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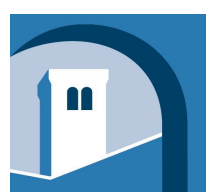
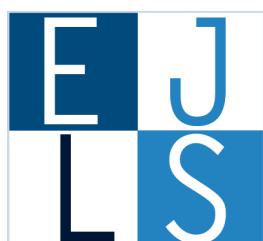
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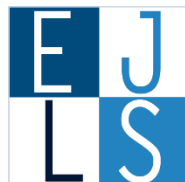
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EDITORIAL

CHANGING TIMES

Anna Krisztian^{*}

The distinguished readership of the European Journal of Legal Studies will know that *changing times* is a constant buzz phrase in the life of this Journal, and the title of the present Editorial was thus not only inspired by recent proposals to end seasonal *time change* in the European Union¹, but it foreshadows significant developments for the EJLS. For one thing, it is inherent to the functioning of the Journal that the composition of the Executive Board changes frequently. This is due to the fact that the EJLS is run entirely by researchers at the Law Department of the European University Institute, who upon completion of their four-year doctorate move on to new challenges and pass the torch to the next generation of enthusiastic young academics to carry on with the worthy task of managing the Journal.

For this reason, our Autumn 2018 Issue is presented to you by a partially altered Executive Board, with four new Heads-of-Section – Irene Otero Fernández (European Law), Nastazja Potocka-Sionek (Comparative Law), Yussef Al Tamimi (Legal Theory), Mike Videler (International Law) – as well as a new Managing Editor, Olga Ceran, who follows in the footsteps of the author of this

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¹ See European Commission Proposal of 12 September 2018 for a Directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC (COM(2018) 639 final, 2018/0332 (COD)), which followed an European Union-wide public consultation on summertime arrangements organised by the European Commission in the period from 4 July 2018 to 16 August 2018. See the website of the European Commission at <https://ec.europa.eu/info/consultations/2018-summertime-arrangements_en> last accessed 20 December 2018.

Editorial, Anna Krisztian, the Journal's Editor-in-Chief since October 2018, succeeding in turn Rebecca Mignot-Mahdavi. The EJLS team has been furthermore reinforced by five new junior in-house editors who joined us recently, namely Grigorios Bacharis, Léon Edward Dijkman, Jaka Kukavica, Svitlana Lebedenko and Sunita Tripathy. Needless to say, that aside from the outstanding individuals mentioned above, much credit goes also to our 'old' Executive Board members and editors unnamed here, without whose dedication this Autumn Issue could not have come into existence. I would hereby like to take the opportunity to thank all of them for their tireless efforts to constantly improve the EJLS.

The European Journal of Legal Studies is however also facing a change of a different kind. Eleven years after the launch of the Journal we feel, in light of developments elsewhere in the academic publishing world, that the time has come to update the EJLS' publication policy as regards the frequency and format of our publications. We will remain committed to providing an open access online journal striving for academic excellence, but as of 2019 we will allow our authors to reach their audience much faster than before by introducing an 'Online First' policy. This will mean in practice that articles will be published online as soon as they are accepted for publication following double-blind peer review, ahead of the publication of our next regular issue. This is, on the one hand, a significant development since it modifies a fundamental aspect of *when* and *how* we publish. On the other hand, this is a minor change as we will continue to deliver excellent scholarly articles to our readership and thus *what* we publish will remain the same. For upcoming details of our modernised publication policy please keep a close eye on the website of the EJLS at ejls.eui.eu.

One thing, however, will not change: we will continue to keep our promises. Therefore, as announced earlier this year, articles of young scholars published in our Autumn 2018 and Spring 2019 Issues will be considered for the 'Best EJLS New Voices Prize' and for the 'Best EJLS Young Scholars General Article Prize', both of which will be awarded by a jury of four professors at the Law Department of the European University Institute following the publication of the Spring 2019 Issue. The attentive reader will notice though that the present issue does not include any New Voices articles. Thus we would encourage young scholars

who are up for a challenge to make their voice heard in 2019 by taking advantage of this unique and innovative publishing format.

In this Issue

The EJLS Autumn 2018 Issue features four outstanding contributions written by legal scholars discussing topical questions deserving of the attention of academics and practitioners alike. Interestingly, each article falls within a distinct section of the Journal, so the reader will find all four EJLS sections (and thus four different areas of law) represented: European law, international law, comparative law, and legal theory. This substantive categorisation is of course in no way a strict one; the presented articles approach their complex objects of inquiry from multimethodological perspectives.

The present issue kicks off with *Stefaan van der Jeught's* intriguing examination of how multilingual European Union law can be considered a double-edged sword from the perspective of legal certainty, given that multilingualism may both enhance and reduce legal certainty for individuals at the same time. Van der Jeught concludes, based on observed national practices – or, put better, the lack of such practices – particularly in the Netherlands, that the interpretation and application of EU law by national courts should entail the comparison of different language versions of disputed Union legislation as a default step.

This season's EJLS publication continues with an engaging exercise of weighing human rights against the law on international carriage by air by *Lalin Kovudhikulrungsri*. Following a comparative analysis of case law in three different jurisdictions (the United Kingdom, the United States and Canada), as well as the application of the international rules of treaty interpretation, Kovudhikulrungsri comes to the conclusion that human rights are susceptible to be outweighed by the law on international carriage by air as a consequence of the exclusivity principle enshrined in the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 and in its predecessor, the Warsaw Convention of 1929.

The third article in this Issue presents *Ilaria Kutufà's* comparative scrutiny of the phenomenon of financial distress of individual debtors. Kutufà's point of

departure is the fact that, depending on whether the question of over-indebtedness is seen as a social problem or a market failure, welfare state and liberal regulatory models can be distinguished. The comparison of different jurisdictions allows for the identification of common rules that could in turn contribute to the harmonisation of the field at European Union level. The author argues that in certain countries, such as Italy, where the currently applicable model is of a hybrid nature, the legislation is subject to reflection by legislators with a view to possible future amendments.

Our list of General Articles concludes with *Laura M. Henderson's* exquisite piece on iterability and decision in judicial decision-making. Henderson discusses judges' discretion and responsibility concerning subversive legal interpretations and to illustrate her point she draws on the post-9/11 legal discourse on terrorism as well as the related seminal case of *Hamdi v. Rumsfeld* of the Supreme Court of the United States of America. The author applies Derrida's and Dworkin's theories to provide guidance to judges in their participatory struggle.

Last but not least allow me to draw your attention to an excellent review written by Timothy Jacob-Owens of *The Oxford Handbook of Citizenship* edited by Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink, and published by Oxford University Press in August 2017. The concept of citizenship, as Jacob-Owens observes, has witnessed a 'renaissance' in academic literature in the last decades and the issue could not be more topical than in today's turbulent times in Europe and elsewhere affected by Brexit, migration, terrorism and other challenges posed by globalisation. The succinct and stimulating review of selected book chapters by Jacob-Owens will no doubt awaken the interest of EJLS readers in *The Oxford Handbook of Citizenship*.

Enjoy your reading and happy holidays on behalf of the entire EJLS team!

CURRENT PRACTICES WITH REGARD TO THE INTERPRETATION OF MULTILINGUAL EU LAW: HOW TO DEAL WITH DIVERGING LANGUAGE VERSIONS?

Stefaan van der Jeught*

European Union (EU) law is equally authentic in 24 language versions. While this multilingualism enhances legal certainty by enabling individuals to ascertain their rights and duties under EU law in their own language, it paradoxically also reduces legal certainty, as it entails that full trust may not be placed in any single language version of EU law. Indeed, according to the settled case law of the European Court of Justice (ECJ), the true meaning of EU law is to be established by means of a purposive/systematic interpretation in the light of all language versions. On the basis of court practices in the Netherlands, this article explores if, and to what extent, national judges take into account the multilingual aspect of EU law. It is assessed in that regard whether current practices raise issues of legal certainty, in particular in case of diverging language versions. It is argued that, in contrast to apparent current practices, language comparison should be a default step in the interpretation and application of EU law, as otherwise discrepancies between language versions of EU law may remain unnoticed. Moreover, national courts should refer such discrepancies to the ECJ. Lastly, national courts should use their margin of appreciation to attenuate any adverse effects for individuals who acted on the basis of a diverging language version.

Keywords: EU law, multilingual law, equal authenticity, discrepancies, legal certainty, legality

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I. INTRODUCTION

European Union (EU) law is equally authentic in 24 language versions. While this multilingualism enhances legal certainty by enabling individuals to ascertain their rights and duties under EU law in their own language, it paradoxically also reduces legal certainty, as it entails that full trust may not be placed in any single language version of EU law. Indeed, according to the settled case law of the European Court of Justice (ECJ),¹ EU law must be interpreted in a uniform way and the true meaning of EU law is to be established by means of a purposive/systematic interpretation in the light of all language versions. In recent years, this method of interpretation has increasingly attracted scholarly attention.² In this context, most authors

¹ In this article, references to the ECJ are to the Court of Justice as part of the Court of Justice of the European Union (CJEU) and therefore do not refer to the General Court or the CJEU as a whole.

² In the more distant past, legal issues linked to multilingualism received little attention (see Jacques Ziller, 'Multilingualism and its Consequences in European

focus their attention on the issue of legal certainty at EU level.³ Considerably less consideration has been given to the practices of national courts when

Union Law' in Hermann-Josef Blanke, Pedro Cruz Villalón, Tonio Klein and Jacques Ziller (eds), *Common European Legal Thinking – Essays in Honour of Albrecht Weber* (Springer 2015) 437-438; Anne Lise Kjær and Silvia Adamo, 'Linguistic Diversity and European Democracy' in Anne Lise Kjær and Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011) 1; see on the issue of multilingual interpretation inter alia Cornelis J. W. Baaij, 'The Significance of Legal Translation for Legal Harmonization' in Cornelis J.W. Baaij (ed), *The Role of Legal Translation in Legal Harmonization* (Wolters Kluwer 2012) 1-24; Cornelis J.W. Baaij, 'Fifty Years of Multilingual Interpretation in the European Union' in Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 217-231; Joxerramon Bengoetxea Caballero, 'Multilingual and Multicultural Legal Reasoning: the European Court of Justice' in Kjær and Adamo (n 2) 97-122; Mattias Derlén, *Multilingual Interpretation of European Union Law* (Wolters Kluwer 2009); Lucie Pacho Aljanati, *The Court of Justice of the European Union's Case Law on Linguistic Divergences (2007-2013): Interpretation Criteria and Implications for the Translation of EU Legislation (PhD Thesis)*, Université de Genève, 2015, <<https://archive-ouverte.unige.ch/unige:76529>> accessed 9 August 2018; Barbara Pozzo, 'L'interpretazione della Corte del Lussemburgo del testo multilingue: una rassegna giurisprudenziale' in Elena Ioriatti Ferrari (ed), *Interpretazione e traduzione del diritto* (CEDAM 2008) 73-112; Karen McAuliffe, 'Language and Law in the European Union: the Multilingual Jurisprudence of the ECJ' in Tiersma and Solan (n 2) 200-216; Christoph Sobotta, 'Die Mehrsprachigkeit als Herausforderung und Chance bei der Auslegung des Unionsrechts' (2015) *Zeitschrift für Europäische Rechtslinguistik*, <<http://www.zerl.uni-koeln.de/christoph-sobotta/2015/mehrsprachigkeit-unionsrecht>> accessed 9 August 2018.

³ See inter alia Elina Paunio, *Legal certainty in Multilingual EU law, Language discourse and Reasoning at the European Court of Justice* (Ashgate 2013); Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Journal* 1469-1493; Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (2013) *International Journal of Law, Language and Discourse* 1-29; Theodor Schilling, 'Beyond Multilingualism: on Different Approaches to the Handling of Diverging Language Versions of a Community law' (2010) *European Law Journal* 47-66; Jérémie Van Meerbeeck, 'The Principle of Legal certainty in the Case Law of the European

dealing with multilingual issues. As Bobek aptly remarks, this topic has largely remained 'beyond the textbooks'.⁴ Yet, as national courts play a pivotal role in the interpretation and application of EU law, the methods they use seem well worth investigating in all EU Member States. In that regard, the most comprehensive scholarly study is that of Derlén who has assessed the issue in Denmark, England and Germany.⁵ This paper supplements the available data by examining current court practices in the Netherlands. The purpose of this paper is, however, broader. In Section II, the current state of affairs regarding the interpretation of multilingual EU law will be discussed on the basis of case law of the ECJ. In Section III, current practices in national courts with regard to multilingual interpretation will be explored. In Section IV, the paper focuses on points of concern in current practices, such as the extent to which linguistic discrepancies may remain unnoticed by national judges and whether issues which are detected are, as a general rule, referred to the ECJ by means of a request for a preliminary ruling. Another point of concern is the possible lack of predictability and foreseeability of multilingual norms (in case of discrepancies between language versions). Section V explores how the rights of individuals could be enhanced in that regard. It will be argued that national courts should use their margin of appreciation to attenuate any adverse effects which may arise for individuals

Court of Justice: From Certainty to Trust' (2016) *European Current Law (Yearbook)* 137-148.

⁴ Michal Bobek, 'The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks' in Kjær and Adamo (n 2) 123-142.

⁵ Derlén (n 2) discusses a total of 186 cases in which one or more foreign language versions have been used in the countries at issue. As to the United Kingdom, it is important to note that his survey is limited to England; see also Mattias Derlén, 'In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union law in National Courts' in Kjær and Adamo (n 2) 143-166; Mattias Derlén, 'A Single Text or a Single Meaning: Multilingual Interpretation of EU legislation and CJEU Case Law in National Courts' in Susan Šarčević (ed), *Language and Culture in EU law: Multidisciplinary Perspectives* (Ashgate 2015) 53-72.

who acted, in good faith, on the basis of a diverging language version of EU law.

II. INTERPRETATION OF MULTILINGUAL EU LAW: THE *STATUS QUAESTIONIS*

1. *Discrepancies between Language Versions*

EU primary law is equally authentic in 24 languages.⁶ According to ECJ case law,⁷ the same is true of EU secondary law.⁸ Equal authenticity, a safeguard for legal certainty as it enables the addressees of the law to ascertain their rights and duties in their own language, may, however, rather paradoxically, also lead to interpretation disputes in case of alleged or real linguistic discrepancies between the language versions. In EU law, various scenarios may be discerned in this regard: discrepancies may occur between various versions of primary or secondary law, as well as, in the case of directives,

⁶ Art 55 Treaty on the European Union (TEU) and art 358 Treaty on the Functioning of the European Union (TFEU).

⁷ ECJ, case 283/81 *CILFIT*, EU:C:1982:335, para 18. It should be noted that Regulation 1/1958, which lays down the language regime of EU institutions, stipulates in its article 4 that regulations and other documents of general application must be drafted in the EU official languages. It does, however, not explicitly grant equal authenticity to the language versions of secondary EU law (Council Regulation No 1/1958 determining the languages to be used by the European Economic Community, *OJ* English special edition: Series I Volume 1952-1958, 59 (lastly amended by Council Regulation (EU) No 517/2013 of 13 May 2013, *OJ* L 158/1)).

⁸ Irish, a Treaty language since the accession of Ireland in 1973, became an EU official language only in 2005. However, a transitional derogation is in force (until 2022): only regulations adopted jointly by the European Parliament and the Council are translated in Irish (Council Regulation (EU, Euratom) 2015/2264 of 3 December 2015 extending and phasing out the temporary derogation measures (...) introduced by Regulation (EC) No 920/2005, *OJ* L 322/1). A similar transitional derogation applied to the Maltese language until 1 May 2007 (Council Regulation (EC) No 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, *OJ* L 169/1).

between a language version of a directive and the norm transposing into national law that directive in the same language.

Such discrepancies may be either textual or conceptual.⁹ Textual divergences include legislative drafting issues¹⁰ or, in the case of multilingual EU law, translation errors, which may give rise to structural-grammatical differences (punctuation, conjunctions, omissions or additions, etc.).¹¹ Conceptual or semantic divergences, on the other hand, concern the use of terms. For example, one language version might contain a polysemous term or a term with a more restrictive meaning or there may be a lack of consistency in the use of terms (e.g. different terms are used in one language version whereas in other languages one and the same term covers the concept at issue).¹² In a more general way, these forms of conceptual indeterminacy in a given language may be described as 'vagueness', or 'ambiguity'.¹³ The conceptual incongruity may be the result of legislative or translation errors, but may also simply be unavoidable in multilingual law, namely where there is a lack of equivalence between corresponding legal concepts in different legal systems.¹⁴ Furthermore, seemingly identical concepts may be incongruous not only between different national legal cultures, but also between national law and EU law.¹⁵

⁹ See, in that regard, Pachó (n 2) 124, 136, 236 et seq.

¹⁰ Lawrence Solan, 'Linguistic Issues in Statutory Interpretation' in Tiersma and Solan (n 2) 96 et seq.

¹¹ Pachó (n 2) 124, 136, 236 et seq; Aleksander Peczenik, *On Law and Reason* (Kluwer Academic Publishers 1989) 24.

¹² Pachó, (n 2) 124, 136, 236 et seq.

¹³ An expression is ambiguous if it has multiple meanings (e.g. a bank may be a river bank or a commercial bank). It is vague if the definition of the concept itself is not clear (e.g. what are 'undue' conditions?). See Peczenik (n 11) 21 and Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Tiersma and Solan (n 2) 129.

¹⁴ Susan Šarčević, 'Challenges to the Legal Translator' in Tiersma and Solan (n 2) 194; Baaij (n 2) 225.

¹⁵ Joël Rideau, 'Justice et langues dans l'Union européenne' in Cristina Mauro and Francesca Ruggieri (eds), *Droit pénal, langue et Union européenne* (Bruylant 2013) 41; Esther van Schagen, 'More Consistency and Legal Certainty in the Private Law

2. Case Law of the ECJ

There is extensive case law of the ECJ on the issue of linguistic discrepancies between language versions of EU law.¹⁶ The Court first established its position half a century ago, when it was asked for the first time to rule on this issue.¹⁷ Since then, the ECJ uses a more or less standardized formula whenever a linguistic discrepancy arises and consistently recalls that 'provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part'.¹⁸ In addition, in

Acquis: a Plea for Better Justification for the Harmonization of Private Law' (2012) Maastricht Journal of European and Comparative Law 56. See also ECJ, case 283/81 *CILFIT*, EU:C:1982:335, para 19: 'It must also be borne in mind that even where the different language versions are entirely in accord with one another, Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.'

¹⁶ See the following footnotes, in particular n 18. For overviews of case law, see Baaij (n 2) 221 et seq; Bengoetxea Caballero (n 2) 97-122; Derlén (n 2) 43 et seq; Mc Auliffe (n 2) 200-216; Pacho (n 2) 136 et seq; Pozzo (n 2) 73-112; Šarčević (n 3) 13; Schilling (n 3) 55 et seq; Stefaan van der Jeught, *EU Language Law* (Europa Law Publishing 2015) 127 et seq.

¹⁷ ECJ, case 19/67 *Van der Vecht* EU:C:1967:49, 354.

¹⁸ Eg *ex pluribus* ECJ, case 29/26 *Erich Stauder v City of Ulm, Sozialamt* ECLI:EU:C:1969:57, para 3; ECJ, case 30/77 *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172, para 14; ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 18; ECJ, case C-404/16 *Lombard Ingotlan Lizing* EU:C:2017:759, para 21; ECJ, case C-48/16 *ERGO Poist'ovňa* EU:C:2017:377, para 37; ECJ, joined cases C-443/14, *Ibrahim Alo* and C-444/14, *Amira Osso* EU:C:2016:127, para 27; ECJ, case C-74/13 *GSV* EU:C:2014:243, para 27; ECJ, case C-558/11 *Kurcums Metal* EU:C:2012:721, para 48. Baaij has identified a total of 30 judgments in the ECJ case law in which this stock phrase is used (Baaij (n 2), 218).

its landmark *CILFIT* judgment, the ECJ made it clear that this obligation also extends to national courts when applying and interpreting EU law.¹⁹

The standard formula seems to give the ECJ quite some leeway to assess cases of discrepancy in order to find adequate solutions and provide for a uniform interpretation of all the language versions. To achieve that aim, the ECJ may use a literal interpretation method (comparing and reconciling the wording of different language versions) or a teleological-systematic method (reasoning based on the general scheme and the purpose of the rules at issue).²⁰ One method does not exclude the other: both may be combined in one and the same interpretation process for a given provision.²¹ According to Baaij, the literal method is the prevailing one, in particular in case of translation errors.²² Moreover, when using the literal method, the ECJ may base its interpretation on the 'majority of languages' or, on the contrary, refer to the 'clarity' argument, i.e. favour an interpretation on the basis of one or more clear language versions.²³ On the other hand, the ECJ does not generally compare all language versions, at least not explicitly.²⁴ Although the ECJ does sometimes implicitly refer to all the language versions of the provision(s) at issue,²⁵ the most commonly used technique is, in current practice, that of a limited linguistic comparison whereby the provisions in the language of the case (which have given rise to the linguistic issue in the first place) are

¹⁹ ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 18.

²⁰ See Pacho (n 2) 326; Derlén (n 2) 43 et seq.

²¹ Solan argues, as to court practices in the US, that the categorical disagreement between purposive and literal interpretation is more a matter of degree. According to him, it's all about 'balancing the language, intent and broader goals of the legislation to produce an interpretation that is simultaneously as faithful as possible to all three considerations' (Lawrence Solan, 'Linguistic Issues in Statutory Interpretation' in Tiersma and Solan (n 2) 87-88).

²² Baaij (n 2) 221, 229.

²³ Ibid.

²⁴ Sobotta (n 2) 18. It may be that a more extensive comparison is performed in internal discussions, see Rideau (n 15) 41.

²⁵ Eg ECJ, case C-168/14 *Grupo Itelevesa* EU:C:2015:685, para 42.

compared with a number of other language versions of the same provisions.²⁶ In practice, these reference languages are most often widely-known languages.²⁷ Other languages are sometimes included in the comparison, but there is no clear predictable pattern.²⁸

Furthermore, in some of its case law as well as in the standardized formula used when dealing with linguistic discrepancies, in particular the phrase '[w]here there is divergence between the various language versions of an EU legislative text', the ECJ seems to suggest that the duty to consult other language versions of EU law is limited to cases in which there are reasons to question the accuracy of one language version.²⁹ In the same vein, an assessment of the ECJ case law by Baaij seems to indicate that language comparison is not necessarily a default step in the ECJ's own interpretation process, thus suggesting that it compares languages only when in doubt.³⁰ The

²⁶ Eg ECJ, cases C-52/13 *Posteshop* EU:C:2014:150 para 20; C-46/15 *Ambisig* EU:C:2016:530, para 47; C-74/13 *GSV* EU:C:2014:243, para 28.

²⁷ In a reference period from 1.1.2012 to 31.12.2017, 13 judgments were identified, in which a linguistic comparison was performed (search on published judgments in that period, using the search term '*version linguistique*', by means of the search form on the website CURIA: <www.curia.europa.eu> (accessed 2.12.2018). In all cases (13), the French version was referred to. As to the other languages, explicit references were found to English (7), German (6), Spanish (5), Italian (4), and Portuguese (4). It should be taken into account that French is the internal working language of the ECJ (Karen Mc Auliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ' in Tiersma and Solan (n 2) 203; Rideau (n 15) 33-34; Van der Jeught (n 16) 188 et seq.).

²⁸ In the period included in the search, Danish (3), Bulgarian (2), Finnish (2), Swedish (2), Polish (2), Estonian (1), Dutch (1), Romanian (1), Czech (1) and Hungarian (1) were also mentioned. See, *ex pluribus*, how languages are checked without clear criteria: ECJ, case C-65/14 *Rosselle* EU:C:2015:339, para 38.

²⁹ See e.g. ECJ, cases 19/67 *Van der Vecht* EU:C:1967:49, 354; C-64/95 *Konservenfabrik Lubella*, EU:C:1996:388, para 17; C-640/15 *Vilkas*, EU:C:2017:39, para 47; C-559/15 *Onix Asigurari*, EU:C:2017:316, para 39.

³⁰ According to Baaij the ECJ included a comparison of language versions in the argumentation of 246 of its judgments (1960-2010). In 170 judgments thereof, the ECJ observed discrepancies between language versions. He asserts that a language

ECJ has, however, never explained the extent or the practical application of this 'criterion of doubt'.³¹ On the other hand, other ECJ case law seems to indicate that it is mandatory in all instances to compare the various language versions of EU law, irrespective of whether the language version in question is clear and unambiguous.³² At any rate, it is often only when language versions are compared that divergences are brought to light.

Finally, it follows from the literal or teleological-systematic interpretation methods used by the ECJ in case of linguistic discrepancies between language versions that, first, the uniform interpretation of a given provision of EU law may contradict the clear meaning of that norm in one or more languages³³ and that, second, national judges or individuals can therefore not rely solely on a single language version of EU law read in isolation.³⁴

III. CURRENT PRACTICES IN NATIONAL COURTS

As was already stated in the introduction, the available research on the current practices of national courts is rather limited. In this section, reference will mainly be made to Derlén's empirical findings on Denmark, England and Germany. This will be supplemented and compared with my own research on Dutch case law.³⁵

comparison was thus explicitly performed in only 3 % of all the ECJ judgments between 1960-2010) (Baaij (n 2) 219). Pacho, however, asserts that linguistic comparison is widely used as a method to support interpretation by the ECJ even when no divergences are present. According to her, such comparison takes place in 31% of the cases which she assessed (Pacho (n 2) 227, 234).

³¹ Tamara Čapeta, 'Multilingual Law and Judicial Interpretation in the EU (2009) Croatian Yearbook of European Law and Policy 9.

³² Eg ECJ, cases C-498/03 *Kingscrest* EU:C:2005:322, paras 21-27; C-219/95P *Ferriere Nord* EU:C:1997:375, para 15.

³³ Šarčević (n 3) 16; Schilling (n 3) 55.

³⁴ Paunio (n 3) 44.

³⁵ <www.rechtspraak.nl> (official website where Dutch case law is published). The research was carried out on 21.6.2017. It concerns the period from the beginning of the EEC (1.1.1958) until 21.06.2017. The research included judgments of the *Hoge*

In case of linguistic discrepancies in EU law, national courts may (or have to, in certain cases) seek guidance from the ECJ by means of a request for a preliminary ruling on the basis of article 267 TFEU. Though it is difficult to assess whether, and to what extent, national courts do actually refer questions to the ECJ on linguistic issues or whether they tend to resolve such issues themselves, some evidence seems to point to the latter.

First, the number of preliminary referrals from national courts to the ECJ regarding linguistic discrepancies in EU law is quite limited. According to Baaij, it is therefore unlikely that all cases involving language discrepancies before national courts made their way to the ECJ.³⁶ He demonstrates that discrepancies between language versions (from 1960 to 2010) gave rise to 170 judgments in which the ECJ acknowledged the existence of linguistic discrepancies. In 110 of these, discrepancies gave rise to interpretation problems. In the same vein, my own more limited survey shows that between 01.01.2011 and 01.12.2018, 42 cases involving discrepancies between language versions of regulations or directives have arisen before the ECJ (6 of these cases concerned furthermore the same linguistic issue in a given directive). Issues were usually raised in direct actions; only 10 cases concern requests for preliminary rulings.

Second, such language issues are only referred to the ECJ by courts from a limited number of Member States, mainly Germany, the Netherlands, the United Kingdom, and Lithuania.³⁷

Third, even in these Member States, it is unlikely that all linguistic issues are referred to the ECJ. Derlén notes the reluctance of Danish and English judges to refer questions of this sort to the ECJ.³⁸ As concerns German case law, he cites judgments of the federal constitutional court upholding the judgments

Raad, the *Raad van State*, the *Centrale Raad van Beroep*, the *College van Beroep voor het bedrijfsleven*, as well as other courts and tribunals (*Gerechtshoven/rechtbanken*) in all areas of law. The search term used was *taalversie* (language version).

³⁶ Baaij (n 2) 15-16.

³⁷ Čapeta (n 31) 10.

³⁸ Derlén (n 2) 79 et seq; (n 4) 106-117.

of lower courts where no language comparison was performed and no question had been submitted to the ECJ.³⁹ Similarly, Dutch case law related to this issue suggests that there is no automatic referral to the ECJ and that in most cases courts deal with discrepancies themselves.⁴⁰

Also, the available research seems to suggest that, in current practice, national judges do not habitually perform a language comparison when interpreting and applying EU law. It would seem that, as a general rule, they compare language versions of EU law only in cases in which an initial suspicion of a linguistic issue in their own language is raised.⁴¹ This is the case when their own language version is unclear or ambiguous or when there is reason to believe that it does not accurately reflect the real intention of EU law makers (for instance in case of internal contradictions or incompatibility with a superior norm or when there are blatant translation errors or omissions).⁴² My own research concerning case law in the Netherlands seems to confirm this assumption: no cases were found in which language comparison was an automatic step in the interpretation process. Bobek suggests that doubts about their own language version are often raised by the parties.⁴³ Similarly, Derlén reports cases in which lawyers submit their own (unofficial) translations of EU secondary law, established on the basis of other authentic language versions, to dispute the language version in the proceedings before the national court.⁴⁴ Lawyers may indeed follow a language strategy when other languages offer more possibilities, even when their own language is perfectly clear and unambiguous.⁴⁵

Arguably, a general duty to compare their own language version of EU law with other versions in all cases would place a heavy burden on national courts in terms of time and resources. In current practice, however, it is not unlikely

³⁹ Derlén (n 2) 87-92.

⁴⁰ See *infra*.

⁴¹ Derlén (n 2) 119 et seq; 172 et seq.

⁴² See, in this sense, Derlén (n 5) 153; Schilling (n 3) 61.

⁴³ Bobek (n 4) 136.

⁴⁴ Derlén (n 5) 154-155.

⁴⁵ Čapeta (n 31) 11.

that a number of language discrepancies remain unnoticed before national courts. Indeed, as language comparison is not a default step in the interpretation process and as it may be assumed that national courts primarily, if not exclusively, use their own language version of EU law, they may not be aware of any linguistic discrepancies.⁴⁶ Incidentally, it may also be that national judges simply do not have the necessary language skills to perform a multilingual interpretation. Interestingly, Derlén observes that, in a majority of cases, those judges performing multilingual interpretation did not explain the method they used to that effect (ranging from dictionaries to translations and comments by legal and language experts).⁴⁷ It should also be noted in that respect that even at the ECJ, which can draw on a translation service and multilingual legal staff, language divergences are not always easily discerned.⁴⁸ As a general rule, the issue is raised by the parties (in direct actions) or the national courts referring the case for a preliminary ruling (most probably also on the request of the parties themselves).⁴⁹ For national courts, which do not have the same resources at their disposal as the ECJ, it is much more difficult to detect linguistic discrepancies and deal with them.

Significantly in this regard, Dutch case law shows an increasing trend in the number of linguistic issues with regard to EU law. Out of a relatively small total number of cases which gave rise to linguistic discrepancies with regard to EU law (84) in the reference period, only 20 date from before 2011; the

⁴⁶ Emilia Miščenić, 'Legal Translation vs. Legal Certainty in EU Law' in Emilia Miščenić and Aurélien Raccach (eds), *Legal Risks in EU Law* (Springer 2016) 94, 96. See also Ziller (n 2) 447.

⁴⁷ Derlén (n 2) 293.

⁴⁸ Schilling (n 3), 59; Sobotta (n 2) 28-29; Čapeta (n 31) 10-11. Language discrepancies may in particular be discovered when those working on the case at the ECJ have proficiency in various languages: their mother tongue, French (the internal working language of the ECJ), as well as the language of the case. The probability of such a multilingual setting is particularly high in some Advocate General's chambers (Advocate Generals draft their Opinions in several languages, in principle in French, English, German, Italian or Spanish). Likewise, translation of procedural documents as well as judgments and opinions may reveal language discrepancies.

⁴⁹ Bengoetxea Caballero (n 2) 97; Sobotta (n 2) 28-29; Čapeta (n 31) 10.

remaining 64 cases are from after that year.⁵⁰ This increase is, however, not reflected in the number of referrals to the ECJ, which may suggest that linguistic discrepancies could remain to some extent undetected.

Another factor worth mentioning is criticism voiced in legal scholarship concerning incoherent terminology in EU law, in particular with regard to private law.⁵¹ It is asserted that many terms are translated differently and interpreted in quite different ways according to the various legal contexts in which they are used, as there are no general definitions of these concepts in EU law.⁵² As Ioriatti-Ferrari aptly notes, EU law is essentially drafted by sector-specific experts or translators, who do not necessarily have legal training, and is only at the final stage revised by legal experts. She argues that this 'law without lawyers' may work well for technical topics but is more problematic in private law, as EU law does not necessarily use the terminology of the various national legal cultures.⁵³ Furthermore, judges may

⁵⁰ See n 35.

⁵¹ Baaij (n 2) 7; Barbara Pozzo, 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law' in Barbara Pozzo and Valentina Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International 2006) 13. As Šarčević observes, 'the link between language, law and cultural identity is traditionally the strongest in private law' (Susan Šarčević, 'Creating a pan-European legal language' in Maurizio Gotti and Collin Williams (eds), *Legal Discourse across Languages and Cultures* (Lang 2010) 23).

⁵² Ioriatti Ferrari (n 2) 149; Van Schagen (n 15) 37-62; Šarčević (n 51) 28 et seq. At the request of the European Commission experts have drafted a Common Frame of Reference to define inter alia fundamental concepts of private law (Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), prepared by the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group)* (2009) available at <<https://www.law.kuleuven.be/personal/mstorme/DCFR.html>> accessed 2 December 2018.

⁵³ '*Diritto senza giurista*' (Ioriatti Ferrari (n 2) 85).

be unaware of conceptual divergences in meaning between language versions and simply apply the concepts they know from their legal culture.

If a language comparison takes place, which languages are compared? Obviously, the idea of comparing all language versions, difficult even for the ECJ, seems completely unrealistic for national judges. Derlén did not identify a single case in which judges in his survey of Denmark, England and Germany consulted all language versions of EU law.⁵⁴ Rather, Derlén suggests that, in current practice, national judges compare (in case of doubt) their own language version with a limited number of other languages, predominantly (in 75% of cases) English and French.⁵⁵ Dutch case law seems to corroborate these findings as to the limited number of reference languages used, yet suggests an even stronger position of English, while German precedes French, albeit by a narrow margin.⁵⁶ At any rate, English is the default language with which the Dutch version of EU law is compared in all cases where linguistic issues arise (with the exception of two cases in which only German was used), while in about half of the cases there is an additional comparison with German and/or French.⁵⁷ Similarly, Bobek observes that in Central Europe (the Czech and Slovak Republics, Poland and Hungary), the first reference languages would be 'either English or German'.⁵⁸ Besides these widely-known languages, other languages may of course also be used. Bobek

⁵⁴ Derlén (n 2) 288 et seq.

⁵⁵ Ibid.

⁵⁶ The difference as to the position of French in the research by Derlén could be explained by the fact that, as the author states, French is the best known foreign language to most English judges. Another element in favour of French is that many cases concern customs classifications (Combined Nomenclature) where French (together with English) has special significance. The use of German by Danish judges lags far behind English and French (Derlén (n 2) 289 et seq).

⁵⁷ See n 35. On a total number of 84 cases involving language discrepancies, the following references were found: English (84), German (44), French (43), Spanish (4), Italian (3), Danish (2), Finnish (1), Swedish (1). Sometimes there is also a general reference to 'other language versions' without specification.

⁵⁸ Bobek (n 4) 138.

suggests that judges may refer to languages which are similar to their own: a Czech judge could, for instance, use the Slovak and Polish versions.⁵⁹

Derlén also gives examples of Danish, German and English courts referring to the English or French version⁶⁰ as the original drafting languages. It is indeed common knowledge that English and French have a preeminent place in the legislative process in the EU.⁶¹ One of these languages is used to draft the original text and amendments, as well as in discussions between representatives of the EU institutions involved. The other language versions are in essence translations.⁶² The approach taken by some national judges is therefore understandable, although at variance with the guidelines of the ECJ which has, as far as could be ascertained, never referred to the drafting language.

IV. POINTS OF CONCERN

Clearly, a general point of concern in this context is quality control of EU legislation in all stages of its production. Indeed, it goes without saying that reducing (literal and conceptual) divergences would, to a large extent, prevent linguistic discrepancy problems. Suggestions include improving the quality of

⁵⁹ Ibid 139.

⁶⁰ Derlén (n 5) 154.

⁶¹ In 2013, English was the predominant drafting language (81%), against 4,5% for French and 2% for German. Historically, French was the main drafting language. In 1997, French was still almost at the same level as English (Aleksandra Čavoški, 'Interaction of law and language in the EU: Challenges of translating in multilingual environment' (2017) *The Journal of Specialised Translation* 62).

⁶² Baaij (n 2) 12; Elena Ioriatti, *Interpretazione comparante e multilinguismo Europeo* (CEDAM, 2013) 66, 68; Manuela Guggeis, 'Multilingual legislation and the legal-linguistic revision in the Council of the European Union' in Pozzo and Jacometti (n 2) 114, 115.

drafting and translation,⁶³ increasing harmonization of terminology,⁶⁴ as well as making better use of IT-tools to detect language discrepancies.⁶⁵ Although these are important remedies to explore, it remains to be seen, however, if it is possible to completely prevent all issues of discrepancies between versions of EU law, as was shown in Section II.1. Moreover, as this article focuses on the application and interpretation of EU law by national courts, the scope of the discussion will be limited here to flaws in that regard, namely the detection of language discrepancies and referral practices to the ECJ. In addition, the issue of legal certainty must be explored, given the fact that individuals may not place full trust in their own language version of EU law (see Section II.2).

1. Detection of Language Discrepancies

An important shortcoming in current interpretation practices in national courts is the possibility that language discrepancies remain unnoticed, which entails the risk of diverging case law in the Member States. Admittedly, the same risk exists to some extent also before the ECJ, but it is greater in (monolingual) national court procedures.

In scholarship, it has been suggested that authentic status should be limited to one or more language versions⁶⁶ or alternatively that English and French should be made 'mandatory consultation languages', which national judges would always have to consult as a default step when applying and interpreting EU law.⁶⁷ Although such solutions would definitely increase the chances of detecting linguistic issues and may enhance coherence in case law, there are

⁶³ Šarčević (n 3) 21-22.

⁶⁴ Ibid 23-24. See also Lucie Pacho Aljanati, Promoting Multilingual Consistency for the Quality of EU Law (2017) *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 67-79.

⁶⁵ Sobotta (n 2) 85 et seq.

⁶⁶ See Schilling (n 3) 47.

⁶⁷ Derlén (n 2) 355-356; (n 4) 156 et seq.

also important legal and practical obstacles.⁶⁸ Arguably, the line between reducing the number of authentic languages and imposing one or more mandatory consultation languages is rather thin. In my view, it appears questionable whether all languages could still be considered equally authentic when special reference status is granted to one or more of them. More substantially, the ECJ would still continue to perform a multilingual interpretation 'on a broad scale', possibly using other languages as well.⁶⁹ There would therefore be no guarantee of similar outcomes. In addition, on a more practical note, it seems doubtful whether all judges in all EU Member States currently have sufficient language skills to perform a mandatory consultation of one or more foreign languages as a default step when applying EU law. If this is not certain for English, it is even more doubtful for French. The number of Europeans knowing more than one foreign language is relatively small, and national judges are probably not an exception in that respect.⁷⁰ Foreign language skills also vary greatly from one Member State to another.⁷¹

In any event, it would seem that more research is needed into current practices of multilingual interpretation by judges in the Member States and into their language skills. The Dutch example seems to show in any case that English is the *de facto* reference language among Dutch judges when applying

⁶⁸ As Sobotta argues, EU citizens cannot be expected to follow the law in another language than their own, as an expression of the principle of legal certainty. In addition, he invokes the principle of non-discrimination on the basis of language (art. 21(1) Charter of Fundamental Rights of the EU) and asserts that multilingualism is partially a constitutional principle of the EU (art. 22 Charter). Moreover, he argues that making only one or a few languages authentic, would reduce the quality of other language versions (Sobotta (n 2) 82; see also Rideau (n 15) 69-70 and Šarčević (n 3) 20).

⁶⁹ Derlén (n 5) 157.

⁷⁰ The most widely spoken foreign languages in the EU are English (38%), French (12%) and German (11%). As far as could be ascertained there are no figures on linguistic skills of judges (but even among 'higher social classes' only about one third has a second foreign language) (European Commission, Europeans and their languages, *Special Eurobarometer 386*, 2012).

⁷¹ Ibid.

and interpreting EU law. It would be important to have empirical data on the situation in all the Member States in that regard. Language training for national judges as well as for law students as part of their curriculum is in any case of the utmost importance.⁷² National judges must at the very least be able to assess whether their language version is in line with other language versions, otherwise they cannot apply and interpret EU law correctly.

2. Referral to the ECJ

As shown in Section III, there seems to be no clear and predictable use by the national courts (in the Member States for which data is available) of the ECJ preliminary ruling procedure in cases of linguistic discrepancies. This situation raises concerns as to the uniform application of EU law. Indeed, it seems doubtful that national courts, if they have detected a language discrepancy, are able to provide for an effective and adequate solution in all cases. Furthermore, the literal method (comparing language versions) is not easy to perform for national courts and will, in most cases, consist of a limited comparison, with English and maybe also French or German. Similarly, it is doubtful that a purposive interpretation approach, which incidentally does not seem to be the general method in national courts, could lead to similar outcomes in all the Member States, or, for that matter, in the ECJ. Another reason to resolve discrepancy issues on the EU level may be that problems are often not limited to only one language version, which requires interpretation by the ECJ. Accordingly, it seems preferable to always refer such issues to the ECJ.

Such an approach is also in line with the *CILFIT* case law of the ECJ, entailing that courts and tribunals against whose decisions no legal remedies are

⁷² See Allan F. Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary' (2012) *European Law Journal* 577 et seq. See also European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme, 2010/2080(INI), §I. See also Georg Kathrein, 'Auslegungsprobleme bei verschiedenen Sprachfassungen', in Gerte Reichelt, *Sprache und Recht* (Ludwig Boltzmann 2006) 77-78.

available may abstain from referring questions to the ECJ only when there is no 'reasonable doubt' as regards the correct application of EU law. Whether or not there is a 'reasonable doubt' must be assessed 'in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community'.⁷³ Arguably, a 'reasonable doubt' about the correct interpretation and application of EU law exists in cases of a linguistic discrepancy, in particular at the conceptual level and, accordingly, such issues should be referred, as a general rule, to the ECJ.

3. *Legal Certainty*

EU multilingualism seems to create a paradox. While it is designed to enhance legal certainty so as to ensure that individuals may ascertain their rights and obligations under EU law in their own language, it also inevitably creates some degree of uncertainty as individuals cannot rely on their own language version alone. Arguably, the lack of full trust in one's own language version could be incompatible with the requirement that the consequences of legal provisions should be predictable and foreseeable to individuals. These are important aspects of the concept commonly known as legal certainty.⁷⁴

⁷³ ECJ, case 283/81 *CILFIT* EU:C:1982:335, para 21.

⁷⁴ *Rechtssicherheit* in German and as such also known in other continental legal systems. Some authors use the more general term 'rule of law' (Peczenik (n 11) 31). Other authors use the term 'legality' or the broad notion of 'lawfulness' in English (Leonard Besselink, Frans Pennings and Sacha Prechal, 'Introduction: Legality in Multiple Legal Orders' in Leonard Besselink, Frans Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Wolters Kluwer 2011) 6-7). The term 'legality' is, however, also used to define legal certainty in criminal matters (Georg C. Langheld, 'Multilingual Norms in European Criminal Law' (2016) *European criminal law review* 47). As such, legal certainty is also considered to be an aspect of the rule of law (Ubaldo de Vries and Lyana Francot-Timmermans, 'As good as It Gets: On Risk, Legality and the Precautionary Principle' in Besselink et al (n 74) 11) or a consequence thereof (Annika Suominen, 'What Role for Legal certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU?' (2014) 2 *Bergen Journal of Criminal Law and Criminal Justice* 7). The latter view is also shared

In order to fully grasp the challenge of multilingual interpretation with regard to legal certainty, it is essential to briefly explore in the following paragraphs some relevant aspects and scholarly views of this concept. Although legal certainty as such defies easy definition,⁷⁵ it is generally accepted that its main purpose is to regulate the use of power by public authorities⁷⁶ as an essential safeguard against arbitrary decisions with regard to individuals.⁷⁷ As such, legal certainty establishes the primacy of statute law by the legislature and finds its origin in continental Europe in the French Revolution, where it was established in an effort to limit the law-making role of the courts.⁷⁸

The protection against arbitrariness may appear in both a formal and a substantive guise.⁷⁹ As a formal principle, the accessibility of the norm is essential: laws should be public and accessible to all addressees. As a more substantive principle, foreseeability and predictability of the application and consequences of the norm are essential: laws must be clear and precise so as to enable individuals to ascertain the extent of their rights and obligations and foresee the legal consequences of their acts.⁸⁰ Individuals must, in other

by the European Commission (Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (COM/2014/158), 11.3.2014). In its case law, the ECJ uses the term 'legal certainty'. That term will be used in this paper as well.

⁷⁵ Delphine Dero-Bugny, 'Les principes de sécurité juridique et de protection de la confiance légitime' in Jean-Bernard Auby and Jacqueline Duheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2014) 653; Suominen (n 74) 1.

⁷⁶ Besselink et al (n 74) 6-7.

⁷⁷ Erik Claes, Wouter Devroe, Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer 2009) 107; Suominen (n 74) 6.

⁷⁸ Besselink et al (n 74) 5-6.

⁷⁹ Leen Keus, 'The Principle of Legal Certainty' in Arthur Hartkamp, Carla Sieburgh, Leen Keus, Jeroen Kortmann & Mark Wissink (eds), *The influence of EU law on the National Private Law* (Kluwer 2014) 297.

⁸⁰ Paunio sees this as a formal requirement, the substantive aspect being related to 'acceptability' by the legal community (Paunio (n 3) 1469).

words, be able to rely on legislation: they have 'legitimate expectations' in that respect, which need to be protected by the courts.⁸¹

In that regard it is settled case law of the European Court of Human Rights (ECtHR) that the requirement of 'foreseeability' is fulfilled when a law is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct.⁸² The ECtHR performs a test of the quality of the legislation in that regard: a provision in national legislation should be phrased in clear terms, avoiding open and vague notions that may give the State authorities unfettered power and leave room for arbitrary interferences.⁸³

Though not explicitly enshrined in primary or secondary EU law,⁸⁴ the ECJ has acknowledged 'legal certainty' as one of the fundamental general principles of EU law.⁸⁵ According to the ECJ, legal certainty requires that rules imposing obligations on individuals have to be clear and precise, avoiding any ambiguity, and that their application should be predictable.⁸⁶ On the formal level of legal certainty requirements (accessibility of the law), the ECJ has consistently held, notably in its landmark *Skoma-Lux* judgment, that an EU regulation is not enforceable against individuals in an EU Member State if that regulation has not been officially published in the language of

⁸¹ Šarčević (n 3) 6; Suominen (n 74) 8. A distinction may be made between 'legal certainty' and the principle of legitimate expectations: the former is 'objective' the latter is 'subjective' (Dero-Bugny (n 75) 655).

⁸² Eg ECtHR, cases 37331/97 *Landvreugd*, para 59; 67335/01 *Achour*, para 54 and 75909/01 *Sud Fondi*, para 110.

⁸³ Aleidus Woltjer, 'The Quality of the Law as a Tool for Judicial Control' in Besselink et al (n 74) 102-105 and case law cited.

⁸⁴ Juha Raitio, *The principle of legal certainty in EC law* (Kluwer 2003) 125-266.

⁸⁵ Woltjer (n 83), 101. See, for instance, ECJ, cases C-231/15 *Prezes Urzędu Komunikacji Elektronicznej* EU:C:2016:769, para 29; C-98/14 *Berlington Hungary* EU:C:2015:386, para 77; C-201/08 *Plantanol* EU:C:2009:539, para 46.

⁸⁶ Woltjer (n 83) 99-101 and case law cited.

that Member State.⁸⁷ This applies even if the individuals concerned were able to acquaint themselves by other means with the provisions of the regulation at issue. Although the ECJ has, however, not yet addressed the more substantive issue of legal certainty with regard to linguistic discrepancies in EU law, it has hinted at an incompatibility between legal certainty and the need for a uniform interpretation of diverging language versions, 'inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words'.⁸⁸

The tension between multilingual interpretation and legal certainty seems clear. The extent to which this tension raises concerns should be assessed, however, against the backdrop of the theory of indeterminate terms, according to which, in a nutshell, all (legal) terms are indefinite and vague and require interpretation.⁸⁹ Moral acceptability of legal decisions is an important element: according to Peczenik, legal certainty in the material sense is 'the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations'.⁹⁰

As to multilingual EU law, scholars influenced by this school of thought defend the view that the trust placed in the ECJ bypasses the problem of possible language discrepancies and leads to an acceptable and trusted solution for all language versions. As Van Meerbeeck asserts, there should be a shift from the Cartesian logic of absolute legal certainty, which he deems unrealistic, towards a 'fiduciary logic'.⁹¹ Likewise, Paunio suggests shifting the focus from clear and unequivocal rules to acceptability and judicial

⁸⁷ ECJ, case C-161/06 *Skoma-Lux* EU:C:2007:773, paras 32 et seq; see also cases C-560/07 *Balbiino* EU:C:2009:341, para 29 and C-146/11 *Pimix* EU:C:2012:450, paras 42 et seq.

⁸⁸ ECJ, case 80-76 *North Kerry Milk Products* EU:C:1977:39, para 11; see also case C-340/08 *The Queen, on the application of M and Others v Her Majesty's Treasury* EU:C:2010:232, paras 64-65.

⁸⁹ For a discussion of these ideas in legal theory, see Brian H. Bix, 'Legal Interpretation and the Philosophy of Language' in Tiersma and Solan (n 2) 146-147.

⁹⁰ Peczenik (n 11) 32.

⁹¹ Van Meerbeeck (n 3) 137, 139, 145.

reasoning.⁹² According to her, the predictable reasoning of the ECJ, on the basis of pre-established interpretative criteria and taking into account not only the purposes of the text but also the underlying aim of the legal system in general, offers adequate safeguards for legal certainty.⁹³ Paunio is influenced by Habermas's 'theory of communicative action', according to which the law must be applied in a way that guarantees both certainty and rightness.⁹⁴ As such, legal certainty is a principle that must be weighed and balanced against other interests and principles in the case at hand.⁹⁵ She proposes the following formula for legal certainty: 'a predictable procedure plus a rationally acceptable and transparent legal reasoning in accordance with the underlying values of the legal community in question equals legal certainty'.⁹⁶

Others argue, by contrast, that terms in legislation should be interpreted according to 'word meaning' rather than 'speaker meaning'. Terms used by law makers should be interpreted according to the current best understanding of their 'real nature'.⁹⁷ As to multilingual EU law, scholars that adopt the latter approach are inclined to consider discrepancies between language versions of EU law to be highly problematic. In that regard, Schilling asserts that the setting aside of the wording of a law and the general lack of detailed reasoning in doing so leaves the impression of a certain arbitrariness and is quite problematic under the aspect of foreseeability of legal consequences.⁹⁸

The core concepts in this debate seem to be legal reasoning and trust. While it is true, however, that arguments in favour of trust rather than clear and

⁹² Paunio (n 3) 2, 193; Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) *European Law Journal* 395.

⁹³ Paunio (n 3) 194. See, in the same sense, Pachon (n 2) 112.

⁹⁴ Paunio (n 3) 1471-1472.

⁹⁵ Paunio (n 3) 1473.

⁹⁶ Paunio (n 3) 1492.

⁹⁷ Bix (n 89) 148.

⁹⁸ Schilling (n 3) 61. See also Derlén (n 2) 332 et seq; Čápetá (n 31) 14.

unequivocal norms may be convincing to some extent as far as the ECJ is concerned, they are less strong with regard to national courts. Some critical observations must be made in that regard.

First, as was shown in Section II, the ECJ applies a literal interpretation method in a majority of cases where linguistic discrepancies occur. As a general rule, national courts seem to take the same approach (at least in the Member States where data are available). Even when using a purposive or systematic interpretation, judges do not usually do so without any consideration for the wording of the law, which remains therefore of the utmost importance. Incidentally, national legal culture may also be relevant in that regard. Traditionally, common law English courts are, for instance, used to examining the words of legislation in meticulous detail, whereas in (some) civil law systems, courts have more freedom in interpreting it.⁹⁹ Judges in certain Member States may therefore feel uncomfortable interpreting EU law on the basis of metalinguistic arguments in a way that contradicts the wording in their own language version. The survey of Dutch case law (Section III) seems in any case to suggest that, in current practice, judges use a literal approach to deal with language discrepancies, comparing the Dutch version with English (and additionally, with German and/or French).

Second, the arguments of scholars influenced by indeterminacy theorists regarding 'acceptance' and 'trust' of the judicial decision-making process do not entirely convince in the context of national judicial decisions. Indeed, as it may be assumed that linguistic resources are more limited in national courts than at the ECJ, the risk of arbitrary decisions based on diverging EU law versions is greater. In any event, it is unlikely that multilingual interpretation by national courts in different EU Member States leads in all cases to similar outcomes. Arguably, such a situation is likely to increase distrust in national courts and EU law in circumstances where one's own language version is set aside. A concrete example may illustrate this point more clearly. In 2005, the Dutch stockbreeder Dirk Endendijk was prosecuted in the Netherlands

⁹⁹ Silvia Ferreri, 'Multilingual Interpretation of European Union Law' (2015) CDCT Working Paper, <<http://www.cdct.it/workingpapers>> (accessed 20 June 2018) 14.

because he had tethered calves contrary to Dutch legislation adopted on the basis of an EU directive.¹⁰⁰ Endendijk argued in his defence that the Dutch language version of the annex to the directive referred to a metallic tether, using the word 'chains' (*kettingen*) several times, whereas he had used a rope for tethering. The Dutch judge referred a preliminary question in that respect to the ECJ.¹⁰¹ The latter Court, however, dismissed the linguistic argument,¹⁰² citing its settled case law as explained above, according to which the word in question could not be examined solely in the Dutch version. It pointed out that other language versions, such as the German (*Anbindevorrichtung*), the English (tether), the French (*attache*) and the Italian (*attacco*), referred to a more general term. The ECJ concluded therefore that the word 'chains' used in the Dutch version was contrary to the objective pursued by the EU legislature: a calf is tethered where it is tied by a rope, irrespective of the material, length and purpose of that rope. Accordingly, Endendijk had committed a punishable act.

Although rationally fully acceptable at the EU level – the Dutch version was clearly the diverging one, a textual language comparison and purposive interpretation brought out the true meaning of the norm – this judgment

¹⁰⁰ The applicable text was Council Directive 91/629/EEC of 19 November 1991 laying down minimum standards for the protection of calves, *OJ L* 340/28. The ECJ handed down its judgment on 3 April 2008. The Directive was later codified (Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves, *OJ L* 10/7). The Dutch version was rectified in 2015 (*OJ L* 10/46) removing the linguistic discrepancy (as established by the ECJ in its judgment).

¹⁰¹ ECJ, case C-187/07 *Endendijk* EU:C:2008:197. See also case 238/84 *Röser* EU:C:1986:88 (para 22), where the ECJ concedes that the German version of a given provision (which is enforced by criminal law) is 'unclear' and 'open to another interpretation', yet states that the correct interpretation 'is apparent from a comparative examination of the different language versions, and in particular of the English, French and Italian versions, in which there is no ambiguity'. See also ECJ, case 250/80 *Schumacher* EU:C:1981:246.

¹⁰² The Court dismissed the claim also on the grounds that the exception at issue applied only to group-housed calves at the time of feeding milk. That was not the case with *Endendijk's* calves, which were penned in individual boxes.

seems to raise questions about the acceptability of the decision on the national level, not least by the individual concerned. Indeed, particularly when one's own language version is clear and unambiguous and there are no apparent reasons to have doubts about it, there seems to be an issue of legal certainty. The question may indeed be raised whether it is reasonable, from the perspective of democratic legitimacy, to expect that the addressee of the law should make the effort of consulting other language versions than their own (authentic) version.¹⁰³ Furthermore, on a practical note, this obligation presupposes linguistic proficiency in one or more foreign languages, which is far from being general.¹⁰⁴

Another important issue relates to the sphere of criminal law. In the case of *Endendijk*, national provisions which were adopted in the application of EU law were enforced through criminal sanctions.¹⁰⁵ In this regard the fundamental principle of legality, which is neatly encapsulated in the famous Latin maxim *nullum crimen sine lege, nulla poena sine lege* ('no crime without law, no punishment without law'), comes into play. This principle, which is intertwined with the concept of legal certainty,¹⁰⁶ is enshrined in article 11(2) of the Universal Declaration of Human Rights¹⁰⁷ and in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰⁸ as well as in article 49 of the Charter of Fundamental Rights of the EU.¹⁰⁹ Already established by Hobbes, who wrote that 'no law made after a fact done can make it a crime',¹¹⁰ this human right entails that the law should

¹⁰³ Sobotta (n 2) 82. See, in the same sense, Rideau (n 15) 69-70 and Šarčević (n 3) 20.

¹⁰⁴ See Section IV.1, in particular n 70.

¹⁰⁵ See for the scope of EU criminal law: Suominen (n 74) 2-6; Burkhard Jähnke and Edward Schramm, *Europäisches Strafrecht* (De Gruyter 2017) 4.

¹⁰⁶ Suominen (n 74) 8-9.

¹⁰⁷ 10 December 1948, 183th Plenary meeting of the UN General Assembly, *General Assembly Resolutions*, 3rd Session (1948-1949), A/RES/217(III), 71.

¹⁰⁸ 4 November 1950, *European Treaty Series* No 005.

¹⁰⁹ 7 December 2000, *OJ C* 202/389 of 7.6.2016.

¹¹⁰ Thomas Hobbes, *Leviathan* (Oxford Clarendon Press, 1965, first edition 1651) 226.

make the scope of a criminal offence as precise as possible (*lex certa*):¹¹¹ individuals must be able to know from the wording of the provisions of the law, if need be with the assistance of the courts' interpretation, what acts and omissions will make them criminally liable.¹¹² The use of vague or ambiguous terms is, in other words, precluded.

Moreover, the principle of legality encompasses the rule of leniency.¹¹³ In doubt, vague or ambiguous provisions are to be interpreted in favour of the defendant, a principle which is encapsulated in the Latin maxim *in dubio pro reo* ('when in doubt, for the accused').¹¹⁴ It could therefore be argued that, in the area of criminal law, individuals should be granted the benefit of the doubt when their own language version diverges from the others.¹¹⁵ At present, there is no case law of the ECtHR on the issue of multilingual norms and criminal liability. It therefore remains to be seen how it would rule in a case such as *Endendijk* and whether it would take issue with the fact that other languages must be consulted to determine the scope of criminal liability (possibly setting aside the wording of an individual's own language version).

¹¹¹ Claes et al (n 77), 92; Mahmoud Cherif Bassiouni, *International Criminal Law volume I Sources, Subjects and Contents* (Martinus Nijhoff 2008) 73 et seq.

¹¹² ECtHR, case 10249/03 *Scoppola*, paras 93-94. An 'inevitable element of judicial interpretation' is acceptable 'provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen' (ECtHR, cases 34044/96, 35532/97 and 44801/98 *Streletz, Kessler and Krenz*, para 50).

¹¹³ Cherif Bassiouni (n 111) 73.

¹¹⁴ A. Ornowska, 'Introducing Hermeneutic Methods in Criminal Law Interpretation in Europe' in Joanna Jemielniak and Przemysław Mikłaszewicz (eds), *Interpretation of law in the Global World: From Particularism to a Universal Approach* (Springer 2010) 254.

¹¹⁵ See, in the same sense, Langheld (n 74) 52.

V. HOW TO ENHANCE THE RIGHTS OF INDIVIDUALS IN CASE OF LINGUISTIC DIVERGENCES?

1. *In the Field of EU Criminal Law: Unenforceability of the Divergent Norm?*

As Van Meerbeeck aptly observes, 'legal certainty should operate mainly for the benefit of the individual and not for the powers that be, namely the EU'.¹¹⁶ Indeed, it seems anything but fair that a citizen such as Endendijk has to bear the negative consequences of a legal provision which was unclear in his own language. Incidentally, the ECJ reasoned along these lines in its *Skoma-Lux* judgment on the issue of formal legal certainty (the accessibility of the norm). It held that an approach allowing an act which had not been properly published to be enforceable would result in individuals 'bearing the adverse effects' of a failure by the EU administration.¹¹⁷

Could the case law in *Skoma-Lux* be applied to cases regarding substantial issues of legal certainty, so as to render a diverging language version unenforceable against individuals? Arguably, the circumstances in which a language version is not officially published, on the one hand, and those in which a language version diverges substantially, on the other, lead in the current state of affairs to quite different legal outcomes. The Czech enterprise *Skoma-Lux* could successfully argue that it did not have to follow EU provisions in the Czech Republic because they were not published in the Czech language. This held true irrespective of the fact that the Czech language version was made available by the Czech authorities in electronic form as well as in customs offices. It was also irrelevant whether *Skoma-Lux*, which had been operating for a long time in the field of international trade, knew the relevant provisions. By clear contrast, the Dutch stockbreeder

¹¹⁶ Van Meerbeeck (n 3) 138.

¹¹⁷ ECJ, case C-161/06 *Skoma-Lux* EU:C:2007:773, para 42. See also ECJ case law on legal certainty and legitimate expectations, e.g. ECJ, cases C-1/02 *Borgmann* EU:C:2004:202, paras 30-31; C-236/02 *Slob* EU:C:2004:94, para 37; C-143/93 *Van Es* EU:C:1996:45, para 27; C-98/91 *Herbrink* EU:C:1994:24, para 9; C-81/91 *Twijstra* EU:C:1993:196, para 24.

Endendijk was unsuccessful despite arguing that he had followed to the letter the obligations laid down in the Dutch language version of the annex to the directive, as he should have consulted other language versions.

On the other hand, however, unenforceability of a diverging language version could severely jeopardize the uniform application of EU law in all the Member States. Arguably, it could make matters worse, as it would open a Pandora's Box of arguments for lawyers to challenge a given language version, in line with current linguistic strategies in litigation.¹¹⁸ Therefore, such unenforceability should be limited, first and foremost, to the spheres of EU criminal law, to safeguard the legality principle.¹¹⁹ Second, there should be an appropriate yardstick to determine whether a language discrepancy is such that it might render a given legal provision unenforceable. As was explained in Section II.1, various categories of linguistic discrepancies may be discerned. Clear editing mistakes in a certain language version, which are easy to detect by the persons concerned and which do not as such affect understandability of the provision at issue would remain enforceable.¹²⁰ Such circumstances would need to be assessed by national courts, using essentially the same criteria as for purely national criminal law.

Another question in that regard is whether national courts should base their decision solely on their own local official language or should also take into account the mother tongue of the accused. Derlén gives an example of a case concerning German citizens in Denmark, where the Danish judge held that the defendants had not been aware of the meaning in the Danish language version but had presumed the (diverging) German version to be correct. Therefore, no intentional infringement was established and the defendants were acquitted.¹²¹ As a general rule though, it would seem that judges should

¹¹⁸ See Section III.

¹¹⁹ See Section IV.3.

¹²⁰ Eg ECJ, case C-558/11 *Kurcums Metal* EU:C:2012:721. This case concerned an omission in the Latvian language version which the Court considered to be 'clearly an editing mistake' (para 50).

¹²¹ Derlén (n 2) 335-336.

apply their own official language version. This is in line with the *Skoma-Lux* judgement, in which the ECJ held that regulations are enforceable against individuals only when published in the language of that Member State (although the issue was less complicated as the case concerned a Czech company in the Czech Republic). At any rate, in the current state of affairs, such unenforceability of a diverging language version would require legislative action or framing of a doctrine in that sense by the ECJ.

2. *A More Convenient Solution: Taking into Account Language Divergences as 'Mitigating Circumstances'*

There is a less radical alternative to unenforceability of the norm at issue: in their assessment of the case, national courts could take into account the fact that a given individual based his or her actions on a diverging language version and attenuate the adverse effects. As with unenforceability, an appropriate yardstick would have to be applied, by which national courts could determine whether the discrepancy affected correct understandability of the provision at issue.¹²² Interestingly, that approach was eventually taken by the Dutch court in the *Endendijk* case. After the judgment in which the ECJ ruled that a 'chain' could also be a 'rope', the Dutch court had no choice but to establish that *Endendijk* had indeed committed a punishable act. Yet, as a mitigating circumstance, it took into account the fact that *Endendijk's* contribution had 'clarified the scope of EU rules' and did not impose a penalty.¹²³ Arguably, the scope of such a lenient approach could be broader than the sphere of criminal law. It could be applied in all cases of a diverging language version of EU law entailing adverse effects for individuals (such as tax liabilities, administrative sanctions, increased obligations or decreased rights, etc.), but exclusively in cases where the ECJ has established such a discrepancy.

¹²² See Section V.1.

¹²³ Rechtbank Zutphen, 20.10.2008, NL:RBZUT:2008:BG0605. Röser was also acquitted (criminal proceedings were canceled as the fault of the defendant was minor and there was no public interest in pursuing the case (Darlén (n 2) 337)).

The question may be raised in that regard whether such 'leniency' would be in line with ECJ case law as it stands. The following example may illustrate this. The *Gerechtshof Amsterdam* held, in a tax law case, that it cannot be expected that a taxable person checks customs regulations in languages other than Dutch.¹²⁴ On appeal in 'cassation', the *Hoge Raad* (Supreme Court of the Netherlands) referred the issue to the ECJ for a preliminary ruling. The ECJ reiterated its standing case law and held that, although the Dutch version of the wording of the customs provision at issue, 'unlike a number of other language versions', did indeed not expressly specify the goods in question, other language versions did.¹²⁵ The ECJ thus gave a general and abstract interpretation of the EU law provision at issue for the sake of uniformity. Its judgment is limited, however, to the question that was submitted by the national court. It does not rule on other aspects of the case. Therefore, it may be argued that national courts still have the possibility to take into account the fact that the individual acted in good faith and was not able to foresee the consequences of his or her actions on the basis of a diverging own language version. In their rulings, national courts could therefore, in my view, endeavour to limit any adverse effects for the individual concerned while at the same time respecting the binding ECJ interpretation.

National courts may, however, appreciate some encouragement from the ECJ in that sense. The ECJ could expressly leave national courts a sufficient margin of appreciation to make an exception in the specific case at issue. Judges would then feel reassured by the ECJ that, in circumstances where a language version is held by the ECJ to be diverging and not correctly establishing the meaning of a given provision, there should be (as far as possible) no liability of the person concerned or other adverse effects. This may fall on fertile ground, as national courts may in any case be reluctant to enforce ECJ rulings against individuals acting in good faith on the basis of their own language version.

¹²⁴ *Gerechtshof Amsterdam*, case 01/90096 DK X. B.V., NL:GHAMS:2004:AR7276, para 6.2.3.

¹²⁵ ECJ, case C-375/07 *Heuschen & Schrouff*, EU:C:2008:645, paras 45-46.

VI. CONCLUDING REMARKS

In Thomas More's *Utopia*, laws are drafted using plain and unequivocal words so as to make sure that all citizens understand them, for 'it is all one, not to make a law at all, or to couch it in such terms that without a quick apprehension, and much study, a man cannot find out the true meaning of it'.¹²⁶ Difficult enough to accomplish in culturally and linguistically homogeneous societies, the achievement of this ideal in a multilingual and pluralistic legal order such as the EU is akin to the quest for the Holy Grail. *Utopia* did not take into account the emergence of a legal order in which laws are equally authentic in 24 languages which furthermore have to be interpreted and applied in a uniform manner in 28 Member States with different legal traditions.

The magnitude of this achievement cannot be underestimated. Great merit is due in that regard to the case law of the ECJ which has for more than half a century eliminated language discrepancies in EU law by means of a purposive and systematic interpretation, taking into account various language versions. As is rightly asserted in legal scholarship, trust in the ECJ and its legal reasoning to provide a uniform interpretation of diverging language versions is essential. Yet the situation may be quite different when national courts apply and interpret EU law. Research in the Netherlands suggests that they do so essentially on the basis of their own language version alone. When they have reasons to doubt that version, they do not automatically refer questions to the ECJ but try to resolve the issue by consulting, as a general rule, the English version (if possible also German and/or French).

Current practice seems to present some methodological flaws. First, it cannot be excluded that language discrepancies remain unnoticed. Language comparison should be a default step in the interpretation and application of EU law. Second, if a language discrepancy is detected, questions should be referred to the ECJ. Moreover, the limits of multilingual interpretation with regard to the concept of *Rechtssicherheit* (legal certainty) have remained largely

¹²⁶ Thomas More, *Utopia* (Dover Thrift Editions, 1997, first edition 1516) 62.

undefined. This multilingualism paradox, where individuals have a right to their own language version, on the one hand, but cannot trust it entirely as they may not rely solely on it, on the other, remains unsolved. Trust in the ECJ and its legal reasoning may to some extent resolve this issue, as is in particular argued by 'indeterminate terms' theorists, who consider in essence that all legal norms are in any case indefinite and that full foreseeability of interpretation by courts of any given rule is an illusion. However, this theory, in my view, is not entirely convincing, in particular with regard to the application and interpretation of EU law by national courts. Indeed, in current practice, it is unlikely that multilingual interpretation by national courts in different EU Member States leads in all cases to similar outcomes. Arguably, such a situation is likely to increase distrust in national courts and EU law, not least in circumstances where the wording of one's own language version is set aside. This issue is of particular relevance with regard to the legality principle in the spheres of EU criminal law.

In that regard, the right of individuals to place trust in their own language version of EU law should be better protected than is currently the case. A radical approach would be, in criminal law, to hold a (seriously) diverging language version unenforceable against individuals, just as is the case when a language version is not published. There is, however, a more convenient and less radical alternative, which would consist of allowing national courts *in concreto*, in the individual case at issue before them, to show leniency and take into account that the individuals concerned acted in good faith on the basis of their own language version. Accordingly, no sanction would be imposed in criminal law and in other cases the adverse effects of a diverging language version would be alleviated as much as possible. This would not require a change in the current case law of the ECJ which would continue to provide a uniform interpretation *in abstracto*. The ECJ could, however, expressly leave national courts a margin of appreciation to encourage them to find adequate solutions *in concreto* to avoid adverse consequences for individuals who base their actions in good faith on a diverging language version.

HUMAN RIGHTS IN THE SKY:
WEIGHING HUMAN RIGHTS AGAINST THE LAW ON
INTERNATIONAL CARRIAGE BY AIR

Lalin Kovudhikulrungsri^{*†}

In order to unify rules on the liability of air carriers, the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention) and its predecessor, the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention), embrace a core value known as the exclusivity principle. Under this principle, both Conventions are an exclusive cause of action and preclude other claims which fit in their scope of application. This paper questions how courts understand and interpret the values of human rights when interacting with the exclusivity principle. To answer this question, the paper examines and analyzes case law from three different jurisdictions, namely the United Kingdom, the United States, and Canada, by employing the rules of treaty interpretation under the Vienna Convention on the Law of Treaties. The paper argues that human rights are prone to being downgraded by the law on international carriage by air in these three jurisdictions. By utilizing the rules of treaty interpretation, this paper finds two common approaches which can be applied in these jurisdictions. First, the Warsaw Convention and the Montreal Convention appear to a certain extent to be self-contained because of their exclusivity principle. Second, courts construe the term 'bodily injury' so narrowly that purely emotional damage, which is usually claimed in cases concerning human rights violations, cannot be pursued. Because of these two factors, persons whose human rights were breached when they were on board an aircraft cannot receive any monetary compensation solely for moral damage. In short,

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it seems the exclusivity principle in private international air law carries a higher value than that of human rights law.

Keywords: Montreal Convention of 1999, exclusivity, carriage by air, persons with disabilities, human rights, fragmentation

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I. INTRODUCTION

The fundamental merit of human rights is widely accepted in international law, though their value is debated in relation to their cultural relativism in

some jurisdictions.¹ International tribunals and legal academia have questioned and construed a relationship between human rights and other branches of public international law, such as trade law and environmental law. This paper examines two different branches of international law: human rights law and private international air law, particularly the law governing international carriage by air. The latter mainly focuses on remedial measures for air passengers.

Remedial measures may fall under the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),² and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999),³ which govern the liability of air carriers.⁴ Since there is no international institute to provide a uniform interpretation of both Conventions, this paper questions how national courts understand and interpret the weight of human rights when interacting with laws on international carriage by air.

To answer this question, this paper examines and analyses case law from three different jurisdictions, namely the United Kingdom (UK), the United States (US), and Canada, by employing the rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT). Two selection criteria are adopted. One is based on the functional method of comparative law while proposing *lex ferenda*, that is, comparisons must be 'in the same stage of legal,

¹ See Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400; Fernando R. Tesón, 'International Human Rights and Cultural Relativism' (1984-1985) 25 Virginia Journal of International Law 869.

² Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929) T.S. 876 (Warsaw Convention of 1929).

³ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), ICAO Doc 9740 (Montreal Convention of 1999).

⁴ Both Conventions apply to all international carriage of persons, luggage or goods performed by aircraft for reward subject to the condition that the place of departure and the place of destination are situated in the territories of two States Parties or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. See Warsaw Convention of 1929 art. 1; Montreal Convention of 1999 art. 1.

political and economic development'.⁵ This functional approach is criticized because of its universal assumption that all societies face the same social problems.⁶ However, this observation provides a strong argument to apply functional comparison in this study since human rights hold universal values.⁷ The other selection criterion is the ratification status of the Convention on the Rights of Persons with Disabilities (CRPD), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Warsaw Convention and the Montreal Convention. This is based on the survey of judgements in the selected jurisdictions. Given that most cases concerning human rights and air travel relate to the treatment of persons with disabilities and racial discrimination, these are the relevant instruments that should be analyzed. While aiming to study countries with different ratification statuses, the present author encountered difficulties in the preliminary survey because the level of development in States ratifying neither the Warsaw Convention of 1929 nor the Montreal Convention of 1999⁸ is incomparable to those of other selected jurisdictions, namely, the UK, the US, and Canada. Consequently, comparisons are made between these three countries. While the UK and Canada ratified the CRPD, the CERD and the Montreal Convention, the US has signed only the CRPD but not ratified it.⁹

⁵ Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 27.

⁶ Ibid 37.

⁷ There are debates on the universal value of human rights. See Donnelly (n 1); Tesón (n 1).

⁸ According to the International Civil Aviation Organization, Antigua and Barbuda, Bhutan, Burundi, Chad, Djibouti, Eritrea, Guinea-Bissau, Haiti, Kiribati, Marshall Islands, Micronesia, Nicaragua, Palau, Saint Kitts and Nevis, San Marino, Sao Tome and Principe, Somalia, South Sudan, Tajikistan, Timor-Leste, and Tuvalu did not ratify the Warsaw Convention of 1929 nor the Montreal Convention of 1999. See International Civil Aviation Organization, 'Current lists of parties to multilateral air law treaties' <<http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>> accessed 5 September 2018.

⁹ United Nations Treaty Collection, 'Status of the Convention on the Rights of Persons with Disabilities' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 25 May 2017; See Rochelle Jones, 'U.S. Failure to Ratify the Convention on the Rights of Persons with

The Montreal Convention of 1999 underpins this discussion, due to European Union (EU) Member States, the EU,¹⁰ the US,¹¹ and Canada¹² having ratified this particular Convention,¹³ which thus prevails over the Warsaw Convention of 1929, under the conditions laid down in Article 55 of the Montreal Convention of 1999.¹⁴ Nevertheless, references to the Warsaw

Disabilities' <<http://www.awid.org/news-and-analysis/us-failure-ratify-convention-rights-persons-disabilities>> accessed 13 January 2017.

¹⁰ In the EU, the Montreal Convention of 1999 was implemented by Regulation 2027/97, as amended by Regulation 889/2002. Regulation 889/2002 extends the scope of application of the Montreal Convention of 1999 to carriage by air within a single Member State. See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L 140/2-5 art. 1.

¹¹ On 5 September 2003, the US was the 30th State to deposit its instrument of ratification of the Montreal Convention of 1999 so the Montreal Convention of 1999 entered into force sixty days later.

¹² Canada incorporated the Warsaw Convention of 1929 and the Montreal Convention of 1999 into the Carriage by Air Act. See *Carriage by Air Act*, R.S.C., 1985, c. C-26. However, the CA Agency has the authority to determine the applicability of the principles of the Montreal Convention of 1999 to a domestic tariff provision on a case-by-case basis. See Canadian Transport Agency, Decision No. 313-C-A-2010, (27 June 2010); Decision No. 309-C-A-2010, (21 July 2010); Decision No. 483-C-A-2010, (24 Nov. 2010); Letter Decision No. LET-C-A-129-2011, (2 Dec. 2011); Decision No. 249-C-A-2013, (26 June 2013).

¹³ International Civil Aviation Organization (n 8).

¹⁴ Montreal Convention of 1999 art. 55.

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to
 - a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);
 - b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
 - c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

Convention of 1929 are inevitable when its content is relevant to the discussion.

Compensation for the carriage of passengers under the Warsaw Convention of 1929 and the Montreal Convention of 1999 can be divided into two categories: compensation for passengers and compensation for their baggage. This paper deals only with compensation for passengers, due to the relevance of the existing case law to this topic.

Section II outlines how the two Conventions deal with air law. A discussion on how the Conventions interact with human rights law is found in Section III. This interaction is then assessed in Section IV, with proposed solutions provided in Section V. Section VI presents some conclusions.

II. SPECIFIC FEATURES OF THE LAW ON INTERNATIONAL CARRIAGE BY AIR

The Warsaw Convention of 1929 and the Montreal Convention of 1999 aim to establish uniformity in the laws governing liability for air carriers, with the result that the Conventions preclude other claims which fit in the temporal scope of their application. This is known as the exclusivity principle, which will be examined in Section III.1 and Section III.2. Before analyzing the interaction between human rights and the law on international carriage by air, it is helpful to describe the basic structure of both Conventions.

-
- d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);
 - e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or
2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

1. *Temporal Scope*

Both Conventions apply to journeys between two Contracting States or within a Contracting State if there is an agreed stopping place within the territory of another State.¹⁵ For a passenger to claim damages, the locational requirement is that an accident takes place 'on board the aircraft or in the course of any of the operations of embarking or disembarking'.¹⁶ The term 'on board the aircraft' is not as debatable as 'in the course of any of the operations of embarking or disembarking'. The US Court of Appeals for the Second Circuit adopted criteria to examine 'embarking' or 'disembarking', namely the activity of passengers at the time of the accident, the air carrier's control or restrictions of movement, the imminence of passengers' actual boarding and the physical proximity to the gate.¹⁷

In the case of persons with disabilities (PWDs), especially those requiring assistance after check-in, control over their own movements may be subject to limitations by airport or airline staff lending assistance at the airport. Case law reveals that the control aspect is not a stand-alone factor in assessing the temporal scope, but courts tend to take other aspects, such as location and type of activity, into account.¹⁸

In *Phillips v. Air New Zealand Ltd.*, the case involved personal damage to a person in a wheelchair on a moving escalator on the way to the departure gate.¹⁹ The UK Queen's Bench Division adjudicated that there might be a number of operations of embarkation and the process of embarkation did not

¹⁵ Warsaw Convention of 1929, art. 1; Montreal Convention of 1999, art. 1.

¹⁶ Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17(1).

¹⁷ *Day v Trans World Airlines Inc.* 528 F.2d 31 (1975).

¹⁸ *Dick v American Airlines, Inc.* 476 F.Supp.2d 61; *Pacitti v Delta Air Lines Inc.* Not Reported in F.Supp.2d (2008), the plaintiff fell down from a wheelchair between Gates 3 and 4 approximately ninety to ninety-five yards away from Gate 9. The Court decided that the case happened in a common area of the terminal used by various airlines for both domestic and international flights, and was not engaged in an activity that was imposed by Delta as a condition of embarkation; *Fazio v Northwest Airlines Inc.* Not Reported in F.Supp.2d (2004), the defendant breached the contract by failing to provide wheelchair within an airport so the plaintiff's husband suffered a serious and significant fall and injury in the course of trying to transport himself through the terminal. The injury happened during an operation of embarking.

¹⁹ *Phillips v Air New Zealand Ltd* [2002] C.L.C. 1199 (2002) para. 1.

have to be a continuous one, so embarkation is not limited to a point close to a departure gate, but can include other points such as security checks.²⁰ The same holds true in cases of disembarkation. A passenger who falls in a corridor in the terminal while being escorted by airline staff to the customs area is in the course of disembarkation.²¹ However, it is inconclusive, since case law interprets differently whether an injury to a wheelchair user during a transfer from one gate to another gate falls within the category of embarkation.²² When an incident happens outside the temporal scope, such as a passenger being refused to check-in²³ or a passenger whose ticket has been cancelled,²⁴ passengers can claim under local laws. On this basis, in order to escape from the temporal scope, it might be argued that a violation of human rights occurring within the temporal scope can be traced back to a poorly-executed operation or miscommunication during the booking stage, check-in or any period before the applicable temporal scope. For example, a PWD whose hip broke during a transfer from a wheelchair to a seat on board by a flight attendant may argue that it resulted from a lack of training or from the management of the airline, which is not a part of the embarkation process. In my view, if a court finds this argument reasonable, then the

²⁰ Ibid.

²¹ *Lyons v American Trans Air Inc.* [1996] 647 N.Y.S. 2d 845; *Gabra v Egyptair* [2000] 27 Avi. 18, 119 cited in George N. Tompkins, Jr., 'Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States' [2010] Kluwer Law International 190.

²² *Dick* (n 18), a person who was injured during transfer from an arrival gate to a departure gate is not strictly involved in the physical activity of getting on the aircraft. Such a person can make a negligence claim under domestic law. See *Seidenfaden v British Airways* [1984] 83-5540 cited in *The Twentieth Annual Journal of Air Law and Commerce Air Law Symposium*, A-18. <http://smulawreview.law.smu.edu/getattachment/Symposia/Air-Law/Collected-Air-Law-Symposium-Papers/Complete_Volume_1986.pdf> accessed 13 Jan. 2017, a passenger injured while being pushed in a wheelchair by personnel employed by the carrier to another terminal for purposes of departing on a domestic flight is in the course of the operations of embarking or disembarking; *Moss v Delta Airlines Inc. et al.* [2006] No. 1-04-CV-3124-JOF, falling down from a wheelchair van was in the process of disembarkation.

²³ *Aquino v Asiana Airlines Inc* [2003] 105 Cal.App.4th 1272.

²⁴ Canadian Transport Agency [1998] Decision No. 170-AT-A-1998 Compensation is granted to a passenger who was refused to be carried on an international flight.

purpose of achieving uniformity of the two Conventions would be jeopardized. This reasoning is rightly affirmed by the Supreme Courts of the UK and Canada, both of which focus on the time when the accident occurred.²⁵ The subsequent question as to whether or not an injured person can claim compensation under local law or human rights law will be discussed in Section III.

2. Substantive Scope

Where passengers are concerned, the Warsaw Convention of 1929 and the Montreal Convention of 1999 cover an 'accident' which happened within the above-mentioned temporal scope. Neither Convention defines the term 'accident'.²⁶ In *Air France v. Saks*,²⁷ the US Supreme Court interpreted Article 17 of the Warsaw Convention of 1929 and held that injury itself cannot be an accident; rather, an accident must be 'an unexpected or unusual event or happening that is external to the passenger' and 'should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries'.²⁸ Hence, Saks, the respondent who became deaf in one ear after a normal operation of the aircraft, was unable to claim under this provision since the aircraft pressurization system had operated in a normal manner. Her loss of hearing resulted from her own internal reaction to the usual, normal and expected operation of the aircraft, which therefore could not be constituted as an accident.

The phrase 'external to the passenger' raises issues concerning human rights violations since one might imagine that human rights are 'internal to the passenger'. For example, can racial profiling be considered 'external to the passenger'? The plaintiffs in cases concerning racial discrimination on board, such as *Gibbs v. American Airlines Inc.*²⁹ and *King v. American Airline Inc. et al.*,³⁰ did not argue that having their human rights violated was 'external' to

²⁵ *Stott v Thomas Cook Tour Operators Ltd* [2014] UKSC 15 para. 60; *Thibodeau v Air Canada* [2014] SCC 67 paras 83-85.

²⁶ Warsaw Convention of 1929 art. 17; Montreal Convention of 1999 art. 17(1).

²⁷ *Air France v Saks* 470 U.S. 392 405 (1985).

²⁸ Ibid.

²⁹ *Gibbs v American Airlines* 191 F.Supp.2d 144 (2002).

³⁰ *King v American Airline Inc. et al* 284 F.3d 352 (2002).

themselves; rather, they argued that the whole Warsaw Convention as a whole did not apply to discrimination claims. Because they made claims under the Civil Rights Act of 1866 or Section 1981 (statutory discrimination), the US courts dismissed both cases without addressing whether 'race' can be encompassed within the definition of 'accident'.

In relation to disability rights, a combination of normal operation of an aircraft with an impairment of a PWD may trigger an injury solely to a PWD. This is the reason that special adjustments are made in order to meet PWDs' needs. However, when there is an injury to a PWD, can an air carrier argue that it is due to a PWD's impairment and thus outside the meaning of 'accident'? The issue of external factors was raised at the Montreal Conference drafting the Montreal Convention of 1999. In Article 16 of the draft text, later forming Article 17 of the Montreal Convention of 1999, the last sentence of Article 16 excludes air carrier's liability from any injury due to the passenger's health: 'the carrier is not liable if the death or injury resulted solely from the state of health of the passenger'.³¹ However, this text was opposed by delegates from Norway and Sweden because the text was detrimental to PWDs and contrary to the draft's objective to protect consumers.³² Hence, this sentence was deleted. Yet if the *Saks* interpretation were strictly adhered to, PWDs would not be able to claim for an injury.³³

Almost twenty years after *Saks*, the US Supreme Court re-interpreted the phrase 'external to the passenger' under the same Warsaw Convention of 1929. In *Olympic Airways v. Husain*, Abib Hanson, who was allergic to smoke, and his wife, Rubina Husain, asked to be seated far away from the smoking section, but a flight attendant repeatedly refused, even though there were free seats available.³⁴ Two hours into the flight, Hanson fell ill and later he passed away. The US Supreme Court expanded the meaning of 'accident' and

³¹ ICAO, 'International Conference on Air Law' (ICAO Doc 9775 Vol. II, Montreal, May 1999) 18.

³² ICAO, 'International Conference on Air Law' (ICAO Doc 9775 Vol. I, Montreal, May 1999) 86.

³³ See *Hipolito v Northwest Airlines Inc.* 15 Fed.Appx. 109 (2001). An asthma attack was not considered an accident as it was not caused by an event external to a passenger. The airline's failure to provide a full bottle of oxygen is not considered an external, unusual event.

³⁴ *Olympic Airways v Husain* [2004] 540 U.S. 644.

concluded that the inaction of a flight attendant could be considered as one of the injury-producing events that constitute an accident.³⁵ Although the causes of death in *Husain* and loss of hearing in *Saks* are both internal to the passengers, *Husain* differs from *Saks* in that a flight attendant's repeated refusal in *Husain* was considered an unexpected and unusual event. In light of industry standards, in *Husain* this was treated as an external factor, while there was no unexpected external factor in *Saks*.

The broad interpretation of 'accident' in *Husain* is not free from controversy, however. In his dissenting opinion, the late Justice Scalia relied on the uniformity of law and argued against the majority view on the basis that the reasoning that an inaction cannot be an accident deviates from the interpretation in other jurisdictions.³⁶ Similarly, Dempsey finds *Husain*'s holding troubling for airlines.³⁷ When the reasoning in *Husain* is applied to the case governed by the Montreal Convention of 1999, a strict liability regime, air carriers have to insure higher amounts for compensation to passengers.³⁸ On a positive note, the insertion of duty of care encourages air carriers to keep up with industry standards,³⁹ and invest in training cabin crews.⁴⁰

³⁵ Ibid. Other cases concerning smoking on board were not brought under the Warsaw Convention of 1929. In Australia, Qantas Airways Limited was sued under the Trade Practices Act 1974. See *Leonie Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) 41-417 (1995) 55 FCR 147. In the US, the Supreme Court of Iowa decided on a State law since the dispute happened in a domestic route. See *Ravreby v. United Airlines Inc* [1980] 293 N.W.2d 260.

³⁶ *Husain*, ibid 663. See *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ. 1005; *Qantas Ltd. v. Povey* [2003] VSCA 227.

³⁷ Paul Stephen Dempsey, 'Olympic Airways v. Husain: The US Supreme Court Gives the Term 'Accident' a Whole New Meaning' [2003] *Annals of Air and Space Law* 333, 341.

³⁸ Andrei Ciobanu, 'Saving the Airlines: A Narrower Interpretation of the Term "Accident" in Article 17 of the Montreal Convention' [2006] *Annals of Air and Space Law* 1, 25.

³⁹ Ann Cornett, 'Air Carrier Liability under Warsaw: The Ninth Circuit Holds that Aircraft Personnel's Failure to Act in the Face of Known Risk is an "Accident" When Determining Warsaw Liability – *Husain v. Olympic Airways*' [2003] *Journal of Air Law and Commerce* 163, 169.

⁴⁰ George Leloudas, *Risk and Liability in Air Law*, (1st sup, Informa law 2009) 119.

In relation to cases concerning PWDs, although the *Husain* case does not apparently involve disability,⁴¹ its reasoning of assessing an unexpected and unusual event in relation to industry standards can be applied to cases involving PWDs. As evidenced in judgments rendered by lower courts in the US and Canada, if an air carrier has the duties both to provide accessible travel and not to discriminate against PWDs, the air carrier's inaction or failure to provide accessible travel for a PWD will constitute an accident.⁴² Yet when an air carrier is not legally bound to provide accommodation for PWDs, not doing so does not constitute an accident.⁴³

III. INTERACTION BETWEEN THE LAW ON INTERNATIONAL CARRIAGE BY AIR AND HUMAN RIGHTS LAW

A question occurs when a human rights claim, which happens within the temporal scope of the Warsaw Convention of 1929 or the Montreal

⁴¹ In Canada, the Canadian Transportation Agency ruled that allergy can constitute a disability but there is no similar approach in the US. See *Canadian Transportation Agency* (File No.: U3570-15) Decision No. 4-AT-A-2010 [2010], (6 Jan. 2010); *Canadian Transportation Agency* (File No.: U3570/08-47) Decision No. 134-AT-A-2013 [2013], *Canadian Transportation Agency* (File No. U3570/01-43) Decision No. 335-AT-A-2007 [2007] paras 28-35.

⁴² See *McCaskey v Continental Airlines Inc.* 159 F. Supp. 2d 562 (S.D. Tex. 2001), in which the lack of crew training and responsiveness after the onset of a stroke was considered an accident; *Prescod v AMR* [2004] 383 F.3d 861 868 (9th Cir. 2004), in which an air carrier's failure to comply with a health-based request also constituted an accident under the Warsaw Convention of 1929; *Bunis v Israir GSA Inc.* 511 F.Supp.2d 319 (2007), in which failure to provide a wheelchair as requested was taken as an unusual or unexpected event; *Balani v Lufthansa German Airlines Corp* [2010] ONSC 3003 (CanLII) (2010), in which failure to provide a wheelchair as requested by a passenger who later fell constituted an accident.

⁴³ *Dogbe v Delta Air Lines Inc.* 969 F.Supp.2d 261 (E.D.N.Y. 2013) 272, in which an air carrier was not obligated to allow a plaintiff to sit in the empty seat even if the plaintiff's leg pain constituted a disability because no law prescribes such a duty; *Timb Thi Nguyen v Korean Air Lines Co Ltd* 807 F.3d 133 (2015), in which an air carrier did not refuse a wheelchair request and an air carrier was not required to give personalized instructions in passenger's native language. The airline's failure to identify a passenger as a wheelchair passenger did not constitute an unexpected or unusual event constituting an accident under the Warsaw Convention of 1929.

Convention of 1999, does not fall within the substantive scope of either Convention: can a plaintiff sue under a human rights law instead?

1. Law on International Carriage by Air versus Domestic Human Rights Law

The exclusivity principle is designed to take priority over any action for damage under any other law if an individual is able to establish recourse within the temporal and substantive scope of either the Warsaw Convention of 1929 or the Montreal Convention of 1999.⁴⁴

In *Stott v. Thomas Cook Tour Operators Ltd.*,⁴⁵ the plaintiff claimed damages for discomfort and injury to feelings by a breach of the UK Disability Regulations, which implemented EU Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, whose objective is to ensure the equal right of PWDs to free movement, freedom of choice and non-discrimination. There was no dispute that the defendant breached its obligations to accommodate a seat as requested by the plaintiff, who was a permanent wheelchair user. Since the plaintiff's alleged injury occurred on board an aircraft, the defendant argued that the exclusivity principle in the Montreal Convention of 1999 pre-empted this claim.⁴⁶ The UK Supreme Court examined cases dealing with this principle in the UK and other jurisdictions and regrettably affirmed that the plaintiff's claim under the UK Disability Regulations was barred since the case happened within a temporal scope of the Montreal Convention of 1999.⁴⁷ In short, the uniformity of liability of air carriers under international law was given greater weight than the human rights claim.

Not only are the rights of PWDs under domestic law pre-empted by the Conventions, but other rights recognized in domestic law, even if omitted from the Conventions are also precluded. These include protection against racial discrimination in *King* and *Gibbs* in the US⁴⁸ and language rights in

⁴⁴ Warsaw Convention of 1929 art. 24; Montreal Convention of 1999 art. 29.

⁴⁵ *Stott* (n 25).

⁴⁶ *Ibid* para 60.

⁴⁷ *Ibid* para 61.

⁴⁸ *Gibbs* (n 29); *King* (n 30).

Thibodeau v. Air Canada.⁴⁹ All of these assertions are based on domestic law and so should not be interpreted as conflicting with a state's obligations under international law, in this case the Warsaw Convention of 1929 or the Montreal Convention of 1999.⁵⁰ In short, a review of case law in the UK, the US, and Canada yields a negative answer to the question whether a plaintiff can make a human rights law claim for an incident which occurs within the temporal scope of the Warsaw Convention or the Montreal Convention because of the exclusivity principle.⁵¹

2. *Law on International Carriage by Air versus International Human Rights Law*

One may argue that since the plaintiffs in the cases mentioned in Section III.1 above had not invoked international human rights law before domestic courts, the cases were pre-empted by international conventions on air law. In *Sidhu v. British Airways Plc.*,⁵² the plaintiff based her argument on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but this was rebutted because not all parties to the Warsaw Convention of 1929 are also party to the ECHR. Despite there being no reference to the VCLT, the House of Lords ruled that the treaty capable of becoming 'relevant rules of international law' for interpretation must be applicable between all of the parties to the Warsaw Convention of 1929.

As a consequence, one might ask if the holding would have been different had the claim in *Stott* been based on the CRPD. The answer will be as same as one in *Sidhu*, since the parties to the CRPD are not the same parties to the Montreal Convention of 1999.⁵³

⁴⁹ *Thibodeau* (n 25).

⁵⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331 (VCLT) art. 27.

⁵¹ See *Sidhu v British Airways Plc.* [1997] AC 430; *El Al Israel Airlines Ltd. v Tsui Yuan Tseng* 525 US 155 (1999); *Thibodeau* (n 25); George N. Tompkins, Jr., 'Summary of MC99 Judicial Updates 2013' [2014] Air & Space Law 91, 92.

⁵² *Sidhu* (n 51).

⁵³ For example, the US, Ireland, Tonga, Belarus, etc. signed the CRPD but ratified the Montreal Convention of 1999. Botswana and Equatorial Guinea did not sign the CRPD but ratified the Montreal Convention of 1999. United Nations Treaty Collection (n 9); International Civil Aviation Organization (n 8).

If a claim were to be based on a peremptory norm would it produce a different result because all states would be bound by this obligation? No case has ever challenged the exclusivity principle by raising a peremptory norm as another competing value. However, Lady Hale noted in *Stott* that protection against racial discrimination, as a peremptory norm, voids any conflicting provision in any treaty.⁵⁴ Even though a central basis of the claim in *King* was racial discrimination, the plaintiff's argument was based on domestic law, despite protection from racial discrimination being a peremptory norm.⁵⁵

This obligation binds a state as an actor under international law⁵⁶ so Lady Hale extended it only to State airlines.⁵⁷ While her *obiter dictum* provides a solution to racial discrimination on the part of State airlines, it creates different results for other types of discrimination, as well as for alleged racial discrimination on the part of private airlines.⁵⁸

In relation to transport, the Committee on the Rights of the Child (CRC Committee) expressly affirms States' obligations even when transport services are privatized.⁵⁹ Lady Hale's *obiter dictum* also contradicts the views rendered by all UN human rights treaty bodies concerning private-sector

⁵⁴ *Stott* (n 25) para 68.

⁵⁵ *King* (n 30); see also *Gibbs* (n 25). Both cases happened after the International Court of Justice ruled in 1970 that protection from racial discrimination is an obligation *erga omnes*.

⁵⁶ *Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970) paras 33-34.

⁵⁷ *Stott* (n 25) para 70.

⁵⁸ Mark Andrew Glynn, 'Case Comment *Stott v. Thomas Cook Tour Operators Ltd* [2014] UKSC 15 & *Thibodeau v. Air Canada* [2014] SCC 67' [2014] *Air & Space Law* 683 at 692.

⁵⁹ Committee on the Rights of the Child, General Comment 16, State obligations regarding the impact of the business sector on children's rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16 paras 15, 33. For the argument on human rights obligation of States when a public function is privatized in the case of the UK, Palmer gives examples of cases in the UK arguing that governments should not contract out human rights obligations by privatization. See Stephanie Palmer, *Privatization and Human Rights in the United Kingdom* in Tsvi Kahana and Anat Scolnicov (eds) *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016) 233.

discrimination.⁶⁰ The opinion of the Committee on the Elimination of Racial Discrimination (CERD Committee) is that the protection from racially discriminatory practices obliges States to adopt measures to inhibit such acts by private entities.⁶¹ Thus, applying the CERD Committee's viewpoint to Lady Hale's *dictum*, a state must prevent private entities, in this case, air carriers and their agents, from carrying out actions that result in racial discrimination. However, no other instances are known of cases decided by a national court where the fundamental value of human rights in relation to air transport was upheld.

3. Monetary Compensation

Both the Warsaw Convention of 1929 and the Montreal Convention of 1999 allow for compensation for 'bodily injury'.⁶² In light of the term 'bodily', it needs to be established whether purely emotional distress is compensable when not connected to a strict interpretation of bodily injury.

Mental injury may have been excluded in the early days of the commercial airline industry in order to protect the new industry from being sued without any liability limit.⁶³ The Chairman of the First Meeting of the Montreal Conference acknowledged that pure psychological injury had not been contemplated during the drafting history of the Warsaw Convention of 1929.⁶⁴

The courts in the UK and the US follow the interpretation of this term under the Warsaw Convention of 1929, meaning that a passenger is unable to claim compensation for purely emotional distress resulting from a violation of their

⁶⁰ Wouter Vandenhoe, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (1st sup, Intersentia 2005) 85, 213, 230, 246; Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010) CRPD/C/9/D/1/2010.

⁶¹ Committee; 'the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma' (Fifty-seventh session, 2000) U.N. Doc. A/55/18 Annex V paras 12-16.

⁶² Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17.

⁶³ Andrew Field, *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, 28 Dalhousie Law Journal 69, 96 (2005).

⁶⁴ ICAO (n 32) 110.

human rights.⁶⁵ In other words, even though courts interpret 'accident' as covering an air carrier's failure to comply with human rights law, 'stand-alone' mental anguish is non-compensable.

The Montreal Conference charged with drafting the Montreal Convention of 1999 differed from the drafting process of the Warsaw Convention of 1929 because the delegates at the former acknowledged the possible exclusion of purely emotional injury by use of the expression 'bodily injury'. Concerns about mental injury, and possible claims arising from discrimination, were raised by the delegate of Namibia, who relied on constitutional guarantees of non-discrimination on the basis *inter alia* of status, asking whether this exclusion would be constitutionally permissible in a number of jurisdictions.⁶⁶ In the end, the Montreal Conference conceded that, under certain circumstances, some States included damages for mental injuries under the 'bodily injury' umbrella, and that 'jurisprudence in this area is developing'.⁶⁷

The courts in *Stott* and *Thibodeau* followed the reasoning emanating from *King*, which was decided under the Warsaw Convention of 1929, and all concurred that there are other possible means of enforcement.⁶⁸ In *Stott*, Thomas Cook avoided prosecution but the firm was guilty of an offence carrying a fine not exceeding 5,000 pounds sterling (approx. 5,525 Euros).⁶⁹ Similarly, in *Thibodeau*, Air Canada failed to provide on-board services in

⁶⁵ See *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7; *Eastern Airlines Inc. v Floyd* 499 U.S. 530 (1991); George N. Tompkins, Jr., 'Summary of MC99 Judicial Decisions 2012' [2013] Air & Space Law 123, 133; George N. Tompkins, Jr., '2015 Summary of MC99 Court Decisions' [2016] Air & Space Law 129, 134.

The Advocate General in *Simone Leitner v TUI Deutschland GmbH & Co KG*, reviewed the term 'damage' in the Warsaw Convention of 1929 including other international conventions on transport to support the claim on compensation for non-material damage from the Package Travel Directive and opined that the Warsaw Convention of 1929 does not preclude non-material damage. It is uncertain whether the Advocate General intended to cover purely emotional distress or not since the plaintiff in the case suffered physical injury too. See Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2001] ECR, I-2631, Opinion of Advocate General Tizzano para 39.

⁶⁶ ICAO (n 32) 72.

⁶⁷ *Ibid* 243.

⁶⁸ *Stott* (n 25) para 64; *Thibodeau* (n 25) paras 110, 132; *King* (n 30) para 38.

⁶⁹ *Stott* (n 25) para 12.

French, but the majority ruling granted no financial compensation for moral damage under the quasi-constitutional Official Language Act. In this five-to-two decision, the majority observed that overlapping remedial provisions between the Official Language Act and the Montreal Convention of 1999 did not conflict, since they had different purposes and aspects.⁷⁰ Moreover, the majority were of the opinion that an appropriate and just remedy must not violate Canada's international obligations, i.e. the Montreal Convention of 1999, to the effect that the declaration, apology, and cost of the application without monetary compensation must be commensurate with appropriate and just remedies.⁷¹ In sum, the US, the UK, and Canada do not view the lack of monetary compensation as unfair towards passengers whose human rights are breached by air carriers and where the violation results in mental injury only.

According to the CERD's reasoning in *L.A. et al. v. Slovakia*, a case concerning whether a letter of apology alone, without monetary compensation for diminution of human dignity, constituted an effective remedy, determination of remedial measures is a matter of national law, unless the national decision is manifestly arbitrary or amounts to a denial of justice.⁷² The *Thibodeau* judgment follows to the letter the line of reasoning in *L.A.* in respect of awarding other remedial measures. However, it appears that both *Stott* and *Thibodeau* follow the judgments under the Warsaw Convention of 1929 and disregard the conclusion at the Montreal Conference that the term 'bodily injury' is open to development.

⁷⁰ *Thibodeau* (n 25) paras 98-100.

⁷¹ *Ibid* paras 110, 132.

⁷² Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011) U.N. Doc. CERD/C/85/D/49/2011 para 7.1.

IV. ASSESSMENT

It is accepted by distinguished legal scholars⁷³ and practitioners⁷⁴ that the problem of fragmentation in international law is overstated. No regime is self-contained, since general international law is applicable for treaty interpretation.⁷⁵ Moreover, the method used in treaty interpretation is not fragmented, at least as far as international tribunals are concerned.⁷⁶ Nevertheless, from Section III above, it appears that the Warsaw Convention of 1929 and the Montreal Convention of 1999 are likely to an extent to be self-contained as a result of their exclusivity principle. Moreover, since courts are known to narrowly construe the term 'bodily injury', claims for purely emotional damage cannot be pursued, given that they are mostly argued within cases alleging human rights violations.

Remarkably, international conventions and legislation for other modes of transportation adopt the expression 'personal injury' instead of 'bodily injury', so their scope is broader than that of air transport.⁷⁷ Attempts to

⁷³ Martti Koskenniemi, 'The case for Comparative International Law' [2009] Finnish Yearbook of International Law 1, 5; James Crawford, *International Law as an Open System: Selected Essays* (Cameron 2002).

⁷⁴ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner, [2009] European Journal of International Law 265, 289; Declaration of Judge Greenwood, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Rep. 2012 394, para 8.

⁷⁵ International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682 (13 Apr. 2006) para. 192; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' [2006] European Journal of International Law 483.

⁷⁶ Eirik Bjorge, *The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Method of Interpretation?*, 533 in Mads Andenas (ed), *A Farewell to Fragmentation Reassertion and Convergence in International Law* (Cambridge University Press 2015).

⁷⁷ See Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), art. 3; Convention concerning International Carriage by Rail, (3 June 1999), Uniform Rules concerning the Contract of International Carriage of

modify the term to 'personal injury' in order to encompass mental injury, such as the Guatemala City Protocol of 1971, were not successful.⁷⁸ The account of the Rapporteur on the Modernization and Consolidation of the Warsaw System supports the notion that claims for discrimination would be allowed under 'personal injury' and that states are reluctant to adopt this term because of its implications:

The expression 'personal injury' would open the door to non-physical personal injuries such as slander, libel, *discrimination*, fear, fright and apprehension and this would clearly be neither desirable nor acceptable.⁷⁹

The argument is that States can exercise their margin of appreciation on remedial measures in order to exercise their discretion. The first condition is that there should be several measures available from which to choose. Though measures to prohibit discrimination and measures to ensure enforcement or an effective remedy may overlap, they are not identical. Penalties can consist of a remedial measure and an enforcement mechanism. On the other hand, raising awareness prevents discrimination but does not deal with remedies directly. Invariably, exclusion of purely emotional damage under the Montreal Convention of 1999 also means that States, courts or other competent bodies cannot exercise discretion in selecting financial

Passengers by Rail, Appendix A, art. 26 (COTIF); Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011 1–12, art. 7. The House of Lords in *King v Bristow Helicopters Ltd.* compared this term in the Warsaw Convention of 1929 and in the COTIF. See *King v Bristow Helicopters Ltd.* [2002] UKHL 7 para. 17.

⁷⁸ Bin Cheng, 'A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)' [2004] *International and Comparative Law Quarterly* 833, 850; Michael Milde, 'The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999' (1999) 24 *Annals of Air and Space Law* 155, 177; Thomas J. Whalen, 'The New Warsaw Convention: The Montreal Convention' (2000) 25 *Air & Space Law* 12, 17; Pablo Mendes De Leon & Werner Eyskens, 'The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System' (2000–2001) 66 *Journal of Air Law and Commerce* 1155, 1167.

⁷⁹ ICAO, '*International Conference on Air Law*' (ICAO Doc 9775 Vol. III Montreal, May 1999) 65. Emphasis added.

compensation for moral damage, regardless of the level of damage, distress or discrimination suffered by PWDs.

Monetary compensation for moral damage is lacking because other possible remedies for victims of human rights violations can be found under administrative mechanisms and, therefore, no monetary compensation is provided. Moreover, even though the preclusion of compensation for moral damage neutrally applies to all passengers, damage stemming from failure to reach accessibility standards, or arguing for non-discrimination on the basis of disability, may be the cause of emotional distress without any bodily injury.⁸⁰ Accordingly, it is legitimate to question whether a law lacking compensation for moral damage, and a preclusion of claims under other laws, is capable of ensuring effective remedy and whether this *status quo* equals discrimination or denial of justice.

The objective of the Montreal Convention of 1999 shifts from the Warsaw Convention of 1929 to protecting consumer and ensuring equitable compensation based on the principle of restitution.⁸¹ An indication in the *travaux préparatoires* that an interpretation of the term 'bodily injury' is open for further development means that courts can take subsequent technical, economic or legal developments into account and that it is a state obligation to develop a meaning.⁸² Thus, it appears that the exclusion of moral damage from human rights violation claims is an issue of treaty interpretation rather than of the treaty drafting itself.

V. POSSIBLE SOLUTIONS TO PROVIDE AN EFFECTIVE REMEDY

In *Turturro v. Continental Airlines*, concerning the exclusion of a private claim under the Air Carrier Access Act, a US domestic law to prohibit discrimination on the basis of disability in air travel, by the Warsaw Convention of 1929, the US Southern District of New York Court opined that

⁸⁰ See *Stott* (n 25).

⁸¹ Montreal Convention of 1999, Preamble; Whalen (n 78) 14.

⁸² International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission. A/CN.4/L.702 (18 July 2006) para 23.

The Convention massively curtails damage awards for victims of horrible acts such as terrorism; the fact that the Convention also abridges recovery for the lesser offense of discrimination should not surprise anyone.⁸³

This Section presents and appraises several possible solutions applicable for moral damage caused to PWDs proposed by states, judges, scholars, and different stakeholders, in addition to the present author.

1. *Confining the Exclusivity Principle*

As the exclusivity principle aims to provide uniform rules on the liability of air carriers, it is necessary to maintain this provision in the self-contained Montreal Convention of 1999. Nonetheless, the issues of consumer protection and human rights protection raise the question of how to properly interpret Article 29 of the Montreal Convention, given that both *Sidhu* and *Tseng* were decided under the earlier Warsaw Convention and their reasoning was followed by the courts in *Stott* and *Thibodeau*.

One proposal is to weaken the exclusivity and permit a co-occurrence of claims within the scope of the Montreal Convention.⁸⁴ This proposal is in line with an interpretation of the Montreal Convention by the Court of Justice of the European Union⁸⁵ and certain lower courts in the US.⁸⁶ The latter

⁸³ *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

⁸⁴ Ingrid Koning, 'The Disabling of the EC Disability Regulation: *Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*' (2014) 22 *European Review of Private Law* 769, 785-786.

⁸⁵ The then ECJ in *IATA and ELFAA v. Department of Transport* concluded that remedial measures for flight delay in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Regulation 261) were not precluded by the Montreal Convention of 1999. According to a line of cases, there are two types of damage: standardized damage and individual damage in case of flight delay. The former was common to all passengers and mentioned in Regulation 261, while the latter was governed by the Montreal Convention of 1999.

⁸⁶ See *Constantino v Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2014); *Summary of MC99 Judicial Decisions 2012* (n 65) 137; *Summary of MC99 Judicial Updates 2013* (n 51) 91-92, 96; George N. Tompkins, Jr., '2014 Summary of MC99 Court Decisions' (2015) 40 *Air & Space Law* 147, 158-160.

distinguish Article 29 of the Montreal Convention from Article 24 of the Warsaw Convention because the former contains the following clause:

In the carriage of passengers, baggage and cargo, *any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise*, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...⁸⁷

These US lower courts differentiate the Montreal Convention from the Warsaw Convention by interpreting the clause 'any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise' to mean 'partial preemption'. They allow a plaintiff to claim under any state law subject to the Convention's limitations on liability if a plaintiff successfully establishes liability set forth by the Convention.⁸⁸

This reasoning is followed in *Adler et al v. WestJet Airlines, Ltd.*, decided only four months after *Stott*. The US District Court for the Southern District of Florida found that the Adlers, who were removed from a plane because a flight attendant felt uncomfortable with their service animal, could file a state-law claim for humiliation provided their claim fell within the scope of the Montreal Convention.⁸⁹ In this case, the US District Court referred neither to the CRPD, owing to non-ratification of the CRPD by the US, nor to any human rights norms.

Clearly, the criticism that the total preemption is too broad⁹⁰ can be reduced by this partial preemption. In *Tseng*, Justice Ginsburg argued that if there were no preemption, it would be unfair for a person who sustained a physical injury to be entitled to a limited amount of compensation under the Warsaw Convention while a person who sustained mental anguish alone is entitled to

⁸⁷ Montreal Convention, 1999, art. 29, emphasis added; See Whalen (n 78) 20; George N. Tompkins, Jr., 'Are the Objectives of the 1999 Montreal Convention in Danger of Failure?' (2014) 39 Air & Space Law 203, 207.

⁸⁸ See *Constantino* (n 86); *Summary of MC99 Judicial Decisions 2012* (n 65) 137; *Summary of MC99 Judicial Updates 2013* (n 51) 91-92, 96; *2014 Summary of MC99 Court Decisions* (n 86) 158-160.

⁸⁹ *Adler et al v WestJet Airlines, Ltd.* No. 0:2013cv62824 - Document 37 (S.D. Fla. 2014).

⁹⁰ Ingrid Koning, 'Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions' (2008) 33 Air & Space Law 318, 341.

an unlimited liability scheme under local law.⁹¹ This could be overcome by defining a compensable amount within the scope of the Montreal Convention so all injured persons are subject to the same limit as decided in *Adler*. However, the interpretation in *Adler* contradicts the *travaux préparatoires*.⁹²

2. Re-interpreting 'Accident' while Confining the Exclusivity Principle

The dissenting opinion in *Thibodeau* also advances an alternative way to interpret Article 29 of the Montreal Convention. Justice Abella, who wrote the dissenting opinion, observed that while courts typically interpret domestic rules in light of international human rights law, in the *Thibodeau* case a commercial treaty was interpreted as diminishing human rights protected by domestic law.⁹³ She applied the rules of treaty interpretation under the VCLT to interpret the shift in language of Article 29 of the Montreal Convention and the shift of objective to consumer-centered to argue against a restriction to passenger protection.⁹⁴ Under this interpretation, she reached a conclusion that the phrase 'in the carriage of passengers, baggage and cargo' under Article 29 restricts the type of action to be brought under the Montreal Convention only to claims for damage incurred in this context.⁹⁵

This dissenting opinion differs from *Adler* regarding the interpretation of 'accident'. Instead of applying *Husain's* flexible interpretation to the term 'accident', Justice Abella proposed that Article 17(1) of the Montreal Convention required (1) an accident, (2) which caused, (3) death or bodily injury, and (4) while the passenger was within the temporal scope of the Convention.⁹⁶ She further considered that failure to provide services in French was not an accident at all and therefore did not discuss the meaning

⁹¹ *Tseng* (n 51) 171.

⁹² *Tompkins, Jr.* (n 21) 51.

⁹³ *Thibodeau* (n 25) paras 134, 170. See Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010) 758 para 89.

⁹⁴ *Thibodeau* (n 25) paras 150, 161.

⁹⁵ *Thibodeau* paras 141-142, 165.

⁹⁶ *Thibodeau* para 175.

of bodily injury.⁹⁷ The Montreal Convention was thus not applicable because there was no 'accident', even though the breach happened on board.⁹⁸ Under this interpretation, courts can recognize the moral damage caused by violating accessibility standards.

Both *Adler* and *Thibodeau's* dissenting opinions present flaws. Despite creating the possibility of compensating PWDs, both interpretations offer no convincing explanation as to why they deviate from the *stare decisis* in the UK, the US, and Canada, as well as other jurisdictions,⁹⁹ and circumvent the uniformity purpose of the Montreal Convention. The dissenting opinion in *Thibodeau* is persuasive because of linkages with human rights and the rules on treaty interpretation. However, the sole cause of action has been acknowledged in the Warsaw Convention and followed by the Montreal Convention. As per the reasoning in *Sidhu* concerning the different state parties to the ECHR and to the Warsaw Convention¹⁰⁰ it is questionable whether language rights trump a treaty agreed by more than a hundred States without breaching Article 27 of the VCLT. Unfortunately, the proper way to interpret the Montreal Convention is neither to rewrite the law nor to contradict from the intentions of state parties, even though the result renders the injured person without compensation because the authority to amend the Convention is a matter for the contracting parties.¹⁰¹

3. *Re-interpreting 'Bodily Injury'*

Another possibility is to interpret the expression 'bodily injury' to cover non-material damage. This interpretation is permissible under the rules of treaty interpretation since, according to the drafting history, this term is subject to evolutive interpretation. Supporting reasons can be deduced from the consumer-oriented policy in the Montreal Convention as well as from the comments of the French delegate on the meaning of the term 'bodily injury'

⁹⁷ Ibid para 176.

⁹⁸ Ibid para 177.

⁹⁹ See *Sidhu* (n 51); *Tseng* (n 51); *Thibodeau* para 177; *Summary of MC99 Judicial Updates 2013* (n 50) 92.

¹⁰⁰ *Sidhu* (n 51).

¹⁰¹ See *Stott* (n 25) paras 63, 70; *King* (n 30).

in French text in the preparatory draft and support from several States.¹⁰² One author relied on the reasoning in *Walz* because the ECJ, despite not directly ruling on bodily injury, interpreted that 'damage' in the whole of Chapter III of the Montreal Convention must be construed as including both types of damage.¹⁰³

One possible argument against this view is that this interpretation will open the floodgates of litigation for moral damage. In reality, this fear can be prevented because courts can exercise their margin of appreciation, as affirmed by the CERD in *L.A.*. Moreover, the present author agrees with the statement made by the delegate of Denmark at the Montreal Conference that a passenger always has to prove that he or she has been mentally injured by an accident.¹⁰⁴

4. *A Solution for Moral Damage under Discrimination Claims*

In Sections V.1 to V.3 above, this paper presented three alternatives. The first two involve confining the exclusivity principle (see Sections V.1 and V.2), while the last one deals with the expression 'bodily injury' (see Section V.3). The options to confine the exclusivity principle and allow a recourse to local law, as Judge Ginsburg reasoned in *Tseng*, would undermine the uniform regulation of the Warsaw Convention.¹⁰⁵ This objective is anchored in the Montreal Convention, along with the consumer protection objective.¹⁰⁶ With the general rules of interpretation as a backdrop, both objectives should be taken into account and construed in a conformable manner.¹⁰⁷ Thus, the first two options are not viable.

¹⁰² McKay Cunningham, 'The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?' (2008) 41 Vanderbilt Journal of Transnational Law 1043, 1073, 1081.

¹⁰³ Case C-63/09 *Walz v Clickair SA* [2010] para 29. See Marc McDonald, 'The Montreal Convention and the Preemption of Air Passenger harm Claims' (2010) 44 The Irish Jurist 203, 237.

¹⁰⁴ ICAO (n 32) 68.

¹⁰⁵ *El Al Israel Airlines, Ltd. v Tsui Yuan Tseng*, 525 US 155, 161 (1999).

¹⁰⁶ Montreal Convention, 1999, preamble.

¹⁰⁷ See WTO, 'US – Import Prohibition of Certain Shrimp and Shrimp Products' WT/DS58/AB/R 12 Oct. 1998 paras 17, 153.

The Montreal Conference concluded that the term 'bodily injury' is evolving.¹⁰⁸ The rules of treaty interpretation endorse states to construe this term in a non-static manner.¹⁰⁹ This approach to interpretation was endorsed by the ECJ in *Walz v. Clickair* in the case of compensation for non-material damage caused to baggage on the basis that the Montreal Convention aims to protect the interests of consumers.¹¹⁰ In my view, this option is not against the spirit of the Convention and is in line with the principle of harmonization: the exclusivity principle is still adhered to and the national courts do not, and are not entitled to, create new laws. Moreover, the proposal to include purely moral injury under the expression 'bodily injury' is comparable to the liability regime for carriage by sea, which allows compensation for personal injury and, at the same time, recognizes the exclusivity principle.¹¹¹ In its concluding observation to the EU, the CRPD Committee also supported the idea that the rights of maritime passengers can be a model.¹¹²

Air carriers may be afraid of being bombarded with legal actions. However, passengers have to prove their damage and courts can exercise their discretion on a case-by-case basis. What is more essential is that the option does not automatically suppress recourse for moral damage. Compared to the stretched interpretation of the term 'accident' in *Husain*, a floodgate is not

¹⁰⁸ ICAO (n 32) 243.

¹⁰⁹ International Law Commission (n 78) para 22.

¹¹⁰ *Walz* (n 103) para 31. The Brazilian court also gives the plaintiff compensation for moral damage to delayed baggage but the reasoning is established in its Constitution, not the Montreal Convention, 1999.

¹¹¹ Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), arts 3, 14.

The exclusivity principle in the Athens Convention is narrower than that of the Montreal Convention, 1999 because the former governs only 'the death of or personal injury to a passenger or for the loss of or damage to luggage'. See Don Green, 'Re-examining the Exclusivity Principle Following *Stott v Thomas Cook Tour Operator Ltd*' (2014) 6 Travel Law Quarterly 114, 116.

¹¹² Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Report Submitted by the European Union' U.N. Doc. CRPD/C/EU/CO/1 (Fourteenth session, 2015) para 53.

broken. The argument that insurance premiums will be increased when moral damage is compensable is unconvincing. If this surcharge reflects the actual market, it should be accepted by all involved.

VI. CONCLUSIONS

This paper has questioned the weight accorded to human rights norms when they interact with the law on international carriage by air. A review of case law in the UK, the US, and Canada yields an unsatisfactory result from a human rights perspective, whereby human rights can be trumped by the law on international carriage by air in these three jurisdictions. This is based on two common approaches in these jurisdictions. Firstly, the Warsaw Convention of 1929 and the Montreal Convention of 1999 appear to an extent to be self-contained because of their exclusivity principle. Secondly, courts are known to narrowly construe the term 'bodily injury' to deter people from claiming purely on grounds of emotional damage when their human rights are breached. The objective of the Montreal Convention specifically to protect consumers differs from that of the Warsaw Convention. Moreover, the drafting history of the former affords states a degree of latitude in the interpretation of the term 'bodily injury'. Hence, in this author's opinion, the above-mentioned twin problems on the interaction between the two branches of law can be eased by the evolutive treaty interpretation method.

THE FINANCIAL DISTRESS OF INDIVIDUAL DEBTORS:
POINTS FOR A *DE JURE CONDENDO* REFLECTION FROM A
COMPARATIVE PERSPECTIVE

Ilaria Kutufa*

The article deals with the issue of over-indebtedness, which is perceived – depending on the regulatory model adopted – either as a social problem or as a market failure. In this context, it is possible to distinguish between the welfare state (debtor oriented) and the liberal (creditors oriented) regulatory models. The comparative study of these paradigms is necessary for the following reasons: the comparison between the regulations of different countries makes it possible to find common rules to draw upon with a view to harmonization, as requested by the European Union; the comparison may reveal some regulatory gaps in those countries where the phenomenon of over-indebtedness appears incessant; there are countries, such as Italy, in which the legislation, apparently hybrid and straddling the two different models, is the subject of current reflection by the legislator for a change. This research suggests that the Italian legislator could be better inspired by the solutions accepted elsewhere and stimulated, at the same time, to overcome the above-mentioned regulatory gaps. This comparison will also show how the original differences are decreasing and allow to imagine meeting points for common rules.

Keywords: Over-indebtedness, welfare state model, liberal model, individual debtor, consumer, credit rating, improvident credit, discharge, responsible lending approach

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I. INTRODUCTION

The persistent incapacity of individual debtors to meet their repayment obligations has generally been identified and interpreted, by legislative provisions designed to regulate the question, as a 'social problem'.¹ In fact, many countries initially dealt with the problem of so-called over-indebtedness not so much as an individual question, but as a collective phenomenon that had to be regulated by each nation's legal system.² This

¹ The social importance of the phenomenon is underlined by the European Economic and Social Committee in its Opinion on 'credit and social exclusion in an affluent society' (2008/C 44/19), published in the Official Journal of the European Union (OJ) of 16 February 2008, C44/74. This aspect has also been emphasised by Enza Pellecchia (ed), *Dall'insolvenza al sovraindebitamento. Interesse del debitore alla liberazione e ristrutturazione dei debiti* (Giappichelli 2012), XIII, who refers to the ancient origins of the phenomenon dating back to the agricultural crisis witnessed in Greece in the 6th century B.C., which represented the opportunity for Solon to adopt social reforms at that time.

² According to the European Economic and Social Committee, *over-indebtedness* is 'a situation where the debtor is permanently incapable of paying his/her debts, or in which there is a real risk of not being able to pay debts when they become due'. According to the European Council (see Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on legal solutions to debt problems (Adopted by the Committee of Ministers on 20 June 2007 at the 999-a meeting of the Ministers' Deputies), *over-indebtedness* 'should cover at least the situations where the debt burden of an individual or a family continuously and/or manifestly exceeds its payment capacity, resulting in systematic difficulties, and sometimes in failure, in paying the creditors'. According to the wording adopted by the Italian legislator in Law no. 3 of 27 January 2012 (art. 6), *sovraindebitamento* is 'la situazione di perdurante squilibrio tra le obbligazioni assunte e il patrimonio prontamente liquidabile per farvi fronte, che determina la rilevante difficoltà di adempiere le proprie obbligazioni,

nation-level solution is adopted as an attempt to find a way of settling the financial crisis and designed to avoid the risk of the 'social exclusion' of those persons who finding themselves incapable of paying off their debts, no longer have any access to credit.³

The nature of the problem, which is relevant in various ways, in itself justifies a multidisciplinary approach to the observation and examination of its specific aspects. The question appears not only to involve the non-legal sciences such as sociology, psychology and statistics, but also to be

ovvero la definitiva incapacità di adempierle regolarmente' (a situation of a lasting imbalance between the obligations taken on and the capital that can be promptly converted to cash to deal with those obligations, resulting in considerable difficulty in meeting one's obligations, or the definitive incapacity to meet them regularly). As defined in German Law (§ 19 *Insolvenzordnung*), *Überschuldung* (also linked to business contexts) 'liegt vor, wenn das Vermögen des Schuldners die bestehenden Verbindlichkeiten nicht mehr deckt, es sei denn, die Fortführung des Unternehmens ist nach den Umständen überwiegend wahrscheinlich' (exists if the debtor's assets no longer cover the existing liabilities, unless, under the circumstances, the continuation of the company is largely probable). According to French law (L330-1 *Code de la Consommation*), *la situation de surendettement des personnes physiques* 'est caractérisée par l'impossibilité manifeste pour le débiteur de bonne foi de faire face à l'ensemble de ses dettes non professionnelles exigibles et à échoir. L'impossibilité manifeste pour une personne physique de bonne foi de faire face à l'engagement qu'elle a donné de cautionner ou d'acquitter solidairement la dette d'un entrepreneur individuel ou d'une société caractérise également une situation de surendettement. Le seul fait d'être propriétaire de sa résidence principale et que la valeur estimée de celle-ci à la date du dépôt du dossier de surendettement soit égale ou supérieure au montant de l'ensemble des dettes non professionnelles exigibles et à échoir ne peut être tenu comme empêchant que la situation de surendettement soit caractérisée' ('is characterized by the manifest impossibility for the bona fide debtor to meet all his non-business debts due and falling due. The manifest impossibility for a bona fide natural person to face up to the undertaking he has given to guarantee or jointly pay the debt of an individual entrepreneur or a company also characterizes an over-indebtedness situation. The mere fact of owning one's principal residence and the fact that its estimated value at the date of submission of the over-indebtedness file is equal to or greater than the amount of all non-business debts due and payable cannot be held to prevent the over-indebtedness situation from being characterized as follows'). This and all subsequent translations are the author's own.

³ In this regard, see the expression specifically used by the European Economic and Social Committee (see n 3).

interconnected, in terms of its legal character and its legislative consequences, with various notions of civil and business law.

The strategies adopted by the different countries to govern the phenomenon fall within three different models of regulation:

- 1) the *consumer bankruptcy* model, based, in general, on the debtor's limited liability, on the sharing of risks with creditors, on the social distribution of the cost of debt, and in particular on bankruptcy discharge seen as a means by which the debtor may be reintegrated into the economic world and the market as quickly as possible;
- 2) the *consumer debt adjustment* model, based on the renegotiation of debts with creditors, in view of the approval of an overall repayment plan seen as an integral part of a project for the re-education of consumers and for the re-establishment of 'a morality of compliance';⁴ and
- 3) the *consumer bankruptcy and debt adjustment* model, based on a compromise approach whereby the bankruptcy discharge outcome is provided for, however it is subjected to the occurrence of certain intervening events, or to the debtor meeting certain subjective or objective requirements of 'merit'.

Upon closer examination, the features that distinguish the above-mentioned models from one another reflect the different approaches to the matter adopted by the respective legal systems.

According to the *liberal* model of regulation (on which the consumer bankruptcy model is based, as in the USA), the aim of the system is market efficiency. The creditors and the debtor are treated as individual contracting parties, the bankruptcy discharge (i.e. write-off of prior-period debts) reduces risks and encourages new access to credit facilities and stimulates economically active behavior. This model incites a fresh start for the debtor after the default: hence, the debtor is reintegrated into economic activity and consumption as quickly as possible and his/her conduct is not stigmatized.

In contrast, according to the *welfare state* model of regulation (on which the consumer debt adjustment model is based, as in Spain), the system aims to

⁴ This expression is borrowed from Pellecchia (n 1) 128.

safeguard the debtor against the onset of (further) social risks (illness, unemployment, etc.), albeit with a view to guaranteeing at least the partial settlement of creditors' claims.⁵ In this model, the debtor, if excessively over-indebted, never deserves to be released from his/her obligations, even when they are the result of unforeseen circumstances. According to this model, a rescheduling of debts with creditors is desirable in order to gain the approval of a global repayment schedule. Advice and debt mediation services help debtors not to repeat the same mistakes and to change their consumption and debt patterns: the function of these services is decisive.

Following the European Union's formulation of the urgent need for common rules and the establishment of a uniform paradigm, a comparative investigation appears necessary, because it is important to understand which model (or which alternative) can best balance the interests at stake. As early as the 1990s, the first study, completed in 1994 (Huls-Reifner-Bourgoinie, *Overindebtedness of Consumers in the EC Member States: Facts and Search for Solutions*), highlighted the problem of a lack of legislative harmonization at a European level, resulting in inequality, social injustice and failure to complete the internal market. Subsequently, in 2002, the Economic and Social Committee, in expressing its opinion on the subject *Household over-indebtedness*, made it clear that the issue of over-indebtedness had been included as a priority in the development of consumer protection policy. The studies promoted over time by the European Commission have increasingly highlighted the urgent need for common regulations and have also affirmed the need for a strategy based on the joint use of preventative and subsequent actions.⁶ Furthermore, the 2008 opinion of the European Economic and Social Committee on *Credit and social exclusion in an affluent society* highlighted the need to draw up harmonized measures to anticipate and prevent this phenomenon. In this regard, two directives have recently been issued by the European Parliament and the Council: Directive 2008/48/EC on credit agreements for consumers and Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property. Furthermore, the

⁵ With regard to this dichotomy, see Pellecchia (n 1), XIII.

⁶ Over time, there has been a succession of working groups: see, among others, the working group on *Inclusion, Social Policy Aspects of Migration, Streamlining of Social Policies*.

search for common rules seems important in order to avoid, or at least reduce, the risk of bankruptcy tourism, a particular form of forum shopping, which may result from uneven legislation between the various countries.⁷ EU Regulation 2015/848 of the European Parliament and of the Council, dealing with this subject, has been adopted. In particular, the Regulation governs insolvency proceedings having cross-border effects. The purpose is to establish rules on jurisdiction, recognition and applicable law in this area. This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the center of his/her main interests. Those proceedings have a universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main ones. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State.

In addition, comparative research seems particularly appropriate in view of the fact that there are some countries, such as Italy, in which the discipline on insolvency law is in the process of being amended. At the moment, Italian legislation in this area enshrines a compromise between the models (liberal and welfare state) described above. The Italian legal system seems to move along both trajectories traced by these two models.⁸ In fact, the above-

⁷ *Bankruptcy tourism* is the phenomenon whereby residents of one country move to another jurisdiction in order to declare a personal bankruptcy there, before returning to their original country of residence. This is done in order to facilitate bankruptcy in a new jurisdiction where the insolvency laws are deemed to be more favorable. For a discussion on the phenomenon of bankruptcy tourism see Bob Wessels (ed), *International Insolvency Law* (Kluwer Law Intl. 2012), 349; Alberto Mazzoni, 'Cross-border insolvency of multinational groups of companies: proposals for a European approach in the light of the UNCITRAL approach' [2010] *Diritto del commercio internazionale* 755; Piervincenzo Pacileo (ed), *Il sovraindebitamento del debitore civile. Analisi comparata dei principali modelli europei* (Giappichelli 2018) 49.

⁸ Italian Law no. 3 of 27 January 2012 containing 'provisions governing usury and extortion, and also settlement of the over-indebtedness crisis', as supplemented by Decree Law no. 179 of 18 October 2012, converted, with amendments, by Italian Law no. 221 of 17 December 2012. The law under examination is the result of a debate that went on for some considerable time in the Italian Parliament, and that was triggered

mentioned Italian legislation is based on the distinction between the financial distress of a generalized 'non-bankruptable' debtor (i.e. an individual or business debtor, who is not a bankrupt commercial entrepreneur) and the consumer's financial distress. The consequent provision (see Articles 12-bis and seq. Law no. 3/2012) of separate (further) rules governing the latter may be read in two different ways. On the one hand, this distinction seems to lean towards the *liberal* model: the provision of a specific procedure for consumers suggests that they merit the application of *ad hoc* rules in the event of over-indebtedness, so that they may go back, as quickly as possible, to feeding the system of supply and demand. In fact, there appears to be a correspondence between the consumer and the market, insofar as the former exists, as part of the production and consumption chain that forms the basis for (and is substantiated in) the market.⁹ On the other hand, the distinction appears to lead towards the *welfare state* model: the provision of specific information in the report drafted by the body settling the crisis that accompanies the proposed restructured repayment schedule (see Article 17 Law no. 3/2012), indicates that the legislator pays particular attention to those debtors who find themselves incapable of meeting their financial obligations insofar as they have been victims of events beyond their control. The causes of indebtedness and the diligence employed by the consumer in freely taking on the financial obligations in question, and the reasons for the consumer's incapacity to fulfil such obligations, as well as the report on that consumer's solvency over the last five years must be made explicit. The comparative study is therefore important for at least three reasons.

by the ('Centaro') Bill passed by the Senate on 1 April 2009, then subsequently deposited with the Chamber of Deputies for a considerable time, and prior to that by the so-called 'Trevisanato' Bill of 28 February 2004 regarding the reform of insolvency procedures. On this matter, see Paolo Porreca, 'L'insolvenza civile', in Antonio Didone (ed), *Riforme della legge fallimentare* (Utet 2009), 2081; Fabrizio Di Marzio, 'Sulla composizione negoziata delle crisi da sovraindebitamento (note a margine dell'AC n. 2364)' [2010] *Diritto fallimentare* 659; Fabrizio Maimeri, 'Il quadro comunitario e le proposte italiane sul sovraindebitamento delle persone fisiche' [2004] *Analisi giuridica dell'economia* 421.

⁹ This is what is deduced from the report accompanying Italian Decree Law no. 179/2012, in which the legislator's aim is specifically stated as being to provide an incentive for development in support of consumer demand.

First of all, the comparison between the regulations of different countries makes it possible to find common rules to draw upon with a view towards harmonization. Secondly, the comparison may reveal some regulatory gaps in those countries where the phenomenon of over-indebtedness appears incessant. Thirdly, there are countries, such as Italy, in which the legislation, apparently hybrid and straddling the two different models, is the subject of current reflection by the legislator for a change. In making the required changes, the legislator could be better inspired by solutions accepted elsewhere and stimulated, at the same time, to overcome the above-mentioned regulatory gaps. In other words, the ideas coming from the comparative analysis could lead the legislator to build a discipline that combines the solutions considered more efficient elsewhere and/or that closes the gaps found. For this reason, given that Italy is currently in the process of drafting its new regulatory framework, the Italian example will be the subject of more in-depth analysis in this article. In addition to the Italian model, the regulations of the United States, United Kingdom, Spain, France, Germany, Denmark and Sweden will be briefly analyzed. The choice to examine the regulatory systems of these countries is justified in a twofold perspective. First, it compares traditionally debtor-oriented models (such as the United States and the United Kingdom) with traditionally creditor-oriented models (such as France, Spain, Germany, Denmark and Sweden): this comparison will show how the original differences are decreasing and it will therefore be possible to imagine meeting points for common rules, also in the light of the regulatory gaps that will emerge. Second, the choice made in Italy, while still undergoing reform, encourages the interpreter to verify the adoption of more effective solutions to stem the phenomenon of over-indebtedness. In fact, as will be shown, Italy provides for *ad hoc* rules on consumer's over-indebtedness. However, this legislation seems to provide forms of subsequent protection (*ex post* protection instruments) rather than preventative measures (*ex ante* protection instruments). Moreover, it does not extend, at least explicitly, these remedies to the individual debtor who is not a consumer. This gives rise to two problems: the problem of verifying whether there is, preventively, a duty for the lender to select consumers on the basis of their financial capacity; and the problem of understanding whether there is a possibility for the honest, but unfortunate, debtor (even if not a consumer), to justify his/her default, assigning liability to the lender.

That is why comparative analysis helps also to outline possible interpretative solutions in legal systems, such as the Italian, in which the current regulations appear unclear. In this respect, the cases of the United States and Switzerland, where the principle of improvident credit extension is most strongly felt, will be examined. Furthermore, European Union legislation, which seems to refer to the responsible lending problem, will be analyzed.

II. THE COMPARATIVE STUDY: THE CONSUMER BANKRUPTCY MODEL AND ITS CONSERVATIVE TREND

The US model is illustrative of the *debtor-oriented* system, with its emphasis on offering the debtor in financial distress the opportunity *to make a fresh start in life*.¹⁰ Consumer default is seen as a natural event affecting anyone, regardless of whether or not he/she is an entrepreneur, who acts as a '*homo oeconomicus*',¹¹ and for this reason merits the opportunity to reacquire his/her social dignity so as to be able to re-enter the consumer circuit and feed the demand for goods.¹²

Title XI of the United States Code (the so-called Bankruptcy Code) establishes various crisis settlement processes, which may be grouped into two basic categories: liquidation procedures on the one hand, and composition with creditors procedures on the other. The former type (Chapter 7) involves the entrustment of the debtor's assets to a trustee appointed to sell the assets and distribute the proceeds from the sale among the creditors. The latter type (Chapter 13) is based on the formulation of a plan for the settlement of liabilities within a given period of time. Both categories are characterized by the concept of *discharge*: in the first case, except for a number of exceptions, unpaid debts are immediately cancelled

¹⁰ This principle goes back a long way: it first appeared in the ruling in *Hardy v. Fothergill* (1888), 13 *App. Cas.* 351, 367, mentioned by Guido Rossi (ed), *Il fallimento nel diritto Americano* (Cedam 1956) 144, footnote 40.

¹¹ Stefano Rodotà (ed), *Dal soggetto alla persona* (Editoriale Scientifica 2007), 22, according to whom (also) the consumer – the stereotypical non-business debtor – lives in (and interacts with) a market dimension of production and consumption.

¹² The central role played in the North American system by the idea that each individual has the right to fail and to be given the opportunity to start again is pointed out in Jay W. Ungerman, 'Discharge: the prime mover of Bankruptcy' [1962] *Journal of the National Association of Referees in Bankruptcy* 85 1962 326.

(discharged) after the proceeds from the sale of the assets have been distributed among the debtor's creditors;¹³ in the second case, the discharge of debts is the final outcome of the implementation of the aforementioned plan.

In this way, the bankruptcy of an individual debtor is perceived as an ambivalent instrument. On the one hand, it serves to distribute the burden of insolvency through a collective procedure, in which all the creditors' claims must be evaluated as a whole and the losses involved shared out fairly. On the other hand, it amplifies the value of the debtor's assets, given that the involvement of the group of creditors has the effect of maximizing the price to be achieved through enforcement proceedings. In this model, which serves the market well, the aim of permitting the debtor to reacquire his/her purchasing power rapidly is of key importance, in that it underlies the belief that by doing so, credit and consumption will be promoted and encouraged.

However, in order to avoid opportunistic behavior when admitting (albeit only partially) creditors' claims, the courts may reject applications for admission to insolvency proceedings should the debtor behave in a contestable manner towards the creditors.¹⁴ Furthermore, in deference to the promulgation of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, a means test has been introduced: a debtor may not have recourse to the procedure referred to in Chapter 7, and thus to the immediate discharge that follows from sale of the debtor's assets, when the debtor's income is higher than the average in the State in which he/she resides. In this case, he/she must necessarily have recourse to the procedure referred to in Chapter 13, whereby, on the contrary, bankruptcy

¹³ Those debts included in the peremptory list provided for by *Sec. 523 of Chapter 5*, cannot be discharged: these include, among others, domestic support obligations, certain tax liabilities, debts deriving from fraud, misappropriation or theft, debts incurred when the debtor willfully causes harm to another or damage to another's property, and debts deriving from fines and other pecuniary penalties. For a broad overview of the various categories, see Lara Modica (ed), *Profili giuridici del sovraindebitamento* (Jovene 2012) 323.

¹⁴ As expressed in *Sec. 707 of Chapter 7* following the amendment of the original wording of the 2005 reform.

discharge is only permitted following implementation of the debt restructuring plan.

It cannot be denied that in the USA, which for a long time has been dominated by the ideological monopoly of pro-debtor arguments, taken on board by *progressive bankruptcy scholars*, persistent discordant voices have emerged that have been strongly supported by *conservative bankruptcy scholarship*.¹⁵ Evidence of this lies in the fact that the aforementioned measures have recently led to a (partial) rethinking of the rule of bankruptcy discharge, in an attempt to (re)convert it from a '*safe harbor*' for any debtor, to its original purpose as a '*safety net*' for the '*honest, but unfortunate, debtor*'.¹⁶ In short, the system remains debtor-oriented, because it is typically aimed at facilitating a fresh start and a rapid reintegration of the debtor into the economic activity, thanks especially to the discharge tool. However, the described novelties reduce the scope of the system.

The position of the United Kingdom, although also characterized by *favor debitoris*, has nevertheless always been a more restrictive one in terms of benefits afforded to debtors. The Insolvency Act and the Insolvency Rules,

¹⁵ According to the *pro-creditors* school of thought, debtors' awareness of the fact that they can easily have recourse to the institution of bankruptcy discharge, constitutes one of the main reasons for consumers' over-indebtedness, creating a situation of moral hazard. See Todd J. Zwicki, 'An Economic Analysis of the Consumer Bankruptcy Crisis' [2005] *Northwestern University Law Review* 1464, which places a critical focus on the distortional effects of an interpretation of discharge as a means of financial planning. For a reconstruction of the progressive/conservative dualism, see among others, Giacomo Rojas Elgueta, 'L'esdebitazione del debitore civile: una rilettura del rapporto civil law-common law' [2012] *Banca, borsa, titoli di credito* I 314.

¹⁶ This ideological shift is underlined in Rojas Elgueta (n 15), 324, where the author nevertheless states that using the instruments of *behavioral law and economics*, the dichotomy in this regard between the *common law system* and the *civil law system* is weakening. With regard to the expansion of the concept of '*unfortunate*', which was initially related to the realm of the intervening impossibility of meeting one's obligations for reasons beyond the debtor's control, see, on the other hand, Douglas G. Baird, 'Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law' [2006] *University of Chicago Law Review* 17, who, in emphasizing the gradual decline of the rule of personal responsibility, generally linked to the question of blame, remarks that: '*every debtor in dire financial straits is unfortunate*'.

with regard to the bankruptcy of individual and business debtors, similarly provide for an insolvency procedure and also for an alternative procedure, aimed at the stipulation of an *individual voluntary arrangement* (IVA). This arrangement can result in – under the supervision of a nominee (generally represented by an Insolvency Practitioner) and subject to an agreement with the creditors representing at least 75% of a debtor's payables – settlement of debt exposure, automatically binding all unsecured creditors to the aforementioned agreement. In the event of bankruptcy, on the other hand, the debtor loses the disposability of his/her assets, which are entrusted to the Official Receiver, first of all, and then to the Trustee. Discharge may be applied by the party in question or may be triggered automatically after a year has elapsed following the opening of bankruptcy proceedings, provided that the debtor has not been convicted for bankruptcy offences and is not in breach of any obligations pending the proceedings.¹⁷

Furthermore, the 2007 Tribunals Courts and Enforcement Act, which actually came into force in April 2009, introduced Debt Relief Orders providing for automatic discharge at the end of a simplified administrative bankruptcy procedure reserved for individuals possessing no assets, and having debts of no more than £15,000. In this way, a solution giving preferential treatment to 'small' debtors is accepted.

This enables a way to deal differently with distinct types of debtors. In other words, without specifically providing rules for consumer over-indebtedness, the United Kingdom offers differentiated solutions according to the size of the debt and the assets owned. This solution can be affected regardless of the debtor's consumer status. In this way, more attention is paid to protecting the debtor, regardless of the role he plays in a market logic.

¹⁷ For a detailed historical survey of English bankruptcy, see Ian P. H. Duffy, 'English Bankrupts' [1980] *American Journal of Legal History* 283, which underlines how, unlike in the North American system, the granting of the benefit of discharge in English law has always been subject to thorough judicial control.

III. THE CONSUMER DEBT ADJUSTMENT MODEL AND ITS PROGRESSIVE TREND

The aforementioned systems are distinguished from the systems of mainland Europe, which are traditionally *creditor-oriented*. However, as will be explained shortly, over time these systems have also weakened the profiles characterizing the creditor-oriented model, taking into account some of the demands favorable to debtors.

Without neglecting the gradual watering-down of the original features of the creditor-oriented model in recent years, the main difference between this model and the consumer bankruptcy model is the traditional codification of a system of the debtor's unlimited financial liability. In fact, the principle whereby the debtor's assets constitute a general guarantee for the creditor, places the emphasis on the need to fulfill obligations insofar as possible, thus rendering discharge theoretically incompatible with the idea that all of the debtor's assets, including future assets, can be used to satisfy creditors' claims.¹⁸

Therefore, the creditor-oriented system generally comprises – albeit with the differences characterizing the heterogeneous rules in force in the different countries – the judicial and extra-judicial renegotiation of debts with creditors, in view of the approval of a global repayment plan, where a key role is played by advisory and intermediation services. The institution of discharge, in the main countries of mainland Europe, is not always available to debtors, and when it is available its application is designed for a different purpose, namely, to rehabilitate the debtor in order to get him/her to meet his/her obligations. In other words, the institution of discharge is used to encourage the debtor to cooperate with the procedure and to comply with

¹⁸ With regard to the historical origins, seen from a comparative viewpoint, of the principle of unlimited financial liability, see Andrea Zoppini, 'Autonomia e separazione del patrimonio, nella prospettiva dei patrimoni separati della società per azioni' [2002] *Rivista di diritto civile* I 552.

the plan, in order to benefit from the 'reward' of freedom from remaining debts. The *fresh start* is thus replaced by the *earned start*.¹⁹

This approach is clearly visible in Spain, where the rules have been brought together, and where just one legal procedure, called *concurso*, governs the default of debtors (both individual and business debtors), regardless of the choice of sub-procedure, be it *liquidación* or *convenio*, it does not result in discharge. The cooperative debtor who has freely applied for admission to the procedure is 'rewarded' simply by the rule that enables that debtor to preserve the possession and administration of his/her assets.²⁰ Upon closure of the *concurso*, due to the insufficient entity of the debtor's assets, '*el deudor quedará responsable del pago de los créditos restantes*' (the debtor is responsible for the payment of the remaining claims).²¹

France, on the other hand, appears more susceptible to progressive influences. Actually, French legislation gives a key role to an external body responsible for administering the procedure.²² It started from rules that were originally based on respect for private autonomy, as a result of which the courts were encouraged to impose, upon those creditors who had originally rejected this choice during the assisted renegotiation procedure, the plan drawn up by the *Commission de surendettement des particuliers*. In that context, the room for maneuver was limited to certain aspects of the original obligation (payment extensions, the reduction or elimination of interest payments, the provision of a deadline, within a given range, for the concession

¹⁹ Udo Reifner, Johanna Kiesiläinen, Nik Huls, and Helga Springeneer (eds), *Consumer over-indebtedness and consumer law in the European Union – Final report to the European Commission*, 2003, 167 <www.ecri.eu>.

²⁰ See art. 40 of the *Ley Orgánica Concursal* 22/2003.

²¹ See art. 178, paragraph 2, of the *Ley Orgánica Concursal* 22/2003: see Pablo Gutierrez de Cabiedes (ed), *El sobreendeudamiento doméstico: prevención y solución* (Cizur Menor 2009), 60, which criticises the tendency to perpetuate over-indebtedness, which is represented as a '*torre del deudor*'. Surprisingly, in the case of legal persons, paragraph 3 of the same provision establishes, on the contrary, '*la cancelación de su inscripción en los registros público*' following liquidation.

²² In Belgium and Luxembourg, an administrative phase is also provided for, during which the financial distress is resolved by means of an amicable settlement. On the similarities with the French model, see Pellecchia (n 1) 130.

of such measures).²³ Starting from there, France has shifted to a system that takes care not to burden debtors and their families excessively.²⁴ Although observing the essential nature of the administrative phase leading up to the formulation of the *Plan conventionnel de redressement*, the French courts have significant discretionary powers when it comes to establishing which revenue is to remain available to the debtor in order that he/she may continue to live in a manner in keeping with human dignity. The courts, as well as the commissions, may establish whether the over-indebted individual merits (or not) admission to the extraordinary procedure of *rétablissement personnel*: if the situation is deemed to be '*irréremédiablement compromise*' (irretrievably compromised) and there is a total absence of *actifs*, the debtor may in fact obtain immediate discharge.²⁵

In Germany too, debtors (both individuals and businesses) are asked to go through a phase of debt renegotiation, which they are free to agree to. In the event of a negative outcome, this may lead to a simplified judicial composition with creditors, or to a simplified insolvency procedure with the assignment to an official receiver for a given period of time of seizable income.²⁶ In accordance with the plan, the debtor must undertake to try to keep a job, and to cooperate with the official receiver, in order not to lose the benefit of discharge otherwise guaranteed to the debtor (*Wohlverhaltensphase*).²⁷

²³ See Law no. 1989-1010 (the *Loi Neiertz*).

²⁴ See the changes introduced by Law no. 2003-710 (the *Loi Borloo*) and by Law no. 2010-737 (the *Loi Lagarde*).

²⁵ Frédéric Ferrière and Pierre-Laurent Chatain (eds), *Surendettement des particuliers* (Dalloz 2006) 240 ff., point out that the aforementioned discretionary power has been widely exercised in favor of debtors in recent years.

²⁶ See the *Insolvenzordnung*, amended on several occasions in order to broaden the range of debtors' non-seizable revenues and assets. Details of the original version of this German insolvency law can be found in Dörte Busch, 'Current Reform Efforts of German Consumer Insolvency Law and the Discharge of Residual Debts' [2006] German Law Journal 6. On the current formulation of the law, see Claus Ott – Mihai Vuia, in *Münchener Kommentar zur InsO*, 3 Aufl., 2014, München, §§ 304-314 InsO.

²⁷ In Austria, whose legislation is very similar to that of Germany, residual debts are automatically discharged following payment by the debtor of the costs of the procedure and of half the unsecured debts. However, should the debtor fail to pay the costs of the procedure in full, and fail to pay at least 10% of unsecured debts, the

In Denmark and Sweden, on the other hand, not only the subsequent granting of discharge, but also the prior admission to the procedure for composition with creditors, are subject to the court's verification of an independent administrative authority (in the first case), and of the causes of the consumer's over-indebtedness (in the second case). As a rule, these systems aim to prevent the positive effects of the procedure benefiting persons who have acted in a financially irresponsible manner with clear speculative intentions and taking on disproportionate risks compared to their financial capacities.²⁸

IV. ITALY'S SPECIAL SOLUTION

A quick view of the comparative analysis of the question reveals a picture where, in terms of the (initially radically different) ways in which different legal systems have treated individual debtors in financial distress, a series of reciprocal influences have more recently emerged. On the one hand, traditionally debtor-oriented countries (such as the United States) currently have mechanisms that make it less easy than before to enjoy the benefit of discharge. Such a change demonstrates the influence of those studies that deny the (totally) positive effect of discharge-oriented legislation on the rate of increase of self-employment, noting that the easier access to discharge is, the higher the cost of credit granted by banks becomes.²⁹ On the other hand, traditionally creditor-oriented countries (such as France, Spain and Germany), whose systems are based on the centrality of the principle of

courts may decide, at their own discretion, whether to grant discharge all the same, or whether to further extend (no more than twice) the deadline set by the payment plan.

²⁸ According to Denmark's *Konkurs lov*, the court must reject the settlement plan proposed by the debtor if the debts were incurred: a) at a time when there was no realistic likelihood of such debts being repaid; b) in the presence of a disproportionate risk in relation to the debtor's financial capacity; c) in view of admission to the procedure for settlement of financial distress. Similarly, Swedish law (*Skuldsaneringslagen (2006:548)*) requires the independent administrative authority to evaluate the reasonableness of the debt restructuring plan.

²⁹ Song Han – Wenli Li, 'Fresh start or Head start? The Effects of Filing for Personal Bankruptcy on Work Effort' [2007] *Journal of Financial Services Research* 123; Kartik Athreya, 'Fresh start or head start? Uniform bankruptcy exemptions and welfare' [2006] *Journal of Economic Dynamics & Control* 30 2051.

unlimited financial responsibility, have taken a more liberal attitude towards the discharge of the individual debtor.

The Italian system is based on the diversification of the legal treatment of individual and business insolvency. The opportunity or rather, the legitimacy of this regulatory choice has been the subject of lengthy debate also at the constitutional level.³⁰ Only recently this system has enacted legislation, which has introduced special procedures for the settlement of 'the over-indebtedness distress' of those persons that cannot be subjected to the insolvency procedures provided for by Bankruptcy Law. In other words, the legislation in question has been concerned with regulating the composition of the crisis of the individual or business debtor, who is not a bankrupt commercial entrepreneur.³¹

An initial evaluation of the situation may be proffered here following the legislative decision to proceed in this direction. Within the framework of the basic approach adopted, the distinction, at the regulatory level, between the business debtor's incapacity to fulfill his/her obligations and the individual debtor's incapacity to do likewise, has been codified by Italian law. Furthermore, the notion of '*sovraindebitamento*' (over-indebtedness) has been introduced, at the factual level, alongside the previously-recognized concepts of '*insolvenza*' (insolvency) and '*crisi*' (financial distress). In other words, Italian legislation has not only kept civil insolvency and commercial insolvency separate, but – in the context of the former – it has also introduced a notion of crisis, 'personalized' for the debtor that cannot be declared bankrupt. This choice is also confirmed in the draft reform under discussion.

V. THE 'ISOLATION' AND 'SPLITTING' OF THE OVER-INDEBTED, NON-BANKRUPTABLE DEBTOR

As pointed out above, Italian Law no. 3/2012 has conformed with the traditional distinction between individual and business insolvency. In doing so, however, it has aimed not only (and not so much) at 'isolating' the case of the non-bankruptable debtor, by establishing a special (diverse) system for the resolution of financial distress, but has also (and above all) been

³⁰ In this regard, see Section 5 below.

³¹ For the definition of this figure see Section 5 below (footnote 30).

concerned with 'splitting' the case in question into two parts, with consequences in terms of the regulation of such cases. In fact, the distinction between the figure of the *business debtor excluded from insolvency procedures*, referred to in the Bankruptcy Law, and that of the *consumer* has been introduced. In particular, Article 6 of that law distinguishes the *debtor who is not subject to insolvency proceedings* (so-called 'non-bankruptable debtor') from the *consumer*. The former is the debtor who is a non-commercial entrepreneur or, even though he is a commercial entrepreneur, does not exceed any of the thresholds established by Article 1 of the Bankruptcy Law.³² The latter is the individual debtor (natural person), who has undertaken obligations exclusively for purposes outside his trade, business or profession. The 'regulatory adjustment' performed in this way is of considerable importance.

As mentioned above, the decision to treat the defaulting business debtor and individual debtor differently is not new: in fact, this option can be found as far back as the business codes of 1865 and 1882 and was already included in the 1942 Civil Code and in the Bankruptcy Law of that same period. Furthermore, more than once it has been brought to the attention of the Constitutional Court, which has reaffirmed the legitimacy of the distinction. Firstly, when pointing out that no violation of the principle of equality has been committed, 'giacché lo svolgere attività commerciale organizzata ad impresa costituisce una situazione obiettivamente diversa da quella di chi svolge un'attività di diverso tipo, e non è irrazionale l'aver limitato alla prima la disciplina concorsuale, né sono arbitrari i motivi di tale limitazione' ('since carrying out a business activity as a firm constitutes an objectively different situation from that of a person carrying out an activity of another kind, and it is not irrational to have limited insolvency law to the former; nor are the

³² Pursuant to Art. 1 of the Bankruptcy Act, commercial entrepreneurs who prove that they fulfil the following conditions are not subject to the provisions on bankruptcy and a composition with creditors:

- a) in the three financial years prior to the date of filing the application for bankruptcy or from the start of the activity, whichever is the shorter, they have had assets totaling no more than € 300,000 in total per year;
- b) have achieved, in any way, in the three financial years prior to the date of filing the application for bankruptcy or from the start of the activity, whichever is the shorter, gross revenues for a total annual amount not exceeding € 200,000;
- c) have an amount of debts, including those not yet due, not exceeding € 500,000.

grounds for such a limitation to be considered of an arbitrary nature').³³ Subsequently, specifying that the arguments underlying the diversification of legal treatment 'sfuggono al giudizio di conformità ai principi costituzionali (...) per rientrare nell'area di scelte proprie del legislatore' ('do not come within the scope of any judgment of compliance with constitutional principles (...) but fall within the scope of the legislator's own decisions').³⁴

Similarly, there is nothing new about the decision to provide for a category of non-bankruptable entrepreneurs, thus removing them from the scope of the application of insolvency procedures: in fact, although remaining within the context of business insolvency, the legislator has chosen, from the drafting of the original wording of the Bankruptcy Law, to identify thresholds below which it is not possible to go bankrupt or be subject to other judicial proceedings provided for therein. Furthermore, the Constitutional Court has also given its opinion on the legitimacy of such a distinction, pointing out that 'anche nel configurare questa discriminazione nell'ambito della categoria dei commercianti, la legge ha tenuto presente una diversità obiettiva di situazioni, in relazione alle dimensioni dell'impresa, diversamente valutando l'interesse pubblico ad applicare la legislazione fallimentare al loro stato di insolvenza' ('also in establishing this distinction within the category of businesses, the Law has kept in mind the objective diversity of situations, in terms of the size of businesses, assessing differently the public interest in applying bankruptcy law to their state of insolvency depending on this criterion'), and reiterating the view that 'l'esclusione dal fallimento del piccolo imprenditore (...) si basa su una valutazione di politica economico-sociale e di opportunità giuridica, che non può essere ripetuta in questa sede' ('the small business' exclusion from bankruptcy (...) is based on an evaluation in terms of socio-economic policy and legal appropriateness that cannot be repeated here').³⁵

On the contrary, the option to provide for a variety of different procedures for the resolution of cases of financial distress (debt-restructuring agreements, restructured repayment schedules, sale of assets), differentiated according to the nature of the non-bankruptable debtor, seems original,

³³ Italian Constitutional Court, 16 June 1970, decision no. 94 [1970] *Foro italiano* I 1857.

³⁴ Italian Constitutional Court, 27 July 1982, decision no. 145 [1982] *Foro italiano* I 3006.

³⁵ See Italian Constitutional Court, 16 June 1970, decision no. 94, *op. cit.*

taking as the selection criterion not the reference to the 'common' individual debtor, but to the consumer. Indeed, while the insolvency procedure can (or must) be triggered by (or in the presence of) any non-bankruptable debtor (including consumers), following rules and methods of implementation that do not provide for any diversification in legal terms, the debt-restructuring agreement and the restructured repayment schedule, on the contrary, are subjectively separate in terms of the submission of the application and in terms of approval thereof.³⁶ Italian Law no. 3/2012, as amended by Italian Decree Law no. 179/2012 (the Decreto Crescita) and its corresponding converting law, establishes that the 'over-indebted debtor' may propose to creditors, with the aid of those bodies appointed to resolve the situation of financial distress, a debt restructuring and claim satisfaction agreement based on a plan. This plan, having ensured due payment of the holders of non-seizable receivables, must foresee deadlines and means of payment, possible guarantees and means for the sale of assets if necessary, or for the direct entrustment of assets to an official receiver. The 'over-indebted consumer', on the other hand, may indeed propose an agreement or plan to creditors that foresees the restructuring of debt obligations and the satisfaction of claims, as described above, but unlike the 'over-indebted debtor', the consumer may do so in any form, including through the transfer of future receivables. Should the debtor's assets and income be insufficient to guarantee the feasibility of the agreement or the plan, the proposal may be underwritten by one or more third parties who agree to the contribution of sufficient income or assets to guarantee implementation thereof. This proposal must be accompanied by a detailed report drawn up by the body responsible for the resolution of the situation of distress in question, containing, among other things, details of the causes of indebtedness, and of the consumer's diligence in voluntarily taking on the obligations, together with a report on the consumer's solvency over the last five years. Furthermore, whereas for the purposes of approval, the 'over-indebted debtor' must reach an agreement with the (unsecured) creditors representing at least 60% of all amounts due, the 'over-indebted

³⁶ It should be pointed out, in fact, that liquidation may also be triggered upon the issuing of an order transforming the procedure for the resolution of distress, based on a debt-restructuring agreement or a restructured payment schedule, in the case of any annulment, revocation or termination of the former, or in the event that the effects of approval of the latter cease, or that the latter is revoked or terminated.

consumer' is only subject to an assessment by the court concerning the feasibility of the schedule and the merits of the debtor's conduct leading up to distress.³⁷ The notification of the proposal to all creditors is therefore not designed for voting purposes, but only for challenges that there may be to the advisability of the plan.

The discharge of residual unpaid debts to insolvency creditors, subject to certain important objective and subjective limitations, has been introduced. The objective limitation is that the benefit in question is restricted to cases of liquidation of assets. In terms of subjective limitations, the discharge only operates if: a) the individual debtor has cooperated with the regular, effective carrying out of the procedure; b) he/she has not benefited from any other discharge in the previous eight years; c) he/she has carried out an activity producing income in keeping with that person's skills, or in any case has looked for a job and has not refused any proposed jobs without good cause; and d) the creditors in title and for reasons predating the order opening the liquidation procedure have had their claims satisfied, at least in part. At the same time, based on the evaluation, in terms of the award of the benefit, discharge shall be excluded in cases where over-indebtedness is the consequence of recourse to negligent, disproportionate credit in view of the individual's financial capacities, or when the debtor, in the five previous years, has defrauded creditors.

VI. THE KEY ROLE OF THE CONSUMER AS A REMEDY FOR MARKET FAILURE: POSSIBLE INTERPRETATIVE AND EXTENSIVE SOLUTIONS

So far, the analysis has shown that many of the countries mentioned have protective measures in place in the event of over-indebtedness, but only a few (such as Sweden, Denmark and Italy) pay attention to the causes of over-indebtedness. Furthermore, it seems that the common feature of the latter countries mentioned is that the over-indebted consumer is granted *ex post* protection instruments and not also that of preventing the phenomenon, by

³⁷ According to art. 12-*bis*, paragraph 3, of Italian Law no. 3/2012, in fact, the court must exclude – for the purposes of approval – that the consumer has taken on financial obligations with no reasonable prospect of meeting those obligations, or that the consumer has negligently caused over-indebtedness, also by recourse to credit out of all proportion to that person's financial capacity.

providing *ex ante* protection instruments. Indeed, it seems appropriate to consider that the consumer may not be reasonably prudent. Therefore, the consumer could be unable to make informed choices that would protect him from the risk of over-indebtedness. From this point of view, and overturning the perspective of the creditor, there is a pressing need to make, with clear rules, the lender responsible. In other words, it would be desirable for the legislation to seek to prevent irrational decisions from being taken by lenders.

According to the responsible lending approach, the lender should be obliged to select the applications for financing, evaluating the most suitable product for the applicant. In addition, the lender should assess the consumer's credit rating, in relation to the ability to repay the loan, the level of debt already in place and the risk of over-indebtedness.

In the Italian legal system, the regulation of the sector (Consolidated Banking Law, art. 120-*undecies* and 124-*bis*), although providing for the evaluation of the consumer's credit rating, does not allow for interpretations that may point to an obligation, on the part of professional lenders, to refrain from granting credit to persons who are already financially fragile. In fact, the term 'credit rating' generally means the objective, present capacity to repay debts, measured in terms of income, of the assets that creditors can claim, and of past repayment history.³⁸ Such a provision thus refers to the precept of sound, prudent management designed to ensure the stability of the banking system rather than to meet the need to regulate demand for credit so as to

³⁸ For this interpretation, see, Alessandro Simionato, 'Prime note in tema di valutazione del merito creditizio del consumatore nella direttiva 2008/48/CE' [2010] *Rivista di diritto bancario* 183; Enrico Caterini, 'Controllo del credito, tutela del risparmio e adeguatezza nel finanziamento "finalizzato"' in Vito Rizzo – Enrico Caterini – Luca Di Nella – Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito* (Edizioni Scientifiche Italiane 2010), 49; Gustavo Minervini, 'Il sovraindebitamento del consumatore e la direttiva 2008/48/CE', in Vito Rizzo – Enrico Caterini – Luca Di Nella – Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito*, op. cit., 65; Serafina Rosaria Larocca, 'L'obbligo di verifica del merito creditizio del consumatore', in Vito Rizzo, Enrico Caterini, Luca Di Nella, Lorenzo Mezzasoma (eds), *La tutela del consumatore nelle posizioni di debito e credito*, op. cit., 233.

safeguard the financed consumer.³⁹ On the contrary, Italian Law no. 3/2012, as amended, seems to highlight the problem of the debtor, who is in a state of over-indebtedness due to events beyond his control.

The question then arises as to how to interpret this apparent dichotomy: is there a duty for the lender to select the consumers on the basis of their ability to perform and is there the possibility for the honest, but unfortunate, debtor to justify his/her default, assigning liability to the lender? In this case too, comparative analysis helps to outline possible interpretative solutions in legal systems, such as the Italian one, in which the current regulations appear unclear. The US doctrine has affirmed, for years, the principle of improvident credit extension.⁴⁰ This refers to a situation in which it is not reasonable, on the basis of information already in the possession of the creditor, to expect the debtor to be able to repay the loan and meet the required deadlines. Thus, the debtor could justify his/her default or take action to have his/her obligation extinguished or, in any case, the part exceeding the reasonable level of credit. Although this theory has been rarely considered by judges, it is worth remembering the Dodd-Frank Wall Street Reform and Consumer Protection Act, whose title XIV is entitled Mortgage Reform and Anti-Predatory Lending Act. This title imposes strict rules on the disbursement of loans.

The Swiss *Loi Federale sur le credit à la consommation* (artt. 22-31) requires lenders to consult a database with information on borrowers in advance to assess their ability to assume additional obligations and to avoid over-

³⁹ Some authors suggest this interpretation: see Aurelio Mirone, 'L'evoluzione della disciplina sulla trasparenza bancaria in tempo di crisi: istruzioni di vigilanza, credito al consumo, commissioni di massimo scoperto' [2010] Banca, borsa, titoli di credito I 592; Antonella Antonucci, 'Credito al consumo e zone limitrofe: una scheda di lettura del d. legis. n. 141 del 2010' [2011] Nuova giurisprudenza civile commentata II 301, according to whom the Consolidated Banking Act 'has partly failed to meet expectations regarding the safeguarding of borrowers, by introducing, on the contrary – in the form of the provision concerning credit-worthiness – special protection for lenders, enabling them to utilise structured ways of managing credit risk'; Modica (n 14) 239.

⁴⁰ Vern Countryman, 'Improvident Credit Extension: A New Legal Concept Aborning' [1975] Main Law Review 23.

indebtedness as a result of a consumer credit contract. If they do not do so, they risk losing their credit.

Also in the context of the European Union, there seems to be some (albeit modest and indirect) reference to the responsible lending issue. In particular, the issue was mentioned in recital 26 of Directive 2008/48/EC of the European Parliament and of the Council, which states that

'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behavior and should determine the necessary means to sanction creditors in the event of their doing so'.

Similarly, recital 29 of Directive 2014/17/EU of the European Parliament and of the Council ('on credit agreements for consumers relating to residential immovable property') states that

'in order to increase the ability of consumers to make informed decisions for themselves about borrowing and managing debt responsibly, Member States should promote measures to support the education of consumers in relation to responsible borrowing and debt management in particular relating to mortgage credit agreements. It is particularly important to provide guidance for consumers taking out mortgage credit for the first time. In that regard, the Commission should identify examples of best practices to facilitate the further development of measures to enhance consumers' financial awareness'.

Consequently, Article 6 provides that

'Member States shall promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. Clear and general information on the credit granting process is necessary in order to guide consumers, especially those who take out a mortgage credit for the first time'.

Article 14 states that

'Member States shall ensure that the creditor and, where applicable, the credit intermediary or appointed representative, provides the consumer with the personalized information needed to compare the credits available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement'.

Article 16 lays down that

'Member States shall ensure that creditors and, where applicable, credit intermediaries or appointed representatives provide adequate explanations to the consumer on the proposed credit agreements and any ancillary services, in order to place the consumer in a position enabling him to assess whether the proposed credit agreements and ancillary services are adapted to his needs and financial situation'.

Article 18 establishes that

'Member States shall ensure that, before concluding a credit agreement, the creditor makes a thorough assessment of the consumer's creditworthiness. That assessment shall take appropriate account of factors relevant to verifying the prospect of the consumer to meet his obligations under the credit agreement'.

In the light of this brief investigation, it appears that the Italian legislator wished to intervene with tools of subsequent protection (*ex post* protection instruments) for so-called 'passive over-indebtedness' with a kind of selective discharge of residual debt, while neglecting, on the creditor's side, the possibility of endorsing, preventatively (*ex ante* protection instruments), the obligation to offer select borrowing facilities to 'deserving' debtors.⁴¹

In any case, the new decision (made in the 'Decreto Crescita') to identify a selection principle of the various procedures for the composition of financial distress caused by over-indebtedness from a subjective viewpoint, making the consumer the paradigm of the non-bankruptable individual debtor, would seem to suggest the view, as previously mentioned, that the most worrying

⁴¹ Pellecchia (n 1) 226 ff., enthusiastically greets in the Decreto Crescita *his* the introduction of the concept of passive over-indebtedness, meaning the situation of over-indebtedness suffered by the 'honest, but unfortunate' debtor perceived as a victim of events beyond his/her control and independent of his/her will.

aspect, in terms of legislative policy, is the market and its state of health.⁴² By accepting the argument that consumers' rights are business rights, given that consumers live and count as such within a market context, it is understandable that the legislator's choice was justified by the need to encourage economic growth, through lending support to consumer demand. In other words, if one starts from the premise that the consumer, as *homo oeconomicus*, expresses him/herself 'in the sphere of production and consumption, and thus in the market',⁴³ the provisions introduced appear to be based on a view of over-indebtedness as a market failure, rather than as a social problem. Therefore, it would seem that the aforementioned additional provisions have diverted the legal profession's attention from the social consequences of over-indebtedness to market efficiency and the encouragement of consumption. Thus, it comes as no surprise to find that the provisions in question only apply, in the productive corporate sphere, to innovative start-ups. For these, the legislators have reserved special 'protective' treatment in order to 'favorire la crescita sostenibile, lo sviluppo tecnologico, la nuova imprenditorialità' ('encourage sustainable growth, technological development and the new entrepreneurship') so as to 'contribuire allo sviluppo di una nuova cultura imprenditoriale ed alla creazione di un contesto maggiormente favorevole all'innovazione' ('contribute to the development of a new entrepreneurial culture and the creation of an environment fostering greater innovation').⁴⁴ With this in mind, the decision to establish a simplified procedure (such as that of the settlement of financial distress caused by over-indebtedness), as an alternative to those solutions offered by the Bankruptcy Law, aims to 'facilitare la ripartenza dello *start-upper* su nuove iniziative imprenditoriali' ('facilitate the start-upper's restart through new business projects').⁴⁵

⁴² See Section I above.

⁴³ This expression is borrowed from Rodota (n 11) 22.

⁴⁴ See art. 25, paragraph 1, of the Decreto Crescita *bis*. On the essence of innovative *start-ups*, see, among others, Monica Cossu, 'Le start-up innovative in forma di società a responsabilità illimitata. Profili privatistici' in Mario Campobasso, Vincenzo Cariello, Vincenzo Di Cataldo, Fabrizio Guerrera, and Antonella Sciarrone Alibrandi (eds), *Società, banche, crisi d'impresa*. Liber amicorum *Pietro Abbadessa* (Utet 2014) 1075.

⁴⁵ See the preface to the Report illustrating the Decreto Crescita *bis*.

It seems then that the current Italian system adopts a liberal model. In short, the legislator is concerned with giving special treatment to the consumer, so that he/she can actively return to consumption as soon as possible. However, it is possible to observe some, albeit timid, signs of welfare issues. The legislator's concern for the consumer's passive over-indebtedness leads to believe that the objective of the regulation could also be that of protecting the debtor from further risks. This observation could lead to interpretative and applicative consequences.

First of all, the lender's duty to assess the consumer's credit rating may be a means of protecting the debtor from insolvency. According to general clauses, the duty must be fulfilled fairly and in good faith. It follows that, when entering into consumer credit contracts, the lender should acquire all the information necessary for an accurate representation of the characteristics of the loan.⁴⁶ In compliance with the rule of pre-contractual fairness and good faith, it could be considered that, in the presence of negative indications on the consumer's credit rating, the lender who, nevertheless, disburses the loan, becomes liable for the damage suffered by the debtor. In other words, even in the absence of an express obligation of abstention on the part of the lender to grant credit to subjects in precarious economic conditions, the interpretation of the current discipline, oriented towards welfare issues, could allow us to believe that the creditor can also be held responsible for having performed an inappropriate and damaging credit contract.⁴⁷ However, it cannot be denied that it would be preferable if such an interpretation was expressed directly by law.

Secondly, the influence of welfare issues leads us to believe that such a regulation can be applied to deal with the over-indebtedness of any individual debtor, even if not a consumer, by paying attention to the reasons for the financial distress and the merit of the debtor. Accordingly, the described

⁴⁶ With reference to the function performed, in these cases, by the principle of fairness, see Pietro Abbadessa, 'Banca e responsabilità precontrattuale: i doveri di informazione', in Salvatore Maccarone – Alessandro Nigro (eds), *Funzione bancaria, rischio e responsabilità della banca* (Milano 1981) 296.

⁴⁷ With reference to Italian doctrine and the need for the financial intermediary to assess the appropriateness of the consumer's request, see Roberto Natoli (ed), *Il contratto 'adeguato'. La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Giappichelli 2012) 117.

framework would become general. Thus, the debtor could be protected from unforeseen events and traumatic changes in his/her economic situation, regardless of his/her nature as a consumer. In other words, the relevant criteria would be only the causes of over-indebtedness and the conduct of the debtor, but not his/her role as a consumer. This solution seems to be better at treating, also with a view to reducing, the phenomenon of over-indebtedness. What should matter is that the debtor is diligent and the victim of passive over-indebtedness, not the fact that he/she is a consumer.

VII. THE (RE)AFFIRMATION OF SOCIAL PROBLEMS FROM THE POINT OF VIEW OF FUTURE LEGISLATION: CONCLUSIONS AND PROSPECTS *DE JURE CONDENDO*

The current signs of future legislation indicate that it is likely the reform will reinforce the idea that we are moving towards a welfare model. In particular, Italian Law no. 155/2017 (art. 9) (an enabling Act permitting the Government to pass legislation on the wholesale reform of the rules governing the management of business distress and insolvency) establishes that those provisions regulating the question of over-indebtedness be reorganized and simplified in accordance with certain specific guidelines.⁴⁸

More specifically, from the subjective point of view, it requires that: (a) the categories of person who may be subject to the procedure, also on the basis of a principle of prevalence of the different forms of obligations taken on, be specified, including individuals and entities that may not be subject to composition with creditors to avoid bankruptcy, or to winding up by the court, as well as shareholders with unlimited liability; (b) that legal persons also be admitted to the discharge procedure, provided they are not guilty of defrauding creditors or of choosing to default on the plan or the agreement. From the point of view of merit, it: (a) regulates those solutions aimed at promoting the debtor's business continuity, and the manner of his/her conversion to the solution of liquidation, if applicable, also when requested by the debtor, permitting only liquidation without any discharge, in the event that the distress or insolvency is the result of the debtor's bad faith or fraud;

⁴⁸ The enabling Act was published on 19 October 2017 and submitted with no. 155. On November 8, 2018, the outline of the legislative decree introducing the Codice della crisi d'impresa e dell'insolvenza was approved, in implementation of Law 155/2017.

(b) permits the deserving debtor who cannot offer creditors any interest, to be granted discharge of residual debts just once, without prejudice to the obligation to pay off such debts within three years should the necessary resources materialize; (c) precludes access to the procedure to those persons whose debts have already been discharged in the previous five years, or who have already benefitted from discharge twice, or in the case of proven fraud. From the objective viewpoint of procedural formalities, the following are provided for: (a) the introduction of protective measures, albeit of a revocable nature, similar to those provided for in composition with creditors; (b) acknowledgement of the idea of access to liquidation, even pending individual executive procedures, on the part of creditors, and when insolvency regards businesses, on the part of the Public Prosecutor; (c) the granting of the initiative, also to creditors and the Public Prosecutor, to convert the procedure into one of liquidation in cases of fraud or default. From the point of view of penalties, it proposes to establish measures penalizing creditors who have deliberately contributed towards aggravating the situation of indebtedness.

Despite the provisional character of the submitted act permitting the Government to pass legislation, it would appear that the noticeable (re)emphasis on the causes of over-indebtedness, and on the debtor's diligence, which moreover justifies the appeal – from the category of persons subjectable to the procedures referred to in Italian Law no. 3/2012 – not only to business debtors in the form of physical persons, but also to those in the form of legal entities, is in keeping with the welfare state model. While it is true that the aforementioned legislative provisions meet liberal needs, where the object of regulation (and of the consequent protection provided) is the market, it is also true that, should the foreseen reform of the law governing financial distress and insolvency actually follow the guideline principles that the bill formulates with regard to the state of over-indebtedness, a series of purely social expectations would be met, at least in part.

It seems that we are moving towards the (re)affirmation of the archetypal 'honest, but unfortunate, debtor', which at this point may also include not only consumers, as well as business enterprises or individual debtors,

provided that they are characterized by the involuntary, uncontrollable nature of the causes of distress.⁴⁹

In this regard, it seems appropriate to reflect – in legislative terms and, then, in a *de jure condendo* analysis – on the possibility of introducing a discipline that better embodies the responsible lending approach. This comparative study has made it possible to highlight the importance of rules for the protection of the debtor, who, blamelessly, relies on the lender's assessment of the sustainability of the loan. However, most of the countries regulate *ex post* protection instruments, i.e. they are concerned with remedying a situation of already proliferating over-indebtedness. On the contrary, it seems that the phenomenon could be better controlled by also taking an *ex ante* protection perspective. It seems appropriate to consider that the debtor may not be reasonably prudent. The debtor could be unable to make informed choices that would protect him from the risk of over-indebtedness. Therefore, it would be desirable for the systems to adopt, in addition to precepts on the lender's information duties, clear rules on the obligation of abstention on the part of the lender to grant credit to subjects in precarious economic conditions and on the liability of the lender for betraying the debtor's reliability on the sustainability of the loan. From this perspective, a new level of sensitivity would derive with regard to the issue of contracting with the insolvent. This would move away from the exclusive protection of the creditor against the insolvent debtor to the protection of the debtor against the risk of over-indebtedness. In this way, the phenomenon of consumer over-indebtedness could be prevented – or at least reduced – through a discipline that grants instruments of preventative protection.

This logic of preventative protection could pave the way for a possible compensatory remedy: the debtor, betrayed in his/her reliability on the sustainability of the loan, could ask and obtain from the lender compensation for the damage suffered.

⁴⁹ The relevance of this viewpoint has been pointed out, albeit in a period prior to the presentation of the enabling act in question, by Pellecchia (n 1), 226, who interprets the wording of Law 3/2012 as permitting each diligent, innocently over-indebted debtor to submit a restructured repayment schedule.

DECIDING TO REPEAT DIFFERENTLY: ITERABILITY AND DECISION IN JUDICIAL DECISION-MAKING

Laura M. Henderson*

This article examines the extent to which judges have a responsibility to engage in subversive legal interpretations. It begins by showing that despite strong legal and political discourses, there remains space for the judge to resist the force of these discourses. To illustrate this point, the article discusses the strong and unified crisis discourse that was used to justify the shift in legal discourse from prosecution of terrorism to prevention of terrorism after 9/11. Subsequently, Jacques Derrida's concept of iterability is used to examine how space to resist crisis discourse was present and used by the court of first instance in the seminal post-9/11 terrorism case of Hamdi v. Rumsfeld. The article proceeds to address the conditions under which the judge had the responsibility to resist this crisis discourse. Here Derrida's work on undecidability is brought into conversation with Ronald Dworkin's classic theory of judicial interpretation. In doing so, I push beyond Dworkin's recognition of the role of political morality in legal interpretation and show that the judge cannot engage in legal interpretation without becoming a participant in the struggle over meaning. This article provides judges guidance in responding to their inevitable implication in this struggle.

Keywords: Derrida, Dworkin, iterability, judicial decision-making, terrorism, undecidability.

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I. INTRODUCTION

After the attacks on the World Trade Center in New York and on the Pentagon in Washington DC on September 11, 2001 scholars observed a shift in Western legal approaches to terrorism. Instead of the previously dominant criminal law approach, an administrative law and precautionary oriented approach to terrorism gained traction as the way to deal with terrorist threats both in government policy and judicial decisions.¹ Studies have shown how a crisis discourse was deployed to enable and justify this shift.² Crisis discourse was present in political and legal realms and worked to emphasize the (supposed) unique and existential threat posed by international terrorism to civilization. It posited that the threat posed by terrorism could only be avoided if the ways of dealing with it were fundamentally changed, specifically, from after-the-fact prosecution of terrorism as a crime to precautionary military or administrative action.

This article first shows that judges had opportunity to resist this crisis discourse. Secondly, it argues that judges had a responsibility to resist crisis discourse, to the extent it aimed to justify the permanent exclusion of a person from the political community. These claims are fleshed out by bringing Jacques Derrida's reading of iterability into conversation with

¹ Rens van Munster, 'The War on Terrorism: When the Exception Becomes the Rule' (2004) 17 *International Journal for the Semiotics of Law* 141; Douglas Feith, 'Council on Foreign Relations: Progress in the Global War on Terrorism', Washington DC, 13 November 2003; Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials' (2013) 7 *International Political Sociology* 313, 328; and Filip Gelev, 'Checks and Balances of Risk Management: Precautionary Logic and the Judiciary' (2011) 37 *Review of International Studies* 2237.

² See Laura M. Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse' (2018) 47 *Netherlands Journal of Legal Philosophy* 49 and Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?' (2014) 5 *Queen Mary Law Journal* 1.

Ronald Dworkin's classic work on legal interpretation. I explore Derrida's iterability in the first post-9/11 case, *Hamdi v. Rumsfeld*,³ that evidenced the shift from a prosecutorial approach toward a precautionary approach. After analyzing the first instance court's subversive attitude to the crisis discourse in *Hamdi*, I proceed to a more general claim about the judge's role and responsibility in legal interpretation. In effect, I use the context of the War on Terror and the *Hamdi* case to reveal something about the law that was always there: its 'structured undecidability'.⁴

Let me set out the line of reasoning this article follows: my reading of Derrida shows that the interpretation of what the 'law' 'is' is an activity inescapably affected by chains of meaning, structured into discourses that shape legal meaning. I define 'discourse' here as ways of speaking or writing that both represent and create our shared understanding of a particular issue by defining what is and is not appropriate, 'what knowledge is considered useful, relevant, and "true" in that context; and what sorts of person or "subjects" embody its characteristics'.⁵ Both legal and political discourses affect the interpretation of law, including the crisis discourse discussed above. At the same time, and crucially, despite the strong structuring force of dominant discourses on the field of (legal) meaning, this structure retains a residual undecidability. It is this residual undecidability that provides the interpreter with space, albeit limited, to subvert the dominant discourse. In this article, I refer to the dual nature of legal interpretation – its determination by discourse and its undecidability – as a 'structured undecidability'. In other words, law is structured by discourse; nevertheless it is never fully defined by the meaning given by this discourse.⁶ The notion of structured undecidability highlights how the interpretation of law's meaning is both subject to the disciplining force of discourse that imposes meaning on us and to the unavoidable partial ambiguity of it. This ambiguity gives space for

³ Supreme Court of the United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), slip op.

⁴ Ernesto Laclau, 'Deconstruction, Pragmatism, Hegemony' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 57.

⁵ Stuart Hall, 'Introduction', in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (London, Sage 1997) 6.

⁶ Laclau 1996 (n 4) 57.

undermining the force of the discourse by allowing for a deferral of dominant meanings in favor of other possible readings.

In the face of this undecidability, however structured it may be, legal interpretation is a process that can only be resolved by a decision. I use Derrida to push Dworkin's view on legal interpretation to acknowledge the role power relations play in Dworkin's process of 'advancing the enterprise' of law.⁷ While not denying the role Dworkin assigns to political morality in legal interpretation, I argue in favor of Derrida's emphasis on the essentially unstable nature of (legal) meaning. Moreover, I highlight the exertion of power necessary to achieve the fictitious stability that is a prerequisite for legal interpretation. By attending to the moment of decision in legal interpretation, it becomes clear that the rule of law is paradoxically *dependent* on the rule of man.⁸ A general, underdetermined law is applied to a particular case by doing two contradictory things at the same time: enforcing 'the law in a non-arbitrary way' and respecting 'the ways in which each case is different'.⁹ It is for this application of the general to the particular that the law depends on individual, (wo)man-made decisions.¹⁰ The law thus *depends* on judicial decisions and 'forms of popular political action that engage in [...] struggle with legal structures and institutions' to enact the law in concrete situations.¹¹ Focusing on this necessary moment of decision in the face of undecidability pushes the discussion beyond the question of which legal interpretation is 'right'. In this way, this article aims to augment the traditional legal interest in the 'right answer' by instead providing guidance on how legal decision-makers can responsibly engage in the conflicts of interpretation they will inevitably encounter, conflicts that in the end must be resolved through decision.

Concretely, this article makes these arguments in the following three sections. After the introduction, section II centers on the Derridean concept

⁷ Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass., Harvard University Press 1985) 159.

⁸ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, Princeton University Press 2009) 66.

⁹ William W. Sokoloff, 'Between Justice and Legality: Derrida and Decision' (2005) 58 *Political Research Quarterly* 341, 342.

¹⁰ *Ibid.*

¹¹ Honig 2009 (n 8) 66.

of iterability. Iterability emphasizes the repeatability of language, while at the same time stressing that language always changes its meaning within each new context it is used. Iterability reveals the space of undecidability in legal interpretation, despite the strongly dominant crisis discourse that structured much legal interpretation after 9/11. This section starts with a brief introduction to the case *Hamdi v. Rumsfeld*, the case I use to highlight the iterable nature of law, and the crisis discourse used therein by the different levels of the judicial institution that ruled on this case. I subsequently engage in a close reading of *Hamdi v. Rumsfeld* to show how the judge in the court of first instance played with the terms of the crisis discourse already present in both the government's public speech and legal submissions. I argue that the judge made these terms mean something different, while at the same time repeating them.

Section III asks how judges should decide in this context of structured undecidability. Here, I compare my view on the iterable nature of law to Ronald Dworkin's famous call for judges to interpret based on the principles of fit and justification, and the political morality of a legal system. While Dworkin acknowledges the aspect of construction inherent in legal interpretation, he fails to fully recognize the power struggle involved in the construction of unity from the undecidable field of legal meaning. Instead of denying the role of power in constructing unity, legal scholars should ask the question how the judge can legitimately decide in conditions of undecidability. Section IV concludes the article.

II. ITERABILITY IN THE CRISIS DISCOURSE OF *HAMDI V. RUMSFELD*¹²

Hamdi v. Rumsfeld was the first case heard by the United States Supreme Court on post-9/11 anti-terrorism measures. It dealt with the issue of whether the detention of Mr. Hamdi, a US citizen captured in Afghanistan without any subsequent criminal charges (and initially without access to a lawyer), violated the due process clause of the US Constitution. The government argued that Mr. Hamdi was an enemy combatant and that interests of national security, the threat posed by terrorism, and the ongoing hostilities

¹² This section draws on Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?' (2014) 5 Queen Mary Law Journal 1.

together justified the preventive detention of Mr. Hamdi without access to a lawyer. The government also argued that this preventive detention should only be subject to highly deferential judicial review.¹³ The US Supreme Court ultimately held the detention to be unconstitutional in this case, but not because preventive detention was unconstitutional as such. The Supreme Court rejected the government's claim that the factual basis for Mr. Hamdi's detention was not subject to judicial review. However, and significantly, the Supreme Court accepted the government's argument that it was authorized to detain Mr. Hamdi preventively as an unlawful enemy combatant.

This decision was part of a general shift toward a precautionary approach to terrorism, that took place after 2001. As Hafetz has noted, in the years since the attacks on the World Trade Centers, an 'alternative, military-based approach [to terrorism], rooted in the language and logic of a global armed conflict against al Qaeda and associated terrorist organizations' has become an institutionalized part of legal discourse.¹⁴ The 'starting point of post-9/11 security politics' became 'prevention rather than defense against actual threat'.¹⁵ A 'discourse on eventualities' developed that called for a 'permanent military policing through the mechanisms of prevention and pre-emption'.¹⁶ The judiciary has been intimately involved in this shift toward precaution, as Gelev has described. 'The judiciary adopts the logic of precaution in exactly the same way as the other two branches of government ... courts are central to the precautionary risk rationality of government.'¹⁷ Here, too, in the *Hamdi* case we see this precautionary discourse being furthered by the Supreme Court's acceptance of a lower standard of review for preventive, administrative detention than that for detainees suspected of a criminal offense. The Supreme Court explained that this lower standard of review was necessary to 'alleviate ... [the] uncommon potential [of procedural guarantees] to burden the executive at a time of on-going military conflict'.¹⁸

¹³ Henderson 2014 (n 12) 10.

¹⁴ Jonathan Hafetz, 'Military Detention in the "War on Terrorism": Normalizing the Exceptional after 9/11,' (2012) 112 Columbia Law Review Sidebar 31.

¹⁵ Van Munster (n 1) 146.

¹⁶ Ibid 142.

¹⁷ Gelev (n 1) 2241, 2240.

¹⁸ Supreme Court of the United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), slip op., 26-27.

The Supreme Court upheld the precautionary approach to terrorism engaged in by the government, although it ensured that *some* judicial review of the government's factual assertions would be possible.

The decisions by the US Supreme Court and the Court of Appeals both used crisis discourse to justify their precautionary approach. I define 'crisis discourse' here as a discourse that links the (presumed) existential threat of terrorism to the (presumed) need for structural legal change. This discourse emphasized the existential and unique nature of the threat posed by international terrorism and used it to rhetorically justify a departure from normal (legal) rules and procedures. The Court of Appeals for the Fourth Circuit employed crisis discourse by highlighting the unique nature of the case under consideration and arguing that the normal way for such a case to proceed was not appropriate under the current circumstances:

The [lower] court's order was not merely a garden-variety appointment of counsel in an ordinary criminal case. If it had been, the lower court's discretion would be almost plenary and hardly a subject for appeal, much less reversal. But the June 11 order was different in kind. In the face of on-going hostilities, the district court issued an order that failed to address the many serious questions raised by Hamdi's case.¹⁹

Further, this court saw a risk of 'saddling military decision-making with the panoply of encumbrances associated with civil litigation'²⁰ and decided 'the development of facts may pose special hazards of judicial involvement in military decision-making'.²¹ In articulating these risks, the court adhered to the terms of crisis discourse, which portrayed the normal legal rules as posing too large a risk in such exceptional times. According to the crisis discourse, these normal legal rules must thus be changed.

The US Supreme Court's decision in *Hamdi* evidenced a similar use of crisis discourse. The Supreme Court reasoned that 'the exigencies of the

¹⁹ United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal before Judges Wilkinson, Wilkins and Traxler (12 July 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 24, internal citations omitted.

²⁰ United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 25.

²¹ United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 26.

circumstances may demand that ... enemy combatant proceedings may be tailored to alleviate their *uncommon* potential to burden the Executive at a time of on-going military conflict'²² and pointed out that 'the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy combatant setting...'.²³ Justice Thomas' dissent went even further than the majority opinion in its use of crisis discourse. According to Justice Thomas, the Supreme Court's failure to understand the new reality of the War on Terror posed a threat to security of the nation: 'the Government's factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets'.²⁴ The Supreme Court and Court of Appeals' rulings in the *Hamdi* case exemplify how crisis discourse was used to justify a shift in legal discourse from prosecution toward precaution and prevention after 9/11.

Yet, while such an analysis of legal decision-making shows how crisis discourse can make possible shifts in legal discourse, it risks giving the (mistaken) impression that the decision in this case was *so fully determined* by the crisis discourse that the decision could not have been any different. Such a perspective ignores what Jacques Derrida has called the 'iterability of language'. On the one hand, discourse can have a highly disciplining effect; it can constitute the subjects who live within it and make certain outcomes thinkable and others not. On the other hand, it is impossible for a discourse to be reproduced without its meaning changing, however slightly.²⁵ This iterability is at the core of law's undecidability. The following part will introduce Derrida's iterability, after which I will use this concept to analyze a particular part of the *Hamdi v. Rumsfeld* case history to highlight the space that was available for the judge to resist crisis discourse. Subsequently,

²² Supreme Court of the United States, *Hamdi v. Rumsfeld*, 27, emphasis added.

²³ Supreme Court of the United States, *Hamdi v. Rumsfeld*, 28.

²⁴ Supreme Court of the United States, *Hamdi v. Rumsfeld*, 18.

²⁵ For more on the productive effects of discourse, see Stuart Hall, 'The Work of Representation' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (London, Sage 1997) 44.

section III of this article addresses the normative question of how the judge should deal with this available space.

1. *Iterability in Language and Law*

One of Jacques Derrida's main contributions to the theory of meaning is the idea that language's meaning is not stable but rather always ambiguous. This ambiguity is not merely a flaw or defect of language, but a fundamental feature of it.²⁶ Neither the author's intention nor the words of a text can limit meaning totally, but instead Derrida stresses the multiple ways in which meaning escapes and transcends language. Derrida explains that each time a word is used, its meaning results from a combination of past uses of the same word as well as from the unique context in which it is used. Words are thus situated within chains of meaning (the previous uses of words linked together with the meanings attributed to them in the past) that partially fix their meaning. However, each time a word is used, that chain is slightly changed. Each time a word is used it is thus both the same and different: it relies upon its sameness with past uses, while at the same time its meaning can never be identical to that of past uses due to the influence the present context has on its meaning. It is this ability of a word to be repeated, while being altered, that Derrida calls iterability.²⁷

²⁶ Here Derrida departs from the structuralists he critiques. While structuralists acknowledged as well that language could be ambiguous, they saw this as a flaw to be overcome. Derrida, on the other hand, argued that this ambiguity was ineradicable. See further David Aram Kaiser and Paul Lufkin, 'Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel,' (2005) 32 *Hastings Constitutional Law Quarterly* 737, 741.

²⁷ Jacques Derrida, 'Signature Event Context' in Jacques Derrida (ed), *Limited Inc* (Illinois, Northwestern University Press 1988) 9. It has been noted that Derrida's iterability is similar to hermeneutics as set out most prominently by Hans-Georg Gadamer, see Michael N. Forester, 'Hermeneutics,' in Brian Leiter and Michael Rosen (eds), *The Oxford Handbook of Continental Philosophy* (Oxford, Oxford University Press 2007) 66. While I do not deny this similarity, I choose here Derrida's perspective because of the emphasis Derrida placed on the importance of ambiguity and alterity. While Gadamer and other followers of hermeneutics certainly would not reject these notions, they view them as less central to language and meaning than Derrida did. Derrida's emphasis on ambiguity means that Derrida's approach to meaning aims to keep the process of interpretation as open

While Derrida's notion of iterability emphasizes the indeterminacy of meaning, we must be careful not to interpret Derrida to mean that language can gain radically new meaning without being affected by its previous uses. The previous contexts in which the word was used and known to the receiver will still always impact the word, even in its new context. By the very fact that it is intelligible, the word's identity must be recognized as something used before. Simultaneously, the word will always carry more richness of meaning than can be exhausted by one particular usage of it. I interpret Derrida's work to highlight the fluidity of meaning and to see meaning as a product of negotiation rather than rigid definition – while not denying that meaning can be stabilized.²⁸

Judith Butler takes pains to show that this fluidity of meaning, while inescapable, does not mean it is *easy* to free oneself from the dominant meaning of a word. She gives the example of how using the word 'queer' creates a 'social bond among homophobic communities [...] The interpellation echoes past interpellations, and binds the speakers, as if they spoke in unison across time'.²⁹ In her words, 'discourse has a history' and each performative has a place in a 'chain of historicity' that constrains past and future use.³⁰ In this way, Butler points to the force exerted by past uses of discourse and to the limits of individual agency in simply changing the meaning of a word. In her example on the use of the word 'queer' she argues that attempts to renegotiate or reappropriate the word by LGBTI communities will always have to reckon with the force of past meanings. There is no blank slate upon which new meanings can be inscribed; instead

and on-going as possible. As Pierre Legrand notes, citing Colin Davis, '[h]ermeneutics would like to bring interpretation to a close, at least provisionally, though it knows it may not be able to; deconstruction would like not to stop, though it knows it will have to.' Pierre Legrand, 'Derrida's Gadamer,' in Simone Glanert & Fabien Girard (eds), *Law's Hermeneutics: Other Investigations* (London, Routledge 2017) 160, citing Colin Davis, *Critical Excess: Overreading in Derrida, Deleuze, Levinas, Žižek and Cavell* (Stanford, CA, Stanford University Press 2010) 55.

²⁸ In this interpretation of Derrida I follow, among others, Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York, Routledge 2011 (1993)) 172; Kaiser and Lufkin (n 26) 741; Legrand (n 27) 152; Sokoloff (n 9) 343-344; and Henry Staten, *Wittgenstein and Derrida* (Oxford, Basil Blackwell 1985) 152.

²⁹ Butler 2001 (n 28) 172.

³⁰ *Ibid* 172, 174.

words have places in chains of historicity that impede attempts to break those chains and insert the word into a new chain. Discourse exerts power by 'echo[ing] prior actions, and *accumulat[ing] the force of authority through the repetition or citation of a prior, authoritative set of practices*'.³¹

Legal decision-making relies heavily upon the aspect of iterability that emphasizes the repeatability of meaning. The force of law depends upon chains of meaning. One only needs to glance at a judicial decision to see these chains appear as the judge refers to past decisions and legislative documents that link together to justify the decision the judge renders. These 'citational chains' are weaved into a legal decision and mean that the judge never speaks alone.³² It is this reference back to past speakers that creates a 'citational force' that establishes the authority of the judge's speech act.³³ The force of the decision is not a product of the judge's intentionality; her own preferences or values are irrelevant to the formal or persuasive power of the decision. Even if she wished her decision to be purely a function of her intention, so long as she continues to use these citational chains, the terms and concepts she uses will always 'exceed and undo the intentions and aims of any particular speaker in time'.³⁴ It is these citational chains that produce the legal authority of the decision. It is because the decision is framed in terms of these chains and is bound to past speakers, past judges, 'as if they spoke in unison across time,'³⁵ that the decision has the force of law.

Such citational chains are, however, not present only in law. And the force these chains exert to (temporarily) fix meaning is not only a force exerted by legal discourses. Other discourses also exert this force. Moreover, no one citational chain exists in isolation; rather they interact to enrich and contaminate each other. This is how the crisis discourse that started in the realm of political discourse was able to be grafted onto and incorporated into legal discourse. While the aspect of repeatability that is present in iterability

³¹ Butler 2001 (n 28) 172, emphasis in original.

³² See Butler 2001 (n 28) 214 note 5, '...every 'act' is an echo or citational chain, and it is its citationality that constitutes its performative force.'

³³ Ibid.

³⁴ Honig 2009 (n 8) 128.

³⁵ Butler 2001 (n 28) 172.

can thus reinforce meaning over time, this meaning can be complicated by competing citational chains that can become just as strong.

Despite the constraining, disciplining force of discourse, perfect replication remains impossible. Next to the aspect of iterability that emphasizes the repeatability of language, there is the aspect of alterity of meaning. Contemporary thinkers like Judith Butler and Bonnie Honig have developed this aspect of iterability to show that while dominant discourses can produce and regulate meaning and subjectivities, these discourses and the meanings and subjects they create are always 'internally discontinuous'.³⁶ Even when a word is used to intend its dominant meaning, this dominant meaning is always supplemented by opposing or differing meanings. While these other meanings might temporarily defer to the dominant meaning, they remain present in the margins. It might thus seem as if permanence is possible – the permanence of meaning across texts and time for example – but language in fact makes such permanence impossible.³⁷

While this aspect of iterability often receives less attention in judicial decision-making, the inevitable non-identical repetition of citational chains means that law cannot be applied in a machine-like way.³⁸ Even despite our best attempts to repeat identically, it is impossible for a repetition to ever be an exact copy of the 'original': '[e]ach case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely'.³⁹ And so, in law, even when a judge attempts to faithfully reconstruct the citational chain that leads back to some original intention or law (if such an original moment exists) she will never be able to do so without in some way *altering* that chain. By applying the law to a

³⁶ Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 *Theatre Journal* 519, 520.

³⁷ Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca, Cornell University Press 1993) 123.

³⁸ Or perhaps more accurately, even a machine's behavior is not fully present to the machine itself as even machines can have parts that bend, break off and be melted (see Ludwig Wittgenstein, *Philosophical Investigations*, trs. G.E.M. Anscombe (Oxford, Basil Blackwell 1958) nos. 193–94, cited in Honig 2009 (n 8) 55).

³⁹ Jacques Derrida, 'Force of Law: The 'Mystical Foundation of Authority'', in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (New York, Routledge 1992) 23.

new situation, a new link is added to the citational chain that is discursively posited by the judge. In doing so, the chain itself changes. It is this aspect of discourse that gives one the possibility to repeat differently. In the next part, I use the concept of iterability with its aspect of repetition and alterity to take a second look at the force crisis discourse exerted on the decision-making in *Hamdi v. Rumsfeld* and to examine one particular judge's different repetitions.

2. *Repeating Differently in Hamdi v. Rumsfeld*

Derrida's concept of iterability highlights the failure of discourse to fully bind legal interpretation. In this part, I look at the judicial proceedings at the court of first instance in *Hamdi v. Rumsfeld* through the lens of iterability. I aim to show how, throughout the hearings at this level, the presiding judge was confronted by both aspects of iterability discussed above. I pay particular attention to the ways in which the aspect of alterity gave the presiding judge space to engage in the 'different sort of repeating' that Butler notes iterability makes possible.⁴⁰ By looking at *Hamdi* from a perspective that highlights the space available for repeating differently, instead of only attending to the determining effects of the dominant discourse, a different picture emerges of how crisis discourse affected legal discourse. The court of first instance's judgment was overturned on appeal, and thus not relevant for purposes of legal precedent (and therefore often ignored by legal scholarship). Yet, this lower-level decision shows that even in the context of a highly coherent, dominant discourse like the crisis discourse employed in the War on Terror, space for resistance is possible. It also shows, however, the repercussions of engaging in such resistance.

When *Hamdi* came before the District Court for the Eastern District of Virginia, the presiding Judge Doumar initially took a highly critical view of the government's use of crisis discourse to justify its actions. For example, Judge Doumar questioned the executive's claim that the US was under extreme threat and was in a state of war. Judge Doumar challenged this discourse by asking the government's lawyer whether there had been any actual declaration of war. After the lawyer answered that there had not been

⁴⁰ Butler 1988 (n 36) 520.

a formal declaration,⁴¹ the judge explicitly voiced his uncertainty about the current state of affairs and his doubt as to whether to go along with the discourse of war: 'There have been a lot of people who say we have a war, but I don't know if this is really a war or what it is'.⁴² The judge questioned the government's assertions regarding the exceptionality of the circumstances, probing what the government's position was on any foreseeable end to these circumstances. Judge Doumar asked the government to clarify 'when are these hostilities going to end? Is he [Hamdi] going to be held forever? Can he be held for life?'⁴³

Judge Doumar's initial skepticism of the government's use of the crisis discourse was brought to a halt by the government's interlocutory appeal to the Court of Appeals for the Fourth Circuit.⁴⁴ In their ruling, the Court of Appeals instructed Judge Doumar to show more deference to the executive in considering the national security aspects of the case. Following this ruling, Judge Doumar began to emphasize the importance of national security, taking care in a subsequent ruling to note for example that 'the judiciary has traditionally shown 'great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs'.⁴⁵ Yet, while Judge Doumar complied with the Court of Appeals' instruction to show deference to the executive in matters of national security, Judge Doumar managed to give this concept of national security a somewhat different shape than the Court of Appeals did. He framed his ruling in terms of national security – thus conforming to the terms of crisis discourse – but did so in a way that emphasized a particular side of

⁴¹ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (29 May 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 34.

⁴² United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 34.

⁴³ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 36.

⁴⁴ United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 21-26.

⁴⁵ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5, citing the United States Court of Appeals' ruling *Hamdi v. Rumsfeld*, 2000 (sic) WL 1483908.

the national security concept: the national values deemed worthy of protection. By citing a case not cited by the Court of Appeals, and neglecting to cite those the Court of Appeals did cite, Judge Doumar acknowledged the national security interest but interpreted this concept differently than the Court of Appeals had done.⁴⁶ Whereas the Court of Appeals linked national security to times of active hostilities and military affairs, Judge Doumar expanded it to include the protection of individual liberty:

The standard of judicial inquiry must also recognize that the 'concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart ... It would indeed be [sic] ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile.' *United States v. Robel*.⁴⁷

Judge Doumar was thus able to follow the instruction of the higher court to rule within a discourse of crisis that highlighted the threats to national security while at the same time detaching 'national security' from the chain of meaning in which the Court of Appeals used it. Judge Doumar grafted this term onto a different chain, thus giving the words a different meaning.⁴⁸

⁴⁶ The United States Court of Appeals used a number of cases to ground its claims on national security (*Dames & Moore v. Regan*, *United States v. The Three Friends*, *Stewart v. Kahn* and *The Prize Cases*) that the District Court did not refer to. Instead, the District Court based its concept of national security on *United States v. Robel*, a case not mentioned by the Court of Appeals. For the Court of Appeals' references in this regard, see United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 23-34. For the citation used by the District Court, see United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5.

⁴⁷ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (16 August 2002), 6. Additions in brackets are Judge Doumar's.

⁴⁸ While there might be slight differences between 'national security' and 'national defense', Judge Doumar uses both terms interchangeably. This seems to reflect the definition given in by the US Department of Defense in both 2000 and 2018, which reads (in part): 'national security -- A collective term encompassing both national

In a similar vein, Judge Doumar included other elements of crisis discourse in his rulings, while at the same time warping their use to mean something different than how they had been used by the government in its legal arguments or in its public pronouncements on terrorism. One typical element of crisis discourse, as used by the government and the higher courts, was the emphasis on the unique nature of international terrorism. In court proceedings, the executive asserted that the 'forces responsible for the September 11 attack pose an *'unusual and extraordinary* threat to the national security and foreign policy of the United States'⁴⁹ and, according to the government, the wartime nature of the case meant that an entirely different paradigm should be applied to the case.⁵⁰ In the rulings from the higher courts, a similar conception of the unique nature of the case was echoed, as was shown above in the citation from the Court of Appeals.⁵¹ Judge Doumar emphasized the novel elements of this case as well. Yet, instead of the singular threat posed by international terrorism, it was the unique nature of the government's action he focused his attention on. The judge asked the government's lawyer whether 'there [is] any case that you know of, any habeas corpus petition that you've ever heard of, prior to this case where counsel could not speak to the person being held?'.⁵² The government could not provide the court with such a precedent, upon which the judge noted in his

defense and foreign relations of the United States...' see Department of Defense Dictionary of Military and Associated Terms 2000, 305 available at [http://www.bits.de/NRANEU/others/jp-doctrine/jp1_02\(00\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/jp1_02(00).pdf) and Department of Defense Dictionary of Military and Associated Terms 2018, 162 available at <http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf?ver=2018-08-27-122235-653>.

⁴⁹ Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi v. Rumsfeld*, 1120871 (U.S.) 56, citing congressional language from the Authorization for the Use of Military Force, among others, emphasis added.

⁵⁰ Brief for Respondents-Appellants (Secretary of Defense) on Appeal to the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld*, (4 October 2002), 12. The respondents speak here of 'The entirely different paradigm in which this case arises – wartime detention of combatants, rather than criminal punishment.'

⁵¹ At supra footnote 19.

⁵² United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (13 August 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 85.

decision: 'this case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer'.⁵³

By pointing out the unique nature of this case, Judge Doumar adopted the terms of crisis discourse but decoupled crisis discourse's emphasis on uniqueness from the threat posed by international terrorism. The government had emphasized the existential threat of terrorism⁵⁴ and the risk that judicial involvement in this case would diminish 'the prestige of our commanders; divert[...] their attention from the war effort and possibly require [...] them to return from abroad to be called to account in our courts; and risk [...] a conflict of military and judicial opinion'.⁵⁵ Judge Doumar, however, spoke of an existential threat to the identity of the United States, the values of the Constitution and the risk of chaos that comes with undermining that identity and those values. Judge Doumar detailed this risk elaborately:

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return of the chaos of a rule of men and not of laws.⁵⁶

Unlike in the dominant use of crisis discourse by the government, Judge Doumar did not interpret the novelty and severity of the threat to mean that completely new procedures were necessary. To the contrary, Judge Doumar seemed to be pointing out the uniqueness of the detention of Mr. Hamdi and

⁵³ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 2.

⁵⁴ Henderson 2014 (n 12) 6.

⁵⁵ Brief for Respondents-Appellants at the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld* (June 19, 2002) 2002 WL 32728567 (C.A.4), 6.

⁵⁶ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 9.

the threat this posed to constitutional values in order to reject the government's crisis discourse.

By using the elements of crisis discourse in his ruling, but decoupling them from previous chains of meaning, Judge Doumar was able to repeat the dominant discourse while simultaneously shifting its meaning. As Judge Doumar's approach to this case shows, the shift toward precaution in post-9/11 counter-terrorism cases was a shift that was not dictated by the existence of the dominant crisis discourse alone, nor one that went uncontested. Whether intentionally or not, Judge Doumar used the space available to repeat differently and employed the terms of crisis discourse in a way that challenged and undermined that same discourse. But this resistance to the dominant crisis discourse was not successful in this instance. After Judge Doumar ruled that Mr. Hamdi should be allowed access to a lawyer, the government refused to comply with his order. This placed the court of first instance in a difficult and unusual position. The court's authority depends on its rulings being respected by the other branches of government, even when these other branches disagree. The only tool the court has in cases when a branch of government threatens non-compliance is to hold the representative in contempt of court, upon which the court can decide to detain the representative in jail. The government's refusal to comply threatened a clash between the judiciary and the executive, a clash Judge Doumar was wary to engage in, as shown by his explicit remark that he was 'not interested in throwing the Secretary of Defense in jail' for contempt of court.⁵⁷ Not complying with the terms of crisis discourse was thus met with a point-blank challenge to the authority of the judge, a challenge the executive won.

In the end, the Court of Appeals for the Fourth Circuit overruled the District Court's rulings on the case, holding that Mr. Hamdi had no right to a lawyer or to contest the facts presented by the government as to his enemy combatant status. According to the Court of Appeals, this was the appropriate attitude a court must show toward the executive in a time of war. After the decision of the Court of Appeals, the case was heard by the Supreme

⁵⁷ United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Telephonic Conference before the Honorable Robert G. Doumar (20 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 13-17.

Court. The Supreme Court affirmed many of the District Court's orders, but did so far more clearly within the precautionary framework of preventive, administrative law than the District Court did. The Supreme Court accepted the argument that the standard of review for Mr. Hamdi's detention should be lower than the standard of review for the detention of someone charged with a crime, because of the criminal law standards' 'uncommon potential to burden the executive at a time of on-going military conflict'.⁵⁸

III. THE DECISION AND RESPONSIBILITY

The first section of this article discussed how iterability can be seen as present in judicial judgments: judgments are rendered in terms of citational chains that restrain and limit possible meanings of the law, while at the same time the judgment cannot help but have an aspect of alterity. I showed how Judge Doumar's use of this space for changing meanings made certain terms of the crisis discourse mean something different. In the present section, I consider how a judge should use this space for repeating differently. Should the judge maintain the fiction of the law as decidable and unified or rather intentionally engage with and take account of its undecidable aspects? This is a normative question and answering this question requires a shift in approach. Whereas section II of this article focused on describing crisis discourse and the possibility for repeating this discourse differently, the question addressed in section III requires a turn toward more fundamental matters of legal philosophy. This section proceeds as follows. To begin the enquiry into how judges should decide between the different possible meanings, I turn to Ronald Dworkin's views on how judges interpret the law. Dworkin was a legal scholar who, like Derrida, was strongly influenced by questions of meaning-making and helped to develop a hermeneutic theory of law. Dworkin acknowledges that law is not unified but argues that the judge, in her construction of the law *as if it were*, can come to an answer that she is convinced is the one right answer. I proceed to critique Dworkin's view of adjudication based on a reading of Derrida that highlights the role of power relations in attempting to unify law. At the end, I return to Derrida's

⁵⁸ Supreme Court of the United States, *Hamdi v. Rumsfeld*, 27.

understanding of undecidability in law to present the judge with a possible way forward.

1. *Dworkin's Undecidable Chain of Meaning*

Ronald Dworkin sets out a theory of legal meaning that sees law as an argumentative practice.⁵⁹ Instead of relying on the original intent of the author of the law, Dworkin proposes that the meaning of law is *constructed*; meaning is made – not found. This interpretive process is one that combines a responsibility to remain faithful to legal tradition with the recognition that, in order to do so, the judge must engage in some type of creative activity.⁶⁰ Approaching the issue from the perspective of the judge presented with a question of interpretation, Dworkin uses the metaphor of a 'chain novel' to show how this interpretive activity takes place. Dworkin explains:

Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history in to the future through what he does on that day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.⁶¹

The first task of the judge is thus to construct a view of the law as if it were a 'coherent whole' and decide the case at hand in a way that best fits within this coherence.⁶² As Dworkin explains it, still in terms of his chain novel metaphor, it is the judge's job to as much as possible write 'a single, unified novel rather than, for example, a series of independent short stories with characters bearing the same names'.⁶³ In Dworkin's comparison between interpretation of art and of law, he explains that in his view interpretation must attempt to show the text 'as the best work of art *it* can be', insisting that

⁵⁹ Ronald Dworkin, 'Law and Interpretation' (1982) 9 *Critical Inquiry* 179.

⁶⁰ At least in the case of interpreting principles, see John McGarry, *Intention, Supremacy and the Theories of Judicial Review* (London, Routledge 2017), 21-22.

⁶¹ Dworkin 1985 (n 7) 159, emphasis in original.

⁶² McGarry (n 60) 19.

⁶³ Dworkin 1985 (n 7) 159.

the 'it' of the text must be respected, instead of 'changing it into a different one'.⁶⁴ The judge must decide which reading of the chain is the best one and continue that reading.⁶⁵

Next to this faithfulness to the enterprise and the avoidance of taking 'some new direction of his own', Dworkin acknowledges the judge does more than simply *receive* the meaning of the law. Creativity is necessary to advance legal history into the future, to interpret what that history means for us today.⁶⁶ Crucially, Dworkin does not deny that in this process of construction, the judge will be affected by politics. Indeed, he remarks that 'interpretation in law is essentially political',⁶⁷ that law is 'deeply and thoroughly political'⁶⁸ and that legal interpretation will be linked to the interpreter's views on political morality, to 'beliefs other judges need not share'.⁶⁹ But, according to Dworkin, one can only speak of a judge making *new* law in a 'trivial sense'.⁷⁰ Instead of setting out to depart from the law as it stands, it is the judge's duty to – with the aid of political morality – construct a theory of law that best fits the legal practice as it currently is and that provides the best normative justification of this practice.⁷¹ In effect, the judge is to endeavor to unify the diffuse nature of law, to '*construct* a unity from the disparate elements'⁷² of legal history and practice and to 'impos[e] purpose' on the law to 'make of it the best possible example of the form or genre to which it is taken to belong'.⁷³ While Dworkin acknowledges that in fact 'the law may not be a seamless web', he entreats the judge to 'treat it as if it were'.⁷⁴ This shall subsequently provide the judge with the soundest theory of law, based on which she can interpret the law. The judge's soundest theory of law constrains

⁶⁴ Dworkin 1982 (n 59) 183.

⁶⁵ Ibid 194.

⁶⁶ Anne Barron, 'Ronald Dworkin and the Challenge of Postmodernism' in Alan Hunt (ed), *Reading Dworkin Critically* (Oxford, Berg Publishers 1992) 148.

⁶⁷ Dworkin 1985 (n 7) 162.

⁶⁸ Dworkin 1982 (n 59) 179.

⁶⁹ Dworkin 1985 (n 7) 162.

⁷⁰ Ronald Dworkin, *Law's Empire* (Oxford, Hart Publishing 1998) 6.

⁷¹ Dworkin 1985 (n 7) 160.

⁷² Barron (n 66) 149.

⁷³ Dworkin 1998 (n 70) 52.

⁷⁴ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., Harvard University Press 1977) 116.

her in her interpretation of the particular law at hand: the answer she must give is that which best fits within the web of meaning she has constructed. The creativity necessary in legal interpretation is, for Dworkin, not the creativity of a judge faced with a blank slate upon which any interpretation can be projected.⁷⁵ The limit to this creativity is found in the judge's duty to remain faithful to advancing the enterprise at hand,⁷⁶ an enterprise characterized by the 'integrity and coherence of law as an institution'.⁷⁷ In every judge's political morality, there must be some sense of this integrity of law that subsequently acts as an 'overriding constraint' on the judge's decision.⁷⁸

In many ways, Dworkin's 'chain novel' approach to law echoes Derrida's iterability. Dworkin's indebtedness to the larger hermeneutic tradition is an indebtedness Derrida shares.⁷⁹ This connection to hermeneutics allows both authors to see the dual nature of the determinedness *and* ambiguity of meaning in language and law. Yet, while Dworkin's hermeneutics remains focused on striving for unity, Derrida's 'radical hermeneutics' emphasizes the discord ever-present in this constructed fiction of unity.⁸⁰ As Derrida stresses, 'conventions, institutions and consensus are stabilizations (sometimes stabilizations of great duration, sometimes micro-stabilizations)' and 'this means that they are stabilizations of something *essentially* unstable and chaotic'.⁸¹ The stabilization – the construction of the purpose and integrity of law – is necessary because of the very fact that 'stability is not natural'.⁸²

How does one get from chaos to a non-natural stability? The construction of a unified version of law from an inherently non-unified field of meaning

⁷⁵ Dworkin 1985 (n 7) 164.

⁷⁶ Barron (n 66) 149.

⁷⁷ Dworkin 1985 (n 7) 161.

⁷⁸ Dworkin 1982 (n 59) 195.

⁷⁹ Both particularly indebted to Gadamer's work on hermeneutics. Derrida, however, often fails to acknowledge this indebtedness, see footnote 111 in Forester (n 27) 66.

⁸⁰ John Caputo, *Radical Hermeneutics: Repetition, Deconstruction and the Hermeneutic Project* (Bloomington, Indiana University Press 1987).

⁸¹ Jacques Derrida, 'Remarks on Deconstruction and Pragmatism' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 83.

⁸² Ibid.

requires an exercise of power, an imposition of will, that suppresses certain alternatives while favoring others. Derrida's work on deconstruction highlights the power play present in this striving for unity. Derrida acknowledges the possibility of constraint that discourse brings, but highlights that the stability and unity that interpreters might perceive are not neutral constructions. Instead, they are the result of contingent processes characterized by power relations. Even after an exertion of power has constructed one fiction of unity over another, the alternatives do not disappear. The simulated stability remains contaminated by the non-unity from which it is constructed.⁸³ As a number of contemporary scholars have emphasized, relying on Derrida, these possible alternatives remain present and continually challenge the boundary as drawn.⁸⁴ These 'remainders', while relegated to the margins in the attempt to construct a unified interpretation of law, cannot be expunged.⁸⁵ They continue to exist, continue to threaten the destabilization of the constructed unity in favor of other possible unities.

Dworkin does not deny that something external to law is necessary to make the step from the non-unified field of meaning to the coherent construction of law. He assumes the judge's access to a political morality will provide the steady ground necessary to bridge this gap. Dworkin, however, filters out all the conflictual, contradictory and power-related aspects of both (legal) interpretation and the political morality the judge needs for this interpretation. He fails to realize that this political morality is itself 'the contingent outcome of a perpetual and radically undecidable conflict of interpretations'.⁸⁶ Thus while the political morality that a judge uses might

⁸³ Staten (n 28) 152.

⁸⁴ Aletta J. Norval, 'Hegemony after Deconstruction: The Consequences of Undecidability' (2004) 9 *Journal of Political Ideologies* 139, 142; E.E. Berns, 'Decision, Hegemony and Law: Derrida and Laclau' (1996) 22 *Philosophy & Social Criticism* 71, 74. Both Norval and Berns attribute this insight to Ernesto Laclau in, among others, Ernesto Laclau, 'The Impossibility of Society' (1983) 7 *Canadian Journal of Political and Social Theory* 21.

⁸⁵ Honig 1993 (n 37) 143-146.

⁸⁶ Barron (n 66) 150. Dworkin certainly mentions the role of politics in interpretation but the politics that is implicated in his process of constructing this soundest theory of the law is a form of politics purified of power relations. All actual conflictual aspects of politics seem to be given no meaningful role to play in Dworkin's theory of law. See Alan Hunt, 'Law's Empire or Legal Imperialism?' in Alan Hunt (ed),

constrain her interpretation, and in this sense provide some ground, it is itself a contingent, human-made product of power relations. The ground political morality provides, therefore, cannot be stable or final. To put this in other words, Dworkin seems to assume that the judge's political morality is the starting point in the interpretive process, instead of the *object* of political struggle. Instead of political morality providing the solid ground that Dworkin seeks in order to avoid arbitrariness, political morality is itself the product of contingent struggles over meaning that are never finally settled and are constantly characterized by relations of power. The political morality that the judge must use to solve the interpretive conflict entails choosing sides in the political conflict⁸⁷ and is itself not grounded on anything outside of the struggle the judge chooses sides in. If political morality is itself a contingent outcome, the judge's interpretation is not the end of an interpretive conflict but rather a step in the chain of political conflict that, while creating the fiction of unity, 'does not transcend the political fray' but is in fact at its center.⁸⁸

We are left with the image of law as a partially structured, partially unstructured field; a field of 'structured undecidability'.⁸⁹ Interpretation of this field is indeed constrained by chains of meaning and discourses of political morality, but these constraints fail to ever fully eliminate the remainders that will continue to challenge the fictional unity. The construction of (legal) meaning is characterized by contestation and struggle over the type of fictional unity that is constructed, and the political morality that provides so much guidance to Dworkin's judge is itself nothing more than the product of such conflicts over meaning. We thus lose any ultimate ground with which to justify (legal) interpretation. This is not to say that

Reading Dworkin Critically (Oxford, Berg Publishers 1992) 41; Andrew Altman, 'Legal Realism, Critical Legal Studies and Dworkin' (1986) 15 *Philosophy & Public Affairs* 205, 216; Barron (n 66) 150 and David Couzens Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 *Southern California Law Review* 135, 174.

⁸⁷ See for example Hoy's interpretation of Roberto Unger's critique of Dworkin in Hoy (n 86) 175.

⁸⁸ Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory' (2007) 101 *American Political Science Review* 1, 6.

⁸⁹ Laclau (n 4) 57.

there are no discourses that exert power to constrict possible meanings and enable others, but rather that the ground these discourses provide is in the end contingent and does not rest on any ultimate justification.⁹⁰

2. *Lucidly Plunging into the Night of Undecidability*⁹¹

In the midst of this lack of final justification, the instant of decision is 'madness'.⁹² The decision acts 'in the night of nonknowledge and nonrule'⁹³ – not because the judge has not prepared herself with 'knowledge, by information, by infinite analysis'⁹⁴ but because undecidability means that any interpretation is an imposition that cannot be grounded in final, ultimate knowledge or guarantees.⁹⁵ At the same time, the structured nature of this undecidability means that the decision is not an *absolute* beginning.⁹⁶ Instead, this decision is a *derivative* beginning and is influenced, shaped and determined to a large extent by the citational chains of dominant discourses. Discourse and the power it exerts on social meaning remains significant and inescapable. What Derrida's perspective highlights is that, despite the strength of these discourses, they ultimately remain *ungrounded*. These discourses retain a measure of disorder that can never be erased from the incomplete and unstable (dis)unity of meaning.

⁹⁰ Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism"' in Judith Butler and J.W. Scott (eds), *Feminists Theorize the Political* (New York, Routledge 1992) 3–21. See further Oliver Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh, Edinburgh University Press 2007) 14.

⁹¹ Derrida speaks of the aporia of forgiveness and claims '[f]orgiveness is thus mad. It must plunge lucidly into the night of the unintelligible,' see Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London, Routledge 2001) 49. I take his plea to combine the plunge necessary to act in conditions of madness with a lucid and well-prepared mind and apply it here to undecidability.

⁹² Derrida 1992 (n 39) 26 (with reference to Kierkegaard).

⁹³ *Ibid.*

⁹⁴ Jacques Derrida, 'Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida' in R. Kearney and M. Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (London, Routledge 1999) 66.

⁹⁵ Derrida 1992 (n 39) 26–27.

⁹⁶ Butler 2001 (n 28) xxi.

Importantly, stabilizing meaning into a fictional unity is the result of power exercised in relations between those struggling over multiple different possible constructions of unity. This realization calls on those involved in decision-making to recognize two things at the same time, namely that their 'most basic commitments regarding self, other, and the beyond human are [...] both *fundamental* and *contestable*'.⁹⁷ Decision-makers have to recognize that despite their conviction in the rightness of their answer, their answer is in fact but one of many possibilities. In the end, 'I can never be completely satisfied that I have made a good choice since a decision in favour of one alternative is always to the detriment of another one'.⁹⁸

Let me reassure the reader: recognizing the lack of ultimate ground for (legal) interpretation does not mean law should be abandoned nor that construction of unity should be avoided.⁹⁹ It does mean, however, that we are placed before the question how we are to act, given this lack of ultimate ground. More concretely, how is the judge to decide if she cannot ground her decision on the ultimate conviction that her answer is right? Derrida argues that to experience and acknowledge this impasse – this need to decide while not having final ground on which to ground the decision – is in fact to experience responsibility. In order to find one's way through this impasse, one must experience it not as a 'paralyzing structure, something that simply blocks the way', but instead we must acknowledge that 'we have to go through pain and [...] a situation in which I do not know what to do'. This 'aporia is what we have to go through in order to take responsibility and to act or decide'.¹⁰⁰

⁹⁷ Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge, Cambridge University Press 2009) 815, emphasis added.

⁹⁸ Chantal Mouffe, 'Deconstruction, Pragmatism and the Politics of Democracy' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 9.

⁹⁹ According to Henry Staten, Derrida's work calls on us to deconstruct the unity of law, 'not in disrespect for truth and disobedience to the law, and certainly not in flight from the demands of a reality which is too stern and fatherly to be faced, but because it is the fantasized fulfillment of an infantile wish.' He admits that there is no 'purifying ourselves of this wish, but we can see it in its primitive intensity,' see Staten (n 28) 154.

¹⁰⁰ Richard Kearney, 'On Forgiveness: A Roundtable Discussion with Jacques Derrida' in John D. Caputo, Mark Dooley & Machael J. Scanlon (eds), *Questioning God* (Bloomington, Indiana University Press 2001) 62.

If the decision-maker acknowledges that 'I have not done enough',¹⁰¹ that she can never do enough to find a final ground for her decision in a field of structured undecidability, she has to face the question of how she can take responsibility for the alternative answers she has excluded with her decision. For Derrida, the moment a decision-maker is confronted with undecidability is where responsibility comes in. Responsibility starts, Derrida says, 'when I *don't* know what to do'.¹⁰² Now, it is likely true that the judge will feel the conviction Dworkin speaks of, that she has found the one right answer. But if she simultaneously recognizes that this conviction, while fundamental, is also contestable, the way to move forward with the decision is by showing responsibility for the other possibilities her decision has foreclosed.

Derrida tells us that the decision must ensure that 'the memory of the undecidability [...] keep[s] a living trace that forever marks a decision as such [...] the undecidable remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision'.¹⁰³ While each judgment remains lacking an ultimate, non-contingent ground, this need not be a call to refrain from judgment. Instead, it is an appeal to the judge to ensure she acknowledges her judgment's groundlessness by keeping open the possibility that that which was excluded from the judge's interpretation of the law, can work to reverse its exclusion by continuing to participate in the struggle over meaning. If the judge takes account of the fact that she can never be sure her decision is the one right one, despite her deep conviction that it is, she is faced with a responsibility. This is the responsibility to form her decision in such a way that maintains the reversibility of the exclusion the decision effects.

Let me specify what or who I entreat the judge not to permanently exclude. My concern here is not for the particular chain of meaning of discourse. Structured undecidability means that it is impossible to ever completely, irreversibly exclude a particular alternative meaning from the discursive order. There will always be some space - however small - for that meaning to

¹⁰¹ Derrida 1996 (n 81) 87.

¹⁰² Jacques Derrida, 'Following Theory: Interview with Nicholas Royle, Christopher Norris and Sarah Wood' in Michael Payne and John Shad (eds), *Life.after.Theory* (London, Continuum 2003) 31-32.

¹⁰³ Derrida 1992 (n 39) 253.

reappear to challenge the hegemonic discourse. My concern is for the carrier of that alternative meaning. While it is true that in a structural sense no alternative meaning can be permanently removed from the realm of possible future meanings, this is of course not the case for the agent needed to engage in the discursive struggle over meaning that is necessary to allow a non-dominant meaning to gain prominence. Alternative interpretations cannot fight for themselves, they cannot give voice to themselves. They need a human to convey them.¹⁰⁴ The problem is thus not that potential alternative meanings will be excluded permanently but that the human who conveys them will be. While the judge cannot help but take sides in the struggle over meaning, when she decides to construct one coherent meaning of the law over possible others, she can ensure that her intervention remains contestable by those individuals on the losing end of this struggle.

How must the judge ensure her decision does not permanently exclude the other? At a fundamental level, avoiding permanent exclusion means ensuring the judge's decision does not result in what has been termed 'legal invisibility', the situation in which the other is put in a position where he lacks the right to be recognized under the law.¹⁰⁵ Legal invisibility, as a type of civil death, excludes the other so fully that he loses his right of independent action and is treated as a passive object to be possessed or ruled over instead of a legal subject. He is, in fact, subjected to law without the corresponding rights of a legal subject.¹⁰⁶ In such instances, the other is left with no (legal) means to challenge the decision which excluded him and the discourse that supports that decision.

¹⁰⁴ At least according to currently accepted insights. It remains possible that at some point non-human animals or robots might become similarly capable of such struggle over meaning.

¹⁰⁵ I borrow this term 'legal invisibility' from Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility' (2007) 60 Southern Methodist University Law Review 1425 and Wouter Veraart's (Dutch) discussion of 'juridische onzichtbaarheid', see 'Het slavernijverleden van John Locke. Naar een minder wit curriculum?' in Britta van Beers and Iris van Domselaar (eds), *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie* (The Hague, Boom juridisch 2017) 218.

¹⁰⁶ Marc de Wilde, 'Safeguarding the Constitution with and against Carl Schmitt' (2006) 34 Political Theory 510, 514.

Importantly, responsibility for the other does not need to imply that the judge in *Hamdi v. Rumsfeld* should have *necessarily* resisted the rupture in legal meaning crisis discourse precipitated, nor, conversely, that the judge should have *necessarily* comported herself with this newly dominant discourse. Taking responsibility in the face of structured undecidability is an activity that rises above arguments about the merits of the various legal or political arguments put forth within the struggle over meaning. Instead, I argue that in *Hamdi* this responsibility calls on the judge to take into account the possibility that the dominant discourse of crisis *might be wrong*. Concretely this means accepting that the threat presumed to justify the indefinite detention may not actually be present. Or, it might be the case that preventive detention might not adequately address the threat, even if one is in fact posed. It could be that the employed political morality is actually immoral. The judge cannot be sure. She should reckon with these possibilities by ensuring her decision does not permanently prevent future decisions from correcting such possible mistakes. Thus, while it may be impossible for the judge's interpretation to avoid being influenced by both legal and political discourses, and while it may be impossible for the judge's interpretation to avoid taking sides in the conflict over meaning, the task of the judge must be to decide in a way that does not shut down this conflict permanently.

To become even more concrete on the question of how the judge should ensure her decision does not exclude the other permanently, let me say something about the application of this idea to *Hamdi v. Rumsfeld*. In this particular case, I would call upon the judge to take account of the effects of her decision on Mr. Hamdi's ability to participate in the discursive struggle over his construction as another who is to be excluded. Such taking account could include asking whether the preventive detention of Mr. Hamdi called for by the government and discursively justified by the crisis discourse restricted his ability to participate in public and legal debate, denied him recognition under the law as a legal subject and whether his detention would in fact be indefinite, without a clear way to know when it must end. Such effects would shut down Mr. Hamdi's ability to challenge his exclusion and thus would deny the possibility that his exclusion might be mistaken. If the answer to these questions is affirmative, it is the judge's responsibility to engage in a 'subversive repetition' of the law to result in a decision with less

exclusionary effects.¹⁰⁷ In this way, the judge can take responsibility for the inevitably exclusionary nature of her decision, by ensuring that this exclusion is not permanently entrenched but instead remains contestable by those who are excluded. By doing so, the dilemma posed by the need for the judge's decision and the impossibility of grounding this decision can be temporarily mediated to such an extent that the groundless decision can be taken responsibly.

Judges will undoubtedly differ over how such 'taking account' will look in practice and will disagree on the interpretation of the exclusionary effects of their decisions. It is not my aim to provide a one-size-fits-all instruction that eliminates this disagreement. Indeed, it is this very possibility of disagreement that highlights the need for each judge to decide each individual case while acknowledging the ever-present possibility that she might be wrong. Yet, if the judge acknowledges undecidability, the judge can bring Dworkin's theory of interpretation to its logical conclusion: if political morality is necessary to interpret law, and if political morality is undecidable, then so are decisions based on that political morality. While, as Dworkin proposes, a decision that *constructs* the law is a necessary response to such undecidability in law, the decision must acknowledge the contingency of this construction by deciding in a way that shows responsibility toward the excluded other. In this way, recognizing the fundamental instability of meaning presents us with a chance¹⁰⁸ to put 'pressure on [law] to be something more than maintenance of the dominant power relations of the community'.¹⁰⁹

IV. CONCLUSION

This article shows how attention to iterability reveals the unstable and internally discontinuous nature of dominant discourses, such as the crisis discourse that took hold after 9/11. The *Hamdi* case addressed above shows how judges can take different orientations in a case involving a strong dominant discourse and thus how even in such cases space remains for alterity. The ruling of Judge Doumar in *Hamdi v. Rumsfeld* shows how

¹⁰⁷ Honig 1993 (n 37) 124.

¹⁰⁸ As Derrida says, 'Chaos is at once a risk and a chance,' see Derrida 1996 (n 81) 83.

¹⁰⁹ Sokoloff (n 9) 347.

citational chains can be opened up and reconstructed, leading to new meanings and 'subversive repetitions'.¹¹⁰ Yet, the intention of Judge Doumar, present to some extent in the instant of decision, is not fully determinate. He is bound by the language game of the law and, in order for his rulings to be intelligible as law, he must remain within this language game. What this case also shows is the institutional backlash that is often the consequence of failing to rule within the dominant discourse.

The conclusion is that law – like language – is characterized by structured undecidability. There is always an element of alterity in every repetition, which means that the law cannot simply be applied without changing the meaning of the law itself. Every decision rendered by a judge implies some sort of change. And, at the same time, the structure of intelligible language requires speakers to remain within the particular language game they are playing. Citational chains lend language its seemingly determinate quality. Within this undecidability between alterity and repetition, Dworkin and Derrida would agree, meaning must be constructed. But, importantly, my reading of Derrida shows that the construction of unity of meaning out of dissensus requires the exertion of power. The argument here thus goes beyond Dworkin's recognition of the role political morality plays in legal interpretation to show that the judge cannot engage in such a construction of unity without becoming a participant in the struggle over meaning. The last part of this article asked how the judge should respond to her inevitable implication in this struggle. I identified the main quality of a proper judicial decision in conditions of undecidability: whether the judge recognizes the contingency of her own decision. This recognition should lead to a decision that avoids the permanent exclusion of the other.

¹¹⁰ Honig 1993 (n 37) 124.

BOOK REVIEW

AYELET SHACHAR, RAINER BAUBÖCK, IRENE BLOEMRAAD, AND
MAARTEN VINK (EDS), *THE OXFORD HANDBOOK OF CITIZENSHIP*
(OXFORD UNIVERSITY PRESS 2017)

Timothy Jacob-Owens*

40 years ago, Herman van Gunsteren wrote that 'the concept of citizenship has gone out of fashion'.¹ Now, as the editors of *The Oxford Handbook of Citizenship* observe, it is 'back with a vengeance': in spite of predictions to the contrary, the concept of citizenship occupies a prominent position in both political and academic discourse today.² Indeed, questions concerning the role and meaning of citizenship underpin many of the most salient issues in current public debate, among them economic globalisation, migration, and counter-terrorism. The past couple of decades have thus witnessed a 'renaissance' in academic scholarship on the topic.³ Hence, while some had imagined that it would be confined to the 'dustbin of the history of ideas', the editors of this *Handbook* are confident that citizenship will continue to be a 'core organizing principle and political and moral ideal' for decades to come.⁴ In producing the *Handbook*, their aim was to explore the extent to which

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¹ Herman van Gunsteren, 'Notes towards a Theory of Citizenship' in Fred Dallmayr (ed), *From Contract to Community: Political Theory at the Crossroads* (Dekker 1978) 9.

² Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink, 'Introduction: Citizenship – *Quo Vadis?*' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 3. See also Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 *Theoretical Inquiries in Law* 489.

³ Shachar et al. (n 2) 4. A survey of the earlier literature is presented in Will Kymlicka and Wayne Norman, 'The Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352.

⁴ Shachar et al. (n 2) 11.

citizenship can still provide political legitimacy in today's world of 'exploding social inequalities and dire human need for protection and belonging'.⁵

The Oxford Handbook of Citizenship is not the first edited volume devoted to the topic. In comparison to other similar volumes, this *Handbook* is rather Western-centric, as underlined by the inclusion of a single chapter devoted to citizenship in 'non-Western contexts' (Erin Aeran Chung).⁶ The *Routledge Handbook of Global Citizenship Studies*, by contrast, includes a total of 10 chapters on citizenship in Asia and nine on Africa.⁷ On the other hand, while other comparable volumes have typically been restricted to social science perspectives, *The Oxford Handbook of Citizenship* encompasses an impressively broad range of scholarly fields, including not only political science and sociology, but also law, economics, philosophy, and geography.⁸ The list of contributors includes some of the most high-profile and authoritative scholars working on citizenship today, among them Will Kymlicka, Jo Shaw, and Christian Joppke. In addition, this *Handbook* is not intended only as a reference work; rather, the editors hope that it will establish a new research agenda for both empirical and theoretical enquiries on the topic of citizenship, with a particular emphasis on interdisciplinary and comparative approaches.⁹ The authors vary in the extent to which they engage meaningfully with this task, but many of the contributions nonetheless contain helpful and relevant suggestions for future research.

The Oxford Handbook of Citizenship contains a total of 36 substantive chapters, which are grouped under five headings. The first of these groups, 'Approaches and Perspectives', lays the broad conceptual groundwork for the

⁵ Ibid.

⁶ Erin Aeran Chung, 'Citizenship in Non-Western Contexts' in Shachar et al. (n 2) 431. In addition, Christian Joppke's contribution includes a fairly superficial comparison of citizenship regimes in immigrant-receiving Western and Gulf states. See Christian Joppke, 'Citizenship in Immigration States' in Shachar et al. (n 2) 385.

⁷ Engin F. Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014).

⁸ See, for example, Engin F. Isin and Bryan S. Turner (eds), *Handbook of Citizenship Studies* (Sage 2002), Hein-Anton van der Heijden (ed), *Handbook of Political Citizenship and Social Movements* (Edward Elgar 2014), and Ian Davies et al. (eds), *The Palgrave Handbook of Global Citizenship and Education* (Palgrave Macmillan 2018).

⁹ See Shachar et al. (n 2) 5, 7.

remainder of the volume, combining accounts of traditional conceptions of citizenship, such as those of ancient Athens and Rome (Ryan K. Balot), with more cutting-edge perspectives, including feminism and queer theory (Leti Volpp) and postcolonialism (Kamal Sadiq). The three subsequent sections – 'Membership and Rights', 'Context and Practice', 'Membership in the State and Beyond' – cover a wide range of themes relating to the theory and practice of citizenship, from indigenous groups (Kirsty Gover) to transnationalism and extra-territoriality (Michael Collyer). The final group of chapters, addressing 'Tomorrow's Challenges', is the *Handbook's* most innovative and includes contributions on such topical issues as digitisation and biotechnology (Costica Dumbrava), quasi-citizens (Rogers M. Smith), and the commodification of citizenship (Ayelet Shachar).

Given the limited space available and in view of this journal's disciplinary orientation, the present review highlights a selection of the *Handbook's* chapters which are likely to have the broadest appeal among legal scholars: Jo Shaw's contribution on citizenship and political rights, David Owen's exploration of citizenship and human rights, Liav Orgad's survey of naturalisation law and policy, and Cathryn Costello's chapter on refugeehood and citizenship. These chapters have been selected as illustrative examples of the scope and quality of the contributions to the *Handbook*. They are, with one exception, written by lawyers, they combine both conceptual and empirical insights, and all address key topics relating to the intersection between law and citizenship.

Jo Shaw's insightful contribution explores the conceptual, legal and historical dimensions of the relationship between citizenship and the franchise, the 'legal articulation of political membership'.¹⁰ Citing a number of international instruments, as well as judgements of the European Court of Justice and the European Court of Human Rights, Shaw points to the development of a consensus within international law in favour of the right to vote in democratic elections. At the domestic level, the legislative trend of widening access to the franchise for persons with mental disabilities is mentioned as an example of the 'effective international diffusion of norms'.¹¹

¹⁰ Jo Shaw, 'Citizenship and the Franchise' in Shachar et al. (n 2) 291.

¹¹ Ibid. 300. See the case of *Alajos Kiss v. Hungary* App no 38832/06 (ECtHR, 20 May 2010). On the normative dimensions of this issue see Sue Donaldson and Will

In discussing voting rights for non-citizens, Shaw highlights the right to vote in local elections for resident non-national citizens of the European Union (EU) as the best-known example of 'alien suffrage', with other special arrangements in certain states existing on the basis of 'historic ties'.¹² In this regard, the United Kingdom's so-called Brexit referendum of 2016, in which Irish and Commonwealth citizens were permitted to vote but resident EU citizens and UK citizens not resident in the UK for more than fifteen years were excluded, is a particularly interesting case and also provides a counter-example to Shaw's general observation that 'non-resident citizens seem to have gained greater traction on the body politic in terms of the argument for widening the suffrage'.¹³

In his chapter on citizenship and human rights, David Owen demonstrates that the idea of a human right to *national* citizenship, as membership of a state, can be supported from a broad range of normative perspectives. He further argues that while a human right to *democratic* citizenship, as equal participation in a political society, is a more controversial notion, a human right to 'democratisation', defined as resistance to unequal and undemocratic forms of government, may be derived from the right to collective self-determination.¹⁴ Owen's focus is on human rights as moral-political rights, rather than entitlements enshrined in positive law; those with an interest in more substantive legal issues would thus be better served elsewhere. For example, no mention is made of the idea that the increasing proliferation of rights through the international human rights regime is eroding, or at least rendering obsolete, the rights content of national citizenship.¹⁵ Nonetheless, this remains a theoretically rich and thought-provoking contribution, particularly notable for Owen's ability to maintain a coherent line of argument while exposing the reader to a wide range of different (and

Kymlicka, 'Inclusive Citizenship Beyond the Capacity Contract' in Shachar et al. (n 2) 838.

¹² Shaw (n 10) 302–3.

¹³ Ibid 296.

¹⁴ See also Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711, 730.

¹⁵ See, for example, Gershon Shafir and Alison Brysk 'The Globalization of Rights: From Citizenship to Human Rights' (2006) 10 *Citizenship Studies* 275. See also Bryan S. Turner, 'The Erosion of Citizenship' (2001) 52 *British Journal of Sociology* 189.

opposing) theoretical perspectives.¹⁶ In the latter part of his chapter, Owen reflects on the interplay between citizenship and the (international) politics of human rights. While acknowledging the sometimes disingenuous practice of states vis-à-vis the ratification and implementation of international human rights treaties, he argues that human rights can have a positive impact in mobilising citizens 'to engage in civic acts of rights claiming' and in protecting and empowering non-citizens to contest their exclusion from civic membership.¹⁷

Liav Orgad presents an admirably concise exposition of the principal functions of and current trends in naturalisation law and policy, as well as conceptual and utilitarian approaches to assessing the ethics of naturalisation. He identifies three key developments in the contemporary (Western) concept of naturalisation: firstly, a legal trend towards increasing regulation of citizenship acquisition by international and, in Europe, EU law; secondly, an 'economic turn', whereby citizenship 'is becoming a tradable asset in the global market economy'; and, finally, a liberalisation in access to citizenship accompanied by a restrictive cultural turn, as evinced by the increasing prevalence of citizenship tests, integration contracts, and language requirements, among other similar measures.¹⁸ As in some of the other contributions to the *Handbook*, Orgad points to a range of possible normative

¹⁶ Owen's contribution incorporates two major approaches to theorising human rights: a 'humanity-based' approach and a 'political' approach. The first of these is grounded on the idea that human rights are held by persons by virtue of some aspect of their 'humanness', such as their capabilities or basic needs. See, for example, Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273 and David Miller, *National Responsibility and Global Justice* (Oxford University Press 2008). The second approach treats human rights as 'a public political doctrine or practice designed to specify conditions of membership of global political society'. See David Owen, 'Citizenship and Human Rights' in Shachar et al. (n 2) 249. This latter approach includes the Rawlsian global public reason and Habermasian discourse ethics accounts. See John Rawls, *The Law of Peoples* (Harvard University Press 1999) and Jürgen Habermas, *Between Fact and Norm* (Polity Press 1996).

¹⁷ Owen (n 16) 258. Here, mention could perhaps usefully have been made of the notion of 'rights-talk' as a legalistic vocabulary used by states to serve political ends rather than to address genuine human suffering. See, for example, Martti Koskeniemi, *The Politics of International Law* (Hart Publishing 2011).

¹⁸ Liav Orgad, 'Naturalization' in Shachar et al. (n 2) 350.

perspectives on the various issues raised in his chapter, steering clear of 'taking sides' himself. While this is understandable given the nature of the volume, the contribution might have been enriched by greater inclusion of the author's own personal standpoint, particularly in view of the strong normative stance in favour of 'cultural defense policies' and 'majority rights' he has defended elsewhere.¹⁹

Finally, in her chapter 'On Refugeehood and Citizenship', Cathryn Costello cogently examines the role of citizenship within the international refugee protection system, primarily under the 1951 Convention Relating to the Status of Refugees (hereinafter 'the Refugee Convention'). Costello characterises the post-Cold War global refugee regime as one of 'containment rather than cooperation to offer protection' and points out the largely restrictive role played by national citizenship in the determination of refugee status.²⁰ She also exposes a number of flaws in the solutions envisaged by the international regime, among them the fact that the political blocking of local integration and, in particular, of naturalisation has become the 'hallmark of protracted refugee situations'.²¹ In the conclusion to her chapter, Costello alludes to another possible solution, namely global citizenship. As Costello observes, 'world citizenship' was proposed as a response to statelessness during the development of the Refugee Convention, though the idea was ultimately rejected by the International Refugee Organisation.²² Very recently, Liav Orgad has suggested that the development of a form of global citizenship under international law, implemented using blockchain technology, could help to address a number of key global challenges, including refugeehood.²³ Proposals of this sort are not, however, without

¹⁹ See Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press 2015).

²⁰ Cathryn Costello, 'On Refugeehood and Citizenship' in Shachar et al. (n 2) 735.

²¹ Ibid 734.

²² Ibid 736. At that time, prominent proponents of world citizenship included Bernard Shaw, Albert Einstein and Bertrand Russel. See Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press 2013).

²³ Liav Orgad, 'Cloud Communities: The Dawn of Global Citizenship?' in Liav Orgad and Rainer Bauböck (eds), 'Cloud Communities: The Dawn of Global Citizenship?' (2018) EUI Working Paper RSCAS 2018/28, <http://cadmus.eui.eu/bitstream/handle/1814/55464/RSCAS_2018_28.pdf?sequence=1&isAllowed=y> accessed 26 July 2018.

their opponents, as illustrated by British prime minister Theresa May's recent statement that 'if you believe you're a citizen of the world, you're a citizen of nowhere'.²⁴ Global citizenship thus remains a relevant but contentious ideal today. Given the ongoing discussions concerning its normative desirability and practical implementation, it is a pity that the notion of global citizenship remains largely unexplored in Costello's otherwise comprehensive contribution.

The chapters surveyed above are representative of the contributions to *The Oxford Handbook of Citizenship*, which are consistently concise and well-written and provide helpful references for further reading, as well as some thought-provoking reflections on possible directions for future research. While those already familiar with the topics covered might wish for greater depth in places, the book is undoubtedly a valuable reference work and will appeal to anyone with an interest in citizenship, irrespective of their disciplinary and methodological orientation. Indeed, it is the diversity of disciplinary perspectives and the combination of both theoretical and empirical approaches that sets *The Oxford Handbook of Citizenship* apart from other comparable volumes. Overall, the *Handbook* provides a wide-ranging and accessible overview of the key themes and current debates on the topic of citizenship. The editors are to be commended for a timely and informative addition to the literature.

²⁴ See Matthew Grant, 'Citizen of the World'? Think again: British Citizenship after Brexit' (Democratic Audit UK, 21 November 2016) <<http://www.democraticaudit.com/2016/11/21/citizen-of-the-world-think-again-british-citizenship-after-brexite/>> accessed 15 August 2018. See also the responses to Orgad in Orgad and Bauböck (n 23).