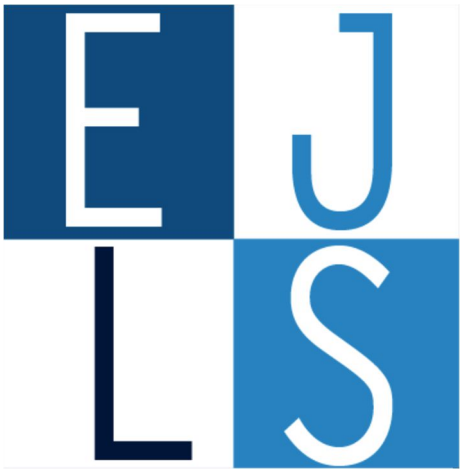

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EDITORIAL

UNITED FOR DIVERSITY?
PEER REVIEW AND THE POLITICS OF CITATION

Timothy Jacob-Owens[*] and Max Münchmeyer[†]

As part of our efforts to address racial, gender, and other (intersecting) inequalities in academic publishing,[1] the editorial board of the European Journal of Legal Studies (EJLS, the Journal) has recently amended its peer review template to include the following question:

> Should the author consider citing a more diverse range of sources (e.g. with respect to language, gender, region, etc)?

This amendment seeks to operationalise a component of our new author guidelines, according to which 'EJLS strongly encourages authors to cite early career researchers and to *reflect regional, gender, and linguistic diversity in their citations*'.[2] This is one of the more challenging aspects of the Journal's recent efforts to confront issues of inequality in academia. Other measures, such as improving the 'blindness' of our submission procedure, can be quite straightforwardly addressed through technical and procedural changes to our review process.[3] By contrast, addressing citation diversity necessitates a more substantive shift in our approach to authors' work, in turn requiring the buy-in and engagement of all the Journal's editors. The original proposal to

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[1] See Olga Ceran and Anna Krisztian, 'From Inclusivity to Diversity: Lessons Learned from the EJLS' Peer Review Process' (2019) 11(2) European Journal of Legal Studies 1; Timothy Jacob-Owens, 'Whiteness in the Ivory Tower' (2021) 13(1) European Journal of Legal Studies 1.

[2] 'Author Guidelines' (European Journal of Legal Studies) <https://ejls.eui.eu/wp-content/uploads/sites/32/2021/10/EJLS-Author-Guidelines.pdf> accessed 8 November 2021 (emphasis added).

[3] Jacob-Owens (n 1) 4-7.

introduce a criterion of this sort sparked a robust debate among board members: for some, this was a very welcome development; others were rather less convinced. In this editorial, we respond to some of the concerns raised and reflect more broadly on the scope and limitations of peer review as a means of improving 'diversity' in academic publishing.

The changes to our peer review template and author guidelines represent an attempt to engage with what Sara Ahmed has called the 'politics of citation': who and how we cite constitutes 'a way of reproducing the world around certain bodies'.[4] In most if not all fields of research, those bodies are almost always white and male.[5] This observation is hardly new. Over 35 years ago, Richard Delgado pointed out that the American civil rights literature – a field one might reasonably imagine to be dominated by scholars of colour – consisted of 'an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas'.[6] This state of affairs is problematic for a number of reasons. Citation, as Kecia Ali reminds us, 'is the currency of academia'.[7] Citation counts are increasingly used as a measure of academic success, with the consequence that the more a given scholar is cited, the more likely they are to enjoy certain material benefits, such as grant funding and job promotions.

The continued citation of the same 'inner circle' of authors also perpetuates the 'canonisation' of their work.[8] Given the demographic profile of most

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4 Sara Ahmed, 'Making Feminist Points' (Feminist Killjoys Blog, 11 September 2013) <https://feministkilljoys.com/2013/09/11/making-feminist-points/> accessed 20 September 2021.

5 See, for example, a recent study seeking to identify the most-cited US legal scholars: Fred R Shapiro, 'The Most-Cited Legal Scholars Revisited' (2021) 88 The University of Chicago Law Review 1595.

6 Richard Delgado, 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132 University of Pennsylvania Law Review 561, 563.

7 Kecia Ali, 'The Politics of Citation' (Gender Avenger, 31 May 2019) <https://www.genderavenger.com/blog/politics-of-citation> accessed 20 September 2021.

8 For a critical take on canons, see Sara Van Goozen, '"What I Would Like Is for People to Come at the World with Lots of Different Ways of Seeing Things "; Dr Liam Kofi Bright on the Philosophical Canon' (Justice Everywhere, 4 October 2021) <http://justice-everywhere.org/general/interview-with-dr-liam-kofi-bright/

'canonical' authors, this in turn serves to further entrench a dominant (white, male, Anglophone, Eurocentric, heterosexual, etc) set of approaches, perspectives, and worldviews within (mainstream) academic research. In light of these problems, Victor Ray argues that 'affirmative action' is required: 'scholars and editors should take proactive measures to make sure researchers are citing relevant work by underrepresented scholars'.[9] The recent changes to the EJLS author guidelines and peer review template are intended to do precisely this.

A principled objection to these changes suggests that they constitute an undue interference with academic freedom: authors should be free, the argument goes, to cite the literature they consider to be most relevant for their intellectual projects and it is not a journal's place to intervene. The immediate problem with this objection is that it is already standard practice for journals, including EJLS, to address authors' citations as part of the peer review process. The previous version of our peer review template, for example, asked reviewers to consider whether the author(s) of a submission 'engage with and critically reflect on the existing literature' and to answer the question of whether the references provided are relevant to the arguments made in the submission. By implication, our reviewers were thus already empowered to assess authors' citation practices and, if necessary, to "intervene" by suggesting possible revisions. Assuming that this "interference" with academic freedom was not in itself misguided, the objection to the "diversity question" must therefore explain why this more recent addition is problematic in a way – or to an extent – that the more general assessment is not.

A principled objection along these lines might perhaps be justified if we were to start requiring submissions *not* to cite certain literature on the grounds of diversity-based considerations.[10] The implications of the changes are not so

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?fbclid=IwAR3BoZZbKMAsO96un9wl0QXfkZSeeyhJ4rRi3bwVXhUFxjZKbTfQpu_3K_w> accessed 6 October 2021.

9 Victor Ray, 'The Racial Politics of Citation' (Inside Higher Ed, 27 April 2018) <https://www.insidehighered.com/advice/2018/04/27/racial-exclusions-scholarly-citations-opinion> accessed 20 September 2021.

10 For discussion, see Joseph Weiler, 'Cancelling Carl Schmitt?' (EJIL:Talk!, 13 August 2021) <https://www.ejiltalk.org/cancelling-carl-schmitt/> accessed 12 October 2021.

far-reaching, however: rather than seeking to promote "cancel culture", the purpose of the "diversity question" is simply to encourage authors – where appropriate – to consider *expanding* their existing citations to reflect broader regional, gender, linguistic, and other diversity. Given this more modest aim, there seems no good reason to consider that, as a matter of principle, diversity-based considerations should not be expressly included in the more general assessment of authors' citation practices. Indeed, given the ethical implications of the current politics of citation, such considerations should arguably be understood to be among the more important aspects of that assessment.

A more practical objection to the 'diversity question' is that it nonetheless places too high a burden on our authors. Authors cite the literature they know and should not be penalised, one might contend, for what is generally a simple oversight – unwittingly reproducing the lack of diversity in the 'canon', perhaps as a product of their own education – rather than a deliberate effort to exclude already marginalised voices. Including a citation diversity requirement might even disadvantage authors without privileged access to language learning opportunities or the full range of academic repositories, thereby undermining the very goals it is intended to serve. These concerns overestimate the implied expectations of the requirement, however. Our intention is not to start rejecting submissions solely on the ground of insufficient citation diversity, nor will authors be expected to cite literature in languages they do not themselves understand.

Rather, the purpose of the recent changes is to encourage authors to actively confront the question of whether their citations reflect the diversity of the relevant field and, if not, to look for ways in which this might be remedied. In some instances, depending on the topic and approach, this might have an important substantive dimension, such as in the (hypothetical) case of a feminist legal theory piece that only cites men or a (less hypothetical) submission on sovereignty in international law that fails to cite anyone outside of Europe. In other cases, it may simply be about signalling to authors that, although most of our articles are published in English, they should feel encouraged to cite literature in any other languages they also speak or read. Either way, it does not seem unreasonable to suggest that these points should be given active consideration in the course of peer review.

Another related argument against the 'diversity question' is that it places too high a burden on our reviewers. Because EJLS is a generalist journal, reviewers are often asked to assess submissions which do not fall directly within their core areas of expertise. As a consequence, they cannot necessarily be expected to have sufficient knowledge of the relevant literature to make an informed judgment as to whether various forms of diversity are appropriately reflected in a given submission's citations. A criterion that would require reviewers to conduct their own thorough literature review of often quite narrow sub-fields within their research area before being able to evaluate a submission would likely be unfeasible, not least because the Journal prides itself on the efficiency of its peer-review process. Even worse would be a review question that would induce reviewers to try to verify (or guess) the gender, race, ethnicity, sexuality, etc of the scholars cited within a submission by means of internet research.

However, these concerns again overestimate our expectations: the idea is simply to prompt reviewers to actively consider a submission's citation diversity to the extent they feel qualified to do so. This follows the approach in other areas, such as methodology, where reviewers may not have been trained in the use of certain statistical or other methods but are nonetheless asked, as legal scholars with expertise in the broader field within which the article is situated, to point out any obvious shortcomings of the submission in question. Other periodicals have sought to avoid these issues by placing the responsibility entirely on the author(s) of a piece, for instance encouraging them to annex a 'citation diversity statement' to their submissions.[11] This prompts authors to confront unconscious bias in their citation practices by asking them to specify, in numerical terms, the proportion of their citations that refer to works of scholars belonging to marginalised groups. Nonetheless, we consider that including the "diversity question" in our peer review template is a more constructive way forward, in that it embeds the discussion in the dynamic "dialogue" between reviewers and authors in a way that likely would not occur if the latter were simply asked to send a list of citation statistics upon submission. Numbers alone cannot capture the fact that what exactly constitutes a 'diverse range of sources' might differ

[11] See Bethany Rowson and others, 'Citation Diversity Statement in BMES Journals' (2021) 49 Annals of Biomedical Engineering 947.

depending on the topic and argument of a submission. Moreover, while careful consideration will of course need to be given to our peer review training, our approach also has the added benefit of helping to sensitise our reviewers to the importance of diversity in citations.

The abovementioned considerations contributed to the decision to include the question about citation diversity (for now) in an "unscored" section of the review template. This means that our reviewers are asked to provide comments, but that any concerns raised or suggestions made will have no direct impact on whether a submission proceeds to the second round of review and eventually to publication. Nonetheless, we hope that the amendments to our review template and author guidelines will help to raise awareness about the lack of citation diversity in academic publishing and make an appreciable, positive impact on the submissions we receive. Furthermore, we also hope that the changes will prompt both our authors and reviewers to broaden their horizons and to reflect critically on the "established" scholarship in their fields.

We realise, of course, that some will argue that this "softer" approach to the issue does not go far enough and that a tougher stance should be adopted. For example, writing recently on Twitter, Tara Van Ho suggested that a lack of citation diversity alone should call for 'major revisions'.[12] More broadly, the focus on citations as such creates the risk that marginalised authors will only be cited in tokenistic 'see also' footnotes, without any mention or genuine critical engagement with their work in the actual text of a submission.[13] Reducing citation diversity to a performative, "box-ticking" exercise clearly fails to address the deeper, structural problems we identified above. As Jenn M. Jackson argues, there is a need to 'reorient our myriad disciplines toward structural inclusion', wherein the contributions of hitherto marginalised scholars are not merely acknowledged but 'considered as foundational to our various fields and formative to the scholarship in our ranks'.[14]

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12 Tara Van Ho (Twitter, 8 September 2021) <https://twitter.com/TaraVanHo/status/1435639180055429126> accessed 6 October 2021.

13 Kecia Ali, 'The Politics of Citation' (Gender Avenger, 31 May 2019) <https://www.genderavenger.com/blog/politics-of-citation> accessed 20 September 2021.

14 Jenn M Jackson, 'Why Citing Black Women is Necessary' (Cite Black Women Collective Blog, 21 December 2018) <https://www.citeblackwomencollective.org/

We acknowledge that the recent measures introduced to the EJLS peer review process are necessarily only a partial solution and that close monitoring will be necessary to determine whether they are having the desired effect and whether and how they might be improved. There is no doubt that more can and should be done. Ultimately, the lack of diversity in academic citations is symptomatic of the broader racial, gender, and other (intersecting) inequalities that structure both the academic world and wider society. The current lack of 'structural inclusion' is, for example, also reflected in the institutional structures of academic publishing, in which whiteness and maleness continue to dominate: the irony of one white, male Editor-in-Chief handing over to another white, male Editor-in-Chief while writing an editorial about diversity is not lost on us. Requiring authors and reviewers to actively confront citation diversity is a small, imperfect step – but it is a step, nonetheless. We hope that there will be many more to come.

IN THIS ISSUE

In the 'New Voices' section of this issue, we are proud to publish two thought-provoking articles by emerging scholars. The first of these is the winning entry of the Journal's New Voices Prize 2020/21. In 'The Death of Laws: Mandatory Requirements and Environmental Protection', **Alberto Quintavalla** and **Orlin Yalnazov** argue that the cause for the decay of legal rules can be linked to factors *endogenous* to law, prompting us to reconsider the mainstream view that such 'legicide' is best explained by pointing to the vicissitudes of politics or society. In the second New Voices article, **Martin Lolle Christensen** asks readers to cast a critical eye on the way scholars use visual aids when discussing and describing international law. Christensen invites us to consider the underlying conception of international law that has led to specific choices about how law is visualised, from the cover illustrations of textbooks to sophisticated graphical representations of legal networks.

Christensen's reflections complement the first contribution in the 'General Articles' section, in which **Kristen M. Renberg** and **Michael C. Tolley** use network analysis and text-as-data methods to provide a fresh look at the

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our-blog/why-citing-black-women-is-necessary-jenn-m-jackson> accessed 20 September 2021.

complex relationship between the European Court of Justice (ECJ), the European Court of Human Rights, and apex national courts. Remaining in the realm of European jurisprudence, **Sorina Doroga** and **Alexandra Mercescu**, meanwhile, analyse both the decisions of the ECJ and the opinions of its Advocates General to investigate the limits of the Court's interpretative methods, ultimately offering a new perspective on the sharp methodological criticism provided by the German Constitutional Court in its controversial *PSPP* judgment.

Yuliya Kaspiarovich and **Nicolas Levrat** return us to the realm of international law by engaging with two highly complex legal regimes: international treaty law and the external competences of the European Union. The authors ask what Brexit means for the EU's mixed agreements, to which both the EU and its individual Member States are parties.

This issue closes with two book reviews. First, **Wojciech Giemza** reviews Michael J. Trebilcock and Joel Trachtman's *Advanced Introduction to International Trade Law* (audiobook, 2nd edn, Edward Elgar 2020), describing it as 'one of the best and most approachable pieces introducing the "spaghetti bowl" of multilateral and bilateral trade bargains between states'. Last but not least, **Théo Fournier** engages with *Islamic Law and International Law: Peaceful Resolution of Disputes* by Emilia Justyna Powell (Oxford University Press 2020), highlighting the author's nuanced definition of Islamic Law States as 'a benchmark for future studies' on this subject.

We would like to thank all our authors and editors for the hard work that has made the compilation of this issue of EJLS possible and hope that it will prove an interesting and enjoyable read.

NEW VOICES

THE DEATH OF LAWS: MANDATORY REQUIREMENTS AND ENVIRONMENTAL PROTECTION

Alberto Quintavalla[*] and Orlin Yalnazov[†]

Legal change is usually seen as a process exogenous to law. In this article, we argue that laws, even if left untouched by the political process, decay of their own accord. The first part develops the argument in conceptual form. The second illustrates it through an example from European Union law. Specifically, it shows that the Court of Justice of the European Union's 'mandatory requirements' doctrine was gradually hollowed out.

Keywords: legal theory, environmental protection, European Union law, mandatory requirements

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[†] Copy editor. We are grateful to the two anonymous reviewers, the anonymous executive editor, and Léon Dijkman for their comments. Thank you for reading our paper. We hope that it will make you happy.

I. INTRODUCTION

All that is born must die. Our bodies are like this, and so too our laws. Impressment,[1] the divine right of kings,[2] the law of necessity,[3] trial by battle[4], ordeals,[5] the Nuremberg Laws,[6] the Statute of Frauds,[7] the Magna Carta,[8] *wergild,*[9] the *Mecelle*,[10] and the Twelve Tables:[11] all dead. Doctors study death compulsively. Lawyers, not so much. Why do laws die? One explanation is that laws tailored to one way of life become obsolete when people start living differently. Trial by battle made sense in high feudalism, but it sounds crazy in high capitalism.[12] Divine proof seemed sound when everyone was pious, but it became absurd after the Enlightenment.[13] Legicide can also come about as a by-effect of politics, the winds of history, and such like. To destroy the *ancien régime*, Napoleon had to wipe out precedent in France. Mr Johnson

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1 The right of the Royal Navy to conscript seamen. See Vagabonds Act 1597.

2 John Figgis, *The Divine Right of Kings* (2nd edn, Cambridge University Press 1922).

3 The right to disobey the law where necessary. See *United States v Schoon*, 939 F.2d 826 (1992).

4 *Ashford v Thornton* (1818) 1 B & ALD 405, 106 ER 149.

5 Margaret Kerr, Richard Forsyth and Michael Plyley, 'Cold Water and Hot Iron: Trial by Ordeal in England' (1992) 22 Journal of Interdisciplinary History 573.

6 Richard Heideman, 'Legalising Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials' (2017) 39 Loyola of Los Angeles International and Comparative Law Review 5.

7 Joseph Perillo, 'The Statute of Frauds in the Light of the Functions and Dysfunctions of Form' (1975) 43 Fordham Law Review 39.

8 AE Dick Howard, *Magna Carta: Text and Commentary* (2nd edn, University of Virginia Press 1998).

9 The remedy of blood money. See Geoffrey MacCormack, 'Inheritance and Wergild in Early Germanic Law' (1973) 8 Irish Jurist 143.

10 An Ottoman civil code based on the Sharia. See Samy Ayoub, 'The *Mecelle*, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries' (2015) 2(1) Journal of the Ottoman and Turkish Studies Association 121.

11 EB Conant, 'The Laws of the Twelve Tables: An Introductory Note and Translation' (1928) 13 St. Louis Law Review 231.

12 Peter Leeson, 'Trial by Battle' (2011) 3 Journal of Legal Analysis 341.

13 Mirjian Damaska, 'Rational and Irrational Proof Revisited' (1997) 5 Cardozo Journal of International and Comparative Law 25.

must do the same to *van Gend en Loos*[14] in Britain, or his regime will surely crumble.

Now, European Union (EU) law can explain Johnson no more than medieval law could explain Bonaparte. If laws emerge and perish subject only to exogenous conditions, then the death of laws is not a concern for lawyers. However, we believe that legal decay can be endogenous, too. A specific question occupies us. Does litigation trigger the decay of laws?[15] Our answer, in brief, is that the more people use a law in litigation, the greater the likelihood that the law in question will become hard to interpret. The proliferation of possible interpretations is liable to cause the law to become either harmful or useless, eventuating its demise. All law thus carries the seed of its future destruction.

We are not the first to say that law is transitory. Professor Rose, for example, has observed regular shifts from 'crystals' to 'mud' in property law.[16] Atiyah's great history of contract ventilates similar ideas.[17] These theories tie the decay of rules to aspects of reality that are exogenous to laws – shifts in social attitudes and practices cause good laws to turn bad, which prompts their supersession. We, conversely, argue there is an endogenous mechanism that causes rules to collapse under their own weight. As far as we can tell, this is a new argument and one whose truth is perhaps not obvious. We propose to develop it in stages. Section II will start by arguing that consumption of law by one person decreases the quality of law available to others. This proposition will then become our cynosure, and we will build a conceptual model of endogenous legal decay around it. In Section III, we will illustrate the model by reference to the case law on 'mandatory requirements' and Article 36 of the Treaty on the Functioning of the EU (TFEU). Section IV concludes.

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14 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* EU:C:1963:1.

15 We assume that litigation is endogenous to law. Of course, litigation also has extra-legal dimensions. We do not consider them here.

16 Carol Rose, 'Crystals and Mud in Property Law' (1988) 40 Stanford Law Review 577.

17 Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985).

II. A Conceptual Model of Endogenous Legal Decay

It is common, especially among lawyer-economists, to say that the law is a public good.[18] Public goods are non-excludable and non-rival. Nobody can be barred from clean air. My breathing does not obstruct yours. The *enforcement* of law is certainly like that. When the police keep the streets safe, nobody is excluded from frolicking around town, nor does the safety of one person make all others less safe. The *production* of law under precedent is also a little like a public good. For a body of precedent to accrue, people must sue one another and proffer information to the courts.[19] The courts use that information to make laws. If the courts make a really good negligence rule, everyone is free to use it to bring further suits. Moreover, use of the rule by one person does not, at least in the short run, make the rule less valuable to others. There is thus non-excludability and non-rivalry.

Our theory is a little different. We say that the law is like the fish in the sea. How so? Without regulation, everyone is free to fish. However, fishing causes the number of fish in the sea to diminish. Technically, the fish in the sea are a common-pool resource.[20] We will argue that the *interpretation* of law is a common-pool resource, too. When the courts make a good negligence rule, everyone can use it to sue others. However, use of the rule by one person causes its value to diminish for future users. Thus, as far as application is concerned, law is non-excludable but rival in consumption.

1. A Model of Legal Decay

To show you how this rivalry in consumption comes about, we will use a hypothetical. Let us say that the Chatrapatran parliament has passed the following law:

- Law: The importation of elephants into Chatrapatra is hereby prohibited, on pain of imprisonment not exceeding three years.

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18 See e.g. Tyler Cowen, 'Law as a Public Good: The Economics of Anarchy' (1992) 8 Economics & Philosophy 249.

19 See Steven Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' (1982) 11 Journal of Legal Studies 333.

20 The classic exposition is Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) Science 1243.

At this point, the law works well. Chatrapatrans know that they may not import elephants, and that is that. In the year following the law's enactment, various elephant importers are brought to court. The defendants' go-to defence is that the animal in their possession is not an elephant but a rhino. The courts, when dismissing these defences, have no choice but to interpret the law to define the term 'elephant'. Let us say that they come up with the following interpretations:

- Interpretation 1: An elephant has floppy ears.
- Interpretation 2: An elephant has massive feet.
- Interpretation 3: An elephant has long, sharp tusks.

The importers all go to jail because the ears of the rhinoceros are not floppy, its feet are comparatively small, and it has a horn rather than tusks. Now, suppose that the next year, a woman is charged under the act with importing an Airedale terrier. The courts say that even though Airedales have floppy ears, they have neither tusks nor massive feet. The woman is free to go. Next, some man, spurred on by Satan, tries to import an elephant with its tusks hacked off. The courts say that the animal, though tuskless, has flapping ears and massive feet, so it is an elephant. We now have two meta-interpretations of the interpretations given in the previous years:

- Meta-interpretation 1: Interpretation 1 alone cannot found liability under the law.
- Meta-interpretation 2: Interpretations 1 and 2 can found liability under the law notwithstanding interpretation 3.

Now, let us imagine that somebody is charged under the law for importing elephant tusks. If the court follows meta-interpretation 1 strictly, then the importer is blameless: having only one mark of an elephant is not enough to establish elephanthood, by analogy with the case of the Airedale. If, however, the court follows meta-interpretation 2, then the importer is liable: if an elephant is an elephant even if it has no tusks, then parts of an elephant must be an elephant, too.

One way out is to devise some interpretation of the meta-interpretations, or a meta-meta-interpretation. However, as new cases come up, that meta-

meta-interpretation is likely to call for meta-meta-meta-interpretations, and so on and so forth. Elephanthood would eventually come to have no definition. At that point, a good government would repeal the law. A bad one would use it to oppress its subjects. A pragmatic one would ignore it. In any case, the law is a dead letter.

Let us now generalise. The Chatrapatran law deteriorates. Its interpretations clash. The only way out is more interpretation. Every additional interpretation helps a judge dispose of the immediate dispute before her, but it adds to the vexations of the next. The root cause of this interpretative proliferation is litigation. When the law was still fresh, it was easy to determine whether the court was dealing with an elephant. Now that there have been a thousand interpretations, the question of elephanthood is no longer soluble.

2. Three Objections

We have so far said two things. First, litigation causes interpretation. Second, interpretation causes the death of laws. Is that process inevitable? In the long run, it assuredly is. A capable judiciary might produce mutually consistent interpretations over very long periods of time. However, in every instance of litigation, there is a *positive* probability that the judiciary will adopt an interpretation which causes inconsistencies further down the line.[21] It follows, then, that every law will eventually go the way of the Chatrapatran law.

You might contest our model on three grounds (that we can see). First, you could say that the proliferation of interpretations that we describe occurs only if the judgments of one court bind the next, that is, under a system of precedent. However, all capitalistic systems of law use precedent in some form.[22] Judges like to follow one another, just like other people. If you wish to take your objection further, you could say that the type of decay that we describe can be avoided if judges were forbidden from delivering reasoned

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21 See Goutam Jois, '*Stare Decisis* Is Cognitive Error' (2009) 75 Brooklyn Law Review 63.

22 See D Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge 2016).

judgments. This is true, but no modern legal system does this, and for obvious reasons.

You might also object to our model if you like Dworkin. Dworkin thought that, in law, there is always a right answer.[23] Our theory blatantly assumes that judges just make answers up as they go along. We nonetheless think that the two are not irreconcilable. Dworkin did not say that the right answers are available to us right now, merely that they exist in principle and that judges should try to find them. The search for right answers may well involve interpretative proliferation. Our theory, were we to embed it into Dworkin's, would explain what happens to Hercules while he is still looking for the right answer.

Last, you could say that our hypothetical is bogus. We populated the Chatrapatran judiciary with rank amateurs. Anyone with legal training would say that the floppy ears holding does not set necessary *and sufficient* conditions for elephanthood. It is also easy to distinguish the case law on living animals from that on tusks. Harmony is thus restored. Is this law's moksha? We think that it is not. Devices like defeasibility and distinguishing precedent are fabrications of the legal mind, just like the naïve meta-interpretations from the hypothetical. Cases can be distinguished until they cannot; criteria are inexhaustive until they become exhaustive. You can certainly devise meta-meta-interpretations that salvage the meta-interpretations,[24] but these too will decay in the same way. Now, unlike the Chatrapatran judiciary, real-world judges design meta-interpretations strategically to keep the laws alive. It would be alarming if they did not, and if the judges are good, a law can live a hundred years or more. Eventually, however, the meta-interpretative edifice must collapse under its own weight.[25]

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[23] See, among others, Ronald Dworkin, 'Judicial Discretion' (1963) 60 The Journal of Philosophy 624 and Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[24] British jurisprudence enthusiasts might recognise this mechanism in the *Practice Statement* [1966] 3 All ER 77; *R v R* [1991] UKHL 12; and *Re Spectrum Plus Ltd* [2005] UKHL 41.

[25] Can good judges postpone this collapse indefinitely? In every instance of adjudication, there is a positive probability that a new meta-interpretation will be necessary to dispose of the facts. If the existing set of meta-interpretations is

3. Solutions

With these straw men burnt, we return to the model. If we are correct, then law is a common-pool resource, that is, one which exhibits non-excludability and rivalry in consumption. Common-pool resources are liable to cause inefficiency. If everyone fishes to their heart's content, the sea would soon be fishless. To avoid depletion, we can regulate. One idea would be to limit access to the courts. Many litigants will file a claim only once. They have no reason to care if their suit causes the quality of the law to deteriorate. If we could expel the casuals from the courts, the aggregate volume of lawsuits would be closer to the optimum. Conversely, repeat litigants shoulder the cost of legal decay.[26] When they decide whether to sue or not, they must balance the expected benefits of a favourable outcome against the risk that the quality of the law that they use will deteriorate. Therefore, we should let them sue whenever they think fit. This is all obviously impracticable, since the class of repeat litigants encompasses large corporations, interest groups, and other vested interests. To close the courts for everyone else would violate all sorts of rule-of-law constraints, not to mention that it would be monstrously unfair.

You can also maintain fish stocks by breeding fish. Obviously, this is costlier than simply taking what is in the sea. However, the expenditure might be justified if it solves the commons problem. Laws are similar. When too much litigation thins out a legal rule, we can simply replace it with some other rule. The fresh rule will be more certain than the old, at least for a while. Provided that the benefits of having a rule at all are positive, a policy of regular legislative (or judicial) reform seems wise. This is so even when the new law aims to achieve the exact same distributive outcome as the old. If litigation causes the decline of a negligence rule that allocates costs to the least-cost-

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good, then that probability might be quite low. However, it cannot be zero. Over time, then, the number of meta-interpretations will increase. Eventually, there will come a point at which computing a meta-meta-interpretation that is consistent with all previous meta-interpretations will be beyond the computational reach of even the brightest stars on the judicial firmament. That point will come much sooner if the judges are obtuse or corrupt, but in any case, could only be avoided if they were like Dworkin's Hercules.

[26] See Paul Rubin, 'Common Law and Statute Law' (1982) 11 Journal of Legal Studies 205.

avoider, the best policy is to simply phrase the old rule differently and put it back on the statute book. Many legal reforms can be understood from this angle. One of them is environmental protection in EU law, on which we now propose to focus.

III. THE MANDATORY REQUIREMENTS DOCTRINE

1. The 'Mandatory Requirements' – Article 36 Boundary

One of the most long-standing issues in EU law is the balance between market integration and other interests such as environmental protection.[27] The judgments adopted by the Court of Justice of the EU (CJEU) on these issues have not always been consistent. Its case law on mandatory requirements with regard to environmental protection offers a striking example.

It is best to refer first to the *Cassis de Dijon* judgment.[28] Article 36 of the 1957 Treaty establishing the European Economic Community (EEC Treaty) included a limited number of exceptions (*numerus clausus*) to the general prohibition on measures restricting trade. In *Cassis de Dijon*, the Court posited that measures restricting trade are otherwise permissible only if these measures are based on certain 'mandatory requirements'.[29] This theory of mandatory requirements provided additional grounds of justification, distinct from the exceptions in Article 36 of the EEC Treaty. In the traditional view, the latter applies to both directly and indirectly

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[27] Patrick Thieffry, *Droit de l'Environnement de l'Union Européenne* (2nd edn, Bruylant 2011) 156. See also Lucía Casado Casado, 'Environmental Protection as an Exception to the Freedom of Establishment and the Freedom to Services in the European Union' (2015) 24(2) Review of European, Comparative & International Environmental Law 209.

[28] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42.

[29] Ibid para 8. The CJEU introduced the concept of 'mandatory requirements' in the *Cassis de Dijon* judgment. This is a non-exhaustive list of exceptional cases in which the Member States can justify the adoption of national measures that could restrict trade in the interest of safeguarding the public interest (e.g. protection of public health, consumer protection), thus complementing the exceptions laid out in Article 36 EEC Treaty.

discriminatory measures, while the former only governs non-discriminatory measures.[30]

Let us take this as the equivalent of the Chatrapatran Law. The CJEU created a distinction between Article 36 and the mandatory requirements doctrine. The distinction is not particularly taxing on the mind, nor is it inconsistent with the text of the EEC Treaty and its successors (collectively, 'the Treaties').[31] However, as cases came to be litigated, the Court's jurisprudence became inconsistent. The inconsistency eventually became too much to bear, and the Court abandoned the distinction between Article 36 and mandatory requirements. While environmental protection had gained political traction over that period, it was the inconstancy occasioned by litigation that ultimately caused the distinction to perish.

Why do we say that the distinction is logical? The term 'environmental protection' was not explicitly included in the EEC Treaty. You would not find it in Article 36 TFEU, either.[32] The grounds of justification explicitly provided in the TFEU are 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property'.[33] For this reason, environmentally friendly measures restricting trade are only permissible if they are non-discriminatory, at least as far as the traditional interpretation of the Treaties is concerned. This interpretation, however, did not remain stable in the case law.[34] While at the beginning, the question of whether a

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30 See Peter Oliver, *Oliver on Free Movement of Goods in the European Union* (5th edn, Hart Publishing 2010) 216ff.

31 The EEC Treaty was replaced by the Treaty Establishing the European Community (EC Treaty), which, in turn, was replaced by the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).

32 Article 36 EEC Treaty became Article 30 EC Treaty and, later, Article 36 TFEU.

33 Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 36.

34 Charles Poncelet, 'Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship?' (2013) 15(2) International Community Law Review 171.

measure was discriminatory was read as a preliminary step in determining the applicability of mandatory requirements, it later became irrelevant.

2. The Traditional Approach

We have argued that the CJEU traditionally treated environmental protection as a mandatory requirement. For example, in 1985, the CJEU decided that a directive on the disposal of waste oils was compatible with the EEC Treaty because the freedoms are 'subject to certain limits justified by the objectives of general interest pursued by the Community'.[35] The Court argued that measures restricting trade 'must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest'.[36] The CJEU thus created an *implicit* distinction between the exceptions to discriminatory measures in Article 36 and other limits to free trade that are based on the 'general interest'.

The CJEU carried this interpretation further in the *Danish Bottles* case, where it had to decide whether legislation requiring reusable containers for beers and soft drinks restricted free trade.[37] There, the Court held that environmental protection is an acceptable 'mandatory requirement' under *Cassis de Dijon*.[38] This judgment is relevant to our argument here for two reasons. First, the CJEU showed that the list of mandatory requirements is open-ended.[39] Second, it stressed that environmental protection, along with all of the other mandatory requirements, should not be equated with the

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35 Case 240/83 *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* (*ADBHU)* EU:C:1985:59.

36 Ibid para 15. This judgment elicited some controversy due to the lack of any legal basis to define environmental protection as an essential objective of the European Community. See Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18(2) Journal of Environmental Law 185, 188.

37 Case C-302/86 *Commission of the European Communities v Kingdom of Denmark* EU:C:1988:421.

38 Ibid para 9.

39 The open-ended nature of the provision could also be inferred from the *Cassis* judgment since the reference to mandatory requirements included the term 'in particular'.

'protection of health and life of humans, animals or plants' exception in Article 30 of the Treaty establishing the European Community (EC Treaty) (formerly, Article 36 of the EEC Treaty).[40]

Finally, *Walloon Waste* confirmed that the aim of 'environmental protection' was only sufficient to salvage non-discriminatory measures.[41] There, the CJEU had to decide whether a Belgian regional decree banning importation of waste (thus excluding the disposal of locally produced waste) was a restriction on the movement of such waste. Although the Belgian authorities invoked environmental protection, the Commission argued that this mandatory requirement could not apply due to the discriminatory nature of the measure.[42] The CJEU, however, stressed that the justification based on environmental protection was legitimate because the particular nature of the subject (i.e. waste) made the decree non-discriminatory. By adopting a definitory strategy, the CJEU maintained the firm distinction between Article 30 EC Treaty and mandatory requirements. The latter only apply to non-discriminatory measures.

3. Rupture

Six years later, the CJEU, in *Dusseldorp*,[43] deviated from *Walloon Waste*. The CJEU decided that a Dutch national measure restricting the export of waste could be justified by environmental protection interests even if the measure was openly discriminatory – something that formerly would foreclose the possibility of applying mandatory requirements.[44] A similar approach was also adopted in the *Aher-Waggon* case.[45] There, the CJEU considered that a German measure making registration of aircraft conditional on observing certain noise limits was justified by considerations of public health and environmental protection, again regardless of its discriminatory nature.[46]

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40 More recent judgments confound this matter a lot more.

41 Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* EU:C:1992:310, para 34 (*Walloon Waste*).

42 Ibid paras 31-33.

43 Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* EU:C:1998:316.

44 Ibid paras 24-50, especially paras 42, 50.

45 Case C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland* EU:C:1998:357.

46 Ibid para 18. See also Case C-320/03 *Commission v Austria* EU:C:2005:684.

These cases moved away from the traditional view that the non-discriminatory nature of a measure was a pre-requisite for applying mandatory requirements.

This new approach was confirmed in *PreussenElektra*.[47] There, the CJEU concluded that a measure mandating that network operators should only purchase renewable electricity from their local area was not incompatible with Article 30 of the EC Treaty due to 'the aim of the provision in question' and 'the particular features of the electricity market'.[48] In other words, the CJEU argued that, although the 'buy local' obligations were potentially discriminatory under previous case law,[49] the specific characteristics of the subject matter, coupled with the environmental protection objective (as well as the interest protecting the health and life of humans, animals, and plants),[50] made this obligation non-discriminatory. In a departure from its previous case law,[51] the Court discussed both grounds of justification (i.e. Article 30 of the EC Treaty and mandatory requirements). One plausible explanation is that, at that stage, the CJEU was no longer concerned with establishing any particular relationship between environmental protection and non-discrimination.

Indeed, in subsequent cases, the CJEU has conceded that there is no need to investigate whether the grounds of justification presented by the Member State refer to discriminatory or non-discriminatory measures since the protection of public health (relevant for the discriminatory measures) and environmental protection (relevant for non-discriminatory measures) are closely interlinked.[52] However, the approach of the Court has not always been consistent. On one occasion, the CJEU reverted to its traditional view. In

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47 Case C-379/98 *PreussenElektra AG v Schhleswag AG* EU:C:2001:160.

48 Ibid para 72.

49 Ibid paras 70-71 with reference to Case 72/83 *Campus Oil and Others* EU:C:1984:256, para 16 and Case C-21/88 *Du Font de Nemours Italiana* EU:C:1990:121, para 11.

50 Ibid paras 73, 75.

51 See in particular *Walloon Waste* (n 41).

52 Case C-524/07 *Commission v Austria* EU:C:2008:717, para 56; Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos*, EU:C:2009:336, para 33.

Radlberger,[53] the Court was called upon to decide whether the public interest of environmental protection could justify a measure restricting trade. In its judgment, the CJEU noted as a preliminary issue that such measure 'appl[ied] without distinction', thus implying that the non-discriminatory character of a measure carries some significance in the environmental protection context.[54]

4. The Death of Mandatory Requirements

The CJEU's inconsistency on whether mandatory requirements can apply only with respect to non-discriminatory measures reached its peak in *Ålands Vindkraft*.[55] There, the CJEU was faced with the question of whether it was permissible for the Swedish government to provide green electricity certificates only to production installations located in Sweden, thus disfavouring green electricity importers. In addressing this issue, the CJEU did not refer either to Article 36 TFEU or to mandatory requirements. Instead, the CJEU stressed how the promotion of renewable energy sources for the production of electricity, despite being a hindrance to free trade, may serve to protect both the environment and the health and life of humans, animals and plants.[56] The CJEU referred to environmental protection without concern for whether the measure was indistinctly applicable. Hence, the measure adopted by Swedish authorities was justified regardless of whether it was a barrier to the free movement of goods.[57]

This shows very clearly a clash between the traditional and current approaches. In the first judgments, mandatory requirements could only be applicable if national rules did not discriminate between imported and domestic goods.[58] This no longer seems to be the case. In fact, the strict application of the traditional approach would have been fatal to the Swedish

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53 Case C–309/02 *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg* EU:C:2004:799.

54 Ibid para 61.

55 Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* EU:C:2014:2037.

56 Ibid paras 77-80.

57 Ibid para 82.

58 See e.g. Case C-788/79 *Gilli & Andres* EU:C:1980:171, para 6.

scheme, which caused clear injury to non-domestic electricity suppliers.[59] The CJEU adopted a similar approach in the *Essent Belgium* case.[60] Although the CJEU still has not expressly overturned the traditional doctrine that mandatory requirements are only applicable to non-discriminatory measures, in this case it simply avoided acknowledging that the measure at issue was discriminatory (even though it openly was).[61]

It is clear that, by the time *Essent Belgium* was decided, there was no longer any distinction between Article 36 and 'mandatory requirements'. Nowadays, the CJEU simply uses environmental protection in the same way that it uses the grounds for derogation under Article 36. The distinction is a dead letter. The Court has never cited any explicit reason for demolishing the distinction, even though the opinions delivered by the Advocates General in more than one judgment urged the Court to take a stance.[62] It would appear that maintaining consistency of interpretation simply became impossible and that the distinction no longer served any useful analytical purpose.

We propose to close off with two theoretical considerations. Firstly, if the law were a public good in the strict sense, then *Cassis de Dijon* would still stand. Its erosion was the result of litigation. Every new attempt to defend some measure by reference to mandatory requirements made the boundary between mandatory requirements and Article 36 harder to define. The first litigants under the *Cassis* regime did not have to worry about this. The parties in *Ålands Vindkraft* certainly did. The eventual depletion of the distinction as a logical device caused its ultimate abandonment. It must be true, then, that the law as a juridical concept is more like a common resource than a public good.

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59 Armin Steinbach and Robert Brückmann, 'Renewable Energy and the Free Movement of Goods' (2015) 27 Journal of Environmental Law 1, 10.

60 Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* EU:C:2014:2192.

61 Henrik Bjørnebye, 'Joined Cases C-204/12 to C-208/12 *Essent Belgium*' [2015] (3) Oil, Gas & Energy Law Journal 6.

62 See *Ålands Vindkraft* (n 55), Opinion of Advocate General Bot; *Essent Belgium* (n 60), Opinion of Advocate General Bot para 92; *PreussenElektra* (n 47), Opinion of Advocate General Jacobs para 230.

Secondly, the dissolution of the distinction is not especially momentous if one is concerned with adjudicative outcomes rather than matters of doctrine. The CJEU could have maintained the distinction. As the Advocates General have regularly suggested, it would have been possible to extend the use of environmental protection as a justification for discriminatory measures, provided that a more rigorous proportionality test be carried out.[63] The mandatory requirement of environmental protection, as interpreted, would then mirror Article 36, achieving the exact same result as the dissolution of the distinction. Had this been done, however, interpretations would have kept on proliferating, and the law would have grown even more uncertain. The ultimate abandonment of the distinction had the effect of resetting that interpretative process, and nothing else.

IV. Conclusion

This contribution discussed why laws die. The argument put forward is that an endogenous mechanism accounts for this. Laws, even if left untouched by exogenous conditions such as shifts in social attitudes, decay of their own accord. As outlined above, the interpretation of laws resembles a common-pool resource – non-excludable but rival in consumption. Individual recourse to courts can decrease the marginal value of the law for future users.

Despite its novelty, this argument is not as controversial as it may appear. In fact, we do not disagree with those claims according to which social change or other exogenous factors may spur regulatory intervention.[64] What we are instead concerned with is only the 'terminal stage' of legal decay. In this vein, our theory could help identify when laws are going to decay and when legislators should repeal them. As this article showed, this issue is not moot. Many regulatory systems experience situations in which the work of the courts has yielded inconsistent adjudicatory outcomes, eventually

63 Ibid.

64 Lyria Moses, 'Regulating in the Face of Sociotechnical Change', in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation, and Technology* (Oxford University Press 2017), Marta Katarzyna Kołacz and Alberto Quintavalla, 'The Conduit between Technological Change and Regulation' (2018) 11 Erasmus Law Review 143.

contributing to the demise of certain laws – the *Cassis de Dijon* case law and environmental protection being only one of these instances.

NETWORKS AND NARRATIVE: VISUALIZING INTERNATIONAL LAW

Martin Lolle Christensen*

This article explores the role of narratives in the use of information visualization by international legal scholars. It adds theoretical depth to the choice of visualization and connects different strands of international legal scholarship to reflect on new methodological directions of international law linked to networks and complexity. The article argues that the use of networks for the visualization of the interactions in the international legal system serves the purpose of transmitting to the reader narratives of international law. Scholars rarely explain the choices they make when using information visualization, especially so with more creative pictures of networks, and frequently treat them simply as didactical illustrations of complex information. Yet, the use of visualizations is linked to certain narratives of international law. This article explores how network aesthetics contribute to a narrative of international law as a complex system, a system that is multidirectional and multifaceted.

Keywords: international law, networks, narratives, visualization

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It is pictures rather than propositions, metaphors rather than statements, which determine most of our philosophical convictions.[1]

Richard Rorty

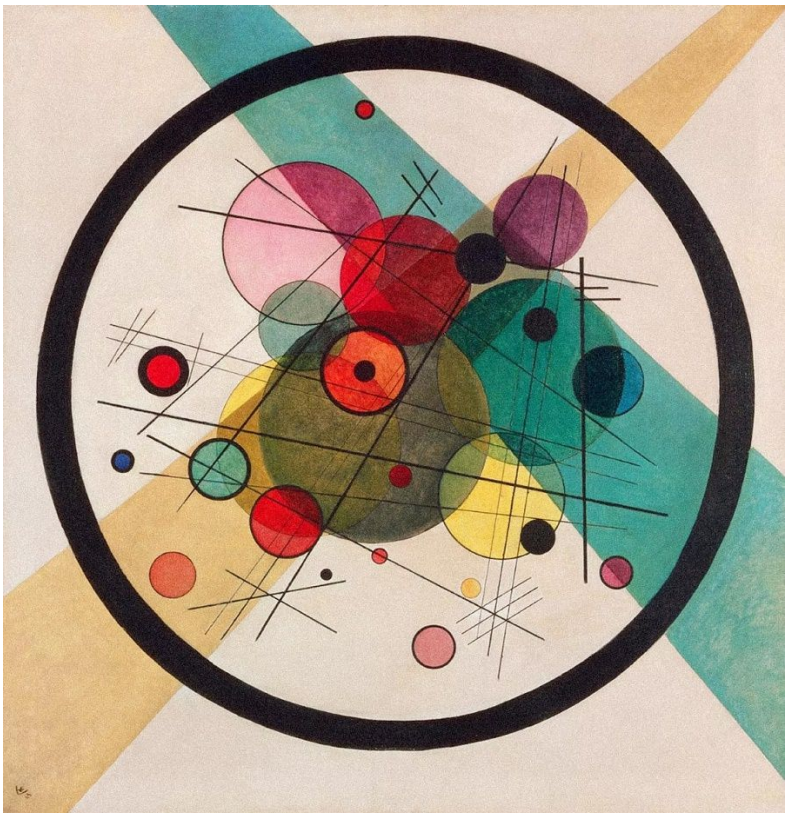

Figure 1: Wassily Kandinsky, *Circles in a Circle*, 1923. Source: *Philadelphia Museum of Art* – www.philamuseum.org

I. VISUALIZING INTERNATIONAL LAW: SETTING THE SCENE

Circles in a Circle was an important work for Kandinsky. It was his first painting on the theme of 'circles' and one of his earliest geometric compositions. Kandinsky wrote that 'the circle is the synthesis of the greatest oppositions. It combines the concentric and the excentric in a single form, and in balance'.[2] This painting reflects Kandinsky's belief that 'certain

[1] Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 2009) 12.

[2] 'Circles in a Circle' (Philadelphia Museum of Art) <https://philamuseum.org/collection/object/51019> accessed 28 June 2021; Will Grohmann, *Wassily Kandinsky* (Thames and Hudson 1958) 188.

colours and shapes signify emotions that can be codified and combined into a whole, reflecting the harmony of the cosmos'.[3]

In late 2016 and early 2017, this painting adorned the cover of Richard Collins' *The Institutional Problem in Modern International Law* and Guy Fiti Sinclair's *To Reform The World*.[4] There is nothing too unusual about this coincidence, as modern abstract paintings are often on the covers of books on international law, and Kandinsky is a common choice, though Klee is by far the most popular.[5] However, in reflecting on book covers as an object of international law, d'Aspremont and De Brabandere argue that the paintings on the covers draw the readers into a game, where 'the readers themselves create an explanatory narrative around the book'.[6] The Kandinsky painting lets the reader imagine the content of the two books. The composition of circles invites us to see both the precarious institutional structure of international law that Collins uncovers as a decentralized legal system, and the ways in which the powers and functions of international organizations are shaped and expanded by their political context, as argued by Sinclair.[7]

Thus, visualization has already affected the reader of international legal scholarship before they have even opened the book. The reader forms a narrative about the content of the book, undoubtably shaped by other narratives of international law that the reader is already aware of. Visualizations are a part of narratives. We, as authors, shape our visualization of international law to fit the narratives we want to communicate to our audiences.[8] The photograph of a child clothed in a Red Cross sack tells a story

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3 Grohmann (n 2) 188.

4 Richard Collins, *The Institutional Problem in Modern International Law* (Bloomsbury Publishing 2016); Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

5 Jean d'Aspremont and Eric De Brabandere, 'The Paintings of International Law' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects: Emergence, Encounter and Erasure through Object and Image* (Oxford University Press 2018) 334.

6 Ibid 332.

7 In correspondence with the authors, both confirm that they chose the cover out of availability, and fit with the theme of their respective books.

8 'The search for aesthetics is part of the daily work of international lawyers' d'Aspremont and De Brabandere (n 5) 330.

about the humanitarian imperative.[9] The historical paintings of the British Empire signing colonial treaties tell a narrative of international law as 'civilizational progress'.[10] Likewise, information visualization, an emerging trend in international legal scholarship, also emphasizes particular narratives about international law, though this aspect of visualization is rarely written about. Therefore, this article discusses the case of network visualization to argue that new empirical approaches to international law are not only means for visualizing data but also ways of understanding the configuration (or structure) of the international legal order. This article contends that the visualization of networks contributes to a narrative of international law as a complex system, a system that is multidirectional and multifaceted.

Among the endless ways in which international law is imagined and visualized, I concentrate on the visualization of the shape and structure of the international legal system. Before doing so, it is important to distinguish between the visuality of the internal and external aspects of the law. The visuality of the external is the depiction of the law as it is happening, represented in objects and paintings, maps and photographs.[11] The visuality of the internal part is different, as the law remains conceptual besides the legal material in which it is found; it is abstract, 'it is not physical or tangible until it is applied or described'.[12] Metaphors, allegories, and artistic illustrations are used to visualize these conceptual aspects of the law. The recent 'empirical turn' of international law, and the emergent use of computer science, have given new tools to the international legal researcher seeking to make law tangible.[13] Law can now be treated as information and

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9 Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013) 28.

10 Kate Miles, 'Visuality of a Treaty: Reflection on Versailles' (2020) 8 London Review of International Law 7, 15–16.

11 Ibid 7; see also Jessie Hohmann and Daniel Joyce, *International Law's Objects* (Oxford University Press 2018).

12 Harlan Grant Cohen, 'Metaphors of International Law' in Andrea Bianchi and Moshe Hirsch (eds) *International Law's Invisible Frames - Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press, forthcoming) University of Georgia School of Law Legal Studies Research Paper 12.

13 Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1; Wolfgang

data, thus turning staggering complexity into (more manageable) visual information. It is this visualization, and the forms that it takes, that is the focus of this article.

The inspiration for this article comes from the fact that the choices regarding visualization in international legal scholarship, especially the more creative pictures of networks, most often go unexplained and are rarely elaborated as more than didactic illustrations of complex information.[14] Furthermore, the research is often 'agnostic' about the implications of the visualization.[15] The focus is the data, not the form. My aim is to add theoretical depth to the choice of visualization. As the visualization contributes to the story that the legal scholar is telling, the choices made should not be taken for granted. For this reason, the article reflects on new methodological directions of international law linked to networks and complexity as used in a small but emerging practice of international legal scholars.

Complexity is a key feature of modern society and network science is an attempt to study complex systems and their components. A network is a complex structure consisting of nodes that are inter-connected by links (edges). The primary characteristics of networks are 'openness, flexibility, extensibility, complexity, internal asymmetry, and an interdependence of individual parts'.[16] Networks are an interdisciplinary method used in a variety of scientific disciplines, such as biology, neurology, and sociology, but they are also part of a much wider conceptual understanding of modernity.[17]

Alschner, 'The Computational Analysis of International Law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021)

14 None of the articles mentioned in section III below elaborate on the form of the network visualization.

15 Expression taken from Urška Šadl and Fabien Tarissan, 'The Relevance of the Network Approach to European Case Law: Reflection and Evidence' in Claire Kilpatrick and Joanne Scott (eds), *New Legal Approaches to Studying the Court of Justice* (Oxford University Press 2020) 124.

16 Patrick Jagoda, *Network Aesthetics* (University of Chicago Press 2016) 8.

17 Warren Weaver, 'Science and Complexity' in George J Klir, *Facets of Systems Science* (Springer US 1991); Albert-László Barabási and Márton Pósfai, *Network Science* (Cambridge University Press 2016)

Complexity has also emerged in international law 'through the actions and interactions between actors in international relations'.[18]

In discussing the aesthetics of international law, Morgan states that 'while in isolation the law seems to embark on its own difficult course, in interdisciplinary mode it parallels, like a Nabokovian pale fire, the literary and aesthetic currents that surrounds it'.[19] If international law is perceived as a complex system, the aesthetics of this complexity, network aesthetics, should be paralleled in the narratives that international legal scholars create about international law.[20] It is this connection between narratives and aesthetics that this article reflects upon.

The next section outlines the role of narratives in international law, particularly narratives that describe the structure of the international legal system. These narratives rely on metaphors to explain the shape and structure of the international legal order. Section III builds on these insights on narratives and metaphors to explore how new empirical approaches to international law study and visualize complexity, expanding upon narratives and metaphors. It further argues that graphical representations of legal networks illustrate particular narratives about the structure of the international legal system and could aid in the creation of new narratives of international law.

II. Narratives and Metaphors in International Law

Narratives are an increasingly studied aspect of international law.[21] They are a way to both question historical contingencies and understand the ways international law is being represented. Seeing international law in narrative

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18 Steven Wheatley, 'The Emergence of New States in International Law: The Insights from Complexity Theory' (2016) 15 Chinese Journal of International Law 579, 581.

19 Edward M Morgan, *The Aesthetics of International Law* (University of Toronto Press 2007) 8.

20 Jagoda (n 16).

21 Studying narratives is a stable part of Law & Literature, see James Boyd White, *The Legal Imagination* (University of Chicago Press 1985) 245; For international law see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 296.

terms highlights the 'discursive and perspectival nature of international law, and allows us to understand the law not only as a system of rules but a world in which we live'.[22] In arguing for a 'turn to narrative', Windsor applies a typology from Ricoeur's narrative theory to the context of international law.[23] Windsor sees two dimensions in the narratives of international law: successional and configurational. All narratives contain these two dimensions, which are in competition with each other.[24] Among narratives focusing on the successional dimension, Windsor highlights the common 'progress narrative' in international law. The configurational dimension is predominant in narratives on the structure and organization of the international legal order.[25] I here explore narratives focusing on the configurational dimension (configurational narratives).[26] It is these narratives that are often expressed through metaphors about the structure of the law, and where networks, and their visualization, can be used to uncover the connections between the various elements of the international legal system.

Configurational narratives deal with the international legal order; they explain in different ways the divergence and convergence of international legal rules and institutions.[27] The idea of 'unity' in international law is at the centre of these narratives, seen as a positive value, an aspiration.[28] On the opposite side to unity, as a counter-narrative, is the idea of the 'fragmentation' of international law.[29] Koskenniemi sees the dichotomy of

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22 Bianchi (n 21) 294; Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4, 5.

23 Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 Leiden Journal of International Law 743, 746; Paul Ricoeur, *Time and Narrative* (University of Chicago Press 1990).

24 Ricoeur argued that any narrative combines two dimensions: a chronological or episodic dimension (successional) and the attempt to construct meaningful totalities out of scattered events (configurational). Windsor (n 23) 746.

25 Windsor calls these configurational-focused narratives 'master-narratives'. Windsor (n 23) 749.

26 For an overview of the visualization of progress narratives, see Miles (n 10) 12–17.

27 Lucas Lixinski, 'Narratives of the International Legal Order and Why They Matter: An Introduction' (2013) 6 Erasmus Law Review 2, 2.

28 Bianchi (n 21) 293; See also Mario Prost, *The Concept of Unity in Public International Law* (Bloomsbury Publishing 2012).

29 Lixinski (n 27) 3.

unity/fragmentation as a matter of narrative perspective: '[w]hat from one angle looks like a terribly chaotic image of something, may from another appear just as a finely nuanced and sophisticated reflection of a deeper unity'.[30] Other prominent narratives that make descriptive claims about the international legal system see it as either containing multitudes (pluralism), as being transnational and autonomous (global administrative law), or as being organized and integrated with domestic systems (constitutionalization).[31] These narratives arose, partly, in response to the fragmentation narrative. Thus, there is struggle and contestation between different narratives, all of them trying to represent the 'reality' of the international legal system. Likewise, insights from network and complexity sciences can be employed to represent a 'reality' of international law as both interconnected and evolving.[32]

International legal scholars, 'somewhat notoriously, tell stories all the time'.[33] A narrative is both *what* this story is and *how* it is told. This can be seen in the use of metaphors in international legal scholarship. Metaphors help visualize the narrative. They provide a language to convey the operation of law, and 'allow international lawyers to build a shared, tangible universe of legal meaning'.[34]

Metaphors become part of their narrative. Thus, configurational narratives of international law are full of metaphors about structure. A good example is the planetary metaphor by Simma and Pulkowski in *Of Planets and the Universe*.[35] They deem the metaphor of planets of self-contained regimes

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30 Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 The Modern Law Review 1, 25.

31 Windsor (n 23) 749.

32 See Steven Wheatley, *The Idea of International Human Rights Law* (Oxford University Press 2019) 48.

33 Bianchi (n 21) 292.

34 Cohen (n 12) 2.

35 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483. A similar but less coherent metaphor is used in Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law 903. See also Wolfgang

within the universe of the international legal system useful to describe modern international law. While it was conceived as a 'hierarchical pyramid structure' in the early 20th century, contemporary international law resembles 'a dense web' of overlapping norms in diverse subject areas.[36] Within the narratives of unity and fragmentation, the planets and the universe are apt for describing a system that allows for internal specialization. A planet can never escape the universe, much like a self-contained regime will always be part of the international legal system.[37]

Metaphors are not immutable, and they might change to better reflect the narrative they are inserted into. In science, one of the most famous shifts in metaphor was from the arboreal (tree-like) to something more weblike.[38] A notable alternative to the tree is the idea of a rhizome, popularized by Deleuze and Guattari in *A Thousand Plateaus*.[39] They were 'tired of trees', and their authoritarian centrality, so they found an alternative able to acknowledge multiplicities and multilinearities.[40] The rhizome metaphor is not common in international law, but in their highly influential paper on fragmentation and global law, Fischer-Lescano and Teubner argue that the solution to conflicts between legal regimes might be characterized as 'rhizomorphic' as it requires not so much the dissolution of different regimes,

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Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561.

36 Simma and Pulkowski (n 35) 484.

37 Ibid 529.

38 Trees are directional and hierarchical (trunk, branches and twigs). The tree is perhaps the most famous metaphor and illustration in science and remained central until the emergence of networks. Its history is described in Manuel Lima, *Visual Complexity: Mapping Patterns of Information* (Princeton Architectural Press 2011). On the shift away from trees in evolutionary science, see David Quammen, *The Tangled Tree: A Radical New History of Life* (Simon and Schuster 2018).

39 A rhizome, unlike a tree, is not monodirectional, rather it reconnects and expands in different directions, with no fixed centre. It is heterarchical, not hierarchical. Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury Publishing 1988).

40 Ibid 15; see also Lima (n 38) 44.

but rather rebuilding those regimes with common reference points and some idea of harmonization.[41]

Developed to describe complex processes, metaphors can enhance thinking and spark creativity, but over time they might become a constraint if they rule out ideas that do not fit into the metaphor's structure.[42] Metaphors must therefore, from time to time, be tested. Thomas A. Smith conducted a pioneering study in legal network analysis that revisited the old metaphor of law as a seamless web.[43] After studying the web of American law in over 4,000,000 judgments, he found that the seamless web metaphor was inaccurate, at least if 'seamless' meant smooth, for the web of law is instead an 'uneven, clumpy web, with some parts thickly connected within themselves, but only loosely connected to other parts'.[44] Furthermore, Smith found that the citation network of a legal system shared characteristics with scale-free networks such as the World Wide Web and the scientific collaboration network.[45] Thus, legal networks can be studied in the same way as other complex networks. Complexity becomes an intricate aspect of the international legal system with this new methodology – if you want to understand international law, you must study it as a complex system. As such it can be said that it is changing narratives and metaphors that led to new methodological approaches.

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41 Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 Michigan Journal of International Law 999, 1034. See likewise on global regulatory governance as a 'rhizomatic maze' Dimitri Van Den Meerssche, 'Regulatory Integration Across Borders: Public–Private Cooperation in Transnational Regulation' (2020) 31 European Journal of International Law 1561.

42 Cohen (n 12) 13.

43 Thomas A Smith, 'The Web of Law' (2007) 44 San Diego Law Review 309. The origin of the metaphor is ascribed to Frederic William Maitland, 'Prologue to a History of English Law' (1898) 14 Law Quarterly Review 13. See further Šadl and Tarissan (n 15) 98.

44 Smith (n 43) 315.

45 Ibid; see also JB Ruhl, Daniel Martin Katz and Michael J Bommarito, 'Harnessing Legal Complexity' (2017) 355 Science 1377.

III. New Empirical Approaches and Visualization

The use of computational methods to study international law is a new approach in empirical legal studies that takes as much from computer science as from political science in its research of the law.[46] Textual and network analysis are prominent methods in this approach. Proponents of these new methods see them as a 'third way' between defending traditional doctrinal legal methodology, and submitting to the encroaching methodology of political and social scientists.[47] The methods from computer science render legal analysis scalable and allow for deeper and wider studies of international law.[48] The ideal of these methodologies 'synthesises' the study of law with the computational analysis, allowing the researcher to find larger patterns, structures, and outliers than would be possible without it.[49]

Network analysis has been used in multiple ways in international legal scholarship. Without being exhaustive,[50] notable examples include citation network analysis, which uses citations (implicit or explicit references) between judgments, paragraphs, treaties, or other legal material to study the

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46 Alschner (n 13); Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20 Journal of International Economic Law 217; Urska Šadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 Leiden Journal of International Law 327; Šadl and Tarissan (n 15).

47 Šadl and Olsen (n 46) 328.

48 Alschner (n 13) 1.

49 Jakob VH Holtermann and Mikael Rask Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and Its Consequences for the Science of International Law' (2016) 29 Leiden Journal of International Law 1001; See also Alschner (n 13) 3: 'Computational legal analysis does not fundamentally change what international lawyers do, be it the doctrinal normative, interdisciplinary or empirical analysis of law, but it expands the tools at their disposal by treating law as data'.

50 For a wider bibliography, see 'Suggested, Non-Exhaustive Bibliography, Databases and Software to Carry Out Data-Driven Empirical Research of International Economic Law' (2017) 20 Journal of International Economic Law 419; Alschner (n 13).

network formed by those interactions.[51] This analysis can entail either tracking how precedent is created (i.e. incrementally over numerous judgments or in one authoritative *grand arrêt)* or exploring how the case law of international courts grows more complex and evolves over time.[52] It can focus on judicial dialogue between courts or map the *universe* of treaties.[53] Likewise, social networks investigate the communities of arbitrators in international investment cases and uses obituaries to put together the 'invisible college' of international law.[54]

A commonality of these diverse projects is that the methodology allows them to see hidden patterns in complex materials. The computational approach focuses on understanding complexity and uncovering empirical evidence that can 'validate hunches and prove legal intuitions correct'.[55] It further seeks to 'reduce' complexity through these new approaches.[56]

There are different ways to visualize a network. Often the network is represented only as data (i.e. tables showing the cases with the highest

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51 Šadl and Tarissan (n 15); Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 European Journal of International Law 83; Joost Pauwelyn and Wolfgang Alschner, 'Forget About the WTO: The Network of Relations between Preferential Trade Agreements (PTAs) and "Double PTAs"' [2015] Trade Cooperation.

52 See e.g. Mattias Derlén and Johan Lindholm, 'Goodbye van Gend En Loos , Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) 20 European Law Journal 667; Urška Šadl and Mikael Rask Madsen, 'A Selfie from Luxembourg: The Court of Justice's Self-Image and the Fabrication of Pre-Accession Case-Law Dossiers' (2015) 22 Columbia Journal of European Law 327.

53 Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 Journal of International Economic Law 279; Alschner and Skougarevskiy (n 35).

54 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301; Luiza Leão Soares Pereira and Niccolò Ridi, 'Mapping the'Invisible College of International Lawyers' through Obituaries' [2020] Leiden Journal of International Law (Forthcoming).

55 Šadl and Olsen (n 46) 330.

56 Alschner and Skougarevskiy (n 35) 563.

PageRank or HITS-Score), telling the reader that these are the 'best-connected cases with the highest authority'.[57] Another way to represent the network is through charts and figures that show the developments within it (i.e. the degree distribution between cases, the growth and decline in citations to a specific judgment).[58] In this sense, it follows the visualization style traditional to Empirical Legal Studies (ELS), brought in from political science.[59] Here, visualization aims to communicate the substance of the data effectively.[60] This type of visualization gives an accurate account of the properties of the network, leaving it to the reader to imagine its shape. The goal is clarity and iteration in the communication of data, and if international law is represented, it is as plots in a graph. However, computer-supported visualization allows for higher creativity and choice than is commonly found in the ELS literature. New ways to graphically represent a network emerge, focusing more on form.[61]

The most creative ways to present networks require visualization software. The nodes and edges can be given varied sizes and colours based on different metrics and the network can be moved around manually or using algorithms that simulate a physical system by placing the nodes into community clusters and giant 'clouds' or 'webs'.[62] A static 'snapshot' is then taken of the

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57 See e.g. Derlén and Lindholm (n 52).

58 See e.g. Alschner and Charlotin (n 51).

59 Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) pt IV; Edward R Tufte, *The Visual Display of Quantitative Information* (Graphics Press 2001).

60 Epstein and Martin (n 59) 228.

61 Interaction with the network is also possible, often in connection with databases. See e.g. Leão Soares Pereira and Ridi (n 54); Dmitriy Skougarevskiy and Wolfgang Alschner, 'Mapping Investment Treaties' (Mapping Investment Treaties) <http://mappinginvestmenttreaties.com/> accessed 10 November 2020; 'Welcome to PITADbeta' (PITAD Investment Law and Arbitration Database: Version 1.0, Pluricourts Centre of Excellence, University of Oslo) <https://pitad.org/index#welcome> accessed 10 November 2020.

62 See e.g. Mathieu Jacomy and others, 'ForceAtlas2, a Continuous Graph Layout Algorithm for Handy Network Visualization Designed for the Gephi Software' (2014) 9 PLOS ONE e98679.

network.[63] These visualizations do not necessarily communicate the data in a clear, effective, and 'objective' way, as is the mantra of ELS visualization. The networks are shaped by aesthetic choices *made by the scholar*. Sometimes this choice is underutilized, with network graphs presented as a dense collection of grey blobs. Other graphical representations are more colourful.[64] Figure 2 provides a good example. It shows a citation network of 11,051 judgments of the European Court of Human Rights between 1960 and 2015.[65] The network is grouped and coloured according to modularity, a measure within networks that creates community clusters based on the distribution of edges between the nodes. The size of the nodes is based on the in-degree, the number of citations a given judgment has received. Using these relatively simple measures, overarching themes in the network become apparent: certain clusters are more isolated than others and certain cases are much more cited than the average.

63 While the picture shows a static image, 'a network is never a static structure, even as network graphs, maps, or visualizations might sometimes suggest a fixed form. Networks depend on an active flow among interlinked vertices'. Jagoda (n 16) 8.

64 See admirable examples in Lima (n 38).

65 For a high-quality version of the image and a description of how it was developed, see 'European Court of Human Rights jurisprudence 1960-2015' (ImgBB) <https://ibb.co/jvRH3bP> accessed 10 November 2020. The network is built with a dataset from iCourts, Centre for Excellence of International Courts.

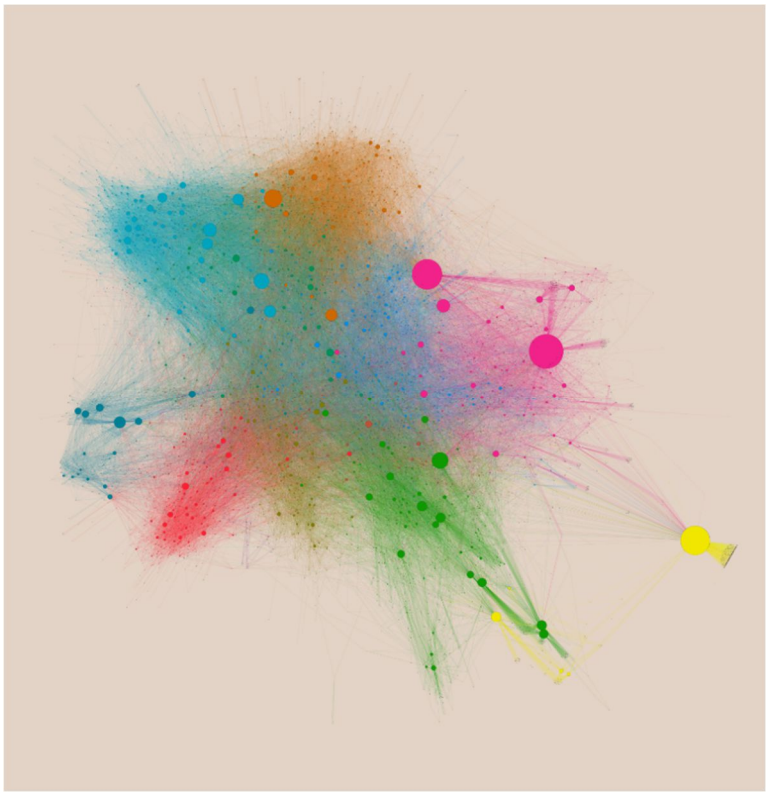

Figure 2: European Court of Human Rights Jurisprudence 1960-2015.

Another illustrative example is found in *The Shape and Structure of the 'Usable Past'* by Ridi, containing 15 graphical representations of networks of the jurisprudence of eight international courts and tribunals.[66] These citation networks are shown as giant nebulas of case law, with nodes of varied size and colour. They show the 'web of law' in all its intricacies. As in Smith's description, the web is not smooth but clumpy, yet by indicating properties such as community clusters, the distinctiveness of different parts of the international legal system becomes apparent. For instance, when comparing the clustering in investment arbitration to a regional human rights court, or if analysing the growing complexity of the WTO Appellate Body case law.[67]

While legal network analysis focuses primarily on studying the properties of networks, the representation of those networks should not go unnoticed. It

66 The article also includes a US Supreme Court network, and a social network of arbitrators. Niccolò Ridi, 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200.

67 Ibid 222, 211.

is contended that the visualization of the networks contributes to a narrative of international law as a complex system, a system that is multidirectional and multifaceted. The aesthetics of networks is not necessarily about controlling complexity but about embracing it.[68] In this regard, while the study of the properties of legal networks is about reducing complexity, and thereby controlling it, the visual representation embraces that complexity. Visualizations show the intricacies of complex composition, but do not necessarily reveal information of the network's individual parts.

Visualization contributes to the narratives that the international legal scholar creates. The graphical representation of networks is malleable to the aesthetic desires of an adept creator, and there are many aspects that can be included or excluded, highlighted or dimmed down. For example, Figure 2 borrows the colour scheme of *Circles in a Circle* (Figure 1) to lure the reader into seeing similarities between the two. In this sense, the use of networks can visually contribute to every narrative focusing on the configurational dimension of international law. Certain narratives will, however, benefit more from network visualization. Like Kandinsky's circles, networks can reflect harmony, and bring precarious objects into balance. They make the reader focus on the interactions rather than the individual parts. The imagined order of legal pluralism, characterized as 'heterarchical interaction of the various layers of law' is apt for the aesthetics of networks.[69] On the other hand, fragmentation becomes increasingly dubious when networks can show the multitude of interactions between the different regimes of international law.[70] Similarly, metaphors such as pyramids conflict with network aesthetics, while planets and the universe are much more congenial fits. In other words, tensions arise in a narrative when its different parts are no longer in tune. Time will tell whether network aesthetics will lead international lawyers to become as 'tired of trees' as Deleuze and Guattari were.

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68 Jagoda argues that we should stop trying to control networks and become 'non-sovereigns' Jagoda (n 16).

69 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 23.

70 Charlotin (n 53).

IV. Conclusion

The visualization of international law as networks – interconnected nebulae of citations, social relations, institutional bonds – is meant to present complex interactions to the reader, in turn leading them to see international law as a system of staggering, but manageable, complexity. This article has brought together different strains of international legal scholarship to appeal for methodological reflection as to why visualizations should be viewed as more than a didactic tool to communicate information. Not only the properties, but also the form of networks should be appreciated and reflected upon. The aesthetic choices of the scholar allow them to communicate ideas of 'proliferating multiplicity' through these networks.[71] The article has left open the question whether this visualization reinforces already existing narratives – narratives that argue for multilinearity and inter-connectivity – or whether it coins a new narrative focused on the complex configuration of the international legal order. Such a narrative would, in turn, become a self-fulfilling prophecy in favour of the computational approach.

[71] Jagoda (n 16) 3.

GENERAL ARTICLES

MAPPING EUROPE'S COSMOPOLITAN LEGAL ORDER: A NETWORK ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS, THE COURT OF JUSTICE OF THE EUROPEAN UNION, AND HIGH NATIONAL COURTS

Kristen M. Renberg* and Michael C. Tolley†

While some scholars, such as Stone Sweet and Ryan, describe Europe's multi-level system of courts as an emerging 'cosmopolitan legal order', few have attempted to study the case citations representing the defining features of the order, namely the interdependence of courts at each level, and the embeddedness of international law in national court decisions. To this end, we have constructed an original database of case citations based on judgments of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and high national courts made available by CODICES, and apply network analysis and text-as-data methods to assess the dynamic interactions among these courts. Our work makes several empirical contributions to the literature on the Europeanization of law and courts: that Europe's 'cosmopolitan legal order' operates more as an interconnected, heterarchical network and less like a hierarchical legal system; that the ECtHR's status today as the 'ultimate supranational arbiter of human rights in Europe' in the words of Kelemen is assured by the propensity of national courts to cite its case law; and that high national courts use their case citations strategically to signal to domestic and international audiences their commitment to the values of the 'cosmopolitan legal order'. After identifying the forces that give the network its unique shape, we discuss the implications of the governance architecture for the effective promotion of the values that inspired the legal order.

Keywords: European courts, cosmopolitan legal order, network analysis, judicial dialogue, strategic citation

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I. INTRODUCTION

In their recent book, Alec Stone Sweet and Clare Ryan argue that Europe's multi-level legal system has emerged as a 'cosmopolitan legal order' (CLO) based on the European Convention on Human Rights. They define a CLO as

> a multi-level, transnational legal system in which (i) justiciable rights are held by individuals; (ii) all public officials bear the obligation to fulfill the

> fundamental rights of every person within their jurisdiction [...]; and (iii) both domestic and transnational judges supervise how officials do so.[1]

In this article, we examine the distinguishing features of a CLO, namely the interdependence of courts at each level, and the embeddedness of international law in national court decisions, using the tools of network analysis and text-as-data analysis. Our objectives are twofold: (1) to provide empirical evidence of the inter-court dialogues over time by mapping the case citation networks of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and high national courts, including both the constitutional tribunals and supreme courts of the Member States of the European Union (EU); and (2) to explain the causes and consequences of the distinct patterns of interactions among these key actors. Our analyses and findings answer longstanding questions about the structure of Europe's CLO, the degree to which European Convention of Human Rights (ECHR) and EU law principles are embedded in high national court decisions, and the case citation behavior of courts at each level of this legal order.

Our findings also provide support for the theory of 'bounded strategic space' previously developed by the international law scholar David Caron.[2] This theory posits that the key actors in international law regimes 'contend with one another, or against the space itself, so as to fulfill the logic of their positions'.[3] The logic or principal objective of the ECtHR and CJEU is to get other key actors to accept their legitimacy as authoritative decisionmakers. Case citations by national courts to the judgments of these courts are a measure of this legitimacy. The ECtHR and CJEU need the cooperation of the other actors. Thus their decisions and interactions with national courts can best be understood in light of Caron's vision of the international legal system: 'one where international courts and tribunals, and national legal systems — each in appropriate spheres and each with appropriate roles —

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1 Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press 2018) 1.

2 David D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley Journal of International Law 401.

3 Ibid 402.

operate together to bring about the measure of coordinated governance necessary to address [the prevailing problems of the day]'.[4] In the context of Europe's CLO, it is natural to expect that the ECtHR and CJEU strive to increase their institutional reputations and promote compliance with their decisions. As for national courts, we expect them to 'fulfill the logic of their positions' by showing compliance with the decisions of the international courts and the values of the treaty systems their countries have agreed to enforce.[5] The position of national courts in this 'bounded strategic space' means that they are communicating with multiple audiences. Under this institutional lens, we hypothesize that high national courts strategically employ citations to ECtHR and CJEU judgments in order to maximize the persuasive authority of their decisions to domestic audiences (national legislatures, executives, NGOs) and to signal to international audiences (EU, Council of Europe, World Bank) their commitment to the values of the CLO.

We construct case citation networks from an original dataset and use them to map the interactions between the ECtHR, the CJEU, and the high national courts of the Member States that are subject to the jurisdiction of both the ECHR and the EU treaties. Our data capture the text and citation of opinions and judgments of high national courts along with the ECtHR and CJEU between 1990 and 2018. This is the first empirical study to rely on the CODICES database. CODICES is a publication of the Venice Commission (COE) and serves as a database for over 10,000 decisions by constitutional, supreme and international courts. In the words of EU law scholar Paul Craig,

> CODICES make data available from countries whose constitutional decisions would not otherwise be readily available. This facilitates research and offers a resource to constitutional courts as to how endemic problems have been dealt with elsewhere, thereby fostering trans-constitutional exchange of ideas'.[6]

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4 David D Caron, 'International Courts and Tribunals: Their Roles Amidst a World of Courts' (2011) 26 ICSID Review — Foreign Investment Law Journal 3.

5 Caron (n 2) 402.

6 Paul Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 57, 62-63. The database is

The United Kingdom is included in this study since their decision to leave the EU in 2016 did not become effective until 31 January 2020.

Authority and hub scores (influence measures) are computed to determine which court — the ECtHR or the CJEU — is the most influential in terms of rendering decisions that are frequently used to support decisions by other courts. Various network analysis methods, such as hierarchical cluster analysis, are employed to reveal communities of high national courts based on their citation behavior towards ECtHR and CJEU judgments. Altogether, these citation networks provide insight into the shape or structure of Europe's CLO, the degree to which international law is embedded in national court decisions, and the case citation behavior of courts at each level of the multi-level system. Further, we employ text-as-data methodologies to demonstrate how citations patterns vary by issue area.

Several scholars and legal actors have attempted to describe the shape of Europe's CLO. Alec Stone Sweet has written that 'Europe possesses an overarching "constitutional" structure [...]. No single organ possesses the 'final word' when it comes to a conflict between conflicting interpretations of rights; instead, the system develops through inter-court dialogue, both cooperative and competitive'.[7] Justice Andreas Voßkuhle, President of the German Federal Constitutional Court, has described the configuration of European courts 'not as a pyramid, but as a mobile'.[8] Voßkuhle, like Stone Sweet, attributes the shape of the system to judicial dialogue or the legal doctrines and procedures which make national courts, the ECtHR, and the CJEU partners in the implementation of ECHR and EU values.[9] Our analyses provide empirical evidence of the nature of inter-court dialogues within

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available at <http://www.venice.coe.int> accessed 27 July 2021. While CODICES is a COE project, there does not appear to be any bias towards hosting decisions whose opinions cite ECtHR decisions.

7 Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 Global Constitutionalism 55.

8 Andreas Voßkuhle, 'Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts' in *Dialogue between Judges 2014--Implementation of the Judgments of the European Court of Human Rights: A Shared Responsibility? (*Council of Europe 2014) 40.

9 Amrei Müller, *Judicial Dialogue and Human Rights* (Cambridge University Press 2017).

Europe's CLO. Our empirical analyses also allow us to ask and answer the following questions: do the case citation networks reveal a strategic nature of inter-court dialogues within Europe's CLO? Which court, the ECtHR or CJEU, has been the most successful over time in getting high national courts to take account of its decisions and evolving case law principles? What are the causes and consequences of the observed case citation patterns of high national courts within the ECtHR and CJEU legal regimes?

Moreover, our methodology provides insight into which court, in the words of political scientist Daniel Kelemen, is 'the ultimate supranational arbiter of human rights in Europe'.[10] He has indicated this question is likely to hold a prominent place in discussions about the CJEU in the twenty-first century. We also highlight how Europe's overlapping systems of rights protection present some challenges for Member States of the EU that are also contracting parties to the ECHR and the Council of Europe (COE). Specifically, we note that one of the challenges is the on-going confusion over how the same right is interpreted in ECtHR and CJEU decisions.[11]

In the next section, we describe the overlapping system of courts and the bounded strategic space of Europe's CLO. Next, we introduce the original dataset we constructed based on the case citations included in the judgments and opinions of the CJEU, ECtHR, and high national courts reported in CODICES. We then explain the network analysis and text-as-data methodologies we used and report our findings and results. We conclude by

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10 R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-first Century' (2016) 79 Law and Contemporary Problems 117, 126–127.

11 One example is the CJEU's judgment in *Samira v. G4S Solutions* C-157/15 EU:C:2017:203, dealing with the prohibition on wearing an Islamic headscarf in the workplace. The CJEU ruled that so long as the restrictions on religious garments are applied to all employees of all faiths, employers are allowed to ban workers from wearing headscarves. This decision is difficult to reconcile with a decision of the ECtHR four years before that allowed crosses to be worn at work. In *Eweida v. UK* [2013] ECHR 37, the ECtHR ruled that wearing religious symbols while on the job is protected as an individual's right to manifest freedom of religion (ECHR, Article 9). While the CJEU focused on whether the employer's ban was an impermissible form of direct discrimination, that is, freedom from discrimination, the ECtHR focused on freedom of religion, that is, the employee's right to manifest religion.

discussing the forces that give the network its unique shape and the consequences of the governance architecture for the effective promotion of the values that inspired the formation of these legal regimes in the first place.

II. COURTS, NETWORKS, AND THE THEORY OF BOUNDED STRATEGIC SPACE

The role of the CJEU in deepening both legal and political integration in the Community and later the EU has been well studied over the past several decades.[12] Scholars examining the ECtHR have explained the post-WWII success of the ECHR in enhancing the domestic enforcement of rights in the signatory states and how the European approach became a model for the world's other two regional systems of human rights protection — the American Convention on Human Rights (1967) and the African Charter on Human and Peoples' Rights (1981).[13] Today, scholars are examining new questions about the dynamic interplay between national, supranational, and international courts in Europe's CLO. For example, what are the legal implications of the Charter of Fundamental Rights (CFR), which became legally binding and a source of primary law in the EU in 2009? How might accession of the EU to the ECHR, which was required by Article 6(2) of the Treaty on European Union and is now stalled following the CJEU's 2014 decision which held that that aspects of the Draft Accession Agreement are incompatible with EU law, affect the way these two legal regimes interact?[14]

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[12] Kelemen (n 10); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Michael Tolley, 'Fundamental Rights, the European Court of Justice, and European Integration' in Donald Jackson, Michael Tolley and Mary Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (SUNY Press 2011); Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001).

[13] Donald Jackson, *The United Kingdom Confronts the European Convention on Human Rights* (University of Florida Press 1997); Donald Jackson, Michael Tolley and Mary Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (SUNY Press 2011); Stone Sweet and Ryan (n 1).

[14] Opinion 2/13 EU:C:2014:2454 (on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

In this article, we gather new empirical evidence of the patterns of transjudicial communication among European courts and use this data to provide insight into these and other questions about the operation of Europe's CLO.

These new problems require new tools of analysis. Here, network analysis is employed to uncover the dynamic interrelations among the key actors in Europe's CLO. Network analysis is a constantly developing field that allows scholars to explore the nature and structure of complex social, political, legal, and economic organizations.[15] Several scholars have demonstrated how network analysis can answer questions about European courts.[16] The key assumption underlying network methodology is that structure and relationships within a network affect observed outcomes. For example, if the supreme and constitutional courts of Member States of the EU and COE are lower courts in a hierarchical structure with the CJEU and ECtHR, they may enjoy less autonomy over their caselaw. Whereas, if high national courts find themselves in a non-hierarchical structural relationship with the ECtHR and CJEU, then they may exert more autonomy over their caselaw and be treated deferentially, rather than delegatory, by the ECtHR and CJEU. Notably, a non-hierarchical structural relationship may also foster greater mutual trust and cooperation among the key actors or nodes because in a system of relative equals there will likely be greater willingness to listen to and adopt good legal

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15 David Lazer, 'Networks in Political Science: Back to the Future' (2011) 44 PS: Political Science & Politics 61; Mark Newman, Albert-László Barabási, and Duncan Watts, *The Structure and Dynamics of Networks* (Princeton University Press 2006); Alain Barrat, Marc Barthelemy and Alessandro Vespignani, *Dynamical Processes on Complex Networks* (Cambridge University Press 2008).

16 Yonatan Lupu and Erik Voeten, 'Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) 42 British Journal of Political Science 413; Maartje de Visser and Monica Claes, 'Courts United? On European Judicial Networks' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013); Simone Benvenuti, 'National Supreme Courts and the EU Legal Order: Building a European Judicial Community through Networking' (2014) 6 Perspectives on Federalism 1; Mattias Derlén and Johan Lindholm, 'Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) 20 European Law Journal 667.

reasoning regardless of whether they originated in a *lower* high national court or *higher* court like the ECtHR or CJEU. As such, this article relies on network analysis and various text-as-data approaches to map the inter-court dialogues which have emerged in the 'bounded strategic space' of Europe's CLO.

Caron's theory of bounded strategic space helps us to understand the behavior of courts in Europe's emerging CLO. In 'Toward a Theory of International Courts and Tribunals', Caron explains how courts in international law regimes work and seek to be effective.[17] Courts are not there to make legal pronouncements *in abstracto*. They are created to make a difference, that is, to 'fulfill the logic of their position' to use Caron's words.[18] We rely on Caron's prediction that the behavior of the key actors and institutions in Europe's CLO is motivated by the competition for influence. Courts at each level compete for influence and seek to be recognized as fulfilling the political objectives of legitimacy and effectiveness. Evidence of this behavior is left behind in the case citations appearing in the judgments and opinions of each court within the fixed system, that is, within the bounded strategic space.

This article also contributes to the literature on citation behavior by courts in multi-layered systems. Network science scholars James Fowler and Sangick Jeon first advanced network analysis as a tool for exploring citation networks in law and aided in the development of 'strategic citations'.[19] If judges were merely following the law and decisions in previous cases, we should expect to observe the same judgments being cited in similar cases. Instead, considerable variation suggests there is some form of strategic behavior underlying citation decisions. Within the context of the United States, for instance, political scientist Rachael Hinkle argues that appellate court judges strategically choose to cite certain cases over others when crafting their legal opinions in order to reduce the probability their decision

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17 Caron (n 2).

18 Ibid 402.

19 James Fowler and Sangick Jeon, 'The Authority of Supreme Court Precedent' (2008) 30 Social Networks 16.

will be reviewed and reversed.[20] This article advances this notion of strategic citations and argues that citations are both a mode of judicial reasoning, used to boost the authority of a court's decision, and a strategy of communication, used to signal or convey messages to wider audiences. High national courts cite ECtHR and CJEU judgments as a means of signaling to other EU Member States and international organizations, such as the EU, the COE, and the World Bank, a country's commitment to liberal-democratic values and the rule of law. Further, these courts may cite decisions by other courts as a means to signal their legal reasoning as legitimate. International law scholar Anne-Marie Slaughter coined the phrase 'persuasive authority' to describe how cross-border citations boost the legitimacy of decisions: 'unlike past legal borrowings across borders, judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue. They cite each other not as precedent but as persuasive authority'.[21] In turn, we expect high national courts to cite decisions by the ECtHR and CJEU to boost their judgment's persuasive authority.

The decision not to cite, or in other words ignore, is also a strategy of communication. Further, a mere counting of citations is not particularly insightful into a national court's ideals. As argued by Erik Voeten, '[i]f our understanding of transjudicial communication is to advance, future studies should seek to account for both the presence of explicit connections between courts rather than to simply document cross citations where they occur'.[22] In addressing Voeten's concerns, we move beyond counting the number of cross citations among courts and instead examine the decision by high national courts to cite international court judgments with high and low authority scores. In the following section, we theorize that a better, more empirically-based understanding of the nature and structure of Europe's CLO emerges when we distinguish the decisions by national courts to cite judgments of international courts with low authority scores (that is, the least influential

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20 Rachael Hinkle, 'Strategic Anticipation of En Banc Review in the US Courts of Appeals' (2016) 50 Law and Society Review 383.

21 Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191, 193.

22 Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 Journal of Legal Studies 547, 573.

judgments in the network) from the decisions to cite judgments of international courts with high authority scores.

III. The Architecture of Europe's Cosmopolitan Legal Order: Pyramid or Mobile?

International law theorists surmise that the shape or structure of Europe's CLO ultimately depends on the influence the ECtHR and CJEU have on national politics and legal systems. However, other international law theorists offer different explanations of this influence. In the following passage, Lisa Conant contrasts the views of 'constitutionalists', 'realists', and 'liberal-pluralists':

> Constitutionalists contend that the impact of ICs [international courts] deepens as interactions between domestic and ICs increase. Realists counter that any apparent impact stems from either the coercion of weak States or a coincidence of interests, with national judges taking their cue from the national executive rather than ICs. In contrast to these accounts, liberal and pluralist theories predict ICs will have a variable impact on domestic politics due to varying patterns of interaction between ICs and domestic actors that are rooted in differences in domestic institutions.[23]

Those who view the structure as a vertically integrated system of international and national courts, such as EU law professors Joseph Weiler and Gráinne de Búrca, are constitutionalists.[24] In contrast, those who maintain that the influence of international courts on national legal systems depends on domestic political factors and that variation among national legal systems makes Europe's multi-layered system less hierarchical are the realists, liberals, and pluralists, to use Conant's terms. The actual influence of international courts is thus an empirical question, and we seek to use case citations to measure influence and, in turn, describe the structure of Europe's CLO based on this analysis.

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[23] Lisa Conant, 'Missing in Action? The Rare Voice of International Courts in Domestic Politics' in Marlene Wind (ed), *International Courts and Domestic Politics* (Cambridge University Press 2018) 14-15 (*citations omitted*).

[24] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51 Harvard International Law Journal 1.

The principal institutional actors, or nodes, in Europe's CLO include the ECtHR, the CJEU, and the high national courts of the Member States of the EU. The connections, or edges, in this network are the case citations in each court's judgments. The factors influencing citation behavior and the forces shaping Europe's CLO are explained below.

We argue that high national courts strategically choose which judgments by the ECtHR and CJEU they cite.[25] As such, some high national courts include multiple citations to these decisions, and other courts rarely issue citations. Our theory and results contribute to prior research that argues that legal citations can serve a number of signaling purposes.[26] Here, the affirmative action of citing the ECtHR or CJEU is considered meaningful, and the absence of citations is meaningful in another away. We build upon previous policy research that has demonstrated that the date when a country joined the EU makes a difference and that variation between older and newer Member States when it came to decision making in the Council of the European Union can be explained in these terms.[27]

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[25] We do not incorporate a measure of valence for each citation in this study. The process of coding the valence of each citation would require a great deal of hand-coding and potentially introduce human error. However, we recognize, as some scholars who have undertaken the arduous task of reading and coding high national court citations have found, that citations to international courts are not always positive or approving of that court's decision. See, for example, Marlene Wind, 'The Nordic, the EU and the Reluctance Towards Supranational Judicial Review' (2010) 48 Journal of Common Market Studies 1039. For our purposes, even a citation with a negative valence is considered relevant because it signifies that the national court took the opportunity to issue a citation towards the judgment, which signals that it may disagree with the decision, but nonetheless accept the legitimacy of the ECtHR's or CJEU's judgments.

[26] James Fowler, Timothy Johnson, James Spriggs, Sangick Jeon, and Paul Wahlbeck, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court' (2007) 15 Political Analysis 324; Fowler and Jeon (n 19); William Landes and Richard Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 Journal of Law and Economics 249; Hinkle (n 19); Thomas G Hansford and James F Spriggs, *The Politics of Precedent on the US Supreme Court* (Princeton University Press 2006).

[27] Teemu Makkonen and Timo Mitze, 'Scientific Collaboration between "Old" and "New" Member States: Did Joining the European Union Make a Difference?'

We expect high national courts in the thirteen countries admitted to the EU in and after the major enlargement in 2004 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, then Bulgaria and Romania in 2007, and Croatia in 2013) to be more likely to cite judgments by the ECtHR and CJEU than courts in the six founding countries (Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany in 1957) and in the countries that joined before the symbolic unification of Western and Eastern Europe (Denmark, Ireland, and the United Kingdom in 1973; Greece in 1981; Portugal in 1986; Austria, Finland, and Sweden in 1995). We use the shorthand 'old' EU-15 and 'new' EU-13 in our hypothesis concerning citation practices of the high national courts of countries that are now both members of the EU and COE. We assume that high national courts in the new EU-13 countries, which are mostly former Eastern-bloc countries, are primarily interested in consolidating their democracies and in demonstrating this to domestic and international audiences.[28] Also, we surmise that these courts, lacking long domestic legal traditions from which to extract the authorities needed to boost their reasoning, often will need to turn to the judgments of international courts. Though we expect to find EU-13 courts issuing more citations to judgments by the ECtHR and CJEU, and more citations to high authority judgments by the ECtHR and CJEU, we acknowledge that prior research has suggested a number of possible mediating factors, including whether the high national court is a constitutional court or a supreme court, and the extensiveness of the norm of judicial review.[29]

(2016) 106 Scientometrics 1193 and Dimiter Toshkov, 'The Impact of the Eastern Enlargement on the Decision-making Capacity of the European Union' (2017) 24 Journal of European Public Policy 177.

28 See, for example, Johanna Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 Yale Journal of International Law 423.

29 Wind (n 25); Marlene Wind, 'Laggards or Pioneers? When Scandinavian Avant-garde Judges Do Not Cite International Case Law: A Methodological Framework' in Marlene Wind (ed), *International Courts and Domestic Politics* (Cambridge University Press 2018).

1. The ECtHR and High National Court Edges

Countries that have ratified the ECHR have demonstrated a commitment to upholding the rights set out in the Convention at the national level. When individuals are dissatisfied, following the exhaustion of their domestic remedies, they may exercise their right to individual petition under Article 34 of the ECHR and present the matter to the ECtHR. Since 1998, the ECtHR has sat as a full-time court composed of judges from each of the contracting state parties to the Convention. If the ECtHR agrees with the national court and rules against the petitioner, then the challenged action will have been judged to comport with the ECHR commitments of the contracting state. On the other hand, if the ECtHR rules in favor of the petitioner, then the contracting state is obligated to change the offending laws or policies.

On the basis of Article 46 ECHR, the authority of ECtHR judgments is limited because, strictly speaking, they only have *inter partes*, not *erga omnes* effect.[30] However, in practice, national positions on whether Strasbourg judgments have an *erga omnes* effect, recognizing as compulsory 'the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention' (Article 46 ECHR), vary from the clear obligation expressed by statute such as Section 2(1)(a) of the Human Rights Act (United Kingdom)[31] to the declaration of such an obligation by judicial decision.[32] The mode of incorporating the ECHR ultimately matters. Whether the ratified Convention is transformed into domestic law automatically as in the monist tradition or whether it is transformed by statute in the dualist tradition will likely affect high national court citations

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30 That said, recent research has demonstrated that, in practice, the ECtHR can have *erga omnes* effects. See Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68 International Organization 77.

31 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights [...].' HRA 1998, Section 2(1)(a).

32 Stephanie Bourgeois, 'The Implementation of the European Convention on Human Rights at the Domestic Level' in Alessia Cozzi and others, *Comparative Studies on the Implementation of the ECHR at the National Level* (Council of Europe 2016) 8-9.

of ECtHR judgments.[33] In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Keller and Stone Sweet find and report that the ECHR's impact has been broad and persuasive in some states, less so in others.[34]

National courts and the ECtHR are clearly partners in the implementation of ECHR values. But, unlike the CJEU, the ECtHR does not hold a formal place in the judicial hierarchies of contracting states. The Strasbourg Court cannot by itself nullify offending national actions or measures. The process is essentially dialogical: the contracting states must take the actions needed to give effect to ECtHR decisions. National courts begin with the assumption that ECHR rights establish a floor and domestic law may not fall below that level unless there is a good reason, and then measure domestic policy and action against this standard. The 'margin of appreciation' doctrine allows countries some leeway in satisfying their international commitments and helps to determine if the departures from the ECHR norm are within an acceptable range.[35] Whether this floor is also a ceiling is a matter of some debate and controversy. Some high national courts, depending upon which rights are at issue, view ECHR rights as only the starting point for expanding the right to be protected in domestic law, while others merely attempt to 'keep pace with Strasbourg rulings', no more and no less.[36]

The ECtHR employs a fairly deferential standard of review of high national court treatment of Convention rights that some commentators call the

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33 Athanassia Sykiotou, 'The Relation of Greek Courts with the European Convention on Human Rights and the European Court of Human Rights Case-Law' in Alessia Cozzi and others, *Comparative Studies on the Implementation of the ECHR at the National Level* (Council of Europe 2016) 51.

34 Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2009) 678.

35 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe 2000).

36 Michael Tolley, 'Judicialization of Politics in Europe: Keeping Pace with Strasbourg' (2012) 11 Journal of Human Rights 66.

'responsible court doctrine'.[37] In Von Hannover v. Germany (No. 2) (2012),[38] this approach can be detected in the ECtHR's review of the fundamental rights decision of Germany's Constitutional Court. The 'responsible court doctrine' means that the ECtHR will leave undisturbed decisions by national courts that fully considered fundamental rights issues in light of ECHR values and ECtHR case law principles.[39] In finding that Germany's Constitutional Court had 'undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints', the ECtHR allowed the balance struck by the national court to stand.[40] By promoting judicial dialogue, the 'responsible court doctrine' may flatten the relationship between high national courts and the ECtHR.

2. The CJEU and High National Court Edges

Unlike ECtHR judgments, the authority of CJEU judgments is not restricted to the parties to the case. Once the CJEU clarifies a legal matter, the ruling has direct effect throughout the EU. The doctrines of direct effect and supremacy, along with the preliminary reference procedure, established the CJEU's influence in Europe's CLO. Given the *erga omnes* effect of CJEU rulings, we expect high national courts to cite and take into full account the Court's rulings and doctrines.

Since the CJEU's decision in *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (1982),[41] high national courts ('against whose decisions

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37 Başak Çali, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddny Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU and National Legal Orders* (Routledge 2016).

38 (2012) 55 EHRR 15.

39 The ECtHR explained its approach in the following way: '[i]n exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on'. *Von Hannover v. Germany* (No. 2) (2012) 55 EHRR 15, para 105.

40 Ibid para 125.

41 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335.

there is no judicial remedy under national law'[42]) have been required to refer all questions of EU law for a preliminary ruling unless the answer to the question is clear or so obvious that there can be no reasonable doubt how EU law is to be applied. For example, the CJEU brought some clarity to the old 'acte clair' doctrine in the joined cases of *X and van Dijk* (2015).[43] In one of the two cases, a lower court in the Netherlands made a preliminary reference to the CJEU for clarification on how to apply EU law on this matter. In the other case, the Dutch Supreme Court thought the answer to the question of how to apply EU law was plain, but initiated a preliminary reference with the question of whether the lower court's referral meant that the matter required clarification.

In *X and van Dijk* (2015), the CJEU ruled that the Dutch Supreme Court did not have to wait. When the answer to the EU law question is obvious, national courts are to be trusted to resolve questions of EU law without the assistance of the CJEU.[44] The CJEU explained that if the national courts are wrong, there are two mechanisms available for relief. The Commission could bring an infringement action against the Member State or, as the CJEU recognized in *Köbler v. Republik Österreich* (2003), individuals could hold a Member State liable for breaches of EU law.[45]

In *International Court Authority*, Alter, Helfer and Madsen reinforce the view that European legal integration turned on the 'constructive relationship' the CJEU developed with national courts.[46] The EU legal system is built upon mutual trust and requires the cooperation of national courts in giving direct effect to EU measures. The hierarchical relationship between national courts and the CJEU may be flattened as a result when the latter allows national courts to decide which questions of EU law they could resolve by themselves and which would need to be referred for a preliminary ruling.

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42 Ibid para 21.

43 Joined Cases C-72/14 (*X v Inspecteur van Rijksbelastingdienst*) and C-197/14 (*T.A. van Dijk v Staatssecretaris van Financien*) EU:C:2015:564.

44 Ibid.

45 Case C-224/01 *Köbler v. Republik Österreich* EU:C:2003:513.

46 Karen Alter, Laurence Helfer and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018) 236.

3. The CJEU and ECtHR Edge

Preserving balance and avoiding conflicts among the courts in Europe's overlapping legal regimes require, in the words of Justice Voßkuhle, 'the parts of the system...[to] go about their task with sensitivity [...]'.[47] The 'equivalence doctrine' is meant to promote this sensitivity of one court for the other.

In *Bosphorus v. Ireland* (2005), the ECtHR ruled that international organizations, such as the EU, are still liable under the ECHR for 'all acts and omissions of its organs regardless of whether the act or omission in question was a consequence [...] of the necessity to comply with international legal obligations'.[48] It also noted 'the growing importance of international cooperation and the consequent need to secure the proper functioning of international organizations'.[49] To reconcile these two positions, the ECtHR introduced what came to be known as the '*Bosphorus* presumption' or the presumption of equivalent protection of Convention rights by the EU, even though the EU is not party to the ECHR.

In *Kadi v. Commission* (2010), the CJEU signaled a more independent or autonomous approach that would characterize its treatment of fundamental rights after 2009.[50] Here, the CJEU ruled that European Community (EC) regulation implementing UN Security Council resolutions violated general European principles of human rights, reasoning that even principles of international law embodied in the UN Charter could not be given effect by EU institutions over principles of fundamental rights in EU law. This view casts some doubt on the reciprocal nature of the equivalence doctrine. If giving the same meaning and scope to corresponding rights in the ECHR, as interpreted by the ECtHR, violates principles of fundamental rights in EU law, then the CJEU must reject the equivalence doctrine and provide more extensive protection.

Inter-court dialogue is an integral part of Europe's CLO. Left behind in their judgments is evidence of the connections among the courts at the various

47 Voßkuhle (n 8).

48 *Bosphorus v. Ireland* (2006) 42 EHRR 1, para 153.

49 Ibid para 150.

50 Case T-85/09 *Kadi v. Commission* EU:T:2010:418.

levels. One way to understand how courts at each level interact is to examine the network's links through case citations.

IV. Data and Methodology

Citation networks can reveal many aspects of the relationships between courts. We conceptualize the structure of Europe's CLO as a network of legal ties connecting the CJEU, the ECtHR, and the high national courts of Member States of the EU. High national courts include constitutional courts and/or the equivalent institutions (constitutional councils, supreme courts, courts of cassation) who are committed to the ECHR and the COE.[51] Figure 1 below represents such a system, where each connecting edge represents a citation.

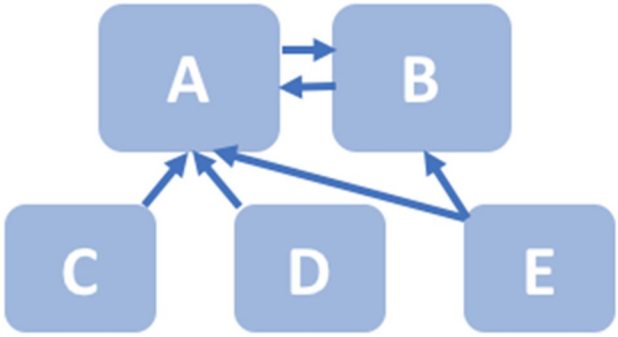

Figure 1: Example of a Citation Network

Courts A and B represent international courts and Courts C, D, and E represent three high national courts. The arrows, the edges in the network, indicate which court cites judgments by another court in the network and which courts receive citations from other courts. Each national court in this

[51] EU Member States with Constitutional Courts: Austria, Bulgaria, Belgium, Croatia, Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain. EU Member States with Supreme Courts or institutions with similar jurisdiction: Cyprus, Denmark, Estonia, Finland, Greece, Ireland, Netherlands, Sweden, United Kingdom. See Jan Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12 International Journal of Constitutional Law 525.

figure cites decisions by Court A, and Court E is the only national court that cites decisions by Court B. Court A cites decisions by Court B and vice versa.

This sample network has many implications. First, it suggests Court A has more influence than Court B because the high national courts cite decisions by Court A more frequently when forming their own legal judgments. Likewise, we can discern which national courts (C, D, or E) are most similar to each other based on their citation behavior. In this example, courts C and D are most similar. The remainder of this section describes how we studied the network relationships in Europe's multi-level system of courts.

First, a web-scraping program was developed and unleashed on the CODICES database. Our program downloaded all decisions by the ECtHR, CJEU, and high national courts. The collected data include the following countries with years of coverage in parentheses: Austria (1993-2017); Belgium (1991-2017); Bulgaria (1994-2000); Croatia (1997-2014); Cyprus (2014); Czech Republic (1996, 2013, and 2016); Denmark (1980-2017); Estonia (1993-2014); Finland (2005); France (2007-2017); Germany (2000-2016); Greece (2012); Hungary (1997, 1998, and 2014); Ireland (1996-2017); Italy (2006-2007); Latvia (1997-2016); Lithuania (1993-2016); Luxembourg (1998-2016); Malta (2005); the Netherlands (1993-2015); Poland (1993-2016); Portugal (2013-2014); Romania (1999-2017); Slovakia (1994-2016); Slovenia (1992-2017); Spain (1999-2016); Sweden (2000-2017); United Kingdom (2001-2017).[52] We then employed a parsing program over each decision, extracting the following information: name of the court issuing the decision, case citation, case name, and all citations within the decision. Only citations to ECtHR and CJEU decisions were collected from the parsed decisions. There were many instances where courts outside the scope of this study, such as the US Supreme Court, were cited. We omitted these citations from our analysis. Altogether, we constructed a citation dataset where each unit of analysis was a citation within a high national court's decision to a decision by the ECtHR or CJEU. This process yielded a dataset containing 10,152 citations.

The data collection process allows us to observe the citation network of national courts citing decisions by the ECtHR and/or the CJEU, the network

[52] The scope of judgments available for the high national courts varied in completeness over time.

of citations by the ECtHR to its own decisions, the network of citations by the CJEU citing its own decisions, and instances where the ECtHR cites the CJEU and vice versa. In CJEU judgments, the most frequently cited ECtHR decision is *Gillow v. United Kingdom* (1986),[53] and the most frequently cited CJEU decision is *Francovich and Bonifaci and others v. Italian Republic* (1991).[54] In ECtHR judgments, the most frequently cited CJEU decision is *Google Spain v. AEPD and Mario Costeja González* (2014),[55] and the most frequently cited ECtHR decision is *Ireland v. United Kingdom* (1978).[56] Prior research has concluded that the ECtHR rarely cites other courts in its judgments, but ECtHR judges do so regularly in separate opinions.[57] Our study confirms this finding. We also found that the CJEU, like the ECtHR, prefers to cite itself rather than other courts.

For the most part, decisions by high national courts included in our data span from the mid-1990s to 2018. Some countries were omitted from some of our analyses because they had not yet joined the EU or judgments from their high court were not available in CODICES. The data are truncated for these reasons. Besides the fact that some countries entered the EU at different times, there does not appear to be a discernible pattern related to missing data in CODICES. We acknowledge that the lack of temporal consistency across the citation data could create several issues for our analysis. Because data for some courts are missing or underrepresented for specific periods, the citation data may fail to capture the evolutive nature of legal questions. For example, a case that concerns data privacy in 1999 will differ from a case that concerns data privacy in 2018. We discuss the method for mitigating these concerns in the following section.

1. Measures of Influence

We cannot merely plot the network structure across multiple national courts and expect to discern meaningful trends. Comparing a court that rarely uses

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53 *Gillow v UK* (1989) 11 EHRR 335.

54 Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italian Republic* EU:C:1991:428.

55 Case C-131/12 *Google Spain v AEPD and Mario Costeja González* EU:C:2014:317.

56 *Ireland v UK* (1979-80) 2 EHRR 25.

57 Voeten (n 22) 549.

citations to a court that frequently uses them mistakenly assumes the observed citations are equal. Second, since each high national court has its own unique docket, we should not expect the same decisions to be cited equally across courts. Finally, ECtHR or CJEU judgments may have varying levels of influence. For these reasons, we develop a method that weights judgments by the ECtHR and CJEU and accounts for each high national court's tendency to cite ECtHR and CJEU judgments. This approach allows us to compare the citation behavior of multiple national courts and uncover the structural relationship between these courts and the ECtHR and CJEU.

Our approach is similar to previous work by network science scholars.[58] Fowler et al. argued that decisions by the US Supreme Court had varying levels of subsequent influence over future decisions.[59] They developed a measure of influence and demonstrated that some US Supreme Court decisions are very influential over future decisions and others less so. In this article, we implement a hypertext-induced topic search (HITS) algorithm to identify influential ECtHR and CJEU judgments. This network measure was first developed by Kleinberg and allows us to assess each cited decision's degree of authority.[60]

We performed the HITS algorithm separately over ECtHR and CJEU judgments. This process first measured the network of ECtHR citations to previous ECtHR judgments and then measured the network of CJEU citations to previous CJEU judgments. Within each citation network, each judgment is assigned an authority score and a hub score.[61] Authority scores are forward-facing and capture how a decision becomes influential within the

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58 Fowler and others (n 26); Lupu and Voeten (n 16).

59 Fowler and others (n 26).

60 Jon Kleinberg, 'Authoritative Sources in a Hyperlinked Environment' (1999) 46 Journal of the Association for Computing Machinery 604.

61 The HITS algorithm defines authority and hub scores through a mutual recursion whereby a decision's authority score is computed as the sum of the scaled hub values that cite that decision and a decision's hub value is the sum of the scaled authority values of the decisions that it cites. In practice, the algorithm performs a series of iterations which update the authority and hub scores for each decision in the network. The algorithm will update each decision's authority score to be equal to the sum of the hub scores of each decision that cites to it as it is applied across the network.

network after it is established. Hub scores are backward-facing and capture the contextualization of the decision's establishment. More simply, hub scores capture which previous decisions were relied upon to create a given decision. Kleinberg denoted a node as a 'good hub' if it pointed to many other nodes and identified a node as a 'good authority' if multiple nodes pointed to it.[62] Hub scores and authority scores are positively correlated in the CJEU and ECtHR networks.

Following others, we converted the estimated authority scores to percentiles.[63] This transformation allows the degree of influence a decision has within its network to be interpreted more easily. Without this transformation, the raw authority scores would be interpreted as logarithmic values. Further, percentiles best capture the intuition that a judgment's influence is perceived in relation to the influence of other judgments.[64]

2. Text-as-Data Methodology

Next, we examine how national court citation behavior varies across different issue areas by applying a Structural Topic Model (STM), a relatively new methodological development whose goal is to identify topics within text across large numbers of documents.[65] This method allows us to observe how influential the ECtHR and CJEU are over different national courts based on the legal issues involved.

Like other text-as-data methodologies, STM requires a number of preprocessing steps. First, the words in each document are transformed to lower case. Next, stopwords, including words such as 'the' that are common in written documents, are removed. The text of each document then undergoes stemming. Stemming involves truncating words in order to form consistency. For example, 'developing' and 'developed' are stemmed into 'develop'. We transformed each judgment by the ECtHR and CJEU into a document-term-matrix, where the frequency of each word in each document

62 Kleinberg (n 60).

63 Ibid; Lupu and Voeten (n 16).

64 Fowler and Jeon (n 19).

65 Margaret Roberts, Brandon Stewart and Edoardo Airoldi, 'A Model of Text for Experimentation in the Social Science' (2016) 111 Journal of the American Statistical Association 988.

is counted. The document-term-matrix does not account for the order in which words appear in a document, leading many to describe this approach as a 'bag of words'.[66] The last preprocessing step before the textual data is ready for STM analysis is removing words from the document-term-matrix that appear only once.

One of the drawbacks of estimating a STM is that the number of topics must be set by the researcher. A range of possible topics is identified and then subjected to a series of diagnostic properties including exclusivity, semantic coherence, held-out likelihood, and residual dispersion.[67] Appendix 2 demonstrates how we selected sixteen topics.[68]

V. RESULTS

We performed three separate network analyses, each exploring a different facet of the structural relationship between courts through citations. A text-as-data approach is also employed to uncover the substantive legal issues in ECtHR and CJEU judgments and to show how the influence of these decisions on high national courts differs across issue areas. The findings of each methodological approach are presented below.

1. Measures of Influence

The results of the HITS algorithm and transformation identified the judgments in Table 1 as the five most influential in their respective courts.

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66 Ibid; see also Peter Grajzl and Peter Murrell, 'Toward Understanding 17th Century English Literature: A Structural Topic Model of Francis Bacon's Ideas' (2019) 47 Journal of Comparative Economics 111, 113.

67 Roberts, Stewart and Airoldi (n 65).

68 It is also important to note that the 'name' of each topic is subjectively selected by the researcher. We selected topics based on the most common terms within a given issue area.

	ECtHR	CJEU
1)	Von Hannover v. Germany (2004)	Google Spain SL, Google Inc. v. Agencia Espanolade Proteccion de Datos (2014)
2)	Labita v. Italy (2000)	International Air Transport Association v. Department for Transport (2006)
3)	Loizidou v. Turkey (1995)	European Parliament v. Council (2006)
4)	Marckx v. Belgium (1997)	Kadi v. Commission (2008)
5)	Golder v. United Kingdom (1975)	ERT AE v. Pliroforissis and Kouvelas (1991)

Table 1: Most Influential Judgments

As suspected, ECtHR and CJEU judgments do not have uniform levels of influence over future decisions. Figure 2 presents the average authority percentile of CJEU and ECtHR judgments for each year. For example, judgments by the CJEU that were established in the late 1990s to the early 2000s appear to have relatively stable authority. In contrast, the average authority of judgments by the ECtHR fluctuates over time. In the last few years of the data examined here (2014-2017), the authority scores of judgments by both courts appears low; however, this may be an incidental suppression from the measurement procedure as the authority of a judgment is measured by how many future cases cite the decision.

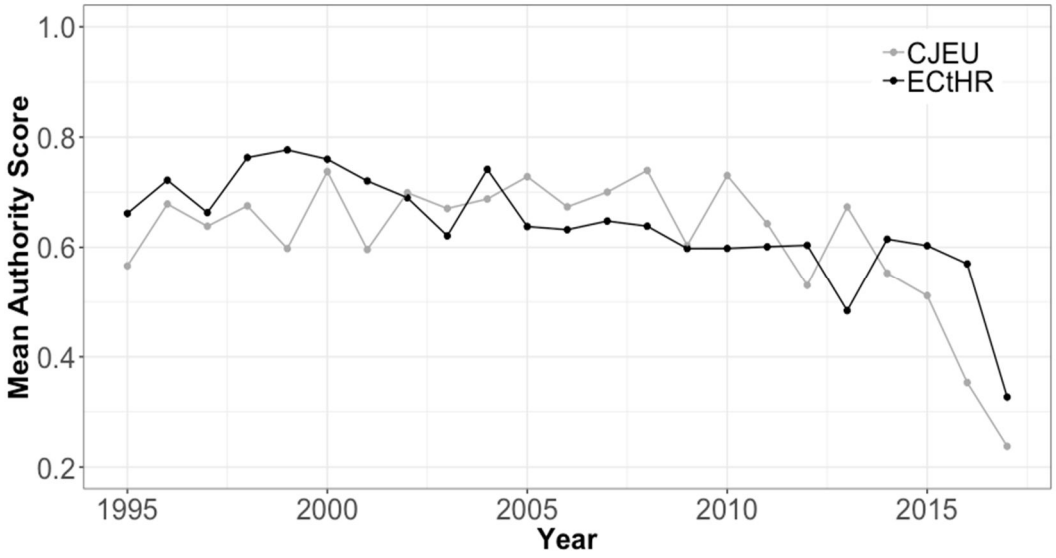

Figure 2: Average Influence Scores

One of the main benefits of generating authority scores is that it allows us to compare how high national courts view and cite the leading CJEU and ECtHR cases. While national courts cite different CJEU and ECtHR

judgments, our approach determines whether these courts are citing decisions with similar authority scores or not.

If, for example, Court X tended to cite judgments by the ECtHR that had high authority scores and Court Y tended to cite judgments by the ECtHR that averaged low authority scores, it implies that the two courts are treating decisions by the ECtHR differently. This scenario suggests, among other things, that Court X regards judgments by the ECtHR more highly and feels the weight of those decisions in ways that Court Y does not. Instead of relying on highly influential judgments by the ECtHR, Court Y relies more on its own domestic decisions than it does the international cases. To the limited extent Court Y cites international cases, they tend not to be the cases that other national courts have deemed to be highly influential. Even though these courts are not citing the exact same judgments by the ECtHR and CJEU, we can still observe meaningful citation patterns. We identify citation behaviors such as a tendency to cite cases with high authority scores, low authority scores, and a tendency to cite a mix of low and high authority decisions.

We predicted one of the best indicators of citation behavior would be when a country entered the EU. For this reason, we compare the citation behavior of the new EU-13 and old EU-15 high national courts. The first set of histograms in Figure 3 compares the distribution of authority scores of cited CJEU judgments by high national courts in old and new Member States. While we observe that both types of Member States cite CJEU judgments with high authority scores similarly, high national courts in the older Member States appear to cite judgments by the CJEU with low authority scores more frequently than courts in new Member States. A similar pattern is detected in the second set of histograms concerning citations towards ECtHR judgments. We also found courts in the older Member States to be more inclined to cite ECtHR judgments with low and moderate authority scores and the courts in the newer Member States prefer to cite judgments with high authority scores.

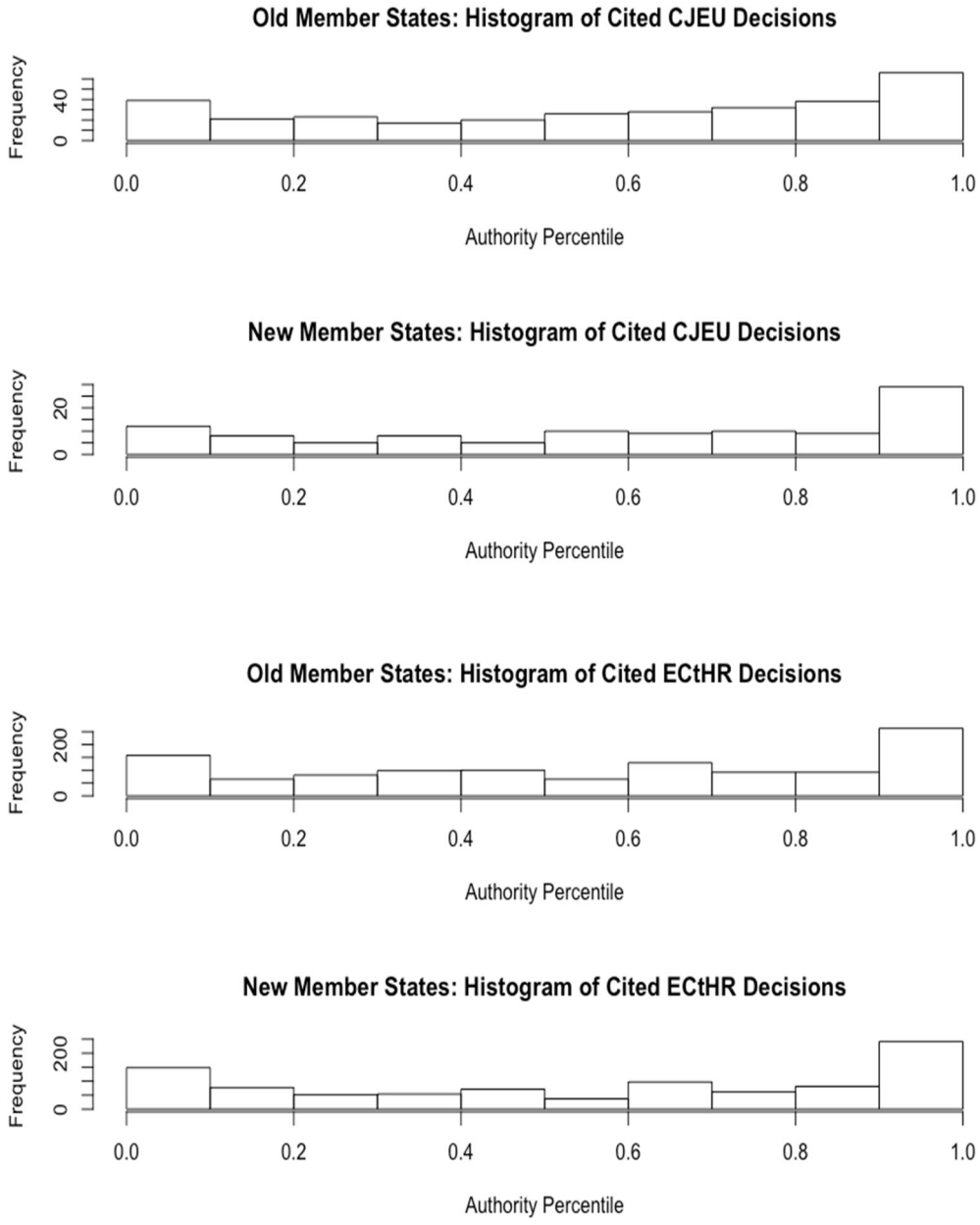

Figure 3: Citation Behavior — New and Old Member States

The authority scores reveal that ECtHR and CJEU judgments vary in their level of influence and that there is variation in the citation behavior across high national courts. Both sets of histograms provide initial support for our main empirical expectations: high national courts in new and old Member States engage in different citation behaviors and the courts in newer Member States tend to cite important and authoritative judgments by international

courts more frequently than courts in Member States which have been part of the EU the longest.

2. Community Measures

Next, we employ community detection measures over the high national courts based on their citation behavior. This hierarchical clustering method allows us to detect which courts are most similar and most different to other courts over time and how these relationships differ based on citations to judgments by the ECtHR and CJEU. Further, this set of analyses can determine which court, the ECtHR or CJEU, is the most influential across all of the national courts in the network and whether the structure of the relationship between courts is hierarchical or not.

If the relationship between courts at the international, supranational, and national levels is hierarchical, then the hierarchical cluster algorithm will ***not*** detect distinctive communities among the national courts based on their citation behavior towards CJEU or ECtHR decisions. In this institutional scenario, an international court, such as the CJEU, sits at the top of a hierarchical pyramid and can command compliance from all of the courts at the national level. A hierarchical court system will be maintained over time by lower court compliance with the decisions by the higher court and the ability of the higher court to direct and persuade lower courts to adopt its decisions. Without this relationship between higher and lower courts, the foundation of the pyramid collapses and flattens the hierarchical shape. If all (or almost all) of the high national courts in this study employed similar citation behavior towards decisions by the ECtHR and CJEU, it would suggest the relationship is hierarchical. However, if national courts vary greatly in their citations of ECtHR and CJEU judgments, it would suggest the system is flat, that is, less hierarchical.

We must first address the issue of truncation in order to perform the hierarchical cluster analyses. To accomplish this, we limited our analyses of national courts whose collected judgments cover three or more consecutive years within the period of 1996 to 2017.[69] Next, we estimated two average

[69] This process led to several national courts not being represented in the remaining set of analyses. The following countries are not represented in the remaining

authority scores. The first represents the average authority score of cited ECtHR judgments by a given national court in a single year. The second represents the average authority score of cited CJEU judgments by a given national court in a single year. These scores allowed us to compare the citation behavior of courts even if they vary in the number of citations employed in their judgments and vary in the number of judgments they produce.

We ran each hierarchical cluster analysis based on the average authority score of cited judgments. Since we are examining *national* courts, the unit of analysis is at the country-year level. Initially, we assigned each country to its own cluster and the algorithm proceeds iteratively, at each stage joining the two most similar clusters, continuing until there is just a single cluster.[70] The first hierarchical cluster analysis estimates communities among national courts based on citations to CJEU judgments and the second analysis estimates communities among national courts based on citations to ECtHR judgments.

The hierarchical clustering algorithm detected four distinct communities among the countries (See Appendix 1-A). Within each community, country-year dyads that are closer to each other share more similar citation behaviors than country-year dyads that are further apart. There appears to be a temporal effect underlying the formation of each community. The largest community captures high national courts that issued citations to CJEU judgments between 2012 and 2017, and the smallest community contains high national courts that issued citations to CJEU judgments between 2009 and 2011. As the hierarchical clustering algorithm detected more than one community among national courts, the results suggest that the authority or weight of the CJEU judgments has not been uniform across the countries and

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network and text-as-data analyses: Bulgaria, Cyprus, Czech Republic, Finland, France Germany, Greece, Ireland, Lithuania, Luxembourg, Malta and Portugal. While it is unfortunate that data for some countries are missing, it is less of a problem since the countries with missing data represent both EU-13 and EU-15 countries which are used in our analyses.

70 At each stage, distances between clusters are recomputed by the Lance–Williams dissimilarity updating formula. See Michael R Anderberg, 'Cluster Analysis for Applications' (1978) (No. OAS-TR-73-9) Office of the Assistant for Study Support Kirtland AFB N MEX.

that the citation behavior of high national courts has varied over time. Moreover, within each community, we observe clustering among the courts at the national level based on when those nations became Member States of the EU.

The hierarchical clustering algorithm also detected four distinct communities among national courts based on citations to ECtHR judgments (See Appendix 1-B). As in the previous estimation, there appears to be a temporal impact underlying the formation of these communities. The citation behavior of the high national courts for the years 2012 through 2017 is distinctly different from the citation behavior of these same courts in previous years. Based on the revealed communities, we conclude that the influence of ECtHR judgments has not been uniform across national legal systems in this study. The variation over time in the tendency of national courts to cite ECtHR judgments suggests the citation network is a structure that is both dynamic and heterarchical. We also find support for our predicted difference in citation behavior by EU-15 and EU-13 national courts. Within the four communities, we consistently found that high national courts in older Member States clustered together as did the high national courts in the newer Member States.

There are several implications in the estimated communities. Some high national courts appear to cluster based on country-specific political and cultural histories. For example, the clustering of Slovakia, Poland, Estonia, and Slovenia suggests that their shared connection with the Eastern bloc is a common denominator. Similarly, 2004, the year these former communist countries joined the EU, may help explain the various clusters. A similar pattern can be detected in citations to ECtHR judgments. The clustering of the high national courts of Lithuania, Slovakia, Latvia, and Slovenia, which were part of the post-Cold War major enlargement in 2004, imply that a common political and cultural history may account for the way these courts approach and cite judgments by the ECtHR. The detection of unique communities provides support for our expectation that the way national courts in Europe's CLO cite decisions by, and form network connections with, the CJEU and ECtHR varies on at least one variable — when the nation joined the EU.

Another conclusion that can be drawn from these estimations is that over time, the influence of ECtHR and CJEU judgments has shifted across national courts. It is unlikely this temporal variation is driven by changes within the national legal systems since the period when the detected communities begin and end is consistent across all the Member States. Rather, this temporal variation is likely driven by the actual decisions of the ECtHR and CJEU on the wide variety of issues that happen to come before these courts. We found that each detected community has a distinct pattern of citing ECtHR or CJEU judgments and this suggests that the case citation network in Europe's CLO is dynamic and heterarchical rather than static and hierarchical.[71]

3. Dual Citations

As previously demonstrated, there is considerable variation in how national courts cite ECtHR and CJEU judgments. Some high national courts appear to favor judgments by the CJEU and others prefer judgments by the ECtHR. High national courts in Member States that have been in the EU longer appear to favor ECtHR over CJEU judgments. For example, in Italy, Spain, and the United Kingdom, roughly 80 percent of cross-border citations are to ECtHR judgments. In contrast, citations are split roughly evenly between CJEU and ECtHR judgments by courts in the newer Member States of the EU, such as Slovakia and Estonia. As we discuss later, this may be evidence of the newer Member States signaling their commitment to the values represented by these two legal regimes.

Some high national courts consistently cite one international court over another. For example, the Supreme Court of Ireland and the Constitutional Court of Lithuania eschew citing CJEU judgments, turning instead to the ECtHR. More typically, however, we observe national courts engaging in dual-citation behavior, where they cite both ECtHR and CJEU judgments. And, as we show below, national courts in the newer EU countries have been

[71] At the moment, network science does not offer a method to detect heterarchical structures as this process would require a top-down analysis as well as a node-to-node analysis.

more likely than courts in the older EU countries to engage in this dual-citation behavior.

Dual-citation patterns take various forms cross-nationally. To demonstrate this variation, we plot the citation behavior of courts in new and old Member States in Figure 4. The estimated percentages are time-independent and were calculated after aggregating all decisions by a court in a given country.[72] The axes in Figure 4 are percentages and for each national court, where the value a country receives on the x-axis and the value it receives on the y-axis will sum to 100. The value of the x-axis is estimated by counting the number of times a court cites an ECtHR judgment divided by the number of citations. The value of the y-axis is calculated by counting the number of times a court cites a CJEU judgment divided by the number of citations.

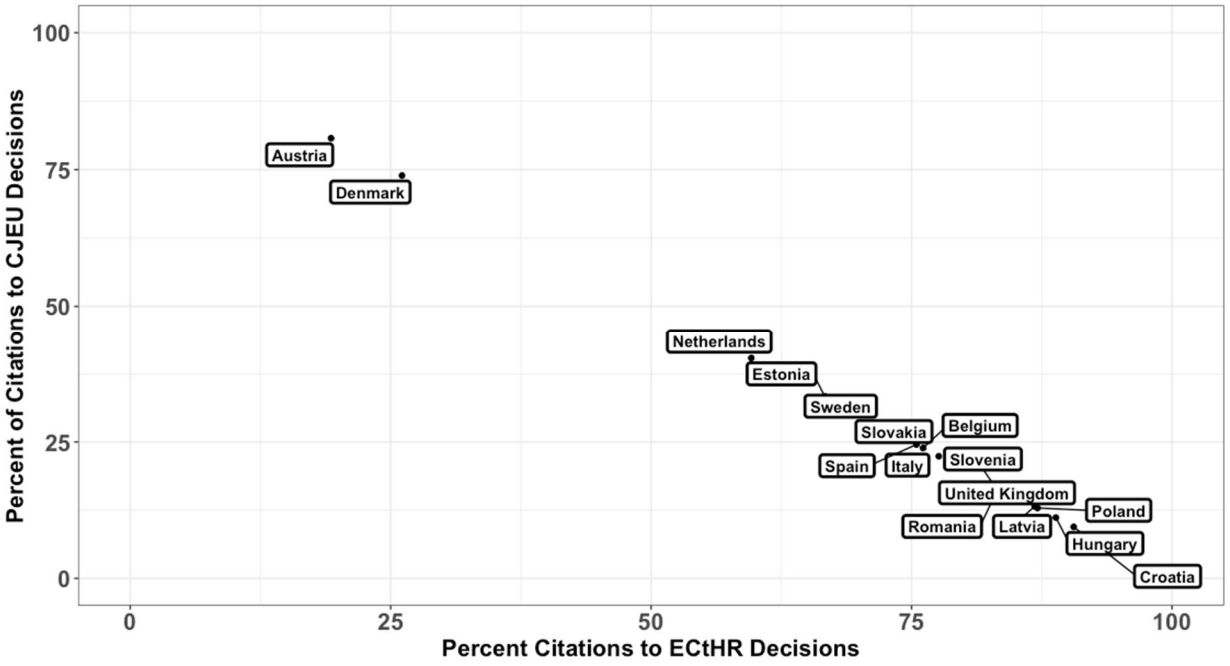

Figure 4: Dual Citation by National Courts

The pattern portrayed in Figure 4 suggests that most high national courts prefer to cite judgments by the ECtHR. There are two distinct countries in Figure 4, Austria and Denmark, whose courts appear to favor citing CJEU judgments over the ECtHR. Our findings for Denmark confirm the results of Wind's study in 2010 which documented the reluctance of the Danish and

[72] As mentioned previously, our concerns about missing data led us to remove some countries when the published decisions collected in CODICES did not cover three or more consecutive years from 1996 to 2017.

Swedish Supreme Courts, when compared with the Norwegian Supreme Court, to cite international courts.[73]

4. The Role of Issue Areas in the Citation Networks

Table 2 below demonstrates the results of the STM model. As noted above, we applied the STM model over all ECtHR and CJEU decisions. This approach allows us to compare ECtHR and CJEU decisions that fall within the same topic and explore how the citation behavior of national courts is distributed across topics. The most frequently cited CJEU judgments involve the Immigration, Environment, and Employment Rights topics. In contrast, the most frequently cited ECtHR judgments involve the Judicial Procedure, Family Rights, and Criminal/Juvenile topics.

Topic	Name	Frequent Terms
1	Politics/Governance	election, candidate, politics, parliament
2	Judicial Procedure	case, application, judgement, procedure
3	Economics	cartel, market, competition, price, benefit
4	Family Rights	child, sex, marriage, parent, birth
5	Criminal Rights	trail, self-incrimination, charged, evidence
6	Genocide	genocide, confiscate, Armenian, attribution
7	Immigration	asylum, migrant, refuge, alien, deport
8	Democratic Procedure	access, vote, register, legality
9	Criminal Punishment	penalty, sentence, offense, prison
10	Criminal/Juvenile	child, violence, prison, severe
11	Natural Resources	minerals, fish, laden, council
12	Employment Rights	profession, disclosure, appeal, ombudsman
13	Religion	church, religion, monastery, school
14	Environment	climate, environment, agreement, envisage
15	Reproductive Rights	abort, embryo, biology, IVF
16	Privacy	data, requirement, journalist, concern

Table 2: Structural Topic Model Results

STM relies on a matrix of terms for each document and calculates the proportion of each document that falls into each topic. In *Airey v. Ireland* (1979),[74] for example, the petitioner claimed that the right to a fair trial also guaranteed a right to legal aid; the STM model found that 71.4 percent of the judgment falls under the judicial procedure topic and the remainder is distributed across other topics. In *Google Spain v. AEPD and Mario Costeja*

73 Wind (n 25); Wind (n 29).

74 *Airey v Ireland* (1979) 2 EHRR 305.

Gonzalez (2014),[75] for example, the CJEU decided that internet search engines must respect an individual's right to privacy and a right to data privacy. In this case, the model found that 67.2 percent of this judgment falls into the privacy topic.

There are other citation patterns within topics. For example, within the Criminal Punishment topic, we find that the Supreme Court of Estonia prefers to cite Criminal Punishment judgments from the CJEU; the high national courts in Belgium, United Kingdom, Lithuania, Poland, Slovakia, Slovenia, and Sweden prefer Criminal Punishment judgments from the ECtHR; and Croatia's court cites the Criminal Punishment judgments of the CJEU and ECtHR evenly. The Family Rights topic also appears to have a polarizing effect. Austria's court stands alone in its preference to citing Family Rights judgments by the CJEU, while the high national courts in Croatia, Spain, Hungary, Latvia, Lithuania, the Netherlands, Poland, and Slovakia generally cite Family Rights judgments by the ECtHR. The topic of Religion, on the other hand, does not have a polarizing effect as national courts frequently cite CJEU and ECtHR judgments.

VI. Discussion and Implications

Our analyses suggest that Europe's CLO has evolved over time largely in response to legal and political changes and this evolution has impacted the authority of the ECtHR and CJEU. The rise of specific issues, such as those related to immigration, may affect how national courts recognize and enforce ECHR and EU principles in domestic law. More general changes in the 'bounded strategic space', such as the accession of new Member States in the EU or changes in the principal treaties, may also account for the variation. Before 2009, the year the Lisbon Treaty and the CFR went into effect, the most important and influential human rights court in Europe was the ECtHR. Afterwards, the number of preliminary references concerning fundamental rights increased significantly and, in turn, has raised the profile of the CJEU as a 'human rights adjudicator'.[76] Nevertheless, to the extent

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75 *Google Spain* (n 55).

76 Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168.

that citations to ECtHR judgments are a measure of the court's influence and prominence, the ECtHR's influence has increased even as the CJEU expanded its rights jurisdiction.

In our analyses of the case citations of the ECtHR and CJEU, we found, not surprisingly, that they prefer to cite their own judgments. However, there were many instances where each court cited the other court's judgments. This finding confirms Voeten's conclusion: 'contrary to its transnationalist reputation, the ECtHR rarely cites other courts in majority judgments, although ECtHR judges do so regularly in separate opinions'.[77] In the network of Europe's multi-level system of courts, we consistently found the ECtHR to be more influential than the CJEU. Our conclusion that the ECtHR is now and over the time span of this study 'the ultimate supranational arbiter of human rights in Europe' is based on evidence related to the number of citations, the preference of the ECtHR over the CJEU in dual citations by national courts, and the overall greater influence of ECtHR judgments across issue areas.[78]

Our results should not be construed to mean that the ECtHR's status in Europe's multi-node legal system will not change in the future. The CFR clearly has influenced the CJEU's work on behalf of rights. Its effect could be seen even before the CFR went into force. Between 2000 and 2009, references to the rights catalogued in the CFR frequently appeared in the judgments of the CJEU alongside references to the rights in the ECHR. The first reference to the CFR in the CJEU was in *Technische Glaswerke Ilmenau GmbH v. Commission* (2002).[79] After 2009, there was a clear change in the citation pattern. First, the number of CJEU judgments with references to the CFR increased five-fold at roughly the same time (comparing the number of cites from 2000 to 2009 with the number from 2010 to 2017). Around the time the CJEU started citing the newly ratified and legally binding CFR with greater frequency, its references to decisions by the ECtHR and the corresponding rights in the ECHR have decreased. The CJEU appears to be giving CFR rights meaning separate and independent from the meaning conferred by the ECtHR. Rather than frequent comparative references to

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77 Voeten (n 22) 549.

78 Kelemen (n 10).

79 Case T-198/01 *Technische Glaswerke Ilmenau GmbH v. Commission* EU:T:2002:90.

decisions by the ECtHR and developing the human rights principles as background or context to the same rights in the CFR, the CJEU has started to develop distinctive CFR principles and approaches.

Further, we theorized and found empirical evidence that the national courts of the newest members of the EU, representing mostly countries of Eastern and Central Europe, cite ECtHR and CJEU judgments more often than the national courts of the old EU-15. The citation behavior of EU-13 national courts, which joined the EU in 2004 and thereafter, formed communities distinct from the national courts of the older Member States in the European judicial network. This finding supports our theory of strategic citation behavior and aligns with prior research in the comparative courts literature that found that courts within new democracies cite international court decisions strategically as a means of signaling legitimacy in their decision-making.

Finally, with regard to governance structure, the results of our influence and community detection measures suggest that Europe's emerging CLO is organized less like a pyramid and more like a flat, multi-node, interconnected network. Our findings support the intuitions of Voßkuhle, Stone Sweet and others who attributed the system's shape to the legal environment created by ECtHR and CJEU decisions promoting dialogue and allowing high national courts greater decisional authority. This finding of less hierarchy in Europe's CLO also lends support to the theory of strategic citation where national courts choose whether to cite or not cite ECtHR and CJEU judgments. International law scholars have identified several factors that mediate the impact of international law on national legal systems.[80] Here, we confirm that the national courts of newer democracies are more likely to cite and incorporate the case law principles of the ECtHR and CJEU. This citation behavior suggests that they are signaling to domestic and international audiences their commitments to liberal-democratic values and fundamental rights. Our conclusion that Europe's emerging CLO is today more heterarchy than hierarchy because the citation behavior of the older EU-15 national courts substantiates Tommaso Pavone's work on Italy which found variation in the willingness of national courts to engage in dialogue with the CJEU: '[...]

80 Wind (n 29); Conant (n 23).

while judges who sought to empower themselves via dialogue with the ECJ do exist, they were and remain the exception rather than the rule'.[81]

An additional consideration for future work is how the specific constitutional arrangements of the high national courts (supreme court or constitutional court) and the political system's commitment to judicial review (less of a commitment in majoritarian democracies than in constitutional democracies) affect willingness to engage in judicial dialogue with the ECtHR and CJEU. This research question would expand upon prior research by Wind, who studied the supreme courts of Denmark, Sweden and Norway.[82] While the decisions of lower national courts are beyond the scope of decisions hosted by CODICES, it would be interesting to know if their interactions with international court judgments are the same as the high national courts' interactions. Such a finding would provide additional support for our conclusion that high national courts in some countries are more likely to incorporate international law principles into their judgments than others. Others too may profitably consider expanding the scope of our study to include contracting states of the COE which are not a part of the EU and test to see if the newer democracies in this subset exhibit the same strategic citation behavior we found in the high national courts of the new EU-13 Member States.

Our findings also emphasize the dynamic nature of law in society and the functions of courts. Law is a dynamic process based on social norms and formal rules. Both law and politics likely drive the ebb and flow of the influence enjoyed by ECtHR or CJEU judgments over high national courts at various times. With the passage of time and the changing, in some instances diminishing, commitments of Member States to the core European values of respect for human dignity and human rights, freedom, democracy, equality, and the rule of law, we envisage the citation behaviors highlighted here may differ in the future.

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81 Tommaso Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' (2018) 6 Journal of Law and Courts 303, 326.

82 Wind (n 25).

VII. CONCLUSIONS

This research illuminated important questions about the dynamic relationship between courts in Europe. The results indicate that Europe's multi-level system of courts is structured more as a flat, heterarchical legal system than as a hierarchical pyramid. As explained, the ECtHR and CJEU have been successful in getting national courts to take into account its decisions, but the propensity for introducing international law principles in domestic law varies among national courts. We also found that specific issue areas may influence national courts' embrace of the decisions of the ECtHR and CJEU. These findings may open doors for future research into how political, economic, legal, and other factors may influence the reception or embedding of international law norms in domestic law. By detecting interdependence among courts and the embeddedness of international law in national court decisions, our network and text-as-data analyses provided empirical evidence of the emergence of a CLO in Europe. Going forward, more work will need to be done to determine if our findings on the way these European courts are configured will remain as they are today or become more hierarchical in the future.

By mapping the case citation networks of courts at the national, supranational, and international levels, we provide new empirical evidence of the way Europe's CLO has emerged. Employing network analysis and text-as-data methodologies to the courts included in the Venice Commission's CODICES database, we reveal the evolving and varied nature of the interactions between the main nodes in this multi-level judicial system. Further, we found that the causes and consequences of this distinctive structure is the result of these courts 'contend[ing] with one another [...] to fulfill the logic of their position' as predicted by the theory of bounded strategic space.[83]

[83] Caron (n 2).

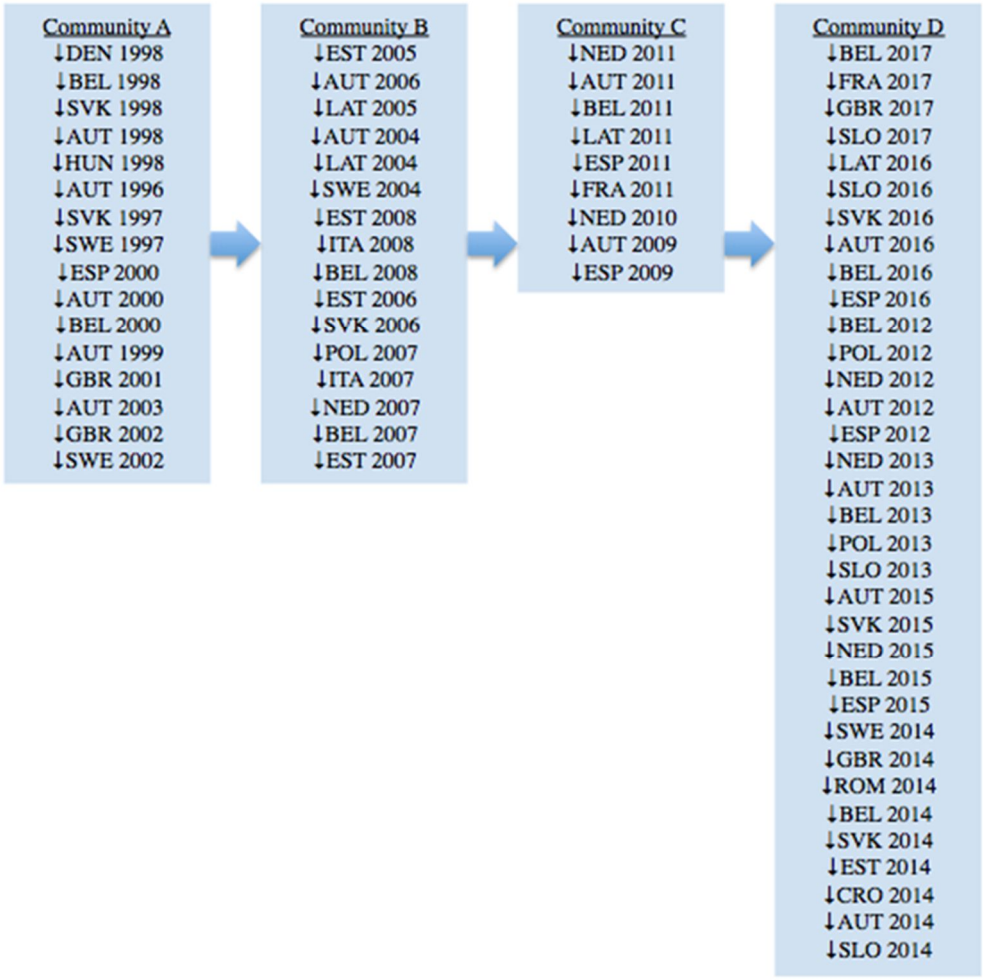
APPENDICES

1. Hierarchical Models

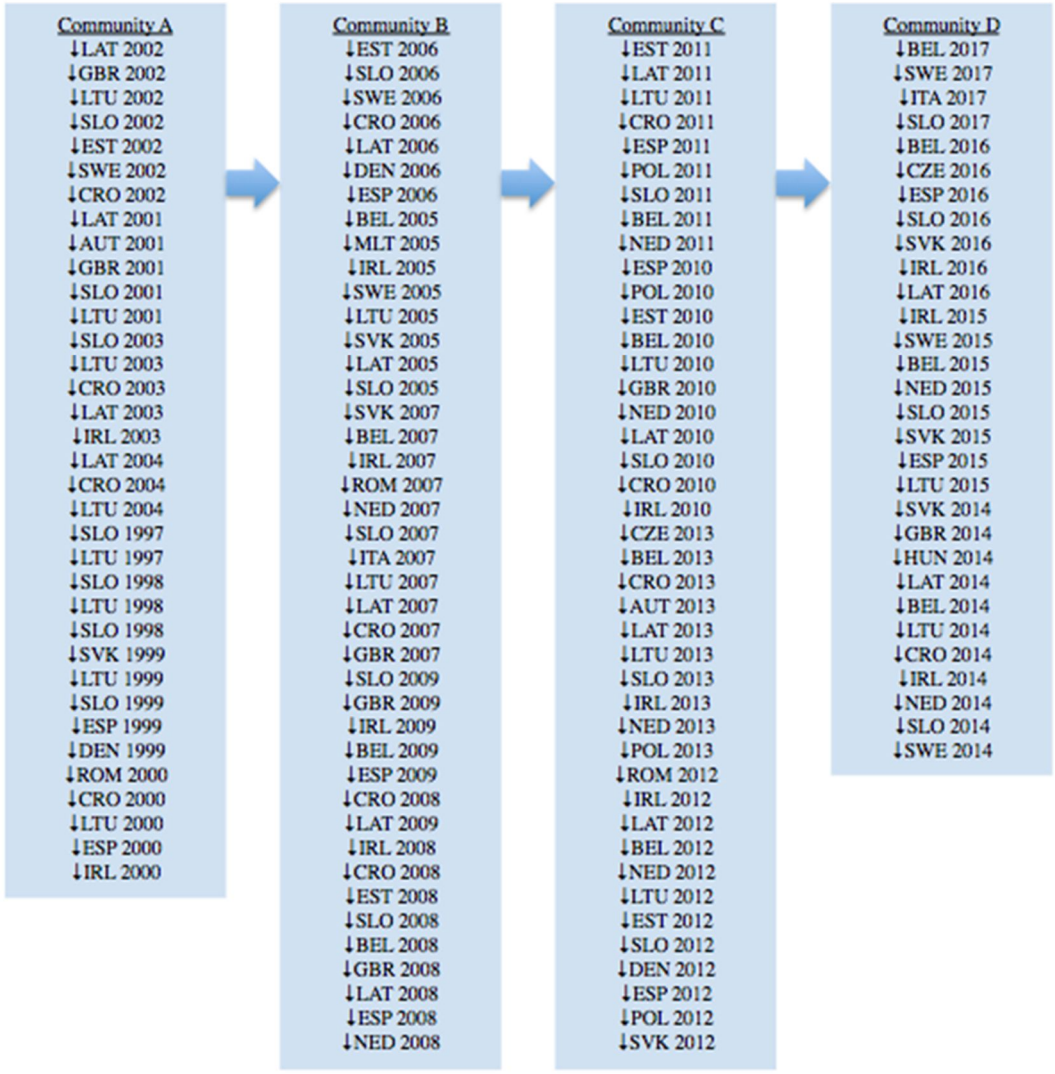
Each community is identified with a label and how it connects to other communities. Within each community we present the order in which country-year dyads from the citation network are clustered together. The closer two country-year dyads are within a community, the more similar their citation behavior.

Focus first on the detected communities for citations to CJEU decisions. There we notice that while some countries over time are consistently clustered with the same countries, others are not. Belgium, for example, is clustered with Denmark and Slovakia in Community A, the earliest community. Over time, we see Belgium clustering with Italy and Estonia and then with Austria and Latvia. At the end of our analysis, Belgium is clustered with France because it was found to have the most similar citation behavior. This pattern suggests Belgium's high national court has cited CJEU judgments more over time. In comparison, Slovenia, within Community D, the more recent community (2014-2017), consistently finds itself clustered with Austria, the United Kingdom, Slovakia, and Latvia. This result indicates that in recent years these national courts have approached CJEU judgments similarly.

A. CJEU and Member States: Detected Member State Communities (CJEU Decisions)

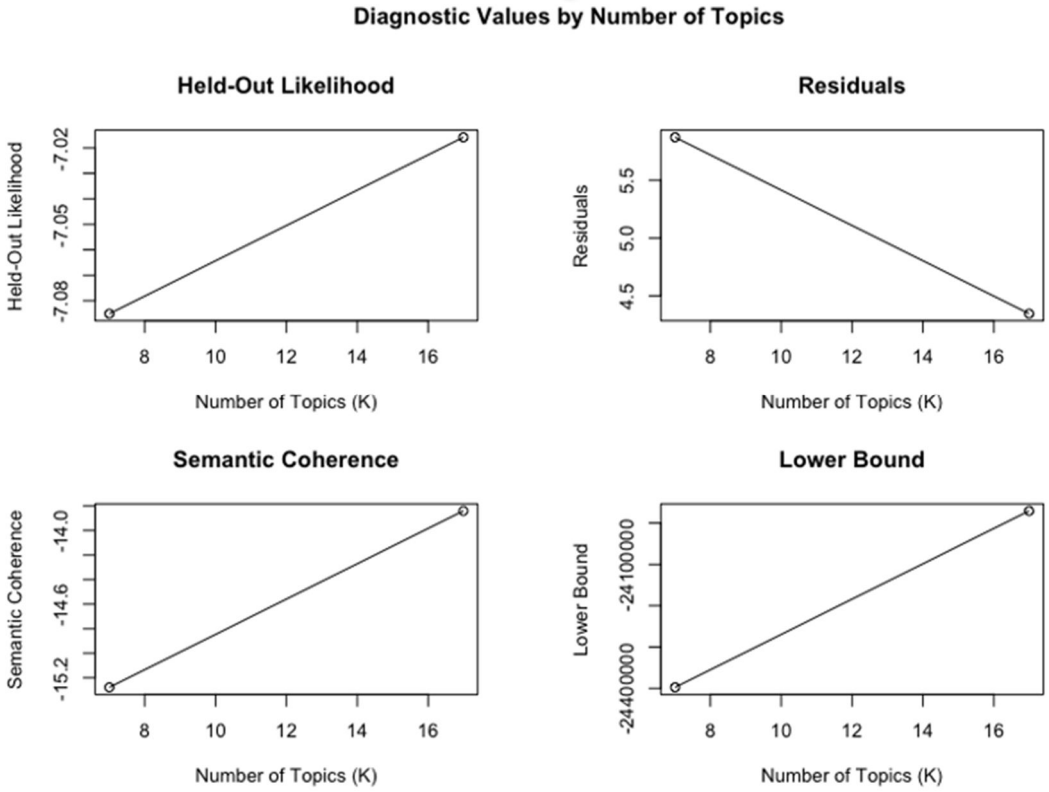


B. ECtHR and Member States: Detected Member State Communities (ECtHR Decisions)



2. STM Topic Selection

We estimated the diagnostic properties of seven to sixteen topics. As the number of topics increases, the probability of observing residuals decreases and semantic coherence within topics increases. These diagnostics give us confidence in selecting sixteen topics. Concerns related to labeling lead us to cap the number of topics at sixteen.



A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling

Sorina Doroga* and Alexandra Mercescu† ‡

This article addresses the use of interpretative methods in the practice of the European Court of Justice. It first discusses the multifaceted context in which the Court operates, and then analyses each of the Court's traditional methods of interpretation separately. Drawing a distinction between the Court's judges and its Advocates General, it shows that there are important limits to how constraining interpretative methods can be. The article also illustrates the potential complications that can arise from the act of ascribing to the process of judicial interpretation a greater role than it can, in fact, assume. In this sense, the German Federal Constitutional Court's ruling regarding the powers of the European Central Bank (known as the PSPP decision) is analysed from the perspective of the methodological challenges it raises.

Keywords: methods of interpretation, legal reasoning, European Court of Justice, methodological vs. substantive reasoning, PSPP decision (of the German Federal Constitutional Court)

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I. INTRODUCTION

The way lawyers deal with texts might be law's (only) *differentia specifica*. Law's 'essence' resides in its particular means, i.e. in specific vocabulary and reasoning techniques. While the judgments of courts can have an impact on politics,[1] lawyers insist that how decisions are made matters almost as much as the result itself. For instance, Jeffrey Goldsworthy seems to reprimand political scientists for failing to see law's *formal* importance:

> [p]olitical scientists often maintain that courts regularly change constitutions through interpretation, but they rarely examine legal arguments with sufficient care to distinguish between different kinds of change, or consider the extent to which courts have legal authority (as opposed to political power) to do so.[2]

This boundary work between law and politics has helped us better understand each field's specificity (alongside their commonalities).[3] More precisely, it has allowed us to view law as being first and foremost about a specific language: the language of interpretation and its persuasive strategies. In other words, there is a *linguistic* dimension to the activity of any court. But we can always add to this, at least in the case of powerful courts, an *institutional*

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1 Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press 2003); Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000); John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 Law and Contemporary Problems 41.

2 Jeffrey Goldsworthy, 'Introduction' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2006) 3-4.

3 Bogdan Iancu, 'Law/Politics Distinctions: The Elusive Reference Points' in Bogdan Iancu (ed), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven International Publishing 2009).

context. Regarding the European Court of Justice (ECJ),[4] this institutional setting is particularly important for understanding the structural constraints that influence the Court's interpretative postures and legal reasoning, especially in relation to other national and international judicial bodies.

The ECJ's tense relationship with national courts in the context of interpretative methodology became starkly visible in the recent judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter *BVerfG*) regarding the powers of the European Central Bank and the validity of some of its monetary interventions (known as the *PSPP* decision[5]). In this already (in)famous decision, the *BVerfG* decided to 'invalidate' a decision of the ECJ on grounds primarily related to the latter's misapplication of the canons of legal interpretation. This exceptional action prompts a series of questions related to the interpretation of (European) law. Notwithstanding the vast general literature on the aims and scope of interpretation in law,[6] in a context in which the belief in the existence of universal legal tools of interpretation is capable of creating tension within the European project, it is, we believe, all the more urgent for theoreticians to ask anew what can and cannot be said (in a court of law) in the name of interpretation. Can and should one expect methodological sameness, or at least similarity, in how judges reason? To what extent do the so-called traditional methods of interpretation constrain the argumentation of the official interpreter of the law? If the well-known strategies of interpretation impose few such constraints on the interpreter, what are we to make of judicial decisions that invalidate other decisions based on their alleged methodological deficiencies? In this article, we seek to provide an answer to these questions, focusing on the ECJ's interpretative practices.

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4 We use the 'European Court of Justice' or 'ECJ' to refer to both the Court of Justice of the European Communities, as well as the Court of Justice of the European Union, since we argue that from the perspective of its general interpretative approach, the Court has largely maintained a steady course, unaffected by the entry into force of the Treaty of Lisbon.

5 *BVerfG*, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 (*PSPP*).

6 There is important literature upholding the claim that judges worldwide use common tools, such as proportionality, in deciding cases. See, for instance, Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) 153.

Structurally, the text proceeds by way of a literature review, a case-law analysis, and a case study, thus ensuring that theoretical insights and practical examples feed into each other throughout. The selection of case-law responds to our meta-theoretical concerns related to interpretation in the overall activity of the Court and was therefore not intended to account for potential chronological evolutions. Not being specifically focused on the timing or the precedential value of the decisions, we included both older and more recent ones, as well as landmark and less prominent judgments. At each stage, we have used an illustrative selection of cases where interpretative approaches are expressly addressed, allowing us to draw out insights into the Court's general stance.

Throughout the paper, we engage both with decisions of the Court, as well as with opinions of Advocates General (AGs). While not legally binding, the latter, as positions expressed by influential and respected members of the Court on the most significant legal matters brought before it, [7] offer valuable glimpses into the methodological workings of the ECJ. The Court's monolithic decisions, pronounced *per curiam*, are often written in terse and formal language and provide little insight as to the various arguments and reasoning paths explored by the judges before reaching what appears to be the only 'right' solution. AGs' opinions, on the other hand, function as 'critical internal mirrors' reflecting the various interpretative possibilities considered and the methodological obstacles encountered.[8] For this reason, at various stages in our paper we refer to AGs' opinions as either syntheses of the Court's approach in respect of (a) particular method(s) of interpretation or as illustrations of the wide range of interpretative choices available (and of the inherent limits of legal methods) when working with EU law.

Our text is organized as follows: drawing on relevant literature, part II addresses the importance of interpretation in the ECJ's discourse, taking account of the complicated institutional setting in which the Court operates. Part III explores, through an analysis of case-law, how the four traditional methods of interpretation are used in practice by drawing what we deem to

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7 See article 252 TFEU.

8 Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2012) 14 Cambridge Yearbook of European Legal Studies 560.

be a necessary distinction between the Court's judges and its Advocates General. This part seeks to show that there are important limits to how constraining each interpretative method can be. Building on the conclusions reached in part III, part IV exemplifies, with reference to the *PSPP* decision, the potential complications arising from the act of ascribing a greater role to the process of interpretation than it can, in fact, assume.

II. The Institutional Context: Several Tales of the Same Court?

As the top judicial body of the European Union, the ECJ has undoubtedly played a pivotal role in shaping the EU's legal system. Alec Stone Sweet goes as far as deeming the Court to be 'the most effective supranational judicial body in the history of the world'.[9] However, without downplaying the role of the Court, some political scholars still argue that the key controlling factors in the evolution of the EU's legal system remain the Member States' will and readiness to embrace, even *post factum*, the direction of further integration.[10]

Against this backdrop, the status of the ECJ within (and outside) the EU legal order is relevant for understanding the interpretative stances that it adopts, as well as the ostensible variations of its approach. A first factor to bear in mind when analysing the Court's interpretative approaches is the constant negotiation of its role as a supranational court, in relation to the international and domestic legal systems. While the ECJ sits at the centre of a supranational legal order, its early institutional design was uncharacteristic of a court of an international organisation. As Dehousse notes, within the Community Treaties the initial tasks of the ECJ were framed using the model of an international jurisdiction, albeit one with atypical features (e.g. compulsory exclusive competence, infringement proceedings against Member States).[11] Gradually, its functions shifted towards those of a

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9 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 1; see also Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 82-83.

10 See Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41.

11 Renaud Dehousse, *The European Court of Justice. The Politics of Judicial Integration* (Macmillan 1998) 18-19.

constitutional[12] and administrative[13] court, although such roles had also been envisaged in the Court's initial institutional design. At present, the ECJ appears to present itself primarily as a constitutional jurisdiction, given its own characterisation of the Treaties as having 'constitutional character', as well as its chief role in ensuring the uniform application of European law throughout the Union.[14] The Court could not completely 'break free' from its international jurisdictional status,[15] just as the legal order of the EU itself did not completely emancipate itself from its origins as an international organisation.[16] Nevertheless, the ECJ proclaimed itself the sole and final adjudicator on matters of European law, rejecting the option of yielding to decisions of external judicial bodies.[17] Any other alternative was deemed to endanger the very foundations of the Union.[18]

Placed in this triad of judicial paradigms – international, constitutional, administrative – the Court set about early on to create a space for itself, allowing it to weld together and reinforce its roles, while at the same time preserving the Union's connectedness to the separate international and national legal communities. The key concept of autonomy of EU law emerged from such internal negotiations of the Court's position vis-à-vis other systems.

We argue that this space- and power-preserving process is still ongoing, even though the Court has indisputably consolidated its influential position at the

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12 Ibid 21-25.

13 Ibid 26-33.

14 Ibid 35.

15 Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3(3) Cambridge Journal of International and Comparative Law 717.

16 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) European Journal of International Law 516: 'The continuous assertion of the Community's *sui generis* character [...] does not by itself create "an own legal order". From a public international law perspective, the EC legal system remains a subsystem of international law'.

17 Opinion of 14 December 1991, *EEA Agreement I (Opinion 1/91)*, 1/91, EU:C:1991:490, para 71; Opinion of 18 December 2014, *Draft agreement on accession to the ECHR (Opinion 2/13),* 2/13, EU:C:2014:2454, paras 170-174.

18 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Bakaraat International Foundation* EU:C:2008:46, para 282; *Opinion 1/91*, paras 35, 71.

centre of the EU's legal order. In this context, the interpretative stances espoused by the ECJ are coloured and informed by the historical evolution of its tasks, as described above, accompanied by parallel shifts in its interpretative posture. Consequently, the ECJ's mixed status translates into a highly selective use of methods, standards and criteria – some specific to domestic systems, others pertaining to the international law sphere – characterised by some scholars as 'extreme methodological freedom'.[19]

A second, connected factor influencing the Court's methodology concerns the sources of its legitimacy within the EU system and especially in relation to other national and international courts.[20] Duncan Pickard, describing the choice of interpretative methods of the ECJ as a feature of supranational law, notes that judicial interpretation is inherently linked to sovereignty.[21] He posits that while national (constitutional) courts 'are free to make their own interpretive rules because they are constitutional decision makers in a co-equal branch of government', international courts, 'by contrast, operate on borrowed sovereignty' and states provide them with meta-rules of judicial interpretation since they 'want to be clear about the methods that they will be using in applying international law'.[22] Indeed, as Beck also observes, at national level interpretation is 'governed by broad criteria and traditions specific to each system',[23] with written constitutions very rarely including meta-rules of interpretation for courts to apply.[24] On the other hand, in international law, the 1969 Vienna Convention on the Law of Treaties

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19 Gunnar Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) 35(1) Yearbook of European Law 512.

20 For an ampler analysis on this relation, see Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 88-97. See also the theoretical interrogation in Mark Tushnet, 'Can There Be Autochthonous Methods of Constitutional Interpretation?' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021).

21 Duncan Pickard, 'Judicial Interpretation at the European Court of Justice as a Feature of Supranational Law' (2017) Stanford-Vienna European Union Law Working Paper No. 20, 6 <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/pickard_eulawwp20.pdf> accessed 20 May 2021.

22 Ibid 4-6.

23 Beck (n 19) 484.

24 Pickard (n 21) 4.

(VCLT) contains the precise meta-rules provided by states for treaty interpretation, which are generally applicable to international adjudicators. In the constitutional legal order created by the EU Treaties and in the absence of a meta-rule of interpretation,[25] the supranational ECJ finds itself in a convolution of two legal worlds. This position serves to explain its approach to interpretation, as well as its different methodological choices regarding primary and secondary EU law, which reflect a mix of international and national law methods.[26]

Still related to the previous observations, a third factor influencing the interpretative posture of the ECJ concerns its dialogue with international and – especially – national courts. Through the preliminary ruling procedure, the ECJ has empowered national (and in particular, lower) courts,[27] incentivizing them to become its allies, at times even in 'tacit opposition' to their own supreme or constitutional courts and their governments.[28] Higher national courts 'realized that their power was being eroded and fought back',[29] at times even challenging the competences of the ECJ.[30] Nevertheless, paradoxically, they also felt increasingly compelled to engage in dialogue with the ECJ themselves.[31]

In this context, for the ECJ to maintain its internal influence, it must project uniformity and predictability of its decisions. At the same time, when dealing with matters external to the Union, the Court must speak a language familiar

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25 Jan Komárek, 'Legal Reasoning in EU Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 49.

26 See for instance Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) EUI Working Paper AEL 2013/9, 47 <https://cadmus.eui.eu/handle/1814/28339> accessed 20 May 2021.

27 R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79(1) Law and Contemporary Problems 133.

28 Stone Sweet (n 9) 82.

29 Ibid 83.

30 See, for instance, the emergence of the *controlimiti* doctrine in the Italian Constitutional Court's case-law in *Frontini*, as early as 1973: Sentenza n. 183/18.12.1973 della Corte Costituzionale, IT:COST:1973:183.

31 Karen Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52(1) International Organization 145.

to international law. On a stylistic level, this translates into a strategic use of legal terminology, concepts and interpretative methods which the Court employs as tools to communicate with other systems. One could suggest that, just as it operates on borrowed sovereignty, the ECJ also operates on borrowed (legal) language. The Court has therefore designed a language consisting of terminology appealing to both its national and international interlocutors, and the traditional interpretative methods form part of it. However, in the spirit of protecting the autonomy of EU law, such terminologies sometimes prove to be 'false friends': instead of operating as the lowest common denominators of the national systems of the Member States, the Court assigns to them unique, 'European' meanings, departing from national ones, or even leaving them hollowed-out.

In the following sections we explore the interplay of these factors by referring to four traditional methods of interpretation (textual, systemic, historical and teleological) and their express use in the Court's case-law. We argue that, while formally invoked, the methods are not decisively constraining for the Court's reasoning and are employed with vast flexibility. Importantly, we show that this conclusion holds both for the Court's judgments and the opinions of its AGs, despite their different styles of reasoning.

III. Interpretation and Its Complements

'Every interpretation is complementary to the text it interprets'[32]

The European Court of Justice addressed the matter of interpretation on several occasions, prompted by the linguistic diversity,[33] but also by the complexity, of the European legal order, with its constant interplay between supranational and national law. The historic *CILFIT* decision might come closest to a general assertion by the ECJ of an interpretative methodology of EU law,[34] even if such pronouncements were made in the context of guidance given to national courts for their own interpretative work. In *CILFIT*, the

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[32] Pierre Legrand, 'Foreign Law: Understanding Understanding' (2011) 6 Journal of Comparative Law 67, 88.

[33] For a doctrinal contribution thoroughly exploring the implications of linguistic diversity for the concept of 'uniform law', see Simone Glanert, 'Speaking Language to Law: The Case of Europe' (2008) 28 Legal Studies 161.

[34] Komárek (n 25) 49. See Case C-77/83 *CILFIT* EU:C:1984:91 (*CILFIT*).

Court instituted a rule that places great emphasis on a systematic and purposive approach.[35] This interpretative scheme appears to follow the structure of Article 31 of the Vienna Convention on the Law of Treaties, signalling an approach coherent with the Court's mixed international-constitutional-administrative status.

On closer inspection of its case-law, however, it becomes clear that the ECJ struggles with the topic of interpretation as its principles of interpretation are far from uniform.[36] While generally, the Court tends to avoid establishing a direct hierarchy of methods, in some cases it has devised an order of preference which is not necessarily consistent with its statements on interpretation in other decisions. Thus, in case C-803/79 (*Gérard Roudolff*) the Court declared that where the text is ambiguous, it shall be examined in light of its purpose,[37] an observation that assigns to teleological interpretation only a subsidiary role, manifestly at odds with the position expressed in *CILFIT*, which implies that a teleological interpretation is *always* necessary.

Moreover, while the Court relies in its adjudicative practice on all of the four traditional techniques of interpretation, it seems to accept at the same time that beyond the desired uniformity and autonomy of EU law, there can be variations across legal systems even at the level of methodology and reasoning, as evidenced by the following statement of AG Geelhoed: '[i]t may be that under national law there are specific techniques of interpretation for that purpose'.[38]

Going through the Court's case-law, it becomes immediately clear what is already known to us from adjudicative practices in domestic contexts: courts employ interpretative tools selectively and rarely assess a provision through the lens of each of the methods available. At the ECJ, it is rather the Advocates General who tend to put a text to the test of *all* the traditional

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35 *CILFIT* (n 34) paras 18-20.

36 The overall number (142) of references to 'rules of interpretation' in both judgments and AG opinions is indicative of the fact that interpretation constitutes an important theoretical preoccupation on the part of the Court.

37 Case C-803/79 *Gérard Roudolff* EU:C:1980:166, para 7.

38 Case C-441/99 *Riksskatteverket v Soghra Gharehveran* EU:C:2001:193, Opinion of AG Geelhoed , para 47. See also Case C-299/17 *VG Media* EU:C:2019:716, para 33 where the Court speaks of 'national rules of interpretation'.

methods. This comes as no surprise, given the differences in style between their reasoning and that of the Court's judges. Indeed, as Mitchel Lasser has compellingly shown in his comprehensive comparative study, the decision-making activity of the Court can be characterized as dualist, consisting of, on the one hand, the impersonal, magisterial, one-sided tone of the Court's judges and the personal, argumentative, plurivocal tone of the Court's Advocates General on the other.[39] While the latter must ultimately embrace a position at the end of their analysis (indeed, they 'emerg[e] as [...] individual[s] who make no attempt to hide – and who can even be said to take pride in – [their] own subjectivity'),[40] their opinions typically explore vast arrays of interpretative possibilities in an 'overly hermeneutic' and dialogical enterprise: 'the Opinions necessarily demonstrate an awareness of interpretive choice, one that is symbolized by the publication of doctrinal controversy and personalized arguments'.[41] Whereas the Court speaks and acts as if there was only one correct answer, the Advocates General often like to 'make clear that the existing legal materials can be interpreted in different ways'.[42]

In what follows we contend that, paradoxically, both attitudes, the apodictic tone of the Court as well as the dialogic stance of the Advocates General, lead to the conclusion that the traditional methods of interpretation do not carry as important a weight as expected when reading the Court's meta-theoretical discourses about interpretation (or, for that matter, scholars' engagement with the topic). We will substantiate our claim by referring separately to each of the established methods.

1. Textual Interpretation: A Text Is a Text Is... Only a Text

That every act of judicial interpretation should begin at the source, that is, at the text of the rule, is generally considered a *datum*.[43] However, establishing

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39 Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations* (Oxford University Press 2004) 103-238.

40 Ibid 132.

41 Ibid.

42 Ibid 135.

43 Case C-190/10 *Génesis* EU:C:2012:157, paras 46–47; Case C-559/10 *Deli Ostrich* EU:C:2011:708, para 27. See also Neil MacCormick and Robert Summers,

what a rule *is* and especially what it *means* in a composite legal order with 24 equally authentic texts is an altogether different enterprise. The principles of multilingualism and linguistic equality, often highlighted as constitutional markers of an integrated democratic construction,[44] at the same time raise some of the most salient challenges to interpretation of EU law by the ECJ and by courts throughout the Union. This holds particularly true in respect of the method of literal interpretation and illustrates the Court's efforts to tackle the third factor of ambiguity identified in part II, related to its dialogue with national courts.

Under the traditional view, 'where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of that provision [...]. [T]he ECJ will never ignore the clear and precise wording of an EU law provision'.[45] However, several questions remain. What does 'clear and precise' mean? Clear for whom? For the ECJ, for the national courts, or both? Such questions are frequently raised in the Court's case-law on the absence of horizontal direct effect of directives[46] and the *contra legem* limit of consistent interpretation.[47] These are, however, instances related not so much to interpretation *per se* – as a mechanism for revealing the *meaning* of norms – but rather to the basic precept that the black-and-white wording of a rule should not be replaced with a different wording which is simply not present.

If we generally view interpretation as a necessary search for meaning, it becomes apparent that for the ECJ, looking at the ordinary meaning of words

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'Interpretation and Justification' in Neil MacCormick and Robert Summers (eds), *Interpreting Statutes. A Comparative Study* (Routledge 1991) 516–517.

44 See Phoebus Athanassiou, 'The Application of Multilingualism in the European Union Context' (2006) 2 Legal Working Paper Series - European Central Bank 6-7; also, Dominik Hanf and Élise Muir, 'Le droit de l'Union européenne et le multilinguisme' in Dominik Hanf, Klaus Malacek and Élise Muir (eds), *Langue et construction européenne* (Peter Lang 2010) 23.

45 Lenaerts and Gutiérrez-Fons (n 26) 7.

46 Ibid 6.

47 For instance, Case C-268/06 *Impact* EU:C:2008:223, para 100; Case C-282/10 *Dominguez* EU:C:2012:33, para 25; Case C-176/12 *Association de médiation sociale* EU:C:2014:2, para 39.

is often insufficient in and of itself.[48] Rather, as noted in legal scholarship, '[m]ultilingual EU law does not contain "one" unequivocal meaning that the interpreter can "discover". Instead, the Court as interpreter adds meaning to EU legislation, using the formal elements of the text only as a springboard'.[49]

CILFIT reveals the steps the Court deems necessary in order to interpret the equally authentic versions of multilingual legislation of the EU: first, interpretation should involve a 'comparison of the different language versions'; second, 'even where the different language versions are entirely in accord with one another', regard should be had to EU-specific terminology and to the autonomous meaning that concepts have under EU law, which can be distinct from their meaning in the national legal systems; third, 'every provision of Community law' should also undergo a systematic and teleological analysis.[50] The Court bestows this complex interpretative task upon national courts, as a type of 'recipe' to ensure the uniform interpretation of EU law throughout the Union.

However, national courts are not adequately equipped to carry out such a significant comparative endeavour, given the magnitude of the task, as well as their familiarity with just one[51] or at best, two or three official languages of the EU.[52] The ECJ itself seldomly engages in this process and does not systematically resort to comparisons of the official language versions of the same rule. In fact, it does so only when expressly prompted by the parties,[53]

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48 Joined Cases C-267/95 and C-268/95 *Merck & Co*, Opinion of AG Fennelly, para 18.

49 Elina Paunio, *Legal Certainty in Multilingual EU Law* (Routledge 2013) 20.

50 *CILFIT* (n 34) paras 18-20.

51 Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) Fordham International Law Journal 665.

52 For a discussion on the multiple levels of linguistic ambiguity and dynamics between the ECJ and national courts, as well as between judges of the ECJ themselves, see Eleanor Sharpston, 'Transparency and Clear Legal Language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System' (2010) 12 Cambridge Yearbook of European Legal Studies 409, 416-418.

53 Joxerramon Bengoetxea, 'Multilingual and Multicultural Legal Reasoning: The European Court of Justice' in Anne Lise Kjær and Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Routledge 2011) 1.

immediately supplementing contextual and purposive arguments to the linguistic ones.[54] We can therefore conclude that textual interpretation carries little weight and almost always requires the employment of additional interpretative tools.

Consequently, not relying solely on textual interpretation, the outcome the Court reaches in each case is rather a cumulative effect of a series of heuristic and theoretical considerations that guide the decision-making process and inform its result, with the textual method used either as a mere point of departure in the Court's reasoning, or as one of several possible methodological justifications for a narrow reading of the norm in question.

2. Systemic Interpretation: A System Is a Legal Order, a Treaty or a Directive?

It is not an exaggeration to claim that at the ECJ, 'the most mundane cases turn into systemic affairs'.[55] Frequently, other methods of interpretation invite systemic consideration as well. For instance, as AG Maduro argues, 'it is not simply the *telos* of the rules to be interpreted that matters but also the telos of the legal context in which those rules exist'.[56] The need to resort so frequently to systemic arguments indicates that *in claris non fit interpretatio* remains more of a revered Latin adage than an actual possibility. In fact, the maxim appears in few documents of the Court, only to be denied application.[57] But does the recourse to systematic considerations amount to what Gunnar Beck has referred to as the 'steadying factors' – elements helping to keep the Court's discretion in check?[58]

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54 See, for example, Case C-376/11 *Pie Optiek* EU:C:2012:502, para 33; Case 6/74 *Moulijn* EU:C:1974:129, paras 10–11; Case 30/77 *Bouchereau* EU:C:1997:172, para 14; Case C-187/07 *Endendijk* EU:C:2008:197, paras 23-24; Case C-239/07 *Sabatauskas and Others* EU:C:2008:551, paras 38-40.

55 Lasser (n 39) 293.

56 Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) European Journal of Legal Studies 5.

57 See, for instance, case C-24/19, *A and Others* EU:C:2020:143, Opinion of AG Campos Sánchez-Bordona, para 60.

58 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012).

In fact, the reference to a systematic understanding of a given provision is not transparent, since the Court does not operate with a single connotation of the term 'system'. Thus, in many cases, the Court seems to have developed a specific, grand, meaning for the concept of 'system', namely that of a proper, self-standing, functioning legal order. Indeed, it has been noted that in the Court's case-law, 'the need to shape a proper European legal system routinely takes center stage'.[59] This is confirmed by the Court's penchant to view precedents as composing a system: 'the view that the solution resides "in the system" [...] rather than the cases as such continues to hold much sway at the Court, as evinced by the popularity of general precedent incantations [...] or its famous references to the "legal order" as a whole or to that which is "inherent in the system" of the treaties'.[60]

For instance, in *Foto-Frost* the Court considered that a different interpretation of the law under discussion 'would be liable to place in jeopardy the very unity of the Community legal order'.[61] Given this abstract conceptualization, it becomes clear that systemic considerations can barely limit discretion insofar as the judge will still have to assess the enormously complicated issue of knowing what a functioning legal order is.

However, in other cases, the Court preferred to ascribe a much more restrictive meaning to the idea of a 'system', referring essentially to the general framework of a given legislative act. The Court can sometimes cite specific recitals from a legislative act.[62] Yet, at other times, it confines itself to considering a particular act as a whole. For instance, in a preliminary ruling the Court held that 'the system established by that directive allows, *inter alia* [...]'.[63]

In many other cases, it is easily discernible in how formulaic a way the systematic method is quoted, since the Court does not go to great lengths either to elaborate on its understanding of the concept of 'system' or to

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59 Lasser (n 39) 296.

60 Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge University Press 2014) 101.

61 Case 314/85 *Foto-Frost* EU:C:1987:452, para 15.

62 See, for instance, case C-487/07 *L'Oréal and Others* EU:C:2009:378, para 71 where the Court cites recitals 13 to 15 in the preamble to Directive 97/55.

63 Case C-25/19 *Corporis* EU:C:2020:126, para 33.

explain the link between its conclusion and whatever idea of system it applied in that specific case. Embracing its 'imperial confidence',[64] the Court often employs what we may call standard phrases such as 'under the system of the Treaty',[65] 'the coherence of the system requires',[66] 'the system of legal protection laid down by the Treaty',[67] or 'it follows from a systematic interpretation'.[68] Moreover, when the '*économie générale*' is invoked, the Court tends to ignore alternative interpretations[69] or to downplay other guidelines of interpretation such as *lex specialis*.[70] As one of the Court's judges argues,

> [t]his is not surprising, since the very concept of *l'économie générale* rests on idea that the chosen interpretation is based on a pre-existing and unalterable authority. [...] [T]here is no pressing need to refer to *jurisprudence constante* or any other authority. Both the rule and the general scheme speak for themselves through agency of the Court.[71]

For their part, Advocates General share some of the Court's understandings in respect of what systematic interpretation should be about.[72] For instance, in one opinion, AG Pikamäe refers to 'the general scheme of Directive 2008/115' while observing that 'more specific consideration will have to be given to the relationship between Articles 16 and 18 of the directive and to the use, in that act but also in other directives, of the concepts of "public

64 Lasser (n 39) 107.

65 See for instance Case C-39/17 *Lubrizol France SAS* ECLI:EU:C:2018:438, para 25.

66 Case 314/85 *Foto-Frost* EU:C:1987:452, para 15.

67 Case 90/77 *Hellmut Stimming KG* ECLI:EU:C:1978:91, 999.

68 Case C-487/07 *L'Oréal and Others* ECLI:EU:C:2009:378, para 74; Case C-25/19 *Corporis* EU:C:2020:126, para 29.

69 See Siniša Rodin, 'Interpretation in The Court of Justice of The European Union: Originalism, Purposivism, and *L'économie générale*' (2019) 34 American University International Law Review 601, 627.

70 Conway (n 20) 224.

71 Rodin (n 69) 627.

72 More surprisingly, AGs sometimes use the same self-assured language as the Court in relation to this mode of interpretation. See for instance C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI:EU:C:2013:49, Opinion of AG Cruz Villalón, para 68: 'a systematic interpretation immediately indicates [...]', 'a systematic interpretation clearly requires [...]'.

policy" and "public security"'.[73] As one can observe, the 'system' can be construed not only as one given normative act – in this case a directive – but as two acts – here two directives – in relation to each other. Moreover, Advocates General undoubtedly add layers of their own to the concept of 'system', for example when they refer back to opinions of other Advocates General and, importantly, to doctrinal writings that criticise the Court's rulings, thereby creating accountability. The very notion of 'system', then, is far from being transparent like a glasshouse through which one could clearly see the one and only possible meaning.

Rather, judges of the ECJ situate the systematic method in a network of self-assured, authoritative statements ('one can almost imagine the Court inserting Q.E.D. at the end of each brief recital'[74]), where it takes the form of an intellectual 'crutch' meant to bestow legitimacy and respectability on the decision to a community of legal professionals who speak the embedded language of canons of interpretation.

However, even a more argumentative, values-oriented reasoning, like that encountered in the opinions of the Advocates General, cannot turn interpretative strategies into fully-fledged means of constraint in adjudicative settings. The Advocates General dedicate more time to the scrutiny of the rationale for, and the implications of, their systematic readings (to take just one example, one opinion contains more than 50 lines of systematic analysis, while the Court's systematic considerations are frequently limited to a few lines).[75] Nonetheless, as they make visible their detailed reasoning, the Advocates place the systematic method in a plurivocal, eclectic, network of other plausible interpretations. This inevitably limits the persuasive force of any one method of interpretation.

Consequently, the systematic approach, as undertaken by the ECJ, requires the interpreter to find an interpretation that is consistent within either a micro-system (single legal acts), a meso-system (a number of related legal acts)

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73 Case C-18/19 *Stadt Frankfurt am Main* EU:C:2020:130, Opinion of AG Pikamäe, para 52.

74 Lasser (n 39) 112.

75 Compare the Opinion of AG Szpunar in Case C-20/17 *Proceedings brought by Vincent Pierre Oberle* EU:C:2018:89, para 78-93, to the judgment in Case C-249/19 *JE (Loi applicable au divorce)* EU:C:2020:570, para 27.

or a macro-system (the whole European legal order). Yet, while the judge certainly cannot put forward an interpretation that blatantly contradicts the materials before them, the fact remains that she still retains a great deal of discretion when designing the specific standard of reference, especially one as open-ended as the notion of a 'system'.

Such variations in the Court's use of the systematic method may also be read through the lens of the contextual factors discussed in part II. In effect, the numerous modulations of the concept of 'system' represent a flexible tool often employed by the ECJ to adjust its stance as a supranational court in relation to other legal orders and to preserve its legitimacy. The availability of options to position itself either assertively, at the centre of a macro-system (the entire EU order) or to withdraw into the micro-system of a single EU legislative act is invaluable to the ECJ, a court engaged in constant dialogue and negotiation with other national or international courts and institutions. We can clearly see this operation of scaling up or down in relation to other guidelines of interpretation, such as when the Court looks for general principles based on the common traditions of the Member States and inevitably comes up with a given selection of countries.

3. Teleological Interpretation: Telos and the (Too) Grand Scheme of Things

It may appear as if everything has already been said and written about teleological arguments in the ECJ's reasoning. The Court's penchant for grand-scale purposive interpretation is at once celebrated and criticised: bold, effective in advancing integration and ensuring uniformity of EU law across the Member States,[76] but at the same time politically activist, often impinging on the competences of the Member States[77] and sitting uneasily with the traditional methodologies of national judiciaries.[78]

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[76] Poiares Maduro (n 56) 4-6.

[77] On the relation between the ECJ's purposive interpretative approach and the EU's competence creep, see for instance, Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Brill Nijhof 1986); Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' (EUobserver, 10 September 2008) <https://euobserver.com/opinion/26714> accessed 12 October 2021.

[78] On the challenges the ECJ's methods raise for national judiciaries, especially for some of the newer Member States, see Michal Bobek, 'A New Legal Order, or a

The teleological method is generally regarded as the ground-breaking instrument through which the ECJ has shaped the development of the European Union and achieved the constitutionalisation of its legal order.[79] This process has been guided first by a departure from the classic reading of public international law norms with *van Gend en Loos*[80] and subsequently, by the shift towards a 'Community based on the rule of law'[81] whose internal and external autonomy is to be preserved by the Court.[82] However, we argue that the ECJ's teleological approach is not always transparent and generates several layers of uncertainty, thus decreasing the overall force of this interpretative strategy.

As already discussed, the Court often proclaims that understanding an EU law provision requires a cumulative analysis of 'not only its wording, but also [of] the context in which it occurs and the objects of the rules of which it is part'.[83] Fennelly observes that 'linguistic conflict or ambiguity is not, in any sense, a pre-condition for the application of the teleological or schematic approach', because '[e]ven when it finds a clear meaning in the language used, the Court will often explain that the result so found conforms with the general scheme and object of the provision',[84] underscoring once again the limited weight of textual interpretation.[85] And yet, on occasion, the Court will resort to purposive interpretation *only* after declaring that the EU provision in question is ambiguous, usually due to linguistic differences.[86]

Non-existent One? Some (Early) Experiences in the Application of EU Law in Central Europe' (2006) 2 Croatian Yearbook of European Law and Policy 265; also, Urszula Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-level Legal Order' (2013) 3(4) Erasmus Law Review 191.

79 G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595.

80 Case 26/62 *van Gend en* Loos EU:C:1963:1, 12.

81 Case 294/83 *Les Verts v. Parliament* EU:C:1986:166, para 23.

82 For instance, Case C-284/16 *Achmea* EU:C:2018:158, para 33; Opinion 1/17 *CETA*, paras 106-108.

83 Case C-292/82 *Merck Hauptzollamt* EU:C:1983:335, para 12; Case 6/72 *Europemballage Corporation* EU:C:1975:50, para 22.

84 Fennelly (n 51), 665.

85 Case C-48/07 *Les Vergers du Vieux Tauves* EU:C:2008:758, paras 39-40.

86 Case 803/79 *Criminal proceedings against Gerard Roudolff* EU:C:1980:166, para 7.

This vacillating approach creates a first layer of uncertainty regarding the instances when the teleological method should be employed and in which configuration with other interpretative tools.

A second, more important ambiguity is connected to the contextual factors in which the ECJ operates[87] and concerns the ECJ's propensity to select, in an almost instinctive and discretionary fashion, a particular dimension of *telos* to use as an interpretative lens for the individual case before it. Such ambiguity is further compounded by the seldomly explicated choice of a particular objective to be attributed to the norm, from a pool of equally plausible (and often conflicting) policy objectives or general values of the Union.[88]

To analyse the Court's approach, scholars have created teleological taxonomies to navigate its use of purpose as an interpretative instrument. Drawing on Bengoetxea's extensive analysis,[89] Lenaerts and Gutiérrez-Fons identify three types of teleological interpretation in the practice of the ECJ: 'functional interpretation', 'teleological interpretation *stricto sensu*' and 'consequentialist interpretation'.[90] However, such doctrinal classifications contribute little to actually elucidating the reasoning behind the ECJ's selective use of this method, especially regarding the choice of *telos*. A more relevant categorisation would be that suggested by Lasser, who examines the various teleological routes available to the Court in some of its emblematic cases, in a type of zooming-out dynamic.[91] He differentiates between a 'micro-teleological' approach (focused on the *effet utile* and specific purpose of the provision in question), a larger-scale, 'substantively teleological policy stance' (guided by one or several of the express objectives of the European

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87 Part II above.

88 This is more rarely the case in those instances in which the Court relies on the specific objectives of a Treaty provision or of a legislative act in order to delineate between different areas of competence of the EU and the corresponding powers of the institutions – see for instance, Case C-91/05 *ECOWAS* EU:C:2008:288, paras 79-99.

89 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford Clarendon Press 1993).

90 Lenaerts and Gutiérrez-Fons (n 26) 25.

91 See, for instance, Lasser's analysis of the ECJ's interpretative options in *van Gend en Loos* – Lasser (n 39) 288-289.

Treaties, such as, for instance, economic integration within the customs union) and a 'meta-teleological' approach (focused on framing the interpretative work 'in terms of systemic meta-policies', situated on the highest discursive plane).[92] Under this last category, the Court may interpret a given provision not in light of its specific purpose or of a precise Treaty objective, but rather by reference to 'the broader context provided by the EC (now EU) legal order and its "constitutional *telos*"'.[93]

This approach often proves problematic in light of the legitimacy factor discussed in part II of our paper, as it can place the Court on a collision course with the Member States and their apex courts for being perceived as (too) activist. This is due to the fact that the meta-teleological strategy (going well beyond the cumulative use of all interpretative methods) is frequently associated with an integrationist stance of the Court in highly sensitive areas of its relationship with the Member States (division of competences, EU citizenship, fundamental rights).[94]

As Lasser concludes, the ECJ displays a predilection for meta-teleological reasoning, often choosing to justify its decisions 'in stunningly grand and even threateningly systemic terms',[95] based on the objectives of the EU's legal order as a whole. A study regarding the opinions of the Advocates General reveals a similar preference. While the type of discourse adopted by the Advocates General is more personal and open-ended, the framing of the interpretative solutions is made in the same meta-teleological terms as those embraced by the ECJ itself.[96]

However, while the Court's predilection for *meta-telos* is transparent, its detailed reasons for choosing one purpose over (an)other, narrower one(s) often remain hidden, or at best, ambiguous. In reality, the Court oscillates between narrower and ampler objectives (equally fitting) as interpretative yardsticks, without offering clear criteria for its choice. In this light, purposive interpretation may be viewed more as a tool to justify the Court's choice of outcome, rather than a constraining legal reasoning tool on which

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92 Ibid 287-289.

93 Poiares Maduro (n 56) 5.

94 Beck (n 19) 510.

95 Lasser (n 39) 289.

96 Ibid 287.

the result is based. This view is consistent with our initial observations on the factors influencing the ECJ's interpretative postures, as its choice of *telos* may prove important for the wider process of shaping the EU's legal order and for maintaining the Court's influence within the system. At the same time, it can generate serious pushback from the Member States and their courts if perceived as discretionary or too activist.

4. Historical Interpretation: Rarely Looking Back?

Reservations have been expressed about the utility of historical interpretations in EU law:

> '[O]riginalism' [...] is [...] futile in the context of the EU [...]: in spite of occasional invocations of the 'founding fathers' of the EU or the 'original intent of the Treaties' by some authors, the moment of founding does not play such a strong symbolic role, that would translate into authority, as it does in the context of the USA.[97]

Nevertheless, there are other understandings of the historical method which remain applicable in the EU context. First, as noted by one Advocate General, '[h]istorical interpretation holds that a provision should be interpreted in the light of its history, taking account of the different stages which led to its adoption'.[98] Second, one could consider, after adoption, the evolution of the relevant field by placing a particular piece of legislation in the context of other – prior and subsequent – regulations.[99]

There are notable differences in reasoning between the Court's judges and its Advocates General when it comes to the use of the historical method. Firstly, the Advocates General are much more prone to resort to this method of interpretation.[100] Moreover, the text of the decisions themselves shows that the Court tends to use historical considerations in a very succinct and often

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97 Komárek (n 25) 42. For a contrary opinion, see Conway (n 20) 226.

98 Case C-249/19 *JE (Loi applicable au divorce)* EU:C:2020:231, Opinion of AG Tanchev, para 44.

99 Joined cases C-477/18 and C-478/18 *Exportslachterij J. Gosschalk* EU:C:2019:759 Opinion of AG Pikamäe, para 54.

100 Thus, of the 62 documents returned when we searched for 'historical interpretation', only 14 consist of judgments, the rest being opinions by the Advocates General.

formulaic manner. For instance, in the case T-374/04 (*Germany v Commission*), having briefly retraced – in no more than four lines – the legislative process that led to the adoption of a directive, the Court found that 'a historical interpretation does not supply additional factors capable of altering the conclusion'.[101] By contrast, Advocates General provide much more detailed historical analyses which, unlike in the case of a ruling, usually occupy a distinct section of their text. For instance, in one opinion, AG Pitruzella dedicated five paragraphs to a historical approach.[102]

Importantly, in another opinion, AG Saugmandsgaard went as far as placing the historical interpretation before the teleological one:

> [...] a dynamic or teleological interpretation is only possible where 'the text of the provision itself [is] open to different interpretations, presenting some degree of textual ambiguity and vagueness'. [...] However, that is not the case in this instance. As I explained above, literal and historic interpretations preclude any ambiguity as to the scope of the terms 'names and addresses' used in Article 8(2)(a) of Directive 2004/48.[103]

All in all, historical arguments do seem to count for Advocates General, in any case significantly more than for the Court's judges. And yet, as the Advocates General take history seriously, their transparent and even tentative discourse,[104] precisely because it is well-elaborated and rich in limpid arguments, inevitably exposes the fault lines and the limits of appealing to history. Indeed, some Advocates General seem to be aware and inform the public that identifying the legislature's original intent is risky, not only because it is difficult to do so, but also because it would freeze meaning in time. As remarked in the *Coman* opinion:

> It makes it impossible for the term 'spouse' to be definitively fixed and sealed off from developments in society. [...] This risk and the more general

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101 Case T-374/04 *Germany v Commission* EU:T:2007:332, para 99.

102 Case C-809/18 P *European Union Intellectual Property Office (EUIPO) v John Mills Ltd.* EU:C:2020:329 Opinion of AG Pitruzzella, paras 27-31.

103 Case C-264/19 *Constantin Film Verleih* EU:C:2020:261, Opinion of AG Saugmandsgaard Øe, paras 46-47, citing Case C-220/15 *Commission v. Germany* EU:C:2016:534, Opinion of AG Bobek, para 34.

104 In one opinion, the Advocate General did not hesitate to use these words: 'I tend to believe [...]'. See Case C-680/16 P *August Wolff and Remedia v. Commission* EU:C:2018:819, Opinion of AG Mengozzi, para 63.

> difficulty in determining the legislature's intention mean, moreover, that the historical interpretation is afforded a secondary role.[105]

Furthermore, certain Advocates General make no bones about the historical method being able to support divergent propositions. In *Coman and Others*, for example, Wathelet remarks that '[i]t therefore seems to me that no argument in AG favour of one theory rather than the other can be derived from the drafting history of the directive'.[106] Significantly, some Advocates General do not shy away from confronting the greatest difficulty of legal interpretation, namely the question of knowing how to decide when the various recognized methods lead the interpreter to contradictory results. The following paragraph is telling:

> If priority is given to a literal and historical interpretation of Article 2(a), second indent, it can be argued that only plans and programmes the adoption of which is compulsory by law require an environmental impact assessment. [...] However, if priority is given to a systematic and purposive interpretation of that provision, plans and programmes the adoption of which is voluntary but which are provided for in laws or regulations will also fall within the scope of the SEA Directive.[107]

One could read this text as an acknowledgment of the role played by the interpreter's choice. The fact that the Advocate General subsequently proceeded to cloak his choice in the language of necessity should not lead us to a different conclusion. Indeed, no further than three paragraphs following this inventory of methods, AG Campos Sánchez-Bordona appears self-assured and trenchantly settles the dilemma: '[s]ince the literal and historical interpretations are inconclusive, it is necessary to resort to a systematic and purposive interpretation'.[108] It is hard to see why two of the methods which previously seemed able to support a specific outcome and which, moreover, converged in their results, suddenly became 'inconclusive'.

To sum up, like with other interpretative methods of the ECJ, the historical approach also receives a paradoxical treatment. As an interpretative tool, it is

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105 Case C-673/16 *Coman and Others* EU:C:2018:2, Opinion of AG Wathelet, para 52.

106 Ibid.

107 Case C-24/19 *A and Others* EU:C:2020:143, Opinion of AG Campos Sánchez-Bordona, para 58.

108 Ibid, para 64.

not important (formally, in the Court's discourse), to the extent that the Court uses it rarely and when it does, it employs it rather hastily, in the form of a customary 'adornment'. Furthermore, it is not important (materially) insofar as, in the work of the Advocates General, the sophistication of the latter's discourse cannot conceal the fact that history constrains up to a certain point, beyond which it is the interpreter who gives meaning to, and assembles the various materials. Thus, perhaps against their will, the opinions of the Advocates General remind us once again that 'interpretation will inevitably (and indeterminably) emerge as conjectural on account of the unbridgeable distance between *interpretans* and *interpretandum*'.[109]

This section has shown the limited weight of interpretation techniques at the European Court of Justice. While always present, especially in the opinions of Advocates General, they do not constrain the official interpreters, be they the judges or the Advocates General, to such an extent as to eliminate discretion from the interpretative process. In brief, while relying on a different process, our analysis converges towards a theoretical conclusion along the lines of Gunnar Beck – that the Court's 'flexible interpretative approach frees it from almost any methodological constraints'.[110] One could thus hardly speak of one consistent interpretative methodology, but rather of a selective use of individual methodologies, often to the detriment of other equally possible methodological pathways.

IV. THE *PSPP* RULING AND ITS DISCONTENTS

> 'The local, the national, is fighting back, in law as in politics'[111]

One could say it was just a matter of time.[112] The *BVerfG* and other European constitutional courts had long been preparing their foreseeable – albeit partial and mostly hypothetical – contestation of the ECJ's hegemony by

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109 Legrand (n 32) 84.

110 Beck (n 19) 512.

111 Gareth Davies, 'Does the Court of Justice own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 European Law Journal 359.

112 See Dieter Grimm, 'A Long Time Coming' (2020) 21 German Law Journal 944; Teresa Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context' (2020) 21 German Law Journal 1045, 1048-1050.

rehearsing again and again their arguments on national and constitutional identity.[113] In particular, the *BVerfG* (an inspiration for other apex courts within the EU system) had proclaimed, as early as 1993, that it would reserve competence to review acts of EU institutions deemed *ultra vires*.[114] Its subsequent case-law reconfirmed this stance,[115] albeit with various degrees of forcefulness, but it had refrained from outright declaring an act of an EU institution *ultra vires*. This restraint ended with the *BVerfG*'s controversial decision of May 5, 2020 – the *PSPP* decision.[116]

Prior to *PSPP*, the Czech Constitutional Court[117] and the Danish Supreme Court[118] had declared two ECJ judgments *ultra vires*.[119] This, however, did little to mitigate the shock of the *BVerfG*'s decision in *PSPP*. Given the German court's position of an 'institutional leader among European constitutional courts',[120] the ruling raises 'questions of an existential nature

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113 For discussions on national identity and Article 4(2) TEU, see for instance, Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 167-168; Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41(2) Brooklyn Journal of International Law 491.

114 *BVerfGE* 89, 155, October 12, 1993.

115 See the *Honeywell* decision*, BVerfGE*, 2 BvR 2661/06, 6 July 2010 and the *Lisbon* decision, *BVerfGE* 2BvE 2/08, 30 June 2009.

116 *BVerfG*, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 (*PSPP*).

117 Decision of the Czech Constitutional Court 012/01/31 - Pl. ÚS 5/12: *Slovak Pensions* (*CCC Landtovà*).

118 Supreme Court of Denmark, Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A* (*SCDK Ajos*).

119 For discussions on the context and impact of the *CCC Landtovà* and *SCDK Ajos* decisions, see Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS'(Verfassungsblog, 30 January 2021*)* <https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/> and respectively, Laurens Ankersmit, 'Primacy and the Czech Constitutional Court' (European Law Blog, 4 March 2012) <https://europeanlawblog.eu/2012/03/04/primacy-and-the-czech-constitutional-court/> accessed 20 July 2020.

120 Thomas Horsley, 'Karlsruhe Bites Back: The German Federal Constitutional Court's PSPP Judgment' (UK Constitutional Law Blog, 13 May 2020) <https://ukconstitutionallaw.org/2020/05/13/thomas-horsley-karlsruhe-bites-back-the-german-federal-constitutional-courts-pspp-judgment/> accessed 20 July 2020.

[...] concerning the balancing between the authority and primacy of EU law, and national competences and sovereignty beyond budget matters'.[121]

The crux of the *BVerfG*'s reasoning, leading it to declare with astounding virulence that the ECJ's decision in *Weiss*[122] was '*simply not comprehensible* so that, to this extent, the judgment was rendered *ultra vires*',[123] was its own understanding of the interpretative methodology that it alleged the ECJ should have applied.

The severe challenge raised by the *BVerfG* is all the more surprising since the ECJ's interpretative strategy in *Weiss* did not appear to be particularly problematic. Rather, the ECJ followed familiar paths, both in regard to the methods of interpretation discussed above,[124] as well as in its proportionality analysis.[125] For instance, as concerns the methods of interpretation, the ECJ performed a step-by-step teleological analysis in respect of the relevant EU provisions, discussing price stability and support for the general economic policies of the Union as some of the main objectives of the ECSB[126] and subsequently clarifying that the specific objectives of Decision 2015/774 contributed to these aims.[127] The ECJ then proceeded to perform a systemic

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121 Theodore Konstadinides, 'The German Constitutional Court's Decision on PSPP: Between Mental Gymnastics and Common Sense' (UK Constitutional Law Blog, 14 May 2020) <https://ukconstitutionallaw.org/2020/05/14/theodore-konstadinides-the-german-constitutional-courts-decision-on-pspp-between-mental-gymnastics-and-common-sense/> accessed 21 July 2020. See also, for instance, Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 24 German Law Journal 1032.

122 Case C-493/17 *Weiss and Others* EU:C:2018:1000 (*Weiss*).

123 *PSPP* (n 5) para 116 (emphasis added).

124 *Weiss* (n 122) paras 50-60.

125 Ibid para 71ff. For a detailed analysis of the proportionality tests performed by the *BVerfG* and the ECJ, see Orlando Scarcello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13(1) European Journal of Legal Studies 45.

126 *Weiss* (n 122) para 51.

127 Ibid paras 54-57.

interpretation of the Treaty provisions in order to assess the correlation between economic and monetary policies.[128]

The *BVerfG*, in turn, after acknowledging that tensions inherent in the design of the Union 'must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding',[129] moved to a scathing analysis of the ECJ's methodology in *Weiss*, stating that

> the mandate conferred [to the ECJ] in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded.[130]

The *BVerfG* further linked the observance of what it deemed accepted canons of interpretation to democratic legitimation[131] and concluded that disregard of such canons represented an attack on Germany's constitutional identity, impinging on the principle of democracy.[132] The outcome is already notorious: a plethora of assertions displaying the breadth of the *BVerfG*'s disgruntlement with the ECJ's judgment – 'simply not comprehensible',[133] 'simply untenable',[134] 'objectively arbitrary',[135] 'not discernible'[136] – and leading it to conclude that 'if the EU crosses the limit set out above, its actions are no longer covered by the mandate conferred' and, 'at least in relation to Germany, [the ECJ's] decision then lacks the minimum of democratic legitimation necessary'.[137]

In light of our analysis of the ECJ's use of interpretative methods, what should one make of a judgment such as the *BVerfG*'s *PSPP* decision, which

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128 Ibid paras 60-66.
129 *PSPP* (n 5) para 111.
130 Ibid para 112.
131 Ibid para 113.
132 Ibid para 115.
133 Ibid paras 112, 116.
134 Ibid para 117.
135 Ibid para 113.
136 Ibid para 153.
137 Ibid para 113.

resorts to the language of 'methodological deficits' to describe the ECJ's approach?

In general, as Urška Šadl remarks, courts in the European Union had 'seemed to practice mutual recognition and respect of their court-like-ness',[138] which supposed that they would not interfere with each other's methodology, that is with their choices as regards the suitable interpretative techniques in a given case. Yet the *BVerfG*'s judgment did exactly that: it 'contest[ed] [the] "methodological autonomy" of the ECJ'.[139] If we are determined to read this 'methodological critique' as 'a mark for the profound dislike of the outcome of the balancing test', there is little else one could add.[140] However, assuming that the German Court's verdict is sincere, we can further ask if such a claim is sensible enough given the inherent limits of the various methods of interpretation in general and their operation in the ECJ's practice in particular.

The *BVerfG*'s decision to forego its previously restrained attitude and act in full defiance of the ECJ emphasizes the German court's demand for more rigour in the use of traditional methods of interpretation and gives voice to what had been hitherto a mostly silent discontent with the ECJ's style of judicial reasoning. At the end of her paper, Šadl hypothesizes that 'the judgment of the [Federal Constitutional Court] is a desperate cry for more methodological integrity' and contends that 'if it is, we should be willing to

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138 Urška Šadl, 'When is a Court a Court?' (Verfassungsblog, 20 May 2020) <https://verfassungsblog.de/when-is-a-court-a-court/> accessed 20 May 2020.

139 Davor Petric, '"Methodological Solange" or the spirit of PSPP' (European Law Blog, 18 June 2020) <https://europeanlawblog.eu/2020/06/18/methodological-solange-or-the-spirit-of-pspp/> accessed 19 June 2020, citing Francisco de Abreu Duarte and Miguel Mota Delgado, 'It's the Autonomy (Again, Again and Again), Stupid!' (Verfassungsblog, 6 June 2020) <https://verfassungsblog.de/its-the-autonomy-again-again-and-again-stupid/> accessed 30 November 2021.

140 Daniel Sarmiento, 'An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term' (EU Law Live, 12 May 2020) <https://eulawlive.com/op-ed-an-infringement-action-against-germany-after-its-constitutional-courts-ruling-in-weiss-the-long-term-and-the-short-term-by-daniel-sarmiento/> accessed 20 May 2020.

go along with the argument'.[141] We cannot help but wonder what 'more methodological integrity' would entail.

In fact, the *BVerfG*'s rebellion brings starkly to the foreground the debate regarding the significance of traditional interpretative methods as universally shared instruments that judges employ. As our analysis has sought to show, a reading of the ECJ's case-law through the lens of the classic methods of interpretation can only provide an incomplete picture of the Court's reasoning. While the decisions formally invoke them, none of the methods is, in and of itself, so constraining as to impose an inescapable outcome in each case. On the contrary, the ECJ's reasoning often appears to be informed by other determinant considerations that contribute to constructing its position within the EU order and its use of the interpretative techniques is quite lax. In this context, apart from endangering the foundational principle of primacy of EU law, the purported 'invalidation' of the ECJ's decision in *Weiss* is criticisable because it places too much weight on the formal interpretative methods, given that they carry in fact little force *in general*. As we have shown, formal interpretative methods play a fairly weak role for the ECJ and in fact, we argue this might hold true for other courts, as reaching complete methodological integrity and purity might prove an unattainable ideal. Therefore, to use methodological canons as the main standard of accountability would mean to pay heed, at a theoretical level, to an excessive formalism whose radical implication is that *any* decision is potentially reversible on methodological grounds. Indeed, who could stop the ECJ, in turn, to declare the *PSPP* judgement incomprehensible or methodologically flawed? On a more practical level, it would mean that the German court took the decision to depart from its previous stance according to which it will not, as a principle, challenge the interpretation of the ECJ when it does not agree with it.[142] By this distancing act, the Court would in fact unilaterally and

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141 Ibid.

142 See *PSPP* (n 5) para 112. For a related comment on the standards of review applied by the German Constitutional Court, see Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979.

secretly negotiate a new programme of integration,[143] one in which, contrary to the text of the Treaties, methodology occupies centre stage.

This argument is not to be understood as meaning that courts should not or cannot be held accountable either *legally*, i.e. by other courts, or *politically*, i.e. by society at large. In fact, in a clear hierarchical system, legal accountability is essentially ensured through the existence of various jurisdictional levels in the system. Accountability derives from the inherent authority embedded in a functional, socially recognized, legal system. Courts hold other courts methodologically accountable every day, but this is only possible in a legal order with strict, undisputed, hierarchies of the kind the European Union does not currently possess.

Until such structures are designed at EU level (if ever), methodological challenges like the *BVerfG*'s are bound to weaken the ECJ's position at the core of the EU's legal order. While controversial, the *PSPP* decision might signal the end of the national constitutional courts' disenfranchised posture in relation to the interpretation of EU law. Already with the mounting constitutional identity case-law of national courts and with the defiant *CCC Landtovà* and *SCDK Ajos* judgments, this idea became gradually discernible.[144] With the *PSPP* decision, the message has been spelled out loud and clear: national constitutional courts are stepping right into the conversation, laying a claim to the meaning and methodology of EU law, with only a mere (irreverent) nod towards the ECJ's powers.

V. Conclusion

In his examination of the controversial Karlsruhe *PSPP* decision, Karsten Schneider asserts that 'the problem with methodologically reconstructing some judgement is not that there would be no "true methodology" at all, though some might raise this quarrel'.[145] Our paper was precisely meant to raise this quarrel. As such, it makes a different claim from those criticizing

143 Karsten Schneider, 'Gauging "Ultra-Vires": The Good Parts' (2020) 21 German Law Journal 978.

144 Decision of the Czech Constitutional Court 012/01/31 - Pl. ÚS 5/12: *Slovak Pensions* (*CCC Landtovà*); Supreme Court of Denmark, Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A* (*SCDK Ajos*).

145 Ibid.

the *BVerfG's* judgment on economic,[146] philosophical,[147] political,[148] legal-doctrinal,[149] or ideological[150] grounds.

While most courts certainly manage to keep intact, at least in the eyes of lay people, the appearances of neutrality and universality, our paper sought to show that upon closer scrutiny, judicial methodology at the ECJ (or perhaps at any court) conceals important nuances and a significant degree of discretion. Importantly, we arrived at this conclusion by way of examining the ECJ's bifurcated scheme of adjudication. Thus, both the opinions of Advocates General, through their complex, dialogical arguments, but also the Court's judgments, in their impersonal, often magisterial style, expose the limitations of the traditional interpretative methods. Our contribution revealed that in fact, for the ECJ the classic methods of interpretation are not as constraining as might appear at first glance. Rather, they represent inherited language which speaks and appeals to judges across countries, precisely by virtue of tradition, while their individual bearing on the outcome of the judicial process will vary greatly.

The ECJ has frequently been accused of opaque legal reasoning and many commentators have called for better judicial justifications.[151] However, we believe it is legitimate to ask what exactly is to be understood by this 'greater demand for justification'.[152] Against the background of our investigation, we claim that better justification cannot mean (only) better *methodological* justification simply because, as shown above, methods are too open-ended to

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146 Mathias Goldmann, 'The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?' (2020) 21 German Law Journal 1058.

147 Justin Lidenboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 21 German Law Journal 1032.

148 Violante (n 112); Grimm (n 112).

149 Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090–1103.

150 Ibid.

151 For instance, Sharpston (n 52); Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 308; Davies (n 111).

152 Sarmiento (n 140).

allow for the establishment of an interpretative meta-standard to which all judges could reasonably be held. To pursue methodological perfection, and to do so at the expense of a political project impacting the concrete lives of hundreds of millions of people, means nothing more than to engage in a futile exercise in linguistic and conceptual impossibility.

We have confined our paper to an analysis of the constraints imposed by the ECJ's methods of interpretation and we have sought to contextualize a major judgement in light of these methods. As such, we did not intend to respond to those commentators who plead for a change in the Court's reasoning style, nor did we seek to devise a normative scheme for what the Court's reasoning should look like. If adjudicative improvement were nonetheless envisaged, and if there is some lesson to be drawn from our paper in this respect, it is that reform will probably not lie in methodology. It has been argued that adjudicative improvement might come with enhanced *substantive* justification – what Vlad Perju referred to as the 'discursive turn'.[153] While this is not the place to assess this normative claim, we can speculate that by espousing a 'justification model of authority', one that is more transparent and less formalistic than the judicial paradigm currently in place, the Court could manage to 'reposition itself with respect to the European public and engage it in a relationship that will enhance the citizenry's sense of shared political identity'.[154] However, the argument for 'more transparency' is not unproblematic either. For one thing, such demands for increased substantive justification risk opening the gate for the contestation of each and every decision in an already fragile context: 'every single policy of the EU is contested somewhere in the EU, and often from contradictory positions at the same time'.[155] On the other hand, the strand of literature dealing with constitutional pluralism would rebut such worries by claiming that contestation is actually a good thing.[156] Again, our purpose here was not to

153 Perju (n 151) 329.

154 Ibid.

155 Floris de Witte, *re:generation Europe* (Palgrave Macmillan 2019) 78.

156 See for instance Davies (n 111); Matej Avbelj, 'Constitutional Pluralism and Authoritarianism' (2020) 21 German Law Journal 1023; Niels Petersen, 'The Concept of Legal and Constitutional Pluralism' in Joachim Englisch (ed), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism* (IBFD 2016) 1-23; Niels Petersen, 'Karlsruhe's Lochner Moment? A Rational

take sides in this otherwise valuable debate, but to simply present how methodology operates in practice. On the basis of our investigation, we believe it is fair to suggest that when one engages in fictitious methodological quarrels, one speaks less about the law and its underlying social tensions than about the interpreter's power of imagination.

This is not to say that methodological talk should be banished either from the language of courts or from doctrinal work. But it can certainly be de-emphasized. Ultimately, that courts like the *BVerfG* should call upon other courts to equip themselves with more methodological scaffolding should certainly not prevent us scholars from denouncing this as a call to impossibility. That is because no court may offer an objectively 'true' methodology, but merely its own, *preferred* method, in a particular context in which its discretion remains largely unfettered.

Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision' (2020) 21 German Law Journal 995.

EUROPEAN UNION MIXED AGREEMENTS IN INTERNATIONAL LAW UNDER THE STRESS OF BREXIT

Yuliya Kaspiarovich* and Nicolas Levrat†

Since 1961, the EU and its predecessors have concluded many so-called mixed agreements with states outside of its community. On the EU side, such agreements are concluded both by the EU and by its Member States, acting jointly. This is a consequence of the principle of conferral, which sometimes limits EU capacity to act on the international stage. It also helps to clear up the evolving distribution of competencies between the EU and its Member States. If mixed agreements are consistent with the EU legal order, they constitute a peculiar and novel practice under general international law. Such agreements do not fit into any of the existing treaty law "categories", and the legal basis for the EU and its Member States' commitments under mixed agreements may appear problematic according to international law. Under EU law, the principles of pre-emption and sincere cooperation apply. However, Brexit has forced legal scholars to reconsider the issue under international law: what happens to a Member State's commitments under mixed agreements when it leaves the EU? According to international law, it should remain a party to such agreements, as a state bound by its international commitments. But how and under what conditions these agreements should be implemented remain open questions. We propose to investigate these legal issues with regard to the UK's commitments under mixed agreements in the context of Brexit.

Keywords: International Law of Treaties, Brexit, EU mixed agreements

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I. INTRODUCTION

Brexit is a journey into uncharted waters. Diplomats, political scientists, economists, and legal scholars have neither precedent nor an agreed theoretical framework for appraising and analysing the situation. Article 50 of the Treaty on European Union (TEU) makes it legally possible for a state to leave the European Union (EU); yet the rules applicable to the process and its legal consequences are far from detailed and precise. While most of the numerous studies on the implementation of article 50 TEU focus on the internal dimension (both for the EU and the United Kingdom (UK)) of the withdrawal agreement and on the trade and cooperation agreement between the EU and the UK,[1] only a few contributions to the academic debate analyse the external dimension of Brexit, namely its effect on already concluded EU

[1] See e.g. Hannes Hofmeister, 'Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 European Law Journal 589; Adam Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 European Law Review 523; Ramses A Wessel, 'You Can Check Out Any Time You Like, But Can You Really Leave? On "Brexit" And Leaving International Organizations' (2016) 13 International Organizations Law Review 197; Federico Fabbrini, *The Law and Politics of Brexit* (Oxford University Press 2017). For various blog posts on similar themes, see also e.g. 'Blog' (DCU Brexit Institute) <http://dcubrexitinstitute.eu/blog/> accessed 22 September 2021; 'LERU Brexit Seminars' (European Futures) <http://www.europeanfutures.ed.ac.uk/topics/leru-leuven-2017> accessed 22 September 2021.

agreements with almost all the countries in the world.[2] Further, most of these studies remain strongly influenced by EU legal scholarship, whereas the legal situation of the UK after Brexit will, as regards UK's rights and obligations towards other subjects of international law (including the EU and its Member States), be considered under international law. Naturally, applicable international law may include provisions of the exit agreement or of the Trade and Cooperation Agreement (TCA), which governs the relationship

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[2] Panos Koutrakos, 'Negotiating International Trade Treaties after Brexit' (2016) 41 European Law Review 475; Vaughne Miller, 'EU External Agreements: EU and UK Procedures' (28 March 2016) House of Commons Library Briefing Paper 7192 <https://researchbriefings.files.parliament.uk/documents/CBP-7192/CBP-7192.pdf> accessed 22 September 2021; Guillaume Van der Loo and Steven Blockmans, 'The Impact of Brexit on the EU's International Agreements' (CEPS, 15 July 2016) <https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements> accessed 22 September 2021; Panos Koutrakos, 'Brexit, European Economic Area (EEA) Membership, and Article 127 EEA' (Monckton, 2 December 2016) <https://www.monckton.com/brexit-european-economic-area-eea-membership-article-127-eea/> accessed 22 September 2021; Adam Lazowski and Ramses A Wessel, 'The External Dimension of Withdrawal from the European Union' (2017) 4 Revue des Affaires Européennes 623; Eleftheria Neframi, 'Brexit et les Accords Mixtes de l'Union Européenne' [2017] Annuaire Français de Droit Européen 360; Jed Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 Emory International Law Review 1051; Robert G Volterra, 'The Impact of Brexit on the UK's Trade with Non/EU Member States Under the EU's Mixed Free Trade Agreements' (Oxford Business Law Blog, 7 May 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk%E2%80%99s-trade-non-eu-member> accessed 22 September 2021; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55 Common Market Law Review 101; Stefano Fella, 'UK Adoption of EU External Agreements after Brexit' (24 July 2018) House of Commons Library Briefing Paper 8370 <https://sipotra.it/wp-content/uploads/2018/07/UK-adoption-of-EU-external-agreements-after-Brexit.pdf> accessed 22 September 2021.

between UK and the EU post Brexit[3] unless otherwise provided by specific provisions of the withdrawal agreement.[4]

As regards UK legal rights and obligations stemming from treaties to which the EU is a party, two radically different situations arise after Brexit. The first concerns agreements concluded by the EU to which the UK is not also a party in its state capacity. International law provides that the UK's rights and obligations under such "EU-only agreements" shall be extinguished once the UK is no longer an EU Member State. Considering that Brexit has the effect of releasing the UK from most of the rights and obligations derived from either the TEU or the Treaty on the Functioning of the European Union (TFEU) and acknowledging that the UK was bound by these EU international agreements according to the provision of article 216(2) TFEU[5] – not applicable to the UK after Brexit – all treaties concluded by the EU alone are no longer supposed to have legal effect on the UK.

The second situation is much more complex and intriguing; it concerns the category of agreements, referred to by legal doctrine as "EU mixed agreements", to which not only the EU, but also each of its Member States, are jointly parties.[6] Member states of the EU are, according to international

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3 Agreement on the Withdrawal of the UK and Northern Ireland from the EU and the EAEC and the Political Declaration Setting Out the Framework for the Future relationship between the EU and the UK [2019] OJ C384 I/01 and I/02 (Withdrawal Agreement); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part [2020] OJ L444 (TCA).

4 Different types of 'sunset clauses' for the separation period are envisaged in the withdrawal agreement with regard to citizens' rights, EU budget legislation, Irish border control and the protocol on UK army bases on Cyprus. Withdrawal Agreement (n 3), as published in OJ C384 I/01.

5 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 216(2) (TFEU) reads: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'.

6 Albert Bleckmann, 'The Mixed Agreements of the EEC in Public International Law' in David O'Keeffe and Henry G. Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983) 155. See also Peter Olson, 'Mixity from the Outside: the Perspective of a Treaty Partner' in Christophe Hillion and Panos

law, bound by such mixed agreements both as EU Member States and as proper contracting parties. In our view, the dominant academic literature underestimates the outcome of Brexit on the UK and EU's international commitments with respect to third countries and each other under the regime of mixed agreements.[7] As we shall show, the legal situation regarding the UK's participation in such international treaties under international law after Brexit is far from clear.

All these questions could have remained purely theoretical if UK voters had not, on 23 June 2016, decided by an almost 52% majority to leave the EU.[8] The Brexit process has forced unsuspecting lawyers to reconsider this question in very practical terms and, most likely, under international law and not EU law. Further, the fact that some EU mixed agreements, such as the Agreement on the European Economic Area (EEA Agreement), confer rights on private legal subjects most likely means that the issue cannot be settled by political understandings between contracting parties. Instead, it must be settled legally to ensure that national judges will not reach discordant legal conclusions when seized by private actors claiming rights stemming from the UK's participation in mixed agreements. As in traditional film photography, where a developer is required to reveal the image captured on the film, Brexit was required to reveal some aspects of the true nature of the EU (understood in the broad sense, encompassing both EU institutions and the Member States).

Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 331-38.

7 This question is explored by some recent contributions dealing with the fate of mixed agreements under WTO Law. See e.g. Ines Willemyns and Marieke Koekkoek, 'The Legal Consequences of Brexit from an International Economic Law Perspective' (2017) Leuven Centre for Global Governance Studies Working Paper No. 188. See also Pavlos Eleftheriadis, 'How to Make a Transitional Brexit Arrangement' (Oxford Business Law Blog, 15 February 2017) <https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/how-make-transitional-brexit-arrangement> accessed 1 October 2021; Odermatt (n 2); Wessel, 'Consequences' (n 2).

8 See 'EU Referendum Results' (BBC News) <https://www.bbc.com/news/politics/eu_referendum/results> accessed 1 October 2021.

In this article we will examine the legal status of the UK as regards its participation in mixed agreements, both before and after leaving the EU. To do so, we will discuss the provisions of both EU law and general international law relevant to the peculiar legal nature of EU mixed agreements. We are well aware that this type of agreement is not specifically dealt with by general international law. Nevertheless, even though the UK will no longer be bound by such agreements as an EU Member State after Brexit, we argue that it can, if it wishes to do so, remain party to any agreement it has ratified as a state party. We shall illustrate this complex legal situation with references to one specific EU mixed agreement, the EEA Agreement.[9]

II. EU Mixed Agreements between EU Law and International Law

From a legal point of view, the EU's singular status under international law is an already well-known and widely-held assumption.[10] Constituted as international organizations, the European Communities gradually but substantially emancipated themselves from their international origins to create 'a new legal order of international law',[11] to which the EU has succeeded.[12] When the Court of Justice of the European Union (CJEU) made this observation, however, it was referring to relationships within the

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9 The Agreement on the European Economic Area [1994] OJ L1/3 (EEA Agreement).

10 Case 26/62 *Van Gend en Loos* EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66. See in particular Pierre Pescatore, *The Law of Integration. Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities* (Sijthoff 1974) 99. See also Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Charles Leben, 'A Propos de la Nature Juridique des Communautés Européennes' (1991) 14 Droits 61. On the other side, but very isolated, see Alain Pellet, 'The International Legal Bases of Community Law' (1994) 5 Collected Courses of the Academy of European Law 226. With regard mixed agreements, see Allan Rosas, 'Mixed Union – Mixed Agreements' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 125.

11 *Van Gend en Loos* (n 10).

12 For the succession of the EU to the EC (which replaced the EEC according to the Maastricht Treaty), see Consolidated Version of the Treaty on European Union [2012] OJ C326, art 1(3) (TEU).

European Economic Community (EEC)[13] – between the EEC, its Member States and private persons – and not to relationships between the EEC and/or its Member States and the rest of the world, which, therefore, were assumed to remain under the realm of international law.[14]

As regards the EU's capacity to enter into international agreements, the CJEU, in its famous 1971 *ERTA* ruling, stated that the EEC's "external competence" (the capacity to conclude treaties) did not depend on competencies formally conferred by the Treaties to the EEC, but could result from the exercise of EEC competencies to develop domestic policies.[15] Since then, the distribution of competences between the EU and its Member States has become increasingly complex. The Maastricht Treaty added a new category of 'non-exclusive' competences that had an impact not only on the internal distribution of competencies, but also on the international capacity of the EU and its Member States.[16] Further, the renewed emphasis on the principle of conferral in article 4(1) TEU, introduced by the Lisbon Treaty, underlines the fact that the EEC lacks general competence to represent its Member States in international relations. The external competence of the EEC remains only sector-specific, and thus runs parallel to the competencies of its Member States.

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13 The EU only appeared in 1993, at which time it coexisted with the EEC (which was rebranded the EC in 1993). The EU succeeded and replaced the EC in 2009. See ibid art 1(3). For the sake of readability, we will refer to the EU, as well as to EU law, even if at points of its development it was formally the EEC or EC.

14 See e.g. Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293, in which the Court states that the EEC is subject to the international law of treaties according to the VCLTs of 1969 and 1986, as it codified customary international law.

15 Case 22-70 *Commission v Council (ERTA)* EU:C:1971:32. For a very interesting contribution, see Robert Post, 'Constructing the European Polity: ERTA and the Open Skies Judgments' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 234.

16 Treaty on European Union (Maastricht Treaty) [1992] OJ C191/6, art G.5, inserting in the Treaty Establishing the European Economic Community (Treaty of Rome) a new art 3.B that introduced into EU law the concepts of subsidiarity and, even more significantly, non-exclusive competences, nowadays called 'shared competencies'. TFEU (n 5) arts 2(2), 4.

1. Origins and Rationale of EU Mixed Agreements According to EU Law

Very early in the history of the EEC, its Member States realized that neither they nor the EEC were fully competent to conclude complex international agreements. Thus emerged the practice of jointly concluding mixed agreements, with the EEC and its Member States together becoming parties on one side, across from one or more third parties on the other side. The EEC's very first mixed agreement was concluded with Greece in 1961 to establish a political and economic dialogue with a country in its immediate vicinity.[17] This was followed by identically structured agreements with Turkey[18] and the Associated African States and Madagascar (AASM).[19] This repeated practice led to the development of the doctrinal notion of 'mixed agreements' to describe the formal participation of both the EEC and its Member States as contracting parties.[20]

This legal category of 'mixed agreements' did not appear in the EEC Treaty and still does not appear in either the TFEU or the TEU. Only the Euratom Treaty contains, since 1957, a reference to a similar type of agreement.[21]

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17 Council Decision 61/106/EEC of 25 September 1961 on the Conclusion of the Agreement Establishing an Association between the European Economic Community and Greece [1963] OJ P26/293.

18 Agreement Establishing an Association between the European Economic Community and Turkey [1977] OJ L361/29.

19 Convention d'Association entre la Communauté Économique Européenne et les États Africains et Malgache Associés à Cette Communauté [1970] OJ L282/2 (no longer in force).

20 'Some clauses of the association agreement with Greece, AASM and Turkey relate to matters that are not covered by the EEC but by member states' competences. Thus, rather than concluding two agreements, one between the Six and the other contracting party and the other between the EEC and the same contracting party, each relating to matters falling within its respective competences, it was decided to negotiate only one treaty, a mixed agreement, signed at the same time by the EEC and the member states'. Michel Melchior, 'La Procédure de Conclusion des Accords Externes de la Communauté Économique Européenne' (1966) 2 Revue Belge de Droit International 202 (our translation). For one of the very first collected volumes on mixed agreements, see David O'Keeffe and Henry G. Schermers (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983).

21 Consolidated Version of the Treaty Establishing the European Atomic Energy Community [2012] OJ C327/01, art 102 reads: 'Agreements or contracts concluded

However, the absence of an explicit reference to this category of agreements did not prevent the EU and its Member States from concluding numerous mixed agreements[22] with the rest of the world.[23] Legally speaking, whether or not an agreement will be "mixed" depends essentially on the scope of competences it implicates. If the full range of competencies necessary for its conclusion have not been transferred to the EU, but only part of it, it will probably be a mixed agreement.[24]

The EU treaties explicitly state that international agreements concluded by the EU bind not only EU institutions, but Member States as well.[25] Still, mixed agreements go a step further than EU-only agreements, since both the EU and each of its Member States become directly and individually (but jointly) parties to the same international agreement. In practice, it is worth asking whether the balance of respective obligations of the EU and its Member States within a mixed agreement is not excessively delicate or even

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with a third State, an international organization or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws'.

22 For a typology of 'mixed agreements', see in particular Marc Maresceau, 'A Typology of Mixed Bilateral Agreements' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 11-30.

23 For the database of the EU Treaties Office, see 'Treaties Currently in Force' (EUR-Lex) <http://ec.europa.eu/world/agreements/default.home.do> accessed 1 October 2021.

24 See also Marise Cremona, 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 14 European Constitutional Law Review 231. Regarding the debate on the 'optional' and 'mandatory' mixity after Opinion 2/15, see also e.g. Laurens Ankersmit, 'Opinion 2/15 and the Future of Mixity and ISDS' (European Law Blog, 18 May 2017) <http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/> accessed 1 October 2021; Francesco Montanaro and Sophia Paulini 'United in Mixity? The Future of the EU Common Commercial Policy in Light of the CJEU's Recent Case Law' (EJIL: Talk!, 2 February 2018) <https://www.ejiltalk.org/united-in-mixity-the-future-of-the-eu-common-commercial-policy-in-light-of-the-cjeus-recent-case-law/> accessed 1 October 2021.

25 TFEU (n 5) art 216(2).

impracticable.[26] *Prima facie*, CJEU judges tend to consider the EU and its Member States as being jointly bound by a mixed agreement,[27] even though international law would bind both the EU and its member as genuine and distinct parties (except as otherwise provided in specific provisions of an agreement). Some authors even argue that most mixed agreements are bilateral in nature, as the EU and its Member States should be considered as unitary and indivisible.[28] Naturally, Brexit does not fit well with such an assertion and, according to international law, the UK, like any other EU Member State, concluded mixed agreements as a sovereign state acting within its own competences.

The CJEU also claims exclusive competence to interpret all the agreements concluded by the EU, including mixed agreements.[29] Such 'equivalent treatment', however, is only relevant under EU law, and even there the nature of Member States' commitments under mixed agreements is very unclear. While EU legal scholarship generally accepts that all EU Member States are parties alongside to mixed agreements the EU and has extensively analysed

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[26] In this sense, Joël Rideau writes: 'The question of controlling "mixed agreements" is delicate. By retaining the Court's questionable assimilation of agreements to acts of the institutions, the most coherent solution would be to distinguish in the "mixed agreement" what is within Community competence and controllable by the Court and what is not within its competence and consequently not controllable. The implementation of the solution linking the control power to the nature of competences could also give rise to thorny problems because of the consequences and the difficult divisibility of the fate of the agreement'. Joël Rideau, *Droit Institutionnel de l'Union Européenne* (6th edn, LGDJ 2010) 309 (our translation). See also the literature on the EU debatable practice of making the declaration of competence to mixed agreements, in particular Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 European Foreign Affairs Review 491.

[27] Case C-53/96 *Hermès* EU:C:1998:292; Joined Cases C-300/98 and C-392/98 *Dior e.a.* EU:C:2000:688; Case C-13/00 *Commission v Irlande* EU:C:2002:184; Case C-459/03 *Commission v Irlande (MOX)* EU:C:2006:345.

[28] Van der Loo and Blockmans (n 2); Wessel, 'Consequences' (n 2).

[29] TEU (n 12) art 19; TFEU (n 5) art 344.

the nature of such 'party' status,[30] the issue has not received nearly as much attention in the realm of international law. Therefore, even outside of the specific context caused by Brexit, mixed agreements may generate risks and legal uncertainty.

Notwithstanding all of this, as long as the UK was an EU Member State bound by EU law, the duty of sincere cooperation,[31] coupled with the principle of pre-emption,[32] allowed the EU and its Member States to fulfil their international commitments coherently regardless of the formal legal status of mixed agreements under EU or international law.[33] However, now that the post-Brexit UK no longer views its obligations under mixed agreements through the lens of EU law, international law has become the only relevant point of reference.

2. EU Mixed Agreements under International Law

The CJEU, through its case law, insists that the issue of the nature and extent of the respective engagements of the EU and its Member States in mixed agreements should be dealt with according to EU law and not under international law.[34] Its stated reason is that the issue of allocating competencies between the Member States and the EU is a question of interpretation of EU law, which falls under the exclusive competence of the CJEU.[35] From the perspective of the jurisdiction of a subject of international law, the CJEU's claim is perfectly consistent with the exclusion of the "federal principle" from international treaty law. Nonetheless, these understudied EU mixed agreements seem to generate situations quite at odds

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30 Odermatt (n 2) 1060. See also Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

31 TEU (n 12) art 4(3).

32 *Costa v ENEL* (n 10).

33 For more details, see Wessel, 'Consequences' (n 2) 109.

34 See e.g. Opinion 1/91 EU:C:1991:490 (on the EEA Agreement); *Commission v Ireland (MOX)* (n 27); Opinion 1/09 EU:C:2001:123 (on the creation of a unified patent litigation system); Opinion 2/12 EU:C:2014:2454 (on the agreement managing the accession of the EU to the ECHR); Opinion 2/15 EU:C:2017:376 (on the free trade agreement between the EU and the Republic of Singapore).

35 See Section II.3 below for a discussion of the relevant case law.

with international treaty law and the international law of responsibility, since none of these subfields of general international law consider the composite nature of the legal entities they regulate. Unfortunately, mixed agreements have rarely been thoroughly investigated from international treaty law perspective.[36]

As previously stated, the EU and its Member States have been concluding mixed agreements since 1961, and this practice has been widely accepted by other states, who did not shy away from signing such agreements. Interestingly, almost simultaneously, the International Law Commission (ILC) of the United Nations (UN), which had been endowed with the task of codifying international treaty law, decided after lengthy and complex debates in its 1962 session to abandon the reference in international treaty law to what had thus far been referred to as the 'federal principle' or 'federal clause'.[37] This principle describes the practice of some federal states of allowing both the federation and its constituent units to simultaneously enter agreements under international law. This practice seems to correspond to the EEC-EC-EU practice of concluding mixed agreements, which would have benefited from a 'federal clause' in international law.

The ILC's mandate to identify customary rules on the law of treaties led it to propose a text on the ability of states to enter international agreements, both as sovereign and independent states as well as Member States of a federal union or an international organization.[38] However, the decision was made to limit the purpose of what was to become the Vienna Convention on the Law of Treaties (VCLT) to the law of treaties between states, thus avoiding the

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36 As a remarkable exception, see the contribution by Joseph HH Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in David O'Keeffe and Henry G Schermers (n 20).

37 'Report of the International Law Commission covering the work of its Fourteenth Session, 24 April-29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)' [1962] II Yearbook of the International Law Commission 164.

38 For the discussion of this subject by the International Law Commission, see 'First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' UN Doc A/CN.4/144 (1962).

issues related to the member states of a federation or union of states.[39] As a consequence, the ILC did not examine whether a state's capacity to enter into treaties may vary according to the internal division of competences within a federation or due to its peculiar status as a member of an international organization. Instead, article 6 of the VCLT merely provides that '[e]very State possesses capacity to conclude treaties'.[40] This extremely concise rule will play a very central role in analysing UK commitments under mixed agreements post-Brexit. Despite some relevant EU legal doctrine considerations,[41] it has never been disputed that EU Member States remain states under international law, and therefore retain an unlimited 'capacity to conclude treaties'.

When the ILC continued its codification mission on the law of treaties by turning to treaties between states and international organizations or between international organizations,[42] it did not resurrect the federal clause with respect to international organizations and their member states. A draft version of the convention on treaties concluded by international organizations discussed during the ILC's sessions in 1982 contained a provision – article 36 bis – that essentially codified the EEC's standard

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39 In practice, the issue has been the subject of several contradictory decisions. As early as 1951, the Commission had considered it useful to limit its work to treaties between states, but the question was debated during the first session of the Diplomatic Conference held in Vienna in 1968. See Philippe Gautier, 'Commentary on Article 1 of the 1969 VCLT', in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011).

40 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 6 (VCLT).

41 Wessel, 'Consequences' (n 2).

42 The VCLT, which codified the already existing customary rules governing the law of treaties between states, was opened for signature within the UN in 1969. In 1986, a '[Vienna] Convention on the Law of Treaties between States and International Organizations or between International Organizations' was opened for signature, but it still has not entered into force. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 1155 UNTS 331 (VCLTIO). The texts and structure of these two conventions are very similar. See Corten and Klein (n 39).

practice.[43] However, the desire to align the provisions of this new convention closely with the VCLT led to the ILC's members to renounce draft article 36 bis in favour of a similarly concise article 6 formula: '[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization'.[44] Notice that, despite the otherwise similar wording, international organizations are accorded capacity to conclude treaties only as 'governed by the rules of the organization', which suggests that they lack the general capacity recognized as inherent in statehood. Nonetheless, neither formulation refers to the specific case of mixed agreements where an international organization *and* its member states, on the one hand, and a third entity, on the other hand, bind themselves through a single treaty.[45] Nor are mixed agreements expressly excluded, however, provided they are allowed by the rules of the organization.[46]

In the absence of a provision like article 36 bis in the eventual Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), which was signed in 1986 but never entered into force, international organizations are free to follow the same exclusive dualist logic applicable to states and conclude international agreements within their respective spheres of competencies. Thus, either the state or the international organization can commit itself through a treaty, but there is no place for mixed arrangements.

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43 Draft articles on the Law of Treaties between States and International Organizations or between International Organizations and comments [1982] II(2) Yearbook of the International Law Commission 44.

44 VCLTIO (n 42) art 6. For commentary on this article, see also Nicolas Levrat, 'Commentary on Article 6 of the 1986 Vienna Convention' in Corten and Klein (n 39) 183.

45 Rafael Leal-Arcas, 'The European Community and Mixed Agreements' (2001) 6 European Foreign Affairs Review 483, 502.

46 This reference to 'rules of the organization' is quite broad and is clearly not limited to the constitutive act or formal texts, but also includes practices or implicit competencies. For developments of this notion within the framework of Article 6 of the VCLTIO, see Levrat (n 44).

Mixed agreements do not seem to be addressed by international law of treaties as it has been codified by the ILC in the VCLT and the VCLTIO.[47]

We must also recall article 27 of the VCLT, which states: '[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.'[48] In other words, from the point of view of international law, which governs the legal effects of mixed agreements between the EU and its Member States on the one side, and a third party on the other, domestic provisions of the parties (in this case, the EU) are irrelevant when it comes to interpreting or mitigating the legal effect of obligations arising from an international treaty under international law.

The rules of international responsibility seem to offer slightly more leeway.[49] Under general international law, there can be no situation of common or shared responsibility between a federal state and its federated entities.[50] Only the federal state is a subject of international law. The same logic is not applicable for the division of responsibility between an international organization and its member states, since all are subjects of international law.[51] The 'draft articles on the responsibility of international organizations'

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47 See Daniel Turp and François Roch 'Commentary on Article 6 of the 1986 Vienna Convention' in Corten and Klein (n 39) 107.

48 VCLTIO (n 42) art 27(2). The principle is the same in the 1969 version, except that it refers to 'domestic law'.

49 The law of international responsibility is, like the law of treaties, mainly of a customary nature; however, unlike the law of treaties, the codification work of the ILC did not result in treaties. There is thus a set of 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (UN Doc A/56/10 (2001)) and a set of 'Draft Articles on the Responsibility of International Organizations' (A/66/10 (2011) para 87), the latter of which was adopted by the International Law Commission at its sixty-third session in 2011 and submitted to the General Assembly as part of its report on the work of that session.

50 This question has been raised and systematically rejected by the ICJ, in particular in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12; *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466; and *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] IC Rep 12.

51 This issue of the division of responsibility between the EU and its Member States has been seen as one of the main problems that has led the CJEU to consider the

submitted by the ILC to the UN General Assembly in 2011, which represent the current state of codification of public international law in this area, assert that, in principle, a state member of an international organization is not responsible for implementing a convention concluded by that organization. Under international law, such a convention binds only the signatory organization, which is a separate legal subject from its member states. Any responsibility on the part of the member state would be subsidiary to that of the organization and derive from the "rules of the organization".[52]

While rules specific to the internal functioning of an organization are carved out,[53] which provides some leeway in the EU context,[54] this exception is, of course, of no use to the UK after Brexit. Therefore, from the perspective of international law, the question that needs to be answered, and which becomes especially acute after Brexit, is the following: when the UK, as a Member State of the EU, signed and ratified an EU mixed agreement with third parties, what commitments did it undertake as a subject of international law?

3. Is an EU Member State a Party, as Defined by International Law, to a Mixed Agreement?

This is, after all, the heart of the matter. Clearly, the issue of the definition of 'party' will play a crucial role regarding the UK's participation in mixed agreements after Brexit. Let us therefore examine two cases in which the CJEU or one of its Advocates General has had the occasion to address the

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participation of the EU – alongside its Member States – in the ECHR as not being in conformity with the spirit of the treaties on which the Union is founded. See Opinion 2/13 EU:C:2014:2454 (on the accession of the EU to the ECHR).

52 Draft Articles on the Responsibility of International Organizations (n 49) art 62.

53 Ibid art 64.

54 For a brilliant thesis providing a detailed analysis of the international responsibility of the EU, see Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016). See also Pieter Jan Kuijper, 'International Responsibility for EU Mixed Agreement' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 208-227.

issue of the legal meaning of 'contracting party' status with regard to mixed agreements.

The first version of the EEA Agreement was submitted to the CJEU according to the opinion procedure now enshrined in article 218(11) TFEU.[55] In this first version of the EEA Agreement, the contracting parties agreed to establish one single Court of the European Economic Area, competent to interpret the provisions of the treaty. In its Opinion 1/91, the CJEU stated:

> As the Court of the European Economic Area has jurisdiction in relation to the interpretation and application of the agreement, it may be called upon to interpret the expression 'Contracting Parties'. As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.[56]

The Court of Justice was thus very reluctant to let any international judicial body other than itself interpret the expression 'contracting party' (and for this reason struck down the proposed agreement as incompatible with EC law), as it regards the issue of distribution of competences between the EU and its Member States. In interpreting 'contracting party' status for the EU and/or its Member States, this proposed judicial body responsible for the dispute settlement within the EEA Agreement would been competent to adjudicate on the distribution of competences between the EU and its Member States, a purely EU law issue.

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55 TFEU (n 5) art 218(11).

56 Opinion 1/91 (n 34). In this Opinion, the court stated that the EEA Agreement as it was first drafted, and especially the jurisdiction it established, was not consistent with the treaties.

We infer from this position that the CJEU was well aware that 'contracting party' may be given a different meaning under EU law and international law – particularly when it concerns the legal status of an EU Member State's participation in a mixed agreement. Thus, for the CJEU it was very clear that, since EU Member States' participation in mixed agreements must be settled in accordance with the internal distribution of competences, no jurisdiction other than the CJEU could be allowed to interpret the expression 'contracting party' as regards the EU and its Member States.

More recently, and again from the standpoint of EU Law, Advocate General Sharpston argued in her opinion on European Union-Singapore Free Trade Agreement for clear distinctions between the EU and Member States in terms of their status as parties to mixed agreements:

> If an international agreement is signed by both the European Union and its constituent Member States, both the European Union and the Member States are, as a matter of international law, parties to that agreement [...]. Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. *Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union (and the fact that the European Union may have played the leading role in negotiating the agreement is, for these purposes, irrelevant)*. If the Member State were to do so, however, the effect of Article 216(2) TFEU will be that — as a matter of EU law — it continues to be bound by the areas of the agreement concluded under EU competence (because it is an EU Member State) unless and until the European Union terminates the agreement. The ability to act independently as an actor under international law reflects the continuing international competence of the Member State; the fact that the Member State remains partially bound by the agreement even if, acting under international law, it terminates it reflects not international law but EU law.[57]

It is thus clear, both from the point of view of EU law and international law, that the participation of EU Member States in EU mixed agreements is distinct from EU participation. In the same measure as a Member State could, according to Advocate General Sharpston, withdraw individually from

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[57] Opinion 2/15 EU:C:2016:992, Opinion of AG Sharpston paras 76-77 (emphasis added).

a mixed agreement but remain bound through article 216(2) TFEU, an EU member State leaving the EU should, without specific provision or action on its part, remain bound by the agreement as a state party, even if it is no longer bound by article 216(2) TFEU.[58]

III. How Does Brexit Affect the UK's Participation in EU Mixed Agreements?

Ramses Wessel has argued that

> with regard to mixed agreements, different considerations indeed apply to bilateral and multilateral agreements. In the case of bilateral agreements (between the EU/Member, States and third party), the UK would cease to be a party, but this will not happen automatically. [...] In the case of multilateral agreements (between the EU, the Member States and a (large) number of other States), the UK could perhaps remain a party.[59]

We disagree with this analysis and offer different opinion. We argue that, after Brexit, the UK, as a party to mixed agreements, will remain bound by its legal commitments towards other parties, as other parties, if they so decide, will remain legally bound towards the UK. EU law, and in particular article 50 TEU, contains no rule capable of resolving this legal issue. Furthermore, as the UK is no longer subject to the jurisdiction of the CJEU, its participation in international agreements is governed only by general international law, except in situations that implicate specific multilateral regimes, such as WTO law, to which both the EU and the UK are parties.[60]

Without challenging the distinction between bilateral and multilateral mixed agreements under EU law,[61] we simply argue that this distinction, based on EU-law categories, does not bear upon the international law of treaties. Furthermore, the EU does not follow consistent criteria in deciding whether

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58 Van der Loo and Blockmans (n 2), arguing that, '[c]ontrary to EU-only agreements, the UK is a contracting party to the agreement for the mixed elements of the agreement and these termination and denunciation clauses are applicable'.

59 Wessel, 'Consequences' (n 2) 123-124.

60 See references in n 7.

61 The nature of a mixed agreement is usually defined in accordance with the definition of the 'parties' to the agreement. See Wessel, 'Consequences' (n 2) 123.

to conclude international agreements as mixed agreements or EU-only agreements. [62] We therefore suggest giving special attention to the formulation of the "party" status to an agreement. This implies that each mixed agreement should be analysed on a case-by-case basis in accordance with its own provisions and the rules of international law.[63] In this way, EU law would remain relevant to the determination of the effects of mixed agreements for the post-Brexit UK as a complementary means of interpretation, an aspect of the 'circumstances of conclusion' of the agreement relevant to interpretation pursuant to article 32 VCLT.[64]

1. Does General International Law Offer Any Solution?

Under international law, once a treaty enters into force, its parties (states or international organizations) are bound by its provisions according to the principle *pacta sunt servanda*. Therefore, the UK, whether member of the EU or not, remains bound by the international commitments it undertook under its own name. Nonetheless, this situation of continued participation by a former EU Member State to a mixed agreement to which it became a party

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62 The issue of 'mandatory' or 'facultative' mixity (or 'incomplete' or 'partial' mixity) has been discussed in legal scholarship. See e.g. Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 183-184; Guillaume Van der Loo and Ramses A Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions' (2017) 54 Common Market Law Review 735. For the legal debate on 'facultative' mixity after Opinion 2/15, see references in n 24.

63 For example, the Cotonou agreement, which is an EU mixed agreement passed with 76 African, Caribbean, and Pacific countries (collectively, ACP) in 2000, is set to expire on 30 November 2021, the date of publication of this article (having been extended beyond its initial expiration date in 2020). A new agreement has been negotiated and accepted on 15 April 2021. It has been presented to 79 member States of OACPS and the EU Member States for approval. 'Post-Cotonou Negotiations on New EU/Africa-Caribbean-Pacific Partnership Agreement Concluded' (European Commission, 15 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1552> accessed 28 November 2021. The UK should not be bound by this or any other eventual successor agreement because it was concluded when the UK was no longer a Member State of the EU.

64 VCLT (n 40) art 32.

as an EU Member State is so novel that general international law does not give a clear-cut answer.[65]

What remains clear is that no rule of general international law can be found to justify the automatic termination of the UK's commitments as a party to EU mixed agreements. Article 42 of the VCLT clearly shows the international community concern for guaranteeing respect for treaty commitments by subjects of international law and strictly limiting the possibility of withdrawal, which is permitted only (1) in accordance with the provisions of a particular treaty, (2) pursuant to a termination right recognized in the VCLT, or (3) with the (implicit or explicit) consent of all parties. We can dispense with any issue as to the formal succession to treaties after Brexit, since the UK as a state is already a party to EU mixed agreements and will remain so after Brexit, not as a successor to the EU, but as a state party to the original treaty since its date of ratification in accordance with its domestic procedural rules.

None of the grounds for the termination or suspension of the application of a treaty listed in the VCLT can properly be invoked in this context.[66] The most likely argument would be that Brexit constitutes a 'fundamental change of circumstances' as countenanced by article 62 VCLT.[67] However, this justification may only be invoked by the party seeking to terminate or suspend its treaty commitments. Thus, it could only be invoked by the UK and could not be invoked against the UK by another party to the treaty. It is also worded in restrictive terms; among other conditions, it can only apply where 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. This issue would therefore need to be dealt with on a case-by-case basis, depending on the specific provisions of the relevant mixed agreement and the conditions for its implementation. One could argue, as regards the EEA Agreement for example, that the UK's continued implementation of this after Brexit would tend towards preserving the status quo as regards the UK's relationship with

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65 See Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 European Journal of International Law 463, 490, in which the author argues that a supranational exception should enter 'the theatre of international life'.

66 VCLT (n 40) art 42-64.

67 Ibid art 62.

the other parties to that treaty – far from a 'radical transformation of the extent of UK's obligations' under that treaty. Finally, attempts to invoke this provision have so far not met with success before international jurisdictions.[68]

If mixed agreements could be considered bilateral agreements, with the 'EU and its Member States' representing a single party to the agreement, then EU Member States, despite signing and ratifying mixed agreements alongside the EU, would not be bound by the resulting treaty commitments under international law. However, in our view, this approach is incompatible with both international law and EU law. As regards the former, the only plausible explanation for considering mixed agreements to be bilateral in nature, despite having at least 30 contracting parties, would be that EU Member States, by virtue of their membership in the EU, have lost the capacity to validly conclude treaties with third parties under international law! Under the unitary logic of international treaty law, if you do not possess such capacity, you are not a state.

In terms of EU law, considering the EU and its Member States as a single party to a mixed agreement would amount to an utter disregard for the principle of conferral as stated at article 4(1) TEU, since it would mean the EU (and its Member States) enter such international agreement as a single subject of international law. As we have shown, international law does not accommodate composite entities, so the relevant party to the agreement would be the EU. This means that the EU would be acting on the international plane in a manner that exceeds the competencies attributed to it by the Member States. In short, the Member States' decision to ratify a mixed agreement would be tantamount to a transfer of new competencies to the EU, in obvious derogation of articles 4 and 48 TEU.[69] This is why, according to our analysis, EU mixed agreements can only be considered as multilateral agreements under international law.

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68 See *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

69 Opinion C-2/94 EU:C:1996:149 (on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

2. Could the Problem Be Solved by the Withdrawal Agreement or the TCA?

Of course, all parties to a mixed agreement can agree on the withdrawal of the UK from that treaty and simply amend the treaty accordingly. Article 54(b) of the VCLT provides that the termination of a treaty or the withdrawal of a party may take place at any time by consent of all the parties after consultation with the other contracting parties.[70] Such a solution was undertaken considering the UK's participation in the EEA Agreement, which included the preparation and signature of an agreement between the United Kingdom and the European Free Trade Association (EFTA) states.[71] The mere fact that such an agreement was needed confirms that the UK's withdrawal from the EU does not imply an automatic withdrawal from other international agreements to which it is a contracting party. The formal condition of article 54 of the VCLT is not met, since there are two distinct agreements at play: one dealing with the withdrawal of the UK from the EU, and the other with the UK's separation from the EEA, whose parties include the EFTA states. Nonetheless, it seems to us that such solution should be deemed acceptable as regards the requirement of unanimous consent embedded in article 54 of the VCLT. Again, though, the fact that such arrangements have been made confirms, in our view, our main hypothesis that the UK, as a state under international law, must be considered as party in its own right to EU mixed agreements – in this case, the EEA.

The picture becomes even more complicated when we consider mixed agreements involving third parties beyond the EU and EFTA. Even if Brexit agreements were to settle the UK's status under EU mixed agreements as regards the EU, its Member States, and the EFTA states, the consent of other third parties would be needed for such an arrangement to produce its full legal effect. According to article 34 of the VCLT, '[a] treaty does not create either

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70 VCLT (n 40) art 54(b).

71 Agreement on Arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland Following the Withdrawal of the United Kingdom from the European Union, the EEA Agreement and Other Agreements Applicable between the United Kingdom and the EEA EFTA States by Virtue of the United Kingdom's Membership of the European Union (adopted 28 January 2020) <https://www.gov.uk/government/news/uk-and-eea-efta-states-sign-separation-agreement> accessed 5 October 2021 (Separation Agreement).

obligations or rights for a third State without its consent'.[72] Therefore, neither the withdrawal agreement of the UK from the EU nor the TCA between the EU and the UK can create or alter rights or obligations towards third parties to EU mixed agreements without the consent of the third states concerned.[73] In this connection, let us underline that the CJEU, in its judgment issued on 27 February 2018, explicitly referred to the provisions of article 34 of the VCLT as customary international law applicable to EU treaty practice.[74]

Therefore, it is clear that the rights of states that are parties to EU mixed agreements cannot be altered by a bilateral agreement between the EU and the UK. Under similar logic, it is indeed questionable whether the UK and the EU can use such means to settle their own bilateral relationship after Brexit.[75] Deciding by a provision in a withdrawal agreement or the TCA that the EU and the UK are not legally bound towards each other by a mixed agreement to which they both remain parties may affect the rights of other parties to the agreement. Further, article 41 of the VCLT narrowly restricts the conditions under which a multilateral treaty may be modified as between only certain parties. Even when these conditions are met, the VCLT guarantees the right of third parties and states that such modification, unless authorized by specific treaty provisions, is permissible only when it 'does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations'.[76] This would have to be assessed on a case-by-case basis for each mixed agreement.

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72 VCLT (n 40) art 34.

73 Separation Agreement (n 71).

74 Case C-104/16 P *Council v Front Polisario* EU:C:2016:973, paras 95, 132; Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* EU:C:2018:118, paras 62-63; Eva Kassoti, 'The ECJ and the Art of Treaty Interpretation: *Western Sahara Campaign UK*' (2019) 56 Common Market Law Review 209.

75 For the discussion on 'disconnection clauses', see Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 160-185.

76 VCLT (n 40) art 41(1)(b)(i).

3. Open Questions for International Lawyers after Brexit

Naturally, establishing that the UK, the EU, its Member States, and third parties remain legally bound by EU mixed agreements after Brexit does not mean that the implementation of the provisions of these treaties may not raise difficulties after Brexit.[77] Nevertheless, the validity of the legal commitments remains unaffected. As much as the relationship between the UK (as a non-EU state) and third parties to EU mixed agreements may lead to complexity and unexpected results, the relationship between the EU and the UK after Brexit, under the provisions of mixed agreements to which both will remain contracting parties, will likely yield the most complex legal issues and will require thorough analysis under EU law, general international law (especially the customary international law of treaties as codified by the VCLT and VCLTIO) and the specific provisions of each mixed agreement.

As an example of the type of legal difficulties that may be encountered, let us take a look at article 2(c) of the EEA Agreement, which states:

> The term 'Contracting Parties' means, concerning the Community and the EC member States, the Community and the EC member States, or the Community, *or the EC member States*. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC member States [...].[78]

Would that mean that, as a former EU Member State, the UK was only partially bound – depending on the wording of each provision of the agreement, as article 2(c) suggests – or should that sentence only be

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77 For example, as regards the old "association agreements" (e.g. Information sur la Date d'Entrée en Vigueur de l'Accord Créant une Association entre la Communauté Économique Européene et la Turquie [1964] OJ 217) or more recent "Stabilisation and Association Agreements" (e.g. Stabilisation and Association Agreement between the European Communities and their Member States, of the One Part, and the Republic of Montenegro, of the Other Part [2010] OJ L108/3), it would make little sense for the UK to continue monitoring these countries' accession processes to the EU, since it would no longer be of political or legal concern for the UK.

78 EEA Agreement (n 9) art 2(c).

considered relevant for EU Member States, such that it becomes irrelevant for the post-Brexit UK?

One could argue that, since the competencies transferred to the EEC (and then to the EU) by the accession agreement of 1972 and further treaty modifications are regained by the UK on the day of Brexit (with the exception of any specific provisions in bilateral agreements between the UK and the EU), the post-Brexit UK will possess the full capacities and competencies of a sovereign state under international law, allowing it to implement its commitments under the EEA Agreement. Accordingly, we believe that the reallocation of competences between the EU and the UK as a result of Brexit should not alter the respective commitments of the EU and the UK as contracting parties pursuant to article 2(c) of the EEA Agreement. Close monitoring of the parties' behaviour after Brexit, as well as effects produced on potential beneficiaries of this treaty such as private companies or individuals, will provide precious information for the validation or invalidation of our hypothesis.[79]

These complex legal issues can be envisaged as questions of interpretation of treaty provisions. Unfortunately, Article 31 VCLT, which codifies the basic principles of treaty interpretation, does not seem to be of much help. However, if the application of article 31's principles fails to offer a clear meaning to treaty provisions, or 'leads to a result which is manifestly absurd or unreasonable', article 32 VCLT allows recourse to 'supplementary means of interpretation', including 'the circumstances of the conclusion' of a treaty.[80] The UK's decision to conclude the EEA with EFTA countries was certainly linked to its EU membership. Is that enough, however, to support an interpretation of the treaty under which the UK's status as a party is conditional upon its continued membership in the EU? This is, in our view, beyond the scope of treaty interpretation.

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79 For arguments validating our hypothesis, see Ulrich G Schroeter and Heinrich Nemeczek, 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' (2016) 27 European Business Law Review 921. For contrary arguments, see Dora S Tynes and Elisabeth L Haugsdal, 'In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area' (2016) 41 European Law Review 753.

80 VCLT (n 40) art 32.

If, contrary to our hypothesis, we consider that the UK was bound by the EEA Agreement solely in its former capacity as an EU Member State, within its competences at the time of concluding the mixed agreement,[81] then Brexit will require examination of issues relating to the 'separability of treaty provisions' under article 44 VCLT.[82] The conditions for separability are rather restrictive, making this option impracticable. Furthermore, the allocation of competencies between the EU and its Member States has evolved since the time of the conclusion of EEA Agreement in 199 and, as the CJEU has stated,[83] this is a question of EU law, not international law.

IV. Conclusion

The EU's practice of concluding mixed agreements alongside its Member States – all 29 legal subjects thus being parties to such agreements and accordingly bound in respect of one or more third parties as well as between themselves – has not been properly addressed under the rules of international law. This omission was exemplified by the refusal of the ILC and the international community to consider the EU's practice of concluding mixed agreements in the codification process that produced the VCLTIO.[84] Nevertheless, this practice exists and a very significant number of third states have accepted it through the conclusion of EU mixed agreements. Brexit reveals that this situation may be problematic from the point of view of international law, since this particular form of international agreement does not fit into any of the existing categories codified by general international law.

As long as an EU Member State remains an EU Member State, the problem may adequately be solved by EU law, which establishes a very clear hierarchical relationship between different kinds of legal norms within the EU legal order. EU mixed agreements are thus considered, from the perspective of EU Law, as some kind of secondary legislation binding upon its institutions and Member States. Legal issues regarding the respective obligations of the EU or its Member States under EU law do not affect

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81 TFEU (n 5) art 216(2).

82 VCLT (n 40) art 44.

83 Opinion 1/91 (n 34).

84 See references in n 42 and n 46.

commitments towards third parties. However, when a Member State leaves the EU, as in the case of the UK, the relationship between the EU and that state, as well as the relationship between that state and third state parties to mixed agreements, remains subject solely to international law. This complex situation was envisaged neither by the EU treaties nor by the rules of general international law. It reveals the very strange and original legal relationship that has been developed over time among the EU, its Member States and third parties through the medium of mixed agreements.

One seemingly convenient proposal would be to consider a Member State's participation in mixed agreements to cease the moment it leaves the EU since it acceded to such agreements by virtue of a status it no longer holds. As we have shown, however, this is legally and politically problematic. It would be unsustainable from the point of view of EU law, as it would vitiate the principle of conferral, as stated in articles 4 and 5 TEU.[85] By accepting that the EU signs and implements mixed agreements on their behalf Member States would *de facto* be transferring competencies to the EU, which otherwise authority to do so under the TEU and TFEU.[86] This hypothesis would contravene the quite extensive case-law of the CJEU under the article 218(11) TFEU opinion procedure, the very wording of which implies that the EU must possess the adequate competencies according to the Treaties before entering an international agreement (and not, as would be the case under this hypothesis, merely as a consequence of international agreement's entry into force).

As we have shown in this article, the apparently easy solution in which Brexit simply terminates the UK's participation in mixed agreements could only be achieved legally, under current international law, if EU Member States, as long as they retain such status, do not bind themselves through mixed agreements as subjects of international law (that is, as states). In other words, as long as they remain within the EU, Member States should not be considered sovereign states under international law! This is, in our opinion, evidently not the case since, if this logic was to be followed to its ultimate legal consequence, it would mean that the UK, by leaving the EU, would become a new subject of international law, whose existence would need to be

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85 TEU (n 12) arts 4-5.

86 See Opinion of AG Sharpston (n 57).

recognized by other states as a new sovereign state. It would also mean, among other dubious consequences, that remaining EU Member States would have to relinquish their membership in the UN, since article 4 of the Charter lists statehood as a requirement for UN member states.[87]

All these scenarios are fantasies – far from real legal situations. EU Member States are states under international law, and therefore bound by the treaties they sign and ratify. So how can we solve the legal question regarding the nature of the UK's participation in EU mixed agreements concluded before Brexit? The current legal frameworks, EU and international law, allow no clear answer to that question. What is certain, however, is that the EU and the UK will not be able to deal with the issue of the UK's participation in mixed agreements after Brexit on their own, since third party rights must also be taken into account. According to article 34 of the VCLT,[88] the consent of third states is required to alter their rights under mixed agreements in any way. It will thus be necessary to reconsider each and every mixed agreement on a case-by-case basis to determine the extent of UK's commitments as a state party. We cannot, for example, exclude the possibility that the UK will invoke article 61 VCLT based on the impossibility of performing its obligations under some treaties after Brexit. However, article 61 VCLT deals with the termination of a treaty, not the withdrawal of a party from a multilateral treaty, which again underlines the complexity of the legal issues at hand.

Thus, Brexit creates – beyond political chaos and economic turmoil – a very complex legal situation, not only as regards the future relationship between the UK and the EU beyond the TCA, but also as regards general rules of international law. We therefore conclude that solving these issues will either require significant new developments in EU practice (for example, moving away from mixed agreements) or the recognition of new categories for mixed agreements, both in EU law and international treaty law. This would most likely involve a reassessment of the relevance of the "federal principle", at

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87 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57.

88 VCLT (n 40) art 34.

least for the EU – understood in the broad sense, including its Member States – as an original, composite subject of international law.[89]

[89] For considerations on that specific issue, see Nicolas Levrat, 'The Theoretical Implications of Supranationality and Legitimacy in a Legal Perspective' in Mario Telo and Anne Weyembergh (eds), *The Supranational at Stake?* (Routledge 2019) 26-44.

BOOK REVIEWS

MICHAEL J. TREBILCOCK AND JOEL TRACHTMAN, *ADVANCED INTRODUCTION TO INTERNATIONAL TRADE LAW* (AUDIOBOOK, 2ND EDN, EDWARD ELGAR 2020)

Wojciech Giemza*

Due to the COVID-19 pandemic and several other crises, 2020 was widely considered an *annus horribilis*. It was no different for globalization and international free trade, the pillars of the 'Washington Consensus'.[1] However, the current crisis of the legal and institutional framework of international trade reaches back to a previous 'terrible year' not that long ago – 2016. Donald Trump's election led the United States to pull out from multilateral initiatives like the Transatlantic Trade and Investment Partnership.[2] We have since witnessed the return of bilateralism, a trade war with China[3] and the blocking of appointments to the World Trade Organization's (WTO) Appellate Body (AB).[4]

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1 John Williamson, 'A Short History of the Washington Consensus' (2009) 15 Law and Business Review of the Americas 7, 7–10.

2 Leif Johan Eliasson and Patricia Garcia-Duran, 'Norm Contestation in Modern Trade Agreements: Was the Transatlantic Trade and Investment Partnership a "One-Off"?' in Elisabeth Johansson-Nogués, Martijn C Vlaskamp and Esther Barbé (eds), *European Union Contested* (Springer International 2020) 153.

3 Qinyi Xu and Chuanjing Guan, 'Escalated Policy Space Conflict: Tracing Institutional Contestations Between China and the United States' (2021) 6 Chinese Political Science Review 143.

4 Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22 Journal of International Economic Law 297, 297–300; Ernst-Ulrich Petersmann, 'Rule-of-Law in International Trade and Investments? Between Multilevel Arbitration, Adjudication and "Judicial Overreach"' (2020) EUI Working Paper LAW 2020/10, 5–7 <https://cadmus.eui.eu/bitstream/handle/1814/67990/LAW_2020_10.pdf?sequence=1&isAllowed=y> accessed 3 June 2021.

EJLS 13(2), November 2021, 151-160 doi: 10.2924/EJLS.2021.007

How to grasp the complexity of international trade law in this situation fraught with economic, social and political difficulties? For students, non-specialized scholars, trade entrepreneurs and government officials, the second edition of Michael J. Trebilcock and Joel P. Trachtman's *Advanced Introduction to International Trade Law* comes to the rescue.[5] Both authors are renowned scholars in the field. Their strong backgrounds in 'law and economics' and 'law and development' approaches are evidenced by the frequent references throughout the book to economic contexts, political economy and empirical research. Unusually, the volume has been made available as an audiobook and, in keeping with the interest of the European Journal of Legal Studies in novel forms of scholarly publications,[6] it is this version that I shall review.

To analyze Trebilcock and Trachtman's work, this review will first discuss the content of their book – an indeed introductory description of the key aspects of international trade law, including the economic rationales for international trade and the law that governs it, the international institutional framework and the main areas of regulation within it. Then, it will address the limits of its relevance considering the contemporary crisis of international trade and its institutional framework briefly alluded to above. While the WTO has arguably weathered the worst of this crisis, the world of international trade and the associated legal regime no longer look just like they were described in the volume. Finally, this review will analyze the way in which the volume's publication as an audiobook may affect its reception and scholarly use.

I. CONTENT

The book is divided into 17 chapters that can be grouped into several broader categories. The authors begin with the contextual and institutional setting, introducing the listener to the theory of free trade, the function of trade agreements and political divisions over international trade in Chapter 1 and

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5 Michael J. Trebilcock and Joel Trachtman, *Advanced Introduction to International Trade Law* (audiobook, 2nd edn, Edward Elgar 2020).

6 Olga Ceran and Anna Krisztian, 'Editorial: The "New Normal" in Academia: What COVID-19 Reveals About (Legal) Publishing and Online Scholarly Communication' (2020) 12(2) European Journal of Legal Studies 1.

the structure of the WTO and its dispute settlement mechanism in Chapter 2. As Chapter 2 is most characteristic of the whole book, it is the focus of this review. After the contextual introduction, the book analyzes the key terms and issues of international trade law, including tariffs, standards of treatment, anti-dumping and subsidies (Chapters 3-8) before delving deeper into the particularities of trade in specific sectors like agriculture, services and investment (Chapters 9-12). The last part addresses the policy challenges of international trade law, including its relationships to health and safety, the environment, labor, human rights and economic development (Chapters 13-17). Apart from a new chapter summing up the future challenges for international trade law, the structure of the book is almost identical to the previous edition.[7]

Besides an exhaustive presentation of the basics of international trade law, the authors dedicate some attention to normative, economic and political rationales for measures like anti-dumping duties, which is very enlightening and helpful. The chapters focusing on the key terms and issues of the field, as well as the dedicated chapter on agriculture, deserve particular praise in this regard. There, the authors prove their understanding of both law and economics. The theoretical explanation of free trade in Chapter 1 is a great introduction to the field. The authors display genuine interdisciplinary insight, highly valued and popular in the WTO scholarship,[8] when describing and critiquing the legal mechanisms of international trade. This is visible, for example, in their analysis of the safeguards regime (i.e. rules on suspending or opting out from some concessions or obligations in certain situations) or agricultural exceptionalism (the particular form of protectionism observed in the agricultural sector). However, compared to economic considerations, the historical and political context of the institutional framework as a whole seems to be merely sketched. Overall, the book fails to reflect deeply on historical or political justifications and implications of the institutions of international trade law.

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7 Government procurement has been moved from Chapter 7 to Chapter 5, while Chapter 2 has been slightly extended to cover the general functioning of the WTO institutions as opposed to just dispute settlement.

8 Jürgen Kurtz, 'Recent Books on International Law' (2012) 106 American Journal of International Law 686, 688.

A good example of this limited contextualization is Chapter 2, which describes the institutional framework of the WTO and its dispute settlement mechanism. This chapter illustrates both the best and the worst aspects of the volume. On the positive side, Section 2.3 on dispute resolution is a real high-quality analysis, providing rich historical context and critical evaluation of both the institution and its reform proposals. Case law data on the utilization of the dispute settlement mechanism is furnished to show the quantitative significance of the phenomenon. The most compelling part is the account of the legal interpretation of the WTO rules (section 2.3.5), in which the authors engage with numerous cases to illustrate the variety of approaches taken by the WTO's dispute settlement bodies, especially the Appellate Body. A similar approach is adopted in other parts of the book, always with great results. Overall, the selection, use and understanding of case law is one of the main strengths of the book. The authors provide many examples of recent case law to shed light on contentious interpretative issues of international trade law, which helps engage the listener.

However, as is often the case in legal scholarship,[9] the case law is presented rather uncritically, in a purely legal dimension. Here, the lack of insight into the political or social concerns hidden not only in the legal framework of international trade but also in its legal reasoning is the most visible. On one hand, this may be explained by the introductory nature of the book, which is intended to be 'a short, straightforward account of the basic structure and principles of international trade law'.[10] On the other hand, the authors have both here in section 2.3 and elsewhere proven their skills in supplementing their legal analyses with extra-legal context in a concise yet elucidating way. Disappointingly, the authors seem to miss the broader political context of some institutions while providing abundant context for others.

Part of the problem may stem from the process of updating an existing work for a subsequent edition. It is not difficult to surmise that, in the previous edition, Chapter 2 concerned only the dispute settlement of the WTO, which remains its strongest part. The newly added sections on the institutional structure and treaty-making and decision-making processes of the WTO seem important due to their fundamental role for its functioning.

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9 Ibid 691.

10 Trebilcock and Trachtman (n 5) preface, 1:10.

Yet, little attention is dedicated to them and they are only briefly described without proper context. For instance, only 5 minutes of Chapter 2 of the audiobook (out of 31) and a single general footnote are dedicated to the WTO institutional reform. Although the key regulations are explained, there is no reflection on the reasons for and effects of, for example, the informal consensus requirement for the transformation of the GATT into the WTO or the changing of WTO rules.[11] These concerns are important to the institutional framework, particularly now, in this moment of profound crisis.

On a similar note, the literature referred to in the volume is not vast and, in some chapters, has hardly been updated since the previous edition. For example, in Chapter 3, virtually all references are to WTO cases discussed mainly in section 3.4.2, which is only a sub-section of this very important and otherwise well written chapter. The newly added Chapter 17 provides references to literature only with regard to three of the eleven future challenges it identifies for the international trade system – economic migration, digital trade and security exceptions. In general, it seems that the substance of Chapters 13 to 17, although appropriate for inclusion, could have been structured better to describe more profoundly the challenges that international trade law faces, particularly its relationship with other fields of international law.[12] An engaged listener would expect more robust references in an advanced introduction.

II. CONTEMPORARY RELEVANCE

Though published only in early 2020, the second edition became quickly obsolete in many aspects due to the recent and rapid developments in the subject matter. Ironically, the newly introduced sections, especially on future

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[11] Richard H Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO' (2002) 56 International Organization 339; Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) 17 Journal of International Economic Law 739.

[12] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003). cf the critical review by Trachtman in (2004) 98 American Journal of International Law 855.

challenges, seem perhaps the most outdated. The future now seems even more challenging than expected.

As has been noted in the previous section, while numerous legal issues are discussed in detail with up-to-date case law, others seem to be merely touched upon. A further example of this is the matter of security exceptions (treaty clauses allowing for avoiding other treaty rules when a national security interest is at stake).[13] These clauses are the main way of avoiding treaty obligations and are the first line of defense in any international dispute. As such, this is a contentious issue in international economic law in general,[14] and has proven particularly relevant in international trade law recently in connection with import limitations adopted by the Trump administration.[15] However, it is only addressed briefly in Chapter 17 in an analysis that fails to look into its contemporary salience and the general international law and political considerations bound up with such clauses.

Furthermore, international trade law, despite its arguably strong reliance on multilateralism, is told in this volume only from the one-sided, Western perspective. While the interests, policies and objections of the United States or of the European Union at WTO-level are mentioned, the same cannot be said of other important actors such as China. Most other stakeholders are mentioned merely as dispute parties before the WTO. The need for a more pluralist account of international trade law seems stronger than ever. Recently, we have faced paradigm shifts in the field like bilateral agreements between economic superpowers, including the United States and China. Such changes, noted by the authors, make preferential trade agreements and the involvement of developing countries even more important.

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13 Chao Wang, 'Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review' (2019) 18 Chinese Journal of International Law 695.

14 William W Burke-White and Andreas Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 105; Roger P Alford, 'The Self-Judging WTO Security Exception' [2011] Utah Law Review 697.

15 Petersmann (n 4) 7.

The WTO governance crisis, already clearly visible in previous years, is also only slightly touched upon in the book (sections 2.3.6 and 17.1). Since December 2019, the Appellate Body cannot hear new cases and thus the whole WTO dispute settlement mechanism has stopped working. The WTO fell into an even deeper governance crisis when Roberto Azevedo resigned from his position of Director General a year before his term would have ended and, due to the decision-making gridlock, the election of an interim leader failed. Only in February 2021 was Ngozi Okonjo-Iweala elected to become the new Director General. Now, the WTO stands before the largest organizational and legal challenge in its history.[16] Many elements of the current crisis of the WTO and international trade pointed out in the introduction to this review are only briefly mentioned or even omitted entirely. While the crisis is of a mainly political character, which may to some extent explain its cursory treatment in the volume, its legal effects and potential legal solutions are inevitably relevant for the contemporary situation of international trade law.[17]

Like many things previously perceived as established paradigms, international trade and the law that governs it came to a crossroads in 2020. The COVID-19 pandemic severely crippled international trade in goods and services. In August 2020, the WTO goods trade barometer hit a record low.[18] The comparative advantage theory, the essential foundation for free global trade, taken up early in the volume, has been shaken. The neo-liberal paradigm of the 'Washington Consensus', questioned before, seems to have crumbled.[19] Effects on global trade and politics are expected in both the short

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16 'The WTO Has a New Chief. Is it Time for New Trade Rules Too?' *The Economist* (20 February 2021) <https://www.economist.com/finance-and-economics/2021/02/20/the-wto-has-a-new-chief-is-it-time-for-new-trade-rules-too> accessed 29 February 2021.

17 Pauwelyn, 'WTO Dispute Settlement Post 2019' (n 4).

18 Michael Shields, 'WTO Goods Trade Index Hits Record Law, Detects Some Recovery Signs' (Reuters, 19 August 2020) <https://www.theguardian.pe.ca/business/reuters/wto-goods-trade-indicator-hits-record-low-486866/> accessed 13 September 2020.

19 Harlan Grant Cohen, 'What Is International Trade Law For?' (2019) 113 American Journal of International Law 326.

and long terms, forcing profound changes in global and domestic economies.[20]

States responded to the crisis by intensifying trade limitations, including export bans, additional licensing and authorization requirements. On the other hand, some restrictions have been lifted precisely because of the pandemic, even between the United States and China.[21] Discussion around the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), affecting access to affordable vaccines, have been revived.[22] Of course, the authors could not foresee the global health crisis, but the fact remains that they overlooked many ongoing challenges that were only exacerbated when the pandemic hit.

III. AUDIOBOOK FORMAT

The audiobook is well read by Mark Topping of BBC Radio and produced by StoryTec. Despite the scholarly form of the text, the feeling is pleasant, as the authors present the matter in a very approachable manner, even for a non-expert. Unfortunately, the audiobook does not provide any form of bibliography or index. Thus, the book's otherwise rich substantive contribution suffers from a lack of connection to an extensive, up-to-date body of literature.

The nature of the audiobook is problematic not only with regards to the bibliography but the footnotes themselves. They are simply copied from the printed book and provided in Word files to be downloaded from the publisher's website. They are not referred to in the audiobook itself. Thus, the listener has trouble relating certain propositions to a proper reference. Similar difficulties appear in navigating the content of the audiobook. It is

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20 Lukasz Gruszczynski, 'The COVID-19 Pandemic and International Trade: Temporary Turbulence or Paradigm Shift?' (2020) 11 European Journal of Risk Regulation 337, 337–341.

21 Ibid 339.

22 Ana Santos Rutschman, 'The COVID-19 Vaccine Race: Intellectual Property, Collaboration(s), Nationalism and Misinformation' (2020) 64 Washington University Journal of Law and Policy 22; Ernest Aryeetey and others, 'A Step Backwards in the Fight against Global Vaccine Inequities' (2021) 397 The Lancet 23.

available only as a set of audio files, each track constituting one whole chapter. Each chapter is divided into subchapters of very uneven length, which, in turn, are often also divided further, sometimes even up to three levels deep. Unfortunately, no detailed table of contents is provided, which makes it difficult for the listener to navigate to material on a particular issue. The use of bookmarks (available, for example, when listening with Google Books or iTunes) thus becomes a bare necessity. It seems that modern technologies could have allowed for a more useful and simpler solution.

This being my first encounter with a scholarly audiobook, I found the whole experience underwhelming. While usually audiobooks are listened to while doing something else, in this case the subject requires not only constant attention but also a possibility to take notes. In addition, the audiobook does not seem to be adjusted in any way to the needs of visually impaired listeners, to whom it could provide great assistance. Besides the price, it is hard to find any advantage the audiobook holds over the printed text. All in all, it is just a well-read version of it.

IV. Conclusion

Advanced Introduction to International Trade Law indeed provides great insight into the legal framework of international trade by true experts. It is hardly possible to find a better explanation of such basic concepts like the most favored nation principle or national treatment. Definitively, Chapters 3-9 are the main strength of the book. The use of case law therein is commendable. However, the dominant methodological perspective on rules and cases is quite doctrinal, with some concessions to political economy and 'law and economics' approaches. Due to the rapid developments of 2020, the second edition has to a certain extent quickly become outdated. The additions seem to be superficial while many big-ticket issues, evident even before its publication, are not addressed in sufficient depth. The whole narrative of the volume represents a Western point of view on law, economics and politics. The listener could have expected a more nuanced perspective on the subject accompanied by a vaster and more diverse literature selection. Despite this criticism, it is still one of the best and most approachable pieces introducing the 'spaghetti bowl' of multilateral and bilateral trade bargains between states. The newly introduced audiobook version has its practical downsides

and is definitively not for everyone. Hopefully, technological developments may enable this form of scholarly work to prove much more useful in the future.

EMILIA JUSTYNA POWELL, ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES (OXFORD UNIVERSITY PRESS 2020)

Théo Fournier*

I. INTRODUCTION

In her monograph, Emilia Justyna Powell takes Shari'ah law seriously. As she explains, there is 'pressing need for people, communities, and policymakers to understand the Islamic legal tradition and how it relates to Western notions of legal authority'.[1] Since Islamic law is applied in 29 countries, it must be taken as a reality of international relations. There is a need to dedicate in-depth research to the topic and, in this regard, Powell's work is certainly a milestone.

The question at the core of Powell's work is *What is the attitude of Islamic Law States towards peaceful resolution of conflict?* It is a clear and well-thought-out research question. It calls for an unambiguous definition of Islamic Law States (ILS) – a challenging yet necessary step that the author undertakes in a very acute manner. The research question narrows down the topic to peaceful resolution of conflict, a field of international law which is too often seen as excluding ILS. 'Why would ILS use international instruments to solve their conflicts?', is the question that Powell asks, in essence, in her introduction, the same instruments which have been portrayed as rooted in a long-standing Christian tradition. The reality, as so often when it comes to international relations, is far more complex. This is suggested in the use of 'attitude' in the research question. 'Attitude' is broad enough to incorporate variation, complexity, and nuance. And that is exactly what the author aims to do: deconstructing a series of widespread clichés about ILS. Her objective is to challenge an unitarian vision of ILS that seeks to explain their common

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1 Emilia Justyna Powell, Islamic Law and International Law: Peaceful Resolution of Disputes (Oxford University Press 2020) 286.

rejection of public international law's instruments of resolution of conflict. In this review, I will first describe the content of the book, looking more specifically at the hypothesis, the methodology, and the structure of the argument. I then move to the substantial review of the work to conclude that, despite some shortcuts in the analysis, Powell's work has the great merit of offering a workable definition of ILS and, therefore, to take Shari'ah law seriously.

II. Hypothesis, Methodology, and Structure of the Argument

Powell's starting point is to acknowledge the diversity of ILS. Such diversity, she supposes, should influence their choice between non-confrontational practices and confrontational practices to peacefully settle inter-state disputes. ILS, Powell explains, are a heterogenous community of states. Some states integrate Shari'ah principles into their legal systems more than others. Since Shari'ah law is mostly based on non-confrontational practices, countries in which Shari'ah law prevails should prefer mediation or conciliation for the peaceful resolution of disputes. On the contrary, countries which are more secular, i.e. those in which Shari'ah is not the major legal source, should be more geared towards arbitration and litigation to settle their disputes with other states. The syllogism can be sketched out in the following way:

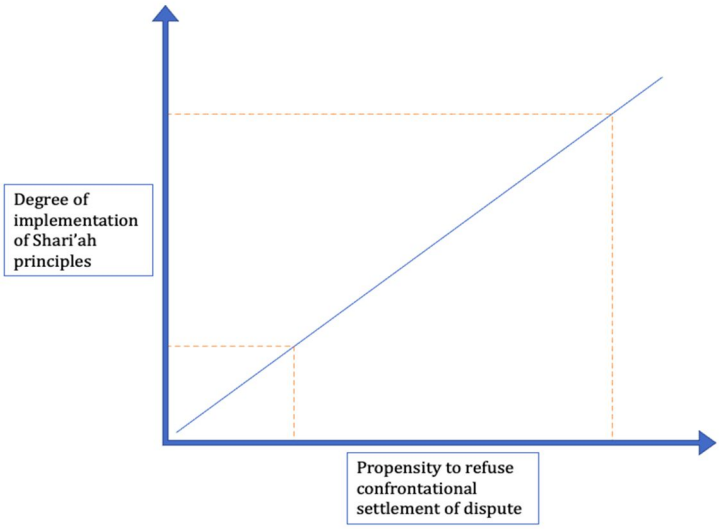

Figure 1: Powell's main hypothesis of research (graph based on reviewer's elaboration)

Powell's ambition is to propose 'a theoretical leap forward in the study of the Islamic milieu'[2] in order to provoke change in Western perceptions of Islam, ranging from academic discussions to political debates.[3] Powell first answers her research question in theoretical terms. She then uses statistical techniques (predictive probabilities) and interviews with judges or Shari'ah law professionals to explore the nexus of Islamic law and international law in a dynamic way, 'one that presents both these legal systems as uniquely rich and vibrant, and as dynamic systems that have changed over time and will continue to evolve'.[4]

The structure of the book reflects an ambition to discuss the attitude of ILS towards peaceful resolution of conflicts in a deliberate and careful manner. Chapter 1 contains all the elements of a good introduction: setting out the relevance of the topic, presentation of the argument, ambition of the work, and methodology. In chapter 2, Powell defines the core concepts of her work: international law and peaceful resolution of conflict, Islamic law, and Islamic Law States. Chapters 3 and 4 should be read, in my opinion, as a single piece. In chapter 3, Powell narrows down the discussion to the similarities between international law and Islamic law. In Chapter 4, she formulates her theory on the preferences of ILS with respect to international conflict management venues. Chapters 5, 6 and 7 are dedicated to quantitative analysis. Powell uses predicted probabilities to determine if there is a systematic way to predict the behavior of ILS when facing an international dispute. She draws on predicted probabilities in three areas: mechanisms used in the context of territorial disputes (chapter 5), attitudes of ILS towards the jurisdiction of the International Court of Justice (ICJ) (chapter 6) and the influence of legal schools and geography on the preferences of ILS (chapter 7). Chapter 8 concludes the book.

III. Taking Islamic Law States and Shari'ah Law Seriously

Islamic Law and International Law is undoubtedly a theoretical leap forward in the study of the Islamic milieu. Shari'ah law is a topic known to cause controversy, and that is prone to fall victim to over-simplification. Those who

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2 Ibid 17.

3 Ibid 285-286.

4 Ibid 16.

know more about the topic, either because of academic interest or by virtue of professional experience, will have encountered the uneasiness in the eyes of their interlocutor when the word 'Shari'ah' is mentioned. Terrorist attacks, the Islamic State of Iraq and the Levant, or violations of basic human rights in some Islamic Law States can certainly explain gross misconceptions of what Shari'ah Law is actually about, even amongst social science scholars.

Powell is not one of them. She demonstrates a tremendous knowledge of Islamic law based on an impressive and diverse bibliography. Even more important is her capacity to tackle the complexity of Islamic law without falling in the trap of over-simplification. Powell always maintains a high level of clarity and pedagogy when she discusses topics such as the secularization of Islamic law, the role of scholars and jurisprudence, the Islamic conception of justice and peaceful resolution of disputes, as well as Islamic legal schools and geographic diversity of ILS.[5]

Powell's definition of ILS can be considered a benchmark for future studies on the topic. She defines an ILS as a 'state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law and where Muslims constitute at least 50% of the population'.[6]

She rightly looks at the degree of incorporation of Islamic law in a given legal system: Shari'ah law can no longer be analysed as a sole expression of natural law. It has been secularized worldwide, either in constitutions or in legal codes. A consequence of this secularization is that trends exist across ILS regarding the degree of incorporation of Shari'ah principles into legal instruments. The identification of these trends is certainly a good starting point for a comparative study on ILS.

The main added value of Powell's definition is the use of precise criteria of identification.[7] She first identifies six criteria to evaluate the degree of incorporation of Islamic law in the legal system: (1) the mention of Islam or Shari'ah in the constitution, (2) the oath taken by the judiciary and other institutions, (3) the requirement of having a Muslim head of state, (4) the supremacy of Shari'ah, (5) a Shari'ah-based education, and (6) the importance

5 Ibid respectively 37-38, 112-115, 121-123 and 140-147, 241-255.

6 Ibid 42.

7 Ibid 58-79.

of customary law. She also identifies another set of five criteria which prove the secularisation of an ILS: (1) the mention of the rule-of-law, (2) the importance given to supreme court and appeal mechanisms, (3) the recognition of secular courts, (4) the presence of women in the judiciary, and (5) a reference to international peaceful resolution of disputes.

One can question the choice of some criteria – for example, why is a reference to peaceful resolution of disputes in the constitution necessarily a proof of secularisation? Similarly, the population criterion of the definition of ILS could be fine-tuned: legal norms apply first and foremost on a territory, irrespective of the composition of the population. For example, the prohibition of alcohol in Saudi Arabia applies also to the non-Muslim population. This is also the case for the wearing of a headscarf and other Islamic legal norms. As any other legal system, territorial jurisdiction of Shari'ah law takes precedence over personal jurisdiction.[8] For this reason, I do not think that the population criterion is relevant to define an ILS.

Yet, criticism of Powell's effort of classification cannot take away from the main contribution of her book. The main added value is to define an 'ideal type' ILS. It will be up to future research to use, challenge, and eventually refine or improve on her definition and corresponding criteria.

IV. Are Predicted Probabilities the Best Approach to Theory-Testing?

Islamic Law and International Law is situated at the crossroads of law and political sciences. As the author explains on the very last page of her work, 'in order to generate insights into how the Islamic milieu behaves toward institutionalized international law, one must draw equally on the international relations literature and the international law literature'.[9]

The book will be of interest to both international relations and international law scholars. It serves as a good reminder for the former that international relations are not exclusively political. The essence of law is to influence

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8 Personal jurisdiction can be relevant in some cases. For example, in the Philippines, Islamic legal norms apply to the Muslim population only. As a consequence, only Muslim citizens can divorce.

9 Powell (n 1) 291.

political choices. Therefore, international law shapes many decisions taken by international actors. On the other hand, *Islamic Law and International Law* reminds international law scholars that the world of international relations is not a coherent set of binding norms, and that despite the effort of the post-WWII international community to legalize international relations, ultimately some decisions remain political.

Emilia Justyna Powell's approach is courageous. Looking at Islamic Law States' behaviour towards international peaceful resolution of conflict is a complex issue and she embraces this complexity. Advocates of positivism (in international law) and of realism (in international relations) will probably find a lot to criticise in her work, but wrongfully so in my opinion: to understand today's world, especially inter-state relations, social science researchers must go beyond their specialty and embrace multi-disciplinarity. That is why her approach must be welcomed and encouraged.

However, while chapters 1 to 4 are models of multi-disciplinary work, I have some serious concerns about chapters 5, 6, and 7. In these chapters, Powell abandons multi-disciplinarity in favour of an exclusively quantitative approach. She uses the method of predicted probabilities to test her theoretical syllogism. The objective of predicted probabilities is to anticipate the probability of an event by using calculations based on the data available. In Powell's work, the objective is to predict the attitude of ILS towards peaceful settlement of international disputes. She conducts a multinomial logistic regression for the predicted behavior of ILS regarding peaceful resolution of disputes (chapter 5). She does a negative binomial regression and logistic regression for the predicted acceptance by ILS of the ICJ's compromissory jurisdiction (chapter 6), as well as to discuss the influence of regions and the Islamic school of jurisprudence (chapter 7).

In chapter 5, Powell conducts a multinomial logistic regression between ILS and non-ILS attempts at arbitration and adjudication from 1945 to 2012 and descriptive statistics on Islamic law and secular legal features. In chapter 6, she performs a negative binomial regression and logistic regression to predict the attitude of ILS regarding the ICJ's compulsory and compromissory jurisdictions. In chapter 7, she links the number and type of cases brought by a given ILS to the ICJ from 1945 to 2014 to its geographic location and the dominant Islamic school of jurisprudence.

The first question a lawyer might ask is: what do predicted probabilities actually prove? One cannot rely exclusively on predictions to draw conclusions on a topic which is so country-dependent. I do not reject the use of quantitative research per se. As Ran Hirschl explains, quantitative analysis in comparative law can be helpful to identify trends or, indeed, probabilities. Yet, to avoid the 'so what' question which one is tempted to ask Powell regarding most of her findings, a quantitative analysis should be paired with 'a detailed examination of crucial or indicative cases'.[10] Without a closer consideration of individual case studies, it is impossible to conclude if Powell's probabilities are accurate or not.

A second objection concerns the internal logic of chapters 5 to 7. These chapters are written like journal articles.[11] Each contains a very long conceptual part, followed by a presentation of the methodology and the quantitative analysis. In a monograph, such a structure leads to repetition, for example regarding the methodology or the theoretical assumptions. It also forces the reader to digest a lot of information before the presentation of the results. Because of that, the structure of *Islamic Law and International Law* loses its consistency.

Whereas chapters 1 to 4 were logically articulated, chapters 5, 6, and 7 seem to be separated from the rest of the monograph. The articulation of the themes that connect these chapters lacks consistency. In chapter 5 and 6, Powell tries to assess whether the degree of incorporation of Shari'ah Law in ILS influences, first, their choice of mechanism to settle territorial disputes (chapter 5), and second, their recognition of the jurisdiction of the International Court of Justice (chapter 6). Yet, because of the general competence of the ICJ, 15 out of the 29 ILS cases before the Court concerned territorial disputes. The structure of chapters 5 and 6 lacks a fine-tuned logic. It would perhaps have been better to reverse the order of these two chapters

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10 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (1st edn, Oxford University Press 2014) 277.

11 In fact, both chapters 5 and 6 were published separately prior to the publication of the book. Chapter 5 was published as Emilia Justyna Powell, 'Islamic Law States and Peaceful Resolution of Territorial Disputes' (2015) 69(4) International Organization 777. Chapter 6 was published as Emilia Justyna Powell, 'Islamic Law States and the International Court of Justice' (2013) 50(2) Journal of Peace Research 203.

so as to start from a more general claim (recognition of the ICJ) to subsequently move to a more specific one (territorial disputes).

I have a similar objection regarding the way Powell discusses the influence of legal schools and geographic areas on ILS preferences for resolution of conflict (chapter 7). These two elements are treated marginally whereas they could or should have been the starting point of the comparison. Imagine if, for instance, Qatar and Saudi Arabia had to settle an international dispute. Legal schools and geography would certainly be a greater factor of influence than the level of incorporation of Shari'ah law in their respective legal orders. It is surprising that an international relations scholar such as Powell does not pay much attention to these factors. The author could have chosen to use geography and legal schools as a first filter for the comparison and then to apply more specific criteria such as recognition of the ICJ or territorial disputes. It would have given the reader an interesting mapping of the tendencies of ILS towards peaceful resolution mechanisms as well as a range of case studies to test the predictive probabilities.

Finally, chapters 5 to 7 give the impression that the author uses the flexibility of quantitative methodology to confirm rather than to confront her hypotheses. Powell claims to use predicted probabilities to test her hypothesis of research, i.e. whether the degree of secularization of Shari'ah law influences the choice of peaceful resolution mechanisms. The first part of her work sets up the framework for theory-testing and justifies her approach. This approach, until the end of chapter 4, is deductive: predicted probabilities should validate or invalidate her theoretical assumption. Yet, throughout chapters 5 to 7, inductive research progressively replaces deductive research. She seems to be using predicted probabilities to feed her theoretical assumption, giving a feeling of circular reasoning and confirmation bias. Chapter 7 is symptomatic of this. When looking at the potential influence of legal schools on the attitude of ILS, her hypothesis is that there is no such influence ... and the predictive probabilities prove her right.[12]

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[12] She first asks: 'Do Islamic schools of jurisprudence matter in how ILS view international conflict management methods?', to then argue that '[t]here is no inherent reason why geographic regions or association with a particular legal school should travel together with the position of ILS on the secular law–Islamic

V. CONCLUSION – TWO OBJECTIVES AND AN INCENTIVE TO DO MORE

Islamic Law and International Law has both a scientific and a political objective. The scientific objective is to prove that the degree of incorporation of Shari'ah law influences Islamic Law States' attitudes towards peaceful resolution of conflicts. Despite the shortcuts in the quantitative methodology, Powell has written a very solid piece of theoretical work. The author comes up with a workable definition of ILS and a series of criteria which will certainly be used for further research on the topic.

Her general hypothesis of a cross-influence between the legal systems of ILS and international law also has the potential to inspire further research. Her work is limited to peaceful resolution of conflict, but it paves the way for a full range of large-n comparative studies. One can think of the attitude of ILS towards Islamic banking: is it a purely economic phenomenon or could we explain it by using Powell's theory of degrees of secularization? A similar approach could also suit a quantitative analysis on reservations to treaties. Popular opinion often presents ILS as a unified block, for example with regard to the recognition of Israel, but perhaps there is more to that if one looks at objective factors such as degrees of secularization, geography or the Islamic school of thought?

The political objective of the monograph is to deconstruct widely diffused negative views of Islam and its relationship with Western standards of justice. This is certainly the biggest added value of Powell's work: to promote tolerance towards a vision of law which rules over dozens of millions of persons, and to prove that similarities between the Islamic world and the Western world exist. Powell makes this point in the most beautiful and well-written way:

> (anti-Islam) rhetoric, seemingly embraced by several state leaders, is inciting an atmosphere of intolerance [...] This book makes the case that the Islamic legal tradition is not ab initio, across the board, in fundamental contradiction with international law. In fact, these two legal systems share more

law scale. Perhaps these three factors affect ILS' preferences in a non-corresponding manner', and finally concludes that '[t]hough it comes as no surprise that Islamic schools of jurisprudence have no palpable impact on ILS' views of international conflict management'. Powell (n 1) 240 and 271 respectively.

similarities than they are given credit for by the policy word, as well as by a large portion of the scholarship. This key message, which is in itself a crucial policy point, might be somewhat unanticipated news.[13]

[13] Powell (n 1) 286.