Volume 14 | Issue 3 Article 1

8-7-2024

Volume 14, Issue 3 - Full Issue

Notre Dame Journal of Int'l & Comparative Law Volume 14

Follow this and additional works at: https://scholarship.law.nd.edu/ndjicl

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation

Volume 14, Notre Dame Journal of Int'l & Comparative Law (2024) "Volume 14, Issue 3 - Full Issue," *Notre Dame Journal of International & Comparative Law*: Vol. 14: Iss. 3, Article 1.
Available at: https://scholarship.law.nd.edu/ndjicl/vol14/iss3/1

This Full Issue is brought to you for free and open access by the Notre Dame Journal of International & Comparative Law at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

LETTER FROM THE EDITOR-IN-CHIEF

Dear Readers,

It is with great pleasure and personal pride that we introduce Volume 14, Issue 3 of our *Journal*, a special issue highlighting the Notre Dame London Law Programme. This program is dedicated to shaping a different kind of lawyer—a global citizen prepared for a transnational legal career. As the oldest study-abroad program offered by an American law school and the only yearlong overseas program approved by the American Bar Association, it epitomizes global legal education.

One-third of this year's *Journal* members, including myself, studied in London. My own time in the London Law Programme and on the *Journal* has profoundly impacted my life, broadened my horizons, and deepened my appreciation for international legal systems. This transformative experience inspired the creation of this special issue, which we hope will convey the profound influence of this unique program.

This issue highlights the critical regulatory, cultural, and geopolitical challenges in contemporary legal practice. In this special issue, we present four articles by London Law Programme professors.

Katherine Reece Thomas's article examines the regulatory challenges and gaps governing deep seabed mining. Her piece emphasizes the need for binding international regulations to protect the environment and ensure equitable benefit-sharing.

Mark Hill's article provides an insightful overview of religious courts in Africa. He discusses varying levels of state recognition and integration, the enforceability of their decisions, and the complexities of implementing religious law across diverse African countries.

Bobby Reddy's article explores the impact of regulatory differences on executive compensation. He highlights the effects of the U.K.'s binding say-on-pay vote compared to the advisory vote in the U.S., suggesting that cultural norms and market performance also play significant roles in pay levels.

Sahib Juss and Satvinder Juss's article delves into the impact of U.S. drone strikes in Pakistan. The authors argue that these strikes have failed to achieve their intended securitization goals, leading to increased anti-American sentiment, insurgency, and collateral damage, and call for a reassessment of their long-term consequences on regional security.

A special thank you to *Journal* members Claire Crites, Scott Holben, Olla Jaraysi, Perla Khattar, Anthony Krempa, and Pavithra Rajendran for taking the time to go above and beyond to help complete this issue. The utmost thank you is owed to Sachit Shrivastav and Chris Ostertag from the *Notre Dame Law Review*, who spent countless hours ensuring this special issue reached the finish line. Their cross-journal support exemplifies the spirit of the Notre Dame community and what it truly means to be a different kind of lawyer. This issue would not be possible without their support.

Finally, we extend our deepest gratitude to our contributors for their scholarship, our dedicated editorial team, our faculty advisors, and our readers for your continued support. We hope this special issue will foster thoughtful reflection, spark engaging discussions, and inspire innovative approaches within the legal community from South Bend to London and beyond.

Yours in Notre Dame,

Editor-in-Chief, Volume 14

DEEP SEABED MINING: WHAT IS TO BE DONE ABOUT THE REGULATORY LACUNA?

KATHERINE REECE THOMAS*

TABLE OF CONTENTS

INTRODUCTION 3

I. THE AREA AND THE AUTHORITY: COMMON HERITAGE 4

A. HOW HAS THE COMMON HERITAGE DECLARATION PLAYED OUT IN PRACTICE? *5*

B. HOW ARE THESE DUTIES AND RULES TO BE IMPLEMENTED? *6*

C. ISA STRUCTURE *7*

D. THE IMPLEMENTATION AGREEMENT, SIGNED IN 1994 AND IN FORCE IN 1996 .... *8*

E. THE JURISDICTION OF THE ISA *9*

F. STATES AND CONTRACTORS *11*

G. RESPONSIBILITIES OF SPONSORING STATES *12*

II. THE MINING CODE 15

III. WHAT NEXT? WHAT HAPPENS NOW? 18

CONCLUSION 20

* Associate Professor of Law, City, University of London and Visiting Associate Professor and Fellow at University of Notre Dame (USA) in England; solicitor (non-practicing), member of the New York Bar (retired); BA (Hons) (McGill), BA (Hons) Jurisprudence (Oxford), and LLM (Cambridge). This Article was first drafted in February 2024. In March 2024 the ISA held its 29th Session Part 1 and where relevant this Article has been updated to refer to statements issued by the ISA relating to that Session.

INTRODUCTION

As long ago as 1969, the United Nations General Assembly passed a resolution calling for a moratorium[1] on all deep seabed mining.[2] In 1970, the U.N. Declaration of Principles Governing the Seabed and Ocean Floor was signed by sixty-eight states, enshrining the principle that the deep seabed should be preserved for "peaceful purposes" and is the "common heritage of mankind."[3]

In 1982, the "Common Heritage of Mankind" declaration was incorporated into Article 136 of the United Nations Convention on the Law of the Sea (UNCLOS), covering the "Area and its resources;" the Area was defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[4] This means land outside the Exclusive Economic Zones (EEZ) or Continental Shelves of coastal states.[5] Originally prompted by the discovery of polymetallic nodules containing nickel, cobalt and copper on the seabed east of Tahiti in the 1950s, the moratorium was passed after the possibility of exploiting the deep seabed by extracting minerals found therein was found sufficiently real by the U.N. General Assembly in 1969, and in 1982 by UNCLOS to include provisions in Part XI[6] for regulating human activity in the Area.[7] As drafted, UNCLOS Part XI proved unacceptable to many western powers, home to companies wishing to extract deep seabed minerals, and was amended by the 1994 Implementation Agreement.[8] The Implementation Agreement involved a dilution of the sharing of intellectual property provisions and a greater role for private contractors at the expense of a multinational operating body.

Currently the tension is between those who think mining should go ahead because in part the minerals are needed for the green transition, and those who believe that the scientific evidence does not indicate mining can go ahead without causing significant harm to the environment and

---

[1] G.A. Res. 2574 (XXIV) D (Dec. 15, 1969).

[2] "Deep seabed" will be spelled without a hyphen as consistent with the U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. The only reference to the "deep seabed" (or "deep sea-bed") is in the Third U.N. Conference on the Law of the Sea, *Economic Implications of Sea-Bed Mineral Development in the International Area: Report of the Secretary-General*, at 8, 22, 36, 39, U.N. Doc. A/CONF.62/25 (May 22, 1974) (contained in the definition of polymetallic nodules when discussing governing preparatory investment in pioneer activities).

[3] G.A. Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (Dec. 17, 1970) ("Common Heritage of Mankind Declaration"). Note the hyphen in sea-bed, and no reference to the *deep* sea-bed. For early commentary, see Alexandre Kiss, *The Common Heritage of Mankind: Utopia or Reality?*, 40 INT'L J. 3 (1985).

[4] UNCLOS, s*upra* note 2, art. 1.

[5] Neither the Convention on the Continental Shelf, April 29, 1958, 499 U.N.T.S. 311 [hereinafter GCCS], nor the Convention on the High Seas, April 29, 1958, 450 U.N.T.S. 79, refer to the deep seabed or waters beyond national jurisdiction. According to GCCS Article 1, the criteria for the outer limit of the continental shelf is one of exploitability based on depth, not distance from the coast. Note that the term "deep seabed mining" is sometimes used to relate to mining the seabed below 200 nautical miles which may not necessarily be equivalent to the Area. *See* YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 234 (4th ed. 2023) (defining the limits of the Area as "200 nautical miles from the baseline or the limit of the continental margin where it extends beyond 200 nautical miles").

[6] Part XI contains Articles 133–91. *See* UNCLOS, s*upra* note 2.

[7] For a historical account, see generally TANAKA, *supra* note 5, at 234–36.

[8] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3 [hereinafter Implementation Agreement].

biodiversity.[9] The result is that so far there is no complete mining code for exploitation.

This Article will focus on the absence of regulation governing possible exploitation of the deep seabed in the Area through mining and the resulting risks for all involved including the planet. It will argue that deep sea mining should not go ahead in the absence of binding international rules because the benefits do not outweigh environmental and other regulatory risks. In other words, we cannot justify "ripping up the ocean floor to facilitate the energy transition."[10] Minerals in the deep seabed are not the key to the transition to green energy. Mining should not proceed without regulation—in other words, before a mining code is agreed upon.

The question is how the regulatory vacuum will be filled—given the slow pace of progress made so far by the international organization established by UNCLOS—to regulate exploration and exploitation in the Area in accordance with the principles of Common Heritage of Mankind. UNCLOS Part XI and the Implementation Agreement make provisions for the International Seabed Authority (ISA) and empower it to regulate deep seabed mining by means of binding exploration and exploitation regulations which will govern mining activities in the Area.[11] So far exploration regulations are in place, but there are no completed exploitation regulations. The so-called Mining Code has therefore yet to be finalized, let alone agreed upon. With mining companies keen to start exploitation, there is a real risk that the regulatory gap will hinder a realization of the principle that the Area is the common heritage of mankind.[12] It does seem that a moratorium is required.[13]

I. THE AREA AND THE AUTHORITY: COMMON HERITAGE

The international law sources today are UNCLOS (1982), the Implementation Agreement (1994, in force 1996), and customary international law. UNCLOS has been ratified by 168 parties, including 167 states (164 U.N. member states plus the U.N. observer state Palestine, as well as the Pacific islands, the Cook Islands and Niue) and the European Union. An additional fourteen U.N. member states have signed, but not ratified the Convention, including the United States, Turkey, and Venezuela. The Implementation Agreement which amended UNCLOS Part XI as originally drafted enabled some developed states, unhappy with the

---

[9] For a useful summary of environmental concerns, see Daisy Chung et al., *The Promise and Risks of Deep-Sea Mining*, REUTERS (Nov. 15, 2023, 3:30 AM), https://www.reuters.com/graphics/MINING-DEEPSEA/CLIMATE/zjpqezqzlpx/ [https://perma.cc/7M8X-ZSJD].

[10] Kenza Bryan & Harry Dempsey, *'Playing with Fire': The Countdown to Mining the Deep Seas for Critical Minerals*, FIN. TIMES (Apr. 25, 2023), https://www.ft.com/content/95ec1105-3f5e-4055-bde8-a0c194f02d35 [https://perma.cc/PS7J-BYZN]. Micheal Widmer, metals strategist at Bank of America, is quoted as having asked, "[c]an [we] justify ripping up the ocean floor to facilitate the energy transition?" *Id.*

[11] *See* UNCLOS, *supra* note 2, arts. 2, 156.

[12] Lessons for space exploration and exploitation to be learnt from seabed mining are explored in MICHAEL BYERS & AARON BOLEY, WHO OWNS OUTER SPACE? (2023).

[13] *Five Things You Need to Know About Deep-Sea Mining*, ECONOMIST IMPACT: SUSTAINABILITY PROJECT (June 4, 2023) [hereinafter *Five Things*, ECONOMIST IMPACT], https://impact.economist.com/sustainability/ecosystems-resources/five-things-you-need-to-know-about-deep-sea-mining [https://perma.cc/98W2-RMQA] ("Several governments, including those of Germany, Spain, New Zealand, Ecuador, Costa Rica, Chile, Norway and the UK, support a moratorium on deep-sea mining until environmental regulations are in place. French president Emmanuel Macron has called for a complete ban. Global brands and major users of battery technology including Samsung, Google, Volvo, Philips and BMW have also backed a moratorium on deep-sea mining.").

deep seabed mining provisions, to sign and ratify UNCLOS.[14] The Implementation Agreement has been ratified by 151 parties (all of which are parties to the Convention), which includes 150 states (147 U.N. member states, the U.N. observer state Palestine, the Cook Islands, and Niue) and the European Union. An additional three U.N. member states (Egypt, Sudan, and the U.S.) have signed, but not ratified the agreement.

UNCLOS Part XI (with the Implementation Agreement)[15] establishes a regime for the seabed beyond national jurisdiction. The Area corresponds to approximately forty-four percent of the ocean floor, while continental shelves account for the approximately remaining fifty-six percent of the ocean floor. Domestic or national law applies to activities on shelves, subject to general rules of public international law and UNCLOS. Coastal states have sovereign rights with respect to activities on the continental shelf and set the rules for mining thereon. It is worth noting that state regulations are expected to be at least as strict as international regulations.[16] The Area is unlike any other sea area, governed as it is by the principle of Common Heritage of Humankind (as we should say now) that establishes that the Area "shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof."[17]

The common heritage principle represents a significant departure from coastal state domination of the seas which prevails in relation to the territorial sea, continental shelf, and EEZ regimes. It enshrines neither sovereignty nor absolute freedom. From the U.N. moratorium declaration, the world is now, some fifty-five years later, on the brink of mining.

A. *HOW HAS THE COMMON HERITAGE DECLARATION PLAYED OUT IN PRACTICE?*

Part XI of UNCLOS reflects the Declaration's principles: Articles 136, 137, 140, 141, 145 and 160 are particularly relevant. The result is that under the Convention (and arguably as a matter of customary international law[18]):

---

[14] TANAKA, *supra* note 5, at 246–52.

[15] The Agreement is to be read with UNCLOS Part XI and in the event of conflict its provisions apply. *See* Implementation Agreement, *supra* note 8, art. 2. References hereinafter to UNCLOS Part XI are to that Part as supplemented by the Implementation Agreement unless otherwise specified.

[16] For example, the Norwegian government has approved plans for deep seabed mining on its extended continental shelf. *See* Ashley Perl, *Mining the Depths: Norway's Deep-Sea Exploitation Could Put It in Environmental and Legal Murky Waters*, CONVERSATION (Jan. 31, 2024, 6:08 PM), https://theconversation.com/mining-the-depths-norways-deep-sea-exploitation-could-put-it-in-environmental-and-legal-murky-waters-220909 [https://perma.cc/7FJU-XFYX]; Richard Milne, *Norway's Parliament Backs Deep-Sea Mining Plans*, FIN. TIMES (Dec. 5, 2023), https://www.ft.com/content/c1a503fb-5d4d-4f60-8ce4-2c861a03aea5 [https://perma.cc/UX8F-V4DE].

[17] G.A. Res. 2749, *supra* note 3, ¶ 2; *see* Kiss, *supra* note 3; *see also* Helmut Tuerk, *The Common Heritage of Mankind After 50 Years*, 57 INDIAN J. INT'L L., 259–83 (2017) (discussing Maltese Ambassador Arvid Pardo's call for a moratorium on mining).

[18] States that are not parties to UNCLOS cannot sponsor deep sea mining companies. However, the rules governing deep sea mining are now arguably binding on nonparties by virtue of their status as customary international law, so this is far from clear. The United States is not a party and adopted its own legislation, the Deep Seabed Hard Mineral Resources Act, in 1980. Deep Seabed Hard Mineral Resources Act, Pub. L. No. 96-283, 94 Stat. 553 (1980) (codified as amended in scattered sections of 30 U.S.C.); *see* Louise Woods & Elena Guillet, *Even Without US, Deep-Sea Mining Rules Likely To Prevail*, LAW360 (Aug. 8, 2023, 5:52 PM), https://www.law360.com/articles/1706813/even-without-us-deep-sea-mining-rules-likely-to-prevail [https://perma.cc/HT9E-8N9G]; Klaas Willaert, *Deep Sea Mining and the United States: Unbound Powerhouse or Odd Man Out?* 124 MARINE POL'Y, no. 104339, 2021, at 1, 4.

- All rights in the resources of the Area are vested in humankind as a whole;[19]
- No state or natural or juridical persons can claim, acquire or exercise rights in connection to the resources in the Area except under UNCLOS Part XI;[20]
- All mining and any mineral resources recovered may only be alienated in accordance with UNCLOS and the rules adopted by the ISA;[21]
- Mining can only take place by entities licenced by the ISA and sponsored by member states;[22]
- States must ensure "effective control" regarding state enterprises or sponsored entities;[23]
- Activities (including research) shall be carried out for benefit of humankind as a whole;[24]
- Financial and other benefits are subject to equitable sharing under rules of the ISA;[25]
- Necessary measures shall be taken to ensure "effective protection for the marine environment from harmful effects" of mining activities; and[26]
- The Area will be used for peaceful purposes.[27]

B. How are These Duties and Rules to be Implemented?

The regulation of the Area is in the hands of the ISA, which has supranational jurisdiction (covering states and natural persons) and exclusive jurisdiction (meaning no state or entity can act without the approval of the Authority).[28] The ISA is made up of 167 member states, and the European Union, and is mandated under the UNCLOS to organize, regulate, and control all mineral-related activities in the international seabed area for the benefit of mankind as a whole.[29] ISA also has the duty to ensure the effective protection of the marine environment from harmful effects that may arise from deep seabed-related activities.[30]

---

[19] UNCLOS, s*upra* note 2, art. 137(2).
[20] *Id*. art. 137(3).
[21] *Id.*
[22] *Id.* arts. 139, 153 annex III (precluding the U.S.).
[23] INFORMAL WORKING GRP. ON INSTITUTIONAL MATTERS, 28TH SESSION OF THE INT'L SEABED AUTH., WEBINAR ON "EFFECTIVE CONTROL": SEPTEMBER 1ST, 2023; AGENDA (2023) [hereinafter EFFECTIVE CONTROL WEBINAR], https://www.isa.org.jm/wp-content/uploads/2023/09/Effective_Control_Webinar-Agenda.pdf [https://perma.cc/7JY7-EKPU] ("Several delegations have noted the need to discuss the issue of effective control within the framework of the informal working group on institutional matters. The cofacilitators of this informal working group agreed to include the topic in the group's programme of work. Subsequently, during the July 2023 Council Session, it was agreed that the facilitators would hold a webinar on effective control in order to guide the drafting of relevant regulations."). For latest developments, see the summary of progress at *Fast Facts 29th Session of the ISA Council—Part 1*, LINKEDIN (Apr. 17, 2024) [hereinafter *Fast Facts 29th Session*], https://www.linkedin.com/pulse/29th-session-isa-council-part-i-summary-key-takeaway-isbahq-wqtpe/ [https://perma.cc/A7ME-J574].
[24] UNCLOS, *supra* note 2, art. 140(1).
[25] *Id.* art. 140(2) (requiring equitable sharing of economic and other benefits in accordance with Article 160).
[26] *Id*. art. 145.
[27] *Id*. art. 141.
[28] *Id*. arts. 145 annex I.
[29] *Id.* arts. 140, 156–57.
[30] *Id.* art. 145.

C. *ISA STRUCTURE*

The Authority is made up of an Assembly, a Council, and advisory bodies.[31] The Assembly includes all member states of the ISA, and the Council has thirty-six of thirty-seven members elected by the Assembly. The Council acts as the executive, and its powers are set out in UNCLOS Article 162. The Council includes members from different groups of states with specific interests in the Area as set out in the illustration below. The Council has two advisory bodies. The Legal and Technical Commission (LTC) (composed of over forty members) advises the Council on all matters relating to the exploration and exploitation of non-living marine resources (such as polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts). The LTC is responsible for drafting the rules, regulations, and procedures (RRPs) for approval by the Council and then the Assembly. Voting is by consensus, but if consensus is not possible there is a provision for voting by two-thirds majority.[32] This may become significant if a mining licence is made and there is no agreement on exploitation regulations as discussed below. The Finance Committee (composed of fifteen members) deals with budgetary and related matters.[33] In addition, there is the Secretariat which is composed of the Secretary-General[34] and approximately forty employees. There are also informal working groups dealing with a range of outstanding matters.

The ISA's powers therefore include the power to adopt rules and regulations relating to prospecting, exploring and exploitation in the Area. Regulations duly adopted are binding on all members of the ISA.[35]

---

[31] *See* Aline Jaeckel, *The Area and the Role of the International Seabed Authority*, *in* ROUTLEDGE HANDBOOK OF SEABED MINING AND THE LAW OF THE SEA 157–77 (Virginie Tassin Campanella ed., 2024).

[32] For a useful summary of process within the ISA, see *Deep Seabed Mining Insights: Understanding the International Seabed Authority*, MINING REV. AFR. (Aug. 1, 2023), https://www.miningreview.com/business-and-policy/deep-seabed-mining-insights-understanding-the-international-seabed-authority/ [https://perma.cc/9TB4-76SY].

[33] *See, e.g.*, EFFECTIVE CONTROL WEBINAR, *supra* note 23; SECRETARIAT INT'L SEABED AUTH., SECRETARY-GENERAL ANNUAL REPORT 2023: JUST AND EQUITABLE MANAGEMENT OF THE COMMON HERITAGE OF HUMANKIND 65 (2023).

[34] Michael Lodge has been the Secretary-General of the ISA since 2017. His current term expires in 2024. *See Mr. Michael W. Lodge Reelected as Secretary-General of ISA*, INT'L SEABED AUTH. (Dec. 4, 2020), https://www.isa.org.jm/news/mr-michael-w-lodge-reelected-secretary-general-isa/ [https://perma.cc/C9AJ-EHBB].

[35] *See generally* Tanaka, *supra* note 5, at 238–42 and sources cited therein.

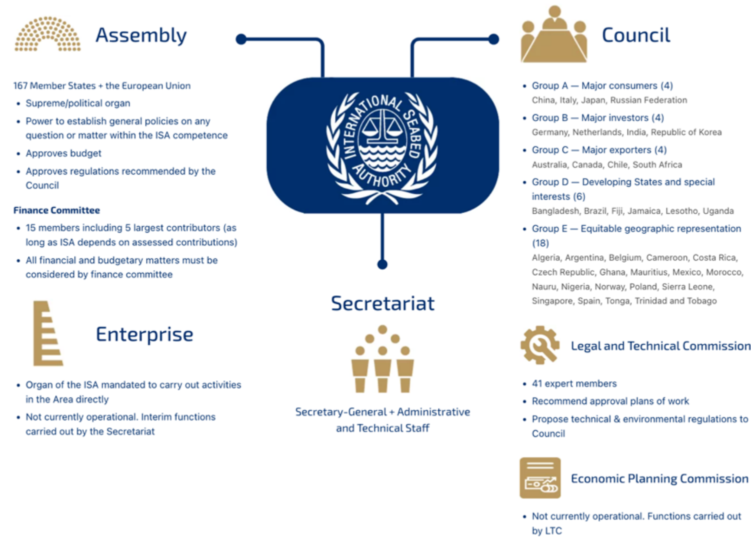

Figure 1: Organs of the ISA[36]

D. *THE IMPLEMENTATION AGREEMENT, SIGNED IN 1994 AND IN FORCE IN 1996*

With a preamble, ten articles, and an annex, the Implementation Agreement[37] prevails over Part XI of UNCLOS in the event of conflict. The Implementation Agreement modified UNCLOS in a number of important ways:

- It postponed creation of the organ of the ISA intended by UNCLOS to carry out activities in the Area directly (the "Enterprise"). The Enterprise is not operational, and its functions are carried out by the Secretariat. Under the Mining Code, as so far drafted, the ISA will grant licences for exploration [38] and eventually grant sponsoring states to sponsoring states and contractors.[39] The ISA itself will not be exploiting the resources. To date it appears that activities are undertaken by joint arrangement between the ISA and states and contractors through joint ventures;[40]
- While the Assembly and the Council have ultimate responsibility for ensuring the equitable sharing of benefits from exploitation, the Implementation Agreement gave more

---

[36] *See Organs of the International Seabed Authority*, INT'L SEABED AUTH. (last visited Aug. 4, 2024), https://www.isa.org.jm/organs/ [https://perma.cc/4ZUZ-WE6E].

[37] Implementation Agreement, *supra* note 8.

[38] There are currently thirty-one in place. *Exploration Contracts*, INT'L SEABED AUTH., https://www.isa.org.jm/exploration-contracts/ [https://perma.cc/N36K-8VUC] (last visited June 21, 2024).

[39] *See infra* Part II.

[40] *See* Implementation Agreement, *supra* note 8, annex § 2(2); UNCLOS, *supra* note 2, arts. 153 annex III; *see also* Tanaka, *supra* note 5, at 238–42. For recent information on the Enterprise relating to the appointment of an interim director, see *Mr. Eden Charles of Trinidad and Tobago Appointed Interim Director-General of the Enterprise*, INT'L SEABED AUTH. (Dec. 14, 2023), https://www.isa.org.jm/news/mr-eden-charles-of-trinidad-and-tobago-appointed-interim-director-general-of-the-enterprise/ [https://perma.cc/62QD-U7KZ]. *See also* Oliver Gunasekara, *Current Status of Deep Sea Mining Regulations*, IMPOSSIBLE METALS (Oct. 20, 2023), https://impossiblemetals.com/blog/current-status-of-deep-sea-mining-regulations/ [https://perma.cc/A3ZM-BWZ3] (covering the status of the Mining Code and contracts granted).

power to the Finance committee than intended originally under UNCLOS;[41]

- It introduced more market-oriented approaches and removed the production limitation;
- It removed mandatory transfers of technology;
- It reduced the financial terms of contracts in favour of contractors;
- It provided for economic assistance to developing countries affected by activities and the establishment of an economic assistance fund; [42] and
- It granted more decision making power to the Council.

E. *THE JURISDICTION OF THE ISA*

The jurisdiction of the ISA is limited to the Area—the seabed, ocean floor, and subsoil, not extending to the waters beyond the limits of national jurisdiction which remain high seas, governed by the High Seas freedoms established by customary law and UNCLOS Part VII.[43] The ISA's powers and functions are set out in UNCLOS Article 157: the organisation is limited to organising, carrying out, and controlling activities in the Area. It has legislative and enforcement jurisdiction as set out in Article 17 of Annex III to UNCLOS. It has the right to take measures to ensure compliance with its regulations and the power to sanction noncompliance. The ISA does not have a navy,[44] but in November 2023 it demonstrated that it has teeth. The Secretary-General of the ISA used his powers through the Prospecting and Exploration Regulations[45] to issue provisional measures in relation to the activities of Greenpeace's vessel *Arctic Sunrise* in the NORI-D contract area[46] within the Clarion-Clipperton Zone. Activists from the Greenpeace vessel had boarded the NORI vessel, *M/V Coco*, to disrupt its activities. The ISA interim measures were directed at the Netherlands government—as the flag state of the Greenpeace vessel—and invited it to consider steps under UNCLOS Article 87 (High Seas Freedoms) and Article 147 (activities in the Area). The Secretary-General also informed Denmark—as the flag state of *M/V Coco*—of NORI's concerns over the activities of Greenpeace and

---

[41] While integration is ongoing, the issue is far from resolved. *See Equitable Sharing of Benefits,* INT'L SEABED AUTH., https://www.isa.org.jm/equitable-sharing-of-benefits/ [https://perma.cc/433D-5BHA] (last visited Mar. 22, 2024).

[42] Implementation Agreement, *supra* note 8, annex § 7(1).

[43] UNCLOS, *supra* note 2, art. 87(2) (High Seas Freedoms); *id.* art. 147(3) (activities in the Area).

[44] Regarding UNCLOS Article 18 of Annex III, ISA Secretary-General Michael Lodge acknowledged the enforcement concerns, writing,

> In relation to enforcement, the concerns of some member states can be easily understood. The Authority has neither ocean-going vessels nor deep-sea submersibles at its disposal. How can it adequately supervise activities that are out of sight and hugely expensive to monitor? These are reasonable concerns, and it is evident that the Authority will need to significantly upscale its regulatory capacity in the coming years.

Michael W. Lodge, *Regulating Access and Sustainable Development of Deep-Sea Minerals for the Benefit of All Humanity*, MARINE TECH. SOC'Y J., Nov./Dec. 2021, at 12, 14.

[45] Int'l Seabed Auth. Council, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, at 18–19, ISBA Doc. 19/C/WP.1 (Apr. 17, 2013), https://www.isa.org.jm/wp-content/uploads/2022/06/isba-19c-wp1_0.pdf [https://perma.cc/C278-FWHG] (Regulation 33).

[46] Nauru Ocean Resources Inc. is a subsidiary of The Metals Company, sponsored by the Republic of Nauru. *See NORI-D Project—Nauru Ocean Resources Inc.*, METALS CO., https://metals.co/nori/ [https://perma.cc/6QN9-BZDK] (last visited June 23, 2024).

the alleged threat to safety. The measures included ordering *Arctic Sunrise* to keep a safe distance.[47]

NORI started proceedings in Dutch courts, resulting in an order that Greenpeace activists disembark from *M/V Coco*. However, no safety zone was ordered. Greenpeace treated the order as a victory and has stressed that the Dutch court questioned the Secretary-General's authority to take the measures he did.[48] The Secretary-General responded, in an interim report to the Council, essentially that his actions were taken under regulations giving him the authority, and that the full Council did not need to be involved.[49] His report further highlighted that Greenpeace, as an observer at ISA, is supposed to help the process of regulating deep sea mining, not engage in disruptive activities.[50] In an article critical of the Secretary-General's action, Dr. Shani Friedman highlighted that the authority of the ISA does not extend to the High Seas and that the measures taken by the Secretary General were essentially *ultra vires*:

> International law does not prohibit protests on the High Seas. However, the freedom of the High Seas must be exercised with due regards to other states' rights (UNCLOS, Art. 87). There is little doubt that Greenpeace has violated the freedom of the High Seas and other rules of international law by boarding the *MV Coco* unauthorized and damaging the vessel.
>
> However, the actions taken by the ISA to address this incident do not seem to be within the scope of its jurisdiction or authority under the Polymetallic Nodules Regulations. Furthermore, the ISA exercised its jurisdiction with respect to a maritime zone or conduct that are outside its capacity altogether, thus acting *ultra vires*. The ISA essentially took upon itself what is an obligation of states—to request the intervention of the flag state.[51]

In March 2024, the Secretary-General further reported to the Council during its 29th Session on the NORI incident and other allegations of interference with activities in the Clarion-Clipperton Area. The Secretary General repeated that the ISA has the right to issue provisional measures in respect

---

[47] *See The Secretary-General of the ISA Takes Immediate Measures in Response to NORI-D Area Incident*, INT'L SEABED AUTH. (Nov. 28, 2023), https://www.isa.org.jm/news/the-secretary-general-of-the-isa-takes-immediate-measures-in-response-to-nori-d-area-incident/ [https://perma.cc/U3F6-ALY3]; *President and Vice-Presidents of the Council Issue Statement on Recent Incidents in NORI-D Contract Area*, INT'L SEABED AUTH. (Dec. 15, 2023), https://www.isa.org.jm/news/president-and-vice-presidents-of-the-council-issue-statement-on-recent-incidents-in-nori-d-contract-area/ [https://perma.cc/Q2FL-LNAX].

[48] *Court Confirms Greenpeace Right to Peaceful Protest as Activists' 200 Hour Long Protest Against Deep Sea Mining in the Pacific Continues*, GREENPEACE INT'L (Nov. 30, 2023), https://www.greenpeace.org/international/press-release/64037/ [https://perma.cc/6B73-4Q8S].

[49] SEC'Y-GEN., INT'L SEABED AUTH., INTERIM REPORT ON THE IMMEDIATE MEASURES OF THE SECRETARY-GENERAL OF THE AUTHORITY (2023).

[50] *See id.*

[51] Shani Friedman, *The Arctic Sunrise II—Does the ISA Have 'Enforcement Jurisdiction' on the High Seas?*, EJIL: TALK! (Dec. 12, 2023), https://www.ejiltalk.org/the-arctic-sunrise-ii-does-the-isa-have-enforcement-jurisdiction-on-the-high-seas/ [https://perma.cc/98DG-2ZW3].

of noncompliance under the Prospecting and Exploration Regulations.[52] It is not clear what all this would mean if unauthorised mining were to start.[53]

F. *STATES AND CONTRACTORS*

UNCLOS, as originally drafted, provided for an entity called the Enterprise to carry out mining in the Area.[54] The Implementation Agreement effectively mothballed the Enterprise and replaced it with a parallel system whereby mining is to be undertaken by private contractors sponsored by parties to UNCLOS.[55] As explained above, to date, exploration work has been done by mining companies sponsored by numerous states, including Nauru, pursuant to contracts entered into with the ISA. The nature of the relationship between the private entity doing the mining and the sponsoring state, and the extent to which that entity needs to be based in that state, raise questions about the meaning of "effective control" as used in the treaty. Multilateral corporations whose headquarters are based in states that are not parties to UNCLOS have incorporated subsidiaries in sponsoring states.[56] This debate about "effective control" is discussed below.

What powers does the ISA have over contractors? The ISA can suspend or terminate contractors' rights under a contract where activities are conducted in such a way as to result in serious, persistent, and wilful violations of the fundamental terms of the contract, or when contractors have failed to comply with a judicial decision.[57] The ISA can impose monetary penalties on contractors[58] and can suspend states from membership in the Assembly if they are in gross and persistent violation of Part XI.[59] It can also issue emergency orders to prevent serious harm to the marine environment.[60] The ISA's jurisdiction is thus supranational, as it has

---

[52] *See* Int'l Seabed Auth. Council, *Incidents in the NORI-D Contract Area of the Clarion Clipperton Zone, 23 November to 4 December 2023*, ISBA Doc. 29/C/4/Rev.1 (Mar. 19, 2024), https://www.isa.org.jm/wp-content/uploads/2024/03/2405417E.pdf [https://perma.cc/AZT2-X6MX].

[53] Note that NORI was criticised for failing to comply with its own risk management rules in relation to a slurry spill in the Pacific. Kenza Bryan, *Seabed Watchdog Accuses Miner of Ignoring Procedures After Spill,* FIN. TIMES (July 21, 2023), https://www.ft.com/content/25907d7e-8ba0-40fe-82f0-ee8d01d10bd1 [https://perma.cc/2E96-BJ97].

[54] UNCLOS, *supra* note 2, art. 170.

[55] Implementation Agreement, *supra* note 8 annex § 2.

[56] See UNCLOS, *supra* note 2, arts. 139, 153(2)(b). See, for example, Lockheed Martin, a U.S. company, has apparently sold its U.K.-registered deep sea mining company, UK Seabed Resources, to a Norwegian entity called Loke Marine Minerals. *Lockheed Martin Sells Deep-Sea Mining Firm to Norway's Loke*, REUTERS (Mar. 16, 2023, 6:43 PM), https://www.reuters.com/markets/deals/norways-loke-buys-uk-deep-sea-mining-firm-lockheed-2023-03-16/ [https://perma.cc/4RV4-QHLG].

[57] UNCLOS, *supra* note 2, annex III, art. 22 (liability of the ISA & Contractor); *see also Deep Seabed Mining Insights: Understanding the International Seabed Authority and the Decision-Making Process for the Adoption of Exploitation Regulations*, WATSON FARLEY & WILLIAMS (July 31, 2023), https://www.wfw.com/articles/deep-seabed-mining-insights-understanding-the-international-seabed-authority-and-the-decision-making-process-for-the-adoption-of-exploitation-regulations/ [https://perma.cc/8X6N-GLMF].

[58] UNCLOS, *supra* note 2, annex III, art. 22 (limited to actual damages). For a comprehensive explanation of liability arising out of Article 22, see TARA DAVENPORT, RESPONSIBILITY AND LIABILITY FOR DAMAGE ARISING OUT OF ACTIVITIES IN THE AREA: ATTRIBUTION OF LIABILITY (Liab. Issues for Deep Seabed Mining Ser. No. 4, 2019) and TARA DAVENPORT, RESPONSIBILITY AND LIABILITY FOR DAMAGE ARISING OUT OF ACTIVITIES IN THE AREA: POTENTIAL CLAIMANTS AND POSSIBLE FORA (Liab. Issues for Deep Seabed Mining Ser. No. 5, 2019). *See also* HANNAH LILY, SPONSORING STATE APPROACHES TO LIABILITY REGIMES FOR ENVIRONMENTAL DAMAGE CAUSED BY SEABED MINING (Liab. Issues for Deep Seabed Mining Ser. No. 3, 2018).

[59] UNCLOS, *supra* note 2, art 153; *id.* annex III, arts. 18–19.

[60] UNCLOS, *supra* note 2, art. 162.

dominion over states and natural persons, and it is exclusive in that no state or natural or juridical person can act without the approval of the Authority.[61] The relationship between the contractor, the sponsoring state, and the Authority therefore raises complex questions at the intersection of international and domestic law. The contractors are creatures of domestic law, but they have duties and rights under the contracts which are governed by international law. As natural or juridical persons, the contractors, as corporate entities, are not endowed with legal personality in international law, and questions about the hybrid nature of this relationship arise.

There are two aspects to this relationship. First, what are the responsibilities and liabilities of state sponsors for actions taken by private law entities? Second, what states are entitled to be doing the sponsoring? In other words, how is the test of effective control to be interpreted?

G. *Responsibilities of Sponsoring States*

Articles 139, 153, and 235 of UNCLOS and Annex III set out the responsibilities of sponsoring states and are relevant to this question.

The ISA's powers over sponsoring states were explored in an Advisory Opinion rendered by the International Tribunal of the Law of the Sea's (ITLOS) Seabed Disputes Chamber in 2011.[62] The Chamber was asked to rule on the responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area.[63] The opinion was unanimous, concluding that a state's responsibility—to ensure that activities be carried out in conformity with UNCLOS—is not an obligation of result but rather an obligation only of due diligence, an obligation to deploy adequate means and use best efforts.[64] The opinion noted that a due diligence obligation is one which "requires the sponsoring state to take measures within its legal system. These measures must consist of laws and regulations and administrative measures."[65] The applicable standard is that the measures must be "reasonably appropriate."[66] The Tribunal went further, finding that there were some direct obligations on states under the Convention (in addition to responsibility for sponsored contractors). It found that states were obliged to apply the precautionary approach and the "best environmental practices."[67]

The tribunal also ruled that "[f]ailure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State."[68] ITLOS is now looking at the issue of responsibility of states for climate change, and the meaning of the due diligence obligation will arise again.[69] The nature of the obligations of states

---

[61] *See* Alberto Pecoraro, *The Regulatory Powers of the International Seabed Authority: Security of Tenure and Its Limits*, 53 OCEAN DEV. & INT'L L. 377, 379 (2022) (citing UNCLOS, *supra* note 2, annex III, art. 3).
[62] Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 10.
[63] *Id.* at 14–16.
[64] *Id.* at 74.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 75.
[68] *Id.* at 76 (Reply to Question 2).
[69] The Commission of Small Island States had asked for an Advisory Opinion regarding the obligations of states in the face of climate change. The request asked:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:

or the ISA itself in respect of deep seabed mining do not seem to have been tested so far in domestic law, and it will be interesting to see how the ITLOS Advisory Opinions are treated in any such proceedings, perhaps in the context of judicial review.[70]

The issue of effective control goes to the heart of establishing mechanisms for ensuring real responsibility. It raises questions about the use of the corporate veil, parent company liability, and the status of multinational companies in international law. The question revolves around whether UNCLOS calls for sponsoring states to exert effective regulatory control over contractors they sponsor or whether what is required is effective economic control.

A significant ISA discussion paper on this issue concluded:

> It seems appropriate to draw the following four general conclusions. The first is that the most cogent interpretation of the phrase "effective control" is that it was designed to cover not only the formal legal position but also the practical position regarding control over a corporation. The second is that given that in interpreting UNCLOS, Article 91, ITLOS has focused on regulatory control, one would expect the same interpretation to be applied to Articles 139 and 153(2). The third is that it is for the sponsoring State, in the first instance, to satisfy itself that the rules in UNCLOS are, and continue to be, complied with. A declaration of sponsorship, a specific act emanating from the will of the State or States of nationality and of effective control, amounts to a declaration by the sponsoring State that it complies with Article 153(2). And finally, it is for ISA to ensure and monitor compliance with the provisions of UNCLOS and its regulations. Any disputes which cannot be resolved should be submitted to the Seabed

> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Order 2022/4 of Dec. 16, 2022, at 1–2, https://itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2022-4_16.12.2022_01.pdf [https://perma.cc/CMM7-KERQ]. It is interesting to note that the U.K. has taken the position that "the relevant provisions of Part XII (in the United Kingdom's view, Articles 192, 194, 197–207, 212–213 and 222) are governed by a standard of due diligence and are thus obligations of conduct." Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Comments of the United Kingdom of Oct. 2, 2023, at 5, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/questions/Comments__United_Kingdom.pdf [https://perma.cc/4GZN-S74P]; *see also* Monica Feria-Tinta & Maurice K. Kamga, *Mining the Bottom of the Sea: Potential Future Disputes and the Role of the International Tribunal for the Law of the Sea*, *in* ROUTLEDGE HANDBOOK OF SEABED MINING AND THE LAW OF THE SEA, *supra* note 31, at 239–55. ITLOS delivered its Advisory Opinion on May 21, 2024. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion of May 21, 2024, https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf [https://perma.cc/QNB7-SYTP].

[70] *See* Cymie R. Payne, *State Responsibility for Deep Seabed Mining Obligations*, *in* ROUTLEDGE HANDBOOK OF SEABED MINING AND THE LAW OF THE SEA, *supra* note 31, at 107–22; LILY, *supra* note 58.

> Disputes Chamber. Third States should raise any concerns in the Council.[71]

A discussion of effective control was on the LTC agenda for the 27th Session, but was deferred to September 2023, when a webinar was held.[72]

At the 29th Session of the ISA in March 2024, the issue of effective control was discussed by the LTC and the Council. Nauru as a sponsoring state had submitted a statement on the meaning of effective control stressing that it should mean effective regulatory control rather than economic control.[73] A briefing paper on conceptual topics related to the Informal Working Group on Institutional Matters in the ISA's Exploitation Regulations Effective Control contains a useful summary of the pertinent questions and concludes:

> IV. Questions for Consideration
> 21. We propose the following questions to structure the conceptual discussion around "effective control" scheduled for the March 2024 session of Council:
> 1) Can Council agree on the overall purpose and rationale for "effective control"?
> 2) Does Council agree that our responsibility to develop "*the criteria and procedures for implementation of the sponsorship requirements […] in the rules, regulations and procedures of the Authority.*" includes a need to provide a clear definition of "effective control" in the Exploitation Regulations?
> 3) Do Council members prefer the 'regulatory control' or 'economic control' approach to "effective control" (or a mixture, or another option), and for what reason?[74]

At the Seventh Meeting of the Informal Working Group on Institutional Matters held during ISA Session 29 Part 1 there was discussion about the meaning of effective control but no clear progress. In the words of the summary released by the ISA:

> The delegations diverged on this matter. There were cautionary notes against sponsoring States of convenience and monopolization risks. Some favoured a mixed approach, combining regulatory and economic control. Many participants expressed the view that there was no need for a definition of "effective control" and that the language in the legal regime set out by Part XI, with the guidance provided by

---

[71] CHRISTOPHER WHOMERSLEY, INT'L SEABED AUTH., EFFECTIVE CONTROL ¶ 34 (2023).

[72] *See* EFFECTIVE CONTROL WEBINAR, *supra* note 23; Int'l Seabed Auth. Legal & Tech. Comm'n, *Issues Related to the Sponsorship of Contracts for Exploration in the Area, Monopolization, Effective Control and Related Matters*, ISBA Doc. 22/LTC/13 (June 21, 2016), https://www.isa.org.jm/wp-content/uploads/2022/06/isba-22ltc-13_1.pdf [https://perma.cc/KGW7-TKTV]; *see also* TARA DAVENPORT, INT'L SEABED AUTH., THE RIGHTS AND OBLIGATIONS OF THE INTERNATIONAL SEABED AUTHORITY AND THE SPONSORING STATE WITH RESPECT TO ACTIVITIES IN THE AREA 58 (2023).

[73] Margo Deiye, Permanent Representative to the International Seabed Authority, Republic of Nauru, *Statement Delivered at International Seabed Authority 29th Session Council Meeting: Agenda Item 10; Effective Control* (Mar. 25, 2024), https://www.isa.org.jm/wp-content/uploads/2024/03/Nauru_Statement.pdf [https://perma.cc/M956-6G2F].

[74] INFORMAL WORKING GRP. ON INSTITUTIONAL MATTERS, INT'L SEABED AUTH., BRIEFING PAPER ON CONCEPTUAL TOPICS RELATED TO THE INFORMAL WORKING GROUP ON INSTITUTIONAL MATTERS IN THE ISA'S EXPLOITATION REGULATIONS (2024).

> the 2011 advisory opinion, was sufficient. Many participants also stressed that changing to an "effective economic control test" would disrupt existing sponsorship arrangements, undermine the effective participation of developing States in activities in the Area, create numerous practical challenges and potential legal conflicts and introduce instability and uncertainty in the Part XI legal regime. An interpretation of effective regulatory control is also supported by Article 9 (4) of Annex III to UNCLOS. The co-facilitators leading the discussion invited delegations to continue intersessional progress on implementation.[75]

These issues are material to the future of deep seabed mining. If effective control is not to mean effective economic control—in other words if multinational corporations incorporated in the Global North are to be able to mine using subsidiaries incorporated in sponsoring states—the connection between the entities behind the mining and the sponsoring states may not be close enough to ensure effective international control over mining.[76]

The role deep sea mining will play in domestic law should be briefly mentioned. This is highly complex and there is no space here to investigate domestic provisions, but many states have legislated, and the IAS website has a link to relevant domestic statutes.[77] The position of the United States is of course very significant, as it is not a party to UNCLOS, but is home to many multinational corporations which may be involved in mining using foreign sponsoring states.[78]

II. THE MINING CODE

The ISA's main task has been to develop what is referred to as The Mining Code. The Mining Code—as the underwater mining regulatory framework—will have an impact beyond UNCLOS. The code will be a comprehensive set of RRPs issued by ISA to regulate prospecting, exploration, and exploitation of marine minerals in the international seabed Area. The Mining Code will be made up of binding regulations and nonbinding recommendations or guidelines. It will be influential on the global approach to regulation of deep seabed mining[79]—specifically the

---

[75] *Fast Facts 29th Session*, *supra* note 23.
[76] On multinationals and the tests of regulatory versus economic control, see ANDRÉS SEBASTIÁN ROJAS & FREEDOM-KAI PHILLIPS, EFFECTIVE CONTROL AND DEEP SEABED MINING: TOWARD A DEFINITION 1 (Liab. Issues for Deep Seabed Mining Ser. No. 7, 2019).
[77] *National Legislation Database*, INT'L SEABED AUTH., https://isa.org.jm/national-legislation-database [https://perma.cc/T532-EL88] (last visited Mar. 23, 2024). For U.K. practice, see James Harrison, *The United Kingdom and Seabed Mining*, *in* ROUTLEDGE HANDBOOK OF SEABED MINING AND THE LAW OF THE SEA, *supra* note 31, at 436–39.
[78] *See supra* text accompanying notes 18 and 54–59.
[79] Norway and the Cook Islands have accelerated efforts to mine the seabed within their respective national jurisdictions. *Client Alert: United Nations Environment Programme Underscores the Importance of Mining for the Clean Energy Transition*, VOLTERRA FIETTA (Jan. 24, 2024), https://www.volterrafietta.com/client-alert-united-nations-environment-programme-underscores-the-importance-of-mining-for-the-clean-energy-transition/ [https://perma.cc/KT3H-7RDC]; Milne, *supra* note 16. The Mining Code will apply in part beyond the Area. States with extended continental shelves must pay contributions to be administered by the ISA in accordance with UNCLOS Article 82. In addition, states mining on the continental shelf must comply with pollution regulations and other limits on exploitation set out in UNCLOS Articles 194 and 208. *See* KLAAS WILLAERT, REGULATING DEEP SEA MINING: A MYRIAD OF LEGAL FRAMEWORKS 13–18 (2021) ("Chapter 3: The Deep Sea Mining Regime on the Continental Shelf").

development of international customary law, which also binds nonparties to UNCLOS (notably the U.S.). To date, only regulations and guidelines for exploration have been passed and are in force.[80] Regulations for actual mining-exploitation have still not been issued. This is the current concern.

The ISA began to develop regulations to govern the exploitation of mineral resources in the Area in 2014 with a series of scoping studies. According to the ISA's website:

> Exploitation regulations aim to balance economic needs with rigorous environmental protection. Once in place, they will require any entity planning to undertake activities in the international seabed area to abide by stringent global environmental requirements. The regime to be established also requires a portion of the financial rewards and other economic benefits from mining to be paid to ISA to then be shared according to "equitable sharing criteria."[81]

The Draft Exploitation Regulations (DER) which were published by the ISA's Legal and Technical Commission in 2019 are not final. The ISA is continuing its work on standards and guidelines for mining. The standards will be legally binding on states, contractors, and the ISA, whereas the guidelines will be recommendatory in nature.[82] The regulations will govern applications for mining exploitation licences and require contractors applying for a licence to submit a "Plan of Work" demonstrating an "effective protection of the Marine Environment," including biological diversity and ecological integrity before licences can be granted.[83] They require states to provide an Environmental Impact Statement (EIS) to the ISA.[84] The EIS is to be prepared in accordance with applicable guidelines, standards, and best practice.[85] It is not really clear yet what this means. The DER include environmental protection elements, including provisions aimed at preserving the "precautionary principle" (the overriding one) and the "polluter pays principle."[86]

In line with the provisions of UNCLOS, the DER also include an inspection regime for the purposes of monitoring and enforcing compliance

---

[80] Since 2000, three different sets of RRPs applicable to exploration in the Area have been issued. As of January 31, 2023, thirty-one contracts for exploration were in force (nineteen for polymetallic nodules, seven for polymetallic sulphides and five for cobalt-rich ferromanganese crusts). Twenty-two contractors have obtained licences. *See Exploration Contracts*, *supra* note 38; ZACHARY DOUGLAS ET AL., PEW CHARITABLE TRS., IN THE MATTER OF A PROPOSED MORATORIUM OR PRECAUTIONARY PAUSE ON DEEP-SEA MINING BEYOND NATIONAL JURISDICTION 2, 20 (2023) [hereinafter PEW LEGAL OPINION]; *see also Seabed Mining Moratorium Is Legally Required by U.N. Treaty, Legal Experts Find*, PEW CHARITABLE TRS. (June 30, 2023), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2023/06/seabed-mining-moratorium-is-legally-required-by-un-treaty-legal-experts-find [https://perma.cc/3X7V-XKCS] (summarizing the Pew legal opinion). A useful summary of the current position is available at *The Mining Code of the ISA*, UMWELTBUNDESAMT (May 19, 2022), https://www.umweltbundesamt.de/en/topics/water/seas/deep-sea-mining/the-mining-code-of-the-isa [https://perma.cc/ZY34-WMWM].

[81] *The Mining Code*, INT'L SEABED AUTH., https://www.isa.org.jm/the-mining-code/ [https://perma.cc/7NEK-YZM3] (last visited Mar. 24, 2024).

[82] The latest consolidated text was discussed at the last meeting of the ISA 29th Session Part 1. *See* Int'l Seabed Auth. Council, *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA Doc. 29/C/CRP.1 (Feb. 16, 2024) [hereinafter *Draft Exploitation Regulations*], https://www.isa.org.jm/wp-content/uploads/2024/02/Consolidated_text.pdf [https://perma.cc/B75R-KFBC]; *see also The Mining Code*, INT'L SEABED AUTH., *supra* note 81.

[83] Int'l Seabed Auth. Council, *supra* note 82, at 20–42, 32.

[84] *Id*. at 80–83.

[85] *Id*. at 74–85.

[86] *Id*. at 15–16. Regulation 2 is subject to amendment as demonstrated by the Consolidated Text.

with the applicable legal framework. The DER also establish the need for environmental performance guarantees and an environmental compensation fund to allow the ISA to fund remediation in the event of serious harm where this cannot be met by the contractor.[87] An inspection regime is established for the purposes of monitoring and enforcing compliance with the legal framework.[88] The key issue at stake is whether the DER when adopted will meet the requirements of UNCLOS Article 145, which specifies that measures must "ensure effective protection for the marine environment from harmful effects which may arise from such activities."[89]

Critics have raged that the regulations are too soft, and that by requiring a threat of "serious harm" they set too high a threshold. It is argued that the "avoid, remedy or mitigate" language used in the DER is not suitable for deep sea mining and is not compatible with Article 145,[90] where the requirement is "effective protection for the marine environment from harmful effects."[91] It is further argued that fundamental principles, such as the effective protection of the marine environment and the common heritage of mankind, are not integrated within the Draft Regulations;[92] there is insufficient discussion of the precautionary principle (approach) which arises only under scoping, only one mention of the ecosystem approach, and no discussion of effective protection of the marine environment.[93] There are still big gaps in the position taken by states with respect to environmental concerns and benefit sharing.[94]

There are also big gaps in the understanding of deep-sea biodiversity and ecosystems. Key concerns include disturbance of the seafloor, sediment plumes, and pollution both from noise vibrations and light from surface vessels.[95] Based on the comments from NGOs and observers it appears that there are real issues to do with the quality of the required Environmental

---

[87] *Id.* at 94–96.
[88] *Id.* at 132–45.
[89] UNCLOS, *supra* note 2, art. 145.
[90] *See, e.g.*, Chris Pickens et al., *From What-If to What-Now: Status of the Deep-Sea Mining Regulations and Underlying Drivers for Outstanding Issues*, MARINE POL'Y (forthcoming 2024), https://doi.org/10.1016/j.marpol.2023.105967 [https://perma.cc/ZSP5-9LVL].
[91] UNCLOS, *supra* note 2, art. 145.
[92] *See* Pickens et al., *supra* note 90.
[93] *See id.* For latest criticism, see World Wildlife Fund, *Brief for Governments at Part I of the 29th*
Session of the International Seabed Authority (Mar. 18–29, 2024),
https://wwfint.awsassets.panda.org/downloads/wwf-global-policy-brief-international-seabed-authority-march-2024.pdf [https://perma.cc/5UT3-RRB9].
[94] *See* Ryan Murdock, *Deep Sea Mining and the Green Transition*, HARV. INT'L REV. (Oct. 16, 2023), https://hir.harvard.edu/deep-sea-mining-and-the-green-transition/ [https://perma.cc/JT2V-KK8X] (discussing the ongoing ISA negotiations). The ISA is also considering an alternative proposal for pooling mining resources into a "Seabed Sustainability Fund." *See* Daniel Wilde et al., *Equitable Sharing of Deep-Sea Mining Benefits: More Questions than Answers*, 151 MARINE POL'Y, no. 105572, 2023 (providing an overview); Int'l Seabed Auth. Fin. Comm., *Development of Rules, Regulations and Procedures on the Equitable Sharing of Financial and Other Economic Benefits Derived from Activities in the Area Pursuant to Section 9, Paragraph 7 (f), of the Annex to the 1994 Agreement*, ISBA Doc. 28/FC/4 (May 11, 2023), https://www.isa.org.jm/wp-content/uploads/2023/05/2308964E.pdf [https://perma.cc/4ELV-M2AU] (requesting the ISA Finance Committee to consider questions regarding the fund, slated to be on the agenda of the 28th Session). For the latest news on the ISA deep sea mining negotiations, see *Latest News and Updates*, DEEP SEA CONSERVATION COAL., https://savethehighseas.org/isa-tracker/latest-news-and-updates/ [https://perma.cc/L553-YUG3] (last visited Aug. 4, 2024).
[95] *See* Catherine Blanchard et al., *The Current Status of Deep-Sea Mining Governance at the International Seabed Authority*, 147 MARINE POL'Y, no. 105396, 2023, at 6. *See generally* Robert Makgill et al., *Implementing the Precautionary Approach for Seabed Mining: A Review of State Practice*, *in* ROUTLEDGE HANDBOOK OF SEABED MINING AND THE LAW OF THE SEA, *supra* note 31, at 48–77; Diva Amon et al., *Assessment of Scientific Gaps Related to the Effective Environmental Management of Deep-Seabed Mining*, 138 MARINE POL'Y, no. 105006, 2022.

Impact Assessments given the gaps in knowledge about effects of deep sea mining. Issues arise from the absence of an environmental baseline and a lack of comprehensive independent scientific information to permit safe monitoring. Additionally, not enough has been achieved on regional environmental management plans.[96]

There is ongoing concern that the environmental performance guarantee, which is the financial bond, is only applicable to the end of mining (closure), not to mining itself.[97] It has been pointed out that provisions concerning the permitted quantity of mining and the collection of mining royalties remain contested. For instance, the process for calculating ore grade for royalty purposes and whether to assess royalties based upon wet or dry ore remain unsettled five years after the last Draft Regulations were first published.[98]

III. WHAT NEXT? WHAT HAPPENS NOW?

There is no governing framework for exploitation, and therefore commercial exploitation has not yet commenced. The Republic of Nauru, which is sponsoring The Metals Company (TMC), triggered the two-year rule in July 2021 which meant the ISA was obliged to "use best endeavors" to complete adoption of relevant RRPs by July 2023.[99] This did not happen.[100] The new target is 2025.[101] It is no surprise then that calls for a moratorium are getting stronger. Given the concerns, a growing number of NGOs, commercial enterprises, and states are calling for a moratorium or precautionary pause on exploitation of the Area. Even the U.K. apparently now favours one.[102] Until the gaps in scientific knowledge are filled or the ISA's institutional capacity is addressed, a precautionary approach requires the commencement of any commercial exploitation be deferred.[103]

The ISA says a moratorium or precautionary pause would not be consistent with UNCLOS. As ISA Secretary-General Michael Lodge put it, any moratorium would be "anti-science, anti-knowledge, anti-development

---

[96] Lea Reitmeier, *What Is Deep-Sea Mining and How Is It Connected to the Net Zero Transition?*, LONDON SCH. ECON. & POL. SCI. (July 27, 2023), https://www.lse.ac.uk/granthaminstitute/explainers/what-is-deep-sea-mining-and-how-is-it-connected-to-the-net-zero-transition/ [https://perma.cc/R4MQ-X5DQ]. Note in particular the reference to the UN Sustainable Development Goal 14 which is to "Conserve and sustainably use the oceans, seas and marine resources for sustainable development." *The 17 Goals*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFS., https://sdgs.un.org/goals [https://perma.cc/97GK-G576] (last visited July 1, 2024).

[97] On the environment generally, see *Protecting the Deep for Us All*, DEEP SEA CONSERVATION COAL., https://savethehighseas.org/ [https://perma.cc/T4ZP-N6N3] (last visited Apr. 24, 2024).

[98] *See also* INT'L SEABED AUTH., TECH. STUDY NO. 31, EQUITABLE SHARING OF FINANCIAL AND OTHER ECONOMIC BENEFITS FROM DEEP-SEABED MINING (2021).

[99] Implementation Agreement, *supra* note 8, annex § 1(15)(b).

[100] Both the 27th and 28th Sessions failed to adopt the relevant RRPs. *See ISA Council Closes Part II of its 28th Session*, INT'L SEABED AUTH. (July 24, 2023), https://www.isa.org.jm/news/isa-council-closes-part-ii-of-its-28th-session/ [https://perma.cc/V6JN-BB7G] ("The Council made significant progress concerning the negotiations on the draft exploitation regulations for mineral resources in the Area in an informal setting in plenary . . . and in the four working groups . . . . The Council expressed its intention to continue the work on the exploitation regulations with a view to adopting them during the 30th session in 2025.").

[101] *Id.*

[102] *See UK Supports Moratorium on Deep Sea Mining to Protect Ocean and Marine Ecosystems*, GOV.UK (Oct. 30, 2023), https://www.gov.uk/government/news/uk-supports-moratorium-on-deep-sea-mining-to-protect-ocean-and-marine-ecosystems [https://perma.cc/7RKP-6N2K].

[103] *See, e.g.*, Int'l Union for Conservation of Nature, General Statement at Part I of the 28th Session of the Council of the International Seabed Authority, Part I (Mar. 24, 2023), https://www.isa.org.jm/wp-content/uploads/2023/03/statement_IUCN.pdf [https://perma.cc/EJN6-MXJU].

and anti-international law."[104] The Pew Charitable Trusts legal opinion stated:

> We consider the language of "moratorium" or "precautionary pause" obscures more than it reveals. Although we refer to that language in this opinion, we understand it to mean no more than the adoption of a legal measure to defer commencement of deep-sea mining until it can be carried out without risking significant harm to the marine environment. Understood that way, a moratorium or precautionary pause is not only consistent with UNCLOS, but is actually required by it. It is a core obligation of States Parties to protect and preserve the marine environment; it would be a violation of that obligation to enable the commencement of exploitation of the Area at a time when scientific understanding of the deep sea, the existing regulatory arrangements, and the ISA's institutional capacity are insufficient to ensure that outcome.[105]

Those who oppose a moratorium, including Nauru, rely on an interpretation of paragraph 15 of the Annex to the Implementation Agreement that would require the Council to consider and approve an application for a licence to exploit within two years of the trigger having been pulled as discussed above.[106] There has been an agreement on a roadmap to extend to 2025 but it appears that there is still no agreement on any procedure to handle provisional licence applications.[107]

One question is whether mining will commence before then.[108] If unregulated mining commences there are real issues for the environment and for liability. The view from would-be miners is that exploitation may go ahead even without final regulations, and they point out that under voting rules a two-thirds supermajority of the Assembly is required to prevent adoption of regulations proposed by the LTC advisory body.[109] TMC has said they intend to submit an exploitation application in 2024.[110] TMC plans to initiate commercial production in early 2025, assuming that the

---

[104] Michael Lodge, Sec'y-Gen., Int'l Seabed Auth., Énergie, Environnement et Climat: Proposition De Résolution 887—Audition [Energy, Environment and Climate: Proposed Resolution 887—Hearing], BELG. PARLIAMENT, at 2:24:04–2:24:11 (June 24, 2020), https://www.dekamer.be/media/index.html?sid=55U0739 [https://perma.cc/F24D-89GD]; *accord* Bryan & Dempsey, *supra* note 10.

[105] PEW LEGAL OPINION, *supra* note 79, ¶13.

[106] REPUBLIC OF NAURU, OPINION PAPER ON THE REGULATORY STEPS AND DECISION-MAKING FOR A PLAN OF WORK SUBMITTED TO THE AUTHORITY PURSUANT TO SECTION 1, PARAGRAPH 15 OF THE ANNEX TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (2021).

[107] *See Co-Facilitators' Briefing Note to the Council on the Informal Intersessional Dialogue Established by Council Decision ISBA/27/C/45*, INT'L SEABED AUTH. (Mar. 23, 2023), https://www.isa.org.jm/wp-content/uploads/2023/03/Co_Facilitators_Briefing_Note.pdf [https://perma.cc/CJC8-K2JT]; *see also* Int'l Seabed Auth. Council, *Decision of the Council of the International Seabed Authority Relating to the Possible Scenarios and Any Other Pertinent Legal Considerations in Connection with Section 1, Paragraph 15, of the Annex to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, ISBA Doc. 27/C/45 (Nov. 11, 2022), https://www.isa.org.jm/wp-content/uploads/2022/12/2225713E.pdf [https://perma.cc/SDE4-ZPZA]. For latest developments, see the summary of progress at *Fast Facts 29th Session*, *supra* note 23.

[108] Some suggest mining can go ahead. Catherine Clifford, *The Metals Company Announces a Controversial Timeline for Deep Sea Mining that Worsens the Divide in an Already Bitter Battle*, CNBC (Aug. 4, 2023, 11:57 AM), https://www.cnbc.com/2023/08/04/the-metals-company-puts-out-controversial-timeline-for-deep-sea-mining.html [https://perma.cc/Q3Z2-G83L].

[109] Gunasekara, *supra* note 40.

[110] *See* Clifford*, supra* note 107.

exploration application is approved.[111] TMC indicated on August 23, 2023, that it had applied with the U.S. Department of Defence to get assistance with building a plant for processing or refining material it retrieves from the sea floor.[112]

CONCLUSION

An equitable legal framework is needed for use of the ocean's resources. The concept of Common Heritage of Mankind was supposed to ensure that sovereignty was not determinative with respect to the Area. Over fifty years from the original declaration of a moratorium, the world is on the verge of seeing unregulated deep seabed mining at a time when precious minerals on the seabed are arguably needed for the green transition that is vital to staving off climate change. The Implementation Agreement of 1994 made serious inroads into the visionary provisions of UNCLOS's Part XI legal regime for the Area. The failure of states to agree that mining should only be carried out by an international organisation (the Enterprise) as originally specified in the 1982 treaty, and a clawing back of significant transfer-of-technology provisions, contributed to the impasse the world is facing now. It has not been possible for the ISA to develop and agree to a Mining Code despite efforts over so many years, and the industry has arguably lost faith in the process. Technology has advanced exponentially since 1982 which has added to the pressures to start mining. It can now be done. States however are coming increasingly alive to the environmental dangers of deep-sea mining and calls for a moratorium are real and numerous. Even some large corporations have supported the call.[113] While common heritage remains the principle, its application in practice has proved elusive so far. International state-led efforts must be intensified to overcome this impasse or commercial mining will start in a regulatory vacuum which cannot be for the benefit of humankind.

---

[111] Gunasekara, *supra* note 40.
[112] *See* Jael Holzman, *One Company's Ambitions Reflect America's Delicate Deep Sea Mining Dance*, AXIOS (Nov. 6, 2023), https://www.axios.com/2023/11/06/deep-sea-mining-metals-company [https://perma.cc/79YK-FVN4]; *see also* Clifford, *supra* note 108.
[113] *See Five Things*, ECONOMIST IMPACT, *supra* note 13.

RELIGIOUS COURTS AND TRIBUNALS IN AFRICA: AN OVERVIEW

MARK HILL KC*

TABLE OF CONTENTS

INTRODUCTION 22
I. RELIGIOUS COURTS AND TRIBUNALS 22
A. TYPES OF RELIGIOUS COURTS AND TRIBUNALS *22*
B. WHERE RELIGIOUS COURTS AND TRIBUNALS OPERATE *23*
II. PROCEDURES FOR MEDIATION AND ARBITRATION IN RELIGIOUS COURTS AND TRIBUNALS 26
A. FUNDING PROVIDED BY THE STATE.. *28*
B. SUBJECT MATTER *28*
III. ENFORCEABILITY AND RECOGNITION BY THE STATE.......................... 31
IV. GOVERNMENTAL OVERSIGHT AND REVIEW.. 32
CONCLUDING REMARKS.. 36

* Global Professor and Distinguished Fellow, University of Notre Dame London Law Programme. I am grateful to Mr. Andrew Scarafile of the University of Notre Dame for his research assistance. This is a revised version of a paper previously published in M Christian Green (et al) (eds) Law, Religion and Reconciliation in Africa (Sun Media, Stellenbosch, 2024).

INTRODUCTION

We are all familiar with legal systems: from constitutional experts to school children. The rule of law and due process are concepts with centuries of tradition and respect. Generally legal systems are seen as being universal and monolithic: a state legislature makes laws for a defined territory which are enforced through an independent body of courts with defined rights of appeal. But this image of universality is somewhat superficial and potentially misleading. Of course, citizens bear allegiance to the state and are bound by the laws enacted through the democratic process. But many citizens also owe allegiance to other systems of law, particularly the laws and regulations of religious organisations to which they belong.

In her monograph, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, the distinguished legal theorist, Ayelet Shachar, explores how multiple affiliations, particularly amongst minority religious groups, has problematised the increased legal recognition of communal religious identities.[1] It is not the purpose of this Article to address the deep philosophical question of whether a citizen can truly show allegiance both to a state and to a faith, nor the derivative jurisprudential questions that arise.[2] Rather, it seeks to perform the more mundane but nonetheless significant task of identifying the existence of religious courts and tribunals in Africa and describing the supplementary jurisdiction in which they operate with various degrees of recognition from organs of the state. This is an underdeveloped field of study, and I am grateful to ACLARS for making room in its Cote d'Ivoire conference for a panel devoted to the results of nascent research in this field from leading African scholars. An early version of this Article was presented at that panel, supplemented by detailed national reports from Algeria, Kenya, Nigeria, South Africa and Zimbabwe.[3] The research questions which the panel set out to address can be broadly summarised as follows:

(i) Are religious courts or tribunals used for the resolution of disputes?
(ii) What are the procedures?
(iii) Do the civil (state) courts recognise and/or enforce decisions of religious courts or tribunals?
(iv) Are religious courts or tribunals subject to governmental oversight or judicial review?

This overview seeks to follow the format of those research questions.

I. RELIGIOUS COURTS AND TRIBUNALS

A. *TYPES OF RELIGIOUS COURTS AND TRIBUNALS*

[1] AYELET SHACHAR, MULTICULTURAL JURISDICTIONS (2001). For a thoughtful consideration, but in a non-African context, see Rowan Williams, *Civil and Religious Law in England*, *in* ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES AND THE PLACE OF SHARIA 20 (Robin Griffith-Jones ed., 2013).
[2] There is already considerable scholarship in the field. In the European context, see ISLAM, RELIGIOUS LIBERTY AND CONSTITUTIONALISM IN EUROPE (Mark Hill & Lina Papadopoulou eds., 2024).
[3] I am indebted to Dr. Mahfoud Ali Zoui, Professor Faith Kabata, Professor Idowo Akinloye, Professor Helena Van Coller, and Professor Fortune Sibanda, with Dr. Bernard Humbe.

Religious courts and tribunals are used for the resolution of disputes in many countries in Africa; however, the binding nature and enforceability of their decisions and adjudications varies from one jurisdiction to another. These institutions can be broadly separated into three categories by the level of authority they hold within the national jurisdiction in which they operate.

The first category of religious courts and tribunals do not receive governmental recognition as official adjudicatory bodies. Individuals, usually adherents of a particular faith, are either required by religious law to have their cases adjudicated by those bodies, or voluntarily submit to their jurisdiction. However, the rulings of these bodies are unenforceable in state courts. Compliance with the decisions of these religious courts or tribunals depends on the regulatory instruments of the religious organisations, which may include disfellowship (shunning) or loss of membership.

The second category of religious courts and tribunals receive official recognition from the state but in a limited form. These limitations generally relate to the subject matter of the dispute (often family law) or to the individual concerned (a church minister or, more broadly, adherents of the faith) or they may be territorial. Some countries only recognise the authority of religious courts and tribunals to hear matters in certain areas of law. In other countries (or particular regions of countries), religious courts and tribunals are allowed to operate a parallel legal system deploying religious law, which citizens may use in preference to the state (secular) civil legal system. Governments may limit the authority of these religious tribunals and courts merely to adjudicating on disputes amongst co-religionists, but this is not always the case. Some religious courts and tribunals permit nonmembers to make use of their services, and in some countries the state affords this civil recognition. States generally provide a means by which the civil courts will enforce the adjudications of religious courts and tribunals.

The third category of religious courts and tribunals operate as part of the state's official legal system. In those jurisdictions, there is no distinction between religious and secular courts. Those religious courts and tribunals are part of the national legal system with judicial means of applying and interpreting religious law.

B. *Where Religious Courts and Tribunals Operate*

Countries with religious organisations functioning within their borders are likely to have one or more different types of religious courts or tribunals operating on their territory, with or without official recognition from the government.[4] Most major organised religions operate religious adjudicatory bodies as a part of their structure of governance in their church. Some of these bodies only operate to discipline clergy while other organs hear and determine disputes between adherents that involve religious law. In Catholicism, for example, every diocese is required to have a tribunal to

[4] For a general overview, see Mark Hill, *Religious Law*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan M. Smits et al. eds., 2023). *See also* Mark Hill, *The Regulation of Christian Churches: Ecclesiology, Law and Polity*, HTS THEOLOGICAL STUD., a3382, Nov. 23, 2016, at 1; Norman Doe, *The Ecumenical Value of Comparative Church Law: Towards the Category of Christian Law*, ECCLESIASTICAL L.J., April 2015, at 135; CHURCH LAWS AND ECUMENISM: A NEW PATH FOR CHRISTIAN UNITY (Norman Doe ed., 2021).

hear matters of canon law.[5] The same is true in Judaism where rabbinical courts (called *Beth Din*) hear claims between disputing (and not exclusively Jewish) parties. In some orthodox Jewish communities, parties are required to seek legal redress in a *Beth Din* before proceeding to the civil legal system.[6]

The most prevalent form of religious tribunal in Africa is Islamic tribunals that use traditional Islamic law (also called sharia law) to decide cases. These Islamic courts may be formally organised locally or take the form of a local Imam acting as judge or arbiter.[7] Multiple religious courts usually operate below the juridical radar of the state; for example, South Africa has Catholic, Jewish and traditional Islamic courts that operate within its territory but with no formal recognition from the state.[8]

A minority of African countries have religious law embedded in their legal systems. In some states, such as Uganda, these institutions receive no financial or other support from government, but their decisions are nonetheless recognised by national courts.[9] In other countries, special religious courts and tribunals are operated by, and with the support of, the state. In Africa, the vast majority of religious courts which are integrated into national court systems are Islamic. However, Morocco has one state-recognised Jewish court in Casablanca.[10]

These Islamic legal systems are commonly divided into two categories: "dual" systems or "classical Sharia" systems.[11] A "dual" system is one where secular law is enforced by the national courts, but Muslims have the option to have their claims heard before a sharia court recognised by the state.[12] In contrast, a "classical Sharia" system merges sharia and civil law. African countries that employ a "classical Sharia" model usually have sharia law as one source, or the only source, of their civil law.[13]

The precise number of African countries that use either a "dual" or "classic" Islamic legal system is disputed. This is both because of varying definitions of "Islamic law" and because of divergences in categorisation of "religious law." Some African countries have "customary law" courts based

---

[5] *See What Is the Purpose of a Tribunal?*, CATH. DIOCESE RALEIGH, https://dioceseofraleigh.org/tribunal/what-purpose-tribunal [https://perma.cc/Z77Q-5WNY] (last visited May 26, 2024); *What Is the Tribunal?*, ROMAN CATH. DIOCESE FALL RIVER: OFF. TRIBUNAL & CANONICAL SERVS., https://www.fallrivertribunal.com/aboutus/whatistribunal/ [https://perma.cc/FL4C-HQXM] (last visited May 26, 2024); *Office of Canonical Services and Tribunal*, DIOCESE MANCHESTER, https://www.catholicnh.org/about/who-we-are/administration/tribunal/ [https://perma.cc/T6SH-S5FZ] (last visited May 26, 2024).

[6] Menachem Posner, *What Is a Beit Din?,* CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/3582308/jewish/What-Is-a-Beit-Din.htm [https://perma.cc/7L88-RXEM] (last visited May 26, 2024).

[7] Kate Hairsine, *Shariah Law in Africa Has Many Faces*, DW NEWS (Jan. 28, 2022), https://p.dw.com/p/46DeP [https://perma.cc/RRC8-BS7R].

[8] *See* Tanja Herklotz, *Religious Courts*, *in* MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW, No. 690 (Rainer Grote et al. eds., 2020).

[9] *Sharia (Qadhis) Courts Decisions Are Legal and Binding*, MUSLIM CTR. JUST. & L., https://mcjl.ug/articles/sharia-qadhis-courts-decisions-are-legal-and-binding/ [https://perma.cc/U2U2-N3LT] (last visited May 26, 2024) [hereinafter *Sharia (Qadhis) Courts*].

[10] Fatine Alaoui, *The Hebrew Court of Casablanca: Judgments in the Name of His Majesty and the Talmud*, MOROCCO JEWISH TIMES (Feb. 28, 2020), https://www.mjtnews.com/2020/02/28/the-hebrew-court-of-casablanca-judgments-in-the-name-of-his-majesty-and-the-talmud/ [https://perma.cc/9AES-56FU].

[11] *See* Ashlea Hellmann, *The Convergence of International Human Rights and Sharia Law: Can International Ideals and Muslim Religious Law Coexist?* 5–6 (N.Y. State Bar Ass'n, Writing Competition) https://nysba.org/NYSBA/Sections/International/Awards/2016%20Pergam%20Writing%20Competition/submissions/Hellmann%20Ashlea.pdf [https://perma.cc/79B4-9SFF].

[12] *Id.* at 5.

[13] *Id.* at 6.

on the traditional law of local communities.[14] These customs can be oral tradition and have a variety of sources, including community tradition influenced by religion.[15] The distinction between tradition and religion is often blurred and, accordingly, it is disputed whether these courts are "religious" in the literal sense.

African countries that can be classified as having state-recognised religious courts in the "dual" system model are Morocco, Egypt, Nigeria, The Gambia, Djibouti, Eritrea, Ethiopia, Kenya, Comoros and Tanzania.[16] The religious courts in these countries exercise a jurisdiction limited either by geography, category of persons within the court's jurisdiction, or subject matter. Two of these countries, Nigeria and Tanzania, apply Islamic law regionally. In Nigeria, sharia law courts only operate in the Nigerian states that have opted to follow sharia law.[17] Currently, twelve of Nigeria's thirty-six states (and the Federal Capital Territory) have opted into sharia law.[18] In Tanzania, religious courts (called *Kadhis*) only operate in the Zanzibar and Kwara states.[19]

Other African countries which employ a "dual" system limit religious court jurisdiction by the religion of people who can access them. This is the case with Islamic courts in Djibouti,[20] Ethiopia,[21] Eritrea,[22] The Gambia,[23] Kenya[24] and Morocco.[25] In Tanzania and Nigeria, the regional sharia courts are limited to Muslims.[26]

Some African nations do not limit state-recognised religious courts and tribunals by the faith of those subject to them but rather by the area of law over which those courts have jurisdiction. This is the case in Comoros and Egypt where all people, regardless of their faith, are held to sharia law in certain areas of law.[27]

Only one country uses Islam as the full underpinning of its legal system, Mauritania. There, non-Muslims are governed and judged wholly based on

---

[14] *See* Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOB. LEGAL STUD. 87 (2011).
[15] *Id.*
[16] *See* Hellmann, *supra* note 11, at 5; *see also* Kali Robinson, *Understanding Sharia: The Intersection of Islam and the Law*, COUNCIL ON FOREIGN RELS. (Dec. 17, 2021, 2:00 PM), https://www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law [https://perma.cc/49BU-JB22].
[17] OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: NIGERIA (2022) [hereinafter 2021 REPORT: NIGERIA].
[18] *Id.*
[19] Issa Babatunde Oba, *Legal Framework of Kadhis' Courts in Zanzibar During the Post Colonial Era*, 86 J.L. POL'Y & GLOBALIZATION 30, 39 (2019).
[20] Michael Bogdan, *Legal Pluralism in the Comoros and Djibouti*, 69 NORDIC J. INT'L L. 195, 203 (2000).
[21] OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: ETHIOPIA (2022).
[22] Luwam Dirar & Kibrom Tesfagabir, *Introduction to Eritrean Legal System and Research*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Mar. 2011), https://www.nyulawglobal.org/globalex/Eritrea.html [https://perma.cc/HLA5-GLWG].
[23] Flora Ogbuitepu, *Guide to Gambian Legal Information*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (May 2012), https://www.nyulawglobal.org/globalex/Gambia.html [https://perma.cc/JJ42-3K77].
[24] *Kadhis Courts*, JUDICIARY OF KENYA, https://judiciary.go.ke/kadhis-courts/ [https://perma.cc/54VX-PJY7].
[25] OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2021 REPORT ON RELIGIOUS FREEDOM: MOROCCO (2022) [hereinafter 2021 REPORT: MOROCCO].
[26] *See* 2021 REPORT: NIGERIA, *supra* note 17; Bogdan, *supra* note 20.
[27] Mohamed S.E. Abdel Wahab, *Update: An Overview of the Egyptian Legal System and Legal Research*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Dec. 2019), https://www.nyulawglobal.org/globalex/Egypt1.html [https://perma.cc/9962-EU4R]; Bogdan, *supra* note 20, at 204.

Islamic law and practice in the national courts.[28] Sudan used to follow this model and had no religious-civil law distinction until it formally became a secular country in 2020; however, recent governmental unrest has led some to question whether this is merely a decree or reality.[29]

II. PROCEDURES FOR MEDIATION AND ARBITRATION IN RELIGIOUS COURTS AND TRIBUNALS

The procedures of religious courts and tribunals vary by the particular faith group concerned and the place of the court or tribunal in the nation's legal structure. In countries in the first category, where the state does not recognise the binding authority of religious courts and tribunals, the process is wholly extrajudicial and according to the rules of the faith hearing the claim. Users of the court or tribunal apply for assistance in the discrete matter they need resolved and have that claim heard according to the procedure prescribed under that religion's law.

Jewish *Beth Din* follows a common general structure under Jewish law, with variance by the laws of the specific tribunal. Under traditional Jewish law, two parties can agree to have their case heard before the *Beth Din* or one party can request that the court summons another party before it by issuing a *hazmana*.[30] A *Beth Din* may send three *hazmanas* before issuing a contempt decree against the nonrespondent.[31] Once a claim is brought to the *Beth Din* and the parties appear, the matter is usually heard and decided at a single hearing.[32] Cases are customarily heard by a three-judge panel but can be referred to a single judge (called a *dayan*) with party consent.[33] If the two sides cannot agree on a forum, they may create a "joint *Beth Din*" known as a *zabala*, where each side picks one judge and then the two selected judges pick a third to hear the case.[34] Each side then presents their case and may be interrupted at any time by the judges for questions.[35] The parties go back and forth responding to the other side's arguments, with judicial intervention, until both sides have fully presented their cases.[36] Witnesses, both factual and expert, are questioned by judges, not the parties.[37] Under traditional Jewish law, witnesses must be Jewish males over the age of thirteen, but this requirement has fallen out of favour in recent years.[38] Decisions are usually given in writing by the panel.[39]

Catholic religious courts follow a strict structure laid out under canon law. Those rules of procedure are contained in codified Canon Law.[40]

---

[28] Keli Vrindavan Devi Dasi, *Update: Law and Legal Systems in Mauritania*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Dec. 2022), https://www.nyulawglobal.org/globalex/Mauritania1.html [https://perma.cc/6WZY-PJ24].

[29] OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: SUDAN (2022).

[30] BETH DIN OF AM., LAYMAN'S GUIDE TO DINEI TORAH 2, http://bethdin.org/wp-content/uploads/2015/07/LaymansGuide.pdf [https://perma.cc/X976-UG74] (last visited May 26, 2024).

[31] *Id.*

[32] *Arbitration (Dinei Torah)*, UNITED SYNAGOGUE, https://oldsite.theus.org.uk/article/arbitration-dinei-torah [https://perma.cc/R7P6-8U8T] (last visited June 24, 2024).

[33] *Id.*

[34] BETH DIN OF AM., *supra* note 30, at 3.

[35] *Id.*

[36] *Id.* at 4.

[37] *See Arbitration (Dinei Torah)*, *supra* note 32.

[38] BETH DIN OF AM., *supra* note 30, at 4.

[39] *Id.* at 5.

[40] *See* Eithne D'Auria, *Catholicism: Church Tribunals in Roman Catholic Canon Law*, CARDIFF U. CTR. L. & RELIGION (Jan. 5, 2009), http://www.law.cardiff.ac.uk/clr/networks/Catholicism.pdf [https://perma.cc/MP53-PWK2].

Parties commonly represent themselves unless the judge deems an advocate to be necessary.[41] The adjudicator is appointed by the diocesan bishop and is usually an expert in canon law.[42] Most matters are determined on the papers without convening a hearing.

There is no uniform system of Islamic sharia law as it is based on interpretations of religious texts and accordingly there is no common structure of sharia courts. There are five major schools of Islamic sharia law.[43] Four are Sunni, the Hanbali, Maliki, Shafi'i and Hanafi schools; and one is Shia, the Jaafari school.[44] The Maliki school of Islamic law is most prevalent in Africa.[45] The Maliki school is originalist in nature as it bases its interpretations on the common understanding of the people of seventh-century Medina, which Maliki adherents believe is the best preservation of the actual teachings of the Prophet Muhammad.[46] Sharia is also heavily influenced by local custom which causes both the law applied and the procedure of the courts and tribunals applying it to vary between one region and another by geographic area.[47]

Despite these variances, there are common concepts among Islamic courts. Notably, the western concept of a lawyer acting as advocate on behalf of a party is foreign in Islamic religious tribunals.[48] In Islamic law, legal representation is "merely a form of agency." [49] The legal representative, known as a *wikalah*, only acts as a stand-in for the party and needs no legal training.[50] Legal expertise in Islamic tribunals is usually provided by a *mufti*, who operates as an independent and impartial expert who exercises his "religious duty" to make his legal knowledge of the subject known to the court.[51] Islamic judges undertake the traditional lawyerly task of examining witnesses and cross-examining parties.[52] Further, they do not have evidentiary rule constraints. Judges in Islamic courts are "entitled to use all relevant facts and apply all relevant laws whether or not these were canvassed by the parties."[53] This means that Islamic judges can consult whatever legal sources they wish to outside the record in deciding upon their rulings.

In the African countries that apply Islamic sharia law to everyone, the civil procedure of the courts is usually set out under the nation's civil law. Egypt, which applies sharia-derived law mainly in personal and family contexts uses traditional French legal procedure and hears cases in their usual civil courts.[54] In contrast, Comoros, which hears all family and inheritance law cases according to Islamic law, decides these issues in special "courts of the *cadis*."[55] Cases in those *cadis* courts are heard under the *cadis* court's specifically derived special procedure.[56]

---

[41] *Id.*
[42] *Id.*
[43] *What Is Sharia Law? What Does It Mean for Women in Afghanistan?*, BBC NEWS (Aug. 19, 2021), https://www.bbc.co.uk/news/world-27307249 [https://perma.cc/EYM5-9TKU].
[44] *Id.*
[45] Robinson, *supra* note 16.
[46] *Id.*
[47] *See What Is Sharia Law?*, *supra* note 43.
[48] *See* Abdulmumini A. Oba, *Lawyers, Legal Education and the Shari'ah Courts in Nigeria*, 49 J. LEGAL PLURALISM 113, 128 (2000).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 129.
[52] *Id.* (citing OMONIYI ADEWOYE, THE LEGAL PROFESSION IN NIGERIA 1865–1962, at 3 (1977)).
[53] *Id.* at 137.
[54] Wahab, *supra* note 27.
[55] Bogdan, *supra* note 20, at 204.
[56] *Id.*

Mauritania, which has a wholly intertwined civil and religious law system, has heard both religious and secular cases in the same court system, and under the same rules of procedure, since the sharia and civil courts were merged in 1983.[57] In Mauritania, there are seven courts of first instance, based on the type of law being heard.[58] All these courts have various procedures and range from one-judge to three-judge panels.[59]

A. *Funding Provided by the State*

As with jurisdiction, the methods of funding religious courts and tribunals in Africa vary from state to state. Self-evidently, African countries which do not recognise religious courts provide no direct financial support. However, these courts can be funded indirectly by the state in two ways.

First, states can fund religious courts through giving public funds to the religious organisations that operate them. For example, Guinea and Côte d'Ivoire both provide public funds to religions and accordingly those funds may trickle down into the religious body's adjudication system.[60]

Second, states can provide grants to organisations which conduct independent arbitration. As many religious organisations, notably Jewish *Beth Din* and Islamic tribunals, offer arbitration, state grants may indirectly fund these tribunals.[61]

Otherwise, these courts are internally funded, either through fees paid to access them or by the religious organisation which runs them. For African countries that partially recognise religious courts, there usually is some form of state funding. In Djibouti, Ethiopia, Eritrea, The Gambia, Kenya, Morocco, Nigeria, and Tanzania, the countries that operate "dual" legal systems, courts are directly funded by the government, but the funding is separate from the state's funding of the civil legal system.[62] In the countries that fold religious law enforcement into their civil legal systems, namely Comoros, Egypt, and Mauritania, national governments fully fund the courts and tribunals that hear religious law as those organs hear both civil and religious matters (and many shared matters as civil and religious law have no distinction).

B. *Subject Matter*

In the countries which do not recognise religious courts and tribunals, the institutions themselves wholly determine the extent of their jurisdiction. Some religious courts and tribunals only have jurisdiction over internal regulation and discipline matters. In the religious courts and tribunals that do extend jurisdiction beyond church employees, the most common subject matter limitation is to personal law matters (such as marriage and divorce, guardianship, adoption, and inheritance).[63] This is because many religions do not recognise civil personal-status judgments (especially in relation to

---

[57] Dasi, *supra* note 28.
[58] *Id.*
[59] *Id.*
[60] *See* BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2021: CÔTE D'IVOIRE (2022); BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP'T OF STATE, 2017 HUMAN RIGHTS REPORT: GUINEA (2018).
[61] *See* EMILIA ONYEMA, 2020 ARBITRATION IN AFRICA SURVEY REPORT (2020), https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf [https://perma.cc/YS4T-R595].
[62] *See, e.g.*, Bogdan, *supra* note 20, at 207.
[63] *See* Herklotz, *supra* note 8.

divorce) to affect the personal status of the individual within the religious community. This is true in Catholicism, Judaism, and some denominations of Islam. Accordingly, these faiths require people to obtain both civil and religious legal determinations to obtain the same status recognition in religious and secular society.

For example, the Catholic church does not recognise the concept of civil divorce, and any secular divorce decree has no effect on the marital status of the individual in the eyes of the church.[64] Therefore, a civil divorce must be accompanied by a declaration of nullity by the Catholic ecclesiastical authority.[65] Orthodox Judaism also does not recognise civil divorces and require a Jewish divorce decree, knows as a *Get*, to recognise the divorce.[66]

In Islam, where divorce is permitted but the method of divorce varies, the decision of an Islamic court may be needed to grant the specific sharia rite of divorce the parties desired in addition to the civil court.[67] In Islam, divorces may be revocable (where there is a waiting period known as an *idda* before a divorce becomes final) or irrevocable (where the divorce decree is final).[68] Islamic couples seeking to dissolve their marriages may either need, or opt to obtain, divorce decrees in both the civil and religious courts.

While nonstate recognised religious courts and tribunals may hear claims regarding a variety of other matters covered under the law of religion of the tribunal beyond personal status claims, these instances are not as common because the tribunals do not have state-backed enforcement authority. However, these bodies may have a "soft" enforcement authority within the communities they operate in which still makes them an attractive dispute resolution method for members of the faith. For example, in *Beth Din* courts, parties that do not comply with judgment can be made subject to a *cherem*, or community shunning.[69]12

In the countries that officially recognise some religious courts and tribunals, their jurisdiction is also mainly limited to personal-law matters. A review of the jurisdiction of the religious courts and tribunals of each African country that recognises their decisions is as follows:

- *Comoros*: Jurisdiction is limited to matters of personal status, family-law and inheritance-law disputes, and cases are heard under sharia law.[70]
- *Djibouti*: Jurisdiction is limited to personal-status and family-law matters, and cases are heard under sharia law.[71]

[64] *Personal and Family Issues: Marriage and Divorce—CCEA*, BBC NEWS: BITESIZE, https://www.bbc.co.uk/bitesize/guides/zrr7y9q/revision/5 [https://perma.cc/X8GF-388A] (last visited May 26, 2024).
[65] *Id.*
[66] Phil Lieberman, *What You Need to Know About a Get*, RABBINICAL ASSEMBLY, https://www.rabbinicalassembly.org/sites/default/files/public/online_resources/what_you_need_to_know_about_a_get.pdf [https://perma.cc/8FZQ-6QNY] (last visited May 26, 2024).
[67] *See* Kecia Ali, *Muslim Sexual Ethics: Divorce*, BRANDEIS U.: FEMINIST SEXUAL ETHICS PROJECT (July 1, 2003), https://www.brandeis.edu/projects/fse/muslim/divorce.html [https://perma.cc/AE7L-U5ZC].
[68] Ruth Levush, *Religious Matrimonial Laws in Selected Middle East and African Countries*, LIBR. CONG.: BLOGS (Aug. 31, 2017), https://blogs.loc.gov/law/2017/08/religious-matrimonial-laws-in-selected-middle-east-and-african-countries/ [https://perma.cc/67ZZ-5828].
[69] George N. Barrie, *Judicial Review and Religious Freedom in South Africa*, 2005 J. S. AFRICAN L. 162, 164 (2005).
[70] Bogdan, *supra* note 20, at 203.
[71] OFF. OF INT'T RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2021 INTERNATIONAL RELIGIOUS FREEDOM REPORT: DJIBOUTI (2022).

- *Egypt*: Civil law courts hear religious claims under Islamic law in personal-status cases.[72]
- *Eritrea*: Jurisdiction is limited to matters of personal status, family-law and inheritance-law disputes, and cases are heard under sharia law.[73]
- *Ethiopia*: Jurisdiction is granted in two areas and all cases are heard under sharia law. First are family-law matters, namely: "marriage, divorce, maintenance, guardianship of minors, and family relationships provided that marriage to which case pertains was concluded under Islamic law or parties are all Muslims."[74] Second are inheritance and some property-law cases, including "cases concerning *waqfs*, gifts, succession, or wills, provided that donor is a Muslim or deceased was a Muslim at time of death."[75]
- *The Gambia*: Jurisdiction is limited to Islamic marriage, family, child-custody and inheritance matters.[76]
- *Kenya*: Muslims may use *Kadhis* courts in cases regarding "personal status, marriage, divorce and inheritance."[77]
- *Mauritania*: Every area of law is intermixed with Islamic law. The Constitution of Mauritania recognises that Islam is the religion of the people and of the State.[78] Accordingly, courts do not have a limited jurisdiction.
- *Morocco*: Specialised family-law courts hear personal status cases according to sharia law regardless of religion.[79] In Casablanca, practicing Jews have personal-status cases heard before the state-sponsored rabbinical court.[80]
- *Nigeria*: In the states where sharia law operates, courts have jurisdiction over every legal matter if at least one party is Muslim, or all parties agree to have their case adjudicated by the religious court.[81]
- *Tanzania*: State-sponsored religious courts are only available in two states and only adjudicate cases related to Muslim family law.[82]
- *Uganda*: Civil courts only recognise and enforce the verdicts of the religious courts in regard to personal-status claims.[83]

In the criminal context, there are stark disparities in the application of sharia versus civil law. Even for the same offense, an individual who opts to have their case heard by a sharia law court rather than a civil law court may be

[72] Wahab, *supra* note 27.
[73] Dirar & Tesfagabir, *supra* note 22.
[74] *Ethiopia, Federal Democratic Republic of*, EMORY L.: ISLAMIC FAMILY LAW, https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/ethiopia-federal-democratic-republic-of/ [https://perma.cc/836P-ZYTJ] (last visited May 26, 2024).
[75] *Id.*
[76] Ogbuitepu, *supra* note 23.
[77] CONSTITUTION OF KENYA art. 24, cl. 4 (2010).
[78] CONSTITUTION art. 5 (1991) (Mauritania).
[79] *Morocco, Kingdom of (& Western Sahara)*, EMORY L.: ISLAMIC FAMILY LAW, https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/morocco-kingdom-of-western-sahara// [https://perma.cc/X567-9SL9] (last visited May 26, 2024).
[80] 2021 REPORT: MOROCCO, *supra* note 25.
[81] OFF. OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2022 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: NIGERIA (2023); Yemisi Dina, *Update: Guide to Nigerian Legal Information*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Aug. 2020), https://www.nyulawglobal.org/globalex/Nigeria1.html [https://perma.cc/MF94-8VWU].
[82] Oba, *Legal Framework*, supra note 19, at 8.
[83] *Sharia (Qadhis) Courts*, *supra* note 9.

opening themselves up to a much greater penalty. For example, both the Nigerian civil courts as well as the state sharia-law courts criminalize words or gestures intended to cause offense to a religion as blasphemy.[84] Under a civil-law conviction for blasphemy, an individual can be sentenced to a maximum of up to two years in prison;[85] a conviction for the same offense under sharia law carries a sentence of death.[86] Although one has to consent to the jurisdiction of sharia courts in countries that follow the "dual" model, this disparity raises questions of whether this amounts to religious discrimination against Muslims by opening them up to significantly greater liability merely because of their faith.

Similarly, within sharia law, there are evident gender disparities in its application.[87] Consider the sharia offense of *zina* (sex outside of marriage). Under the version of sharia applied in Nigeria, a conviction for *zina* requires four witnesses who saw the sexual act in question being committed.[88] However, in cases where a woman is pregnant, the four-witness requirement is waived, leading to a situation where women have a much higher conviction rate than men for the same offense.[89] Gender inequality is also evident in Islamic divorce where women and men are seen differently by the court. In Islam, a man can sue for divorce without the consent of his wife, but the reverse is not true.[90] This inequality gives men an advantage when selecting a forum to bring their legal claims. However, to change the sharia law applied would have theological implications. This sets up a clash between fundamental human rights guaranteed under international law that each country must weigh when deciding to recognise and sponsor religious courts.

III. ENFORCEABILITY AND RECOGNITION BY THE STATE

Countries that do not recognise the authority of religious courts and tribunals do not enforce the judgments of those courts. However, in limited circumstances relating to personal status, they may recognise the determinations of religious courts which, if unrecognised, would cause problems in wider society. This is particularly true regarding marriages and divorces. For example, until 2022, South Africa did not recognise Muslim marriages registered under sharia law.[91] This created problems in determining child custody and alimony payments when Islamic marriages were dissolved because the offspring of these unions and the marital status

---

[84] Criminal Code Act (2000) Cap. (19), § 204 (Nigeria); KANO STATE SHARIA PENAL CODE (1991) § 382(b) (Nigeria).
[85] Criminal Code Act (2000) Cap. (19), § 204 (Nigeria).
Criminal Code Act (2000) Cap. (19), § 204 (Nigeria).
[87] *See, e.g.*, Uzoamaka N. Okoye, *Women's Rights Under the Shari'a: A Flawed Application of the Doctrine of "Separate but Equal,"* 27 WOMEN'S RTS. L. REP. 103 (2006); John Hursh, *Advancing Women's Rights Through Islamic Law: The Example of Morocco*, 27 BERKELEY J. GENDER L. & JUST. 252 (2012).
[88] Kia N. Roberts, Note, *Constitutionality of Shari'a Law in Nigeria and the Higher Conviction Rate of Muslim Women Under Shari'a Fornication and Adultery Laws*, 14 S. CAL. REV. L. & WOMEN'S STUD. 315, 316 (2005).
[89] *See id.* at 316–18.
[90] Immigr. & Refugee Bd. of Canada, *Nigeria: Availability of Divorce for Women in a Muslim Marriage Who Have Experienced Domestic Abuse*, U.N. HIGH COMM'R FOR REFUGEES: REFWORLD (Apr. 9, 2001), https://www.refworld.org/docid/3df4be7f1e.html [https://perma.cc/KX3U-NCRZ].
[91] Charlene Kreuser & Amy-Leigh Payne, *Constitutional Court's Decision on Muslim Marriages Does Not Go Far Enough to Protect Women and Children*, MAIL & GUARDIAN (July 15, 2022) https://mg.co.za/article/2022-07-15-constitutional-courts-decision-on-muslim-marriages-does-not-go-far-enough-to-protect-women-and-children/ [https://perma.cc/PH4C-CR9B].

of the parties themselves were not recognised under South African civil law.[92] As a result, the South African Supreme Court ruled in *Women's Legal Centre Trust v. President of the Republic of South Africa and Others* that marriages registered under sharia law had to be recognised by the state courts.[93] While status determinations by religious law and courts, in some instances, may be recognised by civil authorities, the rulings themselves are not.

Even though the rulings of religious courts and tribunals are generally not recognised for enforcement purposes, some argue that under the common law tradition, their decisions should be reviewable for the purpose of enjoining them if they contradict civil law.[94] Those who support this proposition argue that "any private institution which exercises powers over individuals is obliged to observe common law principles which do not differ in principle from those applied to public bodies."[95] Since religious courts and tribunals "are in a position to act just as coercively as public bodies and their decisions can have far reaching effects," proponents of this form of judicial review believe civil courts in the common law tradition are obligated to regulate them to some degree to ensure justice.[96]

In African countries that have a common law system, there is some case law which supports the position of civil court review of religious legal decisions stretching from the mid-nineteenth to the late twentieth century.[97] The most decision in this vein is *Odendaal v Loggerenberg (1)* where the Supreme Court of South Africa held that "judicial intervention would follow if a domestic religious tribunal had not complied with the 'elementaire beginsels van geregtigheid"' or "elementary principles of justice."[98] However, in practice, civil oversight is seldom carried out as civil judicial intervention in religious courts and tribunals is seen as violating an individual's free will as well as their free exercise of religion.[99]

For the countries that sponsor religious courts and tribunals or fold the enforcement of religious law into their legal system, the decisions of the state-sponsored court are given full faith and credit under national law. The decisions of these bodies are enforceable to the extent that they are subject to judicial review by a higher court.

IV. GOVERNMENTAL OVERSIGHT AND REVIEW

In general, religious courts and tribunals not supported by the state do not have governmental judicial review or oversight. Though, some of these bodies still have internal oversight and judicial review through the given religion's internal appeal system. Notably, Catholic diocesan courts have an appeals structure consisting of four levels: the diocesan, metropolitan, regional, and Holy See.[100] Although sometimes issues of first instance may appear at different levels of the Canon Law court structure, a general process of internal review and oversight is in place.[101]

---

[92] *Id.*
[93] *Id.*
[94] *See* Barrie, *supra* note 69, at 163.
[95] *Id.* (citing LAWRENCE BAXTER, ADMINISTRATIVE LAW 101 (1984)).
[96] *Id.*
[97] *Id.*
[98] *Id.* (quoting *Odendaal v. Loggerenberg en Andere NNO (1)* 1961 (1) SA 712 (O) at 719 (S. Afr.)).
[99] *See infra* Part IV.
[100] D'Auria, *supra* note 40, at 2.
[101] *Id.*

State oversight of nonstate religious courts and tribunals follows a general policy of nonintervention except in extraordinary cases. The reasoning that underpins the secular governmental court hesitation to enforce these judgements is exemplified by *Taylor v. Kurtstag NO*, a 2003 case heard by the Witwatersrand Local Division of the High Court of Johannesburg.[102] There, a Jewish couple agreed to have the financial maintenance and custody aspects of their divorce adjudicated by a *Beth Din*.[103] When it became clear the husband planned to ignore the ruling of the *Beth Din*, the court declared a *cherem* (or excommunication notice) against the husband.[104] As a result, he was shunned by the Orthodox community in Johannesburg which was not allowed to socialize with him or patronize his business.[105]

The husband then filed a claim in South African civil court to enjoin the *cherem*, claiming that its enforcement would infringe upon his constitutional rights as well as defame him.[106] While the civil court agreed that the imposition of a *cherem* both infringed on the applicant's constitutional rights and was unenforceable by the South African legal system, it declined to enjoin the verdict, finding it "reasonable and justifiable since a *cherem* enables the Jewish community "to protect the integrity of Jewish law and custom by ensuring conformity therewith."[107] The Witwatersrand Local Division court relied on two grounds in justifying its decision to not enjoin the imposition of the *cherem*: consent and freedom of religion.

On the first point, consent, the Division court found that the applicant had in effect consented to the jurisdiction of the *Beth Din* court when he agreed to be bound by its ruling.[108] The court found that acceptance of the ruling was not coercion because "[a]dherents consensually undertake to submit themselves to the discipline which has been imposed on them in consequence of their practice of Orthodox Judaism."[109] In regard to the *Beth Din* and the Jewish Orthodox community (which was supposed to impose the *cherem*), the court found that they respectively had the freedom to ask others not to associate with the applicant and to not associate with the applicant if they wished.[110] In enjoining the *cherem*, the court found that they would essentially be interfering in a religious community's decision to exclude an individual from their society and be put in the position of regulating social niceties. Following this line of reasoning, the court found that in enjoining the *Beth Din*, they would be violating the rights of the Johannesburg Orthodox Jewish community.[111]

Second, on the point of free exercise, the Division court found that in enjoining the ruling of the *Beth Din*, they would be violating the freedom of religion of those within the religious community.[112] This was because the court found that a *cherem* was a well-established concept in Jewish law and

---

[102] Barrie, *supra* note 69, at 164.
[103] Waheeda Amien & Khaleel Rajwani, *Equalizing Gendered Access to Jewish Divorce in South Africa*, 52 J. LEGAL PLURALISM & UNOFFICIAL L. 330, 337 (2020).
[104] Barrie, *supra* note 69, at 162.
[105] *Id.*
[106] Amien & Rajwani, *supra* note 103, at 336.
[107] *Id.* (emphasis added) (quoting *Taylor v. Kurtstag NO* 2005 (1) SA 362 (W) at para. 58 (S. Afr.)).
[108] *Id.*
[109] *Taylor*, (1) SA 392 at para. 35.
[110] Amien & Rajwani, *supra* note 103, at 336.
[111] *Id.*
[112] Barrie, *supra* note 69, at 164.

thus part of traditional Orthodox Jewish religious exercise.[113] Since the *cherem* is an established part of Judaism, adherents are "obliged to demonstrate fidelity to it, which included accepting the Cherem."[114] As a result, the court saw that enjoining the *cherem* would be tantamount to government limitation of religious free exercise.[115]

As *Taylor* shows, even violations of constitutional rights may be excused by this rationale for state nonintervention. However, there still may be extraordinary cases where intervention is warranted. These interventions are a far cry from the broad judicial review advocated for by *Odendaal* and would only come into play when religious court action or inaction is so egregious that it outweighs the constitutional free-exercise considerations or puts a person at risk of serious bodily harm.

An example of the former is *Amar v. Amar*, a 1999 decision in the same South African court as *Taylor*, which granted a Jewish couple a divorce despite their lack of a *get* (the permission of the husband) as required under Jewish law.[116] There, the Division court determined that the husband was refusing to grant a *get* as a means of extorting a favourable settlement from his wife and, as a result, the court stepped in, granted the divorce, and determined a settlement of their own.[117]

An example of the latter is *Raik v. Raik*, a 1993 case which largely mirrored the facts and decision from *Amar*.[118] The main distinction between the two cases was that the refusal to grant a *get* in *Raik* was part of a pattern of emotional and physical abuse on the part of the husband.[119] In *Raik*, the court found that the pattern of abuse was sufficient to intervene and overrule the *Beth Din* court.[120]

In the African countries that have state-sponsored religious courts and tribunals, the decisions of those court are subject to review by other courts in that country's legal system. When the civil legal system applies religious law, that appeal is heard through the same judicial review system all cases are heard in. In cases where separate religious courts operate, either run by the state or sponsored by the state, separate appeals processes may exist. A review of the appeals processes for the religious courts and tribunals of each African country that recognises their decisions is as follows:

- *Comoros*: *Kadhis* courts are incorporated into the national judicial structure and operate at the lowest level of the tripartite system. The decisions of *Kadhis* courts are reviewable by both the Court of Appeals,[121] and, since the imposition of a new Constitution in 2018, the Supreme Court, whose decisions are not liable to any recourse and impose themselves on all the jurisdictions of the national territory.[122] These methods of judicial review only consider matters of law, not theology, as the Constitution of

[113] *Id.*
[114] *Id.* at 165.
[115] *Id.*
[116] Amien & Rajwani, *supra* note 103, at 337–38 (citing *Amar v. Amar* 1999 (3) SA 604 (W) (S. Afr.)).
[117] *Id.*
[118] *Id.* at 335 (discussing *Raik v. Raik* 1993 (2) SA 617 (W) (S. Afr.)).
[119] *Id.*
[120] *Id.*
[121] Michael Gyan Nyarko, *Introduction to the Law and Legal System of the Islands of Comoros*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Oct. 2020), https://www.nyulawglobal.org/globalex/Comoros.html [https://perma.cc/82E5-ZY9D].
[122] CONSTITUTION art. 96, cl. 3 (2018) (Comoros).

Comoros recognises Sunni Islam as the official religion of the state and draws on that religion when enacting laws.[123]

- *Djibouti*: *Kadhis* courts have a separate judicial review system than civil courts. Decisions in lower *Kadhis* courts can be appealed to a *Kadhis* appeals court.[124] From there, cases may then be appealed to the Supreme Court of Djibouti (called the Court of Cassation) which has final decision making authority.[125] The Supreme Court has a specific "chamber" which hears Islamic-law cases, but the panel of judges is composed of the same five Justices who normally sit on the Supreme Court.[126] Whenever the Court hears matters of Islamic law, they are joined by independent Islamic law assessors appointed by the President of Djibouti.[127]
- *Egypt*: As Islamic law is used by Family Division civil courts, decisions are reviewed through the normal appeals process. First, cases can be referred to the Court of Appeals for family law.[128] They then may be appealed up to the Court of Cassation which is the final interpretive body of the law.[129] In some instances, cases may be further appealed to the Supreme Court of Egypt but only in instances that deal with questions of constitutionality.[130] As the Egyptian Constitution lays out that the principles of Islamic sharia are the principal source of legislation it is unlikely that a case based on the constitutionality of religious law itself would ever reach the high Egyptian court.[131]
- *Eritrea*: Sharia courts are siloed from the regular civil legal system and are generally unreviewable. However, their decisions are reviewable by the High Court but only for constitutional questions.[132]
- *Ethiopia*: Sharia courts operate in a tripartite legal structure on the federal level, distinct from the civil court system.[133] Cases first are heard in the Federal First-Instance Court of Sharia and can be appealed up to the Federal High Court of Sharia.[134] Those decisions may then be appealed to the Federal Supreme Court of Sharia.[135] All decisions of that court are accountable to the Federal Judicial Administration Commission in some extreme situations dealing with constitutional law.[136]
- *The Gambia*: The Islamic sharia legal system is totally separate and unreviewable by the government. Lower *Kadhis* court

---

[123] *Id.* art. 97.
[124] Bogdan, *supra* note 20, at 207.
[125] Mustafe Mohamed H. Dahir, *Update: Researching the Legal System of the Republic of Djibouti*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (June 2022), https://www.nyulawglobal.org/globalex/Djibouti1.html [https://perma.cc/A8HM-MUKM].
[126] Bogdan, *supra* note 20, at 206.
[127] *Id.*
[128] Wahab, *supra* note 27.
[129] *Id.*
[130] *Id.*
[131] دستور جمهورية مصر العربية [CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT] art. 2 (2014).
[132] Dirar & Tesfagabir, *supra* note 22.
[133] Girmachew Alemu Aneme, *Update: Introduction to the Ethiopian Legal System and Legal Research*, N.Y.U L. SCH.: HAUSER GLOB. L. SCH. PROGRAM (Feb. 2020), https://www.nyulawglobal.org/globalex/Ethiopia1.html [https://perma.cc/J4P7-NBGV].
[134] *Id.*
[135] *Id.*
[136] *Id.*

decisions are reviewed by a *Kadhis* court of appeals consisting of a three-member panel.[137]

- *Kenya*: Lower *Kadhis* court decisions are reviewable by an Upper *Kadhis* court.[138] The decisions of the Upper Kadhis court is reviewable by the Kenyan High Court and the decisions of the Kenyan High Court are further reviewable by Kenya's Court of Appeals.[139]
- *Mauritania*: Sharia is embedded in all areas of Mauritanian law and all courts hear cases concerning Islamic law.[140] The lower courts are divided into six branches: general regional courts (*Wilaya*), district (*Moughataa*) courts, Customary Courts, Criminal Courts, Commercial Courts, and Labour Courts.[141] Those courts are answerable to their own specific courts of appeal and then may be further reviewable by the Supreme Court.[142] In some cases, matters of constitutional law may be further referred to the Constitutional Council.[143]
- *Morocco*: Decisions of religious courts are not reviewable by civil courts in Morocco.[144]
- *Nigeria*: State sharia-law courts can be reviewed by the federal Sharia Court of Appeal which oversees all state applications of sharia law.[145] Those decisions can then be appealed to the secular Court of Appeal and subsequently to the Nigerian Supreme Court.[146]
- *Tanzania*: Regional courts that impose sharia personal law are not reviewable federally.[147] *Kadhis* court decisions may be appealed to the *Kadhis* Appeals Court and then further to the High Court of the Region.[148]
- *Uganda*: The government does not review the decisions of the sharia courts.

CONCLUDING REMARKS

In Africa, Islamic courts are, in most cases, given a greater status than other religious courts and tribunals. For the countries that recognise the jurisdiction of religious courts, only Morocco officially recognises the decisions of a religious court that is not Islamic (and the Jewish court in Morocco only operates for the city of Casablanca).[149] Other countries even constitutionally recognise the legality of tribunals of other faiths but only sponsor and recognise the judgements of Islamic courts. For example, under

---

[137] CONSTITUTION OF THE REPUBLIC OF THE GAMBIA art. 137A (1) (1997).
[138] CONSTITUTION OF KENYA art. 66 (2010).
[139] Tom Ojienda et al., *Update: Researching Kenyan Law*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Apr. 2020), https://www.nyulawglobal.org/globalex/Kenya1.html [https://perma.cc/T8EQ-3B27].
[140] Dasi, *supra* note 28.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *See Morocco*, *supra* note 79.
[145] Dina, *supra* note 81.
[146] *Id.*
[147] Seka Kasera & Christabel Manning, *Update: Tanzanian Legal System and Legal Research*, N.Y.U. L.: HAUSER GLOB. L. SCH. PROGRAM (Aug. 2020), https://www.nyulawglobal.org/globalex/Tanzania1.html [https://perma.cc/Y4FG-VYCW].
[148] *Id.*
[149] *See Morocco*, *supra* note 79.

the Egyptian Constitution, the "principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders," but there is no government body to provide this guidance.[150]

There is further intrareligion favouritism in governments that sponsor religious courts and tribunals depending on the denomination. Africa predominately follows Sunni Islam and the Maliki school of sharia law interpretation which leaves many non-Sunni Muslims disadvantaged in the courts.[151] This also can lead to outright discrimination against minority Muslim denominations in the countries that apply sharia law in the criminal context. An example of this comes from Nigeria where minority Muslims have been charged with crimes, most commonly blasphemy, for making statements inconsistent with the majority interpretation of Sunni Islam but not blasphemous according to the minority denomination of Islam that the accused belongs to.[152]

In some cases, religious courts are further favoured by being granted less oversight than civil courts. This is the case in countries like Tanzania where the Court of Appeal is not given jurisdiction to oversee the cases of the *Kadhis* courts,[153] and The Gambia where *Kadhis* have their own appeals structure separate from the civil system.

---

[150] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 3.
[151] Robinson, *supra* note 16.
[152] Hamza Ibrahim, *Nigerian Appeals Court Throws Out Blasphemy Convictions that Caused Outcry*, REUTERS (Jan. 21, 2022), https://www.reuters.com/article/us-nigeria-crime-blasphemy-idUSKBN29Q2G6 [https://perma.cc/U2NA-GYJE]. In the case of Yahaya Sharif-Aminu, a Sufi Muslim was convicted and sentenced to death for blasphemy for a song he recorded that was blasphemous under the Sunni interpretation of Islam but not his own faith.
[153] *Court of Appeal of Tanzania*, TANZLII, https://tanzlii.org/judgments/TZCA/ [https://perma.cc/9YN6-Q9QV] (last visited June 24, 2024).

GETTING IN A BIND—COMPARING EXECUTIVE COMPENSATION REGULATIONS IN THE U.S. AND THE U.K.

BOBBY V. REDDY*

TABLE OF CONTENTS

INTRODUCTION 39

I. CONCERNS ABOUT EXECUTIVE COMPENSATION 41

II. U.S. EXECUTIVE COMPENSATION REGULATIONS 44

III. U.K. EXECUTIVE COMPENSATION REGULATIONS 49

IV. COMPARING EXECUTIVE COMPENSATION GOVERNANCE IN THE U.K. AND THE U.S. 53

V. EVIDENCE OF THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION 55

VI. REASONS TO DOUBT THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION 58

CONCLUSION 65

* Professor of Corporate Law and Governance, University of Cambridge; former partner, Latham & Watkins LLP; J.M. Keynes Senior Fellow in Financial Economics; and Global Distinguished Professor of Law, Notre Dame London.

INTRODUCTION

Executive compensation generally refers to the pay of inside directors of companies ("executive directors" in U.K. parlance) for the services they provide on an employment basis to the company. In large publicly traded companies, executive compensation has become a hot topic over the decades, especially in relation to the levels of pay, perks, and pensions granted to Chief Executive Officers (CEOs) and, to a lesser extent, Chief Financial Officers (CFOs). In particular, the disparity in pay between those at the top and rank-and-file employees has attracted notoriety.[1] It is not surprising therefore that executive compensation has attracted regulatory scrutiny on both sides of the Atlantic.

Both the U.S. and the U.K. employ regulatory strategies to moderate executive compensation in publicly traded companies, and, perhaps even more so, to encourage the structuring of executive compensation packages in a manner that is perceived to be beneficial to public shareholders. In both jurisdictions the approach has tended to combine enhanced disclosure of executive pay with giving shareholders the opportunity to register their opinions on such compensation—so-called "say-on-pay." However, differences between U.S. and U.K. executive compensation regulations subsist, with the U.K. granting shareholders perceptibly stronger rights. In particular, the U.K. gives shareholders a binding say-on-pay vote, enabling them to veto proposed executive-compensation policies. While say-on-pay also exists in the U.S., the results of any such vote are merely advisory and boards are not legally compelled to comply with the outcomes of such votes. Differences between the two jurisdictions have been highlighted in recent times, with concerns rising in the U.S. that currently applicable regulations have not been successful in moderating executive compensation. Conversely, concerns have been raised in the U.K. that the executive compensation regulatory environment is too onerous and potentially deters both talented individuals from becoming executives of U.K.-listed companies and companies from choosing the London Stock Exchange as a venue for listing in the first place.[2] In a twist to the executive-remuneration story, calls have recently been made that U.K. executives should be paid *more* compensation.[3] Remuneration for executives of publicly traded companies is, on average, greater in the U.S. than in the U.K.,[4] and such a variation has intensified the concerns apparent in the two countries.

With the market for initial public offerings (IPOs) becoming more global, and the existence of large levels of private capital making it more feasible for companies to remain private rather than listing on a stock

---

[1] Various interest groups have focused on the divergence between public company CEO pay and rank-and-file employee pay. For the United States, see, for instance, *Company Pay Ratios*, AFL-CIO: EXEC. PAYWATCH, https://aflcio.org/paywatch/company-pay-ratios [https://perma.cc/945F-QHS6] (last visited May 22, 2024). For the United Kingdom, see, for instance, ANDREW SPEKE ET AL., HIGH PAY CTR., RETHINKING REWARD: HIGH PAY CENTRE ANALYSIS OF FTSE 350 PAY RATIO DISCLOSURES (2023).

[2] *See infra* notes 23–25 and accompanying text.

[3] Leah Montebello, *Row Over Fat-Cat Pay Escalates with Leading City Figures Claiming that Chief Executives Should be Paid More to Avoid a Talent Exodus*, THIS IS MONEY (May 7, 2023, 4:51 PM), https://www.thisismoney.co.uk/money/markets/article-12057117/Fat-cat-pay-row-intensifies-bosses-brain-drain-claim.html [https://perma.cc/EK3W-LGJT]; Sarah Butler, *L&G Opens Door for Huge US-Style Bonuses for UK Asset Managers*, GUARDIAN (Dec. 17, 2023, 12:24 PM), https://www.theguardian.com/business/2023/dec/17/l-and-g-investment-manangement-us-style-bonuses-london-listed-firms-pay-policy [https://perma.cc/8L2Q-QF26].

[4] *See infra* notes 26–31 and accompanying text.

exchange,[5] it is no wonder that stock exchanges around the world have been reexamining their corporate governance regimes. Exchanges, and their regulators, are facing a balancing act. On the one hand, they seek to ensure that corporate governance protections for shareholders are robust in order to facilitate an orderly and attractive market for investors, while, on the other hand, they seek to ensure that regulatory requirements are not so severe that they deter companies from listing on the exchange or impede the ability of companies that do list from innovating, taking risks, and maximizing potential benefits for shareholders and other stakeholders alike.[6] Executive compensation regulations constitute one part of that corporate governance mix. However, with respect to executive compensation, the true impact of regulation *per se* on pay can be difficult to determine. In this Article, it will be argued that although, on paper, the U.K. imposes stricter requirements on listed companies in the realm of executive pay than the U.S., in practice it is not clear that the difference in executive pay levels between the U.S. and the U.K. can be purely attributed to the existence of those regulations. Cultural norms and negative attitudes toward high executive compensation likely play a role in the U.K. in restraining executive pay at levels below the U.S., and with executive compensation packages in the U.S. and the U.K. being dominated by variable, performance-based pay, the relative performance of the two markets over time may also drive deviations in the levels of executive remuneration.

This Article will commence by discussing the concerns that have emerged regarding high executive compensation in the U.S. and the U.K. which stirred the regulators in both jurisdictions to act on executive pay but will also note a materializing school of thought in the U.K. that stern executive compensation regulations may be having a detrimental effect on the competitiveness of the London Stock Exchange as a forum for equity listings. The subsequent two sections will outline the executive compensation regulatory regimes in the U.S. and the U.K. The next section will compare the differences between executive compensation regulations in the U.S. and the U.K., noting that the fact that the future pay of executives of U.K.-incorporated listed companies is subject to a binding, rather than advisory, vote of the shareholders is indicative of a stricter corporate governance environment on executive pay in the U.K. The fifth part of this Article will discuss the evidence that the introduction of a binding vote in the U.K. may have had a bearing on executive compensation in the U.K. lagging behind the U.S., before, in part six, discussing the other side of the argument that the binding vote has not had a material impact on U.K. executive pay and that other nonregulatory factors may have been as, or potentially more, important in creating the gap between U.S. and U.K. executive compensation levels. The Article will finish with concluding remarks and policy considerations.

[5] Brian R. Cheffins & Bobby V. Reddy, *Murder on the City Express—Who Is Killing the London Stock Exchange's Equity Market?*, 44 CO. LAW. 215, 216–17 (2023) [hereinafter Cheffins & Reddy, *Murder*].

[6] For a succinct discussion of the "regulatory and contracting paradigms" and the competing pressures on stock exchange regulation, see Brian R. Cheffins & Bobby V. Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK?*, 86 MOD. L. REV. 176, 188–90 (2023) [hereinafter Cheffins & Reddy, *Listing Rule Reform*].

I. CONCERNS ABOUT EXECUTIVE COMPENSATION

"Fat cats," "bloated rodents," and "greedy bastards" are all provocative terms that have been leveled at executives of publicly traded companies over the years,[7] reflecting the concerns that have emerged over high executive pay. It was not only the huge headline figures[8] that attracted public, media, and political opprobrium, but also the precipitous rate of growth of executive compensation. In the U.S., one study found that "realized"[9] mean executive compensation at the top 350 firms in the U.S. rose 1,460% between 1978 and 2021, a rate greater than the growth of the stock market itself.[10] In the U.K., the rise in executive compensation over time has not been quite as steep as seen in the U.S. but the average pay of CEOs of the top 100 listed companies in the U.K. still rose around 375% between 1998 and 2011, again far outstripping the performance of the market.[11] Furthermore, the divergence in pay between CEOs of publicly traded companies and rank-and-file workers has attracted attention. In 2022, the median S&P 500[12] company CEO earned 272 times as much as the median rank-and-file employee.[13] In the U.K., the equivalent ratio for the FTSE 100,[14] an index broadly comparable to the US's S&P 500, was 118:1.[15]

Although the sheer level of executive compensation may have created media storms, at least ostensibly the authorities have also used other justifications for regulatory fiat. Agency cost considerations were prime amongst them. The agency problem is thought to arise where the managers (the economic "agents") of a company are not sufficiently incentivized to manage the company in the interests of shareholders who, as the residual claimants of the profits of the company, could be considered economically, if not legally, as the "principals."[16] Agency costs arise from the need to monitor those managers, the implementation of mechanisms to align the interests of managers with shareholders, and the consequences of self-serving behavior by managers.[17] Some commentators have identified executive compensation packages that reward managers for better company

---

[7] *See*, *e.g.*, Dan Lin et al., *Chief Executive Compensation: An Empirical Study of Fat Cat CEOs*, 7 INT'L. J. BUS. & FIN. RSCH. 27 (2013); Barrie Clement & Colin Brown, *Fury Over 'Greedy Bosses' Attack*, INDEP. (Sept. 14, 1998, 11:02 PM), https://www.independent.co.uk/news/fury-over-greedy-bosses-attack-1198191.html [https://perma.cc/A7GE-BS8C]; Jason Niss, *Business View: The Greedy Bastards in the Boardroom Are Fanning Flames of Discontent*, INDEP. (Oct. 5, 2003), https://www.independent.co.uk/news/business/comment/business-view-the-greedy-bastards-in-the-boardroom-are-fanning-flames-of-discontent-89862.html [https://perma.cc/799P-HRHC].

[8] *See infra* notes 26–28 and accompanying text.

[9] Determining remuneration on a "realized" basis entails only including stock grants once vested and stock options once cashed-in and ownership taken.

[10] JOSH BIVENS & JORI KANDRA, ECON. POL'Y INST., CEO PAY HAS SKYROCKETED 1,460% SINCE 1978 (2022), https://files.epi.org/uploads/255893.pdf [https://perma.cc/EL4U-W53X].

[11] DEP'T FOR BUS., ENERGY & INDUS. STRATEGY [hereinafter DBEIS], CORPORATE GOVERNANCE REFORM 16–17 (2017).

[12] The S&P 500 is an index of the 500 largest (by way of market capitalization) index-eligible companies listed on U.S. stock exchanges.

[13] *Company Pay Ratios*, *supra* note 1.

[14] The FTSE 100 is an index of the 100 largest (by way of market capitalization) index-eligible companies listed on the premium tier of the London Stock Exchange.

[15] ROSIE NEVILLE ET AL., HIGH PAY CENTRE, ANALYSIS OF UK CEO PAY IN 2022, at 1 (2023).

[16] *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 45 (1997).

[17] Jensen & Meckling, *supra* note 16, at 308.

performance as a critical tool in realigning the interests of managers and shareholders.[18] However, others have also noted that rather than executive compensation being the solution to agency costs, it can represent an agency cost in and of itself.[19] If managers have free rein to set their executive compensation, or at least have significant influence in the establishment of their pay, managerial remuneration simply becomes another avenue for rent-seeking behavior. In the U.K., the perceived failure of executive compensation packages to mitigate agency costs was seen as a key rationale for reinforcing executive compensation regulation in 2012. The goals of the 2012 reforms were to make the pay of company managers more transparent, and to promote a clearer link between pay and company performance.[20] In the U.S., significant executive compensation reforms were made in the shadow of the financial crisis of 2008–2009. Concerns were raised that the financial crisis had been propelled by managers incentivized to pursue short-term goals as a result of executive compensation packages with short-term and easily achievable targets.[21] Again, an incongruence between managerial remuneration and the actual performance of the firms they managed, and a lack of transparency and accountability, were highlighted as prompts for regulatory reform.[22]

If the reasoning for executive compensation regulation is sound, on the flipside, at least in the U.K., a level of unease has developed that it could also create negative externalities. A perception of oppressive regulation of executive compensation has been blamed in the U.K. for both an exodus of talent from the U.K. to the U.S.[23] and compelling U.K. companies to consider shunning the London Stock Exchange in favor of listing on other global exchanges or remaining private.[24] Similarly, the U.K.'s regulatory approach to executive pay has at times been blamed for highly sought-after U.S. executives leaving the U.K. for the warm embrace of their more executive pay-friendly homeland.[25] The same claims and concerns have not garnered traction in the U.S., suggesting that the U.S. employs a substantially more lenient executive compensation regulatory system. The theory plays out accordingly when the actual figures are surveyed. 2022

---

[18] *See, e.g.*, Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 553–64 (1984); Nicholas Wolfson, *A Critique of Corporate Law*, 34 U. MIAMI L. REV. 959, 967, 978 (1980); John Armour et al., *Agency Problems and Legal Strategies*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 29, 36 (3d ed. 2017); CHEFFINS, *supra* note 16, at 654.

[19] Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 783–95 (2002); CHEFFINS, *supra* note 16, at 654.

[20] *See* DEP'T FOR BUS., INNOVATION & SKILLS, IMPROVED TRANSPARENCY OF EXECUTIVE REMUNERATION REPORTING 1 (2012); *see also* Martin Petrin, *Executive Compensation in the United Kingdom—Past, Present, and Future*, 36 CO. LAW. 195, 202 (2016); Fabrizio Ferri & David A. Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK,* 17 REV. FIN. 527, 528 (2013).

[21] Andrew Dunning, *The Changing Landscape of Executive Compensation After Dodd-Frank*, 30 REV. BANKING & FIN. L. 64, 65 (2010).

[22] *Id*.

[23] Daniel Thomas & Andrew Edgecliffe-Johnson, *Does It Pay for British Executives to Move to the US?*, FIN. TIMES (May 10, 2023), https://on.ft.com/3xDtD46 [https://perma.cc/ZU23-THGR]; Montebello, *supra* note 3; Butler, *supra* note 3.

[24] Anjil Raval, *LSE Chief Calls for Higher UK Executive Pay to Retain Listings*, FIN. TIMES (May 3, 2023), https://www.ft.com/content/596e3474-51a0-4dc1-b865-929658ec74d5 [https://perma.cc/KP88-XTPV]; Julia Hoggett, *We Need a Constructive Discussion on the UK's Approach to Executive Compensation*, LONDON STOCK EXCH. GRP. (May 3, 2023), https://www.lseg.com/en/insights/julia-hoggett-ceo-uk-approach-executive-compensation [https://perma.cc/MJ4U-U9RJ].

[25] *See, e.g.*, Sarah Neville & Sarah Provan, *Smith & Nephew Chief Executive to Step Down Over Low Pay*, FIN. TIMES (Oct. 21, 2019), https://www.ft.com/content/4eed5dd6-f3c9-11e9-a79c-bc9acae3b654 [https://perma.cc/HHC2-F9CD]; Thomas & Edgecliffe-Johnson, *supra* note 23.

mean (median) pay for S&P 500 CEOs was $16.7 million[26] ($14.5 million),[27] as compared to $5.63 million ($4.95 million) for FTSE 100 CEOs.[28] To be sure, on average S&P 500 companies have greater market capitalizations than FTSE 100 companies,[29] and when market capitalization is taken into account, comparing similarly sized U.S.- and U.K.-listed companies, the difference in levels of executive compensation is not as stark.[30] However, even taking into account the larger size of U.S. publicly traded corporations, commentators have suggested that, on a like-for-like basis, U.S. executives can expect to earn thirty to fifty percent more in pay than their U.K. brethren.[31]

After decades of one-way antagonism toward high executive pay in the U.K., it would seem that the debate has become more nuanced. Perhaps those leading the line arguing that U.K. executives should receive *higher* pay represent a minority view, but in the midst of a malaise in the fortunes of the London Stock Exchange, and a regulatory agenda seeking to turn its prospects around,[32] the role of executive pay regulations, and corporate governance generally, in the Exchange's decline will continue to come under scrutiny. However, if low levels of executive pay compared to the U.S. do have a part to play in the decline of the London Stock Exchange, is it fair to blame the U.K.'s regulatory regime? To answer that question, first the regulatory mix evident in each of the two jurisdictions must be outlined.

---

[26] *Highest-Paid CEOs*, AFL-CIO: EXEC. PAYWATCH, https://aflcio.org/paywatch/highest-paid-ceos [https://perma.cc/8ZQJ-SBAK] (last visited May 22, 2024).

[27] Freny Fernandes, *Ranked: The Highest Paid CEOs in the S&P 500*, VISUAL CAPITALIST (Sept. 19, 2023), https://www.visualcapitalist.com/the-highest-paid-ceos/ [https://perma.cc/A9S2-JA8A].

[28] NEVILLE ET AL., *supra* note 15, at 1. The raw mean (median) figures of £4.44 million (£3.91 million) have been converted into USD at the prevailing exchange rate as of December 4, 2023.

[29] As of April 27, 2024, the market capitalization of the S&P 500 was $42.732 trillion, giving an average market capitalization per constituent of $85.464 billion. Slickcharts, *Total S&P 500 Market Capitalization* (April 28, 2024), https://www.slickcharts.com/sp500/marketcap#:~:text=The%20S%26P%20500%20has%20a%20market%20capitalization%20of%20%2440.078%20trillion%20dollars [https://perma.cc/JXY4-UG7Z]. As of April 27, 2024, the market capitalization of the FTSE 100 was £1.985 trillion (or $2.479 trillion at the prevailing exchange rate), giving an average market capitalization per constituent of $24.79 billion. London Stock Exchange, *FTSE 100* (April 28, 2024), https://www.londonstockexchange.com/indices/ftse-100 [https://perma.cc/U7M7-SC6F].

[30] *Are UK-Listed Companies Paying the Price for Executive Talent?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (June 12, 2023) [hereinafter SKADDEN], https://www.skadden.com/insights/publications/2023/06/are-uk-listed-companies-paying [https://perma.cc/ED27-SCDC]. It should also be noted that differences exist in the manner in which U.S. and U.K. companies disclose equity compensation in total compensation figures, with the former including equity-based awards granted to executives during the fiscal year, and the latter only including equity awards actually "realized" (vested or exercised, see *supra* note 9) during the fiscal year. *See* SKADDEN, *supra*. Such a difference could skew disclosures in favor of higher U.S. executive pay, but when reviewing executive pay over a longer-term perspective (and with the assumption that in any given year the majority of U.K. executives will have been in their roles long enough for equity awards to vest), the differences should smooth out and not create a material impact on the headline comparisons.

[31] *See* BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, EXECUTIVE REWARDS: PAYING FOR SUCCESS, 2017-9, HC 2018, at 1, 8 n.10 (remuneration committee chair suggesting that U.K. executive pay was about 30-40% lower than in the U.S.); Thomas & Edgecliffe-Johnson, *supra* note 23 (Tom Gosling, an executive fellow at the London Business School, stating that for comparably sized companies a rule of thumb was that CEO pay was about 50% higher in the U.S.).

[32] *See* Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 190–195; Brian R. Cheffins & Bobby V. Reddy, *Law and Stock Market Development in the UK over Time: An Uneasy Match*, 43 OXFORD J. LEG. STUD. 723, 751–52 (2023); Cheffins & Reddy, *Murder*, *supra* note 5, at 218–22.

II. U.S. EXECUTIVE COMPENSATION REGULATIONS

In the U.S., the flagship regulatory reform on executive compensation was 2010's Dodd-Frank Act.[33] As well as bolstering preexisting disclosure requirements[34] for executive compensation arrangements of all U.S. public companies,[35] Dodd-Frank also required that such companies grant shareholders a vote on the compensation of the five highest-paid executive officers once at least every three years.[36] Every six years, shareholders also have the right to vote upon the frequency of such "say-on-pay" votes—every one, two or three years.[37] The say-on-pay measures were largely fashioned on the U.K.'s say-on-pay model that was extant at the time,[38] and consequently the shareholder vote on executive compensation in the U.S. is, crucially, only advisory in nature. If shareholders reject a company's executive compensation, the vote has no legal force and the company is at liberty, from a legal standpoint, to ignore the shareholders' reproach.

Another important feature of Dodd-Frank was its direction to the SEC to mandate that national securities exchanges, such as the New York Stock Exchange (NYSE) and Nasdaq, require that all compensation committee members (or directors performing compensation-setting functions in the absence of a formal committee[39]) of a company listing equity securities on the exchange must be independent.[40] Although even before Dodd-Frank U.S. public companies almost always implemented compensation committees, usually composed of outside directors,[41] to determine executive pay, Dodd-Frank also laid down guidance as to how "independence" could be defined,[42] using enhanced standards after taking Sarbanes-Oxley's[43] interpretation of audit committee independence as inspiration.[44] The direction was a clear riposte to concerns that even when executive compensation was determined by outside directors, those outside directors may suffer conflicts of interest in their decision making.[45]

---

[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).
[34] *See, e.g.*, 17 C.F.R. § 229.402 (2024).
[35] Dodd-Frank Act §§ 953–56.
[36] Dodd-Frank Act § 951.
[37] *Id*.
[38] Jill Fisch et al., *Is Say On Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 105 (2018). In relation to the U.K.'s say-on-pay measures in force at the time, see *infra* note 104 and accompanying text.
[39] *SEC Adopts Dodd-Frank Compensation Committee Rules*, HUGHES HUBBARD & REED (July 3, 2012), https://www.hugheshubbard.com/news/sec-adopts-dodd-frank-compensation-committee-rules [https://perma.cc/5M4D-XUQU].
[40] Dodd-Frank Act § 952.
[41] The use of compensation committees comprising independent directors was, pre-Dodd-Frank, driven by investor pressure, a tax rule providing that tax deductibility of compensation was only permissible if compensation was determined by independent directors, and a desire to insulate against legal challenges. *See* Bebchuk et al., *supra* note 19, at 765. In relation to the relevant tax rule, see text accompanying *infra* note 51.
[42] Dodd-Frank Act § 952.
[43] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 12 U.S.C.).
[44] *SOX Redux: Corporate Governance and the Dodd-Frank Act*, HUGHES HUBBARD & REED (July 2010), https://www.hugheshubbard.com/news/sox-redux-corporate-governance-and-the-dodd-frank-act [https://perma.cc/Z2YF-DZQM].
[45] However, it has been noted that even where the compensation committee members are objectively "independent," the influence that the CEO of a company can have on the nomination and reappointment of outside directors can lead to those directors being in thrall to the CEO. Bebchuk et al., *supra* note 19, at 767; *see also* ARTHUR R. PINTO & JAMES A. FANTO, UNDERSTANDING CORPORATE LAW 296 (6th ed. 2023).

Dodd-Frank also recognized the predilection for public companies to appoint third-party compensation consultants to assist in the determination and structuring of executive compensation.[46] Although, on its face, the utilization of third parties would seemingly increase objectivity in the compensation determination process, the neutrality of such consultants had been questioned on the basis of their desire to genuflect to CEOs who may be responsible for their appointment by the company or other companies in which the CEO also serves on the board.[47] Such bias would be further exacerbated where the consultant also provides other, more lucrative, non-compensation related consultancy services to companies, the engagement of which is very much in the hands of executives.[48] Accordingly, Dodd-Frank specified that the appointment, remuneration, and oversight of compensation consultants should be in the remit of the compensation committee, and that the compensation committee should take into account various factors that could potentially prejudice the independence of such consultants when resolving whether to appoint them.[49]

Although the shareholder vote under Dodd-Frank is advisory, large U.S. companies have been subject to other potential shareholder-voting requirements through ancillary regulations. In 1993, the Clinton Administration promulgated amendments to the Internal Revenue Code that provided that, *prima facie*, executive compensation above one million dollars would not be tax-deductible from the corporation's profits.[50] Although the measure was enacted in the midst of controversy surrounding rapidly rising executive pay,[51] evidenced by the title of the statutory provision being "Certain *Excessive* Employee Remuneration,"[52] a regulatory preference to reduce agency costs by aligning pay with performance was also evinced by an exemption for components of pay conditional upon the achievement of preestablished and objective performance targets. Such qualifying, performance-based compensation could be tax-deductible (even if above one million dollars) if the performance criteria had been established by a compensation committee consisting of two or more outside directors, and if the shareholders of the company had preapproved the material terms of the performance-based pay.[53] If the performance criteria changed, a new shareholder approval was required, or if the compensation committee had the power to amend the targets required to be attained, shareholder approval was required every five years.[54] Therefore, if a corporation wished to deduct performance-based pay from its profits, it would have to obtain binding approval from its shareholders, and it was not possible for the corporation to propose such a pay structure on the basis that it would be paid whether or not tax deductibility were achieved through shareholder approval.[55] Notably, the dynamics differed from a binding say-on-pay vote in the traditional sense, since a natural reckoning for shareholders would be that the approval would

[46] Bebchuk et al., *supra* note 19, at 789.
[47] *Id*. at 790.
[48] *Id*.
[49] Dodd-Frank Act § 952.
[50] 26 U.S.C. § 162(m).
[51] *See Tax Reform: A Deeper Dive into Amended Section 162(m)*, NEWPORT (June 5, 2018), https://www.newportgroup.com/knowledge-center/june-2018-(1)/tax-reform-a-deeper-dive-into-amended-section-162(/ [https://perma.cc/J7M8-GPDU].
[52] § 162(m) (emphasis added).
[53] Regina Olshan & Paula Todd, *Section 162(m): Limit of Compensation*, PRAC. L. 1, 2 (2015), http://us.practicallaw.com/7-501-5106 [https://perma.cc/QY9S-VZDU].
[54] *Id*. at 4.
[55] *Id*.

be beneficial to shareholders since it would reduce the tax burden of the corporation (so beneficial to shareholders), whereas, otherwise, there would be no disincentive on the corporation to increase the fixed salary of the relevant executives (which would be regressive in terms of aligning shareholder and executive interests), as the tax position of the corporation would be the same whether or not executive pay was primarily fixed or performance-based. In 2017, however, the Tax Cuts and Jobs Act removed the exemption for performance-based pay, resulting in fixed and performance-based executive pay above one million dollars losing tax deductibility, [56] and, therefore, obviating the tax-based incentive on corporations to put their performance-based pay to a binding shareholder vote.

Shareholder approvals may also be required by U.S.-listed corporations when issuing equity-based pay, or when implementing stock option schemes. At a very basic level, U.S. corporations, including those incorporated in Delaware, must include an authorized share capital figure in its certificate of incorporation.[57] If the company seeks to issue shares (including shares issuable upon the exercise of stock options) above the authorized share capital figure, it must obtain shareholder approval to amend its certificate of incorporation.[58] In practical terms, though, large, publicly traded corporations usually have significant headroom in their authorized share capital figures, rendering amendment unnecessary in most cases of executive pay.[59] However, the listing rules of the NYSE and Nasdaq further provide that shareholder preapproval is required to implement employee equity compensation plans, subject to certain exceptions.[60] As with the erstwhile tax deductibility rules discussed above,[61] though, the undercurrents to such a shareholder vote differ markedly from a conventional say-on-pay vote. For example, the details of the plan put to a shareholder vote will consist of the general terms of the plan rather than the specific levels of equity to be issued to individual executives.[62] Furthermore, shareholders will likely see the benefit of aligning executive pay with shareholder interests through the issuance of equity-based compensation, with the alternative being for the compensation committee to potentially increase fixed pay for executives to retain their services if a relevant equity-compensation plan were vetoed by the shareholders.

A final avenue for shareholder involvement in executive compensation, at least theoretically, is by challenging excessive pay in the courts. However, in practice, the opportunities for a successful outcome are slim. Since excessive pay harms the corporation rather than the shareholders personally and directly, shareholders would be required to pursue such a

---

[56] Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13601, 131 Stat. 2054 (2017).
[57] *E.g.*, DEL. CODE ANN. tit. 8, § 161 (2024).
[58] *E.g.*, DEL. CODE ANN. tit. 8, § 242(b) (2024).
[59] PINTO & FANTO, *supra* note 45, at 81.
[60] *See* N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 303A.08 (2009); NASDAQ, STOCK MARKET LISTING RULES, at Rule 5635(c). Both the NYSE and Nasdaq provide exceptions where the plans relate to mergers and acquisitions transactions, the need to induce a new employee to the company, or certain tax-optimized, Internal Revenue Code-defined retirement plans and discounted share schemes. Nasdaq also provides an exception where all shareholders of the corporation are able to participate in a warrants or rights offering.
[61] *See* text between *supra* notes 55–56.
[62] Bebchuk et al., *supra* note 19, at 783.

claim through a derivative action on behalf of the corporation.[63] In Delaware, where most U.S.-listed corporations are listed (and where the vast majority of recent IPO companies are listed),[64] except for derivative claims commenced by creditors when the company is bankrupt,[65] prior to commencing a derivative claim, a shareholder must make a demand on the board to pursue the suit or evidence to the court that such a demand would be futile.[66] The concept of futility is that demand would be futile because the "directors are under an influence which sterilizes their discretion, [and therefore] they cannot be considered proper persons to conduct litigation on behalf of the corporation."[67] The plaintiff must demonstrate doubt that the board as a whole is able to exercise its business judgment without self-interest to conduct litigation on behalf of the corporation.[68] In practice, this means that the plaintiff has to show that at least half of the board benefited from the executive compensation decision or was involved in the executive compensation decision and therefore subject to liability if it is found that their decision making involved misconduct.[69] Even if futility is established though, and a derivative claim can proceed, further impugning the executive compensation decision is likely itself to be a futile endeavor. The court will, in accordance with the business judgment rule, presume that the directors have acted (i) on an informed basis, (ii) in good faith, and (iii) with an honest belief that they were acting in the best interests of the company, and have therefore not breached their fiduciary duties to the company.[70] The business judgment rule may be disapplied if the plaintiff can show that those who made the decision were self-interested,[71] but, since a publicly traded

[63] The Delaware Supreme Court has asserted that if the alleged harm has been suffered by the corporation and the corporation itself would benefit from the relevant remedy, any action commenced by a shareholder must be through a derivative claim on behalf of the corporation. Brookfield Asset Management, Inc. v. Rosson, 261 A.3d 1251 (Del. 2021). That decision followed Tooley v. Donaldson, Lufkin, Jenrette, Inc., 845 A.2d 1031 (Del. 2004), and overruled Gentile v. Rosette, 906 A.2d 91 (Del. 2006).
[64] Jens Dammann, Deference to Delaware Corporate Law Precedents and Shareholder Wealth: An Empirical Analysis 2 (May 30, 2019) (unpublished manuscript), https://ssrn.com/abstract=3384446 [https://perma.cc/V6XV-YCCB]; Lucian Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383, 391 (2003); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J. L. & ECON. ORG. 79, 87 (2011); DEL. DIV. CORPS., 2022 ANNUAL REPORT (stating that nearly 68.2% of Fortune 500 companies are Delaware-registered, and that in 2022, 79% of all U.S. IPO companies were registered in Delaware).
[65] Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1093 (2006).
[66] The "demand" requirement stems from the Rules of the Court of Chancery of the State of Delaware, Rule 23.1, which states, "The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." DEL. CH. R. 23.1.
[67] Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984).
[68] Heather Sultanian, *Delaware Supreme Court Clarifies the Standards for Demand Futility*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 27, 2021), https://corpgov.law.harvard.edu/2021/10/27/delaware-supreme-court-clarifies-the-standards-for-demand-futility/ [https://perma.cc/S75R-8ZCQ]. The Delaware Supreme Court recently indicated that demand will be "futile" if it can be shown that at least half of the members of the board (i) received a material personal benefit from the alleged misconduct, (ii) face a substantial likelihood of liability on any of the claims of alleged misconduct, or (iii) lack independence from someone who received a material personal benefit from the alleged misconduct, or who would face a substantial liability on any of the claims of alleged misconduct. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021).
[69] *Id.* Additionally, after the claim has been made, the board could pre-empt futility by forming a special litigation committee that could dismiss the demand if not credible or if it is simply not in the best interests of the company to pursue the claim. The Court will likely defer to the decision of a special litigation committee that is independent and follows a rational procedure. Black et al., *supra* note 65, at 1092.
[70] *Aronson*, 473 A.2d at 812; Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993).
[71] Cinerama v. Technicolor, 663 A.2d 1156, 1168 (Del. 1995).

company fully compliant with applicable regulations will have a compensation committee composed of independent directors,[72] it will be challenging to prove that the decision making of the board on executive compensation was not made on a disinterested basis.[73]

Therefore, assuming that the board was fully informed of all the relevant material facts, it is likely that a plaintiff seeking to show that the decision to pay the relevant compensation was not a valid exercise of business judgment would be limited to an assertion that the pay was corporate "waste," with what the corporation had received being so inadequate in value that "no person of ordinary, sound business judgment would deem it worth what the corporation has paid."[74] Given the high threshold, it is likely that a board will be able, except in the most egregious of circumstances or where there is a lack of good faith,[75] to justify high levels of executive pay.[76] Even a recent decision of the Delaware Court of Chancery voiding a potential $56 billion executive compensation package in favor of CEO Elon Musk at Tesla, which was essentially premised on a lack of good faith as a conflicted transaction resulting in the disapplication of the business judgment standard, was unusual on its facts.[77] Conflicted transactions with controlling shareholders, as the court determined Musk to be,[78] are generally assessed on an "entire fairness" standard[79] where the fairness of the price and process of the transaction must be assessed.[80] Although the business judgment standard can be restored if the relevant decision is determined by a committee of independent directors and approved by independent shareholders,[81] in the presence of a controlling shareholder, Delaware law has, until recently, been unclear as to whether transactions can be cleansed in this way, and the links between the controlling shareholder and the board have generally been held to be critical.[82] Nevertheless, ratifying the transaction by a vote of independent

---

[72] *See supra* notes 40–41 and accompanying text.
[73] For an analogy to New York, see Marx v. Akers*,* 88 N.Y.2d 189, 202 (1996). *See also* Bebchuk et al., *supra* note 19, at 781.
[74] Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).
[75] The Delaware Supreme Court has confirmed that a lack of good faith is a separate ground on which a claim could be made on excessive executive pay. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52–53 (Del. 2006). However, good faith entails acting "in the honest belief that the action taken was in the best interests of the company," Craig W. Palm & Mark A. Kearney, *A Primer of the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)*, 40 VILL. L. REV. 1297, 1313 (1995), and, therefore, is a subjective determination meaning that as long as directors honestly believed they were acting in the best interest of the corporation, they will not be found liable simply because they made poor decisions or engaged in bad practice (as was found in *In re Walt Disney Co.*).
[76] *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000); *see also* Bebchuk et al., *supra* note 19, at 781; PINTO & FANTO, *supra* note 45, at 307.
[77] *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).
[78] Elon Musk, in fact, did not hold a majority of the stock or voting rights in Tesla. However, the court still regarded Musk's influence to be sufficiently significant to deem him a *de facto* controller. *See id*. at 497–520.
[79] Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).
[80] *See* Cede & Co. v. Technicolor, 634 A.2d 345 (Del. 1993).
[81] Tornetta v. Musk, 250 A.3d at 810 (Del. Ch. 2019); *see also* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).
[82] Lucian Bebchuk and Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1289. For an example where the business judgment rule was applied to a decision by an independent committee of directors on pay to the corporation's controller, see *Friedman v. Dolan*, No. CV 9425-VCN, 2015 WL 4040806, at *5–8 (Del. Ch. June 30, 2015). More recently (after the case of *Tornetta* was decided), the Delaware Supreme Court has held that it will revert to the business judgment rule upon the approval by a special committee of independent directors and disinterested shareholders in the case of any transaction where a controller has received a non-ratable benefit. *In re Match Grp., Inc. Deriv. Litig.*, 2024 C.A. No. 2020-0505 (Del. April 4, 2024).

shareholders ("majority of the minority") has been an often used and court-endorsed mechanism to shift the burden of proof under the entire fairness standard to the plaintiff.[83] Tesla did purportedly formulate Musk's package through independent directors and put the package to a shareholder vote. However, Musk was determined by the court to be a controlling shareholder with an unusually large level of influence over the company and the Board, and with personal relationships with Board members. He was further found to have substantially participated in the process leading to the Board's approval of his pay.[84] Accordingly, even though the Board put the compensation package to a shareholder vote, the court, in applying the entire fairness review, asserted that the vote was not sufficient to shift the burden of proof to the Plaintiff since the shareholders were not fully informed of the lack of independence of key directors in this context and were misled as to the process through which Musk's compensation was determined.[85] It is likely that the Tesla judgment, which may be appealed, applies specifically on the unique facts of that case and the immense dominance over the company that Musk exerted.[86] Absent such an unusual lack of good faith in the executive compensation formulation process, as has been said in the Delaware Chancery Court, a decision on executive compensation is "a core function of a board of directors exercising its business judgment,"[87] and the courts will show substantive deference to boards of publicly traded companies on executive compensation.

III. U.K. EXECUTIVE COMPENSATION REGULATIONS

The U.K. employs a variety of legislation and regulations related to executive pay. As with the U.S., disclosure and transparency are important facets of the regulatory regime. Companies listed on the Main Market of the London Stock Exchange first became required to clearly disclose components of executive remuneration in 1995 under regulations promulgated under the U.K.'s Listing Rules.[88] In 2002, those disclosure requirements took on a statutory footing, with companies legislation now providing that all "quoted" companies must annually disclose a directors' remuneration report to its shareholders.[89] "Quoted" companies constitute all companies incorporated in England and Wales that are on the Financial Conduct Authority's "Official List" (which includes London Stock Exchange Main Market companies), as well as England- and Wales-incorporated companies listed in a European Economic Area State, on the NYSE, or on Nasdaq.[90] The disclosure requirements for quoted companies

---

[83] Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115–16 (Del. 1994).
[84] *Musk*, 310 A.3d at 446, 497–520.
[85] *Id.* at 520–26. Although the Court was not required to determine whether the decision of the board was, in fact, made on an independent basis, it indicated that a majority of the board lacked independence *Id.* at 497 n.546.
[86] *See id.* at 502 ("Musk wielded the maximum influence that a manager can wield over a company.").
[87] *In re* Goldman Sachs Grp., Inc. S'holder Litig., No. CIV.A. 5215-VCG, 2011 WL 4826104, at *38 (Del. Ch. Oct. 12, 2011).
[88] CHEFFINS, *supra* note 16, at 663. The U.K. Listing Rules are the rules set forth in the listing rules sourcebook as published by the Financial Conduct Authority exercising its primary market functions, to which all companies listed on the Main Market of the London Stock Exchange must adhere (the rules thereunder hereinafter referred to as the LRs). *See* FIN. CONDUCT AUTH., FCA HANDBOOK, at LR Listing Rules (2024) [hereinafter U.K. LISTING RULES].
[89] Companies Act 2006, c. 46, §§ 423 & 430 (U.K.).
[90] *Id.* § 385. A quirk of the U.K.'s executive compensation regulations is that if a U.K. company seeks to list on the NYSE or Nasdaq with a view to avoiding such regulations, it will have to

were further significantly bolstered in 2013, with the directors' remuneration report being divided into a forward-looking directors' remuneration policy report which must outline the compensation that may be paid to directors,[91] and a backward-looking directors' remuneration implementation report which must set out what directors have actually been paid in the previous fiscal year.[92] The reports cover any payments made to directors of the company, as well as to the CEO and deputy CEO in the rare cases when they are not also on the board as directors.

The forward-looking directors' remuneration policy report must extensively summarize the components of executive compensation and any performance measures and targets to the extent that performance-related conditions are attached.[93] Clear graphical information must be provided to delineate how much individual executive directors will receive if the executive attains minimum, expected, or maximum levels of performance,[94] and the degree of consultation with, and consideration of the views of, shareholders and employees on executive pay must be disclosed.[95]

The backward-looking directors' remuneration implementation report must include a "single total figure table" setting out exactly how much each director has received in the previous fiscal year under each component of compensation, as well as a comparison to the sums received in the immediately preceding fiscal year.[96] Further detailed information must be provided for the CEO, including a comparison of how his or her compensation has varied in line with the company's performance on a relative basis to other comparator companies.[97] Changes in directors' remuneration must also be contrasted to changes in rank-and-file employee pay generally.[98]

Shareholders also have tools to intervene in executive compensation. Under statute, all companies incorporated in England or Wales must submit any employment contracts proposed to be awarded to directors for more than two years in length to the shareholders for pre-approval.[99] The premise behind the provision is that shareholders should be given a say on long-term employment contracts which could result in high termination payments if ended prior to the expiry of their terms. Furthermore, under the U.K. Listing Rules, companies listed on the Main Market of the London Stock Exchange must obtain shareholder preapproval prior to implementing any employee share schemes and long-term incentive schemes in which directors can participate.[100] As with the NYSE and Nasdaq rules on equity-based compensation and stock option plans,[101] the relevant rule is subject to

change its jurisdiction of incorporation away from the U.K.—this potentially exacerbates the fear that if U.K. companies are lured to overseas exchanges, they will also shift operations over time to a foreign jurisdiction.

[91] *See* The Large and Medium-Sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013, SI 2013/1981, Part 4. [hereinafter U.K. Remuneration Regulations 2013] (U.K.).
[92] *See id.* Part 3.
[93] *Id.* at Schedule 8, §§ 25–26.
[94] *Id.* at Schedule 8, § 34.
[95] *Id.* at Schedule 8, §§ 38–40.
[96] *Id.* at Schedule 8, §§ 4–7, 9.
[97] *Id.* at Schedule 8, § 18.
[98] *Id.* at Schedule 8, §§ 9–20.
[99] Companies Act 2006, c. 46, § 188 (U.K.).
[100] U.K. LISTING RULES, *supra* note 88, at LR 9.4.1 R.
[101] *See supra* note 60.

exceptions.[102] Discounted stock options granted with an exercise price below the market price of shares at the time of grant are also subject to shareholder preapproval.[103]

Above and beyond shareholder preapproval for long-term contracts and under the U.K. Listing Rules, the U.K. was a trailblazer on say-on-pay with its 2002 shareholder advisory vote on the directors' remuneration report.[104] With the advent of stricter disclosure requirements in 2013, though, the U.K. doubled down on say-on-pay, introducing a two-vote regime that still stands today. Under the 2013 regime, shareholders have, every three years, a binding vote on the forward-looking directors' remuneration policy.[105] The vote must be brought forward if the existing shareholder preapproved directors' remuneration policy is to be revised or if the company has lost a say-on-pay vote in the previous year.[106] The vote is binding, because if the policy is not approved, the previously approved policy must remain in place, and no director may be paid any sums that are not in accordance with a preapproved directors' remuneration policy or that have otherwise been approved by the shareholders.[107] The second part of the two-vote regime is an annual advisory vote on the directors' remuneration implementation report.[108] Such a vote on what directors have already been paid is merely advisory, since any sums so paid cannot be clawed back purely as a result of losing the vote.[109] The concept behind U.K. say-on-pay is that shareholders must approve the compensation policy pursuant to which directors are to be paid, but if those directors are subsequently paid sums unsatisfactory to the shareholders pursuant to the policy to which they have agreed, the shareholders can only express their dissatisfaction in an advisory manner (with the caveat that, as above, the company must then put forth a new directors' remuneration policy for a vote the following year).

As with U.S. public companies, U.K. companies listed on the premium tier of the London Stock Exchange almost uniformly constitute compensation committees consisting exclusively of independent directors.[110] The motivation is not regulatory fiat, but more soft law under the U.K. Corporate Governance Code.[111] The U.K. Corporate Governance Code operates on a "comply-or-explain" basis, pursuant to which companies listed on the premium tier of the London Stock Exchange must comply with the provisions of the Code or explain in their annual reports why they have not done so.[112] Under the Code, it is recommended that

---

[102] U.K. LISTING RULES, *supra* note 88, at LR 9.4.2 R. Shareholder pre-approval is not required if the arrangement is offered to *all* or *substantially all* employees in the company on similar terms, or if it is implemented to recruit or retain a single director in unusual circumstances.
[103] *Id.* at LR 9.4.4 R. Exceptions are provided if the option is granted under an employee share scheme offered to all or substantially all the employees of the company, or if granted in connection with a takeover or reconstruction. *See id.* at LR 9.4.5 R.
[104] Pursuant to the now-superseded Companies Act 1985, c. 6, § 241A (U.K.).
[105] Companies Act 2006, c. 46, § 439A (U.K.).
[106] *Id.*
[107] *Id.* §§ 226B & 226C. Any such payments are void. *Id.* § 226E(1); *see also text accompanying infra* note 118.
[108] *Id.* § 439.
[109] *Id.* § 439(5).
[110] Bobby V. Reddy, *Thinking Outside the Box—Eliminating the Perniciousness of Box-Ticking in the New Corporate Governance Code*, 82 MOD. L. REV. 692, 721 n.185 (2019).
[111] For the latest edition, see FIN. REPORTING COUNCIL, UK CORPORATE GOVERNANCE CODE (2024) [hereinafter U.K. CORPORATE GOVERNANCE CODE]. The 2024 edition of the U.K. Corporate Governance Code applies to financial years beginning on or after January 1, 2025.
[112] U.K. LISTING RULES, *supra* note 88, at LR 9.8.6(6)R. Such a company must also make a statement as to how it has applied the principles of the U.K. Corporate Governance Code. U.K.

companies delegate the determination of executive director pay (and also the pay of the chair and the tier of senior management immediately below the executive directors) to a compensation committee consisting of three (two in the case of a "smaller" company)[113] or more independent nonexecutive directors.[114] Nearly all companies within the FTSE 350 index comply with these requirements,[115] and, therefore, executive directors should not be directly involved in the potentially agency cost-generating act of setting their own pay. As with the U.S.'s Dodd-Frank, the U.K. Corporate Governance Code establishes criteria that boards should consider when determining whether directors are independent.[116] The Code also recommends that any compensation consultants engaged by the company be selected by the compensation committee rather than by the executives.[117]

Finally, do shareholders of U.K. companies have better prospects than shareholders of U.S. companies in challenging excessive executive compensation in the Courts? In theory, the U.K. does provide legislative avenues to contest executive pay. If a director is paid a sum that is not in accordance with the preapproved directors' remuneration policy, the payment is void,[118] and a derivative claim could be commenced by shareholders on behalf of the company to force the director into paying back the sum to the company. Such an action would only arise if the board had ignored the binding shareholders' vote and breached companies' legislation and would therefore be a rare scenario indeed. Outside of flagrant noncompliance with companies' legislation, shareholders could still maintain a derivative action based upon a claim that executive compensation is so high that it represents a breach by the board of its fiduciary duties. In the U.K., the duties of directors are outlined under statute.[119] A claim for breach of directors' duties in the context of executive compensation would likely be an allegation that the board has exceeded its remunerative power (essentially that the board did not exercise its power for the purposes conferred),[120] or that it was not acting in good faith to promote the success of the company for the benefit of its members as a whole.[121] Although case law precedent exists to confirm that such actions are sound in theory, unless a person is effectively being paid for doing nothing and therefore receiving an unauthorized gift rather than compensation, it is unlikely that the courts will intervene.[122] The courts have maintained that absent a fraud on shareholders or creditors, they should be reluctant to determine whether remuneration is unreasonable, since executive compensation is a decision for internal management.[123] In the case of publicly traded companies, since executive compensation will

---

LISTING RULES, *supra* note 88, at LR 9.8.6(5)R; *see also* Reddy, *supra* note 110, at 694; Brian R. Cheffins & Bobby V. Reddy, *Thirty Years and Done—Time to Abolish the UK Corporate Governance Code*, 22 J. CORP. L. STUD. 709, 715–16 (2022).

[113] U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, n.7. A smaller company is defined under the U.K. Corporate Governance Code to be a premium-listed company that was not within the FTSE 350 index of the largest premium-listed index-eligible companies by market capitalization throughout the year immediately prior to the reporting year.

[114] *Id.*, Provision 32.

[115] S*upra* note 110 and accompanying text.

[116] U.K. CORPORATE GOVERNANCE CODE, *supra* note 112, Provision 10.

[117] U.K. CORPORATE GOVERNANCE CODE, *supra* note 112, Provision 35.

[118] Companies Act 2006, c.46, § 226E(1) (U.K.).

[119] *Id.* §170. The specific general duties of directors are outlined in the next seven sections. *Id.* §§ 171–77.

[120] *Id.* § 171.

[121] *Id.* § 172.

[122] *See Re* Halt Garage [1964] 3 All ER 1016 (U.K.).

[123] *See id.*; Smith v. Croft (No. 2) [1988] 1 Ch 114, at 159–64 (U.K.).

almost ubiquitously be determined by a committee of independent directors, a plaintiff will encounter further difficulties in maintaining that those directors were not genuinely seeking to promote the success of the company.[124] Another potential approach in the U.K. to challenging executive compensation in the courts is under the "unfair prejudice" heading, and evidencing that the affairs of the company have been conducted in a manner unfairly prejudicial to its shareholders.[125] However, circumstances where such claims have been successful have largely involved closely-held companies where executive compensation has seemingly been used as a method of discriminatingly channeling the profits of the company to certain shareholders over others and where the action was part of a broader package of misconduct that was unfairly prejudicial to certain shareholders.[126] Otherwise, again, courts are hesitant to intervene, and it has been held that judging whether executive compensation is reasonable is an elusive concept, since the court generally does not have a yardstick by which to judge whether compensation is reasonable or unreasonable.[127] In any case, satisfying the unfair prejudice condition (without further evidencing a breach of directors' duties) would require a plaintiff to argue that it had informal rights that the relevant compensation not be so high, and that those rights had been breached in an unconscionable manner.[128] Generally, courts have not been receptive to unfair-prejudice arguments based upon informal rights in publicly traded companies, because to accept the existence and enforcement of such expectations could undermine the credibility of the public markets where investors are making investment decisions based upon the observable constitutions of those companies.[129] In short, an action in the U.K. courts based purely upon an assertion that executive compensation is too high is fraught with peril.

IV. COMPARING EXECUTIVE COMPENSATION GOVERNANCE IN THE U.K. AND THE U.S.

"Easy Money" may have been an aspirational 1980s lifestyle choice,[130] but by the 2000s, the regulatory mood music in relation to executive compensation in both the U.S. and the U.K. had clearly shifted to ensuring that executives had "Earned It."[131] Ties that bind, perhaps, but among the similarities, the binding vote of shareholders on executive pay in the U.K. stands out when comparing the governance of executive compensation in the two jurisdictions.

Shareholders in both the U.S. and the U.K. have similar approval rights over discrete aspects of executive remuneration, including equity-based compensation plans, but in both jurisdictions say-on-pay, or shareholder voting on executive compensation generally, is the headline regulatory apparatus to control executive pay. It is in the sphere of say-on-pay that the

---

[124] *See Re* Smith & Fawcett Ltd. [1942] Ch 304 (U.K.) (explaining the relevant duty under Companies Act 2006 § 172 is a subjective duty, making proof of breach challenging); *see also* Regentcrest plc v. Cohen [2001] 2 BCLC 80 (U.K.) (same).
[125] Companies Act 2006, c. 46, § 994 (U.K.).
[126] *See* Fowler v. Gruber [2009] CSOH 36 (Scot.); *see also* Booth & others v. Booth & others [2017] EWHC (Ch) 457 (U.K.).
[127] *See, e.g.*, Lloyd v. Casey [2002] 1 BCLC 454 (U.K.).
[128] O'Neill v. Phillips [1999] 2 All ER 961 (HL) (U.K.).
[129] *See Re* Blue Arrow plc [1987] BCLC 585 (U.K.); *see also Re* Tottenham Hotspur plc [1994] 1 BCLC 655 (U.K.); *Re* Astec (BSR) plc. [1998] 2 BCLC 556, 589 (U.K.).
[130] BILLY JOEL, *Easy Money*, *on* AN INNOCENT MAN (Columbia 1983).
[131] THE WEEKND, *Earned it*, *on* BEAUTY BEHIND THE MADNESS (XO 2015).

U.S. and the U.K. differ most significantly on paper. The critical difference is that in the U.S., shareholder say-on-pay is merely an advisory measure held at least every three years,[132] whereas in the U.K., not only do shareholders have an annual advisory vote on payments actually made to executive directors,[133] but, at least every three years, shareholders also have a binding vote on how executive directors will be paid and the components of executive director compensation packages.[134] The U.S.'s say-on-pay system was based upon the U.K.'s pre-2013 regime,[135] but clearly the U.K. authorities discerned that a simple advisory vote was not satisfying the aims of the policy and a binding vote was introduced. Does the binding nature of the U.K.'s say-on-pay system materially result in a stricter corporate governance regime than the U.S.?

From the perspective of voting percentages, the addition of a binding vote does not seem to have given shareholders greater motivation to vote against executive pay. Prior to the advent of the binding vote, U.K. say-on-pay votes in favor of executive pay were on average regularly over ninety percent.[136] Since the introduction of a binding vote, approval rates continue to sit stubbornly above ninety percent.[137] Given those intransigent statistics, it is perhaps unremarkable that say-on-pay voting approvals in the U.S. have followed a similar trend, showing over ninety percent approval rates.[138] The likelihood of executive pay votes being lost outright (a majority of votes not being in favor) is also similar between the U.S. and the U.K., with the failure rate in the U.S. being around two percent,[139] and, in the U.K., since the binding vote came into force, it is rare for more than four companies within the FTSE 350 index to lose say-on-pay votes in any given year.[140] On the basis of voting dissent, it does not appear that the addition of a binding vote in the U.K. has had much impact.

However, voting dissent is only half the story. It has been suggested that one of the consequences of say-on-pay is that boards have become more attuned to shareholder preferences when it comes to executive compensation, and tailor compensation packages pre-shareholder vote in a manner that will not attract shareholder opprobrium.[141] Additionally, it has

---

[132] *See supra* note 36 and accompanying text.
[133] *See supra* note 108 and accompanying text.
[134] *See supra* note 105 and accompanying text.
[135] Fisch et al., *supra* note 38.
[136] Martin Conyon & Graham Sadler, *Shareholder Voting and Directors' Remuneration Report Legislation: Say-on-pay in the U.K.,* 18 CORP. GOVERNANCE: INT'L REV. 296, 301 (2010); HIGH PAY CTR., THE STATE OF PAY: ONE YEAR ON FROM THE HIGH PAY COMMISSION 19 (2012); Randall S. Thomas & Christoph Van der Elst, *Say On Pay Around the World*, 92 WASH. U. L. REV. 653, 664–65 (2015).
[137] Deloitte, *Directors' Remuneration in FTSE 100 Companies* (2023); Deloitte, *Directors' Remuneration in FTSE 250 Companies* (2023). [Copies of these reports have been deposited with the editors to maintain on file].
[138] *See* John W. Barry, Shareholder Voice and Executive Compensation 1 (Nov. 20, 2023) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.4584580 [https://perma.cc/KE7Z-NTP3]; Fisch et al., *supra* note 38, at 102, 106; Thomas & Van der Elst, *supra* note 136, at 661.
[139] Edward A. Hauder, *Bouncing Back from a Low Say-On-Pay Vote*, HARV. L. SCH. F. CORP. GOVERNANCE (Nov. 5, 2018), https://corpgov.law.harvard.edu/2018/11/05/bouncing-back-from-a-low-say-on-pay-vote/ [https://perma.cc/6SLP-9LPA]; Thomas & Van der Elst, *supra* note 136, at 661; Fisch et al., *supra* note 38, at 106.
[140] Data obtained from KPMG LLP, GUIDE TO DIRECTOR'S REMUNERATION for years 2014–2022. As an outlier, in 2012, before the binding vote came into force, in the much vaunted "shareholder spring", six FTSE 350 companies lost say-on-pay votes. Ruth Sullivan, *'Shareholder Spring' Muted*, FIN. TIMES (Aug. 26, 2012), https://on.ft.com/4cihr85 [https://perma.cc/8N2R-2A45].
[141] *See, e.g.*, David F. Larcker et al., *Outsourcing Shareholder Voting to Proxy Advisory Firms*, 58 J. L. & ECON. 173, 190–92, 203 (2015); Ferri & Maber, *supra* note 20, at 546; Peter Iliev & Svetla Vitanova, *The Effect of the Say-on-Pay Vote in the United States*, 65 MGMT. SCI. 4505, 4515 (2019).

been contended that say-on-pay has resulted in greater engagement between shareholders and boards on executive compensation which would again tend to reduce the propensity for negative votes.[142] As such, although voting dissent has not changed materially between advisory and binding votes, the binding vote may have had more of an influence on boards with respect to engaging with shareholders and formulating compensation packages. A possible hypothesis is that a binding vote results in greater jeopardy for boards than an advisory vote, and, therefore, boards are more likely to temper executive pay to ensure that it is not voted down. Equally, from a shareholder perspective, a possible proposition is that shareholders are more likely to exercise their rights to vote down executive compensation when they know that their dissatisfaction will have a meaningful binding effect, and, therefore, the voting statistics on binding say-on-pay votes would have been far more negative if boards had not been moderating compensation packages to a greater extent than with advisory votes. Collating empirical evidence to prove or disprove such a hypothesis is outside the scope of this Article and likely rather challenging,[143] but, as discussed in the next two sections, some circumstantial evidence can be helpful in determining whether the U.K. is indeed a tougher corporate governance environment on executive compensation.

V. EVIDENCE OF THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION

Several studies have investigated the effect of the U.K.'s advisory say-on-pay vote, pre-2013, on executive compensation. The general consensus was that advisory say-on-pay did not necessarily reduce executive compensation or its growth rate, but that shareholders were more likely to vote against pay if a company had performed poorly.[144] The findings from those older studies seem to match U.S. studies on say-on-pay, where of course the vote is also advisory, which have similarly found that shareholders vote against pay when performance is poor.[145] Although there is some correlation between the levels of absolute pay and shareholder dissent, shareholders are more likely to dissent if a company performs poorly whether or not pay is relatively high, and shareholders will generally approve high pay so long as a company is performing well.[146] Studies indicate that advisory votes in both the U.S. and the U.K. have not had the effect of substantially moderating the levels of executive pay or its growth.[147] A potential conclusion is that shareholders, in both the U.K. and

[142] Thomas & Van der Elst, *supra* note 136, at 730–31; Suren Gomtsian, *Executive Compensation: Investor Preferences During Say-on-Pay Votes and the Role of Proxy Voting Advisors*, 44 LEGAL STUD. 140, 143, 154 (2024); Carsten Gerner-Beuerle & Tom Kirchmaier, *Say on Pay: Do Shareholders Care?* 28 (Eur. Corp. Governance Inst., Finance Working Paper No. 579/2018).
[143] Procuring the necessary evidence would be a challenging task. The requirement of U.K. quoted companies to disclose the extent to which the views of shareholders have been taken into account when formulating directors' remuneration policy was only introduced at the same time as the binding vote requirement in 2013. U.K. Remuneration Regulations 2013, Schedule 8, § 40. Therefore, comparing shareholder engagement pre- and post-binding vote would require a survey of directors who have served on boards pre- and post-2013 to discern any changes in approach to shareholder engagement on executive remuneration and the tailoring of compensation packages to correlate with perceived investor preferences, and the extent to which that has been driven by the addition of a binding vote.
[144] Ferri & Maber, *supra* note 20, at 529–30; Conyon & Sadler, *supra* note 136, at 303–06.
[145] Fisch et al., *supra* note 38, at 119–20; Thomas & Van der Elst, *supra* note 136, at 661.
[146] Fisch et al., *supra* note 38, at 117, 119–20.
[147] Iliev & Vitanova, *supra* note 141, at 4512; Ferri & Maber, *supra* note 20, at 554.

the U.S., have been using advisory say-on-pay votes to express their dissatisfaction with company performance, rather than genuinely opining upon the level and structure of executive compensation.[148]

Even with merely advisory say-on-pay votes, though, studies have shown that boards do take significant shareholder dissent seriously, with boards changing pay practices in the light of significant shareholder dissent.[149] However, if that dissent is principally targeted at poor performance, a cogent response of boards would be to ensure that pay is better correlated with performance. Although shareholders have shown a tendency to vote against pay, whether high or low, if performance is poor, at least boards could justify their position by demonstrating that executives have not been rewarded for failure. It is therefore likely that say-on-pay has at least created more of a link to performance and studies do seem to show that executive pay in both the U.K. and U.S. has become more performance-based over time since advisory say-on-pay was introduced.[150] However, whether that satisfies the intended aims of the policy is up for debate. If shareholders are mainly concerned about current performance, it could incentivize the development of pay practices that prioritize short-term performance at the expense of long-term success.[151] Indeed, one U.K. study noted that payments under U.K. executive compensation packages are biased to short-term performance over long-term future performance measures.[152] Additionally, if there were at least concerns at the time say-on-pay was implemented in the U.K. and the U.S. that executive compensation was too high, it is unlikely that advisory say-on-pay would curb the growth of executive pay—pay packages that comprise larger proportions of performance-based pay over fixed-pay are associated with larger overall levels of pay.[153] The raw numbers seem to corroborate that conjecture. In the U.S., the mean CEO pay of S&P 500 corporations was $16.7 million in 2022, an increase of five million dollars (or forty-three percent) from 2012.[154] In the U.K., for the period during which solely advisory say-on-pay was in force, average CEO pay of FTSE 100 companies was approximately £4.5 million in 2012, an increase of approximately £1.7 million (or sixty-one percent) from 2003.[155] Although the rate of growth of CEO pay may have slightly fallen in the post-advisory say-on-pay years in

---

[148] *See* Fisch et al., *supra* note 38, at 103, 128; Vicente Cuñat et al., *Say Pays! Shareholder Voice and Firm Performance*, 20 REV. FIN. 1799, 1802 (2016).

[149] In relation to the U.S., see Yonca Ertimur et al., *Shareholder Votes and Proxy Advisors: Evidence from Say On Pay*, 51 J. ACCT. RSCH. 951, 954, 984–85 (2013). In relation to the U.K., see Ferri & Maber, *supra* note 20, at 531.

[150] Betty (H.T.) Wu et al., *"Say on Pay" Regulations and Director Remuneration: Evidence from the UK in the Past Two Decades*, 20 J. CORP. L. STUD. 541, 560–61 (2020); Iliev & Vitanova, *supra* note 141, at 4515; Paul Hodgson, *Surprise Surprise: Say on Pay Appears to Be Working*, FORTUNE (July 8, 2015), http://fortune.com/2015/07/08/say-on-pay-ceos [https://perma.cc/3P6N-6WP5].

[151] Fisch et al., *supra* note 38, at 124.

[152] Wu et al., *supra* note 150, at 561.

[153] *Id.*; Iliev & Vitanova, *supra* note 141, at 4514 (noting it is likely that managers will insist on higher upsides associated with performance-related pay to compensate them for the uncertainty in receiving that pay); *see* Alex Edmans et al., *Executive Compensation: A Survey of Theory and Evidence, in* The HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 383, 423 (Benjamin E. Hermalin & Michael S. Weisback eds., 2017); Brian R. Cheffins, *Delaware and the Transformation of the Corporate Governance*, 40 DEL. J. CORP. L. 1, 14 (2015).

[154] *Highest-Paid CEOs*, *supra* note 26.

[155] DBEIS, *supra* note 11, at 17.

both the U.S.[156] and the U.K.,[157] it is clear that pay continued to rise substantially after advisory say-on-pay was implemented in both jurisdictions.

U.K. studies conducted after the implementation of the two-vote regime, including the binding vote on the directors' remuneration policy report, intimate a different story. Studies have indicated that since the binding vote was introduced, negative votes against pay are more correlated with high levels of maximum executive pay opportunities under remuneration policies even when corporate performance is controlled for,[158] and that executive pay growth has slowed materially since the introduction of the binding vote.[159] Commentators have alluded to the binding vote as being the reason for the change in shareholder tack,[160] perhaps as a result of shareholders becoming more inclined to vote specifically against potentially high pay when they know their vote will have a direct effect and prevent the relevant compensation package coming into effect, or boards moderating executive compensation in the fear that shareholders may legally veto pay packages if proposed pay is too high. Again, the figures appear to substantiate the theory, with executive pay growth slowing in the U.K. since 2013 when the binding vote became effective. In 2013, mean FTSE 100 CEO pay was £4.92 million, and had declined to £4.44 million by 2022 (hitting a high of £5.62 million in 2017).[161] During that period, there were several years during which mean pay fell from the previous year,[162] and executive pay appears to have plateaued to an extent in the U.K.[163]

However, it should be noted that studies have found that post-binding vote, shareholders have been less concerned about the structure of executive pay (or the extent to which performance conditions are stretching),[164] and are often reliant upon the opinions of proxy advisors who analyze the governance arrangements of companies and provide voting recommendations.[165] Although the binding vote has arguably resulted in shareholders using their votes more prominently to moderate the levels of executive pay, it does not seem to have resulted generally in shareholders scrutinizing the detail of executive pay packages more thoroughly on a case-by-case basis. A group of U.K.-based asset managers are the exception to the rule, with one study finding that those U.K. asset managers were more likely to engage with boards more assiduously on executive pay than other shareholders,[166] but overseas shareholders, who hold the majority of U.K.

---

[156] Ira Kay et al., *Did Say-on-Pay Reduce or "Compress" CEO Pay?*, PAY GOVERNANCE (Mar. 9, 2017), https://www.paygovernance.com/viewpoints/did-say-on-pay-reduce-and-or-compress-ceo-pay [https://perma.cc/CK2B-5EWQ].
[157] DBEIS, *supra* note 11, at 17.
[158] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 20.
[159] Wu et al., *supra* note 150, at 560–62; Gerner-Beuerle & Kirchmaier, *supra* note 142, at 26.
[160] Wu et al., *supra* note 150, at 556–57; 568; Gerner-Beuerle & Kirchmaier, *supra* note 142, at 26.
[161] High Pay Centre, *supra* note 15, at 9. The decline in median pay was less stark, £3.97 million in 2013 to £3.91 million in 2022.
[162] *Id*. at 9. As compared to the previous year, mean FTSE 100 pay fell in 2016, 2018, 2019 and 2020. Note, however, that 2020 and 2021 will have been marked by the COVID-19 pandemic; not only will executive pay have been moderated as a result of a general malaise in the performance of the stock market during the initial phases of the pandemic, but compensation committees were under public pressure to reduce executive fixed wages and use their discretion to constrain bonuses in the face of broader economic woes at a time when many of those companies had accepted Government financial support.
[163] *Id*.
[164] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 20.
[165] *Id*. at 27; Gomtsian, *supra* note 142, at 162.
[166] Gomtsian, *supra* note 142, at 153-154.

equities,[167] only engaged on a cursory basis and were more likely to slavishly follow the recommendations of proxy advisors.[168] Resource constraints (particularly when executive compensation packages are complicated and onerous to examine in detail), an unfamiliarity with U.K. board members,[169] and a detachment from U.K. social concerns on executive compensation will have led to that lack of engagement by overseas investors.

In summary, it would appear that since the U.K. introduced a binding say-on-pay vote, shareholders have been more likely to vote against proposed executive compensation policies based purely upon the absolute levels of pay potentially available under the policies, with the performance of the relevant company having less influence over voting preferences compared to the previous, advisory-only, say-on-pay regime. Such a trend has coincided with a period during which the growth in executive compensation in the U.K. has broadly leveled off. At first blush, a reasonable conclusion would be that the introduction of the binding vote has had a consequential impact on U.K. executive compensation.

VI. REASONS TO DOUBT THE IMPACT OF THE BINDING VOTE ON EXECUTIVE COMPENSATION

Notwithstanding the circumstantial evidence above that the introduction of a binding vote in the U.K. may have substantively changed the country's executive compensation corporate governance environment, it may be hasty to conclude that the difference in executive compensation regulatory regimes is the causal factor in diverging executive pay trends in the U.S. and the U.K. It is possible that there are more fundamental differences between the jurisdictions beyond regulation. After all, the U.K. and the U.S. may themselves be outliers compared to other countries. For example, a cross-country analysis of say-on-pay examining thirty-eight countries, including the U.S. and the U.K., which was conducted prior to the U.K. introducing a binding vote, found that say-on-pay was associated with lower executive compensation overall,[170] whereas, as discussed above, U.S.-specific and U.K.-specific (pre-binding vote) studies did not reach the same conclusions.[171]

One challenge to the contention that the introduction of a binding vote is the key determinant in the U.K. having a tougher executive compensation environment than the U.S. comes from the U.S.'s flip-flop on tax deductibility requirements.[172] The 1993 shareholder voting requirement to ensure tax deductibility of performance-based pay constitutes in some respects a binding vote on executive compensation, but the effects of that provision are mixed. Some studies have shown that the tax rule did not reduce executive pay or executive pay growth and, although it motivated firms to increase the proportion of performance-based pay, the actual

[167] Latest data shows that 57.7% of U.K. listed equities are held by overseas investors. OFF. NAT'L STAT., OWNERSHIP OF UK QUOTED SHARES: 2022 (2023).
[168] Gomtsian, *supra* note 142, at 153, 162.
[169] *Id*. at 164.
[170] Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, Pay Slice, and Firm Valuation Around the World*, 122 J. FIN. ECON. 500, 502, 505–06, 515 (2016).
[171] *See supra* notes 144–47 and accompanying text.
[172] *See* 26 U.S.C. § 162(m) and Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13601, 131 Stat. 2054 (2017); *see also* text accompanying *supra* notes 50 and 56 (explaining the details of the tax deductibility rules and its subsequent withdrawal).

sensitivity of pay to firm performance declined.[173] On the other hand, another study examining the pay of CEOs appointed after the tax rule came into force (as opposed to the pay of already-incumbent CEOs) found that the tax rule mitigated pay rises when new CEOs were appointed and that those new CEOs were granted pay packages with greater sensitivity to performance.[174] Notwithstanding the inconclusive evidence on the impact of the 1993 tax rule, it seems more conclusive that its withdrawal in 2018 had little to no effect on U.S. corporation pay practices, with no impact upon absolute executive pay levels or upon the proportion of compensation comprising performance-based pay, even though the lack of tax deductibility resulted in the same pay performance-linked packages costing firms more.[175] It would seem that the addition, albeit indirectly, of a binding shareholder say on executive pay had little effect on pay levels or structure in the U.S.

Caution should though be exercised in drawing analogies between the U.S. tax deductibility voting requirements and the more traditional U.K. binding say-on-pay vote, since, as discussed above, different dynamics apply to the vote on tax deductibility for performance-based pay.[176] However, there are further arguments that a U.K.-style binding vote would have little practical impact in the U.S. For example, when comparing a larger group of countries (prior to the U.K.'s binding vote being implemented), a study found that those jurisdictions with advisory votes were associated with lower pay and greater correlations between pay and performance than jurisdictions with binding votes.[177] Some have even suggested that shareholders would be more likely to exercise their rights in an advisory vote regime in this context than a binding vote regime, due to the draconian consequences, and impact on retention, of the corporation losing a binding vote, particularly if the shareholders otherwise approve of the executive team.[178]

Additionally, in some respects an advisory vote could already be considered a *de facto* binding vote. A study examining 2011 voting outcomes found that although U.S. corporations were reluctant to respond to nonbinding votes on general matters, in the context of executive remuneration, corporations would readily revise compensation arrangements in response to significant dissent (even below a majority) upon a say-on-pay vote.[179] The response rate for dissent levels of twenty to twenty-five percent was thirty-two percent, rising to 72.22% and 80.56% for dissent levels of thirty to thirty-five percent and thirty-five to forty percent respectively.[180] One hundred percent of firms revised compensation arrangements if they received dissent of more than forty-five percent.[181] As

[173] Nancy L. Rose & Catherine Wolfram, *Regulating Executive Pay: Using the Tax Code to Influence Chief Executive Officer Compensation*, 20 J. LAB. ECON. 138, 159, 160, 162, 165 (2002); *see also* Christopher D. Jones, The Million-Dollar Question: Has Congress Missed the Mark with I.R.C. § 162(m) Compensation Deductions Caps? 1, 18, 20 (2012) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.2048810 [https://perma.cc/Y55L-252Q].

[174] Steven Balsam & David H. Ryan, *Limiting Executive Compensation: The Case of CEOs Hired After the Imposition of 162(m)*, 22 J. ACCT. AUDITING & FIN. 599, 611, 616 (2007).

[175] LeAnn Luna et al., *The Impact of TCJA on CEO Compensation*, 42 J. ACCT. PUB. POL'Y 1, 7–9 (2023).

[176] *See* text between *supra* notes 56–57.

[177] Correa & Lel, *supra* note 170, at 517–18 (reporting findings and caveating their findings by noting that it can be difficult to compare like with like when distinguishing jurisdictions purely on an advisory versus binding basis, due to other differences in the nature and contents of the laws).

[178] Conyon & Sadler, *supra* note 136, at 299.

[179] Ertimur et al., *supra* note 149, at 954.

[180] *Id*. at 985.

[181] *Id*.

far as the U.K. is concerned, a 2013 study (examining the U.K.'s advisory say-on-pay period) found that U.K. companies suffering more than twenty percent dissent on advisory say-on-pay votes implemented seventy-five to eighty percent of shareholder requests to remove certain provisions.[182] Even though the votes were advisory, boards may have remained anxious that shareholders could use other powers and rights to remove directors, including compensation committee members, from the board.[183] Moreover, the publicity from significant say-on-pay dissent, albeit advisory, could result in indirect penalties and negative outcomes for those receiving the pay and those involved in the relevant decision making.[184] Famously, "outrage constraint," the constraining mechanism on high compensation engendered from concerns about reputational damage and public and market opprobrium,[185] could be exacerbated by reports of significant shareholder dissent. A U.K. study found that sixty-seven percent of directors would rather reduce their pay than suffer the controversy potentially generated by significantly higher-than-average pay levels.[186] Similarly, in the U.S., it was found that directors of corporations that received more than thirty percent dissent on say-on-pay votes saw a diminishment in outside-director board positions at other companies.[187] Clearly advisory votes have more effect than a token slap on the wrist, and absent a change in shareholder approach, the imposition of a binding vote may not be quite the revolution in corporate governance approach that it first appears.

Another aspect that bears consideration is the role of proxy advisors. For instance, the stark increase in U.S. corporations responding to shareholder dissent on advisory say-on-pay votes, when that dissent increases from twenty percent to thirty percent,[188] can perhaps be explained by the fact that, at the time of the relevant study, the guidelines of one of the preeminent proxy advisors, Institutional Shareholder Services (ISS), averred that if a firm received over thirty percent dissent on a say-on-pay vote, and the corporation did not make appropriate modifications to compensation packages, it would recommend a negative vote on say-on-pay the following year and withholding of support for compensation committee members.[189] Moreover, it seems that proxy advisors have a meaningful influence on the outcome of say-on-pay votes. In the U.S., ISS recommendations have been found to have a significant effect on the levels of shareholder dissent on executive compensation.[190] In the U.K., not only

---

[182] Ferri & Maber, *supra* note 20, at 531.

[183] The loss of say-on-pay votes has often subsequently resulted in greater shareholder dissent with respect to the annual director re-elections recommended by Provision 18 of the U.K. Corporate Governance Code. *See* Sullivan, *supra* note 140. The loss of advisory say-on-pay votes in the U.K. has also been known to pressure CEOs and chairs of remuneration committees into resigning. *See, e.g.*, Kate Burgess, *Shake-Up at Shell After Pay Backlash*, FIN. TIMES (Sept. 11, 2009), https://on.ft.com/4eKavC4 [https://perma.cc/U5FK-EHKZ]; Alastair Gray, *Moss Quits After Pay Revolt at Aviva*, FIN. TIMES (May 8, 2012), https://on.ft.com/3xK3VuD [https://perma.cc/PH2Z-TCZU]; Josh Halliday & Lisa O'Connell, *Trinity Mirror Chief Executive Sly Bailey Steps Down*, GUARDIAN (May 3, 2012, 12:47 PM), https://www.theguardian.com/media/2012/may/03/trinity-mirror-sly-bailey-steps-down [https://perma.cc/3E94-LRRE].

[184] Ferri & Maber, *supra* note 20, at 531.

[185] Bebchuk et al., *supra* note 19, at 786.

[186] Alex Edmans et al., *CEO Compensation: Evidence from the Field*, 150 J. FIN. ECON. 1, 6 (2023).

[187] Barry, *supra* note 138, at 1, 4, 12.

[188] Ertimur et al., *supra* note 149, at 954; *see supra* note 180 and accompanying text.

[189] Ertimur et al., *supra* note 149, at 985.

[190] Fisch et al., *supra* note 38, at 118.

do shareholders, particularly overseas shareholders, lean heavily on the advice of proxy advisors,[191] but directors also express concerns about the role of proxy advisors, with a survey finding that seventy-one percent of U.K. company directors believed that proxy advisors had more say over executive compensation than they should.[192] A U.K. study also found that for investors following proxy advice, in recent years, the quantum of pay regularly features as the second most important factor influencing voting (with the structure of pay being the most important).[193] Reverting to the possible impact of the U.K.'s binding vote on pay, the same study found that since 2013 (when the binding vote was introduced), the importance of quantum of pay has largely increased for investors following proxy advice (with the importance of adequate disclosure gradually becoming less important for those voters).[194] One conclusion could be that the binding vote has led to proxy advisors, and those who follow their recommendations, having more confidence to vote against executive compensation packages purely on the basis of high pay because such votes will have real and direct consequences. Such a conclusion would also explain why those proxy advisors do not take the same approach in the U.S. where binding say-on-pay is not in force and ISS recommendations, for example, seem to instead be substantially driven by company performance.[195] However, when scrutinizing the voting of investors in U.K. companies that do not follow proxy advisor recommendations, the picture becomes a little more fuzzy.

It is mainly overseas investors who follow proxy advisor guidance on executive compensation in the U.K.[196] A recurrent group of U.K.-based investors conduct independent in-house scrutiny of investee company executive pay packages on a case-by-case basis with their voting outcomes regularly diverging from proxy advice.[197] Although quantum of pay is, as with investors following proxy guidelines, currently still the second-most important factor influencing the voting of those U.K.-based investors, unlike investors following proxy advisor guidelines, the importance of quantum of pay has remained fairly static for those U.K. investors since 2013 (when the binding vote was introduced).[198] Furthermore, the three largest U.S. fund managers, Blackrock, Vanguard and State Street, also appear to vote on U.K. say-on-pay independently from proxy advice, and for those "big three" investors the absolute level of pay is almost completely irrelevant in their voting decisions.[199] Accordingly, the findings of those studies that show that voting outcomes on say-on-pay after the introduction of the binding vote are correlated with the absolute levels of executive pay,[200] rather than with company performance when only an advisory vote was in force,[201] are most probably a result of the change in approach of overseas investors that follow proxy advisor guidelines (with overseas

[191] Gerner-Beuerle & Kirchmaier, *supra* note 142, at 27; Gomtsian, *supra* note 142, at 153, 162; *see also supra* notes 167 & 168 and accompanying text.
[192] Edmans et al., *supra* note 186, at 7.
[193] Gomtsian, *supra* note 142, at 155-156.
[194] *Id*. at 156.
[195] Fisch et al., *supra* note 38, at 101–02, 124.
[196] Gomtsian, *supra* note 142, at 153; Reddy, *supra* note 110, at 700 (noting that overseas investors are also more likely to follow proxy advisor recommendations on other governance issues).
[197] Gomtsian, *supra* note 142, at 153.
[198] *Id*. at 156.
[199] *Id*. at 153, 162.
[200] *See supra* notes 158–159 and accompanying text.
[201] *See supra* note 144 and accompanying text.

investors owning a majority of U.K.-listed equities).[202] It seems odd that the introduction of a binding vote should have such a major impact on the U.K. voting outcomes of overseas investors that follow proxy advisor recommendations, while not changing the U.K. voting predilections of U.K.-based investors and large U.S.-based investors. Since the binding vote has not resulted in all types of investors taking a harsher standpoint on the quantum of executive pay, it is possible that proxy advisor guidelines are influenced by specific factors that do not in the same way induce the voting of U.K.-based investors that carefully examine executive pay packages on a company-by-company basis or large U.S.-based investors.

A possible suspect when attempting to identify those factors is governance norms. Outside of executive compensation specifically, it has been noted that proxy advisors have a tendency to adhere to governance norms in a jurisdiction (including, in the case of the U.K., recommendations under the U.K. Corporate Governance Code) rather than carefully examining companies on a company-by-company basis and are inflexible in their recommendations even when individual companies have justifiable rationales for deviating from those governance norms.[203] The same has been seen to be the case in the forum of executive compensation.[204] With respect to governance generally, proxy advisors have been known to offer different advice in different jurisdictions based upon local governance norms.[205] It is difficult, though, to identify differing governance norms, *per se*, in the U.K. as compared to the U.S. that would lead to a greater suppression of executive pay in the U.K. in recent years. To be sure, since 2013, initiatives have been launched to encourage greater sensitivity to the gap between executive compensation and general employee pay, including the U.K. Corporate Governance Code introducing recommendations that compensation committees consider rank-and-file employee pay when setting executive compensation,[206] disclosure requirements being enhanced to require comparisons between changes in executive and rank-and-file employee pay and summaries of employee consultations on pay,[207] and the publishing of the ratio of CEO pay to median employee pay becoming mandatory for large companies.[208] However, the evolution of similar governance norms is also evidenced in the U.S. where the disclosure of CEO-to-employee pay ratios is likewise required.[209]

A more likely culprit is that cultural factors and market and social norms may be influencing the advice of proxy advisors, or that executive compensation in the U.K. is more sensitive to "outrage constraint"[210] than in the U.S. Some evidence can be discerned from the finding that ISS recommendations on CEO pay can vary depending upon whether the relevant CEO has been hired from the U.S. or if the U.K.-listed company

[202] OFF. NAT'L STAT., *supra* note 167. Although "overseas investors" would include the big three U.S. investors who do not follow proxy guidelines on executive remuneration, even ignoring the big three, the remaining overseas investors would clearly form a large and influential block.
[203] Reddy, *supra* note 110, at 699–700; Helen Thomas, *London's Next Reform? Doing Away with Shareholder Rebellions*, FIN. TIMES, (Nov. 27, 2023), https://on.ft.com/3L4JZ9a [https://perma.cc/K8AL-KNHG].
[204] Gomtsian, *supra* note 142, at 162.
[205] Reddy, *supra* note 110, at 723; Thomas, *supra* note 203.
[206] U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, Provision 32.
[207] U.K. Remuneration Regulations 2013, Schedule 8, §§ 38–40, 19–20; *see also supra* notes 95 & 98 and accompanying text.
[208] The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860, § 17 (U.K.).
[209] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).
210 See *supra* note 185, and accompanying text.

has its principal operations in the U.S.[211] A U.S. connection seems to give the CEO more leeway on quantum of pay, and it has been noted that proxy advisers opposing compensation levels in the U.K. will often support higher remuneration packages in other jurisdictions.[212] Differing cultural norms would also explain the reticence of the big three U.S.-based investors to prioritize the quantum of executive compensation when voting on pay in U.K. companies.[213] High executive pay is not a key consideration in the determination of their voting in the U.S., and they continue with the same approach when voting in the U.K.

A perception exists that the U.S. has a prevailing societal and cultural environment more accepting of higher pay,[214] which may well have become reinforced in recent years. Indeed, a 2022 Chicago Booth survey of economists found that respondents were much less likely to agree that U.S. CEOs were paid too much as compared to ten years previously.[215] In contrast, with a faltering U.K. economy (at least compared to the U.S.),[216] attitudes to executive pay may have hardened since the binding vote was introduced in 2013, and the U.K.'s 2022–2024 cost-of-living crisis has seemingly bolstered arguments against high executive pay.[217] Furthermore, reports have suggested that the U.K. media and U.K. politicians are more hostile to high executive pay than their counterparts in the U.S.,[218] and that there is less likelihood that success and commensurately high remuneration will be met by outcry in the U.S.[219] For example, it has been noted that although the U.S.'s median CEO-to-median rank-and-file employee pay ratio is much greater than that of the U.K.,[220] it rarely receives the press attention evident in the U.K.[221] If culture and societal attitudes to executive compensation are relevant factors, the presence or absence of a binding vote will not be a principal determinant of executive pay levels and the approach to pay in the U.S. and U.K. would likely remain the same irrespective of

---

[211] Gomtsian, *supra* note 142, at 157.
[212] Hoggett, *supra* note 24.
[213] Gomtsian, *supra* note 142, at 153, 162; *see also supra* note 199 and accompanying text.
[214] Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 182; Thomas & Van der Elst, *supra* note 136, at 720–21.
[215] *See Is Executive Pay Excessively High?* CHI. BOOTH REVIEW (Dec. 2, 2022), https://www.chicagobooth.edu/review/is-executive-pay-excessively-high#:~:text="While%20there%20are%20extremes%20in,votes%2C%20media%2C%20etc." [https://perma.cc/4F4N-8X6N].
[216] *G20*, WORLD ECON. (June 2024), https://www.worldeconomics.com/Regions/G20/ [https://perma.cc/6D58-ZZQ4] (showing that the compound annual growth rate in gross domestic product (GDP) for the U.K. between 2013 and 2023 was 1.4% as compared to 2.4% for the U.S., and the U.K.'s share of global GDP growth over the same period was only 0.9% compared to 9.7% for the U.S.); Delphine Strauss, *UK's Growth Prospects Worst Among Top Economies, Warns OECD*, FIN. TIMES (Nov. 22, 2022), https://on.ft.com/3xy6Jv1 [https://perma.cc/L7CH-QLYR] (stating that predictions also suggest that the U.K. economy will continue to struggle in the near future compared to other nations within the G20 group consisting of the 20 largest global economies); *see also* Richard Partington, *Average UK Person Has Lost Out on £10,200 Since 2010, Thinktank Says*, GUARDIAN (Jan. 22, 2024), https://www.theguardian.com/business/2024/jan/22/average-uk-person-10200-worse-off-since-2010-thinktank-says?CMP=share_btn_url [https://perma.cc/9SWC-7RWF].
[217] *See, e.g.*, *Soaring CEO Pay Shows "Obscene Levels of Pay Inequality" Say TUC*, INST. EMP. RTS. (Jan. 4, 2024), https://www.ier.org.uk/news/soaring-ceo-pay-shows-obscene-levels-of-pay-inequality-say-tuc/ [https://perma.cc/HUC9-ML6Z]; *Executive Pay Rises Amid Cost-of-Living Crisis*, INST. CHARTERED ACCTS. IN ENG. & WALES (Aug. 31, 2023), https://www.icaew.com/insights/viewpoints-on-the-news/2023/aug-2023/executive-pay-rises-amid-costofliving-crisis [https://perma.cc/DRU2-JW5X].
[218] SKADDEN, *supra* note 30.
[219] Thomas & Edgecliffe-Johnson, *supra* note 23.
[220] *See supra* notes 12–15 and accompanying text.
[221] SKADDEN, *supra* note 30.

which of the U.S. or U.K. corporate governance regimes were applicable in each of those jurisdictions.

Finally, differences in executive pay levels in the U.S. and the U.K. may be derived from factors inherent in the structure of the relevant pay packages. For example, if the legacy of advisory say-on-pay in both the U.S. and the U.K. was that performance-based pay became a larger part of executive compensation,[222] and if the relevant performance criteria are not sufficiently closely tied to individual firm performance but instead more broadly track the performance of the market as a whole, U.S. and U.K. executive pay levels will vary significantly with market trends. It is widely accepted that the performance of the U.S. exchanges has vastly outstripped that of the London Stock Exchange in recent years. Between 2000 and 2021, the S&P 500 rose 242% as compared to 12.7% for the FTSE 100.[223] More recently, between 2018 and 2022, median market capitalization and revenue for S&P 500 companies rose fifty-two percent and forty percent, respectively, while the equivalent figures for the FTSE 100 were zero and twenty percent.[224] Although a 2013 U.K. study found that compensation committees of FTSE 350 companies had made progress in tying pay to the relative performance of peer comparators,[225] companies in both the U.K. and the U.S. still persist with absolute metrics alongside relative metrics,[226] and to the extent that compensation is constituted by equity awards, the recorded value of those awards in dollar terms will be propelled by the price of the underlying shares (even if those awards are granted based upon the achievement of relative metrics) and, therefore, by the performance of the economy and the stock exchange generally.[227] Accordingly, empirical evidence has suggested that stock market performance as a whole does impact executive pay—a study found that between 2018 and 2022, the disparity in executive pay between the U.S. and the U.K. widened, with median S&P 500 CEO pay increasing twenty-three percent and median FTSE 100 CEO pay only 1.1%, but when the study controlled for market capitalization and revenue growth, the disparity between the two jurisdictions since 2019 actually decreased.[228] It is therefore quite possible that the say-on-pay advisory vote entrenched the trend for stock market and economic performance to substantively affect executive compensation in both the U.S. and the U.K.

---

222 See *supra* note 150 and accompanying text.

[223] Cheffins & Reddy, *Listing Rule Reform*, *supra* note 6, at 180.

[224] Subodh Mishra, *U.S. CEO Compensation Advantage Grows vs. U.K. Peers*, HARV. L. SCH. F. CORP. GOVERNANCE (July 17, 2023), https://corpgov.law.harvard.edu/2023/07/17/u-s-ceo-compensation-advantage-grows-vs-u-k-peers/ [https://perma.cc/6LYG-CPBF].

[225] Mark Farmer & George Alexandrou, *CEO Compensation and Relative Company Performance Evaluation: UK Evidence*, 45 COMP. & BENEFITS REV. 88, 92 (2013). The U.K. Corporate Governance Code also asserts that executive compensation should take into account not only company performance but *also* individual performance. U.K. CORPORATE GOVERNANCE CODE, *supra* note 111, Principle R.

[226] Joseph Kieffer, *Executive Long-Term Incentive Plans*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 11, 2019), https://corpgov.law.harvard.edu/2019/04/11/executive-long-term-incentive-plans/ [https://perma.cc/2N96-VT3G]; EQUILAR, PERFORMANCE METRICS IN ANNUAL INCENTIVE PLANS (2014) [Copy deposited with the editors to maintain on file]; Deloitte, *FTSE 100*, *supra* note 137 (together showing that in both the U.S. and the U.K., financial performance metrics tied to annual bonus plans often include measures such as profits/operating income, revenue, earnings and earnings per share which are triggered if the corporation surpasses absolute target thresholds; and further showing that although long-term incentive plans often include more relative performance metrics that compare the corporation's performance to peers (such as relative total shareholder return), more absolute metrics such as earnings per share also persist).

[227] *See, e.g.*, SKADDEN, *supra* note 30.

[228] Mishra, *supra* note 224.

The introduction of a binding vote on executive compensation in the U.K. may have coincided with a slowing in the growth of U.K. executive pay to an extent not observed in the U.S., but pinning the cause of that slowing growth on the binding vote is challenging. It is equivocal that the binding vote is a revelation from a governance perspective, with the erstwhile advisory-only system itself having quasi-binding qualities. Additionally, differing and shifting attitudes toward high executive compensation in the U.S. and U.K., and variations in market performance between U.S. exchanges and the London Stock Exchange, may also underpin divergences in U.S. and U.K. executive pay. U.S. and U.K. executive compensation regulations may differ, but it is by no means certain that those contrasting features are responsible for the higher pay granted to executives in U.S. publicly traded companies.

CONCLUSION

Overly high executive compensation has been an accusation levied at executives of both U.S. and U.K. publicly traded companies over the years, and, indeed, compared to rank-and-file worker pay, executive compensation has grown at a startling rate. U.S. and U.K. policymakers have noted both the rampantly rising levels of executive remuneration, and the potentially vital role that executive compensation structure could play in reducing managerial agency costs by aligning the pay of executives with the financial performance of their companies. Accordingly, executive compensation regulations have developed in both jurisdictions that implement mechanisms that restrict a board's ability to formulate executive compensation packages without scrutiny. Many similarities exist between the U.S. and U.K. executive compensation regulatory environments, but there are also differences.

On paper, the U.K. has a more stringent executive pay governance regime than the U.S. The U.S. only mandates an advisory shareholders' say-on-pay at least every three years, whereas the U.K. requires a binding shareholders' vote at least every three years on how executives will be paid in the future and an annual advisory vote on what executives have been paid in the previous fiscal year. Advisory votes in both jurisdictions seemed to precipitate a greater focus on performance-based remuneration, but in terms of reducing the levels of executive pay, shareholders generally only targeted pay at companies that had performed poorly. However, the binding vote in the U.K. has been accompanied by a moderation of executive pay growth in absolute terms.

U.S. corporations now see far greater levels of executive compensation than U.K. companies. In the U.K., that disparity has raised concerns that companies may be deterred from listing in the U.K., instead preferring to remain in the private realm within which say-on-pay, and many disclosure requirements are not in effect, or seeking a flotation on an exchange abroad, such as the U.S., where higher levels of executive pay could be accessible. In relation to the latter, the threat to the U.K. economy is twofold, because U.K.-incorporated companies cannot avoid say-on-pay regulations by listing on the NYSE or Nasdaq and can only evade the rules if they reincorporate in an overseas jurisdiction. Therefore, not only could the rules exile U.K. businesses to the U.S. markets, but they could also lead to those businesses reincorporating and potentially moving managerial operations to the U.S. While the debate in the U.K. has traditionally been focused on the means of constraining executive pay, the narrative has shifted in some

quarters to whether executive compensation regulations in the U.K. are *too* strict.

Notwithstanding the evident differences in U.S. and U.K. executive pay governance, it is challenging to come to firm conclusions when assessing the impact of the U.K.'s binding say-on-pay vote. Causation is elusive to establish, and, therefore, it is not axiomatic that the binding vote has resulted in lower executive pay in the U.K., and, equally, that the introduction of a binding vote in the U.S. would result in a decline in executive pay levels. It may be that cultural sensitivities to high pay in the U.K. led to the halt in rampantly rising executive pay, further accentuated by proxy advisors taking a stricter approach to high executive pay in the U.K., as compared to the U.S., in line with social norms. For sure, the binding vote could have indirectly impacted pay by its very introduction, further bringing societal concerns about executive pay to the fore, but U.K. executive pay may have slowed with or without the binding vote. Moreover, lower levels of executive pay in the U.K. than the U.S. may simply be a manifestation of the greater success of the U.S. markets. With pay being highly geared toward performance-oriented factors, poorly designed performance targets could result in pay being closely tied to the performance of the market as a whole. The preponderance of stock awards in executive compensation packages could also drive greater pay in the U.S. where a stronger U.S. market inevitably results in the value of those stock awards increasing prior to vesting to greater degree than is the case in the U.K. Either way, the reasons for executive pay being lower in the U.K. than the U.S. are likely to be multifaceted.

It is not intended that this Article opine upon the drawbacks, morality or merits of high executive compensation, nor upon whether a relative deficiency in executive pay levels in one jurisdiction could compel companies and executives to list in, or relocate to, other countries. However, from a regulatory perspective, if U.K. policymakers are seeking to level the executive compensation playing field between the U.K. and the U.S., they should not view relaxing existing executive compensation regulations as a silver bullet. It is unlikely that removing the U.K.'s binding say-on-pay vote would have a material impact on executive pay and, therefore, on decisions of companies and executives to inhabit the London Stock Exchange. Bringing U.K. executive pay closer to the U.S. would likely require a change in culture and attitude toward executive pay in the U.K., and also policies that attract to the London Stock Exchange the types of growth companies that have driven the success of the markets in the U.S. rather than the old economy "value" companies that currently dominate the exchange and are favored for their reliable annual dividends.[229] Similarly, in the U.S., if policymakers deem it necessary to constrain executive pay levels, introducing a binding vote on pay is unlikely to be the answer. Again, only a change in public and investor attitude to high pay levels will lead to a material moderation of executive pay. It is easy to get in a bind over regulations and their impact on the markets, but, in the case of executive compensation, it pays to look at the bigger picture before attributing sole responsibility for the divergence in pay levels in the two jurisdictions to differences between U.S. and U.K. regulatory ambits.

[229] Cheffins & Reddy, *Murder*, *supra* note 5, at 222–25.

DRONE ATTACKS AND THE FAILURE OF SECURITISATION IN PAKISTAN

SAHIB S. JUSS* & SATVINDER S. JUSS**

TABLE OF CONTENTS

INTRODUCTION 68
I. WHY PAKISTAN? 69
II. HOW SECURITISATION FAILED IN PAKISTAN 71
III. DID DRONE STRIKES WORK IN PAKISTAN? 73
IV. FAILURES IN PAKISTAN? 75
V. MAKING MORE ENEMIES? 76
CONCLUSION 79

* Sahib S. Juss, LLB, LLM (distinction), is currently a MA War Studies Student at King's College London.
** Satvinder S. Juss, PhD (Cantab.); CIArb, is a Distinguished Global Professor of Law and Notre Dame University & Professor of Law at King's College London, who teaches International Humanitarian Law at Notre Dame University at London Gateway.

INTRODUCTION

According to Pakistani politician Imran Khan, his country's signing on to the war on terror was "one of the biggest blunders Pakistan made" as there is a direct line between that decision and the groups then attacking the Pakistani state, and which has since resulted in tens of thousands of Pakistani deaths.[1] His view is that "[w]e should have stayed neutral."[2] It seems, however, that Pakistan could not stay neutral because, after 9/11, the U.S. government asked General Musharraf of Pakistan to either work with it or against it.[3] Musharraf feared "direct military action" from "a coalition of the United States, India, and Israel against Pakistan" if he did not cooperate as "a real possibility."[4] He also feared "India's increasing role in the war against terror," and as a usurper of democracy in Pakistan he wanted "to consolidate his position" and so he decided to join in with "the US campaign against terrorism."[5] So today, "[t]he US War on Terror is not restricted to active war zones alone," but extends to "states that . . . are not considered capable enough to combat" terrorism.[6]

One controversial technique is how "the United States intervenes remotely through unmanned aerial vehicles (UAVs), commonly known as drones."[7] Drone attacks have been "the defining weapon of the War on Terror."[8] It is said that "precision-guided weapons first appeared in their modern form on the battlefield in Vietnam a little over 50 years ago," but that "as armed forces have strived ever since for accuracy and destructiveness, the cost of such weapons has soared."[9] "[B]ecause smart weapons are expensive, they are scarce."[10] But what if one could "combine precision and abundance?"[11] This is how, "for the first time in the history of warfare that question is being answered on the battlefields of Ukraine . . . [as] drones are mushrooming along the front lines."[12] They are popular because "they are small, cheap, explosives-laden aircraft adapted from consumer models," and they work because "[t]hese drones slip into tank turrets or dugouts" and "they loiter and pursue their quarry before going for the kill" and so succeed in "inflicting a heavy toll on infantry and armour."[13]

Yet, the published literature shows mixed results. This is unsatisfactory. Johnston states, "the effects of drone strikes on militant violence occur

---

[1] Madiha Afzal, *Imran Khan's Incomplete Narrative on the Taliban*, BROOKINGS INST. (Oct. 14, 2019), https://www.brookings.edu/articles/imran-khans-incomplete-taliban-narrative/ [https://perma.cc/P668-QV6Q].
[2] *Id.*
[3] HASSAN ABBAS, PAKISTAN'S DRIFT INTO EXTREMISM: ALLAH, THE ARMY, AND AMERICA'S WAR ON TERROR 217 (2005).
[4] *Id.* at 221.
[5] *Id.* at 288.
[6] Rafat Mahmood & Michael Jetter, *Gone with the Wind: The Consequences of US Drone Strikes in Pakistan*, 133 ECON. J. 787, 787 (2022).
[7] *Id.*
[8] CHRIS WOODS, SUDDEN JUSTICE: AMERICA'S SECRET DRONE WARS (2015); *see also* DRONE (Flimmer Film 2014). The latter, a documentary film, is also reviewed in the *Guardian*. *See* Leslie Felperin, *Drone Review—a Cool-Headed Doc About Killing by Remote Control*, GUARDIAN (Apr. 9, 2015, 4:15 PM), https://www.theguardian.com/film/2015/apr/09/drone-review-killing-by-remote-control-documentary-tonje-hessen-schei [https://perma.cc/RDZ4-M9X4].
[9] *Killer Drones Pioneered in Ukraine Are the Weapons of the Future*, ECONOMIST (Feb. 8, 2024), https://www.economist.com/leaders/2024/02/08/killer-drones-pioneered-in-ukraine-are-the-weapons-of-the-future [https://perma.cc/946W-6P8W].
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

primarily at the tactical level, not the strategic level."[14] Even more unsatisfactory is the large absence of literature on whether drone strikes are effective when a compliant country like Pakistan and the U.S. work together in the war on terror. Perhaps one reason for this is that the story in Pakistan is actually a very complicated one. It is not just about Pakistan. When one reads in Brown University's "Costs of War" publication that "[t]he United States has steadily increased its support of counter-insurgency campaigns by the government of Pakistan through direct military aid and training, and compensation for assistance to the U.S. war in Afghanistan," this is in recognition of the fact that "[t]he U.S. has also used Pakistan as a major supply route for weapons, fuel, and material into Afghanistan, in addition to launching cross border attacks into Afghanistan from Pakistan's territory."[15] The U.S. is also cognizant of how the state of Pakistan itself remains threatened from within so that "[t]his increased U.S. support has coincided with a dramatic escalation of the conflict between local Pakistani insurgents and their government" bearing in mind that "[m]ost of the fighting is concentrated in the Northwest, near the border with Afghanistan, but the bloodshed not infrequently affects civilians throughout Pakistan."[16] However, the fundamental question still remains: Do drone strikes work? What do we mean by work? In what way? And what are the metrics of measurement?

This Article suggests that the success or failure of Western drone strategy cannot be measured by the number of militants and civilians killed.[17] Rather, what is needed is a measure that takes into account not just the Western context of securitisation, but the non-Western context because it is only then that long-term durable intraregional security can be achieved. The securitisation objectives in one country alone cannot be the answer. Securitisation is a long-term process. It is a continuum. It needs to be permanent and durable. There is limited literature here. Yet, our current parochial outlook is one which has profoundly affected the way in which we have conceived securitisation.[18] Pakistan is the case which proves this.

I. WHY PAKISTAN?

Although drones have been deployed in Afghanistan, Libya, Somalia and Yemen,[19] it is Pakistan which has seen 63% of all drone strikes against countries with which the U.S. is not officially at war.[20] One reason is that "no other U.S. military intervention is possible in Pakistan (such as ground

[14] Patrick B. Johnston, *The Impact of US Drone Strikes on Terrorism in Pakistan*, 60 INT'L STUD. Q. 203, 215–16 (2016).
[15] *Pakistani Civilians*, WATSON INST., https://watson.brown.edu/costsofwar/costs/human/civilians/pakistani [https://perma.cc/J5MN-3VLX] (last modified Mar. 2023).
[16] *Id.*
[17] Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 730–52 (2011).
[18] Jan Ruzicka, *Failed Securitization: Why It Matters*, 51 POLITY 365 (2019).
[19] Jacqueline L. Hazelton, *The Political Role of Drone Strikes in US Grand Strategy*, CONVERSATION (Aug. 16, 2016, 9:37 PM), https://theconversation.com/the-political-role-of-drone-strikes-in-us-grand-strategy-62529 [https://perma.cc/69V3-Q5N5]; *see also* Matthieu Aikins, *In U.S. Drone Strike, Evidence Suggests No ISIS Bomb*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/world/asia/us-air-strike-drone-kabul-afghanistan-isis.html [https://perma.cc/B4MP-E69G].
[20] Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data*, BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 1, 2017), https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data [https://perma.cc/N72Q-GQ2G].

troops or manned aircrafts)."[21] Yet, Pakistan is largely overlooked. In 2022, Mahmood and Jetter published "the first analysis that is able to identify causal effects of drone strikes" showing how "the empirical results imply that drone strikes cause terror attacks in Pakistan and growing anti-U.S. sentiment in the Pakistani population," even as "the U.S. military continues to expand its drone program. . . ."[22] This suggests an inability to learn.

In 2010, Bergen and Tiedemann argued that "[t]allying the number of militants killed is of limited use" because the main question is "[w]hat impact has the drone program had on the insurgency in Pakistan. . . ."[23] They suggested "[a] more transparent drone-strike program, with greater overt cooperation from Pakistan, would increase accountability, in particular regarding civilian casualties" and that "[i]t would also help lessen the fervent anti-Americanism in Pakistan."[24] Yet, despite this there is no further research on how the Pakistani government has been cooperating with the U.S. authorities. This is now necessary because of growing evidence that "beyond the rhetoric lies a security cooperation between Pakistan's military and CIA that includes intelligence sharing for drone strikes."[25] Indeed, "secret memos" show there to be "explicit" cooperation between U.S. and Pakistan governments.[26] But where are the research publications on this?

One question is whether drone warfare is the problem or the solution. In Pakistan, only one militant leader was killed in one out of seven attacks,[27] and drones have killed 50,000 innocent people.[28] On the other hand, it is said drone strikes in Pakistan deter terrorist attacks in other countries,[29] making another 9/11 impossible;[30] also there is no evidence of drone victims' relatives becoming bloodthirsty militants.[31] So, in truth, there is no alternative to drones,[32] and only those with little education are against them.[33] Yet, it is equally true that there is sparse literature on what unsuccessful securitisation cases look like in order for there to be a proper study of securitisation.[34] In the case of Pakistan, what remain overlooked, as Wali Aslam laments, are the "seriously harmful effects of drones on the

[21] Mahmood & Jetter, *supra* note 6, at 788.
[22] *Id.* at 808.
[23] Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFFS., July/Aug. 2011, at 12, 14 (2011).
[24] *Id.* at 18.
[25] *PAKISTAN AND US: HAND-IN-HAND ON DRONE DEATHS*, Al Jazeera (DEC. 18, 2013), HTTPS://WWW.ALJAZEERA.COM/FEATURES/2013/12/18/PAKISTAN-AND-US-HAND-IN-HAND-ON-DRONE-DEATHS [HTTPS://PERMA.CC/3WQH-MZCK].
[26] Greg Miller & Bob Woodward, *Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones*, WASH. POST (Oct. 24, 2013), https://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html [https://perma.cc/9F26-UTJU].
[27] Bergen & Tiedemann, *supra* note 23, at 12.
[28] WALI ASLAM, REMOTE CONTROL PROJECT, TERRORIST RELOCATION AND THE SOCIETAL CONSEQUENCES OF US DRONE STRIKES IN PAKISTAN (2014).
[29] Orr, *supra* note 17, at 730–52.
[30] Daniel Byman, *Why Drones Work: The Case for Washington's Weapon of Choice*, FOREIGN AFFS., July/Aug. 2013, at 32.
[31] Aqil Shah, *Do U.S. Drone Strikes Cause Blowback? Evidence from Pakistan and Beyond*, INT'L SEC., Spring 2018, at 47.
[32] C. Christine Fair, *Drones, Spies, Terrorists, and Second-Class Citizenship in Pakistan*, 25 SMALL WARS & INSURGENCIES 205, 205–35 (2014).
[33] C. Christine Fair, Karl Kaltenthaler & William Miller, *Pakistan Political Communication and Public Opinion on U.S. Drone Attacks*, 38 J. STRATEGIC STUD. 852, 852–72 (2015).
[34] Ruzicka, *supra* note 18, at 365–78.

well-being of the Pakistani public and the state."[35] The reason for this is "the dispersal of suspected terrorists across Pakistan in order to escape drones."[36] This has been so, ever since "American drone strikes in Pakistan's Federally Administered Tribal Areas (FATA) started in 2004."[37] The result has been that "many suspected militants being hunted by American predator and reaper aircrafts have relocated from FATA, moving to other parts of Pakistan."[38] Serious studies on the use of drone strikes in the process of securitisation can surely no longer continue to ignore such outcomes. Neither can they more generally ignore "the impact of securitisation practices in one country on the securitisation processes in another" in the war on terror.[39] In the case of Pakistan, the evidence is mounting as to how, in the U.S. use of drone strikes, "these securitisation practices inhibited the securitisation of militancy inside Pakistan."[40] The result is that "the Pakistani security actors could not effectively securitise the militancy after 9/11."[41]

Yet, the war against terrorism following 9/11 has been described as one of the most successful "securitisation" processes since the Cold War.[42] The Copenhagen School defined securitisation as a "process of social construction of threats," rather than as an objective reality.[43] Only if the audience accepts it is an issue securitised.[44] An existential threat to a referent object leads to the securitising actors securitising the issue, and in order to neutralise it, they seek extraordinary measures.[45] Drone strikes are one such measure. However, if in a specific context, the securitising actor does not know how to speak security, then the securitisation process can fail.[46] If "confronted with significant forces of resistance," then it can also fail as will counter securitisation measures.[47] How can such phenomenon be explained?

II. HOW SECURITISATION FAILED IN PAKISTAN

It is the failed cases which provide us with a better understanding of "why some securitizing moves succeed while others do not."[48] This is because security, according to the Copenhagen School, is a "process of social construction of threats which includes securitizing actor[s] (mostly

---

[35] Wali Aslam, *The US Drone Strikes and On-The-Ground Consequences in Pakistan*, PEACE PROGRESS, Feb. 2014, at 30, 30.
[36] *Id.*
[37] *Id.*
[38] *ID.*
[39] Alamgir Khan & Christian Kaunert, *US Drone Strikes, Securitization and Practices: A Case Study of Pakistan*, 16 CRITICAL STUD. TERRORISM 287, 287 (2023).
[40] *Id.*
[41] *Id.*
[42] Scott N. Romaniuk & Stewart T. Webb, *Extraordinary Measures: Drone Warfare, Securitization and the "War on Terror,"* 15 SLOVAK J. POL. SCIS. 221, 221–45 (2015).
[43] Vladimir Šulović, *Meaning of Security and the Theory of Securitization*, BELGRADE CTR. FOR SEC. POL'Y (Oct. 5, 2010), http://pdc.ceu.hu/archive/00006385/01/Security_Theory_Securitization.pdf [https://perma.cc/2KXJ-FEC8]; *see also* Ole Wæver, *Peace and Security: Two Concepts and Their Relationship*, *in* CONTEMPORARY SECURITY ANALYSIS AND COPENHAGEN PEACE RESEARCH 53–66 (Stefano Guzzini & Dietrich Jung eds., 2004); Scott D. Watson, *"Framing" the Copenhagen School: Integrating the Literature on Threat Construction*, 40 J. INT'L STUD. 279, 284 (2004).
[44] Watson, *supra* note 43, at 284.
[45] BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS 36 (1998).
[46] Ruzicka, *supra* note 18, at 373.
[47] Holger Stritzel & Sean C. Chang, *Securitization and Counter-Securitization in Afghanistan*, 46 SEC. DIALOGUE 548, 549 (2015).
[48] Ruzicka, *supra* note 18, at 366.

political elites), who declares [a] certain matter as urgent and a posing threat for the survival of the referent object, that, once accepted with the audience, legitimizes the use of extraordinary measures for neutralization of the threat."[49] It is in the failed cases that we find the reasons for why securitisation has not succeeded. The reasons are telling. We find that an issue is securitised when the audience accepts it.[50] Buzan, Wilde, and Wæver argue that an issue is securitised by the securitising actors when an existential threat is being posed to a referent object and the securitising actors seek extraordinary measures to neutralise it.[51] If an issue is securitised then this can provide "some tangible benefits" in the form of "more efficient handling of complex problems" and "a mobilising of popular support for policies in specific areas by calling them security-relevant," which can result in the "allocation of more resources" to it. If this is not done, then "these achievements might not be obtained if the same problems were regarded only as 'political matters.'"[52]

In Pakistan, the complications are huge. The relationship between drone strikes and measures of terrorist violence must take account of "terrorist attack patterns and lethality and attacks on tribal elders, whom some militants view as actual or potential rivals."[53] While it is the case that "[o]verall, the evidence suggests that drone strikes not only reduce militant violence in the local agencies in which they are conducted, but also in proximate areas, to varying degrees . . . [,]" it is also true that "the effects of drone strikes on militant violence occur primarily at the tactical level, not the strategic level."[54] Does that mean the audience in the given particular case does not accept militant "terrorist" to be a securitised issue? Even if recent research concludes that drone strikes are effective in lending "key support for the hypothesis that new technologies—specifically, remote means of surveillance, reconnaissance, and targeting—prove capable of disrupting and degrading militant organizations," that may not mean that securitisation is accepted.[55] Should we not then work at ensuring that as a primary goal terrorist violence in a given case is what is securitised and seen to be securitised?

This is important for four reasons. First, the existing literature on securitisation suggests that the securitisation process can fail if the securitising actor does not know how to speak security in a specific context during the securitisation move. Second, the securitisation process might fail if the actors do not have sufficient authority over an issue with regard to the audience. Third, the threatening object projected as an existential threat may not be agreeable to securitisation. Lastly, the audience might not accept the securitisation move.[56] Furthermore, the securitisation process in its implementation stage can be "confronted with significant forces of resistance that can challenge securitization through counter-securitizations."[57] Similarly, counter-securitisation can make the securitisation process more complex and prolong, delay, stop, or reverse the

[49] Šulović, *supra* note 43, at 3.
[50] Watson, *supra* note 43, at 284.
[51] BUZAN, *supra* note 45, at 36.
[52] Ralf Emmers, *Securitization*, *in* CONTEMPORARY SECURITY STUDIES 173 (Alan Collins ed., 5th ed. 2018).
[53] Patrick B. Johnston, *The Impact of US Drone Strikes on Terrorism in Pakistan*, 60 INT'L STUD. Q. 203, 204 (2016).
[54] *Id.* at 215–16.
[55] *Id.* at 216.
[56] *See* Ruzicka, *supra* note 18, at 373.
[57] Stritzel & Chang, *supra* note 47, at 549.

process.[58] This is significant because there are now numerous studies which show that the nature of the response to an insurgency can give a spur to radicalisation and thus ensure success for the insurgents. Thus, Kilcullen suggests that insurgents aggregate the local grievances and seek to overthrow the existing political order.[59] Similarly, Galula maintains that insurgents engage in a battle over the support of the population, a key feature of unconventional warfare, and they succeed when they alienate the population from the counterinsurgents.[60] In Iraq, for instance, the violence decreased because the Sunni population, feeling threatened by Al-Qaeda, allied with the U.S. forces.[61] Corum reminds us how insurgencies are different from conventional warfare because the support of the population plays a significant role, and civilian and military intelligence agencies often fail to acknowledge this.[62] As we will see, this is indeed what appears to have happened in Pakistan.

What this literature reminds us of are the dangers of prioritising militarised responses to insurgencies. What the U.S. took insufficient account of was the fact that Pakistan itself was fighting an insurgency in its tribal areas. What its successive governments needed was the support of the people in those tribal areas to defeat the insurgents. The Pakistan government's attempt to securitise the militancy was in the end heavily influenced by the U.S. drone strikes.[63] For the audience in the tribal areas, the U.S. drone strikes in Pakistan turned the war on terror into an American war. This in turn made it difficult for the audience to accept the securitisation of militancy as planned by the security actors in Pakistan. All of this is clear in the work of Khan and Kaunert who used newspaper archival records for "the construction of a chronology of events"[64] to prove this and from Thies whose work explains that the sequence of events tells us how the actors were responding to each other to demonstrate why securitisation by Pakistan failed.[65] According to Madiha Tahir, the existing literature has interrogated the construction of drone targets, collateral damage, and the rationality of the strikes.[66] Yet, how governance in the tribal areas contributes to drone strikes in the area has largely been overlooked.

III. DID DRONE STRIKES WORK IN PAKISTAN?

It is against this background that, whereas there have been those who have argued in favour of drone attacks on militants, there have also been those who have been vigorously opposed. The result is that drone strikes in Pakistan's tribal areas are a hotly debated topic. There is general disagreement among scholars on whether drone attacks are part of the problem or the solution. For instance, one study suggests that drone strikes

---

[58] *Id.*
[59] David Kilcullen, *Countering Global Insurgency*, 28 J. STRATEGIC STUD. 597, 608 (2005).
[60] DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE (1964).
[61] Joshua Rovner, *Questions About COIN after Iraq and Afghanistan*, *in* THE NEW COUNTER-INSURGENCY ERA IN CRITICAL PERSPECTIVE 299 (Celeste Ward Gventer et al. eds., 2014).
[62] JAMES S. CORUM, BAD STRATEGIES: HOW MAJOR POWERS FAIL IN COUNTERINSURGENCY (2009).
[63] Khan & Kaunert, *supra* note 39, at 290.
[64] *Id.* at 291.
[65] Cameron G. Thies, *A Pragmatic Guide to Qualitative Historical Analysis in the Study of International Relations*, 3 INT'L STUD. PERSP. 351, 352 (2002).
[66] Madiha Tahir, Grounding Drone Warfare: Imperial Entanglements, Techopolitics and Ghostly States in the Tribal Areas, Pakistan (Oct. 5, 2020) (Ph.D. thesis, Columbia University) (on file with Academic Commons, Columbia University).

have caused 98% of civilian deaths, while another study maintains that civilian deaths are only 10%.[67] Bergen and Tiedemann, on the other hand, found that Pakistan drone attacks killed very few high-level Al-Qaeda and Taliban leaders.[68] They found that only one out of seven drone attacks killed a militant leader and the majority of Taliban and Al-Qaeda operatives killed in strikes were low-level fighters, with civilians also being killed.[69]

According to Aslam, the characterisation of the drone policy as a "success" because it has reduced the threat of terrorism is flawed and must be re-evaluated.[70] Nevertheless, there are also numerous other scholars who consider drone warfare to be an effective strategy against Al-Qaeda and its affiliates. For instance, Byman maintains that drone strikes have put the Taliban leaders on the run, and they have the potential to prevent another 9/11.[71] Defending the use of the drone, Fair argues that when reviewing different literature on the tribal areas, it seems that there is no other alternative to drones.[72] Fair, Kaltenthaler, and Miller's study maintains that only those people with little education are opposed to drone strikes, and poorly educated women in particular have a more negative opinion about drone strikes.[73] Concerning the use of drones in the future, Orr maintains that it is very likely that the U.S. and other countries will continue to conduct drone strikes in Pakistan to try to prevent terrorist attacks in their own countries.[74] All of this, however, is without a comprehensive understanding of how the securitisation goals of the attacking power may be diametrically opposed to the securitising goals of the country where the attacks are taking place. Militant violence may need dealing with, but is the best way to do so through drone strikes from a foreign power?

The question is an important one because the key principle which guides the securitisation move is whether "the description of the threat as existential accepted or rejected [and] is the solution to the threat accepted or rejected."[75] Unlike de-securitisation which "entails reversal of a previous successful securitization"[76] a failed securitisation move is when the "moves" fail to gain "wider legitimacy among popular, expert and media audiences."[77] Outside the West, as Wilkinson maintains, the key factor responsible for the unsuccessful securitisation is that the theory is not applicable there.[78] For Floyd, "securitization fails only when the would-be securitising actor, or another relevant actor, does not act in response to the threat,"[79] and it is in the non-western context where this is most likely to happen. The failures in Pakistan are a telling illustration of that.

[67] Peter Bergen & Katherine Tiedemann, *The Year of the Drone*, FOREIGN POL'Y, (Apr. 23, 2010), https://foreignpolicy.com/2010/04/23/the-year-of-the-drone/ [https://perma.cc/LB3K-YQRD].
[68] Bergen & Tiedemann, *supra* note 23, at 12.
[69] *Id.* at 12, 16.
[70] Aslam, *supra* note 35, at 31–32.
[71] Byman, *supra* note 30, at 43.
[72] Fair, *supra* note 32, at 230.
[73] Fair et al., *supra* note 33, at 859.
[74] Orr, *supra* note 17, at 752.
[75] Mark B. Salter, *When Securitization Fails the Hard Case of Counter-Terrorism Programs*, *in* SECURITIZATION THEORY: HOW SECURITY PROBLEMS EMERGE AND DISSOLVE 116, 120 (Thierry Balzacq ed., 2011).
[76] *Id.*
[77] Helen Hintjens, *Failed Securitisation Moves During the 2015 "Migration Crisis,"* 57 INT'L MIGRATION 182, 182 (2019).
[78] Claire Wilkinson, *The Copenhagen School on Tour in Kyrgyzstan: Is Securitization Theory Useable Outside Europe?*, 38 SEC. DIALOGUE 5, 5 (2007).
[79] Rita Floyd, *Extraordinary or Ordinary Emergency Measures: What, and Who, Defines the "Success" of Securitization?*, 29 CAMBRIDGE REV. INT'L AFFS. 677, 687 (2016).

IV. FAILURES IN PAKISTAN?

If an issue becomes a security threat, not because it constitutes an objective threat, but because an audience or several audiences accept the securitising actor's claim that a particular issue poses an existential threat to a referent object,[80] then Pakistan is the field of securitisation activity where this did not happen. The successful securitisation of the war on terror was sought there by successive U.S. administrations. The justification of extraordinary measures such as drone strikes to eliminate the threat significantly affected securitisation processes in Pakistan related to the militancy. Nevertheless, Islamabad, on different occasions, communicated the impact of U.S. measures on the internal securitisation efforts, but to no avail. In 2008, the Pakistan Defence Minister Ahmad Mukhtar observed that the U.S. drone strikes were generating "anti-American sentiments" and creating "outrage and uproar among the people."[81] This is unsurprising considering the effects of drone attacks. On top of that, drone surveillance has the effect of psychological colonisation.[82] The following year in 2009, the Pakistani Prime Minister Yusuf Gilani complained that "[w]e are trying to separate militants from tribesmen, but the drone attacks are doing exactly the opposite."[83] The Prime Minister of Pakistan, even in his meeting with the British Minister of Defence, asked for help to stop the drone attacks, as they were counterproductive and negatively affected the government's campaign against the militants.[84] It was to no avail.

On 7 October 2010, Pakistani's Ministry of Foreign Affairs spokesman Abdul Basit openly declared that the drone strikes in the tribal areas of Pakistan had "neither justification nor understanding."[85] He further said that the strikes were "not serving the larger strategic interests, especially in the context of our efforts to win hearts and minds, which is part and parcel of our strategy against militants and terrorists."[86] Here was the clearest example of how securitisation was not accepted, not just by the relevant audience in the tribal areas where the militants operated, but by the government agencies of Pakistan, which were called upon to implement the policy of securitisation imposed by the West. Thereafter, the Minister of Foreign Affairs, Hina Rabbani Khar, speaking at the Asia Society in 2012, stated: "This has to be our war. We are the ones who have to fight against them. As a drone flies over the territory of Pakistan, it becomes an American

---

[80] Christian Kaunert & Ori Wertman, *The Securitisation of Hybrid Warfare Through Practices Within the Iran-Israel Conflict–Israel's Practices for Securitising Hezbollah's Proxy War*, 31 SEC. & DEF. Q., no. 4, 2020, at 100, 101.

[81] Jane Perlez, *Petraeus, in Pakistan, Hears Complaints About Missile Strikes*, N.Y. TIMES (Nov. 3, 2008), https://www.nytimes.com/2008/11/04/world/asia/04pstan.html [https://perma.cc/3HXD-EE8T].

[82] Alex Edney-Browne, *The Psychological Effects of Drone Warfare*: *Social Isolation, Self-Objectification, and Depoliticization*, 40 POL. PSYCH. 1341, 1342 (2019).

[83] BRIAN GLYN WILLIAMS, *PAKISTANI RESPONSES TO THE CIA'S PREDATOR DRONE CAMPAIGN AGAINST THE TALIBAN AND AL-QAEDA*, 8 Terrorism Monitor 3 (2010); *SWA ACTION TO CONCLUDE WELL BEFORE TIME: PM GILANI*, PAK TRIBUNE (NOV. 16, 2009), HTTPS://OLD.PAKTRIBUNE.COM/NEWS/SWA-ACTION-TO-CONCLUDE-WELL-BEFORE-TIME-PM-GILANI-221378.HTML [HTTPS://PERMA.CC/FB29-VWUA].

[84] *Pakistan: Drone Strikes Are Violations of Sovereignty*, HUFFPOST (Aug. 4, 2012), https://www.huffpost.com/entry/pakistan-drone-strikes_n_1568016 [https://perma.cc/R6S5-XLSF].

[85] *Pakistan Criticises "Unjustified" US Drone Strikes*, BBC (Oct. 7, 2010), https://www.bbc.co.uk/news/world-south-asia-11490722 [https://perma.cc/U7XE-7KEW].

[86] *Id.*

war again. And the whole logic of this being our fight, in our own interest is immediately put aside, and again it is a war which is imposed on us."[87]

Eventually, as early as 12 April 2012, the National Assembly of Pakistan passed a resolution which called for the immediate halt of drone strikes and a review of relations with the U.S. The resolution stated, "Pakistan's sovereignty shall not be compromised. . . . Relations with the USA should be based on mutual respect for the sovereignty, independence and the territorial integrity of each other."[88] It was not just on strategic grounds that many Pakistani politicians questioned drone strikes. They did so on legal and moral grounds also. Leaders of political parties such as Imran Khan questioned under what law the drone strikes were being conducted. Consequently, ordinary Pakistanis also started questioning why drones were being used in the tribal areas if they were not legally authorised. The debate on drone strikes therefore informed public opinion and increased anti-American sentiments in Pakistan, while making it difficult for the audience to accept the militancy as an existential threat.[89]

V. MAKING MORE ENEMIES?

It was only a matter of time before, as Hudson, Owens, and Flannes have shown, the persistent use of drone strikes led to blowback in Pakistan and created hatred and retaliation against the U.S.[90] The result was that instead of eliminating insurgents, the attacks created new insurgents. In this way, the excessive use of drone strikes made it difficult for the people to accept the war as Pakistan's own. The reaction was not baseless. The Pew Research Center survey of Pakistanis in 2010 found that 93% of people considered drone strikes a bad thing and 90% believed that they kill too many innocent people.[91] A further Pew Research Center poll in 2012 revealed that 74% of Pakistanis considered America to be an enemy and only 17% supported drone strikes against militants, but even then, only if conducted with the support of the Pakistani government.[92] This is a sobering statistic. It tells us where the war on terror is being lost and how. It tells us of the West's persistent failure to learn from its mistakes. We learn that the decapitation attacks against the Taliban by the U.S. and Pakistan not only created anti-U.S. sentiments, but also sympathies for militant groups.[93] If that is so, then it is a clear failure of securitisation all around.

Whereas the Taliban had initially focused their targets against the Pakistan government, after the introduction of the decapitation policy, the Taliban now increased their attacks against the U.S.[94] Aslam even highlighted how drone attacks that kill innocent civilians may spur the

[87] *Watch: Pakistan FM Calls Drone Strikes "Illegal", Says "This Has to Be Our War,"* ASIA SOC'Y (Sept. 27, 2012), https://asiasociety.org/blog/asia/watch-pakistan-fm-calls-drone-strikes-illegal-says-has-be-our-war [https://perma.cc/UER4-PDVY].

[88] PARLIAMENTARY COMM. ON NAT'L SEC., GUIDELINES FOR REVISED TERMS OF ENGAGEMENT WITH USA/NATO/ISAF & GEN. FOREIGN POL'Y (Pak. 2012).

[89] Fair et al., *supra* note 33, at 852–72.

[90] Leila Hudson, Colin S. Owens & Matt Flannes, *Drone Warfare: Blowback from the New American Way of War*, MIDDLE EAST POL'Y, Fall 2011, at 122, 123.

[91] Christian Enemark, *Drones Over Pakistan: Secrecy, Ethics, and Counterinsurgency*, 7 ASIAN SEC. 218, 226–27 (2011).

[92] MICHAEL J. BOYLE, THE DRONE AGE 55–72 (2020) (quoting PEW RSCH. CTR., PAKISTANI PUBLIC OPINION EVER MORE CRITICAL OF THE U.S. 8 (2012)).

[93] Sara Mahmood, *Decapacitating the Tehrik-i-Taliban Pakistan: An Effective Counter-Terrorism Strategy?*, 7 COUNTER TERRORIST TRENDS & ANALYSIS, no. 6, 2015, at 24, 26–27.

[94] *Id.*

victims, family members, and friends onto revenge against the United States and its allies, inducing them to join militants,[95] so that the drone attacks create more enemies than they eliminate. With this came the realisation of how, as Boyle observed, the government's inability to stop drones could potentially cripple the government and strengthen the militant groups to challenge the authority of the state through violence,[96] as it became clear that drone attacks corrode and undermine the credibility of local governments and help the militant organisation to attract new recruits who fight to overthrow these governments. In fact, in his interview, Bait Ullah Mehsud, commander of Tehrik-i-Taliban Pakistan (TTP), maintained that every drone attack brought him 150 volunteers.[97] For this reason, Kilcullen and Andrew Exum in their study suggested that drone costs outweigh their benefits. In their opinion, the non-combatant victims of the drones have alienated families, who are then intent on revenge, thus helping militants to attract more recruits instead of accepting militancy as a threat.[98] Is this really so? If it is, it is not clear why the U.S. government should then continue with a drone policy that was essentially counterproductive. One person who thought it was a recipe for desecuritisation was Cameron Munter, who remained the U.S. ambassador in Pakistan from 2010 to 2012, because he raised the issue with the CIA, and he tried to convince them that the drone attacks were increasingly destabilising Pakistan. He was told that "[y]ou know this is a never-ending war. Whose side are you on?"[99]

Overall, the evidence suggests that the drone strikes not only influenced Pakistan's securitisation efforts but also contributed to the countersecuritisation of militancy in the tribal areas. The tribal areas are ruled by the centuries-old tradition known as *Pakhtunwali* (code of Pashtun life). *Badala* (revenge) is one of the key features of *Pakhtunwali*, where it is incumbent upon a person whose family or relative has been killed to take revenge. "For instance, on 19 November 2008, the first drone missile was fired in the Khyber Pakhtunkhwa (KP) settler district of Bannu, which killed thirteen people." [100] To take revenge in response, insurgents started attacking NATO supply vehicles to Afghanistan. The supply line passed through the Peshawar and Khyber Agency. In December 7, 2008 it was reported how, "Gunmen mounted the biggest attack yet on Nato supplies going to Afghanistan yesterday, torching more than 100 trucks carrying equipment at a depot in north-west Pakistan, the main route for supplies to troops in land-locked Afghanistan."[101] This was hardly surprising given that

---

[95] M.W. Aslam, *A Critical Evaluation of American Drone Strikes in Pakistan: Legality, Legitimacy and Prudence*, 4 CRITICAL STUD. ON TERRORISM 313, 323 (2011) [hereinafter Aslam, *Critical Evaluation*].
[96] Michael J. Boyle, *The Costs and Consequences of Drone Warfare*, 89 INT'L AFFAIRS 1, 14 (2013).
[97] SHUJA NAWAZ, CTR. FOR STRATEGIC & INT'L STUD., FATA—A MOST DANGEROUS PLACE: MEETING THE CHALLENGE OF MILITANCY AND TERROR IN THE FEDERALLY ADMINISTERED TRIBAL AREAS OF PAKISTAN 18 (2009).
[98] David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009.
[99] Steve Coll, *The Unblinking Stare*, NEW YORKER (Nov. 17, 2014), https://www.newyorker.com/magazine/2014/11/24/unblinking-stare [https://perma.cc/94RF-NG6W].
[100] Khan & Kaunert, *supra* note 39, at 298.
[101] Saeed Shah, Richard Norton-Taylor & Simon Tisdall, *Taliban Destroy 100 Trucks in Biggest Raid on NATO Supplies Bound for Afghanistan*, GUARDIAN (Dec. 7, 2008, 7:01 PM), https://www.theguardian.com/world/2008/dec/08/afghanistan-taliban-nato-raid-pakistan [https://perma.cc/T8HW-HLNL].

"some 40 militant leaders from the tribal region" had now "turned their wrath against Pakistan's security agencies and the military."[102]

The local leading Pakistani newspaper reported that when "drones kill innocent bystanders it infuriates the Taliban—on both sides of the border—who use this campaign to recruit additional foot soldiers and suicide bombers."[103] After the killing of Taliban leader Hakimullah, Pakistan's interior minister, declared "that 'every aspect' of Pakistan's cooperation with the United States will be reviewed."[104] By 2013, Time Magazine was reporting how "NATO supply routes that run to Afghanistan through the northwest Pakistani province of Khyber Pakhtunkhwa" were being blocked by protests.[105] Although in 2015 President Obama was seen to be explaining how "[t]he question is never whether America should lead, but how we lead,"[106] the damage was done, and Pakistanis believed the "drone strategy compromises its sovereignty and enrages militants."[107] Williams recounted one such story of a tribesman who rammed his explosive-filled vehicle into a Pakistan army convoy to take revenge for his family members killed in a drone strike.[108] When Hakimullah Mehsud, the chief of the Pakistani Taliban, was killed by a drone, its government bitterly complained of how "[o]ur efforts have been ambushed, and it was not an ambush from the front."[109] As a result, the increasing use of drone technology to kill the high-value targets and its collateral damage left a profound impact on Pakistan-U.S. relations, and the ongoing efforts against insurgency in the tribal areas. The Pakistan public may have been persuaded if the attacks yielded the results they were claimed to yield. But they did not, as a local newspaper in Pakistan reported that between January 14, 2006, and April 8, 2009, only fourteen wanted leaders of Al-Qaeda were killed in sixty drone strikes, while 687 innocent civilians were killed.[110] Another leading Pakistan newspaper reported that in 2009, among forty-four drone strikes, only five Al-Qaeda leaders were targeted at the cost of over 700 innocent civilians.[111]

---

[102] Zahid Hussain, *Pakistan's Most Dangerous Place*, WILSON Q., Winter 2012, at 16.

[103] *The Year of the Drone*, DAWN (Dec. 19, 2010), https://www.dawn.com/news/592054/the-year-of-the-drone [https://perma.cc/8CZT-VMUF]; *see generally* Brian Fishman, *The Battle for Pakistan: Militancy and Conflict in Pakistan's Tribal Regions*, FOREIGN POL'Y (Apr. 19, 2010, 1:59 PM), https://foreignpolicy.com/2010/04/19/the-battle-for-pakistan-militancy-and-conflict-in-pakistans-tribal-regions/ [https://perma.cc/PH6T-RG6D].

[104] *MEHSUD KILLING "SCUTTLED" PEACE PROCESS*, Radio Free Europe/Radio Liberty (NOV. 2, 2013, 8:43 AM), HTTPS://WWW.RFERL.ORG/A/PAKISTANI-TALIBAN-NEW-LEADER-/25155722.HTML [HTTPS://PERMA.CC/B4X4-X8E2].

[105] OMAR WARRAICH, *FURIOUS PAKISTANIS BLOCK NATO SUPPLY ROUTES TO PROTEST DRONE STRIKES*, Time (NOV. 25, 2013), HTTPS://WORLD.TIME.COM/2013/11/25/FURIOUS-PAKISTANIS-BLOCK-NATO-SUPPLY-ROUTES-TO-PROTEST-DRONE-STRIKES/ [HTTPS://PERMA.CC/A75A-5WJA].

[106] KAREN DEYOUNG, *OBAMA NATIONAL SECURITY STRATEGY STRESSES ALLIANCES, AMERICAN VALUES*, Wash. Post (FEB. 6, 2015, 5:25 PM), HTTPS://WWW.WASHINGTONPOST.COM/WORLD/NATIONAL-SECURITY/OBAMA-NATIONAL-SECURITY-STRATEGY-STRESSES-ALLIANCES-AMERICAN-VALUES/2015/02/06/FA69C174-AD8B-11E4-ABE8-E1EF60CA26DE_STORY.HTML [HTTPS://PERMA.CC/XX3F-5VCN].

[107] *Implications of the Drone War*, DAWN (Apr. 28, 2011), https://www.dawn.com/news/624602/implications-of-the-drone-war [https://perma.cc/4DTU-D2TS].

[108] Brian Glyn Williams, *The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign*, 33 STUD. CONFLICT & TERRORISM 871, 882 (2010).

[109] TIM CRAIG, *DRONE KILLS TALIBAN CHIEF HAKIMULLAH MEHSUD; PAKISTAN ACCUSES U.S. OF DERAILING PEACE TALKS*, Wash. Post (NOV. 2, 2013, 10:55 AM), HTTPS://WWW.WASHINGTONPOST.COM/WORLD/ASIA_PACIFIC/PAKISTANI-OFFICIAL-ACCUSES-US-OF-SABOTAGE-AS-DRONE-TARGETS-TALIBAN-LEADERS-IN-NORTHWEST/2013/11/01/1463D0C2-431D-11E3-B028-DE922D7A3F47_STORY.HTML [HTTPS://PERMA.CC/JN2K-27FV].

[110] *60 U.S. Drone Attacks Kill 687 Civilians in Pakistan*, TEHRAN TIMES (Apr. 13, 2009), https://www.tehrantimes.com/news/192181/60-U-S-drone-attacks-kill-687-civilians-in-Pakistan [https://perma.cc/WH2A-J7K7].

[111] Bergan & Tiedemann, *Year of the Drone*, *supra* note 68.

That is a disproportionate result and can hardly be described as "collateral damage." In another local newspaper in 2014 a report suggested that the CIA-operated drones killed 221 people including 103 children, and this was in the hunt for four men who were on Obama's kill list.[112] Indeed, what the same report further revealed was that from 2004 to 2013, 142 children were killed while pursuing 14 high-value targets. In the circumstances, it was hardly unexpected that drone strikes in Pakistan were so unpopular and did so little to achieve securitisation across the region.

CONCLUSION

President Bush's decision in 2008 to use drone strikes was a unilateral one without prior Pakistani consent.[113] President Obama later extended attacks to local Taliban leaders. Drone attacks rose by 631%, killing 2,500, with 350 innocent civilians.[114] In 2009, Obama authorised fifty drone attacks which left between 517 to 729 people dead.[115] Despite some Al-Qaeda operatives being killed, drone strikes have created hatred against the U.S.[116] The people do not accept this is Pakistan's war; 93% reject drones, and 90% believe drones kill too many innocent people.[117] America was the enemy for 74% and only 17% favoured drone strikes against militants.[118] Drones create sympathy for militant groups,[119] the people speak of revenge,[120] and the government faces rising militancy,[121] as 150 volunteers arise with every drone attack,[122] especially from non-combatant victim's families.[123] Was security achieved?

Securitisation is a process and not an event. It is not a discourse. Neither is it rhetoric. In a globalised world, securitisation needs to be envisioned in the long term and as affecting us all everywhere. Khan and Kaunert[124] have correctly focused "on security practices, rather than discourse," and they conceptualise security as a continuum, rather than equating it with survival. They have examined the extent to which drone attacks in Pakistan "can be considered to be 'securitising practices,' that is, practices which convey the meaning that the issue they are addressing is a security issue."[125] What they mean by this is either "practices that are usually deployed to tackle issues that are widely seen as security issues," or "cooperation practices with bodies or organisations that have traditionally been considered security bodies or organisations, such as those dealing with military or policing

---

[112] Hassan Khan, *"Precise" Drone Strikes in Pakistan: 874 "Unknowns" Killed in US Hunt for 24T*, EXPRESS TRIBUNE (Nov. 26, 2014), https://tribune.com.pk/story/797295/precise-drone-strikes-in-pakistan-874-unknowns-killed-in-us-hunt-for-24-terrorists [https://perma.cc/DFN9-5T2N].
[113] Peter Bergen & Katherine Tiedemann, *The Drone War*, NEW REPUBLIC (June 2, 2009), https://newrepublic.com/article/61767/the-drone-war [https://perma.cc/HNX7-5XDV].
[114] Waqar Muhammad Khan, *Over 2,500 People Have Been Killed in US Drone Strikes in Pakistan, of Which at Least 350 Were Civilians*, DAWN (May 27, 2016), https://www.dawn.com/news/1260840 [https://perma.cc/HFQ2-YARF].
[115] Rafia Zakaria, *The Myth of Precision: Human Rights, Drones, and the Case of Pakistan*, *in* DRONES AND THE FUTURE OF ARMED CONFLICT: ETHICAL, LEGAL, AND STRATEGIC IMPLICATIONS 199, 204 (David Cortright et al. eds., 2015).
[116] Hudson et al., *supra* note 90, at 123.
[117] Enemark, *supra* note 91, at 226.
[118] BOYLE, *supra* note 92, at 62 (quoting PEW RSCH. CTR., *supra* note 92, at 1–2, 8, 12).
[119] Mahmood, *supra* note 93, at 26.
[120] Aslam, *Critical Evaluation*, *supra* note 95, at 323.
[121] BOYLE, *supra* note 92, at 14.
[122] NAWAZ, *supra* note 97, at 18.
[123] Kilcullen & Exum, *supra* note 98.
[124] Khan & Kaunert, *supra* note 39, at 293.
[125] *Id.*

matters."[126] The drone strike policy of Bush and Obama needed to meet these benchmarks.

Drone strikes, as Noam Chomsky has said, were the worst global assassination program ever seen,[127] and the testing ground was Pakistan's tribal areas. It was the "first time in history" that "a civilian intelligence agency" such as the CIA, was "using robots to carry out a military mission" by "selecting people for killing" but "in a country where the United States is not officially at war."[128] For Pakistan, more research continues to be needed.

---

[126] *Id.*
[127] *Chomsky Says US Is World's Biggest Terrorist*, EURONEWS (Apr. 17, 2015, 7:15 PM), https://www.euronews.com/2015/04/17/chomsky-says-us-is-world-s-biggest-terrorist [https://perma.cc/7E6V-CWFV].
[128] Scott Shane, *CIA to Expand Use of Drones in Pakistan*, N.Y. TIMES (Dec. 3, 2009, https://www.nytimes.com/2009/12/04/world/asia/04drones.html [https://perma.cc/HPR8-NPGL].