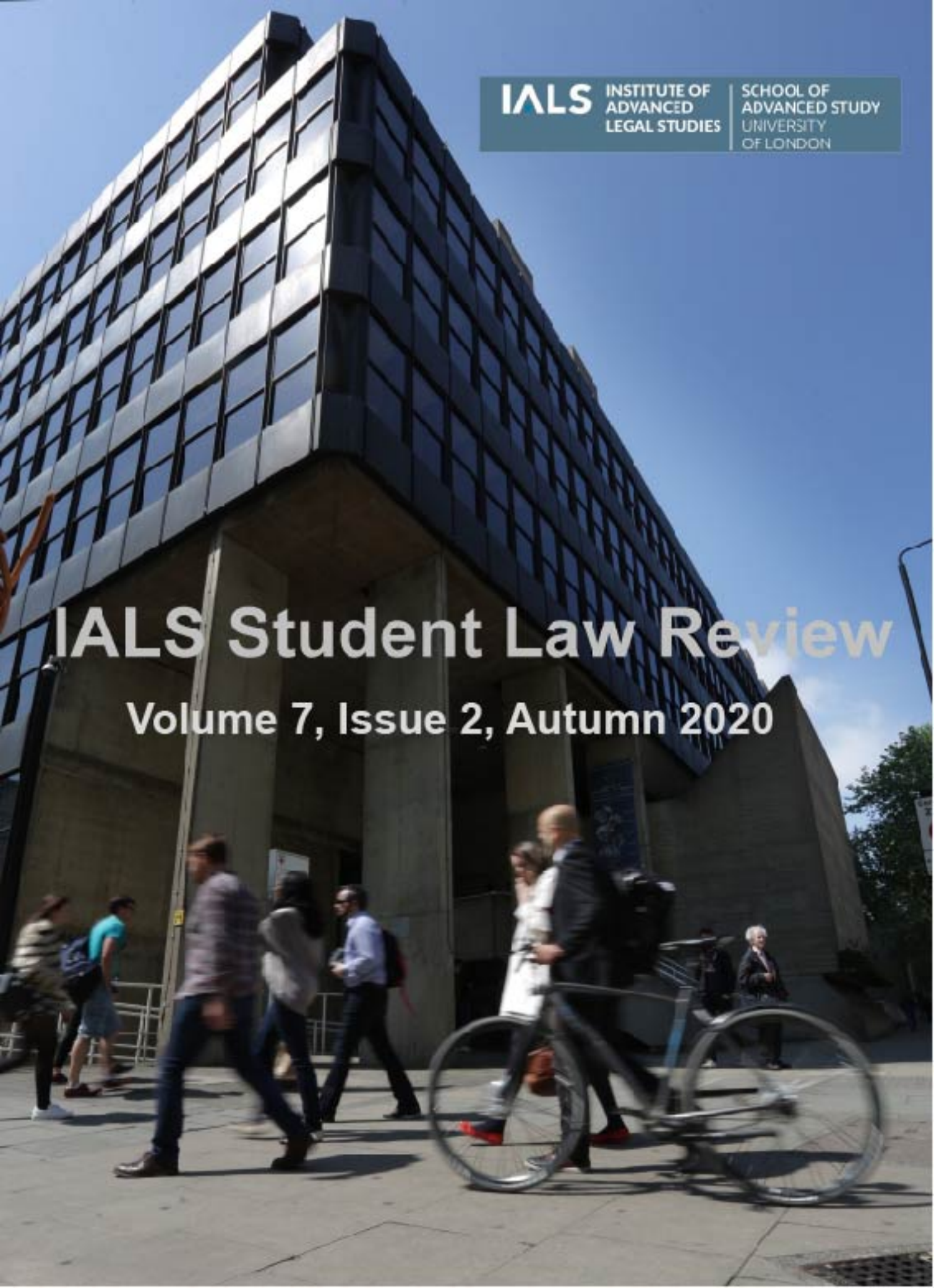

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Editorial
Welcome to the IALS Student Law Review

Tuğçe Yalçin

Welcome to the *Autumn 2020 Issue* of the Institute of Advanced Legal Studies' Student Law Review (ISLRev).

Nowadays, the world is not only experiencing a growing populist trend that enhances a nationalist viewpoint, but we are in an era of digitalisation where – no doubt – the process of technology is changing the international competitiveness as well as affecting almost all aspects of the world's economy.

In the light of the changes of the global economic landscape, coupled with the emergency of the COVID-19 pandemic, this edition of ISLRev has very captivating articles which deal with current issues and debates that will be introduced below.

First, we would like to congratulate George M. Daoud for becoming our new Deputy Editor as well as to introduce our two new Associate Editors, Julius and Victor:

Julius Ibrahim Kalilu Foday is a PhD candidate at IALS specialising in Constitutional and Administrative Law. He is the International Aid/Cooperation Programme Manager, Delegation of the European Union to Sierra Leone. His doctoral research explores the process that will be executed in order to ascertain the viability of drafting gender-neutral legislation within Sierra Leone and will further examine some laws with a view towards determining how legislative drafters in Sierra Leone have responded to the principle of gender-neutral drafting.

Victor Chimbwanda is a PhD candidate at IALS specialising in legal education. He has held lectureships in England, Cyprus and most recently in Ghana where he taught commercial & corporate law and clinical legal education. His doctoral research explores the teaching of skills in selected Anglophone African university law schools to examine the approach to skills teaching in plural legal systems. Previously, he practiced law in Botswana and in England where he is still admitted as an attorney and solicitor.

We also would like to thank **Professor Anton Cooray** from City, University of London, for acting as the Academic Editor of the ISLRev.

The new Editorial Board of the ISLRev is planning to offer incentives to potential contributors in the form of academic webinars with professors/practitioners specialising in their field of publication. Additionally, we are aiming to conduct events where academics, practitioners and students will have the possibility to meet and discuss topics around the journey of pursuing a PhD, publishing in peer-reviewed journals, writing books, etc.

Finally, for each issue of the ISLRev going forward, the Editor-in-Chief will alternate writing an editorial opinion piece. These will give a broad overview of relevant legal topics alongside the articles included in the respective issue.

Without further ado, we are delighted to introduce the following articles of this ISLRev-edition:

Emmanuel Saffa Abdulai discusses the topics of international law and military intervention, rights to self-defense, humanitarian interventions as well as the principles of sovereignty in the wake of enforcement of the rules of *jus cogens*. He analyses whether there is any legal basis in international law for the military intervention in a member state if diplomacy fails to persuade a former president to step down and accept presidential elections results – mobilised by the Economic Community of West African States (ECOWAS) which launched the operation 'Restore Democracy in Gambia'. He tries to answer inter alia the question whether ECOWAS is acting in accordance with the African Union (AU) Treaty and its Peace and Security Protocol to restore peace and avoid grave consequences.

Klemens Katterbauer discusses digital services as they have significantly transformed the world's economy and challenged the existing taxation regulations worldwide. Thus, the intangible nature of digital services challenges the taxation of conventional services that have a physical location of where the services are performed and where the right of taxation derives from. Therefore, the need for adequate regulations related to the taxation of digital services has become ever more prominent with various proposals and implementations. The article provides a case content – inferential statistics research on determining whether a digital service tax or the nexus of a significant digital presence may be more applicable for overcoming the challenges posed by digital services. Additionally, the benefits of artificial intelligence (AI) methods in assisting in the taxation of digital services are outlined.

Lea Ina Schneider explores how state behaviours that originates from a populist attitude affects international law and attempts to answer the following questions: *Why and how does populism challenge the very idea of international law? What are the effects of populist governments on international law? And what role would international law play in a populist era?* Her article concludes that populists attack international law because the international legal system, as it developed after the 1990s, is based on values and concepts, such as international solidarity, which go against the identity and nationalistic politics of populists.

Tiffany M. Sillanpää investigates whether smart contracts meet the traditional requirements of a contract and what smart contracts truly add to traditional contracts. While there may be procedural challenges to undoing or enforcing specific performance under smart contracts because of their decentralised features, any substantive problems that could occur within a smart contract are imminently addressable with and needs to be subjected to the principles and remedies found in traditional contract law. Finally, she concludes with current developments in smart contracts which creates a potential platform for them to become an integral part of the common law legal system going forward.

Dr. Ngozi J. Udombana examines certain legislative expressions in the Administration of Criminal Justice Act (ACJA) as of 2015 of Nigeria that aimed to tackle the multi-dimensioned problems which plagued the criminal justice system for decades. She finds that ACJA is affected by significant measure of substantive and legislative expression gaps which diminish its quality and negatively impact its implementation. Thus, she recommends in her article the amendment of ACJA as well as offers alternative redrafts and suggestions – if these issues and gaps are not timely addressed, they may further affect the effective implementation of ACJA.

Finally, we are hugely thankful to our authors for their submissions. We would like to encourage any postgraduate student, practitioner and academic who intend to submit an article to get in touch with us. The details for submission can be found below:

https://ials.sas.ac.uk/digital/ials-open-access-journals/ials-student-law-review/ials-student-law-review-editorial-board

We look forward to hearing from prospective contributors. Until then, please enjoy the latest issue of the ISLRev!

Tuğçe Yalçin & the ISLRev Editorial Board.

The Questioned Legality of Foreign Military Intervention in Members' state in the Economic Community of West African States!

Emmanuel Saffa Abdulai

Introduction

The military coup in Mali that herald a coup into the political domain of another West African States remains a major concern to ECOWAS Heads of States who summoned an extraordinary meeting to discuss the ugly development. ECOWAS condemned the coup and calls for immediate restoration of democracy and constitutional order in the French speaking West African nation. ECOWAS then appointed a team; lead by former Nigerian President Godluck Jonathan, to negotiation a transition that will immediately return Mali to civilian rule. Unlike Gambia and Sierra Leone, ECOWAS has not threatened physical military intervention, but has announced economic sanctions and blockade. If diplomacy fails, then there is likelihood for a military intervention to force the military to relinquish power and restore democracy, like it did in Gambia in 2017 and Sierra Leone in 1999.

In the Gambia, President Yayah Jammeh, following Presidential Elections held on the 1st December 2016, refused to step down and accept the result. The electoral commission in Gambia had announced that President Jammeh was voted out of office and the main contender, Adama Barrow, won the polls to become President-elect. This marked the end of the 22 years of dictatorship in the tiny West African state. Few days after, President Jammeh rejected the result claiming irregularities and called for fresh elections. ECOWAS could have none of it and asked that the defeated President Jammeh respects the electoral outcomes. Ex-President Jammeh refused to step down after twenty-two years in office, a period that has been regarded as a dictatorship.

ECOWAS concerned with the developed decided to enforce the will of the people of The Islamic Republic of Gambia. Jammeh refused to budge and threatened several actions, including a petition filed later with the court. An Emergency meeting of Heads of State of ECOWAS convened and was agreed that the "wishes of the people at the general elections must be respect."[1] Few days later, the African Union (AU) issued a statement[2] endorsing the ECOWAS heads of state decision; a support later re-echoed by the United Nations General Assembly (UNGA). An intervention force marshaled in Dakar, with Senegal and Nigeria eager to force the defeated President Jammeh out; and the troops actually crossed boarders into Gambia after the ECOWAS deadline passed.

AU Constitutive Act[3] and Its Peace and Security Protocol on Non-Intervention and Non-Use of Force.

In this part, I argue that legally speaking, any basis for the use of force could be founded in the AU Treaty.

In 2000, the Organization of African Unity[4] transformed itself into the African Union[5] with the coming into effect of its Constitutive Act.[6] The Constitutive Act marks the beginning of a tirade of reforms within the AU. Significantly, the AU with determination to reform and transform, declared from the onset that it was time for business by setting itself up with a very lofty goal**;** "to maintain the multifaceted challenges that confront" African countries and the people of Africa.[7] Several organs of the AU changed

[1] See generally https://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-gambian-december-1-presidential-election/ [accessed 29th, May 2020].
[2] See the African Union Press Release https://au.int/ar/node/31696.
[3] The African Union Constitutive Act, herein after referred to as the AU Treaty.
[4] The Organization of African Unity (OAU) came into effect in 1963 as a regional body.
[5] Hereinafter referred to as the AU.
[6] Constitutive Act Supra 2.
[7] Constitutive Act, Supra pmbl.

nomenclatures[8] and new institutions were established. The agency under the OAU Charter that was called the "Mechanism for Conflict Prevention, Management and Resolution," was changed to the The Peace and Security Council (PSC) Protocol[9] made it "not merely an organ of the AU, but … more significantly, the 'standing decision-marking organ for the prevention, management and resolution of conflicts."[10] Perfunctorily, the PSC enjoins the Constitutive Act of the AU to empower the organization with "the right…to intervene in a Member State pursuant to a decision of "[t]he Assembly"[11] in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 14 (h) of the Constitutive Act".[12] The AU further manifested its determination to stop wars by including in the PSC Protocol the power to intervene pursuant to the Constitutive Act, and also established a Standby Force, which "shall compose of standby multidisciplinary contingents, with civilians and military component in their countries and ready for rapid deployment at appropriate notice".[13] "State parties to the Protocol are obliged to 'take steps to establish standby contingents for participation in peace support mission,' as and when the PSC might decide, or for intervention, as the AU Assembly might authorized."[14] Among several functions of the Standby Force is to intervene in countries where there is a "grave circumstance", *at the request of a member state,* to restore peace and security.[15] Additionally, the Standby Force is mandated to provide humanitarian assistance to civilians suffering in conflict situations and to "support efforts to address major natural disaster.[16]

The above provision gives many of us, student as well as scholars of the Africa turbulent situation, hopes of a break from the past. A past where African leaders have colluded with each other to slaughter their kinsmen with impunity**;** for almost forty years after it creation, the OAU climbed down from the lofty peaks of its noble intentions, and degenerated into being merely **"**a trade union of the current Heads of States and Governments, with solidarity reflected in silence if not in open support for each other."[17] Every temptation exist to believe, based on a moral standpoint, that The Constitutive Act of the AU ushered in a new dawn - a light at the end of tunnel.

The Constitutive Act and the PSC Protocol however, presents two fundamental problems. The Constitutive Act relied on the powers of "[t]he Assembly" to authorize an intervention into any "grave circumstances," while the PSC relies on the Constitutive Act for mandate. Starkly, and surprisingly so, absent is any reference to the United Nations General Assembly (GA) or, more especially, the United Nations Security Council[18] (UNSC). The UNSC has the sole powers and responsibilities to mandate "collective security mechanism" in situations where it deems "international peace and security" are threatened. The powers stem from the customary law principle, now codified into convention law principles in Article 2 (4) of the UN Charter, which uphold the Westphalia customs of state sovereignty on "non use of force", "threat to use force" or "act of aggression" in the international relationship between states.

The second problem has to do with the normative provision itself: where it empowers the Standby Force to intervene "at the request of a member state"[19] into the domestic affairs of another or preemptory norms. The use of the definite article "a" renders this provision vague and prong to multiple interpretations, making it problematic. One interpretation, I argue, is that 'any" "(m)ember States" can

[8] Ibid .
[9] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 9th July 200, (hereinafter referred to as the PSC Protocol), which came into effect in 2004 after its inauguration in May of that year. .
[10] Nsongurua J. Udombana, When Neutrality is a Sin" The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan, 1151, (2005).
[11] The Assembly of Heads of States and Government of the African is called "The Assembly" and is the highest decision making body in the AU, which composed of heads of states or governments or representatives of governments. .
[12] PSC Protocol, Supra 7, art. 13 (1).
[13] Id.
[14] Udombana, Supra 8, quoting PSC Protocol 13 (2).
[15] PSC Protocol Supra 7, Article 13 (3) (c). .
[16] Id. Art. 13 (3) (f).
[17] Udombana Supra 8, quoting Juluis Nyerere, former president of Tanzania, describing the OAU before launching a counter invasion into Uganda to ride Field Mashall, Elhaj Edi Amin of his job as president. .
[18] Created by Article of The Charter and empowered to use Chapter VII powers to restore peace or prevent threat to, or, collapse of international peace. .
[19] African Charter, Article 5.

call on the AU to intervene in the internal affairs of an other states. Another interpretation is that the "victim states" should make the call to the regional body for help, when it deems necessary, into its domestic affairs. This could have been the reason why President Elect of Gambia, Adama Barrow, as soon as he was sworn into office called on ECOWAS and AU to assist the people of Gambia in the restoration of democracy and peace. Mali seems to be different with the military insisting that the issue remains purely an internal matter to be decided by the Malian people and not by outsiders. From the two interpretations, the former stands more accepted than the latter, since the drafters were at liberty to categorically state that a victim state shall call on the AU to intervene' without any fuse.

The international trend that flow in proscribing the non-use of force did not pass the Africa regional body- the AU, then the OAU- unnoticed. It was a time in history when African states were determined, 'to keep the hard won independence', and thought it was extremely imperative to avoid outside interference. The fear of re-colonization prompted the institution to recall, "the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation."[20] Thus, every attempt was made to uphold the 'territorial integrity' and 'political independence' of its members.

Taking the cue from the Organization of Africa Unity instrument, the AU Constitutive Act and the Peace and Security Council Protocol promote the doctrine of state sovereignty. The Constitutive Act "enjoins peaceful settlement of disputes among its members[21]; prohibits the use of force or threat of force[22]; and proscribes noninterference into the domestic affairs of other states."[23] The PSC protocol, similarly, enjoins "peaceful settlement of disputes and conflicts"[24] and proscribes "non-interference by any member states in the internal affairs of another."[25]

A number of other instruments before and after the AU Constitutive Act and PSC Protocol also proclaim principles of "sovereignty, noninterference, and recourse to threats or use of force"[26]. One such instrument is the Declaration on a Code of Conduct for Inter-African Relations, adopted in 1994. This pact declares "the peaceful settlement of disputes constitutes an essential component of the duty developing on state to refrain from the use of force or the threat thereof or aggression."[27] Similarly, the Algiers Declaration was adopted in 1999, in Algeria, which reaffirms the necessity "to promote the use of peaceful means in the resolution of conflict, in conformity with the principles of sovereign equality, noninterference, non-recourse to threats or use of force, and of the independence, sovereignty and territorial integrity of states"[28] Additionally, the AU General Assembly adopted the Non-Aggression and Common Defense Pact,[29] which aims "'to promote cooperation among the Member States ...,"[30] all in light of protecting and promoting non-intervention and non-use of force.

The question that stems from the above is, first, how the AU could be inherently so contradictory in the same instruments that acclaim so much to sovereignty, and place a breach in others by allowing itself to intervene into the affairs of another states and establishing a Standby Force under the PSC Protocol? Secondly, does the AU Constitutive Act violate customary and conventional international law, with particular reference to Article 2 (4) of the UN Charter?

Like the exception of individual and collective self-defense and authorization from the UNSC in a time of breach of international peace, the AU has placed exceptions to the non-intervention and sovereignty protection in the region with article 4. This is done by recognizing the need to prevent genocide, crimes against humanity, and other serious crimes and places such emergency as an exception to the rule of

[20] Id. Art. 4 (d).
[21] Id. Art. 4 (e).
[22] Id. Art. 4 (f).
[23] Id. Art. 4. (g).
[24] Peace and Security Protocol 2002, Art. 4 (a) .
[25] Id Art. 4 (f).
[26] Udombana, Supra Note 10., 1162.
[27] Nsongurua Udombana, The Unfinished Business, Conflicts, The African Union and the New Partnership for African Development. (2003).
[28] Algiers Declaration, Adopted 12-14 July 1999. .
[29] 31 January 2005, Not yet in force.
[30] Ibid 28.

non-intervention. There are both moral and political reasons: that even though the conflict of laws seem apparent, prima facie, but underneath this reason for this provision lie the determination of Africa leaders not to allow the reoccurrence of situations of gross violation of human rights like what happened in Rwanda, Sierra Leone, Liberia, Democratic Republic of Congo, Central African Republic, Darfur in Sudan and other egregious killings. Rather than view it as a contravention, argued Udombana, it should be more retrospective of recent history in Africa and to accept the provisions as an exception to the rule.

Customary and Conventional International Law on Non-Intervention and the exceptions

"Oh dear, Customs of Law!"

Customary International Law frowns at the 'use of force' in international relations, thus only permits two instances when a state can resort to force. This general practice of state(s) has become an undisputable set of *lex lata*, rather than *lex ferenda.*

Since the seventeenth century, customary international law has supported the doctrine of state sovereignty and *reserve domain* primarily because the world was littered with conflicts between and among states. And the world thought it was time to negotiate and create a world of mutual respect for states, no matter the size or population. At the Treaty of Westphalia of 1648, the equality and independence of states was maintained with a provision outlining the "duty on the part of states to refrain from intervention in the internal or external affairs of other states"[31] Therefore, every activity with the proclivity to intervene in the "political, socio-economic life of another states" was discouraged. As John Dugard puts it, "the weight of authority is against the recognition of [such rights]"[32] to meddle into the domestic affairs of another state. The International Court of Justice in the Nicaragua case[33] emphasized that "part and parcel of customary international law"[34] is for every state to conduct its business without outside interference.

Convention law also followed the trend of non-intervention; right from the inception of the United Nations (UN). The UN Charter reaffirms the position of customary international law by codifying and proclaiming "the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter."[35] This duty is placed, importantly, on "every state", rather than "certain members", of the UN. Indicating that members or non-members of the UN should adhere to this customary law provisions, irrespective. Article 2 (4) of the UN Charter did not only outlaw the "use of forces" in the affairs of another states, but raised the bar higher to "…interdicts mere threats of force."[36] With the purpose of UN, *inter alia*, to move international relations from the doctrine of 'only the strong survive' to "maintain[ing] international peace and security, and to that end: to take effective collective measure for the prevention of and removal of threats to peace, and for the suppression of acts of aggression and other breaches of peace",[37] it was no mistake that article 2 (4) scopes was tightened to avoid loose cannon interpretations. In order to restrict big and powerful states from using their vantage position to dominate the smaller states, the post World War II idea was to protect 'territorial integrity and political independence.'[38]

The Charter, however, provides two broad exceptions to the use of force or threat of force: first is the "inherent rights" to individual self-defense. While there has been a general agreement on this exemption, there is "fundamental disagreement on the scope of self-defense, especially in relation to

[31] Ian Brownie, Principles of Public International Law 293, (5th Ed., 2003).
[32] John Dugard, International Law: A South African Perspective 423 (2000).
[33] Military and Paramilitary Activities in and Against Nicaragua (Merits), 1986 IVJ Rep. 14 (June 27) hereinafter referred to as Nicaragua. .
[34] Id. 3 .
[35] UN Charter, Article 2 (4).
[36] Y. Dinstein, The Contemporary Prohibition of the Use of Inter-State Fore.
[37] UN Charter, Surpra 23. Art. 1.
[38] UN Charter, supra 23. Art 1 (a).

the so-called anticipatory and 'preventive' self-defense…."[39] The second strand of exception is the "collective security" measure under the authorization of the UNSC, pursuant to the mandate to determine the existence of a "threat to peace", "breach of the peace", or "act of aggression" and to take measures to maintain or restore international peace and security, including the use of force.[40]

Yet, the prohibition of use of force and its exception has witnessed several violations. The United States, for instance, argued rightly so in the Nicaragua Case that, because it placed reservations on the UN Charter, it is not bound by the conventional law principles found in Article 2 (4) and that 'prohibition on the use of forces is conventional since it has been codified into the UN Charter reducing its customary nature.'[41] The International Court of Justice[42] held the impossibility for "two international laws to coincide exactly as regards the regulation of use of force…", but emphasis that there would be "variations between them in a number of points…"[43] The court established further that "(e)ven if customary and convention norms did overlap in every respect, customary law would retain its separate identity - and continue to exist side by side with conventional law…."[44] Therefore, Article 2 (4) is both customary law in nature and conventional law in practice, which makes it almost impossible to deviate from. Supportively, article 53 of the Vienna Convention on the Law of Treaties, which deals with the issue of 'jus cogens', establishes that "a treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general International Law."[45] Certainly, the UN Charter's intention was the reinforcement and enforcements, rather than contradiction of general international law, a genre which customary law bellows.

The United Nations Convention on the Law of the Sea[46] states that:

> *In exercising their rights and performing their duties under this convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.*[47]

There is not much difference in the wording of this article and article 2 (4) of the UN Charter, which prohibits forces, just that "it uses the phrase 'the principles of the international law embodied in the Charter of the United Nations' in lieu of the original terminology ('the Purpose of the United Nations')".[48] Further, the UN adopted the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of United Nations.[49] It made reference to seven previous resolutions[50] and "(e)mphasizing the paramount importance of the Charter of the United Nations for the maintenance of international peace and security and for the development of friendly relations and co-operation among States".[51] Its further reaffirms that;

> *"(e)very State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of*

[39] Nsongurua J. Udombana, when Neutrality is a Sin" The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan, 1160, (2005).
[40] UN Charter, Chapter VII powers – use of force, which has been mandated sparsely over the last decades. .
[41] Nicaragua, Supre 21, 86.
[42] Established in 1921, hereinafter referred to as ICJ.
[43] Nicaragua Ch 7, B.
[44] Id. 96-7.
[45] Vienna Convention the Law of Treaties 196, hereinafter referred to as the "Vienna Convention".
[46] United Nations Convention on the Law of the Sea, 1982, 21 I.L.M 1261, 1326 91982).
[47] Id. Art. 301.
[48] Dinstein, Supra 24, 92.
[49] UN Resolution 2625 (XXV), unanimously passed in 1970, hereinafter referred to as "Friendly Resolution".
[50] "Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XVIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,".
[51] Friendly Resolution, Supra, par. 3.

> *the United Nations and shall never be employed as a means of settling international issues."*[52]

Therefore, many other regional instruments followed this trend of prohibiting the threat or use of force. The Rio de Janeiro Inter-American Treaty of Reciprocal Assistance[53]; and the 1975 Helsinki final Act[54] are among the few examples.

The exceptions of collective self defense provided for in Article 51 of the UN Charter allows for states to use force in order to protect their territorial integrity. The two exceptions of individual and collective self-defense remain unchanged, though with many controversies. Irrespective of the hullabaloo around the principle, "a state has a right to use force to defend itself from external armed attacked."[55] Therefore, there should have been an 'armed attack' before the states can take up arms to defend itself. It has been argued that a state should use force in anticipation of an armed attacked on its territory. Anticipatory self-defense and or belated use of force to defend one's territory have all summed up to one thing: that there most be an attack or a threat of an imminent armed attack on its territory before a state can justifiably then use force as self-defense.

Article 4 of the AU Treaty defying all legitimacy is certainly not appropriate in this context. It provides for an attack and not a defense after an attack. Second, the article further authorized a right to intervene in domestic affairs of another state like civil wars, where heinous crimes are being committed. Which leads to another highly debated issue, international humanitarian intervention (HMI), and the only explanation for this provision could have been "third party intervention".

Where then does this leave Article 4? One school of thought beholds that Article 4 falls under the rubric of collective security. Others believe its does not meet the requirements needed.

When Article 51 of the UN Charter provides that 'every state has the inherent right of individual and collective self defense' to protect it territory, it required further a request from a victim state. According to the Nicaragua Case, for the excuse of collective self-defense to avail itself, there most be an armed attack from another state that precipitated the intervention of a more powerful states, who has a bilateral or multi lateral agreement with the 'victim state.' Secondly, it is clear that the victim state of the armed attack must declare it vulnerability. There is no rule under customary international law permitting another state to exercise the right of collective self-defense on the basis of its own assessment. Where collective self-defense is invoked, it is expected that the state for whose benefit it is used would have declared itself as a victim of an armed attack.[56]

On the 18th April 2006, the UNSC passed a resolution[57] on Sudan craving the "protection of civilians in armed conflicts' and "reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[58] Koffi Annan called on the UN to face a new approach in preventing the suffering of millions trap in conflict. In an address to the UN,[59] he stressed that the world body should "… also move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities."[60] He urged that "the time has come for Governments to be held to

[52] Id. Part I. proclamation principles.
[53] Rio De Janeiro Anti-War Treaty (Non-agression and Conciliation), 1933, 163 L.N.T.S 393, 405.
[54] Helsinki Final Act, 1975, 14 I.L.M 1292, 1294 (1975).
[55] Ibid 45.
[56] Nicaragua case, para 194, "In state practice, there is no instance of anticipatory self defence being expressly invoked to justify the actual use of force, except perhaps in the Harib Fort incident, 1964 UNYB 181; this use of force by the UK was condemned by the Security Council as reprisal." Judge Schwebel, dissenting in para 172-3, argued that there is a right to anticipatory self defense, but came up with no support on state practice for collective self defence. .
[57] Resolution 1674 (2006) Adopted by the Security Council at its 5430th meeting, on 28 April 2006, referring to earlier resolutions, resolutions 1265 (1999) and 1296 (2000) on the protection of civilians in armed conflict….
[58] Ibid.
[59] In larger freedom: towards development, security and human rights for all United Nations conferences and summits in the economic, social and related fields.
[60] Ibid 54.

account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service."[61]

On May 25th 1997, a military coup ousted the democratically elected government of Sierra Leone, President Ahmed Tejan Kabbah. The coup received international condemnation and prompted the then Organization and African Unity, now AU, for the first time, to give 16 –member Nigerian-led Economic Community of West Africa States the power to take the most effective measures to remove coup leader Maj. Johnny Koroma's military junta. With a successful overthrown of the military junta, by ECOMOG,[62] total disorder was loose upon the country. Members of the military junta, who had colluded with the rebels, went into the bush and betrayed their constitutional responsibility of protecting the states. Sierra Leone was left with no standing national army, with only the West Africa Peacekeeping forces as the main sources of support, "a small UN force, UNOMSIL, was sent in to supplement an existing ECOMOG regional Force." [63] A senseless and brutal war was waged for two years that saw the cataclysmic invasion of the capital city, Freetown, in 1999 and scores of innocent people lost their lives and host of other gross violations occurred. The Loma Peace Agreement was signed in July 1999, in Lome, Togo, which replaced a UN Observer Mission (UNOMSIL) with a peacekeeping mission (UNAMSIL).

The mission of the peacekeepers was to help the government implement the peace treaty and to "assist in the implementation of the disarmament, demobilization and reintegration plan."[64] The UNSC adopted unanimously Resolution 1270 which gives Chapter VII powers to the new multi-national force and empowers them to "take the necessary action to ensure the security and freedom of movement of its personnel." After a recommendation by the Secretary General that this was needed to protect the UN forces and civilians.[65] The resolution went further to manifest what is now called the "responsibility to protect", by authorizing UNMASIL *'within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence.'*[66] In a subsequent resolution, Resolution 1289, the SC invoked similar powers of using force to protect civilians when it authorized UNAMSIL to "provide security at key locations, important intersections, and major airports facilitates to allow the free flow of people, goods, and humanitarian assistance; and provide security in the disarmament process."[67]

Justifications…. Is it the Time for ECOWAS and AU to Act?

In the midst of the arguments, it is important to frankly state that the AU Constitutive Act was the first blow to a non-proactive UN system in intervening in grave situations in many "developing countries"; and Africa over the past twenty years, being about the epicenter of endemic brutal fratricidal warfare, has experienced more of nauseous wars that makes all of this pedantic arguments irrelevant. African leaders are registering their dissatisfaction over the manner in which the never-agreeing UNSC has treated Africa's concerns over the past years and saying 'time has come for us to take the destiny of our continent into our own hands.' For decades the UNSC has failed to save the lives of Africans when needed, rather the UN intervened "too little too late" in Sierra Leone (1991 to 2000), Rwanda (1994), Liberia (1989 to 1993) and in Sudan – after thousands of men, women, and children had been butchered by beasts masquerading as liberation fighters.

In Sierra Leone the casualty figure from the country's ten years of war is debatable, as it varies widely.[68] However, "[t]he Crimes of War Project"[69] estimated about 75,000 people died during the conflict and over a million were cramped in refugee camps in neighboring Guinea, Nigeria and Ghana. Rwanda is

[61] supra.
[62] Ibid (54).
[63] Ibid. .
[64] Id. Para 34.
[65] Seventh and Eight Report of the Secretary General on UNOMSIL, S/1999/836,S/1999/1003; first Report.of the Secretary General on UNAMSIL, S/1999/1223; UN Press Release SC/6742.
[66] Ibid.
[67] Gray, Supra 74, 181.
[68]Otaola Igor Hodson De, A Conflict Analysis of the Mano River Region: Guinea, Liberia and Sierra Leone, A Report for ActinAid, p. 4, 31st October 2005.
[69]See generally http://www.crimesofwar.org/.

perhaps the most notorious case of the spectacular failure of the UN and the international system in times of great need – with the world now goggling at films that strive to bring to light deaths equivalent to the Jewish Holocaust during the Second World War. Certainty in the number of deaths continues to be a challenge, estimate have it that between 800,000 to 1,000,000 human lives perished under the watchful eyes of the international community.[70] Despite the media reports, the Canadian led United Nations Assistance Mission to Rwanda failed to stop the massacre, instead Belgium and France were more resolved in pulling out the UN troops that provided a bit of a check against blatant bestiality.

In Liberia, the International Crisis Group[71] estimated that 250,000 thousand people died during the country's conflict. With millions of refugees burdening Sierra Leone, Ivory Coast, Guinea, Nigeria Ghana and the whole of the West Africa sub-region plagued with the effect of that war. Perhaps, ECOWAS thought Gambia could be another Liberia or Sierra Leone. Or would want to avoid the Malian situation from degenerating into a full-blown crisis. The UN in August 2007 authorized the "deployment of 26,000 peacekeeping troops to Sudan's war-torn Darfur Region.**"** The UN estimates the conflict has killed 200,000 people and displaced two million more over the last four years."[72] There are about 240,000 Darfur refugees living in neighboring Chad, and they live in dangerous and unprotected camps.

Every rule that hinders the protection of genocide, war crime and crimes against humanity should give way to humanity -a universal law that would speedily prevent such heinous crimes against human survival, and human dignity. In this vein, should soveriegnty tuimph over humanity? Michael Smith insists that "individual state sovereignty can be overridden whenever the behavior of the state even within it own territory threatens the existence of the elementary human rights abroad and whenever the protection of the basic human rights of its citizens can be assured only from the outside."[73] Kofi Annan, former Secretary General of the UN, mourned at the nonintervention stance of the world body in a more graphic manner when he cautioned, "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica- to gross and systemic violation of human rights that affect every precept of our common humanity?[74]**"**

Jus Cogens: A Customary Law and a Justification for Deviation?

This part examines the principles of *jus cogens*, the theoretical debate of its meaning and argues and takes a position on the relationship between customary law and *jus cogens*.

There is certainly an emerging conflict between the customs of law and the rule of *jus cogens*, that *jus cogens* is part of customary law, but has more force than ordinary customs of law. That the customary law provision of 'prohibition of the use of force' has reached *jus cogens* status which implied that two principles of *jus cogens* are at war here. Another school says *jus cogens* is different from customary law and has more binding force than customary law. Jus Cogens Upholds Humanity!

The doctrine of *jus cogens* is a component of international law that cannot be derogated from. It has been defined as "(p)rinciples of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties. For example, genocide and participating in a slave trade are *jus cogens*.[75] Whatever the definition is, few commonalities present themselves: *jus cogens* is "compelling" and a "higher form" of law that cannot be deviated from by any states. Even though it forms and types are still a constant source of debate among legal scholars, certain crimes have however

[70] See, e.g., Rwanda: How The Genocide Happened, BBC, April, 2004 which estimated of 800,000, and OAU sets Inquiry into Rwanda Genocide, Africa Recovery, Vol. 12 1#1 (August 1998), page 4, which estimates the number at between 500,000 and 1,000,000.
[71] "The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organization, with some 145 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict." See generally: http://www.crisisgroup.org/home/index.cfm?id=208&l=1 .
[72] CNN Femi Oke, anchor of the program Inside Africa, covering the report of Nic Robertson who "relives the dangers of covering a humanitarian crisis in Chad. See http://edition.cnn.com/2007/WORLD/africa/12/28/inside.africa/.
[73] Michael J. Smith, Humanitarian Intervention, An overview of the Ethical Issues (1998).
[74]International Commission on Stat Sovereignty, The Responsibility to Protect: Report on the International Commission on Intervention and State Sovereignty (2001}.
[75] See http://www.nolo.com/definition.cfm/Term/13FB4261-D05C-44FE-A8554A5F5134FC55/alpha/J/.

been classed a *jus cogens*. Crimes like genocide, piracy, general slavery; salve trade, torture, territorial aggrandizement and wars of aggression have all been settled on as rules *of jus cogens*.[76]

The Vienna Convention established that a treaty cannot violate *jus cogens*; a treaty is void if it runs contrary to the principle of *jus congens*. It states that:

> *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*[77]

According to the International Criminal Tribunal for Yugoslavia (ICTY), in the case of *Prosecutor v. Furundzija*[78], preemptory norm cannot be changed "through international treaties or local or special customs or even general customary rules not endowed with the same normative force".

The legal, political and moral problems that arise from this characterization are that the non-use of force is a convention and customary law, but has very often been argued to have attained preemptory norm status. Therefore the evils- genocide and crimes against humanity- that the AU provisions tend to prevent are *jus cogens*.

The theoretical debate aside, however, HMI, or "responsibility to protect" is not a new doctrine, but rather a routine feature that co-existed with the development of state sovereignty in the international legal system. Few treaties before the first and second World Wars explain the state practice doctrine of prioritizing humanity to sovereignty. The protection of Christian minority within the Ottoman Empire[79] and the francophone Roman Catholics in British North America are indicative. "The Treaty of Peace between the United States of America, British Empire, France, Italy and Japan and Poland, for example provides: '[p]oland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race, or religion'"[80] Similarly, the multi-state intervention in Greece between 1827-1830 was more plausibly argued by Ellery Stowell to have a "motive of the intervention would seem to have been to protect the rights of (Greek) self-determination."[81] Stowell claimed that the intervention led Turkey to accept the London Treaty, which led to the independence of Greece in 1830.

Similarly, AU Treaty included in the intervention clause the need to protect "genocide, crimes against humanity and other serious crimes".[82] Genocide is a preemptory norm and can be protected by any action without authorization from UNSC. However, crimes against humanity did not fall into this category, nor are other serious crimes; and this category could spring a UN Charter violative argument. But, though not in all cases, crimes against humanity lead to genocide, so are other serious crimes. In order to prevent the deterioration of situation into genocide and scamper for reactive measure to cure it, the AU Treaty provision on intervening in member states appears to be pre-emptive in nature. Allowing for intervention when the ugly heads of crimes against humanity and other serious crimes arose up.

[76] Artilce 54 of the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951.
[77] Vienna Convention, Supra, U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969.
[78] Prosecutor v. Furundzija, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213 (2002), 435. .
[79] Treaty of Edirne (Adrianople) between Russian and Turkey, Signed 14 September 1829, BFSO XVI, 647, Arts. V and VII.
[80] Udombana, Supra 10.
[81] Ellery Stowell, Intervention in International Law, 126 (1921).
[82] AU Treaty supra 23.

Conclusion

It is a hard contest, but prima facie the AU Charter allows for military intervention in member states, which appears to contravene Article 2 (4) of the UN Charter. Article 2 (4) forms part of both customary and conventional law. With Article 53 of the Vienna Convention being evidential in support of this position: it states that any treaty that runs contrary to *jus cogens* should be automatically declared void. I will argue, on this basis, that prima facie the AU Charter is legally a nullity and cannot stand the test above. However, *jus cogens* contain a particular aspect called preemptory norm, which are non-derogable. Preemptory norm includes crimes like 'genocide', slavery and slave trade, piracy, torture and aggression. The AU Charter, authorizing interventions like what happened in the Gambia, and a pending one in Mali, is geared towards protecting violation of *jus cogens* norms such as crimes again humanity, torture, genocide et al. This ushered in a complex matter of compromising preemptory norm against customary prohibition of force. If the doctrine of *jus cogens* is, arguable, part of customary international law and a state or any other regional body can attempt to stop genocide and without any authorization, then, why would the AU not intervene to stop carnages in a turbulent continent before recourse to unnecessary legalities that have over the years not helped? The imperativeness of scrutinizing some aspect of international law to suit the changing world of the 21st century is now apparent. It is time for an "instant paradigm shift" since the world is "…constantly faced with new situations, due to dynamics of progress. 'Therefore there is clear need for a reasonably speedy method of responding to such changes by a system of prompt rule formulation'"[83]

Obviously, "the AU Charter was certainly overdue for review"[84] and many scholars have pointed out that gone are the days when "feeble compromises of the late 1950s and 1960" which makes the regional instruments "a dated instrument bearing very little likeness to today's realty."[85] Whatever those compromises were, they were no longer desirable in a changing continent. The departure from business as usual was swift and brave and has sent a message to the UN bodies to follow suit, or else, modernity would prevail over tradition in international law and politics. The AU has manifested the need to "take right seriously", align with emerging norm of 'humanity first' and "replac[ing] the culture of impunity with the culture of accountability…."[86] It has sent a strong message that no more would African leaders be allowed to rely on "within borders" argument to oppress their people and escape unscathed.

In this same vain, the international community is gradually accepting and passing resolutions on the dire 'need to protect civilians in times of grave breeches'. It is only a matter of prudence for such giant steps to be taken in order to uphold and protect the stance by institution like the AU to prevent crimes against humanity. The international community should be preemptive, rather than reactive, in their responsibility to protect. The ECOWAS action in Gambia was rocked on the principle emerging approach to uphold and protect humanity. Protecting humanity could justify any further regional action into Mali that will result into physical confrontation through military action to remove the coup leaders and send the soldiers back to the barracks.

Over the years, African countries and their regional organs have come under severe criticism to move away from their non-intervention shell to a more robust outlook. As if ECOWAS heard the clarion call, it has decided to intervene and make scourge of brutality prohibited as dictated by the rules of *jus cogens*. For decades Africans have been slaughtered by their "kith and kin" on the pretext of *reserve domain* and the international community has failed to move swiftly like it did to halt the pogrom in Iraq. Simply because the big players had no interests in protecting the lives of Africans. Civil wars and oppression of all sorts have resulted in the destruction, at will, of vulnerable groups must stop. That is

[83] Nsongurua Udombana, "Can the Leopard Change its Spots? The African Union Treaty and Human Rights", p. 1202 (2000).
[84] Id. 1182.
[85] Udombana, Supra 110, quoting an editorial Sirte and the Rest of Us, AFR. Topics (Nov-Dec 1999) at 3.
[86] Supra 110, at 1259.

the underlying message of the AU Charter, and a clear show of solidarity has emerged with little regard to rules of procedure of an ever divided and undecided UNSC over Africa issues.

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Digital Service Tax:
An Empirical Legal Analysis

Klemens Katterbauer

Introduction

Digital services have played a critical role in almost any economy in the world, and amount to a significant share of the economy. The traditional service economy typically implied that the location of where the service is provided represents the place of taxation. This is due to the fact that both the provider and receiver typically were at the same physical location during the time the service was provided. This allowed the tax authorities to easily trace the transaction and hence impose the corresponding taxes. With digital services companies providing extensive services to consumers across the world, governments face the challenge that these companies may either not levy taxes on the provided services at all or allocate the service revenues to a corporation in a preferential tax region. Famous examples are companies such as Google and Facebook that allocate their revenues from advertisement within the European Union to their Irish subsidiary and then use their preferential tax arrangements to significantly reduce their tax obligations. [1] These revenues are generated in different countries from various users and many countries feel that due to the source principle in taxation, they are entitled to tax these revenues. The perceived mismatch between where the revenues are generated, and the taxed profits is a major driving factor for these governments to implement new legal frameworks in order to close this gap. The mismatch arises due to various factors. First, services can be supplied in a country even if they are not physically established there or have a physical presence. The internet allows businesses to provide services from anywhere using either a website, communication tools such as Skype or email for providing these services. This allows the companies to reduce the number of jurisdictions where the governments have taxing rights. The second, posits is that new business models providing digital services heavily rely on intangible property and can be more mobile. This allows businesses to easily provide services in various countries within a very short period of time with almost no capital expenditure. Intangible property in the case of digital service providers relates to user data, user bases and other software related properties. The third posit is that the value created by the user's participation in digital activities is higher than the existing measures value it.[2] The last posit is of crucial interest given that some of the largest companies in the world primarily derive their revenues from the significant amount of user data they possess and utilize for value generation, even though the value they assign to merely the data is rather minimal.

There have been several proposals by the OECD in order to counter profit shifting and base erosion. The challenges of these proposals are that they necessitate a uniform approach amongst states as discrepancies may lead to the same profit shifting approaches as with the existing regulations. Furthermore, an objective should be to achieve the widest adoption of the framework and reduce variations in terms of the implementation of the guidelines. This implies that the framework should be sufficiently complex in order to be applicable to a variety of circumstances, while easily understandable enough for widespread adoption. Additionally, all these proposals are solely focused on establishing some concepts regarding the taxation of business profits while disregarding the more consumption-based form of taxation that may be relevant given provisioning of services to individuals that may not pay any taxes. Legal theory states that a tax system shall be simple, transparent, neutral and stable in order to be most efficient.[3] Even though there is consensus that the digital economy requires an adapted approach to taxation, there are opinion differences whether the taxation shall be focused on profits only, or whether a sales or usage tax may be the fairer and more stable approach. Given the significant amount of the revenues generated by digital services and the user data, the attractiveness for

[1] Sanger, Chris, and Rob Thomas. New digital tax policies: What, when, where, how and by whom? EY's Global Tax Policy and Controversy Briefing, London: EYGM Limited, 2018, 2.
[2] Sanger (2018), 3.
[3] Bhandari, Monica. Philosophical Foundations of Tax Law. London: Oxford Scholarship, 2017, 5-8.

governments to tax and collect revenues is significant.[4] Hence, governments have recently started, given the perceived lack of progress as well as limited scope of the proposals, to develop their own regulations in order to address this taxation issue. In particular, countries like France have introduced unilateral measures in order to institute consumption-based taxes for taxing digital services. In developing these new regulations, these governments need to take into account that these initiatives have a significant effect on existing tax treaties, which may contain provisions that focus on conventional and traditional businesses. As digital services can be relatively easily provided across the globe, the impact on these treaties may be substantial.

Background and Research Questions

Taxation of digital services has attracted significant interest due to political backslash caused by the revelations of technology companies, such as Google, paying almost no tax in the countries they are operating in, while generating substantial revenues from users.

Digital Services Tax

The European Commission has put forward a proposal for the taxation of digital activities, in particular services. The measures involve a first interim solution of a 3 % digital services tax (DST) and then the introduction of the taxation based on a digital presence. In addition, member states are recommended to incorporate into their tax treaties with third countries the establishment of a significant digital presence. The digital services tax shall incorporate revenues from the advertisement on digital interfaces, the making available of a digital interface where users find and interact with each other and the transmission of user data that was generated from a user activity on the digital interface.[5] The transmission of data and how it relates to the taxation is outlined in Article 3 of the proposal.[6] The mentioned services consist of revenues obtained from the transmission of the user data where the user data were generated from activities on the digital interfaces. It is essential to note that the data must be generated from the activities in the digital interface.[7] Finally, the revenues are deemed to be obtained by the entity providing the digital service, irrespective of whether the entity has really received the revenue.

The initial minimal threshold for taxable revenues under consideration is 50 million euros where the whole group of companies, which belongs together, should have more than 750 million euros in global annual revenues.[8] The essence is that primarily large corporations are targeted. These large corporations typically derive significant revenues from their digital services.[9] From a legal perspective, the DST is exclusively a sales tax and independent of the overall financial status of the enterprise. This has raised concerns from enterprises that fear conflicting taxation claims and international double taxation[10]. This concern is based on the potential prospect of diverging taxation rules of the OECD and the European Union, as well as other countries.[11] In determining the place of taxation, the commission aims at specifying the place where the user is located and is independent of any financial contributions to the revenues by the users.[12]

[4] AICPA. *Taxation of the digitalized economy: A policy paper designed to educate, enlighten and stimulate discussion.* Monthly bulletin, Association of International Certified Professional Accountants, 2018, 1-2.
[5] EC. *Proposal for a COUNCIL DIRECTIVE on the common system of a digital services tax on revenues resulting from the provision of certain digital services.* COM(2018) 148 final, Brussels: European Commission, 2018, 2-5.
[6] EC (2018), Article 3.
[7] PWC. *European Commission Digital Tax Package: Potential impacts on financial services.* New York: Price Waterhouse Coopers, 2018, p 1.
[8] PWC (2018), 1-2.
[9] EC (2018), Article 4.
[10] PWC (2018), 2-3.
[11] NSD. *Opinion on the COM (2018) 148 final Council Directive.* Report, Stockholm: Confederation of Swedish Enterprise, 2018, 1-3.
[12] EC (2018), Article 5.

The provisions specify certain exemptions from the taxation, which incorporate trading venues, systematic internalizers, payment services and crowdfunding providers.[13] Systematic internalizers are investment firms that deal on their own account during the execution of client orders.[14] Trading venues fall within a different category of business and have other regulation dealing with them. Payment services, as well as crowdfunding services are also exempt from the DST, provided that the sole purpose is making payment services available via the digital interface. On the other hand, non-regulated crowdfunding, reward-based and donations fall within the scope of the DST. In addition, services falling under the category relevant for the digital services tax are not considered if the services are provided between one entity and another in the same group.[15] As outlined in Article 5 (4)[16], the place of taxation should not take into account the place where the payment was conducted, or where the supply of the goods or services occurred. This paragraph is rather essential as it ensures that the sole criteria for determining the place of taxation is the place where the access takes place, and not where the goods are shipped to or where the payment is conducted. This also differentiates the tax from the conventional sales taxes that are applicable on where the physical transaction takes place.[17] Essential in this regard is that the whole registration process for tax purposes is conducted electronically, and no national tax number is necessitated for registration. An identification number is then allocated to the entity that is taxable, which is separate from any national tax number. The main purpose keeping the national tax ID and the digital service tax identification number separate is to avoid having service providers required to set up a subsidiary in the country where they provide the service, and to provide a fast and efficient way for these entities to pay these taxes.[18] In particular, there may be many more businesses being subject to the DST as compared to normal sales taxes, hence allowing these businesses to have a fast-tracked process and reduce the cost. The process is similar to what other countries, such as South Africa, have implemented in order to allow foreign companies to easily pay their taxes without having to adhere to the requirements set forth in the tax code.

The European Commission aims at better identifying and valuing intangible assets and regards the current approach by the OECD as rather outdated.[19]The current approach focuses primarily on the principle of a permanent establishment which may not correspond at all to the location where the company engages in economically significant activity due to its digital presence. The digital service tax aims to establish the place of taxation as the location of where the user is located, which represents the logic that the user's involvement creates the value in the digital activity. This is outlined in Article 5 of the proposal[20], and Articles 9-11 outlines a One-Stop-Shop mechanism for the collection of the tax and the country of taxation would be determined based on the IP address.[21]

The United States has been characterized by the Internet Freedom Tax Act, enacted in 1997, that prohibit taxes on internet access. Internet access is defined as a service that allows users to access content, information, email or other services offered over the internet. The Act contains exceptions for sales taxes on online purchases for physical goods. The act has been amended three times and included the extension of the act, the further clarification on the definition of internet access and narrowing of the definition of internet access to exclude voice, audio and video programming.[22] Given the legal structure in the United States that allows states to individually specify the taxes they are charging, some states have started charging taxes on digital goods and services. Given the act, most states presume that most of these digital goods and services are already covered by their existing franchise, sales and use taxes and apply them to these service purchases. On the other hand, North

[13] EC (2018), Article 3.
[14] EC. *Directive 2014/65/EU.* Brussels: Official Journal Of the European Parliament, 2014, Article 4 (20).
[15] EC (2018), Article 3 (8).
[16] EC (2018), Article 5 (4).
[17] EC (2018), Article 5 (4).
[18] EC (2018), Article 10-12.
[19] NOVE. *Nove Digital Tax Package.* NOVE, 2018, 1-2.
[20] EC (2018), Article 5.
[21] EC (2018), Article 9-11.
[22] Stupak, Jeffrey. *The Internet Tax Freedom Act: In Brief.* CRS Report, Washington: Congressional Research Service, 2016, 1-2.

Dakota explicitly defined digital products and then established an exemption for them. Recent years have brought changes in that the government of North Dakota enacted a bill that requires out-of-state sellers that do not have a physical footprint to collect and remit sales taxes.[23]

Having briefly discussed the European and American initiatives related to taxing digital services, other countries have already implemented legislation related to taxing digital services. Starting January 1st, 2018, Brazil has a federal law that allows cities to create a minimum service tax for companies that provide video, imaging, sound and text for downloading.[24] The two largest cities, Sao Paulo and Rio de Janeiro, have both imposed this minimum service tax which is paid by these companies. Another South American country, Colombia, has implemented a law a year prior that requires that digital services provided by a non-resident company to a Colombian beneficiary is subject to VAT tax.[25] The law stipulates that credit and debit card issuers and other payment processors, such as PayPal, need to withhold VAT for these services.[26] The regulation exhibits in terms of its implementation several challenges as it requires these service providers to determine the exact type of purchase made by the user.

There are several more countries being in the stage of implementing a tax on digital services, where the tax falls either in the category of VAT or as a separate tax.

Significant Digital Presence

Existing corporate tax rules rely extensively on the physical presence of a corporation without reflecting the value created by the user participation. Non-residents are considered to be tax liable in a country, only if they have a permanent establishment there.[27] Digital activities may be carried out in a country without ever having set a foot in the country and hence the rules fail to address this occurrence and require a new indicator for economic presence such that the business pays its fair share of taxes for its activities. While determining the tax status of a company is one aspect, attributing the profits derived by the business in the country is a different challenge. The existing regulatory framework specifies transfer pricing rules in order to attribute the profits of multinational corporations.[28] The attribution to the various countries is based on an analysis of the functions, assets and risks within the value chain of the group and a separate entity is hypothesized for applying the OECD Transfer Pricing Guidelines[29]. The major issue is that digital business models have substantially different characteristics as compared to traditional ones in terms of how value is created. The strong reliance on intangible assets, such as user data and advanced data analytics methods in order to extract value from the data, leads to a situation, where these businesses may not easily be compared with conventional brick and mortar businesses. Hence, the application of the existing regulatory framework leads to a distortion of competition and negatively affects public revenues. Given that more and more multinational companies are driven by these business patterns, the difficulty in valuing the contribution is significant.[30]

[23] McLoughlin, Jennifer. *North Dakota Digital Sales Tax Enacted With Postponed Date.* April 12, 2017. https://www.bna.com/north-dakota-digital-n57982086576/ (accessed February 3, 2019).
[24] KPMG. *Brazil: ICMS imposed on electronic commerce, digital goods (São Paulo) .* March 28, 2018. https://home.kpmg/xx/en/home/insights/2018/03/tnf-brazil-icms-imposed-on-electronic-commerce-digital-goods-sao-paulo.html (accessed Februar 2, 2019).
[25] Sanchez, Luis. *Colombia's Tax Authority issues draft resolution on VAT collection on electronic digital services provided from abroad.* October 18, 2018. https://taxinsights.ey.com/archive/archive-news/colombias-tax-authority-issues-draft-resolution-on-vat-collection.aspx (accessed February 2, 2019).
[26] AICPA (2018), 13-15.
[27] OECD. *Model Tax Convention on Income and on Capital.* New York: Organisation of Economic Cooperation and Development, 2016, Article 5.
[28] EC COM(2018) 147 final. *Proposal for a council directive laying down rules relating to the corporate taxation of significant digital presence.* Brussels: European Commission, 2018, 1-2.
[29] OECD. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 .* Paris: OECD Publishing, 2017.
[30] OECD (2016), 1-5.

The European Union has pushed forward a proposal in order to address this issue and establish a new nexus for taxation of digital businesses operating across borders. The major difference compared to existing regulations is that they have a non-physical commercial presence, and the European Commission argues that the new indicators are necessary in order to protect the taxing rights of member states for new digitalized business models.[31] The European Union also outlines the principles of attributing profits to a digital business that aims to better capture the value creation of digital business models[32].

The scope of the proposal affects any corporation both within the European Union as well as outside, given that there is no double taxation agreement that has a significant digital presence. The concept of significant digital presence represents a new nexus for taxation and is a complement to the existing permanent establishment concept. The proposal sets out that an enterprise is assumed to have a significant digital presence if they meet revenue thresholds obtained from digital services, numbers of users of digital services and the number of contracts of digital services. The reason for choosing three different parameters for determining the taxable nexus is due to the fact that digital businesses are quite diverse and may come in various forms. The proposal by the European Union foresees that the minimum revenue threshold shall be set to 7 million Euros and the number of users of digital services shall exceed 100,000 in the tax period. Furthermore, the number of business contracts for the digital services shall be greater than 3,000. If any of these thresholds is met within a jurisdiction of a member state, then this implies that the enterprise has a significant digital presence.[33] The argument is that the revenue threshold is set sufficiently high in order to cover the cost of an additional permanent establishment. The threshold for users was based on the premise that each user returns a certain value in monetary terms and the summation of these values lead to an approximate revenue value as set out in the first threshold. The same is true for business contracts as the assumptions is that the value of business contracts is far more substantial as compared to user contracts and would therefore amount to approximately the same.

Artificial Intelligence utilized in the area of taxation law

Artificial intelligence has in recent years assumed great significance in the legal and judiciary system. Artificial intelligence is defined as the study of intelligent agents which is any device that observes its environment and undertakes actions in order to maximize the probability that it reaches its objectives.[34] This implies that these systems utilize the data provided to them in order to undertake actions, and may in the legal system be used for legal research and due diligence, review documents and contracts as well as predict legal outcomes. In the area of legal research, these systems may read over million pages of law and extract the relevant passages needed. The main focus in this instance is on rapidly finding information that is relevant for the subject matter, and hence reduce the time it takes for fact finding. The second area that is of great interest for artificial intelligence systems is the reviewing of contracts and documents. This allows a machine to scan an existing document, and then find documents that are similarly relevant. A third major area is the prediction of legal outcomes, as well as the assistance of law officials in drafting new laws via determining their effect on future instances. This feedback related to the drafted laws may assist in fine-tuning the existing laws and reduce loopholes related to legislation.[35]

[31] EC COM(2018) 147 final, 2.
[32] EC COM(2018) 147 final, 3.
[33] EC COM(2018) 147 final, 7.
[34] Russel, Stuart, and Peter Norvig. *Artificial Intelligence: A Modern Approach.* New Jersey: Prentice Hall, 2003, 34-35.
[35] Law Technology Today. *Three ways law firms can use artificial intelligence.* February 19, 2019. https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/ (accessed April 27, 2019).

Related to taxation, artificial intelligence has been utilized in a variety of cases. For compliance purposes artificial intelligence is used for analyzing company data and label it. Subsequently, the labeling allows the provider to determine the employment tax obligations relatively easily for a company, which in turn allows the company to manage its tax position as well as control the costs. While the majority of labeling may be done automatically, there is still human intervention required where the labeling is not complete or cannot be performed.[36]

While all these developments are promising, one should always take into account the dis-connects between algorithmic decision making and the function of law.[37] In almost all instances of law, the authorities are required to adhere to a process that establishes norms and guidelines that all have to follow. Algorithmic decision making on the other hand is not based on the process but in terms of the outcome, and the success is determined by whether the system complies with specific examples or not[38]. The challenges that arises from this is that the decision process is circular. This implies that the decision of what is right, is based on the decision of someone else deciding what is right. Given the necessity to reasonably manage the complexity of an algorithmic decision system, this may have to be taken into account. Another distinction between algorithmic decision making and function of law is that most laws are partially articulated vaguely in order to allow for context and nuance for taking decisions. Such vagueness is however not possible to be implemented properly for artificial intelligence systems, nor can decisions be justified if this arbitrariness is incorporated.[39] While the aspect of process and vagueness may in certain circumstances be beneficial in law, the ability of artificial intelligence systems to efficiently and thoroughly assist decision makers may lead to more consistent judgements of the law.

Research Questions

The research questions posed in this paper revolve around the international taxation of digital services. The first research question is whether a digital service tax or the nexus of significant digital presence is more adequate in the context of international taxation of digital services. The question arises whether digital services shall be subject to a user tax, or whether a profit-based tax is more beneficial. In the case of the profit-based taxation, the major question arises to what extent the nexus of permanent establishment needs to be modified.

The second research question revolves around the impact of artificial intelligence on adapting tax treaties in order to achieve fairer taxation for digital services.

The third research question addresses the impact of the taxation of digital services on developing versus developed countries. A major question addressed in the research will be the impact of the modified trans-pacific partnership (CPTPP) on the taxation of digital services on the parties and impact on the tax treaties with China.

Digital Service Tax versus Significant Digital Presence

The first research question deals with whether a specific digital service tax or the concept of a significant digital presence may be more adequate in the context of the international taxation of digital services. This fundamental question in taxation law depends on the implementation of both regimes as well as how it can be best executed in an international setting. Necessarily, enforcement capabilities, ensuring oversight and justifying the legitimacy of the taxation regimes to the stakeholders are equally important. A fundamental question is whether a sales versus profit tax is more adequate in order to achieve fairness of taxation and compare this to existing approaches worldwide in dealing with digital services. Given the novelty of this type of service, there is still considerable disagreement on how to handle these

[36] Van Trigt, Jan, David Miller, Stuart Black, and Albert Fleming. *Artificial Intelligence - entering the world of tax.* Report, London: Deloitte Touche Tohmatsu Ltd., 2017, 4-5.
[37] Venkatasubramanian, Suresh. *Structural disconnects between algorithmic decision-making and the law.* Armed Conflict Series, Boston: International Committee of the red cross, 2019.
[38] Venkatasubramanian 2019, 2.
[39] Venkatasubramanian 2019, 2.

services. Opponents of sales taxes argue that this may create additional burden for businesses and will make services for users more expensive, while proponents of sales taxes argue that these services and generated revenues from users are similar to existing services provided to users already, and hence not taxing them would be discriminatory[40].

The hypothesis outlined in this paper is that a separate nexus for a tax for digital services and a digital service tax is necessitated in order to overcome the challenges arising from the lack of consensus with respect to the development of a new nexus related to permanent establishment.

The hypothesis will be empirically tested using the results from the survey and data collection and complemented by a qualitative analysis of recent legal developments.

Impact of artificial intelligence in the development of tax treaties for greater fairness in the taxation of digital services

The second research question addresses the question of how international or bilateral tax treaties shall be modified in order to ensure fairness in taxation of digital services. The main focus will be on tax treaties between China and other nations given the extensive penetration of digital services in China as well as growing outward export of its services. Balancing the interests of the individual nations is rather critical in light of the growing penetration of these services and the current lack of firm international best practices related to it.

The hypothesis set up is that artificial intelligence assists the existing law drafting process for bi- and multilateral taxation treaties in order to ensure fairness of taxation related to digital services. Using the existing data, an artificial intelligence system will be utilized in order to examine the quality of assistance related to drafting law for digital services.

Research Design/Methodology

Taxation of digital services have attracted significant interest by governments given the perception that new business models may bypass existing regulations in order to reduce their taxation levels.

For the research design, an empirical research approach related to legal studies will be utilized. Empirical research design in legal studies has grown in recent decades in importance and has led to significant research results in law studies.[41] The first crucial step in empirical legal research is to formulate the research questions that should be both relevant to real world and contribute to an existing body of the scholarly literature. Based on the research question, a falsifiable hypothesis has to be derived that shall be stated clearly enough such that the proposed answer to the research question can be investigated in terms of its truthfulness. Furthermore, the relationship between an outcome (dependent variable) and several explanatory variables (independent variables) has to be specified.

In case the evidence is strong enough that the falsifiable hypothesis is not able to be rejected, then the established theory may be more and more plausible. If the theory has several observable implications and if the hypotheses derived from it are not able to be rejected, then the theory may be rather strong.

Most empirical legal research can be divided into three main types that consist of the judicial opinion coding, descriptive statistics and inferential statistics.

The first major type of empirical legal research deals with the characterization of judicial opinions depending on the basis of their content. The judicial opinion is first analyzed in terms of its content, then codified in order to be used in a subsequent analysis. The advantage that this type brings is that the number of raw data, hence cases, is quite substantial and given the heterogeneity in terms of developments in the various jurisdictions, this can provide essential clues about these areas. A

[40] Kim, Young Ran. "Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate." *72 Alabama Law Review*, 2020.
[41] Heise, Michael. "The Importance of Being Empirical." *Cornell Law Faculty Publications*, 1999: 807-833.

challenge this type of research encountered is that it relies heavily on the subjective determinations of the statements of judicial opinions[42].

A second major type of empirical legal research is the descriptive usage of data. This implies that one or more variables are described or presented according to the properties they possess. The arising properties may convey crucial information such as the means, medians, modes, rates and frequency counts, and these data may well illustrate the correlation between two or more parameters[43].

A third type of empirical research is the inferential usage of statistics. The research may focus on deriving generalizations based on data drawn from a sample of cases or the subjects of the object population. Essential in this regard is to ensure that the sample is drawn from the sample population in a random form. The usage of inferential statistics then allows to make interferences regarding selected attributes of a population solely on the information obtained from the random sample.

Within this article a combined case content analysis - inferential statistics approach will be utilized for addressing the research questions. The research design will first consist of a survey addressing the first research question. The survey will encompass various parameters that are analyzed based on the response from individuals. The aim is to provide a statistically significant recommendation on how to approach the current issues with the taxation of digital services. Furthermore, the survey will also encompass data related to achieving fairness of taxation for digital services given the existing treaties.

The survey encompasses forty respondents that were randomly selected. The sample size is sufficient in order to reach an effect size of 0.5 and power of 0.6 for the employed t-test for testing the hypotheses.[44] The one-tailed t-test allows the testing the statistical significance into one direction, allowing for a binary outcome, such as in the considered cases, to be tested. One of the tests is testing the hypothesis that the digital service tax may be preferred from a legal as well as fairness point of view as compared to the nexus of a significant digital presence.

Results

Digital Service Tax versus Significant Digital Presence

Service taxes, such as the digital service tax, as well as other consumption taxes are indirect taxes as compared to corporate taxes that are directly incurred from the corporations.[45] The term “service” is characterized legally typically by two factors. The first, a service needs to be a real activity. Secondly, the activity has to be performed in order to benefit someone else than the provider of the services.[46] In the digital space, the difference between a digital good or service may sometimes be non-existent or may have a dual characteristic. While many nations have implemented regulations relating to the taxation of services, that include digital services as well, the digital services under consideration may in many instances be similar or equivalent to digital goods. These digital services encompass a limited portion of the revenues companies make from digital services provided to users. For individuals purchasing services from abroad with a distinctive transaction source originating from their country, the existing taxation frameworks may be able to trace these transactions. Global digital service providers may in many instances receive most of their revenues from advertising and utilization of user data for marketing purposes. Furthermore, the user data may be utilized in services for companies that may have their billing address and revenue allocated in another jurisdiction. This implies that although the user data and revenues may be sourced from the jurisdiction of the user, the revenues may not be taxed in the jurisdiction but solely in the jurisdiction of the billing address.

[42] Heise (1999), 825-826.
[43] Heise (1999), 827.
[44] Kenny, David. *Statistics for the social and behavioral sciences.* Boston: Little Brown, 1987, 207-2010.
[45] OECD. *Adressing the tax challenges of the digital economy.* Paris: OECD Publishing, 2014.
[46] EY. *Worldwide VAT, GST and Sales Tax Guide.* Report, London: Ernst & Young, 2019.

When addressing the matter of a digital service tax, the main underlying question is whether the revenue generated from the utilization of user data and revenues received from advertisement can be perceived as an indirect payment of individual users for utilizing the services. Given the current proposals for digital services taxes, the approaches would all be directly applicable to the revenues generated from certain digital services, especially taxation and search engine remunerations. Considering that the taxation base is revenues this would then amount to an additional consumption tax, or tax provided for services. The main fundamental question is why existing consumption taxes do not already sufficiently capture the revenues arising from digital platforms for several governments. The main public recognition is that digital platforms provide very distinctive economic characteristics that are not sufficiently captured with the existing legal taxation frameworks. These characteristics are amongst others the network effects that generate market power, multi-sided business models that allow pricing choices to maximize profit and negligible marginal cost as well as geographical mobility[47]. Existing taxation concepts may not or only partially take into account these characteristics, and hence companies may be able to shift their revenues and profits to constituencies with preferential tax treatments.

Given the declared empirical approach to investigating whether a direct taxation approach via a digital service tax or a change of the nexus to a digitally significant presence is preferred, the results of the survey will be discussed below and analyzed. Furthermore, the analysis will be complemented by putting the results in context with existing legal theories and law developments.

When analyzing the responses from the questionnaire, several trends are observable. The first major trend is that the majority, thirty-one, of the respondents recommend a digital service tax as compared to relying on the adaptation of permanent establishment clause. When inquiring about the reason for preferring either a digital service tax or digital significant presence, one determines that most of the respondents have the opinion that the digital service tax and local implementation of a digital service tax (similar to domestic value added taxes) may easier to be realized as compared to achieving a global consensus on adapting the nexus of permanent establishment. The results correspond with the wider opinion of many governments pushing for the introduction of a digital service tax. Given the governments legal right to be solely responsible for consumption taxes related to domestic consumption, the digital service tax approach allows to introduce a consumption tax related to the usage of consumers of its services, while avoiding to directly tax the profits of the corresponding companies. The digital service tax further does not distinguish between domestic and foreign companies, given that the place of taxation is the location of the consumer of the services, which additionally makes it rather attractive in order to avoid the impression of discrimination against foreign companies.

In contrast, the survey respondents outlined in their preference for the significant digital presence that it encompasses a broader base of taxation, based on the nexus of significant digital presence. The argument is that this allows for the more comprehensive taxation of digital goods and services, while maintaining the existing taxation based on permanent establishment. An additional argument presented is that the nexus of significant digital presence can be easier incorporated into double taxation treaties. The main opinion supporting this argument is that it broadens the definition of when a company is fully taxable in a jurisdiction and broadens the tax base for it. Furthermore, the approach would be in close alignment with the recommendations by the OECD, and even though the approach may take longer, the survey respondents argued that it may be preferable over instituting additional consumption taxes.

When surveying the percentage amount of revenue that shall be taxed by the digital service tax, the majority of respondents recommended to charge less than 3 percent but more than 1 percent. The main justification for the stated percentage range is that an additional consumption tax should be sufficient enough in order to receive the justified taxation amounts resulting from the profits the companies generate in the jurisdiction, while avoiding high taxation levels that may reduce the attractiveness of operating in the country as well as lead to tax evasion. When dealing with taxation rates, it is essential to determine them based on the scope of the proposed taxation. The more comprehensive the taxation

[47] Cui, Wei. *The Digital Services Tax: A Conceptual Defense.* Faculty Publications, Vancouver: Peter A. Allard School of Law - University of British Columbia, 2018, 1-2.

will be, the less should be the taxation rate. While the amount may be less than what has been put forward in other countries such as in Malaysia, the scope of the proposed digital services tax may be significantly broader as compared to that of other nations[48]. In the case of Malaysia, the Malaysian government primarily aims at digital services that are provided by foreign service providers in order to remove the existing gap that foreign service providers are not responsible for the service taxes. Being applied to solely foreign service providers, the tax is intended to counter foreign companies that derive revenues from Malaysia but do not pay any taxes in the country. An essential aspect outlined when analyzing the survey respondents is that both domestic and foreign digital service providers should be treated equally in terms of taxation of digital services. Given the international nature and ability to provide services within an instant from any point in the world, ensuring that there is no nationality attached to taxation is quintessential for the development of international taxation treaties, as well as avoid legal challenges resulting from existing treaties.

When addressing which services shall be encompassed by the digital services tax most of the respondents indicated that revenues from the utilization of user data shall be included, while advertising revenues are mentioned second most often. Search engine as well as referencing services generate significant revenues via allowing companies to let their services and company information be ranked higher in the search results as compared to that of other providers, as well as utilize user data for their service provisioning.

Most of the respondents indicated that search engine related revenues as well as advertising revenues shall fall within the mentioned category. Considering large digital service providers, such as Google, Facebook and Twitter, the mentioned revenue categories encompass most of the revenues of these companies that are typically directed into low tax constituencies. The main legal reason is that value generation is occurring at the consumer's site, and not the place where the company declares the revenues to be taxed[49]. While an argument has been that the user data's value is too attenuated in order to justify the institution of corporate taxes, many companies are creating significant income or even their primary income base arises from the utilization and commercialization of user data. Even the argument that users may opt out from providing the data, may not be convincing, since it is nearly impossible to not use digital services in one's life, which renders it non-optional to not keep a digital footprint. Therefore, user data's value is significant as well as allows the generation of considerable income from the commercialization of them.

The next question addressed in the survey was how to incorporate the digital services tax into bilateral or multilateral double taxation agreements. The expectation was that there will be a difference in viewpoints with respect to whether solely treat digital service tax as a value added tax or whether allow it to be accounted for in repatriated profits. In the case of a value added tax, then this would be like any other value added tax for products, which would make it rather unlikely to be incorporated in any double taxation agreements. The main viewpoint of the respondents was that a digital service tax shall be a value added tax, and not be relevant for a double taxation agreement, given that it is a domestic consumption tax. The nexus of permanent establishment does not have to be modified in such an instance, which provides governments with the time to engage in constructive discussions and aim at a comprehensive solution regarding the modification of the nexus of permanent establishment. As mentioned by the survey respondents, the current rather intensive discussions regarding a digital service tax are primarily the result of the stalled progress with respect to the change of the nexus of permanent establishment at the OECD level. Addressing potential complaints of governments, whose companies may be adversely affected by such domestic charges, a dual charge of revenues should be avoided. This requires that if both governments charge a digital service tax and the revenue charged

[48] Baker & McKenzie. *Service Tax on Imported Digital Services.* April 15, 2019. https://www.bakermckenzie.com/en/insight/publications/2019/04/service-tax-on-imported-digital-services (accessed May 13, 2019).
[49] Connon, Davida, and Simeon Djankov. *Tax policy should recognize the true value of user data.* December 27, 2018. https://blogs.worldbank.org/developmenttalk/tax-policy-should-recognize-true-value-user-data (accessed June 30, 2019).

overlaps between the jurisdiction, then respective tax rebates should be incorporated into the double taxation agreement.

For the question of addressing the legal challenges arising from a digital service tax, there were several key challenges that were mentioned most. A major potential challenge is that a digital service tax may argued to be discriminatory as it treats certain businesses differently. This may be argued in terms of nationality as well as size of the businesses, which may in the European Union lead to challenges. Another challenge that was expressed by the survey respondents were technical grounds that may arise from companies outlining that the revenues do not fall under the scope of the law. A further challenge that may arise is the matter state subsidies where certain provisions in the digital service tax may allow certain companies to be better off than others. This may then be argued to result into unfair subsidies. Another final challenge raised by most respondents is the impact of tax treaties on the implementation of a digital service tax. For example, a company may ask to invoke conditions of a tax treaty with another country to outline that the other country does not have the right to tax the revenue or income. The resulting question is what kind of tax the digital service tax is considered, in particular a consumption or revenue-profit based tax [50].As seen in the latest implementations of a digital service tax in France, there may be significant disagreement by other nations whose companies might be affected by these taxes [51]. In particular, the United States government argues that the digital service tax in this form, disproportionally affects American companies and amounts to an unfair trade practice. The threshold levels stipulated in the law encompass both a global revenue level of 750 million euros, and 25 million in France. The main challenge arising from this definition is that a global revenue threshold may give the impression that it targets large global corporations to generate additional revenues, while failing to outline the relationship to the revenue generated from domestic consumers. Determining the revenue generated from domestic consumers may be rather challenging, given that the revenue is declared in another jurisdiction, and many governments consider defining the application of the tax in terms of general revenue levels as easier to be enforced.

For the question whether a digital service tax improves or worsens fairness of taxation most of the respondents replied that fairness of taxation will improve given that it allows countries to avoid losing out on taxes due to bilateral income tax treaties or lack of jurisdictions. The justification is that the tax allows the place of taxation to be shifted to the place where the value is generated, which is the user site. Furthermore, even in the case that companies shift their revenues into low-tax jurisdictions, the digital service tax will still apply since it is based on location of the user. This supports the growing pressure to change the nexus of permanent establishment to one related to significant digital presence, irrespective of whether the company has a physical presence in the country or not.

The next related question dealt with the impact artificial intelligence has in determining whether a digital service tax is preferred over the utilization of the nexus of a significant digital presence as well as the integration of artificial intelligence technology for the development of treaties and laws. Several respondents outlined the ability of artificial intelligence to scan through thousands of treaties and law and extract important sections that may be utilized for the development of the laws. Further mentioned is the usage of artificial intelligence methods for determining the user related derived revenues in order to reduce tax evasion attempts by corporations. In particular, this involves the scanning of user data related revenue information and avoid under- or false reporting of revenues. The ability to very efficiently investigate user data and relate them to the cases under investigation allows law professionals to more efficiently develop new regulations as well as ensure that taxation laws and bilateral taxation treaties are in alignment.

[50] Ali, Hamza, and Isabel Gottlieb. *How Amazon, Facebook Could Challenge Europe's Digital Taxes.* January 22, 2019. https://news.bloombergtax.com/daily-tax-report-international/how-amazon-facebook-could-challenge-europes-digital-taxes (accessed May 16, 2019).

[51] Alderman, Liz. *France Moves to Tax Tech Giants, Stoking Fight With White House.* July 11, 2019. https://www.nytimes.com/2019/07/11/business/france-digital-tax-tech-giants.html (accessed July 13, 2019).

The final question deals with tax evasion measures that may be incorporated into law development of a digital service tax in order to counter some of the existing challenges encountered by governments. The main recommendation is to set safeguard measures for exchange of information related to taxable subjects. A major challenge existing taxation treaties face is the lack of information regarding the jurisdiction's taxable subjects and their taxation levels. This is even more substantial for digital service providers that may utilize this lack of intergovernmental cooperation in order to bypass to pay their required taxes.

The survey results outline the growing preference to overcome the challenges and differences in opinion between the members of the OECD via the implementation of domestic consumption taxes. As compared to profit-based taxes that may cause concerns related to double taxation, a digital service tax is levied on the consumer and hence an entirely domestic issue. While there will disputes related to additional taxes that have to be paid by companies, the reference to the domestic nature of the taxes will be a decisive point.

Fairness of taxation – Artificial intelligence approach to the development of a digital service tax

Fairness of taxation is amongst the most crucial aspect of any developed tax system. With taxation systems becoming more and more complex as well as introduction of digital service taxes, there may be major challenges for conventional law development. The challenges for the development of a digital service tax are manifold and encompass areas such as discrimination, technical grounds, state aid, tax treaties and the regulations set up by the world trade organization. These challenges may be significant and render the law unenforceable or even requires it to be withdrawn. Given these obstacles, the major question arises how artificial intelligence may assist in the development of regulations related to digital service taxes. The first area of assistance is in the research phase relating to documents and laws being relevant or affected by a digital service tax. Natural language processing (NLP) plays here a crucial role. NLP extracts information from large amounts of data and text, and then processes it in order to relate the various information. In the case of a digital service tax, treaties and laws may be searched in terms of containing information such as "service taxes", "value added taxes" and "double taxation". The processing may be more refined depending on the search results, with several parameters being utilized. The document processing phase may even be more extensive if a paragraph or document is uploaded and then utilized for queries in order to extract the relevant sections [52]. These systems have been greatly extended, in the sense that someone may ask a legal question and the system then provides legal information related to the question, as well as a legal recommendation. While for several law areas the approach may result into adequate recommendations and statements, given the relative novelty of the research area, this may pose a challenge for the existing methods. Most of these methods rely on extensive number of cases and documents that may not be available for these systems to learn and derive conclusions.

Digital technology and artificial intelligence have in the tax area shown great potential in ensuring strengthening compliance of companies in multiple jurisdictions. For value added taxes, the traceability of transactions provides a strong incentive in becoming more tax compliant [53]. Additional findings outlined that if the probability of detection of the evasion of taxes is low, then taxpayers may be even more inclined to evade taxes. A similar issue currently arises from digital services. The transactions of users are in many instances not explicitly traced by the providers, and due to the in many instances different jurisdictions the authorities may not have any traces regarding the transactions. While foreign purchases of digital services may be traceable based on a credit or debit card transaction, or bank transfer, value generation created by user interaction may be more difficult to be traced since the transactions may not fall within the jurisdictions at all.

[52] Dale, Robert. *Law and Word Order: NLP in Legal Tech.* December 16, 2018. https://towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06 (accessed May 19, 2019).
[53] Pomeranz, Dina. "No Taxation without Information: Deterrence and Self-Enforcement in the Value Added Tax." *American Economic Review* 105, no. 8 (2015): 2539-69.

When dealing with artificial intelligence techniques for the development of a digital service tax, then most of the use cases may be addressed by either predictive or prescriptive techniques. Predictive techniques are used for the anticipation of problems and allows for the tax administration to decide which actions to take and when. Such techniques may be used for the estimation of revenues derived from individual users, as well as the location of these users. Predictive artificial intelligence techniques are rather crucial allowing to recognize patterns in the user data, and the revenues the service companies receive for these users. Prescriptive artificial intelligence techniques then allow to take actions and understand the causes of these actions. The latter is rather crucial in order to determine the best approaches in ensuring compliance of companies with the digital service tax, as well as allow to institute actions in order to proactively allow for the collection of digital service taxes. Current digital service tax proposals are strongly reliant on the data provided by the companies in order to determine the taxable amounts. The challenge that arises is that companies may report varying degrees information in order to minimize their taxation needs outlining that their in-country generated revenues may be lower than in reality. In this instance, artificial intelligence techniques may be of significant assistance in analyzing the extent of access to the services of a service provider from users in the country, and hence is able to estimate the necessitated taxes[54]. The French implementation of the digital service tax has outlined for digital interfaces and targeted advertising two different calculation methods. In both instances the total turnover related to the portion of taxable services of the company is considered and multiplied with the proportion derived from France. For digital interfaces, the proportion may be either calculated as the ratio of the number of transactions involving at least one French user by the total number of transactions, or the number of French accounts divided by the total number of accounts[55]. For targeted advertising the ratio may be calculated as either the ratio of advertising messages targeting French users by the total number or the number of French user data that was collected divided by the total number of users for which the data were collected. Determining these ratios pose the greatest challenge and predictive techniques may be utilized for estimating these ratios or check the company's provided data in terms of accuracy and plausibility. Existing website access tracking methods are easily able to determine the IP address of the accessor, and therefore the ratio of users accessing the website from a specific country may easily be determinable. While data of individual users may cause legal challenges due to the data privacy regulations of the European Union, the aggregated form of the data as well as limited details may render it easily retrievable.

The main fairness challenge is whether the simple ratio allows to properly attribute revenues generated in the country from the user interaction, which may pose challenges. The assumption for the ratio calculation is that the value of each user is the same irrespective of the individual user, as well as the value generated from various countries for a single user is regarded as the same. Just considering various purchasing powers across multiple countries, the revenue generated due to a single user in the United States may be significantly higher as compared to India, even though the number of users may significantly be higher in India. Therefore, the amount of taxes paid in India may be significantly higher as compared to those in the United States, even though the generated revenue from the users in the United States may be higher. Therefore, the type of tax may be similar to a poll tax as it solely based on users and not the value generated.

In order to overcome this challenge, the usage of artificial intelligence techniques may assist in more closely connecting revenues to the users they have generated it from. In doing so there needs to be a differentiation between advertising and providing digital interfaces where the user data are utilized implicitly for providing services. For advertising revenues, artificial intelligence methods can easily be determined based on the user access and IP address of this user. As each access causes certain revenues, artificial intelligence methods may rather easily allow the companies to determine the attributable revenues and arising taxation. For revenues related to digital interfaces a different approach may be applied. For digital interfaces there is no direct connection between the user access and the

[54]OECD, *Advanced Analytics for Better Tax Administration: Putting Data to Work.* Paris: OECD Publishing, 2016.
[55]KPMG, *France: Digital Services tax (3%) is enacted.* July 25, 2019. https://home.kpmg/us/en/home/insights/2019/07/tnf-france-digital-services-tax-enacted.html (accessed July 27, 2019).

derived revenues from it. Hence, an implicit relationship must be developed between the user accesses and the derived revenues. While this differs for various situations and the application under consideration, artificial intelligence methods allow for deriving patterns and relationships between the former and estimate the approximate taxation base. While there are several potential approaches in establishing guidelines for the derivation of the taxation base, a flexible approach may be recommended in order to encompass the variety of different digital interface models. Nevertheless, all models should encompass the number of accounts registered as well as the number of users accessing the website as the basis for determining the attributable taxation base.

The advantages of such a differentiated approach to taxation are manifold given the significant diversity and business models under consideration, as well as ensuring that a stable taxation framework is established for the digital economy. Ensuring the stimulation of innovation, avoiding market fragmentation and allowing all players to enter the market under fair and balanced conditions is vital to create a stimulating market environment.

Avoiding sole access-based models allows companies to more accurately calculate the revenues generated from the user interaction. In particular, multiple companies may evaluate the value generated by individual user data differently and use various ways to commercialize these data. Allowing to use AI based models to more accurately connect user interaction and derived revenues will enable tax authorities to fairer calculate digital service tax related revenues and avoid over- as well as undertaxation. Necessarily, guidelines related to the model application as well as allowed influencing factors are crucial in order to also avoid tax evasion.

Conclusion

Digital services have grown in importance across the world and created new business models. Given the intangible nature of these businesses and the ability to provide services from anywhere in the world has challenged conventional taxation frameworks and led to growing calls amongst governments to reduce the perceived imbalance with respect to the profits generated by these companies as compared to the taxes they pay. The article provides an inferential – case study approach to deal with the question whether a consumption or profit based approach to taxation is preferential, as well as what impact artificial intelligence methods may have on assisting in achieving greater fairness in the taxation of digital services. The results clearly outline a preferential view of the digital service tax as compared to a significant digital presence due to the growing resemblance that the services should be taxed based on the user interaction as compared to a fictious location of the company that provides these services. Furthermore, artificial intelligence methods may definitely play a beneficial role in avoiding tax avoidance and determining more accurately the enterprise's fair share of taxes. The article presents recommendations towards the structuring of a taxation framework for digital services supported by empirical data.

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The Concept of International Law in an Era of Populism

Lea Ina Schneider

Introduction

Nowadays, the world is experiencing a populist trend that is enhancing a nationalist viewpoint, which has contributed to the perception that international law is currently in a state of crisis.[1] The populist backlash around the world has targeted international law and legal institutions.[2] Populists attack international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people.[3] Hence, the rise of populism has raised the legitimate concern whether populist governments might contribute to a broader crisis of international law.[4] Widespread doubts and misgivings about multilateralism and international law, in general, are often attributed to the rise of populism.[5] Populist leaders have criticised international institutions and norms, and seem likely to repudiate certain international norms and treaties in the areas of trade, security, and the laws of war.[6]

This essay should be understood against this background. Populism is not a legal concept and as such cannot be grasped legally.[7] Rather, this essay explores how state behaviour that originates from a populist attitude affects international law. One major difficulty is that populists often use international law in political rhetoric. Hence, it is difficult to distinguish cases where the legal language is used as a political instrument from those where it is used to make a legal argument.[8] This problem will be overcome by having an actor-centred approach to bridge the gap between political phenomena and their legal impact.[9] Looking at populists as actors is conducive because it starts from the assumption that discursive practices, as well as political concepts, influence legally relevant practice and, thus, the overall development of international law.[10] It is underscored that international law is a fragmented regime: international legal instruments and institutions have proliferated and resulted in a growing web of overlapping and non-hierarchically organized regimes.[11] This means it is difficult to speak of international law in general which is why this essay will specify which area or institution of international law is referenced.

This essay will strive to answer the following questions:

Why and how does populism challenge the very idea of international law? What are the effects of populist governments on international law? And what role might international law play in a populist era?

These questions will be answered in an abstract way. However, where appropriate, examples of populist actions will be used to illustrate the abstract arguments. This article argues that the conception of international law as the promotion of community interests based on a shared understanding of solidarity (more than merely a law of coordination) which developed throughout the 1990s is challenged by populists. This understanding of international law goes against the identity politics of populist governments. Even though, up to now populists have mainly threatened international law on the

[1] Heike Krieger, 'Populist Governments and International Law' (2019) 30 European Journal of International Law 971, 971.
[2] Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 International Journal of Constitutional Law 576, 578.
[3] Eric Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 Arizona State Law Journal 795, 795.
[4] Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1; Harold Hongju Koh, 'Is Trump's assault on international law working?' *Oxford University Press Blog*, (England, 11 March 2019), <https://blog.oup.com/2019/03/trumps-international-law/> accessed 24 March 2020.
[5] Christine Schwöbel-Patel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer 2018), 98.
[6] Posner (n 3), 796.
[7] Oliver Dörr, 'Völkerrechtliche Grenzen des Populismus?, Der amerikanische Präsident und das geltende Völkerrecht' (2018) 73 Juristen Zeitung 224, 231.
[8] Maziar Jamnejad/Michael Wood, 'The Principle of Non-Intervention' (2009) 22 Leiden Journal of International Law 345, 347.
[9] Krieger (n 1), 973.
[10] Lauri Mälksöo, *Russian Approaches to International Law* (Oxford University Press, 2015), 2.
[11] Mark Pollack, 'Who Supports International Law, and Why? The United States, the European Union, and the International Legal Order' (2015) 13 International Journal of Constitutional Law 873, 883-884.

rhetorical level, this practice still negatively influences the environment in which international rules are interpreted.

First, as populism and international law are rather vague concepts, the article will state the applicable definitions for the purposes of this essay. Second, it will analyse why and how populists attack international law. Subsequently, the article will examine the effects of populism on international law. Finally, it will outline the role of international law in a populist era might be.

Mapping the Terrain – Terms and Definitions

The nature of populism and its definition has been the preoccupation of many scholarly debates.[12] Populism is a widely used, yet imprecise and highly disputed term, and often serves as a vague placeholder for various political phenomena that are considered to be anti-establishment.[13] Müller defines populism as a political concept that creates two groups in the state: the morally pure, homogenous people and the immoral, corrupt elites. The first group must fight the latter.[14] The populists claim to be the representative of the people and the only ones who recognize the true will of the people. Therefore, disqualifying any opposition is illegitimate and even undemocratic.[15] Populism is therefore above all anti-elitist, anti-pluralist and is based on a moral claim to sole representation.[16] This article will apply Besson's definition of international law which states that international law has to be defined as the legal order which aims to structure the interaction between entities participating in and shaping international relations.[17]

Why and How Populists Attack International Law

International Law as a Tool of the Globalised Elite

Populists draw the picture of international law being the instrument of global intellectual technocratic elite.[18] They argue that elites across the world create interpret and enforce international law not as an incentive to benefit everyone or reflects the values of the global population, but to create international law that benefits themselves and reflects their values.[19] Populists blame globalisation and international law for insecurity and economic dislocation in order to undermine the establishment elites who constructed them.[20] Populists have convincingly argued that international institutions (and the process of globalisation they have facilitated) have benefitted elites while leaving behind ordinary people.[21] The anti-globalist sentiment appears strong and undercuts that the basic premise of some international law scholars that people internalize international law is questionable.[22] By arguing that international legal rules are a creation of intellectual, technocratic elite that is out of touch with the real world, populists aim to delegitimize constraints that international law places on political decision-makers.[23]

[12] See e.g. Rogers Brubaker, 'Why Populism?' (2017) 46 Theory and Society 357.
[13] Cas Mudde/Cristóbal Rovira Kaltwasser, *Populism, A Very Short Introduction* (Oxford University Press, 2017), 9.
[14] John B. Judis, *The Populist Explosion, How the Great Recession transformed American and European Politics* (Columbia Global Reports, 2016), 1-4; Jan-Werner Müller, *What Is Populism?* (Penguin Books, 2016), 1-7.
[15] Müller (n 14), 20, 29.
[16] Jan-Werner Müller, 'Was ist Populismus?' (2016) 7 Zeitschrift für Politische Theorie, 187.
[17] Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson/John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 163.
[18] Krieger (n 1), 971.
[19] Robert H. Bork, *Coercing Virtue, The Worldwide Rule of Judges* (Aei Press, 2003), 15-19; John O. McGinnis/Ilya Somin, 'Should International Law Be Part of Our Law?' (2007) 59 Stanford Law Review 1175, 1238-1239.
[20] Posner (n 3), 816.
[21] Nina Pavcnik, 'How Has Globalization Benefited the Poor?' *Yale Insights*, (United States, 28 April 2009), <https://insights.som.yale.edu/insights/how-has-globalization-benefited-the-poor> accessed 10 March 2020.
[22] Posner (n 3), 805; Richard Wike, 'Global Opinion Varies Widely on Use of Torture Against Suspected Terrorists' *Pew Research Center*, (United States, 9 February 2016), <www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/> accessed 9 March 2020.
[23] Krieger (n 1), 971-972.

Ironically, however, international law has tried to limit the influence of some of the most powerful collective actors, states, and strengthen the international legal status of the same everyday individuals celebrated by populists. Human rights norms have sought to protect individuals from excessive governmental power and to give common people a protected international legal status.[24] Hence, this provides a potential point of intersection between the goals of populism and international law.

The current anti-elitism associated with populist backlash is more than a general antipathy towards international technocracy that is strongly associated with international law. The backlash against elites is placed in the context of powerful regional and international institutions that make seemingly undemocratic decisions. Particularly since the Global Financial Crisis, ordinary people have begun to doubt whether their politicians have a great deal of power in the face of global financial power players such as large corporate banks and multinational corporations. Critics drew the conclusion that only the very wealthy in western countries benefit from globalisation. Within this context, doubts and misgivings about multilateralism have fallen on fertile ground.[25]

Furthermore, populists attack international law as rule by technocracy. The functioning of international law relies on trust and mutual goodwill, while populists see corruption and bribery everywhere and are critical of the role of experts.[26] Populists in various countries have often blame foreign influences and international institutions for their nation's problems.[27] In recent years, populists have targeted institutions such as the European institutions, International Monetary Fund, International Criminal Court, and mocked and belittled international legal norms, including human rights law.[28]

Additionally, international law is inherently pluralistic in nature and assumes that different countries have legitimate national interests, which seeks to promote cooperation, accommodation, and reconciliation. However, populists reject pluralism and have difficulty recognizing that the interests of foreign nations are also legitimate; or there is an inherent value in an international order that respects differences among nations. Populists tend to see foreign countries as rivals or enemies, and the international order as a series of contingent deals rather than a supranational system of law.[29]

Furthermore, populists claim that international law is an illegitimate intervention in a state's sovereignty. By associating the people's will with state sovereignty, any norm that contradicts this will is violating the state's sovereignty.[30]

Democracy Deficit

A huge drawback of the international legal system, especially the European system, has been what is commonly referred to as the 'democracy deficit'.[31] This idea suggests that the public is not represented in the international level and does not have sufficient means to contribute democratically in the process of its content.[32] The best evidence for the political weakness of the European system is survey data, which suggest that the effort to politically integrate never gained traction.[33] An interesting pattern is that less educated people have been less likely to identify as European or partially European than more educated people. This feeling of alienation is supporting the common view that European integration is,

[24] Aaron Fichtelberg, 'Populist Paranoia and International Law' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer 2018), 65.
[25] Schwöbel-Patel (n 5), 106.
[26] Posner (n 3), 796-797.
[27] András Derzsi-Horváth, 'Western Populism Is a Fundamental Threat to the Humanitarian System' *Guardian*, (England, 26 November 2016), <www.theguardian.com/global-development-professionals-network/2016/nov/26/western-populism-is-a-fundamental-threat-to-the-humanitarian-system> accessed 9 March 2020.
[28] Posner (n 3), 797.
[29] ibid.
[30] Brandes (n 2), 579.
[31] McGinnis/Somin (n 19), 1193; Fritz Scharpf, *Crisis and Choice in European Social Democracy* (Cornell University Press, 1991).
[32] McGinnis/Somin (n 19), 1177.
[33] Robert Rohrschneider, 'The Democracy Deficit and Mass Support for an EU-Wide Government' (2002) 46 American Journal of Political Science 463, 472.

and has always been, a project of and for the elites.[34] Populists rely on 'democracy deficit' to challenge international law.

Effects of Populism on International Law

Multilateralism, International Institutions and an International Community Structured Around Common Interests

The policies of populists affect the current state of international law on two different levels. In the political sphere, populist's practices alter the environment in which legal rules are interpreted. In the legal sphere, populist governments push for changes in the interpretation of established international legal rules.[35] Populist governments also tend to reject the emanations of global public opinion based on NGO participation because civil society weakens their claim to exclusively represent the people.[36]

Populist governments advance an understanding of international law as a law of coordination.[37] In this iteration, international law does not aim to construct an international community but merely provides for a minimal order between independent states. These states refuse a substantive common value system and do not accept any higher authority. Hence, international law's function is reduced to keeping states peacefully apart and to organising common action in a situation where an issue cannot be managed effectively by each state alone.[38] Consequently, sovereign states are the relevant actors, and where international organisations are created, they mainly serve their member states' interests. Substantive rules focus on the protection of sovereignty, such as the principle of non-intervention, while law enforcement works on a bilateral basis, and the jurisdiction of international courts is subject to state consent.[39] Hence, populists oppose those elements of current international law that are built upon multilateral structures, international institutions and the concept of an international legal community based on common values.[40]

International law reflects pluralist structures, meaning it assumes that a society is composed of a large variety of different groups with different interests and acknowledges diversity within societies. The political process of defining common goods must therefore be based on negotiations and compromise.[41] International law is understood as a multilateral forum which offers a framework and a vocabulary through which highly differing actors can formulate their demands and claims, justifications and contestations for identifying common values and establish institutions to implement them.[42] Populists, however, reject compromises.[43] Instead, populists favour bilateral or unilateral structures which seem to make it easier to realise populist agendas.[44] This tendency is illustrated by the focus of the current US administration on bilateral and regional trade agreements[45] and the bilateral vision of international law which is portrayed in political speeches by Hungarian Prime Minister Viktor Orbán.[46]

[34] Posner (n 3), 807.
[35] Krieger (n 1), 973.
[36] ibid, 973-974.
[37] ibid, 973.
[38] Krieger (n 1), 978.
[39] Rüdiger Wolfrum, 'International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Max Planck Institute, 2006), paras 41-48.
[40] Krieger (n 1), 979.
[41] Mudde/Kaltwasser (n 13), 8.
[42] Andrew Hurrell, *On Global Order, Power, Values, and the Constitution of International Society* (Oxford University Press, 2007), 312-313.
[43] Janne E. Nijman/Wouter G. Werner, 'Populism and International Law: What Backlash and Which Rubicon?' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer, 2018), 8.
[44] Krieger (n 1), 979.
[45] US President's 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program, Chapter I (2017), 1, 7; Christian Schaller, '«America First» – Wie Präsident Trump das Völkerrecht strapaziert', *Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit* (Germany, 2019), 11.
[46] Speech of Hungarian Prime Minister Orbán at the Lámfalussy Conference (23 January 2017).

As mentioned, the anti-establishment stance of populism furthers scepticism towards international institutions.[47] Even withdrawal becomes an option.[48] For instance, Venezuela gave notice of its denunciation of the American Convention on Human Rights (ACHR) in 2012.[49] While this may appeal to a particularly powerful state, such as the US, other populist governments may prefer to remain within these institutions challenging or aiming to reform them from within. For example, Hungary is a member of the ACT Group, which advocates for a reform of the veto power in the UN Security Council.[50]

A further strategy of populist governments is the creation of alternative institutions that they can dominate more easily than established ones; or forge alliances with like-minded states. An example can be seen in Venezuela's efforts to establish the Union of South American Nations (UNASUR).[51]

Populist governments may be increasingly non-compliant with rules and dictates of international organisations. If states participate in international organisations only to defend their national interests, the decisions of such institutions are likely to be disregarded where they are regarded to be opposed to the individual nation's interests.[52] For example, in its party programme, the Freedom Party of Austria puts Austria's international legal obligations under an explicit national interest reservation: Accepting and fulfilling international obligations may not be to the detriment of the Austrian population.[53] This entails that in cases where compliance with international law is detrimental to such interests, international law would be dispensed with at the national level. This would affect interpretative principles, such as the doctrine of *Völkerrechtsfreundlichkeit*, which requires the judge to apply an interpretation that allows national law to be brought in line with the international legal obligations of the state.[54] The most obvious conflict between populist agendas and predominant interpretations of international law unfolds in the relationship with international (human rights) courts.[55] The concept of a constitutional or national identity as an instrument to formulate opposition against international or supranational court decisions has gained increased relevance.[56] The rejected Swiss initiative (called *Selbstbestimmungsinitiative*) is an example for a negative attitude towards international courts, which aimed at establishing primacy of national over international law.[57]

Populist strategies to withdraw from treaties or to create alternative institutions also affect the authority of existing institutions. These practices may increase scepticism as to whether an institution is capable of fulfilling its objectives, increased possibilities for forum shopping in order to reach politically desired outcomes and may ultimately render international institutions dysfunctional.[58] Discursive attacks on international institutions may also undermine their authority.[59] International courts become controversial in countries with strong populist movements[60] as they are part of the liberal international institutional order.[61] The legal texts that international courts interpret advance core liberal objectives such as increasing civil liberties, and promoting the flow of goods and people across borders. International

[47] Wayne Sandholtz, 'Resurgent Authoritarianism and the International Rule of Law' (2019) 38 KFG Working Paper Series, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" 1, 25.
[48] Fichtelberg (n 24), 47.
[49] Press Release of the Inter-American Commission on Human Rights, Doc. E-307/12, (12 September 2012).
[50] UNSC, Statement of Hungary, UN Doc. S/PV. 8175, (6 February 2018), 26.
[51] Karen J. Alter/Laurence R. Helfer, *Transplanting International Courts, The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press, 2017), 180.
[52] Krieger (n 1), 982.
[53] Freedom Party of Austria, Party Programme, (18 June 2011), <www.fpoe.at/themen/parteiprogramm/parteiprogramm-englisch/> accessed 10 March 2020.
[54] Krieger (n 1), 982.
[55] Laurence R. Helfer, 'Populism and International Human Rights Institutions: A Survival Guide' in Gerald L. Neuman (ed), *Human Rights in a Time of Populism, Challenges and Responses* (2019, forthcoming); iCourts Working Paper Series, no. 133 (2018), Duke Law School Public Law & Legal Theory Series, no. 2018-50, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202633> accessed 10 March 2020, 9.
[56] Krieger (n 1), 982.
[57] Swiss Initiative *Schweizer Recht statt fremde Richter,* BBI 2016 7091.
[58] Mikael Rask Madsen/Pola Cebulak/Micha Wiebusch, 'Backlash against International Courts')2018) 14 International Journal of Law in Context 197, 197, 200, 209, 211.
[59] ibid, 112.
[60] Erik Voeten, 'Populism and Backlashes against International Courts' (2019) 20 Perspectives on Politics 1, 2.
[61] ibid, 6.

courts often hand down judgements that clash with populist narratives about whose rights deserve to be protected.[62]

Additionally, characterised identity politics, populists are likely to produce tension with concepts of universalism and common interests of an international community based on international solidarity.[63] A populist approach will favour particularized, culturally contingent value concepts contradicting the idea that a national identity could be formed around a commitment to a global community structured around universal values.[64] In order to preserve the identity politics, populist governments focus on more traditional elements of international law. They promote international norms that protect state sovereignty and the *domaine réservé*.[65] This development can be illustrated by both speeches President Trump delivered before the UN General Assembly in 2017[66] and 2018[67] which demonstrate that the current US administration pictures an international legal order that resembles a law of coordination rather than a law of cooperation.[68] His speeches demonstrate focus on sovereignty, security and prosperity, rather than the rule of law, democracy, and human rights, which have become a marker for the progress of international law in the 1990s.[69] In his 2017 speech, Trump draws a picture of an international order focused on independent nations and claims the nation-state remains the best vehicle for prosperity. As a consequence, the whole speech ignores concepts of international solidarity in line with the anti-pluralist stance of populism. Moreover, Trump explicitly refutes elements of global governance as well as the idea of any power-limiting role of international law.

However, practice suggests that it is too far-fetched to assume that populist governments reject all concepts of common interests. For example, Hungary is a member of the Group of Friends of the Responsibility to Protect (R2P) and supports R2P-related initiatives at the UN.[70]

The populist focus on sovereignty also fosters what observers have called “respatializing power”[71] and thus reinforces the image of closed statehood. The protection of states’ borders through legal and physical control becomes a visible symbol for sovereignty-based identity politics that explains the prominent role that migration policies play for populist governments in their criticism of global governance.[72] It is empirically difficult to pin down the extent populist governments have directly influenced European immigration policies. However, diverging indirect effects are acknowledged in political science literature.[73] There are indications that populist migration discourses have contributed to a securitization of immigration that also affects the broader legal framework.[74]

[62] Voeten (n 60), 6.
[63] Krieger (n 1), 984.
[64] Mattias Kumm, ‘Democratic Constitutionalism Encounters International Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 227.
[65] Krieger (n 1), 984.
[66] UNGA, Address by Mr. Donald Trump, President of the United States of America (Address by President Trump 2017), UN Doc. A/72/PV.3, (19 September 2017), 10.
[67] UNGA, Address by Mr. Donald Trump, President of the United States of America (Address by President Trump 2018), UN Doc. A/73/PV.6, (25 September 2018).
[68] See Wolfgang Friedmann, *The changing structure of International Law* (Steven & Sons, 1964).
[69] Krieger (n 1), 985.
[70] UNGA, Statement of Hungary, UN Doc. A/72/PV. 100, (25 June 2018), 9.
[71] Aristotle Kallis, Populism, ‘Sovereigntism, and the Unlikely Re-Emergence of the Territorial Nation-State’ (2018) 11 Fudan Journal of Humanities and Social Science 285, 287.
[72] ibid, 295 ff.
[73] Bertjan Verbeek/Andrej Zaslove, ‘Populism and Foreign Policy’ in Cristóbal Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017), 396.
[74] Krieger (n 1), 986.

Changing International Rules by Changing National Legislation

If populists challenge the domestic rule of law, this is directly connected to the international rule of law through substantive values and norms that are the basis for both domestic and international legal orders. The erosion of the domestic, rights-oriented rule of law, therefore, weakens the international rule of law as well.[75] Populist governments influence international law by pushing for changes of the interpretation of specific international legal rules – in particular, by changing pertinent national legislation.

An important example concerns legislation regulating foreign funding of NGOs.[76] Those academic voices that have advocated for introducing elements of democracy into global governance rely on NGOs as the representatives of global public opinion.[77] NGOs are seen as increasingly deterritorialized actors spreading human rights norms, rule of law and democracy.[78] Based on their anti-establishment stance, populist governments want to restrict NGO activity as well as the tendency to resist the spread of global norms through civil society.[79] Opposition from within civil society creates a moral and symbolic problem for populists, insofar as it undermines their claim to exclusive moral representation of the people.[80] Hence, they apply argumentative strategies to demonstrate that civil society is influenced and manipulated by external powers. With this policy, they present transnational NGOs as foreign agents. This antagonistic rhetoric aims to denounce any legitimacy of global public opinion or transnational participatory democracy. Therefore, populist governments promote and re-emphasis on a broader understanding of states' *domaine réservé,* aimed at restricting foreign funding for NGOs. Also, they foster non-intervention discourses.[81]

The development of stricter regulations against NGOs has already started in the early 2000s as a backlash against democracy promotion in China and Russia.[82] The Venice Commission holds that most of the member states of the Council of Europe do not regulate foreign funding for NGOs.[83] However, an empirical study in 2013 examined 98 countries worldwide and found that 39 restrict such funding while 12 even prohibit it.[84] Most of the restrictions are directed against human rights NGOs.[85] For example, Venezuela enacted a Law on Defence of Political Sovereignty and National Self-Determination in 2010 which entirely forbids political parties and NGOs involved in political or human rights matters to receive foreign funding.[86] The restriction of funding for NGOs might contribute to an extensive interpretation of what constitutes political interference in the *domaine réservé*.[87]

[75] Sandholtz (n 47), 5.
[76] Krieger (n 1), 989.
[77] E.g. Hauke Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism' (2002) 31 Journal of International Studies 675, 680 ff.; Jürgen Habermas/Jacques Derrida, 'Nach dem Krieg' *Frankfurter Allgemeine Zeitung*, (Germany, 31 May 2003), <www.faz.net/aktuell/feuilleton/habermas-und-derrida-nach-dem-krieg-die-wiedergeburt-europas-1103893.html> accessed 21 March 2020, 33 ff.
[78] Brunkhorst (n 77), 680, 682.
[79] Timothy M. Gill, 'The Venezuelan Government and the Global Field: The Legislative Battle over Foreign Funding for Nongovernmental Organizations' (2016) 31 Sociological Forum 29, 34.
[80] Müller (n 14), 48.
[81] Krieger (n 1), 991.
[82] Thomas Carothers, 'The Backlash against Democracy Promotion' (2006) 85 Foreign Affairs 55, 56.
[83] European Commission for Democracy through Law (Venice Commission), Hungary – Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad, Opinion 889/2017, (20 June 2017), para 14.
[84] Darin Christensen/Jeremy M. Weinstein, 'Defunding Dissent: Restrictions on Aid to NGOs' (2013) 24 Journal of Democracy 77, 80.
[85] Aziz Huq/Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 University of California Los Angeles Law Review 78, 50.
[86] La Asamblea nacional de la República bolivariana de Venezuela, Ley de defensa de la Soberanía política y autodertimación nacional, no. 960, (22 December 2010).
[87] Krieger (n 1), 992.

The interrelatedness between the *domaine réservé* and a state's constantly evolving human rights obligations has prompted an interpretation for states to rely on a narrow margin of appreciation under human rights law in order to delineate their *domaine réservé* and to define what constitutes an illegal interference.[88] Thus, in principle, any legislation complying with a state's human rights obligations can define a state's *domaine réservé*.[89]

Questioning the 1990s Narrative of International Law

Since the 1990s, international law seems to have turned into a system that promotes community interests based on a shared understanding of solidarity. This has constituted not only a system of rules, principles, and concepts at regional and global levels, but also a normative ideal.[90]

Multilateral treaties and highly institutionalized organizations offered a legal framework for global governance.[91] There was a perception that democratic constitutionalism was open to international law and that it established legal structures that allowed for compliance with international law.[92] However, this optimistic perception changed gradually. The impacts of globalisation on local societies, such as climate change, have heightened the impression that the promises attributed to international law in the period after 1990 have not been fulfilled.[93] Global governance is increasingly understood as a threat to a localised exercise of public power.[94] The current rise of populism is seen by many political observers as a response to the failure of mainstream politicians to raise awareness on the benefits of global governance. Rather, a delegitimising discourse takes place implying that political decisions were forced upon states, and ultimately the people, by international institutions.[95]

Populist governments contribute to an overall perception of decline of the 1990s narrative by acting against the rule of law, democracy, and human rights protection at the national level as well as fostering an understanding of international law as a law of coordination. Moreover, populist governments are not the only actors who are contesting the 1990s narrative of international law. Their contestations and rejections are shared by the agendas of autocratic regimes.[96]

Role of International Law in a Populist Era

After having analysed the effects of populism on international law e, the next question is what its role in a populist era consists of.

From a legal positivist perspective, a significant part of the current challenge for international law appears to be confined to the level of rhetoric.[97] Neither political speeches nor party programmes directly translate into legally relevant acts that could challenge international law. Politics of withdrawal are in line with consent-based international law and an important incentive for states to accept binding treaties in the first place.[98] Nevertheless, the political discourse and the political environment that surround international law impact this overall development as they may influence the perceptions of its status and precipitate a larger-scale retreat into nativism and unilateralism.[99] For decades, a withdrawal from major multilateral treaties seemed to be a taboo, with very few exceptions. However, recent

[88] Georg Nolte, 'Art. 2 (7) UN-Charter' in Bruno Simma et al. (eds), *The Charter of the United Nations, A Commentary,* (Volume I, 3rd edn., Oxford University Press, 2013), 298 para 42.
[89] Krieger (n 1), 993.
[90] Shirley V. Scott, 'The Decline of International Law as a Normative Ideal' (2018) 49 Victoria University of Wellington Law Review 627, 627.
[91] Wolfrum (n 39), para 49.
[92] Kumm (n 64), 273 ff.
[93] Krieger (n 1), 977.
[94] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61, 63, 65.
[95] Mudde/Kaltwasser (n 13), 117.
[96] Krieger (n 1), 988.
[97] ibid, 987.
[98] ibid.
[99] James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 Modern Law Review 1, 22; Krieger (n 1), 987.

practices have affected this perception and have thus opened space for states to quit multilateral agreements, which in turn makes the international order appear more fluid and reversible.[100]

Analysing how populism affects international law enables us to identify the weaknesses and structural shortcomings of international law.[101] After all, the populist critique that globalisation lacks legitimacy is shared by many academics as well.[102] However, due to the anti-elitist and anti-pluralist stance, as well as the exclusionary form of identity politics, some observers question that populist globalisation critique can be corrective for international law in that it furthers the legitimacy of global governance.[103]

International institutions controlling legislative acts of populist governments, for example the Venice Commission, need to take into account that concerns raised by governments may be legitimate and address issues where law reform is required as a corrective for negative and unintended consequences of globalisation. Human rights institutions have to carefully examine where a legitimate aim, per se, is only used as a pretext. In order to question whether a law's purpose is legitimate, they have to take into account the overall context and, in particular, the circumstances under which the law was drafted.[104] Hence, the fact that populists criticize international law should be seen as an opportunity to re-evaluate the law and identify the legitimate concerns in order to improve the international legal system.

Populists might also affect the use of international law in domestic courts: under populist attacks, courts are likely to prefer, where possible, resort to legal sources that enjoy sound domestic legitimacy in order to minimize their exposure to criticism from populist leaders.[105] In these situations, international law should serve as an important source for courts to protect human rights as international law serves as a source of interpretation for constitutional provisions. Also, international law can dismantle the polarized public discourse imposed by populists highlighting respect, analysis and application of international law as a means of maintaining pluralism in legal and public debate and, accordingly, enhancing democracy.[106]

Populists employ domestic law, including constitutional law, to promote their goals and weaken the democratic nature of the state.[107] This has been referred to as 'constitutional capture'.[108] International law is one of the ways in which courts can counter populist law-making. Hence, international law is one of the tools available to domestic courts in mitigating the negative effects constitutional capture has on democracy and human rights.[109] International law can be used in responding to either legislation that violates human rights or to more sophisticated, subtle forms of constitutional amendments that are open to interpretation. Incorporating international human rights law into the law's interpretation could be used by the court to minimize potential violations. Also, referring to international law enhances pluralism by facilitating a discourse in which different perspectives are discussed and presented as legitimate, even if they are, ultimately, not adopted.[110] Hence, international law plays a crucial role when incorporated into domestic legal rulings as it allows for a variety of perspectives to be debated and, eventually, enabling dissent.[111]

[100] Krieger (n 1), 987.
[101] ibid, 972.
[102] See e.g. Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 547, 561; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law' (2004) 15 European Journal of International Law 885.
[103] Alston (n 4), 4; Helfer (n 55), 7 ff.
[104] Krieger (n 1) 995.
[105] Brandes (n 2), 577.
[106] ibid, 577.
[107] ibid, 589.
[108] Paul Blokker, 'Populist Constitutionalism' *Blog of the International Journal of Constitutional Law* (4 May 2017), <www.iconnectblog.com/2017/05/populist-constitutionalism/> accessed 23 March 2020.
[109] Brandes (n 2), 589.
[110] ibid, 594.
[111] ibid, 595.

In times of populist governments, international law as a safeguard for core rights is more essential than ever. So far, not even populist governments have contested that international law exists. They complain that some of it is wrong, that it does not benefit the people, or that the elite invented it.[112] However, it is quite an accomplishment that even populists accept that there are legal constraints at the international level which underlines its importance as a protector of fundamental rights, both, on the international level and on the domestic level.[113] On the international level, its task is to prevent itself from being increasingly limited and restricted and on the domestic level, in a populist state; it can help the courts as an interpretational tool in order to mitigate the negative impacts of populist legislation.

Conclusion

The questions posed earlier in the article can be answered thus: Populists attack international law because the international legal system, as it developed after the 1990s, is based on values and concepts such as international solidarity which go against the identity and nationalistic politics of populists. Populist governments' attitude towards international law hinges on an instrumental approach and a rhetoric-based principled opposition that, if enacted in practice, would significantly change international law's nature as it has developed after 1990. In general, populists promote a concept of international law as a law of coordination and aim to reduce it to an instrument for furthering national interests.

This populist concept of international law also impacts the interpretation of the relationship between international and national law; the latter should prevail where international law is seen to be detrimental to the nation's interest. So far, populists mainly manifest their agendas in political speeches and party programmes; withdrawal or non-participation still remains the exception. Most efforts to influence the development of international law or to escape its restrictions remain within the legal limits imposed by international law. Beyond rhetoric and symbolism, the instrumental approach of populist governments fosters cherry-picking according to their policy preferences. This contributes to a perception of populist governments as backsliders in relation to the development that international law made after the end of the Cold War. It furthers the impression that international law is currently in a state of crisis.[114] Nevertheless, international law has an important role to play in a populist era by acting as a safeguard for the protection of fundamental human rights.

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[112] Krieger (n 1), 971.
[113] Marcela Prieto Rudolphy, 'Populist Governments and International Law: A Reply to Heike Krieger' (2019) 30 The European Journal of International Law 997, 1005.
[114] Krieger (n 1), 996.

Freedom to (Smart) Contract:
The Myth of Code and Blockchain Governance Law

Tiffany M. Sillanpää

Introduction

Courts in common law jurisdictions like the UK, Canada and the USA have had the difficult job of balancing the overarching principle of "freedom to contract", which mandates they uphold contracts in their original form as much as possible, while protecting weaker parties from fraud, unjust treatment, and unconscionable outcomes. Historically, courts' success in walking this line has been mixed. In the US specifically, contract scholars like Friedrich Kessler have been known to condemn narrow adherence to the principle of "freedom to contract" while large-scale enterprises have attempted to circumvent any legal uncertainty stemming from judicial intervention by using imposing standard-form contracts onto their weaker counterparts.[1]

Of late, this struggle has acquired new life in the debate surrounding Smart Contracts. Much like the enterprises who used standard-form contracts as a tool for "excluding or controlling the 'irrational factor' in litigation",[2] Smart Contract advocates contend that removing the judiciary as the governing body over contract law and imposing contractual performance via decentralized blockchain governance will improve efficiency, legal certainty, and ultimately achieve true "freedom to contract" without judicial intervention. However, one's ability to write a contract that completely circumvents the potential for legal intervention or judicial enforcement, and achieve the complete separation between private and public law that "freedom to contract" advocates originally claimed, seem dubious at best. This paper will demonstrate, that as long as smart contracts meet the traditional requirements of a contract, they cannot fall outside the established legal system's purview. The common law legal system's deep-rooted belief in the rule of law and due process prevents the judiciary from being excluded from contract enforcement regardless the medium. The only thing a smart contract truly adds to traditional contracts is automated execution that is enforced by the blockchain's consensus mechanism; this may provide some efficiency to the legal system by streamlining basic performance but it cannot be the only form of governance over smart contracts. While there may be procedural challenges to undoing or enforcing specific performance under smart contracts because of their decentralized features, any substantive problems that could occur within a smart contract are imminently addressable with and must be subjected to the principles and remedies found in traditional contract law.

In order to explore these questions further, Part I of this paper will first outline the basic concepts of smart contracts and establish that they can and should be considered to meet the formation requirements of a traditional contract. It will also explore how courts can overcome any interpretation issues presented by the computer-code elements of a smart contract with plain-language supplements and expert witnesses. Part II will outline the respective anti-establishment nature of the blockchain community and highlight why their insistence on blockchain-only governance is incompatible with the common law legal system's requirements for rule of law and due process.[3] Part III will provide more context for the assertion that blockchain governance alone is not sufficient by outlining more complex situations where smart contracts can go wrong and applying potential solutions from traditional contract law. Having established that smart contracts are like traditional contracts and therefore must theoretically fall within the existing legal governance structures, Part IV will explore the practical challenges of litigating smart contracts and propose some solutions to common procedural issues surrounding anonymous parties. Finally, I will conclude with current developments in smart contracts which point to a potential for them to become an integral part of our legal system going forward. Overall,

[1] See generally, Kessler, *supra* n. 1.
[2] Kessler, *supra* n. 1, 632 & 638.
[3] While this paper will largely reference USA academics and perspectives on the matter, the general principles of contract law discussed and relied on are applicable to the general body of contract law found in common law jurisdictions like the USA, Canada, and the UK.

I will argue that smart contracts, if carefully drafted to consider potential pitfalls and the future needs of contracting parties to amend or enforce, can hold the potential to provide efficiencies and greater legal certainty to contracting parties, not through circumventing the legal system, but by working with it to automate simple performance enforcement and deferring more complex contractual breakdowns to the judiciary.

Overview: Smart Contracts vs. The Legal System

Smart contracts are agreements governed by "the blockchain—a digital ledger, distributed across a network, that securely records transactions between parties—to automatically and securely execute obligations when certain conditions are met."[4] In other words, once parties agree to a coded-version of the transaction they desire to execute, the smart contract will unequivocally execute the transaction when defined conditions are met. This generally requires an Oracle—some trigger that sits outside the contract—to inform the smart contract of when the specified conditions have been met. Because the contract and its results are stored on the blockchain, they cannot be unilaterally undone by any party to the contract without first achieving a 51% consensus of the blockchain members. Smart contract advocates claim these features offer a "way to make the application of legal rules and agreements more consistent and efficient." [5] But such claims are coloured by the highly political, anti-establishment nature of the blockchain community and arguably fail to appreciate that contracts are more than "bare financial transactions" and have been used as a "social resource" to organize relationships.[6]

Are Smart Contracts Actually Contracts?

While some question whether these code-based agreements have all the required elements to be legal contracts, the Chamber of Digital Commerce (CoDC) argues that most smart contracts demonstrate as having the three key legal elements required of a traditional contract (offer, acceptance, consideration).[7] An offer is made when a "smart contract code [is] deployed on a distributed ledger" for anyone on that ledger to interact with. [8] Acceptance is achieved when a participant on the ledger signs the transaction with a private key and thus binds both sides of the contract with the consideration of promising to perform in the future[9] or by putting funds into a wallet. Furthermore, the CoDC argues that even when a smart contract is executed between a human and the code, both the Electronic Signatures in Global and National Commerce Act (ESIGN) and Uniform Electronic Transaction Act (UETA) equate the code or computer's actions to those of a person or legal entity being bound, thus creating a contract.[10] Furthermore, even in such contracts, the code itself still requires a human author just like a written contract or a smart contract, where both parties know each other.

Can Courts Interpret Smart Contracts?

Not all smart contracts are equally reliant on code to define their terms. The CoDC identifies two main models of smart contracts: external and internal.[11] External smart contracts are those that are governed by traditional, natural language contracts with the smart, code-driven part of the contract merely automating the performance of terms as appropriate (e.g. payment, shipment, etc.). If there is any disagreement between the parties, the traditional, non-code version of the contract prevails, making it much easier for parties and courts to determine what was intended and the terms actually agreed to. CoDC equates this smart contract configuration to that of traditional contracts written in different languages, where one language is set to rule the other(s) in cases of discrepancy; therefore parties

[4] Karen E.C. Levy, "Book-Smart, Not Street-Smart: Blockchain-Based Smart Contracts and The Social Workings of Law" [2017] 3 Engaging Science, Technology, and Society 1, 1-2.
[5] *Ibid.*
[6] *Ibid.*
[7] Miren Aparicio Bijuesca *et al.,* "Smart Contracts: Is the Law Ready", (*Chamber of Digital Commerce: Smart Contracts Alliance*, Sep 2018) 15 - 16.
[8] *Ibid.* at 15.
[9] *Ibid.* at 16.
[10] *Ibid.* at 17.
[11] See, Bijuesca et al. *supra* n. 10, 25 - 26.

wishing to create an external smart contract must be clear about which version of the contract prevails in order to successfully put the natural-language terms first and foremost.[12] However, when such clarity is lacking in multi-language contracts, the UNIDROIT Principles stipulate that preference should be given to the contract that was originally drawn up.[13] Presumably, the same can apply to smart contracts; if the code was written first and the natural-language contract second, the code prevails. Inversely, one may say that code is not "language" in the way that French or Spanish is and therefore should not be interpreted as a substitute for the natural language contract at all; perhaps it can be treated like a schedule or appendix, but not the main, binding part of any agreement as code is not a "human" language of any kind. This approach may work in certain contexts, however, given that the code creates an outcome automatically, its interpretive value seems more relevant to the main body of most external smart contract.

Contrastingly, internal smart contracts surrender far more to the code-based part of the contract than their external counterparts. The CoDC identifies two types of internal smart contracts: 1) those where the code encompasses the entire agreement and any natural-language portion of the contract merely explains the terms of the code, and 2) those where the code forms the integral or operational portion of the legally binding contract and natural-language is reserved for non-operational clauses. [14] In both versions, however, the code is supreme and any natural-language portion of the agreement is secondary. Therefore, while the natural-language portion of the contract may help courts understand the parties' intent, they will still have to interpret code to definitively understand what consensus was reached. While this has been raised as a problem for courts wishing to exert power over smart contracts, the use of expert witnesses who can read and inform the court what the code "says", can quickly and easily remedy this issue (e.g. bringing a programmer to the stand to testify what the outcome of the code, as written, would be).

Indeed, interpreting code is generally less challenging than interpreting natural language. Since it is written to be performative, in that it is meant to be executed by a computer that is following directions without independent thought or outside context, the code itself is unambiguous and determinative to a much greater degree than natural language. Still, this does not mean that code will do what the human signing it thinks it will— it is possible for complex code to be misunderstood or generate undesired results in the presence of unexpected inputs. Such outcomes may, as this paper will later discuss, raise common law issues of "mistake" in contract formation.

Whether one chooses an external or internal smart contract, however, the inflexibility of the code-based executions present potential challenges when circumstances change or errors in the code create undesirable results for one party. While the CoDC suggests several internal mechanisms to help solve these problems which mirror those in current commercial agreements (e.g. escrows, arbitral clauses, claw-back mechanisms, etc.), they acknowledge that many of these "break" or undermine the advantages of smart contracts and do not completely eliminate the potential need for judicial intervention.[15] A contracting party's tolerance for such compromises on the ideology of "unstoppable" contracts depends on how strictly they adhere to the original social and political goals contained in blockchain and smart contract's anti-establishment roots.

[12] Bijuesca et al. *supra* n. 10, 26.
[13] International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts, 4.7 (2016).
[14] Bijuesca et al. *supra* n. 10, 26.
[15] Bijuesca et al. *supra* n. 10, 31-2.

Theoretical Grounds for Judicial Authority Over Smart Contracts

Satoshi Nakamoto clearly defined the goal of his blockchain in his 2008 Bitcoin Whitepaper: to circumvent financial institutions and enable "two willing parties to transact directly with each other without the need for a trusted third party."[16] This antiestablishment tone carried through into smart contract applications built atop blockchain and cryptocurrency systems, only here the establishment to circumvent is the legal system and, particularly, judicial intervention.

Ardent smart contract advocates dislike traditional, natural-language contracts because they see them as ambiguous; because natural language can be interpreted subjectively by both the parties and the judiciary, they provide no certainty or predictability of outcome. Much like standard form contracts, smart contracts attempt to pre-empt incalculable or undesirable risks presented by performance or litigation uncertainty by using code executed by infallible computers; advocates claim that because anyone reading a smart contract can predict what the code will do in any given situation, smart contracts are not ambiguous like natural-language agreements. [17]

For this reason, advocates argue that smart contract should "replace large swaths of the traditional contract system" and that such circumvention of the legal system is desirable.[18] The increased certainty of code-based contracts will result in lower transaction costs, higher consumer protection and improved liberty as individual preferences will be protected from subjective and unpredictable judicial interpretation; they boldly argue that it will also prevent corruption because, unlike human judges, the blockchain cannot be threatened or bribed.[19] Notably, such concerns of judicial manipulation may be more prevalent in some jurisdictions than others but advocates do not appear to make such distinctions when discussing the general global need for smart contract adoption.

In short, smart contract advocates are deeply committed to the "freedom to contract" ideals and a strict division between public and private law; [20] they acknowledge the need for governance but see this governance as being conducted via the blockchain amongst the private users of the smart contract platform itself and not by the judiciary. The benefits of judicial discretion in upholding principles of "justice" and "equity" in cases where fraud, frustration, or misrepresentation block or warp at least one party's contractual goals, are, from the smart contract advocate's perspective, outweighed by the uncertainty that judicial discretion introduces into an area of law critically dependent on legal certainty. While courts are already weary of altering private contracts unnecessarily and take every effort to uphold contracts whenever possible, ardent smart contract advocates wish to eliminate all centralized judicial involvement in favour of decentralized blockchain governance. This anti-establishment ideology, however, has severe practical limitations that necessitate the a centralized judicial function to ensure justice and equality remain present in contractual agreements.

[16] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System", (Bitcoin.Org, Oct 2008) 1, <http://satoshinakamoto.me/bitcoin.pdf> last accessed 30 Nov 2019.
[17] James Grimmelmann, "All Smart Contracts are Ambiguous", [2019] 2 Journal of Law & Innovation 1, 3; See also, Kessler, supra n. 1, 631-2 (Provides examples of standard form clauses writing-out judicial risk in insurance contracts, the use of warranty classes in the machine industry that limit buyer's remedies or exclude his right to claim damages, and arbitration clauses in international trade agreements as means to exclude litigation risks).
[18] Verstraete, *supra* n. 2, 746.
[19] Verstraete, *supra* n. 2, 747; Grimmelmann, *supra* n. 20, 5.
[20] Verstraete, *supra* n. 2, 743.

Failings of the Anti-Establishment Ideology

While smart contract advocates claim to create decentralized systems of law, independent of any jurisdictional legal system, the plausibility of a completely anti-establishment contracting system is suspect. As James Grimmelmann says, "[t]here is no escape from politics, because blockchains are made out of people."[21] He goes on to posit that blockchain governance is as much a social institution as the legal system, only the contract "depends indirectly on what people think about the computer system on which it runs" rather than what the judiciary think it means when they read it as with a natural-language contract.[22] In this sense, smart contracts are more institutionalized than natural-language contracts as they require parties to put trust in the blockchain system and code rather than their contractual counterparts. As long as the code does what it is supposed to and blockchain nodes achieve consensus, the intent and actions of one's counterpart do not matter; once triggered, the contract moves forward as defined at the time of its writing, regardless of either party's change in circumstances, misunderstandings, or otherwise.

Therefore, while smart contract governance is decentralized, it is still capable of bureaucratic behaviour that smart contract advocates accuse legal institutions of.[23] Indeed, "code is law" ideology and "come hell or high water" enforcement models make smart contracts and blockchain governance stricter and more bureaucratic than the common law system's more flexible nature found in judicial interpretation's ability to look at matters on a case-by-case, fact-focused basis. Once put in motion, smart contracts grant the trusted blockchain all the power to keep both parties to the terms regardless of exigent circumstances or mistake. While such draconian enforcement measures are the very features of smart contracts that advocates tout as creating certainty within the system and complete freedom to contract, when code malfunctions or the contract outcome is different from what one or more parties thought they were agreeing to, important due process issues are raised.

Rule of Law, Due Process, and Smart Contracts

Because, "the law cannot possibly anticipate the content of an infinite number of atypical transactions into which members of the community may need to enter", the government has delegated some of its law-making power to individuals via the right or freedom to contract.[24] While this empowers individuals to be private legislators as to who can make and execute binding "law," it does not grant them a right to act arbitrarily.[25] Therefore, as long as "self-government by contract should be subject to the limitations inherent in the notion of the rule of law," meaning the freedom to contract is not an exercise of "individual autonomy but an entitlement to the use of governmental resources and authority." [26] In short, while we enjoy the freedom to set terms and agree to whatever commitments we see fit under private contract law, contracts must adhere to the democratic principles of public law and can be governed by judicial oversight when circumstance necessitate.

Smart contract advocates would find this logic a direct violation of the very meaning of private law and an undue limit on autonomy. Yet, even smart contracts do not eliminate the need for enforcement and governance over contract-made law; they simply attempt to automate execution with decentralize governances via the blockchain's consensus. "Freedom to contract" means nothing unless there is a means to enforce the contracts stemming from it. While the blockchain achieves basic enforcement through automation and the blockchain's consensus mechanism, this cannot replace judicial means of contract governance since, as we will see, blockchain governance lacks the ability to rectify complex contractual breakdowns in a way that respects the rule of law. While smart contracts may provide

[21] Grimmelmann, *supra* n. 20, 22.
[22] Grimmelmann, *supra* n. 20, 22 & 3.
[23] Same Mire, Blockchain In The Legal Industry: 10 Possible Use Cases, (Disruptor Daily, 26 Oct 2018) https://www.disruptordaily.com/blockchain-use-cases-legal/ last accesses 22 Nov 2019.
[24] Kessler, *supra* n. 1, 629.
[25] F. Eric Fryar, Common-Law Due Process Rights in the Law of Contracts, [1988] 66 Tex. L. Rev. 1021, 1023; see also, Douglas v. United States Fidelity & Guar. Co., 81 N.H. 371, 375, 127 A. 708, 710 (1924) as cited by Fryar.
[26] *Ibid.*

streamlined efficiency, judicial oversight is better positioned to analyze substantive issues in light of broader legal principles like justice and equality which include concepts of fairness and unconscionability.

Due process is one such essential part of the rule of law. It establishes boundaries within which the law makers must operate when subjecting individuals to its coercive power. Here, the judiciary has several tools to ensure due process in contract enforcement in addition to the basic concepts of offer, acceptance and consideration. These include concepts like mistake, misrepresentation, duress, and fraud as well as the potential for efficient breaches when performing a contract becomes less efficient than paying damages. Courts also, of course, look at contract performance against contact terms to resolve situations where one party has not upheld their end of the bargain or is taking advantage of the other party.

The blockchain, however, has no means to evaluate a contract's efficacy or fairness and once they are set in motion, there is no way for the blockchain governance to stop performance that is creating harm to one or more parties. If there were to be no judicial oversight or the ability for a governing body to impose remedy, then the irreversible nature of the blockchain would also allow one party to take advantage of mistakes or misunderstandings to his counterpart's detriment. To illustrate the limits of blockchain governance and the need for additional judicial support, let us take some hypothetical situations in which a smart contract could be abused or breached without remedy.

Situations Requiring Traditional Enforcement and Remedy

Example Agreement: A distributor and re-seller decide to make a smart contract for the purchase and sale of goods. The parties agree that the distributor will ship the re-seller a defined amount of product each month for 12 months; the smart contract is coded to release 50% of the monthly payment when the product is shipped and another 50% when the product is received. The "oracle" informing the smart contract when to execute parts of the code is a combination of the distributor's inventory system and the shipping company's parcel tracking system. When the shipping company confirms a shipment containing the correct amount of inventory (per the inventory system) has been picked-up from the distributor's facilities, the first half of the payment is automatically sent by the smart contract to the distributor; once the shipping company confirms the shipment has been delivered, the second half of the payment is automatically sent. The smart contract re-executes this process each month for one year, until the contract is complete.

This arrangement removes any risk of late or non-payment for the distributor and streamlines the re-seller's payment process so that it avoids any accidental late-payment penalties. However, there could be several opportunities for contractual disputes to arise in such a smart contract configuration despite its automated nature. While some of them could have been pre-empted by better coding, once the smart contract is agreed to and in motion any ability to correct drafting mistakes with addendums or a mutual understanding outside the contract becomes technically unavailable. Granted, if the parties know and trust each other well, they may certainly self-correct outside of the smart contract itself. However, should the relationship become contentious or one party decides to be uncooperative, smart contract advocates would say they must depend on the blockchain to force performance as it has been coded. Thus, if the code malfunctions and enriches one party to the other's detriment or one party decides to take advantage of places where human performance is still required to undermine the agreement, blockchain governance will not provide a remedy.

However, if this were a traditional contract, not only could drafting errors be fixed by mutually agreed addendums, but the judiciary could also use established legal principles to uphold due process and correct injustices. The following subparts will explain possible conflicts in smart contracts and compare the potential for remedy (or lack thereof) in blockchain governance against judicial intervention using traditional contract principles.

Code-Based Errors

Occasionally, smart contract code malfunctions or are miswritten and yield undesired results. However, blockchain governances would uphold the unexpected result because it is what the code dictated and the parties agreed to the code. This "code is law" ideology is driven by the blockchain community's political aversion to any kind of intervention—judicial or otherwise—on "code-legal" executions that could strip the code of its "certainty." From a contract law perspective, this is an extreme interpretation of the "freedom to contract" principle. While individuals are free to make and enter into agreements, contract law requires that there be *consensus ad idem* for the contract to be enforceable. Through one party making an offer and the other party accepting it, the two minds come together and a contract is formed.[27] A smart contract "merely executes the commands that a programmer integrated into it, which are intended to reflect the pre-existing common intent of the parties"[28]; however when the code's result and the parties' intent are at odds, has *consensus ad idem* really been achieved? Very likely not.

For instance, supposed the example smart contract above is accidentally coded to send 60% of the payment upon shipment, and another 50% upon delivery, amounting to an overpayment of 10% for that month. Blockchain governance would approve this outcome since it is what the code dictates should happen even if it is not necessarily what the parties thought the code would do or intended the code to do when it was written. Courts, however, have more dynamic ways of handling and correcting such mistakes in traditional contracts which could also be applied to smart contracts.

Mistranscription

First, let us suppose that the parties negotiated the terms of the agreement outside the code and one party was charged with creating a smart contract based on what they discussed. A court would likely deem the smart contract unenforceable under the concept of mistranscription. In a traditional contract, mistranscription occurs when two parties agree terms orally and one party is tasked with transcribing the oral agreement into writing but makes a mistake when doing so.[29] While both parties sign the written agreement, mistranscriptions are considered a mechanical error that occurs after the contract has been made as the "only contract the parties have made is the oral contract." [30] Generally, the appropriate relief in such cases is to amend the written version to correctly embody the oral contract; such a remedy will only be granted if the petitioner provides clear and convincing evidence that mistranscription has occurred. [31]

In a smart contract context, if the parties agreed their terms before inscribing them in code, the coded version of the contract should act as a transcription of their original agreement. If parties have a natural-language explanation of terms to accompany the smart contract, or even emails or other business documents demonstrating the original intent, the evidentiary burden on the party claiming harm becomes easily satisfied and reformation should be ordered. Despite the blockchain's immutable qualities, contract reformation on platforms like Ethereum is not an impossible task depending on how the smart contracts are coded—as long as the parties agree to it, or are otherwise ordered by a court to change it. [32] At the very least parties can mutually decide to "undo" a contract using the "self-destruct", "delegate call" or "call code" functions[33] and recreate a new, corrected contract.[34]

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[27] See Generally, Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256.
[28] Blaise Carron and Valentin Botteron, How Smart can a contract be*?, in* Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law 8 (Daniel Krause *et al* 2019).
[29] Melvin A. Eisenberg, Foundational Principles of Contract Law, 577 (2018).
[30] *Ibid.*
[31] *Ibid.* at 577-8.
[32] See Bill Marino and Ari Jules, Setting Standards for Altering and Undoing Smart Contracts, [2016] https://www.semanticscholar.org/paper/Setting-Standards-for-Altering-and-Undoing-Smart-Marino-Juels/91af4fd1a2de62ada8d8be2ad671b31479dea3d9 last accessed 7 Dec 2019. This article looks at the various coding options that can be implemented and against smart contracts to uphold classic legal principles of mistake.
[33] Solidity, Introduction to Smart Contracts, https://solidity.readthedocs.io/en/v0.5.13/introduction-to-smart-contracts.html last accessed 7 Dec 2019.
[34] See, Bill Marino and Ari Jules, *supra* n. 35; (positing various coding options that can be implemented and against smart contracts to uphold class legal principles of mistake).

However, courts may need to order more than simply reformation as the smart contract's automatic-execution will have already put the re-seller at a financial disadvantage. In the example provided, the re-seller has over-paid by 10% and a court order demanding the return of funds will also be required. While this goes beyond the normal remedy for mistranscription, as an equitable remedy in contract law, there is nothing stopping a judge from also incorporating the return of financial damages suffered as a result of the mistranscription.[35]

Notably, mistranscription is available even if one party "intentionally, rather than negligently, mistranscribes the parties' contract" thus, removing any ability for one party to fraudulently misrepresent the terms of the agreement to the other party's detriment. So, if the distributor was responsible for coding the contract, they cannot benefit from this power under traditional contract law. In the blockchain governance system alone, however, there is nothing stopping a code-writer from committing such *fraud in the factum*.

Mutual Mistake

Now, if the negotiations were done in code, with each party making changes to the code respectively to come to an agreement, and that code somehow executes an action or result that neither party intended, traditional courts may find a mutual mistake. Both parties thought the code would perform the act of releasing 50% of the payment at each stage; they have a tacit assumption[36] that the code will perform what they intended and thought they coded it to. Such an error in the code would be akin to a typographical error in a traditional contract which, so long as the courts can infer the parties' intent from the rest of the contract (e.g. total purchase price from which the percentages are drawn in this case) the contract will not be found ambiguous and unenforceable.[37]

Unilateral Mistake

From a traditional contract law perspective, the code itself in the example provided has also created a unilateral mistake. By sending too much money, which the distributor should know is a mistake, the code has caused the re-seller to make a mistake according to the originally agreed price. Once again, while the blockchain's "code is law" persuasion offers no remedy, contract law would find such a mistake required correction and the distributor would be ordered to re-pay the amount owing. Going forward, the automated-contract would either need to be reformed to correct this coding error or a court order would demand that re-payment occur each month— an easier but less efficient solution.

Fraudulent Misrepresentation

There are also opportunities for fraudulent misrepresentation in smart contracts which blockchain governance alone cannot correct. Suppose, perhaps, the distributor made some claims about the product that they knew were not true but critical to the re-seller's decision whether to contract or not.[38] Provided the re-seller relied on these claims and suffered harm as a result of the untruth, this is a fraudulent misrepresentation and renders a traditional contract voidable and may make the harmed re-seller eligible for compensatory damages.[39] However, once again, blockchain governance alone has no system for dealing with such situations. So, if the distributor knows that representing their product as better than it is, will get them a higher purchase price and influence the re-seller to sign the contract, they could take such action without fear of ever having to be held accountable.

[35] Notably, the court would also likely find a unilateral mistake resulting from the payment already made which is discussed later.
[36] Melvin A. Eisenberg, *supra* n. 29, 582.
[37] See, Corbin on Contracts §§ 25.19, 28.45 (describing various typographical errors as mutual mistake); *Starr v. Union Pac. R.R. Corp.*, 31 Kan. App.2d 906, 909-10, 75 P.3d 266 (Kan. Ct. App. 2001) ("errors in contracts, which do not create such inconsistency that the overall intent of the parties cannot be determined from the four corners of the instrument, do not result in an ambiguous contract but merely create an inconsistency subject to interpretation by the court considering the contract as a whole.").
[38] LII, Fraudulent Misrepresentation, Cornell Law https://www.law.cornell.edu/wex/fraudulent_misrepresentation# last accessed 7 Dec 2019.
[39] *Ibid.*

Breach of Contract

The risk for fraud in smart contracts seems to run quite high. In the specific example given, the ability for the distributor to profit off a fraudulent misrepresentation about the product could be rectified by changing the code so that the contract does not release the final payment until after the re-seller has inspected the shipment. However, replacing the (presumably) neutral shipping company with a party to the contract creates new opportunities for fraud. Should the re-seller decide to keep the product but not fulfill its role as the Oracle and prompt the smart contract to release final installment, the power to commit fraud merely shifted from one party to the other. The only thing that may stop the re-seller from committing such an act, is, of course the fact that his/her funds are tied to a wallet (presumably interest free) until the contract term has lapsed.

Suppose, however, there was an additional term that automatically charges the distributor a significant late-fee if they have not shipped by a certain day of each month. Without a remedy for breach of contract in the blockchain governance, the distributor would be trapped in an agreement where they would continue to lose money whether they shipped or not. Meanwhile, the re-seller may be happy to remain tied to the idle contract and collect the late fee until the contract has run its term.

The lack of remedy for breach of contract in blockchain governance necessitates judicial intervention. While smart contract advocates stipulate that breaches are not possible in automated code-based agreements, the examples above have proven that as long as any human action is required or any nexus with the “real world” occurs, the opportunity for fraud and breach are a reality.

Furthermore, smart contracts do not allow purposeful breaches when situations change and one parties becomes unable to perform his/her role in the contract. This can occur in extreme situations where situations outside of the breaching party’s control make performance impossible (e.g. the product is simply no longer available or attainable). Alternatively, there may be situations where the subject matter or performance of the contract itself suddenly becomes illegal. In a standard contract, this would automatically make the contract void and permit a party to breach it by refusing to supply illegal products or perform illegal acts.

While there are many further examples we could explore, the common contractual issues raised above demonstrate a clear need for dynamic and case-by-case judicial governance of smart contracts despite their automated natures. Smart contract advocates who propose that blockchain governance could unseat the traditional legal system or that the traditional legal system has no role in interpreting smart contracts disregard the very legal foundations upon which freedom to contract is founded. Furthermore, without a respect for the rule of law and due process, contracts become meaningless as the ability to enforce them in the dynamic way required is severely weakened. As it stands now, the blockchain is unable to govern the myriad of conflicts to which even the best written (or best coded) contracts may give rise.

In the interest of efficiency, smart contracts themselves should be carefully constructed to minimize the potential for complex conflicts that cannot be addressed by blockchain governance. However, unless blockchain governance becomes dynamic and capable of equitable and fact-based remedies, the potential need for judicial intervention can only ever be minimized rather than eliminated.

Procedural Challenges

Having discussed the theoretical need for judicial intervention, interpretation, and contract law remedies in smart contracts, we must now turn to the practical implications. The decentralized nature of the blockchain's governance system, capacity for parties to remain anonymous, and the ability to easily (or unknowingly) contract with anyone around the globe presents practical challenges to civil procedure that the current American legal system has yet to address. The CoDC identifies multiple specific procedural challenges that those wishing to exercise traditional legal enforcement against smart contract parties face, [40] though anonymity is the root of all the problems they identify. If parties can be identified, then smart contracts do not differ that much from ordinary international or cross-jurisdictional contracts and civil procedure has established methods for determining personal jurisdiction, applicable law, and enforcement procedures. While in a traditional cross-jurisdictional contract the parties would know the risks of contracting with an out-of-state/country party, such risks should be assumed by those in smart contracts as well given the blockchain's decentralized nature.

While the fictional contract we explored above was quite traditional in the sense that the parties presumably knew each other, many smart contracts take place between anonymous parties. For instance, should I want to trade Bitcoin for Ether when the exchange reaches a desirable rate, I may simply publish a contract to the blockchain thus, allowing anyone, anywhere to contract with me using their private but, anonymous key. Furthermore, while actors within Distributed Autonomous Organizations (DAOs) hold different powers within a coded-venture—Creators, Investors, Contractors, and Curators—and potentially different levels of liability depending on the cause of breach, they remain anonymous to the other parties in the venture. In the event of a fraud or an attack like the one that happened against The DAO, how can one take legal action if they do not know the offeror or offeree?

Identifying and Serving Parties

In one-to-one contracts, bringing an action requires an ability to identify who you contracted with. Similarly, while DAOs sit outside the realm of traditional corporate law, they may be considered general partnerships or unincorporated associations.[41] In such cases action can be brought against individuals as long as they can be identified.

In a traditional contract, an inability to find your co-contractor will necessarily bar one from taking further legal action. However, the statute of limitations can be paused and subpoena rights created by filing a case against a fictious defendant (i.e. "John Doe lawsuits") and using the time between filing and trial to locate the missing party. Presumably a court would allow the same to be done in smart contract situations, but the success rate of identifying an otherwise anonymous contracting party on a smart contract platform or DAO is highly circumstantial.

There are several ways to attempt to identify someone using their blockchain wallet address. For instance, people may post such an address elsewhere on the web which may have trace connections to their actual identities linked to email addresses, social media profiles, and IP addresses (though these are maskable using a VPN), etc.[42] One may also look at other transactions within the wallet to determine things like location and trace their initial entry into the blockchain using traditional banking systems. While more complex computer forensics, like those conducted by companies like Chainalysis, may not be feasible or attainable for individuals wishing to bring action, the potential to subpoena information on transactions processed through official exchanges may shed light on a wallet's owner.

[40] Bijuesca et al. *supra* n. 10, 31; (a) potential lack of personal jurisdiction over parties (assuming they can be identified) and the smart contract platform itself; b) difficulties in determining applicable law given no clear place of contracting or performance or subject matter; c) difficulties in enforcing monetary damages against anonymous and potentially distant parties; d) inability to stop automated-code without cooperation of parties or platform; e) inabilities to determine the location of the distributed ledger and who to serve if the platform is at fault.).

[41] Steven Palley, How to Sue a Decentralized Autonomous Organization, (Coindesk, 20 Mar 2016) https://www.coindesk.com/how-to-sue-a-decentralized-autonomous-organization, last accessed 7 Dec 2019.

[42] Ajay Chandhok, BLOCKCHAINS AREN'T ANONYMOUS. BUT THEY CAN BE, (LedgerOps) https://ledgerops.com/blog/blockchains-arent-anonymous-but-they-can-be/05/01/2019, last accessed 22 Nov 2019.

However, the success of such actions can vary by situation and provide limited comfort to those considering smart contracts. Those hoping to avoid such ambiguity going forward, may consider identifying parties or providing contact information for them within the smart contract code or an authoritative plain-language version of the coded contract. Much like a traditional contract, writing in these more standard pieces of information will take the guess work out of a court's ability to enforce a smart contract, should the code malfunction or parties' relationship otherwise breakdown.

Interestingly, there is potential for service of process to be conducted via the blockchain, thus removing the need to actually know the parties' identity or physical address at the initial states of a litigation. According to *Federal Rule 4(c)* procedural requirements, service of process is fulfilled provided it is accompanied by a copy of the complaint and issued by any person over the age of 18 years and not a party to the complaint.[43] Thus, in order to serve on the blockchain, a complainant would need to open a new smart contract offering to pay someone else on the blockchain to send the notice to someone else. If the recipient is outside the USA, however service must be given "by any means of internationally agreed means of service."[44] Whether the blockchain is considered such an appropriate channel under The Hauge Convention which governs this matter[45] is unclear, however according to Article 11 signatories are permitted to agree to their own appropriate communication channels[46]—for ease, the blockchain should be designated along with the choice of law clause within the smart contract.

However, if parties do not reply to this summons or comply with court orders, the value in knowing their identity and the other physical assets that a court can seize still stands. Again, though perhaps more common in smart contracts, the implications of an unknown contracting party are not unique to smart contracts—and unknown party in a traditional contract will present the same challenges.

Serving the Platform

In cases where parties cannot be identified one may also be able to bring action against the smart contract platform itself and its creators or controllers if such a structure exists. The Ethereum Foundation, for instance, set a precedent in 2016 when it intervened to unwind unwanted transactions resulting from a hacker exploiting faulty code in The DAO. In this instance, the Ethereum Foundation took action independently and created a hard-fork to undo the unwanted results of the hack. While a soft-fork was proposed,[47] the contentious nature of "fixing" a mistake that many though was fair under a "code is law" ideology – including the hacker himself[48] – meant that any hope of all nodes adhering to a new version of Ethereum and completely abandoning the original blockchain were far flung. So, Ethereum decided to take sole responsibility for correcting the "mistake" with a god-like action to override blockchain governance.[49] The hard-fork created a new version of Ethereum and while contentious and hotly debated, it was supported by 97% of Ethereum holders; still, today, we have two versions of Ethereum as a result: Ethereum Classic, and Ethereum 2.0 which continues to be developed.

Notably, the Ethereum Foundation, besides being the creators of the Ethereum blockchain upon which The DAO ran, held no direct responsibility for smart contracts that were exploited or creating the malfunctioning code. The inserted themselves into the situation because The DAO contained roughly 15% of all Ether and its failure would have negatively impacted the Ethereum network and value as a whole.[50] Very likely, the Ethereum Foundation also realized that despite the blockchain community's

[43] See, Federal Rule 4(c) (1-2) https://www.law.cornell.edu/rules/frcp/rule_4.
[44] Federal Rule 4 (f)(1) https://www.law.cornell.edu/rules/frcp/rule_4.
[45] See, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) ("The [Hauge] Convention provides simple and certain means by which to serve process on a foreign national.").
[46] Hague Service Convention and Signatories, Art. 11 https://www.courts.ca.gov/partners/documents/ea_HagueService.pdf
[47] Michael del Castillo, The DAO: An Analysis of the Fallout, (Coindesk 18 Jun 2016) https://www.coindesk.com/the-dao-an-analysis-of-the-fallout last accessed 10 Dec 2019.
[48] Gautham, DAO Hack, Attacker Sends Open Letter to Ethereum Community, (NewsBTC, 2015), https://www.newsbtc.com/2016/06/18/dao-hack-attacker-sends-open-letter-to-ethereum-community/ last accessed 10 Dec 10 2019.
[49] Michael del Castillo, *supra* n. 50.
[50] David Siegel, Understanding The DAO Attack, (Coindesk, 27 Jun 2016) https://www.coindesk.com/understanding-dao-hack-journalists last accessed 10 Dec 2019.

insistence on being outside the traditional legal system, people had invested real money in The DAO which meant there were implications in the "real world" where national laws exist; any potential for the Foundation to be held legally liable would have been something that Vitalik and the other foundation members wanted to get ahead of. As David Siegel posited in an article preceding the foundation's hard-fork solution:

All parties here may have legitimate claims that could take years to settle out in courts around the world. […] It's also very likely that there will be lawsuits. We could see a total mess, with lawsuits extending for many years. […] Even though the letter and the spirit of smart contracts is that "smart contracts rule," and the rule of law doesn't apply – in this case, most people would like to see a do-over. I'm guessing we will see various rules of law apply.[51]

Unfortunately for blockchain advocates, the Ethereum Foundation has now proven its ability to override the "immutable" blockchain which, should it happen again soon or too often, may undermine the Ethereum blockchain's credibility altogether and prompt a mass exodus from the platform. For traditional-law advocates, however, the Ethereum Foundation's new-found power, so to speak, presents it as a viable party who can be subpoenaed to carry out court-orders resulting from legal action even when individuals cannot be found. An injured party may be able to bring action against the Foundation for any harm they suffered as a result of a contract made on the Ethereum blockchain and the Foundation may be compelled to correct it.

Now, this solution will only work in situations where the contractual intent was clear and the execution clearly contrary (e.g. fraud, some mistranscription, coding errors) and courts do not require the other anonymous party's presence in order for it to establish what both parties intended. Furthermore, the practicality of forcing Ethereum to conduct a hard fork for every minor contract dispute is incredibly limited. The Ethereum 2.0 fork received 97% consensus because the hack had, arguably, put all the claims about smart contracts being safer and more certain than traditional contracts into question; allowing one hacker to drain huge sums of money out of The DAO and claim that he had the right to do so because of a flaw in the code offended blockchain political (and perhaps group morality?) of the blockchain community. But, for less political or offensive contract breaches, the blockchain may not be as willing to consent to a fork given the amount of effort it takes.[52] Therefore, while a court could theoretically order the Ethereum Foundation to release a new version of the blockchain that unravels the smart contract in question, it will have very little control over whether that version is accepted by the nodes governing the blockchain itself.

[51] *Ibid.*

[52] See generally, Jordan Heal, Hard forks: Contentious or not?, (Coin Rivet, 16 Jan 2019) https://coinrivet.com/hard-forks-contentious-or-not/ last accessed 10 Dec 2019; Furthermore, there are security risks associated with hard forks like "replay attacks" that allow a transaction on one fork to be recreated on another thus allowing dishonest users to get free coins on the secondary blockchain. See for instance, SFOX, Life after Hard Forks: What You Need to Know About Replay Protection, (Medium, 1 Feb 2019) https://blog.sfox.com/life-after-hard-forks-what-you-need-to-know-about-replay-protection-ab8adaf6ddf6 last accessed 10 Nov 2019.

Conclusion

In conclusion, while Smart Contracts themselves are not substantively different from traditional contracts, the decentralized nature of the blockchain does present some procedural challenges for those seeking traditional remedies. This does not mean that all is lost for smart contracts, however. Their value in streamlining simple enforcement and potentially removing frivolous contractual disputes from the court system should not be discounted. However, serious contractors will need to put a significant amount of effort into their smart contract formations to ensure the valuable flexibility that traditional contracts offer, which necessitates fundamental operations of rule of law and due process, is incorporated. For instance, parties can remedy many of the enforcement and flexibility issues discussed in this paper by writing plain-language terms to accompany smart contracts that designate forum of law, formally identify both parties, and agree service of process methods. The code itself can also be written with built in "outs" that parties can decide to execute together should they need to breach or change the contract in some manner; Bill Marino has proposed a valuable set of coding standards for those hoping to have useful and valuable smart contracts to adopt. [53]

Unlike traditional contracts, the smart contract requires two types of expertise to ensure proper drafting: technical and legal. For those who are daunted by the marriage of computer languages and legalese, start-ups and technology companies are forming legal-tech partnerships to pave the way. From RocketLawyer announcing its partnershmeip with OpenLaw and ConsenSys to bring smart contracts to everyday consumers, to LegalZoom announcing a partnership with Clause to provide blockchain based smart contracts to their customers as well, Smart Contracts are starting to enter the mainstream.[54] Guidance from these fusions of legal and blockchain experts will only do good things for the viability of smart contracts going forward. The future of smart contracts will be neither a new eutopia of litigation-free contract law, nor a futuristic dystopia of cold code-based law. Rather, if done properly, smart contracts are an opportunity to bring current contract law into the 21st century and improve the efficacy of our legal system overall.

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[53] See Bill Marino and Ari Jules, *supra* n. 35; (looking at the various coding options that can be implemented and against smart contracts to uphold classic legal principles of mistake).
[54] Amy J. Schmitz and Colin Rule, Online Dispute Resolution for Smart Contracts, [2019] University of Missouri, 110.

Administration of Criminal Justice Act of Nigeria 2015:
A Critique of Selected Legislative Expressions

Dr Ngozi J. Udombana

The important idea in legislative drafting is to say what you mean accurately, cohesively, clearly, and economically. …ambiguity and confused expression tend to defeat the purpose of … legislation… Clarity and simplicity … begin with straightforward thinking and end with straightforward expression.[1]

Introduction

The Administration of Criminal Justice Act (ACJA) 2015 is a significantly improved version of a merger of the Criminal Procedure Act (CPA)[2] enacted in 1945 and Criminal Procedure Code (CPC)[3] enacted in 1960. These were the two principal statutes governing the administration of criminal justice in Nigeria prior to 2015. Though the CPA and CPC applied respectively in the Southern and Northern parts of the Country at the Federal and State levels and in all courts, they both applied in the Federal Capital Territory, Abuja. It was challenging having two different criminal laws for the North and the South of the Country. Besides, some of the provisions were obsolete and needed amendment to mirror the intention of the Constitution and societal changes. There was also evidence of outright abuse of the provisions of the laws by the police, prosecutors and lawyers.[4]

The ACJA, described as probably the most potent instrument of criminal justice administration for initiating change and restoring sanity to a degenerate society,[5] was one of the Acts enacted in the dying days of the 7th National Assembly. It was enacted because the criminal justice system of the Country had lost its capacity to quickly respond to the needs of the society such as checking the rising rate of crime, speedily holding criminals accountable and protecting the victims of crime. It considerably preserves the existing criminal procedure system whilst introducing elaborate, innovative and revolutionary provisions. These provisions aim at promoting fairness, transparency, accountability and integrity of Nigeria's criminal justice processes and enhancing the efficiency and credibility of the criminal justice administration system in the Country.[6] The Act is uniformly applicable in all federal courts across Nigeria.[7]

Going by how long its twin predecessors, the CPA and the CPC had endured and the perennial problem of delay in criminal justice administration accompanying their implementation, the ACJA is indeed an Act that was long overdue. Its enactment has heralded a sigh of relief by stakeholders, particularly the countless victims of criminal justice delay and denial. As good and as welcome as the Act is, however, it is evident that it is fraught with a significant measure of substantive and legislative expression gaps, which diminish its quality and affect its implementation. If these are not timely addressed, they may lead to further unintended outcomes.

This article is majorly concerned with the legislative expression gaps. Being a very long Act - 495 sections - many of which have several subsections and paragraphs, the paper cannot address all the gaps in this respect. It only randomly highlights and discusses a selection of them and provides relevant redrafts and suggestions. Following this introduction, the article clarifies concept in the next segment,

[1]William P Statsky, *Legislative Analysis and Drafting* (2nd edn, West Publishing 1984) 162.
[2]Cap C41 Laws of the Federation of Nigeria 2010
[3]Cap C39 Laws of the Federation of Nigeria 2010.
[4]Adedeji Adekunle, 'An Overview of the Administration of Criminal Justice Act 2014' <http://nji.gov.ng/images/Workshop_Papers/2016/Induction_Course/s11.pdf> accessed 23 March 2020.
[5]Yemi Akinseye George, 'The Administration of Criminal Justice Act 2015: An Overview in relation to criminal cases adjudication in the Federal High Court' <http://www.censolegs.org/publications/4.pdf> accessed 23 March 2020.
[6]Adeniyi Familoni, 'Understanding the New Administration of Criminal Justice Act 2015' (Nigeria Bar Association National Conference, Abuja, August 2015) 1.
[7]Yemi Akinseye George, 'Innovative Provisions of the Administration of Criminal Justice Act 2015' *The Nation Newspaper* (Lagos, 2 June 2015) 40.

after which it gives an overview of the ACJA. It then analyses relevant gaps in legislative expression to which it proffers solutions before concluding the article.

Clarification of Concept

Legislation plays an unrivalled role in the existence and sustenance of the society. It is the translation of the rules of human and governmental interactions into legal documents that command obedience. The process of drafting legislation is usually tedious; it involves concerted painstaking efforts in planning and execution. Language is a major tool in legislative expression; it comprises both written and unwritten expressions. Words, diagrams and symbols are key components of written expression. Modern legislative expression consists generally of words. This is accomplished through the appropriate employment of syntax, which is the arrangement of words and phrases to create well-formed sentences in a language.[8]

Syntax basically has to do with sentence structure, or word choice and order. The structure of a sentence or the choice and order of presentation of words determine the meaning that can be ascribed to any writing or speech. Improper sentence structure can result in unintended purposes, such as the failure of the audience to understand what is being communicated, or ambiguity i.e. uncertain or inexact meaning.[9] Ambiguity can be semantic or syntactic.

Semantic ambiguity occurs when a word has more than one meaning e.g., 'a light truck'; does a 'light truck' mean light in weight or light in colour?[10] What about a little bit more complex one like a 'light feather' considering the fact that a feather can either be light in colour and in weight; or any other colour, yet light in weight. So, does 'light' here mean light in weight or light in colour or both? Again, consider 'I give all my containers to Edidiong'; do containers here mean cargo container, a file format or a person that holds people in a reasonably calm state? Such ambiguity can be corrected by defining any term that might be subject to more than one interpretation.

Syntactic ambiguity is the result of unclear sentence structure or poor placement of words, phrases or clauses.[11] Consider this notice on a private property: 'Please do not ask permission to hunt'[12] Does this mean that anyone is free to hunt without asking for permission to do so or that hunting is strictly prohibited and so no one should bother asking for permission to do so? Consider this also: 'Because he was enraged, Mr. Angana ordered the teacher to discipline the student.' Who was enraged, Mr. Angana, the teacher or the student? Syntactic ambiguity can generally be resolved through a process of disambiguation[13] - the removal of ambiguity by making something clear - by reordering the words, phrases or clauses in question.

[8]Oxford Dictionaries Online (Oxford University Press 2014). Syntax originated in the 16 Century from the French word syntaxe or Greek word suntaxis, which means arrange together<https://en.oxforddictionaries.com/> accessed 11 June 2020.
[9]Compact Oxford Dictionary of Current English (Oxford University Press 2005). Essentially, ambiguity exists when words can be interpreted in more than one way.
[10]H Xanthaki, 'On Transferability of Legislative Solutions: the Functionality Text' <www.researchgate.net/publication/265042905_on_Transferability_of_Legislative_Solutions_The_Functionality_Test> accessed 23 March 2020.
[11]R Dickerson, The Fundamentals of Legal Drafting (Little-Brown 1986) 101 and 104 for the distinction between semantic and syntactic ambiguity.
[12] George C. Christie, 'Vagueness and Legal Language' 48 Minnesota Law Review, 885.
[13] M C MacDonald, N J Pearlmutter, and M S Seidenberg, 'The lexical nature of syntactic ambiguity resolution' (1994) 101(4) Psychological Review 676.

The problem of ambiguity accentuates the need for clarity in drafting, especially legislative drafting. Clarity is the state or quality of being clear and easily perceived or understood.[14] It depends on the proper selection of words, on their arrangement and on the construction of sentences.[15] Clarity is achieved through the use of plain English, which is distinguishable from legalese by its economy of words, lack of archaic or lawyerly phrases, relatively short sentences, use of active voice and action verbs, avoidance of nominalisation, drafting in the singular tense, use of present tense, use of simple words, avoidance of superfluous words, and use of gender neutral language, among others.[16] Appropriate use of punctuation and paragraphing are also relevant to achieving clarity in all forms of writing. Achieving clarity should be the chief aim of every drafter.

The importance of appropriate use of language in legislative drafts cannot be overemphasised because there is a limit to which even the courts can go to decipher the true intent of a legislature in its attempt to ensure justice. This is evident in the court's declaration in *Barclays Bank of Nigeria Ltd v CBN*[17] that

> *In considering whether or not a Court has jurisdiction to entertain any claim, it is our view that while a person's right of access to the Courts may be taken away or restricted by statute, the language of any such statute will be watched by the Courts and will not be extended beyond its onerous meaning unless clear words are used to justify such extension.*[18]

Legislative expression in this article, therefore, has to do with sentence structure as it relates to choice or order of words as well as the relevant devices for achieving clarity in drafting.

Brief Overview of the ACJA 2015

The essence of the ACJA, as captured in the purpose clause in Part 1, is to provide for the administration of criminal justice system in Nigeria, which promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crimes and protection of the rights and interest of the suspect, the defendant and victims.[19] This, as Akinseye-George observes, indicates 'a deliberate shift from punishment as the main goal of the criminal justice to restorative justice which pays attention to the needs of the society, the victims, vulnerable persons and human dignity.'[20]

The Act is divided into 49 parts with 495 sections dealing with a variety of subjects that had previously bedevilled the criminal justice system and slowed down the wheels of justice. Among others, Part 2 addresses the critical issues of arrest, bail and preventive justice; Part 3 provides for the general authority to issue warrants and allied issues while Part 4 provides for prevention of offences and security for good behaviour. Part 5 is on proceedings in subsequent cases, subject to order to furnish security and Part 6 focuses on public nuisance. Part 7 deals with attachment of property where there is disobedience to summons or warrant while Parts 8 and 9 provide, generally, for criminal trial and inquiries. Parts 10 and 11 relate to the powers of the Attorney-General and his or her control of criminal proceedings while Parts 12-18 cater for institution of proceedings, appearance, service, validity of process, search warrants and related matters. Part 19 is on bail and recognizance while Part 20 covers ownership of property, including a wife's remedy against her husband as it relates to her person or

[14]Compact Oxford Dictionary (n 9).
[15]H Thring, Practical Legislation: The Composition of Language of Acts of Parliament and Business Documents (John Murray 1902) 61.
[16]Parliamentary Counsel Office, Chapter Three: 'Principles of Clear Drafting' <www.pco.govt.nz/cleardrafting> accessed 28 June 2020.
[17][197] LPELR-751 (SC).
[18] ibid [14, paras D-E] (Justice Williams, citing Halsbury's Laws of England, 4th Edn, Vol 10, para 720).
[19]S 1(1).
[20]Yemi Akinseye-George 'An Overview of the Changes and Application of the Administration of Criminal Justice Act 2015' in Adedeji Adekunle, Suzzie Oyakhire and Chukwuemeka C Nwabuzor (eds), Issues in Criminal Justice Administration in Nigeria (NIALS 2016) 1-2.

property and their competence as witnesses. Parts 21-23 address the various ramifications of charges for offences, and Parts 24-27 deal with previous acquittals or conviction, attendance and examination of witnesses as well as their expenses.

Part 28 covers the controversial issue of plea bargaining and pleas, generally; Part 29 provides for the procedure to be adopted where a defendant or suspect is of unsound mind; and Part 30 takes care of the thorny issue of detention time limits. Part 31 is on presentation of case and conclusion of trial. Part 32 provides for costs, compensation, damages and restitution while Part 33 provides for custody, disposal, and restoration of property. Part 34 provides for seizure, forfeiture, confiscation and destruction of the instrumentality of crime while Parts 35-37 address the procedure in perjury, summary trials and trials by way of information. Part 38 relates to provisions on death sentence, Part 39 provides for pregnant woman convicted of capital offence while Part 40 deals with sentencing other than capital sentence. Parts 41-46 provide for detention in a safe custody other than prison or mental health asylum; deportation; child offenders, with specific focus on the procedure for trying child offenders; probation and the long canvassed for non-custodial alternatives, parole and the Administration of Criminal Justice Monitoring Committee.

The Act introduces innovative provisions that, if strictly applied, will enhance the efficiency of the criminal justice system. It builds on the existing framework of criminal justice administration in the Country while filling the gaps observed in this framework over the course of several decades. One of such innovative provisions is the abolition of the arrest of family and friends in lieu of the suspect as a means of compelling the suspect to submit to arrest, even when such family and friends are not connected with the alleged offence.[21] If this provision is properly implemented, it has the potential to reduce prison and police cell congestion.

Another innovation is the requirement of electronic recording of confessional statements.[22] This is a vital provision that is aimed at proving the voluntariness of a confessional statement and preventing its retraction by an accused person claiming it was obtained under duress. Such denial usually requires a trial within trial to resolve; a necessity that had compounded the problem of delay in criminal trials. The Act has been rightly criticised, though, for making the requirement of electronic recording of confessional statement discretionary by using 'may' instead of 'shall', which is mandatory. This creates a loophole which is susceptible to exploitation by not only the police, but other government departments involved in recording statement of suspects.[23]

Thankfully, in *Nnajiofor v FRN,*[24] though the Court acknowledged that the ordinary interpretation of 'may' is permissive, as established in a long line of cases,[25] it, nevertheless, held that the word 'may' in section 15(4) read along with section 17(1) and (2) is mandatory and not permissive. This position of the Court is in line with a long line of other cases that have held the word 'may' to be mandatory and not permissive. [26]

This decision was based on the application of the mischief rule of interpretation in the light of the mischief which the ACJA set out to cure. Part of this mischief is the protection of the right of an accused, who, under the Constitution, is presumed innocent until proven guilty.[27]

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[21]S 7.
[22]S 15(4).
[23]Estine Okolo, 'Issues in the Administration of Criminal Justice Act 2015 – Opinion' <http://investadvocate.com.ng/2016/10/21/issues-administration-criminal-justice-act-2015-opinion/> accessed 23 March 2020. Section 494(1) of ACJA 2015 defines a police officer to include 'any member of the Nigeria Police Force established by the Police Act or where the context so admits, shall include any officer of any law enforcement agency established by an Act of the National Assembly.'
[24] [2018] LPELR-43925 (CA). See also Charles v FRN [2018] LPELR- 43922 (CA).
[25]Such as Messy v Council of the Municipality of Yass [1922] 222 SRNSW 494 and Michel v Baker [1800] 44 Ch D 282.
[26]Such as R v Barrow [1693] Carth. 293 cited in R v Bishop of Oxford [1879] 4 QBD 245, 258, Edewor v Uwegba [1987] 1 NWLR (Pt 50) 313, 339, John v Igbo-Etiti LGA [2013] 7 NWLR (Pt 1362) 1, 16 and Coca-Cola (Nig) Ltd v Akisanya [2017]17 NWLR (Pt 1593) 74, 123.
[27]Constitution of the Federal Republic of Nigeria 1999, Cap C23 Laws of the Federation of Nigeria (LFN) 2010, as amended, s36(5).

Note, however, that the general position of the courts is to interpret the words of any statute in its ordinary and literal meaning once they are clear and unambiguous. The only exception to this is where it will result in absurdity to do so as the Court of Appeal indicated in *Julius Berger (Nig.) Plc v Anizzeal Eng. Project Ltd.*[28] quoting with approval the Supreme Court's decision in *Araka v Egbue*[29] that –

The duty of the Court is to interpret the words contained in the statute and not to go outside the words in search of an interpretation which is convenient to the Court or to the parties or one of the parties. Even where the provisions of a statute are hard in the sense that they will do some inconvenience to the parties, the Court is bound to interpret the provisions once they are clear and unambiguous. It is not the duty of the Court to remove the chaff from the grain in the process of interpretation of the statute to arrive at favourable terms for the parties outside the contemplation of the lawmaker. This will be tantamount to travelling outside the statute in a voyage of discovery. This Court cannot embark upon such a journey.

This view reinforces the fact that the purpose of law is better served by using precise language. The intention of the lawmaker should be made as clear as possible. This is to avoid going through the rigors of the court process to determine the intention of the law over an issue that could easily have been resolved by the use of 'shall' as was done in other parts of the same section. This is more so since it is not every accused whose voluntary confessional statement is not electronically recorded that will have the opportunity of having such discretionary exercise of power by a police officer tested through the court process. Many such suspects would have ended up, and many more will still end up, not having the benefit of their rights protected in this regard. Clearly, the provision of section 9(3) of the Administration of Criminal Justice Law of Lagos State (ACJL), 2007, mandating the Police to ensure that confessional statements are recorded on video, and the said recording and copies filed and produced at the trial, is better.

Attendant to the challenge of electronic recording of suspects' confessional statement is the question as to whether the equipment required for recording the statement will be readily available and functional as and when needed. Incidentally, ACJA 2015 has no answer for this eventuality, except to provide that notwithstanding the provision of section 15(4), 'an oral confession of an arrested person shall be admissible in evidence'.[30] This provision significantly undermines the mischief sought to be addressed by section 15(4). Again, section 9(3) of the ACJL of Lagos State preventively addresses such situation where a video facility may not be available. The section mandates that the statement should be made in writing in the presence of a legal practitioner of the suspect's choice.

The ACJA deliberately mainstreams human rights and protection of vulnerable persons by elaborately providing for the need to treat arrested persons humanely.[31] It equally outlaws malicious instigation of the arrest, detention and prosecution of another because of civil wrong or contract.[32] This is a very welcome development as it had become rampant in Nigeria for the police and other law enforcement and security agencies to be used to settle such matters, which were clearly outside their call of duty.

Also noteworthy is section 396(3)-(5) requiring a day-to-day trial from arraignment till the conclusion of trial, reducing total adjournments throughout the trial to not more than five for each party, with interval between adjournments not exceeding 14 working days. Where it is impracticable to conclude the trial within the given number of adjournments and interval, additional adjournments may be granted at intervals not exceeding seven days, including weekends. Incessant, and often avoidable, adjournments have been the bane of timely criminal justice delivery in Nigeria. A strict adherence to the provisions of

[28] [2013] LPELR-20694 (CA).
[29] [2003] MJSC 17.
[30] S 15(5)
[31] S 8. This accords with the provisions of the 1999 Constitution, as amended s 34; Principle 1, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UNGA Resolution 43/173 of December 1988; Article 5 Universal Declaration Human Rights, 1948; Article 7 International Covenant on Civil and Political Rights, 1966; and Article 5 African Charter on Human and Peoples' Rights, 1981.
[32] S 8(2).

this section will remarkably speed up criminal justice administration. The flip side of this provision, however, is that it could result in the maintenance of the status quo, especially with a judge that is not disciplined enough to take proper control of proceedings in his or her court. This is because the provision on additional adjournments does not peg the number of such adjournments.

Again, it could result in criminal matters being struck out for want of diligent prosecution because of the frequently shoddy way prosecution is conducted by some prosecutors who rush to court without proper investigation and preparation. This often leads to unjustified requests for further adjournments as evident in Ubani's lamentation on the effect of incessant adjournments of cases on criminal trials –

> *The worst scenario is now at the various High Courts and Federal High Courts across the federation. To be sincere I am handling some of these cases in the High Court, Lagos State presently in which I think if the prosecution should come up with diligent handling, the defendants should smell the rod in Correctional Centres.*[33]

Yet another novel provision of the Act is section 396(7). The provision allows a Judge of the High Court, who has been elevated to the Court of Appeal, to continue to sit as a High Court Judge in order to conclude any part-heard criminal matter pending before him or her at the time of the elevation. Such a judge must conclude the matter within a reasonable time, provided this does not prevent him or her from taking up the new post. This offers a great relief to parties to such cases as it mitigates the waste of efforts, time and resources suffered when such elevation occurred in the past and the case had to start afresh before another judge. The practice of having such cases start afresh before a new judge contributed to the prolonged duration of many criminal cases in the courts.[34]

Incidentally, Section 396(7) ACJA has recently been held by the Apex Court, the Supreme Court of Nigeria, to contradict and challenge the letters, substance and spirit of section 290(1) of the 1999 Constitution. Therefore, it is to the extent of such inconsistency void by virtue of section 1(3) of the Constitution.[35] According to the Court, the effect of section 290(1) of the 1999 Constitution, as amended, is that a Judge elevated to a higher Court has ceased to be a Judge of the Court from which he or she was elevated. Such a judge has, by that appointment, been deprived of the jurisdiction to conclude the hearing of the case before him or her at the Court from where he or she was elevated. The Supreme Court, in arriving at this decision, followed its earlier decision in *Ogbunyinya & Ors v Okudo & Ors*[36] and affirmed in *Our Line Ltd v S.C.C Nigeria Ltd & Ors.*[37] This is a serious drawback on the relevance of this provision and the grounds so far gained through its application. It also reveals the significant gap of failure to take adequate cognisance of constitutional provisions in the enactment of the law. Resolving this problem may require the National Assembly amending the relevant sections of the Constitution to accommodate this novel provision of the Act. This is not an easy task going by the stringent requirement for constitutional amendment in Nigeria.[38]

The responsibility for ensuring compliance with the provisions of the Act for the realisation of its goal rests with the courts, law enforcement agencies and other authorities or persons involved in criminal justice administration.[39] The responsibility for making arrangements and rules to enhance the proper application of the Act rests on the shoulders of heads of Federal courts, including the Chief Judge of the Federal High Court.[40]

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[33]Monday O Ubani, 'We need to save Nigeria from the criminal justice sector', Opinion, Gavel International <https://thegavel.com.ng/2020/02/26/8300/> accessed 23 March 2020.
[34]See Fatima Waziri-Azi, 'Compliance to the Administration of Criminal Justice Act, 2015 in Prosecution of High Profile Corruption Cases in Nigeria (2015-2017)' (2017) 5(2) Journal of Law and Criminal Justice 113 (noting that 'Nigeria has a history of slow dispensation of justice; trials could remain in court for as long as ten years without making any progress with all sides exploiting the loopholes in the laws').
[35] Ude Jones Udeogu v Federal Republic of Nigeria & 2 Ors Suit No. SC. 622c/2019.
[36] [1979] NSCC 77.
[37] [2009] 17 NWLR (Pt. 1170) 383.
[38] 1999 Constitution (n 27) s 9.
[39] S 1(2).
[40] S 490.

A Critique of Selected Legislative Expressions

This critique is done under specified relevant heads that fall within the scope of the discourse as clarified under conceptual clarification.

The Use of Inappropriate Words

Section 3 on **'Arrest generally'** provides –

> *'A suspect or defendant alleged or charged with committing an offence established by an Act of the National Assembly shall be arrested, investigated,* ***inquired into****, tried or dealt with according to the provisions of this Act, except otherwise provided under this Act.'*

The highlighted phrase 'inquired into' is inappropriately used as a person cannot be inquired into. A person's action or a state of affairs may be inquired into following stipulated procedure. The use of 'investigated' in the provision is appropriate and enough, as to investigate also means to inquire. The use of both words in this instance, therefore, also amounts to tautology.

Section 4 on **'Mode of arrest'** provides –

> *'In making an arrest, the police officer or other persons making the arrest shall actually touch or confine the body of the suspect, unless there is a submission to the custody by word or action.'*

The word 'actually' is not a language of law. By this provision, in arresting an offender, whether during the commission of an offence or on suspicion of committing an offence, a touch is required unless there is a voluntary submission to arrest. A touch is a touch, even though the means of doing so may differ, but this provision is not about the means of touching. So, the person being arrested is either touched or not touched. The use of 'actually', in addition to not being a legislative language, adds nothing to the provision and, so, is unnecessary.

Section 96 on **'Offence commenced and completed in different states'**

Where an offence:

(a) is commenced in a State and completed in another State, or

(b) is completed in the Federal Capital Territory, Abuja after being commenced in another State,

> *'the suspect may be dealt with, tried and punished as if the offence had been actually or wholly committed in any of the States, or Federal Capital Territory, Abuja.'*

Again, the use of 'actually' is irrelevant and inappropriate. The use of "wholly committed" fully represents the intention of the provision. There is neither a parallel between the words 'actually' and 'wholly' nor are they alternatives to each other. 'Actually' relates to reality, truth or fact, while 'wholly' relates to completely, totally or entirely. Also, there should have been a comma after 'Abuja' in subsection (b).

Section 457 (1) on **'Duties of a probation officer'**

A probation officer shall, subject to the directions of the court:

> *where the person on probation is not actually with the probation officer, visit or receive reports on the person under supervision at such reasonable intervals as may be specified in the probation order or subject as the probation officer may think fit;*

Again, the use of "actually" here is inappropriate and unnecessary. If the person on probation is not with the probation officer, then he or she is not with the officer. There is no other way of being with him or

her – whether in spirit or by implication, hence, the requirement for a visit or receipt of report regarding him or her.[41]

Ambiguity

Section 6 on **Notification of cause of arrest and rights of suspect**

6(2) The police officer **or** the person making the arrest **or** the police officer in charge of a police station shall inform the suspect of his rights to:

(a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of ***his*** own choice;

A suspect's right to silence is guaranteed in section 35(2) of the Constitution.[42] The pronoun 'his' in subsection (2)(a) is ambiguous as it is not certain whether it refers to the police officer, the person making the arrest, the police officer in charge of the police station or the suspect. Even though, by implication, it makes more sense to infer that it applies to the suspect, the couching of the subsection can ordinarily be subject to more than one interpretation. Such loop hole should not be allowed in legislation. Compare this provision with that of section 35(2) of the Constitution which has the same intent, but clearly couched in a way that raises no ambiguity. Section 35(2) 'Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.'

The ambiguity in section 6(2)(a) could easily have been cured by replacing 'his' with 'the suspect'. Also, the 'or' between 'officer' and 'the' in line one of 6(2) is repetitive, a comma would have been more appropriate there.

Section 11 on **'Examination of arrested suspect'**

11 Where a suspect is in lawful custody on a charge of committing an offence of such a nature and alleged to have been committed in such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, a qualified medical practitioner or any certified professional with relevant skills, acting at the request of a police officer, may make such an examination of the suspect in custody as is reasonably necessary in order to ascertain the facts which may afford the evidence, and to use such force as is reasonably necessary for that purpose.

This provision does not follow the modern standard for the construction of legislative sentence, which requires that a sentence starts with the legal subject: the police officer. The language is legalese, verbose and, to an extent, ambiguous. The sentence is long and windy (106 words). It can be made more concise by removing unnecessary words.

The ambiguity in the sentence is evident in the following portions –

> *'… that there are reasonable grounds **for believing** that an examination of his person…' To whom is this belief ascribed: the police officer, the victim(s), or witnesses of the alleged offence? Such passive voice provision that fails to specify the person to whom the belief is ascribed creates implementation problem. The provision needs to clearly specify the person to whom the belief is ascribed.*
>
> *'…and to use such force as is reasonably necessary for that purpose.' Who is to use such force: the police officer, the medical practitioner or certified professional, or both?*

[41] See Ss 6(1), 276(2) and 436(h) of the Act on more inappropriate use of 'actually'.
[42] 1999 Constitution (n 27).

Suggested redraft

11(1) A police officer, who reasonably believes that an examination of the person of a suspect in lawful custody will produce evidence as to the commission of the offence by the suspect, may request a qualified medical practitioner or a certified professional with relevant skills, to examine the suspect for the purpose of getting such evidence.

(2) Necessary force may be used for the examination.

Section 11(2) as presented above remains passive, not having named the person who is to use the force. This is because one still cannot tell from the original provision whether it is the police officer, or the medical practitioner or certified professional, or both. Assuming the police officer is the intention of the law, a more appropriate provision would be –

(2) The police officer may use necessary force for the examination.

If the medical practitioner or certified professional is the intention of the law, it would be –

(2) The medical practitioner or certified professional may use necessary force for the examination.'

In reality, the medical practitioner or certified professional is the person conducting the examination. One would ordinarily ascribe the use of force to him or her, but it is unusual to envision a medical practitioner or professional applying force to an examinee (except in psychiatric cases, which this is not). It is more appropriate to associate the police with the use of force than a medical practitioner or professional. Consequently, one may take it that the intention of the law is that while the police applies the force, if necessary, the medical personnel conducts the examination.

Whichever way, the law will need to be amended to specifically clarify this ambiguity.

Long Sentences

Long sentences are often a function of one or a combination of the following: cramming of more than one idea in a sentence, the use of unnecessary words, the use of a chain of words for a general word and repetition of words for emphasis. Long sentences tax readers and either keep them in suspense or make them lose interest in what is being said. The modern trend in legislative drafting, and indeed legal drafting, generally, is to make sentences as concise as possible. The ways to achieve this include avoiding unnecessary words and phrases, using a general term for a chain of words that convey the same meaning or substituting a single defined expression for a string of words. Cross referencing could also be employed, where appropriate.

The utility of short sentences as opposed to long ones is evident in Crabbe's observation that '[t]he ability to write short simple sentences devoid of ambiguity and distracting surplusage is a pre-requisite as well as a style that is both concise and simple leaving a minimum of opportunity for individual difference of opinion.'[43] In effect, the shorter a sentence is, the lesser the likelihood of ambiguity and unnecessary words.

One example of provisions in this category include:

Section 12 on **'Search of place entered by suspect sought to be arrested'**

12(1) Where a person or police officer acting under a warrant of arrest or otherwise having authority to arrest, *has reason to believe* that the suspect to be arrested has *entered into or is within* any *house or place*, the person residing in or being in charge of the *house or place* shall, on demand by the police officer or *person acting for the police officer*, allow *him* free access to the *house or place* and afford all reasonable facilities to search the *house or place* for the suspect *sought to be arrested*. (92 words).

[43] VCRAC Crabbe, 'The Role of Parliamentary Counsel in Legislative Drafting' Document No 11 (UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers, Kampala, March 2000) 8.

This provision is unnecessarily wordy. All the italicised words indicate the presence of nominalisation, the use of a chain of words for a single word, unnecessary duplication of words and superfluous words. It also fails the test of a standard sentence structuring.

A more concise and properly structured redraft could be –

12(1) A police officer or person having a warrant of arrest or otherwise authorised to arrest, who *believes* that the suspect is within *any premises*, may demand entry into the premises and the person residing in or in charge of the premises, shall allow *the officer or the officer's representative* free access to the premises and *provide assistance* to search the premises for the suspect. (64 words).

Also,

12(2) Where access to a house or place cannot be obtained *under subsection (1) of this section*, the person or police officer may enter the *house or place* and search it for the suspect *to be arrested*, and in order to effect an entrance into the *house or place*, may break open **any outer or inner door** or window of any *house or place*, whether that of the suspect *to be arrested*, or of any other person or otherwise effect entry into such *house or place*, if after notification of his authority and purpose, and demand of admittance duly made, he cannot obtain admittance.' (103 words).

All the italicised phrases are superfluous and can be jettisoned without affecting the intent of the provision. The repeated phrase 'house or place' can be replaced with the word 'premises'. The phrase in bold can simply be replaced with 'any door' as it makes no difference whether it is an outer or inner door that is broken.

A redraft

12(2) A police officer or person who, after due notification of his authority and purpose, and demand for entrance into any premises in order to arrest a suspect, fails to obtain admittance into the premises, may break open any door or window of the premises or otherwise effect entry into such premises in order to search *the premises* for the suspect. (60 words).

Indeed, the italicised 'the premises' in this last line can still be removed without affecting the meaning of the provision.

Marginal Notes

Marginal notes, also known as side notes, shoulder notes or section headings[44] are brief descriptions of the content of sections of an Act. They give a user a quick view and understanding of the content and scope of the Act. They also help users to quickly direct their attention to relevant provisions of the Act.[45] They, thus, help in fulfilling the principle that law should be accessible and comprehensible to all.[46]

The rules of their application include: they are assigned only to sections and not subsections, paragraphs and subparagraphs; they must be concise - generally a maximum of six to eight words - and accurate; the language must be consistent with those of the sections to which they refer; and must be couched in lower case, except for the first word, which is in initial capital.

Many of the marginal notes in the ACJA do not meet the test of conciseness as evidenced in the following selected sections for which suggested redrafts have been offered.

Section 14 'Arrested suspect to be taken immediately to police station'

Suggested redraft: 'Arrested suspect to be taken to police station'

[44]Ian McLeod, Principles of Legislative and Regulatory Drafting (Hart Publishing 2009) 24
[45]Gordon Stewart, 'Legislative Drafting and the Marginal Notes' (1995)16(1) Statute Law Review 21.
[46]ibid

Section 26 'Arrest for offence committed in presence of Judge, Magistrate or Justice of the Peace'

Suggested redraft: 'Arrest for offence committed before judicial officer'

Section 267 'Conduct of cases by legal practitioner for complainant or for defendant'

Suggested redraft: 'Complainant or defendant's right to legal representation'

Section 288 'Procedure when defendant of unsound mind is reported to be able to make his defence'

Suggested redraft: 'Procedure for defence by defendant of unsound mind'

Section 298 'Court may bring up person remanded or make any order during remand'

Suggested redraft: 'court order during remand'[47]

Section 101: The marginal note reads 'Transfer of case where cause of complaint has arisen out of jurisdiction of court'

Apart from the fact that this marginal note is too long (14 words), it does not accurately capture the essence of the section with regards to the issue of custody as seen in the provision reproduced below-

'Where a suspect is:

- in custody and the court directing a transfer thinks it expedient that the custody should be continued, or
- not in custody, that he should be placed in custody,

the court shall, by its warrant, commit the suspect to prison, subject to such security as it may deem appropriate in the circumstances, until he can be taken before a court wherein the cause of complaint arose.'

Suggested redraft: 'Custody pending transfer of case outside jurisdiction'

Paragraphing

Paragraphing is a drafting device that aids clarity. It makes for an orderly presentation of statutes that assists readers to understand the structure and content of the statutes. Section 101 has been deliberately placed last in the immediately preceding segment because of further observation on paragraphing which is discussed in this segment. One of the rules of paragraphing is that the provisions in the paragraph must be consistent with the introductory or umbrella words down to the conclusion. The flow of the introductory words through each of the provisions in the paragraph to the conclusion must be grammatically correct and coherent.[48] This is not the case with paragraph (b) of section 101. A combination of the introductory word through paragraph (b) to the conclusion reads –

'Where the suspect is:

(b) not in custody, that he should be placed in custody,

the court shall, by its warrant, commit the suspect to prison, subject to such security as it may deem appropriate in the circumstances, until he can be taken before a court wherein the cause of complaint arose.'

This error can be cured by adding 'and the court thinks it expedient' after 'not in custody' so that the section then reads –

[47] See also, ss 324, 328, 407, 415, 424, 425, 433, 440, 454 etc for more examples.
[48] For more on paragraphing, including the guidelines for its application, see G C Thornton, *Legislative Drafting* (4th edn, Tottel Publishing 1996) 61-65.

'Where a suspect is-

- in custody and the court directing a transfer thinks it expedient that the custody should be continued, or
- not in custody, *and the court thinks it expedient* that he should be placed in custody,

the court shall, by its warrant, commit the suspect to prison, subject to such security as it may deem appropriate in the circumstances, until he can be taken before a court wherein the cause of complaint arose.'

Better still, the section could be redrafted as follows –

'Where the court directing a transfer thinks it expedient that a suspect who is-

in custody should remain in custody; or

not in custody should be placed in custody,

the court shall, by its warrant, commit the suspect to prison, subject to such security as it may deem appropriate in the circumstances, until he can be taken before a court *in the jurisdiction* where the cause of complaint arose.'

Note the addition of the phrase in italics, which has been added in this redraft to more clearly reflect the intention of the drafter as the original provision '…until he can be taken before a court wherein the cause of complaint arose' implies that the cause of complaint (more appropriately 'cause of action') arose in the court itself as against a location within the jurisdiction of the court.

Consider also section 107(3) which provides –

(3) Where the suspect is not:

(a) before the court when the discontinuance is entered, the registrar or other proper officer of the court shall immediately cause notice in writing of the entry of the discontinuance to be given to the officer in charge of the prison or other place in which the suspect may be detained and the notice shall be sufficient authority to discharge the suspect; or

(b) in custody, the court shall immediately cause notice in writing to be given to the suspect and his sureties *and shall in either case cause a similar notice in writing to be given to any witness bound over to prosecute.*

This paragraph is also erroneously drafted. The italicised portion is applicable to both paragraphs (a) and (b) and should not have been made part of paragraph (b) only. It should have been set out separately in a way that shows that it applies to both paragraphs.

A suggested redraft-

(3) (a) Where the suspect is not-

(i) before the court when the discontinuance is entered, the registrar or other proper officer of the court shall immediately cause [a] notice in writing of the entry of the discontinuance to be given to the officer in charge of the prison or other place in which the suspect may be detained and the notice shall be sufficient authority to discharge the suspect, or

(ii) in custody, the court shall immediately cause [a] notice in writing to be given to the suspect and his sureties;

(b) The court shall, in either of the cases in (3)(a) cause a notice in writing of the entry of the discontinuance to be given to any witness bound over to prosecute.

Wrong Grammar, Incomplete Sentence and Solid Block Provision

Section 17 on **'Recording of statement of suspect'**

(1) Where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he *so* wishes to make a statement.

The highlighted word, 'so', is superfluous.

(2) Such statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organization or a Justice of the Peace or any other person of his choice**.** *Provided that the [l]egal [p]ractitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a legal practitioner.*

The full stop preceding the italicised portion of this subsection starting with 'Provided' makes the highlighted portion an incomplete sentence. The appropriate punctuation mark should have been a comma instead of a full stop. A wrong application of punctuation marks distorts legal drafts. Punctuation should, as such, not be used arbitrarily but purposefully, especially as it forms part of an enactment and is taken into consideration in the interpretation of an enactment.[49]

Also, the solid block subsection would be clearer and better understood if presented in a numbered paragraph as follows –

(2) (a) Such statement may be taken in the presence of a legal practitioner of his choice; or

(b) Where he has no legal practitioner of his choice, in the presence of-

(i) an officer of the Legal Aid Council of Nigeria,

(ii) an official of a Civil Society Organization,

(iii) a Justice of the Peace, or

(iv) any other person of his choice,

provided that the legal practitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a legal practitioner.

It could also be alternatively presented as follows –

(2) (a) Such statement may be taken in the presence of a legal practitioner of his choice; or

(b) Where he has no legal practitioner of his choice, in the presence of-

(i) an officer of the Legal Aid Council of Nigeria,

(ii) an official of a Civil Society Organization,

(iii) a Justice of the Peace, or

(iv) any other person of his choice.

The legal practitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a legal practitioner.

Additionally, there is a problem with the content of this proviso segment of this provision presented in this suggested alternative draft as subsection (c). The implication of the concluding clause 'except for the purpose of discharging his role as a legal practitioner' is that every person mentioned in the provision – officer of the Legal Aid Council, official of a Civil Society Organization, a Justice of the Peace or any

[49] Interpretation Act Cap I23 Laws of the Federation of Nigeria (LFN) 2010, s 3(1).

other person of his choice is a legal practitioner. In reality this is not likely to be the case. Apart from an officer of the Legal Aid Council, all the other categories of persons mentioned may not be lawyers; yet only a lawyer can, under any circumstances, discharge his role as a legal practitioner. Clearly, this subsection needs to be amended to correct this error.

Clarity and Inconsistency

Section 18 on **'Arrest by police officer without warrant'**

(1) A police officer may, without an order of a court and without a warrant, arrest a suspect:

(g) having in his possession without lawful excuse, the burden of proving which excuse lies on such person, any implement of housebreaking, car theft, firearm or any offensive or dangerous weapon;

This draft is awkward. It is structurally defective in that it unduly separates the verb (nominalised here as 'having in his possession') and its object ('any implement of housebreaking, car theft, firearm or any offensive or dangerous weapon') with modifiers ('without lawful excuse, the burden of proving which excuse lies on such person').

A better draft would be –

18(1) A police officer may, without an order of a court and without a warrant, arrest a person suspected of-

(g) possessing any implement of housebreaking, car theft, firearm or any offensive or dangerous weapon without lawful excuse; the burden of proving lawful excuse lies on such person;

This is clearly a reverse onus provision, which requires a person in possession of something to prove lawful possession. It is an exception to the general rule that he who alleges is the one to prove.[50]

Section 82 on **'Restoration of attached property'**

(1) Where within one year from the date of the attachment, a suspect, whose property is or has been at the disposal of the Court under section 80 of this Act, appears voluntarily or being arrested is brought before the Court and proves to its satisfaction that he:

(a) did not abscond or conceal himself for the purpose of avoiding execution of the warrant; and

(b) had no notice of the public summons or warrant as to enable him to attend within the time specified therein, *that property, so far as it has not been sold, and the net proceeds of any part of it which has been sold* shall, after satisfying from the proceeds all costs incurred in consequence of the attachment, be delivered to him.

There is inconsistency in the italicised portion of this provision. If, in one breath, the property has not been sold, how can it, in another breath, refer to any part of it which has been sold? The provision needs to be clarified.

Though language is the tool of communication, to the drafter's chagrin, the use of language is not, and cannot be, an exact science. As Thornton observes '[d]espite the riches of the immense vocabulary of the English language, it has tremendous potential for vagueness, ambiguity, nonsense, imprecision, inaccuracy and indeed all the other horrors recognised by the legislative drafter.'[51] As has been illustrated in this segment, this drafter's pain is clearly evident in some sections of the ACJA 2015. This impacts negatively on the quality of the Act, making the need for necessary amendment evident. The testing of more of these provisions in court, as the need arises, will show how far this goes in practice.

[50] *Basaki v State* [2011] LPELR-4859 (CA), Joseph *v* State [2017] LPELR-43614(CA), Auta *v The State* [2018] LPELR-44490(CA).
[51] Thornton (n 48) 2.

CONCLUSION

The ability of any legislation to achieve the goal of government to effectively govern in the modern democracy depends largely on the quality of the legislation, and its capacity to meet the society's expectations and needs at every point in time. Language is the tool of communication. Legislative competence requires a good mastery of the use of written language, the proper application of which impacts the quality of law. The legislative drafter must, as such, strive to be a craftsperson in the use of language.

This article has given an overview of the ACJA 2015. It acknowledges the Act as a most welcome enactment that has made several innovative provisions aimed at addressing the many gaps in the CPA and CPC which had long plagued Nigeria's administration of criminal justice system. More significantly, the article examines certain legislative expressions in the Act. It indicates the gaps in these legislative expressions, provides relevant analyses and proffers alternative redrafts and suggestions.

The article notes that as good and welcome as the ACJA is, it is evident that it is fraught with a significant measure of substantive and legislative expression gaps. One significant gap in the Act is its failure to have sufficiently taken cognisance of critical constitutional provisions. This is seen in the recent decision of the Supreme Court in *Ude Jones Udeogu v Federal Republic of Nigeria & 2 Ors,*[52] which nullified the provisions of section 396(7) of the Act as inconsistent with section 290(1) of the Constitution.[53]

The identified gaps diminish the quality of the Act. A timely amendment is needed to address the shortcomings highlighted here and many others which could not be dealt with in this article. If these gaps are not timely addressed, they may lead to more unfavourable and unintended outcomes, which will impact negatively on the overall implementation of the Act.

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[52] Suit No. SC. 622c/2019 (n 35).
[53] 1999, as amended.

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