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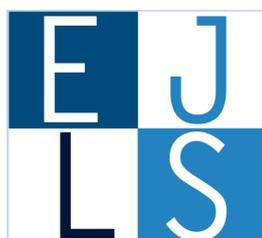
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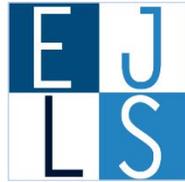
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## EDITORIAL

### FROM INCLUSIVITY TO DIVERSITY: LESSONS LEARNED FROM THE EJLS' PEER REVIEW PROCESS

Olga Ceran<sup>\*</sup> and Anna Krisztian<sup>†</sup>

*'Diversity is being asked to the party; Inclusion is being asked to dance.'*

Verna Myers<sup>‡</sup>

Striving for academic excellence is the main objective of every legal journal, and the European Journal of Legal Studies is no exception. All the reviewers involved in the peer review process of the EJLS, whether it be our own in-house reviewers affiliated to the European University Institute (EUI) or external reviewers commissioned on a need-be basis, aspire to contribute to a scholarly communication of the highest academic standard – as we know it. In this strive for excellence, we aim to be as inclusive as possible. Arguably, the EJLS can be seen to represent the so-called Western-style academia, whatever this phrase is meant to encompass. Although we would prefer not to be defined along these lines, we do attempt to bring more diversity into the life of our Journal in a number of ways, as we believe that diverse perspectives can result in a richer exchange of scholarly ideas.

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<sup>‡</sup> Verna Myers, 'Diversity Is Being Invited to the Party; Inclusion Is Being Asked to Dance' <[https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2012/june\\_2012/diversity\\_invited\\_party\\_inclusion\\_asked\\_dance/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/june_2012/diversity_invited_party_inclusion_asked_dance/)> accessed 21 May 2019.

And yet as a journal we keep on running into invisible walls that prevent us from increasing our diversity in the way we imagined, which in turn gives an account of the conditions of the academic world at large. Our Spring 2019 Issue, as you will see, features an exceptionally well-balanced geographic representation of authors, in that more than half of the papers were authored by non-Western European academics.<sup>2</sup> This unprecedented realisation inspired us to focus the present editorial on diversity and inclusiveness in peer review and academic publishing. We hope that the sharing of our experiences can benefit the broader academic community and ideally further the debate on diversity and inclusivity in academia in general, and in academic publishing in particular.

Of course, diversity can have different dimensions, extending to, *inter alia*, gender, professional seniority, nationality or country of origin, affiliation, and socioeconomic background. In order to gain a comprehensive picture of the context of academic publishing, it is imperative to look at both sides of the coin: the reviewers participating in peer review and the authors wishing to publish their scholarly work. Hereby we will limit our discussion to two of these dimensions: gender, and more importantly for our purposes, institutional affiliations. We omit a discussion on professional seniority given that EJLS reviews are predominantly conducted by EUI researchers. Moreover, the Journal has a special target group of authors comprising early-career scholars, all of which obviously skew our figures on the representation of different levels of professional seniority. We do not touch upon the socioeconomic background of the two examined groups either.<sup>3</sup>

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<sup>2</sup> In this issue, 3 articles and one book review were written by non-Western European academics, which is quite exceptional compared to the total of 15 such articles published in the EJLS' past 24 issues over the last 12 years.

<sup>3</sup> The reason for this is twofold. First, we simply do not have this kind of information on our reviewers and authors. Second, this data – while being an important indicator for the discourse on individual opportunities in academia – do not play a role directly in our general discussion on cultural, linguistic and gender diversity.

Let us first look at gender representation<sup>4</sup> at the EJLS. Following the latest elections at our Journal, the EJLS Managing Board is currently composed of seven women and three men, while forty-two female and thirty-four male in-house and external editors participate in our peer review process. The current balance in favour of women in both managing positions and reviewer positions is however not reflected among authors wishing to publish with us. A closer examination of all submissions received in the past one and a half years<sup>5</sup> reveals that 50.2 per cent of all manuscripts received for peer review were submitted by a single male author, while only 23.7 per cent of the papers were submitted by a single female author. The remaining 26.1 per cent of all submissions were co-authored papers, comprising 17.8 per cent of co-authoring male and 8.3 per cent of co-authoring female authors of the total number of submissions. That is, the total gender representation of authors submitting articles was 68 per cent male and 32 per cent female. This is a slight improvement compared to the preceding two-year period from September 2015 to August 2017, which witnessed a gender balance of 70.4 versus 29.6 per cent in favour of men.<sup>6</sup>

Whereas a journal like the EJLS has little influence on gender balance in the submission of papers, it does eliminate any potential gender bias in relation to the acceptance of manuscripts for publication by providing a double-blind peer-review process. In other words, due to the fact that reviewers receive anonymised papers only, unconscious prejudices in relation to gender are avoided in the process. This is of course not to say that the eventual gender balance in the *submission* of papers will not manifest itself in the gender balance in the *publication* of papers. In fact, a scrutiny of all the papers published in the various EJLS issues since its 2007 establishment shows a clear dominance of male

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<sup>4</sup> Notwithstanding the importance of different gender theories, for the sake of simplicity hereby we stick to the traditional dichotomy of gender (i.e. male/female).

<sup>5</sup> That is, in the period from mid-September 2017 to mid-May 2019.

<sup>6</sup> See Elias Deutscher, Raphaële Xenidis, Birte Böök, 'Managing a Student-Run Peer-Reviewed Legal Journal: Ten Years of Bridging Research and Experience', Editorial (2017) 10(1) *European Journal of Legal Studies*, Autumn Issue. The cited Editorial provides the reader with an interesting glimpse into the management of the EJLS during its first ten years of existence.

authors. To be specific, with regard to articles, 151 male authors have featured in our publications so far (126 of them single authors, 25 of them co-authors), while "only" 70 women have published with us so far (56 of them single authors, 14 co-authors). Similar proportions typify our book review section: 9 book reviews were written by women, and 16 book reviews were authored by men. The proportion of female authors per issue however has fluctuated constantly and it has ranged from a low of 12.5 per cent to a high of 75 per cent. Editorials and introductory or concluding pieces were written by a total of 9 women (five single female authors and four female co-authors), and by a total of 24 men (twenty of them single authors, and four of them co-authors). These numbers illustrate that whereas more women than men are currently involved in the management of the EJLS and in the peer review process, when it comes to both potential and actual authors, the balance is still in favour of men.

A more complex issue to analyse is geographic representation. To start with, the nationality or country of origin of persons do not necessarily correspond with their professional affiliations, and whereas we have this information on our own *reviewers*, we are normally aware only of the affiliation of our *authors*, and not necessarily their country of origin. As regards our in-house reviewers, geographic representation is mostly determined by who is affiliated to the EUI's Law Department at a given point in time.<sup>7</sup> EUI researchers currently contributing to the functioning of the EJLS represent more than 25 different nationalities. More importantly, these young scholars come from different legal and academic cultures, thus their diversified expertise greatly contributes to diversity and inclusivity in our peer review process.<sup>8</sup> Furthermore, the reviewers' direct

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<sup>7</sup> Logically, the members of the EJLS Managing Board themselves are also elected from among the EUI law researchers. In order to allow for (culturally) diverse perspectives among managing members, persons for these positions are usually elected every 1-3 years, thus the steering wheel of the EJLS is never in the hands of one person (or a small group of persons) for too long.

<sup>8</sup> Academic attention paid to bridging the gap between Western and Eastern European scholarship which historically tended to be divided for cultural and linguistic reasons seems to be intensifying. A noteworthy example of a grand-scale research project supported by the European Research Council's Starting Grant is 'IMAGINE:

experiences with different professional traditions bring with them more sensitivity to regional particularities, which in turn enables us to better accommodate the ensuing needs of our authors. Importantly, when it comes to external reviewers, their country of origin is something that does not come into play directly when selecting them for peer reviews.<sup>9</sup>

With their different origins and affiliations, our reviewers also bring their broad language competences. Commitment to linguistic diversity by publishing articles in languages within the linguistic competence of Board Members is an important part of the EJLS mission. Notwithstanding the potential benefits of the dominance of English language journals, the high pressure to publish in English has been criticized as leading to the exclusion of many valuable research outcomes, often for reasons related to language and style only. This trend has also been said to have wider social consequences.<sup>10</sup> Being accessible only in a global English discourse, knowledge gets de-localized and becomes inaccessible to those who may often be the most interested and affected. However, despite these observations, our experience seems to suggest that publishing in English is seen as equally empowering as – if at all – limiting.<sup>11</sup> It allows authors to reach

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European Constitutional Imaginaries: Utopias, Ideologies and the Other'. The project will scrutinize European constitutional imaginaries with a particular focus on the writings of scholars in post-communist Europe. The aim of the project is to potentially uncover ideas and contributions that until now have mostly been overlooked in EU constitutional scholarship, and to disseminate the research results in English.

<sup>9</sup> That is, unless we look for expertise in specific legal systems, which may admittedly correspond with one's country of origin.

<sup>10</sup> See for instance Mary Jane Curry and Theresa Lillis, 'The Dangers of English as Lingua Franca of Journals' <<https://www.insidehighered.com/views/2018/03/13/dominance-english-language-journal-publishing-hurting-scholarship-many-countries>> accessed 16 May 2019.

<sup>11</sup> This point was brought up also, among others, in discussions during an EUI departmental seminar on 14 February 2018 on 'Language in Law and in German Universities' Legal Education', a paper written by Professor Stefan Grundmann <[https://www.rewi.huberlin.de/de/lf/lsgmn/stg/fukuoka\\_2018\\_language\\_in\\_legal\\_studies\\_final.pdf](https://www.rewi.huberlin.de/de/lf/lsgmn/stg/fukuoka_2018_language_in_legal_studies_final.pdf)>. The paper presented during the seminar, later published in Martin Schmidt-Kessel (ed), *German National Reports on the 20th International Congress of*

wider audiences and participate in the global scholarly discourse in a way that publishing in other languages does not.<sup>12</sup> Nevertheless, the multilingual policy of the EJLS offering the possibility to publish in languages other than English does not seem to directly lead to the reception of many non-English language submissions.

Notwithstanding the currently observable reluctance of authors to submit manuscripts in languages other than English, at the EJLS we are proud of the fact that over the course of time we have published 48 articles in languages other than English (namely, Dutch, German, French, Italian, Portuguese, Romanian, and Spanish), most of which have an English language version as well. 29 of the 48 articles (60 per cent) come from the first two issues of the EJLS, when the Journal had just recently been established, and the authors were kindly suggested to thereby contribute to the multilingual mission of the Journal. 12 of the non-English articles were published in the third issue, three in the fourth one, and the remaining four contributions published in languages other than English are spread around EJLS issues published in the last ten years. Even though the language competences of our Editorial Board today are more extensive than ever, in the recent period<sup>13</sup> we received only four articles in languages other than English, three of which were written in French and one in Italian. Nevertheless, in line with our strive for linguistic inclusivity, we have developed a copyright policy which *inter alia* allows for the translation of articles published with the EJLS, provided that the original publication is duly referenced. Through this policy, we leave it open for the authors to participate both in global discourses in English as well as regional discourses in the local vernacular – if they wish to do so. And it seems many of them do – at least this is what we can conclude based

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*Comparative Law* (Mohr Siebek 2018) advocated for the global legal community's duty to foster a form of discourse based on a variety of languages. It argued that languages are not a matter of skill or a technical issue only, but are directly relevant for shaping thoughts, and therefore also for the content of scholarly discussions.

<sup>12</sup> Naturally, in the case of the EJLS, its relatively wide thematic scope (comprising international law, European law, comparative law and legal theory) also contributes to this.

<sup>13</sup> The mentioned period covers the time from 1 January 2018 to 9 May 2019.

on the growing number of inquiries we receive about this aspect of our publication policy.

Drawing on our experiences in communicating with our potential authors during the review process, we can establish that generally authors do not feel discriminated against<sup>14</sup> by the dominance of the English language in academic publishing. This, however, does not mean that the recognized limitations become any less relevant. Our experience confirms that non-native speakers often struggle with certain aspects of English academic writing, and for many scholars accessible services in terms of language assistance and correction are less than satisfactory. On multiple occasions in the EJLS' past we have observed that EJLS Executive Editors were conducting more extensive language corrections than envisaged as a matter of courtesy because we felt strongly about not rejecting good articles solely on linguistic grounds. Unfortunately, the EJLS – being a freely available open access journal – simply does not itself have resources to provide linguistic assistance on a regular basis. As much as we sympathize with our authors and their struggles, these issues are beyond our control as editors of the Journal.

What we can offer, however, is an inclusive and "human" approach to our work. This is obviously for the benefit of all our authors, but it becomes increasingly important for non-native speakers and authors coming from non-Western academic traditions. Our Managing Editors, responsible for the first screening of all incoming submissions, are obliged to give substantive feedback also on *rejected* articles, even if the rejection occurs on formal grounds. As the reference persons for our authors, the Managing Editors put emphasis on being available and supportive whenever authors may have a question about the formal or

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<sup>14</sup> For some of the most important theories on linguistic justice see Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (Oxford University Press 2011); Will Kymlicka and Alan Patten (eds), *Language rights and political theory* (Oxford University Press 2003); Jacqueline Mowbray, *Linguistic Justice: International Law and Language Policy* (Oxford University Press 2012); Helder De Schutter, 'The Linguistic Territoriality Principle – A Critique' (2008) 25 *Journal of Applied Philosophy* 2; Helder De Schutter, 'The Liberal Linguistic Turn: Kymlicka's Freedom Account Revisited' (2016) *Dve Domovini* 44.

substantive requirements for submissions or may need any other form of assistance during the process. In the review process itself, we have introduced standardized review templates which not only provide for more consistent feedback on conditionally accepted articles, but also facilitate the comprehension of the reviewers' comments. Based on the experience of our Managing Editors, these small procedures are not to be underestimated. In fact, some first-time authors go as far as apologise for the weaknesses of their submitted papers, including linguistic issues, emphasizing that English is not their first language. In such cases, the positive and supportive feedback culture of a journal proves to be crucial.

Apart from the above described policy measures we have implemented in order to prepare the ground for an inclusive and diverse peer review process and academic publishing at the EJLS, there are some further aspects of our publishing strategy that are worth mentioning in this context. First of all, in contrast to still too many other academic journals, the EJLS has from the beginning adopted a fully open access policy.<sup>15</sup> Thanks to all the excellent academics who are willing to contribute their time and expertise to our journal on a voluntary basis, the EJLS functions without the operation of any paywall: there is no publication fee, there are no subscription fees – and all the EJLS publications are available free of charge online, both on the EJLS website as well as in the EUI's Research Repository.<sup>16</sup> In relation to open access publishing, we support the idea of non-prohibitively expensive indexing, and therefore participate in initiatives such as the Directory of Open Access Journals (DOAJ) which is generally considered to be more inclusive and diversity-enhancing than

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<sup>15</sup> For a description of Open Access publishing and an overview of its benefits see Jonathan P. Tennant, François Waldner et al, 'The academic, economic and societal impacts of Open Access: an evidence-based review' <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4837983/>> accessed 1 May 2019.

<sup>16</sup> The EUI's Research Repository is called Cadmus. EJLS issues are available at <<http://cadmus.eui.eu/handle/1814/6775>>. For additional coverage EJLS issues are also deposited with HeinOnline.

traditional indexing.<sup>17</sup> It arguably needs no explanation to see the benefits of these measures for a wide range of potential authors.

The free accessibility of EJLS publications aside, the Editor-in-Chief, in cooperation with the designated Media Coordinator, ensures that the Journal actively reaches out to a wide range of potential authors through the Journal's online presence.<sup>18</sup> Research suggests that academic journals with presence on social media platforms, especially Twitter, are more widely disseminated and receive a higher number of citations.<sup>19</sup> It is a great tool for real-time communication with our audiences, be it announcement of calls for papers or promotion of published research. For our readers and authors, it means an increased accessibility to current scholarly discussions, allowing academics from all over the world to stay informed, find and share resources, engage in the discussions and network outside of traditional channels.<sup>20</sup> Indeed, as a result – at

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<sup>17</sup> On this and further courses of action to improve the diversity potential of journals, see '5 Ways academic journals can increase diversity in peer review', available at <<https://blog.scholasticahq.com/post/ways-academic-journals-can-increase-diversity-peer-review/>> accessed 10 May 2019.

<sup>18</sup> For the sake of completeness, we should add that we also reach out to potential authors and readers in more traditional ways, for instance by our presence at conferences and other academic events. However, just as for other journals, our potential physical outreach is much more limited than our online presence.

<sup>19</sup> Han Zheng et al, 'Social media presence of scholarly journals' (2019) 70(3) *Journal of the Association for Information Science and Technology* 256-270. See also Jayashree Rajagopalan, 'Why Academic Journals, Publishers, and Societies Should Get on Social Media Right Now' (LSE Blogs, 4 December 2017) <<https://blogs.lse.ac.uk/impactofsocialsciences/2017/12/04/academic-journals-with-a-presence-on-twitter-are-more-widely-disseminated-and-receive-a-higher-number-of-citations/>>; José Luis Ortega, 'Academic Journals with a Presence on Twitter Are More Widely Disseminated and Receive a Higher Number of Citations' (LSE Blogs, 11 January 2017) <https://blogs.lse.ac.uk/impactofsocialsciences/2017/01/11/twitter-can-help-with-scientific-dissemination-but-its-influence-on-citation-impact-is-less-clear/>. All accessed 15 May 2019.

<sup>20</sup> Twitter is '[...] a great medium through which to publicize understudied material, such as fragmentary texts or non-English scholarship'. See 'Why Academics Should Use

least in part – of our consciously built-up online presence, we as an Europe-based journal are pleased to observe intensifying interactions among our increasingly global audience online, as well as a steady flow of incoming submissions from outside the Western academic world. We will work hard to keep up our contribution to the international scholarly exchange of ideas in the future.

### IN THIS ISSUE

In our Spring 2019 Issue we are pleased to present our distinguished readership with four excellent academic articles and three outstanding book reviews. The issue opens with a New Voices article which we received in response to our special call for papers. Anna Shtefan argues in an original, succinct and innovative way that the lack of a common approach in the member states of the European Union to the freedom of panorama, a copyright exception, leads to legal uncertainty for natural and legal persons. Shtefan provides a brief analysis of all the currently applied legal regimes in terms of their relation to the Berne Convention for the Protection of Literary and Artistic Works and the interest of society, and then concludes by proposing an ideal three-step model for the regulation of the freedom of panorama which in her view should be adopted by EU member states.

Staying within the realm of EU law, the issue goes on with Piotr Sadowski's insightful general article on the protection of fundamental rights of asylum seekers in the recent case law of the Court of Justice of the European Union (CJEU). As Sadowski points out, the Common European Asylum System has been continuously tested in practice in the previous decade, and it has recently come under unprecedented pressure due to the latest migration crisis. A critical assessment of the relevant judgments of the Court reveals that the Court is still too often required to strike a balance between the efficiency of EU law and the protection of fundamental rights. Ultimately, the article concludes with an answer to the question whether the CJEU has succeeded in strengthening the

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Twitter? <<https://academicpositions.com/career-advice/why-academics-should-use-twitter>> accessed: 15 May 2019.

protection of these fundamental rights and whether it has contributed to the ongoing European judicial dialogue on the rights of asylum seekers.

The next article in line is Giovanni De Gregorio's engaging piece which discusses a different but similarly topical legal issue of EU fundamental rights law. It addresses the increasing role played by online platforms in the context of fundamental rights, which seems to result from the constitutional liberties granted to these actors on the eve of the emergence of algorithmic societies. Taking a digital constitutional perspective, De Gregorio proposes two solutions to limit the powers of these private actors. The first solution focuses on the introduction of new (procedural) user rights and legal remedies, while the second concerns the enforcement of constitutional rights against global online platforms by rethinking the doctrine of horizontal effect. Both proposals are undoubtedly worthy of academic attention.

Our general articles section concludes with Ielyzaveta Badanova's piece which takes both an international law and EU law perspective on the integration of the Ukraine-EU gas market. More precisely, Badanova looks at the concept of solidarity as applied in the integration of the said gas market, picturing it in all three relevant legal dimensions (that is, solidarity as a constitutional principle, a general legal maxim and a duty of cross-border assistance). Badanova then goes on to juxtapose this concept to the broader discourse on the meaning of solidarity under international law and elaborates on the possibility of the former informing the development of the latter.

Our book review section features three equally interesting book reviews which we can also wholeheartedly recommend to our readers. First, Jakub Handrlica takes a critical look at Anna Södersten's *Euratom at the Crossroads* published by Edward Elgar in 2018. In Handrlica's view this book is a real gap-filler of the academic legal literature on the topic, in that Södersten's work represents the first attempt in the past decades to comprehensively address the legal issues arising from the existence of the Euratom Treaty. The book, among others, also discusses the relationship between the Euratom and the EU Treaties, and the possibility of membership in only one of the communities – topics which will unquestionably gain further relevance in light of the current Brexit debate.

Moving on to a different area of law, Léon E. Dijkman reviews Ole-Andreas Rognstad's *Property Aspects of Intellectual Property* published by Cambridge University Press in 2018. The book kicks off with the three aspects of intellectual property (IP) that can potentially be analogised with property in tangibles as identified by Rognstad. These are the justification and the structure of IP, as well as IP as assets. Building on this understanding Dijkman constructs his review around the book's main contributions to the relevant legal discourse on IP as assets but does not shy away from pinpointing some shortcomings as well.

Our book review section concludes with Tarik Gherbaoui's comments on Manfred Nowak and Anne Charbord's edited volume on *Using Human Rights to Counter Terrorism*. Similarly to Södersten's work, it was published by Edward Elgar in 2018, and in turn takes our readers to the waters of international law. The book discusses in a thought-provoking way whether human rights impede counter-terrorism efforts or whether, on the contrary, they are a valuable tool in the fight against terrorism. As Gherbaoui points out, one of the book's strengths is that it provides different perspectives in its analysis of the problem, which follows from the inclusion of various contributors from the field who have actively influenced relevant policy-making in the past.

Speaking on behalf of all the editors who made the publication of this issue possible, we hope you will find pleasure in reading our Spring 2019 Issue!

## NEW VOICES

### FREEDOM OF PANORAMA: THE EU EXPERIENCE

Anna Shtefan \*

*Freedom of panorama allows creating and using images of works which are permanently located in public places without the consent of the author. There is no common approach to freedom of panorama, a copyright exception, among the member states of the European Union (EU). Different states have very different forms of freedom of panorama, including the types of works covered and the ways in which images of such works may be used. This causes complexity for users since for the legitimate use of the images of works it is necessary to study the laws of each state separately. In this article, I examine how freedom of panorama is regulated in EU member states, with a particular focus on how the existing approaches relate to the Berne Convention and to the interests of society. I then propose a model regulation of freedom of panorama based on a three-step test which takes into account the interests of both the authors and of wider society.*

**Keywords:** freedom of panorama, EU copyright, copyright exceptions, free use of work

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## I. INTRODUCTION

Freedom of panorama allows individuals to create images of artistic works which are permanently located in public places – by taking photographs, video, drawing, etc. – and to use such images without the consent of the author. The purpose of this rule is to ensure that the diverse interests of society are accommodated. In the words of Barron Oda, it is 'rooted in the notion that if a work is put forth to the public for the public's aesthetic enjoyment, education, or enrichment, then the public should be able to make reasonable reproductions of such work in furtherance of that purpose'.<sup>1</sup> Freedom of panorama concerns works protected by copyright and is thus a copyright exception. Works that have entered the public domain generally do not require permission for their use although the legislation of some states may contain special rules for works that are considered cultural heritage or have other special value.

At the European Union (EU) level, freedom of panorama is enshrined in Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'). Article 5(3)h establishes that EU member states may provide for exceptions or limitations to the exclusive reproduction right of works, such as works of architecture or sculpture, located permanently in public places. This exception is discretionary and leaves the possibility for member states to decide independently on the inclusion of such a provision in national law.

In the majority of EU member states, freedom of panorama is already implemented but each state regulates it differently. Today, there are five different approaches to freedom of panorama across the EU. This diversity

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<sup>1</sup> Barron Oda, 'Mobile Devices, Public Spaces, and Freedom of Panorama. Reconciling the Copyright Act with Technological Advances and Social Norms Regarding Content Creation and Online Sharing' (2018) 14(2) SciTech Lawyer 1. <<https://www.kiip.re.kr/webzine/1804/resource/file/Library04.pdf?ver=1>> accessed 10 December 2018.

of approaches raises at least three issues. First, there is no single accepted approach to the permissible uses of images created under freedom of panorama. For example, some states allow any use of images obtained within the framework of freedom of panorama, while others provide for non-commercial use only. This creates complexity for users who need to study the legislation of each European state individually to find out how to legally use images of works located in public places.

The second problem is the lack of clear regulation of the types of works that are subject to freedom of panorama. The InfoSoc Directive gives the example of works of architecture or sculpture.<sup>2</sup> However, the laws of different European countries cover different types of works. For instance, reproduction in pictorial form of 'works of art' is permitted in Denmark, although the Danish Act of Copyright does not specify which works actually qualify as such.<sup>3</sup> In Belgium, freedom of panorama covers works of plastic art, graphics or architectural design.<sup>4</sup> In Estonia, the list includes works of architecture, works of visual art, works of applied art or photographic works.<sup>5</sup> These discrepancies further complicate the understanding of the essence of freedom of panorama, since each state has its own individual approach.

Third, there is also no single approach to determining what constitutes a 'public place'. Some states specify a list of public places: 'public roads, streets or squares' (Germany);<sup>6</sup> 'places like a square, street, park, public route or

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<sup>2</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. <<https://wipolex.wipo.int/en/text/126977>> accessed 10 December 2018.

<sup>3</sup> Denmark: The Consolidated Act on Copyright No. 1144 of October 23, 2014. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=363859](http://www.wipo.int/wipolex/en/text.jsp?file_id=363859)> accessed 10 December 2018.

<sup>4</sup> Belgium: Loi du 27 juin 2016 modifiant le Code de droit économique en vue de l'introduction de la liberté de panorama. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=420197](http://www.wipo.int/wipolex/en/text.jsp?file_id=420197)> accessed 10 December 2018.

<sup>5</sup> Estonia: Copyright Act (consolidated text of February 1, 2017). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=431814](http://www.wipo.int/wipolex/en/text.jsp?file_id=431814)> accessed 10 December 2018.

<sup>6</sup> Germany: Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, geändert durch Gesetzes vom 01. September 2017).

another public place' (Czech Republic);<sup>7</sup> 'public roads, squares, streets or parks' (Poland).<sup>8</sup> In other countries, the law simply refers to a 'public place' without specifying further what this means (Lithuania,<sup>9</sup> Malta,<sup>10</sup> Portugal,<sup>11</sup> Sweden<sup>12</sup>). As a result, it may be difficult to determine whether a certain place may be considered a 'public place'.

On this basis, many users may find it difficult to understand whether a particular work is covered by freedom of panorama, whether the location of the work is a 'public place', and for what purpose the image of this work can be used. Due to the availability of digital technologies, many persons can take pictures using a camera on a mobile phone, so the process of creating images of works is practically impossible to control or restrict. However, for the legitimate use of images, users need to verify what is specifically permitted by the legislation of the country concerned and which prohibitions it contains. In this context, it is fair to believe that, in the words of Eleonora Rosati, 'the

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<[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=462249](http://www.wipo.int/wipolex/en/text.jsp?file_id=462249)> accessed 10 December 2018.

<sup>7</sup> Czech Republic: Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=137175](http://www.wipo.int/wipolex/en/text.jsp?file_id=137175)> accessed 10 December 2018.

<sup>8</sup> Poland: Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=408584](http://www.wipo.int/wipolex/en/text.jsp?file_id=408584)> accessed 10 December 2018.

<sup>9</sup> Lithuania: Law No. VIII-1185 of May 18, 1999, on Copyright and Related Rights (Last amended on 22 December 2015 – No XII-2237). <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5f13b560b2b511e59010bea026bdb259?jfwid=9tq1470gj>> accessed 10 December 2018.

<sup>10</sup> Malta: Copyright Act, 2000 (Chapter 415, as amended up to Act No. VIII of 2011). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=355524](http://www.wipo.int/wipolex/en/text.jsp?file_id=355524)> accessed 10 December 2018.

<sup>11</sup> Portugal: Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=451731](http://www.wipo.int/wipolex/en/text.jsp?file_id=451731)> accessed 10 December 2018.

<sup>12</sup> Sweden: Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=450011](http://www.wipo.int/wipolex/en/text.jsp?file_id=450011)> accessed 10 December 2018.

different conditions of national exceptions and limitations thus raise issues of compatibility with EU law, as well as practical difficulties when it comes to determining the lawfulness of certain uses of a copyright work'.<sup>13</sup> A further question arises if freedom of panorama permits the commercial use of the images of works without the consent of the author: how does this correspond to the three-step test of the Berne Convention for the Protection of Literary and Artistic Works? More specifically, can such use bring harm to the normal use of the work?

Resolving these issues is important since freedom of panorama must serve cultural, educational and other interests of society, while at the same time protecting the interests of the author. In this article, I examine the approaches to the legal regulation of freedom of panorama developed in the legislation of the EU member states and analyse which model presented in the legislation is most consistent with the principles of free use of works in accordance with both the Berne Convention and the interests of society.

## II. LEGAL REGULATION OF FREEDOM OF PANORAMA IN EU MEMBER STATES

Freedom of panorama is formulated in the InfoSoc Directive in a general form, leaving a broad margin of discretion for member states to determine the boundaries of their legislation. This has led to the development of several different approaches to the regulation of freedom of panorama. An overview of these approaches is presented below.

### *1. Use of Images Allowed for Any Purpose without Remuneration*

Some European countries permit the use of images of works for commercial purposes without obtaining a permit and without remuneration of the original artist. For example, in Belgium, individuals are allowed 'to reproduce and make available to the public works of plastic art, graphics or architectural design permanently located in public places if such use does not affect the

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<sup>13</sup> Eleonora Rosati, 'Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful?' (2017) 8(4) *Journal of Intellectual Property, Information Technology and E-Commerce Law* <<https://www.jipitec.eu/issues/jipitec-8-4-2017/4639>> accessed 10 December 2018.

normal exploitation of the work nor does it cause undue prejudice to the legitimate interests of the author'.<sup>14</sup> In Hungary, 'works of fine art, architectural and applied art creation erected with a permanent character outdoors in a public place a view may be made and used without the authorisation of authors and paying remuneration to them'.<sup>15</sup> The law of Sweden provides that 'works of fine art may be reproduced in pictorial form if they are permanently located outdoors or at a public place; buildings may be freely reproduced in pictorial form'.<sup>16</sup> Finally, in some states, such as Croatia<sup>17</sup> and the Czech Republic<sup>18</sup>, the name of the author needs to be indicated unless the work is anonymous or unless such indication is not possible. However, permission to use the work is not required.

## *2. Use of Images for Any Purpose with Remuneration*

The practice of allowing the use of images of works for any purpose as long as the original artist is remunerated is not widespread among EU member states but nonetheless it exists. In Austria, it is permissible 'to reproduce, distribute, present in public by means of optical devices and broadcast works of architecture after their construction or other works of fine art permanently located in a place used as a public thoroughfare. For copying, distribution and provision to the public, the author is entitled to appropriate remuneration. These claims can only be made by collecting societies'.<sup>19</sup> The possibility of remuneration for the use of the image created within the

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<sup>14</sup> Le Code de droit économique (n 4).

<sup>15</sup> Hungary: Act No. LXXVI of 1999 on Copyright. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=325838](http://www.wipo.int/wipolex/en/text.jsp?file_id=325838)> accessed 10 December 2018.

<sup>16</sup> Lag (1960:729) (n 12).

<sup>17</sup> Croatia: Copyright and Related Rights Act and Acts on Amendments to the Copyright and Related Rights Act (OG Nos. 167/2003, 79/2007, 80/2011, 141/2013 and 127/2014). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=357287](http://www.wipo.int/wipolex/en/text.jsp?file_id=357287)> accessed 10 December 2018.

<sup>18</sup> Consolidated Version of Act No. 121/2000 (n 7).

<sup>19</sup> Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz 1936, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 99/2015). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=395335](http://www.wipo.int/wipolex/en/text.jsp?file_id=395335)> accessed 10 December 2018.

framework of freedom of panorama is also provided for by the Portuguese Code of Copyright and Related Rights.<sup>20</sup> This approach is typical of copyright exceptions, since it does not require permission to use the work. At the same time, the author retains the right to fair remuneration, which ensures respect for the interests of the author, especially when the image of the work is used for commercial purposes.

### *3. Use of a Panoramic Image for Any Purpose; Use of an Image of a Particular Work for a Non-commercial Purposes Only*

In a number of EU member states, freedom of panorama depends on what is contained in the image. If an image does not focus on a specific work in public space, the image can be freely used for any purpose. On the other hand, when the main element in the image is a particular work, the use of this image is restricted. In Estonia, it is permissible 'to reproduce works of architecture, works of visual art, works of applied art or photographic works which are permanently located in places open to the public, without the authorisation of the author and without payment of remuneration, by any means except for mechanical contact copying, and to communicate such reproductions of works to the public except if the work is the main subject of the reproduction and it is intended to be used for direct commercial purposes'.<sup>21</sup> In Finland, freedom of panorama means 'the ability to create an image of a work of art that is permanently placed in a public place or in the immediate vicinity of it. If the artwork is the main subject of the image, the image may not be used for commercial purposes.'<sup>22</sup> This rule is also provided for in the legislation of Lithuania<sup>23</sup> and Romania.<sup>24</sup> This approach seems reasonable. Individuals have ample opportunity to use images of works in the public space, while the

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<sup>20</sup> Código do Direito de Autor e dos Direitos Conexos (n 11).

<sup>21</sup> Copyright Act (n 5).

<sup>22</sup> Finland: Tekijänoikeuslaki 8.7.1961/404 (sellaisena kuin se on muutettuna asetuksella 18.11.2016/972).

<[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=467066](http://www.wipo.int/wipolex/en/text.jsp?file_id=467066)> accessed 10 December 2018.

<sup>23</sup> Law No. VIII-1185 (n 9).

<sup>24</sup> Romania: Law No. 8 of March 14, 1996 on Copyright and Related Rights (updated 2018). <<https://www.dpvue.com/p/copyright-law-in-romania.html>> accessed 10 December 2018.

author can influence the commercial use of an image in which their work occupies a central place.

#### *4. Use of Images for Non-commercial Purposes Only*

Some EU member states have limited freedom of panorama solely to non-commercial use of images. The use of images for commercial purposes is considered to be beyond the scope of freedom of panorama and requires permission from the author. In Latvia, freedom of panorama covers 'the use of images of works of architecture, photography, visual arts, design, as well as of applied arts, permanently displayed in public places, for personal use and as information in news broadcasts or reports of current events, or include in works for non-commercial purposes.'<sup>25</sup> A similar approach has been taken in Bulgaria,<sup>26</sup> in Denmark,<sup>27</sup> and in France.<sup>28</sup>

#### *5. No Freedom of Panorama*

Two EU member states, Greece and Italy, currently do not have freedom of panorama. The copyright law of Greece permits only the occasional reproduction and communication of images of works located permanently in public places by the mass media.<sup>29</sup> Such use does not need the consent of the author or any payment. However, it cannot be seen as freedom of panorama since the use of works is permitted only in the mass media and has only occasional significance. In Italian copyright law, the list of exceptions contains no provision for freedom of panorama. Article 108(3) of the Code of

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<sup>25</sup> Latvia: Copyright Law (as amended up to December 31, 2014). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=417220](http://www.wipo.int/wipolex/en/text.jsp?file_id=417220)> accessed 10 December 2018.

<sup>26</sup> Bulgaria: Law on Copyright and Neighboring Rights (as amended up to 2011). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=280106](http://www.wipo.int/wipolex/en/text.jsp?file_id=280106)> accessed 10 December 2018.

<sup>27</sup> The Consolidated Act on Copyright (n 3).

<sup>28</sup> France: Law No. 2016-1321 of October 7, 2016, for a Digital Republic. <[http://www.wipo.int/wipolex/en/news/2016/article\\_0014.html](http://www.wipo.int/wipolex/en/news/2016/article_0014.html)> accessed 10 December 2018.

<sup>29</sup> Greece: Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4540/2018). <[https://www.wipo.int/wipolex/en/text.jsp?file\\_id=480970](https://www.wipo.int/wipolex/en/text.jsp?file_id=480970)> accessed 10 December 2018.

the Cultural and Landscape Heritage of Italy permits the reproduction of works relating to cultural heritage.<sup>30</sup> No fee is charged for reproduction carried out by an individual for private use or educational purposes if the image is not used for profit. However, this rule has fairly narrow boundaries as it applies to works that have already entered the public domain. As for works that are under copyright protection, there is no legal provision for the use of images of such works.

The above analysis shows that freedom of panorama is regulated very differently in different EU member states. The types of works to which this rule applies, the list of public places, and the purpose of the use of images are all determined individually by each state. These issues need to be clarified since they affect not only the understanding of the essence of freedom of panorama but also its effective application. From this, the following question arises: which of the existing models of freedom of panorama is the most consistent with the principles of free use of works? To answer this question, it is necessary to look at the relevant provisions of the Berne Convention and establish the optimal form of balancing the interests of society against those of the authors of works permanently located in public places.

### III. THREE-STEP-TEST AND FREEDOM OF PANORAMA

In the EU, copyright in its modern form seeks to balance the interests of the author and society. Copyright exceptions serve societal interests by allowing the free use of works whose legal protection has not yet expired. Principles of free use of works are enshrined in Part 2 of Article 9 of the Berne Convention according to which it shall be a matter for domestic legislation in the state parties to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal 'exploitation' of the work and does not unreasonably prejudice the legitimate interests of the author. This provision contains three basic requirements that the free use of works should satisfy:

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<sup>30</sup> Italy: Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42>> accessed 10 December 2018.

- 1) The free use of a work should be restricted to certain special cases. The scope and limits of the free use of works are not determined accidentally nor at one's individual discretion, but are envisaged by the law that establishes a clear list of cases when such use is permissible and lawful.
- 2) The free use of a work should not conflict with its normal use. The use of the work by the copyright holder and the free use of the work by third parties must be carried out in different ways. There should be no competition between the author or other copyright holder and third parties regarding use the work.
- 3) The free use of a work should not unreasonable prejudice the legitimate interests of the author. Only extremely important public interests may outweigh the copyright and require such free use of the work when this would harm the interests of the author. However, as a general rule, the free use of a work should not give rise to any obstacles to or other negative effects on the possibility of the exploitation of the work by the author. An author may not be deprived of the possibility of obtaining economic benefit from the use of their work for the reason that the benefit is already received by another person acting within the limits of copyright.

While undeniably important for the development of science, education and culture, as well as serving public interests, freedom of panorama has another side. The possibility of using the images created within freedom of panorama for a commercial purpose does not always correspond to the interests of the author of the work. If a third party uses the image of a work for a commercial purpose, in some cases the author may be deprived of the same opportunity since it has already been done by someone else. In order to illustrate this problem, I present some examples from the judicial practice of Ukraine. Although Ukraine is not an EU member state and Ukrainian law does not yet provide for freedom of panorama, these examples clearly highlight the conflict between the interests of the author and another person who used a picture of a work located in an open space for commercial purposes.

The examples all concern the same work, a sculpture dedicated to the founders of Kyiv which was erected in 1982.<sup>31</sup> In the second half of the 1990s and early 2000s, various individuals independently of each other began to use an image of this sculpture in their business operations. The image appeared in a bank's advertising,<sup>32</sup> on the cover of a book of a non-educational nature,<sup>33</sup> and on the packaging of some foods (several types of cheese<sup>34</sup> and sausages<sup>35</sup>). None of the users asked the permission of the rights holder to use the image of the work. All these cases went to trial and in each case the courts came to the conclusion that the author's rights were not respected. These conclusions are substantiated since in Ukraine (both at that time and now) such use of the work does not fall within the scope of copyright exceptions. But if we look at these examples from the position of freedom of panorama, when it allows the use of the image for any purpose, should the author have the right to influence the commercial use of images of their work or at least be remunerated for its use?

The Working Group on Intellectual Property Rights and Copyright Reform of the European Parliament turned its attention to this problem in 2016. According to a working document:

where architectural works are central to a scene in the television, producers should seek authorization from the artist, who may in that case be entitled to some payment. In other words, there should be a distinction between use

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<sup>31</sup> The picture of a monument may be seen here: <[https://ua.igotoworld.com/en/poi\\_object/2052\\_the-monument-to-the-founders-of-kyiv.htm](https://ua.igotoworld.com/en/poi_object/2052_the-monument-to-the-founders-of-kyiv.htm)>.

<sup>32</sup> Case 22-5874 *Joint-Stock Bank 'UkrGasbank' v Vasyl' Boroday* (2008) <<http://reyestr.court.gov.ua/Review/4611925>> (in Ukrainian) accessed 10 December 2018.

<sup>33</sup> Case 3/109/08 *Vasyl' Boroday v Limited Liability Company 'FOLIO Publishing House'* (2008) <<http://reyestr.court.gov.ua/Review/5749072>> (in Ukrainian) accessed 10 December 2018.

<sup>34</sup> Case 22-51 *Open Joint Stock Company 'Molochnik' v Vasyl' Boroday* (2009) <<http://reyestr.court.gov.ua/Review/8795295>> (in Ukrainian) accessed 10 December 2018.

<sup>35</sup> Case 3/60/07 *Vasyl' Boroday v Private enterprise 'VK and K'* (2007) <<http://reyestr.court.gov.ua/Review/560241>> (in Ukrainian) accessed 10 December 2018.

of architectural works in the public interest, which should be excluded from any fees and other uses.<sup>36</sup>

Indeed, the interests of society cover such spheres as education, culture, and obtaining and disseminating information. For these purposes, the freedom of panorama must ensure the possibility of using works that are located in public places. When it comes to the commercial interests of a particular person or company, freedom of panorama should more clearly take into account the provisions of the three-step-test.

As stated above, there are 5 different approaches to legal regulation of freedom of panorama across the EU member states. One of them, permitting the use of images for any purpose without remuneration, can harm the interests of authors, since it allows the use of images of works for commercial purposes without any payment to the original creator. In other models of freedom of panorama, the interests of the authors are respected. However, not every model can provide a balance between the interests of the authors and society, despite this being precisely the purpose of copyright exceptions and limitations.

#### IV. BALANCING THE INTERESTS OF THE AUTHORS AND SOCIETY

The Berne Convention three-step test only applies to the interests of the authors. However, in other provisions of the Convention there are also areas of social interests connected with copyright exceptions. The Berne Convention expressly includes the use of works for information purposes in Part 2 of Article 10bis. It follows from Article 10 that works can also be used for the purpose of education and science.

According to Article 5(2) of the InfoSoc Directive, EU member states may provide for exceptions or limitations to the reproduction right in cases of reproductions using any kind of photographic technique or other process having similar effects and reproductions using any medium made by a natural

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<sup>36</sup> European Parliament, Working Group on Intellectual Property Rights and Copyright Reform, 'Copyright Reform: Working Document' (17/05/2016). <[http://www.europarl.europa.eu/cmsdata/104023/Working%20Document%20on%20Copyright%20\\_JURI%20meeting%2013.06.2016.pdf](http://www.europarl.europa.eu/cmsdata/104023/Working%20Document%20on%20Copyright%20_JURI%20meeting%2013.06.2016.pdf)> accessed 10 December 2018.

person for private use.<sup>37</sup> That is, educational, scientific, informational, and private interests of society serve as the basis for the establishment of copyright exceptions and limitations. However, they cannot be established for the purpose of securing individual commercial interests without taking into account the interests of the authors. The InfoSoc Directive repeatedly mentions the fair remuneration for right holders to compensate them adequately for the use made of their protected works. The authors of works of public art cannot be completely eliminated from the process of using images of their works when this use has a commercial component. Therefore, freedom of panorama is characterised by two important elements: on the one hand, the regime of using images of works should not contradict the three-step-test; on the other hand, the interests of society need to be respected.

If we consider the existing models of freedom of panorama in terms of ensuring a balance between the interests of the authors and society, we can draw the following conclusions:

- 1) Within the model 'use of images allowed for any purpose *without* remuneration', society has ample opportunities for using works that are located in public space, while the interests of the author are not taken into account at all.
- 2) In the model 'use of images for any purpose *with* remuneration', the interests of society are respected; the authors can rely on receiving financial rewards but cannot influence the sphere of the use of images of their works.
- 3) The model 'use of images for non-commercial purposes only' does not give society the possibility of commercial use of panoramic images so the protection of the interest of society is rather limited.
- 4) Within the model 'use of a panoramic image for any purpose, use of the image of a particular work for non-commercial purposes only', society has opportunities for non-commercial using images of works, and the authors reserve the right to authorise the commercial use of images when their work is the main subject of representation.

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<sup>37</sup> InfoSoc Directive (n 2).

5) In the model 'no freedom of panorama', the interests of society are not adequately protected.

The most apposite would seem to be model 4. In this scenario, the non-commercial use of an image of a work is permitted without authorisation or payment of remuneration. Commercial use of the image, on the other hand, is only carried out on the basis of author's permission and with payment of remuneration. Building upon this approach, I think it possible to offer the following model of freedom of panorama, based on the solutions already in use in Estonia, Finland, Lithuania and Romania:

1) An image of a street, square, square, park or another public place that is not related to a particular work and contains two or more different objects can be freely used for any purpose.

2) An image of a particular work or an image whose main subject is a particular work may be freely used for personal, informational, educational, scientific or other not-for-profit purpose;

3) An image of a particular work or image whose main subject is a particular work may be used for purposes that are directly or indirectly related to the receipt of income from such use only with the consent of the author or other copyright holder and with payment of remuneration.

This approach appears to be the most balanced out of all the discussed models. It takes into account the needs of society, allowing it to freely create images of works for personal purposes and use panoramic images in the commercial sphere. At the same time, this approach does not unreasonably harm the interests of authors and gives them the opportunity to influence the use of the image if the main element of such an image is their particular work. As this approach is based on solutions already existing in several EU member states, this gives ground to believe that it could be adopted across the whole of the EU.

## V. CONCLUSION

At present, when certain aspects of copyright require reviewing and updating, it is necessary to bring the legal rules in line with the needs of society, to take into account the legislative challenges related to the

development of digital technologies and react to problems which are already identified. As described in this article, one of these problems is to achieve a commonly shared understanding of freedom of panorama which, for the time being, is characterized by a diversity of regulatory approaches in the EU member states. Each existing approach has its own benefits, but it does not always fully reflect the needs of the present times: in some cases, the interests of the author are unreasonably limited; in others, the interests of society are not accounted for in full. It seems that the model of freedom of panorama proposed in this article offers due consideration to the interests of all parties, both authors and society. Taking into account the object which is embodied in the image and looking at whether the purpose of the use of this image meets the conditions of the three-step-test, this approach is recommended as possibly the most fitting response to the challenges outlined above.

It is also important to note that the issues discussed in this article do not exhaust all of the existing problems associated with the freedom of panorama. In particular, how will the Directive on Copyright in the Digital Single Market affect freedom of panorama? Is the distribution of images of works on the internet permitted within the framework of freedom of panorama or does this only cover physical usage? And how, above all, do we distinguish between commercial and non-commercial use? While this last issue has been attracting considerable attention over the recent years, ultimately all these uncertainties indicate that further exploration of freedom of panorama remains relevant and necessary.



## GENERAL ARTICLES

### A SAFE HARBOUR OR A SINKING SHIP? ON THE PROTECTION OF FUNDAMENTAL RIGHTS OF ASYLUM SEEKERS IN RECENT CJEU JUDGMENTS

Piotr Sadowski\*

*For over a decade, the Common European Asylum System has been continuously tested in practice. However, it has been under particular pressure in recent years due to the unprecedented scale of the latest migration crisis. The Treaty of Lisbon extended the competencies of the Court of Justice of the European Union in asylum issues. A critical evaluation of the decisions of the Court in this article confirms the existence of a constant tension between ensuring the efficiency of EU law and respecting the rights enshrined in the Charter of Fundamental Rights of the European Union. These research findings are used to determine whether the Court of Justice has strengthened the protection of these rights (especially in the Dublin procedures and in the cases of detention of asylum seekers) and whether it has contributed to the ongoing European judicial dialogue on the rights of asylum seekers.*

**Keywords:** Charter of Fundamental Rights of the European Union, EU asylum policy, refugees, right to judicial scrutiny, detention of asylum seekers, unprecedented flows of migrants

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## I. INTRODUCTION

The number of migrants arriving to the European Union since the start of the migration crisis in 2014 and the death toll of persons attempting to cross the Mediterranean Sea<sup>1</sup> during that time have provoked many debates about, *inter alia*, the fundamental rights of asylum seekers in Europe. Questions about the fairness and effectiveness of the Common European Asylum System ('CEAS') have repeatedly been raised.<sup>2</sup>

This article analyses the scope of the judgments of the Court of Justice of the European Union (hereinafter 'Court of Justice' or 'CJEU') on the protection of fundamental rights of refugees and asylum seekers.<sup>3</sup> The evaluation of the

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<sup>1</sup> Current data can be found in International Organization for Migration, 'Migration Flows - Europe' <<http://migration.iom.int/europe/>> accessed 2 October 2018.

<sup>2</sup> See further Jenny Ritter and others, 'Introduction. European Perspective and National Discourses on the Migrant Crisis' in Melani Barlai and others (eds), *The Migrant Crisis: European Perspectives and National Discourses* (LIT-Verlag 2017) 13–20.

<sup>3</sup> The CJEU decisions and Advocates General's Opinions were available on CURIA <[www.curia.europa.eu](http://www.curia.europa.eu)> accessed 25 August 2018, and the European Court of

CJEU's contribution to a common European understanding of human rights (a so-called *ius commune europaeum*) takes into account the frequency and quality of the Court's references to the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter' or 'CFREU'),<sup>4</sup> the 1950 European Convention on Human Rights and Fundamental Freedoms ('ECHR'),<sup>5</sup> the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol ('Refugee Convention'),<sup>6</sup> and the decisions of the European Court of Human Rights ('ECtHR'). This topic has been widely discussed in the academic literature.<sup>7</sup> However, an update or reevaluation of the case law is justified by the ever growing number of CJEU judgments on asylum issues.<sup>8</sup> Although some of the decisions have already been analysed by scholars,<sup>9</sup> in the publications currently available researchers have primarily scrutinised detailed aspects of EU asylum law e.g. a right to a legal remedy in the Dublin procedure.<sup>10</sup> In contrast, in this article 'asylum policy' is understood in its

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Human Rights judgments were available on <<https://hudoc.echr.coe.int>> accessed 25 August 2018.

<sup>4</sup> Consolidated version [2016] OJ C202/389.

<sup>5</sup> ETS No. 5.

<sup>6</sup> 189 UNTS 137 and 606 UNTS 267.

<sup>7</sup> Cf. Sílvia Morgades-Gil, 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?' (2015) 27 *International Journal of Refugee Law* 433, 433–456; Sara Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 *European Journal of Migration and Law* 137, 137–153; Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 *Maastricht Journal of European and Comparative Law* 812, 812–835.

<sup>8</sup> Between 1 January 2015 and 15 September 2017, the CJEU closed 21 cases focusing on 'asylum policy'. Since then up until 14 November 2018, the CJEU has issued 11 judgments on asylum issues. CURIA (n 4).

<sup>9</sup> Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:409 and Case C-155/15 *George Karim v Migrationsverket* EU:C:2016:410 are exceptional as they were commented in Maarten den Heijer, 'Remedies in the Dublin Regulation: Ghezelbash and Karim' (2017) 54 *Common Market Law Review* 859.

<sup>10</sup> Heijer (n 9). The Dublin procedure is regulated in Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the

holistic meaning. It therefore applies to all issues starting from the submission of an asylum application to the moment when a decision on granting or rejecting asylum becomes final.<sup>11</sup> As such, it encompasses different rights available to asylum seekers e.g. to submit an asylum application, to appeal a decision denying asylum, and to have an asylum interview. Due to the impact of the CJEU's decisions on the member states' laws and practices, this analysis contributes to the discussion on the relationship between the *effet utile* of EU law and the protection of fundamental rights.

A critical evaluation of its recent judgments shows that the Court of Justice has recognised the importance of the Refugee Convention within the CEAS.<sup>12</sup> However, the CJEU has not established a consistent practice of referring to that Convention. Hopes that the CJEU will progressively develop the protection of rights enshrined in the Refugee Convention<sup>13</sup> have so far not materialised. The scope of the rights secured by the CFREU (which, according to Article 52(3) of the Charter, have the same meaning and scope as those in the ECHR) has also rarely been investigated by the Court of Justice.<sup>14</sup> The principle that the ECHR represents a minimum standard of

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criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31 (hereinafter 'the Dublin III Regulation').

<sup>11</sup> See Article 78 of the Treaty on the Functioning of the European Union. Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/47.

<sup>12</sup> Case C-443/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover* EU:C:2016:127, para 29, Case C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani* EU:C:2017:71, para 42, Case C-560/14 *M. v Minister for Justice and Equality, Ireland, Attorney General* EU:C:2017:101, para 22.

<sup>13</sup> Roland Bank, 'The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law' (2015) 27 *International Journal of Refugee Law* 213, 213.

<sup>14</sup> *M.* (n 12) paras 30-33, Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano* EU:C:2017:591, para 32 and Case C-578/16 PPU *C.K., H.F., A.S. v Republika Slovenija* EU:C:2017:127 are exceptional in this regard. However, the Charter applies only to issues which are 'within the meaning and scope of EU law'.

protection of fundamental rights in the EU was established by the CJEU to limit the analysis of the rights guaranteed by the CFREU.<sup>15</sup> Those rare and limited references to international human rights law (including the ECHR, as interpreted by the ECtHR) confirm that the Court of Justice still focuses primarily on the autonomy of EU law, insufficiently integrating this special legal regime into other branches of international law. This fundamentally limits the CJEU's contribution to the *ius commune europaeum*.

In certain areas, however, EU law and the Court of Justice's decisions provide for the protection of more precise and specific rights in comparison to the Refugee Convention or the ECHR. Some CJEU decisions may therefore set an example to other courts, including the ECtHR, particularly on issues such as the possibility of questioning the legality of intergovernmental cooperation, specific timeframes for permissible detentions, an obligation to issue a decision rejecting the examination of subsequent asylum applications, and the impact of the receiving country's actions on the efficiency of guarantees of persons subjected to the Dublin procedure.

Although the Court of Justice increasingly upholds fundamental rights, it does not do so consistently. Examples of decisions favouring member states' interests over the rights of asylum seekers can be found in judgments focusing on the arrival of exceptionally large numbers of migrants. These judgments focus on literal interpretations of EU law, favouring mutual trust over the individual's right to an effective remedy.<sup>16</sup> They also lack consistency with the standard set by the ECtHR. Due to the importance of the challenges associated with an unprecedented number of migrant arrivals, recalling that also non-EU state parties to the ECHR (*inter alia*, countries covered by the EU neighbourhood policy) are affected with the migration crisis, these judgments question the *ius commune europaeum*.

This article consists of five parts. The presentation of the methodology of selection of the CJEU judgments (section II) is followed by concise

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<sup>15</sup> Cf. Case C-239/14 *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy (CPAS de Huy)* EU:C:2015:824, *Ghezelbash* (n 9), Case C-18/16 *K. v Staatssecretaris van Veiligheid en Justitie* EU:C:2017:680, and *Mousa Sacko* (n 14).

<sup>16</sup> Cf. Case C-646/16 *Khadija Jafari, Zainab Jafari v Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586 and Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* EU:C:2016:188.

reflections on the coherence between the Council of Europe ('CoE') and the EU's standards of protection of human rights (section III). The CJEU's judgments are briefly presented in section IV. They are gathered in thematic sets in which cases are presented in chronological order to show the gradual development of fundamental rights. This section also analyses recent cases in light of earlier findings of scholars. Section V critically examines if the CJEU adequately protects the fundamental rights of refugees and asylum seekers, thereby contributing to the development of the *ius commune europaeum*.

## II. THE METHODOLOGY OF SELECTION OF THE CJEU JUDGMENTS

A filtered search on the CURIA database shows that, between 1 January 2015 and 15 September 2017 (the period with the highest inflow of asylum seekers to the EU),<sup>17</sup> the CJEU closed 21 cases focusing on 'asylum policy'.<sup>18</sup> In those cases, the Court referred to: the CFREU (eleven judgments); the Dublin III Regulation (ten cases), Directive 2013/32 and Council Directive 2005/85 on asylum procedures (five cases),<sup>19</sup> Directive 2013/33 laying down standards for the reception of asylum applicants (five cases),<sup>20</sup> and Council Directive 2004/83 on minimum standards of qualification as refugees (one case).<sup>21</sup> The Mass Influx Directive (Council Directive 2001/55)<sup>22</sup> was cited once. Finally,

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<sup>17</sup> Eurostat, 'Asylum statistics' [April 2018] Statistics Explained <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> accessed 14 November 2018.

<sup>18</sup> CURIA (n 3).

<sup>19</sup> Four references to Directive 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60. Council Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 was cited once.

<sup>20</sup> Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

<sup>21</sup> Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

<sup>22</sup> Council Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on

'asylum policy' cases also concerned the Schengen Borders Code<sup>23</sup> (two cases) and Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals (four cases).<sup>24</sup>

This article will analyse the following judgments, listed in chronological order, made by the CJEU between 1 January 2015 and 15 September 2017, which referred to the above-cited regulations: *Tall, Warendorf, Al Chodor*,<sup>25</sup> *J.N.*,<sup>26</sup> *Mirza, Ghezelbash, Lounani, M., C.K., H.F., A.S., Daher Muse Ahmed*,<sup>27</sup> *Moussa Sacko, A.S.*,<sup>28</sup> *Jafari, Mengesteab*,<sup>29</sup> *Amayry*,<sup>30</sup> *K*, and *Karim*. The above-mentioned cases have been chosen due to the fact that all of them were assigned the keyword 'asylum policy' by the CURIA and they were issued by the CJEU between 1 January 2015 and 15 September 2017. This research is thus based on the judgments issued during the period of the highest inflow of asylum seekers to the EU, namely 2015 and 2016. Additionally, it covers parts of 2017, as all asylum seekers should receive first-instance decisions in their cases, even if they submitted their applications by the end of December 2016 (as, according to Directive 2013/32 asylum decision should, as a rule, be made within six months). The analysis focuses on all requests by interested member states for a preliminary ruling in asylum policy cases. Therefore, it cites those CJEU judgments that address the situation of countries concerned with the transit of migrants (both the Mediterranean countries and countries located on the Balkan migration route) and destination countries.

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measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

<sup>23</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

<sup>24</sup> Directive 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

<sup>25</sup> Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor* ECLI:EU:C:2017:213.

<sup>26</sup> Case C-601/15 *J.N. v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84.

<sup>27</sup> Case C-36/17 *Daher Muse Ahmed v Bundesrepublik Deutschland* EU:C:2017:273.

<sup>28</sup> Case C-490/16 *A.S. v Republika Slovenija* EU:C:2017:585.

<sup>29</sup> Case C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland* EU:C:2017:587.

<sup>30</sup> Case C-60/16 *Mohammad Khir Amayry v Migrationsverket* EU:C:2017:675.

Nevertheless, not all of the cases which the CJEU marked with a keyword 'asylum policy' met the thematic criteria of this article.<sup>31</sup> In two cases the referring national courts withdrew their requests for a preliminary ruling, which makes it impossible to analyse them as they were removed from the register of the Court of Justice.<sup>32</sup> The *Mossa Oubrami* case did not cite any asylum issues, but instead focused on the aforementioned Directive 2008/115. Finally, in *Ovidiu-Mihăiță Petrea*, the Court of Justice's decision concerned the right of a Romanian citizen to exercise his freedom of movement, and therefore does not meet the thematic criteria of this article. Thus, four of the CJEU judgments – *Max-Manuel Nianga*, *Seusen Sume*, *criminal proceedings against Mossa Oubrami*, and *Ovidiu-Mihăiță Petrea* – could not be analysed.

The case selection for this research is thus based on clearly defined criteria, namely the thematic scope and the time of making judgments. As such, the selected decisions of the Court of Justice constitute a reliable starting point for a comparative analysis, focusing on the CJEU's standard of protection of the fundamental rights of asylum seekers. A relatively large number of analysed judgments ensures a well-grounded examination of the Court of Justice's interpretation of these rights. The CJEU's respect for *stare decisis*<sup>33</sup> increases the reliability of the present article's findings.

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<sup>31</sup> To list the case law in a chronological order: C-445/14 *Seusen Sume v Landkreis Stade* EU:C:2015:314, Case C-199/16 *Max-Manuel Nianga v État belge* EU:C:2017:401, Case C-225/16 *a criminal proceedings against Mossa Oubrami* EU:C:2017:590, Case C-184/16 *Ovidiu-Mihăiță Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* EU:C:2017:684.

<sup>32</sup> *Max-Manuel Nianga* and *Seusen Sume*.

<sup>33</sup> Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014); Pedro Caro de Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance' (2012) 13 *German Law Journal* 979, 1002.

### III. EUROPEAN STANDARDS OF PROTECTION OF HUMAN RIGHTS

#### *1. The Development of Ius Commune Europaeum as a "Safe Harbour"*

Diversification and expansion of international law has resulted both in its fragmentation<sup>34</sup> and specialisation.<sup>35</sup> The identification of an adequate standard of protection of human rights is a complicated issue, particularly 'when the wording and scope of the respective provisions contain subtle differences'.<sup>36</sup> This explains why building a common understanding of human rights – *a ius commune* – is always a work in progress.<sup>37</sup> It unveils conflicts between universal and regional systems of protection of human rights,<sup>38</sup> thereby 'striking at the heart of the principle of universality on which human rights rests, both legally and conceptually'.<sup>39</sup> There are divergent views about all principal features of the *ius commune*. Nevertheless, 'the

<sup>34</sup> 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, Fifty-Eighth Session, Geneva, 1 May-9 June and 3 July-11 August 2006' 10.

<sup>35</sup> Ibid 17; Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 2 *European Journal of Legal Studies* 4.

<sup>36</sup> Peter Van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune Europaeum' (2012) 30 *Netherlands Quarterly of Human Rights* 195, 212; Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilisation' (2015) 84 *Nordic Journal of International Law* 371, 393.

<sup>37</sup> Michael De Salvia, 'L'Élaboration d'un "ius commune" de Droits de l'Homme et les Libertés Fondamentales dans la Perspective de l'Unité Européenne: L'oeuvre Accomplie par la Commission et la Cour Européennes des Droits de l'Homme' in Franz Matscher, Gérard J Wiarda and Herbert Petzold (eds), *Protecting human rights: The European dimension: studies in honour of Gérard J. Wiarda = Protection des droits de l'homme: la dimension européenne* (Heymanns 1988) 555–563.

<sup>38</sup> Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 219; Raghunandan Swarup Pathak, 'Introductory Report' in Council of Europe (ed), *Universality of human rights in a pluralistic world* (Engel 1990) 5-17.

<sup>39</sup> United Nations Human Rights Office of the High Commissioner, 'The European Union and International Human Rights Law' 8 <[https://europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)> accessed 15 November 2018.

transnational and universal character of the discourse and the pervasive yet multifaceted relationship between the global discourse and local legal and political systems'<sup>40</sup> also increases the visibility and coherence of human rights and, consequently, the efficiency of the protection of those rights.

Although European values are often said to be imposed on non-European societies,<sup>41</sup> identifying a common European standard is not without difficulty. The Council of Europe and the EU play important roles in the protection of human rights in Europe, but both institutions operate in very different legal, political, and factual contexts. Even though 'the EU may have to adhere to human rights obligations indirectly through the prior obligations of its Member States',<sup>42</sup> EU law does 'not necessarily reflect the broader and deeper standards contained in UN instruments'<sup>43</sup> and in the ECHR. For 'this complex interplay between overlapping and interdependent dimensions [...] [to] not lead to a cacophony of divergent interpretations',<sup>44</sup> a well-managed dialogue between the CJEU and the ECtHR is necessary. This could indeed increase the fairness and predictability of the decisions of the two courts,<sup>45</sup> both of which should strive towards 'the development of a harmonious European common law of fundamental rights'<sup>46</sup> – a *ius commune europaeum*.

To this end, it would help to identify general European trends in the interpretation of these rights, which ultimately would assist in achieving a common – albeit not unified – European understanding of human rights. This requires the strengthening of judicial dialogue, both horizontal (i.e. between European and national courts, and constitutional and regional

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<sup>40</sup> Paolo Carozza, 'My Friend Is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas Law Review 1031, 1077.

<sup>41</sup> Paivi Leino, 'A European Approach to Human Rights? Universality Explored' (2002) 71 Nordic Journal of International Law 455, 460.

<sup>42</sup> Tawhida Ahmed and Israel de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 European Journal of International Law 771, 772.

<sup>43</sup> United Nations Human Rights Office of the High Commissioner (n 39) 8.

<sup>44</sup> Van Elsuwege (n 36) 197.

<sup>45</sup> Guy Harpaz, 'The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' [2009] Common Market Law Review 105, 109.

<sup>46</sup> Van Elsuwege (n 36) 197.

courts) and vertical (i.e. between European courts and constitutional courts).<sup>47</sup> International judges are already aware of the need to build such a common European understanding of human rights.<sup>48</sup> They strengthen the *ius commune europaeum* by 'cross-referenc[ing] each other's decisions when interpreting human rights norms',<sup>49</sup> and are inspired by other courts' *rationes decidendi*, even if it is still highly debated which principles are shared by European countries.<sup>50</sup>

An increased integrity and visibility of fundamental rights strengthens the predictability of the judgments of the European courts and increases coherency of interpretations of human rights standards. This is for the benefit of member states, as it limits the likelihood that an implementation of EU law would lead to an infringement of the ECHR. However, an increased integrity and visibility of fundamental rights is also an important advantage to individuals – especially asylum seekers – who can rely on interpretations by analogy, and on the CJEU's understanding of their rights. Therefore, in this article the CJEU judgments which underline the need to strengthen the establishment of a clear (well-justified and elaborated in the Court's decisions), balanced (taking into account interests of individuals, and of the member states), and coherent (taking into account not only EU secondary law but also the Charter, and the ECHR) European system of protection of human rights are called a "safe harbour".

Derivations from common interpretation lines lead to confusion regarding the commonality of European human rights, especially if judgments are not based on well-reasoned *rationes decidendi*.<sup>51</sup> This scenario may be called a "sinking ship" because it creates a risk to both states and individuals. Firstly,

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<sup>47</sup> More in Agnès G Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009).

<sup>48</sup> Van Elsuwege (n 36) 215.

<sup>49</sup> Vasiliev (n 36) 372.

<sup>50</sup> According to Michael De Salvia *ius commune europaeum* is focused on: human dignity, legality, equality of arms and proportionality. Michael De Salvia (n 37) 555-563. Others contested inclusion of the principle of equality to this list. Leino (n 41) 460.

<sup>51</sup> Confront with Andreas Paulus, 'International Adjudication' in Samantha Besson and John Tasioulas (eds), *The philosophy of international law* (Oxford University Press 2010) 220.

diverting approaches can expose the EU member states – all of which are also state parties to the ECHR – to inconsistencies and uncertainties regarding the scope of their responsibilities under EU and international law. This could weaken the social acceptance of CJEU and ECtHR judgments, and increase tensions between the two courts.<sup>52</sup> Secondly, individuals would have difficulties in understanding and, consequently, successfully claiming their rights in mutually incoherent European systems for the protection of human rights. Therefore, their feeling of alienation may be analogous to being on a sinking ship which is left on a swell of the sea of human rights law. Hence, in this article the metaphor a "sinking ship" relates to a complex "ocean" of responsibilities of states on the one hand, and a complicated – from an individual's point of view – process of identifying the applicable standard of protection of fundamental rights on the other hand.

## 2. *The Council of Europe's Standard*

Actions aimed at establishing a European system for the protection of human rights preceded the end of World War II.<sup>53</sup> Scholars correctly claim that,

from [...]the] initial starting point, the CoE has developed one of the most advanced systems for the protection of human rights anywhere in the world. The [...] system has a refined enforcement mechanism and is very effective.<sup>54</sup>

The efficiency of the system has increased over time, especially since the ECtHR began to operate on a permanent basis.<sup>55</sup> The ECtHR stressed early on that the Convention should be read in a way appropriate 'to realise the aim and achieve the object of the treaty'.<sup>56</sup> This approach was accompanied by the

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<sup>52</sup> Harpaz (n 45) 122-123.

<sup>53</sup> Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, Oxford University Press 2007) 2.

<sup>54</sup> Rhona KM Smith, *Textbook on International Human Rights* (6th edn, Oxford University Press 2014) 97. The same conclusions were made by Bantekas and Oette (n 38) 221-222 and Vasiliev (n 36) 381.

<sup>55</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby 1994 (ETS No 155). More in Mowbray (n 53) 14-18.

<sup>56</sup> *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968), para 8.

development of the ECtHR's autonomous interpretation of ECHR rights.<sup>57</sup> The Strasbourg Court found that 'the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions'.<sup>58</sup> This is a clear indication that the ECtHR's aim is to ensure that the ECHR rights are not theoretical nor illusory, but practical and effective.<sup>59</sup>

This dynamic interpretation has extended the scope of application of the Convention to 'an ever-widening range of contexts'.<sup>60</sup> Hence, although the ECHR and its protocols do not contain a specific right to asylum, the ECtHR has nonetheless developed adequate safeguards in this regard,<sup>61</sup> by stressing the absolute nature of the rights under Articles 2 and 3 of the Convention.<sup>62</sup> Other ECHR rights, especially the right to private and family life – Article 8 – and the right to effective access to an appeal – Article 6 – go beyond the *non-refoulement* principle and substitute the Refugee Convention.

### 3. *The EU's Standard*

The European Economic Communities ('EEC') were initially established to strengthen the economic cooperation between its member states. However, a gradual expansion of the EEC's competences also increased the interest in

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<sup>57</sup> More in George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 *European Journal of International Law* 279.

<sup>58</sup> *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31.

<sup>59</sup> *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979).

<sup>60</sup> Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57, 58. Evolutive interpretation has been questioned by some States Parties to the ECHR. More in Fiona de Londras and Kanstantsin Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 523, 523.

<sup>61</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 311.

<sup>62</sup> It started with *X v Belgium* App no 984/61 (ECtHR, 19 May 1961), 6 *Collection of Decisions*, 39, 40. Compare with Samantha Velluti, *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 79; Agnès G Hurwitz (n 47) 190–191.

protecting human rights at the EEC level.<sup>63</sup> This was confirmed not only in the subsequent Treaties, but also in the decisions of the Court of Justice.<sup>64</sup>

The entry into force of the Treaty of Lisbon<sup>65</sup> in 2009 was a significant step towards protecting fundamental rights in the EU. As a result of the increase in the EU's functional powers, the protection of fundamental rights expanded into policy areas in which they were initially only incidentally regulated.<sup>66</sup> The widening of the CJEU's jurisdiction further contributed to that process, as the Court did not refrain from a *pro homine* interpretation of EU law even during transition periods.<sup>67</sup> However, to this day, the CJEU can only decide on issues which fall within the scope of EU law.<sup>68</sup>

Additionally, the Treaty of Lisbon made the CFREU legally binding, bringing the protection of fundamental rights to a new level.<sup>69</sup> According to Article 6(1) TEU, the Charter has the same legal status as the Treaties. The Charter was drafted using plain language, which is used in order to increase the visibility of fundamental rights protected by EU legislation, and to define the current state of development of these rights. The Charter does not directly quote the ECHR, however it does refer to it.<sup>70</sup> It is disputed whether

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<sup>63</sup> Smith (n 54) 112; Christian Franklin, 'The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon' (2010) 15 *Tilburg Law Review* 137, 139; Harpaz (n 45) 107.

<sup>64</sup> Franklin (n 63) 148; Aidan O'Neill, 'The EU and Fundamental Rights – Part 1' (2011) 16 *Judicial Review* 216, 216; Van Elsuwege (n 36) 196.

<sup>65</sup> Treaty on European Union [2007] OJ C306/1.

<sup>66</sup> Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *Common Market Law Review* 219, 226–227; Eleanor Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' [2018] *Common Market Law Review* 997, 1000.

<sup>67</sup> Cf. Case C-19/08 *Migrationsverket v Edgar Petrosian and Others* EU:C:2009:41, and Case C-465/07 *Elgafaji and Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

<sup>68</sup> Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321, [1989] ECR 02609.

<sup>69</sup> Spaventa (n 66) 1001; Muir (n 66) 219; Agnès G Hurwitz (n 47) 247.

<sup>70</sup> Andrzej Bisztyga, 'Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – Stan Kompatybilności czy Konkurencyjności?' (2011) 3 *Przegląd Prawa Konstytucyjnego* 179, 186.

the Charter's aim is to complement the ECHR,<sup>71</sup> or whether it guarantees a higher standard of protection.<sup>72</sup> Official Explanations relating to the Charter of Fundamental Rights provide little clarification and are not legally binding.<sup>73</sup>

#### 4. *The EU versus the Council of Europe*

Article 6(2) TEU puts a time-unspecified obligation on the EU to accede to the ECHR. However, this accession shall not affect the Union's competences as defined in the Treaties. As a consequence, the CJEU has so far declared potential accession agreements to be incompatible with EU law.<sup>74</sup> Moreover, Article 53 CFRUE guarantees that the ECHR sets out a minimum standard of fundamental rights protection in the EU. However, as the Charter applies only to issues which are 'within the meaning and scope of EU law', the CJEU decides *ad casum* if this precondition is met.<sup>75</sup> Still, it is unclear if 'the meaning and scope' refers to the set of rights enshrined in the Charter, or if it applies also to a certain standard of protection of those rights.<sup>76</sup> The first option provides a possibility to rely on the Charter only if EU law directly refers to fundamental rights. This approach focuses on the mere existence of the Charter rights, but ignores the differences between the CFRUE and the ECHR regarding the content of these rights. Instead, the

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<sup>71</sup> Daniel Engel, *Der Beitritt der Europäischen Union zur EMRK: vom defizitären Kooperationsverhältnis zum umfassenden EMRK-Rechtsschutz durch den EGMR?* (Mohr Siebeck 2015) 24.

<sup>72</sup> Bożena Gronowska, 'The EU Charter on Fundamental Rights – Do We Really Need It?' in Justyna Maliszewska-Nienartowicz, *European Union at the Crossroads: The Need for Constitutional and Economic Changes* (TNOiK 2007) 137.

<sup>73</sup> Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

<sup>74</sup> *Opinion 2/94 on accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECR 1996 P-1783; *Opinion 2/13* EU:C:2014:2454.

<sup>75</sup> Francesca Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) 17 *European Journal of Migration and Law* 1, 2–4. The CJEU has been criticised for not finding the application of EU law in Case C-638/16 PPU *X and X v Belgium*, EU:C:2017:173. Evelien Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal Integrity vs. Political Opportunism?' (2017) CEPS Commentary 3.

<sup>76</sup> Daniel Engel (n 71).

second view should be promoted because it increases the coherency of European systems of protection of human rights, thereby preventing potential conflicts between obligations stemming from the ECHR and EU law. As the EU has not yet acceded to the ECHR, member states would be the biggest beneficiaries of a strengthened *ius commune europaeum*, as it would mitigate the likelihood of repeating legal problems, such as those which arose in *M.S.S.*<sup>77</sup> Currently, the ECHR and the Charter standards may vary, so states have to check if the application of proportional and reasonable restrictions imposed by EU law will not infringe the ECHR.<sup>78</sup> However, this is not a systemic solution as it leaves discretion to national bodies regarding identification of the common understanding of these standards.

Finally, the Strasbourg Court has developed the doctrine of equivalent protection which provides for the possibility of checking the conformity of the EU's actions with the ECHR.<sup>79</sup> This was established despite the EU not being party to the Convention. The doctrine takes into account the peculiarities of EU law, including the principles of supremacy and direct effect, which makes it a reasonable compromise.<sup>80</sup> The Strasbourg Court has stressed that the ECHR did not prohibit state parties from transferring their sovereign power to an international organization.<sup>81</sup> However, such a transfer does not lift the human rights responsibilities of these states for the actions and omissions of their bodies under their international legal obligations. Therefore, even though the ECtHR have admitted that EU law generally ensures an equivalent protection of human rights, they have reserved a right to review if, in an individual case, a member state's actions are manifestly incoherent with the ECHR.

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<sup>77</sup> *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

<sup>78</sup> Daniel Engel (n 71) 27; Agnès G Hurwitz (n 47) 249.

<sup>79</sup> *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005), paras 155–157. It was inspired by *Solange II* [1986] *Wünsche Handelsgesellschaft* 2 BvR 197/83. More in Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) 19–23.

<sup>80</sup> Ravasi (n 79) 38–39; Van Elsuwege (n 36) 206.

<sup>81</sup> *Matthews v the United Kingdom* App no 24833/94 (ECtHR, 18 February 1999) para 32.

The doctrine of equivalent protection was challenged before the CJEU in the *M.S.S. and N.S.* cases.<sup>82</sup> Nonetheless, the ECtHR has stuck to this standard and refrained from developing its own interpretation of EU law.<sup>83</sup> However, it follows from the CJEU decision in *Melloni*<sup>84</sup> that, in harmonised policy areas, national legislation cannot provide for a higher standard of protection of fundamental rights than that established by EU law, if this endangers the supremacy of EU law.<sup>85</sup> A 'minimum standard' approach was not promoted in this judgment, leaving member states with contradictory interpretations of their international human rights obligations. However, the Court of Justice subsequently maintained an equivalent protection doctrine.<sup>86</sup> National courts may also use the ECHR as a minimum standard if the CJEU finds that the case is not 'within the meaning and scope of EU law'.<sup>87</sup> The ECtHR has already confirmed that it will not refrain from checking the equal protection standard in asylum cases.<sup>88</sup>

### 5. *Whose Standard?*

The EU is slowly adopting an increased focus on fundamental rights. This was facilitated when the Charter became legally binding and was given the same legal basis as the Treaties. Nonetheless, the EU has not established a holistic fundamental rights policy. The ECHR sets the minimum standard of protection for the EU, even though the EU is not party to the Convention.

<sup>82</sup> Joined cases C-411/10 and C-439/10 *N.S. v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865.

<sup>83</sup> *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 November 2011), paras 225–226. See references in Velluti (n 62) 88.

<sup>84</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

<sup>85</sup> Krystyna Kowalik-Bańczyk, 'Autonomia Prawa Unijnego w Świetle Opinii 2/13' (2015) 12 *Europejski Przegląd Sądowy* 14, 19; Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection - On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 *Human Rights Law Review* 485, 492–493.

<sup>86</sup> Bernhard Schima, 'EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in Its Context' (2015) 38 *Fordham International Law Journal* 1097, 1121–1124.

<sup>87</sup> Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, paras 71–72. More in Sánchez (n 7) 1593–1594.

<sup>88</sup> *Tarakbel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014), para 88.

Nevertheless, it is still unclear whether the CJEU sufficiently indicates in its decisions the importance of ensuring consistency of application between the rights envisaged in the ECHR and in the Charter.<sup>89</sup>

The ECtHR can decide on all issues within state jurisdiction and, as such, it is a fully-fledged human rights court. The Court of Justice, on the other hand, can only refer to or uphold fundamental rights if the circumstances fall within the scope of EU law. As the EU regulates fundamental rights only incidentally, the CJEU is more restricted in securing these rights than the ECtHR.<sup>90</sup>

The Refugee Convention forms the basis of the CEAS. The importance of the Refugee Convention was underlined by Article 78(1) TFEU, Article 18(2) CFREU, and EU legislation building the CEAS. The CJEU was 'the first international court actually interpreting the Refugee Convention'.<sup>91</sup> This raised expectations that the Court of Justice 'would boost international refugee law',<sup>92</sup> as the CJEU's progressive interpretation of the Refugee Convention could be an inspiration to other non-EU legal systems. This establishes a "safe harbour".

As such, the most prominent advantages of the CoE's system of protecting human rights include the ECtHR's extensive experience in human rights law and its wide jurisdiction. The Strasbourg system is more holistic and the ECHR represents a minimal standard for the EU. Due to 'the living instrument doctrine', the ECHR is continuously developed and adapted to meet the current needs of European societies. However, this doctrine applies only when a general trend in the CoE is found, which limits accusations of judicial activism of the ECtHR.

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<sup>89</sup> Currently there are no self-contained (closed) regimes, but some specialised regimes are increasingly independent from general international law. Ewelina Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego* (Wydawnictwo C.H. Beck 2018) 386–392.

<sup>90</sup> Turkuler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 *European Journal of International Law* 565, 582.

<sup>91</sup> Bank (n 13) 213.

<sup>92</sup> *Ibid.*

#### IV. AN OVERVIEW OF THE CJEU'S JUDGMENTS

##### *I. Increased Recognition of the Right to Effective Remedy in Dublin Cases*

The Dublin III Regulation has significantly increased the procedural safeguards in asylum law without prioritising the speediness of the Dublin procedure over the right of the individual to judicial scrutiny.<sup>93</sup> This was stressed in *Ghezelbash*, in which the CJEU underlined that fundamental rights are not limited to 'systemic flaws in the asylum procedure and in the reception conditions for asylum seekers',<sup>94</sup> as this interpretation would deprive other rights of any practical effect.<sup>95</sup> This was an important development, particularly when compared to the judgment in the *N.S.* case. In *Ghezelbash*, the CJEU stressed that an applicant can ask for a verification that the Dublin criteria were applied correctly to his or her case, but the decision responding to this request 'could have no bearing on the principle of mutual trust'.<sup>96</sup> However, this does not amount to a right to choose the country in which the asylum application is processed.

*Ghezelbash* can unquestionably be identified as creating a "safe harbour" as it stresses the importance of fundamental rights in the Dublin procedure. At the same time, the Court weighted the above-described *pro homine* interpretation of EU law against the interests of the member states by stressing that the right to judicial scrutiny cannot be understood as a right to choose the country of asylum. This balanced – and hence, compromised – approach increased the practicality of the CJEU judgment. The same purpose is achieved by the Court's indication that the right to judicial scrutiny applies not only in case of systemic flaws as in most cases this kind of flaws are not identified.

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<sup>93</sup> More in Heijer (n 9) 859–860.

<sup>94</sup> *Ghezelbash* (n 9) para 37. Limitations of the right to judicial remedy to systemic deficiencies were criticised by Isiksel (n 90) 586 and Hemme Battjes and Evelien Brouwer, 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?' (2015) 8 *Review of European Administrative Law* 183, 189–190.

<sup>95</sup> *Ghezelbash* (n 9) para 57.

<sup>96</sup> *Ibid* paras 54–55.

In *Ghezelbash*, the CJEU did not specify which Dublin criteria may be contested by applicants. These issues were, however, addressed in *Karim*.<sup>97</sup> The Court explained that the national court has the right to verify the duration of absences of the asylum seeker from the EU.<sup>98</sup> *Karim* can be classified as contributing to a "safe harbour" as the ruling ensures the coherence of the CJEU's interpretation of the right to judicial remedy with its earlier decisions in *M.S.S.* and *N.S.*<sup>99</sup> The Court indicated that the Dublin criteria may be questioned by the applicant, and a national court must be able to verify substantive aspects of the applicant's claims. Yet, a national court's decision in an individual case cannot be understood as an attempt to question the mutual trust.

This gradually increasing recognition of the right to an effective remedy was affirmed in *A.S.*<sup>100</sup> The Court of Justice stressed that an applicant may claim improprieties in an individual Dublin transfer due to a late submission of the transfer decision.<sup>101</sup> This finding also applies in cases of illegal border-crossing when the transfers were accepted by the receiving country.<sup>102</sup> This increases the practical relevance of the *A.S.* decision since many applications are submitted in similar circumstances. The six-month period for a transfer should be calculated from the moment when the final appeal decision is made. This interpretation contributes to the *effet utile* because a submission of an appeal suspends the transfer. In times of a migration crisis, a judgment upholding another Dublin criterion, which can be relied upon by an applicant who has illegally crossed the border, is a useful clarification. Thus, it is clear that *A.S.* creates a "safe harbour".

The strengthening of the applicants' right to an effective remedy continued in the decision in *C.K., H.F., A.S.* Here the Court of Justice held that the applicants could present objective evidence of serious medical constraints to a Dublin transfer before national courts, and that the courts must then decide

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<sup>97</sup> *Karim* (n 9); Heijer (n 9) 865.

<sup>98</sup> *Karim* (n 9), paras 26-27. Dublin responsibilities cease when the receiving country will establish that the asylum seeker left the EU for more than three months. Heijer (n 9) 865.

<sup>99</sup> Compare with Battjes and Brouwer (n 94) 187-188.

<sup>100</sup> *A.S.* (n 28) paras 32-34.

<sup>101</sup> *Ibid* para 35.

<sup>102</sup> *Ibid* paras 90-92.

if the applicants' rights under Article 4 CFREU and Article 3 ECHR would be infringed if transfers were made.<sup>103</sup> This applies even when the asylum system of the destination country is not affected by any systemic deficiencies. This ruling is in line with *M.S.S.* (although this judgment was not cited by the CJEU) as systemic deficiencies should preclude all transfers *ad abstractum*. A reference to the ECtHR's decision in *Paposhvili*<sup>104</sup> increases the coherence between the case law of the CJEU and the ECtHR. Consequently, the CJEU's reasoning in *C.K., H.F., A.S.* contributes to the creation of a "safe harbour" as it reflects the ECtHR's level of protection and it is not limited to the systemic deficiencies of the destination country's asylum system.

The CJEU case law established in *Ghezelbash* and *Karim* was further developed in *Mengesteab*,<sup>105</sup> where the Court of Justice focused on the timeframe in which the request to take charge of an applicant should be made. It concluded that time limits 'contribute, in the same way as the criteria set out in Chapter III [of the Dublin III Regulation] [...], to determining the responsible Member State'.<sup>106</sup> Those deadlines can be invoked to question the proper implementation of the above-mentioned Regulation. Thus, the CJEU identified another factor, additional to those developed in *Karim* and *A.S.*, which can be raised during the judicial review. The Court also underlined that the receiving state's actions do not legalise the transfer if the Dublin III Regulation deadlines have been exceeded, thereby creating a "safe harbour".

The CJEU stressed, furthermore, that the decision of which state should be responsible for handling the asylum case should be initiated as soon as possible.<sup>107</sup> This does not necessarily signal the priority given to the speediness of the Dublin procedure, because it facilitates, *inter alia*, the search for family members of unaccompanied minors<sup>108</sup> and shortens the detention period. Regrettably, in *Mengesteab*, the CJEU did not address the

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<sup>103</sup> *C.K., H.F., A.S.* (n 14), paras 75 and 90.

<sup>104</sup> *Paposhvili v Belgium* App no 41738/10 (ECtHR 13 December 2016).

<sup>105</sup> *Mengesteab* (n 29) paras 46–48.

<sup>106</sup> *Ibid* para 53.

<sup>107</sup> *Ibid* para 80–83. Therefore, judges focused on different aspect than in *N.S.* (n 82) para 108.

<sup>108</sup> Jason Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017) 47–78.

need to ensure the best interests of the child, even though it is clearly established in the Charter and CEAS. It also did not indicate that deprivation of liberty should be as short as possible. This suggests that the Court still focuses on EU integration, only reluctantly referring to the coherence of protection of fundamental rights, thus contributing more to a "sinking ship" situation. Owing to these deficiencies, it is difficult to classify *Mengesteab* as contributing either to the creation of a "safe harbour" or facilitating a "sinking ship".

The Dublin III Regulation does not set up objective preconditions for the limitation of liberty. Instead, it refers to Directive 2013/33 and Article 6 CFREU. Directive 2013/33 sets a higher standard than the ECHR because the Convention does not require a test of the efficiency of less coercive measures and of the existence of a risk of fleeing.<sup>109</sup> Nevertheless, the ECtHR judgment in *Del Rio Prada v Spain*<sup>110</sup> was referred to by the CJEU in *Al Chodor*<sup>111</sup> to find that any limitation to the right to liberty and security must be provided for by general law. Such law must be of a certain quality, sufficiently accessible, precise and foreseeable in its application; a consistent administrative practice does not meet that standard.<sup>112</sup> This finding increases the rule of law, and *Al Chodor* thus contributes to the *ius commune europaeum* because the CJEU specified that limitations to freedoms enshrined in the Charter have to be precisely defined by law, including by EU secondary legislation which has direct effect. This clarification applies to the right to asylum, but also to other rights envisaged by the Charter.

As the competencies of the EU are growing, member states are increasingly often, as Article 51(1) of the Charter puts it, 'implementing Union law'. Therefore, more and more frequently countries will have to decide to what extent they can limit the rights guaranteed by the CFREU. Consequently, the likelihood that the Charter's standard will not be applied correctly by

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<sup>109</sup> Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salab Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor* EU:C:2016:865, paras 49–55; *Al Chodor* (n 25) para 37.

<sup>110</sup> *Del Río Prada v Spain* App no 42750/09 (ECtHR 21 October 2013).

<sup>111</sup> *Al Chodor* (n 25) para 35

<sup>112</sup> *Ibid*, para 38–45. An increase in guarantees regarding detention in Dublin procedures was noted by Sánchez (n 7) 112.

member states is increasing. Hence, *Al Chodor* (which refers to the standard of law which limits freedoms envisaged in the Charter) will most likely be cited in other future CJEU judgments, also those focusing on other EU policies. Finally, the efficiency test could also be 'a source of inspiration' for the ECtHR in its future decision as it has already been criticised for not applying this test.<sup>113</sup> *Al Chodor* therefore clearly establishes a "safe harbour".

Tensions between the efficiency of EU law and the rights of asylum seekers lay at the heart of the decision in *Amayry*. The Dublin III transfer is suspended if the applicant asks for a judicial review of the Dublin decision. If that request is submitted after several weeks in detention, the deprivation of liberty is continuous and its total length may exceed the six-week period, which is, 'in principle, sufficient'.<sup>114</sup> A contrary view would put states which have introduced an automatic suspending effect of an appeal in a less favourable situation than those which have not introduced such a measure. It would also sacrifice judicial protection to the speediness of the Dublin mechanism. Moreover, the Court of Justice stressed that a detention of two months may not be overly excessive, but a three to twelve-month long deprivation of liberty is disproportionate.<sup>115</sup> This clarification is an important contribution to the *ius commune europaeum* because EU law, in that respect, is more specific than the ECHR. Hence, *Amayry* increases the fairness and predictability of rules on the deprivation of liberty, thereby contributing to a "safe harbour". Regrettably, a need to guarantee an individual case assessment and the national courts' supervision of the detention was only referred to in the context of longer periods of detention.<sup>116</sup> Moreover, considerations regarding the link between the duration and objective of the deprivation of liberty are missing references to the principle of proportionality and the ECtHR judgments, thereby forming part of a

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<sup>113</sup> Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law Symposium: Part V: The Right to Belong: Citizenship and Human Rights' (2012) 19 *Indiana Journal of Global Legal Studies* 257, 282; Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 *European Journal of Migration and Law* 149, 176.

<sup>114</sup> *Amayry* (n 30) para 30.

<sup>115</sup> *Ibid* paras 45–47.

<sup>116</sup> *Ibid* paras 46–47.

"sinking ship".<sup>117</sup> Despite these drawbacks, however, *Amayry* can be categorised as establishing a "safe harbour".

## 2. *Combating Abuses of Asylum Procedures*

According to statistical data some asylum seekers misuse asylum procedures, for example by submitting unfounded and subsequent applications.<sup>118</sup> To combat an overuse of refugee procedures, states may be tempted to sacrifice the rights of asylum seekers, especially the right to judicial remedy as it prolongs refugee status determination procedures.

These constraints were addressed in *Tall*, in which the CJEU clarified that the right to judicial remedy also covers the right to contest 'a decision not to further examine a subsequent application', even if it is followed by a return decision.<sup>119</sup> Nevertheless, it would be disproportionate to oblige member states to fully re-examine cases when no new evidence or arguments were found in the preliminary examination of the renewed application. The decision in *Tall* can therefore be considered a helping hand to countries which struggle with the overuse of asylum systems, as they can refrain from re-examining renewed applications. It also ensures a fair balance between the right to judicial scrutiny and the efficiency of asylum procedures, because prior to the delivery of this judgment subsequent applications were processed in accelerated procedures in which the applicants' rights were limited.<sup>120</sup> Owing to these reasons, *Tall* can be classified as creating a "safe harbour".

Similar constraints were addressed in *M*. EU legislation guarantees the right to a hearing in subsidiary protection cases, only if national law stipulates that an application is analysed as a request for asylum and, if a refugee status is denied, as a request for a subsidiary protection.<sup>121</sup> Nevertheless, this right should also be provided when a single procedure is not implemented. In that context, EU law will not apply directly. Still, rights conferred by EU law have to be effectively protected by domestic legislation, as the member states will

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<sup>117</sup> Cf. *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 70.

<sup>118</sup> Eurostat (n 17).

<sup>119</sup> *Tall* (n 15) paras 44–45.

<sup>120</sup> Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Central European University Press 1999) 50.

<sup>121</sup> Article 14 read with Article 10(2) of Directive 2013/32.

clearly be acting within the scope of EU law when they implement, enforce, or interpret EU secondary legislation.<sup>122</sup> This explains why *M.* contributes to a common understanding of the concept of 'acting within the scope of EU law' which applies also to other EU policies. For these reasons, *M.* contributes to the creation of a "safe harbour".

The possibility of limiting the right to an interview in an appeal was confirmed in *Mousa Sacko*.<sup>123</sup> Nevertheless, this restriction must respect guarantees established in Articles 6(1) and 13 ECHR. An appeal court or tribunal 'must be able to review the merits of the reasons which led the competent administrative authority to find that the application for international protection was unfounded or made in bad faith'.<sup>124</sup> Due to a close link between first instance and appeal proceedings, applicants may be denied a hearing on appeal, if the 'information contained in the administrative file in the proceedings at first instance' is sufficient.<sup>125</sup> That view seems to balance the fairness of the asylum procedure with its speediness. It is also in line with a literal interpretation of Directive 2013/32, which does not guarantee access to an interview in an appeal procedure. At the same time, references to the ECHR's standard provide adequate guarantees of protection of the applicants' rights. As such, *Mousa Sacko* is also part of the establishment of a "safe harbour".

In *Daber Muse Ahmed*, the CJEU concluded that a decision on the inadmissibility of an asylum application should be issued to an applicant who had been granted subsidiary protection by another member state.<sup>126</sup> Hence, applicants should submit their asylum claims in the first secure country. Some scholars support such an interpretation,<sup>127</sup> whereas others claim that this limitation is not explicitly provided for by the Refugee Convention.<sup>128</sup> As such, clarifications from the CJEU have contributed to a *ius commune europaeum* and the establishment of a "safe harbour". However, they were not

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<sup>122</sup> Franklin (n 63) 152–154; Van Elsuwege (n 36) 199–200.

<sup>123</sup> *Moussa Sacko* (n 14) paras 36–39.

<sup>124</sup> *Ibid* para 36.

<sup>125</sup> *Ibid* para 46, and *M.* (n 12) para 54.

<sup>126</sup> *Ahmed* (n 27) paras 39–40.

<sup>127</sup> Agnès G Hurwitz (n 47) 47.

<sup>128</sup> Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630, 650.

sufficiently justified and lacked references to the Refugee Convention, the ECtHR's judgments, and the Charter, thereby contributing to a "sinking ship" scenario. *Daber Muse Ahmed* therefore cannot easily be classified either as establishing a "safe harbour" or contributing to a "sinking ship".

### 3. *Application of the 'Safe Country Concept'*

The Court of Justice has been alleged by member states of increasing the protection of fundamental rights beyond the wording of EU Treaty provisions by defining EU standards in areas which were deliberately not regulated by EU law-makers or in which EU legislation was insufficiently precise and clear.<sup>129</sup> In other words, states have been accusing the CJEU of excessively favouring the rights of individuals over the state's sovereignty. Nevertheless, it would be misleading to say that the Court has always opted for a *pro homine* interpretation of EU law.<sup>130</sup> Evidence for this can be found in cases focusing on, for example, the 'safe country concept'.<sup>131</sup>

In *Mirza*, the CJEU upheld the transfer of the applicant to the country in which his asylum claim would be presumed to be inadmissible, on the grounds that he had travelled via a safe country.<sup>132</sup> A contrary interpretation could introduce a new exception to the general rule. It could also encourage migrants to continue their journey without waiting for the asylum decision issued by the first safe country, which would overburden destination countries and be contrary to the foundations of the CEAS. This part of *Mirza* does not raise doubts regarding compliance with fundamental rights. The same cannot be said about the release of the transit country of its obligation to provide the sending country with extracts from national law concerning

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<sup>129</sup> Muir (n 66) 221-222. More in: Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945, and Karen J Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) 52 *International Organization* 121.

<sup>130</sup> Some scholars claim that this *pro homine* interpretation is at odds. Isiksel (n 90) 582-583.

<sup>131</sup> More on this concept in Lavenex (n 120); Claudia Engelmann, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990-2013)' (2014) 16 *European Journal of Migration and Law* 277.

<sup>132</sup> *Mirza* (n 16) para 63.

the concept of 'a safe country'.<sup>133</sup> The laws and practices of member states as regards this concept vary.<sup>134</sup> Nevertheless, the CJEU unquestionably favoured mutual trust over a duty to ensure that the Dublin transfer would not result in the automatic removal to a country which is presumed to be safe. This raises questions regarding *Mirza's* coherence with *M.S.S.*<sup>135</sup> As the concept of 'a safe country' is also applied by non-EU countries, *Mirza* may encourage them to favour unconditional mutual trust, thereby contributing to a "sinking ship" scenario.

*Jafari* is another example of a *pro integracione* judgment, as the CJEU concluded that if a country has tolerated the entry of an individual into its territory (also as a result of an avoidance of border controls), it could not escape Dublin responsibilities, because the Schengen Border Code, Directive 2001/55 and Article 78(3) TFEU, provide mechanisms which could mitigate the migration crisis.<sup>136</sup> Regrettably, the CJEU did not address the fact that these measures do not help transit countries to stop secondary movements of large numbers of asylum seekers efficiently. Therefore, *Jafari* neither ensured the *effet utile* of EU law, nor safeguarded satisfactory reception standards. It can thus be classified as contributing to a "sinking ship" scenario.

These deficiencies were addressed in *A.S.*, in which the CJEU extensively cited *Jafari*, but softened its line of interpretation. The transit country is responsible for processing asylum claims if this does not expose the applicants to a real risk of suffering inhuman or degrading treatment.<sup>137</sup> Regrettably, in *A.S.*, the Court did not specify whether such a risk should be identified *ad casum* or *in abstracto*. The CJEU complicated its answer to this question by citing in the same paragraph both an individualised risk and a risk existing in EU member states.<sup>138</sup> Hence, *A.S.* can also be considered as creating a "sinking ship" situation.

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<sup>133</sup> Ibid paras 57–63.

<sup>134</sup> Engelmann (n 131) 288–300.

<sup>135</sup> Battjes and Brouwer (n 94) 188.

<sup>136</sup> *Jafari* (n 16) paras 90–92.

<sup>137</sup> *A.S.* (n 28) para 41.

<sup>138</sup> Ibid.

## V. "SAFE HARBOUR" OR "SINKING SHIP"?

### *1. Functional Interpretation of EU Law in Asylum Cases*

Interpretation of EU law can be difficult due to differences in language versions of the EU legislative acts. A comparative analysis of the different language versions may also be insufficient.<sup>139</sup> Therefore, it is necessary to consider the context of EU law and the objectives pursued by the rules which a specific provision is part of.<sup>140</sup> Thus, the CJEU have repeatedly examined the objectives of the Dublin III Regulation<sup>141</sup> and the CEAS.<sup>142</sup>

In *Fransson*, EU fundamental rights were cited to give effect to EU rules, even though the EU legislation which was at the heart of this case left a certain level of discretion to the member states.<sup>143</sup> Some scholars supported this view and explained that 'the scope of EU law should be understood more broadly whenever this is a pre-condition for emphasising fundamental rights protection throughout the European Union'.<sup>144</sup> This approach should be applied especially 'when it presents even a partial connection with EU law'.<sup>145</sup> These opinions should be praised because the Charter has increased the visibility of fundamental rights in the EU.<sup>146</sup> Moreover, Article 51(1) of the Charter supports the CJEU in promoting fundamental rights,<sup>147</sup> making the Court co-responsible for building the *ius commune europaeum*. A broad understanding of a term 'within the scope of EU law' would therefore strengthen the EU integration process, thus establishing a "safe harbour".

However, a functional interpretation, which has already caused fundamental rights to spill over into areas which were not initially covered by EU law,<sup>148</sup> may cause concern among member states which would rather opt for slower

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<sup>139</sup> Cf. *Al Chodor* (n 25) para 21; Opinion of AG Øe in *Al Chodor* (n 109) paras 38–39.

<sup>140</sup> Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* EU:C:2013:862.

<sup>141</sup> *Ghezelbash* (n 9) para 57; *Jafari* (n 16) paras 83–85; *Mengesteab* (n 29) paras 73–74; *Amayry* (n 30) para 37.

<sup>142</sup> *K.* (n 15) paras 36 and 49.

<sup>143</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105.

<sup>144</sup> *Muir* (n 66) 228; *Schima* (n 86) 1108.

<sup>145</sup> *Ippolito* (n 75) 3.

<sup>146</sup> *Eeckhout* (n 129) 971.

<sup>147</sup> *Franklin* (n 63) 157.

<sup>148</sup> *Muir* (n 66) 237–238; *O'Neill* (n 64) 223.

EU integration. They may accuse the EU institutions of trying 'to claim competence which the Treaties did not confer on the EU',<sup>149</sup> especially as 'a purely functional power to lay down rules on human rights [in asylum policy] [...] may be most meaningful'.<sup>150</sup> Hence, a functional interpretation may hamper amendments to EU law.<sup>151</sup> Nevertheless, the CJEU should not avoid this interpretation, especially as 'the Charter project [...] may be understood as an attempt at limiting the CJEU[']s judicial activism'.<sup>152</sup>

## 2. *Limited Explanations to CJEU's Judgments*

To refrain from becoming involved in national disputes, the Court of Justice avoids giving concrete answers to preliminary questions and instead provides limited *rationes decidendi*.<sup>153</sup> Thus, it leaves 'the final balancing to the referring [national] court'.<sup>154</sup> However, this makes judgments abstract and difficult to implement.<sup>155</sup> This may explain why some preliminary questions are repeatedly referred to the CJEU.

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<sup>149</sup> Stephen Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: An Originalist Analysis' (2015) 11 *European Constitutional Law Review* 482, 489; Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015) 31; Van Elsuwege (n 36) 199.

<sup>150</sup> Eeckhout (n 129) 984.

<sup>151</sup> More in Piotr Sadowski, 'Wpływ Poszerzenia Kompetencji Trybunał Sprawiedliwości Unii Europejskiej na Rozwój Europejskiej Polityki Migracyjnej' in Piotr Sosnowski, Anita Garnuszek (ed), *Rola Trybunałów i Doktryny w Prawie Międzynarodowym* (WPiA UW, Interdyscyplinarne Koło Naukowe Dyplomacji i Prawa 2010) 213–214.

<sup>152</sup> Aidan O'Neill, 'The EU and Fundamental Rights – Part 2' (2011) 16 *Judicial Review* 374.

<sup>153</sup> Isiksel (n 90) 582. Cf. *Mirza* (n 16); *Daber Muse Ahmed* (n 27).

<sup>154</sup> Schima (n 86) 1126.

<sup>155</sup> Hélène Lambert, 'Transnational Law, Judges and Refugees in the European Union' in Hélène Lambert and Guy S Goodwin-Gill (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 8.

An example which supports this theory is *Ĵ.N.* This judgment develops the previous *Arslan* decision,<sup>156</sup> even though it is not explicitly cited in *Ĵ.N.* In *Arslan*, the CJEU had upheld the detention of an applicant who submitted one application for asylum during a return procedure. In *Ĵ.N.*, this interpretation was expanded to include repeated asylum claims. In both cases, detention served the 'purpose of expulsion', because 'an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made'.<sup>157</sup> The deprivation of liberty should be imposed only after assessing if 'individual conduct represents a serious threat to public policy, public security, or national security'.<sup>158</sup> This view has been expressed in a context of applications which are frequently rejected because they are submitted only to delay the return. The Court of Justice correctly concluded that the return procedure must be continued at the stage at which it was suspended by a submission of the asylum application.<sup>159</sup> It clarified the EU's interpretation of the term 'purpose of expulsion', ensuring that it was in line with the ECtHR's judgments. Thus, *Ĵ.N.* contributes to the creation of a "safe harbour". It is likely that the decision will be cited in subsequent judgments.

The avoidance of the Court of Justice to provide straightforward answers to preliminary questions can also be perceived as a confirmation of the view that 'the CJEU's main focus seems to be on ensuring the acceptability of its judgments for the national courts of the Member States'.<sup>160</sup> Examples supporting the latter statement can be found in *A.S.* and in paragraph 55 of *Jafari*. The CJEU stressed that the Dublin III Regulation applies when countries tolerated an entry by an individual, because EU law provides exceptional mechanisms which then apply.<sup>161</sup> However, this approach can be called a "sinking ship" as the inefficiency of those measures resulted in overburdening the countries in question.

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<sup>156</sup> Case C-534/11 *Mehmet Arslan v Policie ĀR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* EU:C:2013:343.

<sup>157</sup> *Ĵ.N.* (n 26) para 79.

<sup>158</sup> *Ibid* para 73.

<sup>159</sup> *Ibid* para 80.

<sup>160</sup> *Ippolito* (n 75) 38.

<sup>161</sup> *Jafari* (n 16) paras 97–99.

### 3. *Building an Ius Commune Europaeum?*

The CJEU is limited to interpret issues which have been brought by the national referring courts, which is a major challenge to developing a holistic perception of fundamental rights.<sup>162</sup> However, an internal referencing system (when the CJEU cites its own judgments), as evidenced in cases *M.*<sup>163</sup> and *A.S.*,<sup>164</sup> as well as cases which refer to *Gbezelbash*<sup>165</sup> and *Al Chodor*,<sup>166</sup> develop a comprehensive approach to fundamental rights in asylum policy. Moreover, the harmonisation clause (also known as a coherence clause),<sup>167</sup> which is provided for in Article 52(3) of the Charter, confirms that the ECHR defines a minimal standard of respect of fundamental rights. Thus, some scholars claim that it should be compulsory for the CJEU to refer to ECtHR judgments, because the ECtHR is the only body legally empowered to interpret the ECHR.<sup>168</sup> Nevertheless, others recall that the framers of the Charter did not intend to impose such an obligation on the Court of Justice.<sup>169</sup> The latter view is implicitly supported by the CJEU as it only very inconsistently cites the ECHR and the ECtHR's judgments.

This research also confirms that the Court of Justice only reluctantly refers to the Refugee Convention in its decisions.<sup>170</sup> The Refugee Convention forms an essential part of the argument only in the *Warendorf* decision, in which the Court of Justice held that Directive 2011/95 must be read 'in a manner consistent with the [...] [Refugee] Convention and the other relevant treaties referred to in Article 78(1) TFEU [and with] the Charter'.<sup>171</sup> Thus, the Refugee Convention applies to the right of freedom of movement, because

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<sup>162</sup> More in Lambert (n 155) 2.

<sup>163</sup> *M.* (n 12) paras 28–34 and 46–48.

<sup>164</sup> In *A.S.* (n 28) the CJEU cited *Jafari* (n 16) and *C.K., H.F., A.S.* (n 14).

<sup>165</sup> *Amayry* (n 30) para 65; *Al Chodor* (n 25) paras 33–35; *Karim* (n 9) paras 22–23; *Jafari* (n 16) para 41; *A.S.* (n 28) paras 24, 31–32; *Mengesteab* (n 29) paras 43–49, 58.

<sup>166</sup> Cf. *Al Chodor* (n 25). It was cited in *Amayry* (n 30) para 43 and in *A.S.* (n 28) para 41.

<sup>167</sup> *Engel* (n 71) 25.

<sup>168</sup> Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in PP Craig and Gráinne de Búrca (eds), *The evolution of EU law* (2nd edn, Oxford University Press 2011) 490.

<sup>169</sup> *Krommendijk* (n 7) 816; *Brittain* (n 149) 504.

<sup>170</sup> *Warendorf* (n 12) para 29; *Lounani* (n 12) para 42; *M.* (n 12) 22.

<sup>171</sup> *Warendorf* (n 12) para 29.

under EU law the rights and benefits of refugees and beneficiaries of subsidiary protection should be equal. These rights must also be exercised under the same conditions and restrictions as those provided for other foreigners who are legally resident in the member state which has granted them protection.

Moreover, in *Lounani*, the Court of Justice cited the 1945 Charter of the United Nations, the Refugee Convention, the resolutions of the United Nations Security Council, and addressed the facts of the case. It concluded that an exclusion clause may also be applied to applicants who were not convicted of widely interpreted terrorist offences, even if it has been established that neither the leaders of a terrorist group, nor their subordinates, have committed terrorist attacks.<sup>172</sup> *Lounani* is therefore an important contribution to the *ius commune europaeum*, owing to a well-reasoned *ratio decidendi* and a clearly established link between EU law and UN agreements. It also proves that the CJEU can refrain from highlighting the distinctiveness of EU law from international law.<sup>173</sup> Thus, *Lounani* can be called a "safe harbour".

In cases focusing on Articles 2, 4 and 6 of the Charter, the CJEU has referred to Articles 2, 3 and 5 of the ECHR and followed the ECtHR's judgments. In most CJEU judgments, the Refugee Convention and the ECHR were only a point of reference. Therefore, the interpretation of the Refugee Convention still remains primarily in the hands of national courts.<sup>174</sup> Hence, this research confirms other scholars' findings that the CJEU has 'limited itself to dealing with the EU law provisions in the sense of a self-contained regime',<sup>175</sup> although the term 'specialised regime' may be more adequate in this context. This interpretation is supported by Article 51(1) of the Charter.

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<sup>172</sup> *Lounani* (n 12) paras 74–77.

<sup>173</sup> A lack of that commodity was contested by Harpaz (n 45) 127 and Piotr Sadowski, 'Can Terrorists Be Denied Refugee Status?' (2015) *The Polish Quarterly of International Affairs* 91, 100–101.

<sup>174</sup> Lambert (n 155) 4; Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 *The European Journal of International Law* 963, 969.

<sup>175</sup> Bank (n 13) 213; Ippolito (n 75) 20.

Nevertheless, the ECHR has played an important role in CJEU judgments on the detention of asylum seekers.<sup>176</sup> Article 5 ECHR was referred to in order to indicate limitations which may be legitimately imposed on the exercise of the rights laid down in Article 6 CFREU.<sup>177</sup> The ECtHR's judgments were referred to in paragraph 38 of *Al Chodor*, thus creating a "safe harbour". However, in *K.*, the Court of Justice briefly explained that 'detention [...] [is not precluded], provided that such a measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness'.<sup>178</sup> This is an important clarification of the legitimacy of detention for the purpose of, *inter alia*, establishing identity and nationality – an issue essential for all member states struggling with the migration crisis. Regrettably, the CJEU has refrained from any further in-depth elaborations and missed the opportunity to develop a *ius commune europaeum*, contributing thereby to the "sinking ship" scenario.

In most of the cases analysed in this article, the CJEU did not provide extensive reasoning on the level of protection of rights provided for in the Charter. However, in paragraphs 30–33 of *M.*, the CJEU scrutinised the right to be heard and, in paragraph 32 of *Moussa Sacko*, it analysed the right to an effective legal remedy. Finally, in *C.K., H.F., A.S.*, the judges recalled the absolute nature of the right covered by Article 4 of the Charter and linked its application to human dignity (Article 1 of the Charter).

The EU has not established a comprehensive fundamental rights policy. Thus, the CJEU should continuously increase the visibility of these rights by emphasising their importance. It should therefore 'rely on the Strasbourg Regime and on the jurisprudence of the Strasbourg Court in a more explicit, coherent, systemic, integrative and comprehensive manner'.<sup>179</sup> This would strengthen the coherence between the CJEU and the ECtHR's judgments and, consequently, also their predictability. References to the CoE's regime would demonstrate the willingness of the Court of Justice to continue the judicial dialogue with the ECtHR.<sup>180</sup> This could be an incentive for the

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<sup>176</sup> *Al Chodor* (n 25) paras 37–39; *K.* (n 15) para 52.

<sup>177</sup> *Al Chodor* (n 25) para 39; *J.N.* (n 26) para 47.

<sup>178</sup> *K.* (n 15) para 52.

<sup>179</sup> Harpaz (n 45) 115.

<sup>180</sup> This dialogue has been facing challenges after the CJEU's *Opinion 2/13* (n 74).

ECtHR to also refer to the CJEU's judgments. Increased mutual respect between these two courts would furthermore strengthen a feeling of a co-responsibility for development of the *ius commune europaeum*.

Moreover, references to international law, in particular to developments in the UN and the CoE, could increase the legitimacy and authority of the CJEU. In that way, the Court of Justice could 'promote [...] [a] higher level of compliance with its verdicts'.<sup>181</sup> That could also increase the social acceptance of the CJEU's judgments, as it would 'assist [...] [the Court in] striking the delicate equilibrium between national, regional and universal protection of human rights within the EU'.<sup>182</sup> Thus, a well-justified *obiter dicta* explaining the relationship between international law and EU law could become the CJEU's contribution to the *ius commune europaeum*.

Regrettably, references like those outlined above were rarely made in the analysed CJEU judgments. *Al Chodor, K.*, and *Amayry* confirm previous findings that the CJEU has not developed a systematic methodology and consistent practice of referring to the ECtHR's jurisprudence.<sup>183</sup> Some scholars perceive this as an attempt by the Court of Justice to keep a monopoly over the interpretation of EU law.<sup>184</sup> This, however, seems a too far-reaching statement, as the CJEU is not explicitly obliged to cite the ECHR.

The CJEU is more likely to refer to the Charter than to the ECHR. References to Articles 4, 18, 34, 45, and - more frequently - Article 47 of the Charter have served 'as a "yardstick" for the protection of fundamental rights in the European Union [and the Court] was also (though not always) capable

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<sup>181</sup> Harpaz (n 45) 120.

<sup>182</sup> Ibid 117.

<sup>183</sup> Bruno de Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice' in P Popelier, Catherine van de Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 19; Krommendijk (n 7) 816-817.

<sup>184</sup> Kowalik-Bańczyk (n 85) 20; Philippe Sands, 'Reflections on International Judicialization' (2016) 27 *European Journal of International Law* 885, 893. Contrary view was expressed by Isiksel (n 90) 572.

of determining a sometimes "progressive" interpretation of human rights'.<sup>185</sup> This can be seen in the decisions in *Tall, K., Ghezelbash* and in *Moussa Sacko*. Rare references to the ECHR could also signal that the CJEU tries to avoid conflicts with the ECtHR, since the Court of Justice refers to ECHR only when the issue at stake has already been analysed by the ECtHR.<sup>186</sup> The CJEU could use this approach to its advantage. This would, however, require the Court of Justice to stress that it is primarily focused on the interpretation of the Charter, and that the ECHR is used simply as a minimum standard.

## VI. CONCLUSIONS

Unprecedented migratory pressure has put the CEAS to the test. It has also revealed loopholes in EU member states' national laws and practices. The decisions of the Court of Justice between 1 January 2015 and 15 September 2017 on the rights of asylum seekers have focused on the application of the Dublin III Regulation and Directive 2013/32. We should especially praise the Court's views on a need to ensure the efficiency of the right to judicial scrutiny, and on a tolerated entry of individuals. Reflections on the transit of foreigners who intended to submit their applications for asylum in another member state, and on the conflict between, on the one hand, the right to judicial scrutiny for a decision on a Dublin transfer and, on the other, the need to ensure a speedy execution of the Dublin procedure are also valuable clarifications of EU law. *Ghezelbash* has already been recognised as a milestone in the development of the rights of asylum seekers, but *Al Chodor* and *Jafari* will most likely become similar cornerstones of the EU asylum policy.

Nevertheless, the CJEU's deliberations on the fundamental rights of asylum seekers cannot unambiguously be classified as either creating a "safe harbour" or contributing to a "sinking ship". This is because, in some cases, the Court of Justice has supported the need to respect the fundamental rights of the

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<sup>185</sup> Ippolito (n 75) 20.

<sup>186</sup> Franklin (n 63) 159–160. This was a common approach of the Luxembourg Court. O'Neill (n 152) 386. A more sceptical view was presented by Christian Tomuschat, 'The Micro Level: Insights from Specific Policy Areas: The Relationship between EU Law and International Law in the Field of Human Rights' (2016) 35 Yearbook of European Law 604, 611.

applicants, whereas in others it relied on the functional approach to evade making a reference to these rights.

The analysis in this article confirms that the CJEU is gradually strengthening the protection of fundamental rights of asylum seekers in the EU. In *Ghezelbash*, the Court underlined this approach by stressing a limited use of reasons which can be invoked by asylum applicants to ask for a judicial scrutiny of the decisions on their transfer. That list of exceptional reasons was expanded in *Karim* and new exceptions were exemplified in *A.S.*, *Mengesteab*, *C.K.*, *H.F.*, *A.S.*, and *Al Chodor*. In *M.*, and *Mousa Sacko* the CJEU limited the right to a hearing, but ensured the respect for the fundamental rights of the applicants. Those explanations can unquestionably be called a "safe harbour".

References to the Charter in the CJEU judgments confirm that 'the entry into force of the Lisbon Treaty has marked a new era for European Union involvement in fundamental rights matters',<sup>187</sup> indicating that the Charter has contributed to establishing a "safe harbour" in the EU. On the other hand, the practice of making references to the CFREU has not yet become routine. They are more frequent in less controversial matters, but even in those cases they are not extensively elaborated on. Thus, the CJEU's judgments do not provide thorough clarifications regarding a correlation between the rights enshrined in the CFREU and those in the ECHR. This is a missed opportunity for the development of a *ius commune europaeum*, a project that would increase the coherence of human rights protection across Europe and, consequently, the efficiency of protection of those rights. Therefore, it is legitimate to say that in some cases the Court of Justice has sacrificed fundamental rights protection in order to deepen the EU integration process, thereby contributing to the "sinking ship" circumstances.

However, the CJEU has also gradually opened up a dialogue with the ECtHR by referring not only to the ECHR but also to the ECtHR case law, consequently creating a "safe harbour". This furthers the development of the *ius commune europaeum*. Nevertheless, the CJEU is far from having established a consistent methodology of citing the ECtHR's judgments, lending support to the "sinking ship" scenario.

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<sup>187</sup> Muir (n 66) 219.

# FROM CONSTITUTIONAL FREEDOMS TO THE POWER OF THE PLATFORMS: PROTECTING FUNDAMENTAL RIGHTS ONLINE IN THE ALGORITHMIC SOCIETY

Giovanni De Gregorio\*

*The rise of the algorithmic society has led to a paradigmatic shift where constitutional liberties granted to online platforms have turned into newfound powers. This situation is not only the result of new technological developments but also of the recognition of the online platforms' exclusive role in implementing an online public regulatory framework, as the cases of content management and the right to be forgotten online illustrate. Behind such delegated competences, online intermediaries can exercise sovereign powers over their online spaces through instruments based on private law and technology. In this scenario, the liberal constitutional approach adopted in relation to online platforms has played a crucial role in increasing the possibilities for these actors to affect individuals' fundamental rights. This work will address two potential solutions to limit the extent of such private powers from a (digital) constitutional law perspective. The first will focus on the introduction of new user rights whose aim is to regulate online platforms' decision-making processes and provide new legal remedies against such decisions. The insertion of new procedural rights in the online environment, including, for example, the obligation to explain the reasons behind platforms' decisions, would be appropriate in order to reduce the opacity of automated decision-making processes and foster human awareness in the algorithmic society. The second solution will question the doctrine of horizontal effect in order to establish a mechanism to enforce constitutional rights vis-à-vis online platforms that operate in a global framework.*

**Keywords:** constitutional law, online platforms, fundamental rights, algorithms, digital constitutionalism

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## I. INTRODUCTION

In recent decades, globalisation has challenged the boundaries of constitutional law by calling traditional legal categories into question.<sup>1</sup> The internet has played a pivotal role in this process.<sup>2</sup> On the one hand, this new protocol of communication has enabled the expanded exercise of individuals' fundamental rights such as freedom of expression.<sup>3</sup> On the other hand, unlike other ground-breaking channels of communication, the cross-border nature of the internet has weakened the power of constitutional states, not only in terms of the territorial application of sovereign powers vis-à-vis other states but also with regard to the protection of fundamental rights in the online environment. It should come as no surprise that, from a transnational constitutional perspective, one of the main concerns of states is the

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<sup>1</sup> Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 985.

<sup>2</sup> Oreste Pollicino and Marco Bassini, 'The Law of the Internet between Globalisation and Localization' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2016).

<sup>3</sup> Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1.

limitations placed on their powers to address global phenomena occurring outside their territory.<sup>4</sup>

The development of the internet has allowed new businesses to exploit the opportunities deriving from the use of a low-cost global communication technology for delivering services without any physical burden, regardless of their location. In particular, the predominant role of online hosting providers, in this work referred to as 'platforms', cannot be neglected.<sup>5</sup> Although the activities of such platforms are based on different business models (e.g. Facebook and Google),<sup>6</sup> they do not produce or create content but instead host and organise their users' content for profit. These platforms should therefore be considered as service providers rather than content providers.<sup>7</sup>

Furthermore, due to the development of new profiling technologies such as pattern recognition mechanisms, platforms can now increasingly rely on more pervasive control over information and data. These algorithm-based technologies allow private actors to process huge amounts of information,<sup>8</sup> with the result that they now know almost everything about individuals and their activities online, as the Cambridge Analytica scandal has indirectly shown.

Even more importantly, however, the processing of data has entrusted these actors with almost exclusive control over online content, transforming their

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<sup>4</sup> Eric C Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8(3) *International Journal of Constitutional Law* 636.

<sup>5</sup> Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1(2) *Social Media + Society* 1.

<sup>6</sup> Geoffrey G Parker, Marshall W Van Alstyne and Sangett P Choudary, *Platform Revolution – How networked markets are transforming the economy – and how to make them work for you* (WW Norton & Company Inc 2017); Nick Srnicek, 'The challenges of platform capitalism: Understanding the logic of a new business model' (2017) 23(4) *Juncture* 254.

<sup>7</sup> For a definition of online platforms, see Parker, Van Alstyne and Choudary (n 6).

<sup>8</sup> Solon Barocas, Sophie Hood and Malte Ziewitz, 'Governing Algorithms: A Provocation Piece' (2013) <<https://ssrn.com/abstract=2245322>> accessed 20 June 2018; Caryn Devins, Teppo Felin, Stuart Kauffman and Roger Koppl, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law and Public Policy* 357.

role into something more than a mere intermediary.<sup>9</sup> The 'information society', which developed at the end of the 1990s, has evolved into the 'algorithmic society' through the emergence of hosting providers such as YouTube and Facebook.<sup>10</sup>

This evolution calls into question the role of online platforms, moving the debate from a private to a public law perspective,<sup>11</sup> more specifically to a digital constitutional one.<sup>12</sup> Indeed, *inter alia*, modern constitutionalism aims to, on the one hand, protect fundamental rights, and, on the other hand, limit the emergence of powers outside constitutional control.<sup>13</sup> A new wave of (digital) constitutionalism is rising as a shield against the discretionary exercise of power by online platforms in the digital environment.

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<sup>9</sup> Jacqueline D Lipton, 'Law of the Intermediated Information Exchange' (2012) 64(5) *Florida Law Review* 1337. See also Georgios N Yannopoulos, 'The Immunity of Internet Intermediaries Reconsidered?' in Mariarosaria Taddeo and Luciano Floridi, *The Responsibilities of Online Service Providers* (Springer 2017).

<sup>10</sup> Jack Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *University of California Davis* 1151 1.

<sup>11</sup> Recently, scholars have approached the public role of online platforms from different perspectives. See e.g. Natali Helberger, Jo Pierson and Thomas Poell 'Governing Online Platforms: from Contested to Cooperative Responsibility' (2018) 34(1) *The Information Society* 1; Kate Klonick, 'The New Governors: the People, Rules, and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598; Orla Lynskey, 'Regulating Platform Power' (2017) LSE Legal Studies Working Paper 1 <[http://eprints.lse.ac.uk/73404/1/WPS2017-01\\_Lynskey.pdf](http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf)> accessed 1 September 2018; Julia E. Cohen, 'Law for the Platform Economy' (2017) 51 *UC Davis Law Review* 133.

<sup>12</sup> Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4(3) *Social Media + Society* 1-11; Dennis Redeker, Lex Gill and Urss Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (2018) 80 *International Communication Gazette* 302.

<sup>13</sup> Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2012) NYU School of Law, Public Law Research Paper No. 10-87 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1)> accessed 2 April 2019; Joseph H. H. Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (Cambridge University Press 2003).

Online platforms play a crucial role in addressing the challenges faced by the public enforcement of user rights.<sup>14</sup> The activity of content removal and the enforcement of the right to be forgotten online are only two examples illustrating how public actors have delegated regulatory tasks to private actors in order to ensure the effective implementation of public policies online.<sup>15</sup>

In fact, online platforms enjoy a broad margin of discretion in deciding how to implement such functions. Platforms are free to define and interpret users' fundamental rights according to their legal, economic and ethical framework due to the fact that there are no laws or regulations currently in place to prevent them from doing so. For instance, the decision to remove and consequently delete a video from YouTube is a clear interference with the uploading user's right to freedom of expression but could also preserve other fundamental rights such as their right to privacy. To some extent, this privately driven activity mirrors the exercise of judicial balancing and public enforcement carried out by public authorities.

However, this 'delegation' of responsibilities is not the only concern at stake. By virtue of the algorithmic architecture, online platforms can also perform autonomous quasi-public functions without the need to rely on the oversight of a public authority, such as for the enforcement of their Terms of Services (hereinafter 'ToS'). In both cases, online platforms can set the rules for enforcing and balancing users' fundamental rights by using automated decision-making processes without any constitutional safeguards.<sup>16</sup> This may be problematic from a constitutional standpoint as private actors are not bound to respect fundamental rights due to the lack of regulation translating

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<sup>14</sup> Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (16) 288 final.

<sup>15</sup> Niva Elkin-Koren and Eldar Haber, 'Governance by Proxy: Cyber Challenges to Civil Liberties' (2017) 82(1) Brooklyn Law Review 105.

<sup>16</sup> Regarding technological enforcement, see, in particular, Lawrence Lessig, *Code 2.0: Code and Other Laws of Cyberspace* (Basic Books 2006); Tarleton Gillespie, 'The Relevance of Algorithms' in Tarleton Gillespie, Pablo J Boczkowski and Kirsten A Foot, *Media Technologies: Essays on Communication, Materiality, and Society* (MIT Press 2014); Helen Nissenbaum, 'From Preemption to Circumvention: If Technology Regulates, Why Do We Need Regulation (and Vice Versa)?' (2011) 26 Berkeley Technology Law Journal 1367.

constitutional principle into binding norms. In other words, the enforcement and balancing of fundamental rights in the algorithmic society is increasingly privatised.

This paper attempts to go beyond the main description of the situation at stake by proposing solutions to limit the extent of private powers online from a constitutional perspective. In order to achieve this objective, the aim of this paper is twofold. Firstly, the paper highlights the reasons why the recognised economic freedoms of online platforms have turned into more extensive forms of private power. In particular, the main claim is that the liberal constitutional approach adopted by the EU and the US during a phase of technological acceleration has allowed online platforms to acquire new areas of power, particularly due to the development of algorithmic technologies. Secondly, having explained this shift from a private to a public law perspective, the paper proposes potential solutions to the problem of how to address the exercise of delegated and autonomous powers by private actors online. This is done by questioning the above-mentioned liberal constitutional approach in order to protect the fundamental rights of individuals against the behaviours of private actors operating in a global framework.

From a transnational constitutional standpoint, this paper analyses the liberal constitutional approach adopted by the EU and the US in regard to online platforms.<sup>17</sup> In the first part of the paper, the shift from the latter's economic freedoms to areas of power is described from an economic, legal (constitutional) and technological perspective. The second part of the paper analyses delegated powers by focusing on the examples of online content management and the right to be forgotten online. Regarding autonomous power, the role of ToS as an instrument of private policy online will be described. Finally, the paper addresses two – potential – cumulative solutions looking at the latest trends in the legal frameworks of the EU and the US. The

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<sup>17</sup> Transnational constitutional law emerges due to the influence of global actors such as online platforms on the application of fundamental rights across the globe. See Peer Zumbansen and Kinnari Bhatt 'Transnational Constitutional Law' (2018) King's College London Dickson Poon School of Law Legal Studies Research Paper Series 5 <<https://repub.eur.nl/pub/106209/TCL-paper-BhattZumb.pdf>> accessed 1 September 2018.

first proposal focuses on regulating online platforms' decision-making processes by introducing procedural safeguards. The second solution focuses on the horizontal effect doctrine and its limits. The aim is to define a mechanism to enforce constitutional rights vis-à-vis online platforms which formally are private actors, but increasingly pursue public tasks.

## II. FROM PUBLIC TO PRIVATE AS FROM ATOMS TO BITS: THE REASONS FOR A GOVERNANCE SHIFT

In the 1990s, Negroponte defined the increasing level of digitisation as the movement from atoms to bits.<sup>18</sup> In general, a bit is only the sum of 0 and 1 but, as in the case of atoms, the interrelations among bits can build increasingly complex structures.<sup>19</sup> Such a dichotomy demonstrates a clear shift from ownership of things to ownership of information.<sup>20</sup> The move from the industrial to the information society is mainly due to the move from rivalrousness to non-rivalrousness of traditional products and services.<sup>21</sup> Put another way, the bits exchanged through the internet have driven the shift from analogue to digital technologies by creating revolutionary models to market and deliver traditional products or services. The result is that the economy is no longer based only on the creation of value through production but through information.

In this hurricane of technological developments,<sup>22</sup> the overwhelming majority of constitutional states has adopted a liberal approach with respect to the regulation of the internet.<sup>23</sup> The rapid expansion of new digital technologies combined with the failure of public actors to promptly address

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<sup>18</sup> Nicholas Negroponte, *Being Digital* (Alfred A Knopf 1995).

<sup>19</sup> Bill Gates, *The Road Ahead* (Viking Press 1995).

<sup>20</sup> John P Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' in P Ludlow (ed), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (MIT Press 1999).

<sup>21</sup> Yochai Benkler, *The Wealth of Networks* (Yale University Press 2006); Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press 2013).

<sup>22</sup> Rosa Hartmut, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013).

<sup>23</sup> John G Palfrey, 'Four Phases of Internet Regulation' (2010) 77(3) *Social Research* 981.

these phenomena are two of the main arguments which have led the first 'cyberspace' libertarian scholars to consider the dimension of the cyberspace as being outside the scope of influence of public actors.<sup>24</sup> In particular, in his 'Declaration of Independence of Cyberspace',<sup>25</sup> Barlow maintains that the digital space is a new world separated from the atomic one. As highlighted by Johnson and Post at the end of the 1990s, '[c]yberspace has no territorially-based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location'.<sup>26</sup> In their view, the lack of physical boundaries lent support to the claim that cyberspace should constitute an independent jurisdiction separate from that of the state.<sup>27</sup>

The well-known debate about the extraterritorial extension of national jurisdiction as resulting from the case *Licra v. Yahoo France* in 2000 seemed to confirm the reasoning of the two US scholars.<sup>28</sup> Indeed, according to the theories of Johnson and Post, the only effective approach for cyberspace would be a system of free market regulation. By allowing users to choose the rules they find appropriate, new legal institutions would emerge from the digital realm.<sup>29</sup> A 'decentralised and emergent law', resulting from customary or collective private action, would form the basis for creating a democratic set of rules applicable to the digital community.<sup>30</sup> In other words, Johnson

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<sup>24</sup> Among the most relevant scholars, see John Perry Barlow, David Johnson, David Post and Tom W Bell.

<sup>25</sup> John P Barlow, 'A Declaration of Independence of the Cyberspace' (*Electronic Frontier Foundation*, 1996) <[www.eff.org/cyberspace-independence](http://www.eff.org/cyberspace-independence)> accessed 16 June 2018.

<sup>26</sup> David R Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1371.

<sup>27</sup> *Ibid* 1367.

<sup>28</sup> *Licra et UEÿF v. Yahoo Inc and Yahoo France* TGI Paris 22 May 2000. See Joel R Reidenberg, 'Yahoo and Democracy on the Internet' (2001/2002) 42 *Jurimetrics* 261; *Yahoo!, Inc. v La Ligue Contre Le Racisme* 169 F Supp 2d 1181 (ND Cal 2001). See Christine Duh, 'Yahoo Inc. v. LICRA' (2002) 17 *Berkeley Technology Law Journal* 359. Regarding the topic of Internet jurisdiction, see Uta Kohl, *Jurisdiction and the Internet* (Cambridge University Press 2007); Dan J B Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press 2017).

<sup>29</sup> Johnson and Post (n 26).

<sup>30</sup> David R Johnson and David Post, 'And How Shall the Net be Governed?' in Brian Kahin and James Keller (eds), *Coordinating the Internet* (MIT Press 1997).

and Post's proposal represents a bottom-up approach: rather than relying on traditional public law-making power to set the rules of cyberspace, every single digital community should be capable of participating in the creation of the new rules governing their own digital world.<sup>31</sup>

However, this scenario is not reality today. Instead of a democratic decentralised society, the potentialities of the internet have created an oligopoly of private entities who both control information and determine how people exchange it.<sup>32</sup> As such, the platform-based regulation of the internet has prevailed over the community-based model.<sup>33</sup>

In the past, public actors traditionally exercised control over the information marketplace through different systems such as public registers of data and ownership of the media. In fact, in some cases, the present news media industry continues to be subject to forms of public control even in those states that recognise a high level of freedom for businesses in conducting economic activities.<sup>34</sup> Because they were the only entities able to exploit the power to gather and store data and information about people from different sources, the monopoly on knowledge was a prerogative of public actors.

In the case of the internet, however, the extension of such public control over information has not been complete for at least three reasons. First, unlike the

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<sup>31</sup> The criticism to the democratic development of a set of rules related to the digital space comes from the absence of a unique community in the digital environment. See Cass Sunstein, *Republic.com 2.0* (Princeton University Press 2009). From another perspective, according to Reed, this element was the 'Cyberspace fallacy'. Reed recognised that, although the interpretation of the digital space by the Cyberlibertarian doctrine is not completely wrong, the weak point depends on the physical substance of the individual that acts in the digital environment, which is located in one precise jurisdiction. See Chris Reed, *Internet Law: Text and Materials* (Cambridge University Press 2007) 174-175.

<sup>32</sup> Robin Mansell and Michele Javary, 'Emerging Internet Oligopolies: A Political Economy Analysis' in Arthur S Miller, Warren J Samuels (eds), *An Institutional Approach to Public Utilities Regulation* (Michigan State University Press 2002); Alex Moazed and Nicholas L Johnson, *Modern Monopolies: What It Takes to Dominate the 21<sup>st</sup> Century Economy* (St Martin's Press 2016).

<sup>33</sup> Orly Lobel, 'The Law of the Platforms' (2016) 101 *Minnesota Law Review* 87.

<sup>34</sup> Simeon Djankov, Caralee Mcliesh, Tatiana Nenova and Andrei Shleifer, 'Who Owns the Media?' (2003) 45 *Journal of Law and Economics* 341.

control over traditional channels of communication bound by scarce resources, the internet offers a quasi-unlimited space, increasing the complexities in monitoring its boundaries and decreasing the need to ensure media pluralism through regulations.<sup>35</sup>

Second, whilst traditional channels of communication are located in a specific territory without the possibility to easily reach the global community, the cross-border nature of the internet has made it difficult for constitutional states to extend their sovereign powers over phenomena occurring outside their territory. In other words, although states are considered the only legitimate authorities to implement binding norms and enforce them, this idea of exclusive control is strongly challenged at the international level where states cannot exercise their sovereign powers externally.<sup>36</sup>

Even more importantly, the marginalisation of constitutional states is also the result of complex internet governance structures, based on the mutual influence of different stakeholders at the international level.<sup>37</sup> Although states have maintained the ability to rely on remedies of last resort such as

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<sup>35</sup> See, however, Robin Mansell, 'New Media Competition and Access: The Scarcity-Abundance Dialectic' 1999 1(2) *New Media and Society* 155.

<sup>36</sup> The above-mentioned US case *Yahoo v Licra* (n 28) has shown the challenges raised by judicial orders with extraterritorial scope. Another example is the *Equustek* case in which the Canadian Supreme Court ordered Google to remove links from its global search engine. According to the Supreme Court: '[t]he interlocutory injunction in this case is necessary to prevent the irreparable harm [to Equustek] that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation'. See *Google v Equustek Solutions* [2017] 1 SCR 824. Regarding the issue of unilateralism see Yochai Benkler, 'Internet Regulation: A Case Study in the Problem of Unilateralism' (2000) 11 *European Journal of International Law* 171.

<sup>37</sup> Regarding the debate on Internet governance and the role of ICANN, see Lucia De Nardis, *The Global War for Internet Governance* (Yale University Press 2014); Milton Mueller, *Networks and States: The Global Politics of Internet Governance* (The MIT Press 2010); Jeanette Hoffman, Christian Katzenbach and Kirsten Gollatz, 'Between coordination and regulation: Finding the governance in Internet governance' (2017) 19(9) *New Media & Society* 1406.

Internet shutdowns,<sup>38</sup> the multilevel and decentralised governance of the internet has restricted the power of constitutional states to exercise their sovereignty. In the future, the development of new privately-developed technologies such as Blockchain and artificial intelligence could make this scenario still more complex. Decentralisation would disintermediate and delegate public functions to machines and distributed ledger technologies developed by private actors.<sup>39</sup>

However, such considerations are not sufficient to explain why some governments have followed another path imposing their sovereign powers over online activities within their territory. It is necessary to bear in mind that not all public actors have chosen the same free-market approach concerning the internet. Particularly in countries where forms of surveillance and control over information are diffused, like China and the Arab states,<sup>40</sup> the internet has been subject to public controls leading to the blocking of some online services or the monitoring of data.<sup>41</sup> This possibility seems to confirm the paternalistic theories of those scholars who have criticised the libertarian approach.<sup>42</sup> In particular, according to Lessig, governments can impose their control over the internet through four modalities of regulation based on law, social rules, economic and network architecture.<sup>43</sup> The last of these mechanisms constitutes the most effective way to regulate the internet since the regulator has the power to set the rules of the game online by

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<sup>38</sup> Justin Clark et al., *The Shifting Landscape of Global Internet Censorship*, (2017) Berkman Klein Center for Internet & Society Research Publication <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33084425>> accessed 4 December 2018; Ronald Deibert et al., *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press 2008).

<sup>39</sup> Regarding the role of distributed ledger technology and Blockchain, see, in particular, Primavera De Filippi and Aaron Wright, *Blockchain and the Law* (Harvard University Press 2018).

<sup>40</sup> Barney Warf, 'Geographies of Global Internet Censorship' (2011) 76 *GeoJournal* 1.

<sup>41</sup> Palfrey (n 23); Anupam Chander and Uyen P Le, 'Data Nationalism' (2015) 64(3) *Emory Law Journal* 677.

<sup>42</sup> Jack Goldsmith, 'Against Cyberanarchy' (1998) 65 *The University of Chicago Law Review* 1199; Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press 2006).

<sup>43</sup> Lessig (n 16).

shaping the network structure.<sup>44</sup> In the case of China, the adoption of the 'Great Firewall' is one of the most evident examples of how states can express their sovereign powers over the internet by regulating the network's architectural dimension.<sup>45</sup>

It is possible to observe that this approach has been adopted particularly by those states whose authoritative regimes are not bound by constitutional limits.<sup>46</sup> Put another way, the more authoritarian the state, the more it would be able to regulate the internet and other digital technologies. Indeed, in such cases, internet censorship is merely a political decision to protect a general national interest prevailing over any other fundamental right or conflicting interest with the regime.

In the opposite scenario, constitutional states need to consider the potential impact of regulatory burdens on fundamental rights. Here, the role of constitutional law clearly emerges. Unlike authoritarian regimes, where the level of fundamental rights protection could be absent or low, in constitutional states the need to respect fundamental rights and economic freedoms of businesses has allowed private actors to enjoy broad margins of autonomy. Looking at platforms from an EU constitutional standpoint, such entities are private actors. As a result, they can rely on their freedom to conduct business as recognised by the Charter of Fundamental Rights of the European Union (the 'Charter') together with the EU fundamental freedoms,

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<sup>44</sup> Francesca Musiani, 'Network Architecture as Internet Governance' (2013) 2(4) Internet Policy Review <<https://policyreview.info/node/208/pdf>> accessed 20 June 2018.

<sup>45</sup> Jonathan Zittrain and Benjamin Edelman, 'Empirical Analysis of Internet Filtering in China' (2003) Harvard Law School Public Law Research Paper No. 62.

<sup>46</sup> Justin Clark, Robert Faris, Ryan Morrison-Westphal, Helmi Noman, Casey Tilton and Jonathan Zittrain, 'The Shifting Landscape of Global Internet Censorship' (2017) Berkman Klein Center for Internet & Society Research Publication <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33084425>> accessed 15 October 2018; Ronald Deibert, Hohn Palfrey, Raphael Rohozinsky, Jonathan Zittrain and Janice Gross Stein, *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press 2008).

especially, the freedom to provide services as set out in the Treaties.<sup>47</sup> From a US constitutional perspective, platforms rely on a different constitutional basis to perform their business, in particular their freedom of speech as recognised by the First Amendment.<sup>48</sup> In both cases, platforms enjoy a 'constitutional safe area' whose boundaries can be restricted only by the prominence of other fundamental rights.

These economic and constitutional considerations are not sufficient to explain how the liberal approach to private actors in the online dimension has led to a transformation of their liberties into power. In this *laissez-faire* scenario, data and information have started to be collected globally by private actors through the possibilities derived from new digital technologies, firstly, by the internet and, subsequently, by the development of automated technologies.

Whereas in the information society bits have allowed private actors to gather information and develop their business, today algorithms allow such actors to process it by extracting value from huge amounts of data (referred to as 'Big Data'). Since data and information constitute the new non-rival and non-fungible oil of the algorithmic society,<sup>49</sup> their processing has led to an increase in the power of some private actors in the digital age where the monopoly over knowledge does not belong exclusively to public actors but also to some private businesses.<sup>50</sup>

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<sup>47</sup> Charter art 16 and TFEU arts 56-62. Charter of Fundamental Rights of the European Union [2012] OJ C326/12. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/12.

<sup>48</sup> US Constitution, First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

<sup>49</sup> 'The World's Most Valuable Resource Is No Longer Oil But Data' *The Economist* (6 May 2017) <[www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data](http://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data)> accessed 28 May 2018. See, also, Michele Loi and Paul-Olivier Dehaye, 'If Data Is The New Oil, When Is The Extraction of Value From Data Unjust?' (2017) 7(2) *Philosophy and Public Issues* 137.

<sup>50</sup> This phenomenon can be described by applying the theory of the 'Nodes and Grades' theorised by Murray. According to such theory, some entities in the network can influence the structure of the cyberspace more than others and this

Online platforms can be defined as gatekeepers who control the flow of information.<sup>51</sup> The possibility to autonomously set the rules according to which data flows and is processed leads to an increase in the discretion of private actors.<sup>52</sup> From a transnational constitutional perspective, this phenomenon can be described as the rise of a civil constitution outside institutionalised politics. According to Teubner, the constitution of a global society cannot result from a unitary and institutionalised effort but emerges from the constitutionalisation of autonomous subsystems of that global society.<sup>53</sup>

This complex framework of new challenges has contributed to marginalising those public actors who have delegated some of their tasks to online platforms instead of imposing their sovereign powers in order to avoid the expansion of new private powers. This shift of power can be interpreted not only as the consequence of economic and technical forces but also as the result of the decreasing influence of constitutional states in the field of internet governance. In particular, the choice to delegate public functions to online platforms is linked to the opportunity to rely on entities whose services are based on the workings of the online environment. Private conglomerates like Alphabet or Facebook enjoy more resources compared to public actors, especially due to their involvement in managing other public interests such as health and education. Indeed, platforms run their business activities by virtue of the internet, which is the channel through which their services operate.

These observations illustrate only some of the developments that have allowed private actors to expand their regulatory influence over the internet.

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peculiarity transforms some actors in the regulators of the cyberspace. See Andrew Murray, 'Nodes and Gravity in Virtual Space' (2011) 5(2) *Legisprudence* 195.

<sup>51</sup> Emily B Laidlaw, 'A Framework for Identifying Internet Information Gatekeepers, in *International Review of Law*' (2012) 24(3) *Internet and Technology* 263; Jonhatan A Zittrain, 'History of Online Gatekeeping' (2006) 19(2) *Harvard Journal of Law and Technology* 253; Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal governance' (2005) 30 *Australian Journal of Legal Philosophy* 30.

<sup>52</sup> Yochai Benkler, 'Degrees of Freedom Dimension and Power' (2016) 145 *Daedalus* 18.

<sup>53</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford University Press 2012).

This is why some authors have referred to this phenomenon as the rise of the law of the platforms.<sup>54</sup> In order to understand this situation from a constitutional perspective, the next sections will address the exercise of delegated and autonomous powers by online platforms.

### III. DELEGATED EXERCISE OF QUASI-PUBLIC POWERS ONLINE

Having explained the main economic, technological and constitutional development which led to the shift of power on the internet from public actors to private ones, it is now time to examine the delegation of public functions to online platforms.

More than fifteen years ago, scholars already began to label this phenomenon the 'invisible handshake' according to which public actors would rely on private actors online to pursue their aims.<sup>55</sup> Among such scholars, Reidenberg has defined a set of modalities to ensure the enforcement of legal rules online.<sup>56</sup> In particular, Reidenberg has described three types of enforcement: network intermediaries,<sup>57</sup> network engineering and technological instruments.<sup>58</sup>

Regarding the first approach, Reidenberg has explained how public actors can rely on online platforms in order to ensure the enforcement of public policies online. Due to the diffused nature of the cyberspace, states do not possess the resources to pursue each wrongdoer acting in the digital environment. Examples in this field are peer-to-peer and torrent mechanisms which demonstrate the complexities required to investigate, prosecute and sanction millions of infringers every day. In such situations, online providers

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<sup>54</sup> Luca Belli, Pedro A Francisco and Nicolo Zingales, 'Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police' in Luca Belli and Nicolo Zingales (eds), *How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio 2017).

<sup>55</sup> Micheal D Birnhack and Niva Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) 8 *Virginia Journal of Law & Technology* 1.

<sup>56</sup> Joel R Reidenberg, 'States and Internet enforcement' (2004) 1 *University of Ottawa Law & Techonology Journal* 213.

<sup>57</sup> *Ibid* 222.

<sup>58</sup> *Ibid* 225.

can function as 'gateways points' (or intermediaries) to identify and block illicit behaviours acting directly on the network structure. According to Reidenberg, the architecture of the cyberspace prescribes its rules constituting the basis of the digital regulation.<sup>59</sup> In this way, this approach allows governments to regain control over the internet using platforms as proxies in order to reaffirm their national sovereignty online.

In the next subsections, the cases of online content management and the right to be forgotten online will provide two examples of how public actors have relied on online platforms as proxies in order to ensure the enforcement of public policy online.

### *1. Online Content Management*

The first example of such delegation is seen in the implicitly recognised role of online platforms in managing online content hosted in their digital spaces. At the end of the last century, by virtue of their 'passive' function, these actors were treated as mere intermediaries of products and services. Both the US and EU approach to online service providers' liability are clear examples. The Communications Decency Act,<sup>60</sup> together with the Digital Millennium Copyright Act<sup>61</sup> and the e-Commerce Directive,<sup>62</sup> have introduced a special regime of exceptions to the liability of online intermediaries, acknowledging, *in abstracto*, their non-involvement in the creation of content.<sup>63</sup>

This allocation of public functions technically consists in imposing obligations to online intermediaries to remove online content once they become aware of its illicit nature ('notice and takedown'). As already mentioned, public actors have generally considered platforms neither

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<sup>59</sup> Joel R Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1997-1998) 76 *Texas Law Review* 553.

<sup>60</sup> Communications Decency Act, 47 U.S.C. § 230(c)(1) [1996].

<sup>61</sup> Digital Millennium Copyright Act, 17 U.S. Code § 512.

<sup>62</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.

<sup>63</sup> Andrej Savin, *European Internet Law* (Edward Elgar Publishing 2017); Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers* (Springer 2017).

accountable nor responsible for transmitted or hosted contents (i.e. safe harbour), provided that platforms are unaware of the presence of illicit content in their digital rooms.<sup>64</sup> On the one hand, the liability of online intermediaries in relation to third-party content has always been limited, in order to foster the development of information society services, thus protecting freedom of economic initiative (or free speech in the US framework). On the other hand, this special regime aims to avoid that entities which do not have effective control over third-party hosted content are considered liable for hosting them.<sup>65</sup>

Lacking any procedural obligations, this system of liability has entrusted online intermediaries with the power to autonomously decide whether to remove or block content based on the risk to be held liable. Since online platforms are privately run, these actors would try to avoid the risks to be sanctioned for non-compliance with this duty by removing or blocking even content whose illicit nature is not fully evident.<sup>66</sup> Indeed, platforms will likely focus on minimising this economic risk rather than adopting a fundamental rights-based approach.

As a result, such publicly delegated activity implies, *inter alia*, that platforms can take decisions affecting fundamental rights and, in particular, freedom of expression and privacy.<sup>67</sup> At the same time, this responsibility would also imply that they should implement effective and appropriate safeguards in

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<sup>64</sup> E-Commerce Directive (n 62), arts 12-14; Communications Decency Act (n 60), Section 230.

<sup>65</sup> For the recent developments in the Digital Single Market, see Giancarlo Frosio, 'The Death of "No Monitoring Obligations": A Story of Untameable Monsters' (2017) 8(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 212; Giovanni De Gregorio, 'Expression on Platforms: Freedom of Expression and ISP Liability in the Digital Single Market' (2018) 3(2) *European Competition and Regulatory Law Review* 203.

<sup>66</sup> Regarding the risk of collateral censorship, see *Delfi As v Estonia* 62 EHRR 6; *MTE v Hungary* App no 22947/2013 (ECtHR 2 February 2016).

<sup>67</sup> Orla Lynskey, 'Regulation by Platforms: The Impact on Fundamental Rights' in Luca Belli and Nicolo Zingales (eds), *Platform Regulations How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio, 2017); James Grimmelman, 'Speech Engines' (2014) 98 *Minnesota Law Review* 868.

order to ensure the prevention of unintended removal of lawful content and respect the fundamental rights in question.<sup>68</sup>

However, this is not the current situation. Several drawbacks need to be addressed. Firstly, a private actor such as an online platform should not autonomously decide whether content is illicit in the absence of a legal review or a judicial order. If platforms can determine the lawfulness of online content, they are then exercising a function which traditionally belongs to the public authority.<sup>69</sup> When users notify the hosting providers about the presence of alleged illicit content, such actors need to assess the lawfulness of the content in question in order to remove it promptly. Lacking any regulation of this process, online platforms are free to assess whether a certain online content is unlawful and make a decision regarding its consequent removal or block. As a result, this anti-system has led platforms to acquire an increasing influence on the balancing of users' fundamental rights. For example, the choice to remove or block defamatory content or hate speech videos interferes with the right to freedom of expression of the users. At the same time, the decision about the need to protect other conflicting rights such as the protection of minors or human dignity is left to the decision of private actors without any public guarantee.

More importantly, however, the primary issue is the lack of any transparent procedure or redress mechanisms allowing users to appeal against a decision regarding the removal or blocking of the signalled content. For example, platforms are neither obliged to explain the reasoning of the removal or blocking of online content, nor to provide remedies against their decisions. Here, the impact of the platforms' powers on fundamental rights is evident. Lacking any regulation, users cannot rely on any legal remedy in order to complain against a violation of their fundamental rights such as freedom of expression or privacy.

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<sup>68</sup> E-Commerce Directive (n 62) Recital 42.

<sup>69</sup> Recently, the Court of Appeal of Rome has clarified that, in order to consider an online content as defamatory, the platform is obliged to act only according a public order of removal. See Court of Appeal of Rome n 1065/2018. M Bellezza, 'Responsabilità ISP: chi decide se un contenuto è diffamatorio?' (2018) 2 *Rivista di diritto dei media* 377.

## 2. *The Right to Be Forgotten Online*

Similar considerations also apply to the enforcement of the right to be forgotten in the online dimension.<sup>70</sup> Before the adoption of the General Data Protection Regulation (hereinafter 'GDPR')<sup>71</sup> the Court of Justice of the European Union ('CJEU') recognised for the first time at the EU level the right to be forgotten online in the landmark decision *Google Spain* in 2014.<sup>72</sup>

Even without analysing the well-known facts of the case, one can observe that such a decision finds its roots in the necessity to ensure the protection of the fundamental right to privacy in the digital dimension.<sup>73</sup> Indeed, the Court has brought out a new right to be forgotten as a part of the right to privacy in the digital world. In order to achieve this aim, the CJEU, as a public actor, by interpreting the framework of fundamental rights in the EU together with the dispositions of directive 95/46,<sup>74</sup> has *de facto* entrusted private actors (in this case, search engines) to delist online content without removing information on the motion of the individual concerned. Indeed, the search engine is the only actor which can ensure the enforcement of the right to be forgotten online since it can manage those online spaces where the link to be 'forgotten' are published. Hence, the data subject has the right to ask the search engine to obtain the erasure of the link to the information relating to him or her from a list of web results based on his or her name.

It is possible to argue that the interpretation of the CJEU has unveiled a legal basis for data subjects to enforce their rights against private actors. The EU

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<sup>70</sup> Oreste Pollicino and Marco Bassini, 'Reconciling Right to be Forgotten and Freedom of Information in the Digital Age. Past and Future of Personal Data Protection in the EU' (2014) 2 *Diritto pubblico comparato ed europeo* 641; Frank Pasquale, 'Reforming the Law of Reputation' (2015) 47 *Loyola University of Chicago Law Journal* 515.

<sup>71</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC OJ L 119/1, art 17.

<sup>72</sup> Case 131/12 *Google Spain v AEPD* EU:C:2014:317.

<sup>73</sup> *Ibid* 84.

<sup>74</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 31-50.

Court has recognised a right to be forgotten online through the interpretation of directive 95/46, applying horizontally (*de facto*) Articles 7 and 8 of the Charter.<sup>75</sup>

However, unlike in the case of content management, both the CJEU and the Article 29 Working Party have identified some criteria according to which platforms shall assess the request of the data subject.<sup>76</sup> Thus, online platforms do not enjoy an unlimited discretion in balancing data subjects' rights. Moreover, the recent European codification of the right to erasure has contributed to clarifying the criteria to apply the right to delist. These considerations are also relevant for the US environment since the extraterritorial effect of the GDPR will affect US entities.<sup>77</sup> In particular, according to Article 17 GDPR, the data subject has the right to obtain from the controller, without undue delay, the erasure of personal data concerning him or her according to specific grounds,<sup>78</sup> and excluding such rights in other cases,<sup>79</sup> for example when the processing is necessary for exercising the right to freedom of expression and information.

Although the data subject can rely on a legal remedy by lodging a complaint to the public authority in order to have their rights protected, the autonomy of platforms continues to remain a relevant concern. When addressing users' requests for delisting, the balancing of fundamental rights is left to the assessment of the online platforms. Even in this case, the issue is similar to that of the notice and takedown mechanism since search engines enjoy a broad margin of discretion when balancing users' fundamental rights and enforcing their decisions. For example, search engines will continue to decide whether the exception relating to the freedom to impart information applies

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<sup>75</sup> Charter (n 47). According to art 7: 'Everyone has the right to respect for his or her private and family life, home and communications'. According to art 8(1): '1. Everyone has the right to the protection of personal data concerning him or her'.

<sup>76</sup> Working Party 29, 'Working Party on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12', <[http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf)> accessed 25 June 2018.

<sup>77</sup> GDPR (n 71) art 3(2).

<sup>78</sup> Ibid art 17(1).

<sup>79</sup> Ibid art 17(3).

in a specific case. Moreover, search engines conduct the delisting process relying only on their internal assessments based on the facts provided by the data subject and, according to EU law, they are not obliged to provide any reason for their decision or redress mechanism.

Therefore, the online enforcement of the right to be forgotten is another example of the discretionary power that platforms exercise when balancing and enforcing fundamental rights online. As in the case of content management, the impossibility of assessing how private actors decide a specific case due to the low level of transparency of platforms' decision-making processes is one of the main issues at stake.

#### **IV. AUTONOMOUS EXERCISE OF QUASI-PUBLIC POWERS ONLINE: TOWARDS A PRIVATE CONSTITUTIONAL ORDER OR AN ABSOLUTE REGIME?**

These two examples provide a picture of the aforementioned libertarian theories,<sup>80</sup> if only as a romantic memory belonging to an internet which has radically changed its form.

The delegation of public functions is not the only challenging phenomenon for the traditional boundaries of constitutional law. The general autonomy afforded to online platforms in performing their activities has made this situation more complex. The technological evolution together with a liberal constitutional approach has allowed online platforms not only to become proxies of public actors but also to rely on their private autonomy in order to set their own rules of procedures. This is particularly clear by focusing on ToS which are contracts according to which platforms unilaterally establish what users can do in their online rooms and how their data is processed.<sup>81</sup>

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<sup>80</sup> See Section II of this work.

<sup>81</sup> Luca Belli and Jamila Venturini, 'Private Ordering and the Rise of Terms of Service as Cyber-Regulation' (2016) 5(4) *Internet Policy Review* <<https://policyreview.info/node/441/pdf>> accessed 16 June 2018; Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2018) *International Review of Law, Computers & Technology* <<https://www.tandf-online.com/doi/abs/10.1080/13600869.2018.1475898>> accessed 1 December 2018.

From a private law perspective, these agreements can be considered mere boilerplate contracts, where clauses are based on standard contractual terms that are usually included in other agreements.<sup>82</sup> Users cannot exercise any negotiation power but, as an adhering party, may only decide whether or not to accept pre-established conditions.

At first glance, the significance of this situation under a public (or rather constitutional) law perspective may not be evident, both since boilerplate contracts are very common even in the offline world and since online platforms' ToS do not seem to differ from the traditional contractual model.<sup>83</sup>

For the average user, however, there is one main difference which deserves to be taken seriously into consideration. Unlike the parties to a contract in the atomic world, online platforms can enforce contractual clauses provided for in the ToS directly without the need to rely on a public mechanism such as a judicial order. For instance, the removal or blocking of online content is performed directly by online platforms without the involvement of any public body ordering the infringing party to fulfil the related contractual obligations. Here, the code assumes the function of the law.<sup>84</sup> By relying on the network architecture as a modality of regulation, platforms can directly enforce their rights through a quasi-executive function. This private enforcement is the result of an asymmetrical technological position in respect of users. Platforms are the rulers of their digital space since they can manage the activities which occur within their boundaries. Such power, which is not delegated by public authorities but results from the network architecture itself, is of special concern from a constitutional perspective

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<sup>82</sup> Woodrow Hartzog, 'Website Design as Contract' (2011) 60(6) *American University Law Review* 1635.

<sup>83</sup> On the role of private law in governing the internet see Peter Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14(1) *Indiana Journal of Global Legal Studies* 191; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press 2015).

<sup>84</sup> Lessig (n 16).

since it represents a form of self-regulation and disintermediation of the role of public actors in ensuring the enforcement of fundamental rights online.<sup>85</sup>

Such functionality is usually defined, but not limited, by the platform's ToS, which, similarly to the law, can be considered as the legal basis according to which platforms exercise their powers. By defining the criteria according to which decisions will be enforced, as well as the procedural and technical tools underpinning their ToS, platforms establish the rules governing their community, exercising a sort of quasi-legislative power. Although this autonomy is limited in some areas, for example data protection,<sup>86</sup> the global application of their services and the lack of any legal rules regulating online content management leave a significant amount of political discretion in the hands of platforms when drafting their ToS.<sup>87</sup>

Behind these normative and executive functions, the two above-mentioned examples have shown how platforms can perform a function which is similar to that of the judiciary, namely the balancing of fundamental rights. When receiving a notice from users asking for content removal or the delisting of online links, in order to render a decision, platforms assess which fundamental rights or interest should prevail in the case at issue. Taking as an example the alleged defamatory content signalled by a user, the platform

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<sup>85</sup> Gunther Teubner, 'Societal Constitutionalism: Alternative to State-Centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004); Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *The Modern Law Review* 24.

<sup>86</sup> The case of data protection is one of the main limits to the autonomy of online platforms in setting their community rules. In particular, the adoption of the broad territorial scope of application of the GDPR will also bind those non-resident platforms targeting residents in the EU. See GDPR (n 71) art 3(2). See Paul De Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory' (2016) 6(3) *International Data Privacy Law* 230.

<sup>87</sup> The situation is different as long as privacy policies are concerned. E.g. in the EU framework, the GDPR establishes a comprehensive framework of obligations in the field of data processing. In particular, GDPR (n 71) art 12 provides specific rules regarding the information about the processing which should be made available to the data subjects.

could freely decide whether such content is being lawfully protected by right to inform or not.

One of the main issues to be addressed is how platforms exercise legal safeguards. Whilst it may be possible to refer to the law of the notice provider or that established in the ToS, it is not possible to concretely assess the level of compliance with the chosen legal standard due to the lack of transparency in the online platforms' decision-making.<sup>88</sup>

Furthermore, adding another layer of complexity – and concern – is the possibility that these activities can be executed by using automated decision-making technologies. On the one hand, algorithms can be considered as technical instruments facilitating a platform's various functionalities, such as the organisation of online content. But, on the other hand, such technologies can constitute technical self-executing rules, obviating even the need for a human executive or judicial function. In particular, the primary concern is the low level of decision-making transparency<sup>89</sup> which strongly affect users' fundamental rights.<sup>90</sup>

This technological asymmetry constitutes the true difference from traditional boilerplates contracts. Their enforcement is strictly dependent on the role of the public authority in ensuring the respect of the rights and obligations which the parties have agreed upon. This could be considered

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<sup>88</sup> Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 *University of Colorado Law Review* 1263.

<sup>89</sup> Algorithms raise serious concerns in terms of transparency due to the unpredictable automated results which limit the diffusion of online contents whose unlawfulness is detected by machines. See Frank Pasquale, *The Black Box Society. The Secret Algorithms that Control Money and Information* (Harvard University Press 2015); Matteo Turilli and Luciano Floridi, 'The Ethics of Information Transparency' (2009) 11(2) *Ethics and Information Technology* 105; Tal Zarsky, 'Transparent Predictions' (2013) 4 *University of Illinois Law Review* 1507.

<sup>90</sup> The outcomes provided by algorithms are based on pre-accepted parameters without the possibility to balance the different fundamental rights at stake. Regarding the impact on freedom of expression see Stuart M Benjamin, 'Algorithms and Speech' (2013) 161 *University of Pennsylvania Law Review* 1445; Bart Custers, Toon Calders, Bart Schermer, and Tal Zarsky (eds), *Discrimination and Privacy in the Information Society* (Springer 2013).

another clue to the exercise of quasi-public power by online platforms. Users, as citizens, are usually subject to the exercise of a legitimate authority which, in the framework of the internet, seems to be exercised by the platforms through instruments of private law mixed with technology (the law of the platforms).

Within this framework, if a quasi-public role of platforms in the online environment is recognised, it would be possible to argue that the power exercised by online platforms mirrors, to some extent, the same discretion which an absolute power can exercise over its community. From a constitutional perspective, it could be observed that, in the case of platforms, the three traditional public powers are centralised; the definition of the rules to assess online contents, the decisions over the users' complaints and their enforcement are practised by the platform without any separation of powers.

Constitutionalism has primarily been based on the idea of the separation of powers, as theorised by Charles De Secondat.<sup>91</sup> In contrast, here it is possible to highlight the rise of a private order whose characteristics do not mirror constitutional provisions but is more similar to an absolute power. In particular, this phenomenon cannot be defined as the rise of a 'private constitutional order' since neither the separation of powers nor the protection of rights are granted in this system.<sup>92</sup> Rather, the above-mentioned framework has shown how the absence of the separation of powers in platform activities is one of the main reasons that explain the strong impact of their activities on users' fundamental rights. Indeed, the internet has allowed the concentration of private powers in the hands of online platforms which exercise them with absolute discretion. This has led some authors to refer to this phenomenon as a return to feudalism,<sup>93</sup> or to the *ancien régime*.<sup>94</sup>

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<sup>91</sup> Charles De Secondat, *L'esprit des lois* (Barrillot & fils 1748).

<sup>92</sup> The French Declaration of the Rights of Man and Citizens art 16 states: 'Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution'. Declaration of the Right of Man and the Citizen, 26 August 1789.

<sup>93</sup> James Grimmelman, 'Virtual World Feudalism' (2009) 118 Yale Law Journal Pocket Part 126.

<sup>94</sup> Belli and Venturini (n 81).

## V. SOLUTIONS AND PERSPECTIVES

The challenges analysed above question not only the role of public actors in regulating the internet, but, more importantly, the possibility that constitutional law is able to limit private powers whose nature is more global than local.<sup>95</sup> In other words, this scenario allows looking at online platforms not only as private actors whose activity is based on their freedom to conduct business or their right to free speech but, in some cases, as entities capable of exercising powers which mirror those of public actors.

In this scenario, constitutional states are faced with a paradoxical situation. On the one hand, in order not to hinder the aforementioned liberties, public actors are encouraged to recognise a high degree of economic freedom allowing private actors to exercise their autonomy. However, as already explained, this approach has led online platforms to enjoy broad margins of autonomy through instruments based on technology and private law. Unlike public actors, platforms are neither obliged to pursue public interest, nor to protect fundamental rights. On the other hand, even if constitutional states intend to establish a system of pervasive public control over online content, the overregulation of private activities could increase the risk of public and private censorship.<sup>96</sup>

Hence, the two main questions are whether and how constitutional states can react to this paradoxical situation and what the role of constitutional law should be when developing a new framework.

Liberal constitutionalism has traditionally been characterised by a vertical dichotomy where private actors claim the respect of their rights vis-à-vis public actors. Historically, the first bills of rights were designed to restrict the power of governments rather than interfere with the private sphere; in fact, at that time, it was thought that the private sphere needed to be protected from the state through the recognition of rights and liberties. As a result, constitutional provisions have been interpreted as either providing a limit to the coercive power of the state or as a source of positive obligation resting on

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<sup>95</sup> Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69(3) *The Modern Law Review* 327.

<sup>96</sup> Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17 *Theoretical Inquiries in Law* 487.

public actors in order to protect constitutional rights and liberties. From this point of view, the threat to individual rights does not result from the exercise of freedoms by private actors but rather emanates from the state, the only entity which can exercise legitimate power.

Global dynamics and, in particular, the internet have affected this paradigm, allowing private actors to gather power in new and significant areas. In light of this, it is perhaps no coincidence that the number of situations where transnational corporations have violated fundamental rights is on the rise.<sup>97</sup> However, the transnational character of businesses such as online platforms and their inherently private nature should not justify the violation of fundamental rights.

At this point, the distinction between public and private actors acquires a specific relevance. Since only public actors are bound to respect constitutional provisions, two solutions must be considered: on the one hand, the establishment of new safeguards in order to provide legal instruments to reduce the transparency gap and protect users' fundamental rights. On the other hand, the vertical scope of fundamental rights needs to be questioned in order to understand whether it is fit-for-purpose in a globalised world.<sup>98</sup>

Hence, it is time to address the situation by proposing solutions to this complex issue. The following subsections will provide at least two cumulative proposals. The first perspective addresses the regulation of online platforms' decision-making processes. This proposal is a response to the lack of transparency in platforms' decision-making when they perform (delegated or autonomous) quasi-public functions. In contrast, the second proposal questions the vertical structure of constitutionalism and its impact on the protection of fundamental rights in the online environment.

#### *1. The Old-School Solution: Nudging Online Platforms to Behave as Public Actors*

The first solution aims to transcend the dichotomy between public and private actors by proposing new rights for users. The narrative regarding the need to protect platforms' economic freedom (or the right to free speech in

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<sup>97</sup> Teubner (n 95).

<sup>98</sup> Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution' (2017) 3(1) Italian Law Journal 193.

the US framework) and, consequently, the development of digital services, could be disruptive to users' fundamental rights. Moreover, it could also encourage private actors to acquire even more power due to the opportunities offered by new digital technologies.

In order to reduce such risks, it would be necessary for public actors to become more proactive; although legal remedies are obvious instruments for users to enforce their rights vis-à-vis online platforms, it is necessary to focus not only on reactive measures such as legal remedies but also on proactive ones. The current level of threat to fundamental rights should be decisive for public actors when deciding whether or not to regulate private activities and, consequently, restrict their freedom to conduct business or their right to free speech. As the European Court of Human Rights has explained, there is a positive obligation for public actors to limit risks to violation of fundamental rights.<sup>99</sup> This approach is thus based on the following consideration: if there is a serious risk for fundamental rights, public actors should act within the scope of their role to limit this interference. By regulating private activities, public actors can require online platforms to comply with transparency obligations.

The lack of transparency in algorithmic decision-making processes increases the asymmetry between users and platforms.<sup>100</sup> In order to address this issue, public actors could recognise new user rights whose proactive aim should be to reduce the transparency gap in the decision-making processes of online platforms. The possibility for users to obtain justification for automated outcomes or have access to redress mechanisms would mitigate this situation.<sup>101</sup> Put differently, these new rights would allow users to rely on a

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<sup>99</sup> See, for example, *Von Hannover v Germany* 40 EHRR 1. See Lech Garlicki, 'Relations between Private Actors and the European Convention on Human Rights' in Andra Sajo and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005); Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zao RV* 691.

<sup>100</sup> See Section IV of this work.

<sup>101</sup> Kate Crawford and Jason Schultz, 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms' (2014) 55 *Boston College Law Review* 93; Danielle K Citron and Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 *Washington Law Review* 1; Maayan

'human translation' of the algorithmic process. Such steps are particularly important since they allow users not only to rely on proactive and reactive measures but also to enhance the human dimension in the algorithmic process. This would help create the basis for the development of a sustainable digital humanism rather than an opaque techno-authoritarianism.

At least within the EU framework, the Commission has recently attempted to follow a soft-law path to adopt this approach. The idea is to nudge platforms to make their activities more transparent without merely focusing on recognising the right of the user to claim damages for violations of their fundamental rights. In particular, the Commission has recently issued, *inter alia*, a Code of conduct on countering illegal hate speech online,<sup>102</sup> as well as a Communication on tackling illegal content online,<sup>103</sup> then implemented in the Recommendation on measures to effectively tackle illegal content online.<sup>104</sup> Taken together, the Code and the Recommendation can be considered a first attempt by the EU to reduce its marginalisation vis-à-vis online platforms by providing a form of 'administrativisation' of platforms' activities. This choice could be interpreted as an acknowledgement of, on the one hand, the role of online platforms in ensuring the enforcement of public

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Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473. In the EU framework, in the field of personal data, the GDPR (n 71) has introduced a similar mechanism which, however, does not apply to the process of removal obligations. See, in particular, Bryce Goodman and Set Flaxman, 'European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"' (2017) 38 *AI Magazine* 50; Andrew D Selbst and Julia Powles, 'Meaningful information and the right to explanation' (2017) 7 *International Data Privacy Law* 233; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76.

<sup>102</sup> Code of conduct on countering illegal hate speech online, available at <[http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54300](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300)> accessed on 1 September 2018.

<sup>103</sup> Commission, 'Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms' COM (16) 555 final.

<sup>104</sup> Commission, 'Recommendation of 1 March 2018 on measures to effectively tackle illegal content online' C (18) 1177 final.

policies online and, on the other hand, the need to ensure that, by virtue of their role, such private actors should act responsibly.<sup>105</sup>

According to the Recommendation, platforms are first of all encouraged to publish, in a clear, easily understandable and sufficiently detailed way, the criteria according to which they manage the removal or blocking of access to online contents.<sup>106</sup> This is a clear example of how the Commission is trying to improve the degree of predictability concerning content removal procedures in order to reduce platforms' discretion vis-à-vis users' requests.

Further, the Recommendation provides guidelines regarding the notice and takedown process. Although there are some exceptions,<sup>107</sup> once the notice provider has submitted its request to the hosting provider, the latter should send a confirmation of receipt and inform the former of its decision about the content at stake.<sup>108</sup> Moreover, in the case of removal or blocking of access to the signalled online content, platforms should, without undue delay, inform users about the decision, setting out its reasoning as well as the possibility to contest the decision.<sup>109</sup> This system seems to mirror an administrative process whereby the notice provider, as a citizen, can rely on a specific (public) procedure according to which the hosting provider, as a public body, complies with established rules.

In turn, the content provider should have the possibility to contest the decision by submitting a 'counter-notice' within a 'reasonable period of time'. If the counter-notice provides grounds for considering whether the noticed content was lawful, the hosting provider should review its decision. The provider should also make access to such content available without undue delay and without prejudice to the possibility to define and enforce its ToS.<sup>110</sup> In this process, there could also be the ex-post opposition of the content provider, as a plaintiff/defendant. This latter process seems to mirror a

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<sup>105</sup> Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (16) 288 final.

<sup>106</sup> C (18) 1177 final (n 104) para 16.

<sup>107</sup> Ibid para 10.

<sup>108</sup> Ibid para 8.

<sup>109</sup> Ibid para 9.

<sup>110</sup> Ibid paras 9-13.

judicial environment where the notice provider, as a plaintiff, lodges a complaint, and the hosting provider, as a judge, upholds it.

Notwithstanding the fact that the Commission has made strides towards a more transparent EU online environment,<sup>111</sup> this soft-law approach has potential drawbacks. In particular, since this approach does not establish mandatory obligations, online platforms can freely choose whether to implement such procedures. Even more importantly, the Commission has not limited the discretion of platforms' decision-making processes, leaving a margin of autonomy similar to that enjoyed by a judge or an administrative authority.

By comparison, since June 2017, Germany has taken a different approach. A new German law, known as NetzDG,<sup>112</sup> was adopted obliging online platforms with more than two million users in Germany to take actions in order to handle illegal content hosted by them within 24 hours after having received a notice.<sup>113</sup>

Compared to the changes that has taken place in the EU framework, it is interesting to observe that the US framework remains much the same. The constitutional predominance of the First Amendment in the US continues to shield these actors from any form of regulation. However, it is worth mentioning the Stop Enabling Sex Traffickers Act (SESTA) and the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), also known

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<sup>111</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services' COM (18) 238 final.

<sup>112</sup> *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (NetzDG) [2018]. For some comments, see Holger Lutz and Sebastian Schwidessen, 'The New German Hate Speech Law – Introduction and Frequently Asked Questions' (2017) 18(4) *Computer Law Review International* 103; Aleksandra Kuczerawy, 'Phantom Safeguards? Analysis of the German law on Hate Speech NetzDG' (Ku Leven Blog, 30 November 2017) <[www.law.kuleuven.be/citip/blog/phantom-safeguards-analysis-of-the-german-law-on-hate-speech-netzdg](http://www.law.kuleuven.be/citip/blog/phantom-safeguards-analysis-of-the-german-law-on-hate-speech-netzdg)> accessed 20 June 2018.

<sup>113</sup> For content whose illicit nature is not so evident, such German law provisions provide companies with an extra time of seven days to decide whether to eliminate the online content at issue.

as SESTA-FOSTA.<sup>114</sup> Both measures affect the exception established by Section 230 of the Communications Decency Act according to which '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.<sup>115</sup> It would be possible to consider this approach as a step towards stricter content management within the US framework.<sup>116</sup>

These developments represent the first indication towards the end of the marginalisation of public actors in the online sphere.<sup>117</sup> Indeed, obliging online platforms to comply with specific procedures – and recognising the possibility for users to rely on clear rules in order to enforce their rights – would constitute the expression of the sovereign powers of the state over online actors.

Within this framework, platforms will continue to enjoy a broad margin of discretion. However, the promotion of transparency in decision-making processes and available redress mechanisms could guarantee more safeguards for users than in the current scenario. On the one hand, the proposed measures mitigate the impact on fundamental rights resulting from the absence of any accountability. On the other hand, they do not burden platforms with *ex-ante* monitoring obligations.

## 2. *The Innovative Solution: Enforcement of Fundamental Rights*

Whereas proposing a regulatory solution to the above-mentioned challenges is a largely traditional approach, the following perspective is more innovative and thus needs further analysis. It would be based on a reconsideration of the

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<sup>114</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017 H R 1865.

<sup>115</sup> Communications Decency Act (n 60).

<sup>116</sup> See, also, the Senate bill named 'Algorithmic Accountability Act 2019'. The aim is to require 'the Federal Trade Commission to require entities that use, store, or share personal information to conduct automated decision system impact assessments and data protection impact assessments'.

<sup>117</sup> Among the efforts at the international level, see the Manila principles on intermediary liability <<https://www.manilaprinciples.org/principles>> accessed 3 November 2018; see also the Santa Clara principles on Transparency & Content Moderation <[http://globalnetpolicy.org/wp-content/uploads/2018/05/Santa-Clara-Principles\\_t.pdf](http://globalnetpolicy.org/wp-content/uploads/2018/05/Santa-Clara-Principles_t.pdf)> accessed 3 November 2018.

traditional boundaries of constitutional law and the distinction between private and public actors in exercising public tasks online.

This approach questions the horizontal effect doctrine of fundamental rights regarding the role of online platforms exercising private powers on the internet. As Tushnet has sustained, if the doctrine of horizontal effect is considered 'as a response to the threat to liberty posed by concentrated private power, the solution is to require that all private actors conform to the norms applicable to governmental actors'.<sup>118</sup>

Traditionally, constitutional rules apply vertically only to public actors in order to ensure the liberty and autonomy of private actors. On the contrary, the horizontal doctrine extends constitutional obligations also to private actors. Unlike the liberal spirit of the vertical approach, this theory rejects a rigid separation between public and private actors in constitutional law. Put another way, the horizontal doctrine is concerned with the issue of whether and to what extent constitutional rights can have impact on the relationships between private actors. As observed by Gardbaum, '[t]hese alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal)'.<sup>119</sup>

The horizontal effect can result from constitutional obligations on private parties to respect fundamental rights (i.e. direct effect) or the application of fundamental rights through judicial interpretation (i.e. indirect effect). Only in the first case would a private entity have the right to rely directly on constitutional provisions to claim the violation of its rights vis-à-vis other private parties.

Within the US framework, the Supreme Court has usually applied the vertical approach where the application of the horizontal approach – known in the US as the 'state action doctrine' – would be considered the

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<sup>118</sup> Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' 1(1) *International Journal of Constitutional Law* 79.

<sup>119</sup> Stephen Gardbaum, 'The Horizontal Effect of Constitutional Rights' (2003) 102 *Michigan Law Review* 388.

exception.<sup>120</sup> Consequently, US constitutional rights lack horizontal effect not only *in abstracto* but also in relation to online platforms.<sup>121</sup> Only the prohibition on slavery as provided for by the Thirteenth Amendment applies to public and private actors.<sup>122</sup>

The horizontal extension of fundamental rights is less rigid in the EU environment. One possible explanation for such differences could be the impact of social democratic openness of Member States. According to Tushnet, states which provide social welfare rights in their constitutions more readily apply the horizontal effect doctrine.<sup>123</sup>

Within the EU framework, the debate about the horizontal direct effect has not only focused on national constitutions but also on the EU dimension itself.<sup>124</sup> Traditionally, the effects of the rights recognised directly under EU primary law have been capable of horizontal application. In particular, the CJEU has applied both the horizontal effect and the positive obligation doctrines regarding the four fundamental freedoms. In the *Van Gend En Loos*

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<sup>120</sup> See, in particular, *Shelley v Kraemer*, 334 US 1 (1948). Mark Tushnet, 'Shelley v. Kraemer and Theories of Equality' (1988) 33 New York Law School Law Review 383; Gardbaum (n 119); Mattias Kumm and Victor Ferreres Comella, 'What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect' in Andras Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005).

<sup>121</sup> Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms' (2018) 32 Berkeley Technology Law Journal 988. Regarding this topic, see also Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 University of Colorado Law Review 1263.

<sup>122</sup> Gardbaum (n 119) 388; George Rutherglen, 'State Action, Private Action, and the Thirteenth Amendment' (2008) 24(6) Virginia Law Review 1367.

<sup>123</sup> Tushnet (n 118).

<sup>124</sup> Regarding the horizontal effect of fundamental and human rights in the EU framework, see Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (European Law Publishing 2016); Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38(3) European Law Review 479; Elena Gualco and Luisa Lourenço "'Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect' (2016) 1(2) European Papers 643.

case, the CJEU stated: 'Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.<sup>125</sup> This definition remained unclear until the Court specified its meaning in the *Walrave* case<sup>126</sup> which, together with *Bosman*<sup>127</sup> and *Deliege*,<sup>128</sup> can be considered the first acknowledgement of the horizontal effect of the EU fundamental freedoms.<sup>129</sup>

However, if this is the case in the context of the EU Treaties, the same judicial activism cannot be seen in the framework of the Charter.<sup>130</sup> Since its entry into legally binding force with the adoption of the Treaty of Lisbon, the Charter has been recognised as having 'the same legal value as the Treaties'.<sup>131</sup> The difference in approach can be explained by looking at Article 51(1) of the Charter which seems to narrow the scope of application of the Charter to EU institutions and to the Member States in their implementation EU law.<sup>132</sup> Although this strict literal interpretation seems to narrow the possibilities of

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<sup>125</sup> Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1.

<sup>126</sup> Case 36/74 *Walrave v Association Union cycliste internationale* EU:C:1974:140.

<sup>127</sup> Case C-415/93 *Union royale belge des sociétés de football association v Bosman* EU:C:1995:463.

<sup>128</sup> Case C-51/96 *Deliege v Ligue francophone de judo et disciplines associées* EU:C:2000:199.

<sup>129</sup> Among the other decisions, see Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* EU:C:2000:296; Case C-103/08 *Gottwald v Bezirkshauptmannschaft Bregenz* EU:C:2009:597; Case C-223/09 *Dijkman v Belgische Staat* EU:C:2010:397.

<sup>130</sup> Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* EU:C:2014:2; Case C-555/07 *Küçükdeveci v Swedex* EU:C:2010:21; Case C-144/04 *Mangold v. Rüdiger Helm* EU:C:2005:709.

<sup>131</sup> Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 6(1). Grainne De Burca and Jo B Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 *Columbia Journal of European Law* 355.

<sup>132</sup> Charter (n 47). According to art 51: '1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective power. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

horizontally enforcing fundamental rights, it is possible to argue that, under the EU constitutional perspective, a more extensive approach to horizontality is less problematic.<sup>133</sup> The horizontal application of fundamental rights could constitute a limitation to the expansion of power by social subsystems.<sup>134</sup> According to Teubner, the emergence of transnational regimes shows the limits of constitutions as means of regulation of the whole society since social sub-systems develop their own constitutional norms.<sup>135</sup> Therefore, the horizontal effects doctrine can be considered a limit to the self-constitutionalising of private regulations by reconducting them to the constitutional framework. As a result, if the horizontal effect of fundamental rights is purely considered a problem of political power within society, an approach which excludes its application would hinder the teleological approach behind the horizontal doctrine, the aim of which is to protect individuals against unreasonable violation of their fundamental rights vis-à-vis private actors.

However, it is necessary to highlight at least one of the main drawbacks of the general horizontal application of fundamental rights. Applying extensively this doctrine could lead to negative effects for legal certainty. Indeed, every private conflict can virtually be represented as a clash between different fundamental rights. The result could lead to the extension of constitutional obligations to every private relationship, thus hindering any possibility to foresee the consequences of a specific action or omission. Fundamental rights can be applied horizontally only *ex post* by courts through the balancing of the rights in question. This process could increase the degree of uncertainty as well as judicial activism, with evident consequences for the separation of powers and the rule of law.

These concerns show the complexities of relying on the horizontal effect doctrine to generally limit the emergence of private powers. The above-

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<sup>133</sup> Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *European Law Journal* 657.

<sup>134</sup> Teubner (n 53).

<sup>135</sup> Gunther Teubner 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' (2013) 4 *Transnational Legal Theory* 44.

mentioned issue can be overcome by limiting the application of this approach to only those cases where private actors exercise their autonomy as a result of a delegation of public functions. In particular, in the examples of platforms, although these entities cannot be considered public actors *per se*, their delegated public functions can be considered equal to those of public actors. In other words, it would be possible to envisage a definition of public law which is not fixed but it is able to extend to those cases where public actors entrust private actors with quasi-public functions through a delegation of powers. Indeed, users have legitimate expectation that if a public actor has entrusted a private one to pursue a public policy, it is necessary that those private actors be held accountable for any violation of users' fundamental rights. This approach would give users the right to bring claims related to violations of, for example, freedom of expression directly against platforms as entities performing delegated public functions. This mechanism would allow fundamental rights to become horizontally effective against the conduct or omission of actors evading their responsibilities and shielding their activities under a narrative based on freedoms and liberties.<sup>136</sup>

Furthermore, where platforms exercise autonomous powers, a broad extension of the horizontal effect doctrine would transform these entities into public actors by default. For this reason, public actors could regulate online platforms' autonomy through due process obligations and accountability mechanisms in order not to leave the development of the digital environment in the hands of actors who enjoy significant power without pursuing any public interest.

## VI. CONCLUSION: DIGITAL HUMANISM V. TECHNO-AUTHORITARIANISM

Infinite scalability, non-rivalrousness and intangibility are the main characteristics of the information found in digital spaces. Although technology has played a crucial part in the evolution of the role of private actors in the online environment, at this point it cannot be denied that public actors have also facilitated the emergence of platforms' powers. Indeed, the

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<sup>136</sup> Rebecca Tushnet, 'Power Without Responsibility: Intermediaries and the First Amendment' (2008) 76 *The George Washington Law Review* 986.

US and EU's choice to adopt a liberal constitutional approach to the internet, especially to online platforms, is one of the main causes of the shift from economic freedoms to new forms of private powers. Both the liberal constitutional approach and the possibilities coming from new digital technologies have resulted in entrusting private actors with regulatory powers over the internet.

Moreover, the adoption of a liberal approach was not the only 'mistake' made by public actors. Constitutional states have entrusted online platforms with public policy tasks without clearly defining the boundaries of such activities. Such a transfer of responsibilities resulted from the recognition of platforms' role in establishing an effective online public regulatory framework. Although the delegation to private actors of public tasks should not be considered a negative phenomenon *per se*, how these actors exercise their 'private sovereignty' should be regulated carefully since at present, unlike public actors in constitutional states, they are not obliged to respect fundamental rights. Whereas constitutional law has traditionally been developed to limit governmental powers, new private forces have emerged threatening the protection of fundamental rights.

Both the case of content management and the right to be forgotten have shown this dynamic. In the first case, both the EU and the US have entrusted platforms with online content management functions. Due to the lack of any limitation, platforms are neither obliged to adopt a fundamental-rights based approach nor provide reasons for their decision or redress mechanisms. This leaves users without any legal remedy against the violation of their fundamental rights such as privacy or freedom of expression. The same consideration applies in the case of the right to be forgotten where, although the GDPR has established more criteria to assess the implementation of this right, search engines can autonomously decide how to assess and deal with users' requests.

Furthermore, delegated powers are not the only source of concern. Behind delegated powers, platforms can exercise sovereign powers over their online spaces through instruments based on private law and technology. The possibility to balance and enforce users' fundamental rights through automated systems is an example of an absolute regime resulting from a mix of constitutional freedoms and technology.

In this scenario, the regulation of platforms' decision-making processes, as well as the horizontal effect doctrine of fundamental rights, can play a crucial role. Regarding the first solution, the establishment of new rights in the online environment such as, for example, the obligation to explain the reasons behind platforms' decision-making, would increase transparency. The same considerations apply to procedural rights such as the obligation to send a notice to the user when a decision of removal or blocking can affect his or her fundamental rights. Moreover, the second solution would lead to recognising the public role of platforms when exercising functions that mirror those of public authorities. The result of this extension would give users the possibility to directly enforce their fundamental rights vis-à-vis private actors.

Through a process of digital humanism, these new rights would aim to enhance the human awareness in the algorithmic process. Importantly, this would reduce the threat of techno-authoritarianism and the possibility for private actors to leave privately developed technologies to determine the standard of protection of fundamental rights online.



# MAKING SENSE OF SOLIDARITY IN INTERNATIONAL LAW: INPUT FROM THE INTEGRATION OF THE EUROPEAN GAS MARKET

Ielyzaveta Badanova\*

*Solidarity is cited in the international law doctrine but often denied a self-standing legal meaning and normative force in international relations. Its mainstream understanding in the international law doctrine is often limited to a socio-political notion, which in my view neglects the evidence that one can gather from the practice of international law regimes. This happens to be particularly true for the international law of Ukraine-EU gas market integration, which operates the term quite widely. The present article seeks to repair the said omission by explaining how solidarity is pinpointed in this international law framework. This analysis allows picturing solidarity in three different legally relevant dimensions (constitutional principle, general legal maxim and the duty of cross-border assistance). The latter two dimensions present solidarity in terms of specific rights and obligations, which can be helpful in cementing solidarity as a legal notion in international law.*

**Keywords:** solidarity, Ukraine-EU relations, EU external energy policy, Energy Community

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## I. INTRODUCTION

Despite being extensively discussed in the academic literature,<sup>1</sup> solidarity is often viewed with scepticism by international law scholars who consider it undefinable or incapable of affecting international relations.

These conclusions are rarely based on the analysis of European Union law or of the international law of European energy cooperation. In fact, in the EU Treaties<sup>2</sup> solidarity is mentioned by name and is considered one of the principles of EU law. It takes specific legal forms in sectoral regulations, in particular on energy where it features both as a guiding principle<sup>3</sup> and as a practical tool to ensure security of natural gas (gas) supply.<sup>4</sup>

<sup>1</sup> For an international law account of the concept, see Ronald St. John MacDonald, 'Solidarity in the Practice and Discourse of Public International Law' (1996) 8(2) *Pace International Law Review* 259; Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' in Pierre Marie Dupuy and others, *Common Values in International Law: Essays in Honour of Christian Tomuschat* (N.P. Engel Verlag 2006) 1087; Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010); Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2012); Markus Tobias Kotzur and Kirsten Schmalenbach, 'Solidarity Among Nations' (2014) 52(1) *Archiv des Völkerrechts* 68.

<sup>2</sup> Treaty on European Union (TEU); Treaty on the Functioning of the European Union (TFEU).

<sup>3</sup> TFEU, art 194.

<sup>4</sup> 'New rules to secure gas supplies in Europe bring more solidarity' (European Commission, 12 September 2017) <[http://europa.eu/rapid/press-release\\_IP-17-3203\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3203_en.htm)> accessed 02 December 2018.

Relatively more successful than the internal market for electricity,<sup>5</sup> the EU's internal gas market has been instrumental in spreading the Union's regulatory approaches beyond its borders. This process is forged through international law arrangements, including association agreements as well as the Treaty Establishing the Energy Community (EnC).<sup>6</sup>

In the Energy Community, Ukraine is the second biggest member (after the EU), based on gas market parameters.<sup>7</sup> It is a critical route for transporting gas of a single Russian exporter, Gazprom, to the EU and wider Europe, including the Balkans.<sup>8</sup> Adding that to Europe's general dependence on Russian gas,<sup>9</sup> Ukraine is the crucial security factor for the whole of the Energy Community.

Since 2014 when Ukraine made a strategic turn from Russia in its gas policy,<sup>10</sup> legal instruments of Ukraine-EU integration in this sector have absorbed numerous references and instruments of solidarity from the European Union legal order.

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<sup>5</sup> 'Continued gas wholesale market integration, but electricity market integration at risk' (ACER, 06 October 2017) <<http://www.acer.europa.eu/Media/News/Pages/Continued-gas-wholesale-market-integration,-but-electricity-market-integration-at-risk.aspx>> accessed 02 December 2018.

<sup>6</sup> Treaty Establishing the Energy Community (signed 27 June 2014; entered into force 01 July 2006) OJ L198/18 (EnC). For the most recent text of the treaty, see <<https://www.energy-community.org/legal/treaty.html>>.

<sup>7</sup> Energy Community Secretariat, 'Annual Implementation Report' (2017) <<https://www.energy-community.org/implementation/IR2017.html>> accessed 02 December 2018.

<sup>8</sup> DG Energy, 'Quarterly Report on European Gas Markets, Market Observatory for Energy: Volume 11 (issue 2; second quarter of 2018)' 11 (figure 9). See also Regulation 2017/1938 (n 105) Annex I where the risk group 'Ukraine' involves: Bulgaria, Czech Republic, Germany, Greece, Croatia, Italy, Luxembourg, Hungary, Austria, Poland, Romania, Slovenia, Slovakia.

<sup>9</sup> DG Energy (n 8) 9. See also Energy Community Secretariat, 'Knocking on the EU's Door through the Energy Community: Integration of Western Balkans into the Pan-European Energy Market' (2018) 8 <<https://www.energy-community.org>> accessed 02 December 2018 ('Russia continues to dominate the gas market [in the Western Balkans] in such a way that would be unacceptable in the EU').

<sup>10</sup> Katarzyna Wolczuk, 'Managing the flows of gas and rules: Ukraine between the EU and Russia' (2016) 57(1) *Eurasian Geography and Economics* 113.

This article seeks to shed light on solidarity in international law by using the example of a field that is not commonly explored by international lawyers. In my view, the non-recognition of solidarity as a legal notion is partially caused by the lack of its exact description. By establishing a useful interface between international and EU law on the subject, our analysis concentrates on the identification of clear-cut forms of solidarity, especially its transcription into specific, positive (to do) and negative (not to do) obligations. In Section II, since we are primarily concerned with the role of solidarity in international law, we offer a working definition of solidarity, along with its basic normative content, derived from the international law doctrine. In Section III, this definition is validated in the EU legal order, which helps to delineate different legally relevant dimensions of solidarity, thus signalling that its reading as a socio-political, 'meta-legal' notion is incomplete. These dimensions are then identified in the international law framework of Ukraine-EU gas market integration (Section IV), where the EU law constructs operate in a truly international law setting. Section V summarises the conclusions from this exercise.

## II. SOLIDARITY IN INTERNATIONAL LAW

### *1. How can Solidarity be Defined for International Law Purposes?*

What do we mean by solidarity in an international law context? An authoritative commentator remarks that 'the expression "solidarity" (a) scarcely appears in any international treaty of note; and (b) is missing from landmark statements articulating the general practice of States accepted as law, namely, custom'.<sup>11</sup> More drastically, another acknowledged lawyer notes that solidarity 'is too abstract and too indefinite in contours and contents to become a normative concept that produces steering effects on States' behaviour in international relations'.<sup>12</sup>

It is indeed true that solidarity is not expressly mentioned in the Charter of the United Nations. Neither is it listed among fundamental principles of

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<sup>11</sup> 'Discussion Following the Presentation by Philipp Dann' (intervention by Yoram Dinstein) in Wolfrum/Kojima (n 1) 78.

<sup>12</sup> Ibid 42.

international law under the Friendly Relations Declaration.<sup>13</sup> The UN Desertification Convention<sup>14</sup> is one of the few universal international treaties referring to solidarity but not clarifying its meaning. No reputable international law interpreter (e.g. International Court of Justice, International Law Commission) have had the right occasion to express itself on the universal definition of solidarity. The history has known attempts to denote solidarity in political acts, namely as part of the legal toolkit of the New International Economic Order<sup>15</sup> and in relation to the UN Millennium Development Goals.<sup>16</sup> However, they arguably failed to gain universal recognition, proposing an asymmetrical treatment of developing countries.<sup>17</sup>

It is thus the legal scholarship (in academia, governmental and inter-governmental public service) who have shaped the concept of solidarity in international law for purposes of domestic and international decision-making.

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<sup>13</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (24 October 1970).

<sup>14</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 17 June 1994; entered into force 26 December 1996) 1954 UNTS 3, art 3(b).

<sup>15</sup> Report of the Secretary-General, 'Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order' (1984) UN Doc A/39/504/Add.1, 91. See also UNGA Res 55/107 (14 Mar 2001) UN Doc A/RES/55/107, UNGA Res 59/193 (20 Dec 2004) UN Doc A/RES/59/193 ('(f) Solidarity, as a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice and ensures that those who suffer or who benefit the least receive help from those who benefit the most'). Kotzur/Schmalenbach (n 1) 74.

<sup>16</sup> United Nations Millennium Declaration, UNGA Res 55/2 (18 Sep 2000) ('Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.'). See Philip Dann 'Solidarity and the Law of Development Cooperation' in Wolfrum/Kojima (n 1) 64.

<sup>17</sup> MacDonald (n 1) 279-280; Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 237.

According to Wolfrum (referring to Scheuner), 'the idea that the principle of solidarity should guide states in their relations was discussed between the sixteenth and nineteenth centuries'.<sup>18</sup> Yet, it is hard to trace the evolution of solidarity as a separate international law notion before the time when the term itself was formulated and became part of the mainstream linguistic practice.<sup>19</sup> Derived from Roman law (*obligatio in solidum*),<sup>20</sup> solidarity appears in the 1804 French Civil Code in a narrow legal context of shared responsibility, but '[t]he transformation of the legal concept of solidarity into a political concept seems to have begun in the latter half of the eighteenth century'.<sup>21</sup> Leroux (1797-1871) is credited as the 'first theorist of solidarity' in print thanks to his 1840 publication.<sup>22</sup> This must be the time when the term migrated to England and Germany.<sup>23</sup> Both the Oxford English Dictionary<sup>24</sup> and the Digital Dictionary of the German Language<sup>25</sup> indicate the French origin of the word and give the earliest reference thereto to the 1840s.

It is in the mid-19<sup>th</sup> century that the 'solidarity theory of law' was developed by Duguit (1859-1928) and extended to the field of international law by Scelle

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<sup>18</sup> Rüdiger Wolfrum, 'Solidarity' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2015) 402; Ulrich Scheuner, 'Solidarität unter den Nationen als Grundsatz in der gegenwertigen internationalen Gemeinschaft' in Jost Delbruck, Knut Ipsen, Dietrich Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel* (Duncker & Humboldt 1975).

<sup>19</sup> Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2004) 25 ('The idea existed before the term became widespread, and the term was in general use before its modern meaning had developed.').

<sup>20</sup> Hauke Brunkhorst, *Solidarity: From Civil Friendship to a Global Legal Community* (The MIT Press 2005) 2.

<sup>21</sup> Stjerno (n 19) 27.

<sup>22</sup> Laurence Wilde, *Global Solidarity* (Edinburgh University Press 2013) 20-21. See Pierre Leroux, *De l'humanité* (Perrotin 1840).

<sup>23</sup> Stjerno (n 19) 30.

<sup>24</sup> OED Online, <<http://www.oed.com>> accessed 02 December 2018. See Malcolm Ross, 'Solidarity: A New Constitutional Paradigm for the EU?' in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 23 ('[t]he first mention of solidarity in the Oxford English Dictionary only appears in the mid-nineteenth century').

<sup>25</sup> Das Wortauskunftssystem zur deutschen Sprache in Geschichte und Gegenwart, <<https://www.dwds.de>> accessed 02 December 2018.

(1878-1961),<sup>26</sup> becoming one of the mainstream doctrines describing the origin of international law.<sup>27</sup> Duguit explains solidarity in the context of individual freedom:

once a man becomes part of the society and because he is a social being, there are born for him a series of obligations, namely to exercise his own physical, intellectual and moral activity and to abstain from doing whatever can hinder the development of others, so that in the end it is not correct to say that a man has the right to exercise his activity; rather he has the duty not to hinder the activity of others, the duty to facilitate and assist within his powers<sup>28</sup>

and admits that '[this] duty can be founded only on the principle superior to the man, on the ideal to be pursued, on the goal to be achieved'.<sup>29</sup> Interestingly, he recognizes that the word 'solidarity' is quite often used indiscriminately.<sup>30</sup>

For Scelle, solidarity can be driven by either innate similarities or forces unleashed by the division of labour,<sup>31</sup> but in any event it is a product of social reality reaching out to the international plane; this metalegal (*métajuridique*)<sup>32</sup> phenomenon pre-determines the existence of socially necessary international legal orders.<sup>33</sup> His contemporary colleagues in theory and practice of international law likewise appealed to the socially cohesive quality of solidarity.<sup>34</sup> They all thus viewed solidarity as a socio-political notion rather than as a legal concept formalised in positive law.<sup>35</sup>

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<sup>26</sup> Armin von Bogdandy 'Opening Address' in Wolfrum/Kojima (n 1) 2.

<sup>27</sup> Oriol Casanovas y La Rosa, *Unity and Pluralism in Public International Law* (Martinus Nijhoff Publishers 2001) 6-10.

<sup>28</sup> Léon Duguit, *Souveraineté et liberté: leçons faites à l'Université Colombia (New-York), 1920-1921* (Librairie Felix Alcan 1922) 142 (author's translation).

<sup>29</sup> Ibid 144.

<sup>30</sup> Duguit (n 28) 147.

<sup>31</sup> Georges Scelle 'Règles générales du droit de la paix' (1933) 46 *Recueil des Cours de l'Académie de Droit International* 327, 339-340.

<sup>32</sup> Ibid 334-335.

<sup>33</sup> Ibid 350.

<sup>34</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2009) 287-352.

<sup>35</sup> Although it cannot be excluded that this image of solidarity was influenced by the Code Civil. See Koskenniemi (n 34) 289.

Modern scholars locate solidarity in individual treaty provisions, principles and branches of international law such as: Article 22 of the Covenant of the League of Nations,<sup>36</sup> Articles 41-42, 49-50 of the UN Charter,<sup>37</sup> Article 1 of the 1949 Geneva Conventions,<sup>38</sup> Article I of the General Agreement on Trade and Tariffs 1994,<sup>39</sup> Article 5 of the North Atlantic Treaty;<sup>40</sup> *erga omnes* obligations,<sup>41</sup> collective security,<sup>42</sup> the responsibility to protect,<sup>43</sup> sustainable development and common but differentiated responsibilities;<sup>44</sup> international development law,<sup>45</sup> international human rights law,<sup>46</sup> and international refugee and disaster relief law.<sup>47</sup> In doing so, they mostly rely on some ordinary, often dictionary meaning of solidarity, usually skipping a complicated exercise when they would need to determine the full content of the term for international law purposes. Some even consider this exercise doomed to failure.<sup>48</sup>

However, the many doctrinal applications of solidarity have similarities which can be summarised to form a non-contentious definition. Taking

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<sup>36</sup> MacDonald (n 1) 261.

<sup>37</sup> Karel Wellens, 'Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections' in Wolfrum/Kojima (n 1) 28-30.

<sup>38</sup> Ibid 20.

<sup>39</sup> Ibid 22. See also Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1096-1098.

<sup>40</sup> Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1091-1092.

<sup>41</sup> Wellens (n 37) 22-28.

<sup>42</sup> Abdul G Koroma, 'Solidarity: Evidence of an Emerging International Legal Principle' in Hestermeyer (n 1) 104-105; Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1092-1093.

<sup>43</sup> Wellens (n 37) 12; Koroma (n 42) 119-123; Laurence Boisson de Chazournes 'Responsibility to Protect: Reflecting Solidarity?' in Wolfrum/Kojima (n 1) 94-95.

<sup>44</sup> Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1094-1096; Koroma (n 42) 111-113.

<sup>45</sup> Kotzur/Schmalenbach (n 1) 84-85.

<sup>46</sup> Theo van Boven 'The Right to Peace as an Emerging Solidarity Right' in Eva Rieter and Henri Waele, *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (Brill 2011).

<sup>47</sup> Nele Matz-Lück, 'Solidarität, Souveränität und Völkerrecht: Grundzüge einer internationalen Solidargemeinschaft zur Hilfe bei Naturkatastrophen' in Hestermeyer (n 1).

<sup>48</sup> Kotzur/Schmalenbach (n 1) 72.

inspiration from Dann's presentation at the 2008 convention,<sup>49</sup> I propose to define solidarity as a relationship generated by the interplay of three key elements: common values and objectives; mutuality; and equality.

For solidarity to exist, there must be a 'sense of community or commonality'<sup>50</sup> and a recognition that common values and objectives can be secured only if everybody in the community participates in the joint efforts (mutuality).<sup>51</sup> This requires that the values and objectives must themselves be such as to depend on everyone's input. They must be susceptible of securing a community. Short-term or one-off objectives are unlikely to solidify mutual obligations. Mutuality also pre-determines that solidarity is a relationship among formal equals. When everyone contributes to the common cause which is otherwise non-achievable, 'solidarity changes the rules from the zero-sum game – "In order to win, someone else must lose" - to "No one wins unless everyone wins"'.<sup>52</sup> Then even the least powerful has a say and simultaneously bears the burden of common efforts. Equality has formed 'the revolutionary core of the concept of solidarity',<sup>53</sup> providing a historical alternative to philanthropy and mercy. We can thus visualise solidarity as a wheel where the hub represents common objectives, the rim signifies equality (i.e. equal distance from the hub) and spokes stand for mutuality holding together the whole structure:

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<sup>49</sup> Dann (n 16) 61.

<sup>50</sup> Simma (n 17) 238 (referring to MacDonald).

<sup>51</sup> Dann (n 16) 61, fn 20 (referring to MacDonald).

<sup>52</sup> MacDonald (n 1) 281.

<sup>53</sup> Dann (n 16) 57.

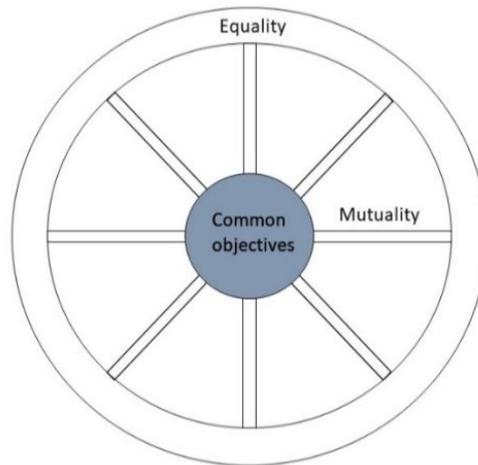


Figure 1: Visualisation of solidarity as a socio-political notion

This understanding of solidarity seems the most basic and the least controversial. Taken in its ideal form, solidarity can thus be distinguished from adjacent socio-political concepts such as cooperation (where mutuality is not as paramount to the achievement of the set goal) and loyalty<sup>54</sup> (where common goals are pursued in such a way that equality is undermined). It fits well into the consensual paradigm of international law, provides a healthy alternative to previously discarded attempts to define solidarity but does not fully cut away from those.<sup>55</sup> All this makes it suitable for test in real-life legal regimes.

## 2. *How can Solidarity Affect International Relations?*

To affect international relations, solidarity must be expressed in terms of legal rights and obligations of solidarity bearers, i.e. members of a community

<sup>54</sup> Kotzur/Schmalenbach (n 1) 74.

<sup>55</sup> Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (1 May 1974) 3 ('International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.').

bound by 'mutual concern'.<sup>56</sup> The definition suggested above does not however specify the personality of such solidarity-bearers. Their identity depends on the character of common values that are subject to convergence. Where such values are of interest to each and every individual ('solidarity with respect to humankind'<sup>57</sup>), then the required level of mutuality becomes hard to achieve. This showcases the basic paradox of solidarity which 'turns on its simultaneous appeal to unity and universality and its dependence in practice on antagonisms between particular groups'.<sup>58</sup>

A community can consist of individuals as e.g. advocated by Scelle.<sup>59</sup> However, even his vision pre-supposed that individuals would exercise solidarity through professional associations acting across borders,<sup>60</sup> i.e. through an appropriate medium. Since in this article we inspect specific international law instruments (see Section IV), we are best positioned to analyse the normative impact of solidarity at the level of states and other subjects of international law whose legal personality emanates from the state.

In this connection, several prominent international law scholars opine:

[solidarity] is an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and maintenance of common goals or interests. Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole. No state may choose to exercise its power in a way that gravely threatens the integrity of the community.<sup>61</sup>

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[t]he principle of solidarity envisages equalizing deficits which result from the fact that jurisdictional powers of States are necessarily limited. Therefore States acting merely on an individual basis cannot provide satisfactorily for solutions which the interests of the community demand. Such demands

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<sup>56</sup> Andrew Mason, *Community, Solidarity and Belonging: Levels of Community and Their Normative Significance* (Cambridge University Press 2003) 27.

<sup>57</sup> 'Discussion Following the Presentation by Karel Wellens' (intervention by Fred Morrison) in Wolfrum/Kojima (n 1) 51.

<sup>58</sup> Wilde (n 22) 18. See also Ross (n 24) 33.

<sup>59</sup> Scelle (n 31) 43-44.

<sup>60</sup> Koskenniemi (n 34) 267.

<sup>61</sup> MacDonald (n 1) 290; Simma (n 17) 238.

require a common action. ... generally speaking ... States in shaping their positions in international relations should not only take into consideration their own individual interests but also those of other States or the interests of the community of States or both.<sup>62</sup>

These statements expose the basic normative content of solidarity, i.e. to motivate and restrain international law subjects in their decision-making which is the result of their belonging to a qualified community. However, due to the lack of precision they can be partially blamed for promoting an overly ambiguous picture of solidarity. I seek to repair this deficiency through the analysis of a specific international law regime endowed with key elements of solidarity originating from the EU law.

### III. SOLIDARITY IN EU LAW

In the EU Treaties, the number of references to solidarity is striking compared to other international treaties.<sup>63</sup> Though intuitive, this difference could be of certain legal significance.<sup>64</sup>

In TEU, solidarity qualifies the system of Union values in the context of relations between peoples,<sup>65</sup> generations,<sup>66</sup> men and women,<sup>67</sup> as well as Member States between themselves, with the Union and the outside world.

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<sup>62</sup> Rüdiger Wolfrum, *Solidarity amongst States* (n 1) 1087-1088. See also Christian Tomuschat 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 9, 261 (where he refers to 'a duty of cooperation' that trumps sovereignty).

<sup>63</sup> Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 36-37; Hanspeter Neuhold 'Common Security: The Litmus Test of International Solidarity' in Wolfrum/Kojima (n 1) 212.

<sup>64</sup> Dann (n 17) 64, fn 31 ('It is interesting to speculate why the word [solidarity] is used so little in legal documents. During the time of the Cold War there was probably strong resistance on the side of the industrialised countries to use it, since solidarity was certainly rather a word of the then Second World, i.e. the socialist countries. But today, after the end of the Cold War, there would not be any need to avoid the notion anymore; so why is it still not used? Is it just not so essential? Is it really vague? Or is it considered to entail real duties?').

<sup>65</sup> TEU, recital (7).

<sup>66</sup> TEU, art 3(3).

<sup>67</sup> TEU, art 2.

Under Article 3(3) TEU, solidarity among Member States – alongside economic, social and territorial cohesion – is coined as the goal of the Union. Moreover, TEU bases the EU's external action on the principle of solidarity, which, among others, 'ha[s] inspired [the Union's] own creation, development and enlargement, and which it seeks to advance in the wider world'.<sup>68</sup> TFEU refers to solidarity predominantly in areas of energy (specifically as regards the internal energy market<sup>69</sup> and delivery disruptions<sup>70</sup>) as well as of joint response to terrorist attacks, natural and man-made disasters.<sup>71</sup>

Not surprisingly, international lawyers see the degree of solidarity among EU Member States as unprecedented.<sup>72</sup> For some EU law scholars, solidarity has achieved nothing short of a constitutional role.<sup>73</sup> If so, can one still argue that solidarity in the EU legal order is 'too abstract'?

Among many contexts of solidarity in EU law,<sup>74</sup> I have identified two which seem the most relevant for further analysis of Ukraine-EU gas market integration.<sup>75</sup> Firstly, it is Article 4(3) TEU which migrated word-for-word to Article 6 EnC. Secondly, it is the EU *acquis* on the security of gas supply, which promotes solidarity as a specific legal tool and is likewise included in the bilateral integration agenda. Combined with its reading as a constitutional principle, solidarity is thus analysed in three legally relevant dimensions (to be extrapolated to the international plane in Section IV).

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<sup>68</sup> TEU, art 21(1). See also TEU, art 3(5).

<sup>69</sup> TFEU, art 194.

<sup>70</sup> TFEU, art 122.

<sup>71</sup> TFEU, art 222 (the so-called 'solidarity clause'). See Kotzur/Schmalenbach (n 1) 78-80.

<sup>72</sup> Neuhold (n 63) 211; Alain Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1994) V/2 *Collected Courses of the Academy of European Law* 193, 268 ('la solidarité plus forte entre les Etats membres que celle qui unit (?) les éléments de la "communauté internationale"').

<sup>73</sup> Ross (n 24) 45; Kotzur/Schmalenbach (n 1) 73; Klamert (n 63) 35.

<sup>74</sup> Ross (n 24) 41.

<sup>75</sup> EnC, art 94.

*1. Article 4(3) TEU: Constitutional Principle and General Legal Maxim*

Last two lines<sup>76</sup> of Article 4(3) TEU (previously – Article 10 EC, 5 EEC and 86 ECSC) stipulate that EU Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union and that they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

That the said legal formula (which does not refer to the notion by name) embodies solidarity has been noted by legal scholars<sup>77</sup> as well as by EU law actors themselves. The Court of Justice of the EU and its predecessors (CJEU, the Court) explicitly recognize that:

The solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 where a Member State is seriously threatened with difficulties as regards its balance of payments.<sup>78</sup>

The Court reiterated this position implicitly in at least two cases.<sup>79</sup> Governments and national courts on several occasions relied on the cited provision as embodying solidarity.<sup>80</sup>

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<sup>76</sup> The first line was added to this article only in TEU.

<sup>77</sup> MacDonald (n 1) 297; Ross (n 24) 42; Klamert (n 63) 31-32.

<sup>78</sup> C-6/69 *Commission v France* ECLI:EU:C:1969:68, para 16.

<sup>79</sup> C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* ECLI:EU:C:2006:443, Opinion of AG Kokott, para 48 (referring to C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* ECLI:EU:C:1997:628, para 45); Case C-304/02 *Commission of the European Communities v French Republic* ECLI:EU:C:2005:444, Opinion of AG Geelhoed, para 8 (referring to Case 44/84 *Derrick Guy Edmund Hurd v Kenneth Jones (Her Majesty's Inspector of Taxes)* ECLI:EU:C:1986:2, paras 57-58).

<sup>80</sup> Joined Cases C-63/90 and C-67/90 *Portuguese Republic and Kingdom of Spain v Council of the European Communities* ECLI:EU:C:1992:381, para 51; Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* ECLI:EU:C:2004:17, para 19.

On its face, the cited *Commission v France* associates solidarity with the duty of mutual assistance. Yet, other judgements demonstrate that Article 4(3) TEU encompasses a broader set of duties designed to safeguard the essence of the EU legal order, which fits into the parameters of solidarity set in Section II. As early as in *Costa v ENEL*, CJEU coins 'reciprocity' as the basis of the EU's legal system and adds that:

[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.<sup>81</sup>

Thus, common objectives, 'reciprocity' and intolerance to discrimination are all cited as reasons to reject the untenable position of a Member State which negates its national court's right to seek a preliminary ruling from CJEU. Although in our definition solidarity is based on mutuality rather than reciprocity,<sup>82</sup> the difference between the two is not always scrutinised and the terms are often used interchangeably.

For the Court, it is indeed what we call mutuality that lies at the heart of Article 4(3) TEU. In another case, it states that the Member State's refusal to implement a regulation 'undermines the efficacy of the provision decided upon in common, while at the same time taking an undue advantage to the detriment of its partners in view of the free circulation of goods'.<sup>83</sup> This distortion, according to CJEU, 'strikes at the fundamental basis of the Community legal order'.<sup>84</sup> The free-rider problem thus described is characteristic of a mutuality relationship: due to strong dependencies where one member benefits, all others suffer. In organised systems (e.g. harmonised VAT), this can even lead to a tangible shift in financial burdens.<sup>85</sup> Importantly, CJEU also mentions that this unlawful situation 'brings into

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<sup>81</sup> Case 6-64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66, 593-594.

<sup>82</sup> Dann (n 15) 61, fn 20.

<sup>83</sup> Case 39-72 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1973:13, para 21.

<sup>84</sup> *Ibid*, para 25.

<sup>85</sup> Case C-493/15 *Agenzia delle Entrate v Marco Identi* ECLI:EU:C:2017:219, paras 16-19.

question the equality of Member States before Community law',<sup>86</sup> thus supporting the third element of our definition.

The ample CJEU jurisprudence not only helps to uncover the constitutional dimension of solidarity but also to depart from its elusive image of a socio-political notion. Distancing from principles and institutions specific to the Union, most fundamentally solidarity can be said to mean:

- Duty of coordinated action: 'in a field ... in which worthwhile results can only be attained thanks to the co-operation of all', members may not adopt unilateral measures outside the common framework;<sup>87</sup> where, however, the collective interest is in danger, a member must step in (but, again, after effectively consulting others);<sup>88</sup>
- Duty of uniformity: members must ensure uniform application of common rules;<sup>89</sup>
- Duty of enforcement: members must ensure effective, proportionate and dissuasive penalties for violation of common rules<sup>90</sup> and take necessary actions to combat fraud;<sup>91</sup>

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<sup>86</sup> *Commission of the European Communities v Italian Republic* (n 83) para 24.

<sup>87</sup> Case 141/78 *French Republic v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1979:225, para 8; John Temple Lang, 'The Duty of Sincere Cooperation as a Lawyering Strategy' in Fernanda Nicola, Bill Davies (eds), *EU Law Stories Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

<sup>88</sup> Case 32/79 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1981:93, paras 25, 28; Case C-105/02 *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:2006:637, para 60.

<sup>89</sup> Joined cases 205 to 215/82 *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* ECLI:EU:C:1983:233, para 17.

<sup>90</sup> Case C-7/90 *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV* ECLI:EU:C:1991:363, para 11.

<sup>91</sup> Case C-352/92 *Milchwerke Köln/Wuppertal eG v Hauptzollamt Köln-Rheinau* ECLI:EU:C:1994:294, para 23.

- Duty of diligence: members must ensure correct use of common resources,<sup>92</sup> including by promptly countering cases of misuse;<sup>93</sup>
- Duty of transparency: members must provide necessary information to establish the availability of common resources<sup>94</sup> and their correct use;<sup>95</sup>
- Duty of trust: members must rely on representations that others make within the system of shared responsibility;<sup>96</sup>
- Duty of external abstention: members may not enter into external commitments 'capable of affecting [common] rules already adopted [...] or of altering their scope'.<sup>97,98</sup>

This bundle of duties constitutes a general legal maxim of solidarity and represents its second legally relevant dimension.

## 2. EU *acquis* on Security of Gas Supply: Duty of Cross-Border Assistance

The third dimension of solidarity can be observed through the secondary legislation on the security of gas supply approved under Article 194 TFEU. This treaty provision crystallizes the Union policy direction on energy<sup>99</sup> and

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<sup>92</sup> Case C-8/88 *Federal Republic of Germany v Commission of the European Communities* ECLI:EU:C:1990:241, para 20.

<sup>93</sup> Case C-34/89 *Italian Republic v Commission of the European Communities* ECLI:EU:C:1990:353, para 12.

<sup>94</sup> Case C-275/04 *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:2006:641, para 83.

<sup>95</sup> Case C-38/06 *European Commission v Portuguese Republic* ECLI:EU:C:2010:108, para 70.

<sup>96</sup> Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* ECLI:EU:C:2000:75, paras 51-52.

<sup>97</sup> *Opinion 2/91 delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* ECLI:EU:C:1993:106, para 11.

<sup>98</sup> See also John Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007) 31(5) *Fordham International Law Journal* 1483.

<sup>99</sup> Leigh Hancher and Francesco Maria Salerno, 'Energy Policy After Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012); Rafael Leal-Arcas and Andrew Filis, *The Energy*

mandates its pursuit 'in a spirit of solidarity between Member States'. According to Ahner/Glachant, '[t]here is an obligation flowing from Article 194 to pursue solidarity actively'.<sup>100</sup>

The security of gas supply broadly means the availability of the technical and resource capacity to satisfy gas demand in different circumstances,<sup>101</sup> and it is currently listed as the first objective of the Energy Union (alongside solidarity and trust).<sup>102</sup> Article 194 TFEU has given rise to two pivotal Union-wide acts on the security of gas supply,<sup>103</sup> namely: Regulation 994/2010<sup>104</sup> (now

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Community and the Energy Charter Treaty: Special Legal Regimes, their Systemic Relationship to the EU, and their Dispute Settlement Arrangements (2014) 12(2) Oil, Gas & Energy Law Intelligence I, 11-12.

<sup>100</sup> Nicole Ahner and Jean-Michel Glachant, 'The Building of Energy Solidarity in the EU' in Jean-Michel Glachant and others (eds), *A New Architecture for EU Gas Security of Supply* (Claeys & Casteels Publishing 2012) 145.

<sup>101</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC {2009} OJ L211/94, art 2(32) (referred to in Regulation 994/2010 (n 104) art 2, Regulation 2017/1938 (n 105) art 2(1)). For different approaches to defining energy security in the EU, see Leal/Filis (n 99) 10-11.

<sup>102</sup> Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM(2015) 80 final; Natasha A Georgiou and Andrea Rocco, 'Energy governance in EU-Russia energy relations: paving the way towards an energy union' (2017) Institute of European Law Working Paper 01/2017 12-17 <<http://epapers.bham.ac.uk/2944>> accessed 02 December 2018.

<sup>103</sup> There is another interesting legal act adopted under this TFEU Article 194, namely: Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU {2017} OJ L99/1. However, as explained above, here we dwell upon the legal rules and mechanisms coming under the topic of Ukraine-EU gas market integration. So far Decision (EU) 2017/684 is not part of the Energy Community *acquis* and its prospects to become one are unclear.

<sup>104</sup> Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC {2010} OJ L295/1.

repealed) and Regulation 2017/1938<sup>105</sup> (effective as of 01 November 2017). The two documents have the same philosophy: while the ultimate security depends on a situational combination of factors, it is the state of preparedness and resilience that can be managed constantly and systematically. They are identical in preaching preference towards security built by market forces with exceptional state interventions when 'the market can no longer deliver the required gas supplies'.<sup>106</sup> But their reliance on solidarity as a last-resort, non-market-based security of supply tool differs significantly.

Regulation 994/2010 was born out of unprecedented events of January 2009 when for almost two weeks Russian gas transit through Ukraine was halted, leaving the EU without the critical supply source.<sup>107</sup> Despite the legislation in force at that time (i.e. Directive 2004/67/EC), the EU proved poorly prepared to counter a disruption of such a magnitude.<sup>108</sup> The Commission's legislative proposal launched in July 2009 under then effective Article 95 EC contained few references to solidarity<sup>109</sup> (all of which survived in the final text) but failed to clarify its meaning. When adopted, Regulation 994/2010 read in the preamble that 'Member States should devise measures to exercise solidarity' associating it with agreements between gas undertakings for additional gas volumes and fair and equitable compensation for them.<sup>110</sup> The body of this Regulation gave a single practical instruction on solidarity:

in a spirit of solidarity, the Competent Authority shall identify in the Preventive Action Plan and the Emergency Plan how any increased supply

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<sup>105</sup> Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 {2017} OJ L280/I.

<sup>106</sup> Regulation 994/2010 (n 104) art 1; Regulation 2017/1938 (n 105) art 1.

<sup>107</sup> Ahner/Glachant (n 100) 123-153.

<sup>108</sup> Commission, 'Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC – The January 2009 gas supply disruption to the EU: an assessment' COM (2009) 363.

<sup>109</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC' COM/2009/0363 final.

<sup>110</sup> Regulation 994/2010 (n 104) recital (36).

standard or additional obligation imposed on natural gas undertakings may be temporarily reduced in the event of a Union or regional emergency.<sup>111</sup>

This meant that only additional gas amounts were at stake and could be shared with the Member State in an emergency.

Recently enacted Regulation 2017/1938 deals with this problem – How to compensate for missing gas in a Member State affected by a substantial gas shortage? – differently. Its solution is that (roughly)<sup>112</sup>

[c]ustomers others than households, essential social services and district heating cannot continue to be supplied with gas in a given Member State - even if it is not in an emergency situation - as long as households, essential social services and district heating are not being supplied in another Member State in emergency to which the first country's transmission network is connected.<sup>113</sup>

This is the common objective behind the 'solidarity measure of a last resort'<sup>114</sup> for the first time introduced in a Union regulation.<sup>115</sup> Triggered in a dire situation where at the affected state level all efforts have been exhausted and the neighbouring states have lowered additional supply standards applicable to their gas undertakings,<sup>116</sup> it should be operationalized through separate inter-state arrangements.<sup>117</sup> However, the Regulation sets forth mandatory

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<sup>111</sup> Ibid, art 8(2).

<sup>112</sup> While this excerpt from the proposal aptly captures the basic principle, the exact boundaries of the solidarity measure are specified through the definition of 'solidarity protected customers' and other provisions of the Regulation (Regulation 2017/1938 (n 105) arts 2(6), 13(1)).

<sup>113</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010' COM/2016/052 final, p.12.

<sup>114</sup> Regulation 2017/1938 (n 105) art 1.

<sup>115</sup> Ibid, recital (45).

<sup>116</sup> Ibid, art 13(3).

<sup>117</sup> Commission Recommendation (EU) 2018/177 of 2 February 2018 on the elements to be included in the technical, legal and financial arrangements between Member States for the application of the solidarity mechanism under Article 13 of Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply {2018} OJ L32/52.

elements of this legal mechanism and creates the necessary environment for its subsistence rooted in mutuality and equality.

Specifically, the integrity of the internal gas market requires that no Member State, by taking unilateral action, disturb its proper functioning even in face of a gas crisis.<sup>118</sup> Instead, Member States are required to prepare for an emergency and coordinate their steps with others, including the European Commission. Regulation 2017/1938 lays down a harmonized format for this exercise: mandatory templates for risk assessment as well as for Preventive and Emergency Action Plans;<sup>119</sup> joint development of regional chapters and their incorporation into national plans<sup>120</sup> based on a common risk assessment conducted in risk groups;<sup>121</sup> review of national plans by the Commission.<sup>122</sup> It also stipulates that only pre-agreed actions shall be deployed in an emergency, except for 'duly justified exceptional circumstances' (in which case immediate notification to the Commission and Member States in the same risk group is warranted).<sup>123</sup> Understanding the aggregated security of supply situation in the Union is another mutual challenge, which the Regulation handles through information provision obligations related to most relevant gas contracts.<sup>124</sup>

To sustain equality, the Regulation employs a uniform definition of solidarity-protected customers<sup>125</sup> and harmonized supply and infrastructure standards of conduct for gas undertakings (including the obligation to reduce increased supply standards to a common level where the neighbouring Member State suffers a gas disruption).<sup>126</sup> It imposes an obligation on the receiving Member State to pay all reasonable costs associated with the delivered gas to the Member State providing solidarity (inter-state 'fair and

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<sup>118</sup> Regulation 2017/1938 (n 105) recital (7).

<sup>119</sup> Ibid, arts 7(5), 8(5).

<sup>120</sup> Ibid, art 8(3).

<sup>121</sup> Ibid, art 7(2).

<sup>122</sup> Ibid, art 8(7)-(9).

<sup>123</sup> Regulation 2017/1938 (n 105) recital (7), art 11(4).

<sup>124</sup> Ibid, art 14.

<sup>125</sup> Ibid, recital (24), art 6(1).

<sup>126</sup> Ibid, arts 5-6, 11(3).

prompt compensation')<sup>127</sup> and a duty to select the most advantageous offer of solidarity among offers made.<sup>128</sup>

These and other elements of Regulation 2017/1938<sup>129</sup> mirror the set of legal duties derived from Article 4(3) TEU. This indicates that the three dimensions of the notion in EU law spring on a single ideological basis and add up to a wholesome picture of solidarity. As opined by AG Mengozzi in relation to Article 194 TFEU:<sup>130</sup>

This reference to solidarity between Member States [...] is made in a context in which the principle of solidarity between Member States has taken on a character that could be defined as a 'constitutional principle'. The idea of solidarity between Member States is not only expressed in various places in the Treaties, but also, under the third subparagraph of Article 3(3) of the TEU, constitutes one of the objectives of the Union.<sup>131</sup> [...] [I]n interpreting the provisions of Regulation No 994/2010, account must be taken of the fundamental role played by the principle of solidarity between Member States in the context of that regulation.<sup>132</sup>

Solidarity can thus be said to permeate the EU legal order. Starting as a constitutional principle and panning out in specific legal duties under EU Treaties and secondary legal acts, it affects international relations within the Union. It can likewise affect international relations of the Union and the outside world where the relevant international law framework is in place.

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<sup>127</sup> Ibid, art 13(8).

<sup>128</sup> Ibid, art 13(4).

<sup>129</sup> Ibid, art 14(10) (requiring the imposition of effective, proportionate and dissuasive sanctions); *ibid*, recital (44), art 11(3) (endowing the European Commission with the coordination role for managing third-party relations).

<sup>130</sup> Case C-226/16 *Eni SpA and Others v Premier ministre and Ministre de l'Environnement, de l'Énergie et de la Mer* ECLI:EU:C:2017:1005, Opinion of AG Mengozzi, paras 32-38.

<sup>131</sup> *Ibid*, para 33 (references omitted).

<sup>132</sup> *Ibid*, para 37. Treaty references to solidarity were also taken into account also in Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756, Opinion of AG Kokott, paras 142-143.

#### IV. SOLIDARITY IN THE LAW OF UKRAINE-EU GAS MARKET INTEGRATION

The 2016 Ukraine-EU Memorandum of Understanding on a Strategic Energy Partnership introduces the EU's Energy Union objectives into the bilateral cooperation agenda.<sup>133</sup> Compared to previous political documents, the Memorandum's language is pronounced on solidarity: as noted elsewhere, '[c]ouched in diplomatic terms, the gas-related sections of the 2016 Memorandum are still precise, principle-based and charged with solidarity'.<sup>134</sup>

The question is how this impetus is reflected in the international law framework of Ukraine-EU relations in the gas sector, which by far is dominated by three major international treaties: EnC; the Ukraine-EU Association Agreement (UA-EU AA)<sup>135</sup> and the Energy Charter Treaty (ECT).<sup>136</sup>

EnC is 'the first multilateral treaty integrating a specific economic sector in south-east Europe',<sup>137</sup> which highlights the special role of energy on the region's political and economic scene. EnC is said to have marked a qualitative transition in the EU's external energy policy thanks to its varied

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<sup>133</sup> Memorandum of Understanding on a Strategic Energy Partnership between the European Union together with the European Atomic Energy Community and Ukraine (24 November 2016) <[https://ec.europa.eu/energy/sites/ener/files/documents/mou\\_strategic\\_energy\\_partnership\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/mou_strategic_energy_partnership_en.pdf)> accessed 02 December 2018.

<sup>134</sup> Ielyzaveta Badanova, 'Ukraine-EU political agenda 1991-2016: premises for mutual solidarity obligations in the natural gas sphere' (2017) 2 *Ukrainian Journal of International Law* 17, 20.

<sup>135</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (signed 27 June 2014; entered into force 01 September 2017) OJ L161/3 (UA-EU AA).

<sup>136</sup> Energy Charter Treaty (adopted 17 December 1994; entered into force 16 April 1998) 2080 UNTS 100 (ECT).

<sup>137</sup> 'Summary of Treaty' (European Union External Action), <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=3421>> accessed 02 December 2018.

membership and a relatively high degree of institutionalisation.<sup>138</sup> UA-EU AA supplements EnC with additional bilateral mechanisms setting the current legal landscape of the Ukraine-EU partnership in the gas sector.

Meanwhile, ECT has a different mission. It does not as such promote integration but rather seeks to 'establish a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [Energy] Charter' (Article 2). In such a way, it highlights the shared values (market economy) and objectives (free flow of energy products, fair and equal treatment of energy investments) of its members, which are, however, pursued based on reciprocity (rather than mutuality). For instance, ECT seeks to reconcile divergent interests in relation to transit (interests of those who transport v. those who sell) through a set of duties imposed on transit countries.<sup>139</sup> Compare this with the approach taken by EnC where transit as a category is eliminated<sup>140</sup> and network users are enabled to sell gas freely within the integrated market area with the help of the entry-exit system for booking and pricing of gas transmission services.<sup>141</sup> Finally, ECT's voting system is largely unbalanced in favour of the EU,<sup>142</sup> which 'presents an inherent bias towards EU industrial and energy

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<sup>138</sup> Heiko Prange-Gstöhl, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?' (2009) 37 *Energy Policy* 5296, 5297.

<sup>139</sup> Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press 2015) 67.

<sup>140</sup> Agency for the Cooperation of Energy Regulators, 'Transit Contracts in EU Member States: final results of ACER inquiry' (2013) 15-17 <<http://www.acer.europa.eu/Media/News/Pages/ACER-finds-that-gas-Transit-Contracts-in-seven-EU-Member-States-do-not-comply-with-EU-rules-.aspx>> accessed 02 December 2018.

<sup>141</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36, art 13(1) (implemented in the Energy Community by Decision of the Ministerial Council of the Energy Community 2011/02-MC-EnC of 06 October 2011).

<sup>142</sup> Irina Kustova, 'A Treaty à la Carte? Some Reflections on the Modernization of the Energy Charter Process' (2016) 9 *Journal of World Energy Law and Business* 357, 367.

interests'.<sup>143</sup> This combination of reasons has arguably diminished ECT's role as a forum for stepping up energy cooperation between the EU and its neighbouring countries, including Ukraine.<sup>144</sup> In these circumstances, further analysis concentrates on the solidarity footprint in EnC and UA-EU AA only.

### *1. EnC: Solidarity Regime in the Making*

#### A. Solidarity as Constitutional Principle

The Energy Community is founded on the resolve 'to establish among the Parties an integrated market in gas and electricity, based on common interest and solidarity'.<sup>145</sup> Solidarity is thus named the key feature of a target model of sectoral (gas, electricity, oil; together referred to as Network Energy)<sup>146</sup> relations between the EU and the so-called 'Contracting Parties' (CPs), i.e. six Western Balkan countries, Ukraine, Moldova and, since recently, Georgia.<sup>147</sup>

In terms of import/export profile, the Energy Community membership is relatively homogenous. As explained by one researcher, 'Ukraine, Energy Community countries and the EU in general as a community of consumer states have similar goals and priorities of the energy policy that produce natural motivation for creating a security space'.<sup>148</sup> On a bilateral plane, already the 2005 Memorandum of Understanding on co-operation in the field of energy recognised that 'in [this] field, the EU and Ukraine share convergent interests and both could benefit from the integration of their

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<sup>143</sup> Leal (n 99) 22.

<sup>144</sup> Kustova (n 142) 358.

<sup>145</sup> EnC, preamble.

<sup>146</sup> Ibid, art 2(2).

<sup>147</sup> 'Who we are' (Energy Community) <<https://www.energy-community.org/aboutus/whoweare.html>> accessed 02 December 2018.

<sup>148</sup> Oleksandr Sukhodolya, 'Energy Community and Ukraine: Objectives, Priorities and Problems of Cooperation' (in Ukrainian) (2016) 2(39) *Strategic Priorities* 13, 15.

respective energy markets, thereby enhancing the energy security of the European continent'.<sup>149</sup>

This convergence of interests is reflected in the Energy Community's task formulated with reference to five objectives: (1) 'a stable regulatory and market framework capable of attracting investment' (investment climate promotion); (2) 'a single regulatory space for trade in Network Energy' (trade climate promotion); (3) enhancement of the security of supply in the single regulatory space; (4) promotion of energy efficiency, environmental protection and renewables, as well as (5) development of Network Energy competition to profit from economies of scale.<sup>150</sup> According to Article 3 EnC, this task is pursued through three types of 'activities', each having a progressively expanding geographical coverage:

(i) implementation by CPs of the agreed EU *acquis* in energy, environment, competition, renewables, energy efficiency and statistics (EnC is viewed as a 'core legal instrument that the EU uses [to] export ... EU energy norms and regulations to neighbourhood countries and beyond'<sup>151</sup>);

(ii) establishment of a regulatory regime for efficient market operation in-between CPs and neighbouring EU Member States, in particular for Network Energy transmission and in cases of unilateral safeguard measures; and

(iii) creation of a single energy market across the whole of the Energy Community, including joint response to energy supply disruptions and, potentially, a common external energy trade policy.

In the gas market context, the achievement of these objectives dictates a high degree of mutuality, especially for the EU and Ukraine. This is particularly true for objectives (3) and (5).

Already upon Ukraine's accession to EnC, the EU underscored that 'in the gas sector, the fulfilment of the obligations deriving from the accession to the

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<sup>149</sup> Memorandum of Understanding on co-operation in the field of energy between the European Union and Ukraine (01 December 2005) <[https://ec.europa.eu/energy/sites/ener/files/documents/2010\\_ukraine\\_mou.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2010_ukraine_mou.pdf)> accessed 02 December 2018.

<sup>150</sup> EnC, art 2(1).

<sup>151</sup> Prange-Gstöhl (n 138) 5296.

Energy Community requires specific attention due to the importance of this sector for the security of supply of all Parties'.<sup>152</sup> The EU, in turn, is instrumental in ensuring the security of gas supply to Ukraine through, *inter alia*, sustaining current gas transit flows<sup>153</sup> and enabling access to its internal gas market.<sup>154</sup> Other CPs mostly act as security-takers. However, their commitment starts to matter when new gas transit routes are being developed by the Russian exporter to bypass Ukraine.<sup>155</sup> Thus, the full participation of the Energy Community membership is essential to the common cause of sustainable supply security.

Likewise, the effective pooling of resources and needs within the Energy Community is essential for achieving benefits from economies of scale. This can be ensured through fair competition for gas throughout the integrated market area. As of now, the whole of the Energy Community faces similar challenges linked to the historical role of the dominant external gas source.<sup>156</sup> Here again mutuality plays a key role.

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<sup>152</sup> Decision of the Ministerial Council of the Energy Community 2009/04/MC-EnC of 17 December 2009. See Commission, 'Proposal for a Council Decision on establishing the European Community position within the Ministerial Council of the Energy Community' COM/2009/0632 final.

<sup>153</sup> See the Appeal by the Verkhovna Rada (Parliament) of Ukraine to MPs and executive authorities of the EU concerning the enhancement of cooperation on energy security and potential risks of realization of gas transit projects to bypass Ukraine (in Ukrainian) dated 15 November 2016 No.1733-VIII <<http://zakon5.rada.gov.ua/laws/show/1733-19>>.

<sup>154</sup> Since autumn 2015, National JSC Naftogaz of Ukraine secures necessary volumes of gas to cover the country's gas needs through physical reverse flows from the EU. See Naftogaz of Ukraine, 'Annual Report 2016: in the black' (2017) 73-74 <[http://www.naftogaz.com/files/Zvity/Annual\\_report\\_eng\\_170608.pdf](http://www.naftogaz.com/files/Zvity/Annual_report_eng_170608.pdf)> accessed 02 December 2018.

<sup>155</sup> 'Serbia, Russia revive gas pipeline plans' (Reuters, 09 March 2018) <<https://af.reuters.com/article/africaTech/idAFL5N1QR3QK>> accessed 02 December 2018.

<sup>156</sup> See above n 7. As to Ukraine, virtual reverse flows are blocked by current contractual arrangements involving Gazprom and in future would depend on the availability of gas transit through Ukraine. See Naftogaz of Ukraine, 'Annual Report 2014: Changing for the Future' (2015) 82-83 <[http://www.naftogaz.com/files/Zvity/Naftogaz\\_Annual\\_Report\\_2014\\_engl.pdf](http://www.naftogaz.com/files/Zvity/Naftogaz_Annual_Report_2014_engl.pdf)> accessed 02 December 2018.

At first glance, investment and trade climate promotion reminds of ECT's regime. However, as exemplified above, EnC handles these objectives through community building, including by harmonising the basic regulatory framework for market and infrastructure operations. In the Energy Community, the prohibition of customs duties, quantitative restrictions and measures having equivalent effect<sup>157</sup> is complemented with requirements of the EU's Third Energy Package<sup>158</sup> and, since recently, Gas Network Codes.<sup>159</sup> These measures are designed to eliminate unnecessary restrictions on gas trade across borders and create a predictable investment regime. In addition, under the TEN-E Regulation<sup>160</sup> a list of Projects of Energy Community Interest is developed, approved and updated resulting in prioritisation and facilitation of meaningful infrastructure upgrades.<sup>161</sup>

In the meantime, Article 7 EnC speaks of equality within the Energy Community stating that discrimination within the scope of the Treaty shall be prohibited. It can be plausibly argued that EnC would have never been signed if it provided otherwise. The 'solidarity motive', i.e. the chance to place normative constraints on the EU's behaviour, can be a powerful driver for joining the Energy Community.<sup>162</sup> From an international law viewpoint, EnC is an international treaty by virtue of which the parties have agreed to a set of mutual rights and obligations to be put in place through a specific institutional framework. It is recognised that 'the Energy Community has autonomous decision-making powers'.<sup>163</sup> Within the EU legal order, EU

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<sup>157</sup> EnC, art 41.

<sup>158</sup> Decision of the Ministerial Council of the Energy Community 2011/02-MC-EnC of 06 October 2011.

<sup>159</sup> Decision No 2018/02/PHLG-EnC of the Permanent High-Level Reflection Group of the Energy Community of 22 January 2018.

<sup>160</sup> Decision of the Ministerial Council of the Energy Community 2015/09/MC-EnC of 16 October 2016.

<sup>161</sup> Decision of the Ministerial Council of the Energy Community 2016/11/MC-EnC of 14 October 2016.

<sup>162</sup> In addition to those listed in Prange-Gstöhl (n 138) 5300-5302.

<sup>163</sup> Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty {2006} OJ L 198/15, recital (11).

institutions and Member States, in the relevant part, are required to abide by the rules of this international treaty.<sup>164</sup>

Yet, it is true to say that the EU has the driver's seat in the organisation. The European Commission has a mandate to move forward the integration process within the Energy Community.<sup>165</sup> The EU has two (instead of one) representatives in the organisation's political bodies, the Ministerial Council and the Permanent High-Level Group,<sup>166</sup> and several in the technical body, i.e. the Regulatory Board.<sup>167</sup> On top of that, it enjoys a decisive vote in all these bodies.<sup>168</sup> Compared to ECT, these peculiarities are less drastic and would arguably not suffice to ultimately distort the balance of powers. For instance, at least one infringement case against an EU Member State has officially been registered with the compliance monitoring body, Energy Community Secretariat (ECS).<sup>169</sup>

The bigger issue with equality is posed by the alleged failure of EnC to adequately address the legal regime of interconnection points between the EU and CPs. According to EnC institutions, acts of the Ministerial Council adopted under Title II do not bind the EU, which means that implementation of EU's legislation at these points is not sanctioned by either the EU (where it is voluntary) or the Energy Community.<sup>170</sup> This goes against the overall market integration efforts, especially in the context of Network

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<sup>164</sup> According to CJEU, 'the fact that [an international treaty] is intended essentially to promote the economic development of [a non-EU country] and therefore involves an imbalance in the obligations assumed by the Community towards the non-member country concerned' should not prevent the legal effects on this treaty in the EU. See Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzepowicz-Meyer* ECLI:EU:C:2002:57, para 27.

<sup>165</sup> EnC, arts 4, 79.

<sup>166</sup> *Ibid*, arts 48, 54.

<sup>167</sup> *Ibid*, arts 59.

<sup>168</sup> *Ibid*, arts 83.

<sup>169</sup> Case ENC 01/17 <<https://www.energy-community.org/legal/cases/2017/case0117BU.html>> accessed 02 December 2018.

<sup>170</sup> Policy Guidelines by the Energy Community Secretariat on the Application of the Energy Community Acquis between the Contracting Parties and the European Union, 12 November 2014, PG 01/2014.

Code implementation.<sup>171</sup> For example, the Capacity Allocation Mechanism Network Code (CAM NC)<sup>172</sup> harmonises the procedures and timing for auctions at cross-border points, which makes it ineffective to introduce this code in CPs alone leaving out important interconnectors between CPs and EU Member States. On a similar note, a separate category of infrastructural projects (Projects of Mutual Interest) was created to compensate for the fact that in the Energy Community the above-mentioned TEN-E Regulation tied the granting of the status of a Project of Energy Community Interest to its previous qualification as a Project of Common Interest in the EU.<sup>173</sup>

All in all, this is an urgent matter of constitutional significance that needs to be addressed in the Energy Community, so that the pronounced language of integration is fully realised. Without solidarity, integration will be reduced to either simple association (no mutuality) or expansion (no equality).

#### B. Solidarity as General Legal Maxim

Title I EnC incorporates Article 6 which is identical to Article 4(3) TEU, except for the reference to 'Parties' instead of 'Member States'. Under Article 94 EnC, the Energy Community institutions shall interpret 'any term of other concept used in this Treaty that is derived from European Community law' (let alone a set of wholesome sentences) in conformity with CJEU case law.<sup>174</sup> This is a solid basis to argue that Article 6 EnC should convey the same basic scope of obligations as Article 4(3) TEU. While CJEU has given a rather restrictive interpretation to a similar provision in the context of one association agreement,<sup>175</sup> that case related to an agreement

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<sup>171</sup> Energy Community Secretariat, 'The State of Gas Market Integration in the Energy Community: Special report for the CESEC High Level Group Meeting' (2018) 17 <<https://www.energy-community.org/news/Energy-Community-News/2018/06/29.html>> accessed 02 December 2018.

<sup>172</sup> Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 {2017} OJ L 72/1.

<sup>173</sup> Recommendation R/2016/01/MC-EnC of 14 October 2016.

<sup>174</sup> Leal (n 99) 31.

<sup>175</sup> Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, para 24.

where no such interpretative guidance was given and dealt with direct effect (rather than the legal impact on public international law relations).<sup>176</sup>

In practice, Article 6 EnC is widely employed in dispute settlement proceedings under EnC.<sup>177</sup> On several occasions it even justified the recognition of a CP's treaty violation<sup>178</sup> and the call for the EU to implement equivalent sanctions (e.g. suspension of financial support) against a persistently defaulted CP.<sup>179</sup>

However, the full potential of legal integration through Article 6 EnC remains underexploited. On the one hand, EnC practice has developed in such a way that this article is invoked in most compliance cases. This differs from CJEU's approach where the relevant provision is not normally used in simple non-compliance proceedings.<sup>180</sup> On the other hand, reliance neither on Article 6 nor on Article 7 EnC has seemingly allowed clarifying the above-mentioned frustrating situation with interconnection points (despite the duty of uniformity under Article 4(3) TEU).

Both these deficiencies can be attributed to the absence of an adjudicatory authority capable of enforcing EnC as well as of objectively resolving disputes where the EU is blamed. This fact naturally affects the selection of cases that are brought for consideration before the Ministerial Council as well as the sophistication and volume of legal reasoning in the infringement proceedings. When the dispute settlement is ultimately political, the motivation on the part of the monitoring body becomes not to bring to justice as many complaints as possible (and thus promote the unity of the legal

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<sup>176</sup> Ibid, para 13.

<sup>177</sup> In particular, it is relied upon mostly to allege the failure to lay down the basic legal framework such as the Third Energy Package or state aid rules. For more information on cases, see <https://www.energy-community.org/legal/cases.html>.

<sup>178</sup> See Case ECS-08/11 <<https://www.energy-community.org/legal/cases/2011/case0811BH.html>> accessed 02 December 2018.

<sup>179</sup> Decision of the Ministerial Council of the Energy Community 2016/16/MC-EnC of 14 October 2016.

<sup>180</sup> Joined cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice Port* ECLI:EU:C:1992:118, para 19 ('the wording of Articles 5 and 6 of the Treaty is so general that there can be no question of applying them independently when the situation concerned is governed by a specific provision of the Treaty').

order), but rather to pursue only those complaints which are likely to find support among political representatives (and thus promote the legitimacy of the legal order).

### C. Solidarity as Specific Obligation of Cross-border Assistance

Regulation 2017/1938 is not yet part of the Energy Community *acquis* (neither is Regulation 994/2010), which means that the solidarity mechanism endorsed thereunder has not yet been extended to the rest of the Energy Community, including Ukraine. Currently CPs are only bound by adapted Directive 2004/67/EC,<sup>181</sup> which is clearly obsolete. However, discussions on implementation of the new Regulation in the Energy Community have been ongoing for some time; more importantly, they include pronounced calls for comprehensive legal coverage (which would resolve the above-mentioned issue of cross-border application).<sup>182</sup> Nevertheless, EnC itself and the unilateral practice thereunder point to the actual interplay of solidarity in Ukraine-EU relations as inspired by EnC.

Under Article 37 EnC (contained in Title III), when the relevant Party takes temporary safeguard measures to address a sudden gas crisis, such measures need to 'cause the least possible disturbance in the functioning of the Network Energy market of the Parties, and not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen' as well as 'not distort competition or adversely affect trade in a manner which is at variance with the common interest'. Falling short of establishing a positive duty of help, this provision represents a negative inter-state obligation to assist in a crisis by not aggravating the unfortunate stance. It effectively limits the choice of crisis management tools available to the parties,<sup>183</sup> thus

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<sup>181</sup> Decision of the Ministerial Council of the Energy Community 2007/06/-MC-EnC of 06 October 2011.

<sup>182</sup> Energy Community Secretariat, 'Revised security of gas supply regulation covering the Energy Community is best guarantee for Europe's security of gas supply' (08 April 2015) <<https://www.energy-community.org/news/Energy-Community-News/2015/04/08.html>> accessed 02 December 2018.

<sup>183</sup> There remains a question as to its binding effect on the EU as a whole (or on the European Commission which under Article 12(3) of Regulation 2017/1938

signalling the prevalence of the joint belief in the well-functioning market capable of handling a gas disruption. The mutual assistance mechanism organised under Article 46 EnC in the form of the Security of Supply Coordination Group should be helpful in implementing the relevant EnC provisions. Noteworthy, the preamble of the Procedural Act establishing this forum reads that 'securing energy supply through solidarity constitutes one of the main objectives of the Energy Community'.<sup>184</sup>

In addition, Ukraine has voluntarily implemented all core requirements of Regulation 994/2010 in its 2015 Law on the Natural Gas Market.<sup>185</sup> Article 6(3) thereof reads that in case of a gas crisis the competent authority may take safeguard measures which shall, *inter alia*, 'not create unjustified obstacles to the flow of gas in gas transmission systems of Ukraine and of other state parties to the Energy Community', 'not create likely serious threat to the security of gas supply of the other state party of the Energy Community' and 'not limit access to gas transmission systems or storages of Ukraine for customers established under the laws of the other state party of the Energy Community where this is technically possible and safe'.<sup>186</sup> This wording is copied from Article 10(7) of Regulation 994/2010 (which later migrated to Article 11(6) of Regulation 2017/1938) and bears a self-imposed constraint on the freedom to act in a gas crisis linked to the membership in the Energy Community. The EU is yet to reciprocate these efforts as Regulation 2017/1938 shows little extra solidarity towards CPs.<sup>187</sup> The Commission's initiative which linked the provision of solidarity to CPs' compliance with their EnC commitments<sup>188</sup> was stricken down in the final text.

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coordinates crisis management during a regional or Union emergency) given the limited territorial coverage of Title III.

<sup>184</sup> Procedural Act 2008/02/MC-EnC of 11 December 2008.

<sup>185</sup> Energy Community Secretariat (n 171) 11.

<sup>186</sup> Law of Ukraine 'On the Natural Gas Market' of 09 April 2015 #329-VIII (Закон України 'Про ринок природного газу') <<http://zakon2.rada.gov.ua/laws/show/329-19>> accessed 02 December 2018.

<sup>187</sup> Regulation 2017/1938 (n 97) recital (57), art 16.

<sup>188</sup> Commission (n 109) 40-41.

## 2. UA-EU AA: *Additional Instruments for Solidarity*

UA-EU AA is an all-encompassing cooperation agreement which marked a turning point in the history of Ukraine and Europe as a whole. Per the CJEU's interpretation, it 'create[s] special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system'.<sup>189</sup> The treaty started to apply provisionally from 01 November 2014 (the Deep and Comprehensive Free Trade Agreement part – from 01 January 2016) to ultimately come into force as of 01 September 2017. It repeals and replaces the Partnership and Cooperation Agreement (PCA)<sup>190</sup> concluded previously as part of the European Neighbourhood Policy (ENP).<sup>191</sup>

In contrast to PCA, UA-EU AA bears explicit references to solidarity in the context of energy cooperation (Article 338) as well as migration and asylum issues (preamble and Article 16). Reminiscent of EU Treaties, this approach highlights that on these topics interests of the EU and Ukraine are specially interrelated and interdependent.

UA-EU AA explicitly 'builds on the commitment of the Parties to implement [EnC]'. This preambular statement is further expanded in Article 278 whereby Ukraine's obligation to implement the EU *acquis* is automatically updated with the advent of the Energy Community *acquis*. Nevertheless,

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<sup>189</sup> *Demirel* (n 175) para 9.

<sup>190</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine (adopted 14 June 1994; entered into force 01 March 1998) OJ L49/3 (PCA). For the relation between the two agreements, see UA-EU AA, Articles 479, 486(6).

<sup>191</sup> Marise Cremona and Christophe Hillion, 'The Potential and Limits of the European Neighbourhood Policy' in Nathaniel Copsey and Alan Mayhew, *European Neighbourhood Policy: the Case of Ukraine* (SEI Seminar Paper Series No 1 2007) 37-38. Promoting common values, ENP fell short on the rest of solidarity elements and is rightly described as 'clearly and unambiguously an EU policy directed at its neighbours rather than the creation of something new (a space or an area) or a shared enterprise (a process or partnership)' (ibid 39). Not surprisingly, PCA did not contain any references to solidarity or related provisions. In the gas sector, it simply confirmed the parties' attachment to the European Energy Charter and in a single article devoted to energy (Article 61) sketched the areas of bilateral cooperation.

Article 278(3) UA-EU AA prevents parties from using this treaty's dispute settlement fora to raise issues of EnC compliance.

On the solidarity front, UA-EU AA supplements EnC with at least two additional instruments: the early-warning mechanism (EWM) under Annex XXVI to Chapter I of Title V and a strategic decision-making clause (Article 274).

Operating under Article 340 and Annex XXVI, EWM is designed to react to an emergency situation or a threat of such a situation defined as a significant disruption or physical interruption of gas supply between the EU and Ukraine. It presupposes a procedure for notification and joint assessment of the situation which should end up in a joint action plan. During this time, it is prescribed that the parties 'will do their utmost to minimise negative consequences for the other Party' and 'refrain from any actions unrelated to the ongoing emergency situation that could create or deepen the negative consequences for the supply of natural gas [...] between Ukraine and the European Union'. Regulation 2017/1938 mandates that once EWM is activated, 'the Union should take appropriate action to try to defuse the situation'.<sup>192</sup> It can arguably lead to the declaration of an early warning level crisis in EU Member States.<sup>193</sup>

Article 274 UA-EU AA located in a special chapter on energy trade broadly relates to decision-making on gas infrastructure, namely gas transmission and storage facilities. Overall, it imposes a duty of consideration of the other party's interests during infrastructure developments and 'when developing policy documents regarding demand and supply scenarios, interconnections, energy strategies and infrastructure development plans' as well as a duty to cooperate on related matters of trade, sustainability and supply security. While the chapter where this provision is located deals with both gas and electricity, this article focuses on gas, which can be explained by the search for a commitment to safeguard Ukraine's gas transit status. It was, for instance, invoked by National JSC Naftogaz of Ukraine as a justification to

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<sup>192</sup> Regulation 2017/1938 (n 105) recital (59).

<sup>193</sup> *Ibid.*, art 11(1)(a).

sue the European Commission for amending the access regime of the OPAL pipeline in Germany.<sup>194</sup>

At the moment, UA-EU AA does not operate as a self-sufficient solidarity regime. It relies on the institutional and constitutional basis of the Energy Community while at the same time reinforcing bilateral cooperation and communication. Nevertheless, the situation can change if the solidarity potential of the Energy Community is not developed. For instance, the already mentioned issue of cross-border application of the Energy Community *acquis* could be resolved on a bilateral level by extending the internal market treatment to this sector under Annex XVII of UA-EU AA.

#### IV. CONCLUSIONS

The present article illustrates that in understanding an ambiguous concept of public international law, one can rely on its application in a particular international law regime, including in a very specific and technical area such as gas market regulation. This epistemological approach is rarely used because, on the one hand, it requires quite diversified knowledge and, on the other, it may be difficult to duplicate in respect of each problematic notion. However, it has proven effective in this case where we have looked at the definition and normative force of solidarity.

In particular, we have established that early teachings of solidarity and its later doctrinal applications can be summarised in such a way as to produce its (relatively) non-contentious definition and a sketch of its normative powers. Formulated as a combination of three elements (common values and objectives, mutuality, and equality), solidarity features as a fundamental socio-political notion underlying the EU legal order and, in a way described by its first teachers, emits legal rules and mechanisms that serve to solidify this particular community. Apart from a constitutional dimension, solidarity takes the form of a general legal maxim of Article 4(3) TEU as well as of the duty to safeguard gas supply to a closed circle of customers under Regulation 2017/1938. Technicalities of a solidarity measure of last resort under this

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<sup>194</sup> Case T-196/17 Action brought on 27 March 2017 – Naftogaz of Ukraine v Commission {2017} OJ C 151/45.

Regulation provide an especially interesting case of how solidarity could be translated into legal rules and procedures.

When these dimensions operate in the legal framework of Ukraine-EU gas market integration, they exemplify the rule of solidarity in international law. The search for solidarity in these relations has led to the incorporation of the Energy Community; dissatisfaction with the level of mutuality and equality in this forum could engender the creation of a new solidarity regime under UA-EU AA. EnC, which possesses fundamental characteristics of a solidarity regime, contains a mechanism of self-preservation, i.e. Article 6 analogous to Article 4(3) TEU. The full potential encrypted thereunder needs to be explored and promoted in practice upon the initiative of EnC bodies which seem to be more cognisant of illuminating CJEU jurisprudence. Finally, solidarity is embodied in duties of emergency assistance between Ukraine and the EU: while mostly negative or procedural in nature, they have a strong tendency to be complemented with positive duties of help (using the format of Regulation 2017/1938).

The methodology applied in this article can be expanded to other fields where solidarity engrained in EU law migrates to international law regimes fuelled by integrationist forces (e.g. migration, disaster relief, etc). This looks like a viable way to finally establish solidarity, which historically started as a legal notion, as a valid international law concept.



## BOOK REVIEWS

ANNA SÖDERSTEN, *EURATOM AT THE CROSSROADS* (EDWARD ELGAR 2018)

Jakub Handrlica \*

The Treaty establishing the European Atomic Energy Community (hereinafter 'the Euratom Treaty' or 'the Treaty') was signed by the representatives of six states on 25 March 1957 in Rome.<sup>1</sup> Pursuant to its Article 224, the Treaty entered into force on the first day of the month following the deposit of the instrument of ratification of the final signatory state, i.e. on 1 January 1958. During the 1950s and 1960s, the establishment of Euratom triggered significant interest within scientific literature.<sup>2</sup> During this time, Euratom became the subject of several

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<sup>1</sup> Belgium, Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands.

<sup>2</sup> Kenneth Cohen, 'Euratom' (1959) 7 *The Journal of Industrial Economics* 79; Reuben Efron and Allan S. Nanes, 'The Common Market and Euratom Treaties: Supranationality and the Integration of Europe' (1957) 6 *International & Comparative Law Quarterly* 670; Georges Fischer and Daniel Vignes, 'Euratom' (1956) 2 *Annuaire Français de Droit International* 695; Hugo J. Hahn, 'Control under Euratom Compact' (1958) 7 *American Journal of Comparative Law* 39; Hugo J. Hahn, 'Euratom: Conception of an International Personality' (1958) 71 *Harvard Law Review* 1001; James G. Johnson, 'An Introduction to the European Atomic Community (Euratom)' (1957-1958) 13 *Business Lawyer* 801; Allan Nanes, 'The Evolution of Euratom' (1957/1958) 13 *International Journal* 12; Pierre Mathijsen, 'Problems Connected with the Creation of Euratom' (1961) 26 *Law and Contemporary Problems* 438; Norbert Pelzer, 'Die rechtliche Problematik der Beschränkung der deutschen Atomwirtschaft durch den Euratomvertrag' (1962) *Der Betrieb* 398; Willem Van Slobbe, 'Euratom' (1956) 104 *De Economist* 593; Lawrence Scheinman, 'Euratom: Nuclear Integration in Europe' (1966/1967) 36 *International Conciliation* 1; Georges Vedel, 'Euratom' (1958) 9 *Revue économique* 225 etc.

academic theses which were successfully defended at various universities.<sup>3</sup> In addition, the Brussels-based '*Librairie encyclopédique*' published the first commentary on the provisions of the Treaty.<sup>4</sup> This widespread attention to Euratom clearly reflected the atmosphere of 'nuclear euphoria', which supported nuclear energy as of the way forward for future economic development.<sup>5</sup>

However, later political and economic developments<sup>6</sup> caused academic interest in the Euratom Treaty to wane. During the 1970s, it became clear that Euratom would not be implemented in the way the Treaty had foreseen, a fact described by some authors as the 'final crisis of Euratom'.<sup>7</sup> In the following decades, Euratom received only occasional academic attention. In particular, it was the 'Euratom Treaty's notorious resistance to change'<sup>8</sup> which became the object of academic interest.<sup>9</sup> The literature thus reflected the fact that the Euratom

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<sup>3</sup> E.g. Kurt Ballerstedt, *Das Eigentum an Kernbrennstoffen* (Veröffentlichungen des Instituts für Energierecht an der Universität Bonn 1962); Theo W. Vogelaar, *Het eigendomsrecht van Euratom over bijzondere splijstoffen* (Gorcum & Comp NV 1961), etc.

<sup>4</sup> Jacques Errera et al., *Euratom: Analyse et Commentaires du Traité* (Librairie Encyclopédique 1958).

<sup>5</sup> See e.g. Bertrand Goldschmidt, *The Atomic Complex: A Worldwide Political History of Nuclear Energy* (American Nuclear Society 1982) 112.

<sup>6</sup> In the course of the 1970s, it became clear that the member states preferred to develop their own nuclear research, in the area of nuclear reactors, rather than pursuing joint research under the auspices of Euratom. The member states were also not prepared to allow Euratom to execute some of its functions, in particular the supply monopoly as set out in the Chapter 6 of the Euratom Treaty. Further, the incident in the Three Miles Island (1979) crystallised anti-nuclear concerns among the general public and became a catalyst for new nuclear construction programme in several countries.

<sup>7</sup> Carl Deubner, 'The Final Crisis of Euratom' (1979) 2(1) *Current Research on Peace and Violence* 53.

<sup>8</sup> Irina Cenevska, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within* (Brill Nijhoff 2016) 1.

<sup>9</sup> Ilina Cenevska, 'The European Parliament and the European Atomic Energy Community: A Legitimacy Crisis?' (2010) 35 *European Law Review* 415; Christiane True, 'EU-Kompetenzen für Energierecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents' (2004)

Treaty had not undergone any substantial modification since its adoption (having even managed to evade the amendments provided by the Lisbon Treaty later on).<sup>10</sup> In this respect, the Euratom Treaty was referred to as being 'like a Chinese girl-child, exposed after birth because the parents did not want it to live',<sup>11</sup> 'a dormant serpent',<sup>12</sup> 'an outsider',<sup>13</sup> 'a chameleon',<sup>14</sup> 'an invisible creature',<sup>15</sup> or even said to be 'already forgotten a decade after its establishment'.<sup>16</sup>

The 60<sup>th</sup> anniversary of the Euratom Treaty provided a good opportunity to revisit this community and its peculiar legal order. This opportunity was taken by Anna Södersten, who published her book *Euratom at the Crossroads* based on

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Juristenzeitung 779; Sebastian Wolf, 'Zur Zukunft des Euratom-Vertrags' (2006) 29 *Integration* 297; Sebastian Wolf, 'Integration durch Kernfusion? Zur Wiederbelebung der Euratom - Gründungsmythen' (2007) 25 *Forum Recht* 26 etc.

<sup>10</sup> The Euratom Treaty has been amended by the Maastricht Treaty (Title IV: Provisions amending the Treaty establishing the European Atomic Energy Community and Title VII: Final Provisions which extended the institutional changes introduced to the EC Treaty and the ECSC Treaty to the Euratom Treaty), the Treaty of Amsterdam (Articles 1, 4, 7, 8, 9, 10, 11 and relevant protocols applicable to Euratom), the Treaty of Nice (Articles 1, 3, 7, 9 and relevant protocols applicable to Euratom) and lastly, by the Lisbon Treaty (see Protocol No. 2, 'Amending the Treaty establishing the European Atomic Energy Community' and other protocols applicable to the Euratom). However, notwithstanding several non-substantial changes, the text of the Euratom Treaty has essentially remained the same since 1957.

<sup>11</sup> David Allen, 'The Euratom Treaty, Chapter VI: New Hope or False Dawn?' (1983) 20(3) *Common Market Law Review* 473.

<sup>12</sup> Nuria Prieto Serrano, 'Wakening the Serpent: Reflections on the Possible Modification of the Euratom Treaty' (2006) 1(1) *International Journal of Nuclear Law* 14.

<sup>13</sup> Cenevska (n 7).

<sup>14</sup> Jakub Handrlica, 'The Splendid Durability of the Provisional: A Tribute to Euratom' (2018) 14 *Croatian Yearbook of European Law & Policy* 161.

<sup>15</sup> Juan Sellarés Sella, 'El Euratom subsiste, invisible e incompatible con el tinglado comunitario' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa: la salida de la crisis constitucional* (Iustel 2007).

<sup>16</sup> Theo W. Vogelaar, 'Euratom: de vergeten gemeenschap' (1967) 8(1) *Nieuw Europa: maandblad van de Europese Beweging in Nederland* 14.

her PhD thesis.<sup>17</sup> At the start of her book (p. 1), she correctly states that Euratom remains a kind of *terra incognita* for the majority of the recent scholarship on European Union (EU) law. The goal of her study, to identify the legal implications of the continued separate existence of Euratom within the EU, is ambitious.

Several other studies have recently addressed this issue from a number of perspectives. Rasa Ptasekaite has dealt with mutual relations between the EU and Euratom from the point of view of the three founding treaties (the Treaty on European Union, the Treaty on Functioning of the European Union and the Euratom Treaty).<sup>18</sup> In her 2016 book, Iлина Cenevska addressed Euratom issues mainly from the perspective of environmental law.<sup>19</sup> And very recently, Pamela M. Barnes published an outstanding monograph on nuclear energy in the EU from a policy perspective.<sup>20</sup> In this context, Södersten's book represents the first attempt to comprehensively address the legal issues arising from the existence of the Euratom Treaty since Jaroslav G. Polach's *Euratom: Its Background, Issues and Economic Implications* of 1964.<sup>21</sup> In contrast to Polach's study, Södersten's main focus is the legal framework of Euratom, rather than the economic or political issues.

Following a historical introduction (pp. 12-30), the book is divided into two parts, 'Structural issues' and 'Substantive issues'. They may be read independently. The first part, containing a more theoretical discussion, will

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<sup>17</sup> The dissertation was written under supervision of Professor Marise Cremona and successfully defended at the European University Institute, Department of Law in 2014.

<sup>18</sup> Rasa Ptasekaite, *The Euratom Treaty vs. Treaties of the European Union: Limits of competence and interaction* (Swedish Radiation Safety Authority 2011).

<sup>19</sup> Cenevska (n 10).

<sup>20</sup> Pamela M. Barnes, *The Politics of Nuclear Energy in the European Union* (Barbara Budrich Publishers 2018).

<sup>21</sup> Jaroslav G. Polach, *Euratom: Its Background, Issues and Economic Implications* (Oceana Publications 1964). Abram I. Ioirish published his *Euratom: Právoúye problémi* [Euratom: Legal Problems] in 1992. However, the fact that this study was published only in Russian makes it much less accessible for European scholars.

perhaps be more interesting for scholars of EU law and, in general, for those interested in questions of the mutual relations between the EU and Euratom. The second part may be more interesting to practitioners, as it provides an outstanding (and often detailed) overview of existing Euratom policies and corresponding legislation. However, only together do the two parts provide a complete picture of the implications of the separate legal order established under the Euratom Treaty.

The section on structural issues deals with the architecture of the Euratom Treaty (pp. 31-56) and with the relations between this Treaty and primary EU law (pp. 57-84). Södersten thus provides a valuable introduction for any reader familiar with EU law seeking clarification of the mutual relations between the two existing communities (i.e. the EU and Euratom). In this respect, she correctly points to the 'different ethos' of the two treaties, stating that 'while the European Economic Community was initially predominantly *functional*, the EU is now predominantly (or at least increasingly) *humanist*. Euratom has not undergone the same evolution' (pp. 66-68).<sup>22</sup> In this respect, two potential interpretations of the mutual relations between the Euratom Treaty and primary EU law are discussed. On the one hand, one can use a strict interpretation, which provides for a 'fixed boundary' between the respective treaties, thus understanding the Euratom Treaty as 'a *lex specialis* as a whole and *in abstracto*' (p. 53). This interpretation was previously developed in more detail by Thomas F. Cusack.<sup>23</sup> Cusack argued that because of the fundamental difference of approach and philosophy of the treaties, it would be wrong to see this relationship as a dichotomy of *lex specialis* and *lex generalis*. This interpretation would lead to the

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<sup>22</sup> However, there had in fact been a 'different ethos' in the two treaties from the very beginning. While the Treaty establishing the European Economic Community aimed primarily to create a common market, the Euratom Treaty's purpose was the promotion of the speedy development of nuclear industry. This divergence of goals was reflected in the contemporary legal scholarship. See e.g. Ulrich Meyer-Cording, 'Europa und der Euratomvertrag' in Europa Union Deutschland (ed), *Euratom: Wirtschaftliche und politische Probleme der Atomenergie* (Europa-Union 1957).

<sup>23</sup> Thomas F. Cusack, 'A Tale of Two Treaties: An Assessment of the Euratom Treaty in Relation to the EC Treaty' (2003) 40 *Common Market Law Review* 177.

conclusion that matters not being addressed by the Euratom Treaty remain in the competence of the member states. On the other hand, there has been another contrasting interpretation, arguing in favour of the subsidiary application of provisions of EU primary law. Södersten follows this latter interpretation, supported by both theoretical arguments and the case law of the Court of Justice. The author presents a general outline of this issue in the 'structural issues' section (pp. 50-55), while the topical issues of subsidiary application of EU primary law are discussed under 'substantive issues', in particular with regard to competition law (pp. 128-130), state aid (pp. 131-140), and nuclear export controls (pp. 211-216).

Legal issues arising from Euratom membership are also discussed (pp. 78-80), in particular with respect to potential withdrawal from this community. Here, the author clearly, and to my mind correctly, argues that separate membership of just one community (either the EU or Euratom) would be – from a strict legal point of view – possible. In the light of the current Brexit debate, this issue is very topical. Here, Södersten builds upon her earlier work on this topic.<sup>24</sup> She argues against the recent statements made by the UK government that Brexit from Euratom is a *necessary* corollary of Article 50 TEU (p. 78). In this respect, she claims that reference to this provision, as provided in the Euratom Treaty (Article 106a),<sup>25</sup> merely implies the existence of a possibility for a separate 'withdrawal from Euratom', rather than a necessity to withdraw from both

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<sup>24</sup> Anna Södersten, 'Brexit, Euratom and Nuclear Proliferation' (2016) 98 Nuclear Law Bulletin 47.

<sup>25</sup> (1) Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.

(2) Within the framework of this Treaty, the references to the Union, to the 'Treaty on European Union', to the 'Treaty on the Functioning of the European Union' or to the 'Treaties' in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty.

communities at once (p. 80). At the same time, she also correctly states that 'although legally possible, partial membership would likely create some practical difficulties because Euratom and the EU share the same institutions' (p. 80). In this context, the author pays further attention to the issues of the UK's withdrawal from Euratom in the chapters addressing nuclear non-proliferation (pp. 210-211). However, the UK's withdrawal from Euratom will clearly have much wider consequences than presented here and will also touch upon some other areas, such as nuclear research, supply policy, and nuclear common market.<sup>26</sup>

Among the 'substantive issues' discussed, Södersten deals with the material issues of particular policies, as executed under the Euratom Treaty. Euratom was established with the aim to promote the speedy development of nuclear industries. The author analyses supply policy (pp. 93-100), as well as the policies of exclusive ownership (pp. 100-102), investments (pp. 102-106) and nuclear research (pp. 107-113). Furthermore, she considers the provisions of the Euratom Treaty dealing with the nuclear common market, questioning both their effectiveness (127-128) and their relation to the rules of competition law (pp. 128-131). Finally, she looks at the issues of radiation protection (pp. 141-168) and nuclear safety (pp. 169-196), which had originally played only a marginal role within the Euratom competencies.

The fact that these measures, which primarily aim to protect human health and the environment, have recently played an increasing role in Euratom's legislation somewhat undermines the suggestion discussed above that the Euratom Community is more 'functional' than 'humanistic'. The amount of space the author devotes to dealing with various pieces of legislation protecting both society and the environment from potential dangers demonstrates, in my opinion, that there has been a considerable shift in the 'ethos' of Euratom toward

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<sup>26</sup> The topic was recently addressed by Stephen Tromans and Ian Truman in their speech 'Existing Euratom', given at the 'Nuclear Inter Jura 2018' in Abu Dhabi, UAE. The presentation is available at <<https://inl2018uae.com/congress-papers/>>.

a more 'humanistic' community in recent decades.<sup>27</sup> This conclusion is also supported by the discussions on a prospective strengthening of the nuclear third party liability regime under the umbrella of the Euratom Treaty.<sup>28</sup> Moreover, the fact that Euratom has, at last with regard to certain policies, been considered a source of inspiration for other regions may also lead to a more positive evaluation of this Community.<sup>29</sup>

Euratom also possesses certain important external competencies. Södersten does not deal with these in a specific chapter of her book, but rather addresses them in the context of relevant policies. External relations vis-à-vis third states are discussed with respect to supply policy (pp. 96-99), nuclear research (pp. 111-112), and nuclear non-proliferation (pp. 223-226). Södersten also touches upon this issue with respect to nuclear safety (pp. 187-188), in the light of Euratom enlargement to Central and Eastern Europe (2004 and 2007). This work represents a useful contribution to the current debate on the extra-territorial effects of EU energy policy.<sup>30</sup> However, with respect to nuclear safety, it would also be interesting to address the issue of the potential extra-territorial effects of the existing Euratom directives.<sup>31</sup> Södersten did not address this issue explicitly

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<sup>27</sup> For this perspective, see also Pamela M. Barnes, 'The Resurrection of the Euratom Treaty: Contributing to the Legal and Constitutional Framework for Secure, Competitive and Sustainable Energy in European Union' in Thijs F. Etty and Han Somsen (eds), *Yearbook of European Environmental Law* (OUP 2008); Jürgen Grünwald, 'Der Euratom-Vertrag: nie war er so wertvoll wie heute' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 481; Werner Schröder, 'Die Euratom: Auf dem Weg zu einem Umweltgemeinschaft' (1995) *Deutsches Verwaltungsblatt* 322.

<sup>28</sup> See Denis Philippe, Marc Beyens and Patrick Reyners (eds), *Prospects of a Civil Nuclear Liability Regime in the Framework of the European Union* (Bruylant 2012).

<sup>29</sup> Gregoire Mallard, 'Can the Euratom Treaty inspire the Middle East?' (2008) 15 *The Nonproliferation Review* 459.

<sup>30</sup> See e.g. Kim Talus and Moritz Wüstenberg, 'Risks of Expanding the Geographical Scope of EU Energy Law' (2017) *European Energy and Environmental Law Review* 138.

<sup>31</sup> E.g. Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste, *OJ L 199*, 2.8.2011, pp. 48-56 (see Article 4 for principles governing export of

in her book, which opens the door for future research and publications in this field by her and others.

In her conclusion, Södersten correctly states that 'while Euratom has some important functions, the EU could equally perform many of these functions. Given the expansion of EU competencies, there is no longer a need for the Euratom Treaty as a separate treaty' (p. 234). However, she has not composed a requiem for Euratom. For her, it seems clear that the dissolution of Euratom would be a purely academic proposal, rather than a politically viable solution. In fact, the issues of nuclear energy remain so delicate that most of the member states will in future quite probably prefer the status quo to incorporation of Euratom into the EU framework.<sup>32</sup> The author is aware of this situation, stating that '[a]t a time when public support for the EU is in decline, such a reform would not be desirable; nuclear energy cooperation is far too sensitive an issue' (p. 235).

Overall, I consider Södersten's book to make a valuable contribution to legal scholarship on the future of EU law. In her introduction, she correctly points to the lack of publications addressing Euratom. Most of the literature is from the 1950s and 1960s and only a minor portion of it refers to the legal aspects. However, this book contains references to a wide range of existing academic sources dealing with various issues of Euratom. Consequently, it is clear that Södersten's book is based on comprehensive and thorough scientific research on existing sources and their subsequent analysis. She succeeded in her goal of providing a complex analysis of the legal framework established under the Euratom Treaty. Regarding the relative lack of scientific literature on Euratom, Södersten's work deserves to become a handbook on Euratom issues in the coming decades.

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*radioactive waste to third States*). See also Jakub Handrlica, 'Exclusivism' in International Nuclear Law: The Concept Revisited' (2018) 8 *The Lawyer Quarterly* 280-283.

<sup>32</sup> For further details see Christiane True, 'The Euratom Community Treaty's Prospects at the Start of the New Millenium' (2006) 1 *International Journal of Nuclear Law* 247.



OLE-ANDREAS ROGNSTAD, *PROPERTY ASPECTS OF INTELLECTUAL  
PROPERTY* (CAMBRIDGE UNIVERSITY PRESS 2018)

Léon E. Dijkman\*

In *The Unbearable Lightness of Being*, Milan Kundera warns that metaphors are dangerous.<sup>1</sup> Kundera postulates that love begins with the fictions we create of others and hints that we can never be quite certain to what extent we love the person, rather than the fiction. The word 'property' in the term intellectual property (IP) seems to put the associated rights – copyrights, patents and trademarks, among others – in a similarly thorny predicament. Intellectual 'property' suggests that these rights connote ownership of the protected ideas, much like traditional property rights connote ownership of tangible goods, the only difference being that their object is intangible. But is IP really property or are these rights quite different in nature? Could it be that what might initially have been a simple moniker for a set of rights that were otherwise hard to classify has taken on a life of its own, leading us to improperly conflate IP and property in tangible objects even today? In his new book on the subject, Ole-Andreas Rognstad fears that the answer might be 'yes'.<sup>2</sup>

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<sup>1</sup> Milan Kundera, *The Unbearable Lightness of Being* (MH Heim tr, Faber & Faber 2015) pt 1 ch 4.

<sup>2</sup> Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (Cambridge University Press 2018) 201 (proposing that, rather than lamenting the propertization of IP, we should underscore 'the elusiveness of the property metaphor and the limited guidance it provides').

## I. THE BOOK'S MAIN CONCLUSIONS

Rognstad identifies three aspects of IP that can potentially be analogized with property in tangibles: (1) the justification and (2) the structure of IP, as well as (3) IP as assets. The first aspect relates to the grounds on which the grant and scope of IP can be justified. The second aspect concerns, in particular, the relation between IP rights and their object of protection. The third aspect focuses on IP rights as assets, that is legal entitlements representing some economic value that may be transferred, securitized or licensed. The book proceeds to analyse, for each individual aspect, how appropriate the comparison of IP to property in tangibles is.

Its general conclusion is that the comparison will often be ill-advised: 'the considerable differences with regard to the possible justification grounds, as well as the structuring of the rights, imply that from a legal point of view little is gained from drawing real property analogies'.<sup>3</sup> Such analogies fare somewhat better when speaking of IP as assets, though even here 'considerable caution should be exercised'.<sup>4</sup> Let me attempt an analogy of my own to illustrate the point: one might say that property in tangibles is like IP the way cars are like buses. Both belong to the general class of vehicles and they share various features which make them more alike than, say, private cars and cruise ships. But they also differ in significant respects, such as their function and size. As a result, some rules apply equally to cars and buses, such as speed limits and the prohibition of drink driving, but not all: buses are allowed in bus lanes and must be driven by persons holding a special driver's license. Thus, rules applicable to buses do not necessarily carry over to cars just because both are motorized vehicles. For instance, when faced with the question whether a car may pick up a passenger at a bus stop, the fact that a bus may do so is not decisive and perhaps not even helpful.

In much the same way, Rognstad argues that rules relating to property in tangibles do not necessarily translate well to IP. Rognstad concedes that both

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<sup>3</sup> Ibid 200.

<sup>4</sup> Ibid.

legal concepts denote entitlements to objects and are therefore similar in this limited sense, but immediately warns that the similarity may be accepted only 'at the level of pure description', that is 'without drawing material analogies from one set of rules to the other'.<sup>5</sup> Superficial similarities between IP and property in tangibles are deceptive because they suggest these rights are also similar in other respects when in reality they are not. This is the cardinal danger for Rognstad, because IP rights should be granted, and their scope delineated, in accordance with their specific justification.<sup>6</sup> Overreliance on real or perceived similarities to property in tangibles may make us forget these specific justifications.<sup>7</sup>

Coincidentally, another book on property aspects of IP – this one specifically on copyright – came out shortly after Rognstad's had gone to press, *Propertizing European Copyright: History, Challenges and Opportunities* by Caterina Sganga. Interestingly, Sganga's conclusions on the role property logic should play in the development of copyright are diametrically opposed to Rognstad's. She argues that embracing the propertization of copyright could result in a more consistent, predictable and balanced development of EU copyright law.<sup>8</sup> For instance, she suggests that inspiration could be drawn from the concept of *res nullius* to find 'an implied renunciation of any claim or remedies against the infringement' in the case of non-use of copyrighted works.<sup>9</sup> Interested readers would do well to read Sganga's book alongside Rognstad's. It shows that property is a malleable

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<sup>5</sup> Ibid 123, 124.

<sup>6</sup> Ibid 123 (relying on false analogies risks the 'creation of concepts that are detached from the interests at stake and the purposes that IPRs pursue, such that the particular justifications for IPRs are lost from sight').

<sup>7</sup> The concern that this leads to overprotection of IP at the expense of the public domain is frequently expressed in IP scholarship. Rognstad is agnostic about the consequences: 'It is important to remember that use of the term property does not in itself mean strong or absolute protection', *ibid* 200.

<sup>8</sup> Caterina Sganga, *Propertizing European Copyright: History, Challenges and Opportunities* (Edward Elgar 2018) 269ff.

<sup>9</sup> Ibid 244.

concept and that reliance on property logic can be used to either oppose or defend the strengthening and expansion of IP rights.<sup>10</sup>

## II. COMMENT

### 1. *Abstractions in Intellectual Property*

As noted above, for Rognstad, the equation of IP and property really only makes sense when speaking of IP as assets.<sup>11</sup> But, when considering the subject matter and scope of IP – that is, material IP law – this analogy stops short. This has long been debated, as Rognstad's book summarises well. The book's most original contribution is the reference to early writings on the subject by Scandinavian legal realists, for whom the key difference between IP and property in tangibles was that, in the case of IP, the object 'does not exist in the real world; it is only an abstraction of the embodiments subject to protection'.<sup>12</sup> Just like Plato's ideal forms in his allegory of the cave, patented inventions or copyrighted works can never be known as such, but rather are only ever imperfectly reflected in their embodiments (and there is no philosopher king to redeem us).<sup>13</sup> In this way, IP relates to infinite physical phenomena.<sup>14</sup> Consequently, establishing IP

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<sup>10</sup> This argument has been made before. In particular, see Michael A Carrier, 'Cabining Intellectual Property through a Property Paradigm' (2004) 54 *Duke Law Journal* 1, 5, who proposes to import categories of limits from property in tangibles into IP.

<sup>11</sup> E.g. Rognstad (n 2) 138 (a reference to IP as property might be helpful for 'establishing that general rules on the treatment of assets may, to some extent, also apply to IPRs'). Although Rognstad considers this function of IP to have the most in common with property in tangibles, he points out various differences that can create difficulties for the analogy even here.

<sup>12</sup> *Ibid* 49.

<sup>13</sup> Plato, *Republic* (B Jowett tr., Project Gutenberg eBook reprint 2008), Book VII.

<sup>14</sup> Rognstad (n 2) 49. Rognstad repeatedly cites a manuscript on this subject that has since been published as Alexander Peukert, *Kritik der Ontologie des Immaterialgüterrechts* (Mohr Siebeck 2018). For a more practical application in the field of patent law, see Robin Feldman, *Rethinking Patent Law* (Harvard University Press 2012), for whom the abstract nature of inventions means patents are no more than bargaining positions, as well as Jessica Lai, 'The Nebulous 'Invention': From 'Idea and Embodiment' to

infringement always involves an intermediary abstraction step, absent in disputes over property in tangibles.<sup>15</sup> The seemingly facile observation that tangibles are fixed and rivalrous, then, becomes the root of profound differences with the object of IP. This affects both the justification and the substance of their respective property entitlements and, as a result, when speaking of one, analogies to the other fail.

Whereas property in tangibles is often justified by reference to the so-called tragedy of the commons, IP is traditionally justified as a response to the 'tragedy of the free rider'.<sup>16</sup> Private property in tangibles exists to prevent overuse, but overuse can never occur with intangibles. Likewise, while free-riding can occur with both tangibles and intangibles, it may be especially problematic in the context of IP because it directly affects its incentive function.<sup>17</sup> Thus, when explaining IP's *raison d'être*, reliance on justificatory theories developed in the context of property in tangibles, such as John Locke's theory of labor, may be inappropriate.<sup>18</sup> So, too, for the substance of the rights. The absence of an intermediary abstraction step makes doctrines like trespass and *rei vindicatio*, which serve to effectuate property rights in the context of tangibles, apply poorly to IP. The 'borders' of IP's object are not just harder to establish; rather, for Rognstad, 'determining the scope of the legal object [of IP] requires methods

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'Idea/Embodiment and Observable Physical Effects', in Jessica Lai and Antoinette Dominicé (eds), *Intellectual Property and access to Im/material goods* (Edward Elgar 2016).

<sup>15</sup> For instance, identifying the invention underlying the claims before patent infringement can be established. See Rognstad (n 2) 106-109.

<sup>16</sup> Scholars have questioned whether this is really a 'tragedy'. See esp. Mark A Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 *Texas Law Review* 1031.

<sup>17</sup> Rognstad (n 2) 98; see also chapters 2 and 5 of the book, which contain a much more nuanced discussion of the respective justifications for property in tangibles and intangibles which, for reasons of space, cannot be reviewed here. The interested reader may also wish to consult Michael Spence, *Intellectual Property* (Oxford University Press 2007), ch 2; and Peter S Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit de Geest, *Encyclopedia of law and economics* (Edward Elgar 2000), with many references to further literature.

<sup>18</sup> *Ibid* 30; but see Adam Mossoff, 'Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory' (2012) 29 *Social Philosophy and Policy* 283.

very different from those used to determine the boundaries of physical goods, making the two phenomena difficult to compare'.<sup>19</sup> IP's delicate balancing act between too little abstraction, resulting in practically meaningless protection, and too much abstraction, resulting in overbroad protection at the expense of the public domain, is not performed in property in tangibles and it is certainly not its essential methodology.

This balancing act defines IP and performing it fairly is a perennial problem.<sup>20</sup> Rognstad suggests that we should be aware of this problem and, in particular, ensure that we 'find the abstraction levels that reflect the functions and purpose of the rules'.<sup>21</sup> This recommendation is not entirely clear: on the one hand, a large body of legislation, case law and literature has developed in each field of IP to help courts perform the abstraction step. Striking the right balance between the interests of the rights holder and those of the public was the guiding principle in developing this body of law, which should address Rognstad's concerns.<sup>22</sup> On the other hand, if he envisages an increased awareness of IP's functions and purpose in the day-to-day application of this body of law, this is easier said than done. Consider, for example, the two signs shown in figure 1, both of which were registered as trade marks for (*inter alia*) hotel services.

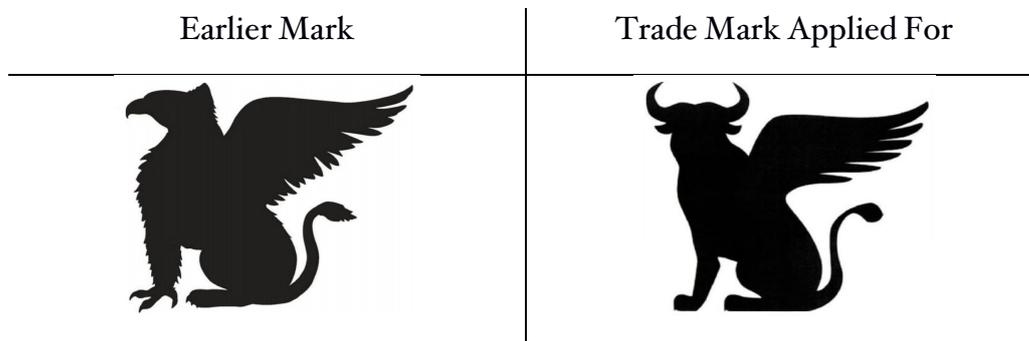
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<sup>19</sup> *ibid* 96.

<sup>20</sup> The book cites an oft-quoted American case in which Judge Learned Hand famously formulated the problem, *Nichols v. Universal Pictures*, 45 F.2d 119 (2d Cir. 1930), 121: '... there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended ... Nobody has ever been able to fix that boundary, and nobody ever can.' Note the reference to copyright as 'property', which suggests that Judge Hand may nonetheless have felt the abstraction step does not make copyright and property in tangibles fundamentally different.

<sup>21</sup> Rognstad (n 2) 111, 106, 108.

<sup>22</sup> This is perhaps most clear in the case of Article 69 European Patent Convention and its Protocol, which in Article 1 explicitly states that the article seeks to combine 'a fair protection for the patent proprietor with a reasonable degree of certainty for third parties.'



*Figure 1. Two Signs Registered for Hotel Services*

The European Union Intellectual Property Office (EUIPO) Board of Appeal considered these signs dissimilar, finding that they have 'completely different figures characterised by very different features' and recognizing in the earlier sign a griffin whereas the trade mark applied for was considered 'fanciful'.<sup>23</sup> The General Court annulled the decision: it held that both signs show a 'black-on-white silhouette of an animal-like creature viewed in profile', depicted in similar positions, which both evoke 'an imaginary creature merging the characteristics of several animals'.<sup>24</sup> Both decisions were based on factually correct considerations, but only one is 'right'. The case is a textbook example of the abstraction problem: what level of detachment from the griffin is permissible when assessing similarity? The fact of the matter is that this assessment is invariably subjective and it remains unclear how the function and purpose of the underlying rule, i.e. Article 8(1)(b) of (now) Regulation 2017/1001 (the European Trade Mark Regulation), can help guide it. The problem is not resolved by simply bearing in mind that the underlying rule aims to prevent consumer confusion, because determining the level of abstraction at which confusion can no longer occur will remain a subjective matter.

## *2. Practical Implications*

This brings me to the main shortcoming of the book, of which there are otherwise very few. Chapter 7 takes a practical approach to the asset function of IP and contains various original insights which seem relevant and applicable in

<sup>23</sup> EUIPO BoA 17 January 2017, R-165/2016-4, para 29 and 31.

<sup>24</sup> GC 15 March 2018, T-151/17 (*Marriott Worldwide Corp. v. EUIPO*), para 36 and 42.

everyday situations.<sup>25</sup> But the argument on the justification and scope of IP, while skilfully developed, remains rather theoretical: the griffin example shows Rognstad's findings here may be difficult to apply when performing the abstraction step in practice. Another case in point is Recital 9 of Directive 2001/29/EC (the InfoSoc Directive) which states explicitly that '[i]ntellectual property has ... been recognised as an integral part of property'. Although he discusses the recital, Rognstad does not address this statement at all.<sup>26</sup> This is rather surprising since the recital suggests that the equation with property has implications for the protection afforded to copyright holders.<sup>27</sup> This express classification of copyright as property by the EU legislator raises the question how much room is left to consider Rognstad's thoughtful warnings.

Perhaps the purpose-oriented application of IP law advocated by Rognstad is not so much needed in performing the abstraction step, but rather at the stage of remedies. It may well be that a court finds infringement of an IP right and still concludes that imposing a particularly oppressive remedy, such as an injunction, would run counter to the function and justification of the IP right being enforced. It will be tempting to draw an analogy to property in tangibles, for instance to rules developed in cases of minimal or unintentional encroachment of land, where a remedy might be refused even though the property owner is within their rights. And yet, it is here that a clear distinction with property in tangibles is most needed because, while IP exists to stimulate creativity and innovation, the breadth of the monopoly it affords may sometimes have the opposite effect. This concept of purpose-bound rights with potentially

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<sup>25</sup> Especially the discussion of IP as fundamental rights is illuminating and well worth reading. Unfortunately, a more in-depth analysis of Rognstad's conclusions in this chapter is outside of the scope of this review.

<sup>26</sup> Rognstad (n 2) 89.

<sup>27</sup> The first sentence of this recital stresses the need for a 'high level of protection'. Sganga (n 8) 98 even suggests the recital presents copyright as 'an entitlement that is more an end in itself than a tool to achieve higher public goals', a conception that would seem anathema to Rognstad.

unlimited scope is alien to property in tangibles, and the harmful effects of overlooking this are felt most strongly at the remedies stage.<sup>28</sup>

The book hints at this, but unfortunately does not fully develop the point. For instance, Rognstad discusses the US Supreme Court's landmark decision in *eBay v. MercExchange* concluding that the Supreme Court is 'sensitive to the obvious differences between the utilitarian accounts of property in tangibles and IP'.<sup>29</sup> This is true, but there is more to the decision than that. The case re-established traditional equitable principles as the proper test for injunctive relief in patent cases.<sup>30</sup> Justice Kennedy's concurrence, which Rognstad also cites, suggests this may have been necessary to better equip lower courts to deal with patent cases presenting 'considerations quite unlike earlier cases'.<sup>31</sup> Since then, U.S. courts have developed new practices that better reflect the economic realities in which modern day patent law functions.<sup>32</sup> In Europe, the CJEU's case law on the proportionality principle in IP has been interpreted as a parallel development.<sup>33</sup> Rognstad criticizes this case law, somewhat harshly in my opinion, for not being sufficiently explicit about why one right or the other prevails.<sup>34</sup> I believe that

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<sup>28</sup> See in particular Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth 1996) ch 7.

<sup>29</sup> See Rognstad (n 2) 80 and *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>30</sup> 547 U.S., at 394: 'Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief .... We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts'.

<sup>31</sup> 547 U.S., at 396 (Kennedy, J., concurring).

<sup>32</sup> See e.g. Christopher B Seaman, 'Permanent Injunctions in Patent Litigation after EBay: An Empirical Study' (2015) 101 Iowa Law Review 1949, 1988, who shows, among other things, that non-practicing entities have significantly lower chances of being afforded injunctive relief.

<sup>33</sup> See e.g. Ansgar Ohly, 'Three Principles of European IP Enforcement Law: Effectiveness, Proportionality, Dissuasiveness' in Josef Drexler, *Technology and Competition: Contributions in Honour of Hanns Ulrich* (Larcier 2009).

<sup>34</sup> Rognstad (n 2) 194.

what the CJEU's decisions lack in explication, they make up for in pragmatism.<sup>35</sup> And judicial pragmatism is much needed to shed European IP law of misguided property rhetoric, so carefully exposed by Rognstad. We should be grateful to the CJEU for handing us the tools to do so and start using them to their full potential.

### III. CONCLUSION

As *The Unbearable Lightness of Being* draws to an end, life forces its characters to shed long-held convictions. *Property Aspects of Intellectual Property* may leave the reader feeling the same, because Rognstad's thorough analysis leaves but little intact of the property analogy that so often characterizes our understanding of IP. As one of few comprehensive analyses of the subject from a European perspective to date, the book is a welcome contribution to the scholarship on the fundamental question to which extent IP is 'property', even if it does not exhaustively cover the various topics it touches upon. The reader unfamiliar with the subject will find in the book a helpful introduction to the many problems it gives rise to, while the more informed reader will appreciate the breadth of Rognstad's treatment of the topic. In sum, there is something in the book for every IP enthusiast.

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<sup>35</sup> A fine example is CJEU 13 November 2018, C-310/17 (*Levola Hengelo BV v Smilde Foods BV*), see also Léon E Dijkman, 'CJEU Rules That Taste of a Food Product Is Not Protectable by Copyright' (2019) 14 *Journal of Intellectual Property Law & Practice* 85.

MANFRED NOWAK AND ANNE CHARBORD (EDS),  
*USING HUMAN RIGHTS TO COUNTER TERRORISM*  
(EDWARD ELGAR 2018)

Tarik Gherbaoui\*

During election campaigns politicians habitually claim that human rights obstruct their valiant efforts to counter terrorism. Frightened by the possibility to get caught up in a terrorist attack and overwhelmed by the extensive media coverage of terrorism, the wider public is generally persuaded by the rhetoric of the politicians. Despite the seemingly endless stream of counter-terrorism legislation at the international, regional, and national level, terrorist organisations continue to evolve, reinventing themselves and outmanoeuvring law enforcement and intelligence agencies. Far-reaching counter-terrorism measures potentially engage with the whole spectrum of human rights, ranging from the prohibition of torture and the right to life to the right to privacy and freedom of speech. The relationship between counter-terrorism and human rights is delicate and multi-faceted, with both short-term and long-term dimensions. Edited by Manfred Nowak and Anne Charbord, the thought-provoking book under review, *Using Human Rights to Counter Terrorism*, asks the historically vexed question: Do human rights impede counter-terrorism efforts or are they a valuable tool in the fight against terrorism?

Human rights law imposes 'positive obligations' on states to take firm action to counter terrorism, e.g. to protect the right to life of the citizens of a state.<sup>1</sup> At the same time, there are unmistakably specific cases in which human rights law may prevent a state from taking measures it deems necessary to counter terrorism. Since most human rights are qualified rights, as opposed to absolute rights, and as such allow states some room to derogate in time of emergency, it

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<sup>1</sup> *Osman v UK* ECHR 1998-VIII 3124, para 115.

is evident that human rights law already offers states an ample range of mechanisms to balance the protection of a certain right and national security interests.<sup>2</sup> As the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated: 'Law is the balance, not a weight to be measured'.<sup>3</sup>

Many legal scholars approach the interplay between counter-terrorism efforts and human rights from a dogmatic and legalistic perspective.<sup>4</sup> Such dogmatic legal arguments about international legal obligations in human rights treaties and their protocols, preambles, and explanatory memoranda are undoubtedly important. However, the authors of this book have addressed the controversial relationship between human rights and counter-terrorism in a more sophisticated and comprehensive fashion by adopting a variety of perspectives. The book's key argument is that, 'contrary to conventional wisdom, respect for human rights does not hinder the fight against terrorism; it actually assists it from a moral, legal, judicial and operational perspective'.<sup>5</sup> This argument is clearly spelled out and thrust to the forefront at the very beginning of the book.

The authors of the book include the current UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism<sup>6</sup> and her two predecessors;<sup>7</sup> the former UN Special

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<sup>2</sup> Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 81.

<sup>3</sup> UNHCR 'Report of the Special Rapporteur on human rights while countering terrorism' (2010) UN Doc. A/HRC/16/51, para 12.

<sup>4</sup> For examples of such arguments, see various chapters in: Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart 2008); K Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).

<sup>5</sup> Manfred Nowak and Anne Charbord, 'Introduction' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 4.

<sup>6</sup> Fionnuala Ní Aoláin, 'The Complexity and Challenges of Addressing the Conditions Conducive to Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

<sup>7</sup> Ben Emmerson, 'New Counter-Terrorism Measures: Continuing Challenges for Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to*

Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment;<sup>8</sup> and other high-profile counter-terrorism experts, including the former Director of Global Counter Terrorism Operations for the UK Secret Intelligence Service (MI6).<sup>9</sup> One of the main strengths of the book is that the authors distinguish themselves through a combination of academic prowess coupled with unrivalled practical expertise in the field of counter-terrorism. It is therefore hardly surprising that the book adopts a highly pragmatic approach to answer the vexed question of whether human rights impede or enhance counter-terrorism efforts. Nonetheless, the book also offers a fair amount of substantive legal analysis and effectively deals with theoretical issues whenever necessary.

On the other hand, the selection of academics and counter-terrorism experts from predominantly legal backgrounds means that empirical studies of the interplay between human rights and counter-terrorism unfortunately fall largely outside the scope of the book. The further inclusion of such studies could prove helpful to substantiate the claims put forward throughout the piece. For example, it would be worthwhile to investigate the precise role that excessive counter-terrorism laws play in the radicalisation of individuals at the micro level, using large samples from several states. The results of such empirical research could then be used in support of more abstract arguments and could in turn provide a compelling incentive for lawmakers and policymakers to abstain from violating human rights in the name of counter-terrorism.

In terms of structure, the book can roughly be divided into two parts. The first three chapters broadly sketch the main developments and human rights challenges in the field of counter-terrorism since 9/11. Chapters 4 to 8 each

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*Counter Terrorism* (Edward Elgar 2018); Martin Scheinin, 'Impact of Post-9/11 Counter-Terrorism Measures on all Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

<sup>8</sup> Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

<sup>9</sup> Richard Barrett and Tom Parker, 'Acting Ethically in the Shadows: Intelligence Gathering and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

explore a topical issue in depth: the causes of terrorism, foreign terrorist fighters, intelligence gathering to counter terrorism, the preventive criminal justice approach against terrorism, and accountability of human right violations in countering terrorism. This structure works well. Unlike many other edited volumes, the editors have ensured that each chapter is firmly grounded within the book's main theme. The interplay between counter-terrorism efforts and human rights law runs as a common thread across all chapters. However, the strong focus on the overarching theme has also resulted in a not insignificant amount of repetition across chapters. Important international legal instruments, such as UN Security Council Resolution 1373 and UN Security Council Resolution 2178, are analysed on more than one occasion. Although a certain degree of overlap is inevitable due to the crucial role of these legal instruments and cases, it may make the book less attractive for those wishing to read it from cover to cover.

In Chapter 1, the editors set the scene by exploring the key trends in counter-terrorism at the international and national level in the aftermath of 9/11. The editors analyse how the initial Security Council resolutions, that blatantly disregarded human rights, were partly remedied by the more human rights friendly approach of the General Assembly. As a result, recent Security Council resolutions frequently contain a clause that requires states to implement them with full respect for human rights. Furthermore, Manfred Nowak and Anne Charbord persuasively spell out some of the key trends in counter-terrorism at the national level: the unhelpful use of the war paradigm in the counter-terrorism context, the externalisation of counter-terrorism measures, determined attempts at circumventing the prohibition of torture, increased reliance on intelligence information, and the use of various branches of law to counter terrorism.

After the lengthy yet perceptive opening chapter, the following seven chapters expertly and critically investigate the profound impact that counter-terrorism measures have had on human rights in various jurisdictions. As it is becoming increasingly clear that counter-terrorism measures 'now permeate nearly every

aspect of life',<sup>10</sup> I will not seek to provide a comprehensive overview of the impact of such measures. However, I have distinguished four key themes that pervade the book, all of which must be addressed in order to avoid even more adverse consequences for human rights in the immediate future.

The first key theme is an enduring one: the absence of agreement on a definition of terrorism at the international level. As Fionnuala Ní Aoláin acutely observes in Chapter 4, this has led to a situation of 'conceptual and practical fuzziness around the obligations and limitations of states when addressing politically motivated violence'.<sup>11</sup> As highlighted by Martin Scheinin in Chapter 2, a proper definition of terrorism is crucial to limit the scope of application of counter-terrorism laws, which usually offer lower levels of protection to individuals than ordinary laws. In Chapter 8, Lisa Oldring explains how these definitional clouds at the international level have opened the door for the adoption of vague and broad laws at the national level, not only by totalitarian regimes but also in democratic societies that generally respect the rule of law.

The long-standing controversy about the definition of terrorism directly relates to the second key theme that emerges from the book: the ambiguities surrounding the intersection between terrorism and armed conflict. The foreign fighter phenomenon has evidenced the transnational character of modern-day terrorist organisations. The introduction of the new legal concept of the 'foreign terrorist fighter' in Security Council Resolution 2178<sup>12</sup> has led to a further conflation between legal regimes: counter-terrorism law, international human rights law, and international humanitarian law. In Chapter 5, Lisa Ginsborg persuasively argues that it is legally problematic as well as detrimental to the fundamental principle of belligerent equality if acts that are lawful under international humanitarian law, such as attacks on a state's military assets, are considered terrorist acts. This is precisely the reason why many of the international conventions against terrorism do not apply to situations of armed conflict. Ben Emmerson scrutinises, in Chapter 3, how the existence of an armed

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<sup>10</sup> Nowak and Charbord (n 5) 2.

<sup>11</sup> Ní Aoláin (n 6) 169.

<sup>12</sup> UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

conflict, an intricate question of law and fact, determines the legality of lethal drone strikes which impact on the right to life. Manfred Nowak and Anne Charbord conclude that 'attempts at lowering the protection that individuals deserve by artificially applying the war paradigm to measures to counter-terrorism does not stand up to legal scrutiny'.<sup>13</sup>

The third key theme that is raised across the book is the growing recognition of the need to address the root causes of terrorism, including through a practice called 'countering violent extremism'. The occurrence of human rights violations due to excessive and discriminatory counter-terrorism measures has been identified as a major cause of terrorism. Conversely, respect for the rule of law and the promotion of human rights are recognised as indispensable to avoid the radicalisation of potential future terrorists. In Chapter 4, Fionnuala Ní Aoláin provides some invaluable insights into the conditions conducive to terrorism at the micro and macro level, highlighting the significant interplay between the various conditions. In Chapter 5, Lisa Ginsborg critically investigates the rise to prominence of the notion of 'countering violent extremism' (CVE) in international legal instruments. While a comprehensive response to prevent the radicalisation of terrorists, including radicalisation on the internet, should in principle be welcomed, Ginsborg rightfully warns that the broad concept of 'extremism' could lead to the abuse of human rights when left undefined.

The growing online presence of terrorist organisations brings us to the fourth key theme: the human rights impact of intelligence gathering and mass surveillance in counter-terrorism operations. In Chapter 6, Richard Barrett and Tom Parker analyse the pivotal role that intelligence gathering plays in the prevention of terrorist acts. Covert counter-terrorism action, such as surveillance of digital communications, inevitably tests the boundaries of the right to privacy. The insightful analysis by Barrett and Parker concludes that it is 'clearly possible to collect evidence on potential terrorism threats both at home and abroad entirely within the boundaries of existing human rights law'.<sup>14</sup>

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<sup>13</sup> Nowak and Charbord (n 2) 34.

<sup>14</sup> Barrett and Parker (n 9) 239.

In Chapter 8, Lisa Oldring argues that the secrecy surrounding intelligence operations is often an obstacle to ensure accountability for human rights violations. In Chapter 7, Ulrich Garms scrutinises how some states make use of 'advanced criminalisation offences' in order to prevent terrorist acts before they reach the threshold of harmful conduct or punishable attempt. Such a preventive criminal justice strategy allows subjects to be put under surveillance at a rather early stage. As Martin Scheinin notes in Chapter 2, this has resulted in a situation in which 'the line between collection of evidence in a criminal setting and the collection of intelligence becomes more blurred'.<sup>15</sup> Garms highlights the potentially detrimental impact of a preventive criminal justice strategy on the right to a fair trial, the right to privacy, and the principle of legality.

Notwithstanding the sometimes damning findings of human rights abuses that pervade the book, states have recognised the importance of respecting human rights while countering terrorism by making it one of the pillars of the United Nations Global Counter-Terrorism Strategy adopted in 2006.<sup>16</sup> The authors of the excellent study under review have persuasively argued that many states have failed to match the rhetorical commitments set out in this strategy. The discrepancy between official rhetoric and state practice is flagrant. There is therefore no shortage of books on terrorism and counter-terrorism, including ones that are critical about the impact on human rights of counter-terrorism laws.<sup>17</sup> However, this book stands out from other works in the field in several ways.

Firstly, the book addresses the human rights implications of various stages of counter-terrorism practice: the prevention of radicalisation (Fionnuala Ní Aoláin), the investigation of potentially dangerous individuals and the discovery of evidence (Richard Barrett and Tom Parker), the early preparatory phase of

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<sup>15</sup> Martin Scheinin, 'Impact of Post-9/11 Counter-Terrorism Measures on all Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 109.

<sup>16</sup> UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288.

<sup>17</sup> For a recent example, see: Satvinder Juss (ed), *Beyond Human Rights and the War on Terror* (Routledge 2018).

criminal acts (Ulrich Garms), and the aftermath of human rights violations (Lisa Oldring). Due to the depth and comprehensiveness of the research, the authors are able to reveal how counter-terrorism laws indeed permeate many aspects of life and why this should worry us. Secondly, the book thrusts the interplay between counter-terrorism and human rights to the forefront, addressing it from an international and comparative perspective. Other works on counter-terrorism are often focused on a specific jurisdiction<sup>18</sup> or a specific thematic area<sup>19</sup> and only deal with their interplay with human rights intermittently. As terrorists swiftly cross international borders, counter-terrorism efforts have become equally transnational, justifying the truly international outlook of the book. Thirdly, since terrorism and counter-terrorism are moving targets, keeping up with recent developments is essential. This book accurately captures some of the key developments that have taken place in recent years, such as the foreign fighter phenomenon, the blurring of the distinction between terrorism and armed conflict, and the rise to prominence of the 'countering violent extremism' phenomenon. As a result, it provides a welcome and timely update on some of the older literature from the decade immediately following 9/11.<sup>20</sup>

In conclusion, this excellent book edited by Manfred Nowak and Anne Charbord tackles the interplay between human rights and counter-terrorism in a comprehensive, digestible, and convincing fashion. The authors navigate the intricate complexities of the interplay between human rights and counter-terrorism with great skill. They are unanimous in their assessment that respect for human rights is a prerequisite for long-term success in countering terrorism. However, I believe there is one important caveat: the real challenge may not lie in persuading legal academics and human rights advocates of the righteousness of these arguments. Those who are persuaded by the arguments elegantly expressed in this book should seek to convince the wider public, as well as those legislators that keep producing ineffective and counterproductive counter-

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<sup>18</sup> Cian Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012); Clive Walker, *Terrorism and the Law* (Oxford University Press 2011).

<sup>19</sup> Francesca Capone, Andrea de Guttry, and Christophe Paulussen (eds), *Foreign Fighters under International Law* (T.M.C. Asser Press 2016).

<sup>20</sup> *Ibid* (n 4).

terrorism laws. It is perhaps the only way to resolve the *vexata quaestio* addressed by this book once and for all. However, in these turbulent times, such an endeavour may well prove to be a Herculean task.