Working Grp., Directorate-General for Energy, *Working Paper on Energy Poverty*, at 2, <https://ec.europa.eu/energy/sites/ener/files/documents/Working%20Paper%20on%20Energy%20Poverty.pdf>.

¹⁸⁶ Lachlan Urquhart & Derek McAuley, *Assessing Information Security Regulations for Domestic and Industrial Cyber-Physical Systems* 1 (May 22, 2017) (TILTING Perspectives 2017: Regulating a Connected World, Tilburg, Netherlands), <https://ssrn.com/abstract=2971991>.

¹⁸⁷ Klaus Kubeczko et al., *On Socio-Technical Concerns for Smart Grid Security and Resilience* 1 (Feb. 27, 2015) (AIT Austrian Institute of Technology), <https://ssrn.com/abstract=2824408>.

¹⁸⁸ DR. MARIA BADA, ET AL., *CYBER SECURITY CAPACITY REVIEW: REPUBLIC OF CYPRUS* 4 (2017). At this stage either no cyber security maturity exists, or it is very embryonic in nature. There might be initial discussions about cyber security capacity building, but no concrete actions have been taken. There is an absence of observable evidence at this stage.

"formative,"¹⁸⁹ "established,"¹⁹⁰ "strategic,"¹⁹¹ and "dynamic"¹⁹² based on a multitude of factors.¹⁹³ In terms of policy and strategy, Cyprus has been gauged to range from start-up to established levels of maturity, and the legal and regulatory frameworks range between formative and established levels of maturity.¹⁹⁴ In terms of the legal framework in place, a number of domestic and EU laws have been implemented in recent years.¹⁹⁵ As seen above, Cyprus has transposed the NIS Directive in full, and has taken the route towards full implementation of all ENISA-¹⁹⁶related mechanisms.¹⁹⁷ Gaps in the legislative framework have been identified; there is currently no system enabling the reporting of online incidents and complaints.¹⁹⁸ A fully functional system enabling the reporting of online incidents and complaints must be introduced to ensure that incidents and complaints arising in the context of smart grid operations are dealt with quickly and efficiently.

Despite recent developments in the field of cyber security, the introduction of smart grids will bring a new set of challenges which the current cyber security framework is not yet fully equipped to meet. Smart grids are vulnerable to, *inter alia*, natural disasters, infrastructural failure, and cyber security attacks which could be employed as a method of

¹⁸⁹ *Id.* at 5. Some features of the aspects have begun to grow and be formulated, but may be ad-hoc, disorganized, poorly defined – or simply “new”. However, evidence of this activity can be clearly demonstrated.

¹⁹⁰ *Id.* The elements of the aspect are in place, and working. However, there is not well thought-out consideration of the relative allocation of resources. Little trade-off decision-making has been made concerning the “relative” investment in the various elements of the aspect. But the aspect is functional and defined.

¹⁹¹ *Id.* Choices have been made about which parts of the aspect are important, and which are less important for the particular organization or nation. The strategic stage reflects the fact that these choices have been made, conditional upon the nation’s or organization’s particular circumstances.

¹⁹² *Id.* At this stage, there are clear mechanisms in place to alter strategy depending on the prevailing circumstances such as the technology of the threat environment, global conflict or a significant change in one area of concern (e.g. cybercrime or privacy). Dynamic organisations have developed methods for changing strategies in stride. Rapid decision-making, reallocation of resources, and constant attention to the changing environment are features of this stage.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 9.

¹⁹⁵ *Id.* at 61–65.

¹⁹⁶ See generally EUR. UNION AGENCY CYBERSECURITY, <https://www.enisa.europa.eu/about-enisa> (last visited Jan. 8, 2020). The European Agency for Cybersecurity (“ENISA”) is a center of expertise for cyber security in Europe. ENISA is actively contributing to a high level of network and information security (NIS) within the Union, since it was set up in 2004, to the development of a culture of NIS in society and in order to raise awareness of NIS, thus contributing to proper functioning of the internal market. The Agency works closely together with Member States and private sector to deliver advice and solutions. This includes, the pan-European Cyber security Exercises, the development of National Cyber security Strategies, CSIRTs cooperation and capacity building, but also studies on secure Cloud adoption, addressing data protection issues, privacy enhancing technologies and privacy on emerging technologies, eIDs and trust services, and identifying the cyber threat landscape, and others. ENISA also supports the development and implementation of the European Union's policy and law on matters relating to NIS).

¹⁹⁷ Petros Petrikos, *Building Infrastructures: Reviewing Cypriot Cybersecurity Practices*, GLOBAL RISK INSIGHTS (Apr. 8, 2019), <https://globalriskinsights.com/2019/04/building-infrastructures-reviewing-cypriot-cybersecurity-practices/>.

¹⁹⁸ BADA ET AL., *supra* note 188, at 66.

warfare.¹⁹⁹ At present, Cyprus has a single active CSIRT²⁰⁰ in place, which might not be sufficient to meet the needs of an expanding and developing grid. By contrast, neighboring Turkey has in total seven active CSIRTs in place, which are a combination of private and state-owned initiatives.²⁰¹ RoC's political situation, with approximately 40% of the island under Turkish occupation, means that the implications of this disparity for the security of the Cypriot information system are grave.²⁰² To ensure that RoC is prepared to protect its growing and developing grid from politically motivated attacks to its security system, policy makers need to ensure that the number of active CSIRTs is increased to enable it to meet and address potential threats to its security infrastructure.

Additional issues were identified, such as the lack of appropriate training opportunities for those employed in ICT, and the absence of relevant cyber security initiatives, borne out by the government's reluctance to invest in the ICT sector.²⁰³ The management of smart grids will be undertaken in part by teams of specialized ICT professionals, whose role in the successful operation of the grid is crucial. The government needs to ensure that such specialized teams are in place, and that they are appropriately trained. More needs to be done in terms of investing in the ICT sector and offering the appropriate education and training opportunities.

E. Electric Vehicles and Storage

1. Electric Vehicles

Electric vehicles can play a crucial role in the decarbonization of the economy. Their interaction with the grid will be instrumental to the delivery of the Commission's goals. Electric vehicles have the potential to serve the grid as an independent distributed energy source;²⁰⁴ they can be integrated into power systems and operate with different objectives, such as the dynamic loads by drawing power from the grid (during charging) or by feeding power to the electric grid.²⁰⁵ By remaining connected to the grid even when stationary, electric vehicles can provide the grid support by delivering the ancillary services, such as peak power shaving, spinning reserve, voltage and frequency regulations, through the concept of vehicle to grid (V2G).^{206 207} The introduction of smart vehicles will thus

¹⁹⁹ Abdulrahman Okino Otuoze et al., *Smart Grids Security Challenges: Classification by Sources of Threats*, 5 J. ELECTRICAL SYS. & INFO. TECH. 468, 468 (2018), <https://www.sciencedirect.com/science/article/pii/S2314717218300163>.

²⁰⁰ *CSIRTs by Country—Interactive Map*, EUR. UNION AGENCY CYBERSECURITY, <https://www.enisa.europa.eu/topics/csirts-in-europe/csirt-inventory/certs-by-country-interactive-map#country=Cyprus> (last visited Jan. 8, 2020).

²⁰¹ Petrikos, *supra* note 197.

²⁰² *Id.*

²⁰³ BADA ET AL., *supra* note 188, at 74.

²⁰⁴ Francis Mwasilu et. al., *Electric Vehicles and Smart Grid Interaction: A Review on Vehicle to Grid and Renewable Energy Sources Integration*, 34 RENEWABLE & SUSTAINABLE ENERGY REV. 501, 502 (2014), <https://www.sciencedirect.com/science/article/pii/S1364032114001920>.

²⁰⁵ *Id.* at 506.

²⁰⁶ *Id.* at 502.

²⁰⁷ Willett Kempton & Steven E. Leendre, *Electric Vehicles as a New Power Source for Electric Utilities*, 2 J. TRANSP. RES. 157, 157 (1997), <http://www.civil.ist.utl.pt/~martinez/PDF/ELECTRICMOVE/Paper18.pdf>.

complement efforts to smarten the grid and render it more efficient; by acting as distributed energy sources,²⁰⁸ electric vehicles will effectively contribute to the decentralization of the energy system and increase the functionality of the grid.

The higher cost of electric vehicles and the absence of appropriate infrastructure have rendered their widespread commercialization a difficult task.²⁰⁹ The infrastructure in Cyprus is not yet entirely conducive to the widespread deployment of electric vehicles, and the costs associated with electric vehicles are still relatively high compared to the costs of regular vehicles. However, plans are currently underway to install charging stations by the end of 2019,²¹⁰ and free parking has been introduced for hybrid and electric cars in the municipality of Nicosia.²¹¹ Tax incentives have also been introduced by the government; vehicles emitting less than 120g CO₂/km are exempt from registration tax and pay the lowest rate of tax under the annual road tax.²¹² The DSO has been operating and managing the electric vehicle charging system, and it is expected that by the end of 2019, there will be sufficient charging stations to cover the entire island.²¹³

The government can do more by way of incentivizing consumers to switch to electric vehicles, such as exempting all electric vehicles from tax for the first few years of use. However, introducing further incentives might not be a priority for the Cypriot government at this stage, given the high percentage of transport fuel tax it appears to collect annually.²¹⁴ One way of resolving this would be to increase the percentage of environmental tax in the country to make up for the inevitable drop in revenue from fuel tax. However, as the country's revenue from environment-related taxes is already higher than the EU average,²¹⁵ the idea of raising environment-related taxes may not be very appealing to policy makers. The recent discoveries in the EEZ hold the key to generating additional revenue on the island as investment opportunities will undoubtedly generate additional tax, making it easier for the government to stomach the losses in fuel tax incurred by the wider use of electric vehicles.

²⁰⁸ Mwasilu, *supra* note 204, at 502 (Distributed energy sources ('DERs') are small-scale units of local generation connected to the grid at distribution level).

²⁰⁹ Kempton & Leendre, *supra* note 207, at 159.

²¹⁰ Lizzy Ioannidou, *Electric Car Charging Stations Islandwide by the End of Next Year*, CYPRUS MAIL (Nov. 29, 2018), <https://cyprus-mail.com/2018/11/29/electric-car-charging-stations-islandwide-by-end-of-next-year/>.

²¹¹ *Free Parking for Hybrid and Electric Cars*, CYPRUS MAIL (Jan. 5, 2018), <https://cyprus-mail.com/2018/01/05/free-parking-hybrid-electric-cars/>.

²¹² EUR. AUTO MANUFACTURERS ASS., OVERVIEW ON TAX INCENTIVES FOR ELECTRIC VEHICLES IN THE EU (2018), https://www.acea.be/uploads/publications/EV_incentives_overview_2018_v2.pdf.

²¹³ Andreas Marangou, Chairman EAC Board of Directors, Speech at Press Conference for the Presentation of the 2017 Annual Report (Nov. 20, 2018), in CYPRUS PROFILE (Dec. 31, 2018), <https://www.cyprusprofile.com/en/articles/speech-by-the-chairman-of-the-eac-board-of-directors/>.

²¹⁴ Taxation & Customs Union, *Taxation Trends in the European Union: Data for the EU Member States, Iceland and Norway*, at 40 (2018), https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2018.pdf.

²¹⁵ *European Commission on the Environmental Implementation Review: Cyprus*, at 2 (2019), http://ec.europa.eu/environment/eir/pdf/factsheet_cy_en.pdf.

2. Storage

Electricity storage will play a key role in the transformation of the energy system, as it will enable solar and wind power generation and allow the sharp decarbonization of certain sections of the energy sector.²¹⁶ The proper integration of storage into the grid is crucial to the shift from the current centric-oriented paradigm to a distributed cellular-oriented grid with plenty of renewable energy feed-in at distribution level.²¹⁷ The use and integration of storage tools will be particularly beneficial, given the country's enormous potential for solar energy generation; the storage of variable renewables will catalyze the country's transition to a green economy and the more efficient use of its developing grid. Cyprus's first battery storage project is currently in the initial phases of construction.²¹⁸ In 2013, the University of Cyprus obtained permission from the U.N. to develop a 10 MW photovoltaic park inside the U.N. buffer zone in Nicosia, the country's capital.²¹⁹ The process of obtaining the relevant licenses finally concluded in early 2019. It is anticipated that the project will primarily cover the University's electricity needs; it will also be used as a means to test the EU-funded Delta research and innovation project.²²⁰ During the period between 2013 and 2019, a number of other storage projects have been implemented in Cyprus (run by local and international investors), namely a number of EBRD-funded photovoltaic parks in the areas of Frenaros, Nisou, Dhali, Paliometochos and Malounta.²²¹

The process of obtaining the relevant licenses for the buffer zone project lasted six years; this highlights certain deficiencies in the system, which need to be addressed in order to ensure that potential investors will not be deterred by the prospect of long and arduous licensing procedures. It is arguable that because of its location, the buffer zone storage project was inevitably (and understandably) subject to additional licensing requirements, being contingent, *inter alia*, on authorization by the U.N. On any view, however, six years is an unreasonably long time; policy makers must focus their efforts on

²¹⁶ IRENA, *supra* note 98, at 10.

²¹⁷ Christos Konomis, *First for Cyprus as it Commissions PV and ESS Project*, ENERGY STORAGE J., <http://www.energystoragejournal.com/first-cyprus-commissions-pv-ess-project/> (last visited Jan. 8, 2020).

²¹⁸ Ilias Tsagas, *Cyprus Set to Install its First Battery Storage and Blockchain Systems*, PV MAGAZINE INT'L (Mar. 27, 2019), <https://www.pv-magazine.com/2019/03/27/cyprus-set-to-install-its-first-battery-storage-and-blockchain-systems/>.

²¹⁹ Ilias Tsagas, *10 MW Installation in Cyprus Buffer Zone*, PV MAGAZINE INT'L (Jan. 2, 2013), https://www.pv-magazine.com/2013/01/02/10-mw-installation-in-cyprus-buffer-zone_10009701/.

²²⁰ *About DELTA*, DELTA PROJECT, <https://www.delta-h2020.eu/about-delta/> (last visited Jan. 8, 2020). DELTA is a three-year Research & Innovation Action project commencing 01 May 2018 and running until 30 April 2021. The project team comprises 10 organizations from 8 countries. DELTA proposes a Demand-Response (DR) management platform that distributes parts of the Aggregator's intelligence into a novel architecture based on Virtual Power Plant (VPP) principles. It will establish a more easily manageable and computationally efficient DR solution and will deliver scalability and adaptiveness into the Aggregator's DR toolkits. The Project will employ a permissioned blockchain system and utilize smart contracts to improve efficiency in demand-response settings; the purpose of this is that aggregators can supply more flexibility to the grid from small- and medium-scale prosumers than currently available. As the University of Cyprus and the Electricity Authority of Cyprus are two of the 10 partners in the Delta Project, Delta will have access to the data generated within the buffer zone and will be able to test the potential benefits of the use of blockchain for data aggregators and prosumers.

²²¹ Axel Reiserer, *EBRD Supports Expansion of Solar Energy in Cyprus*, EUR. BANK RECONSTRUCTION AND DEV. (July 1, 2016), <https://www.ebrd.com/news/2016/ebrd-supports-expansion-of-solar-energy-in-cyprus.html>.

building a reliable and efficient licensing system conducive to the proliferation of storage projects across the island and attracting investment.

The current political situation on the island, however, is not particularly favorable to new investments; Turkey's constant disregard for RoC's exclusive rights in the EEZ has led to escalating tensions between the two states, contributing to and exacerbating underlying historical tensions. Turkey has recently started drilling operations in the EEZ; its actions have been widely condemned by the international community, in particular the United States, the European Union, and Greece.²²² Cyprus has written to the UN Secretary General reiterating that Turkey's activities in the Eastern Mediterranean constitute a violation of international law,²²³ but it appears that at present, no official stance has been adopted by the UN. Turkey's actions undoubtedly raise concerns about its future behavior in respect to the buffer zone photovoltaic park. Although it appears unlikely that Turkey will act in any way to adversely affect the operation of the buffer zone photovoltaic park, it is not entirely improbable, given its recent aggressive tactics, especially in the light of a future condemnation by the UN, or an adverse finding by an international body such as the ICJ. To ensure an abundance of safe and reliable storage capacity, concerted efforts need to be made on RoC's territory, where the risk of disruption is lower, and a safer environment for investors can be guaranteed more easily.

III. LITHUANIA

A. Introduction: Lithuania, a population in major decline

A trend that has been observed since the early 1990s displays the transition from population growth, to flatline, to decline (see Figure 2). Negative population growth is often influenced by economic decline, but quickly becomes a viscous cycle of a downward spiral in the overall economy, tax revenues, decline in service provision and social infrastructure, leading to more abandoned houses and factories.²²⁴ Once negative growth has established itself within a region, it makes it less attractive to the population left behind, and increases the likelihood of them leaving as well.

²²² *Concerns Over Turkey's Drilling Operations Offshore Cyprus*, OFFSHORE ENERGY TODAY (May 6, 2019), <https://www.offshoreenergytoday.com/concerns-over-turkeys-drilling-operations-offshore-cyprus/>.

²²³ S.C. Res. 73/753, at 1 (Feb. 19, 2019).

²²⁴ Rūta Ubarevičienė & Maarten van Ham, *Population Decline in Lithuania: Who Lives in Declining Regions and Who Leaves?*, 4 REG'L. STUDIES REG'L. SCI. 57, 58 (2017).

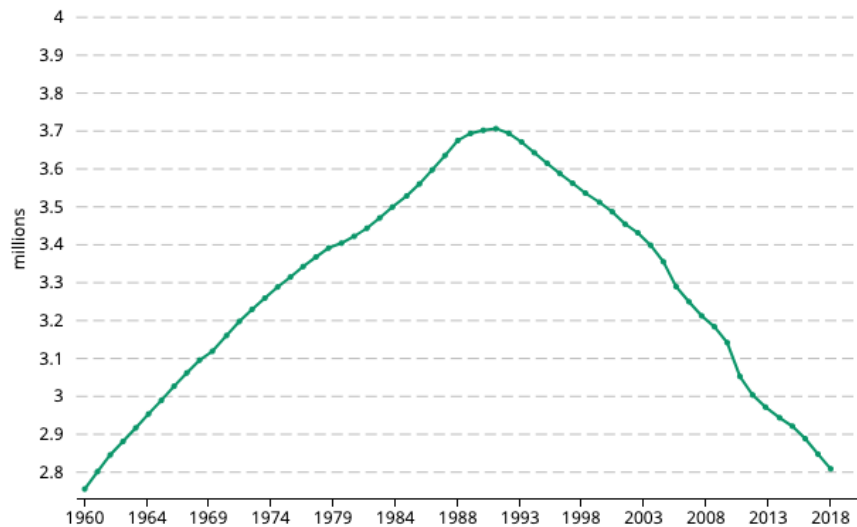


Figure 2: Eurostat, Lithuanian population 1960-2018²²⁵

Lithuania, as well as the other Central Eastern European countries were under the Soviet Communist regime. The regime promoted a command economy model based on central planning principles.²²⁶ During this time, population movement was regulated domestically as well as between the communist states with an aim to create an even population spread. This would establish a spatial distribution of economic and human resources.²²⁷ During the Soviet regime, Lithuania was a major contributor to agricultural supply and the population was encouraged to live and work in rural settlements under government-provided housing and monetary income. Towards the end of the Soviet era, close to one-third of the Lithuanian population resided in rural areas and were employed in agricultural-like jobs.

The sudden change in political and economic situation taking place in the 1990s was a clear indicator of a new regional development shaping Lithuania.²²⁸ The former Soviet system did not meet the needs of the post-socialist society. The extreme negative population growth and regional disparities in Lithuania can be linked to the former Soviet regulated planning principles. People whom had been provided jobs by the Soviet central government became unable to continue a sufficient level of employment and standard of

²²⁵ *Lithuanian Population Data 1960–2018*, <https://ec.europa.eu/eurostat/web/population-demography-migration-projections/data/database> (click Population change—Demographic balance and crude rates at national level (demo-grid); then click the “TIME” box, then, in the pop-up window, click “select all,” then scroll down to Lithuania) (last visited Jan. 8, 2020).

²²⁶ Ubarevičienė & van Ham, *supra* note 224, at 60.

²²⁷ *Id.*

²²⁸ Audrius Siaurasevicius & John Rettie, *Lithuania Breaks Away from the Soviet Union*, THE GUARDIAN (Mar. 12, 1990), <https://www.theguardian.com/world/1990/mar/12/eu.politics>.

living under the new economic system. Lithuania thought initially that a free market model would solve its former problems, but it did not. This reversed the previously controlled flow of population movement, and more people sought the larger cities for better opportunities. The rise in unemployment and economic hardship combined with accession to the European Union ended with mass emigration.

In fact, 80% of population decline in Lithuania in the last decade is due to emigration, and is amongst the highest in the EU.²²⁹ Simultaneously, birth rates dropped, and both have contributed to the negative growth. Between 1992 and 2018 nearly one fifth of the population was lost, making it one of the greatest population decline in the world (currently).²³⁰ As a result, the major population decline has affected Lithuania's potential revenue from income tax.²³¹ Positively, total revenue received from tax is steadily increasing, but could affect the national budget to allocated resources according to environmental, climate change and electricity grid infrastructure.

B. The Lithuanian Electrical Grid

1. Setting the Scene

For the past decades, Lithuania together with the other Baltic States and Poland have been connected to the old Soviet electricity grid.²³² This has led to an electricity network that is low-tech, asynchronised from the rest of Continental Europe, and at an overall energy deficit. Lithuania has become extremely energy dependent and relies heavily on supply from other states to cover its national energy demand.²³³ In 2018, Lithuania imported 36 percent of its total electricity demand from Russia, whereas national generation was only at 25 percent of national demand.²³⁴ It is therefore more important than ever for Lithuania and the other Baltic States to take full advantage of developing smarter grids and decentralization to permit better interconnectivity, which would allow flexibility to invest in renewable energy and ensure self-sufficiency and long-term sustainability.

Recent efforts have secured the decoupling agreements of the Baltic States and Poland from the Russian electricity network.²³⁵ The agreement will end years of bickering for the three Baltic States to integrate their grids with the Continental Synchronous Area. With the backing of the EU, they will assist with negotiations on how to make the transition as

²²⁹ *Migration in Numbers: Migration Trends*, EUR. MIGRATION NETWORK <http://123.emn.lt/en/#chart-1-desc> (last updated May 22, 2018).

²³⁰ *Population Development*, EUROSTAT, <https://ec.europa.eu/eurostat/web/population-demography-migration-projections/visualisations> (last visited Jan. 8, 2020).

²³¹ CTR. TAX POLICY & ADMIN., REVENUE STATISTICS (2018), <https://www.oecd.org/tax/tax-policy/revenue-statistics-lithuania.pdf>.

²³² *Grid Development: Strategic Projects*, LITGRID (2019), www.litgrid.eu/index.php/grid-development-strategic-projects/-/strategic-projects/-/779.

²³³ *Power System: National Electricity Demand and Generation*, LITGRID (2019), <http://www.litgrid.eu/index.php/power-system/power-system-information/national-electricity-demand-and-generation/3523>.

²³⁴ *Id.*

²³⁵ Alissa de Carbonnel & Andrius Sytas, *Baltic States to Decouple Power Grids from Russia, Link to EU by 2025*, THOMSON REUTERS, (June 28, 2018), www.reuters.com/article/us-baltics-energy-eu-russia/baltic-states-to-decouple-power-grids-from-russia-link-to-eu-by-2025-idUSKBN1JO15Q.

smooth as possible. By 2025, the decoupling is estimated to be complete and the Baltics will be fully connected and synchronized to the EU electricity grids. The decoupling will also pave the way to benefit from the EU's \$1.2 billion to fund the project.²³⁶ Under the new agreements, the terms dictate that states will use the current overland LitPol link between Lithuania and Poland, as well as around the territorial seas of Kaliningrad. Russia will still maintain some bargaining power with Brussels on how to continue securing energy supply to Kaliningrad.

2. *Energy Governance and Smart Grid optimization*

The Third Energy Package was adopted by the EU in 2009. This legislative measure was aimed at liberalizing EU energy markets, allowing for superior grid connectivity between member states, and ensuring energy democratization and decentralization on an EU level. In accordance with the energy package, Lithuania reformed its electrical sector by separating transmission from generation and supply activities, thus achieving unbundling.²³⁷ This has been an important step towards accomplishing increased efficiency of the electricity system, preventing discrimination against new market participants, optimising use of grid infrastructure, incentivizing domestic and foreign investment, and ensuring competitive prices for end-users.²³⁸

The energy package was fully integrated in Lithuania by 2012, when the Government adopted a resolution approving the activities required to separate transmission of electricity undertakings from generation and supply.²³⁹ Shortly following the successful implementation, procedures for certifying Litgrid AB as Lithuania's transmission system operator (TSO) were enacted.

In Lithuania, electricity generated from renewable sources are mainly promoted through a floating feed-in-premium. This is a type of price-based policy instrument where eligible renewable energy generators are compensated by a premium price on top of the wholesale price. Renewable Energy Sourced (RES) plants with a capacity exceeding 10kW secure such a rate through tenders.²⁴⁰ An immediate area of improvement within the regulation is to extend the support scheme to new RES installations. However, there are plans to introduce technology neutral tenders together with fixed feed-in-premiums during 2019. Furthermore, all producers of electricity from renewable energy may apply for loans and subsidies through the Environmental Project Management Agency (EPMA) in

²³⁶ *Baltic States to Decouple Power Grids from Russia, Link to EU by 2025*, DEUTSCHE WELLE (June 28, 2018), www.dw.com/en/baltic-states-to-decouple-power-grids-from-russia-link-to-eu-by-2025/a-44449454.

²³⁷ *Electricity Sector*, MINISTRY OF ENERGY OF THE REPUBLIC OF LITH. (Sep. 14, 2015), <http://enmin.lrv.lt/en/sectoral-policy/electricity-sector-1>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 20(3) (Ministry of Energy of the Republic of Lithuania, 2016).

cooperation with the Climate Change Special programme.²⁴¹ Solar, wind and biomass production are currently benefitting from net-metering.²⁴²

Further support schemes exist for RES related to cooling and heating purposes, which are exempt from environmental pollution taxes and are also eligible for subsidies and loans under EPMA.²⁴³ Consequently, there is a priority purchase for all heat suppliers to purchase heat produced from renewable energy sources, unless renewable heating exceeds demand.²⁴⁴

Lithuania's electrical energy policy is mainly governed by the Law on Electricity (LoE)²⁴⁵ and the Law on Energy from Renewable Sources (LERS).²⁴⁶ The former establishes the legislative framework for the organization of the Lithuanian electricity sector, and regulates the relationship between all the market players.²⁴⁷ The legislation ensures the unbundling from commercial interest of the electricity market for transmission and distribution grid operators.²⁴⁸ Furthermore, it promotes the development of the internal electricity market and its interconnectivity and the modernization of technical market implementations. The advancement of technological measures and increased interconnectivity echoes through the regulation and promotes a healthy future for developing the energy efficiency of the Lithuanian electricity grid. This will allow for new technologies based on RES to foster growth and connectivity.

LERS first articles establishes the purpose and objective of the legal regulation and promotion of energy produced from renewable sources.²⁴⁹ The legislation quickly ascertains that the legal basis will be provided to state administration, whom will supervise and control the renewable energy sector and all related activities and parties. It is evident that there is still Soviet influence in the language of the legislation, almost an unwritten obligation to carefully monitor the movement and undertakings related to the energy sector. Having said that, there is still a clear objective and purpose to establish sustainability of the

²⁴¹ *Republic of Lithuania - Environmental Projects Management Agency APVA Profile*, ENVTL. PROJECTS MGMT. AGENCY, <http://www.environmental-expert.com/companies/republic-of-lithuania-environmental-projects-management-agency-apva-26200> (last visited Jan. 8, 2020).

²⁴² Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 13(2) (Ministry of Energy of the Republic of Lithuania, 2016).

²⁴³ *EU Structural Assistance for 2014–2020*, ENVTL. PROJECTS MGMT. AGENCY (2019), <https://www.apva.lt/en/epma-services/eu-structural-assistance-2014-2020/>.

²⁴⁴ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 3(2) (Ministry of Energy of the Republic of Lithuania, 2016).

²⁴⁵ Elektros Energetikos Įstatymas [Law on Electricity], Oficialusis Leidinys 160-7576, *translated in* Official Gazette 2011, (Ministry of Energy of the Republic of Lithuania, 2011).

²⁴⁶ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 1 (Ministry of Energy of the Republic of Lithuania, 2016).

²⁴⁷ Elektros Energetikos Įstatymas [Law on Electricity], Oficialusis Leidinys 160-7576, *translated in* Official Gazette 2011, art. 1 (Ministry of Energy of the Republic of Lithuania, 2011).

²⁴⁸ *Id.* at art. 3(4).

²⁴⁹ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 1–5 (Ministry of Energy of the Republic of Lithuania, 2016).

use of renewable energy sources and to promote further development and innovation of technologies and consumption of energy from renewable sources.²⁵⁰ LERS also understands the need to promote international relations in order to foster strong interconnectivity and energy trading to secure supply and balance of energy.

By 2020, three mandatory targets related to the energy sector have been established by the legislation:

- i. A minimum of 10 percent of energy consumption in the transport sector must be sourced from renewables;
- ii. 20 percent of gross annual energy consumption must be derived from renewable energy sources; and
- iii. 60 percent of district heat and 80 percent of produced household heating must come from renewable energy sources.²⁵¹

Furthermore, the legislation informs of four additional targets related to the electricity sector:

- i. To increase total installed capacity of wind power plants that are connected to the grid up to 500 MW;
- ii. To increase total installed capacity of solar energy plants connected to the grid up to 10 MW, excluding smaller installations generating less than 30 kW;
- iii. To increase the total installed capacity of hydro power plants connected to the grid up to 141 MW; and
- iv. To increase total installed capacity of biofuel power plants connected to the grid up to 105 MW.²⁵²

These targets reflect the country's initiative to establish energy independence and ultimately energy democratization (see Figure 3). Developing renewable energy technologies and enhancing the electricity grid from the bottom-up to handle digital computerized equipment will allow for smarter grid solutions. The Lithuanian network of transmission lines, substations, transformers and other sources that deliver electrical energy from power plants to households and businesses will become more technically advanced, and permit two-way communication between the various end points. It will be much easier to monitor the efficiency of the network through computer systems that will oversee automation, controls, and provide instant analysis of the network's balancing equation.

²⁵⁰ *Id.*

²⁵¹ *Id.* at art. 1(5).

²⁵² *Id.* at art. 13(3).

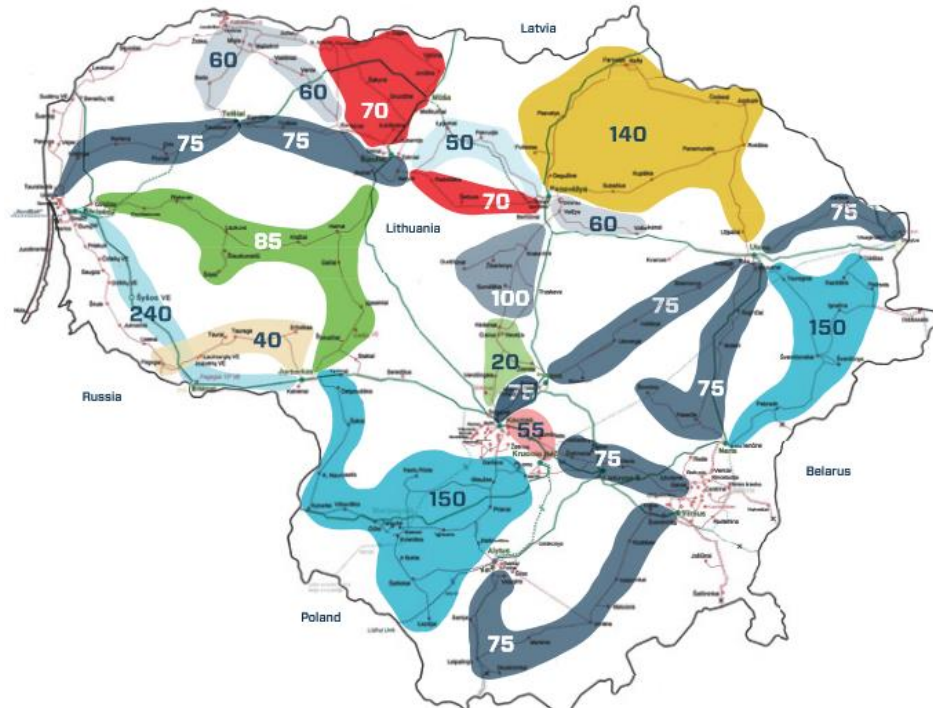


Figure 3: Map of RES Power Plant Connections to the 330-110 kV Transmission Grid by 2030.²⁵³

3. *Proactive consumer participation*

The National Energy Independence Strategy has defined in their long-term perspective that electricity consumers will eventually become proactive participants (prosumers) and benefit from self-generation and new technologies including smart meters.²⁵⁴ This will allow prosumers the opportunity to use energy generated from renewable energy sources for their own needs and receive a reward for any surplus energy supplied back to the grid.²⁵⁵ According to national targets in the report, prosumers are perceived to account for 2 percent of all consumers by 2020, at least 30 percent by 2030 and at least 50 percent by 2050.²⁵⁶

²⁵³ LITGRID, THE DEVELOPMENT OF THE LITHUANIAN ELECTRIC POWER SYSTEM AND TRANSMISSION GRIDS 14 (2014).

²⁵⁴ National Energy Independence Strategy (2018) – Executive Summary – Energy for Competitive Lithuania (Unofficial translation from Lithuanian to English), http://enmin.lrv.lt/uploads/enmin/documents/files/National_energy_independence_strategy_2018.pdf.

²⁵⁵ Dėl Nacionalinės Energetinės Nepriklausomybės Strategijos Patvirtinimo [On the Adoption of National Energy Independence Strategy], Oficialusis Leidiny 80-4149, ch. 1 § 2 (June 26, 2012).

²⁵⁶ *Id.*

There are many advantages of allowing prosumers to enter the market in a smart grid scenario, and it is something Lithuania could benefit from by decentralizing its domestic source of energy generation and storage. Regulation in this area must be encouraged and requires further development and support to allow consumers to become prosumers. A large prosumer network would assist in creating flexibility with the transfer and storage of surplus energy on the electricity grid. Smart grid technology would eventually be able to self-analyze where energy is needed and balance the supply and demand equation.

4. Support Schemes

An important factor for the Baltic States on achieving energy independence from the Russian-controlled IPS/UPS system and joining a decentralized and democratized European power system is to reduce reliance on energy generated from fossil fuels. Lithuania will thereby transcend a lot of the already adapted methods available in Europe that will aid them in achieving better exchange of energy. As shown in Table 1, Lithuanian legislation is showing avid signs of support, the release from fossil fuels through supportive quota obligations, subsidies, and tax regulation mechanisms.

Support Scheme	Custodian	Description
Quota Obligation	Law on Energy from Renewable Sources	Fuel traders are obligated to sell petrol containing 5-10% biofuels and diesel containing at least 7% biofuels.
		The share of biofuels in petrol and diesel is set by the Government or its authorized institutions. ²⁵⁷
Subsidies	National Paying Agency under the Ministry of Agriculture	Part of the price of rapeseed oil used for the production of rapeseed methyl ester and part of the price of rapeseed and cereal grain purchased for the production of

²⁵⁷ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 33(3) (Ministry of Energy of the Republic of Lithuania, 2016).

		dehydrated ethanol will be reimbursed. ²⁵⁸
Tax Mechanisms	Law on Environmental Pollution Taxes	Natural and legal persons using biofuels in vehicles are exempt from the environmental pollution tax on their vehicle emission. ²⁵⁹
	Relief from Excise Duty	Excise tax relief applies to biofuels for transport. The rate of excise tax is reduced in proportion to the percentage of biomass per tonne of biofuel. The relief applies to bioethanol, biodiesel, bio-ETBE and vegetable oil. ²⁶⁰

Table 1: Support schemes²⁶¹

The various regulatory support schemes are attempting to indirectly deter the use of fossil fuel based energy sources. In return, the balancing equation Lithuanian policy makers are attempting to establish are allowing alternative fuels from renewable sources to integrate themselves in the market. Together with obligations of grid expansion and optimization, this would allow for increased capacity of electricity generated from RES.

However, where there is a desire to install an offshore windfarm, the applicant must apply and be granted a license to use a territorial sea within the exclusive economic zone (EEZ) in the Baltic Sea for the development and maintenance of the windfarm.²⁶² The current legislation only grants tenders that last 35 years without the possibility of

²⁵⁸ *Subsidy (National Paying Agency Under the Ministry of Agriculture)*, RES LEGAL, <http://www.res-legal.eu/search-by-country/lithuania/single/s/res-t/t/promotion/aid/subsidy-national-paying-agency-under-the-ministry-of-agriculture/lastp/159/> (last updated Dec. 21, 2018).

²⁵⁹ *Tax Regulation Mechanism (Law on Environmental Pollution Taxes)*, RES LEGAL, <http://www.res-legal.eu/search-by-country/lithuania/single/s/res-hc/t/promotion/aid/tax-regulation-mechanism-law-on-environmental-pollution-taxes/lastp/159/> (last updated Dec. 21, 2018).

²⁶⁰ *Country Profile-Lithuania*, EUR. ENV'T AGENCY (Dec. 15, 2014), <https://www.eea.europa.eu/publications/energy-support-measures/lithuania-country-profile/view>.

²⁶¹ Jurga Tallat-Kelpšaitė, *Summary of Support Schemes: Promotion in Lithuania*, RES LEGAL (Dec. 19, 2018), www.res-legal.eu/search-by-country/lithuania/tools-list/c/lithuania/s/rese/t/promotion/sum/160/lpid/159/.

²⁶² Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 22 (Ministry of Energy of the Republic of Lithuania, 2016).

extension.²⁶³ There is therefore an unanswered question as to what happens when the tender has expired. This is an area of improvement, to either allow for longer term tenders, or to add the possibility of extending or renewing the agreement to operate in the Baltic Sea or the coastal areas within Lithuania's EEZ.

5. *LitGrid – The Transmission System Operator*

The system operator for the Lithuanian electricity grid is LitGrid. Its purpose is to support the stable operation of the electricity system and to manage the flow of electricity and to establish conditions for healthy competition in the electricity market.²⁶⁴ LitGrid is also responsible for integrating the Lithuanian electricity system into the European electricity infrastructure.

LitGrid is also responsible for the continuous growth and expansion of the distribution and transmission grid. This includes reconstructing the existing grid and install new distribution grids from the bottom-up by considering smart grid technologies and development trends seen in other markets.²⁶⁵ Moreover, the grid operator must ensure that the grid is evolved enough to secure reliable operation of the distribution grid and its interconnections with other grids.²⁶⁶ Lithuania's grid strategy is also outlined in its Smart Specialisation Strategy (S3), and covers development strategies for all technologies related to building and supporting development of Lithuania's smart grid.²⁶⁷

Lithuanian legislations are showing ample engagement to foster growth and enhance its smartness and technological capabilities. At the present time and in-line with its legislative and strategic obligations, LitGrid's online tools have been developed to secure the reading and public display of real-time operational data on the power system, grid development and electricity market.²⁶⁸ Especially interesting and relevant are grid development projects and grid performance. LitGrid publishes ten-year grid development plans and reviews them on an annual basis.²⁶⁹ Included in the plans are forecasts for electricity demand, power plant capacity, power balances, and information on the transmission grid, its development, and current and planned investments. The current investment value spanning 2018-2027 amounts to 766 million Euros.²⁷⁰

²⁶³ *Resolution No. 03-229 / 2011*, RES LEGAL, <http://www.reslegal.eu/searchbycountry/lithuania/sources/t/source/src/resolution-no-03-2292011/> (last updated Dec. 19, 2018).

²⁶⁴ *About Us: Activities*, LITGRID (2019), <http://www.litgrid.eu/index.php/about-us/activities/599>.

²⁶⁵ *Elektros Energetikos Įstatymas* [Law on Electricity], Oficialusis Leidinys 160-7576, *translated in* Official Gazette 2011, art. 39(2) (Ministry of Energy of the Republic of Lithuania, 2011).

²⁶⁶ *Id.* at art. 39(3).

²⁶⁷ *See* On the Approval of the Programme on the Implementation of the Priority Areas of Research and (Socio-Cultural) Development and Innovation of Research (Smart Specialisation) and Their Priorities, No. 411 (2014), https://s3platform.jrc.ec.europa.eu/documents/20182/223684/LT_RIS3_201404_Final.pdf/0e516a08-b6d8-4806-af39-dac515eb9c38 (Lth.).

²⁶⁸ *Lithuanian Electricity Transmission System Operator Litgrid*, LITGRID, <http://www.litgrid.eu/>.

²⁶⁹ *Grid Development*, LITGRID, <https://www.litgrid.eu/index.php/grid-development/-/electricity-transmission-grid-ten-year-development-plan/3851> (last visited Jan. 8, 2020).

²⁷⁰ David Napler, *Litgrid: Connecting Baltic States to European Power Network*, ENERGY FOCUS at 8,10 (June 6, 2019).

LitGrid is overseeing the Synchronization project, ensuring that the Baltic States are completely decoupled from the Russian infrastructure and connected to continental Europe by 2025.²⁷¹ The cost of completing this project is estimated to range between 435 million to 1.071 billion Euros. In addition, there are currently nine grid-infrastructure projects listed in their repertoire to be under construction or planned for development.²⁷²

Furthermore, there is an imposed obligation on the grid operator to allow renewable energy source (RES) plants to not only connect to the grid, but to also receive a premium condition. A RES plant can require the grid to undergo large scale enhancement to ensure its optimization, volume handling and continuous expansion. A RES plant will either be connected to the transmission grid or the distribution grid depending on the scale of its electricity generation. A thorough procedure flow on how a RES plant is to be connected to the grid is specified in the Law on Energy from Renewable Sources.²⁷³

In terms of distribution of cost, 40 percent shall be borne by the RES plan operator for installations exceeding 350 kW capacity, and 20 percent of connection cost for plants with lower capacity. The remainder of the cost is covered by a public service obligation (PSO) tariff, which is ultimately paid for by consumers.

B. Achieving Energy Democratization

At present, there are two sides to Lithuania's electricity problem. First, Lithuania is dependent on Russian electrical energy to fulfil national demand.²⁷⁴ Second, it depends on Russian grid infrastructure.²⁷⁵ Following the shut-down of the nuclear power plant in Ignalina in 2009, import of electricity covered nearly three quarters of its demand.²⁷⁶ In addition to being on Russian infrastructure, the frequency at which the electricity flows, the voltage of the lines, and balance of the grid is also controlled by the Russian system. It is therefore imperative for Lithuania and the other Baltic States to ensure European integration and decoupling from the Russian system to seek energy democracy with continental Europe.

Once decoupled from the Russian controlled network, Lithuania will be able to take better advantage of the Continental European power system and adopt better European transparent standards for system control of the power network. Integration into the European power grid is arguably the number one strategic priority for Lithuania's grid system operator LitGrid.²⁷⁷

²⁷¹ *Grid Development: Synchronization*, LITGRID, www.litgrid.eu/index.php/grid-development-/strategic-projects-/synchronous-operation-/137#synchronization_visual (last visited Jan. 8, 2020).

²⁷² *Grid Development: Infrastructure Projects*, LITGRID, <https://www.litgrid.eu/index.php/grid-development-/infrastructure-projects-/klaipeda-telsiai/700> (last visited Jan. 10, 2020).

²⁷³ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 14 (Ministry of Energy of the Republic of Lithuania, 2016).

²⁷⁴ Simon Hoellerbauer, *Lithuania Moves to Bolster Electricity Security*, FOREIGN POL'Y RES. INST. (Mar. 23, 2016), www.fpri.org/article/2016/03/lithuania-moves-bolster-electricity-security/.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Grid Development: Strategic Projects*, *supra* note 232.

Conversely, to address these concerns, LitGrid implemented two strategic projects: NordBalt and LitPol, which link the Lithuanian grid to the Swedish and Polish grids, respectively.²⁷⁸ This secures a steady flow of energy supply from the two countries to help cover Lithuania's national demand. In 2018, the NordBalt link from Sweden supplied 23 percent of total energy demand for Lithuania, and has been a key supplier since its upstart in 2015.²⁷⁹ This is part of the longer-term grid decentralization—connecting to the north European electricity markets first, and subsequently to the common European electricity market.

Currently, Lithuania is involved in four projects related to the synchronization of power systems which involves three power transmission lines between Krūnois PSP: Alytus (300 kV), Marijampolė-Lithuanian border (400 kV), and Visaginas NPP-Kruonis PSP (330 kV), as well as various aspects of integrating the Baltic States' network to the continental European network.²⁸⁰ These are part of the European Commission's common interest project, presently consisting of 195 key energy infrastructure projects.²⁸¹

In April 2019, the European Commission approved a scheme to support electricity production from renewable energy sources in Lithuania.²⁸² The support scheme is open to all types of renewable energy generation and will contribute to the EU environmental objectives. A total budget of 385 million Euros has been allocated to all Lithuanian renewable installations and aims to contribute to Lithuania's transition to low carbon and climate friendly energy supply, in line with national and EU environmental objectives as well as state aid rules.²⁸³ On a national level, Lithuania implemented this scheme to support new RES installations including wind, solar, and hydropower. This aims to help Lithuania meet its new 2025 targets of 38 percent gross energy consumption to be sourced from renewable sources.²⁸⁴

C. Smart Metering Systems

One of the duties imposed on the distribution grid operator is to organize, install, operate, and maintain the metering of electricity transmitted through the distribution grids, and to ensure the installation of smart metering systems.²⁸⁵ LitGrid, as the grid operator, must also carry out measurements of electricity distributed through the grid from the point

²⁷⁸ Stasys Backaitis, *Are All Lithuanian Energy Problems Now Resolved? Lithuania's Energy Timeline – from Total Dependence to Independence*, VILNEWS, www.vilnews.com/2015-10-are-all-lithuanian-energy-problems-now-resolved (last visited Jan. 8, 2020).

²⁷⁹ *Power System: National Electricity Demand and Generation*, LITGRID, www.litgrid.eu/index.php/power-system/power-system-information/national-electricity-demand-and-generation/3523 (last visited Jan. 8, 2020).

²⁸⁰ *Grid Development: Strategic Projects*, LITGRID, <https://www.litgrid.eu/index.php/grid-development-/strategic-projects-/strategic-projects-/779.#> (last visited Feb. 12, 2020).

²⁸¹ *Id.*

²⁸² European Commission Press Release IP/19/2230, *State Aid: Commission Approves €385 Million Support for Production of Electricity from Renewable Sources in Lithuania* (Apr. 23, 2019).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Elektros Energetikos Įstatymas [Law on Electricity]*, Oficialusis Leidinys 160-7576, *translated in Official Gazette* 2011, art. 39(4) (Ministry of Energy of the Republic of Lithuania, 2011).

of generation to the end user, and ensure that the technological enhancement of the grid is in accordance with its smart grid objectives.²⁸⁶

The state-owned energy distribution operator, JSC Energijos Skirstymo Operatorius (ESO), is responsible for Lithuania's procurement to roll-out smart meters, and is also the distribution system operator (DSO). According to EU measures, smart meter roll-out for Lithuania should achieve 80 percent by 2020; however, that is not currently the case.²⁸⁷ The same EU report made key assumption data for Lithuania and anticipated a 2.3 percent reduction in energy consumption per household with smart meters. Other benefits to cost of installation include reduced administration of meter readings, reduced technical losses, electricity cost savings, reduction in commercial losses, reduction of CO₂ emission, and an avoided (continued) investment cost in standard meters.²⁸⁸

ESO carried out a pilot project to test the benefit and implementation of smart meters in various locations in Lithuania, ranging from urban, suburban, and rural areas, as well as old and new buildings, for a total of 2927 smart meters.²⁸⁹ Following a survey, the main benefits recognized by the respondents were automatic meter readings, easier to pay bills, and tracking of energy consumption, resulting in an average of 7.1 percent electricity saved. Ultimately, the pilot wanted to confirm and conclude the benefits to household consumers, namely that consumers are given better control and transparency of their energy usage, and improved understanding of how their energy bill is broken down with close to real-time accuracy. This allows consumers to identify how they could save money by changing their energy consumption habits, or by changing their electricity provider.

Additionally, the pilot has helped ESO to set a target for the deployment of smart meters. By the end of 2023, fully integrated IT systems and data exchange platforms will be implemented and ready to receive incoming data from approximately 1.8 million smart meters. In early March 2019, ESO issued a call for tenders to purchase 1.76 million smart meters and accompanying IT solutions. The tender is estimated to last for 10 years, where the winning bidder will commence smart meter roll-out in the fourth quarter of 2020 with a planned completion at the end of 2023.²⁹⁰

In the late fall of 2017, EY Baltic together with state-owned ESO conducted an extensive cost-benefit analysis of installing smart meters in Lithuania.²⁹¹ The analysis is based on different data and assumptions to provide a supporting report on the instalment and application of smart meters. The analysis disclaims that it was not approved by the

²⁸⁶ *Id.* at art. 39(5).

²⁸⁷ INST. OF COMMUN & COMPUT. SYS. OF THE NAT'L TECH. UNIV. OF ATHENS & AF-MERCADOS EMI, STUDY ON COST BENEFIT ANALYSIS OF SMART METERING SYSTEMS IN EU MEMBER STATES 65 (2015) <https://ec.europa.eu/energy/sites/ener/files/documents/AF%20Mercados%20NTUA%20CBA%20Final%20Report%20June%202015.pdf>.

²⁸⁸ *Id.* at 66.

²⁸⁹ Evaldas Žibaitis, *Smart Metering Program and Procurement Strategy*, ESO (Sept. 19, 2018), [http://www.eso.lt/stream/101696/20180919%20eso%20%20smart%20metering%20programee%20\(presentation\).pdf](http://www.eso.lt/stream/101696/20180919%20eso%20%20smart%20metering%20programee%20(presentation).pdf).

²⁹⁰ *Id.*

²⁹¹ *Smart Program Update*, ESO, <http://www.eso.lt/en/smart-metering-program/smart-program-update.html>.

National Commission for Energy Control and Prices and has not included assessment of any regulatory aspects.²⁹²

The report assesses multiple areas of the Lithuanian gas and electricity sector to display trends and spikes in hourly demand. Most of the figures used are from 2016, but should provide an accurate and relevant scope for future consumer demands with emerging technologies in mind.

Figure 4 below displays hourly electricity demand per month in 2016. Though there's a slightly lower usage trend during the summer months, the curve evidences a similar pattern throughout each 24-hour cycle, with the first raise at around 5:30am. The electricity demand remains fairly stable from 8am through 4pm. This could signal that the Lithuanian population is steadily engaging in consumption throughout the day and only slowing down consumption during the late hours. Recognizing and capturing these trends are essential to understanding how to build a strong response program.

²⁹² *Id.*

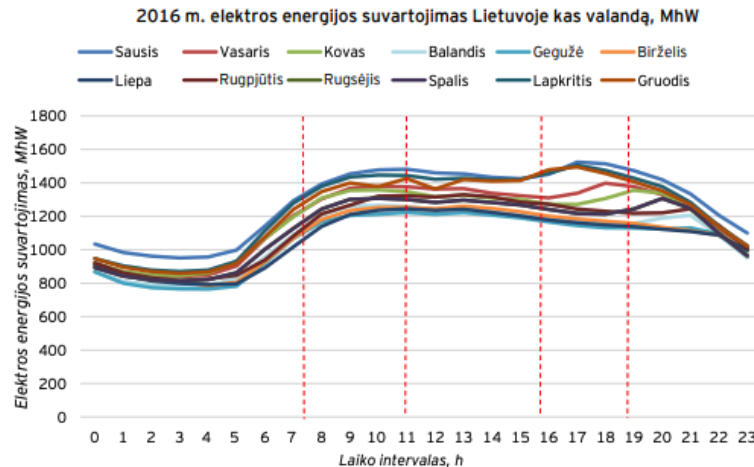


Figure 4: 2016 m. elektros energijos suvartojimas Lietuvoje kas valandą, MhW²⁹³

Educating the population about when they consume energy and how that reflects on their monthly energy bill may influence their behavior (see Figure 5). The installation of smart metering technology would allow the individual user to discover their consumption patterns. Additionally, consumption data would also be captured by the grid operators to better understand when peak demand is during the day. This is valuable information to solve the balancing equation for when supply is needed in the different geographical regions.

²⁹³ ERNST & YOUNG BALTIC, IŠMANIOSIOS ENERGIJOS APSKAITOS DIEGIMO LIETUVOJE KĄSTŲ IR NAUDOS ANALIZĖ 59 (2018), http://www.eso.lt/download/150035/2017%20m.%20kaštų_naudų%20analizė.pdf (Lth.).

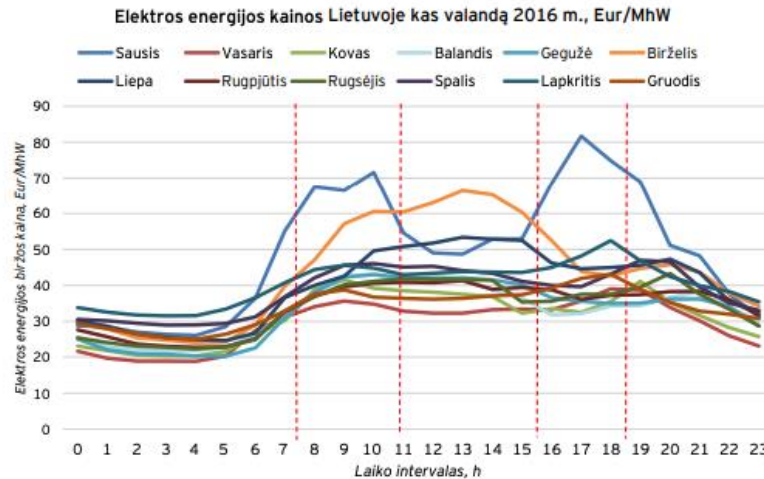


Figure 5: Elektros energijos kainos 2016 m. Lietuvoje kas valandą, Eur/MhW²⁹⁴

D. Demand Response

There is an inherent importance in acknowledging the significance for integrating demand response (DR) and energy efficiency measures in EU member states. Such measures have been conducted by LitGrid AB and Energijos Skirstymo Operatorius (ESO) AB through a study published in 2019.²⁹⁵ The study provides an oversight over the current EU regulatory standing and shows how demand response may assist towards deregulation and the decentralization of electricity distribution.

Demand response involves instigating new consumption patterns in order to balance the supply of electricity. This means that demand should equal supply; when less electricity is in circulation, consumption demand must reflect this fact, and vice-versa. Demand response helps to keep the cost of electricity down and reduces overall energy consumption at peak points of the day. The report by LitGrid and ESO identified four main types of demand response relevant to Lithuania:

- The shifting of electricity demand from one period of time to another.²⁹⁶
- Fuel shift.²⁹⁷

²⁹⁴ *Id.* at 60.

²⁹⁵ EA ENERGY ANALYSES, DEMAND RESPONSE: POTENTIAL DR SERVICES AND TECHNICAL REQUIREMENTS 4 (2017), https://www.ea-energianalyse.dk/reports/1735_WP_1_Report_Final.pdf.

²⁹⁶ This may include water treatment plants or industry with a number of pumping processes that do not need to run continually and can therefore run during times with low electricity prices.

²⁹⁷ With end-user application to better rely on more than one fuel input in order to coincide with their heat and/or electricity needs.

- Utilisation of back-up systems.²⁹⁸
- Peak shaving/valley filling.²⁹⁹

Within Europe, the Smart Energy Demand Coalition (SEDC) performed regular status updates of regulatory frameworks for incentive-based demand response.³⁰⁰ The latest status report highlights a few items:

- Regulatory framework for demand response in Europe is showing progression
- Restricted consumer access to demand response remains as a barrier to the effective functioning of the market
- Noteworthy progress has been made in opening balancing markets to demand-side resources
- The wholesale market must become more open to demand-side resources
- Local system services are not yet commercially tradeable in European countries

The SEDC has concluded that markets operating in the Nordic spot trading are not offering good frameworks for incentive-based demand response. The same extends to Lithuania, who has been excluded from the overall status report due to little or no progress in demand response development.³⁰¹

Most EU member states face similar development challenges when it comes to demand response.³⁰² Small scale end-users are pressed to have smart meters installed in order to measure their usage, prices, and trends, thereby allowing end-users to self-analyze when it is best to consume energy. Relying on smart meter technology is not a negative in itself, but requires a large-scale installation procedure, which costs taxpayers the price of the device and administration fees (installation). Smart Metering technology is arguably one of the key business enablers for smart grids.³⁰³

Lithuanian legislation covers monitoring of the balancing equation between demand and supply in relation to the reliability of the transmission and distribution grids.³⁰⁴ In that regard, the National Control Commission for Prices and Energy (the Commission) is obligated to publish annual reports containing information about the electricity demand and supply balance at national level, expected future demand of electricity, and supply

²⁹⁸ Targeting public, industrial and commercial sites and building that have back-up generators when electricity supply is interrupted. These may also be utilized for demand response as it maintains a certain amount of reserve energy.

²⁹⁹ This refers to reducing electricity demand when the prices are high, without using the same electricity at another point in time. Valley filling is the opposite. This type is best utilized for changing consumer habits in times of extreme pricing circumstances.

³⁰⁰ *Smart Program Update*, *supra* note 291.

³⁰¹ *Id.* at 18.

³⁰² SMART ENERGY DEMAND COAL., MAPPING DEMAND RESPONSE IN EUROPE TODAY 2015, 11 (2015), <http://www.smartenergy.eu/wp-content/uploads/2015/09/Mapping-Demand-Response-in-Europe-Today-2015.pdf>.

³⁰³ *Demand Response Status in EU Member States*, *supra* note 6, at 12.

³⁰⁴ *Elektros Energetikos Įstatymas* [Law on Electricity], Oficialusis Leidinys 160-7576, *translated in* Official Gazette 2011, art. 19(1) (Ministry of Energy of the Republic of Lithuania, 2011).

proposals. It shall also include development of electricity capacity and measures for satisfying electricity demand at peak times.³⁰⁵

By returning to Lithuania's consumption data, it is clear to see that total demand for electricity between 2014 to 2018 increased by nearly 10 percent.³⁰⁶ Comparing the demand to the price per kWh for households, data displays that there has been a price reduction of about 18 percent over the same period.³⁰⁷ The increase in supply and reduction of price per kWh coincides with various occurrences: connection of NordBalt power line to Sweden and LitPol link to Poland, increased export of electricity (especially to Poland), increased import of electricity from Sweden, and an increase in electricity generated from renewable sources.

The National Control Commission for Prices and Energy plans are to lay down the technical modalities for demand response measures, which will include consumer access to such measures and participation of demand response measures in the electricity market. Lithuania offers dynamic pricing for demand response measures that are offered via network or retail tariffs, including time-of-use tariffs and real-time pricing. The prices for electricity are state regulated, and the DSO provides six to eight plans for consumers, taking consumption, time zones, and minimum amount consumed into account.³⁰⁸

Furthermore, there is an aim to switch from regulated electricity prices to a market-based model. This is based on the balance of supply and demand. Together with European Union backing, this model of market-based prices will promote consumer empowerment with the establishment of decentralized system development, distributed generation, and increased renewable resources in the household sector. Future aspects aim at inviting domestic consumers to participate in the electricity market and to connect to the grid as a prosumer. Domestic renewable integration will be widely used to aid in user load management and energy storage management, with an aim to improve energy efficiency and decarbonization at a lower cost.³⁰⁹

³⁰⁵ *Id.*

³⁰⁶ *Power System: National Electricity Demand and Generation*, LITGRID, <http://www.litgrid.eu/index.php/power-system/power-system-information/national-electricity-demand-and-generation/3523> (last visited Jan. 8, 2020).

³⁰⁷ Ian Tiseo, *Lithuania: Electricity Prices for Households 2010-2018, Semi-Annually*, STATISTA (May 22, 2019), www.statista.com/statistics/418098/electricity-prices-for-households-in-lithuania/.

³⁰⁸ LITH. MINISTRY OF ENERGY & LITH. MINISTRY OF ENV'T, INTEGRATED NATIONAL ENERGY AND CLIMATE PLAN OF THE REPUBLIC OF LITHUANIA: DRAFT VERSION (2018), https://epilietis.lrv.lt/uploads/epilietis/consultations/docs/7097_d1ac7d8d6a5e703f951ef9e14643cc26.pdf.

³⁰⁹ *Id.* at 99.

E. Cross-Border Relations and Power Grid Synchronization

Lithuania as well as other Baltic states have long been controlled by Russian government agencies and Russian owners of power infrastructure.³¹⁰ In July 2018, a political agreement was signed in Brussels to free the Baltic States from the Russian regime and bring power synchronization with the Continental European electrical grids.³¹¹ The synchronization will take place between the LitPol Link.³¹²

As depicted in Figure 6, Lithuania is a net importer of electrical energy, and there's a genuine concern among Lithuanians about its energy security due to its reliance on Russian gas.³¹³ Since nuclear power is not an option, it is imperative that the government looks to invest in renewables in an effort to improve their energy system.

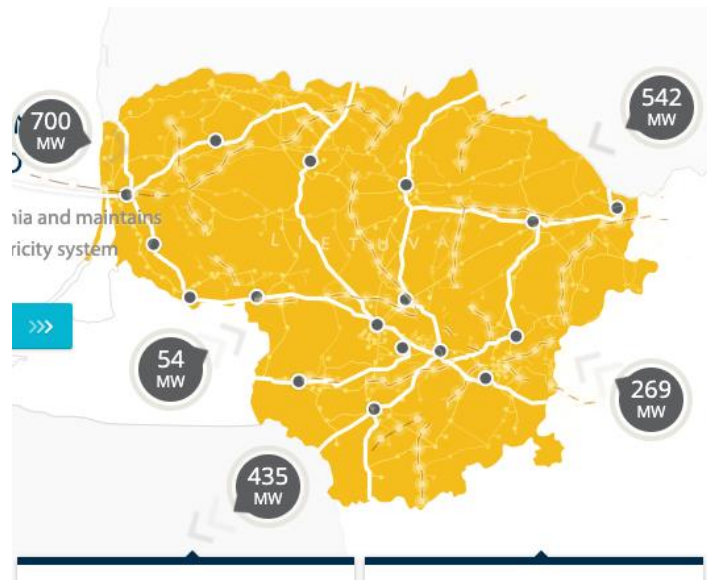


Figure 6: Litgrid flow of supply from interconnectors.

³¹⁰ Commission Report Juncker Commission Ends Energy Isolation and Increase Solidarity and Energy Security (2018), https://ec.europa.eu/energy/sites/ener/files/energy_solidarity_security.pdf.

³¹¹ BNS, Power Grid Synchronization Is Final Step in Lithuania's European Integration - President, DELFI (June 28, 2018), en.delfi.lt/business/power-grid-synchronization-is-final-step-in-lithuanias-european-integration-president.d?id=78431331.

³¹² BNS, Technical Scenario for Baltic Grid Synchronization Approved in Brussels (Updated), DELFI (Sept. 14, 2018), <https://en.delfi.lt/business/technical-scenario-for-baltic-grid-synchronization-approved-in-brussels-updated.d?id=79070143>.

³¹³ Energiewende Team, Lithuania's Energy Transition at a Crossroads, ENERGY TRANSITION (Sept. 15, 2017) <https://energytransition.org/2017/09/lithuanias-energy-transition-at-a-crossroads/>.

Comparably, Lithuania is one of the smallest energy consumers in the Baltic region and the EU. Yet, Lithuania represents one of the most complex examples of energy security issues. In 2009, Lithuania shut down its final nuclear reactor, which was of similar construction to the Chernobyl plants in Ukraine. Nuclear power was the main source of electrical energy generation, and Lithuania was able to export 58 percent of total electrical energy generated.³¹⁴

The closure of the final power plant increased the need to import energy to satisfy demand. In order for Lithuania to become more independent, it needed to transition to smarter and more sustainable solutions for energy generation and reduce its import dependencies from Russia, which was 63 percent in 2012.

Interconnections to other Baltic states as well as the Nordic states are key features of Lithuania's effort in decentralizing its electricity grid.³¹⁵ The Baltic Energy Market Interconnection Plan (BEMIP) is looking to achieve exactly this through the termination of energy isolation by creating an open and integrated regional electricity and gas market between EU states in the Baltic Sea region.³¹⁶ Initially, the focus under the BEMIP was to establish routines around gas and electricity, and building infrastructure to increase power generation. A second Memorandum of Understanding (MoU) was signed between a number of parties on June 8, 2015, extending the initiative's gambit to include security of supply, energy efficiency, renewable energy generation, and the integration of the Baltic States' synchronization to the Continental European electricity grid.³¹⁷

Evidence of the BEMIP's initiative is the interconnectivity of LitPol with the Nordic electricity markets (Finland and Sweden). In addition to Estlink and Nordbalt, the Baltic States have reached an interconnectivity of 23%, and have become one of the best interconnected regions in Europe.³¹⁸ Nonetheless, further efforts and long-term projects will need to be developed to ensure continuous growth and sustainability. Lithuania and the Baltic region will need to continue to focus on making the most of their renewable energy potential.

The three Baltic States are currently still synchronized to the Russian and Belarusian electricity systems. BEMIP has established specific working grounds to achieve synchronization of the Baltic grid with the network in continental Europe by 2025. A political roadmap was endorsed by the Heads of State or Governments of Lithuania, Latvia, Estonia, and Poland, together with EC President Juncker for synchronizing the Baltic electricity grid by the targeted date of 2025.³¹⁹

³¹⁴ NORDEL ET AL., MARKET BASED ANALYSIS OF INTERCONNECTIONS BETWEEN NORDIC, BALTIC AND POLAND AREAS IN 2025 35 (2009).

³¹⁵ *Id.*

³¹⁶ *Baltic Energy Market Interconnection Plan*, EUR. COMM'N (July 31, 2014), ec.europa.eu/energy/en/topics/infrastructure/high-level-groups/baltic-energy-market-interconnection-plan.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ EUR. COMM'N, POLITICAL ROADMAP ON THE SYNCHRONISATION OF THE BALTIC STATES' ELECTRICITY NETWORKS WITH THE CONTINENTAL EUROPEAN NETWORK VIA POLAND (2018), https://ec.europa.eu/energy/sites/ener/files/political_implementation_roadmap.pdf.

F. Data Protection in Smart Grids

With the two-way digital communication between supplier and consumer rewarding support to intelligent metering and monitoring system, smart grids are an advantageous and beneficial tool to society at large. However, the dependency on computer and cloud networks supporting future smart grids inhibits a risk and vulnerability to malicious attacks with possible devastating effects.

Much like US Constitutional Amendments, data protection is a human right in the EU. Article 8 of the European Convention on Human Rights (ECHR) provides every EU and EEA citizen the right to respect for private and family life, which can be extended to encompass the protection of personal data. This is perhaps the basis for which Regulation 679/2016 (General Data Protection Regulation “GDPR”) was founded. It may also be the reason for the proliferation of new data protection/Privacy laws and regulation developing around the world. The current landscape is changing drastically and gives stronger protective rights to consumers and individuals. New data protection regulations are flourishing in California (California Consumer Protection Act “CCPA”),³²⁰ India (India Privacy Bill),³²¹ New Zealand (Privacy Amendment Bill),³²² Thailand,³²³ Singapore,³²⁴ and Canada,³²⁵ to mention a few.

The GDPR is directly applicable to all EU Member States and applies by extension to all natural persons in Lithuania. The implementation of GDPR into Lithuanian law was achieved on 16 July 2018.³²⁶ This means that grid companies operating externally and internally to the electricity grid have an obligation to ensure the safe collecting, processing, handling, and storage of personal data belonging to EU citizens. This is especially important for personal data activities related to smart meters and smart grids.

After a little over a year following the successful implementation of GDPR, trends are revealing how the legal landscape has reacted to the new privacy laws. Various customer rights under the Regulation are being enacted such as Subject Access Requests, the Right to be Forgotten, and the right to [easy] portability. However, the largest scare factor for the new data protection law are, perhaps, data breaches. A personal data breach that has a high likelihood and high severity of harm must be reported to the relevant Data Protection

³²⁰ Xavier Becerra, *California Consumer Privacy Act (CCPA): Background on the CCPA & the Rulemaking Process*, OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/privacy/ccpa> (last visited Feb. 16, 2020).

³²¹ Jennifer Bryant, *What you should know about India's forward-moving privacy bill*, INT'L ASSOC. PRIVACY PROFESSIONALS (Dec. 17, 2019), <https://iapp.org/news/a/indias-data-privacy-bill-under-committee-review/>.

³²² Andrew Little, *Privacy Bill*, NEW ZEALAND PARLIAMENT, https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_77618/privacy-bill (last visited Feb. 16, 2020).

³²³ *Thailand Personal Data Protection Act*, BAKER MCKENZIE (May 28, 2019), <https://www.bakermckenzie.com/en/insight/publications/2019/05/thailand-personal-data-protection-act>.

³²⁴ *Legislation and Guidelines*, PERSONAL DATA PROTECTION COMMISSION SINGAPORE, <https://www.pdpc.gov.sg/Legislation-and-Guidelines/Personal-Data-Protection-Act-Overview> (last visited Feb. 16, 2020).

³²⁵ *The Personal Information Protection and Electronic Documents Act (PIPEDA)*, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/> (last visited Feb. 16, 2020).

³²⁶ Council Regulation 2016/679, 2016 O.J. (L 119).

Authority (DPA) within 72 hours of awareness.³²⁷ A notification to the impacted data subjects may also be required, and should be issued without undue delay.³²⁸ Failure to comply may result in administrative fines of up to 2 or 4 percent of total global revenue.³²⁹

The EU Commission established a Smart Grid Task Force in 2009 designed to issue advice on issues related to smart grid deployment and development. Out of the five Expert Groups, Expert Group 2 has been assigned to mitigate the risks to personal data.³³⁰ In that regard, the Expert Group has issued guidance on data protection, privacy, and security surrounding customer protection related to smart grids. It has also specifically designed a Data Protection Impact Assessment (DPIA) template for Smart Grid and Smart Metering systems.

A DPIA is a process designed to evaluate risks to the rights and freedoms of individuals. It aims to assess the origin, nature, and severity of risk as well as to analyze measures, safeguards and control mechanisms utilized to control these risks on an ongoing basis. A DPIA allows data controllers to adequately determine its internal rules, procedures, and controls for collecting personal data with regard to proportionality and legitimate interest. Controllers must show that they practice privacy by design.

The specific DPIA template was designed with the collection and usage of personal data (for instance household consumption) in relation to and as a key business enabler for the successful operation of Smart Grids and smart metering systems. Therefore, it is essential that the risks to the rights and freedoms of EU natural persons are properly addressed and mitigated through compliance to the GDPR, and monitored by the EU regulators to ensure that personal data is collected proportionally, and with legal basis. Lithuanian legislation is echoing this, and ensures that the electricity grid operators must establish a high level of protection of consumer rights and electricity household consumers.³³¹

Further privacy recommendations that Lithuania should consider when developing its smart grid are the ones published by the European Union Agency for Network and Information Security (ENISA).³³² The recommendations allow decentralization of smart grids from a data protection point of view. There is a focus on interdependencies and communication between various actors in the value chain of smart grids including cross-market support.³³³

³²⁷ *Id.* at 52.

³²⁸ *Id.*

³²⁹ *Id.* at 82.

³³⁰ *Smart Grids and Meters Energy*, EUR. COMM'N (July 31, 2019), <https://ec.europa.eu/energy/en/topics/markets-and-consumers/smart-grids-and-meters/overview>.

³³¹ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 10(2) (Ministry of Energy of the Republic of Lithuania, 2016).

³³² ENISA, SMART GRID SECURITY: RECOMMENDATIONS FOR EUROPE AND MEMBER STATES (July 10, 2012), <https://www.enisa.europa.eu/publications/ENISA-smart-grid-security-recommendations>.

³³³ ENISA, COMMUNICATION NETWORK INTERDEPENDENCIES IN SMART GRIDS (2016).

G. Electric Vehicles and Storage

1. Electric Vehicles

Currently, there are a few major competitive technologies in the vehicle spectrum: battery electric vehicles (EV), plug-in hybrid electric vehicles (PHEV), hybrid electric vehicles (HEV), and internal combustion engine vehicles (ICV). Though the latter technology is by far the most popular, electric vehicles are advancing as the related technologies are improving, and awareness of climate sustainability is increasing. At the present day, the Lithuanian population is heavily invested in ICVs and hosts a large second-hand market of ICVs. This is mainly due to the affordability and availability of such vehicles. According to the Lithuanian Electric Vehicles Association, there are currently fewer than a hundred registered EVs.³³⁴

In the transport sector, electrification is considered as the main technological alternative that has significant potential to reduce greenhouse gas emissions and dependency on fossil fuels.³³⁵ To expand upon the potentials, electric vehicles may result in the realization of climate targets, the deployment of alternative sources of energy generation, cleaner urban transport, and enhanced energy consumption efficiency. Electric vehicles may also support the electricity grid in a smart grid scenario by allowing the electric vehicle to operate as a transmission of electricity between the vehicle-to-grid, vehicle-to-household, vehicle-to-building, and grid-to-vehicle.³³⁶

Invest Lithuania is promoting investors to set up shop in Lithuania to help develop EV related technology in accordance with sustainable manufacturing guidelines.³³⁷ Especially within the sphere of battery gigafactories, Lithuania's government is willing to offer favorable conditions for large scale projects, facilitated through a fast-track set up process. The investment scheme shares the renewable energy targets stipulated in LOERS, which may look attractive for long-term investors. Additionally, Lithuania's higher educational institutions are targeting course programs to echo industry needs within the private sector, thus creating a designated workforce that is willing and knowledgeable about real world needs.³³⁸

a. Electric vehicle support schemes

EV support schemes are targeted incentives and inducement mechanisms which are central to the early development and deployment of electric vehicles. These support schemes may range from being direct or primary to indirect and secondary, and may apply

³³⁴ *Apie Asociacija [About]*, LIETUVOS ELEKTROMOBILIŲ ASOCIACIJA [LITHUANIAN ELECTRIC VEHICLES ASSOCIATION], <http://www.elektromobilis.org/apie/> (last visited Jan. 8, 2020).

³³⁵ Nicholas Lutsey & Daniel Sperling, *Regulatory Adaption: Accommodating Electric Vehicles in a Petroleum World*, 45 ENERGY POL'Y 308, 308 (2012).

³³⁶ David P. Tuttle & Ross Baldick, *The Evolution of Plug-in Electric Vehicle-Grid Interactions*, 3 IEEE TRANSACTIONS ON SMART GRID 500, 500 (2012).

³³⁷ *Reasons to Choose Lithuania*, INVEST LITHUANIA, <https://investlithuania.com/key-sectors/manufacturing/ev-batteries/> (last visited Jan. 8, 2020).

³³⁸ *Id.*

to all phases of the value chain. Different sectors may be targeted, such as battery R&D, infrastructure expansion (for instance, charging stations), and the purchasing phase.

Drivers in Lithuania lack eco-driving awareness and culture.³³⁹ In addition, current prices of EVs are unobtainable when compared to the average salary of the Lithuanian population.³⁴⁰ For instance, a new Nissan Leaf is priced at 39,900 Euros, which, for an average Lithuanian earner, would take thirty-one months to pay off, and, in comparison, it would take a German average earner only ten months to pay off.³⁴¹ Furthermore, the replacement of EV battery systems is still at a disproportionate cost compared to the lifetime of an EV. Suggestions may be made to allow preferential treatment of taxation of EVs through government subsidies.³⁴² In order to fund this, taxes could increase on internal combustion vehicles, which could also have a knock-on effect to move away from ICVs. However, the government has been skeptical to fund tax incentives and other subsidies for EVs. There is a perception in Lithuania that EVs are only for the high earners in society, and there is no value in promoting such schemes to the national budget.³⁴³ Currently, it is still a large step forward to be made before policy subsidies are fully introduced.

That being said, there are other incentives Lithuania could explore apart from financial incentives to promote the EV measure. For instance, 57 new charging stations were planned to be built before the end of 2018, with the EU backing the country with 1.5 million Euros, plus an additional 15% backing by local municipalities housing the new charging stations.³⁴⁴ An increased network of electric charging station is a necessary infrastructure pillar to support the proliferation of electric vehicles. Many of the charging stations are installed along major highways and along the trans-European road network, inviting cross-European support and influence.

Furthermore, there are other indirect schemes supporting zero-emission transportation solutions. A great example is SPARK eGO.³⁴⁵ This is a car sharing scheme priced at a very competitive rate.³⁴⁶ Some immediate advantages for drivers utilizing the SPARK scheme is the use of “A lanes” (public transport lanes), free parking in the cities of Vilnius, Kaunas, and Trakai, as well as loyalty points per kilometer driven. SPARK is an easy-to-use service

³³⁹ Laurencas Raslavičius et al., *Electric Vehicles Challenges and Opportunities: Lithuanian Review*, 42 RENEWABLE AND SUSTAINABLE ENERGY REV. 786, 789 (2015).

³⁴⁰ *Lithuania Average Monthly Wages*, TRADING ECONOMICS, <https://tradingeconomics.com/lithuania/wages> (last visited Nov. 2, 2019). Average salary Q1 2019 = EUR 1262/month, up from EUR 935 Q3 2018. Comparably, Germany average salary per month is EUR 3932.

³⁴¹ *Nissan Announces New LEAF 3.ZERO and New LEAF e+ 3.ZERO with Higher Output and Longer Range*, NISSAN (Jan. 9, 2019), <https://europe.nissannews.com/en-GB/releases/release-90b1ce83155c6b12ec5c018c9a0239df-nissan-announces-leaf-3zero-and-leaf-3zero-e-limited-edition-with-higher-output-and-longer-range-2#>.

³⁴² Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 19(1) (Ministry of Energy of the Republic of Lithuania, 2016).

³⁴³ *Id.*

³⁴⁴ *57 New Charging Stations for Electric Cars to be Installed in Lithuania*, THE BALTIC COURSE (Aug. 8, 2018), www.baltic-course.com/eng/good_for_business/?doc=142181.

³⁴⁵ SPARK, <https://www.espark.lt/en/> (last visited Jan. 8, 2020).

³⁴⁶ *Id.* At EUR 1.95 per minute for the first 13 minutes and EUR 0.15 for every extra minute. One can also commit to a daily rate EUR 22.

that has an interactive map on its website of available EVs, parking, and charging stations. Some of the incentives of using the service mimic that of Norway's governmental incentives for car owners to choose EVs over petrol-based vehicles. In Norway, EV owners may also use public transport lanes, pay no road tax, access free parking at allocated lots located around the nation, and enjoy lower vehicle taxes and point of purchase.

Other support schemes that are objectively considered as good practices to deploy EVs and stimulate development include capital incentives such as tax credits and public tenders for projects related to EVs.³⁴⁷ The investment cost for the average Lithuanian is still extremely high, and without any direct financial incentives, EV deployment will take a very long time. Direct incentives that Lithuania may consider are value added tax (VAT) relief, exemption from road tax, other subsidies related to R&D, and the allowance of EVs to be added to the Green Investment Scheme, as seen in other EU countries.³⁴⁸ A variety of support schemes would be a better suited model for Lithuania as it may interact with several types of renewable energy technologies in relation to grid connectivity and optimization.

Lithuania's EV market is facing a number of challenges. These range from weak representation of original equipment manufacturers (OEM), prevailing second-hand market of old vehicles, low purchasing powers of citizens, high global prices of EVs, and a lack of direct capital state subsidies and support.³⁴⁹ However, there are a number of strengths and opportunities that policymakers in Lithuania could target to support a long-term deployment strategy of EVs. For instance, Lithuania is well positioned in science and IT related to transport and EV technologies.³⁵⁰ This position could be angled towards climate related targets of reducing GHG emission and dependency of fossil fuels. Much like investing in RES plants, investing in zero-emission transport technology could create an organic transition towards more EVs on the roads.

b. EU-wide measure to promote EVs nationally

Implementing an EU-wide industry mandate to deliver a set minimum target of EVs could put pressure to increase the number of electric vehicles sold in Lithuania. Such a measure could also boost research and development in the value chain related to electric. Subsequently, this could yield better EVs with longer range and lifespan, and be more cost-effective for costumers. Such a mandate could also address *compliance* vehicles that are low quality, but sold quantitatively to meet quota obligations. Although electrification of the transport sector may not be the number one priority for Lithuania, it should take measures to diversify its potentials to expand to eliminate GHG emission in transportation.

³⁴⁷ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 19(3) (Ministry of Energy of the Republic of Lithuania, 2016).

³⁴⁸ *Green Investment Scheme*, NAT'L FUND FOR ENVTL. PROT. AND WATER MGMT. (2018), <https://www.nfosigw.gov.pl/en/priority-programmes/green-investment-scheme/>.

³⁴⁹ Raslavičius et al., *supra* note 333, at 798.

³⁵⁰ *Id.*

2. Storage

An important factor in establishing good balancing mechanisms to the energy system's fluctuation of demand and supply are efficient storage solutions. In a Smart Grid scenario, storage systems will have the ability to detect when there is excess electrical energy entering the grid, whether that is from generated or imported supply. Naturally, an excess of energy in storage systems will subsequently flow back into the grid when generation is scarce or demand is high. Presently, there are technological limitations to effectively store energy at the necessary scale without significant loss. Although Lithuania has development plans for electricity storage infrastructure in related to smart grids, there is still much to be done.³⁵¹

Currently, the largest storage facility in Lithuania is the Kruonis Pumped Storage Hydroelectric Plant (KPSHP), located in the center of the country near the major city of Kaunas, and it is the only power plant of this type in the Baltic region.³⁵² The plant has a total capacity of 900 MW. The intention of the plant is to effectively assist with the balancing equation between supply and demand, and it is also capable of ensuring 94 percent of Lithuania's power reserve in case of an emergency outage. The KPSHP is able to operate in two different modes: first, during low demand at night, it operates in pump mode and utilizes cheap surplus energy to raise the water from the lower reservoir to the higher reservoir. Second, when demand is high, or at peak, the plant operates as a traditional hydroelectric plant.

There are various projects exploring the possibilities of better energy storage facilities in Lithuania. For example, the Lithuanian Business Support Agency (LSBA) has granted \$267,000 to support the development of an experimental floating photovoltaic power plant at the existing HPSHP. At full capacity the solar system, covering the entire aquatic surface of the KPSHP will be able to generate 200-250 MW, and could be connected to additional battery energy storage systems. This is an innovative way of maximizing the potential of both the hydropower plant as well as the floating photovoltaics' capacity. The solar power could help power the hydropower plant when it is in pump mode.

³⁵¹ Įstatymas Energija Iš Atnaujinamų Šaltinių [Law on Energy from Renewable Sources], Oficialusis Leidinys 62-2936, *translated in* Official Gazette 2011, art. 13(4) (Ministry of Energy of the Republic of Lithuania, 2016).

³⁵² *Kruonis Pumped Storage Hydroelectric Plant (the KPSHP)*, IGNITIS GAMYBA, <https://ignitisgamyba.lt/en/our-activities/electricity-generation/kruonis-pumped-storage-hydroelectric-plant-the-kpsHP/4188> (last visited Jan. 7, 2020).

CONCLUSION

It must be acknowledged that Hungary's electricity market has undergone substantial reform since the collapse of the various bureaucratic command economies, including that of Hungary. Restructuring the Hungarian electricity sector along western market-based lines and positioning it for integration with Western Europe have been the key parameters of such reforms, and have included greater liberalization, unbundling, market liquidity, and modernization.

At the same time, notably, the role of the state is not entirely limited to regulatory oversight, given that it has proprietary interests—often absolute—in various electricity market participants including those involved in, among other things, electricity generation, distribution, supply, and trading. The TSO is also state-owned, although it operates along ITO lines to ensure fair and equal access to all participants.

What is more, features typically associated with sophisticated smart grid systems—including universal smart metering, storage capacity, EV proliferation, self-generation, DR, etc.—are generally either at an early stage or not widely adopted. Cases in point are the limited extent of Hungary's smart metering efforts and the dearth in EV charging points, which both undermine Hungary's other goals. For instance, the lack of more universal smart metering undermines DR efforts, and the lack of charging points discourages greater EV take-up. In turn, both outcomes undermine Hungary's efforts towards, among other things, energy efficiency and the decarbonization of the economy.

As for recommendations, the Hungarian government could do more to signal a firmer commitment to *smart grid development* and optimization, for instance, by listing it more prominently in its national policy priorities, given the implications for domestic and foreign investment. Presenting smart grid development as a strategic matter could attract the necessary investments as it may promote greater certainty among investors.

In relation to *state intervention in pricing*, a key segment of the electricity market—namely, the provision of 'affordable' electricity to households—has had implications for those participants at the supplier end of the electricity market (i.e., retail market) who find state-imposed tariffs restrictive on their ability to compete profitably. As a consequence, some suppliers are unlikely to renew their licences, and are thus likely to exit the electricity market altogether or redirect their resources to other aspects of the market. This could lead to fewer participants at the retail/supply end of the market, which could conceivably undermine the competitiveness of the market.³⁵³ The Hungarian government should consider refining its pricing policy to ensure that it does not rob from Peter to pay Paul. For instance, restricting price-setting to protecting the most vulnerable—e.g., those experiencing 'energy poverty' (i.e., when energy costs amount to at least 10% of household income) or some other apposite criterion—could reverse these effects.

In relation to *smart meter rollout*, while the government has expressed support and its willingness to examine whatever conclusions may be drawn from the limit in geographic scope pilot schemes and from international experience, it should recognize that smart-

³⁵³ INT'L ENERGY AGENCY, ENERGY POLICIES OF IEA COUNTRIES: HUNGARY 2017 REVIEW 82–83 (2017), <https://euagenda.eu/upload/publications/untitled-94763-ea.pdf>.

metering is a very effective means of smartening its national grid as very few technologies hold such potential to hit a number of objectives (including more efficient electricity use, empowering consumers, real-time exchange of data to facilitate greater efficiency in planning, and so on). While CBAs in some national contexts may suggest that the perceived benefits are not compelling vis-à-vis the costs of purchasing and installing the equipment, this could be an area for which the government could consider legislatively requiring all market participants, save, for instance consumers, who are likely to benefit from this measure to fund it collectively and proportionally. The government has highlighted how the universal rollout of smart meters could present an ‘extraordinary opportunity’ for Hungarian industry including job-creation;³⁵⁴ however, it should be mindful of its international obligations under, among other things, EU and WTO rules to ensure that any resultant policy does not compromise national treatment and most-favoured-nation related commitments, respectively, nor compromise its subsidy/state-aid related commitments under international instruments applicable to Hungary.

In relation to the expansion of *low- and zero-emissions mobility/EVs*, the government should consider tweaking the existing set of measures to further incentivize greater take-up of EVs and the progressive phasing out of polluting vehicles. A low-hanging fruit would be to exponentially increase the currently puny amount of charging points available to the public. What is more, Hungary’s existing public transport fleet is relatively old, and EVs should feature in decisions to phase out older vehicles for more energy-efficient and electricity-powered replacements.

In relation to DR, while Hungary has transposed EU legislation to make DR legally possible, regulatory, market, and technical/infrastructural factors and barriers impede greater expansion. What is more, the fact that smart-metering—a key instrument in DR given that it assists end-users to adjust their consumption—is limited in Hungary, further undermines the development of DR. Additionally, the pricing policy for households may also disincentivise DR and, more broadly, energy efficiency. Consequently, the government should consider how to better balance its other aims (e.g., supporting households through electricity tariff setting) with its efforts to promote energy efficiency through, among other things, facilitating DR.

Regarding Cyprus, the primary concern for policy makers at this stage should be the full liberalization of the electricity market in order to ensure full participation of all relevant actors, increase competition in the sector, and enable the implementation of effective demand response measures. A restructuring of the CTSO management team may be necessary to ensure a more consistent and reliable approach to the relevant liberalization timetables and restore confidence in the agency. In addition, changes to the regulatory and legal framework may be necessary to remove the EAC’s tight grip on distribution and transmission and introduce effective regulatory incentives for investment.

To ensure that end users will benefit from the upcoming smart meter deployment on the island, policy makers must focus on providing them with the necessary information on

³⁵⁴ MINISTRY OF NAT’L DEV, NATIONAL ENERGY STRATEGY 2030 94 (2012), <https://2010-2014.kormany.hu/download/7/d7/70000/Hungarian%20Energy%20Strategy%202030.pdf> (concerning the apparent unprofitability of the *universal service* segment of the retail market).

how to best utilize the new technology, and ensure that low income households in particular are able to make use of smart metering in the most efficient and cost effective manner. Changes to the current data protection framework may be necessary in the future: as the grid develops and becomes more interconnected, the legal definitions of certain actors and the extent of their powers may need to be redefined. Such changes could be introduced by legislative action or by courts developing the common law.

To safeguard the integrity and security of a well-connected and developed grid that will incorporate electric vehicles and meet growing electricity demands, the government should invest more in the ICT sector, e.g., by creating more training opportunities for those employed in the field, and by improving existing mechanisms for incident reports. What is more, to enable and encourage the widespread use of electric vehicles, more charging stations need to be introduced, as well as better taxing structures or other economic incentives to make electric vehicles more appealing to the public. Even though a number of storage projects are currently underway on the island, they are progressing relatively slowly; one of the reasons appears to be because the process of obtaining the relevant licences appears to be lengthy.

Finally, the present political climate in Cyprus is plagued by rising tensions: Turkey's aggressive external policy has threatened to disturb the fragile peace on the island and could become an unwelcome deterrent to further investment. In addition, the country's geographical proximity to the ongoing war in Syria has recently yielded some unpleasant side effects which could further deter potential investment. A speedy resolution of the relevant political issues would certainly assist in increasing investment opportunities on the island.

As for Lithuania, there is a thematic approach that echoes through Lithuanian legislative efforts to promote the development of sustainable and renewable energy technologies, and ensures its connectivity to the Lithuanian electricity grid. Although there are many challenges to decentralize and progress towards a true Smart Grid, there are many opportunities to build strength and learn from pioneering markets such as Denmark. The LOERS provides adequate support mechanisms to promote RES plants and installations, and ensures its continuous prosperity through climate targets. Although Lithuania is lagging behind on EU targets, they are showing strong willingness to solve the current setbacks. The major asynchronization is prioritized project for creating an integrated electricity grid with the rest of Continental Europe. In achieving a synchronized electricity system, Lithuania can start taking advantage of the increased security of supply flowing from its neighbouring countries.

Smart Grid development is also strongly mentioned in the Law on Electricity. Efforts are showing avid signs of strong research and development being carried out to increase the technological smartness of the power grid. An important effort in achieving smarter solutions is to build from the bottom-up. Smart metering projects have been initiated by Lithuania, where mass roll-out have begun in 2019, and targets for large scale usage is set for 2023. Although this is behind EU targets and what some other EU markets are able to achieve, Lithuania has realized that it needs to be realistic.

With all new technology that relies on computerized systems handling data, it is important to ensure strong data protection mechanisms. Lithuania has successfully implemented the General Data Protection Regulation that came into force on May 25,

2018. The regulation offers natural persons strong privacy rights, and regulators have been awarded with large enforcement powers, with administrative sanctions ranging up to four percent of a corporation's global revenue, or 10 million Euros. Further efforts have been completed on EU level to ensure data protection and cyber security within the smart grid sector. Lithuania should therefore ensure that undertakings processing consumer data complete a Data Protection Impact Assessment to identify areas of risk.

In the transport sector, Lithuania is finding struggles. With prices of EVs being disproportionally high compared to average earnings, other incentives need to be explored. It is still important for the Lithuanian transport sector to foster a mindset of green development within personal transportation. The dependency on fossil fuels takes time to reduce, and diversifying the zero-emission portfolio will be rewarding in the future.



THE TRIAL OF CIVILIANS BEFORE MILITARY COURTS OF PAKISTAN

M. Nawaz Wahla

Abstract

The Islamic Republic of Pakistan amended its Constitution and enacted the 21st Constitutional Amendment. The subject amendment created the military courts which empowered to try civilians who have been accused of committing crimes of terrorism. The thesis of the paper focuses on whether the newly enacted military courts violated the doctrine of separation of powers and deprived the accused civilians of their fundamental rights, i.e., the right to a fair trial and due process by an independent and impartial judiciary. Additionally, it focuses on whether the trials of civilians before military courts under the 21st Amendment deprived them of their constitutional rights; i.e., lack of protection of fundamental guarantees; no right to appeal; and is contrary to the constitutional principle of separation of powers. The military, is generally command-centric; it is part of the executive branch; its courts are uniquely designed to police the behavior of its members by the applying special rules and procedures. The notion of separation of powers, independent judiciary is inherently lacking in the field of militarized justice. Militarized justice is a symbol of a weakness as well as an indication of non-functional civil judicial system. The international community perceives the militarized justice as a stigma for any country which it must shun at all costs.

The purpose of this paper is to analyze whether the trials of civilians in military courts under the 21st Constitutional Amendment violate Pakistan's obligations under the standards of International Law—categorically, the requirements laid out in Article 14 of the International Covenants of Civil and Political Rights (ICCPR). For analysis and comparison purposes, the factual narratives have been adapted from the “Petitions” which were filed and decided by the Supreme Court of Pakistan.

“INJUSTICE ANYWHERE IS A THREAT TO JUSTICE EVERYWHERE”

Martin Luther King

“JUSTICE AND RULE OF LAW MUST BE THE ENDURING INSPIRATION”

M. Nawaz Wahla GMAP – 2017

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INTRODUCTION

In January 2015, The Islamic Republic of Pakistan amended its Constitution and enacted the 21st Amendment. Under this 21st Amendment the new military courts were created and empowered to try civilians charged with the crimes of terrorism. This paper is tailored along the lines of a case study. Specifically, the analysis is “context-specific” within the confines of the Judgment of the Pakistan Supreme Court, *Civil Petitions No. 842 of 2016 and others, of June 2016*.¹ The family members of those who were convicted by the military courts during the period of 2015 to 2016, filed Petitions to the Supreme Court (“the Court”) challenging, inter alia, the lack of fundamental protections and voluntariness of the defendants’ “confessions.” In August 2016, the Court dismissed all Petitions without addressing the merits of the allegations that the Petitioners were tortured while in custody and lacked legal protections without any detailed reasoning or specificity. The Court, sadly, reiterated and ducked behind its limitation of judicial review. The Court ruled that the “confessions” were recorded by a magistrate and were not retracted, hence stood “proved.”² The Court’s ruling is in stark contradiction to the facts of the record before it and the widely available public literature. The Court’s prior ruling on the very same issue in cases before the civilian courts is markedly different than the military courts in terms of the veracity and the voluntariness of “confessions.”

The principal analysis focuses on whether the enactment of military courts was the right step to begin with, or whether the government should have undertaken the judicial reforms to empower civil judicial system. The paper will argue that empirical evidence has established that the measure was short-sighted, flawed and counterproductive to achieve the over-arching objective that is “the *supremacy* of the rule of law.”

The paper is comprised of eight parts. Part I lays out the factual background of the 21st Amendment and the legal challenges raised against the Amendment. Part II discusses the application of the Amendment. Part III highlights the worldwide reaction towards the establishment of the military courts. Part IV addresses the relevant International Law Standards, i.e., law of the Treaties, Universal Treaty Standards, as well as International Human Rights Law standards, specifically, the International Covenant on Civil and Political Rights (“ICCPR”) and other UN Human Rights Treaties. Part V discusses the obligations of Pakistan as a member state to the ICCPR are discussed. Part VI addresses the principles articulated in the Article 14 of the ICCPR which serve as a guidance for the member states in conducting trials. Part VII undertakes the doctrine of fair trial, public hearing before an impartial tribunal is undertaken. Lastly, part VIII, conducts a critical analysis on whether the military courts were compliant with the standards enumerated in the ICCPR.

I. FACTUAL BACKGROUND OF THE 21ST AMENDMENT

The newly enacted 21st Amendment to the Constitution of Pakistan in 2015 empowered the military courts to try civilians primarily charged, inter alia, with crimes of terrorism. It has been reported that since the inception of these military courts in 2015, a

¹ Said Zaman Khan v. Federation of Pakistan, (2016) 2017 SCMR 1249 (SC) 1 (Pak.).

² *Id.* at 59–60.

total of 310 people have been sentenced to death out of the 717 terrorism cases transferred by the federal government. Inter-services Press Release reported that 546 of the 717 cases have been finalized by the military courts with 234 handed imprisonment and 310 sentenced to death.³ After the death sentences were handed down, the family members of some of the convicts filed Petitions to the Supreme Court of Pakistan in 2015. The following four factual descriptions are incorporated from those petitions.

After having been convicted and sentenced to death by the military courts, sixteen petitions were filed before the Pakistan Supreme Court. The facts of the petitions were the subject of the challenge for the Supreme Court to decide. The critical study of these facts and the established standards will be used as a yard stick to determine whether the notions of “fair trial” and “due process” were followed by the military courts.

Petition No. 1:

A pertinent factual background of this petition which was filed before the Court is as follows: Petition of Ms. Momin Taj (mother of the petitioner) asserted that her son was taken into custody by the Military Intelligence Agency on December 10, 2014 in the city of Rawalpindi.⁴ Despite her best efforts, the whereabouts of her son could not be ascertained.⁵ In October 2015, the family of the petitioner was informed through an unknown telephone call, that her son was confined in Adyala jail in the city of Rawalpindi and a Field General Court Martial (“FGCM”) had tried and convicted him to a death sentence.⁶ The petitioner filed an appeal through the available channels, such as jail authorities, the Court of Appeals, and a Mercy Petition according to Pakistan Army Act, 1952. The petitioner also sent a Mercy Petition to the President of Pakistan.⁷

Petition No. 2

A petition filed on behalf of Haider Ali described that Ali was taken into custody on September 21, 2009, when he was a 10th grade student.⁸ The petitioner-mother complained that she had no information of her son’s whereabouts.⁹ On April 3, 2015, the petitioner learned through a Newspaper called “Daily Mushriq” that her son had been convicted by the FGCM and sentenced to death.¹⁰

Petition No. 3

Petition of the parents of Qari Gul asserted that he was taken into custody by the law

³ *More than 80 Convicts Sentenced to Death by Military Tribunals in Pakistan Since 2015*, PAK. TODAY (March 18, 2018), <https://www.pakistantoday.com.pk/2018/03/18/more-than-180-convicts-sentenced-to-death-by-military-tribunals-in-pakistan-since-2015>; *Bilawal Objects to Another Extension for Military Courts*, PAK. TODAY (Dec. 20, 2018), <https://www.pakistantoday.com.pk/2018/12/20/bilawal-objects-to-another-extension-for-military-courts/> [hereinafter *Bilawal*].

⁴ *Said Zaman Khan v. Federation of Pakistan*, (2016) 2017 SCMR 1249 (SC) 4 (Pak.).

⁵ *Id.* at 4–5.

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.*

enforcement agencies on April 27, 2011.¹¹ His whereabouts were kept secret by the military courts.¹² In April 2015, Gul's parents discovered through a press release that their son had been tried by the FGCM, convicted and sentenced to death.¹³ As it was widely reported in the media, that the military courts neither disclosed the specific nature of the charges, i.e., the charging document against the accused nor provided written judgments, contrary to the requirement of international law.¹⁴

Petition No. 4

The Petition of Mohammad Ghauri alleged that he went missing on January 1, 2010.¹⁵ Petitioner-father filed an application of his disappearance at the Police Station in Islamabad on January 7th, 2010.¹⁶ The petitioner appealed to the High Court to intervene and issue an order to the appropriate authority to find his son or his whereabouts, to no avail.¹⁷ On January 1st, 2016, petitioner learned through newspaper that his son had been tried by the FGCM, was convicted, and sentenced to death, on charges of terrorism.¹⁸ However, there was no public release of the charges and judgment.¹⁹

A. Legal Challenges

The essence of the legal challenges raised by these petitions (other than some case specifics), inter alia, are that the petitioners were subjected to "secret trials" without an access to legal assistance; were not allowed representation by counsel of their own choice; were tortured and their confessions were in violation of Article 10 and 10A of the Constitution of the Islamic Republic of Pakistan, 1973, which states: "No person who is arrested shall be detained in custody without being informed, as may be, as the grounds for such arrest, nor shall he be denied the right to consult and defend by a legal practitioner of his choice."²⁰ The procedures adopted by the FGCM were in violation of the requirements of "Fair Trial" and "Due Process"²¹ (rooted in the domestic law).

As noted earlier, the analysis and focus of this paper is from the perspective of International Law, not domestic law. The major argument and the analysis is premised upon whether Pakistan, by being a member of the ICCPR and simultaneously enacting military courts has violated its obligation to provide fundamental guarantees laid out in the Covenant.²²

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.* at 7–8.

¹⁴ *Id.*

¹⁵ *Id.* at 14.

¹⁶ *Id.*

¹⁷ *Id.* at 15.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ PAKISTAN CONST. art. 10, 10A.

²¹ *Id.* The words "fair trial and due process" are not specifically mentioned but are implied by the language of the Articles 10 and 10A of the Constitution of the Islamic Republic of Pakistan.

²² UN Human Rights Comm., General Comment No. 32, art. 14, Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment No. 32].

B. The Alleged Justification for Establishment of the Military Courts

Before addressing the various violations of the specific standards of the ICCPR by the military courts, a brief overview of some of the alleged justifications for the enactment of such law are discussed herein. On December 16, 2014, Taliban killed 141 army school children and staff in the city of Peshawar.²³ This horrific act, and public outcry, resulted in Pakistan's formulation of 20-points National Action Plan (NAP).²⁴

The goal of the National Action Plan was to prepare a comprehensive list of measures and actions to be taken by the government of Pakistan and its law enforcement agencies to combat extremism and rampant terrorism in the country. On January 5, 2015, Pakistan's Parliament passed a constitutional amendment called the 21st Amendment and Army Act Amendment.²⁵ The 21st Amendment was enacted for two years, ending on January 5th, 2017.²⁶ The time period was extended for another two years until January 5, 2019.²⁷ It is reported that another extension of time for two years was sought and was passed under the 23rd amendment.²⁸

Various newspapers and media reports had described that speaking at the Senate floor the Prime Minister of Pakistan, Nawaz Sharif offered alleged justifications as to why the amendment bill was necessary.²⁹ He allegedly claimed that the bill about the military courts was to deal with *hardcore* terrorists who killed Pakistanis.³⁰ He claimed that such measure was important for Pakistan. He described the nation's realization that law and order had been deteriorating for the past 60 years.³¹ He argued that the acts of terrorism and its brutality had been on the rise. He complained that there has very little accountability to such heinous acts of violence.³² He contended that the new legislation was meant to overcome such lawlessness.³³ He argued, correctly, that it is the responsibility of a state to ensure the safety and well-beings of its citizens.³⁴ The paper takes the position that these measures taken to ensure alleged public safety were ill-conceived.

It has been reported that some legislators were skeptical, reluctant and were opposed to the amendment bill and the establishment of the military courts. In addressing such concerns, the Interior Minister of Pakistan assured that the "speedy trials" sought by the

²³ *Pakistan Taliban: Peshawar School Attack Leaves 141 Dead*, BBC (Dec. 16, 2014), <https://www.bbc.com/news/world-asia-30491435>.

²⁴ *Parliament Passes 21st Constitutional Amendment, Army Act Amendment*, DAWN NEWSPAPER (June 5, 2015), <https://www.dawn.com/news/1155271>

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Bilawal, supra note 3; Zardari Directs PPP Leadership, Opposition Parties to Oppose Military Courts' Extension*, PAK. TODAY (Jan. 13, 2017), <https://www.pakistantoday.com.pk/2017/01/13/zardari-directs-ppp-leadership-opposition-parties-to-oppose-military-courts-extension/>.

²⁹ *Parliament Passes 21st Constitutional Amendment, Army Act Amendment, supra note 24; Two Bills Tabled in NA for Changes to Constitution, Army Act*, THE NEWS INT'L (June 4, 2015), <https://www.thenews.com.pk/print/10118-two-bills-tabled-in-na-for-changes-to-constitution-army-act>.

³⁰ *Parliament Passes 21st Constitutional Amendment, Army Act Amendment, supra note 24.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Military Courts would be “no kangaroo courts.”³⁵ The paper will show that, as later events and other evidence has established, he was wrong in his assessment.

It is astounding to note that when the Minister for Information and Broadcasting who introduced the 21st Amendment Bill, 2015 and the Pakistan Army Act, 1952 (Amendment) Bill, 2015, in the presence of Prime Minister and lawmakers, the “proceeding lasted for only 10 minutes” and was adjourned until two days later, soon after the introduction of two highly important bills.³⁶ The bills “were passed without opposition” and there was little to no discussion from members from either side in the Parliament.³⁷ The amendments were agreed to in advance of the actual debate on the senate floor, the leadership agreed to the amendments in the PM House, in the presence of the Chief of Army Staff, General Raheel Sharif.³⁸ It is reasonable to assume that such an important piece of legislation would require serious debate and consideration. The foregoing is indicative that the impact of such amendment was not well thought out. Such a hasty measure is indicative of the lack of deep appreciation for empowering civil judicial system rather than the military.

D. Allegedly Weakened Civilian Judiciary—A Flawed Argument

One of the alleged justifications for the establishment of the military courts was that the civil courts and the Judicial System, as a whole, were *ill-equipped* to deal with terrorism. The proponent of the military courts argued that civil courts were slow; had low conviction rates; and were fearful due to lack of security for the judges, prosecutors, and the witnesses.³⁹ But, the theme of this paper is that this reasoning for the creation of military courts was flawed, short sighted and is in violation of the International Law standards, i.e., Article 14 of the ICCPR.

It is reported in the media that this was not the first time that Pakistan had established military courts. On December 29, 2014, Rafia Zakaria, a journalist, in her article published on Aljazeera.com titled “Military Courts and Terrorists Heroes,” contended that “the most notable and controversial of these bills was the establishment of special Military Courts that would try terror suspects for the next two years.”⁴⁰ She wrote that “in the opinion of the prime minister, and several other political parties, this measure, which would take power away from Pakistan's civilian judiciary, was necessary to win the fight against terror.”⁴¹ Zakaria’s article highlights the salient aspects of the 21st Amendments as described in the following section.

Zakaria correctly argues that no one denies that the civilian courts themselves were the subject of the terrorist attacks. On March 3, 2014, two suicide bombers attacked a District Court in Islamabad.⁴² But she advocates against the amendment and contends that the core of the problem is when terrorists are arrested, they very rarely are tried, rate of convictions

³⁵ *Id.*

³⁶ *Two Bills Tabled in NA for Changes to Constitution, Army Act, supra* note 29.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Rafia Zakaria, *Military Courts and Terrorists Heroes*, AL JAZEERA, (Dec. 29, 2014), <http://www.aljazeera.com/indepth/opinion/2014/12/military-courts-pakistan-2014122983812353350.html>.

⁴¹ *Id.*

⁴² *Id.*

were low, is flawed argument.⁴³ This paper takes the position that civil judicial reforms rather than the military courts were to be created.

Zakaria offers data to make her point, asserting that since 2012, the conviction rate in the terrorism cases in the wake of Khyber Pakhtunkhwa, where the intensity of attacks was more than any other place, was approximately 4 percent.⁴⁴ In the province of Punjab, it was the same. She argues that in the year 2012, 559 cases against terrorist suspect were adjudicated, 414 cases not guilty verdict was handed down.⁴⁵ She contends that this was poor prosecution of terrorism cases.⁴⁶

Law and order is very fragile in the country, it has been reported that witness rate of recanting was very high.⁴⁷ The threat to kidnap a witness's family members is cited as a reason for a witness changing their statement.⁴⁸ People do not want to get involved and come forward to testify. Hence, those who are suspected of terrorism acts are acquitted.

Again, the argument advanced by the thesis of the paper is that the emphasis should have been in these areas, i.e., to improve the security of witnesses, crimes against the witness should be punished publicly and swiftly. Such measures would create confidence in the civil judicial system, rather than the enactment of militarized justice.

It was also reported that due to lack of witness protection program in place, in the cases where people of power were involved, the witnesses often face death threats.⁴⁹ Witnesses either did not testify or changed their testimonies. According to the reports, it has come to light that during the period of 1990 and 2009, terrorist attacks and suicide bombing were at their highest rate.⁵⁰ Among people who were tried under terrorism charges, 74 percent were acquitted.⁵¹

The paper raises the question, does this justify the creation of the military justice? The heart of the argument made in this paper is that it is the civil judicial system which needs to be empowered, judicial reforms to be undertaken, rather than the creation of the military courts.

E. A Military Solution—A Short Sighted Measure

Zakaria correctly questions the validity of the proposed solution.⁵² This paper adopts and agrees with her position. She challenges that the various governmental entities over a period of time, have exploited, manipulated and taken advantage of issue of terrorism and/or religious extremism prevalent in recent times.⁵³ She further argues that the legislation of military courts for a period of two years could not possibly be a solution to this problem.⁵⁴ While the 21st Amendment was being considered by legislators, at the same

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

time, the military was launching bombs and attacking the terrorist's hideouts in the northern part of the country.⁵⁵ Zakaria correctly argues that empowering military to administer justice is not only violation of international law, it also diminishes Pakistan's image at the world stage.⁵⁶ Zakaria goes on to explain the logic behind the new legislation as it is being advocated by the government that if the terrorists were severely punished, tragedies like the one that occurred at the Peshawar High School will never happen again.⁵⁷ It is a flawed argument because military courts are not the solution to the problem.

II. APPLICATION OF THE AMENDMENT

The 21st Amendment applies to offenses relating to terrorism, those who claim that they are members of the terrorist organization, and/or using a religion or sect in committing such acts.⁵⁸ According to Article 175 (3) of the Constitution the separation of powers has been spelled explicitly.⁵⁹ The Executive branch is an independent and separate than the Judicial and the Legislator. But the Article 175 (3) of the constitution will not apply to this new legislation under the 21st Amendment.⁶⁰ In other words, even though the military is part of the Executive branch, it is being empowered to adjudicate cases by this 21st Amendment.

A. Offenses for Which Civilian Trials will be Held in Military Courts

The 21st Amendment applies to “all persons who claim to or are known to, belong to any terrorist group using the name of the religion or a sect and carrying out acts of violence and terrorism,”⁶¹ including:

- Attacking military officers or installation;
- kidnapping for ransom;
- possessing, storing or transporting explosives, firearms, suicide jackets or other articles;
- using or designing vehicles for terrorist attacks;
- possessing firearms designed for terrorist acts;
- acting in any way to “over-awe the state” or the general public;
- creating terror or insecurity in Pakistan;

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ PAKISTAN CONST., amend. 21 (“In the Constitution of the Islamic Republic of Pakistan, hereinafter called the Constitution, in Article 175, in clause (3), for the full stop at the end a colon shall be substituted and thereafter, the following proviso shall be inserted, namely: ‘Provided that the provisions of this Article shall have no application to the trial of persons under any of the Acts mentioned at serial No. 6, 7, 8 and 9 of sub-part III or Part I of the First Schedule, who claims, or is known, to belong to any terrorist group or organization using the name of religion or a sect. Explanation:- In this proviso, the expression ‘sect’ means a sect of religion and does not include any religious or political party regulated under the Political Parties Order, 2002.”).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (emphasis added).

- attempting to commit any of the above listed acts within or outside of Pakistan
- providing or receiving funding for any of the above listed acts;
- waging war against Pakistan.⁶²

Additionally, the 21st Amendment also includes certain offenses which were part of Protection of Pakistan Act, 2014.⁶³ When these offenses were allegedly committed by those claiming to, or known to, “belong to any terrorist group or organization using the name of religion or sect.”⁶⁴

Those offenses are listed as follows:

1. Crimes against minorities;
2. Killing, kidnapping, extorting, assaulting or attacking members of the government, judiciary, foreign officials, tourists, media personnel, social workers or “other important personalities”;
3. Destruction of or attacks on energy facilities, gas or oil pipelines, aircrafts or airports, national defense materials and institutions;
4. Illegally crossing national boundaries “in connection with” any of the above-mentioned offenses.⁶⁵

III. WORLDWIDE REACTION TO THE ESTABLISHMENT OF MILITARY COURTS

There has been largely an appalling and negative reaction to the establishment of the military courts. Kathrine Houreld, a reporter for the Reuter, World News, on 3/25/2015, published an article, titled as: “Worries Grow as New Courts Hand Pakistan Army More power.”⁶⁶ In this article Houreld gives weight to critics who find it astonishing that an elected civilian government would undertake a legislation to voluntarily hand over its authority to the military.⁶⁷ It is correctly highlighted that under the doctrine of separation of power, by way of adopting the subject legislation, too much power has been given to the military.⁶⁸ She notes that the military had always played a major role in the context of balance of power.⁶⁹

According to Houreld’s reporting in Reuters, she highlights that the attorneys who have been representing the suspects and the family members were concerned about the

⁶² INTERNATIONAL COMMISSION OF JURISTS, PAKISTAN: MILITARY TRIALS FOR CIVILIANS – QUESTIONS AND ANSWERS 3 (2015), <https://www.icj.org/wp-content/uploads/2015/04/Pakistan-Q-and-A-Military-Courts-Advocacy-Analysis-Brief-2015-ENG.pdf> [hereinafter *Questions and Answers*].

⁶³ PAKISTAN CONST., amend. 21; *see also* The Protection of Pakistan Act 2014, No. 10 of 2014, Pak. Code (2014) (“As passed by the Parliament–A- Bill – to provide for protection against waging of war or insurrection against Pakistan and prevention of acts threatening the security of Pakistan”).

⁶⁴ PAKISTAN CONST., amend. 21, § A, cl. 2.

⁶⁵ The Protection of Pakistan Act 2014, No. 10 of 2014, Pak. Code (2014).

⁶⁶ Katherine Houreld, *Worries Grow as New Courts Hand Pakistan Army More Power*, REUTERS (Mar. 25, 2015), <https://www.reuters.com/article/us-pakistan-military-courts-insight/worries-grow-as-new-courts-hand-pakistan-army-more-power-idUSKBN0ML2PD20150325>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

fairness of the new courts.⁷⁰ The convictions and the death sentences which were handed down by the military courts were causes for concern. Attorneys were of the opinion that such convictions could not have either been awarded by the civil courts, if were awarded, these would have been reversed.⁷¹

The article goes on to describe that several defendants have complained that they were not provided access to a legal representative, as was the prerequisite of the military law. Some said they were *tortured in custody*.⁷² As noted above, the military is command-centric, if the court has reached a verdict which is not liked by the higher authorities, since the military is based on concept of chain of command, and the military system allows to dissolve and reprimand courts which have reached verdicts the command disagrees with.⁷³ The military system allows to order a trial to be repeated. It is reported according to court documents and former military officials. "This happens often. The military is command-oriented, right from arrest until execution,"⁷⁴ stated a former military judge, Inam ul-Rahiem. He claimed that he was forced take an early retirement, because he handed over judgments which were not liked by his senior officers.⁷⁵

There is a growing concern which is privately shared by the Army Officers that the civilian government, by and large, is incompetent and put undue pressure on them to get involved in the law and order situation of the country.⁷⁶ "With the civilian courts, it is said, justice is delayed and justice denied,"⁷⁷ one senior military official said. "With the military courts, it is justice on time and justice delivered."⁷⁸

One of the very prominent members of the Pakistan Senate, Senator Aitzaz Ahsan, voted for the new military courts, by saying it was necessary in a country at "war" with militants.⁷⁹ He asserted that "I have a visceral distaste for military courts, but the safeguards provided and the state of war we are in justifies it."⁸⁰ There is no doubt that Pakistan's justice system is slow, the cases keep pending for an extraordinary amount of time.

Human rights lawyer, Asma Jahangir, says that reforms are slow, it is undesirable by the elite and the powerful to have an independent and impartial judiciary.⁸¹ Because such a Judiciary could hold them accountable which does serve their interest, they could be held accountable. She emphasizes that "It suits those who want to work the system."⁸²

Amnesty International in its report for the year 2016–2017, wrote in pertinent parts as follows: Military courts: The new legislation of 2015, empowered the military courts to try

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

civilians who were accused of terrorism-related offences.⁸³ It was reported that by January 2016, the government had established 11 military courts which will hear the subject cases.⁸⁴

As noted above, in August, 2016, the Supreme Court of Pakistan ruled on the cases from the military courts for the first time.⁸⁵ The death sentences imposed on 16 civilians by the military courts were upheld by the Supreme Court.⁸⁶ The holding of the Supreme Court was that the appellants had failed to prove that either their constitutional rights were violated or the military courts failed to follow procedures.⁸⁷ It has been widely reported by the lawyers who were legally representing these petitioners that they were denied access to their clients.⁸⁸ The individuals were denied access to their private attorneys, as their right to have a counsel of their choice.⁸⁹ No access to military court's documents and/or their judgments, if any, were given to prepare for filing appeals in their cases.⁹⁰ It is also reported that some of accused were minor at the time of arrest, i.e., under the age of 18 years old, some of them were allegedly taken away by force, a common measure called as an 'Enforced Disappearance,' it is reported that they were tortured and were subjected to mistreatment.⁹¹

On April 15, 2015, International Commission of Jurists posted an article titled, "Pakistan: trials of civilians before the military tribunals a subversion of justice."⁹² On April 30, 2015, Global Military Justice Reforms, published an article, titled "Judicial Independence in Pakistan—A Possible Straw in the Wind."⁹³ The article raises the concern about the judicial independence and separation of powers. The military courts, despite being the part of Executive, were given powers to try civilians according to the 21st Amendment to the Constitution of Pakistan.⁹⁴ This measure was against the basic notion of separation of powers. As it was reported in Dawn Newspaper, a regulation which permitted the use of "executive magistrates" in the Provincially Administered Tribal Areas (PATA), was declared in valid by two-judge panel of the Peshawar High Court.⁹⁵ This is remarkable to note that such regulation and/or arrangement gave powers to the PATA deputy and assistant commissioners to administer the duties of judicial officials. Both deputy and

⁸³ *Pakistan 2016*, AMNESTY INT'L, <https://www.amnesty.org/en/countries/asia-and-the-pacific/pakistan/report-pakistan/> (last visited Feb. 23, 2019).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² International Commission of Jurists, *Pakistan: Trials of Civilians before Military Tribunals a Subversion of Justice* (Apr. 15, 2015), <https://www.icj.org/pakistan-trials-of-civilians-before-military-tribunals-a-subversion-of-justice/>.

⁹³ Global Military Justice Reform, *Judicial Independence in Pakistan—A Possible Straw in the Wind* (April 30, 2015), <http://globalmjreform.blogspot.com/2015/04/judicial-independence-in-pakistan.html>.

⁹⁴ *Id.*

⁹⁵ *Id.*

assistant commissioners are part of executive branch.⁹⁶

On January 11, 2015, Jhanghir, the former President of Supreme Court Bar Association of Pakistan, and Chairperson of Friends Group, said that 21st Amendment was nothing else but an attack on the powers of legislator.⁹⁷ She asserted that there was a general belief that the parliamentarians were somehow coerced into blackmailed to vote in favor the legislation of military courts.⁹⁸ However, she regretted and expressed sadness as to how a democratically elected government would delegate its powers of the parliament to the military courts.⁹⁹

On January 27, 2017, Center for Land Warfare Studies, published an article entitled, "Military Courts in Pakistan: Army Should Be Enabler Not Provider of Justice."¹⁰⁰ And on April 2, 2015, the Dawn Newspaper ran a headline: "Military Courts Announce Death Sentences of Six Convicts."¹⁰¹ It was reported by the ISPR that the Chief of the Army Staff, General Raheel Sharif, confirmed the death sentences handed down to six terrorists by the newly enacted military courts.¹⁰²

On June 6, 2015, Human Rights Watch reporter, published an article in Fox News with a headline: "Pakistan's Death Penalty Debacle."¹⁰³ It can be safely construed that the reporter is implying that the creation of military courts for certain short period of time would not be productive and constructive in the long run. Conventional wisdom would dictate that a State must have an able and a capable civil judiciary fully equipped in all aspects to administer justice in all cases, including terrorism. If Pakistan's civil judicial system is incapable, as argued by legislators, the position of this paper is that it would be imprudent to undertake the requisite judicial reforms to overcome the supposed shortcomings, rather than enacting the military courts for two to three years.

A. The Nexus Between Human Rights and Traditional International Law

According to the generally established international law norms, the military court's jurisdiction is confined to the military offenses committed by the military personnel.¹⁰⁴ The Court Martials should not be a substitute to try civilians or the alleged acts of terrorism and gross human rights violations.

⁹⁶ *Id.*, Eugene R. Fidell, *Judicial Independence in Pakistan—A Possible Straw in the Wind?*, GLOBAL MIL. JUST. REFORM (Apr. 30, 2015, 1:52 AM), <https://globalmjreform.blogspot.com/2015/04/judicial-independence-in-pakistan.html?m=0>.

⁹⁷ Asma Jahangir, *21st Amendment Suicide Attack on Parliament*, DAWN NEWSPAPER (Jan. 11, 2015), <https://www.dawn.com/news/1156304>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Meenakshi Sood, *Military Courts in Pakistan: Army Should Be the Enabler, Not the Provider of Justice*, CENTRE FOR LAND WARFARE STUDIES (Jan. 27, 2017), <http://www.claws.in/1698/military-courts-in-pakistan-army-should-be-the-enabler-not-the-provider-of-justice>.

¹⁰¹ *Military Courts Announce Death Sentences of Six Convicts*, DAWN (April 2, 2015), <https://www.dawn.com/news/1173472>.

¹⁰² *Id.*; *Two Bills Tabled in NA for Changes to Constitution, Army Act*, *supra* note 29.

¹⁰³ Phelim Kine, *Pakistan's Death Penalty Debacle*, HUM. RTS. WATCH (June 6, 2015, 2:08 AM), <https://www.hrw.org/news/2015/06/06/>.

¹⁰⁴ EUGENE R. FIDELL, *MILITARY JUSTICE: A VERY SHORT INTRODUCTION* 1–8 (2016).

A brief historical context is appropriate to summarize the sources of these international law standards. Historically, protection of human rights has been a tremendous subject of debate.¹⁰⁵ Humanitarian Law, as it is understood today in the context of law of armed conflict is quite old, i.e., dates back to the ancient Egyptians and Sumerians, pertaining to the treatment of the prisoners, circa 1400 B.C.¹⁰⁶ The modern humanitarian law had evolved and developed over time through series of initiatives and efforts of various individuals who wanted to ensure that the conduct of war was subject of international agreements.¹⁰⁷ As a result of these initiatives, Geneva Convention of 1864 came into being.

The purpose of the Geneva Convention was to provide protection for medical personnel and hospitals. Then came The Hague Convention of 1899 which laid out the humanitarian rules pertaining to naval warfare. These conventions/treaties were indicative of states practices before and after they were adopted. “Over time, these treaties have been revised, amplified and modernized and became a body of law dealing with any and all aspects of law of armed conflict.”¹⁰⁸

Humanitarian law is old and predates the international human rights law, it is noted that the former has significantly impacted the latter in various ways.¹⁰⁹ For example, the various provisions of recent protocols of international human rights documents are similar to the Geneva Conventions (1949).¹¹⁰ Also, it is noteworthy as to member state’s obligation that the derogation clauses of the international human rights treaties have been adopted as well as incorporated by reference from the humanitarian law treaties.¹¹¹ With that background, now turn to some of specific sources of these standards. As a matter of fact, these standards emanate from several different sources. Amnesty International in its publication titled as Fair Trial Manual, Second Edition (the “Manual”); International Human Rights; and Public International Law in a Nutshell Series shed light on these standards, as follows:

IV. SOURCES OF INTERNATIONAL LAWS—IN GENERAL

International law, traditionally, used to be defined as a body of law that governs relations between States. Put it in different way, only States were subjects of international law, i.e., the rights and obligations of states were recognized. The rights and burdens of the entities were derivative because they were dependent on the State. The modern definition as it has come to be accepted is that it is a “law that deals with the conduct of the States and International Organizations and its relations with person, whether natural or juridical.”¹¹² It is important to note that applicability of international law is not limited to international relations. Rather, international law does apply to both international and national legal

¹⁰⁵ THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (5th ed. 2017).

¹⁰⁶ *Id.* at 24.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 25.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 26.

¹¹² *Id.* at 2–3.

plane. By way of example, if a state is a party to a treaty that is valid and binding under international law, the non-performance cannot be excused as a matter of international law because treaty was declared invalid under national law, subject to some exceptions not relevant here. A state's failure to perform as per the terms and conditions, would constitute breach of international law. National law does not supersede international law, even though it may take precedence over international law on the national Plane.¹¹³ The International Court of Justice held in *Avena and Other Mexican Nationals* (Mex v. U.S.), 2004 I.C.J.12, 63 (Mar.31) "as a matter of international law, the United States cannot invoke national law procedural default rules to preclude giving effect to rights for certain individuals arising under Vienna Convention on Consular Relations."¹¹⁴ It is pertinent here to describe the relevant law of the treaties.

A. Law of Treaties

Generally, a treaty is defined as "an international written agreement and/or agreements entered into between two (bilateral) or more states (multilateral) or international organizations which are governed by the rules and regulations laid down by the international law."¹¹⁵ A treaty could be described by different names, such as, covenants, charters, protocols, etc., but from the legal perspective, names have no significance, except that they may imply greater or lesser importance.

Treaties at the international level, serve numerous functions such as a legal acts and instruments. Put differently, treaties, serve as the constitutions of international organization, and they can be sources of international law. Treaties can be used for varied purposes, i.e., "to transfer territory, to regulate the commercial conduct as well as relations, to settle disputes, to protect human rights, just to name few."¹¹⁶

As Buerghenthal and Murphy describe in their nutshell series, Public International Law, 6th Edition, "the international law of treaties has been codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331, 8 I.L.M. 679 (VCLT)."¹¹⁷ The Vienna Convention on the Law of Treaties ("VCLT") came into force in 1980, and was ratified by 113 states. It is significant to note that the VCLT has an authoritative legal significance for states *not even party to it*. Generally, the parties to a treaty are bound by its terms and conditions. It has now been generally accepted that most of the provisions of VCLT are declaratory and drive their bases from customary international law.¹¹⁸ It is also noteworthy that although the United States is not a party to the VCLT; it recognizes that most of its substantive provisions are drawn from international law on the subject. Within the context of the U.S., unlike international agreements entered into, the advice and consent of the Senate is required before becoming a party to a treaty. It is noteworthy that, in the U.S. context, international law is law of the land.

Before addressing the enforcement mechanism of a treaty, it should be noted that the treaties a state party enters into a treaty when it shows intention and consent to be bound by

¹¹³ *Id.* at 7–8.

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.* at 129.

¹¹⁶ *Id.* at 123–25.

¹¹⁷ *Id.* at 125–27.

¹¹⁸ *Id.* at 129–130

the agreement on a specific date. Article 11 of the VCLT describes the procedure as to how the states consent to be bound by the treaty.¹¹⁹ It identifies a number of methods under international law by which a state shows its consent, such as, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or any means stipulated by the parties.¹²⁰ In most cases, the treaty will specify the method, i.e., that the states will be bound upon signing of the treaty etc.¹²¹

Generally, it is understood that a treaty becomes binding upon ratification, an act when a country through its head of state, foreign minister or duly authorized diplomatic agent declares that it considers itself bound by the terms and conditions of the treaty.

Another important term to note is reservation, Article 2(1) (d) of the VCLT defines it as follows: “. . . a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State.”¹²² So, by having a reservation, a State manifests its intent to modify the treaty subject to three exceptions: (i) if treaty prohibits reservation; (ii) if the treaty permits only certain types of reservation; and (iii) if the reservation is incompatible with the underlying object and purpose of a treaty.

The most important aspect of the incompatible reservation is that a State *cannot suspend* non-derogable fundamental rights.¹²³ As it was enunciated in its advisory opinion by the Inter-American Court of Human Rights, states are expressly barred from suspending the non-derogable rights, such as not to torture.¹²⁴ (The procedural aspects of the acceptance and/or objection to the reservation are not relevant to this paper and is not discussed.) However, it is significant to note that recently the European Court of Human Rights, U.N. human rights treaty bodies, and U.N. Human Right Committee have asserted to disregard the reservations pertaining to human rights which were contrary to the “spirit, object and purpose of the treaty.” So, its implication is extremely significant—“a state making a reservation is deemed to have become a party to the treaty even though it ratified the treaty subject to the reservation, which is denied its intended legal effect.”¹²⁵

Article 26 of the VCLT is very pertinent to the underlying purpose of this paper. It states in relevant parts: “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹²⁶ It has been described as the “fundamental principle of the law of the treaties.”¹²⁷ The Restatement (Third) Section 321 refers to it as “perhaps the most important principle of international law.”¹²⁸ Article 27 of VCLT goes on to describe that the obligations to perform under good-faith, as far as international law is concerned, do not provide a justification for a treaty to conflict with domestic law.¹²⁹

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 128.

¹²² *Id.* at 131.

¹²³ *Id.* at 139.

¹²⁴ *Id.*

¹²⁵ *Id.* at 136.

¹²⁶ *Id.* at 142.

¹²⁷ *Id.* at 142–43.

¹²⁸ *Id.* at 142.

¹²⁹ *Id.*

In light of the foregoing, as noted above, Pakistan is a member to the ICCPR. Its reservations pertaining to the fundamental rights could not be recognized from the perspective of international law.

B. The International Covenant on Civil and Political Rights (ICCPR)

The principles enumerated in the ICCPR are the primary focus of this paper. It will be discussed later in the paper whether ICCPR rules were followed or not by the military courts of Pakistan. The ICCPR was adopted in 1966 by the UN General Assembly and came into force in 1976.¹³⁰ There were 167 states parties. The record shows that as of June 26, 2013, 167 states were party to the ICCPR.¹³¹ Pakistan is a member of ICCPR, its obligations under the ICCPR are discussed in a later section in the paper. The manual points out that the member States by virtue their membership to the ICCPR have the obligation and are legally bound to abide by its terms i.e., to protect, inter alia, “the right to life; the right to be free from arbitrary arrest or detention; the right to freedom from torture and other ill-treatment; and the right to a fair trial.”¹³² It is noted that the UN Human Rights Committee has been empowered to monitor whether the member states are complying and implementing the ICCPR and whether its Second Optional Protocol is being followed.¹³³ The UN Human Rights Committee provides General Comments which serve as an authoritative guidance on interpretation for the member States.¹³⁴

As noted above, Protocol is a mechanism to make an amendment to a treaty, the first Optional Protocol to the ICCPR was introduced and adopted in 1976.¹³⁵ According to this protocol, the Human Rights Committee was given the authority to consider complaints which were submitted by or on behalf of individual member States. This is a procedural remedy to serve as a check upon member states the compliance of the treaty terms.

The (Second) Optional Protocol to the ICCPR was signed in 1991.¹³⁶ The primary purpose of this Optional Protocol was that member states should abolish the death penalty. Pakistan, at its own will, voluntarily choose to become a member to this protocol. The membership to a Treaty and/or a Protocol has its benefits as well as limitations. It can be safely construed and analogized as a “contract” between parties.

The parties are bound by the terms and of a contract. If a party breaches the terms and conditions of a contract, she is liable for such breach conditions. Similarly, the countries which are members of a treaty and a protocol are bound by the terms and conditions of the subject treaty/protocol. When Pakistan choose to adopt this protocol, it agreed to abide by its terms and ensure that the death penalty under its jurisdiction will no longer would be the law of land. Put in another way, Pakistan shall undertake necessary steps and measures to abolish the death penalty.

¹³⁰ *Id.* at 163.

¹³¹ Amnesty Int’l, *Fair Trial Manual*, AI Index POL 30/002/2014, at 1 (2d ed. 2014) [hereinafter *Fair Trial Manual*].

¹³² *Id.*

¹³³ *Id.*; BURGENTHAL ET AL., *supra* note 105, at 163–164.

¹³⁴ *Fair Trial Manual*, *supra* note 132, at 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

There was moratorium on death penalty in Pakistan for certain period of time.¹³⁷ The death penalty was reintroduced and moratorium was lifted on death penalty because allegedly, terrorism and lawlessness in the country was out of control. This measure was taken in aftermath of killing of 141 high school students in Peshawar in December 2014, as noted above.¹³⁸ Also as pointed out earlier, the new legislation in terms of 21st Amendment empowered the military courts to award death sentences, which it did.¹³⁹

C. Other UN Human Rights Treaties—Convention Against Torture

In 1984 The UN General Assembly adopted a Convention called, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴⁰ The convention was adopted by member states by consensus and became effective and enforceable in 1987.¹⁴¹ As noted earlier, it has been widely reported within Pakistan and by international media that the suspects were subject to torture while in government custody, some were taken away by force, and their whereabouts were unknown for years.

D. Non-Treaty Standards

Additionally, the Manual states that: “Many human rights standards relevant to fair trials are contained in non-treaty instruments.¹⁴² Non-treaty instruments are usually called Declarations, Principles, Rules, and Guidelines and so on. The Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁴³ and the Standard Minimum Rules for the Treatment of Prisoners¹⁴⁴ are examples of non-treaty Instruments which set out important fair trial guarantees. States do not formally become parties to non-treaty standards. Although non-treaty standards do not technically have the legal power of treaties, they have the *persuasive force* of having been negotiated by states, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus. Because of this political force, they are considered “authoritative”, and they are cited and relied upon in rulings of regional human rights courts and national courts. Non-treaty standards sometimes reaffirm principles that have become or are already considered to be legally binding on all states under customary international law.”¹⁴⁵

E. Universal Treaty Standards

The Manual further prescribes that: the international treaties which are listed below were voluntarily entered into member states, hence the terms and condition of such treaties

¹³⁷ *Death Penalty Moratorium Lifted Completely in Pakistan: Officials*, DAWN (March 10, 2015), <https://www.dawn.com/news/1168652>.

¹³⁸ *Id.*

¹³⁹ *Pakistan to Reinstate Secret Military Courts Despite Criticism*, BBC (Mar. 22, 2017), <https://www.bbc.com/news/world-asia-39348773>.

¹⁴⁰ BURGENTHAL ET AL., *supra* note 105, at 168.

¹⁴¹ *Fair Trial Manual*, *supra* note 132.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Pakistan to Reinstate Secret Military Courts Despite Criticism*, *supra* note 139.

are legally binding on states parties.¹⁴⁶ The primary focus of these treaties is that member states should ensure to adhere to standards of fair trial to its citizens and are cited in this Manual.

As noted earlier, the summary of facts adopted from the mercy petitions filed in the Supreme Court are very explicit and graphic in details about the ill-treatment, harsh conditions as well as torture suspects suffered while in the detention. These details of suffering are heart wrenching and flagrant violations of the subject treaty. Even the Supreme Court of Pakistan in its ruling has alluded to the fact that suspects were allegedly ill-treated and tortured while in the government custody.¹⁴⁷ As a member state of the ICCPR, Pakistan has the obligation and responsibility to abide by its terms. The term is explicit that suspects will not be subjected to torture while in custody.

The Manual, as noted, states that in 2006, The *Optional Protocol to the Convention against Torture* was adopted and became enforceable.¹⁴⁸ This optional protocol was designed for purposes to bar States from imposing death penalties except in times of war.

There has been some discussion in some quarters that terrorist attacks on Pakistan's government entities, such as civil courts and public schools could be construed as acts of aggression and/or act of war. There were no more conventional wars being fought in the 2014–2015 time frame. Non-state actors, such as, terrorist groups launching attacks against any particular state, could be argued whether it is an act of war or not. Therefore, whether the invocation of the death penalty under the circumstances prevalent in the country could be a justified remedy depends. Without a doubt, the security condition in the country was dire. But that required addressing the root causes of the security condition, not resorting to actions which breed more violence. The judicial reforms, security, law and order and rule of law should be the priority of the State; instead of resorting to short-sighted measure of military courts.

Additionally, Pakistan as a member of ICCPR is under the obligation to adhere to the terms and conditions of the treaty. As noted above, it had been widely reported that the military courts have awarded the death penalties.¹⁴⁹ As a member state, Pakistan should not be imposing the death penalty due to its membership of the ICCPR. The adoption of this Protocol was an additional mechanism for the UN body to monitor whether or not the member States were compliant to its terms.¹⁵⁰ The principal focus of this paper is based on the provisions of Article 14 of the ICCPR. But other standards where relevant are cited accordingly.

V. PAKISTAN'S OBLIGATIONS UNDER THE ICCPR

According to the UN record, Pakistan became the signatory to the ICCPR on April 17, 2008.¹⁵¹ Pakistan ratified and acceded to the Convention on June 23, 2010 and the Convention's entry into force became effective on September 23, 2010.¹⁵²

¹⁴⁶ *Fair Trial Manual*, *supra* note 132.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1–10.

¹⁴⁹ *See* Said Zaman Khan v. Federation of Pakistan, (2016) 2017 SCMR 1249 (SC) 1 (Pak.).

¹⁵⁰ *Pakistan 2016*, *supra* note 83, at 3.

¹⁵¹ *Id.*

¹⁵² International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

A. Reservation by Pakistan

Pakistan has made several reservations to the articles in the Convention; “the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws,”¹⁵³ “the provisions of Article 12 shall be so applied as to be in conformity with the Provisions of the Constitution of Pakistan,”¹⁵⁴ “With respect to Article 13, the Government of the Islamic Republic of Pakistan reserves its right to apply its law relating to foreigners”¹⁵⁵ “the provisions of Article 25 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan”¹⁵⁶ and the Government of the Islamic Republic of Pakistan “does not recognize the competence of the Committee provided for in Article 40 of the Covenant.”¹⁵⁷

Pakistan as a full member state of the Covenant is bound to observe its standards and obligations. As noted above, the member states under certain circumstances (state of emergencies) can *abrogate* certain provisions. But the basic fundamental and cornerstone obligations, such as fair trial can never be abrogated in any circumstances.

VI. ARTICLE 14 OF THE ICCPR STATES IN PERTINENT PARTS:

It should be noted that complete Article 14 is listed below for the purposes of completeness. But [Only] the relevant provision are analyzed in section 8. ICCPR state in pertinent part as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defense and to communicate

¹⁵³ DEMOCRACY REPORTING INTERNATIONAL, BRIEFING PAPER 04, PAKISTAN’S RESERVATIONS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (July 2010), http://democracy-reporting.org/wp-content/uploads/2016/02/dri_briefing_paper_4_-gop_reservations_on_iccpr.pdf.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.¹⁵⁸

It is worthwhile to note that General Comment 32 of the UN Human Rights Committee has stated that, “The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.”¹⁵⁹

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Thus, for example, as Article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Article 14.¹⁶⁰

VII. HISTORICAL CONTEXT OF FAIR TRIAL, PUBLIC HEARING BEFORE AN IMPARTIAL TRIBUNAL

According to the standards and principles listed above, those who are accused of criminal offenses—no matter how serious and heinous—are guaranteed, inter alia, a fair trial by an independent, impartial and competent tribunal established by law.¹⁶¹ The UN Human Rights Committee has taken the position that the Article 14 provision of the ICCPR applies to *all courts*, whether ordinary or specialized, civilian or military.¹⁶²

I want to make note that I was attending an International Law Conference in November 2017, at Fordham University Law School, New York, a book titled as “General Principles of Law and International Due Process” caught my attention.¹⁶³ I have incorporated doctrine of the Due Process—which in essence is the subtitle and heart of this paper. The relevant references from the subject book is an attempt to point out that the “due process” historically is linked with the standards laid in the Covenant.

In their book, Professor Kotuby, Jr. and Professor Sobota wrote, “The inchoate notion of ‘due process’ set in the Twelve Tables have had perhaps their most robust expression in modern human rights conventions.”¹⁶⁴ The Inter-American Convention on Human Rights (IACHR), as has been pointed out above that a Convention is a mechanism or a tool to make modification to an existing treaty, so it carries a *weight and force of treaty*. The IACHR lays out that an accused of a crime has the right to a hearing.¹⁶⁵ The hearing must be held before an impartial tribunal. It is reported that The European Convention for the protection of Human Rights and Fundamental Freedoms also follows similar provisions, such as, that the fair trial and public hearing is basic right of everyone who is charged with a crime.¹⁶⁶ Additionally, the hearing should be held within a reasonable period of time before an independent and impartial tribunal established by law.¹⁶⁷

The close review of the Petition No.1 (noted above) reveals that the accused was taken into custody in 2014. His whereabouts were unknown to his family, the charges brought against him are unknown; it is not documented anywhere that he was given the opportunity to have legal representation of his own choice; it is also not reported where the trial took place, (place of the trial); who the witnesses testifying against him were; and whether he presented live testimony and/or documentary evidence on his behalf.

Applying the standards of the IACHR and European Convention for the protection of Human Rights and Fundamental Freedoms to these facts as noted in the petitions, it is hard

¹⁶⁰ *Id.*

¹⁶¹ International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁶² General Comment No. 32, *supra* note 22.

¹⁶³ CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES (2017).

¹⁶⁴ *Id.* at 61.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

to make a case that the requirements could have been satisfied. From Pakistan's standpoint, an argument can be made that Pakistan is not a member to these treaties, and therefore it is not bound by its terms and conditions. It is not a plausible argument because whether or not Pakistan is a member, fundamental rights cannot be abrogated. Additionally, the persuasive argument would be that the laws, such as these are authoritative, persuasive and universal in nature and their application have the force of versatility. Regardless of membership, fair trial and public hearings are fundamental freedoms.

Professor Kotuby and Sobota go on to describe that the Magna Carta or the "law of the land" exercises the powers of the government.¹⁶⁸ This is how this principle came to be known:

"No free man shall be seized or imprisoned, or stripped of his rights or Possession, or outlawed or exiled, or deprived of his standing in any Other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equal or *by the law of land*." ¹⁶⁹

As it is reported that the doctrine of due process evolved over time, it was subsequently adapted and adopted in the American colonial and the State constitutions,¹⁷⁰ and later the federal Constitution. The terms of the Constitution were kept vague in order to adapt to the laws of respective states. It is remarkable to note that "[t]he history of the American freedom is, in no small measure, the *history of procedure*."¹⁷¹ Certain baseline procedural rules have thus been identified as a core of the "due process." They include, among others, "the right to notice reasonably calculated to apprise interested parties of the pendency of an action,"¹⁷² the ability to be heard at a meaningful time and in a meaningful manner,¹⁷³ the opportunity to present every available defense;¹⁷⁴ the requirement that criminal guilt or civil liability be based on public evidence;¹⁷⁵ and the need for the judge to be impartial, unbiased, and objective.¹⁷⁶

If we apply these due process standards to the facts in the four above mentioned petitions and analyze it logically, it will be difficult to make a convincing argument that the requirements of due process have been satisfied. The ability to be heard in a meaningful manner implies that the accused is provided all the safeguards to present his and/or her case

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 63 (emphasis added).

¹⁷⁰ Eight of thirteen colonies had a "law of the land" provision, or its equivalent, in their constitutions. See also HANNIS TAYLOR, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS 13–15 (1917).

¹⁷¹ *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring) (emphasis added).

¹⁷² *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

¹⁷³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

¹⁷⁴ *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932).

¹⁷⁵ *Fiore v. White*, 531 U.S. 225, 228 (2001) (holding that failure to prove a basic element of a crime renders a criminal conviction void for lack of due process); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) ("[S]o is it a violation of due process to convict and punish a man without evidence of his guilt."); *Garner v. Louisiana*, 368 U.S. 157 (1961).

¹⁷⁶ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); see also *Mooney v. Holohan*, 294 U.S. 108, 112 (1935) (stating that due process "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured").

with sufficient preparation, to have a counsel of his own choice, if he or she cannot afford one, should be provided one free of cost, be allowed to call witnesses in his own behalf, permitted to present rebuttal witnesses, if he chooses to do so, able to present any documentary evidence in his defense.

The concept of public evidence is premised upon the notion of ‘fairness’, means that the evidence is presented in the public arena from both parties, the state and the accused. The purpose of this doctrine is to have the public’s confidence in the judicial system and rule of law. If the trial is conducted as a pretense, and a state intentionally as well deliberately undertakes deceptive measures merely to get a conviction rather than finding the truth, will ultimately undermine the judicial system as whole in the long run. No democratic country aspires to adopt or accept such a system.

The generic nature of these rights is intentional “no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.”¹⁷⁷ It is hard to imagine that any two cases will be exactly factually similar. There could be similarities between the cases but they are almost always fact specific. Therefore, it is not possible to apply the requirements of due process in every situation with rigidity and inflexibility. The concept of due process is based on general notion of universal fairness. Therefore, the authors contend that: “the very nature of the due process negates any concept of inflexible procedure universally applicable to every imaginable situation.”¹⁷⁸

VIII. ARE PAKISTANI MILITARY COURTS COMPATIBLE WITH THE INTERNATIONAL LAW STANDARDS, PARTICULARLY THE ICCPR?

With this backdrop and the broad standards noted above in mind, it is now pertinent to analyze objectively whether the Pakistani Military Courts were adherent to the subject standard. In this section the relevant provisions of Covenant will be discussed.

Article 14 (1) of the ICCPR states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁷⁹

A. Fair and Public Hearing by a Competent, Independent and Impartial Tribunal

To critically analyze whether or not the Military Courts have complied with this principle, it should be noted that the UN Human Committee has taken the position that this provision of the ICCPR applies to all courts, whether ordinary or specialized, civilian or military, those who are accused of criminal offenses—no matter how serious and heinous—are guaranteed, inter alia, a fair trial by an independent, impartial and competent tribunal established by law.

¹⁷⁷ KOTUBY & SOBOTA, *supra* note 164, at 65.

¹⁷⁸ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982).

¹⁷⁹ As noted in *supra* note 151

The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed by the Covenant.¹⁸⁰ The term “tribunal” in the context of Article 14(1) has been interpreted a body that has been “established by law, is independent of the *executive* and *legislative* branches of the government or enjoys in specific cases *judicial independence* in deciding the legal matters in proceedings that are judicial in nature.”¹⁸¹

The individuals who are charged with criminal offenses are guaranteed access to these tribunals. The Committee has noted that these rights cannot be limited.¹⁸² Any conviction by a body which does not constitute a tribunal is incompatible with this provision. The Committee goes on to state that if a member state fails to formulate a court or tribunal that is neither competent and disregards its obligations and rights nor provides an access either to the accused and its family members is in a violation of Article 14.¹⁸³ The analysis of the following factors is determinative of this standard.

It is further argued that the military courts are part of the executive, not an independent branch as is the pre-requisite under Article 14 (1). “The requirement of competence, independence, and impartiality of the tribunal are the *absolute rights* and are not subject to exception”.¹⁸⁴

B. Composition of Military Courts:

According to the Army Act, 1952 Section 85: “The composition of a Field General Court martial is no less than five officers.”¹⁸⁵ Section 87 of the Army Act states that “it should consist of no less than three officers,”¹⁸⁶ There is no right to jury trial in the Pakistan legal system, let alone in military courts.

The Dawn Newspaper published the following headline:

New Martial Powers: Individuals illegally crossing national boundaries can now be tried by military courts; Federal government can transfer any case, pending in any civilian court, to military courts; Those, who are convicted by military courts will have no right of appeal before civilian courts; New legislation gives a judicial mandate to an executive functionary.¹⁸⁷

It is noted that the ICJ further reports that the procedural aspects of the military courts are strictly followed according to the guidelines set forth by the Army Act of 1952. Which

¹⁸⁰ General Comment No. 32, *supra* note 22, at ¶ 6.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ The Pakistan Army Act, No. 39 of 1952, PAK. CODE, *amended* by the Pakistan Army (Amendment) Act, No. 2 of 2015, (Pak.), § 87.

¹⁸⁶ *Id.* at § 85. INTERNATIONAL COMMISSION OF JURISTS, MILITARY INJUSTICE IN PAKISTAN: A BRIEFING PAPER (2016), <https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf> [hereinafter BRIEFING PAPER].

¹⁸⁷ Malik Asad, *The New Martial Powers*, DAWN NEWS (Jan. 07, 2015), <https://www.dawn.com/news/1155411>.

is contrary to the procedures of a Civil Court, as mandated by Article 14 of the ICCPR.¹⁸⁸ This procedure is also not in compliance with the notion of independent, impartial judiciary because the army is inherently a part of the executive branch. The military courts are presided by the active serving military officers, and not by the judges as required by the Article 14 of the ICCPR.¹⁸⁹

The requirement of “Independence” speaks to the procedures and the qualifications and the appointment of judges. The military officers who preside over these trials are not trained in law, are not required to have a law degree, and have no training in any procedural and law of evidence. In military courts the military rules apply. The military officers are bound to and strictly adhere to the hierarchical structure of the Army. It is difficult to imagine an officer junior in rank disagreeing with a senior officer. This explains the lack of total independence.

The notion of “Impartiality” has two components: (1) free of personal bias and 2) appearance of impartiality to a reasonable observer. According to Human Rights Committee, Ninetieth Session, Geneva 9 to 27 July 2007, General Comments No.32, “The judges must not allow their judgment to be motivated or influenced by their personal bias or prejudice, nor harbor preconceptions about any case before them.”¹⁹⁰ The judges must not promote the interest of one party over the other. The second aspect of impartiality focuses on the aspect of appearance of impartiality in its functioning and operations to an ordinary observer. All parties should be treated equally, no preferential treatment is afforded to anyone before the tribunal. As noted above, the country was ready for *revenge*, prior to the legislation and afterward it was widely and open reported that the worst of the worst were going to be tried by these military courts. The doctrine of presumption of innocence was lacking right from the start, a violation of the established criteria. Using any objective criteria, it would be very hard to make a persuasive argument that the subject military courts were impartial in the exercise of their duty.

The military tribunal are procedurally different than the civilian courts. The military tribunal are governed by the Pakistan Army Act of 1952. It has its unique characteristics which are fundamentally different than the ordinary civil criminal courts. Some of which are listed as follows:

1. *No public hearing*

According to the Army Act, there is no requirement that any of proceedings such as, court martial take place in public. The ICJ paper noted that The Army Act does not necessitate that a trial must take place in public.¹⁹¹ According to the Ordinance of February 25, 2015, judges of military courts could hold in camera trials, and do not have to disclose the identities of the individuals associated with cases.¹⁹² Again, it is inherently contrary to the notion and doctrine of the fair trial. The issue is whether these military courts meet the criteria of ‘Public Hearing.’ As noted above, and described in the petitions, it will be

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 10.

¹⁹¹ *Id.*

¹⁹² *Id.*

impossible to make a case that such hearings were public by any stretch of the imagination. As the allegations in these petitions are indicative of fact after these individuals were captured no one knew their whereabouts. *Where, when and how* the trials were held, is not known in the public arena. Also, it is uncontroverted evidence that the military courts in Pakistan and elsewhere are generally held *away from the public eye*.

Pakistan can argue that Article 14, (1) permits Member States “may exclude the media in some circumstances, such as, national security in a democratic society, special circumstances where publicity would be prejudicial to the interest of justice . . .”¹⁹³ But the persuasive argument is that Article 14, (1) of the ICCPR “contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law.”¹⁹⁴

It is incumbent upon the States that the guarantees of fair trial should not be subjected to abrogation. If a state adopts a measure which is meant to circumvent the protections of fair trial and due process protections, such measure will be unacceptable. For example, as Article 6 of the Covenant is non-derogable in its entirety, what that means is that a member state cannot opt out.

2. *Referral of cases to the military courts*

There is no public information as to how the cases were selected and/or referred to the military courts. There are media reports that previously pending cases were being transferred to the military courts. The transfer of the cases prior to the enactment of the bill as per 21st Amendment which empowered military courts would constitute a classic example of the doctrine of “*Ex-Post Facto Laws*.” The laws which are retroactively applicable. Ex- Post facto laws, in the U.S. and supposedly in the Western World are considered fundamentally unconstitutional.

By reviewing the facts of the above mentioned petitions, substantial evidence supports the argument that cases prior to the enactment of the 21st Amendment have been transferred, tried, and awarded convictions. That would constitute the violation of Article 14 provision, any trial which results in rendering a verdict of the death penalty even during a state of emergency and or exigent circumstance must conform to the provisions of the Covenant, including all the requirements of article 14.

3. *Presumption of innocence*

Article 14 (2) of the ICCPR in pertinent part states: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”¹⁹⁵ Article 14 (2) of the ICCPR emphasizes the recognition of the universal principle that anyone who is charged with a crime is presumed to be innocent until proven guilty.¹⁹⁶ It has been widely reported that this rule was flagrantly in non-compliance. By all accounts the rule was reversed in the sense that everyone tried by the military courts were subjected to “Presumption of Guilt.” Prior to the passing of the 21st Amendment to the Constitution and Army Act of 1952, there were wide spread reports in the news and the

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ General Comment No. 32, *supra* note 22.

¹⁹⁶ *Id.*

social media that the “darkest of the cases” will be tried in the newly established Military Courts.¹⁹⁷ The nation was bent on revenge, rather than doing justice to all. Emotions were running high. The debates in the Parliament to consider these amendments took minutes, as noted earlier, and amendments were approved by overwhelming majority. Before being presented in these courts, the accused were *tainted* and *presumed guilty*. It is hard to argue how this rule was not violated by the military courts. It could be further argued that the trials were mere pretense. It was contrary to the universal concept of innocent until proven guilty.

4. *Speedy trial*

Article 14 (3) (a) states in pertinent part that: “in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹⁹⁸

The significant language of this article is “promptly.” It can be safely translated to the concept of “*speedy trials*.” As it is noted in the petitions, (petition no. 2) mentioned above, Ali was taken into custody on September 21, 2009, when he was 10th grade student. His parents claimed that they did not know his whereabouts, until April 3, 2015. It was reported in the media that Ali was tried by the FGCM and sentenced to death.

There are number of issues with this petition, as it is noted in the petition that he was a *minor* at the time of his arrest. First of all, it should be noted that Article 14 (4) states that “in case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”¹⁹⁹ There is no such evidence in the record from which it can be inferred that any rehabilitation were made. Additionally, the 21st Amendment became effective on January 1, 2015. He was taken into custody on in 2009. It is logical to assume for that his arrest was allegedly for crimes committed in 2009 or prior to that time. If he was continually in the custody of government from 2009 to 2015, how could he have committed a crime of terrorism, which was not in existence at time? This is a classic example of Ex-Post Facto laws, which are considered fundamentally and inherently unconstitutional.

Article 14 (3) (c) states that the accused “to be tried without undue delay.”²⁰⁰ It can be argue what is “undue- delay.” As it has come to be known that objectively speaking the trial should be conducted within a ‘reasonable’ period of time. It is an objective standard. Again, if we consider the facts of Petition No. 2, the petitioner was in custody from 2009 to 2015, it would not constitute an objective and reasonable period of time. A strong and persuasive argument would be made that a six years period of detention without any charges and trail would be an undue delay and a violation of the Article 14 (3) (b).

5. *Assistance of counsel*

¹⁹⁷ *Two Bills Tabled in NA for Changes to Constitution, Army Act*, *supra* note 29.

¹⁹⁸ General Comment No. 32, *supra* note 22.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

The essence of Article 14 (3) (b) is to have adequate time to prepare his defense and to communicate with *counsel of his own choice*. It is widely reported that those who were convicted and sentenced to death, were not allowed to hire or meet with counsel of their choosing. As it is evident from the four petitions noted above, parents did not know the whereabouts of their sons. It is reported that according to the attorneys who represented the convicted individuals have contended that they were never given access to their clients. Furthermore, these individuals were tried before secret courts. They were kept in internments and secret detention centers for years. There is no written Judgement by the Military Courts and it is unknown what evidence was used against the individuals. The Military Courts allowed the previously recorded statements against these individuals. This is contrary to the right to confront. When an accused is not permitted to cross examine, confront or impeach a witness, as described by the facts of the petition that none of the petitioner was provided these guarantees by these courts. No one knew where the subject trials were held, fundamentally unfair and in violation of fair trial as described in Article 14. According to the Army Act, “an accused person may be tried and punished for offences under in any place.”

6. *Transparency*

The significant aspect of Article 14 (3) (d) is that the accused be tried *in his presence*, and to defend himself in person, or through legal assistance, without payment if he does not have means to pay. Again, there is no way of knowing what transpired in this regard. There are some reports that judges of Military Courts reviewed cases in camera. It is widely reported that there is total lack of transparency. Lack of transparency is a critical aspect of the military proceedings. The military proceedings are not open to the public, contrary to the domestic and international standards. What has come to light through the documentary evidence, literature and news media thus far, establishes that the proceedings in the military courts have been conducted in secrecy and away from the public eye. Since January 2015, when military courts came into existence, the Government of Pakistan and the armed forces have not disclosed what “procedures” have been undertaken to handle these alleged terrorists. There has been “no public disclosure of the names” of people being tried, except very recently names have released.

The International Commission of Jurists (ICJ) in its critique of Pakistani Military Courts, published a briefing paper on June 26, 2016, under the heading of “Military Injustice in Pakistan.”²⁰¹ It contends, that the procedures adopted by military courts in Pakistan, including the referral of cases to military courts, lack transparency and adequate information about the operation of military courts is not publicly available.²⁰² This secrecy in itself contravenes the rule prescribe in ICCPR.

As the ICJ in its critique notes that there is no mechanism to find out how the government of Pakistan transfers cases to the military Courts. It is reported that the cases are being transferred without any criteria and at the whim of the officials.²⁰³

²⁰¹ BRIEFING PAPER, *supra* note 186.

²⁰² *Id.*

²⁰³ *Id.* at 10.

7. Evidence

Although Section 133-B of the Pakistan Army Act of 1952 describes the rules of evidence in proceedings before court martial are the same as those observed by regular civilian and criminal courts, the reports and the petitions filed before Supreme Court state otherwise.

Article 14 of the ICCPR emphasizes that its provisions “apply to all courts and tribunals, whether ordinary or specialized, civilian or military.”²⁰⁴ The Committee requires that such trials are “in full conformity with the requirements of Article 14 and that *its guarantees cannot be limited or modified* because of the military or special character of the court concerned.”²⁰⁵

As noted above, Katherine Horreld has stated that the Pakistan military courts could not be independent and the proceedings before them are not adherent to either national or international standards. The evidence has established that the military judges are active and serving military officer. These judges are part of the Executive Branch, which is contrary to the notion of independent judiciary. These officers are not legally trained nor do they have a law degree. They are neither required to have a law degree or legal training,²⁰⁶ nor have the benefit of the security of the tenure,²⁰⁷ which are prerequisite of judicial competence and independence.²⁰⁸

It has been reported that Pakistan military courts have not issued any detailed, reasoned judgments.²⁰⁹ As it is the essential element of a fair trial that there should be a written judgement, which specifically includes its essential findings, evidence and legal reasoning. It has been held that even in cases where the public has been excluded from attending the trial, the judgement, as described above must be made public, except in juvenile and guardianship of minors are concerned.²¹⁰

It is important to note that the Committee contends that “trials of civilians by military courts should be *exceptional*, limited to cases where the State party can establish that such measures are necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offenses at issue the regular civilian courts are unable to undertake the trials.”²¹¹

It is remarkable to note that the Committee states that the countries which have chosen to utilize special tribunals, and put “faceless judges” also called “anonymous judges” to fight certain activities of terrorism, suffer from the “irregularities such as exclusion of

²⁰⁴ General Comment No. 32, *supra* note 22, at ¶ 6.

²⁰⁵ *Id.*; BRIEFING PAPER, *supra* note 186, at 10.

²⁰⁶ G.A. Res. 40/32, (Nov. 29, 1985); G.A. Res. 40/146, (Dec. 13, 1985).

²⁰⁷ Int’l Ass’n Judicial Indep. & World Peace, Montreal Declaration 2.19(b) (June 10, 1983), https://12ca241e-b6b8-91e5-b777-949f9bfa986c.filesusr.com/ugd/a1a798_e527f11f0d704ee69526069d1520bbd6.pdf (“Judges whether appointed or elected shall have guaranteed tenure until a mandatory retirement age or expiry of their term.”).

²⁰⁸ The Pakistan Army Act, No. 39 of 1952, PAK. CODE, *amended* by the Pakistan Army (Amendment) Act, No. 2 of 2015, (Pak.), § 133.

²⁰⁹ Babar Sattar, *Militarised Justice*, THE NEWS (Dec. 5, 2015), <https://www.thenews.com.pk/print/79676-militarised-justice>.

²¹⁰ General Comment No. 32, *supra* note 22, at ¶ 22.

²¹¹ *Id.*

public or even the accused or their representative from the proceedings, restriction of the right to a lawyer of their own choice, restriction or denial of right to communicate with their lawyers, particularly when held incommunicado, threats to the lawyer, inadequate time to prepare for trial,”²¹² denial of to summon and examine the witnesses, do not satisfy the basic standards of fair trial and independence and impartiality of judges.

As noted above, a careful review of the rational/justification put forward by Pakistan government for the enactment of 21st Amendment was that civilian courts were unable to conduct terrorist trials. This is a flawed and shortsighted argument. The government must undertake the all necessary measures to equip the civil judiciary to successfully address all cases, including offenses of terrorism. The public confidence in the civil judiciary is of paramount importance for the respect of rule of law which in turn creates the environment of overall stability in the country.

This paper takes the position that: By creating the military courts, a parallel system of justice, the administration has further helped weakening the judicial system of the country. Building of the institutions, empowering and strengthening the judicial system is what the civilized, advanced democracies across the globe have always endured. Looking for temporary measures is misguided as well as shortsighted.

As noted above, Military Courts have not provided any public information about the time of the trials, the place of trials, specificity of the charges, the evidence against the defendants, or the judgments (including findings and legal reasoning) since its inception.

The Pakistan Government argues that it had confronted and continues to face a real and serious threat of terrorist attacks on its soil. A state has a responsibility and legal duty to prevent terrorist attacks and protect its citizens within its jurisdiction. Pakistan’s argument that it is any State’s legitimate interest to have the terrorism eradicated from its land, but it does not take into consideration, or perhaps does not *want* to ponder that it has to comply simultaneously with the proscribed obligations, such as, international treaties, the International Covenant on Civil and Political Rights, 1966, (ICCPR). Specifically, Article 14 of the ICCPR contains guarantees that a Member State must respect and adhere to “the guarantees of the Covenant irrespective of their legal system or legal traditions. The members State are allowed as to report their understanding of the interpretations of guarantees as to how does it apply to the domestic law, but the General Comments No. 32, is very specific that the application of the contents of guarantees within the context of domestic law, cannot be left to the sole discretion of a member state.”²¹³

8. *Confession:*

“Article 14, paragraph 3(g) guarantees the right not to be compelled not to testify against oneself or to confess guilt.”²¹⁴ The safeguard is the primary protection for the accused in any judicial system. The essence of the doctrine of confession is premised on voluntariness, and without duress. One of the elements of confession is that it should be under the non-threatening environment and close proximity to the arrest.²¹⁵ As noted, the

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

confessions taken by the Pakistan military courts have been years after the arrest of the individuals. Some of the reports have surfaced that the authorities used torture and ill-treatment to obtain confessions, contrary to the ICCPR.²¹⁶ The confession has to be made voluntarily and before a different entity than the investigation authority. The confession must be made immediately after the arrest of the accused. The longer detention and abusive and torturous prison conditions would be conducive for tainted confession. Such confession is inadmissible for the purposes of procuring convictions.

UN Human Rights Committee, 120th session, Geneva, 3-28 July, 2017²¹⁷, states that 169 civilian cases were transferred to the military courts. It was released and made public that 159 individuals (95%) allegedly “confessed” to the charges against them. This is an alarming rate of confession. It raises the questions about the legitimacy and voluntariness of the confessions. A very strong, reasonable and logical inference can be drawn that these confessions were the product of the infliction of torture and other ill treatments meted upon these individual. It is almost impossible to have such a rate of confessions. That leads to a conclusion that these trials were merely labeled as trials without the providing the fundamental guarantees of the fair and impartial trials.

The UN Committee against Torture (CAT) has repeatedly asserted that people accused of crimes must be kept at facilities officially recognized places of detention, and measures should be taken against the incommunicado detention where suspect are kept.²¹⁸ In its concluding observation on Pakistan, the CAT Committee had urged Pakistan to ensure that no one is held incommunicado detention where suspects were deprived communication with the outside world.²¹⁹

As noted above, the petitioners argue they were in secret detentions for years and were kept incommunicado detention centers. They assert that they were deprived of communication with the outside world. They were not given access to legal representation and family members. Applying these facts to the law/guarantees as it is enunciated in the Covenant, it would be very hard to make an argument that these confessions were voluntarily made and the convictions based upon them could be valid under any standards.

It is imperative to point out that if a State engages in a pretense of conducting a trial. But in reality the process does not satisfy the elements of a fair trial and due process, the implications of such measures are far devastating. If the only objective of the State is to get a conviction by offering deliberately false and perjured testimony, then that State by engaging in such conduct is doing its citizens a huge disservice and is sabotaging the supremacy of rule law. If the public at large does not have confidence and respect in the rule of law, does not have the respect and confidence in the judges, the prosecutors and law enforcement authorities, that State will not be successful and prosper in the long run.

It is worthwhile to take a lesson from the history on the doctrine of due process. In the year 1935, the Supreme Court of the United States in the case of *Mooney v. Holohan*, 294 U.S.103, 112 (1935) and in *Caperton v. A.T.Massey Coal Co.*, 556 U.S. 868 (2009) stated:

²¹⁶ INTERNATIONAL COMMISSION OF JURISTS, SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS IN ADVANCE OF THE EXAMINATION OF THE INITIAL REPORT OF PAKISTAN UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 15 (2017).

²¹⁷ *Id.*

²¹⁸ BUERGENTHAL, ET AL, *supra* note 186, at 109–110.

²¹⁹ *Id.*

“due process cannot be deemed to be satisfied by mere notice and hearing if a State contrived a conviction . . . through deliberate deception of court and jury . . . by the presentation of testimony known to be perjured.”²²⁰

It is without a doubt that there is no legal system which works perfectly and operates flawlessly. But when any legal system, in this case the military courts of Pakistan, is bent on avenging the terrorists, rather than administering justice and fairness and adhering to the fundamental guarantees, is most probably will create resentment, hatred and more terrorists not less. The rational and logical approach would have been to observe complete transparency, empowerment of civilian courts and total observance of rule of law.

9. *Right to appeal*

Section 133-B, Pakistan Army Act, 1952, describes the appellate procedures that anyone convicted by the Field General Court Martial can appeal his conviction, with in thirty days to the Chief of Army Staff or his designee etc. ICJ argues correctly that under the 21st Amendment the accused persons have no right to appeal his conviction to the civil courts, which is contrary to the fundamental standards of the Article 14 of ICCPR.²²¹ The right to appeal is an inherent right of any convicted person. The deprivation of such right to appeal is incompatible with the international standards.

As the evidence had revealed that Pakistani military justice system for civilian trials is contrary to established international standards, inter alia, the right to life, the right to fair trial, and the independence and impartiality of judiciary, just to name few. It has been reported that military courts for the last two years have tried the civilians for the offenses related to terrorism, as empowered by the new legislation.²²² The record shows that the military courts handed down sentences for 274 civilians including children away from the public eye, in opaque, and in secret proceedings.²²³ These military courts have sentenced 161 civilians to death and at least 48 have been hanged.²²⁴ The trials conducted by military courts have been reported to be grossly unfair and non-compliant with the requirements of Article 14 of the ICCPR. The military courts have provided no public information about these trials specially pertaining to the time of the trial, place of trial, the specific nature of the charges and what was the evidence against these convicted people. The Military Courts have not published the written judgments, their legal findings, detailed legal analysis and reasoning for the subject convictions.

Now turning to Military justice in general. Eugene R. Fidell, is a senior research scholar and the founder of the institute of Military Justice. He notes that “the military is the rear part of the contemporary society that enjoys the privilege of policing its own members’ behavior, with special courts and separate body of rules.”²²⁵ Fidell contends that military justice system differs from the civilian criminal justice system. The differences are enormous and range from trivial to the profound. Both systems seek to punish crime, but

²²⁰ KOTUBY & SOBOTA, *supra* note 164, at 65.

²²¹ General Comment No. 32, *supra* note 22.

²²² *More than 80 Convicts Sentenced to Death by Military Tribunals in Pakistan Since 2015*, *supra* note 3; Bilawal, *supra* note 3.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ EUGENE R. FIDELL, *supra* note 104, at xxi.

military justice aims to maintain order and discipline within its boundaries including adherence to host of requirements that have no counterpart in civilian society. Military represents a specialized society within a society.²²⁶

A well-known quotation from French Statesman George Clemenceau on the military justice is something to the effect that “Military justice is justice what Military music is to music”²²⁷ reflects the enormous controversy that the military courts have always prompted.²²⁸ He is critical of fact that the military courts inherently lack the requirements which have been laid down by international standards, such as, that the courts and tribunals should be independent and impartial. As noted earlier that the military courts are part of the executive branch. The military courts wouldn’t be able to overcome this requirement. The second component of the requirement is that the basic fundamental principle of the “Due Process” (which is commonly known as, notice and hearing) is neither applicable nor is necessarily complied by the Military Courts. The Military Court are authorized to hold trials away from the public. The Military Courts not necessarily provide a notice of hearing. It leads to a logical conclusion that to put these courts in such a position, where they cannot and /or unable to comply with the due process and ICCPR requirements, is fundamentally flawed and unfair.²²⁹

As noted above, Pakistani Military Courts fell way short of meeting its obligations under international standards. The evidence has shown that adherence to the rules and procedures of “fair trial” and “due process” was not much of concern for military courts in Pakistan. As the cursory review of the factual summary of the petitions, mentioned above, establishes that the secret trials, torture and false confession are rampant in the subject trials.

The ICJ notes that the reality is that to ensure that the criteria of independent and impartial justice must be administered by the tribunal, it will be hard to make a case that the military courts in Pakistan are complying and are adherent to the requirements as laid down as guidance and general principles, specifically the article 14 of the ICCPR. The international law standards and the specific procedures, as noted above, military courts in Pakistan do not comply with the due process requirements by any stretch of the imagination.²³⁰

It is also important to note that the Supreme Court of Pakistan in 1998 in a landmark case, had previously ruled that granting the Military Courts jurisdiction over civilians is unconstitutional, contrary to the its present ruling.²³¹ The Court held that a “trial by

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ INTERNATIONAL COMMISSION OF JURISTS, *MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS* (2004), <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf> [hereinafter *MILITARY JURISDICTION AND INTERNATIONAL LAW*].

FEDERICO ANDREU-GUZMAN, *MILITARY JURISDICTION AND INTERNATIONAL LAW* 10 (2004), <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>.

²²⁹ *Id.* at 10.

²³⁰ *Id.*

²³¹ *Sheikh Liaquat Hussain v. The Federation of Pakistan*, (1999) 504 PLD (SC) 42 (Pak.).

independent and impartial courts is a fundamental rights of all citizens of Pakistan.”²³² The Court reasoned that the armed forces are subject to the military command which is under the federal government, hence do not satisfy the requirements of independence and impartiality.

It is significant to note that it is the same Supreme Court which had held in the case of *Sheikh Liaquat Hussain v. The Federation of Pakistan*, that Military Courts create a parallel judicial system because it does not provide a right to appeal its rulings before the Supreme Court. Therefore, the “establishment of Military Courts for trials of civilians amounts to a parallel system for all intent and purposes which is wholly contrary to the known existing judicial system having been set up under the constitution and the law.”²³³

The Supreme Court notes in *Sheikh Liaquat Hussain*, *supra* that the gravity and threat imposed by the terrorism and other criminal “acts are negation of principles of democracy, freedom, equality, tolerance and social justice. However, the Court was crystal clear that laws which were enacted to restore peace and curb terrorism should be consistent with the Constitution and fundamental rights as enumerated therein.”²³⁴

The Court goes on to state: “It is imperative for the preservation of the State that the existing judicial system should be strengthened and the principle of *trichotomy* is adhered to by following in letter and spirit, the constitutional provisions and not by making deviation thereof on any ground.”²³⁵

The justification of pubic emergency and the doctrine of necessity cannot and should not be basis for a departure from the principle of separation of powers and right to a fair trial, writes the Supreme Court. Sadly, seventeen (17) years later, the Court reverses its precedence under the doctrine (cover) of limitation of judicial review.

In the context of Pakistan’s global image, allowing the Military Courts to try civilians puts it in a negative light. As noted above, there has been an extremely negative reaction to the creation of the military courts in Pakistan. The ICJ has pointed that Pakistan is the *only* country in the South Asia, which has allowed Military Courts to try civilians.

India: In 1982 the Supreme Court of India held that Military Courts raise “fair trial” concerns.²³⁶

Nepal: In 2006, the Supreme Court of Nepal ruled, in *Bhuwan Niraula, et al. v. Government of Nepal, et al.*, (2011) held that the military justice system as set out in the Act of (2006) “does not adhere to the constitutional principles for independent judiciary, the rule of law, a fair trial and right to justice. . .”²³⁷

Bangladesh: In 2009 a mutiny was undertaken by the members of Bangladesh Rifles, a paramilitary force.²³⁸ It is reported that more than 70 people were killed in a riot. ²³⁹ There was an attempt to try these civilian suspects in military courts. The Supreme Court held

²³² *Id.*

²³³ *Id.*; see also, *Questions and Answers*, *supra* note 62.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Lt. Col. Prithi Pal Singh Bedi etc. v. Union of India & Others*, (1983) 1 SCR 393 (India).

²³⁷ *Id.* at 240

²³⁸ *Id.*

²³⁹ *Id.*

that military courts have no jurisdictions over the Rifle Personnel, as they were the members of the civilian police force.²⁴⁰

Regarding the current status of Military Courts in Pakistan is concerned, the March 2019 is the expiration date.²⁴¹ It is reported that the government is seeking another extension and there is a strong opposition to such move. It further reported that the on February 6, 2018, the Supreme Court stayed order of life imprisonment of 14 convicts by the military courts.²⁴² On July 5, Peshawar High Court, stops execution of ‘missing person’ convicted by the military court.²⁴³ Such move could be a reversal and/or expiration of these court, one could hope.

C. Pakistan’s Argument—State of Emergency

As noted earlier, Pakistan could argue that deviation from Article 14 is permissible under exigence circumstances. The basis of this argument could be that the ‘national security’ of the country is at stake because of the ongoing attacks of extreme terrorism. While it is true that reservations to particular clauses of article 14 may be acceptable, the strongest and persuasive position the Committee has been advocating is that “the right to a ‘fair trial’ would be incompatible with the *object* and *purpose* of the Covenant.”²⁴⁴

It is important to note that “while article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a *public emergency* should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.”²⁴⁵

There is documentary evidence that the terrorist attacks in Pakistan have been going on since the 1980s. It is almost impossible to predict how long these exigent conditions will last. Could Pakistan afford to have these Courts forever and/or an indefinite period? That argument would neither be reasonable nor persuasive by any stretch of the imagination.

One of the key elements of the protections provided in Article 14 of the ICCPR is the right to a fair trial administered by an independent and impartial court or tribunal.²⁴⁶ At the heart of protections as laid down in the Article 14 of the ICCPR is a right to fair trial. The implications of this guarantee and protection is that the justice must be done both procedurally and substantively to each and every case. The member states are bound to follow and adhere to the guarantees of Article 14 of the Covenant.

The second component of the fair trial is an ‘independent and impartial’ court. The word “independent” implies that the judiciary is a separate and apart from the other branches of the government. The impartiality means that it is free from outside influence of any sort, and applies laws without any prejudice towards any parties regardless of the

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *SC Gives Stay Order Against Life Imprisonment of 14 Military Court Convicts*, PAK. TODAY (Feb. 6, 2018), <https://www.pakistantoday.com.pk/2018/02/06/sc-gives-stay-order-against-life-imprisonment-of-14-military-court-convicts/>.

²⁴³ *Id.*

²⁴⁴ *Id.* at ¶ 8.

²⁴⁵ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

²⁴⁶ *Id.* at art.14 (1)

nature of offenses and their status in society. As we all have come to know the famous phrase that, "No one is above the Law."

It is crucial and significantly important for the member states to undertake the guarantees of Article 14 seriously and *must* respect them both procedurally and substantively. The implication is that no member state can take a refuge or hide behind its legal system and denies the due process as a pretext. The member states must adhere to the provisions and guarantees of Article 14 irrespective of their *legal traditions* and their *domestic law*. Because the protections of Article 14 of the ICCPR are of such significant importance, the Committee has emphasized that their implementation as well as application cannot be left at the sole discretion of the member states as well as discretion and /or pretext of use of the domestic law, while ignoring the standards and the guarantees of the Covenant. The Committee notes that Member States should report as to how they interpret these 'guarantees' within the context of their domestic and respective legal systems.²⁴⁷ This mechanism by its implication provides a check whether or not a particular member state is adherent to the protections as enunciated and / or its interpretation is a pretext in a violation of the guarantees of the Article 14 of the ICCPR. It must be noted that a derogation that would circumvent the protection and guarantees of the fair trial would be against the purpose and spirit of the Covenant.²⁴⁸

By reviewing the decision of the Supreme Court and close study of the facts of the petition, the paper takes a position that it would be hard to argue that the derogation would prevail by invoking the emergency doctrine.

D. Way Forward and Recommendations

In light of the issues which this paper has highlighted, it is hoped that the implementation of following recommendation/suggestions would be beneficial for achieving the overarching objective and the spirit of the rule of law.

1. It has been proven time and again that Military Courts jurisdiction must be confined for military personnel only. The countries where the military justice used to be part of judicial system are moving toward the process of democratizing the system. For example, like most Latin American Countries., Argentina, upon gaining its independence from Spain in 1810 continue to implement the colonial military criminal legal rules.²⁴⁹ The various provisions of the colonial military laws remained in force as long as they were incompatible with the rules of new government. Military courts, over time became primarily responsible for military offenses.²⁵⁰

Additionally, the decisions from various International Tribunals/Courts are shaping and refining the jurisprudence of military justice. The Inter-American Court of Human Rights, in the case of *Genie Lacayo v. Nicaragua*, undertook to determine whether the right of fair trial had been safeguarded.²⁵¹ In this case a Nicaraguan citizen was killed by members of the People's Army, the court proceedings were held in the military

²⁴⁷ *Id.*

²⁴⁸ General Comment No. 32, *supra* note 22, at ¶ 22.

²⁴⁹ MILITARY JURISDICTION AND INTERNATIONAL LAW, *supra* note 233, at 169.

²⁵⁰ ANDREU-GUZMAN, *supra* note 233, at 169

²⁵¹ *Id.* at 114.

jurisdiction. The Inter-American Commission on Human Rights referred the case to the Court. Although, it was a military crime and should be tried by the military courts, but the argument was “to prosecute ordinary crimes as though they had been committed by members of the military breached the guarantee of an independent and impartial tribunal,” as enunciated in the American Convention on Human rights.²⁵²

In the case of *Cesti Hurtado v. Peru*, the Inter-American Court of Human Rights, issued a clear and unequivocal decision on the subject of trying civilians in military courts.²⁵³ The Court cited the case of *Castillo Petruzzi et al v. Peru*, in that case several civilians were tried and convicted by the Peruvian military courts on the charge of treason.²⁵⁴ According to the law of Peru the treason is classified as a terrorist offense.²⁵⁵ The Inter-American Court’s decision dated May 30, 1999, stated that the procedures undertaken by the military courts were not in compliance with the article 8 of the American Convention, specifically the principles of competent, independent and impartial tribunal.²⁵⁶ The Inter-American Court of Human Rights has taken the position that “[a] basic principal of independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law.”²⁵⁷

2. As noted above, that some minors were taken into custody and were tried before the military courts. It is a universally established legal principle that children under the age of 18 years old should be tried in juvenile courts which has special procedures for reasons. Hence, Children under the age 18 should never had been tried before the military courts.

3. It is in the interest of Pakistan for the sake of its international standing that the military courts must be suspended forthwith. The pending second extension of the military courts should not be granted. All cases pending before the military courts should be transferred to the civilian courts. Every effort must be undertaken to restore the public’s confidence in the rule of law.

4. Judicial system as a whole must undertake judicial reforms. One of the justifications, inter alia, offered for the formation of the military courts was that the ordinary civilian courts were ill-equipped to handle terror related cases. Additionally, it was argued that conviction rates were very low, it took too long to have cases come to conclusions, the judges were threatened and witnesses did not want to testify or change their testimony due to fear and intimidation. It would be logical to provide the necessary tools and resource to the courts to be fully functioning in all aspects. It defies any imagination that within two years the military courts would be able to rid the decades old terrorism rampant in the country. It could be strongly argued that the judicial system must be empowered and equipped in all aspects, such as, improvement of security for judges and judicial system, training of judges, training of prosecutors and law enforcement officials in the area of fair trial and due process. It is public knowledge that there is no continuing legal education either for the judges or the prosecutors and/or public defenders. The imparting of adequate training is critical for these positions. Recruiting judges and prosecutors who are

²⁵² MILITARY JURISDICTION AND INTERNATIONAL LAW, *supra* note 233, at 119.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ ANDREU-GUZMAN, *supra* note 233, at 118–19.

²⁵⁷ *Id.* at 120.

committed for public service is the key. A judge who is not trained and/or not aware of risks and benefits the position of judgeship entails, unfortunately is weak chain link in the system. If a judge is afraid of risks involved with the job, he or she is ill-prepared to be in that position. Training and awareness along the lines of 'commitment to serve' and upholding 'the rule of law' should be primary goal.

5. The rule of law should be implemented regardless of the status of parties before the court. The culture of immunity must come to an end. The country's elite is still hung up on the colonial mentality and culture of privilege. The notion that 'no one is above the law' is mostly foreign to the country's elite. Those who have committed the crimes of torture should be punishable under the criminal law and held accountable.

6. The crime of torture must comply with the requisite standards as enunciated in the ICCPR standards.

7. If a state does not dispense justice in its true sense, and don't follow the rule of law, it is historically proven that there is going to be no stability and ultimately no prosperity. In more recent times it has become evident that the international human rights law (IHRL) has changed significantly than its past. IHRL emphasizes that human beings are given rights which are internationally protected as individuals and not because they are national of particular state. If a state has committed violations of human rights against its citizens, today certain international institutions could exercise jurisdiction to protect such individuals against such violations. Without a question, the measures and remedies against a violator state had been neither adequate nor effective. But the international human rights law, as it stands today, and the international institution which are empowered to enforce that law have internationalized it and brought to the forefront.²⁵⁸

As the Covenant and other international instruments have emphasized that the Member States are under the obligation not use any measures which can be construed as a torture and /or any other cruel, inhuman or degrading treatment or punishment to get confession and ultimately a conviction. The states should make torture as a criminal offence in the domestic legislation. States parties should make it as a priority to investigate all allegations of torture and other ill-treatment. The perpetrators must be held accountable, regardless of their status. Member States should ensure there is a redress mechanism in place for the victims. As it is widely reported that there have been disappearances, tortures and ill-treatments, which are in violation of international law.

It is in the national interest of any state that its citizens have confidence and respect for its judicial system. To foster that notion, it is imperative for a state to strive for a transparent, independent and impartial civil judicial system. A judicial system, capable of handling any and all cases, including terrorism cases must be the objective for the long run. To equip the civil judicial system with necessary capabilities, a judicial system which is adherent to the rule of law in its letter and spirit, would serve the country better domestically and internationally. Fully understanding the country's endemic poverty, illiteracy, corruption and various forms of discrimination prevent masses from the protection of the internationally recognized human rights, but that is the area where the focus ought to be.

²⁵⁸ BUERGENTHAL ET AL., *supra* note 186, at 24–26.

CONCLUSION

In light of all of the foregoing, the credible evidence has been presented that the Pakistan military courts have not conducted the trial according to the standards as required by the International Law, specifically, the Article 14 of the ICCPR.



GLYPHOSATE'S FATE: COMPARING STRATEGIES FOR THE PRECAUTIONARY
CANCELLATION OF GLYPHOSATE REGISTRATIONS IN THE UNITED STATES
AND THE EUROPEAN UNION

J. Julius Graefe

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INTRODUCTION

Glyphosate, the active herbicide in Bayer Monsanto's (Monsanto) widely utilized weedkiller, Roundup, has been applied to conventional crops in the United States (U.S.) since the early 1970s.¹ Despite being the predominant herbicide choice in American agriculture,² glyphosate has emerged as a controversial substance due to its suspected carcinogenic potential in humans. Recently, in the case of *Johnson v. Monsanto Co.*,³ a San Francisco jury decided that Plaintiff Dewayne Johnson's non-Hodgkin's lymphoma, a type of lymphatic cancer, was the result of Johnson's perennial exposure to glyphosate during his former tenure as a school groundskeeper. Since the *Johnson* verdict, American courts have been inundated with thousands of related claims by domestic farmers and groundskeepers who similarly allege that glyphosate is to blame for their respective cancers. Nonetheless, Monsanto remains steadfastly committed to its position that glyphosate is safe, and it argues that the link between cancer and glyphosate is not only speculative, but scientifically unproven.⁴ The U.S. Environmental Protection Agency (EPA), which is tasked with the registration of pesticides for approved uses,⁵ agrees with Monsanto that glyphosate poses no health risk to humans.⁶ Likewise, the European Union (EU) has decided that glyphosate is harmless,⁷ although certain Member States have independently held otherwise.

This note argues that the potential carcinogenic danger posed by glyphosate is too great to ignore, irrespective of the current safety determinations by Monsanto, the EPA, and the EU. As a result, this note proposes strategies for the procurement of a ban on glyphosate in both the U.S. and the EU. Part I of this note discusses the scientific uncertainty surrounding glyphosate, and brings attention to Monsanto's likely interference in the objectivity of epidemiological studies that have been used by the EPA to inform its glyphosate decision-making. Part II examines the current regulatory landscape of glyphosate in the EU, and draws comparisons to federal EPA oversight of glyphosate in the U.S. Collectively, Parts I and II argue that, on a federal level, the U.S. and the EU are unlikely to alter their stances on glyphosate in the near future, thus making a prompt ban on glyphosate improbable. As such, the U.S. and the EU federal governments cannot be relied upon to protect the public from potentially devastating health consequences. In order to oust glyphosate in the U.S. and in the EU, non-federal solutions must take priority.

Under a dual federalism analysis, the precautionary principle, i.e., the notion that scientific certainty is not a prerequisite for taking proactive, protective action, must be realized as the best method for EU Member States to regulate glyphosate independently of

¹ *Glyphosate*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ingredients-used-pesticide-products/glyphosate> (last visited Jan. 6, 2020).

² *EPA Releases Draft Risk Assessments for Glyphosate*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pesticides/epa-releases-draft-risk-assessments-glyphosate> (last visited Jan. 6, 2020).

³ Verdict Form, *Johnson v. Monsanto Co.*, No. CGC-16-550128, 2018 WL 3830050 (Cal. Super. Ct. Aug. 10, 2018).

⁴ Scott Partridge, *The Verdict was Wrong on Glyphosate*, MONSANTO (Aug. 13, 2018), <https://monsanto.com/news-stories/statements/roundup-glyphosate-dewayne-johnson-trial/>.

⁵ 7 U.S.C. § 136a (2018).

⁶ *EPA Releases Draft Risk Assessments for Glyphosate*, U.S. ENVTL. PROT. AGENCY (Dec. 18, 2017), <https://www.epa.gov/pesticides/epa-releases-draft-risk-assessments-glyphosate>.

⁷ *Glyphosate*, EUROPEAN COMM'N, https://ec.europa.eu/food/plant/pesticides/glyphosate_en (last visited Jan. 6, 2020).

the federal EU. Conversely, in the U.S., individual states are not similarly situated to ban glyphosate at their own discretion, let alone counter to the EPA, which is not bound to the precautionary principle and insists that glyphosate is safe. Thus, unlike EU Member States, U.S. states cannot rely on the precautionary principle as a fallback option in the event that the federal government fails to regulate as desired. Evidently, a dual federalism tactic to banning glyphosate is effective only in the EU.

Regulation of glyphosate in the U.S. is thus achievable only by holding the federal government accountable for its decision-making. The recent case of *League of United Latin American Citizens v. Wheeler*⁸ will be discussed to demonstrate how litigation could be used to mandate the EPA to ban glyphosate.

I. OVERVIEW OF GLYPHOSATE AND ITS FEDERAL REGULATORY STATUS IN THE U.S.

Glyphosate was first introduced in the U.S. in 1974 under the trade name Roundup.⁹ As an herbicide, glyphosate prevents weeds from competing with crops for water, sunlight, and nutrients. About ninety percent of the world's glyphosate application is committed to conventional agriculture,¹⁰ and the remaining ten percent is used to control nuisance weeds in public places like parks, streets, and schools.¹¹ When all of the uses are combined, glyphosate is easily the world's most popular weedkiller, with approximately 1.8 billion pounds of the herbicide being applied annually worldwide.¹²

Human exposure to glyphosate occurs in myriad ways, although primary exposure occurs either through direct skin contact with the herbicide or via the consumption of sprayed food crops. For instance, many farmers, groundskeepers, and even homeowners are exposed to glyphosate by spraying the herbicide.¹³ Alternatively, those who are not engaged in the application phase of glyphosate, but nonetheless consume sprayed crops, absorb trace amounts of glyphosate into their bodies. This occurs because glyphosate does not fully dissolve upon being sprayed. In fact, the EPA sets limits on glyphosate residue that may permissibly remain on crops after they have been harvested, and the U.S. Food and Drug Administration (FDA) must ensure that food products do not contain glyphosate residue in excess of the EPA limits.¹⁴ Recent studies indicate that glyphosate residue has accrued considerably in processed foods such as breakfast cereals, and, although the levels are still well within the prescribed limits, some health advocates are urging for a revision of the limits by alleging that they are presently too relaxed, and, therefore, ineffective.¹⁵

⁸ *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814 (9th Cir. 2018).

⁹ *History of Monsanto's Glyphosate Herbicides*, MONSANTO (June 2005), https://monsanto.com/app/uploads/2017/06/back_history.pdf.

¹⁰ Charles M. Benbrook, *Trends in Glyphosate Herbicide Use in the United States and Globally*, 28 ENVTL. SCI. EUR. 1, 6 (2016) (stating that 1.8 billion pounds of glyphosate were used globally in 2014).

¹¹ *What is Glyphosate?*, SOIL ASSOCIATION, <https://www.soilassociation.org/our-campaigns/not-in-our-bread/what-is-glyphosate/> (last visited Jan. 6, 2020).

¹² Benbrook, *supra* note 10, at 6.

¹³ Glyphosate may be absorbed into the body by breathing the spray or by inadvertently getting the spray onto one's skin.

¹⁴ See *Questions and Answers on Glyphosate*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/foodborneillnesscontaminants/pesticides/ucm583713.htm> (last visited Jan. 6, 2020).

¹⁵ See Oliver Milman, *Weedkiller Found in Wide Range of Breakfast Foods Aimed at Children*, THE GUARDIAN (Aug. 16, 2018, 1:00 AM), <https://www.theguardian.com/environment/2018/aug/16/weedkiller-cereal-monsanto-roundup-childrens-food>.

Prior to being permitted to appear in food products and in children's cereal brands, every pesticide and herbicide must first be approved for use, distribution, or sale by the EPA in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁶ Under FIFRA, all herbicides undergo a process known as registration, whereby the applicant of the herbicide must demonstrate that the herbicide "will not generally cause unreasonable adverse effects on the environment."¹⁷ FIFRA defines the term "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment."¹⁸ In order to assess the potential effects on humans and the environment, the EPA develops risk assessments that evaluate potential "harm to humans, wildlife, fish, and plants."¹⁹ The most notable assessed human harms include short-term toxicity risks and long-term effects like cancer and reproductive disorders.²⁰

Once a draft risk assessment is completed by the EPA, the EPA publishes its assessment in the Federal Register,²¹ and a notice and comment period ensues. After the notice and comment period closes, the EPA offers a proposed decision on whether to register a substance, which invites an additional notice and comment period.²² Thereafter, the EPA issues its interim or final decision,²³ and the process of registration is complete. Once a registration is finalized, the EPA has the authority to regulate how much of a registered substance can safely appear in food products. The EPA must also review each approved substance at least every fifteen years to determine whether the substance can still perform its intended function without newly causing unreasonable adverse effects on human health or the environment.²⁴

With respect to glyphosate, the EPA consistently finds that the herbicide does not cause "unreasonable adverse effects on the environment." Currently, glyphosate is undergoing a re-registration review. The notice and comment period for the EPA's draft risk assessment of glyphosate closed on April 30, 2018,²⁵ and the EPA published its proposed interim registration review decision to reapprove glyphosate on May 6, 2019.²⁶ In its proposed interim decision, the EPA conceded that it "identified potential risk to mammals and birds," but it nonetheless concluded that "the benefits outweigh the potential

¹⁶ See *Summary of the Federal Insecticide, Fungicide, and Rodenticide Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-federal-insecticide-fungicide-and-rodenticide-act> (last visited Jan. 6, 2020).

¹⁷ 7 U.S.C. § 136a(c)(5)(D) (2018).

¹⁸ 7 U.S.C. § 136(bb) (2018).

¹⁹ *About Pesticide Registration*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 6, 2020).

²⁰ *Id.*

²¹ See *id.*

²² *Registration Review Process*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pesticide-reevaluation/registration-review-process> (last visited Jan. 6, 2019).

²³ *Id.* (stating that the EPA may issue, where appropriate, an interim registration decision before making its final registration decision).

²⁴ *Id.*

²⁵ *Glyphosate Registration Review*, U.S. ERULEMAKING PROGRAM MGMT. OFFICE, <https://www.regulations.gov/docket?D=EPA-HQ-OPP-2009-0361> (last visited Jan. 6, 2020).

²⁶ *Glyphosate Proposed Interim Registration Review Decision; Notice of Availability*, 84 Fed. Reg. 19782 (May 6, 2019).

ecological risks when glyphosate is used according to label directions.”²⁷ Importantly, the bulk of the glyphosate safety controversy emanates from the possible carcinogenic potential of glyphosate. However, the EPA has concluded that glyphosate should be classified as “*not likely* to be carcinogenic to humans.”²⁸ It is significant to note that “not likely” is the strongest classification that the EPA could assign for non-carcinogenic potential,²⁹ although the classification does not carry statistical significance or establish scientific certainty. The EPA based its assessment on the leading epidemiological, animal carcinogenicity, and genotoxicity studies,³⁰ which were all evaluated according to the EPA’s own “Guidelines for Carcinogen Risk Assessment.”³¹

In contrast to the EPA’s determination is the International Agency for Research on Cancer’s (IARC)³² recent classification of glyphosate as a probable carcinogen.³³ Specifically, the IARC designated glyphosate as a “Group 2A” carcinogen, which means that the studied agent is “probably carcinogenic to humans”—a classification category that is used when there is limited evidence of carcinogenicity in humans, but sufficient evidence of carcinogenicity in experimental animals.³⁴ Like the EPA, the IARC made its classification based on the best publicly available scientific evidence on epidemiology, animal carcinogenicity, and carcinogenic mechanisms.³⁵ However, the IARC relied exclusively on studies performed by “independent experts, free from vested interests,”³⁶ which is the likely explanation for the EPA’s and the IARC’s differing conclusions. Although the EPA’s assessment of glyphosate as a non-carcinogen aligns with the overwhelming worldwide consensus on glyphosate’s non-carcinogenicity—thus rendering the IARC’s classification a clear outlier—the EPA may have relied on science that was negatively influenced by Monsanto.

²⁷ U.S. ENVTL. PROT. AGENCY, EPA-HQ-OPP-2009-0361, GLYPHOSATE PROPOSED INTERIM REGISTRATION REVIEW DECISION 35 (2019), <https://www.epa.gov/sites/production/files/2019-04/documents/glyphosate-pid-signed.pdf>.

²⁸ U.S. ENVTL. PROT. AGENCY, OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, GLYPHOSATE. DRAFT HUMAN HEALTH RISK ASSESSMENT IN SUPPORT OF REGISTRATION REVIEW 3 (2017) (emphasis added), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2009-0361-0068>.

²⁹ *Risk Assessment for Carcinogenic Effects*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/fera/risk-assessment-carcinogenic-effects> (last visited Jan. 6, 2020) (stating the EPA categories for carcinogenic potential are ranked as: (1) “Carcinogenic to Humans”; (2) “Likely to be Carcinogenic to Humans”; (3) “Suggestive Evidence of Carcinogenic Potential”; (4) “Inadequate Information to Assess Carcinogenic Potential”; and (5) “Not Likely to be Carcinogenic to Humans”).

³⁰ U.S. ENVTL. PROT. AGENCY, OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, *supra* note 28.

³¹ These guidelines, which do not establish any substantive rules and have no binding effect on the EPA, are intended to “enhance the application of the best available science in EPA’s risk assessments.” U.S. ENVTL. PROT. AGENCY, EPA/630/P-03/001F, GUIDELINES FOR CARCINOGENIC RISK ASSESSMENT 1–2 (2005).

³² The IARC is an intergovernmental agency under the umbrella of the World Health Organization of the United Nations (“UN”), and is funded by UN member countries including the U.S. See *Director’s Message*, INT’L AGENCY FOR RESEARCH ON CANCER, <https://www.iarc.fr/wp-content/uploads/2018/08/iarc-brochure-web.pdf>.

³³ *IARC Monographs Volume 112: Evaluation of Five Organophosphate Insecticides and Herbicides*, INT’L AGENCY FOR RESEARCH ON CANCER (Mar. 20, 2015), <https://www.iarc.fr/wp-content/uploads/2018/07/MonographVolume112-1.pdf>.

³⁴ *Id.*; see also *Q&A on Glyphosate*, INT’L AGENCY FOR RESEARCH ON CANCER (Mar. 1, 2016), https://www.iarc.fr/wp-content/uploads/2018/11/QA_Glyphosate.pdf (for glyphosate, the IARC based its classification on “‘limited evidence’ of cancer in humans (from real-world exposures that actually occurred) and ‘sufficient’ evidence of cancer in experimental animals (from studies of ‘pure’ glyphosate.”).

³⁵ INT’L AGENCY FOR RESEARCH ON CANCER, *supra* note 34.

³⁶ *Id.*

The allegation that Monsanto interfered with the objectivity of scientific carcinogenicity studies on glyphosate came to light in the recent *Johnson* case. In *Johnson*, Plaintiff Dewayne Johnson was a groundskeeper for the public school district of Benicia, California from 2012 to 2014, for whom he sprayed several hundred gallons of Roundup on a daily basis.³⁷ Johnson eventually developed non-Hodgkin's lymphoma during his time as the groundskeeper, which he and his doctors traced to his exposure to Roundup.³⁸ Consequently, Johnson sued Monsanto, arguing that Roundup was defectively designed, and that Monsanto acted with malice when it failed to warn Johnson of the carcinogenic danger of glyphosate, a danger that Monsanto allegedly knew of.³⁹ During the case, Johnson's counsel relied on the IARC's classification of glyphosate as a probable carcinogen. In addition, the counsel shed light on the 'Monsanto Papers,' an extensive collection of declassified documents and correspondence between Monsanto officials and outside parties—including the EPA—that reveal Monsanto's covert and potentially collusive efforts to propagate the non-carcinogenicity of glyphosate by whatever means necessary.⁴⁰ The majority of the 'Monsanto Papers' were introduced as evidentiary exhibits during the trial,⁴¹ which allowed the jury to ascertain the extent to which Monsanto might have meddled in the development of glyphosate science. Monsanto allegedly orchestrated this scientific interference by surreptitiously financing pro-glyphosate studies, by assigning Monsanto officers to be the "ghost authors" of pro-glyphosate studies and articles,⁴² and by undermining findings that warned of glyphosate's carcinogenic potential.⁴³ The jury in *Johnson* was so convinced of Monsanto's alleged interference that it concluded that Monsanto knew of Roundup's cancer risks, and that Monsanto acted with conscious disregard for Johnson's safety by failing to warn him of the risks.⁴⁴ Due to the magnitude of Monsanto's wrongdoing, the jury awarded Johnson punitive damages.⁴⁵

In light of the *Johnson* verdict, it is alarming to see that the EPA found glyphosate to be a non-carcinogen in its draft risk assessment, which was published prior to the materialization of the 'Monsanto Papers' in *Johnson*. It is presently unknown whether the EPA relied on any tainted studies that support the non-carcinogenicity of glyphosate.

³⁷ Sam Levin, *The Man Who Beat Monsanto: 'They have to pay for not being honest'*, THE GUARDIAN (Sept. 26, 2018, 12:00 AM), <https://www.theguardian.com/business/2018/sep/25/monsanto-dewayne-johnson-cancer-verdict> (last visited Jan. 6, 2020).

³⁸ *See id.*

³⁹ Complaint for Damages and Demand for Jury Trial, *Johnson v. Monsanto Co.*, No. CGC-16-550128, 2016 WL 347894 (Cal. Super. Ct. Jan. 28, 2016).

⁴⁰ *See Monsanto Papers*, BAUM HEDLUND ARISTEI GOLDMAN, P.C., <https://www.baumhedlundlaw.com/toxic-tort-law/monsanto-roundup-lawsuit/monsanto-secret-documents/> (last visited Aug. 9, 2019) (noting that there are over 100 available documents, i.e., the "Monsanto Papers," that depict Monsanto's interference with glyphosate carcinogenicity studies); *see also* Leemon B. McHenry, *The Monsanto Papers: Poisoning the Scientific Well*, 29 INT'L J. OF RISK & SAFETY IN MED. 193, 193 (2018) (discussing that the Monsanto Papers reveal "Monsanto-sponsored ghostwriting of articles published in toxicology journals . . . interference in the peer review process, [and] behind-the-scenes influence . . .").

⁴¹ Supplemental Brief Regarding Punitive Damages, *Johnson v. Monsanto Co.*, No. CGC1650128, 2018 WL 3873613 (Cal. Super. Ct. Aug. 3, 2018).

⁴² Ghost writing refers to Monsanto's practice of assigning its own officers to conduct studies and to write articles. Upon publication, the credit for the work is transferred to some unaffiliated entity in order to hide Monsanto's own involvement.

⁴³ *See supra* note 42 (accompanying text).

⁴⁴ Verdict Form, *Johnson v. Monsanto Co.*, No. CGC-16-550128, 2018 WL 3830050 (Cal. Super. Ct. Aug. 10, 2018).

⁴⁵ *Id.*

However, it is known that the IARC found glyphosate to be a carcinogen, and that it strove to rely on studies that were allegedly detached from “‘secret data,’”⁴⁶ and were “free from vested interests.”⁴⁷ As such, the EPA’s findings, and the multitude of studies that support glyphosate’s safety, must be questioned. It would be imprudent to conclude that the science behind glyphosate is sound. It would also be premature to conclude that glyphosate is unequivocally safe or unsafe, since the available science on glyphosate is so undeveloped, partially corrupted, and secretive, whereby scientists cannot retest experiments or refine evolving theories. Therefore, until more transparent science emerges that says otherwise, this paper problematizes the lack of glyphosate regulation, and argues that governments should err on the side of caution by suspending or cancelling glyphosate registrations.

Given the EPA’s recent classification of glyphosate as a non-carcinogen, the EPA is unlikely to deregister the substance in its 2019 proposed interim decision. Part II examines regulation of glyphosate in the EU, where the EU federal government has similarly failed to protect Europeans against glyphosate.

II. THE REGULATORY STATUS OF GLYPHOSATE AT THE FEDERAL EU LEVEL

In the EU, any “active substance” to be used in herbicides and pesticides must be approved for use by the European Commission (EC).⁴⁸ To illustrate the process, the manufacturer of an “active substance” must first submit an application for the approval of that substance to a designated EU Rapporteur Member State (RMS).⁴⁹ In regard to glyphosate, the RMS evaluator was Germany.⁵⁰ The manufacturer’s application must contain relevant data and studies, which the RMS uses to prepare a comprehensive risk assessment of the substance.⁵¹ The RMS’s risk assessment is then peer reviewed by the European Food Safety Authority (EFSA) in consultation with all twenty-eight Member States.⁵² Once the assessment is peer reviewed—a stage that draws on the expertise of approximately six-hundred experts—the EFSA submits its conclusions and recommendations to the EC.⁵³ Subsequently, the EC, which is comprised of representatives from each Member State, votes on whether to add the substance to the EU’s list of approved active substances.⁵⁴ If added, the substance is legally eligible for use in pesticide products across the EU.

⁴⁶ Int’l Agency for Research on Cancer, *Opinion Letter on IARC Glyphosate Finding*, at 2 (Nov. 20, 2017), https://www.eenews.net/assets/2018/02/07/document_gw_03.pdf (providing that in a letter to members of U.S. Congress, the then-director of the IARC wrote, “the IARC [glyphosate findings] are based on independent scientific review of published research and not on the basis of unpublished or ‘secret data’ unavailable publicly.”).

⁴⁷ INT’L AGENCY FOR RESEARCH ON CANCER, *supra* note 34.

⁴⁸ *Pesticides*, EUROPEAN COMMISSION, https://ec.europa.eu/food/plant/pesticides_en (last visited Jan. 6, 2020). The European Commission is the executive arm of the EU that “[p]romotes the general interest of the EU by proposing and enforcing legislation as well as by implementing policies and the EU budget.” *European Commission Overview*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited Jan. 6, 2020).

⁴⁹ *How Pesticides Are Regulated in the EU: EFSA and the Assessment of Active Substances*, EUROPEAN FOOD SAFETY AUTH., https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/Pesticides-ebook-180424.pdf.

⁵⁰ *Who Assesses Pesticides in the EU?*, EUROPEAN FOOD SAFETY AUTH. (2016), <https://www.efsa.europa.eu/sites/default/files/Glyphosate-infographic.pdf>.

⁵¹ *Id.*

⁵² EUROPEAN FOOD SAFETY AUTH., *supra* note 49.

⁵³ *Id.*

⁵⁴ *Id.* at 4.

In 2015, the EFSA concluded that glyphosate is unlikely to pose a carcinogenic risk to humans based on evidence that did not support the substance's carcinogenic potential.⁵⁵ Specifically, the EFSA determined “that there is very limited evidence for an association between glyphosate-based formulations and non-Hodgkin lymphoma.”⁵⁶ Consequently, in 2017, the EC reached the necessary sixty-five percent majority to renew glyphosate for a period of five years.⁵⁷ Arguably, however, the EC failed to adhere to the precautionary principle that binds its decision-making.

The precautionary principle stands for the basic proposition that one should be “better safe than sorry.”⁵⁸ In the context of governmental regulation, the precautionary principle signifies that restrictive regulation may be justified when the certainty of harm is not yet known, but the potential risks are. The precautionary principle is akin to taking an umbrella outside when there is a chance of rain: it may or may not rain, but, in the event that it does, the umbrella can be deployed to protect oneself from getting wet.

Of course, carrying the umbrella is a somewhat cumbersome undertaking, and doing so is especially futile if it does not rain. This aspect of the precautionary principle is its most burdensome feature: even though the principle protects against uncertain harms, it can sometimes be too restrictive, thus stagnating economic growth and innovation, and resulting in overly cautious decision-making.⁵⁹ But, the principle can and should be applied in a precise, constructive manner. In the EU, the principle has been adopted as binding authority by the EC, and it is applied in instances where scientific evidence is “insufficient, inconclusive or uncertain” and preliminary evidence “indicates that there are reasonable grounds for concern.”⁶⁰ Thus, the EC does not tactlessly apply the precautionary principle at whim; rather, it applies the principle only in instances of *confirmed* scientific insufficiency, inconclusiveness, or uncertainty. This type of application is the principle's most salient virtue—without scientific certainty, humans are not able to confidently understand the potentially devastating effects of a tested variable on environmental and human health, which are two of the most valuable, yet fragile systems in the world. As such, whenever confirmed scientific uncertainty exists in the realm of environmental or human health, precaution should be exercised. Conversely, if no confirmed scientific uncertainty exists, it would be unproductive to exercise precaution. Therefore, the EC has appropriately narrowed its application of the precautionary principle.

Despite being bound by the precautionary principle, EC has reapproved the use of glyphosate. The EC was able to reapprove glyphosate by denouncing any existence of

⁵⁵ European Food Safety Auth., *Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate*, 13 EUR. FOOD SAFETY AUTHORITY J. 1, 10 (2015).

⁵⁶ Christopher J. Portier et al., *Differences in the Carcinogenic Evaluation of Glyphosate Between the International Agency for Research on Cancer (IARC) and the European Food Safety Authority (EFSA)*, 70 J. EPIDEMIOLOGY & COMMUNITY HEALTH 741, 741 (2016).

⁵⁷ Caterina Tani, *German Vote Swings EU Decision on 5-year Glyphosate Renewal*, EUOBSERVER (Nov. 27, 2017), <https://euobserver.com/environment/140042> (last visited Jan. 6, 2020). Germany swung the necessary vote to renew glyphosate. In the EU, a minimum of sixty-five percent of Member States (sixteen states) must vote in favor of renewal in order to meet the EU's majority vote rule.

⁵⁸ Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1004 (2003).

⁵⁹ See *id.* at 1003 (“[T]he precautionary principle . . . leads in no direction at all. The principle is literally paralyzing—forbidding inaction, stringent regulation, and everything in between. The reason is that in the relevant cases, every step, including inaction, creates a risk to health, the environment, or both.”).

⁶⁰ European Commission Press Release IP/00/96, Commission Adopts Communication on Precautionary Principle (Feb. 2, 2000).

confirmed scientific uncertainty regarding the substance's potential carcinogenicity. Instead, the EC maintains that, based on its review of the EFSA's glyphosate assessment, glyphosate does not pose any cancer risk. This is especially troubling because the EC should not only apply the precautionary principle when insufficient scientific evidence exists, but also when "a lack of agreement as to the nature or scale of the likely adverse effects" exists.⁶¹ The IARC has classified glyphosate as a probable carcinogenic, which is in contrast to the EFSA's finding. Thus, precaution is justified. Moreover, scientific uncertainty exists because the classifications made by the IARC, the EPA, and the EFSA all exhibit some degree of uncertainty: the IARC has classified the carcinogenic likelihood as "probable"; the EPA as "not likely"; and the EFSA as "unlikely." The wording and the significance of these classifications fail to establish scientific certainty. Lastly, *Johnson* exposed Monsanto's interference in the objectivity of glyphosate studies, which greatly diminishes the reliability of those studies. The extent of the interference by Monsanto is unknown, so it is unrealistic to decipher exactly how much science has been blemished. However, unreliable science has, more likely than not, played a material role in informing the decision-making of the EPA and the EFSA.

To complicate matters, the EFSA's risk assessment has itself been condemned for featuring critical shortcomings that likely compromised its overall reliability. The RMS of glyphosate, Germany, who was the creator of the assessment report, was accused of copying dozens of pages verbatim from a 2012 report of the Glyphosate Task Force, an industry body led by Monsanto.⁶² The copied pages consisted of pro-glyphosate studies that denied the correlation between glyphosate and cancer. After the allegation surfaced, the EC publicly stated its intention to have France take over from Germany as the RMS responsible for assessing glyphosate's safety in the future.⁶³

In addition to the alleged copying, the EFSA has been chastised for its reliance on unpublished data and for its dismissal of the IARC's findings. First, the EFSA classified human cancer evidence as "very limited," but then dismissed the link between glyphosate and cancer "without clear explanation or justification."⁶⁴ Second, the EFSA confirmed that glyphosate induces oxidative stress, which has been linked to cancer initiation and progression,⁶⁵ but the EFSA dismissed this finding on the grounds that oxidative stress is a non-causative factor in cancer development.⁶⁶ Third, the EFSA dismissed evidence of tumor growth patterns in seven peer-reviewed mouse studies that the IARC found credible enough to rely on.⁶⁷ And lastly, in regard to the assessment performed by Germany, transparency was practically non-existent: many of the "citations for almost all references

⁶¹ EUR. COMM'N, THE PRECAUTIONARY PRINCIPLE: DECISION-MAKING UNDER UNCERTAINTY 5 (2017).

⁶² See Arthur Neslen, *EU Report on Weedkiller Safety Copied Text from Monsanto Study*, GUARDIAN (Sept. 14, 2017), <https://www.theguardian.com/environment/2017/sep/15/eu-report-on-weedkiller-safety-copied-text-from-monsanto-study>.

⁶³ See Simon Marks, *Brussels Moves Goalposts on Glyphosate*, POLITICO (Apr. 19, 2019, 1:49AM), <https://www.politico.eu/article/france-chosen-to-take-over-from-germany-in-assessing-glyphosate-monsanto-roundup/> (writing that the German Agricultural Ministry does, however, claim that the EC is planning to make this move for "legal reasons only").

⁶⁴ Portier et al., *supra* note 56, at 743.

⁶⁵ Simone Reuter et al., *Oxidative Stress, Inflammation, and Cancer: How are they Linked?*, 49 FREE RADICAL BIOLOGY & MED., 1603, 1603 (2010).

⁶⁶ Portier et al., *supra* note 56, at 743.

⁶⁷ *Id.*

[to studies] . . . have been redacted,” rendering scientific review of the used studies impossible.⁶⁸

These aforementioned shortcomings support the notion that the EC should have applied the precautionary principle. In 2018, the city government of Brussels, Belgium filed a complaint against the EC with the European Court of Justice, claiming that the EC did not adhere to the precautionary principle during the glyphosate reapproval process.⁶⁹ Brussels alleged that the EFSA’s assessment appeared to be based on the ‘doubt benefits the substance’ principle, which is to say that as long as the causal link between glyphosate and harmful effects is not sufficiently proven, glyphosate cannot be banned.⁷⁰ Brussels argued that the ‘doubt benefits the substance’ principle is “‘diametrically opposed to the precautionary principle,’” which the EC was bound to follow.⁷¹ Although a coalition of health and environmental NGOs joined Brussels’ fight against the EC,⁷² the Court of Justice did not grant Brussels standing because it only allows Member States to sue the EC, and the Belgian government declined to join the lawsuit on behalf of its capital government.⁷³ To date, no other government has sued the EC for its likely breach of the precautionary principle.

Evidently, the EC and the EFSA have not applied the precautionary principle with integrity. Regulation of glyphosate cannot occur until the EC has to renew glyphosate in 2022.⁷⁴ Interestingly, shortly prior to the EC’s decision to renew glyphosate, the European Parliament called for a ban on glyphosate, citing cancer fears and revelations about Monsanto’s influence on glyphosate research.⁷⁵ Although the EC ignored the plea from parliamentary lawmakers, it will likely face even more pressure by 2022. Until then, the EC cannot be entrusted to proactively protect Europeans against glyphosate. Thus, to resolve EC inaction on glyphosate, Part III identifies the best alternative strategy for Europeans to obtain protection against glyphosate.

III. EU MEMBER STATE REGULATION OF GLYPHOSATE

Federalism refers to a type of governance in which a centralized government and regional governments combine to create a single political system. The two preeminent types of federalism are dual and cooperative federalism. Cooperative federalism refers to the notion that all layers of government (i.e., national, state, regional, local, etc.) interact cooperatively to solve problems through mutual decision-making. Dual federalism, on the

⁶⁸ *Id.*

⁶⁹ Sarantis Michalopoulos, *Brussels Government Takes Commission to EU Court over Glyphosate*, EURACTIV (Mar. 14, 2018), https://www.euractiv.com/section/agriculture-food/news/brussels-government-takes-commission-to-eu-court-over-glyphosate/?_ga=2.22099259.1475445576.1541407171-1163985002.1535963881 (quoting a Brussels official remark: “[t]he scientific assessments on which the [glyphosate] renewal was based have given too much weight to their analyses commissioned and provided by the industry . . .”).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Robert Hodgson, *NGOs Join Brussels Region in Glyphosate Court Case*, ENDS EUROPE (July 26, 2018), <https://www.ends-europe.com/article/53427/ngos-join-brussels-region-in-glyphosate-court-case>.

⁷³ See Michalopoulos, *supra* note 69.

⁷⁴ *EU Lawmakers Vote to Ban Glyphosate Weed Killer by 2022*, DEUTSCHE WELLE (Oct. 24, 2017), <https://www.dw.com/en/eu-lawmakers-vote-to-ban-glyphosate-weed-killer-by-2022/a-41093018>.

⁷⁵ *Id.* (noting that Parliament released a statement in late 2017, writing that the research revelations “‘shed doubt on the credibility of some of the studies used in the EU evaluation on glyphosate safety’”).

other hand, signifies that the different levels of government are sovereign co-equals that share distinct, autonomous responsibilities.

In the EU, herbicides are regulated pursuant to a dual federalism approach. Unlike the U.S., the EU's political system features an additional layer of federal governance. The EU itself acts as a national government, which is home to twenty-eight Member States. Each Member State is an independent country that features its own national government, and individual state governments typically exist beneath a Member State's government. This added layer of federal governance makes a considerable difference in the governmental regulation of glyphosate in the EU versus the U.S.

In order for an herbicide to be approved for use in the EU, it must receive separate approval from the EU and the Member States. As discussed *supra*, glyphosate is an "active substance" that must first be authorized for use by the EC.⁷⁶ Once an herbicide such as glyphosate is approved as an active substance—and glyphosate has been approved by the EC as an active substance until 2022⁷⁷—the Member States have the separate responsibility of authorizing active substances in pesticide formulations. Such formulations are officially termed "Plant Protection Products."⁷⁸ A Plant Protection Product (PPP) contains at least one active substance, although it can contain a mix of EC-approved substances.⁷⁹ In regard to glyphosate, Roundup is the PPP that features glyphosate as its active, EC-approved ingredient.

Only the EC has the authority to ban or approve active substances, including glyphosate. Therefore, Member States cannot unilaterally ban glyphosate as a substance. Nor can state or municipal governments within Member States ban glyphosate. For instance, following Brussels' failed complaint against the EC for the EC's alleged failure to adhere to the precautionary principle upon reauthorizing glyphosate, the Brussels Government instated its own ban on glyphosate.⁸⁰ However, the EC moved to undo that ban on the grounds that the Brussels government lacked the authority to ban a substance that has already been approved by the EC.⁸¹ Arguably, had the Belgian government instated the ban, the outcome would have been the same.

Even though Member States cannot ban active substances, they can restrict the use and application of the active substance. This is where PPPs come into play. The dual federalism model in the EU grants Member States absolute authority to either grant full authorization, restricted authorization, or no authorization for the use of a PPP.⁸² Thus, while the EU approval system for active substances operates as a single market, PPP authorizations vary at the Member State level. Consequently, the use of a registered PPP in one Member State may be illegal in a neighboring State, where the PPP is not authorized.⁸³

⁷⁶ *Pesticides*, *supra* note 48.

⁷⁷ Tani, *supra* note 57.

⁷⁸ *Pesticides*, *supra* note 48.

⁷⁹ *Id.*

⁸⁰ Christopher Vincent, *European Commission Rolls Back Brussels Glyphosate Ban*, BRUSSELS TIMES (Oct. 24, 2018), <http://www.brusselstimes.com/brussels/12929/european-commission-rolls-back-brussels-glyphosate-ban>.

⁸¹ *Id.*

⁸² EUR. CROP PROT. ASS'N, REGISTERING PLANT PROTECTION PRODUCTS IN THE EU 9 (2013), https://www.ecpa.eu/sites/default/files/7450_Registration%20brochure_3.pdf.

⁸³ EUR. COMM'N, DIRECTOR-GENERAL OF HEALTH & FOOD SAFETY, OVERVIEW REPORT: CONTROLS ON THE MARKETING AND USE OF PLANT PROTECTION PRODUCTS 3 (2017).

Member States may choose not to authorize a PPP for many reasons, including local variations in climate and cropping patterns.⁸⁴ Each Member State, as a sovereign nation, prescribes its own legal standards for the PPP registration process. In Germany, for instance, the German Plant Protection Act governs the PPP proceedings, whereby the Federal Office of Consumer Protection and Safety is the licensing authority, while the Federal Environment Agency (UBA) and the Federal Institute for Risk Assessment (BfR) execute PPP impact assessments.⁸⁵ The UBA's role is to evaluate the impact of a PPP on biodiversity and the environment, and the PPP may not pose any "unacceptable effect" on either.⁸⁶ The BfR is responsible for a comprehensive assessment of the health risks posed by a PPP.⁸⁷ Notably, the BfR takes into account a PPP's effects on a variety of potentially exposed people, including the applicators of the PPP, residents who live next to a treated surface or field, bystanders who could be exposed during application, and consumers who could ingest PPP residue through food or water.⁸⁸

In regard to glyphosate, the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB)⁸⁹ seeks an undisclosed end date for the use of glyphosate-based PPPs.⁹⁰ Germany is basing its phaseout of glyphosate PPPs on harms to biodiversity.⁹¹ Specifically, the President of the UBA stated, "we must use every opportunity to avert the worst effects on biodiversity."⁹² The "opportunity" to which the UBA President refers to is the chance to revoke the authorization of glyphosate PPPs. Germany also recognizes the need to replace glyphosate PPPs with substitute PPPs that are less harmful to the environment. The Environment Minister of the BMUB commented, "[i]f . . . even more harmful crop protection products are used instead of glyphosate, nothing is gained for the environment."⁹³ As such, Germany hopes to enact a stricter PPP authorization process so that environmentally harmful PPPs like glyphosate never enter the market in the first place.⁹⁴

While Germany has not banned glyphosate as an active ingredient, it plans to ban all PPPs containing glyphosate. Although this is not a ban of glyphosate *per se*, it operates as one in effect. Interestingly, Germany premises its ban on environmental considerations through biodiversity findings of the UBA, rather than on adverse human health effects that

⁸⁴ *How Does the Approval Process Work for Plant Protection Products (PPPs)?*, PESTICIDE REGISTRATION & CONTROL DIV., <http://www.pcs.agriculture.gov.ie/aboutus/abouttheapprovalprocess/howdoestheapprovalprocessworkforplantprotectionproductsppps/> (last visited Jan. 6, 2020).

⁸⁵ *Plant Protection Products*, BUNDESINSTITUT FÜR RISIKOBEWERTUNG, https://www.bfr.bund.de/en/plant_protection_products-579.html (last visited Jan. 6, 2020).

⁸⁶ *Plant Protection Products*, UMWELT BUNDESAMT (Sept. 24, 2015), <https://www.umweltbundesamt.de/en/topics/chemicals/plant-protection-products>.

⁸⁷ *Plant Protection Products*, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ The BMUB houses the UBA.

⁹⁰ Michelle Martin & Michael Hogan, *Germany Seeking End Date for Glyphosate Use: Minister*, REUTERS (Nov. 6, 2018, 4:36AM), <https://www.reuters.com/article/us-germany-glyphosate/germany-seeking-end-date-for-glyphosate-use-minister-idUSKCN1NB12F>.

⁹¹ See Katy Askew, *German Crackdown on Glyphosate: 'We Must Use Every Opportunity to Avert the Worst Effects on Biodiversity'*, FOOD NAVIGATOR (Nov. 7, 2018, 2:10PM), <https://www.foodnavigator.com/Article/2018/11/06/German-crackdown-on-glyphosate-We-must-use-every-opportunity-to-avert-the-worst-effects-on-biodiversity>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

would be established by the BfR. Nevertheless, Germany has lawful plans to ban the use of glyphosate products, and it is not the only Member State to do so.

In the Czech Republic, for example, the application of glyphosate products on food crops has been banned as of January 1, 2019.⁹⁵ Emmanuel Macron, the President of France, has committed to banning glyphosate for eighty-five percent of uses in France over the course of the next few years.⁹⁶ Italian officials banned the use of glyphosate products in all areas frequented by the public, such as parks, roads, sports fields, and schoolgrounds.⁹⁷ Other Member States that feature bans on glyphosate PPPs to some degree include the Netherlands, Portugal, and Sweden.⁹⁸ Additional Member States on the cusp of restricting glyphosate PPP use include Belgium, Greece, Luxembourg, Slovenia, and Malta, but they are all waiting on the EC to initiate a new study on the carcinogenicity of glyphosate before taking any action of their own.⁹⁹ And lastly, many cities throughout the EU have used their local authority to restrict the use of glyphosate products within their city limits.¹⁰⁰

Even though the EC has failed to apply the precautionary principle to its glyphosate renewal proceedings with integrity, Member States can choose to protect their citizens against the potential dangers of glyphosate by limiting the use of glyphosate PPPs within their national boundaries. Therefore, dual federalism is the ideal solution for banning glyphosate in the EU. Although the EC fails to protect European citizens, Member States like Germany are likewise bound to the precautionary principle,¹⁰¹ which provides their citizens with a second line of federal defense against glyphosate. At the same time, Member States such as France, Germany, and Italy, who have all restricted glyphosate use and possess considerable political clout in the EU, are putting enormous pressure on the EC and the EU government—such as the European Parliament, which passed a non-binding resolution to urge the EC to ban glyphosate in 2022¹⁰²—to nix glyphosate at the EU level. Thus, the EC may be pressured into banning glyphosate, and, at a minimum, Member States will likely pressure one another to adopt more restrictive PPP regulatory measures.

IV. THE REGULATORY STATUS OF GLYPHOSATE AT THE U.S. STATE LEVEL

⁹⁵ Louise Kelleher, *Czech Mate for Roundup*, AGRIC. & RURAL CONVENTION (Feb. 14, 2019), <http://www.arc2020.eu/czech-out-this-roundabout-way-to-not-ban-roundup/>.

⁹⁶ Sybille de La Hamaide et al., *France Suggests Glyphosate Exit Could Be Even Slower Than Planned*, REUTERS (Feb. 15, 2019, 9:30AM), <https://www.reuters.com/article/us-france-agriculture-glyphosate/france-suggests-glyphosate-exit-could-be-even-slower-than-planned-idUSKCN1Q41S0>.

⁹⁷ *Italy Places Important Restrictions on the Use of Glyphosate*, PESTICIDE ACTION NETWORK EUR. (Aug. 24, 2016), <https://www.pan-europe.info/press-releases/2016/08/italy-places-important-restrictions-use-glyphosate>.

⁹⁸ *Where is Glyphosate Banned?*, BAUM HEDLUND ARISTEI GOLDMAN PC, <https://www.baumhedlundlaw.com/toxic-tort-law/monsanto-roundup-lawsuit/where-is-glyphosate-banned/> (last visited Jan. 6, 2020).

⁹⁹ See Sarantis Michalopoulos, *Six Member States Call for Glyphosate Alternatives, Exit Plan*, EURACTIV (Jan. 8, 2018), <https://www.euractiv.com/section/agriculture-food/news/six-member-states-call-for-glyphosate-alternatives-exit-plan/> (noting these Member States are also more inclined to have the EC ban glyphosate as an active ingredient, as opposed to restricting the use of glyphosate products themselves).

¹⁰⁰ See *Where is Glyphosate Banned?*, *supra* note 98.

¹⁰¹ *Precautionary Principle*, UMWELT BUNDESAMT (Jan. 25, 2019), <https://www.umweltbundesamt.de/en/precautionary-principle> (“The precautionary principle is the guiding principle of environmental policy at German [and] EU . . . levels.”).

¹⁰² See *EU Lawmakers Vote to Ban Glyphosate Weed Killer by 2022*, *supra* note 74.

In the U.S., the federal government represents the sole federal decisionmaker in the herbicide registration process. U.S. states have the opportunity to restrict the use or sale of pesticides, but the EPA must consent to those restrictions. As such, autonomous state regulation of herbicides does not exist.

The EPA derives its authority to approve the use, distribution, or sale of herbicides under FIFRA.¹⁰³ Likewise, states derive their authority to regulate herbicides under the “Authority of States” section of FIFRA (section 136v).¹⁰⁴ Two subsections of § 136v are particularly relevant: § 136v(a) and (c). Subsection § 136v(a) states that “[a] state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].”¹⁰⁵ Subsection 136v(c) provides that “[a] State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs . . . [only] if registration for such use has not previously been denied, disapproved, or canceled by the [EPA] Administrator.”¹⁰⁶ Read plainly, § 136v(a) grants states the authority to regulate pesticides and herbicides only to the extent that the substance has been registered by the EPA. Thus, states do not have the authority to unilaterally register substances that have not been registered by the EPA. However, under § 136v(c), states can register federally approved substances for additional uses to meet unique local circumstances. To illustrate, if a federal pesticide is registered to be used only on corn fields, a state could petition the EPA to approve the state’s request for additional uses of the pesticide on other agricultural fields, if the state demonstrates a uniquely local need to do so.

Neither subsection, nor the remainder of §136v, explicitly grants states the right to ban a federally registered herbicide or pesticide. Subsection 136v(c) reads to permit states to *expand* federal registration for *additional* uses; it does not permit states to ban or restrict the sale or use of herbicides. However, the seemingly unambiguous language of § 136v(c) has not discouraged states from interpreting “meet special local needs” as empowering them to restrict the federal registration label for local needs. Importantly, the EPA has historically been willing to approve certain state restrictions under § 136v(c) for a variety of local reasons.¹⁰⁷ Nonetheless, the EPA enjoys absolute authority to approve or deny state requests under § 136v(c)¹⁰⁸—a key possession of authority that will undoubtedly control the destiny of state restrictions of herbicides. Such authority is discussed as it pertains to a recent case study in Arkansas.

¹⁰³ 7 U.S.C. § 136a (2018).

¹⁰⁴ 7 U.S.C. § 136v (2018).

¹⁰⁵ 7 U.S.C. § 136v(a) (2018).

¹⁰⁶ 7 U.S.C. § 136v(c) (2018).

¹⁰⁷ See *Guidance on FIFRA 24(c) Registrations*, U.S. ENVTL. PROT. AGENCY (Mar. 19, 2019), <https://www.epa.gov/pesticide-registration/guidance-fifra-24c-registrations>.

¹⁰⁸ *Id.*

In Arkansas, the State Plant Board (ASPB)¹⁰⁹ passed temporary in-season bans on the use of dicamba in 2017 and in 2018.¹¹⁰ Monsanto developed dicamba as a weedkiller that can be applied to cotton and soybean crops that are genetically modified to be resistant to dicamba.¹¹¹ Dicamba was applied to new strains of cotton and soybean plants on Arkansas fields for the first time in 2017.¹¹² Subsequently, many non-dicamba resistant soybeans experienced severe damage from dicamba spray, which is capable of drifting away from its source for several miles.¹¹³ After receiving over one-thousand complaints from farmers about the harm caused by dicamba drift, the AFSB made the decision to temporarily ban dicamba for 120 days.¹¹⁴ The AFSB also temporarily banned dicamba in 2018, and was planning to do the same in 2019, before the EPA intervened.¹¹⁵ The EPA overrode the statewide ban on dicamba,¹¹⁶ and permitted the uninterrupted spraying of the herbicide until December 20, 2020.¹¹⁷ However, the EPA's ruling did set forth limited restrictions on the application of dicamba,¹¹⁸ which the AFSB has since adopted.¹¹⁹

Importantly, the AFSB never possessed the unilateral right to restrict the dicamba application timeframe. The EPA needed to approve the 2017 and 2018 rulings of the AFSB as valid § 136v(c) state requests.¹²⁰ The EPA determined that the AFSB met the "special local need" requirement of § 136v(c) because Arkansas demonstrated a local need to restrict dicamba's application timeframe to prevent further damage to statewide crops. Although the AFSB was able to restrict the use of dicamba for two consecutive years, the EPA retains the sole authority to review state pesticide restriction requests and to approve or deny them. Therefore, it is unlikely that a state could ever garner EPA approval of a year-round, i.e., permanent ban of a federally registered substance.

To complicate matters, the states will likely have even less regulatory leeway in a few years' time because the EPA is reevaluating its review process for § 136v(c) restriction

¹⁰⁹ The Arkansas State Plant Board is a part of the Arkansas Agriculture Department, whose mission is to "protect and serve the citizens of Arkansas . . . by providing . . . unbiased enforcement of laws and regulations." *Plant Industries Division Mission*, ARK. DEP'T AGRIC., <https://www.aad.arkansas.gov/arkansas-state-plant-board> (last visited Jan. 6, 2020).

¹¹⁰ See Danny Hakim, *Monsanto's Weed Killer, Dicamba, Divides Farmers*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/business/monsanto-dicamba-weed-killer.html> (Arkansas announced a 120-day ban of the weed killer beginning on July 11, 2017); George Jared, *Arkansas State Plant Board Passes Regulatory Changes for Use of Dicamba*, TALK BUS. & POL. (Feb. 21, 2019, 3:45PM), <https://talkbusiness.net/2019/02/arkansas-state-plant-board-passes-regulatory-changes-for-use-of-dicamba/>. Dicamba was banned during three months of the 2018 growing season, and the Arkansas State Plant Board has proposed a restriction on the application of dicamba from May 26 to October 31 for 2019. *Id.*

¹¹¹ See Hakim, *supra* note 110.

¹¹² Kevin Folta & Cameron English, *Lessons Learned from the 2017 Monsanto Dicamba Herbicide Fiasco*, GENETIC LITERACY PROJECT (Jan. 25, 2018), <https://geneticliteracyproject.org/2018/01/25/lessons-learned-2017-monsanto-dicamba-herbicide-fiasco/>.

¹¹³ *Id.*

¹¹⁴ Jared, *supra* note 110.

¹¹⁵ Daniel Breen, *Arkansas Plant Board Votes to Loosen Dicamba Restrictions*, U. ARK. PUB. RADIO (Feb. 21, 2019), <https://www.ualrpublicradio.org/post/arkansas-plant-board-votes-loosen-dicamba-restrictions>.

¹¹⁶ See *EPA Approves Dicamba Use in Arkansas After Herbicide's Ban*, ASSOCIATED PRESS (Nov. 2, 2018), <https://www.apnews.com/3a6b3a161d14449b9d2dc885acdf5f71>.

¹¹⁷ *EPA Announces Changes to Dicamba Registration*, U.S. ENVTL. PROT. AGENCY (Oct. 31, 2018), <https://www.epa.gov/newsreleases/epa-announces-changes-dicamba-registration>.

¹¹⁸ *Id.* at 1. The EPA mandates that "only certified applicators may apply dicamba," and that dicamba application is prohibited on soybean crops 45 days after planting and on cotton plants 60 days after planting. *Id.*

¹¹⁹ Jared, *supra* note 110.

¹²⁰ See *Guidance on FIFRA 24(c) Registrations*, *supra* note 107.

requests. The EPA has said that many § 136v(c) requests are “to narrow the federal label, such as to add a more restrictive cut off-date.”¹²¹ Specifically, “[d]ue to the fact that [§ 136v(a)] allows states to regulate the use of any federally registered pesticide, and the fact that some states have *instead* used [§ 136v(c)] to implement cut-off dates . . . EPA is now re-evaluating its approach to reviewing [§ 136v(c)] requests and the circumstances under which it will exercise its authority to *disapprove* those requests.”¹²² The EPA then stated that it intends to develop a proposed rule on the matter,¹²³ which must pass through ordinary APA procedures.

The EPA’s announcement shows that it is seemingly frustrated with states’ use (or abuse) of § 136v(c) as a tool to restrict federal registrations, rather than to expand them for local needs—as is statutorily written. Any concrete action taken by the EPA will further dampen state attempts to limit the sale or use of federally approved substances. In regard to glyphosate, any state that could request the restriction of glyphosate will likely be rejected by the EPA. Unlike dicamba, which actually caused tangible crop harm in Arkansas, glyphosate can be restricted only for speculative health or environmental concerns that have been rebuffed by the majority of glyphosate science. Therefore, no matter how desperately a state wants to ban glyphosate, the EPA will never approve a state’s request to restrict glyphosate under § 136v(c) based on fears that, from the EPA’s perspective, are illegitimately held.

To date, no state has dared to establish a state ban on glyphosate in defiance of the EPA’s registration supremacy. Only one state, California, has at a minimum attempted to warn Californians about the carcinogenic risks of glyphosate. Pursuant to Proposition 65, California requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer.¹²⁴ In July 2017, California listed glyphosate as a carcinogen, and this listing remains active today.¹²⁵ Under Proposition 65, a warning must be placed on a product label that contains a listed carcinogen within a year of the carcinogen’s listing.¹²⁶ Hence, California sought to require warning labels to be placed on all products containing glyphosate by July 2018. However, California was preliminarily enjoined from placing warning labels on glyphosate products in *National Association of Wheat Growers v. Zeise*.¹²⁷ In *Zeise*, the court held that “[i]t is inherently misleading for a warning to state that a chemical is known to the state of California to cause cancer based on the finding of one organization [the IARC] . . . when apparently all other regulatory and governmental bodies have found the opposite, including the EPA”¹²⁸ The court further held that California’s requirement would violate the First Amendment rights of the various plaintiffs,¹²⁹ because the proposed risk labels are “false and misleading” statements.¹³⁰ The court explained, “[a] reasonable consumer may understand that if the warning says ‘known

¹²¹ *Id.* at 1.

¹²² *Id.* (emphasis added).

¹²³ *Id.*

¹²⁴ *About Proposition 65*, CAL. OFF. ENVTL. HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/about-proposition-65> (last visited Jan. 6, 2020).

¹²⁵ *Glyphosate*, CAL. OFF. ENVTL. HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/chemicals/glyphosate> (last visited Jan. 6, 2020).

¹²⁶ *About Proposition 65*, *supra* note 124.

¹²⁷ *Nat’l Ass’n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842 (E.D. Cal. 2018).

¹²⁸ *Id.* at 852–53.

¹²⁹ *Id.* at 850.

¹³⁰ *Id.* at 853.

to cause cancer,' there could be a small minority of studies or experts disputing whether the substance in fact causes cancer."¹³¹ Because there are many studies that disagree with California's position, California's glyphosate labeling requirements violates the First Amendment. Therefore, although glyphosate continues to be listed as a carcinogen under Proposition 65, California cannot require warning labels that say the same. The *Zeise* decision defeated the principal purpose of Proposition 65, namely, to actively flag the carcinogenic risk of certain products for would-be consumers through product labeling.

Evidently, U.S. states lack the necessary authority to ban glyphosate, or, at a minimum, to actively warn state residents about the carcinogenic potential of glyphosate. Therefore, the American public cannot rely on the federal or state governments to exercise regulatory precaution regarding glyphosate.

V. LITIGATION AS A STRATEGY TO PROACTIVELY PROTECT AMERICANS AGAINST GLYPHOSATE

This part argues that litigation is the best, and, realistically, the only option to proactively protect Americans against glyphosate. In considering litigation as an option to achieving a ban on glyphosate, it must be discussed whether it would be more effective to sue Monsanto or the EPA.

Beginning with an analysis of litigation against the former, Monsanto has been named as a defendant in over 700 lawsuits in the U.S. District Court for the Northern District of California (N.D. Cal.),¹³² where the *Johnson* case serves as legal precedent. On March 27, 2019, a second jury verdict in the N.D. Cal. court resulted in a finding that Roundup was a substantial factor in causing the plaintiff's non-Hodgkin's lymphoma.¹³³ The jury awarded \$75 million in punitive damages, and \$5.27 million in compensatory damages.¹³⁴ If these punitive verdicts become a trend, Monsanto will need to contemplate whether glyphosate's profitability is sustainable in the long term.¹³⁵ Eventually, Monsanto may have to assess whether it is in its best interest to cease its production of glyphosate. Of course, this scenario is purely hypothetical, and Monsanto will likely be disinclined to stop selling glyphosate products unless it can produce alternative products that can replace its glyphosate products and forgone profits. It is important to note that effective alternatives to glyphosate do exist,¹³⁶ but it is unknown whether a company such as Monsanto can capitalize on them or even be the appropriate entity to do so.

¹³¹ *Id.* at 851.

¹³² *Roundup (Glyphosate) Cancer Cases: Key Documents & Analysis*, U.S. RIGHT TO KNOW, <https://usrtk.org/monsanto-papers/> (last visited Jan. 6, 2020).

¹³³ Holly Yan et al., *\$80 Million Awarded to Man Who Jury Says Got Cancer After Roundup Exposure*, CNN (Mar. 27, 2019), <https://www.cnn.com/2019/03/27/health/monsanto-roundup-verdict/index.html>.

¹³⁴ *Id.*

¹³⁵ Monsanto may either need to stop selling glyphosate because glyphosate's return on investment is outpaced by judicial damages, or because the optics of glyphosate are crushing the company's overall profitability and marketability. In regard to the latter, "Bayer has seen its market value slashed by about 30 billion euros since August [2018], when a California jury in the [Johnson] lawsuit found that Monsanto should have warned of the alleged cancer risks." Burger & Weiss, *Bayer Says Next Glyphosate Lawsuit Likely to be Postponed*, THOMAS REUTERS (Aug. 7, 2019, 7:11 AM), <https://www.reuters.com/article/us-bayer-glyphosate-lawsuit-idUSKCN1UX17L>.

¹³⁶ See *Are There Alternatives to Glyphosate for Weed Control in Landscapes*, N.C. STATE UNIV. (Oct. 2, 2018), <https://content.ces.ncsu.edu/are-there-alternatives-to-glyphosate-for-weed-control-in-landscapes>

While a profusion of successful lawsuits against Monsanto for harms to human health may ultimately dragoon the company into relinquishing its glyphosate production, it is not possible to predict if or when a critical mass of lawsuits will be reached. Therefore, for the purpose of this note, individual-led lawsuits against Monsanto are not the most focused¹³⁷ or expeditious means for creating systemic changes to Monsanto's business model. Instead, this note suggests suing the EPA through a cause of action that directly petitions for a repeal of the glyphosate label.

First, the EPA could be sued for arbitrary and capricious rulemaking when it renews glyphosate in a final EPA ruling. An agency rule is arbitrary and capricious if the agency has, for instance, "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."¹³⁸ If the EPA were to renew glyphosate, it should very easily be able to explain its rationale for doing so in light of the evidence in the record that would overwhelmingly support glyphosate's safety.¹³⁹ Thus, an arbitrary and capricious challenge is not a worthwhile pursuit.

Alternatively, it must be assessed whether the EPA Administrator has failed to perform a nondiscretionary duty by failing to cancel glyphosate's FIFRA registration. Traditionally, many federal environmental statutes such as the Clean Water Act and the Clean Air Act contain citizen suit provisions that enable ordinary citizens to sue the EPA Administrator for his or her failure to perform a nondiscretionary duty articulated in the organic statute. FIFRA does not have a citizen suit provision or an equivalent provision.¹⁴⁰ Therefore, FIFRA cannot be used as a legal basis to sue the EPA.

The unavailability of an arbitrary and capricious challenge and a citizen suit greatly lessens the prospect of a possible glyphosate lawsuit against the EPA. Fortunately, however, a recent proceeding against Scott Pruitt, the former EPA Administrator under the Trump Administration, could offer some direction. The lawsuit resulted from the EPA's

("Although there are effective alternatives to glyphosate, each of these alternatives will be, in some way, less effective, less convenient, and/or more expensive." In the EU, Member States that have banned glyphosate PPPs will be using glyphosate alternatives).

¹³⁷ Lawsuits against Monsanto are not aimed at banning glyphosate, but function to compensate victims who seek damages and justice.

¹³⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹³⁹ During the notice and comment process, anyone may shape the content of the record by providing commentary and evidence in support for or against an agency's proposed action. The agency is then obligated to respond to comments after a "consideration of [their] relevant matter." 5 U.S.C. § 553(c) (2018). However, the agency is not required to respond to all comments; it must respond only to what the U.S. Supreme Court has characterized as "significant" comments. *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1203 (2015). With respect to the glyphosate re-registration process, the majority of the "significant" comments in the record will likely be submitted by influential public and private entities (e.g., Monsanto, farmers organizations, food companies, etc.) who are benefitted by glyphosate, and, therefore, will attest to glyphosate's safety and support the EPA's proposed rule for glyphosate's re-registration. Accordingly, the EPA's final rule confirming its proposed rule will not be "counter to the evidence before the agency." *State Farm Mutual Auto. Ins. Co.*, 463 U.S. at 43.

¹⁴⁰ *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities#Citizen%20Enforcement> (last visited Jan. 6, 2020).

regulation of chlorpyrifos, a popular insecticide that was first registered in 1965.¹⁴¹ Scientists eventually discovered that chlorpyrifos causes extreme neurodevelopmental damage in children who consume chlorpyrifos-sprayed crops.¹⁴² In 2007, the Natural Resources Defense Council (NRDC) and the Pesticide Action Network (PAN) jointly petitioned the EPA to ban chlorpyrifos and to revoke all “tolerances,” i.e., residual allowances for chlorpyrifos on food products.¹⁴³ In 2017, the EPA denied that petition on the grounds that “the science addressing neurodevelopmental effects remains unresolved,” and that the EPA would not complete “any associated tolerance revocation of chlorpyrifos without first attempting to come to a clearer scientific resolution.”¹⁴⁴ This decision contradicted the EPA’s prior conclusion that chlorpyrifos was unsafe. In late 2016, the EPA issued a Proposed Rule that sought to revoke chlorpyrifos tolerances because “[t]he revised analysis indicates that expected residues of chlorpyrifos on most individual food crops exceed the ‘reasonable certainty of no harm’ safety standard under the Federal Food, Drug, and Cosmetic Act.”¹⁴⁵

Unsurprisingly, the Petitioners, NRDC and PAN, challenged the EPA’s denial of their petition in federal court in *League of United Latin American Citizens v. Wheeler*.¹⁴⁶ In *Wheeler*, the Ninth Circuit held that there was no justification for the EPA’s flip-flop in its 2017 decision to maintain a tolerance for chlorpyrifos in the face of scientific evidence that its residue on foods causes neurodevelopmental damage to children.¹⁴⁷ The Court found that the Federal Food, Drug, and Cosmetic Act (FFDCA) unequivocally requires the EPA to “modify or revoke a tolerance if the Administrator determines it is not safe.”¹⁴⁸ A tolerance is safe only when “the Administrator has determined that there is a reasonable certainty that no harm will result from . . . exposure to the pesticide”¹⁴⁹ Accordingly, the EPA bears a continuing obligation to revoke tolerances that it does not find with a “reasonable certainty” to be safe, and this obligation applied to chlorpyrifos.

Importantly, the court found that the FFDCA and FIFRA are inextricably linked, where one implicates the other. The court wrote, “[t]he EPA Administrator must register a pesticide . . . when . . . the pesticide does not have ‘unreasonable adverse effects on the environment.’ FIFRA incorporates the FFDCA’s safety standard into the definition of

¹⁴¹ *Chlorpyrifos*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ingredients-used-pesticide-products/chlorpyrifos> (last visited Jan. 6, 2020). Between 2011 to 2015, U.S. farmers sprayed five to ten million pounds of chlorpyrifos on corn, soybeans, and other crops. *Estimated Agricultural Use for Chlorpyrifos*, U.S. GEOLOGICAL SURVEY, https://water.usgs.gov/nawqa/pnsp/usage/maps/show_map.php?year=2000&map=CHLORPYRIFOS&hilo=L (last visited Jan. 6, 2020).

¹⁴² See Eric Lipton, *Court Order E.P.A. to Ban Chlorpyrifos, Pesticide Tied to Children’s Health Problems*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/politics/chlorpyrifos-pesticide-ban-epa-court.html>.

¹⁴³ See *EPA Administrator Pruitt Denies Petition to Ban Widely Used Pesticide*, U.S. ENVTL. PROTECTION AGENCY (Mar. 29, 2017), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-denies-petition-ban-widely-used-pesticide-0>.

¹⁴⁴ *Chlorpyrifos*; Order Denying PANNA and NRDC’s Petition to Revoke Tolerance, 82 Fed. Reg. 16,581 (Apr. 5, 2017), <https://www.federalregister.gov/documents/2017/04/05/2017-06777/chlorpyrifos-order-denying-panna-and-nrdcs-petition-to-revoke-tolerances>.

¹⁴⁵ *Chlorpyrifos*; Tolerance Revocations; Notice of Data Availability and Request for Comment, 81 Fed. Reg. 81049, 81050 (Nov. 17, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2015-0653-0402>.

¹⁴⁶ *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814 (9th Cir. 2018).

¹⁴⁷ *Id.*

¹⁴⁸ 21 U.S.C. § 346a(b)(2)(A)(i) (2018).

¹⁴⁹ 21 U.S.C. § 346a(b)(2)(A)(ii) (2018).

‘unreasonable adverse effects’ to include ‘a human dietary risk from residues’¹⁵⁰ Therefore, “chlorpyrifos [did] not meet the statutory requirement for registration under FIFRA, which incorporates the FFDCA’s safety standard.”¹⁵¹ The court remanded the decision to the EPA “with directions to revoke all tolerances and *cancel all registrations* for chlorpyrifos”¹⁵²

The *Wheeler* decision demonstrates that while there is no citizen suit provision under FIFRA, one could use the FFDCA as a proxy to challenge a FIFRA registration in court. The FFDCA’s petition provision reads that “[a]ny person may file . . . a petition” to challenge the issuance of a residual tolerance.¹⁵³ With respect to glyphosate, anyone could petition the allowance of glyphosate residues on food, and allege that glyphosate is unsafe for human consumption. If skin exposure to glyphosate creates potential genotoxic, disruptive endocrinal, and carcinogenic effects, perhaps consumption of glyphosate residues is not much safer. Thus, new scientific experiments should prioritize consumer safety tests of crops contaminated with glyphosate. If studies were to demonstrate that glyphosate is unsafe for consumption, or, alternatively, if researchers find that current glyphosate residual levels in food products must be lowered,¹⁵⁴ yet these levels are *unable* to be stabilized despite the implementation of reasonable risk mitigation measures,¹⁵⁵ then environmental groups could petition the EPA to revoke the glyphosate registration label because there is no guarantee that glyphosate will not pose “any unreasonable risk to man or the environment.”¹⁵⁶ If the EPA declines to act on the petition, the petitioners could

¹⁵⁰ *Wheeler*, 899 F.3d at 818 (emphasis added).

¹⁵¹ *Id.* at 829.

¹⁵² *Id.* (emphasis added).

¹⁵³ 21 U.S.C. § 346a(d)(1) (2018).

¹⁵⁴ For instance, in June 2019, the Environmental Working Group (EWG), a nonprofit organization specializing in research on toxic chemicals and pesticides, released its latest findings that show that glyphosate was detected at purportedly unsafe levels in twenty-one leading cereal and snack brands. Specifically, EWG alleged that “[t]he new tests confirm and amplify EWG’s findings from tests in July and October of [2018], with levels of glyphosate consistently above EWG’s children’s health benchmark. The two highest levels of glyphosate were found in Honey Nut Cheerios Medley Crunch, with 833 parts per billion, or ppb, and Cheerios, with 729 ppb. The EWG children’s health benchmark is 160 ppb.” Naidenko & Temkin, *In New Round of Tests, Monsanto’s Weedkiller Still Contaminates Foods Marketed to Children*, ENVTL. WORKING GROUP (June 12, 2019), <https://www.ewg.org/childrenshealth/monsanto-weedkiller-still-contaminates-foods-marketed-to-children/>. The EWG, Ben & Jerry’s, Stonyfield Farms, and a variety of other organizations have jointly petitioned the EPA to revert the tolerance level of glyphosate on oats to the EPA’s more health-protective 1993 level, which was 300 times more stringent than today’s level. Petition To Modify the Tolerance and Product Labels for Glyphosate With Regard to Oats; Notice of Filing, 84 Fed. Reg. 19783 (May 6, 2019), <https://www.federalregister.gov/documents/2019/05/06/2019-09221/petition-to-modify-the-tolerance-and-product-labels-for-glyphosate-with-regard-to-oats-notice-of>; see also, *EPA Seeks Public Comment on Use of Monsanto’s Weedkiller, Glyphosate on Oats Used in Foods Marketed to Kids*, ENVTL. WORKING GROUP (May 3, 2019), <https://www.ewg.org/release/epa-seeks-public-comment-use-monsanto-s-weedkiller-glyphosate-oats-used-foods-marketed-kids> (“Over the past 25 years, the EPA has increased the amount of glyphosate residue allowed on oats 300-fold. The first increase, to 20 ppm, was granted in response to a 1997 petition from Monsanto, when farmers around the world first began using glyphosate widely as a late-season drying agent. It was increased to the current 30 ppm level in 2008.”). Evidently, the EWG alleges that current tolerance levels for certain foods are too high and unsafe. If the EPA declines to lower these levels despite science demonstrating a need to do so, the EPA’s decision could be challenged in court.

¹⁵⁵ The EPA restricts the use of pesticides to “specific pests and . . . specific circumstances. . . . Over time, registered pesticides, or certain uses of a registered pesticide, have been canceled.” *Regulatory Information by Topic: Pesticides*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/regulatory-information-topic/regulatory-information-topic-pesticides#restricted> (last visited Jan. 6, 2020).

¹⁵⁶ 7 U.S.C. § 136(bb) (2018).

subsequently challenge that decision in court, as the NRDC and PAN did with respect to their chlorpyrifos petition. With cases like *Johnson* already in the books in the U.S. district court for the N.D. Cal., certain venues may be more disposed to hear a failed glyphosate petition.

Concededly, the aforementioned litigation strategy is a circuitous method to achieving a ban on glyphosate, but it is logistically the best strategy. It would be much more logical to directly challenge the glyphosate FIFRA registration in court, and it would also be more practicable to sue the EPA for its failure to deregister glyphosate when it likely causes cancer to its applicators. But the written law does not provide that type of recourse. Therefore, a suit under a rejected FFDCA petition is the best option to impel the EPA to deregister glyphosate.

CONCLUSION

Glyphosate is a substance that should be banned out of precaution. Because Monsanto likely meddled in the scientific data proving glyphosate's safety, the validity of those studies must be questioned. This note applauds the dual federalism model that exists in the EU, where Member States have the ability to ban glyphosate products if their judgment differs from the EC's. Conversely, it is troubling to see that the EPA enjoys virtually unchecked power over the herbicide registration process in the U.S. States should have the ability to exercise their sovereign state rights, and to set much stricter regulations than the EPA. Instead, the EPA controls the destiny of state herbicide regulation, and appears poised to further restrict the states' ability to enact regulations that limit the use or sale of EPA registrations. While litigation ordinarily functions as a viable check on the EPA to oblige it to regulate responsibly—and to require it to perform nondiscretionary duties—this is not the case with respect to FIFRA. FIFRA does not contain a citizen suit provision, and so, the EPA is immune to lawsuits by injured citizens and environmental groups for its failure to deregister glyphosate. Accordingly, this note proposes a solution to banning glyphosate in the U.S. through an FFDCA lawsuit that could indirectly require the EPA to deregister glyphosate. This strategy is the best chance that Americans have under today's law to be protected against glyphosate.



PERSONAL NARRATIVE AS A TOOL OF LEGAL ANALYSIS TO EVALUATE AND
IMPROVE ACCESS TO ABORTION SERVICES FOR INDIGENOUS WOMEN¹ IN
CANADA

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¹ In this paper, I use the term “Indigenous women” to include First Nations’, Métis, and Inuit women. I chose to use the term “Indigenous” out of respect for and acknowledgment of the preferences of most First Nation, Métis, and Inuit individuals.

² As an individual, I have and acknowledge both my American and Canadian backgrounds. In addition, my perspective includes a great-grandmother, who was Mi’Kmaq (PEI). My great-grandmother never spoke of her experience as Mi’Kmaq, and for all intent and purposes camouflaged her Mi’Kmaq identity, due to her fear of mistreatment. I was raised with some teachings of Mi’Kmaq culture, but my perspective from which this paper derives is that of a white female lens. For that reason, I acknowledge and note that this paper is limited by my own experiences, perspective and lens. In addition, I acknowledge that not all Indigenous women in Canada believe in abortion, and wish to improve abortion access. This paper, however, is applicable and a response to the Indigenous women in Canada, who would like to improve access to abortion services.

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INTRODUCTION

Prince Edward Island (P.E.I.), Canada derives much of its beauty and special qualities from its Island-geography that limits accessibility to the mainland. P.E.I. is one of Canada's Maritime Provinces and is located to the north and west of Canada's mainland provinces of New Brunswick and Nova Scotia, respectively. Separated from the mainland by the Northumberland Strait, individuals may only access P.E.I. by air, ferry, or the 12.9-kilometer-long Confederation Bridge that connects it to New Brunswick.³ As an island with limited accessibility, P.E.I. has remained somewhat free of rapid industrialization, environmental degradation, and human destruction. But the remoteness of P.E.I. that contributes to these benefits has also enabled certain social issues to avoid nationwide scrutiny, including women's access to abortion services.

Although legal in Canada, P.E.I. did not provide on-Island surgical abortions from 1982 until 2017.⁴ After almost thirty-five years of abortion rights' advocates fighting for on-Island abortion access and a notice of a pending lawsuit, the P.E.I. government announced in 2016 that P.E.I. would provide on-Island abortion services, including medical and surgical abortions.⁵ The fight for on-Island abortion services is indicative of the many barriers that women face in accessing safe abortions, even when abortion is legal.

This note will discuss abortion law in Canada. More specifically, this note will look at the barriers to access an abortion in Canada. In doing so, this note will examine how geographic location, race, and socioeconomic class all influence access to abortion services. Part I provided a short description of P.E.I. and its fight for on-Island abortion services. Part II will provide an overview of abortion law in Canada after 1988. Part III will discuss the barriers to abortion access in Canada, specifically looking at systematic and structural, location, and socioeconomic class barriers. Part IV will discuss how Critical Race Theory (CRT), and an application of personal narrative, a CRT tool of legal analysis, can evaluate and improve access to abortion services for Indigenous women in Canada. This note will argue that an application of personal narrative can correctly evaluate and improve access to abortion services for Indigenous women in Canada.

I. OVERVIEW AND SUMMARY OF ABORTION LAW IN CANADA AFTER 1988

Abortion law in Canada dramatically changed in 1988. Prior to 1988, Section 251 of the Criminal Code made abortion a criminal offense, but exempted "therapeutic abortions."⁶ Section 251 of the Criminal Code provided a procedure in which women could apply for a therapeutic abortion through a therapeutic abortion committee that included at least three hospital-appointed doctors to determine whether an abortion was necessary to

³ *Prince Edward Island*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Prince-Edward-Island> (last visited Jan. 8, 2020).

⁴ Sara Fraser & Jesara Sinclair, *Abortion Services Coming to P.E.I., Province Announces*, CBC NEWS (Mar. 31, 2016, 12:32 PM), <https://www.cbc.ca/news/canada/prince-edward-island/pei-abortion-reproductive-rights-1.3514334>.

⁵ *Id.*

⁶ Donald L. Beschle, *Judicial Review and Abortion in Canada: Lessons for the United States in the Wake of Webster v. Reproductive Health Services*, 61 U. COLO. L. REV. 537, 547 (1990).

protect the life or health of the pregnant woman.⁷ If the therapeutic abortion committee found that an abortion was required to protect the life or health of the pregnant woman, then the committee would issue a certificate to the woman's doctor that enabled the doctor to legally perform the abortion.⁸ Section 251 of the Criminal Code intentionally did not define "therapeutic" and "health" in order to allow the therapeutic abortion committee to use their medical expertise and decide each application on a case-by-case basis.⁹

In 1988, Section 251 of the Criminal Code's exemption for therapeutic abortions was challenged as a violation of rights protected by the 1982 Canadian Charter of Rights and Freedoms in *Regina v. Morgentaler*.¹⁰ In *Morgentaler*, the Supreme Court of Canada held that Section 251 of the Criminal Code violates the right to security of the persons of many pregnant women, which is guaranteed under section seven of the 1982 Canadian Charter of Rights and Freedoms,¹¹ because "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person."¹² In addition, the Supreme Court of Canada determined that "[t]he procedures and administrative structures established in...section [251] to provide for therapeutic abortions do not comply with the principles of fundamental justice,"¹³ because women often experience a delay in the process for seeking a therapeutic abortion, which can negatively affect the woman's mental and physical well-being.¹⁴

Furthermore, the Supreme Court of Canada held that the violation of Section seven of the Charter of Rights and Freedoms could not be saved under "the limitation clause" of Section one of the Charter of Rights and Freedoms, which the Supreme Court of Canada has held to mean that some violations of the Charter's rights and freedoms can be justified.¹⁵ A court will find a statutory provision that violates a Charter freedom or right to be justified when (1) "the provision is 'of sufficient importance to warrant overriding a constitutionally protected right or freedom;'" and (2) "the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society."¹⁶ In *Morgentaler*, the Supreme Court of Canada found Section 251 of the Criminal Code and its procedures for therapeutic abortions to be unfair and arbitrary, and against the Parliament's intent that "the 'life or health' of pregnant women is paramount."¹⁷

The *Morgentaler* holding was narrow because it did not create a right to abortion that is insulated from legislation.¹⁸ *Morgentaler's* narrow holding enables and invites the Canadian legislature to reconsider the issue of abortion, especially in terms of the protection of fetal interests, which the Supreme Court stated "may well be deserving of

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 547–48.

¹⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.); Beschle, *supra* note 6, at 550–52; Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J. L. & FEMINISM 327, 370 (2017).

¹¹ *Morgentaler*, 1 S.C.R. at 81; Beschle, *supra* note 6, at 550–52; Rimalt, *supra* note 10.

¹² *Morgentaler*, 1 S.C.R. at 32.

¹³ *Id.* at 79; *see also* Beschle, *supra* note 6, at 552–53; Rimalt, *supra* note 10, at 370–72.

¹⁴ *Morgentaler*, 1 S.C.R. at 58.

¹⁵ *Id.* at 75–76; Beschle, *supra* note 6, at 552–53; Rimalt, *supra* note 10, at 370–72.

¹⁶ *Morgentaler*, 1 S.C.R. at 76 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 352 (Can.)).

¹⁷ *Morgentaler*, 1 S.C.R. at 74; Rimalt, *supra* note 10, at 370–71.

¹⁸ Beschle, *supra* note 6, at 554; Rimalt, *supra* note 10, at 371.

constitutional protection under Section one”¹⁹ of the Charter of Rights and Freedom, if Parliament establishes a fair and non-arbitrary standard or procedure in which the fetal interests prevail over that of pregnant women.²⁰ The Canadian legislature has been unable to pass any legislation on the issue of abortion, and there are currently no federal laws that regulate or restrict abortion access.²¹

The lack of federal legislation on abortion allows Canadian provinces and territories to regulate abortion as a health care service.²² But the federal government of Canada does have some power in its allocation of funds to provinces and territories for health care purposes.²³ According to Joanna N. Erdman, “[i]n Canada, Medicare refers to a national health care system composed of provincially administered health insurance plans jointly funded by the provincial and federal governments,” which “was created to ensure universal, comprehensive, and accessible health care for all Canadians.”²⁴ The federal government of Canada is responsible for enforcing the Canada Health Act.

The Canada Health Act, as a part of Canadian health care policy is designed to “protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.”²⁵ The Act provides that each province or territory must provide a health insurance plan that is (1) publicly administered; (2) comprehensive; (3) universal; (4) portable; and (5) accessible in order for the province or territory to receive “full cash contribution” from the federal government.²⁶ An abortion must be considered a “medically necessary” service in order to receive federal payment for the service under the Act,²⁷ but “medically necessary” is not defined in the Act, so provinces and territories have wide flexibility in their public health insurance schemes.²⁸

As a result of the lack of federal legislation on abortion, Canadian provinces and territories have been able to enact laws and regulations that impede women’s access to abortion services.²⁹ For example, immediately after *Morgentaler*, all Canadian provinces, except Ontario and Quebec, limited or removed funding for abortion under public health insurance schemes.³⁰ Although these new laws and regulations from provinces and territories may be defeated in court, many survive to limit women’s access to abortion services.³¹

¹⁹ *Morgentaler*, 1 S.C.R. at 76; Rimalt, *supra* note 10, at 371; *see also* Beschle, *supra* note 6, at 555–56.

²⁰ *Morgentaler*, 1 S.C.R. at 76; Beschle, *supra* note 6, at 555–56; Rimalt, *supra* note 10, at 371.

²¹ Rimalt, *supra* note 10, at 371.

²² *Id.*

²³ Christabelle Sethna & Marion Doull, *Spatial Disparities and Travel to Freestanding Abortion Clinics in Canada*, 38 WOMEN’S STUD. INT’L F. 52, 52 (2013).

²⁴ Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1149 (2007).

²⁵ Canada Health Act, R.S.C. 1985, c C-6, s. 3.

²⁶ *Id.* at s. 7.

²⁷ *Id.* at s. 2.

²⁸ Frances E. Chapman, ‘Butcher of Women’: ‘Abortion Tourism,’ *Canadian Abortion Access and the Cautionary Case Study of Kermit Gosnell*, 25 TEX. J. WOMEN, GENDER, & L. 1, 7 (2015).

²⁹ Erdman, *supra* note 24, at 1094.

³⁰ *Id.*

³¹ *Id.*

II. AVAILABILITY AND ACCESS TO ABORTION SERVICES IN CANADA

Although the *Morgentaler* decision decriminalized abortion, it did not guarantee abortion availability or accessibility as a publicly funded health service.³² There remains a variety of barriers that interfere with a woman's access to abortion services. According to Jocelyn Downie and Carla Nassar, "access to a safe and legal abortion remains practically illusory for many women today."³³ Barriers to access abortion services in Canada may include, but are not limited to, systematic, structural, socioeconomic class, and location barriers.

A. Systematic and Structural Barriers

There are numerous systematic and structural barriers that restrict women's access to abortion services in Canada. The most obvious of these barriers is the overall number of safe and legal abortion service providers, which may not be enough to accommodate all women seeking abortion services.³⁴ According to the Abortion Rights Coalition of Canada (ARCC), around ninety to one-hundred hospitals across Canada provide abortions.³⁵ In terms of free-standing abortion clinics, there are three in Alberta, eight in British Columbia, three in Manitoba, four in New Brunswick, one in Newfoundland & Labrador, one in Nova Scotia, sixteen in Ontario, one in P.E.I., twelve in Quebec, four in Saskatchewan, and three in the Territories (Northwest Territories, Nunavut, and Yukon).³⁶ Some family doctors and primary care clinics will also prescribe medical abortions through the use of Mifegymiso, which is a drug combination of mifepristone and misoprostol.³⁷ Although abortion services are available across Canada, other barriers exist that further complicate a woman's access to these services, such as the location of the service and socioeconomic class.

Similarly, there is a barrier in the difference between abortion services that are provided in a hospital and free-standing clinics. According to the Abortion Rights Coalition of Canada (ARCC), abortion services offered at free-standing clinics generally result in a better experience for women than those provided in hospitals.³⁸ According to Christabelle Sethna and Marion Doull, "many women bypass hospital-based abortion services in or near their home communities in favor of freestanding clinics."³⁹ Also, according to the Canadian Institute for Health Information, the number of induced abortions reported in 2017 was 64,433 at clinics, and 29,597 at hospitals.⁴⁰ Advantages of free-standing clinics include: (1) little, if any policy restrictions; (2) abortions performed up to at least sixteen weeks and

³² *Id.*

³³ Jocelyn Downie & Carla Nassar, *Barriers to Access to Abortion Through a Legal Lens*, 15 HEALTH L.J. 143, 143 (2007).

³⁴ *Id.* at 146.

³⁵ *List of Abortion Clinics in Canada (and some hospitals)*, ABORTION RIGHTS COALITION OF CANADA, 1 (Oct. 22, 2019), <http://www.arcc-cdac.ca/list-abortion-clinics-canada.pdf>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ HOSPITALS VERSUS CLINICS: COMPARISONS OF ABORTION CARE, ABORTION RTS. COALITION OF CAN. (Feb. 2017), <http://www.arcc-cdac.ca/postionpapers/09-Hospitals-vs-Clinics.PDF> [hereinafter HOSPITALS VERSUS CLINICS].

³⁹ Sethna & Doull, *supra* note 23, at 55.

⁴⁰ CANADIAN INST. FOR HEALTH INFO., INDUCED ABORTIONS REPORTED IN CANADA IN 2017 (2018), <https://www.cihi.ca/sites/default/files/document/induced-abortion-2017-en-web.xlsx>.

possibly up to twenty-two weeks; (3) stable and private ownership; (4) short wait-lists; (5) full counseling services; (6) no doctor's referral required; (7) shorter recovery time; (8) less expensive procedures due to the use of local anesthesia; (9) availability of other reproductive health services, such as birth control and aftercare; (10) greater likelihood to have more supportive pro-choice environment and staff; and (11) access to more information and resources.⁴¹

Hospitals also have their own advantages including: (1) locations in both rural and urban areas; (2) complete financial coverage for the abortion; (3) better protection from protesters; (4) some availability of late-term abortions for genetic reasons and high-risk pregnancies; (5) training centers for abortion providers; and (6) immediate emergency care for complications.⁴²

In addition, both hospitals and free-standing abortion clinics have disadvantages. Only around sixteen percent of hospitals in Canada will perform abortions.⁴³ Furthermore, hospitals can have policy restrictions, such as on operating room time, and restrictions where abortions can only be performed up to twelve to fourteen weeks.⁴⁴ Hospitals can be subject to political influence, and have a limited number of providers.⁴⁵ There can also be a longer wait time, such as up to six to eight weeks.⁴⁶ Furthermore, hospitals provide little to no counseling, often require a doctor's referral, offer no other medical support services, information, and resources, and are more likely to be less private.⁴⁷ Additionally, hospitals generally cost taxpayers twice as much as free-standing abortion clinics.⁴⁸ And lastly, hospitals may have a slightly higher medical risk because general anesthesia is usually used during the procedure.⁴⁹

Unlike abortion services offered in hospitals, those provided in free-standing clinics have fewer disadvantages. But disadvantages to abortion services provided in free-standing clinics still do exist.⁵⁰ Free-standing clinics are usually only located in urban areas or major Canadian cities, and are more likely than hospitals to be targeted by protesters.⁵¹ Abortions provided at these clinics may also not be completely funded.⁵² Additionally, the service only includes "elective" abortions, and there is a lack of emergency care for complications, so patients with complications must be transported to the nearest hospital.⁵³ Lastly, these clinics are typically not used as training centers by medical schools as a way to inform and improve the safety of future abortions.⁵⁴

⁴¹ HOSPITALS VERSUS CLINICS, *supra* note 38.

⁴² *Id.* at 2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The difference between a woman's location in a rural and urban area influences her access to abortion services. According to Christabelle Sethna and Marion Doull, "[u]rban centers serve women best because of the existence of numerous freestanding abortion clinics (and hospital-based abortion services) available to them, increasing the chances of a timely appointment in a location that is reached easily, quickly and at low cost."⁵⁵ The lack of free-standing abortion clinics in rural areas has forced Canadian women from rural areas to seek abortion services at hospitals, which may be the only point of health care access in the area.⁵⁶ This means that women from rural areas may need a physician referral, which can be problematic given the shortage of primary care physicians or family doctors in Canada. According to the Canadian Medical Association, fourteen percent of family physicians practice in rural areas, yet nineteen percent of Canadians live in rural areas.⁵⁷ This is further complicated by the fact that seventy-four percent of family physicians are partially or completely closed to new patients.⁵⁸ For example, P.E.I., with its population of 154,750 individuals,⁵⁹ has around nine-thousand individuals on the patient registry waiting to be assigned a family physician.⁶⁰ This can create a delay for women who must obtain a physician referral for an abortion, which is problematic due to the time-sensitive nature of pregnancy.⁶¹

In addition, research has shown that even women who have a family physician may discover the anti-abortion ideology of their physician when they seek a referral for an abortion.⁶² Not only is the experience potentially traumatic and uncomfortable for a woman seeking an abortion, but also the family physician may directly refuse to give the referral, or indirectly prevent the woman from receiving the referral by delaying tests, providing incorrect information about the legality of and other options for an abortion, or lying about sending a referral.⁶³ Research has also showed that family physicians with anti-abortion ideology may even threaten to drop a woman as a patient at the practice if she continues to seek an abortion.⁶⁴ This threat is of greater significance due to the shortage of family physicians and long patient registry lists, especially in rural areas where there may only be a single family physician.⁶⁵

A physician referral is not required for all abortions, but even self-referral can provide a barrier to access. In P.E.I., if a woman wishes to have a surgical abortion off-Island, then

⁵⁵ Sethna & Doull, *supra* note 23, at 58.

⁵⁶ *Id.*

⁵⁷ *Quick Facts on Canada's Physicians: Canadian Physician Resources-2018 Basic Facts: Physician distribution*, CANADIAN MED. ASS'N, <https://www.cma.ca/quick-facts-canadas-physicians> (last visited Jan. 8, 2020).

⁵⁸ *Physician Data Centre: CMA Workforce Survey 2017*, CANADIAN MED. ASS'N, <https://www.cma.ca/physician-data-centre> (last visited Jan. 8, 2020).

⁵⁹ *PEI Population Report Quarterly: Population Report, First Quarter 2019*, P.E.I. CAN. (June 19, 2019), <https://www.princeedwardisland.ca/en/information/finance/pei-population-report-quarterly>.

⁶⁰ Krystalle Ramlakhan, *Opposition Presses Health Minister on Doctor Shortage, Patient Registry*, CBC NEWS (Apr. 18, 2018, 6:26 PM), <https://www.cbc.ca/news/canada/prince-edward-island/pei-doctor-shortage-physicians-pei-james-aylward-robert-mitchell-1.4625513>.

⁶¹ Downie & Nassar, *supra* note 33, at 144–45.

⁶² *Id.* at 145.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

she may self-refer to The Moncton Hospital in Moncton, New Brunswick by telephoning the hospital.⁶⁶ But in cases of self-referral, a woman may feel uncomfortable providing personally identifiable information over the telephone about a politically and socially controversial medical procedure.⁶⁷

B. Socioeconomic Class and Location Barriers

There are numerous socioeconomic class barriers that have made Canadian women's access to abortion services a privilege of wealth. All territorial and provincial health insurance plans completely cover the cost of abortion services at hospitals.⁶⁸ But territorial and provincial health insurance plans may not cover abortion services at free-standing clinics.⁶⁹ In fact, Nunavut, Yukon, Northwest Territories, New Brunswick, Nova Scotia, and P.E.I.'s health insurance plans do not cover abortion services at free-standing clinics.⁷⁰ In this way, women of lower socioeconomic class may be forced to seek abortion services from hospitals, and in doing so, lose some sense of personal autonomy.

In addition to the cost of the actual abortion service, women must also pay travel costs to reach these services. The distance to a provider is positively correlated to travel expenses for the woman.⁷¹ According to Christabelle Sethna and Marion Doull, 44.9 percent of participants traveled an hour or more from home to access abortion services at a free-standing clinic.⁷² The same study also found that women who live "in Canada's rural, Northern, and coastal communities are underserved" in regard to access to free-standing clinics.⁷³ These travel costs are further compounded by the fact that many facilities require multiple appointments pre- and post-abortion to provide information, and to perform blood work and ultrasounds that confirm pregnancy and gestational age.⁷⁴ For example, in P.E.I., a surgical abortion on-Island requires two appointments,⁷⁵ and a medical abortion on-Island requires three appointments.⁷⁶ In April 2019, Health Canada changed its prescribing guidelines for Mifegymiso, the drug prescribed for medical abortions.⁷⁷ The new guidelines no longer require women to have an ultrasound before they are prescribed Mifegymiso for a medical abortion.⁷⁸ Health Canada informed prescribers that they are to "to use their

⁶⁶ *Abortion Services*, HEALTH PEI (Jan. 30, 2018), <https://www.princeedwardisland.ca/en/information/health-pe/abortion-services>.

⁶⁷ Downie & Nassar, *supra* note 33, at 146.

⁶⁸ *Abortion Coverage by Region*, NAT'L ABORTION FED. CAN., <http://www.nafcanada.org/access-region.html> (last visited Jan. 8, 2020) [hereinafter *Abortion Coverage*]; HOSPITALS VERSUS CLINIC, *supra* note 38, at 2.

⁶⁹ *Abortion Coverage*, *supra* note 68; HOSPITALS VERSUS CLINICS, *supra* note 38, at 2.

⁷⁰ *Abortion Coverage*, *supra* note 68.

⁷¹ Downie & Nassar, *supra* note 33, at 152–53.

⁷² Sethna & Doull, *supra* note 23, at 56.

⁷³ *Id.* at 61.

⁷⁴ Downie & Nassar, *supra* note 33, at 152–53; *Surgical Abortion*, PRINCE EDWARD ISLAND CAN. (Nov. 28, 2018), <https://www.princeedwardisland.ca/en/information/health-pe/surgical-abortion>; *Medical Abortion*, PRINCE EDWARD ISLAND CAN. (Nov. 28, 2018), <https://www.princeedwardisland.ca/en/information/health-pe/medical-abortion>.

⁷⁵ *Surgical Abortion*, *supra* note 74.

⁷⁶ *Medical Abortion*, *supra* note 74.

⁷⁷ *Health Canada Says Ultrasound No Longer Mandatory Before Mifegymiso Prescribed for Abortion*, CBC NEWS (Apr. 16, 2019, 2:57 PM), <https://www.cbc.ca/news/health/mifegymiso-ultrasound-1.5100405>.

⁷⁸ *Id.*

medical judgement on how best to determine gestational age and to rule out an ectopic pregnancy,” when determining whether an ultrasound is necessary before prescribing Mifegymiso.⁷⁹ While this change may be seen as a means to increase access to medical abortions, prescribers ultimately have discretion. Furthermore, Health Canada advises prescribers to require an ultrasound in cases where the gestational age is unknown and an ectopic pregnancy is a possibility, which often means that an ultrasound is still required. In the two months after the new guidelines were issued, Rachelle Pike, manager of women’s wellness program and sexual health services for Health PEI, reported that women in about seventy percent of the cases still required an ultrasound.⁸⁰ Although Health Canada has made efforts to increase access to abortion services, multiple appointments are still required. These additional appointments increase the overall time and travel required for a woman seeking an abortion, adding increased strain to women of lower socioeconomic class, such as missing work.⁸¹ Women that live a great distance away from an abortion provider may also have to pay for food and accommodations because it is not possible to make the round-trip in one day.⁸² Women may also have caregiving or other familial responsibilities that require alternative arrangements to be made at a possible financial cost, so that a woman can access abortion services.⁸³ The time, travel, and financial burdens may also prevent a woman from bringing a supportive friend or partner on her trip, which may worsen an already difficult experience.⁸⁴

The territorial health insurance plans in Yukon and the Northwest Territories do cover travel costs for abortion services outside the territories.⁸⁵ In addition, women in P.E.I. “may be eligible to apply for one of Health PEI’s Travel Support Programs” to help pay for the travel cost of a surgical abortion off-Island.⁸⁶ But these forms of financial support may not protect a woman’s employment, and may not compensate for the missed work pay due to the time required to access abortion services. These socioeconomic barriers do not affect all women equally, but rather hurt those of lower socioeconomic class.

III. APPLICATION OF PERSONAL NARRATIVE, A TOOL OF CRITICAL RACE THEORY, TO EVALUATE AND IMPROVE ACCESS TO ABORTION SERVICES FOR INDIGENOUS WOMEN IN CANADA

A. Critical Race Theory

Critical Race Theory (CRT) launched in 1989 as a critique of Critical Legal Studies (CLS).⁸⁷ CRT views race as a social construction that works to maintain and reinforce

⁷⁹ *Id.*

⁸⁰ Kevin Yarr, *Health PEI drops ultrasound requirement for abortion drug*, CBC NEWS (June 13, 2019, 7:38 AM), <https://www.cbc.ca/news/canada/prince-edward-island/pei-misfegymiso-ultrasound-1.5173424>.

⁸¹ Downie & Nassar, *supra* note 33, at 152–53.

⁸² *Id.* at 153.

⁸³ *Id.*

⁸⁴ *Id.* at 155–56.

⁸⁵ *Abortion Coverage*, *supra* note 68.

⁸⁶ *Abortion Services*, *supra* note 66.

⁸⁷ *Critical Race Theory*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/critical-race-theory> (last visited Jan. 8, 2020).

white privilege through legal, social, and economic institutions.⁸⁸ CRT provides tools of legal analysis that expose and challenge the dominant paradigm in the legal field. One tool of legal analysis in CRT is personal narrative. Personal narrative is a powerful tool that could help to uncover, challenge, and remove the barriers to abortion access for Indigenous women in Canada.

B. Personal Narrative

Personal narrative provides a voice to individuals from marginalized groups that tend to be silenced. Mari Matsuda suggests that “those who have experienced discrimination speak with a special voice to which we should listen.”⁸⁹ By “looking to the bottom” it is possible to hear from individuals from marginalized groups. In doing so, “[new] notions of right and wrong, justice and injustice, are examined. . . .and identifiable normative priorities emerge.”⁹⁰ This leads to “an outsider’s jurisprudence” that can belong to individuals from marginalized groups, who may experience systems of oppression, such as race, socioeconomic class, or gender.⁹¹ In an outsider’s jurisprudence, individuals of color who use personal narrative to articulate their lived experiences create a powerful tool of duality that consists of their “deep criticism of law [along] with an aspirational vision of law,” which helps to acknowledge and transform current society and culture.⁹² In doing so, Matsuda claims that “[t]he need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law,” which help to challenge the existing and dominant systems of oppression.⁹³

The use of personal narrative is especially powerful for women of color because it recognizes the constantly-fluctuating “multiple consciousness” of oppression that may come from numerous systems of oppression.⁹⁴ According to Angela Harris, “consciousness is ‘never fixed, never attained once and for all’” and “is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.”⁹⁵ Harris further clarifies that “a multiple consciousness is home both to the first and the second voices, and all the voices in between.”⁹⁶ Matsuda suggests that women of color should be a “paradigm group for utilization of multiple consciousness as jurisprudential method.”⁹⁷ In doing so, Matsuda advises individuals in the legal profession to seek, see, and use the multiple consciousness

⁸⁸ *Id.*

⁸⁹ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. REV. 323, 324 (1987) [hereinafter *Looking to the Bottom*].

⁹⁰ *Id.* at 325.

⁹¹ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) [hereinafter *Public Response to Racist Speech*].

⁹² *Looking to the Bottom*, *supra* note 79, at 333.

⁹³ *Public Response to Racist Speech*, *supra* note 91, at 2325.

⁹⁴ Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method A Talk Presented at the Yale Law School Conference on Women of Color and the Law, April 16, 1988*, 14 WOMEN'S RTS. L. REP. 297 (1992) [hereinafter *When the First Quail Calls*].

⁹⁵ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990).

⁹⁶ *Id.*

⁹⁷ *When the First Quail Calls*, *supra* note 94, at 297.

in practice “with a deliberate choice to see the world from the standpoint of the oppressed” in order to create a more just world.⁹⁸

Personal narrative’s acknowledgement of multiple consciousness leads to a better society, and supports the oppressed, including women of color. According to Lani Guinier, “[m]ultiple consciousness provides intellectual camouflage and emotional support for the outsider who always feels the Threeness of race, gender, and marginality.”⁹⁹ Guinier also suggests that a race-neutral, gender-neutral perspective is those “with a white, male perspective, those in the majority, and those gentlemen surrogates to whom the majority grants insider privileges.”¹⁰⁰ The power of multiple consciousness is that it “centers marginality and names reality” for women of color, and personal narrative can articulate the experience of multiple consciousness.¹⁰¹

Personal narrative not only recognizes multiple consciousness, but it may also accommodate intersectionality as another tool for legal analysis in Critical Race Theory. Intersectionality is an analytical tool that creates a greater understanding of how overlapping systems of oppression due to an individual’s identity create that individual’s lived experience. A failure to recognize all aspects of an individual’s identity distorts that individual’s experience.¹⁰² This is especially pertinent to women of color because they are “not the sum of race and sex.”¹⁰³ Women of color are marginalized within feminist and antiracist movements “[b]ecause of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other.”¹⁰⁴ Failure to acknowledge how race, gender, and other systems of oppression intersect to create a unique lived experience “makes the illusive goal of ending racism and patriarchy even more difficult to attain.”¹⁰⁵

C. The Use of Personal Narrative for an Evaluation of and an Improvement in Access to Abortion Services for Indigenous Women in Canada

The use of personal narrative can articulate the lived experiences of Indigenous women in Canada because it acknowledges the intersection of race, gender, and other systems of oppression. In doing so, personal narrative can also challenge the assumption that all women’s experiences in their access to abortion services in Canada are identical, and instead reveals that these experiences are shaped by different systems of oppression.

This paper argues that the use of personal narrative would be beneficial to the evaluation of and improvement in access to abortion services for Indigenous women in Canada. Indigenous women in Canada make up 4.3 percent of the total female population

⁹⁸ *Id.* at 299.

⁹⁹ Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 96 (1990).

¹⁰⁰ *Id.* at 97.

¹⁰¹ *Id.*

¹⁰² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter *Demarginalizing the Intersection of Race and Sex*].

¹⁰³ *Id.* at 149.

¹⁰⁴ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) [hereinafter *Mapping the Margins*].

¹⁰⁵ *Demarginalizing the Intersection of Race and Sex*, *supra* note 102, at 152.

in Canada,¹⁰⁶ but they have been silenced by various systems of oppression, including race, gender, and socioeconomic class. According to The Canadian Press, four out of every five Indigenous reserves have median incomes that fall below the poverty line.¹⁰⁷ Inadequate and unsafe housing, a lack of basic infrastructure and sanitation, food insecurity, and lowered accessibility to safe drinking water also contribute to the lived experiences of Indigenous women.¹⁰⁸ The use of personal narrative would allow for Canada to “look to the bottom” and to hear from those most oppressed, including Indigenous women, in order help to create an outsider’s perspective. The use of personal narrative would uncover the lived experiences and “the reality of oppression” for Indigenous women, who seek abortion services in Canada.¹⁰⁹ According to Mari Matsuda, “looking to the bottom” to yield an outsider’s jurisprudence “teaches [us] that these details and emotions they evoke are relevant and important as we set out on the road to justice.”¹¹⁰ The details and emotions that make up the true lived experiences of Indigenous women in Canada are key to evaluating and improving access to abortion services for these women because it acknowledges how systems of oppression affect Indigenous women. But there is great transformative power that “is a direct result of the experience of oppression” because “looking to the bottom” challenges the dominant understanding of abortion access for women in Canada.¹¹¹

Another benefit to the use of personal narrative in the evaluation of access to abortion services for Indigenous women in Canada is that it starts a conversation. In doing so, it may amplify problematic issues of access for Indigenous women in Canada. The amplification of issues of abortion access for Indigenous women in Canada creates a dialogue that is based on the lived experiences of Indigenous women. This can generate more conducive support for Indigenous women.

One example of this support is in Jessica Yee’s work. Yee, daughter of a Mohawk mother and Chinese father, is a reproductive justice activist, founder and executive director of Native Youth Sexual Health Network.¹¹² In addition to Yee’s work at Native Youth Sexual Health Network, Yee also invites Indigenous women seeking an abortion to stay in her Toronto home for as long as needed.¹¹³ She and other women provide “safe havens” across Canada for Indigenous women that must travel great distances to access abortion services because these services are often not offered outside of urban areas.¹¹⁴ These “safe

¹⁰⁶ PAULA ARRIAGADA, STATISTICS CANADA, ABORIGINAL PEOPLES IN CANADA: FIRST NATIONS, MÉTIS AND INUIT WOMEN 3 (Statistics Can., Soc. and Aboriginal Statistics Div. ed., 2016).

¹⁰⁷ Jordan Press, *Over 80% of reserves have median income below poverty line, census data shows*, GLOBAL NEWS (Oct. 10, 2017 2:43 PM), <https://globalnews.ca/news/3795083/reserves-poverty-line-census/>.

¹⁰⁸ Erin Nelson, *Autonomy, Equality, and Access to Sexual and Reproduction Health Care*, 54 ALTA. L. REV. 707, 721 (2016–2017).

¹⁰⁹ *When the First Quail Calls*, *supra* note 94, at 300.

¹¹⁰ *Id.* at 299.

¹¹¹ *Looking to the Bottom*, *supra* note 89, at 335.

¹¹² Joanna Smith, *A Helping Hand, Far From Home, In a Time of Need*, THE TORONTO STAR (May 31, 2010), https://www.thestar.com/news/canada/2010/05/31/a_helping_hand_far_from_home_in_a_time_of_need.html.

¹¹³ *Id.*

¹¹⁴ *Id.*

havens” are kept secret until “they hear through the grapevine that someone needs help.”¹¹⁵ Yee and other “safe havens” not only provide housing, food, and transportation, but they also accompany women to all their appointments with abortion providers, and “listen to their stories and concerns.”¹¹⁶ This is significant for Indigenous women because some have never travelled away from their homes, including those on reserves, and may only speak an Indigenous language.¹¹⁷ These support systems demonstrate the benefits that personal narrative can generate with its ability to start conversations, amplify issues, and generate solutions that are specific to the unique experiences of Indigenous women.

Another benefit to the use of personal narrative in the evaluation of access to abortion services for Indigenous women in Canada is the ability to infuse the discussion on abortion access with a variety of women’s experiences. In this way, personal narrative allows for the use of intersectionality as an additional tool of legal analysis. Kimberlé Crenshaw describes “intersectionality” as “the ways in which the location of women of color at the intersection of race and gender makes [their] actual experience[s]...qualitatively different than that of white women.”¹¹⁸ Due to the intersectional identity of Indigenous women “as both women and of color within discourses that are shaped to respond to one or the other, [Indigenous] women...are marginalized within both.”¹¹⁹ In addition, socioeconomic class and other systems of oppression may further marginalize Indigenous women in Canada. Personal narrative and intersectionality would allow Indigenous women in Canada to articulate their true lived experiences, including their access to abortion services, and they would not have to separate or choose one identity over the other. Personal narrative, along with the use of intersectionality, would also challenge “the stigma of ‘otherness,’ which effectively precludes [Indigenous women’s] potentially radicalizing influence from penetrating the dominant consciousness.”¹²⁰ In this way, the “othering” of Indigenous women in Canada “reinforces identification with the dominant group” of women that are white, educated, and from a middle- to upper-socioeconomic class.¹²¹ The construction of Indigenous women as “the other” subordinates them, and ignores and distorts their lived experiences in access to abortion services, which makes legal reform in the area problematic because it may not be specific to Indigenous women. But personal narrative and an application of intersectionality would acknowledge the unique position of Indigenous women, as a result of systems of oppression.

Personal narrative is conducive to intersectionality because it allows for the articulation of how Indigenous women, who face both racism and sexism, do not simply experience a double burden of racism and sexism, but rather sexism and racism intersect to create unique lived experiences that are not a perfect fifty-fifty division between sexism

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Mapping the Margins*, *supra* note 104, at 1245.

¹¹⁹ *Id.* at 1244.

¹²⁰ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1359 (1988) [hereinafter *Race, Reform, and Retrenchment*].

¹²¹ *Id.* at 1372.

and racism.¹²² Crenshaw further notes, “[i]ntersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”¹²³ For Indigenous women in Canada seeking abortion services, socioeconomic class or other systems of oppression may be additional burdens that interact with the preexisting vulnerabilities of race and gender to create another dimension of disempowerment for Indigenous women.

Although Indigenous women in Canada face similar barriers to abortion access that all women in Canada face, these barriers impact Indigenous women differently due to these additional burdens that interact with their preexisting vulnerabilities. Through personal narrative and intersectionality, these barriers to abortion access find new meaning when applied to Indigenous women. According to Statistics Canada, Indigenous women experience higher rates of unemployment and have a lower median income by \$5,500 than non-Indigenous women.¹²⁴ This disparity may affect the socioeconomic class and ability of Indigenous women to afford the costs associated with accessing abortion services, such as travel, missed employment, and alternative child care arrangements. Although Indigenous women who live on a reserve may receive federal funding that would cover travel, food, and accommodation costs associated with an abortion, the woman must first receive permission from her band council, which often compromises privacy and confidentiality in small communities,¹²⁵ and may create delays for the procedure.¹²⁶

The distance from a reserve or Indigenous community to an abortion provider is also often greater due to the fact that Indigenous “[r]eserves are most often located in rural, remote or Northern communities,”¹²⁷ and non-reserve Indigenous communities tend to be located in rural areas,¹²⁸ whereas, abortion providers tend to be located in urban areas. According to Christabelle Sethna and Marion Doull, “women who self-identified as First Nations or Métis were three times more likely to report travelling over 100 kilometers to access a [free-standing] clinic as compared with white women,”¹²⁹ and were more likely to report that their journey to a free-standing clinic was difficult as compared to white women.¹³⁰

A further complication to the distance that an Indigenous woman may have to travel in order to access an abortion provider is the danger of violence against Indigenous women. According to the Royal Canadian Mounted Police (RCMP), ten percent of missing females across all Police Jurisdictions in Canada are Indigenous,¹³¹ and thirty-five percent of female

¹²² Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1467–68 (1992) [hereinafter *Race, Gender, and Sexual Harassment*].

¹²³ *Race, Reform, and Retrenchment*, *supra* note 120, at 1249.

¹²⁴ ARRIAGADA, *supra* note 106, at 22.

¹²⁵ Smith, *supra* note 102.

¹²⁶ Sethna & Doull, *supra* note 23, at 60.

¹²⁷ *Id.*

¹²⁸ Smith, *supra* note 112.

¹²⁹ Sethna & Doull, *supra* note 23, at 57.

¹³⁰ *Id.*

¹³¹ ROYAL CANADIAN MOUNTED POLICE, MISSING AND MURDERED ABORIGINAL WOMEN: 2015 UPDATE TO THE NATIONAL OPERATIONAL OVERVIEW (June 19, 2015), <http://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-2015-update-national-operational-overview>.

homicide victims in all RCMP jurisdictions were Indigenous.¹³² Travel has been particularly dangerous on Highway 16 in British Columbia.¹³³ Highway 16 passes through multiple Indigenous reserves and has been named the “Highway of Tears” because dozens of Canadian women and girls, most of them Indigenous, have vanished or been murdered near the Highway.¹³⁴ Many of these disappearances and crimes against Indigenous women remain unsolved.¹³⁵

Racism and sexism have contributed to the lack of justice for these women. Carolyn Bennett, the Minister of Indigenous and Northern Affairs, has spent months consulting with Indigenous communities, and in the process has met with numerous families and survivors of crime.¹³⁶ According to Bennett, “families and survivors have complained of racism and sexism by the police, who [Bennett] said treated the deaths of indigenous women ‘as inevitable, as if their lives mattered less.’”¹³⁷ Bennett describes the crimes against Indigenous women and lack of response from law enforcement as an “unequal application of justice.”¹³⁸ In addition, a United Nations report in 2015 described the prior government’s measures to protect Indigenous women from harm in Canada “as ‘inadequate’ and said that the lack of an inquiry into the murders and disappearances constituted ‘grave violations’ of women’s human rights.”¹³⁹ The criminal injustice against Indigenous women that results from racism and sexism creates a barrier to abortion access that is unique to the lived experiences of Indigenous women in Canada. Personal narrative and intersectionality would be valuable tools of legal analysis in evaluating and improving abortion access for Indigenous women in Canada because only through these tools would Indigenous women be able to articulate and make visible how systems of oppression form their lived experiences.

Personal narrative, along with an application of intersectionality, can also help to deter essentialism. Essentialism works under the assumption that there is one uniform experience. Angela Harris defines “gender essentialism” as “[t]he notion that there is a monolithic ‘women’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation.”¹⁴⁰ Similarly, Harris defines “racial essentialism” as “the belief that there is a monolithic ‘Black Experience,’ or ‘Chicano Experience.’”¹⁴¹ Gender and racial essentialism, in turn, tend to reflect the dominant culture that “is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us.”¹⁴² This is problematic for Indigenous women in Canada because their lived experiences are ignored and distorted under essentialist notions of race and gender, which

¹³² *Id.*

¹³³ Dan Levin, *Dozens of Women Vanish on Canada’s Highway of Tears, and Most Cases Are Unsolved*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/25/world/americas/canada-indigenous-women-highway-16.html>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Harris, *supra* note 95, at 588.

¹⁴¹ *Id.*

¹⁴² *Id.*

reflect the dominant paradigm. Personal narrative, along with intersectionality provide a way to challenge the dominant understanding of accessibility to abortion services. In doing so, problematic issues of access to abortion services may be solved in a way that not only pertains to white and socioeconomically privileged women, but also addresses the unique lived experiences of Indigenous women in Canada.

Race and gender essentialism have already been proven to distort and ignore the diverse nature of the experiences of Indigenous women in Canada with the uniform assumption that Indigenous women do not believe in abortion. In 2017, former Conservative MP Rob Clark, a candidate to lead the Saskatchewan Party and become the province's next premier, stated that "First Nations don't believe in abortion."¹⁴³ In an opinion article from CBC News, two Indigenous women, Erica Violet Lee and Tasha Spillet refuted his statement.¹⁴⁴ Lee and Spillet explained that, "Indigenous women and girls—especially those on reserve and in rural communities—face barriers to accessing basic health care; and yes, access to abortions is a necessary part of the basic health care package that we deserve."¹⁴⁵ Lee and Spillet further explained that "[t]o believe that life is truly sacred means acknowledging that the bodies of Indigenous women are no one's territory but our own."¹⁴⁶ Similarly, in a 2008 *National Post* article, Conservative MP Rod Bruinooog (Winnipeg South) said that "his Aboriginal background informs his stance against abortion."¹⁴⁷ Jessica Yee, daughter of a Mohawk mother and Chinese father and a reproductive justice activist expressed her frustration at Bruinooog's comment because "she believes it tries to paint all indigenous belief systems with the same brush and ignores a cultural history of abortion that she argues was distorted by the role of the church in colonization and the tragic residential school system."¹⁴⁸ In addition, Yee "worries about this cultural stigma being reinforced by outsiders."¹⁴⁹ The use of personal narrative and intersectionality would challenge these dominant and monolithic understandings of Indigenous women's beliefs, and help to improve Indigenous women's access to abortion services in Canada.

Another benefit to the use of personal narrative in the evaluation of access to abortion services for Indigenous women in Canada is the ability to build coalitions that effect change and provide reproductive justice for Indigenous women. Personal narrative, along with an affirmative use of intersectionality, can help to create a coalition that does not distort the lived experiences of Indigenous women or force an Indigenous woman to separate her race and ethnicity from her sex and gender. Through personal narrative and intersectionality, coalition-building for reproductive justice is stronger and more successful because Indigenous women will be able to identify with the movement, "see themselves in

¹⁴³ Erica Violet Lee & Tasha Spillet, *Indigenous women on the Prairies deserve reproductive freedom*, CBC NEWS (Nov. 25, 2017, 6:00 AM ET), <https://www.cbc.ca/news/indigenous/opinion-indigenous-women-reproductive-freedom-1.4418787>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Smith, *supra* note 112.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

the representation of women,” and “see diversity and an appreciation of the differential constraints that double and triple jeopardy places upon them.”¹⁵⁰

When personal narrative enables coalitions to incorporate the most oppressed individuals at “the bottom,” such as Indigenous women in Canada, “[p]olitical possibilities open up” because “we expand the parameters of the center and embrace the margins.”¹⁵¹ According to Kimberlé Crenshaw, “[w]hen we begin to see that a problem initially conceived somewhat narrowly has broader manifestations, we also see that problems we thought unrelated are actually somewhat familiar and that in fact feminism might have some conceptual tools to address them,” and in doing so, “[t]his facilitates the building of a coalition.”¹⁵² Personal narrative would enable Indigenous women in Canada to insert their lived experiences of access to abortion services to the dominant understanding of abortion access for women in Canada, which would allow for a shared interest over issues of abortion access, and therefore create a larger, stronger, and more effective coalition to improve abortion access for all women in Canada.

One example of the ability of personal narrative to create a strong political coalition is in the fight for women in P.E.I. to have access to on-Island abortion services. Prior to 2017, women in P.E.I. had to travel off-Island for access to abortion services. A 2014 report by Colleen MacQuarrie, Jo-Ann MacDonald, and Cathrine Cambers (MacQuarrie Report) on the impact of abortion policies on women in P.E.I., captured and validated the lived experiences of women in P.E.I.¹⁵³ The MacQuarrie Report played a role in the P.E.I. government’s decision to provide on-Island abortion services because it not only revealed P.E.I. women’s lived experiences in seeking abortion services in P.E.I. between 1979 and 2014,¹⁵⁴ but it also raised consciousness and awareness, amplified the issues of access to abortion services, and helped to unite P.E.I. women over their similarly-shared experiences.

The methodology of the MacQuarrie Report consisted of forty-five research conversations ranging between one to two hours with women in P.E.I. who shared their experience of seeking abortion services in P.E.I.¹⁵⁵ The MacQuarrie Report made numerous findings about the experiences women faced in their journey to access abortion services in P.E.I. According to the MacQuarrie Report, the “thematic structure of the impact of P.E.I.’s abortion policies on women [in P.E.I. included]: (1) anti-choice structures; (2) silencing the concept of abortion; and (3) self silencing.”¹⁵⁶ In addition, the MacQuarrie Report identified four paths to abortions for women in P.E.I. or “Maze Trail[s]”: (1) The Surgical Abortion Path through the Public Health System, including medical abortion; (2) The Dead End Path, including women, who carried unwanted pregnancies, had unsupportive doctors, family and friends, experienced intimate partner violence, and placed their child up for adoption; (3) At Home Paths, which included

¹⁵⁰ *Race, Gender, and Sexual Harassment*, *supra* note 122, at 1473–74.

¹⁵¹ *Id.* at 1474.

¹⁵² *Id.* at 1475.

¹⁵³ COLLEEN MACQUARRIE ET AL., TRIALS AND TRAILS OF ACCESSING ABORTION IN PEI: REPORTING ON THE IMPACT OF PEI’S ABORTION POLICIES ON WOMEN (2014).

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 7.

desperation and self-inducing abortion practices; and (4) Self-Referral Surgical Abortion Paths outside the public health system.¹⁵⁷

The MacQuarrie Report helped to spur a second wave of activism for reproductive justice on P.E.I., which united activists and prompted the formation of P.E.I. Reproductive Rights Organization (PRRO), a working group of pro-choice activists, members of the Women's Legal Education and Action Fund (LEAF) and two lawyers from Halifax, Nova Scotia, and the group Abortion Access Now (AAN).¹⁵⁸ These groups and their work resulted in the ninety-days' notice to P.E.I. of AAN's intent to file a lawsuit for P.E.I.'s violation of the Charter of Rights and Freedoms, and to force P.E.I. to provide complete and unrestricted access to publicly-funded on-Island abortion services.¹⁵⁹ In response to notice of the impending lawsuit, P.E.I. premier and attorney general at the time, Wade MacLauchlan, stated that the province would be unsuccessful in defending against this suit because P.E.I.'s abortion rights policy was contrary to the Canadian Charter of Rights and Freedoms.¹⁶⁰ At this time, MacLauchlan also announced that on-Island abortion services would be available in the coming months,¹⁶¹ signaling a victory for abortion activists.

The MacQuarrie Report's use of personal narratives is an example of personal narratives building a coalition. This resulted in a beneficial impact on women's access to abortion services in P.E.I., and could yield similar reproductive justice for Indigenous women in Canada.

Similarly, another benefit of the use of personal narrative is its ability to challenge and push legal doctrine in a way that improves access to abortion services. One example in which personal narrative has helped to expand access to abortion services in Canada involves Manitoba. As part of a class action suit, two women, Jane Doe 1 and Jane Doe 2, challenged section (28) of Manitoba Regulation 46/93 and sections 116(1)(h) and 116(2) of The Health Services Insurance Act, R.S.M. c. H35, which limited insured therapeutic abortions to hospitals, as violative of sections 2(a), 7, and 15 of the Canadian Charter of Rights and Freedoms.¹⁶² Jane Doe 1 had an abortion at the Morgentaler Clinic in Winnipeg, and personally paid the full cost of \$375.00 because she did not want to wait six to eight weeks to have the procedure done at the hospital, the Health Sciences Centre.¹⁶³ Although the cost of Jane Doe 1's abortion would be fully-covered by the Manitoba Health Services Insurance Plan, if the abortion were performed in the hospital, Jane Doe 1 feared that the wait would be physically and emotionally stressful for her, and she also did not want to experience the higher health risks associated with a delay in having an abortion.¹⁶⁴ Similarly, Jane Doe 2 personally paid a portion of the fee charged for an abortion at the

¹⁵⁷ *Id.*

¹⁵⁸ Angela Mombourquette, *Why P.E.I. didn't provide abortions for 35 years*, UNITED CHURCH OBSERVER (May 2018), https://www.ucobserver.org/justice/2018/05/abortion_prince_edward_island/.

¹⁵⁹ *Id.*; *P.E.I. abortion advocates to sue for access on Island*, CBC NEWS (Jan. 5, 2016, 10:42 AM AT), <https://www.cbc.ca/news/canada/prince-edward-island/abortion-lawsuit-pei-1.3389889>.

¹⁶⁰ Mombourquette, *supra* note 158; Sara Fraser & Jesara Sinclair, *Abortion Services Coming to P.E.I., Province Announces*, CBC NEWS (Mar. 31, 2016, 12:32 PM AT), <https://www.cbc.ca/news/canada/prince-edward-island/pei-abortion-reproductive-rights-1.3514334>.

¹⁶¹ Fraser & Sinclair, *supra* note 160.

¹⁶² Jane Doe 1 v. Manitoba, No. 456 M.J. (judgment) ¶¶ 1, 31 (2004).

¹⁶³ *Id.* at ¶¶ 5, 8.

¹⁶⁴ *Id.* at ¶ 8.

Morgentaler Clinic because she was informed that she would have to wait four to six weeks for an initial appointment at the hospital, the Health Sciences Centre, and would still need an additional two appointments after the first appointment before the abortion would be performed.¹⁶⁵ Instead of having her abortion at the hospital where the abortion's cost would be fully-covered by the Manitoba Health Services Insurance Plan, Jane Doe 2 had her abortion at the Morgentaler Clinic because she feared the delay in obtaining her abortion would lead to "severe emotional stress and increased physical risk."¹⁶⁶ Before the case reached the court, the last remaining private abortion clinic, the Morgentaler Clinic, became nonprofit, and the Manitoba government agreed to fund abortions at the non-profit clinic.¹⁶⁷ In addition, the Manitoba government amended its regulation to include coverage for abortions performed in clinics under the Manitoba Health Services Insurance Plan.¹⁶⁸

When the case reached the court in *Jane Doe 1 v. Manitoba*, the Manitoba Court of Queen's Bench granted summary judgment in favor of Jane Doe 1 and Jane Doe 2 because legislation that forces women to have to stand in line in an overburdened, publicly-funded health care system and to have to wait for a therapeutic abortion, a procedure that provably must be performed in a timely manner, is a gross violation of the right of women to both liberty and security of the person as guaranteed by [section] 7 of the Charter.¹⁶⁹

In addition, the Manitoba Court of Queen's Bench also declared that the "legislation is a violation of the right to freedom of conscience as guaranteed by [section] 2(a) of the Charter and of equality rights as guaranteed to women by virtue of [section] 15 of the Charter."¹⁷⁰ Furthermore, the Manitoba Court of Queen's Bench stated that Manitoba's legislation was "not in accordance with the fundamental principles of justice nor [was] it saved by [section] 1 of the Charter,"¹⁷¹ because Manitoba's legislation was not "a reasonable and demonstrably justified limit on those rights and freedoms within...the Charter."¹⁷² In granting summary judgment for Jane Doe 1 and Jane Doe 2, the Manitoba Court of Queen's Bench also provided the Government of Manitoba with exactly one-year from the date of the Court's decision to review and revise legislation in accordance with the Court's decision.¹⁷³

Although *Jane Doe 1* initially was a favorable outcome for women's increased access to abortion services in Manitoba, the Manitoba Court of Appeal granted the Government of Manitoba's appeal of the decision.¹⁷⁴ In *Jane Doe 1* (2005), the Manitoba Court of Appeal overruled the lower court's decision because "important Charter issues involve complex and developing areas of the law which require a full factual underpinning based on a trial

¹⁶⁵ *Id.* at ¶¶ 11–15.

¹⁶⁶ *Id.* at ¶¶ 12, 14–15.

¹⁶⁷ *Manitoba must pay for private abortions, judge rules*, CBC NEWS (Dec. 24, 2004, 8:50 AM ET), <https://www.cbc.ca/news/canada/manitoba-must-pay-for-private-abortions-judge-rules-1.515653>; *Winnipeg abortion clinic goes non-profit*, CBC NEWS (Apr. 8, 2004, 10:31 AM ET), <https://www.cbc.ca/news/canada/winnipeg-abortion-clinic-goes-non-profit-1.485093>; Erdman, *supra* note 24, at 1102.

¹⁶⁸ Erdman, *supra* note 24, at 1102.

¹⁶⁹ *Jane Doe 1 v. Manitoba*, No. 456 M.J. (judgment) ¶ 78 (2004).

¹⁷⁰ *Id.* at ¶ 79.

¹⁷¹ *Id.* at ¶ 86.

¹⁷² *Id.* at ¶ 90.

¹⁷³ *Id.* at ¶ 91.

¹⁷⁴ *Jane Doe v. Manitoba*, No. 335 M.J. (judgment) ¶ 30 (2005).

record.”¹⁷⁵ The Manitoba Court of Appeal further stated that “this is a case where one would expect the record to be based on viva voce evidence and be as ample as possible to provide the necessary factual underpinning for these complex Charter challenges.”¹⁷⁶ The Manitoba Court of Appeal notes that “medical evidence, if possible, concerning the abortion procedures and risks of delay and with respect to the nature of the stress suffered by the plaintiffs,”¹⁷⁷ would provide the fact-specific details to properly evaluate Charter challenges.

The Manitoba Court of Appeal’s decision is reflective and supportive of the need for personal narrative in evaluating issues of abortion access for women, including Indigenous women in Canada. Personal narrative would enable Indigenous women in Canada to challenge and improve the existing legal doctrine about abortion access because it is fact-specific and recognizes the unique circumstances that shape the lived experiences of Indigenous women in Canada. This could help to push the legal doctrine toward expanding abortion rights and access for Indigenous women because it can help courts and government legislatures to make decisions that reflect the true lived experiences and unique circumstances of Indigenous women in Canada, which may result in greater abortion rights for Indigenous women. In addition, the mere notice and initial filing of a lawsuit has influenced both the Manitoba and P.E.I. governments to change their legislation in a way that increases access to abortion services, which may be a powerful tool for Indigenous women to improve their access to abortion services.

Another benefit of the use of personal narrative in the evaluation of access to abortion services for Indigenous women in Canada is the validation of these lived experiences. Indigenous women in Canada may experience numerous systems of oppression, which imperfectly intersect and fluctuate in the form of multiple consciousness. According to Mari Matsuda, “[t]his constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both.”¹⁷⁸ Doctor Frances E. Chapman explains further that “denial of [abortion] access...ha[s] led to ‘reproductive oppression,’ which includes the ‘control and exploitation of women, girls, and individuals through [their] bodies, sexuality, labour and reproduction.’”¹⁷⁹ Joanna N. Erdman further explains that “[d]ifferential treatment that ‘restricts access to a fundamental social institution, or affects “a basic aspect of full membership in Canadian society”’ communicates a message of exclusion and inferiority.”¹⁸⁰

The use of personal narrative would enable Indigenous women in Canada to articulate the effect various systems of oppression have on their lived experiences, including their access to abortion services. In doing so, Indigenous women would validate their experiences, and challenge the dominant paradigm. Patricia J. Williams calls for a “rights discourse” to be a part of personal narrative¹⁸¹ Williams explains:

¹⁷⁵ *Id.* at ¶ 29.

¹⁷⁶ *Id.* at ¶ 27.

¹⁷⁷ *Id.*

¹⁷⁸ *When the First Quail Calls*, *supra* note 94, at 298.

¹⁷⁹ Chapman, *supra* note 28, at 9.

¹⁸⁰ Erdman, *supra* note 24, at 1148.

¹⁸¹ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 159 (1991).

In the law, rights are islands of empowerment. To be un-righted is to be disempowered, and the line between rights and no rights is most often the line between dominators and oppressors. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.¹⁸²

Williams reflects on the significance of her own use of personal narrative, and explains “[m]y value depended on the glorious intangibility, the eloquent invisibility of my just being part of the collective; and in direct response I grew spacious and happy and gentle.”¹⁸³ Personal narratives would not only increase self-worth in and empower Indigenous women in Canada through their right to accessible abortions, but they would also create a more just and empowered society in general because they would embrace the rights of all, including those most oppressed at the bottom and at the margins.

D. Critiques of the Use of Personal Narrative in the Evaluation and Improvement of Access to Abortion Services for Indigenous Women in Canada

Personal narrative has faced critiques from those outside of CRT, which may weaken the argument for the use of personal narrative to evaluate and to overcome barriers to abortion access for Indigenous women in Canada. Although bell hooks describes the “‘lived experience’ of critical thinking, of reflection and analysis” and “theory [as] a healing place,” where [an individual] work[s] at explaining the hurt and making it go away,” theory and its tools of legal analysis have limitations.¹⁸⁴ Personal narrative, a tool of legal analysis in CRT, may be ignored because feminist works by women of color and marginalized white woman that are written in a way that is accessible to the public “[are] often de-legitimized in academic settings.”¹⁸⁵ As a result, the power of personal narrative to effect change and promote justice in law and society is diminished.

Daria Roithmayr also notes that storytelling has been denounced for the following reasons: (1) radical stories about those in the legal field are atypical and unrepresentative, and alter rational debate on issues like merit; (2) stories indicate the unique perspective of the author, and women of color fight with white women over who has the right to be the spokesperson for the group; (3) stories lack clarity and analysis, and thus no uniform interpretation; and (4) authors take critiques of their stories as personal attacks, which limits a real exchange of ideas.¹⁸⁶

Former Judge Richard A. Posner stated further that “[b]y exaggerating the plight of the groups for which they are the self-appointed spokesmen, the critical race theorists come across as whiners and wolf-criers.” Posner also finds the use of personal narrative in

¹⁸² Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 1, 22 (1988).

¹⁸³ *Id.* at 18.

¹⁸⁴ Bell Hooks, *Theory as Liberatory Practice*, 4 YALE J.L. & FEMINISM 1, 2 (1991).

¹⁸⁵ *Id.* at 4.

¹⁸⁶ Daria Roithmayr, *Guerrillas in Our Midst: The Assault on Radicals in American Law*, 96 MICH. L. REV. 1658, 1670–71 (1998).

identity politics to be “divisive,” “intellectually limited,” “irrational,” and difficult for problem solving.¹⁸⁷

There is some merit to these critiques of personal narrative in evaluation of access to abortion services for Indigenous women in Canada. There has been at least one thesis completed that examined the maternity experiences of Indigenous women in the Okanagan Valley, British Columbia.¹⁸⁸ Jennifer Lynn Leason, an Indigenous woman herself, focused on the narratives of Indigenous women, and in addition, conducted ten semi-structured interviews with “sister-participants”¹⁸⁹ to capture Indigenous women’s maternity narratives.¹⁹⁰ Leason’s work contains brief mention of abortion access, but notes that there is “limited research on Aboriginal women’s views, access, and experiences of abortion,” and thus a need for more narratives about these subjects.¹⁹¹ Unlike the MacQuarrie Report in P.E.I., Leason’s collection of Indigenous women’s maternity narratives have not yet had the effect of building a coalition with the power to challenge law and society. Leason’s work may provide a start to legal reform, but it is also suggestive of the limitations of personal narratives because it struggles with legitimization in the academic or legal fields, especially when authored by a woman of color. Unlike the MacQuarrie Report in P.E.I., which makes no mention of race, Leason’s work may demonstrate how race and racism may limit the effectiveness of personal narrative in evaluating and improving Indigenous women’s access to abortion services in Canada.

Roithmayr and Posner’s “spokesperson” concerns in personal narrative also have weight as a limitation on the ability of personal narrative to improve abortion access for Indigenous women in Canada. There is the potential for a “spokesperson” issue due to the fact that the term “Indigenous women” alone ignores the diversity of groups. The term “Indigenous women” includes First Nations, Métis, and Inuit women.¹⁹² Furthermore, there are greater than six-hundred First Nations bands.¹⁹³ The variety of languages, cultures, governing structures, traditions, and beliefs is somewhat erased under the term “Indigenous.” This may lead to a “spokesperson” that does not and cannot represent Indigenous women’s diverse views about and experiences with abortion access. Disagreements about and with the “spokesperson” may alienate some Indigenous women, and hurt the potential to build coalitions that address issues of abortion access. Similarly, the “spokesperson” may contribute to a form of First Nations band/Métis/Inuit essentialism, where a “spokesperson” may emerge from the most privileged and dominant band, and thus create a notion that the experiences of Indigenous women in Canada are monolithic and reflective of the experiences of women from the most dominant bands.

¹⁸⁷ Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC, Oct. 13, 1997, at 40, 43.

¹⁸⁸ Jennifer Lynn Leason, *Exploring the Complex Context of Indigenous Women’s Maternity Experiences in the Okanagan Valley, British Columbia by Expanding on Aboriginal Women’s Responses to the Canadian Maternity Experiences Survey* (Feb. 3, 2017) (unpublished Ph.D. thesis, University of British Columbia) (on file with Vancouver: University of British Columbia Library).

¹⁸⁹ *Id.* at 60.

¹⁹⁰ *Id.* at 59.

¹⁹¹ *Id.* at 93.

¹⁹² STATISTICS CANADA, *ABORIGINAL PEOPLES IN CANADA: FIRST NATIONS PEOPLE, MÉTIS AND INUIT*, <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm> (last updated July 25, 2018).

¹⁹³ *Id.*

Personal narrative would help to guard against this band essentialism, but “spokesperson” problems may limit the power of personal narrative to avoid band essentialism, and in the process deplete the power to effect legal and societal change for Indigenous women, who may wish for better abortion access.

Another limitation of personal narrative in the improvement of abortion services for Indigenous women in Canada is the cultural defense to preserve Indigenous cultures. According to Kimberlé Crenshaw, “[p]eople of color may...be silenced by the cultural defense out of [their] desire to maintain [their] much needed communal bonds and out of a well-placed fear that minority cultures, generally under assault, must be protected in order to survive.”¹⁹⁴ Cultural defense is especially relevant to Indigenous women due to a history of colonialization, sterilization, and experimental birth control¹⁹⁵ where decimation of the Indigenous population was the goal.¹⁹⁶ In this way, Indigenous women may not want to share personal narratives, especially those concerning access to abortion services, because they may fear negative repercussions from the dominant paradigm that would manipulate their right to abortion as another means of population annihilation.

CONCLUSION

Although abortion is legal in Canada and was decriminalized in the *Morgentaler* decision, various barriers exist that restrict women’s access to abortion services, including but not limited to systematic and structural, geographic location, socioeconomic class, and race barriers. The experiences of women in P.E.I. demonstrated how numerous barriers intersected to restrict a woman’s access to on-Island abortion services. As a result of the work of activists for reproductive justice on P.E.I., the province launched the Women’s Wellness Program in January 2017 at the Prince County Hospital in Summerside, which provides abortion services along with sexual health services and pre- and postnatal care.¹⁹⁷ The Women’s Wellness Program was the first on-Island access to abortion services in almost thirty-five years, and was aided by the MacQuarrie Report, which consisted of personal narratives from women in P.E.I. with experiences in trying to access abortion services. The use of personal narratives in the MacQuarrie Report indicates the power of personal narrative as a tool of legal analysis and reform. In addition, *Jane Doe 1* (2004) and *Jane Doe 2* (2005) demonstrated how courts recognize the significance of and desire the fact-specific information and personal narratives from the women seeking abortions, when courts are evaluating claims and making decisions. But more importantly, the MacQuarrie Report and *Jane Doe 1* (2004) and *Jane Doe 2* (2005) indicate that the mere notice and initial filing of a lawsuit can help to challenge and broaden legal doctrine on access to abortion services.

This note discussed abortion law in Canada. More specifically, this note looked at the barriers to access to an abortion in Canada. In doing so, this note examined how geographic

¹⁹⁴ *Race, Gender, and Sexual Harassment*, *supra* note 122, at 1472.

¹⁹⁵ Erika Dyck, *Canada’s Shameful History of Sterilizing Indigenous Women*, THE CONVERSATION (Dec. 5, 2018 7:10PM EST), <https://theconversation.com/canadas-shameful-history-of-sterilizing-indigenous-women-107876>.

¹⁹⁶ Jane Kirby, *A Broad Vision for Reproductive Justice*, BRIARPATCH MAGAZINE (Dec. 21, 2017), <https://briarpatchmagazine.com/articles/view/broad-vision-reproductive-justice>.

¹⁹⁷ Mombourquette, *supra* note 158.

location, race, and socioeconomic class all influence access to abortion services. Part I provided a short description of P.E.I. and its fight for on-Island abortion services. Part II provided an overview of abortion law in Canada after 1988. Part III discussed the barriers to abortion access in Canada, specifically looking at systematic and structural, location, and socioeconomic class barriers. Part IV discussed how Critical Race Theory (CRT), and an application of personal narrative, a CRT tool of legal analysis, can evaluate and improve access to abortion services for Indigenous women in Canada. This note argued that an application of personal narrative can correctly evaluate and improve access to abortion services for Indigenous women in Canada.

Although the use of personal narrative in the MacQuarrie Report contributed to the launch of on-Island access to abortion services, there are still barriers that impede access to these services for P.E.I. women, such as travel to and lack of information about these services. But relative progress is significant in the fight for reproductive justice for women in P.E.I. Unlike women in P.E.I., Indigenous women in Canada still have inadequate access to abortion services. The use of personal narrative in the MacQuarrie Report and its relative success in achieving reproductive justice for women in P.E.I. can be used as a model for providing better access to abortion services for Indigenous women in Canada. Critical Race Theory and its use of personal narrative as a tool of legal analysis should be used to capture the lived experiences of Indigenous women in Canada because it has the potential to raise consciousness and awareness, amplify and validate issues of access to abortion services, and help to unite Indigenous women over their similarly-shared experiences. This cannot only lead to a stronger coalition to fight for reproductive justice for Indigenous women in Canada, but can also provide a way for Indigenous women in Canada to challenge and expand legal doctrine in a way that includes greater access to abortion services.

