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ARTICLES

NATURAL LAW IN CHINESE LEGAL THOUGHT: THE PHILOSOPHICAL SYSTEM OF WANG YANGMING

Norman P. Ho[*]

ABSTRACT

Did natural law theory or natural law thinking exist in traditional Chinese legal thought? There have principally been three answers to this question. The most popular, conventional response has been that natural law did exist in traditional China in the form of Confucianism, and more specifically, in the idea of li (ritual propriety). Others argue that natural law did exist in traditional China, though not primarily in the idea of li (ritual propriety) but rather in other concepts, such as the dao (the Way) or laws of nature. Yet others say that natural law theory did not exist in traditional China, and, even if it did, it cannot be located in Confucianism. These three arguments have primarily focused on pre-Qin Confucianism, and their methodology has largely been selecting various passages from different ancient Chinese thinkers and/or texts to prove their positions. There has also been little comparison done with Western natural law theorists. In this article, I take a different position and methodological approach and argue that Ming dynasty Confucian philosopher Wang Yangming's (1472-1529) philosophical system can be understood as a coherent natural law theory. In Wang's system, the natural law and its norms are not only in, but actually are, the human "heart-mind" (xin) itself, equivalent to "Heavenly Principle" (tianli). They are discoverable via reason, as seen through his concept of "Pure Knowing" (liangzhi). His natural law theory is based on, and can therefore accommodate, various sources and bases, including the eternal order of the cosmos,

laws of nature, self-evident values, and practical reason. Indeed, Wang's philosophical system is arguably the closest thing traditional Chinese legal thought has to classical Western natural law theory. To try to demonstrate this particular point, this article also briefly highlights the similarities (and differences) between Wang's theory of natural law with those of Aristotle and especially St. Thomas Aquinas (who is regarded as the seminal Western natural law theorist). Finally, I will also look at Wang's government career to examine how his natural law thinking functioned in practice. It is hoped that this article can contribute not only to our understanding of traditional Chinese legal thought but also to comparative legal theory and legal theory more generally by broadening the traditional canon of natural law thinkers, which has been long dominated by Western natural law theorists. In this sense, this article is also inspired by general jurisprudence scholars such as William Twining who have called for jurisprudence scholarship that is more attune to non-Western legal traditions.

I. INTRODUCTION

An important question in comparative natural law theory and traditional Chinese legal thought[1] that has received considerable scholarly attention is whether natural law (or natural law ideas and natural law thinking)[2] existed in traditional Chinese legal thought, and, if it did, what was its content? A general review of the existing scholarship in English, Chinese, and Japanese reveals three main positions in response to this question.

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* Associate Professor of Law, Peking University School of Transnational Law. Email: nph225@nyu.edu. I would like to thank the two anonymous reviewers, as well as my colleagues at the Peking University School of Transnational Law, the Asian Law Institute (National University of Singapore), and the National University of Singapore Faculty of Law, for their helpful comments.

[1] By "traditional Chinese legal thought" or "traditional Chinese law," I refer to Chinese law, legal thought, and legal culture from antiquity up to 1911 (i.e., up to the fall of the Qing dynasty, the last imperial dynasty in Chinese history).

[2] The specific term we know in Western jurisprudence as "natural law" (i.e., *lex naturae*) or its modern Chinese equivalent (*ziran fa*) did not exist in traditional Chinese legal discourse. Zhang Huimin & Luo Min, *Zhong xi 'ziran fa' guan zhi bijiao* [*Comparative Study on Chinese and Western 'Natural Law' and Enlightenment to Legal Construction of China*], 2 GANNAN SHIFA XUEYUAN XUEBAO [J. GANNAN NORMAL U.] 68, 68 (2013). But this does not necessarily mean that natural law thinking or natural law ideas did not exist in traditional China.

The first position is that there was indeed natural law in the Chinese legal tradition, and it was Confucianism, grounded in the idea of *li*, usually translated into English as ritual propriety or rites.[3] This is the most popular, conventional account of natural law in traditional China.[4] The first major proponent of this view was Chinese political thinker and reformer, Liang Qichao (1873-1929).[5] Similar views by other Asian scholars were advanced by Chinese intellectual, Hu Shi,[6] Taiwan scholar, Mei Zhongxie,[7] and Japanese scholar, Fukutaro Masuda.[8] In Western scholarship, such views have been set forth by Hyung I. Kim,[9] J.J.L. Duyvendak,[10] Derk Bodde,[11] and most famously, Joseph Needham, who equated *li* (ritual propriety) with natural law.[12] The general idea of this position is that *li* (ritual propriety) functioned as a collection of supreme, universal ethical and moral principles, serving as a form of higher law in society. This position, however, has been persuasively criticized by R.P. Peerenboom, who has pointed out that *li* (ritual propriety) in Chinese civilization and philosophy cannot be understood as a universal principle because they "are the particular mores, values and guidelines for human interaction of a particular society at a particular time."[13] In other words, *li* (rites,

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[3] The concept of *li*, frequently translated into English as ritual, rites, and ritual propriety (I use these translations interchangeably in this paper), originally referred specifically to religious rituals, but, in Confucian philosophy, its meaning was extended to include matters of etiquette and aspects of one's entire way of life, including demeanor and dress. In the Confucian tradition, it has even become "co-extensive with all of ethics." READINGS IN CLASSICAL CHINESE PHILOSOPHY 390 (Philip J. Ivanhoe & Bryan W. Van Norden eds., 2d. ed. 2005).

[4] Indeed, R.P. Peerenboom has noted that the "conventional wisdom about Chinese philosophies of law has it that, insofar as natural law existed in China, it was Confucian natural law predicated on universal ethical principles or *li* (礼 – conventionally translated 'rites,' and not to be confused with *[L]i* 理 – principles)." R.P. Peerenboom, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO 76 (1993).

[5] YU RONGGEN, RUJIA FA SIXIANG TONGLUN [ON CONFUCIAN LEGAL THOUGHT] 42 (1998).

[6] Hu Shih, *The Natural Law in the Chinese Tradition*, *in* NATURAL LAW INSTITUTE PROCEEDINGS NO. 5 119, 119-153 (Edward F. Barrett ed., 1953).

[7] YU, *supra* note 5, at 43.

[8] *Id.* at 44.

[9] HYUNG I. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY (1981).

[10] J.J.L. DUYVENDAK, THE BOOK OF LORD SHANG: A CLASSIC OF THE CHINESE SCHOOL OF LAW (1963).

[11] DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 21 (1967).

[12] JOSEPH NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA (VOL. 2) 544 (1956). Peerenboom has labeled Needham the "leading spokesperson for this view" of natural law in China. *See* Peerenboom, *supra* note 4, at 76.

[13] PEERENBOOM, *supra* note 4, at 125.

ritual propriety) is a changing concept.

The second position is more diverse and consists of various approaches. Broadly though, it posits that there was a natural law in traditional China, but it is not primarily grounded in *li* (rites, ritual propriety) but rather on another Chinese philosophical concept or a combination of Chinese philosophical concepts or philosophical schools. Geoffrey MacCormack argues for the existence of natural law in traditional China but carefully distinguishes between what he calls "cosmological" natural law theories (which he explains are theories founded on laws governing the nature, similar to laws of nature) and "moral" natural law theories (which he explains is a belief of a higher law based on principles derived from human nature which tell us how we should act with others).[14] Cai Xinyi believes that Daoism and Mohism are also natural law theories.[15] Zhang Huimin & Luo Min view Confucianism and Daoism both as natural law theories.[16]

Still, some scholars are even more inclusive. For example, Xiusheng Liu, Ma Jianxing, and Jiang Qinghua have all argued that Confucianism, Daoism, and Mohism are *all* forms and sources of natural law theories,[17] and Xiusheng Liu in particular has also argued that various philosophical concepts – such as *li* (rites, ritual propriety), *ren* (benevolence),[18] and *Dao* (the Way) – together comprise Chinese natural law thinking.[19] Caleb Wan looks at numerous concepts such as *li* (rites, ritual propriety) and the Mandate of Heaven as sources of natural law thinking in traditional China.[20] May Sim meanwhile looks specifically to the Chinese philosophical concept of *zhong*, as understood in the classical

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[14] Geoffrey MacCormack, *Natural Law in Traditional China*, 8 J. COMP. L. 104, 105 (2013).

[15] Cai Xinyi, *Zhongxi ziranfa sixiang bijiao* [*A Comparison of Chinese and Western Natural Law Thought*], 11 SHAANXI JIAOYU GAOJIAO [J. SHAANXI HIGHER ED.] 7, 7-8 (2014).

[16] Zhang & Luo, *supra* note 2.

[17] Xiusheng Liu, *Appendix 2: Natural Law in Classical Chinese Philosophy*, *in* NATURAL LAW MODERNIZED 258, 258-294 (David Braybrooke ed., 2001); Ma Jianxing & Jiang Qinghua, *Chaoyue Zhongxi de ziranfa zhi jing: ziranfa sixiang xinlun* [*Going Beyond the Western vs. Chinese Natural Law Lens: A New Discussion of Natural Law*], 11 TAIPINGYANG XUEBAO [PACIFIC J.] 45, 45-55 (2006).

[18] For Confucius, *ren*, usually translated as "benevolence" in English, referred to the "sum total of all virtuous qualities" or "the perfection of human character." It was considered the key Confucian virtue. Ivanhoe & Van Norden, *supra* note 3, at 391.

[19] Liu, *supra* note 17.

[20] Caleb Wan, *Confucianism and Higher Law Thinking in Ancient China*, 10 REGENT J. INT'L L. 77, 77-104 (2014).

Confucian text *Doctrine of the Mean*, as forming a natural law theory in traditional China.[21]

Another group of scholars under this broad second position argues that natural law in traditional China was grounded not in separate or combinatory philosophical concepts, but in the natural order or laws of nature as seen in various texts. Peerenboom, for example, argues that natural law existed in traditional China and was grounded in the laws of nature and the natural order; for this proposition, he uses as evidence a classical Chinese text called the *Huang-lao boshu*.[22] Li Hongmei shares a similar view, arguing that natural law in traditional China was grounded in the laws of nature as set forth by the philosophical concepts of *tianli* or *tiandao* (Heavenly Principles).[23] Karen Turner[24] and Tan Jiangping[25] also try to show that natural law in traditional China was grounded in the natural order, namely, the concept of the *dao* (the Way), which they argue functions as a universal standard underlying all things (in Turner's words, a "unified standard [which] served as a model for the social and political order"[26]). Steven Greer and Tiong Piow Law argue that natural law in traditional China was grounded in the natural order, but they use the *Book of Changes* for evidence to support their claim.[27] And, Derk Bodde, in a later paper, looks to the cosmological writings of the Han dynasty as evidence of laws of nature in traditional Chinese legal thought.[28]

Finally, there is the third position, which argues that there really was no natural law theory in traditional China, and, even if there was, it certainly cannot be found in Confucianism. Major

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[21] May Sim, *A Natural Law Approach to Law: Are the Confucians and the Thomists Commensurable*, 8 J. COMP. L. 158, 158-177 (2013).

[22] PEERENBOOM, *supra* note 4, at 76.

[23] Li Hongmei, *Zhongguo rujia yu xifang jindai ziranfa sixiang zhi bijiao* [*The Study on the Comparison of the Chinese and Western Thought of Natural Law*], 35 XIBEI DAXUE XUEBAO (ZHEXUE SHEHUIKEXUE BAN) [J. NW. U. (PHIL. & SOC. SCI. ED.)] 106, 106-108 (2005).

[24] Karen Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1, 1-44 (1992).

[25] Tan Jiangping, *Lun "Dao" de ziranfa yiyi ji qi dui Zhongguo chuantong falv wenhua de yingxiang* [*The Natural Law Meaning of "Dao" and its Influence on Chinese Traditional Legal Culture*], 2 JIANGXI SHEHUI KEXUE [JIANGXI SOC. SCI.], 93, 93-95 (2000).

[26] Turner, *supra* note 24, at 24.

[27] Steven Greer & Tiong Piow Lim, *Confucianism: Natural Law Chinese Style?*, 11 RATIO JURIS 80, 80-89 (1998).

[28] Derk Bodde, *Chinese "Laws of Nature": A Reconsideration*, 39 HARV. J. ASIATIC STUD. 139, 139-155 (1979). *See also* his earlier paper, *Evidence for "Laws of Nature" in Chinese Thought*, 20 HARV. J. ASIATIC STUD. 709, 709-727 (1957).

proponents of this position include Elena Consiglio[29] and Yu Ronggen.[30] The basic idea of this position (best epitomized by Consiglio's thesis) is that classical Confucianism was not primarily a legal theory and did not provide a "critical and conscious reflection upon the nature of law and morality," instead focusing on "solutions to important ethical, political, and philosophical questions."[31]

To sum up the discussion above, we can see there are a variety of different answers to the question as to whether natural law theory existed in traditional China. However, even though the scholarly answers have been different, the methodologies employed have largely been similar, as well as being similarly problematic. First, almost all of the aforementioned scholars have focused specifically on pre-Qin, or classical, Confucianism and Confucian texts from those periods. This temporally limited approach is problematic because it ignores other versions of Confucianism – most notably, Neo-Confucianism – which are much more cosmologically oriented and therefore arguably more promising sources of natural law thinking than classical Confucianism, which was not imbued with cosmological concerns. Indeed, even Elena Consiglio – who argues that classical Confucianism cannot be understood as a natural law theory – admits in a footnote that "other versions of Confucianism, by contrast, maybe considered compatible [to natural law theory] to the extent they rest upon foundationalist premises."[32]

Second, the preferred methodological approach largely seems to be picking disparate, various concepts and/or quotes from various Chinese philosophical texts as evidence of natural law thinking,[33] or looking at one single text for such evidence.[34] This is problematic because such a cherry-picking approach is artificial and

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[29] Elena Consiglio, *Early Confucian Legal Thought: A Theory of Natural Law?*, 2 RIVISTA DI FILOSOFIA DEL DIRITTO 359, 359-380 (2015).

[30] YU, *supra* note 5, at 41-61, 132-133.

[31] Consiglio, *supra* note 29, at 377.

[32] *Id*. at 372, n. 15.

[33] *See, e.g.*, Bodde, *supra* note 28 (looking at passages from various philosophical texts to show that Chinese thinkers acknowledged laws of nature), Wan, *supra* note 20 (looking at various concepts, such as the Mandate of Heaven, over a five-thousand-year period of Chinese history to show that natural law thinking can be found in China), and Liu, *supra* note 17 (arguing that Confucianism, Daoism, and Mohism, along with various, discrete concepts such as *ren* (benevolence), *li* (ritual), and *dao* (the Way), all comprise natural law theories).

[34] *See, e.g.*, PEERENBOOM, *supra* note 4 (focusing on the *Huang-lao boshu* text as a source of natural law thinking), and Sim, *supra* note 21 (focusing on the *Doctrine of the Mean* text as a source of natural law).

does not give the sense of a truly unified, coherent natural law theory in traditional China. Rather, the preferred methodological approach would be to investigate the Chinese philosophical tradition and query if there were specific, single thinkers who explicated a natural law theory in a coherent, systematic manner. If the answer to this question is "yes, there were such thinkers," then we can more persuasively argue that natural law ideas and thinking did exist in traditional China through a holistic and complete study of that thinker's philosophical universe. If, however, the answer is "no, there were not," and we then have to resort to cherry-picking certain concepts or quotes from different texts or thinkers, then the argument that natural law thinking existed in traditional China becomes less persuasive. One, after all, can always select ideas or concepts from the vast Chinese philosophical tradition to prove his/her point.

A methodological focus on specific, individual thinkers and their philosophies as a whole also allows us to better compare such thinkers with natural law thinkers in the Western tradition, such as Aquinas, often viewed in Western natural law studies as the "paradigmatic" natural law thinker.[35] It allows us to compare "apples with apples," rather than compare discrete, cherry-picked concepts from the Chinese philosophical tradition with specific, individual Western natural law thinkers. A good comparison with Western natural law theory – which has largely been ignored in the existing scholarship on natural law thinking in traditional China – will also help us to better understand what is different about natural law thinking in traditional China and what natural law theories in traditional China might be able to contribute to natural law studies more broadly.

Contrary to most existing scholarship on natural law in traditional China, I broadly argue that Neo-Confucianism (and not classical Confucianism) is the most promising source for natural law thinking, and I follow the aforementioned methodological approach of focusing on specific philosophers and looking at their thought, holistically and comprehensively. Specifically, my thesis in this paper is that Ming dynasty Confucian philosopher Wang Yangming (1472-1529)'s[36] philosophical system can be understood

[35] *See* MARK MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 1 (2006) (arguing that Aquinas is the "paradigmatic natural law theorist").

[36] For biographical and philosophical orientations to Wang Yangming, see WANG YANGMING, INSTRUCTIONS FOR PRACTICAL LIVING AND OTHER NEO-CONFUCIAN WRITINGS BY WANG YANGMING (Wing-tsit Chan trans. & annot., Columbia U.

as a coherent, integrative natural law theory. In Wang's system, the natural law and its norms are not only in, but actually are, the human "heart-mind" (*xin*) itself, equivalent to "Heavenly Principle" (*tianli*). They are discoverable via human reason, as seen through Wang's concept of "Pure Knowing" (*liangzhi*). I also hope to show that Wang's natural law theory is one that is based on, and therefore can accommodate, various sources and bases, including the eternal order of the cosmos, self-evident values, and practical reason. Indeed, Wang's philosophical system is arguably the closest traditional China has to a coherent natural law theory akin to Western natural law theory, containing elements similar to Aquinas' and also Aristotle's natural law ideas. Furthermore, Wang is an interesting figure to study because he was not only a philosopher but also an active official and law enforcement officer. Therefore, analyzing Wang gives us an opportunity to see how his natural law ideas affected his political and legal judgments and policies.

With respect to existing scholarship specifically on Wang Yangming's legal ideas, there have been a handful of articles (in Chinese language), which attempt to set forth Wang Yangming's legal thought, but none of them explicitly analyze it in natural law terms or discuss it as a potential natural law theory.[37] Other scholars[38] have pointed to Wang Yangming as a possible source of natural law thinking in traditional China that is akin to Western natural law thinking, but they do so only in passing; they do not

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Press, 1963); TU WEI-MING, NEO-CONFUCIAN THOUGHT IN ACTION: WANG YANGMING'S YOUTH (1472-1509) (1976), JULIA CHING, TO ACQUIRE WISEDOM: THE WAY OF WANG YANG-MING (1976); and GEORGE L. ISRAEL, DOING GOOD AND RIDDING EVIL IN MING CHINA: THE POLITICAL CAREER OF WANG YANGMING (2014). For a fuller biography of the voluminous literature on Wang Yangming in English, Chinese, and Japanese, I recommend referring to the "Works Cited" section of Israel's book.

[37] Li Ming, *Zhenzhi duxing, chunfeng meisu: Wang Shouren falv sixiang tanwei* [*Carrying Out True Knowledge, Being Honest & Pure and Beautifying the Customs*], *in* LIXING YU ZHIHUI: ZHONGGUO FALV CHUANTONG ZAI TANTAO [RATIONALITY AND WISDOM: A FURTHER DISCUSSION OF THE CHINESE LEGAL TRADITION] 452, 452-466 (Zhang Zhongqiu ed., 2008); Xu Xiaoguang, *Wang Yangming "De xian fa sui" sixiang jianlun* [*Analysis on Wang Yangming's Thoughts of "Morality First and Law Later"*], 3 Guizhou shifan daxue xuebao (shehui kexue ban) [J. GUIZHOU NORMAL U. (SOC. SCI.)], 19, 19-23 (2015); Duan Zhizhuang, *Cong Song-Ming lixue jiaodu kan Zhongguo chuantong falv sixiang* [*Discussion on Chinese Traditional Legal Ideology from Philosophy Li in the Song and Ming Dynasty*], 24 SHIYAN ZHIYE JISHU XUEYUAN XUEBAO [J. SHIYAN TECH. INST.] 58, 58-62 (2011).

[38] The two scholars are MacCormack, *supra* note 14, at 119, and Hu Shih, *supra* note 6, at 152.

fully elucidate, set forth, or analyze Wang's theory. Nor do they attempt to make connections between Wang's natural law ideas and his career actions as a judicial official and magistrate to investigate what influence his natural law ideas had on his legal decision-making. In this sense, my paper can also be seen as helping to develop their arguments more fully, namely the "moral" theory of natural law identified by MacCormack.[39] To my best knowledge, this paper is the first in a Western language to fully set forth Wang's philosophical system as a natural law theory and to analyze its possible impact on Wang's legal and political decision-making.

From a more macroscopic level, this paper hopes to make the following scholarly contributions. Most immediately, I hope to deepen our understanding and appreciation of traditional Chinese law and legal theory and specifically on Confucianism and law. More broadly, this paper also hopes to contribute to the fields of comparative jurisprudence and pluralist legal theory by arguing that coherent, fully-formed natural law theories can also be found in the Chinese Confucian tradition, despite the lack of the term "natural law" (the example of Wang Yangming shows us that we cannot think of classic, topical issues in analytical jurisprudence, such as natural law, as simply limited to the Western or Anglo-American canon). In this sense, we should broaden what is considered the traditional canon of natural law thinkers.

Finally, before we proceed into this paper, one might legitimately query why the comparison is against Western natural law theory – i.e., using Western natural law as the baseline for comparison. In other words, rather than asking how Wang Yangming's natural law theory was similar to that of Aquinas', why should we not rather ask: Did the Western legal tradition have anything akin to Wang's thought, or did the Western legal tradition have anything akin to certain philosophical concepts in Wang's thought?[40] The answer is four-fold. First, and most simply, the pre-existing scholarly question and scholarly debate I am responding to in this paper have been already framed by both Western and Asian scholars by using Western natural law as the baseline (i.e., "was there natural law in traditional China?"). Second, as mentioned earlier, the specific term we know in Western jurisprudence as "natural law" (i.e., *lex naturae*) or its modern Chinese equivalent (*zi ran fa*) did not exist in traditional Chinese

[39] MacCormack, *supra* note 14, at 105, 118-119.

[40] I am thankful to Arif Jamal and Gary F. Bell for raising these important questions and issues.

legal discourse.[41] However, even though the specific terminology or vocabulary did not exist in traditional China, natural law ideas and natural law thinking did, and it is conceptually helpful to refer to such ideas simply as "natural law." Since I am using the term "natural law" in this paper, and since such term was born in Western legal theory, it therefore makes sense to use Western natural law, and its paradigmatic thinkers, as baselines for comparison.

Third, the field of legal theory today more generally has been dominated by Western modes of discourse. This does not have anything to do with academic imperialism. Such a phenomenon makes sense given that legal theory has played a much larger role in current and historical discourse in the Western world than in traditional or contemporary China. Fourth, I should just point out here that there is no specific reason why we must frame the scholarly question using the term natural law ("was there natural law in traditional China?"). One could easily frame the question using more culturally neutral terms, such as "was there non-positivist approaches to law and legal thought in traditional China"?[42] However, as mentioned earlier in this paragraph, the scholarly question and debate have already been framed in terms of "natural law," so I do not see a big reason to reframe or reword the larger debate here.

This paper proceeds as follow. The second section briefly deals with the issue of defining natural law for purposes of this paper and sets out the analytical framework. The third section sets forth Wang's philosophical system and explains how it can be understood as a natural law theory. The fourth section considers the question of the effect of Wang's natural law ideas on human law and legal and political decision-making; to that end, I will look at Wang's political writings as well. The paper then concludes.

II. THE ANALYTICAL FRAMEWORK – HOW DO WE DEFINE NATURAL LAW?

Before we delve into the details of Wang's philosophical system as a natural law theory, we must deal with one foundational question: What exactly is "natural law?". This is not an easy question to answer, and, moreover, there is no single, unified

[41] Zhang & Luo, *supra* note 2.
[42] I thank David Frydrych for this point.

definition of natural law. As the oldest theory of law, natural law has a history of over twenty-five hundred years with numerous varieties and doctrines of natural law throughout the centuries,[43] for example, traditional or classical natural law theory (epitomized by thinkers such as Aquinas) and modern natural law theories (epitomized by thinkers such as Finnis).

Despite the difficulty in setting out a uniform definition of "natural law," all natural law theories have some characteristics in common. What is constant in all natural law theories, and the working definition of "natural law" that I shall use in this paper, is that natural law is constituted of "objective, moral principles which depend upon the nature of the universe and which can be discovered by reason."[44] Furthermore, these principles provide a "rational foundation for moral judgment" that "always remain true," even if they might be disregarded or misunderstood in real life.[45] These principles are also universal and not human-made.[46] And regardless of which specific variety of natural law one ascribes to, all natural law theories argue that the status of what is "law" does not depend primarily on social facts (e.g., how it was promulgated in a certain jurisdiction), but on some additional factors external to that jurisdiction.[47] This, collectively, is what I mean by "natural law" in this paper.

In setting forth what I see as Wang's natural law theory, I rely on Ratnapala's analytical framework for understanding and discussing any natural law theory generally. As Ratnapala argues, any natural law theory must answer two discrete questions: first, how do we discover and/or know the natural law; and, second, what is the natural law's effects on human law?[48] For the first question, different varieties of natural law have had different answers, including looking to the eternal order of the universe, divine will (of God), rules of nature, practical reason, self-evident reason, the "moral right" of certain communities to "determine the terms and direction of social cooperation,[49] teleology, and natural requirements of life.[50] Regarding the second question, if human

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[43] MDA FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 84 (8th ed., 2008).
[44] *Id*. at 84.
[45] *Id*.
[46] SURI RATNAPALA, JURISPRUDENCE 122 (2009).
[47] IAN MCLEOD, LEGAL THEORY 17 (6th ed., 2012).
[48] RATNAPALA, *supra* note 46, at 122.
[49] SCOTT SHAPIRO, LEGALITY 43 (2011).
[50] RATNAPALA, *supra* note 46, at 124.

law conflicts with the natural law, the possible answers are either that there is no moral obligation to obey that law or that there is no legal obligation to obey that law.[51]

Using the above analytical framework, how does Wang fit? As I hope to show in this paper, Wang is arguably clearer as to the first question (i.e., sources of natural law and how we discover what it is); he grounds his natural law vision on various bases, including the eternal order of the universe, self-evident values, and rules of nature which are contained in, and comprise, each person's heart-mind. As to the second question on effects on human law (or more broadly, natural law's effects on political and legal decision-making), Wang's answer is not as clear, but documentary evidence (from his various writings) seem to suggest that he believed that natural law principles could at times over-ride human law.

III. WANG YANGMING'S PHILOSOPHICAL SYSTEM AS NATURAL LAW – HOW DO WE DISCOVER / KNOW WHAT THE NATURAL LAW IS?

In this section, I set forth the important aspects of Wang's philosophical system, arguing it can be understood as a natural law theory. To be sure, there are numerous studies on Wang Yangming's philosophy (on which I sometimes rely on in this section to help explicate some key philosophical concepts in his thought), but none of these studies, to my knowledge, approach it from a legal theory perspective or argue it is a natural law theory.[52] To highlight my argument that Wang's philosophical system can be understood as natural law theory, I will also undertake comparisons with key Western natural law theorists, namely Aquinas, and to a lesser extent, Aristotle.

First, it is important to set out what Wang hoped to accomplish with his philosophy. Simply put, Wang wanted to understand how a person could cultivate herself to become a sage. A sage would be someone who was able to make morally correct decisions all the time and with spontaneity. Because of this, the sage would live a good, fulfilling life. Wang was also driven by a teleological conviction that all humans ultimately tended toward such a goal.

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[51] *Id*. 123-124.

[52] There are many studies on Wang Yangming's philosophies, but none analyze it in legal theory terms, let alone from a natural law perspective. For an overview of key studies, see accompanying text, *supra* note 36.

The ultimate goal of Wang's philosophical system – and natural law theory – is not unlike the goals of Aquinas' and Aristotle's natural law. Aristotle also had a teleological conviction regarding human development, and his philosophical thinking (and natural law ideas) was aimed at the goal of helping human beings march toward a life of socialization, ultimately culminating in life in a *polis* (city-state).[53] For Aquinas, natural law was important because it played a role in helping direct human beings to a happy life and fulfillment as God's creations, growing closer to God and God's teachings.[54] Thus, all three thinkers saw natural law and natural law ideas as playing an important role in helping to improve a person's life.

The metaphysical center of Wang's philosophical system – and his natural law theory - is *Li* (I capitalize this, to differentiate it from *li*, or ritual propriety, which is a different Chinese character), which is commonly translated into English as "Pattern, Principle, or Coherence." For purposes of this paper, I will refer to *Li* as "Principle."[55] Principle can be understood as the metaphysical foundation of Wang's entire philosophical system. Neo-Confucian thinkers like Wang observed that the universe had a clear order and that there were certain patterns in the world (e.g., seasonal cycles, patterns of biological development), and, thus, they adopted the term Principle as the underlying "metaphysical DNA"[56] of the universe.[57] Principle gives the entire world and everything in the world form and meaning,[58] as well as physical and moral shape.[59] It is naturally there in the actual world, and it is manifested

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[53] *See* Aristotle, *Politics* 1.1252(b), 1.1253(a), *in* ARISTOTLE IN 23 VOLUMES, VOL. 21 (H. Rackham trans., Harvard U. Press, 1944). *See also* RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE 16 (4th ed., 2015).

[54] John Finnis, *Aquinas' Moral, Political, and Legal Philosophy*, *in* STAN. ENCYCLOPEDIA PHILOSOPHY (Edward N. Zalta ed., 2017), https://plato.stanford.edu/archives/spr2017/entries/aquinas-moral-political.

[55] I adopt this translation (Principle) of *Li* for a few reasons. First, it is the standard, most commonly utilized translation in the English language-literature on Neo-Confucianism. *See* JEELOO LIU, NEO-CONFUCIANISM: METAPHYSICS, MIND, AND MORALITY 6 (2017) (writing that, out of all the various translations of *Li*, the use of "Principle" has "now become a standard usage"). Second, and more importantly, I agree with Wing-Tsit Chan's defense of "Principle" as probably the most accurate English translation of *Li*, as *Li* "is not only a principle of organization, but also principle of being, nature, etc." *See* REFLECTIONS ON THINGS AT HAND: THE NEO-CONFUCIAN ANTHOLOGY 368 (Wing-Tsit Chan trans. & ed., Columbia U. Press, 1967).

[56] PHILIP J. IVANHOE, ETHICS IN THE CONFUCIAN TRADITION: THE THOUGHT OF MENGZI AND WANG YANGMING 23 (2d ed., 2002).

[57] STEPHEN C. ANGLE, SAGEHOOD: THE CONTEMPORARY SIGNIFICANCE OF NEO-CONFUCIAN PHILOSOPHY 31-32 (2010).

[58] IVANHOE, *supra* note 56, at 35.

[59] *Id*. at 22.

everywhere.[60] It can also be understood as "principle of organization which constitutes the essence of a thing,"[61] including humans, animals, and objects. Principle gives the world and each and everything in the world structure, as well as a direction and process of development.[62] Every single thing has its own Principle, but at the same time, there is unity of Principle; the Principle of any single thing is part of the Principle of the entire, integrated universe which ties together all Principles of every single thing.[63] Peter Bol has analogized this quality of the concept of Principle to "unified field theory" or a "theory of everything."[64] Furthermore, Neo-Confucian thinkers like Wang believed that all Principle – be it the Principle of a human being, a Principle of a strawberry, or a Principle of a tiger – are the same Principle.[65]

Principle, however, is not just descriptive. For Wang, it also has a moral dimension that "provides a way of saying how things should be."[66] In other words, not only does it give things structure and a process of development, but it also gives things their teleology

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[60] *Id*. at 46.

[61] WANG YANGMING, THE PHILOSOPHICAL LETTERS OF WANG YANGMING 123-124 (Julia Ching trans. & annot., Australian Nat'l U. Press, 1972).

[62] PETER K. BOL, NEO-CONFUCIANISM IN HISTORY 164-165 (2010).

[63] *Id*. at 166.

[64] *Id*.

[65] *Id*. Bol discusses two ways for understanding how this is possible. One way is a "theoretical supposition that follows" from the idea that the Principle of any single thing is part of the Principle of the entire, integrated universe. As Bol notes,

> suppose there was a seed that contained all the *li* [Principle] for the entire unfolding of the universe and everything in it and that every single created thing had that seed. It follows that each person (and each tree) has the *li* [Principle] for being itself and at the same time the *li* [Principle] for all other things. *Id*. at 166-167.

The second way to understand this claim is through what Bol calls 'cognition.' Neo-Confucians like Wang believed that humans are different from other beings in the universe because their *qi* is more transparent and their heart-mind is Principle, and therefore allows them to see Principle and the "structure, process, and functional relationships." As Bol writes,

> when Neo-Confucians suppose that *li* [Principle] gives structure, process, and function to all things, they are identifying something that also makes each and every thing coherent and comprehensible. Let us take *li* [Principle] to stand for the 'coherence' everything inherently possesses; we can then see that the coherence we apprehend in things is the same coherence that every other thing has, and in fact is the character of our own mental process. To put this another way: just as any given thing has its own coherence, the coherence of one thing is same coherence as that of another; coherence itself does not vary even when each thing has its own coherence. To see the *li* [Principle] of something is to see its coherence, and that coherence is both there in the thing and in our mind. *Id*. at 167-168.

[66] *Id*. at 165.

and their distinctive function. He frequently equated it also to *Tianli*, frequently translated as "Heavenly Principle," a single, unified source for both the moral and physical structure of the universe.[67] Julia Ching has described Heavenly Principle as representing the "supreme moral truth or the plenitude of moral goodness in which man participates, as well as that to which our moral judgments and actions should conform."[68] Therefore, in Wang's thought, Principle is both descriptive and normative.[69]

Wang's notion of Principle perhaps can be analogized with the idea of eternal law in Aquinas' natural law system. Aquinas' eternal law is similarly both descriptive and normative. For Aquinas, the eternal law is God's great plan for the universe, known only by God.[70] Since God created the universe, it naturally follows that the eternal law gives structure to God's creations (e.g., the physical body of a human, the feathers of a bird). At the same time, however, the eternal law also gives humans (and, indeed, all things) normative direction and function in the world.[71] This direction is important because God has given humans a destined goal, which is eternal happiness, and the eternal law helps guide humans through this teleological journey to this desired end.[72]

Having discussed the metaphysical foundation (i.e., Principle) of Wang's thought, we can now proceed to the next major concept in Wang's philosophical system, which is *xin*, the "heart-mind."[73]

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[67] IVANHOE, *supra* note 56, at 25.

[68] WANG, PHILOSOPHICAL LETTERS, *supra* note 61, at 124.

[69] This of course may be problematic from a Western philosophical perspective, given the emphasis on the Humean "is/ought" distinction. However, the "is/ought" distinction never seemed to have been a major issue or problem for philosophers like Wang. One reason seems to be, as Justin Tiwald and Bryan W. Van Norden note, that there is quite often an intuitive and

> intimate connection between matters of fact and judgments of value. For example, [Principle] accounts for the following pairs of descriptive and prescriptive facts: A human will lose concentration if she does not get enough sleep in a twenty-four hour period. A surgeon should get enough sleep prior to going into the operating room.

READINGS IN LATER CHINESE PHILOSOPHY: HAN DYNASTY TO THE 20TH CENTURY 172 (Justin Tiwald & Bryan W. Van Norden eds., 2014).

[70] WACKS, *supra* note 53, at 19. *See* ST. THOMAS AQUINAS'S SUMMA THEOLOGICA, question 93, https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.

[71] *Id*. at 19. FREEMAN, *supra* note 43, at 100.

[72] FREEMAN, *supra* note 43, at 100.

[73] There are also various English translations of *xin*, including "heart," "mind," and "heart-mind." Chinese philosophers generally believed that *xin* was not only the physical, biology organ ("heart") in humans, but it also possessed the ability to think, analyze, perceive, and feel. Hence, I believe the term "heart-

It is literally the heart in our bodies, but it is also simultaneously more than that – it has a biological, moral, and intellectual role. All humans have this heart-mind, which has been described as a "center in man's being that is the source of all of his conscious and moral activity."[74] It is a "seat of consciousness"[75] that gives life and is the source of all goodness in human beings.[76] Furthermore, it can be understood as being "one with nature" and a "source of goodness as well as the principle of all conscious and moral activity, possessing within itself the power of guiding the human person to the highest goals of sagehood."[77]

Wang makes a key philosophical move by then equating the heart-mind directly with Principle and the Heavenly Principle. As he famously remarked, "[t]he heart-mind is Principle. Is there any affair in the world outside of the heart-mind? Is there any Principle outside of the heart-mind?"[78] Wang also posited that the heart-mind is the "embodiment of Heavenly Principle" and is "completely identical with the Heavenly Principle."[79] What is the implication of this equivalency of the heart-mind with the Principle and Heavenly Principle?

First, if we accept that Principle gives structure, a process of development, function, and unity to all things in the universe, and if the heart-mind, in turn, is also Principle, what follows is that the heart-mind itself has a natural, innate ability to know how everything in the universe is structured, what they all do, and how they should all fit and work together.[80] Furthermore, because all Principle is one Principle, each person is at one and united with the universe, with all other things, and part of a universal body via his heart-mind, forming "one body with Heaven, Earth, and all things."[81] Third, because Principle and Heavenly Principle are moralized concepts, and the heart-mind is now equated with them

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mind" is more appropriate. Hence, I use "heart-mind" as the English translation for *xin* throughout the paper. In addition, for translations on which I rely in this paper, which originally use "mind" or terms other than "heart-mind" for *xin*, I replace their terms with "heart-mind."

74 CHING, *supra* note 36, at 57.

75 WANG, PHILOSOPHICAL LETTERS, *supra* note 61, at 123.

76 CHING, *supra* note 36, at 55.

77 *Id*. at 66.

78 WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at 7. I follow Wing-Tsit Chan's translation here, except I use the term "heart-mind" rather than Chan's "mind" for *xin*.

79 *Id*. I follow Chan's translation except rather than translate *Tianli* as "Principle of Nature," as he did, I use "Heavenly Principle."

80 IVANHOE, *supra* note 56, at 35.

81 *Id.* at 35.

both, it follows then that all human beings, through their heart-mind, possess a "complete and perfect set of the principles that underlie, inform, and give meaning to all the objects and events in the . . . world."[82] Fourth, because (as Wang pointed out) there is no Principle outside the heart-mind (since the heart-mind itself is Principle and therefore already contains the totality of the resources of Principle and moral virtue), the heart-mind is in and of itself holistically complete, and thereby possesses the innate, natural ability to know what is good, to learn how to be good, and to do good (again, since Principle is moralized).[83]

This innate ability to know and do the good is what Wang Yangming eventually referred to as *liangzhi*, frequently translated as "Pure Knowing." It is an "inborn moral sense, common to all . . . ."[84] Pure Knowing represents a "perfect and fully formed moral disposition innate to human beings – a faculty one possessed and naturally operated flawlessly."[85] It allows all human beings to know what is right and what is wrong, providing the innate capacity to know and do good.[86] Analogized as a "sun,"[87] a "Buddhist's spiritual seal, mariner's compass," and a "miraculous pill,"[88] Pure Knowing is a sort of internal tutor which allows us to recognize, immediately and spontaneously, good and bad thoughts and "allows us to immediately eliminate bad thoughts from our [heart-]mind."[89] To support his position on Pure Knowing, Wang posits that [t]he heart-mind is naturally able to know. When it perceives the parents, it naturally knows that one should be filial. When it perceives the elder brother, it naturally knows that one should be respectful. And when it perceives a child fall into a well, it naturally knows that one should be commiserative. This is Pure Knowing and need not be sought outside.[90]

With Pure Knowing, since our heart-mind is Principle itself,

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[82] READINGS FROM THE LU-WANG SCHOOL OF NEO-CONFUCIANISM 105 (Philip J. Ivanhoe trans. & ed., Hackett, 2009).
[83] XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 109 (2000).
[84] CHING, *supra* note 36, at 107.
[85] IVANHOE, *supra* note 56, at 50.
[86] WANG, PHILOSOPHICAL LETTERS, *supra* note 61, at 124.
[87] IVANHOE, *supra* note 56, at 50.
[88] CHING, *supra* note 36, at 108.
[89] IVANHOE, *supra* note 56, at 135.
[90] WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at 15 (with some minor translation modifications on my part; for example, Chan translates *liangzhi* as "Innate Knowledge of Good," but I use Ivanhoe's translation of "Pure Knowing"). In addition, Chan translates *xin* as "mind" but I translate it as "heart-mind."

we will ultimately feel more connected with the entire world and universe; "we see that our [heart-]mind is the same as the Principles we see around us;" and, we will, in Wang's view, feel a "deep and undeniable connection between each of us and every aspect of reality."[91] We will all be one and able to see Principle in all things around us that we all have in common, which will link us and lead us to care about the world."[92] Wang's concept of Pure Knowing is not unlike aspects of Aristotle's thought. For example, Aristotle also believed that the source of ideal, good values was in human nature and not in external, transcendental values or principles.[93] This is akin to Wang's belief that goodness and perfection are in fact innate in human beings already. Indeed, Aristotle also believed that human beings have an inherent, innate "potential" for good.[94] Wang, however, went even further than Aristotle and had a much more optimistic assessment of human beings – through our heart-mind and Pure Knowing, Wang believed human beings are by nature already good, enjoying a "perfect and fully-formed moral disposition."[95]

How does Pure Knowing fit into what I set out as Wang's natural law theory? In what I set out as Wang's natural law theory, I believe it is equal to the Western natural law notion of natural law being discoverable by reason – one of the major characteristics in any natural law theory. In other words, it is Wang's natural law theory's answer to the question of how we know or discover what the natural law is. In other words, for Wang, the natural principles which are contained in our heart-mind are discoverable precisely because we have Pure Knowing. This is akin, arguably, to Aquinas' theory of natural law. Aquinas defines natural law as "participation in the eternal law by rational creatures." [96] In Aquinas' thought, human beings are rational creatures and are special and different from animals because humans, as God's creations, "partake of Eternal Reason, for that is what gives them their dispositional tendencies to their due act and purposes" toward

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[91] READINGS FROM THE LU-WANG SCHOOL, *supra* note 82, at 114.
[92] *Id*.
[93] WACKS, *supra* note 53, at 16.
[94] JAMES E. PENNER & EMMANUEL MELISSARIS, MCCOUBREY & WHITE'S TEXTBOOK ON JURISPRUDENCE 18 (5th ed., 2012). *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, question 91 (a2), https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.
[95] IVANHOE, *supra* note 56, at 50.
[96] *Quoted in* WACKS, *supra* note 53, at 18.

the good.[97] Put another way, we as humans have a special intellect which allows us via our own, innate insights and thinking to participate in the natural law and to grasp the essential principles of eternal law – the divine plan for human flourishing.[98] For Aquinas, we as human beings cannot know via direct knowledge what God is thinking, but rather "all those things to which man has a natural inclination, one's reason natural understands as good (and thus to be 'pursued') and their contraries as bad (and 'to be avoided').[99]

Wang's theory is similar to Aquinas,' but it actually goes further and is more empowering to humans. While Wang saw Principle shared by everything in the world (e.g., shared by humans, plants, and other animals), and Aquinas pointed out that "Eternal Reason" is something that only human beings have, Wang's philosophical system nevertheless similarly highlights the special distinctiveness of human beings, which are endowed with the heart-mind which gives them emotional, moral, and cognitive faculties that other animals may not enjoy. In Wang's theory, through the heart-mind and Pure Knowing, we can not only participate in the natural law but actually *know* Principle and Heavenly Principle (which, as stated before, can be analogized to Aquinas' "eternal law" concept), because, again, the heart-mind itself is Principle. For Aquinas, we can only participate in the eternal law. We are, in other words, limited to participation and perhaps grasping such principles. We can never actually have direct knowledge of the eternal law, but only derive certain inclinations toward the good. For Wang, however, we have direct knowledge of the Principle and have the full moral complement of natural law principles already in us that direct us to the good.

In this sense, Wang's philosophical system stands out among his other Neo-Confucian predecessors, namely, Zhu Xi (1130-1200). Zhu Xi, in contrast to Wang Yangming, did not believe the heart-mind itself was Principle itself; and, hence, we as human beings can enjoy Pure Knowing. For Zhu Xi, morality is "transcendent and independent of human conceptions," whereas, for Wang, it is

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[97] *Quoted in* J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 80 (2014). *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, question 91 (a2), https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.

[98] WACKS, *supra* note 53, at 18-19.

[99] *Id*. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, question 94 (a2), https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.

"privileged to the human mind."[100] As such, Zhu Xi believed that methodical, circumspect investigation of things (*gewu*) – most effectively through serious study of the Confucian classics and similar texts across a number of years – was needed to understand and make manifest Principle in one's life properly.[101] Hence, Zhu Xi would not agree with Wang that we already necessarily have direct knowledge of the Principle and possess the full moral complement of natural principles in us that would guide us to realizing the natural good. Zhu Xi would hold that we still need to do concentrated and sustained external searching and studying of Principle in order to truly understand it and bring it about in our lives. In this sense, we can see that Wang's philosophical system is arguably closer to Aquinas' than Zhu Xi, since Aquinas also believed that humans already have, by virtue of being God's creation, eternal reason and a special intellect which allows us to participate in the natural law and ultimately in God's plan for humanity.

So, what exactly does Wang consider naturally good? For Aquinas, the good we intuitively know is comprised of things like procreation, knowledge, society, and reasonable conduct.[102] For Wang, it is compassion, filial piety, ritual propriety, humaneness, community, and unity.[103] The "moral paragon" – one of the highest forms of good – was for a human to view the "entire universe as his own body, or more precisely, to see himself as part of the universal body."[104] This emphasis on unity, socialization, and community as comprising the good can be seen in Aquinas but also in Aristotle's thought, which argued that the teleological goal for humans was the inclination toward socialization and ultimately *polis* life.

Therefore, in Wang's powerful natural law theory, self-cultivation and following the natural law is simply a process of letting our Pure Knowing shine through and take control, so we make the morally correct decisions spontaneously and without

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[100] LIU, *supra* note 55, at 139-140.

[101] PATRICIA BUCKLEY EBREY, THE CAMBRIDGE ILLUSTRATED HISTORY OF CHINA 203 (1996).

[102] WACKS, *supra* note 53, at 17. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, question 94 (a2), https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.

[103] *See The Community Compact for Southern Ganzhou*, *in* SOURCES OF CHINESE TRADITION: VOLUME 1 (FROM EARLIEST TIMES TO 1600) 854 (Wm. Theodore de Bary & Irene Bloom eds. & comps., 2d ed., 1999); ISRAEL, *supra* note 36, at 38.

[104] IVANHOE, *supra* note 56, at 21.

hesitation. This is Wang's doctrine of *zhixing heyi*, or the "Unity of Knowledge and Action." Wang's point here can be summarized as follows: we all have inborn, innate Pure Knowing, which allows us to discern and know the natural law principles inside ourselves. But for Wang, knowing about something and doing it are precisely the same. For example, if we study books to understand the Principle of filial piety in the parent-child relationship, we will be wasting our time because this Principle is already in our heart-minds. When we love and respect our parents, we are simultaneously knowing and acting out our filial piety.[105] As Wang argues, when it is winter, we will naturally know it is winter, think of the cold, and spontaneously seek ways to provide warmth for our parents.[106] In other words, Wang views knowledge as "the beginning of action and action [as] the completion of knowledge."[107] The knowledge of it being winter and the act of thinking of, caring of, worrying about our parent's ability to stay warm are connected and cannot be separated. As another example, when we see flowers, we appreciate them; the knowledge of beauty is natural, and the act of appreciation are linked together.[108] In short, the Unity of Knowledge and Action can be summarized this way: for Wang, we cannot act without thinking, and we cannot think without acting.[109]

At this point, some might think that Wang's theory of natural law is too idealistic and too optimistic. Some might also argue that his notion of the heart-mind and Pure Knowing, as providing all of us a complete, holistic, already fully developed moral disposition, is not realistic because certainly in society we have people who do not seem to follow the natural law principles contained in their heart-mind. Our society has, for example, evil murderers and criminals. How does Wang explain the existence of evil in the world? Wang believed even these people had Pure Knowing; it was just simply obscured (as Wang remarked, "even robbers and thieves know they should not steal. When they steal, they still feel shame within them.").[110]

Like many Neo-Confucian thinkers of his time and who preceded him, Wang believed that everything had Principle, and all

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[105] LEE DIAN RAINEY, CONFUCIUS AND CONFUCIANISM: THE ESSENTIALS 172 (2010).
[106] WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at, 8.
[107] *Id*. at 30.
[108] RAINEY, *supra* note 105, at 173.
[109] I thank Peter K. Bol for this point.
[110] READINGS FROM THE LU-WANG SCHOOL, *supra* note 82, at 113.

Principle was one Principle in the world. However, we can't deny that things look different in the world – a table looks different from a chair, and a hippo looks different from a panda. In Wang's (and Neo-Confucian) metaphysics, this is because things are made up of both Principle and *qi* (frequently translated as "Ether" or "Material Force"). *Qi* is what the universe is made up of, and it is the different combinations of *qi* and Principle that makes things different.[111] Pure Knowing is also lodged in this *qi*, which in turn can interfere with the operation of Pure Knowing, letting selfish desires and selfish thoughts (which include, for Wang, "love of sex, wealth, and fame" and also "idle and sundry thoughts"[112]) to come up and "take hold" of the heart-mind.[113] Put another way, *qi* may "interfer[e] and clou[d] our heart-mind" which "causes us to see ourselves as separated, alienated" from everything in the physical world, including other humans and animals, creating selfish desires which in turn "make us less attune" to Pure Knowing.[114] The possible obstruction of Pure Knowing by *qi* and the resultant selfish desires can be compared to Aquinas' idea that our passion and malevolence may also cause obstructions or obscuration of the application of our practical knowledge to participate in the natural law,[115] although Wang is still more optimistic than Aquinas in that he would not have ascribed to a doctrine of original sin.

How much your Pure Knowing is obstructed depends on the quality of your endowment of *qi*. Principle governs this endowment, so it is a matter of fate.[116] Therefore, *qi* also helps explain why some people appear to be hardened criminals while others are kind-hearted angels. The murderer may have, quantitatively, more, or qualitatively, lower-quality, *qi*, whereas Mother Theresa may have had a better quality *qi*. But the most important point here is that, for Wang, everyone came become a sage. All that people need to do is purify their Pure Knowing, which is still like the bright sun. All that's happened is that the clouds of selfish desire have temporarily obscured its functioning.[117] In other words, we are never fully separated from

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111 David Tien, *Metaphysics and the Basis of Morality in the Philosophy of Wang Yangming*, *in* DAO COMPANION TO NEO-CONFUCIAN PHILOSOPHY 295, 297 (J. Makeham ed., 2010).
112 WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at 49.
113 IVANHOE, *supra* note 56, at 86.
114 READINGS FROM THE LU-WANG SCHOOL, *supra* note 82, at 106.
115 WACKS, *supra* note 53, at 17.
116 IVANHOE, *supra* note 56, at 86-87.
117 *Id*. at 50.

the natural law and its principles. Our Pure Knowing is always there to help us discover and know the natural law principles encapsulated in our heart-mind. With respect to how we remove selfish desires and ensure the best functioning of our Pure Knowing, we have to recognize our selfish desires and extend our Pure Knowing, thinking ethically about everything we do and cultivating awareness.[118] We must be like a "cat catching a mouse," constantly engaging in the moral problems we face in life.[119]

To summarize this section, on the whole, I have argued that Wang's philosophical system – which I have presented above – can be understood as a natural law theory. The foundational natural law and the moral norms it encapsulates are not only in, but are, the human heart-mind itself, based on Heavenly Principle. They are discoverable via reason and natural knowledge as seen through Wang's concept of Pure Knowing. And, although we may have selfish desires which go against these natural law principles, they can be overcome, and we will eventually extend our Pure Knowing and be able to act morally in a spontaneous way. Wang's natural law theory thus can also be understood as a natural law theory built on various sources and bases. As seen above, it is based on the eternal order of the universe and cosmos (i.e., Principle, Heavenly Principle), in rules of nature (also Principle), and self-evident value and practical reason (i.e., the concept of Pure Knowing).

Having tackled the first question on how we discover or know what the natural law is in Wang's philosophical system, we proceed to the second question: what does Wang's theory say on the question of what effect natural law has on human law?

IV. WANG YANGMING'S PHILOSOPHICAL SYSTEM AS NATURAL LAW – WHAT'S THE EFFECT OF NATURAL LAW ON HUMAN LAW?

As indicated in the introduction, any theory which purports to be a natural law theory must answer the question of what the effects of natural law are on human law. There are two major answers that natural law theory has generally offered in response to this question. First, human law that runs counter to the natural law is not a law at

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[118] *Id*. at 107. READINGS FROM THE LU-WANG SCHOOL, *supra* note 82, at 106, 113.

[119] IVANHOE, *supra* note 56, at 107-108.

all, and there is no moral or legal obligation to obey it. Second, human law that runs counter to the natural law is not ideal, and it may be defective as law, and there is no moral obligation to obey it, but there may still be a legal obligation to obey it. The most famous Western natural law thinker who is commonly understood to have espoused the former position is Augustine ("an unjust law is no law"),[120] with Aquinas echoing the latter (Aquinas generally argued that laws that run counter to the natural law lose their obligatory character in a moral sense and is a corruption of law, but one may still have a legal obligation to obey it, especially if "greater scandal would result from disobedience"[121]).[122]

What is Wang's position? First, a note on methodology. Wang did not leave behind any full, formal treatises on law,[123] so, therefore, we must look to his life and life actions as an official, study his policies, and consult his political writings (e.g., writings on policy, policy recommendations). Based on such writings, Wang's position on this question is unfortunately not entirely clear, but the evidence suggests that he might be a more categorical natural law thinker like Augustine, who believed there could be cases where there is no moral or legal obligation to obey human law which conflicts with the natural law. First, what does seem to be clear is that Wang acknowledged that there were natural law principles higher than human law. Second, he would probably agree that a human law or human policy or human decision counter to natural law would be selfish, evil, defective, and lose its moral binding power. As evidence to support the above assertions, I will make the following more specific points. First, it appears that Wang suggested that legal officials should hear cases based on natural law principles and not necessarily human law or human-made legal principles. Second, Wang's strong opposition to litigation (even though it was technically allowed under human law) seems to be driven by his natural law theory. Third, Wang seems to have also expressed hesitation to punish people under his jurisdiction according to dynastic, human-made law, suggesting instead that natural law, higher-level norms were more important. Collectively, such beliefs on Wang's part may suggest that he held a stronger or

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120 RATNAPALA, *supra* note 46, at 137.
121 PENNER & MELISSARIS, *supra* note 94, at 26.
122 WACKS, *supra* note 53, at 19. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, question 96 (a4), https://archive.org/stream/treatiseonlawsum017571mbp/treatiseonlawsum017571mbp_djvu.txt.
123 ISRAEL, *supra* note 36, at 178.

more categorical position (perhaps akin to Augustine) that human laws which ran contrary to natural law imposed no moral or legal obligation.

First, Wang suggested that legal officials should hear cases based on natural law principles and not necessarily on human law or human-made legal principles. For example, one official who was very much attracted to Wang's teaching complained to Wang that, although he was really keen on following and learning Wang's philosophy, he probably could not do so because his "duties of keeping records and presiding over litigations are so heavy."[124] In response, Wang replied to this official:

> When did I teach you to drop your work of keeping records and presiding over litigations and then to pursue learning in a vacuum? Since you have your official duties, you should pursue learning right in those official duties. Only then will you be truly investigating things. For instance, when you interrogate a litigant, do not become angry because his replies are impolite or become glad because his words are smooth; do not purposely punish him because you hate his effort to solicit help from your superiors; do not bend your will and yield to him because of his pleading; do not decide the case carelessly on the spur of the moment because you are too busy with your own trifling affairs; and do not settle it according to the opinions of others because people on the side praise you, criticize you, or are building[125] up a case against you. To do any of these is selfish. You need only follow what you know yourself. You must carefully examine yourself and control yourself, lest your heart-mind become in the least prejudiced and destroy the truth as to who is right and who is wrong.[126]

The key line above is Wang's exhortation to the official that in hearing legal cases, he needs "only follow what you know yourself."[127] In other words, in hearing cases, Wang suggested that one must use his natural law philosophy built on Pure Knowing

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[124] WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at 197.
[125] *Id*. at 197.
[126] *Id*. at 198. I use Chan's translation, save for minor changes; here, I translate *xin* as "heart-mind" (Chan translates it as "mind").
[127] *Id*.

and the heart-mind. One cannot settle cases simply on selfish desires or emotions but rather use as a higher standard "what you know yourself." It follows from Wang's theory that "what you know yourself" is referring to Pure Knowing and the principles of natural law and morality that are fully contained in your heart-mind. This higher, natural law standard will guide any legal official to the correct decision in a case. Indeed, Wang does not mention mastery of specific laws or statutes as the key, but rather, following higher norms through your Pure Knowing and fighting against selfish desires.

Similarly, in other passages, Wang argued that in determining whether the conduct was right or wrong, there was no need to clearly know or memorize regulations or human law – what mattered was following the natural law principles in your heart-mind. For example, one disciple complained to Wang that the *Spring and Autumn Annals*[128] was not clearly written, was difficult to understand, and that, as a result, it was hard to judge whether certain recorded actions in the text were crimes or not.[129] To this, Wang explained that it was silly to "inquir[e] into its details" and suggested that the Heavenly Principle would allow us to judge whether something was a crime or not. For example, when "so-and-so murdered his ruler, the murder in itself was a crime."[130] In other words, Heavenly Principle – and not unnecessary factual details or details about specific laws – would be sufficient to help us determine whether a particular act would be a crime.

In another passage, Wang also argued that a sage need not concern himself with memorizing things like regulations, but should focus on natural law principles in the Heavenly Principle, which could guide our conduct. This suggests that Wang believed there were higher, natural law norms at play that were sufficient to guide our conduct. He said:

> That the sage is omniscient merely means that he knows the Heavenly Principle and that he is omnipotent merely means that he is able to practice the Principle of

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[128] The *Spring and Autumn Annals* is essentially a history of the twelve dukes of the ancient Chinese state of Lu from roughly 722 to 481 BC. Its structure is akin to that of a historical outline or timeline, reporting facts in a chronological, pithy order. Authorship was traditionally attributed to Confucius. The *Spring and Autumn Annals* was a revered work in the classical Confucian tradition and was believed by many Confucian officials to hold important lessons for morality and ethical governance.

[129] WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 36, at 20.

[130] *Id*. at 20.

> Nature. The original substance of the heart-mind of the sage is clear and therefore in all things he knows where the Principle of Nature lies and forthwith carries it out to the utmost . . . . A sage does not have to know all the names and varieties of ceremonies and music. But since he knows the [131] Principle of Nature, all measures, regulations, and details can be deduced from it. The fact that when he did not know he asked shows how the measure and pattern of the Heavenly Principle operates.[132]

In other words, for Wang, knowledge of the natural law norms in our heart-mind and based on Heavenly Principle would be sufficient for us to figure out "all measures" and "regulations" (i.e., human law). Such norms are higher than things such as "measures" and "regulations." Similarly, for Wang, it is ultimately enough just to know the natural law norms based on the Heavenly Principle; we don't need to have a list of explicit universal principles for conduct or a litany of regulations. These passages, above all, seem to collectively reflect Wang's belief that natural law was clearly superior to human law, which might not even have to be consulted in order to decide a case (or in other words, has no legal or moral binding force on the legal official).

Wang's strong opposition to litigation (even though it was technically allowed under human law) also seems to be driven by his natural law theory and his concern for higher, natural law norms. When Wang served as magistrate of Luling County (located in modern-day Jiangxi province) in 1509-1510, he was extremely disappointed with the excessive number of lawsuits and the general culture of litigation in the county.[133] Indeed, in a 1517 proclamation, he made in a later posting to Ganzhou, Wang expressed his views toward litigation in a clearly disparaging way:

> Have you seen any person who is violent, greedy, aggressive, and who encroaches upon others for his own selfish benefit, not detested and hated by others? The aim of those who stupidly resort to litigation is to struggle for benefits, but they do not necessarily obtain them. They aim to expose justice but justice is not necessarily exposed.

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[131] *Id*. at 201. I use Chan's translation here, except I translate *xin* as "heart-mind," not "mind".
[132] *Id*. at 202.
[133] ISRAEL, *supra* note 36, at 35.

> Externally they arouse the hatred of government officials and internally they destroy their own family heritage. They bring disgrace to their ancestors above and give trouble to their offspring below. Why take so much trouble to engage in litigation? Because it is a common practice in this part of the country to struggle for benefits and vigorously to pursue litigation, I have therefore sincerely and earnestly spoken as I have. I am ashamed that I am unable to rule by virtue and merely instruct you with words. Elders, please make a special effort to follow my words and each and all admonish the young. Don't forget.[134]

I believe we can understand Wang's hostility toward litigation because he believed it fundamentally went against the higher level, natural law norms in his philosophical system. Recall that Wang considered community and unity to be some of the "good" in his philosophical system. As the passage above suggests, Wang believed litigation was harmful to society not only because it was selfish, but even almost evil (note Wang's dramatically derogatory language such as "disgrace to ancestors"). Litigation fundamentally goes against the ultimate goals of unity and seeing yourself as part of the body of the entire world, connected with other persons and the universe through Principle. Litigation separates us, breeds mistrust, and goes against the fundamental natural law norms of unity and seeing us in connection and a community with others. Indeed, there is even evidence to suggest that Wang – on the issue of litigation – followed what he saw as higher-level, natural law norms rather than human law. We know, for example, that at one point during his governance of Luling County he reduced the number of litigation cases he had to hear by only hearing cases that involved life or death issues.[135] His views on litigation also seem to reflect his categorical, strong views on natural law over human law – litigation was to be avoided, even though it was legally permitted under dynastic law. When litigation conflicted with natural law, it did not have much moral or legal obligatory power.

Finally, Wang seems to have also expressed hesitation to punish people under his jurisdiction according to dynastic, human-

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[134] Wang Yangming, *Instructions to both the Old and the Young in the Several Prefectures (1517)*, *in* WANG, INSTRUCTIONS FOR PRACTICAL LIVING, *supra* note 35, at 295.

[135] ISRAEL, *supra* note 35, at 36.

made law, suggesting instead that natural law, higher-level norms were more important. In a proclamation to Luling County residents during his time at magistrate, he was troubled and frustrated by his people's lack of attention to his exhortations; and, although he was in his full authority to punish them for violations of human-made, dynastic law, Wang expressed great disquiet toward doing so, highlighting the effects that higher-level, natural law norms may have had on his thinking. Wang remarked that "it is not the case that I don't have severe punishment with which to penalize you . . . [but] in my heart I feel yet uncomfortable governing you uniformly in accordance with law."[136] It is not altogether clear whether Wang fully disregarded the human law here in subsequently refusing to punish, but at least we can say that his mental calculus and legal decision-making is being consciously affected by natural law principles.

In sum, while the written evidence is not entirely clear, Wang's commitment on the superiority, necessity, and sufficiency of natural law in deciding cases, his opposition to litigation, and his hesitation to apply punishment as mandated under the dynastic laws seem to suggest that he held a strong, categorical position on natural law – that is, that human laws that went against the natural law did not possess much moral or legal obligatory power.

V. CONCLUSION

My general point in this paper has been to argue that Wang Yangming can be understood as a natural law thinker and that his philosophical system can be understood as a natural law theory. As can be seen, his natural law theory is based on the unchanging laws of the cosmos, universe, and of human nature, governed and united by Principle, consisting specifically of higher-level norms and moral principles that are contained naturally and innately in the heart-mind of every person. They are discoverable by reason, as seen through his concept of Pure Knowing, and naturally put into practice, as seen in the concept of the Unity of Knowledge and Action.

It is hoped that the findings in this paper have two broader contributions. The first contribution is to the field of Chinese legal thought and legal history. It is hoped that this paper provides a

136 *Id.*

more persuasive answer to the question of: did natural law exist in traditional China? It is also hoped the methodology used in this paper – focusing holistically on individual Chinese thinkers when doing comparative legal theory – can be employed going forward, rather than the cherry-picking approach and/or focusing only on classical Confucianism.

The second contribution is broadly to the field of comparative legal theory. Why might Wang Yangming be of interest to, and be read by, people interested and/or working in natural law theory generally, regardless of tradition? It is hoped that this paper reveals that the traditional canon of natural law theory, which is dominated by Western natural law thinkers, such as Aquinas, should be broadened. Indeed, traditional Chinese natural law theory, as seen through Wang's philosophical system, has the capacity and ability to simultaneously accommodate numerous bases and sources of natural law, which may heighten the relevance and universal aspect of natural law today, especially since legal positivism has today largely won out over natural law and/or non-positivist theories of law in the legal theory academia. Second, Wang's service as a government official who decided legal cases is important and unique, as it allows us an opportunity to look at a natural law thinker who also applied his natural law thinking and broader philosophy in real-world judicial matters and deciding cases (which is different from natural law thinkers like Aquinas and Aristotle). As I hope I have shown, I believe there is consistency between Wang's natural law views in theory and practice.

Keywords
Natural Law, Chinese Legal Thought

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COMPETENCE-COMPETENCE AND SEPARABILITY UNDER THE NIGERIAN ARBITRAL LAW: A CURSE OR BLESSING?

Abdulrazaq Adelodun Daibu[*] *& Ibrahim Kayode Adam*[**]

ABSTRACT

Settlement of disputes by arbitration is made attractive by its unique attributes as a speedy trial, choice of arbitrators by parties and confidentiality of proceedings. However, the enjoyment of these attributes may become illusory where questions relating to the principles of competence-competence and separability of contractual obligations are not resolved in favor of arbitration or arbitral proceedings. A situation where objections to the competence of arbitration proceedings, jurisdiction of arbitral panels, or validity of parties' contracts are considered matters for resolution by the courts seems a total subversion of the real essence of arbitration. The paper argues that a matter once submitted to court adorns the "garb of litigation" and therefore is prone to unnecessary publicity, technicality, and absence of parties' consent in the appointment of adjudicating officer(s). Thus, arbitration can only achieve its full potentials where the principle of competence-competence is accorded due recognition, and the arbitration agreement is considered severable from the composite whole. To reinforce its approach, the paper explores the application of the principles in civil and common law jurisdictions and concludes that the goal and ideals of arbitration are better served by the approach of the civil law jurisdictions where the principles are fully observed.

I. INTRODUCTION

The principles of competence-competence and separability are essential to effective domestic and international arbitral proceedings. They are different, but often linked, because they share common goals: to prevent early judicial intervention from obstructing the arbitration process, to sever the main contract from

[*] Lecturer, Department of Private and Property Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria. Email: abdulrazaqdaibu@yahoo.com.

[**] Senior Lecturer and Head Department of Business Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria. Email: adam_kayus2003@yahoo.com.

the contract to arbitrate (and vice versa where one of the contracts is found to be void, voidable, invalid and or unenforceable), and to strengthen the jurisdiction of an arbitral tribunal by allowing it to determine its own jurisdiction.[1] The idea of competence-competence is based on the general notion that the power to resolve jurisdictional disputes is inherent in all adjudicatory bodies and essential to their ability to function properly.[2] Hence, while the doctrine of competence-competence relates to power of an arbitral tribunal to decide any challenge to its jurisdiction, separability involves bifurcation of the arbitration agreements from the underlying contracts in which they appear or to which they relate, in order to resolve the dispute of the parties pursuant to the implied or express intent that any and or all disputes arising from their contract be resolved by arbitration.[3]

This paper examines the principles of competence-competence and separability, their rationale or jurisprudential basis, and their interface and effects on arbitral agreements and arbitral proceedings in Nigeria. It finds that the principles are a means for empowering arbitral panels to appropriately deal with every issue arising out of parties' disputes in respect of their agreements, including mode of dispute resolution. It further finds that unless the empowerment promised by these principles are appropriately delivered to arbitral

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[1] *See generally* Saksham Chaturvedi & Chanchal Agrawal, Jurisdiction to Determine Jurisdiction, 77(2) ARBITRATION 201-206 (2011); C.R. Reetz, The Limits of the Competence-Competence Doctrine in United States Courts, 5(1) DISPUTE RESOLUTION INTERNATIONAL 5-19 (2011); H. Smith, The Arbitration Clause: Who determines its Validity and its Personal and Subject Matter Reach?, 6 AM. REV. INT'L ARB. 395, (1999); J.A. Rosen, Arbitration under Private International Law: The Doctrines of Separability and Competence de la Competence 17 FORDHAM INT'L J. 599 (1997); Svernlov C., What Isn't, Ain't: The Current Status of the Doctrine of Separability, 8 (4) J. INT'L ARB. 37 (1991); A. REDFERN, M. HUNTER, & NIGEL BLACKABY, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK: OXFORD UNIVERSITY PRESS 153-158 (Student ed., 2003); K. Haining & B. Zeller, Can Separability Save Kompetenz-Konpetenz When there is a Challenge to the Existence of a Contract, 76(3) ARBITRATION 493-502 (2010).

[2] F. Solimene, The Doctrines of Kompetenz-Konpetenz and Separability and their Contributions to the Development of International Commercial Arbitration, 8(3) ARBITRATION 249-251 (2014); J.D. LEW, L.A. MISTELIS & S.M. KROLL, COMPARATIVE INTERNATIONAL ARBITRATION 333, paras 14-16 (1st Indian ed., 2007); S. CHATURVEDI & C. AGRAWAL, *supra* note 1, 205-206 (2017).

[3] P.O. Idornigie, Nigerian Telecommunications Plc v. Pentascope International BV Private Ltd: Separability Circumscribed by Arbitrability, 71(4) ARBITRATION 375 (2005); S. Chaturvedi & C. Agrawal, *supra* note 1, at 202; A. REDFERN ET AL., *supra* note 1, at 154; Patterson R. J. Dispute Resolution in a World of Alternatives, 37 CATH. U. L. REV. 591, 593 (1998); P.O. Idornigie, Anchoring Commercial Arbitration on Fundamental Principles 23 THE ARBITRATOR & MEDIATOR 65 (2004).

panels, the maximum benefits and promises of arbitration enjoyed in some jurisdictions may elude Nigeria.

The paper is divided into six parts; the first part is a general overview of the entire work. The second part examines the principle of competence-competence, generally, and the negative and positive effect of the principle, as well as a comparative analysis of the principle in some selected jurisdictions and under the Nigerian law. The third part of the paper examines the principle of separability, and the limits and criticisms, while the fourth section deals with the relationship between the two principles. The fifth section of this paper deals with competence-competence and separability under the Nigerian law, while the sixth section is the summary of the work, its findings, and general conclusion.

II. AN APPRAISAL OF THE PRINCIPLE OF COMPETENCE-COMPETENCE

The principle of competence-competence,[4] in the commercial arbitration parlance, is the power, ability, and authority of an arbitral tribunal to decide whether or not it has jurisdiction in a given dispute.[5] Competence-competence presupposes that an arbitral tribunal's jurisdiction includes the jurisdiction to consider and determine, in the course of arbitral proceedings, whether it has requisite competence to sit over a matter or subject matter of arbitration.[6] The principle is to the effect that an arbitral tribunal has primary jurisdiction to decide on its own jurisdiction.[7] Indeed, the

[4] Kompetenz-Kompetenz and Compètence de la Compètence (German and French, respectively). *See* D.T. Hascher, Arbitration and National Courts: Conflict and Cooperation 21 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 189, 191 (2010); E. GAILLARD & J. SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Alphen aan der Rijin: Kluwer Law International, 1999); J. A. Graham, Mexican Legislator Reintroduces the Principle of Komprten-Kompetenz 78(1) ARBITRATION 63 (2012); C.R. Reetz, *supra* note 1, at 5-6; S.G. Pinsolle et al., The Competence-Competence Principle under National Law, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 95-113 (Herbert Kronke ed.); F. Solimene, *supra* note 2, at 249.

[5] C.R. Reetz, *supra* note 1, at 5; S.G. Pinsolle, *supra* note 4, at 95-113.

[6] J.J. Barcelo, Who Decides the Arbitrator's Juridiction? Separability and Competence-Competence in Transnational Perspective, 36(4) VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1115 (2003); M. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2008).

[7] E.I. AKPATA, THE NIGERIA ARBITRATION LAW IN FOCUS 42 (1997); S. Chaturvedi & C. Agrawal, *supra* note 1, at 201-202; A. REDFERN ET AL., *supra* note 1, at 154; F. Solimene, *supra* note 2, at 249-251. *See also* UNCITRAL, Article XVI (Model

competence-competence principle is of practical necessity in arbitration because, without it, a party to an arbitration agreement would be able to thwart arbitral proceedings merely by challenging the parties' arbitration agreement.[8] The principle therefore limits the chances of a party to avoid or delay arbitral proceedings by disputing the existence or validity of the arbitration agreement.[9] Also in international transactions, parties of different nationalities may agree that any or all disputes arising out of their contractual relationship, including disputes about their arbitration agreement, be resolved in a neutral, non-national forum like the arbitrators themselves. This is because of the fear or perceptions that judges in national courts tend to protect the interest of their nationals and establishment against the other party.[10] Hence the parties' agreement, national laws, and some international rules make provisions that empower arbitrators to decide any objection to their jurisdiction.

Competence-competence has two connotations, often referred to as its "positive" and "negative" effects.[11] In its positive effect, competence-competence permits an arbitral tribunal like the courts to rule on any challenge or objection to arbitral proceedings.[12] This presupposes a concurrent jurisdiction between an arbitral tribunal and national courts.[13] Hence while the national courts as permanent bodies have power to consider and determine the existence and validity of arbitration agreements, an arbitral tribunal may also rule on its own jurisdiction based on the parties' agreement even though

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Law on International Arbitration as adopted on 21st June, 1985. Annexe 1 to UN doc. A/40/17).

[8] A.I. Chukwuemeire, Arbitration and Human Rights in Africa, 7 AFRICAN HUMAN RIGHTS LAW JOURNAL 119 (2007); F. Solimene, *supra* note 2, at 255.

[9] S.G. Pinsolle et al., *supra* note 4, at 95.

[10] D. Brawn, Commercial Arbitration in Dubai, 80(2) ARBITRATION 156 (2014); A.I. Chukwuemeire, *supra* note 8, at 119-121.

[11] *See* generally NEGATIVE EFFECT OF COMPETENCE-COMPETENCE: THE RULE OF PRIORITY IN FAVOUR OF THE ARBITRATORS, IN ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, THE NEW YORK CONVENTION IN PRACTICE 258-59 (E. Gaillard & Y. Banifatem eds., 2008); S. OZMUMCUM, THE PRINCIPLE OF COMPETENCE-COMPETENCE AND SEPARABILITY IN TURKISH CIVIL PROCEDURE CODE NO. 6100 ANNALES XLV, NO. 62 269 (2013); O. Susler, The English Approach to Competence-Competence, 13 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 427 (2013); K. Haining & B. Zeller, *supra* note 1, at 493-502; C.R. Reetz, *supra* note 1, at 5-20; F. Solimene, *supra* note 2, at 251.

[12] O. Susler, *supra* note 11, at 427; NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 269.

[13] S. Ozmumcu, *supra* note 11, at 269; O. Susler, *supra* note 11, at 427.

it is not a permanent body.[14]

The positive effect competence-competence is usually regulated by the relevant national laws of the seat of arbitration.[15] It must however be noted that the positive effect of competence-competence on the power of an arbitral tribunal is not limited to merely ruling on its own jurisdiction, rather it extends to ruling on any challenge or objection to the existence or validity of the arbitration agreement. Hence, an arbitration clause is often treated as an agreement independent of the other terms of contract embodying it, notwithstanding that the clause forms part of the same contract. Thus, a decision by the tribunal that the contract is null and void should not by operation of law affect the validity of the arbitration clause.[16]

The negative effect of competence-competence is comprised of imposing a limit on the roles of the courts, in so far as arbitral

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[14] NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 258-259.

[15] National laws are common referred to as *lex arbitri*. The *lex arbitri* often positively confers arbitrators with competence to rule on their own jurisdiction. *See, e.g.*, Article 30 English Arbitration Act 1996; Section 592(1) Austrian Code of Civil Procedure. *See also* Article 16(1) UNCITRAL Model Law. In the United States, however, several courts held that under the Federal Arbitration Act, "[u]unless the parties clearly and unmistakably provide otherwise [e.g., by incorporating arbitration rules that provide for competence-competence], the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *See* AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649) (1986); JSC Surgutneftegaz v. President and Fellows of Hansard College, No. 04 Civ. 6069(RCC), 2005 WL 1863676. *See also* E. GAILLARD & J. SAVAGE, *supra* note 4, at 400; F. Solimene, *supra* note 2, at 251.

[16] UNCITRAL, Article XIII, §1 (Model Law on International Commercial Arbitration), Section 12 (1) and (2), Arbitration and Conciliation Act Cap. A18, LAWS OF THE FEDERATION OF NIGERIA 2004 (hereafter ACA). The ACA was passed during the military regime as a decree in 1988 and is deemed to be an Act of the National Assembly by virtue of Section 3I5 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Act is stated to apply throughout the federation of Nigeria. *See* Section 58. *See also* Daibu A. A., The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review, 6(1) THE GRAVITAS REVIEW OF BUSINESS AND PROPERTY LAW 44-46 (2015); B.A. Bukar, Emerging Trends in Alternative Dispute Resolution: From Mono Door to Multi-Door 79(1) ARBITRATION 78 (2013); M.M. Akanbi, Challenges of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations 78(4) ARBITRATION 325 (2012); P.O. Idornigie, Overview of ADR in Nigeria 73(1) ARBITRATION 75 (2007); J. O. OROJO & M.A. AJOMO, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION IN NIGERIA, 166 (1999); P.O. Idornigie, Anchoring Commercial Arbitration, *supra* note 3, at 65. In the United States, there is no express provision similar to the aforementioned provisions. However, seven states of Florida, Texas, California, Oregon, Illinois, Connecticut, and Louisiana have adopted legislation based on the Model Law. *See* UNCITRAL status chart at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html; C.R. Reetz, *supra* note 1, at 5-7.

proceedings are concerned, to only the need to set aside, recognize or enforce an arbitral award.[17] Thus, in jurisdictions where negative effect of competence-competence has a very strong root, the courts will not have parallel jurisdiction with the tribunal to rule on objections to the arbitral proceedings.[18] The courts are refrained from determining the jurisdiction of the arbitrators at that stage as they will have the opportunity to review (not rehear) any challenge to the jurisdiction of the tribunal at the enforcement of stage.[19] The arbitrators have priority over the court and will be the first judge to rule on their jurisdiction in this regard.[20] Hence, while it is correct to say that arbitrators are not the sole judges, they are the first judges regarding their own jurisdiction.

The operation of the negative effect of the doctrine is generally governed by Article 16(1) of the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration,[21] which provides that:

> The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Therefore, if a party claiming invalidity of arbitration agreement institutes an action for either declaration, injunction, or any other relief because of the invalidity of the main contract, the court before which the action is brought shall stay proceedings and refer parties to arbitration, where the other party requests this not later than when submitting his or her first statement on the substance of the dispute.[22]

The principle of competence-competence is now recognized in most national laws, regional, and institutional arbitration rules

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[17] *See* Article 1466, French New Code of Civil Procedure; Article 186(1), Swiss Private International Law Statute 1987; Section 1040(1), German Code of Civil Procedure. *See also* Sections 31 and 51 of the ACA for the recognition and enforcement of domestic and international awards respectively.

[18] NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 258.

[19] *See* C.R. Reetz, *supra* note 1, at 7-11; F. Solimene, *supra* note 2, at 251; E. GAILLARD & J. SAVAGE, *supra* at note 4, at 400.

[20] NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 258.

[21] General Assembly Resolution 31/98 (December 15, 1976).

[22] UNCITRAL, art VIII §1 (Model Law on International Commercial Arbitration); Haining K. & Zeller B., *supra* note 1, at 495.

including the International Court of Justice (ICJ).[23] It must be noted that there are considerable differences among national laws regarding the boundaries of arbitrators' competence-competence.[24] These differences relate to issues such as the extent of priority enjoyed by arbitral tribunals over state courts in determining the validity of an arbitration agreement, the power of courts to examine the validity of the arbitration agreement (whether with a full power of review or only on a prima facie basis), and the court's option to decline jurisdiction or only stay the proceedings in case of a valid arbitration agreement.[25]

On a comparative analysis, the principle of competence-competence under the French law, which is a civil law jurisdiction, comprises a broad recognition of the negative effect of competence-competence. Where the arbitral tribunal has already been constituted, the national courts must decline jurisdiction without examining the validity or otherwise of the arbitration agreement. [26] If the arbitral tribunal is not yet constituted, even the national courts still have to decline jurisdiction, unless a prima facie examination shows that the arbitration agreement is manifestly null and void or inapplicable.[27] In any event, manifest nullity is extremely rare under the French principle of the validity of arbitration agreements in international matters[28] and might occur, for instance, if the subject matter is obviously not arbitrable.[29] French law thus gives very wide effect to arbitration agreements and does not allow parties to impede or delay arbitration proceedings by instituting court proceedings. However, this is subject to certain limits that a French court is not allowed to decline jurisdiction on its own motion,[30] just as French law does not allow parties to petition the

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[23] *See* ICSID, Article 4I; Article V(3) European Convention on International Commercial Arbitration and Article 36(6) Statute of the International Court of Justice; Article 6(4) ICC Rules; Article 9 (i) Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules;); S. Chaturvedi & C. Agrawal, *supra* note 1, at 204; K. Haining & B. Zeller, *supra* note 1, at 494.

[24] Although the UNCITRAL Model Law is a standard template of arbitration law, most countries have modified it to suit their peculiar national circumstance. Hence, there is no uniformity.

[25] For a detailed analysis of the negative effect of competence-competence, *see* NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 257-273; S.G. Pinsolle et al., *supra* note 4, at 96-107.

[26] S.G. Pinsolle et al., *supra* note 4, at 96.

[27] *Id.*

[28] *Id.*

[29] NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 259.

[30] Article 1458(3), French Civil Code Procedure. French procedural law generally considers competence to be a "matter solely to the parties" benefit.

court for a declaratory judgment on the validity of the arbitration agreement.[31]

Under German law, another civil law jurisdiction, although the principle of competence-competence is fully entrenched, unlike the French counterpart, the German law is reluctant to recognize the negative effect of the principle of competence-competence. A German court *seized* of a matter that is subject to an arbitration agreement must decline jurisdiction upon a jurisdictional objection by the respondent before the beginning of the hearing on the merits, unless the court considers the arbitration agreement to be null and void, ineffective, or incapable of being performed.[32] German authorities understand this provision as obliging German courts to examine with the full scope of review whether the arbitration agreement is null and void, ineffective, or incapable of being, rather limit their review to a prima facie examination.[33] Furthermore, German law states that before an arbitral tribunal is constituted, a party can apply to a court to establish whether or not an arbitration agreement is enforceable. In such a case, the court is considered to have full power to examine the question of the arbitral tribunal's jurisdiction.[34] This provision thus opens a door for delay tactics by a party to the arbitration agreement.[35]

By contrast, most common law jurisdictions adopt a positive approach to competence-competence. In the United States, for example, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator(s), unless the parties specifically provide otherwise by incorporating arbitration rules that provide for competence-competence in their agreements. [36] The decisions of English courts since the enactment of the Arbitration Act 1996 also portrayed a positive application of competence-competence in that, apart from current powers of the

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[31] Cass., Rev. Arb. 1999, 260 (Court of Cassation, France); J. POUDRET & S. BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 132 (2007).

[32] Section 1032(1), German Code of Civil Procedure.

[33] H. Peter, Arbitration Agreement and Substantive Claim Before Court, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 139 (Karl-Heinz Bockstiegel, Stefan Kroll & Patricia Nacimiento eds., 2007) (Alphen aan den Rijin: Kluvwer Law International, 2007).

[34] S.G. Pinsolle et al., *supra* note 4, at 99-100.

[35] *Id*. at 100.

[36] F. Solimene, *supra* note 2, at 251; E. GAILLARD & J. SAVAGE, *supra* note 4, at 400. *See also* the cases of AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986); JSC Surgutneftegaz v. President and Fellows of Hansard College (No. 04 Civ. 6069(RCC)), 2005 WL 1863676.

courts and arbitral tribunal to determine challenges to arbitral agreements,[37] the courts approach to the application of competence-competence in England is that of an expansive power of the courts and restrictive power of the tribunal.[38] The courts in England thus have enormous power of scrutiny when it comes to the issue of validity, existence, and scope of the arbitration agreement.[39]

The United Arab Emirate (UAE) law[40] applicable in Dubai does not provide for the principle of competence-competence.[41] However, parties can include in their agreement, or in the arbitration rules they adopt, that the arbitral tribunal may determine and rule on its own jurisdiction, or else any jurisdictional challenge is an issue for the court.[42] In the case that the tribunal is satisfied that there exists a valid prima facie arbitral agreement, it will rule on its jurisdiction as a preliminary issue and thereafter proceed with the arbitration.[43]

Under Nigerian law,[44] the principle of competence-competence appears to be comprised of both the positive and negative effect, in that the arbitral tribunal has the power to deal with any objection to its jurisdiction, but this does not preclude

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[37] *See* §32(4) United Kingdom Arbitration Act (1996).

[38] *See* the cases of Fiona Trust & Holding Corp. v. Privalov (2006) EWHC 2583, 29 (Comm); Law Debenture Trust corp. Plc v. Electrim Finance BV (2005) EWHC 1412, 34 (Ch); Downing v. Al Tameer Establishment (2002) EWCA Civ. 721, 31; Al-Naimi v. Islamic Presss Agency (2002) 1 Lloyd's Rep. 522, 525. *See also* Jan Paulsson, Arbitration-Friendliness: Promise of Principle and Realities of Practice. Has London Met The Challenge? (The International Finance Service London Conference, London, December 1, 2006); NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 266.

[39] NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 268.

[40] The UAE civil law is based on the UAE Civil Code (Law of Civil Transactions, Federal Law No. 5 of 1985), which itself is fashioned on the Egyptian Civil Code of Iman Abu Hanafi School of Thought, the predominant school of Islam in Egypt. *See* Brawn, *supra* note 10, at 156.

[41] Brawn, *supra* note 10, at 156, 163.

[42] *Id.* at 163.

[43] *Id.*

[44] Nigeria was a former British colony until 1960 when it got its independence. The common law of England is one of the major sources of Nigerian laws as a result of its colonial historical link with the Britain. The common law is adversarial in nature as against the inquisitorial system of administration of justice obtainable in most civil law jurisdictions. The common law provides the basis for the application of the adversarial trial system in Nigerian courts and by extension arbitral proceedings. For a brief history of Nigeria, see generally A.A. Daibu & F.F. Abdulrazaq, Legal and Practical Challenges to the Enforcement of the Right to Freedom of Expression in Nigeria, 7(1) YONSEI LAW JOURNAL 91-96 (2016); J.O. ASEIN, INTRODUCTION TO NIGERIA LEGAL SYSTEM 98-104 (2nd ed. 2005); N. TOBI, SOURCES OF NIGERIAN LAW (1996); A.O. OBILADE, THE NIGERIAN LEGAL SYSTEM 17-52 (1979).

the court from examining, with the full scope of judicial review, whether an arbitration agreement is contrary to public policy, null and void or ineffective.[45] For instance, while section 12(1) of the ACA provides that an arbitral tribunal shall be competent to rule on any question or objection to its jurisdiction with respect to the existence or validity of an arbitration agreement, sections 4 and 5 also provide that the court, before whom a matter subject to arbitration is brought, shall/may stay proceedings and refer the parties to arbitration, respectively. Also, section 34, which is similar to Article 5 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, prohibits the court's intervention in arbitration matters except in situations expressly provided by the Act.[46] Thus, while its positive aspect empowers and strengthens the jurisdiction of the tribunal, the negative aspect restricts and limits the court intervention in arbitral proceedings to recognition and enforcement and/or refusal of recognition and enforcement of the arbitral award.[47]

One of the beauties of competence-competence is that it permits arbitrators to consider any challenge(s) to their jurisdiction and to proceed with the arbitration proceedings notwithstanding such challenges, subject to little or no subsequent judicial review of

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[45] *See* the Supreme Court of Nigeria's decision in KSUDB v. FANZ Construction Ltd (1990) 4 NWLR (Pt.142) 1, 32-33. It was held that disputes such as indictment for an offense of a public nature, disputes arising out of illegal contracts and void agreements, disputes leading to a change of status, disputes that may result in the arbitral panel giving decision in rem; rights exercisable against the world, disputes where a party already admits liability but only fails to comply/act, and disputes where the causes of action no longer exist and are not arbitrable on account of public policy.

[46] J.O. Olorunfemi, The Effect of Arbitration Agreement on the Jurisdiction of the Court in Nigeria 2(1) NIGERIA JOURNAL OF PUBLIC LAW 315 (2009); M.M. Akanbi, Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria, 2(1) NIGERIA JOURNAL OF PUBLIC LAW 298-299 (2009); E.O. Ezike, The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act, 8 THE NIGERIA JURIDICAL REVIEW 142, 151 (2000-2001); N. Ikeyi, The Courts and the Arbitral Process in Nigeria, ARBITRATION AND DISPUTE RESOLUTION JOURNAL 369 (1997); A. Azouzu, The Arbitration and Conciliation Decree (Cap. 19) as a Legal Framework for Institutional Arbitration: Strengths and Pitfalls, 2 LAWYERS' BI-ANNUAL 1 (1995). *See also* the case of Statoil v. Nigeria Ltd v. Nigerian National Petroleum Corporation (2013) NWLR (Pt. 1373) 1, 28, 29.

[47] *See* the ACA for domestic arbitration, §§30, 32 and the ACA for international arbitration, §§48, 51. *See also* A. Chukwuemerie, Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1966, 15 ARBITRATION INTERNATIONAL 171-173 (1999).

the jurisdictional challenges at any time during the proceedings or after an award has been rendered, by motion for stay of court proceedings, through an application to set aside an award, or motion to refuse to recognize the award, depending on the national or institutional arbitral laws adopted by the parties. The principle may apply to grant arbitrators exclusive authority to rule in the first instance on challenges to their jurisdiction, subject to subsequent judicial review of their jurisdictional determination (be it an interim or final award), under otherwise applicable standards of review.[48]

The principle of competence-competence is however not without its criticisms. One of the major criticisms against it is that there is no basis or foundation for an arbitrator's authority to decide his or her own jurisdiction, since an arbitrator's authority derives exclusively from the parties' arbitration agreement.[49] According to this argument, arbitrators lack the authority to decide any matter unless and until their authority under the parties' arbitration agreement is established.[50] It has also been argued that arbitrators cannot be compared with courts in that courts are a creation of the statutes and national laws with specific powers and responsibilities to adjudicate and resolve disputes.[51] Hence, courts' power to determine their own jurisdiction is not only a function of necessity but derives from statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine their own jurisdiction because there is a non-circular alternative (that is the judiciary) and because the parties do control the existence and limits of an arbitrator's power.[52] Secondly, and as a practical matter, it is considered unrealistic to expect arbitrators to be neutral when determining objections to their jurisdictions, since their financial interest lies in sustaining the ability to earn the full fees, which are perhaps payable only upon adjudicating the parties' dispute on the merit.[53] Thus, the argument goes that it will be manifestly wrong

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[48] W.W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction (ICCA Congress, Montreal; 13 ICCA Congress Series 55, 2006); S. Chaturvedi & C. Agrawal, *supra* note, 1, at 204; F. Solimene, *supra* note 1, at 251.

[49] P. Binder, International Commercial Arbitration and Conciliation, in UNCITRAL MODEL LAW JURISDICTIONS 144 (2nd ed., 2005).

[50] F. Solimene, *supra* note 2, at 251; E. GAILLARD & J. SAVAGE, *supra* note 4, at 400; P. Binder, *supra* note 49, at 144. *See also* Sphere Drake Insurance Ltd. v. All American Insurance Co. 256 F.3d 587, 591 (7th Cir. 2001).

[51] M.M. Akanbi, *supra* note 46, at 301-302.

[52] G E. GAILLARD & J. SAVAGE, *supra* note 4, at 400; F. Solimene, *supra* note 2, at 251; S. Chaturvedi & C. Agrawal, *supra* note 1, at 210.

[53] QC P Gross, Competence of Competence: An English View, 8 ARBITRATION INT'L 205 (1992); S. Chaturvedi & C. Agrawal, *supra* note 1, at 201. *See also* Ottley v. Sheepshead Nursing Home, 688 F.2d 898 (2d Cir. 1982) (Lumbard, J.,

and inequitable to allow an interested umpire to decide his own case.[54]

III. THE PRINCIPLE OF SEPARABILITY

The principle of separability[55] connotes that the parties' agreement to arbitrate is analytically separate, distinct and independent from the parties' agreement in the underlying contract insofar as it relates to the "procedural" issue of dispute resolution as opposed to the "substantive" issues of the parties' rights under the contract and thus forms the basis for the ability of the tribunal to rule on its jurisdiction.[56] Separability, like competence-competence, is consistent with the parties' implied or express intent that all disputes between them including disputes about the validity of their underlying contract be submitted to arbitration. One rationale for separability is the need to give effect to the intention of the parties, for instance where parties' intention is expressed in the sense that a clause is embedded in their agreement that expressly provides that "the arbitration clause is separable from the contract containing it."[57] Another rationale for separability is that it reduces or limits avoidable and unnecessary challenge to the arbitrators' jurisdiction by a reneging party merely because the main contract is not enforceable, void *ab initio*, or voidable, and thus has the effect of supporting and protecting not only domestic commerce but also transnational and international business.[58]

The principle is necessary to address the needs of parties to ensure their agreements to resolve disputes in a neutral, non-

dissenting).

[54] M.M. Akanbi, *supra* note 46, at 298-309, 302; QC P Gross, *supra* note 53, at 205; S. Chaturvedi & C. Agrawal, *supra* note 1, at 201.

[55] Also called severability or autonomy. *See* P. Mayer, The Limits of Severability of the Arbitration Clause (Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of New York Convention 261 (Paris, ICCA Congress Series No. 9, 1999); R.J. Patterson, Dispute Resolution in a World of Alternatives, 37 CATH. U. L. REV. 591, 593 (1988); F. Solimene, *supra* note 2, at 252; Chaturvedi & C. Agrawal, *supra* note 1, at 202; A. REDFERN ET AL., *supra* note 1, at 154.

[56] Chaturvedi & C. Agrawal, *supra* note 1, at 202, 203; REDFERN ET AL., *supra* note 1, at 154. R.J. Patterson, *supra* note 55, at 591; P.O. Idornigie, Nigerian Telecommunications, *supra* note 3, at 376; P. SHERIDAN, CONSTRUCTION AND ENGINEERING ARBITRATION 43 (1999); K. Haining & B. Zeller, *supra* note 1, at 495, 496; F. Solimene, *supra* note 2, at 252-253.

[57] F. Solimene, *supra* note 2, at 252-253.

[58] *Id.* at 255.

national forum are guaranteed notwithstanding challenges to the validity of their underlying contracts.[59] The UNCITRAL Arbitration Rules provide that an arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part.[60] It further provides that an arbitration clause, which forms part of a contract and which provides for arbitration under the rules, shall be treated as an agreement independent of the other terms of the contract and that a decision by the arbitral tribunal that the contract is null and void shall not by operation of law entail the invalidity of the arbitration clause.[61]

The principle is not only applicable in circumstances of breach, repudiation, and termination of an arbitration agreement but also where the main agreement is vitiated and or unenforceable *ab initio*. Thus, the application of the combined principles of separability and competence-competence prevents the obstruction of arbitral proceedings by a party acting in bad faith. Separability is a development of the courts[62] and has come of age. In the English case of *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd*,[63] the court of appeal held that the arbitration clause, as a matter of construction, was wide enough to cover disputes over the initial illegality of the contract; and, since the particular type of illegality alleged had nothing to do with the arbitration clause itself, the arbitration clause remained operative even if the rest of the contract failed as this would not bring down the arbitration clause because the illegality alleged did not affect it.

The effects of separability are numerous, but chief among them is the fact that the invalidity of the parties' underlying contract does not necessarily affect their arbitration agreement. As a result,

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[59] A.I. Chukwuemeire, Arbitration and Human Rights in Africa, 7(1) AFRICAN HUMAN RIGHTS LAW JOURNAL 103-41, 119 (2007).

[60] Article 21(2), UNCITRAL Model Arbitration Rules, attached to the first schedule of the ACA; Article 16 (1), Model Law; Article V(3), European Convention, Article 41(1), International Convention for Settlement of Investment Dispute (ICSID) (1965) (Nigeria has been a party since Oct. 14, 1966). Section 7, of the EAA, and Section 15, of the Draft Federal Arbitration Bill, contained similar provisions.

[61] Article 21(2), UNCITRAL Arbitration Model Rules; ACA §12 (2).

[62] P.O. Idornigie, Nigerian Telecomunicatios, *supra* note 3, at 372.

[63] Harbour Assurance Co. (UK) Ltd, (1993) QB 701. *See also* the cases of Heyman v. Darwins Ltd (1942) A.C 356; Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corp. Ltd. (1981) 1 LIoyd's Rep. 253; Harbour Assurance Co. (UK) Ltd. v Kansa General Insurance Co. Ltd. (1993) 1 LIord's Rep. 445; Prima Paint Co. v. Flood Conklin Manufacturing Corp., 388 U.S. 395 (1967).

a challenge to the validity of the underlying contract does not necessarily affect the arbitration agreement or deprive the arbitral tribunal of jurisdiction to hear the parties' dispute concerning the challenged contract. For the same reason, the invalidity of the parties' underlying contract does not necessarily deprive an arbitral award of validity. If an arbitral tribunal or court concludes that the parties' underlying contract was invalid, that conclusion does not necessarily undermine the validity of an award rendered by the arbitral tribunal pursuant to parties' arbitration agreement.[64]

Secondly, the invalidity of the parties' arbitration agreement does not necessarily affect the underlying contract. The underlying contract can continue to be enforced, generally in national courts, notwithstanding the unenforceability of the arbitration clause. The law, or substantive legal rules, governing the arbitration agreement may be different from the law, or substantive legal rules, governing the underlying contract. Furthermore, the arbitration clause may survive termination or expiration of the underlying contract, as long as the claims arise from conduct during the term of the agreement or during the term of specific provisions that survived the agreement. [65]

It is, however, pertinent to note that principle of separability has limitations. Although the arbitral agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement, where any vitiating factor affecting the underlying contract extends to the arbitration clause, the arbitration clause may generally become invalidated. [66] For example, if the main agreement and the arbitration agreement are contained in the same document, and one of the parties claim that he never agreed to anything in the document and that his signature was forged, that will be an attack also on the validity of the arbitration agreement itself. Thus, the ground of this attack is not only that the main agreement was invalid but also

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[64] P.O. Idornigie, Nigerian Telecomunicatios, *supra* note 3, at 372.

[65] R.H. Smit, Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil fit? Or Can Something Indeed Come from Nothing?, 13 AM. REV. INT'L ARB. 19 (2002); S. Chaturvedi & C. Agrawal, *supra* note 1, at 203; K. Haining & B. Zeller, *supra* note 1, at 495; Nolde Bros Inc. v. Bakery Workers 430 U.S. 243, 250 (1977).

[66] P.O. Idornigie, Nigerian Telecomunicatios, *supra* note 3, 375.

that the signature to the arbitration agreement, as a 'distinct agreement,' was forged.[67]

Similarly, if a party alleges that someone who purportedly signed an agreement on his behalf has no authority whatsoever to conduct any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement. Thus, it is clear from the above illustration that there may be cases in which the ground upon which the main contract is invalidated is identical to the ground upon which the arbitration agreement is also invalidated. Any factors which vitiate a contract may vitiate an arbitration agreement. However, for arbitration clauses, such vitiating factor must affect the arbitration clause independently of the main or underlying contract. This implies that, in the face of such vitiating factor, a claim can be filed challenging the validity of the arbitration clause itself either before the arbitral tribunal or national court (depending on the nature of the factor and the stage in the arbitral proceedings and, to some extent, on the relevant national law). An example would be where one party alleges that it never contracted with the other party (possibly because a condition precedent for the commencement of the contract was not performed so that the contract never came into existence). The vitiating factor also affects the existence of the arbitration clause claimed in the contract, so that the contesting party may either commence legal proceedings in a court declaring the arbitration clause non-existent or take the same point before the arbitral tribunal as an objection to the jurisdiction of the tribunal.[68]

Another vitiating factor that may affect the enforceability of both the main contract and the arbitration clause is the concept of arbitrability. It raises a question as to whether the subject matter of the dispute is itself capable of settlement by arbitration under the applicable law.[69] Waller J. In *Soleimany v. Soleimany*,[70] the court held that where the subject matter of the underlying contract is not

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[67] *See* the cases of Knight Frank & Rutley v. A. G. Kano State (1990) 4 NWLR (Pt.143) 210; Alao v. ACB Ltd. (1998) 3 NWLR (Pt. 542) 339; Thirwell v. Oyewumi (1990) 4 NWLR (Pt. 144) 386; Nigerian Telecommunication Plc v. Pentascope International BV Private Ltd. Unreported Suit No. FHC/ABJ/CS/36/2005 (2005).

[68] P.O. Idornigie, Nigerian Telecomunicatios, *supra* note 3, 377; K. Haining & B. Zeller, *supra* note 1, at 495-496.

[69] A.A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 154 (2001); Kano State Urban Development Board v. Fanz Construction Limited (1990) 4 NWLR (Pt. 142) 1.

[70] Soleimany, (1999) QB 785.

arbitrable or is incapable of resolution by arbitration, the vitiating factor equally affects both the underlying contract and the arbitration clause in it. In the Nigerian case of *Nigerian Telecommunication Plc v. Pentascope International BV Private Ltd*,[71] the Federal High Court Abuja Judicial Division (per Adah J) refused an application for stay of the proceedings on the ground of illegality. In that case, Nitel alleged that Pentascope was not registered in Nigeria in compliance with the mandatory provision of the Company and Allied Matters Act 1990 (CAMA); and, therefore, by the provision of section 54, the agreement between the parties was illegal and accordingly not arbitrable. Similarly, in *Statoil (Nigeria) Ltd. v. Federal Inland Revenue Service*,[72] the Nigerian court of appeal held that disputes arising from taxation matters could not be a subject of arbitration on the ground of public policy; and, consequently, the arbitration clause of the parties in that regard is not enforceable.

Thus, under the Nigerian law, it appears that where the subject matter of the underlying contract is not arbitrable, both the main contract and arbitration agreement contained in it will be void for illegality or on the ground of public policy. However contrary to the decisions of both the Federal High Court and the court of appeal as well as the argument of some scholars,[73] it is submitted that any objection to the jurisdiction on the ground of illegality should be raised before the arbitral tribunal in the first instance which the tribunal will decide as a preliminary issue by way of interim award. This is because the Arbitration and Conciliation Act does not only limit intervention of the courts in arbitral proceedings but also unequivocally vest the power to determine jurisdiction in the tribunal.[74] A situation where objections to the validity of parties'

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[71] Nigerian Telecommunication Plc, Unreported Suit No. FHC/ABJ/ CS/36/2005 (2005).

[72] Statoil (Nig.) Ltd. v. F. I.R. S. (2014) LPELR 23144 CA.

[73] Idornigie believes that the issue of arbitrarily should be decided by the court because arbitrators are not likely to decline jurisdiction immediately when the issue is raised. They usually rule on the merit of the case after a full hearing. *See* P.O. Idornigie, Nigerian Telecomunicatios, *supra* note 3, at 376.

[74] *See* sections 34 and 12(2), ACA; C. A. Obiozor, Does an Arbitration Clause or Agreement Oust the Jurisdiction of the Courts? A Review of the case of the M. V. Panormos Bay v. Olam (Nig.) Plc, 6(1) NIGERIAN BAR JOURNAL 168 (2010). *See also* the Nigerian court of appeal decision in Statoil Nigeria Limited v. Nigerian National Petroleum Corporation, (2013) 14 NWLR (Pt 1373) 1, 28-29, where the court set aside an injunction granted by the Federal High Court Lagos Judicial Division (per Okeke J) to restrain arbitral proceedings on the putative but erroneous ground that the subject matter of the contract is not arbitrable. The court of appeal further held that the unambiguous intendment of the legislature

contracts, competence of arbitration proceedings and jurisdiction of arbitral tribunals are resolved by the courts is a total subversion of the real essence of arbitration: party autonomy which allow parties to a dispute the freedom and opportunity of resolving their disputes amicably in a preferred manner without undue interference from the state.[75] Thus, submitting arbitral matters or issues to court, whether at the preliminary, interlocutory or substantive hearing stage, adorns the "garb of litigation" and becomes subject to its standards such as unduly long trials, excessive cost implication, hostility, publicity, technicality and absence of parties' consent in the appointment of adjudicating officer(s) contrary to the ideals and attributes of arbitration.[76]

One the major criticisms against separability according to its critics is that, if the main contract upon which the arbitration agreement is predicated is non-existent, invalid or unenforceable as a whole, then so must be all of its parts, including its arbitration clause: *Ex nihilo nihil fit.*[77] This is in tandem with the general principle of law that one cannot put something on nothing.[78] Secondly, it has been argued that the provisions relating to dispute resolution procedure under a contract are interrelated with, albeit separate and distinct from, the substantive provisions of the contract that contain the arbitration clause. Therefore, parties to a transaction and their counsel or representatives would be surprised to hear that they have concluded not one but two separate agreements at the time of entering into it.[79]

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in the provision of section 34 ACA is to the effect that court cannot intervene in arbitral proceedings outside those specifically provided.

[75] *See* S. Fagbemi, The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?, 6(1) JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY (Afebabalola University) 224-225 (2015).

[76] A. A. Daibu, The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review, 6(1) THE GRAVITAS REVIEW OF BUSINESS AND PROPERTY LAW 44 (2015); M. M. AKANBI, DOMESTIC COMMERCIAL ARBITRATION IN NIGERIA: PROBLEMS AND CHALLENGES 32 (Germany, 2012); F. AJOGWU, COMMERCIAL ARBITRATION IN NIGERIA: LAW AND PRACTICE 5 (Lagos, 2009).

[77] The term *ex nihilo nihil fit* means "from nothing, nothing comes." *See generally* R. H. Smit, *supra* note 65, at 4; P. SANDERS, L'AUTONOMIE DE LA CLAUSEE COMPROMISISSOIRE" (ICC ed.), HOMMAGE A FREDERIC EISENMANN 31-43 (PARIS, LIMER AMICORUM, 1978), cited in J. POUDRET J. & S. BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 134 (LONDON, SWEET & MAXWELL, 2ND ed., 2007).

[78] *See* Buhari v. Adebayo (2014) 10 NWLR (Pt. 1416) 560, 587; Aderibigbe v. Abidoye (2009) 10 NWLR (Pt. 1150) 592, 618- 619; UAC v. Macfoy (1962) AC 152, 160; Ojukwu v. Oyeador (1999)7 NWLR (Pt. 203) 299.

[79] *See* STEPHEN M. SCHWEBEL, THE SEVERABILITY OF THE ARBITRATION AGREEMENT IN INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 1, 5 (1987).

Furthermore, there is a well-established legal fiction that, when parties enter into a contract containing an arbitration clause, they are really entering into two separate agreements: the principal agreement containing their substantive obligations and the arbitration agreement which provides for the settlement of disputes arising out of the principal agreement.[80] This legal fiction is perfectly justified if we consider what happens when parties enter into two physically-separate contracts. In this situation, if the principal agreement is alleged to be void, it is not a question affecting the validity of the arbitration agreement since it is an independent contract. How logical is it, then, to treat an arbitration agreement which is only a clause in a contract differently?[81] It is, after all, a widespread practice that courts usually review only arbitral awards and not the merits of disputes which are meant to be arbitrated. However, if parties fail to accept the separability principle, courts should as a matter of public policy order the parties to respect their contract because the arbitration clause is an independent contract.

IV. THE RELATIONSHIP BETWEEN THE PRINCIPLES OF SEPARABILITY AND COMPETENCE-COMPETENCE

The two principles of separability and competence-competence have been described as "corollaries" of each other.[82] They are distinct in scope but related in purpose. The doctrine of separability means that the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained as long, as the arbitration clause itself is validly entered into by the parties and worded sufficiently and broadly to cover non-contractual disputes. Hence, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity.[83] By treating arbitration agreements as distinct from the main contract, separability rescues many arbitration agreements from failing simply because they are contained in contracts of questioned

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[80] A. REDFERN ET AL., *supra* note 1, at 251.

[81] This reasoning was applied by J. Steyn in Paul Smith Ltd. v. H & S International Holding Co. Inc., [1991] 2 Lloyd's L.Rep., 127.

[82] G. B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 167-191(AMSTERDAM, KLUWER, 2d ed., 2002); R. H. Smit, *supra* note 65, at 19.

[83] Marcus S. Jacobs, The Separability of the Arbitration Clause: Has the Principle Been Finally Accepted in Australia? 68 ALJ 629, 629 (1994).

validity. In order words, separability is the basis for competence-competence because unless the arbitration clause is severed, the tribunal cannot consider and determine challenges to its jurisdiction. [84] Thus, competence-competence starts where separability ends.

The principle has two aspects. Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement *itself*, and thus the competence of the arbitrator, is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction.[85] Secondly, in most countries that apply the negative approach to competence-competence, the arbitration agreement in a contract means that arbitrators will have priority over national courts on any issue. [86] If the prima facie existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration. But there is great variation where this second aspect is concerned. In civil law countries such as France, arbitrators appear to have a wide jurisdiction to determine their competence. The prevalent view in common law country is that arbitrators have only a limited competence to rule on their jurisdiction and these rulings may be reopened and scrutinized by the courts.[87]

The first justification for separability is when parties enter into an arbitration agreement which is broadly couched; they usually intend that all disputes, including disputes over the validity of the contract, are to be settled by arbitration.[88] This may be an implied term of the contract. For instance, applying the officious bystander test,[89] if the parties when concluding the agreement were asked,

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[84] K. Haining & B. Zeller, *supra* note 1, at 493,495.

[85] *See* ACA §4 (2).

[86] These include countries such as France, Germany, Switzerland, Canada, and India. *See* NEGATIVE EFFECT OF COMPETENCE-COMPETENCE, *supra* note 11, at 261-266. In Nigeria until arbitration is first explored, the court cannot assume jurisdiction because the right of action in the court is yet to accrue. In such circumstances, a court where a matter subject to the arbitration agreement is brought is expected to stay proceedings for parties to resort to arbitration as stipulated in their agreements. *See* The Owners of The MV Lupex v. Nigeria Overseas Chartering and Shipping Limited (2003) 15 NWLR (Pt. 842) 469; Nika Fishing Co. Ltd. v. Lavina Cooperation (2008) 16 NWLR (pt. 1114) 509, 543-544; Obembe v. WEMABOD (1977) 5 SC 115.

[87] Carl Svernlöv, What Isn't, Aint: The Current Status of the Doctrine of Separability 8(4) JIA 37, 37 (1991); F. Solimene, *supra* note 2, at 251.

[88] SCHWEBEL, *supra* note 79, at Ch. 1, 1-13.

[89] Reigate v. Union Manufacturing Co. (ramsbotlom) (1918) 1 KB 592, 605; Shirlaw v Southern Foundaries (1926) Ltd [1939] 2 KB 206, 227.

"Do you mean, in providing that 'any dispute arising out of or relating to this agreement' shall be submitted to arbitration, to exclude disputes over the validity of the agreement?," surely they would have replied that they did not mean to exclude such disputes. Applying the separability doctrine thus gives effect to the will of the parties.[90] If simply by denying that the main contract is valid, one party can deprive the arbitrator of competence to rule upon that allegation, this provides a loophole for parties to repudiate their obligation to arbitrate. This defeats some of the main advantages of choosing arbitration over litigation as a means of dispute settlement — speed and simplicity without the time and expense of the courts.

Second, there is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into the arbitration agreement.[91]If it is presumed that the parties have conferred the arbitrator with the jurisdiction to decide his or her own jurisdiction in the same way that he or she deals with the other legal matters arising in the arbitration, the court should respect the contract of the parties so long as the arbitrator acts in good faith and not contrary to public policy.

The competence-competence doctrine is more controversial. As a matter of strict logic, it is hard to see how an arbitrator has the jurisdiction to determine his or her own competence since to do so presuppose that he or she already possesses competence under the very agreement which is doubted and sought to be challenged.[92] However, the principle has been justified on several grounds. First, it excludes judicial review of the award completely; the parties must *afortiori* be able to exclude the rule that the arbitrator cannot finally decide on his own jurisdiction. Competence-competence power is

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[90] This argument was approved by Leggatt L. J. in Harbour Assurance, *supra* note 63, at 464. Contrast Adam Samuel who criticizes this argument in his review of Schwebel's book in (1988) 5(2) JIA 119 at 120-121. Samuel agrees with J. Gillis Wetter that when two parties enter into a contract it is almost always very far from their minds and from the minds of their legal advisers that they are entering into two separate contracts. *See* SCHWEBEL, *supra* note 79, at 1, 5, cited in R. H. Smith, Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil fit? Or Can Something Indeed Come from Nothing?, 13 JOURNAL OF ARBITRATION LAW (2003). It is however, preferable to justify separability on the principle that the court applies a presumption in favor of separability of an arbitral clause to preclude unnecessary disruption of the arbitration.

[91] *See* I.F.I. SHIHATA THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 25-26 (1965), cited in J. A. Rosen, Arbitration under Private International Law: The Doctrines of Separability and Competence de la Competence 17 FORDHAM INT'L. J. 599, 608 (1994).

[92] SHIHATA, *supra* note 91; Clive M Schitthoff, The Jurisdiction of the Arbitrator, in THE ART OF ARBITRATION 285, 292-293 (Jan C Schultsz & Albert Jan van den Berg eds., 1982).

inherent in all judicial bodies and is essential to their ability to function. Hence it is best seen as a rule of convenience designed to reduce unmeritorious challenges or objections to an arbitrator's jurisdiction. It also promotes the arbitral process by giving arbitrators the competence to decide their own competence so that parties are not compelled to seek relief in the courts.

Therefore, separability and competence-competence are connected.[93] It has been said that the competence-competence rule is a corollary of the separability doctrine since the latter creates the basis for the arbitrator to have jurisdiction to rule not only on the validity of the main contract but also on the validity of the arbitration agreement. Alternatively, separability can be seen as a principle of substantive law which enlarges the effective range of the procedural law principle of competence-competence. While competence-competence simply involves the process by which the arbitral tribunal determines the validity of an arbitration clause independent of the validity of the basic commercial contract in which it is encapsulated, separability merely severs the arbitration clause from the main contract and says nothing about the validity or otherwise of the arbitration clause itself. However, the fact that an arbitration clause might be valid notwithstanding infirmities in other contract terms does not mean that the clause will necessarily be valid, or that an arbitrator's erroneous decision on the clause's validity will escape judicial scrutiny.[94]

Therefore, the doctrines of separability and competence-competence intersect only in the sense that when they rule on their own jurisdiction arbitrators are to look at the arbitration clause alone, not the entirety of the contract. Working in tandem, the two doctrines prevent attempts to thwart the parties' true intent, which is usually to have all disputes under the contract resolved by arbitration. They also promote and preserve the arbitral process by removing the need to resort to the courts for the determination of preliminary issues of jurisdiction.

V. AN APPRAISAL OF COMPETENCE- COMPETENCE AND SEPARABILITY UNDER NIGERIAN LAW

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93 F. Solimene, *supra* note 2, at 254.

94 W. Park, Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators, 8 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 133, 142-143 (1997).

The principles of competence-competence and separability have been incorporated and domesticated into the Nigerian arbitration law by section 12 (1) of the ACA,[95] which provides thus:

> An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.[96]

Similarly, section 12(2) also provides that

> for the purpose of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.[97]

From the above language, it is clear that, while section 12(1) provides for the principle of competence-competence, section 12(2) provides for separability. Hence, it can be argued that the doctrine of competence-competence is derived or based on the doctrine of separability. Without the doctrine, a tribunal is otherwise potentially obliged to refuse to entertain or consider any arguments on its jurisdiction to hear the merits of a claim, since the validity of the arbitration clause might be affected by the invalidity of the underlying contract.[98] An arbitral tribunal is competent to rule on questions pertaining to its own jurisdiction and on any objections concerning the existence or validity of an arbitration agreement. The arbitral tribunal is also empowered to rule on objections challenging its jurisdiction, including any objections concerning the existence or validity of the arbitration clause of a separate arbitration agreement. [99]Also, for purposes of subsection (1) of that section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the validity of the arbitration

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[95] ACA.
[96] ACA §12 (1).
[97] ACA §12 (2).
[98] MUSTILL AND BOYD, COMMERCIAL ARBITRATION 120 (2D ED., 2000).
[99] ACA §12 (1). *See also* UNCITRAL art. 21(1), Arbitration Model Rules.

clause.[100] The arbitral tribunal shall have the power to determine the existence or the validity of the contract that an arbitration clause forms a part.

The domestication and incorporation of the duo of competence-competence and separability in the Nigerian arbitral law is to prevent parties from frustrating and challenging, albeit frivolously, the arbitral tribunal based merely on a defective arbitral clause and/or main clause, to strengthen and jealously guide the jurisdiction of arbitrators, as well as to prevent unnecessary and premature interference by courts in the arbitral process, thereby making arbitration a true alternative to litigation. Therefore, by empowering an arbitral tribunal to determine the fundamental issue of jurisdiction rather than the court, the principle of separability strengthens and reinforces the principle of competence-competence which in turn promotes party autonomy by giving effect to the will of the parties in their arbitration agreement.

It must be noted that there are few cases decided on the principles, but an assessment of the readily available ones and others on arbitration generally reveals that Nigerian courts have not fully recognized the necessity of protecting the arbitrators' power to rule on their own jurisdiction by preventing the courts from dabbling with such power as exists in most civil law jurisdictions. For instance, in *Nigerian Telecommunication Plc v. Pentascope International BV Private Ltd*,[101] the Federal High Court held that the contract between the parties was not arbitrable because it was illegal and contrary to public policy. Also, in *Statoil (Nigeria) Ltd. v. Federal Inland Revenue Service*,[102] the court of appeal held that tax matters are not arbitrable despite the clear agreements of parties to arbitrate. It is submitted that the courts in those cases ought to stay the proceedings and direct parties to arbitration to allow the arbitrators to decide the issues of illegality and arbitrability in accordance with the provisions of sections 4 (1), (2) and 12 (1) of ACA.

A court has a duty to interpret a contract by giving effect to the wishes of the parties.[103] Therefore if the parties' agreement is that

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[100] Article 16 (I) - (II), UNCRITICAL Model Law; Gary B. Born (Op. cit) 872, Article 21, UNCRITICAL Model Law and Section 12, ACA also support separability.

[101] Nigerian Telecommunication Plc, Unreported Suit No. FHC/ABJ/ CS/36/2005 (2005).

[102] *Id.*

[103] L.A. Abdulrauf & A. A. Daibu, Challenges of Section 20 of the Nigerian Admiralty Jurisdiction Act to International Arbitration Agreements, 2 JOURNAL

any or all disputes between/among them are to be resolved by arbitration, the court should respect it. However, in *Statoil Nigeria Limited v. Nigerian National Petroleum Corporation*,[104] the court of appeal held that the clear intention of the legislature, in the provision of section 34 ACA, is that courts cannot intervene in arbitral proceedings except as provided by the ACA itself. The court further set aside an injunction granted by the Federal High Court restraining arbitral proceedings between the parties. This decision is a commendable authentication of the intention of the legislature in that regard. Thus, if the intention of the legislature is respected by the courts and the parties, real progress would be achieved in arbitral practice as parallel litigation would be reduced and the country made one of the most attractive arbitration havens in Africa.

VI. CONCLUSION

This paper examined the principles of competence-competence and separability, the jurisprudence and rationale of the concepts under various jurisdictions with particular reference to some civil and common law jurisdictions, and a comparison and the relationship between the two concepts especially as regards the scope, purpose, and justifications. The paper notes that parties of different nationalities find it difficult to do business together in a particular legal system unless their agreements to resolve disputes in a neutral and non-national forum are guaranteed, notwithstanding challenges to the validity of their underlying contracts. Hence, the doctrines are necessary to address the needs of parties to international commerce in a particular country.

The paper contends that where the subject matter of the underlying contract is capable of arbitration under the Nigerian law and the contract is in existence, the doctrine of separability will apply to enable the arbitrators to assume jurisdiction and determine the reference or dispute on the merits. The whole essence of separability is to distinguish the arbitration agreement from the main contract to give validity to the arbitration agreement even

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[104] Statoil Nigeria Limited, (2013) 14 NWLR (Pt 1373) 1, 28-29; Abdulrauf & Daibu, *supra* note 103.

where the main contract is invalid or void, the only exception being arbitrability and illegality.

The paper revealed that the interplay of the doctrine of competence-competence and separability is not only a linchpin to effective and efficient arbitral proceedings but a practical necessity, without which a party to an arbitration agreement would be able to avoid arbitration merely by challenging the contract in which the arbitration agreement is founded. The paper further examined the domestication of the concepts into the Nigerian arbitration law and noted that the domestication of the duo in the Arbitration and Conciliation Act is meant to strengthen the arbitral processes for the efficient resolution of disputes; and, thus, it a blessing to the practice arbitration in Nigeria without which recalcitrant and unscrupulous parties would have exploited the lacuna to prolong and frustrate prompt hearing of reference which is one of the basic essences of arbitration.

The paper found that the civil law approaches to competence-competence, especially that of France wherein courts are widely restricted from determining the jurisdiction of the arbitrators until the later stage (by way of review), is more ideal and preferable to the expansive powers of the courts and restrictive powers of the arbitral tribunal obtainable in most common law jurisdictions.

A trite legal concept is that parties to an agreement retain the freedom to determine their own terms, and the duty of the court is to strictly interpret the terms of the agreement on its clear wordings. Therefore, where a contract specifically provides for arbitration, courts are bound to give effect to the contract, even more so when there is a statutory restriction of court intervention in arbitral proceedings.[105] The practice by which issues, such as objections to the competence of arbitration proceedings, jurisdictional competence of arbitral panels, and/or validity of the parties' contracts, are considered matters for resolution by the courts in Nigeria is not only a total subversion of the real essence of arbitration but is also contrary to the principle of competence-competence and separability. Hence, for sustainable arbitral practice in Nigeria, it is high time for Nigerian courts to be more proactive in recognizing and adopting the negative approach to competence-competence which gives priority to tribunals over courts in determining objections to arbitral proceedings, as is the case in civil law jurisdictions.

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[105] *See* ACA §34.

Keywords
Competence-Competence, Separatability, Arbitral Tribunal, Jurisdiction, Arbitration Agreement, Arbitration and Conciliation Act, Nigeria

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A VICIOUS CYCLE: CURRENT US IMMIGRATION DETENTION SYSTEM

Gina S. Rhee[*]

ABSTRACT

Every year, the US deports thousands of aliens. The growth in immigration detention in recent years has been especially remarkable. Immigration detention policy is not practiced uniformly across the United States. The differences in policies and practices are significant for understanding the transformation of a core idea of migration control into a piece of legislation and then into an everyday practice. This paper reflects certain problems of current the US detention system, such as detention of children, harsh incarceration condition for civil detainees, arbitrary transfers, lack of a statute of limitations, an unreasonable bond system, deprivation of due process protection, and lack of an adequate medical support system. Furthermore, the paper assesses alternative options for immigration detention and explores ways to develop and improve the current detention system by looking at both US immigration cases and rulings and various international treaties and the UN Human Rights Declaration.

I. INTRODUCTION

Every year, the US deports thousands of aliens. The growth in immigration detention in recent years has been especially remarkable. In 1994, officials held approximately six-thousand non-citizens in detention on any given day.[1] That daily average had surpassed twenty thousand individuals by 2001 and thirty-three thousand by 2008.[2] Over the same period, the overall number of individuals detained each year has drastically increased from approximately eighty thousand to approximately three hundred and eighty-thousand.[3] Immigration detention policy is not practiced

[*] Attorney at Heins, Mills & Olson P.L.C., Minneapolis, MN, U.S.A.
Email: ginarhee.korea@gmail.com.

[1] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[2] *Id.*
[3] *Id.*

uniformly across the United States. For example, some states place time limits on detention while others practice indefinite detention. A number of states confiscate personal clothing and mobile phones while others permit detainees to wear their own clothes and keep their personal effects. Some states allow detainees to move freely within the center while others confine detainees to cramped, overcrowded cells. Some states detain children, some do not, and some have a policy of not detaining children, yet do in practice. The differences in policies and practices are significant for understanding the transformation of a core idea of migration control into a piece of legislation and then into an everyday practice.[4]

This paper reflects certain problems of current the US detention system, such as detention of children, harsh incarceration condition for civil detainees, arbitrary transfers, lack of a statute of limitations, an unreasonable bond system, deprivation of due process protection, and lack of adequate medical support system. Furthermore, the paper assesses alternative options for immigration detention through various interpretations of current statutes and explores ways to develop and improve the current detention system by looking at both US immigration cases and rulings and various international treaties and UN Human Rights Declaration.

As Anil Kalhan explains,

> [f]or decades, courts have documented and analyzed a wide range of detention-related concerns, and, with the number of detainees skyrocketing since the 1990s, these concerns have rapidly proliferated to the point where some commentators resist the very term 'detention' in this context as sanitized and misleading, masking quasi-punitive circumstances that approximate criminal 'incarceration' or 'imprisonment.'[5]

In general, two categories of people are subject to immigration detention. The first are non-citizens who have either entered the United States territory without authorization or are suspected of intending to cross the United States without authorization.[6] In most cases, this first category of people is asylum seekers. The second

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[4] STEPHANIE SILVERMAN & AMY NETHERY, UNDERSTANDING IMMIGRATION DETENTION 1-14 (2d ed. 2014).
[5] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[6] STEPHANIE SILVERMAN & AMY NETHERY, UNDERSTANDING IMMIGRATION DETENTION 1-14 (2d ed. 2014).

category of people subject to detention is people who have been residing within the United States, and their stay is no longer valid.[7] This might be because their visa has expired or they have committed an offense that has invalidated their visa.[8] Immigration detention is not prohibited per se under the law, but it must not amount to arbitrary deprivation of liberty.[9] Yet, administrative detention often fails to provide detainees with guarantees similar to those afforded to persons in criminal detention.[10]

As a matter of law, immigration detention is unlike criminal incarceration.[11] The Immigration Detention Overview and Recommendations report provides important distinctions between the characteristics of the Immigration Detention population in Immigration and Customs Enforcement (ICE) custody and the administrative purpose of their detention – which is to hold, process, and prepare individuals for removal – as compared to the punitive purpose of the Criminal Incarceration system.[12] "A recent report by Dora Schriro, a senior Department of Homeland Security (DHS) official, gives official imprimatur to crucial aspects of this picture, acknowledging explicitly that most detainees are held – systematically and unnecessarily – under circumstances inappropriate for immigration detention's noncriminal purposes."[13] For example, between 2002 and 2009, the United States rapidly increased its use of prison-like detention, often detaining asylum seekers without access to prompt court review of detention.[14] To facilitate removal – long understood to be a civil sanction, not criminal punishment – detention and other forms of custody are constitutionally permissible to prevent individuals from fleeing or endangering public safety.[15] However, freedom from physical restraint "lies at the heart of the liberty that the Due Process Clause protects," and, if the circumstances of detention become excessive

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[7] *Id.*
[8] *Id.*
[9] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).
[10] *Id.*
[11] HOMELAND SECURITY ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, 1-35 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[12] *Id.*
[13] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[14] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).
[15] Fong Yue Ting v. United States, 149 U.S. 698, 728-30 (1893).

in relation to these noncriminal purposes, then detention may be improperly punitive and therefore unconstitutional.[16]

There are elements necessary to ensure that detention is justified. It should be lawful, necessary, proportionate, and for the shortest time possible time.[17] As Homeland Security Secretary, Janet Napolitano, recently stated, "the paradigm was wrong."[18] "Most detention facilities, the report notes, were designed to hold criminal suspects and offenders, not immigration detainees, and most detention officials have experience in law enforcement, not civil detention and alternatives to detention."[19] Furthermore, absent specific guidelines on prolonged detention, detainees are to be detained in such setting for an indefinite period of time. Although the Supreme Court has upheld the constitutionality of mandatory detention under criminal deportability grounds for the "brief period necessary" to hold and conclude removal proceedings, the Court also has held that, absent special circumstances, detention beyond a period reasonably necessary to effectuate removal raises serious due process concerns.[20]

The massive workload of immigration judges is one of the factors that contributes to this rather chaotic detention system. For over thirty years, immigration judges have been asking for more colleagues and resources to help them manage a workload that is just under three times as high as their federal district court counterparts.[21] This continued disconnect in focusing on detaining and deporting over legalization is not accidental.[22] Moreover, while DHS appears prepared to detain low-risk individuals in less restrictive settings and expand alternatives to detention, it remains unclear whether those programs will meaningfully reduce the overall severity of custody.[23] As we will discuss later, overcrowding and lack of fundamental rights, such as adequate telephone access, deprivation of due process, and medical support have long been documented, and verbal and physical abuse within the center have

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[16] Zadvydas v. Davis, 533 U.S. 678, 590 (2001).
[17] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).
[18] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[19] *Id*.
[20] Zadvydas v. Davis, 533 U.S. 678, 690-96, 699-701 (2001).
[21] Kari Hong, *The Ten Parts of "Illegal" in "Illegal Immigration" That I Do Not Understand*, 50 UC DAVIS L. REV. 43-56 (2017).
[22] *Id*.
[23] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).

also been common.[24] Particularly, inadequate health care has been a serious problem. Over one-hundred detainees have died in custody since 2003, often due to neglect of their health needs.[25] The following part of this paper will outline critical issues arising from current detention system and some of the key human rights protections that the United States must integrate into their use of immigration detention.

II. IMMIGRATION DETENTION AND PROBLEMS

A. Right to Counsel in Immigration Proceedings

Before deportation, aliens are entitled to an administrative removal proceeding at which they can challenge the grounds for their deportation or, more commonly, appeal for discretionary relief.[26] Despite the harsh consequences of removal, the complexity of the immigration code, and the limited resources of many aliens, there is no comprehensive system for the provision of counsel to indigent aliens facing removal proceedings.[27]

For many individuals, detention lasts for prolonged or indefinite periods of time.[28] "Although adjudicators expedite proceedings involving detainees, neither the Sixth Amendment nor any statutory speedy trial guarantee applies to immigration proceedings."[29] Ultimately, counsel may mean the difference between winning and losing a removal proceeding.[30] Studies consistently demonstrate that the ability to retain counsel can dramatically influence outcomes. One comprehensive research study concluded that "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."[31] Another study produced roughly

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[24] Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA, 29-43 (2009).
[25] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[26] *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544-61 (2007).
[27] *Id*.
[28] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).
[29] *Id.*
[30] Kevin R Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE. L. REV. 2394-2414 (2013).
[31] Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of*

similar results.[32]

Private parties who successfully represent noncitizens in removal proceedings cannot generally recover attorneys' fees, thus making it unlikely that private attorneys possess the economic incentive to represent lawful permanent residents in removal proceedings.[33] Section 192 of the Immigration and Nationality Act (INA) grants aliens the privilege to retain counsel for removal hearings, but it expressly denies government funding for representation.[34] Although many scholars and advocates have argued for a categorical right to appointed counsel for indigent aliens in removal proceedings, courts have not heeded the call.[35] The Supreme Court has long held that deportation is not punishment, and the protections and procedures that attach to criminal trials thus do not apply in immigration proceedings.[36] While courts are quick to emphasize the non-penal nature of removal proceedings, they also apprehend the grave consequences of deportation. The government relies on the fair results of removal proceedings to deport aliens just as it relies on the results of criminal trials to imprison defendants.[37] In the *Cuyler* case, the Court reasoned that when a defendant is deprived of effective counsel "a serious risk of injustice infects the trial itself. When a state obtains a criminal conviction through such a trial, it is the state that unconstitutionally obtains a criminal conviction through such a trial, and it is the state that unconstitutionally deprives the defendant of his liberty."[38]

B. Arbitrary Transfers

Many detainees endure due process violations and hardships arising from routine transfers to facilities far from where most detainees reside.[39] "Transfers exacerbate the problems that invariably arise in detention, disrupting detainees' ability to present effective arguments for release and against removal by interfering

Immigration Litigation in the Courts, 1979-90, 45 STAN. L. REV. 115, 175-78 (1992).

[32] Kevin R Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE. L. REV. 2394-2414 (2013).

[33] *Id.*

[34] 8 U.S.C. § 1362 (2000).

[35] Robert N. Black, *Due Process and Deportation — Is There a Right to Assigned Counsel?*, 8 UC DAVIS L. REV. 289 (1975).

[36] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39, 1050 (1984).

[37] *Id.*

[38] Cuyler v. Sullivan, 446 U.S. 335, 343 (1980).

[39] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).

with attorney-client relationships, delaying and complicating proceedings, and even changing the applicable substantive law."[40] When an alien is transferred to another facility, ICE should ensure seamless transfer of communication to a new officer.[41] Further, the officer should receive training to be able to assess the general well-being or demeanor of persons on their caseload.[42]

Immigration and Customs Enforcement has pledged to implement a detainee-locator system and to follow new managerial protocols before transferring individuals.[43] According to the report prepared by ICE in 2009, detainees are often transferred to locations prohibitively far away, and attorneys are not notified when their clients are moved.[44] "While [the aforementioned] changes may ensure that fewer detainees 'disappear' altogether within ICE's facilities network, they will do relatively little to rein in the haphazard transfer practices that currently prevail."[45] Therefore, ICE should create substantive rules guiding and limiting transfers, or making it easier for detainees to change venue. Furthermore, DHS and ICE should develop a centralized system for family members to locate detainees, and ICE should ensure that attorneys and family members are notified in advance of detainee transfers. Improving the conditions of transport is also critical, in particular, managing them with increased sensitivity to women's mental and physical health concerns during transit. ICE should also ensure that transferred detainees can place a call to their family and attorney within twenty-four hours of arrival at the detention facility.

When faced with the choice of devoting resources to improve conditions or to acquire additional detention space, the government may face considerable pressure to choose the latter.[46] In fact, an accountable government may act in "arbitrary" ways depending on the nature of public preferences to which government is

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[40] *Id.*

[41] HOMELAND SECURITY ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, 1-35 (2009), HTTPS://WWW.ICE.GOV/DOCLIB/ABOUT/OFFICES/ODPP/PDF/ICE-DETENTION-RPT.PDF.

[42] *Id.*

[43] U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, IMMIGRATION AND CUSTOMS ENFORCEMENT'S TRACKING AND TRANSFERS OF DETAINEES, 3-4 (2009), http://trac.syr.edu/immigration/library/P3676.pdf.

[44] HOMELAND SECURITY ICE, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, 1-35 (2009), HTTPS://WWW.ICE.GOV/DOCLIB/ABOUT/OFFICES/ODPP/PDF/ICE-DETENTION-RPT.PDF.

[45] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).

[46] Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 547 (1999).

accountable.[47] "While the budgetary pressures could also prompt DHS to expand less costly alternatives to detention, the close association of immigration control with criminal enforcement will continue to place pressures upon the government to hold noncitizens under restrictive, quasi-punitive forms of custody."[48]

C. Detention of Minors

According to Center for Civil and Political Rights (CCPR) General Comment No. 35, "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests … [,and] also the extreme vulnerability and need for care of unaccompanied minors."[49] The Committee on Migrant Workers (CMW) calls for detention of children to cease, for a "best interest" determination, and for unaccompanied migrant children in transit or destination countries and minors with family members not to be separated from families.[50]

Children often become classified as "unaccompanied" when they reach the US border and are apprehended by ICE officials or Customs and Border Patrol (CBP) agents.[51] Within the United States, worksite enforcement operations conducted by ICE officials also affect children. "Just three worksite raids in 2006 and 2007 affected 501 children."[52] Some children also become unaccompanied when they are separated from family members who are subjected to detainment or deportation by immigration officials. Others on their way to the United States might become separated from their parents due to unexplainable circumstances.[53]

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[47] Aziz Huq, *The Political Path of Detention Policy*, 48 AMER. CRIM. L. REV. 1531 (2011).

[48] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010)

[49] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).

[50] *Id*.

[51] Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 1(1) THE JOURNAL OF THE HISTORY OF CHILDHOOD AND YOUTH 126-38 (2008).

[52] Marisela Garcia, Unaccompanied Children in the United States: Challenges and Opportunities, http://www.latinopolicyforum.org/resources/document/Unaccompanied-Children-Article.pdf.

[53] Alejandra Lopez, Seeking 'Alternatives to Detention': Unaccompanied Immigrant Children in the U.S. Immigration System (May 1, 2010) (Honors College thesis, Pace University).

Most unaccompanied immigrant children leave their home countries to escape war and conflict, a natural disaster, civil, political, or economic upheavals; and, at times, they leave to avoid gang-, crime-, or drug-related violence, when the journey to the United States seems like the only alternative.[54] Many unaccompanied immigrant children in detainment, in particular those of Mexican descent, are forced by ICE and CBP officials to make legal decisions upon detainment; these children must choose between filing for asylum to remain in the country or signing "voluntary departures."[55] "Accepting voluntary departure does not affect future applicants for entry to the US. A person who is deported must wait a decade before returning to this country or face a possible federal prison term."[56] These children depend on an attorney to file for asylum, to explain the complexities of their immigration case, and to provide advice that would resolve their cases in the best possible manner. But without money to hire an attorney, unaccompanied immigrant children rely on pro-bono attorneys to counsel and represent them. The limited number of pro-bono attorneys and their limited capacity to take on new cases, forces over 50% of unaccompanied immigrant children to go through the immigration process without legal aid.[57]

An example of this occurring took place in a 1985 case where Mr. Perez-Funez, a Mexican sixteen-year-old boy, "claimed that the INS presented him with a voluntary departure consent form without advising him of his rights in a meaningful manner."[58] The court responded by preventing the INS from obtaining voluntary departure agreements from children without notifying first a guardian or a nonprofit organization.

The court decision in *Perez-Funez v. District Director* highlights the need to inform immigrant children of their rights under the supervision of an adult or organization.[59] Most children are not prepared to make such difficult legal decisions on their own accord. A child's fate belongs under the protection and care of an

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[54] *Id*.

[55] 'Voluntary departure' agreements allow ICE and BPS officials to deport children immediately without having them go before an immigration judge.

[56] Ruth Teichroeb, Ruth. Jail Alternative Safeguards Teen Aliens, Seattle Post-Intelligencer Report (Dec. 2, 2004), http://www.seattlepi.com/local/202002_carson02.html.

[57] Alejandra Lopez, Seeking 'Alternatives to Detention': Unaccompanied Immigrant Children in the U.S. Immigration System (May 1, 2010) (Honors College thesis, Pace University).

[58] Perez-Funez V. District Director. INS, 619 F. Supp. 656 (C.D. Cal. 1985).

[59] *Id*.

adult who looks after the child's interests. However, under current immigration policy, unaccompanied immigrant children do not own the right to free legal counsel, nor are their best interests secured at the hands of immigration officials. This severely conflicts with the assurance of upholding a child's best interests.[60]

Finding the best "alternatives to detention" for unaccompanied immigrant children is not only essential to maintain the dignity of the US Constitution but also to secure the credibility and accountability of an immigration system that remains broken.[61] The detention center system is not the place for children as it is designed to incarcerate and punish criminals. More than 72% of children in the facilities reported that they were restrained by leg shackles and handcuffs, and 61% detailed how they were routinely subjected to strip searches.[62]

While the DHS is told to seek the welfare of unaccompanied immigrant children and passage of federal policies reflects an attempt to align with the best interest principle, the federal government increases the number of private contracts to handle the imprisonment of immigrants every year and gives ICE the responsibility to "strengthen the nation's capacity to detain and remove criminal and other deportable aliens."[63] How can the same agency that seeks to deter immigration and imprison immigrants be responsible for finding the best means possible of gaining their residency and their release? This paradox makes it impossible for DHS to prioritize both the welfare of children under their custody and national security issues where ICE finds "it a key component of the comprehensive strategy to deter illegal immigration."[64]

As one solution, NGOs offer children the opportunity to trust persons who work to underscore their welfare and interests. NGO involvement provides children with opportunities to ask questions and discuss concerns about their cases, as well as someone to remind them of hearings and scheduled check-ins with ICE.[65] However, there is still a crucial need to afford unaccompanied

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[60] Alejandra Lopez, Seeking 'Alternatives to Detention': Unaccompanied Immigrant Children in the U.S. Immigration System (May 1, 2010) (Honors College thesis, Pace University).
[61] *Id*.
[62] *Id*.
[63] IMMIGRATION. THE DEPARTMENT OF HOMELAND SECURITY. WASHINGTON D.C., https://www.dhs.gov/mission.
[64] *Id*.
[65] Nina Robin, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, 09-01 ARIZ. L.J. 1-79 (2009).

immigrant children with free legal representation so that their interests are best advocated. Congress' role is to ensure that immigration courts have the discretion to consider the impact of detention on families. Both DHS and ICE should consider the impact of detention on families in making determinations regarding the availability of bond and parole, and further establish a policy that places primary caregivers of minor children in facilities near where their children are residing and permits transfer only in documented emergencies.

D. Medical Support

The number of immigrants detained by INS on any given day rose from an average of 4,062 in 1980 to approximately 30,000 in 2008, while the number of immigrants detained annually increased from 280,000 in 2005 to nearly 400,000 in 2010.[66] Meanwhile, the average length of INS detention skyrocketed from less than four days in 1981 to sixty-four days in 2003.[67] During this period, Congress increased funding for INS, allowing the Service to increase the number of beds and staff in federal and nonfederal detention facilities. Despite these new resources, INS lacked the infrastructure and personnel necessary to house its entire detainee population on its own and turned to state, local, and private prison facilities for assistance. By 2011, these nonfederal facilities housed 84% of all INS detainees.[68] The rapid increase in immigrant detention, coupled with the delegation of detention duties to non-federal facilities, has resulted in widespread abuse and neglect of federal immigrant detainees. Notably, between 2003 and 2011, 127 detainees died in ICE custody; 71% of those deaths occurred in nonfederal facilities.[69]

According to the doctor who was hired to conduct the mortality review of detainee, Amra Miletic, "this was a death that was preventable."[70] The consultant criticized the qualifications of

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[66] Nina Bernstein, *Getting Tough on Immigrants to Turn a Profit*, N.Y. TIMES, Sept. 29, 2011.

[67] *Id*.

[68] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: DETENTION MANAGEMENT (Nov. 10, 2011), https://www.ice.gov/factsheets.

[69] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DETAINEE DEATHS - OCTOBER 2003 - DECEMBER 19, 2011 (2011), http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf.

[70] DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT OF INVESTIGATION, Case No. 201106138 (Aug. 17, 2011),

the detention center's medical staff, writing "competence in the practice of contemporary medicine and nursing must be questioned. The nursing staff, based on documentation, appears to be working outside the scope of nursing practice and the physician's lack of understanding of the urgency of colonoscopy and referral to emergency care begs to question his competency."[71]

Even more concerning, inspectors document allegations that non-medical facility staff interfered with medical recommendations from nurses, violating standards which require clinical decisions to be the sole province of the clinical medical authority and never made by non-clinicians.[72] Even worse, federal overseers often "cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse." Notably, ICE has terminated its contract with only three facilities as a result of noncompliance with ICE's standards.[73]

Indefinite detention is harmful to the health of detainees, and some are detained for years. In addition, Medical Justice's research has demonstrated that detainees are harmed by improper use of segregation, instances of medical mistreatment, excessive use of restraints, injuries caused during removal, and inappropriate treatment of hunger strikers.[74] The long-term and indefinite nature of detention in many states is a key contributor to mental decline. Detainees with mental health disorder are particularly likely to present with high levels of anxiety or agitation. This may be misunderstood as challenging behavior by ICE officials, leading to a vicious circle of increasingly restrictive containment and worsening behavior and health.[75] Feelings of despair, hopelessness, depression, anxiety, post-traumatic stress disorder, psychosis and suicidal ideation are commonly reported by detainees; and, in some systems, suicide and incidents of self-harm occur at much higher

https://www.documentcloud.org/documents/2695509-Miletic-Amra.html#document/.

[71] *Id*.

[72] DETENTION WATCH NETWORK & AMERICAN CIVIL LIBERTIES, FATAL NEGLECT - HOW ICE IGNORES DEATHS IN DETENTION, NATIONAL IMMIGRANT JUSTICE CENTER 1-28 (Feb. 2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf.

[73] Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476-1497 (2012).

[74] Chris Harris, A Secret Punishment – The Misuse of Segregation in Immigration Detention, Medical Justice, 1-111 (2015).

[75] *Id*.

rates than among un-detained asylum seekers.[76] Children, torture survivors, and other vulnerable people are at particular risk of lifelong psychological damage from even short periods of immigration detention.[77] Detainees with mental health issues should not be detained in the first place since it can cause tremendous harm to the mental health of detainees and in particular those who have preexisting mental health disorders. According to Home Office policy, detainees with mental health issues should not be considered suitable for detention except in exceptional circumstances.[78] However, lack of proper screening processes means that many detainees are not identified and end up inappropriately detained.

E. Excessive Physical Restriction

In a 2009 report, Human Rights First organization documented an increase in prison-like detention, finding that in nearly all facilities, ICE "detains asylum seekers in penal and penitentiary-like conditions: asylum seekers and other immigrant detainees are stripped of their own clothing and given prison uniforms, not allowed any contact visits with family or friends, and lack meaningful privacy and access to outdoor recreation."[79] In addition to concluding that "freedom of movement within the facilities is restricted," the report also documented excessive use of handcuffs and shackles regardless of the detainee's age.[80]

Another study, conducted by medical experts, also highlighted the way in which the use of prison uniforms identifies detained asylum seekers as criminals.[81] After conducting a comprehensive review of the impact of detention on asylum seekers, Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture recommended that detained asylum seekers be permitted to

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[76] *Id*.

[77] STEPHANIE SILVERMAN & AMY NETHERY, UNDERSTANDING IMMIGRATION DETENTION 1-14 (2d ed. 2014).

[78] Chris Harris, A Secret Punishment – The Misuse of Segregation in Immigration Detention, Medical Justice, 1-111 (2015).

[79] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).

[80] *Id*.

[81] Physicians for Human Rights, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers, Bellevue/NYU Program for Survivors of Torture 191 (June 2003), https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf.

wear their own clothing as a "simple, yet important" way for asylum seekers to be "able to identify themselves as individuals and not as criminals."[82] In August 2009, DHS announced its decision to move away from a "jail-oriented approach" to immigration detention, recognizing that immigration detention should be approached in a "civil" rather than "penal" manner.[83] While indicating an intent to build facilities more appropriate for immigration detainees, US immigration authorities also requested that a number of changes be made to eight facilities—including increased visitation (and contact visitation), increased outdoor and indoor recreation, greater freedom of movement within facilities, and allowing detainees to wear their own clothing.[84] However, as previously stated, a large number of detention centers are managed by non-federal contractors, and their practices are not supervised on regular basis. Thus, whether the guidelines are properly followed or not remains doubtful.

F. Rationality of Detention

The bed quota mandated by Congress through DHS' appropriations bill since 2009 warrants scrutiny, especially in light of recent jurisprudence placing limits on immigration detention. Specifically, the judicial trend towards upholding detainees' rights with respect to prolonged mandatory detention can be applied to the fact that Congress requires the agency to maintain thirty-four thousand detention beds a day. This is especially true in light of DHS's stated policy of prioritizing the detention and removal of non-citizens who pose "threats to national security, public safety, and border security."[85]

If the mandate is to fill beds regardless of whether the noncitizens should be subjected to detention, then the provision is squarely in violation of the procedural due process.[86] Specifically, the individual interest is a liberty interest; there does not appear to

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[82] *Id*.

[83] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 2009 IMMIGRATION DETENTION REFORMS, PRESS RELEASE (Aug. 6, 2009), https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-ICCPR-submission.pdf.

[84] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).

[85] Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE L.J. 77-121 (2017).

[86] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

be any outweighing government interest in filling thirty-four thousand beds a day; and, there are no costly procedural safeguards.[87] Congress should be made to clarify that the DHS appropriations language of "shall maintain" does not mean the executive must "fill" the beds. During this period, the number of detainees without any criminal conviction – who may not be subject to mandatory custody – doubled. Officials spend $1.7 billion annually to run "the largest detention system in the country," a sprawling network of over five hundred facilities nationwide.[88]

Research study to date indicates that noncitizen immigration arrestees do not, in fact, pose more risk than criminal pretrial detainees. Regarding public safety risk, for example, criminal recidivism by ICE arrestees has been found to be significantly lower than recidivism by the general prison population. A US criminal justice study found that released noncitizens were re-arrested pretrial at lower rates than US citizens: 0.0 to 3.2% compared to 1.9 to 4.5%.[89] Schriro also anecdotally noted immigration detainees' less dangerous demeanor, which she ascribed to their "appreciably well-developed" life skills – being more likely than those in the criminal justice system to have come from "intact families," with jobs, families, children, and a "stake in the community."[90]

Immigration detention should only be imposed as a last resort when there are no less coercive alternatives to meet the US' objectives such as non-custodial measures, an individual assessment, and choosing the least intrusive or restrictive measure.[91] The rationales for immigration detention must be "rationally ... connected" to "legitimate state objectives."[92] The government defends immigration detention statutes by asserting its interest in ensuring compliance with the immigration laws and the public's safety. While these interests are certainly legitimate, the harder question to answer is whether immigration detention is "rationally ... connected to them in such a way that immigration

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[87] *Id*.
[88] Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE L.J. 77-121 (2017).
[89] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIG. L.J. 45-93 (2014).
[90] *Id*.
[91] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).
[92] *Id*.

detention is not excessive."[93]

The requirements of lawfulness, necessity, and proportionality apply not only to the initial detention order but the whole period of detention. Determinations of "reasonableness," "necessity under the circumstances," and "proportionality" require careful individual consideration of the circumstances of each case.[94] The UN Human Rights Committee has applied this principle in a number of decisions. For example, in considering a Bangladeshi asylum seeker's detention in Australia, the Human Rights Committee concluded that an asylum seeker's detention was arbitrary where the state did not justify detention "in relation to the particular case."[95] In a separate case, the committee found an asylum seeker's detention arbitrary where the state party had "not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends," such as reporting requirements or sureties.[96] Not only are individualized assessments necessary to ensure that detention is not arbitrary within the meaning of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and other human rights conventions, but individualized assessments must also be provided to ensure that any restrictions on the movement of asylum seekers are necessary within the meaning of Article 31(2) of the Refugee Convention.[97] The United Nations High Commissioner for Refugees (UNHCR) Executive Committee has confirmed that detention may only be resorted to "if necessary" and on "grounds prescribed by law" for certain specified reasons relating to the individual asylum seeker, including to verify identity or protect national security, an approach that is also detailed in UNHCR's Detention Guidelines.[98] The guidelines stress that detention based on other grounds, such as the desire to deter future asylum seekers, is "contrary to the norms of refugee law."[99]

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[93] Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE LAW & POLICY REV. 228-273 (2012).

[94] UN Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 59, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010).

[95] Shafiq v. Australia, UN Human Rights Comm., Commc'n No. 1324/2004, UN Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006).

[96] C v. Australia, UN Human Rights Comm., Commc'n No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, ¶ 8.2 (Nov. 13, 2002); *see* Baban v. Australia, UN Human Rights Comm., UN Doc. CCPR/C/78/D/1014/2001, ¶ 7.2 (2003).

[97] Convention Relating to the Status of Refugees art. 31(1), 1951.

[98] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).

[99] *Id*.

G. Federal and State Immigration Policing

The federal government has increased the daily number of individuals in immigration detention from 6,785 in 1994 to over 34,069 in 2012.[100] The federal government now holds nearly four hundred thousand individuals annually, in a patchwork of county jails, privately-run prisons, and other facilities across the country.[101] A growing number of states and localities have adopted policies limiting their cooperation with ICE at the next stage of the enforcement process, when ICE issues detainers to facilitate apprehension of individuals identified through Secure Communities. For example, California recently adopted the Trust Act, which, except in cases involving individuals charged with or convicted of serious criminal offenses, prohibits law enforcement officials within the state from detaining individuals for immigration enforcement purposes, at ICE's request, if those individuals are otherwise eligible for release.[102] Arizona's alien smuggling law is another reform challenge that has quietly transferred control over immigration prosecution into the hands of state and local actors, enabling them to work independently to pursue their own immigration agendas without Congress's blessing or the Executive's guidance.[103] Moreover, by allowing devolution of immigration enforcement to occur within an exclusively criminal state practice, the federal civil–criminal immigration system is recalibrated toward criminal enforcement.[104] Current reform proposals still fall far short of addressing the central design flaws in the immigration detention system. To achieve a meaningful reform, major design constraints, such as overreliance on mandatory detention and unproductive burden-shifting schemes, must be eliminated.[105]

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[100] IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), ICE TOTAL REMOVALS, DEPARTMENT OF HOMELAND SECURITY (Aug. 25, 2012), https://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf.

[101] HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM - A TWO-YEAR REVIEW 1 (2011), https://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[102] Patrick McGreevy, *Brown Resets Bar on Migrant Rights*, L.A. TIMES, Oct. 6, 2013, http://huff.to/192nrO6e.

[103] Ingrid Eagly, *Local Immigration Prosecution: A Study of Arizona before SB 1070*, 58 UCLA L. REV. 1749 (2011).

[104] *Id.*

[105] Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI L. REV. 137 (2013).

Recently, Supreme Court has applied strict scrutiny to invalidate state laws denying legal immigrant eligibility for state welfare programs[106] and commercial fishing licenses.[107] While undocumented immigrants have not been extended the same degree of equal protection, the Supreme Court nevertheless did apply an intermediate standard of heightened scrutiny to invalidate a state law authorizing local school districts to deny educational access to children who were not lawfully admitted to the United States.[108] "Moreover, like U.S. citizens, non-U.S. citizens, whether lawfully present or not, are protected in their day-to-day lives by other provisions of the U.S. Constitution"[109] that guarantee the fundamental rights of all "persons."[110]

III. POSSIBLE ALTERNATIVES AND RECOMMENDATIONS

A. Revisiting the Definition of Aggravated Felony

The government classifies certain criminal convictions under immigration law as "aggravated felonies." This classification is one of the most powerful legal tools that the government uses against a noncitizen. But because of overly-aggressive use of this classification by the government, an immigrant's crime does not have to be either aggravated or a felony to be designated an "aggravated felony." If the government decides that someone's crime is an aggravated felony, the person will be detained, often for years until the person is deported. The power of the federal courts to correct the actions of the government is significantly limited when the person has been classified as an "aggravated felon." The government uses this expanded version of the law aggressively to classify as many immigrants as possible as aggravated felons. Often, minor offenses that have been found to be aggravated felonies include misdemeanor theft of items of minimal value, such

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106 Graham v. Richardson, 403 U.S. 365 (1971).
107 Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
108 Plyler v. Doe, 457 U.S. 202 (1982).
109 Anil Kalban, *Immigration Enforcement and Federalism after September 11, 2001, in* IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 185 (Ariane Chebel d'Apollonia & Simon Reich ed., 2008).
110 *Id*. *See also* Wong Wing v. United States, 163 U.S. 228, 237-38 (1896).

as fifteen dollars' worth of clothes and pulling the hair of another during a fight over a boyfriend. The government also changed the rules so that these changes reached back in time to apply to all crimes no matter when they were committed (discussed later in this paper). All of these aggravated felonies subject immigrants to automatic deportation regardless of their individual circumstances and without consideration that they have already served their time, resulting in a disproportionately harsh double punishment.[111]

By amending Section 101(a)(43) (8 U.S.C. 1101(a)(43)), Congress must narrow the "aggravated felony" definition under immigration law so that it reflects common sense, proportionality, and the US system of justice, and not mandate life exile for an overly-broad range of offenses nor target minor violations of the law.[112]

B. Statute of Limitation in Immigration Law

Under statutes of limitation in both the criminal and civil contexts, the law generally limits the time during which the government may bring criminal or civil charges against an individual. For example, under federal criminal law, an individual may generally not be prosecuted or punished for a non-capital offense unless charges are brought within five years.[113] Similarly, under non-criminal federal law, an action or proceeding may generally not be brought against an individual for the enforcement of any civil penalty or forfeiture unless commenced also within five years.[114] Nevertheless, immigrants face deportation for conduct that happened many years ago because federal immigration authorities have deemed that the lack of a statute of limitations in the INA itself allows them to reach back in time as far as they want to deport people. DHS bringing deportation charges against immigrants, long after the conduct in question, violates basic notions of fairness and creates tremendous hardship for immigrants, many of whom are long-time lawful permanent resident immigrants, refugees, or asylees, and their families, employers, employees, communities, and the United States as a whole. [115] Even though the federal civil

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[111] Angie Junck, Principles for Immigration Reform that Promote Fairness for All Immigrants, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/ijn_documents_final.pdf.
[112] *Id.*
[113] 18 U.S.C. § 3282.
[114] 28 U.S.C. § 2462.
[115] Angie Junck, Principles for Immigration Reform that Promote Fairness for All

statute of limitations provision at 28 U.S.C. 2462 has been described as the 'catch-all' statute of limitations that applies where Congress has not otherwise provided for a limitations period in a statute,[116] the federal government and courts have nevertheless declined to apply 28 U.S.C. 2462 to immigration removal proceedings because the INA does not itself include any express statute of limitation provision. Therefore, Congress must clarify that the general federal civil statute of limitation applies to the bringing of removal charges based on long ago conduct, or enact an immigration-specific statute of limitation.[117]

C. Revision of Bond System

Under current immigration laws, non-citizens in removal proceedings have limited opportunities to challenge the necessity of their detention. One way in which non-citizens can seek release from immigration detention is through the payment of a bond. However, current bond policies have a punitive effect on indigent non-citizens, who cannot afford to pay for their release. Under the INA, non-citizens who pose no flight risk or danger to public safety may be released either on parole or on bond of no less than fifteen hundred dollars. Pursuant to INA § 236(c), some non-citizens, such as those who commit certain criminal offenses, are subject to mandatory detention and are ineligible for release on bond. Immigration bond amounts are determined on a case-by-case basis by ICE officers and immigration judges.[118] As such, bond amounts can vary widely, ranging from the statutory minimum of fifteen hundred dollars to over twenty-five thousand dollars.[119] According to recently released data by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the median immigration bond for fiscal year 2015 was approximately six

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Immigrants, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/ijn_documents_final.pdf.

[116] Fed. Election Comm'n v. Nat.'l Republican Senatorial Comm., 877 F. Supp. 15, 17 (D.D.C. 1995).

[117] Angie Junck, Principles for Immigration Reform that Promote Fairness for All Immigrants, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/ijn_documents_final.pdf.

[118] Sela Cowger, Policy Brief: Reforming Bond Policies for Indigent Noncitizens in Immigration Detention (Nov. 2016), http://immigrationforum.org/wp-content/uploads/2016/11/Bond-Paper-PDF.pdf.

[119] *Id.*

thousand and five hundred dollars.[120]

The US Department of Justice (DOJ) recently argued before the Eleventh Circuit Court of Appeals, in *Walker v. City of Calhoun*, that bail and bond policies that do not consider an indigent defendant's ability to pay violate the Fourteenth Amendment. In an amicus brief, the DOJ wrote, "In addition to violating the Fourteenth Amendment, such bail systems result in the unnecessary incarceration of people and impede the fair administration of justice for indigent arrestees…. [T]hey are not only unconstitutional, but they also constitute bad public policy."[121]

In 2012, the district court granted a preliminary injunction requiring the government to provide certain class members detained for more than one hundred and eighty days with a bond hearing before an immigration judge.[122] The district court held that the immigration judge must release these detainees "on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."[123] The Ninth Circuit Court of Appeals affirmed the district court's decision,[124] and, in 2013, the district court issued a permanent injunction, which was subsequently affirmed in part by the Ninth Circuit.[125] Congress should eliminate the statutory minimum for the current immigration bond, and INA and ICE officers and immigration judges should be required to consider an individual's ability to pay when determining bond amounts for detainees who pose no danger to public safety or flight risk.[126]

D. Alternatives to Detention

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[120] Angie Junck, Principles for Immigration Reform that Promote Fairness for All Immigrants, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/ijn_documents_final.pdf.

[121] Sela Cowger, Policy Brief: Reforming Bond Policies for Indigent Noncitizens in Immigration Detention (Nov. 2016), http://immigrationforum.org/wp-content/uploads/2016/11/Bond-Paper-PDF.pdf.

[122] Rodriguez II, 2012 WL 7653016.

[123] *Id*.

[124] Rodriguez II, 715 F.3d at 1146.

[125] Rodriguez v. Holder (Rodriguez III), No. CV 07-03239-TJH, 2013 WL 52229795, (C.D. Cal. Aug. 6, 2013).

[126] Sela Cowger, Policy Brief: Reforming Bond Policies for Indigent Noncitizens in Immigration Detention (Nov. 2016), http://immigrationforum.org/wp-content/uploads/2016/11/Bond-Paper-PDF.pdf.

Alternatives to detention (ATD) are any legislation, policy, or practice, formal or informal, that ensures people are not detained for reasons relating to their migration status.[127] Under international law, immigration detention must only be used as a last resort, and, therefore, states must first seek to implement ATD, which allows individuals at risk of immigration detention to live in non-custodial, community-based settings while their immigration status is being resolved.[128]

"While ICE's use of detention has exploded fivefold, from 85,730 individuals in 1995 to nearly 441,000 individuals in FY 2013, ICE's use of alternatives to detention pales in comparison."[129] As Noferi delineates regarding ICE's own program,

> ICE's Intensive Supervision Appearance Program ('ISAP'), involving electronic monitoring and varying degrees of supervision, supervised nearly 41,000 unique noncitizens over the course of fiscal year 2013, and nearly 24,000 that began in that year. … ISAP has showed remarkably high success: from fiscal years 2011 to 2013, 99% of participants in the full service program appeared at scheduled court hearings, and 95% appeared at removal hearings. … A report found the average daily cost of the ISAP program to be $10.55 per day, compared to the $158/day estimated cost of detention. An independent study found that DHS could save over $1.44 billion of its $2 billion detention budget at the time by detaining only noncitizens with serious crimes and otherwise using alternatives.[130]

E. Restricting Arbitrary Transfers and Protection of Due Process

Individuals who are placed in removal proceedings cannot be expected to navigate the maze without the assistance of counsel. Doing so presents a grave risk that an individual who might have a legal basis for remaining in the United States is deported for no

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[127] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment* 29 GEO. IMMIG. L.J. 45-93 (2014).
[128] *Id.*
[129] Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment* 29 GEO. IMMIG. L.J. 45-93 (2014).
[130] *Id.*

other reason than an inability to access counsel.[131] Facing immigration detention and deportation do not have the same constitutional protections as defendants facing criminal incarceration.[132] Some of the constitutional protections inapplicable in the immigration context include the privilege against self-incrimination, the right to trial by jury, the prohibition on ex post facto laws, the right to appointed counsel, and the ban on cruel and unusual punishment.[133] One circuit hinted at the possibility of a constitutional right to appointed counsel in some circumstances, but no court has ever actually appointed counsel in an immigration proceeding under this reasoning.[134]

Immigration detention transfers are extremely common today and are rooted in the executive branch's discretionary authority, which was established over the past few decades.[135] Section 241(g) of the INA provides that, "the Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."[136] This provision was incorporated into immigration law in 1952[137] and has not materially changed. Federal courts have consistently held that § 241(g) grants the executive branch almost limitless authority to house detainees wherever the government sees fit.[138] Indeed, 84% of immigration detainees during ICE's 2007 fiscal year were transferred at least once.[139]

Moving immigration detainees, from densely populated urban areas where they live and are initially detained by ICE to distant rural outposts that are geographically isolated, subverts the fundamental principles of justice that are the foundation of Fifth

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[131] César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. (2011).

[132] Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* 48 U. MICH. J. L. REFORM 879 (2015).

[133] Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. L. Reform 1001 (2015).

[134] Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975).

[135] César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. (2011).

[136] INA § 241(g), 8 U.S.C. §1231(g)(1)(2006).

[137] *See* Immigration and Nationality Act, Pub. L. 82-414, ch. 477, § 242(c).

[138] Avramenkov v. INS, 99 F Supp. 2d 210, 213 (D. Conn. 2000); Comm. of Central Am. Refugees v. INS, 682 F. Supp. 1055, 1064 (N.D. Cal. 1988).

[139] *See* ICE's Tracking and Transfers.

Amendment due process protections.[140] Procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner and to determine whether procedural due process has been met; it is necessary to determine whether proceedings are in fact meaningful.[141] In *Plasencia*, the Supreme Court incorporated *Mathews v. Eldridge's* three-pronged balancing test into the context of immigration proceedings in an effort to guide courts in this analysis.[142] According to the *Plasencia* Court, in evaluating the procedures used in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used, the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.[143]

While an access to counsel has never been as important in deportation proceedings as it is today, the current transfer procedure severely undermines detainees' relationship with potential and existing counsel.[144] As the US Court of Appeals for the Eleventh Circuit held, "the right to counsel in the immigration context is an integral part of the procedural due process to which the alien is entitled."[145] That is, this right to counsel is recognized in an effort to abide by Fifth Amendment standards of due process, namely, the fundamental fairness that procedural due process seeks to protect.[146]

The disruption that transfers cause to detainees' ability to retain counsel or communicate with counsel is only heightened by the federal government's consistent failure to institute procedures that seek to preserve detainees' access to counsel, or even to follow its own stated policy.[147] Furthermore, the increased complexity of

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[140] César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. (2011).
[141] *Id.*
[142] Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying Eldridge, 424 U.S. at 334-35).
[143] Landon, 459 U.S. at 34 (discussing Eldridge, 424 U.S. at 334-35).
[144] César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. (2011).
[145] Frech v. U.S. Att'y Gen., 491 F.3d 1277, 1281 (11th Cir. 2007) (quoting Saakian v. INS, 252 F.3d 21, 24 (1st Cir. 2001).
[146] Lassiter v. Dep't. of Social Services, 452 U.S. 18, 24-25 (1981); See also Jiang v. Houseman, 904 F. Supp. 971, 978 (D. Minn. 1995).
[147] César Cuahtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L. J. (2011).

immigration laws means that transferring detainees, and thereby depriving them of counsel, presents a significant risk to the erroneous deprivation of their right to remain in the United States.[148]

F. Prompt Individual Assessment

About 41% of detainees whom ICE classifies as low-risk are unlikely candidates for civil detention because they have no criminal history or minor criminal activity that did not involve physical violence.[149] Similarly, many of the 40% of detainees who are classified as medium-risk are unlikely to pose a danger or flight risk; these are individuals who lack a history of violent assaults or a history of assaults while in any type of custody, and who have not been convicted of an offense that ICE considers among the most severe.[150] The remaining 19% of detainees – people who are classified as high risk – present a more likely option for civil detention.[151] These individuals, after all, are more likely to have evidenced a history of violence, though not necessarily so – only 11% of detainees had in fact committed violent crimes.[152] Because high-risk classification does not necessarily indicate a past involvement in violent crime, even these individuals should receive individualized assessments of dangerousness or flight risk to limit the possibility of detaining people who pose neither.[153]

If detention is deemed necessary, the conditions of confinement should be tailored to the individual's personal circumstances.[154] Currently, there is no good measure of the violent propensities or flight risk of the aggregate immigration detention population because many receive no individualized review.[155] Given that only a small number of people in immigration detention

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[148] Laura Sullivan, Enforcing Non-enforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database, 97 CAL L. REV. 567, 571 (2009).

[149] HUMAN RIGHTS FIRST, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., 2011 OPERATIONS MANUAL, ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS § 2.2(V)(F)(1), https://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf.

[150] *Id.*

[151] *Id.*

[152] U.S. Dep't of Homeland Sec., 395, § 2.2(V)(F)(3).

[153] César Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346-1414 (2014).

[154] *Id.*

[155] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010).

can be said to have committed a violent offense, however, it is reasonable to infer that the bulk of detainees are not violent.[156] Consequently, ICE would need to turn to non-custodial environments to detain people.[157]

Moreover, if detained, migrants and asylum seekers must be provided prompt court review of the detention decision.[158] Independent court review is essential to ensure that detention is not arbitrary and is conducted in accordance with international law. That review must be effective, not merely pro forma, and must include a genuine inquiry into the necessity of detention.[159] Article 7(6) of the American Convention on Human Rights, for example, provides that anyone "deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."[160]

The UN Working Group on Arbitrary Detention recently reminded the United States that a judicial authority "shall decide promptly on the lawfulness" of detention.[161] It is not enough that detention promptly be brought under judicial control; the court quickly must decide the lawfulness of detention.[162] For example, in *Tibi v. Ecuador*, the Inter-American Court of Human Rights ruled that a decision issued twenty-one days after the petition was filed was "clearly an excessive time" and violated the promptness requirement.[163] While habeas corpus is an essential safeguard against arbitrary detention, in practice, this protection often does not function as a prompt court review of detention.[164]

Also, any determination that detention is necessary should be subject to periodic review, a key procedural safeguard against arbitrary detention.[165] This protection is well grounded in human rights law. The Human Rights Committee, in applying ICCPR

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[156] *Id.*
[157] César Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346-1414 (2014).
[158] César Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346-1414 (2014).
[159] *Id.*
[160] American Convention on Human Rights, art. 7(6) (1978).
[161] ICCPR, art. 9(4) (1976); European Convention, art. 5(4) (1953); American Convention on Human Rights, art. 7(6) (1978).
[162] César Hernández, *Immigration Detention as Punishment*, 61 UCLA L. Rev. 1346-1414 (2014).
[163] Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 134 (Sept. 7, 2004).
[164] César Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346-1414 (2014).
[165] *Id.*

Article 9(1)'s prohibition against arbitrary detention in *A v. Australia*, emphasized that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed."[166]

Lastly, refugees and asylum seekers should not be subjected to punitive or penal detention conditions. Article 31(1) of the Refugee Convention stipulates that contracting state "shall not impose penalties" on asylum seekers because of their illegal entry or presence.[167] While administrative detention is permitted in limited circumstances, the term "penalty" certainly includes imprisonment.[168] As Guy Goodwin-Gill has noted, "any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by the United States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as penal."[169]

G. Physical and Mental Health Treatment

The 2009 DHS-ICE report recommended that "facilities should be placed nearby consulates, pro bono counsel, asylum offices, and 24-hour emergency medical care" and that the "system should be linked by transportation."[170] Yet according to Human Rights First's calculations, 40% of all ICE bed space is located more than sixty miles from an urban center.[171] Deaths in detention are the most egregious and permanent consequence of an unaccountable and negligent immigration detention system. Several international human rights organizations have released reports on suggestions and recommendations to improve the medical support system in detention facilities.

First of all, ICE should release people with serious medical and

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[166] A v. Australia, UN Human Rights Comm., Commc'n No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, ¶ 8.2 (Nov. 13, 2002); *see* Baban v. Australia, UN Human Rights Comm., UN Doc. CCPR/C/78/D/1014/2001, ¶ 7.2 (2003).

[167] Refugee Convention, 32, art. 31 (1951).

[168] *Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series*, UNHCR, ¶ 15, POLAS/2006/03 (Apr. 2006).

[169] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).

[170] Angie Junck, Principles for Immigration Reform that Promote Fairness for All Immigrants, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/ijn_documents_final.pdf.

[171] *Id.*

mental health needs, particularly when individuals require higher-level care. They should also terminate contracts for facilities with repeated preventable deaths, such as the Eloy Detention Center in Arizona.[172] To do so, according to the report, increasing transparency of inspections, deaths, and serious medical incidents in detention is critical. The report recommends making the inspections process more transparent and death reviews available to the public within three months of being finalized, and providing regular public and congressional reporting on the frequency and circumstances of sentinel events in detention.[173] Furthermore, once ICE publishes all death reviews that occur, including by the Office of Inspector General and Office for Civil Rights and Civil Liberties, an independent medical advisory committee should be allowed to investigate deaths that occurred in detention.[174]

In terms of mental health care, Congress should pass legislation to requires DHS to establish procedures for the timely and effective delivery of mental health care to immigration detainees and to require ICE officers and detention facility personnel to receive training in recognizing and responding to survivors of domestic and sexual violence and gender-based persecution.[175] Furthermore, they should facilitate detainees' access to on-site psychiatrists and psychologists and increase the availability of counseling services to be used in conjunction with, or instead of, medication.[176]

H. Interpretation under the Universal Declaration of Human Rights

The right to liberty and the right to be free from arbitrary detention are foundational rights under human rights law. The Universal Declaration on Human Rights (UDHR) declares that "everyone has the right to life, liberty, and security of person," and that "no one shall be subjected to arbitrary arrest, detention or

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[172] Detention Watch Network & American Civil Liberties, Fatal Neglect - How Ice Ignores Deaths In Detention, National Immigrant Justice Center, 1-28, https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention.

[173] Detention Watch Network & American Civil Liberties, Fatal Neglect - How Ice Ignores Deaths In Detention, National Immigrant Justice Center, 1-28, https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention.

[174] *Id.*

[175] Nina Robin, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, 09-01 ARIZ. L.J. 1-79 (2009).

[176] *Id.*

exile." The ICCPR gives effect to these principles, providing that "everyone has the right to liberty and security of person" and "no one shall be subjected to arbitrary arrest or detention."[177] These core human rights protections apply to all persons, including migrants, refugees, and asylum seekers. As such, migrants, refugees, and asylum seekers have the right to liberty and the right to be free from arbitrary detention, as contemplated by the UDHR and guaranteed by ICCPR Article 9 and other human rights conventions.[178]

The main procedural safeguard is the right to review of detention. It constitutes protection from arbitrary detention. Secondly, the right to liberty entails also the right to compensation for unlawful or arbitrary detention. Finally, independent monitoring, although not explicitly provided in human rights treaties, is a widely recognized safeguard against arbitrary detention. Judicial review of detention must be both accessible for detainees and effective, and legal remedies must also be available to detainees. The most fundamental guarantees in this respect include a) information, b) legal assistance, and c) linguistic assistance.[179]

The purpose of the obligation to provide information to detainees is to enable them to seek release if they believe the grounds for their detention are invalid or unfounded; thus, the reasons not only include a brief general legal basis but also detailed factual reasons.[180] In order to effectively seek a remedy, immigration detainees should receive broader information than solely on the reasons for their detention. Pursuant to the UN Body of Principles 13, "any detained person shall be entitled to have the assistance of a legal counsel."[181] A detainee is entitled to communicate and consult with his legal counsel and be allowed adequate time and facilities for consultations with his legal counsel. If a state lacks financial resources to offer legal assistance to

[177] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).

[178] Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. L.J. 507-531 (2010).

[179] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).

[180] Chris Harris, A Secret Punishment- the Misuse of Segregation in Immigration Detention, Medical Justice, 1-111 (2015).

[181] Mariette Grange & Izabella Majcher, When Is Immigration Detention Lawful? The Monitoring Practices of UN Human Rights Mechanisms, 21 Global Detention Project 1-22 (2017).

immigration detainees, it is encouraged to explore other options to ensure that detainees have access to legal aid to challenge their detention such as providing immigration detainees with lists and telephone numbers of lawyers and organizations offering pro-bono services, including toll-free numbers, to inform detainees about the status of their case.[182]

Without being able to understand the proceedings, immigration detainees are precluded from seeking a remedy:

> Article 16(8) in International Convention for the Rights of Migrant Workers and Members of Their Families (ICRMW) provides that during the appeal or review proceedings, immigration detainees must have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used. Pursuant to the Body of Principles 14, 'a person who does not adequately understand or speak the language used by the authorities responsible for his … detention … is entitled to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.'[183]

By virtue of article 9(4) of the ICCPR, as mirrored in articles 16(8) of the ICRMW, "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[184] Furthermore, detention should be open to periodical review to reassess the necessity of detention.

In 1966, the UN ICCPR included Article 7 that states:

> No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. The terms 'cruel,' 'inhuman,' and 'degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such

[182] *Id.*
[183] *Id.*
[184] *Id.*

> as sight or hearing, or of his awareness of place and the passing of time.[185]

Article 10 further states that, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person … [, and] the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."[186] These two articles set out a general protection for detainees held in any form of detention or imprisonment from any form of ill-treatment.

IV. CONCLUSION

The United States is a nation of immigrants and a global leader in the protection of refugees. However, not only are US immigration detention practices unnecessarily costly, they are also inconsistent with human right's values and human rights commitments. The laws of the United States, policies of the department, and practices of the detention centers often fail to provide fundamental protections to asylees and refugees, and existing protections continue to be eroded as the United States escalates migration enforcement and detention. Although ICE recently committed to reform the system and Congress revisits mandatory detention provisions, both results have had slight effect, for now. As migration continues to grow and evolve, so too will the obstacles that face migrants as they attempt to receive the rights to which they are entitled. Not only should the international community devote more attention to addressing these issues, but the United States must take concrete steps to change laws, rules, policies, and practices that do not comply with the requirements of international human rights law.

Keywords
US Detention, Immigration, Asylum, Refugee, International Human Rights Law

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[185] Chris Harris, 'A Secret Punishment': The Misuse of Segregation in Immigration Detention, Medical Justice, 1-111 (2015).
[186] *Id.*

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BOOK REVIEW

THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT, EDITED BY RICHARD ALBERT, XENOPHON CONTIADES & ALKMENE FOTIADOU, OXFORD: HART PUBLISHING, 2017

Franciska Coleman[*]

I. INTRODUCTION

At its heart, constitutional law is the history of a dream. However oppressive and blood ridden the past, nations imbue their constitutions with their dreams for a better tomorrow—their vision of the ideal human society. These constitutional dreams are a national heritage passed from generation to generation, and constitutional law captures each generation's struggle to realize the promise of its heritage. Dreams, however, change. As nations grow older, become more diverse, more educated, more prosperous, or simply more "enlightened," their beliefs about the characteristics of the ideal society change. As a result, their constitutions are reinterpreted, amended, even discarded and replaced. One of the greatest challenges for a nation is preserving shared dreams across constitutional change. One way nations meet this challenge is by defining in advance the acceptable and unacceptable ways of changing or replacing their constitutional dreams. Thus, written constitutions often include formal provisions that establish the procedures and boundaries of constitution change, and these vary according to the political, social, and historical context of each nation.

[*] Visiting Scholar, Harvard Law School Charles Hamilton Houston Institute for Race and Justice. Email: frcoleman@law.harvard.edu.

Recently, rapid globalization and increases in pluralism have led to shifts in the dreams of many nations.[1] Scholars have responded by producing a broad range of scholarship on the issue of constitutional change, from descriptive accounts[2] to prescriptive accounts[3] to comparative critiques.[4] The comparative aspect of constitutional change is a growing field,[5] and the volume reviewed[6] here seeks to be a foundational text within that tradition.

The Foundations and Traditions of Constitutional Amendment grew out of a workshop on comparative constitutional amendment at the Boston College of Law and is edited by Richard Albert, Xenophon Contiades and Alkmene Fotiadou. It is a collection of twenty papers, including an introduction and conclusion by the editors, designed to serve as a foundational text for the study of comparative constitutional amendment as distinct area of study within public law. This collection is divided into two parts, Foundations of Constitutional Amendment and Traditions of Constitutional Amendment, with the former focusing primarily on theory and the latter on practice. Notwithstanding this general bifurcation, the works in this volume are a blend of comparative, doctrinal, historical and theoretical approaches to constitutional amendment. They revolve around three primary themes: 1) Defining and the delimiting the amendment power, 2) Permissible conceptualizations of constitutionalism, and 3) Interactions between amendment rules and political culture.

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[1] *See*, e.g., Pyung Shin, "Recent Discussions on the Constitutional Law Amendment of South Korea" 21 A STUDY OF THE CONSTITUTION OF THE WORLD 1-25 (2015).

[2] *See generally* BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION (2014).

[3] *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

[4] *See generally* David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189 (2013).

[5] *See, e.g.*, ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE US (Xenophon Contiades ed., 2013).

[6] THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT (Richard Albert et al. eds. 2017).

II. SUMMARY

Defining and Delimiting the Amendment Power

As might be expected from a volume on constitutional amendment, several papers focus on defining and delimiting the amendment power, with most of the authors rejecting a simplistic distinction between the constitution making power and the amendment power. For example, in his paper, "Constituting the Amendment Power: A Framework for Comparative Amendment Law," Thomas Pereira addresses the Sieyesian distinction between the constituent power and constituted powers. While acknowledging that this binary "is intrinsic to very concept of constitutionalism,"[7] he rejects a categorical characterization of the amendment power as either fundamentally constituent or fundamentally constituted. Instead, he suggests that whether a given amendment power is constituent or constituted depends on the history and legal culture of the nation. He suggests three possibilities in terms of a nation's approach to the amendment power. First, he identifies as the most common "'the people' has left the house" approach, which suggests that the amendment power is always constituted power and must conform to existing constitutional structures. When it does not, it is either illegal or a constituent power. Secondly, he identifies the "'we' are always open" approach, a form of parliamentary sovereignty in which there is no difference between the constituent and constituted power, so that the amendment power is both simultaneously. Lastly, he identifies an intermediate approach, "follow the yellow brick road," in which the amendment power is constructed as constituent or constituted depending on the procedures set forth in the original constitution.

Echoes of the idea that procedural requirements determine the nature of the amendment power also appear in Yaniv Roznai's paper, "Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures." However, rather than distinguishing between constituent and constituted powers, Roznai distinguishes between primary constituent power (constitution making) and secondary constituent power (constitution amending). His paper addresses the idea that the primary constituent powers are unlimited while

[7] Albert, *supra* note 6, at 105.

secondary constituent powers can be limited. He argues that the limited/unlimited distinction between the two types of constituent powers, is not a binary but is polymorphic, with limited and unlimited representing opposite ends of a spectrum. Thus, Roznai argues for the need to link limitations on the amendment power to amendment procedures; for example,

> the more similar the characteristics of the *secondary constituent power* are to those of the democratic *primary constituent power*, [t]he less it should be bound by limitations and *vice versa*. The closer it is to a regular legislative power, [t]he more it should be bound by limitations and judicial scrutiny.[8]

Oran Doyle, in his "Constraints on Constitutional Amendment Powers," also discusses limits on the amendment power, through the lens of unconstitutionality. Doyle distinguishes between positive, conceptual, and moral approaches to identifying unconstitutional amendments:

> In the positive sense, an amendment is an unconstitutional amendment if it fails to meet the standards posited by the constitutional text. In the moral sense, an amendment is an unconstitutional amendment if it fails to respect the value of constitutionalism…In the conceptual sense, an amendment is an unconstitutional amendment if it purports to make a change that falls outside the concept of constitutional amendment.[9]

He suggests that the distinctions between these concepts are often lost through a focus on quantification—departing too much from the underlying text or from the value of constitutionalism, or introducing too much change to be only an amendment. Doyle argues that making the quantum of change introduced by an amendment dispositive in evaluations of the unconstitutionality of an amendment is unwarranted, and that the focus instead should be placed on the values served by a particular limitation on the amendment power. He then identifies three key values served by amendment constraints—foundational, majoritarian, and counter-

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[8] *Id*. at 37.
[9] *Id*. at 74.

majoritarian—and suggests that these values, rather than quantum of change, should be the focus of unconstitutional amendment analysis.

Permissible Conceptualizations of Constitutionalism

Doyle's paper is also addressed to a second focus that appears in the papers in this volume—conceptualizing constitutionalism. For example, Mark Tushnet, in his "Comment on Doyle's Constraints on Constitutional Amendment Powers," suggests that Doyle's critique of approaches that focus on the quantum of constitutional change may in fact be a critique of a certain conceptualization of constitutionalism—i.e. quantitative constitutionalism. Tushnet identifies the theme of Doyle's paper as addressed to the question of "Under what circumstances should good constitutional design require that a nation's people incur these costs [of constitutional replacement rather than amendment] so that they can govern themselves in a way different from the way previously prescribed by the Constitutional framers?" [10] In addressing this question, Tushnet highlights the fact that unamendability actually implicates two institutions: "the Constitution which says some provisions are unamendable, and the courts that enforce unamendability."[11] Tushnet, however, suggests that the practical stakes of unamendability have proven to be low given that judicial interpretations of such provisions rarely prevent determined majorities from changing their constitutions. He also offers the use of "pro tanto" constitutional replacement to suggest that the theoretical stakes of unamendability may be low as well.

Several other authors in this volume also explore what counts as "constitutional" constitutional change and how constitutional changes should be evaluated. For example, in her paper "Constitutional Sunrise," Sofia Ranchordás explores the constitutionality of contingent constitutional change. She explores the meaning and function of sunrise clauses, defined as "dispositions providing that a constitutional provision only comes into force on a specific date or that its coming into effect is contingent upon the verification of specific conditions." [12] She distinguishes sunrise clauses from sunset clauses, and discusses the conditions under what they are used and what courts have said

[10] *Id*. at 99.
[11] *Id*. at 101.
[12] *Id*. at 180.

regarding their constitutionality. Ranchordás notes that "[s]unrise clauses allow the constitution-making and amending process to be not only a backward-looking effort in the sense of 'claiming our constitutional inheritance' but also a form of 'making a constitutional donation' to 'our posterity'."[13] She suggests that sunrise clauses have the potential to be an important tool for post conflict societies and societies that are highly divided.

In one of their contributions to this volume, Xenophon Contiades and Alkmene Fotiadou return to the issue of quantitative evaluations of constitutionalism. In "Amendment-Metrics: The Good, the Bad and the Frequently Amended Constitution", they explore the contention that long constitutions with high amendment rates are "bad" constitutions that harm the economy and cause poverty. In rejecting this contention, they suggest that while empirical analyses regarding length and amendment frequency may offer insights, "constitutional change engineering cannot be explained on the basis of quantitative empiricism."[14] They note that an "amendment formula does not operate in a vacuum, since the degree of difficulty of constitutional change depends on various factors such as electoral system, judicial identity, and political culture."[15] In their view, "[h]aving a consensual [political] culture or adversely a culture of distrust exerts immense influence on the way mechanisms of constitutional amendment operate."[16]

Contiades and Fotiadou doubt the utility of quantitative evaluations of "good" and "bad" constitutions, and emphasize the importance of a "working" constitution. They argue that "[t]he criterion for assessing whether a constitution is good is whether it organizes state power and regulates social co-existence in a given polity legitimately, efficiently, and in a workable way."[17] James Fleming, on the other hand, in his "Comment on Amendment-Metrics" is much less reticent than Contiades and Fotiadou in describing long constitutions as "bad." He uses the US experience with *Lochner* to suggest that there may be good grounds for concluding that a constitution containing detailed economic provisions and restrictions is a bad constitution. He also suggests that frequently amending such detailed provisions might make such a constitution even worse. He concludes that "[o]n these criteria, a

[13] *Id*. at 196.
[14] *Id*. at 233.
[15] *Id*.
[16] *Id*.
[17] *Id*. at 237.

good constitution should be brief rather than prolix, and it should be infrequently amended."[18]

Interactions between Amendment Rules and Political Culture

While both Amendment-Metrics and the Comment discuss the utility of quantitative evaluations of constitutional change, they also address a third focus of the collections in this volume—the impact of social and political culture on formal provisions for constitutional change. Contiades and Fotiadou argue that quantitative methods fail to take political culture into account, while Fleming uses US political culture to suggest that quantitative methods have value. Several other authors in this collection also address the interaction between the formal provisions for amendment in a given nation and its social and political culture. For example, in his paper, "Formal Amendment Rules and Constitutional Endurance: The Strange Case of the Commonwealth Caribbean," Derek O'Brien notes that the resilience of Caribbean constitutions is not merely a function of formal amendment rules, but is influenced to a significant degree by social attitudes and context. He uses Ginsburg and Melton's theory of "amendment culture" as a framework for understanding why Caribbean nations have low levels of amendment success, even in those nations whose formal amendment rules require only a simple majority. He attributes this to the conservativism of small states, political adversarialism, and the value placed on entrenchment within these societies.

Lael Weiss also discusses a similar dynamic in her paper on the Australian constitution, which, like the Caribbean constitutions, was a product of Britain's constituent power. In her chapter "Constituting the People: The Paradoxical Place of Formal Amendment Procedure in Australian Constitutionalism," Weis notes that the Australian Constitution has as low an amendment rate as the US Constitution, despite "an amendment procedure that is both *reasonably practicable*, in the sense that it is neither overly onerous to propose or to approve an amendment, and *reasonably democratic*, in the sense that it is designed to engage the body politic in matters concerning fundamental norms and values."[19] She attributes this to the overwhelmingly partisan nature of Australian amendment practice (offering the 1988 Referendum as a prime

[18] *Id*. at 251.
[19] *Id*. at 255.

example) as well as the fact that Australia lacks a constitutional culture that strongly associates constitutionalism with popular sovereignty. As she notes, "The plausibility of regarding the formal amendment procedure as the locus of popular sovereignty appears to turn on background conditions, such as constitutional culture, which does not obtain in Australia given the unusual character of the Australian Constitution as a founding document." [20] She concludes that successful constitutional amendments depend not merely on formal amendment rules, but also on the way in which the people have been "constituted" by the constitutional order.

While O'Brien and Weiss discuss political cultures that hinder successful constitutional amendment, Duncan Okubasu's chapter addresses the effect of an amendment culture that errs in the opposite direction, increasing the rate of amendment to such a degree that it is indistinguishable from ordinary politics. In "The Implication of Conflation of Normal and 'Constitutional Politics' on Constitutional Change in Africa," Okubasu argues that the conflation of normal politics and constitutional politics elides the consensus building foundation of constitutional politics, leaving only an endless cycle of amendment. As he notes, "the use of normal politics to devise constitutional change arguably leads to casual attention to constitutional developments and sociologically illegitimate constitutional processes and outcomes that do not attract wider societal acceptance; ultimately resulting in a sort of vicious circle of instability."[21] His solution, to design constitutions in Africa in such a way as to diminish the influence of normal politics on constitutional change, may also have some value for constitutions, such as those in the Caribbean, where constitutional change is stymied by adversarial politics.

III. CRITIQUE AND CONCLUSION

A major strength of this volume is its breadth. It seeks to incorporate within a single volume both comparative jurisdictional studies of constitutional change and doctrinal and theoretical analyses of the foundational questions and emerging issues of the field. The goal of the editors appears to be to provide something for everyone—political scientists, historians, legal scholars,

[20] *Id*. at 271.
[21] *Id*. at 340.

philosophers, doctrinalists, and empiricists. As a result, common issues are addressed from a multitude of perspectives and frameworks. (For example, Joshua Braver's historical account of revolutionary reform in Venezuela is followed by Juliano Benvindo more philosophical comment on the same event.) In addition to the multifaceted approach in the collected papers, the contributions of the editors that bookend the volume provide a very broad overview of the entire field, providing a conceptual map to foundational issues and a summary of perspectives and approaches on emerging topics.

The strength of this volume, however, is also its weakness. The range of topics within the foundations and traditions sections are so broad that the unifying theme of each section is difficult to discern. Even with the various colloquies, the threads that connect the papers are often lost in the details of each author's particular focus. Though some authors do refer to the other works within the collection, the engagement of authors with each other seems to center on peripheral support rather than on connecting thematic threads across the volume. This creates the *impression* of a lack of depth in the treatment of the broad range of topics, but the enterprising reader will find that some issues, like amendment culture, are actually explored quite thoroughly from a variety of perspectives.

Overall, this volume largely succeeds in its purpose of providing a broad foundational introduction to the emerging field of comparative constitutional amendment. The introductions and conclusions by the editors provide a helpful framework for understanding current issues in the field as well as directions and topics for future research. Moreover, the comprehensiveness and interdisciplinary nature of the collected papers make this volume a good addition to the bookshelves of scholars interested in the legal, social and political aspects of comparative constitutional amendment.