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EDITORIAL

SOME THOUGHTS ON THE (UN)SUSTAINABILITY OF ACADEMIC PUBLISHING

Anna Krisztian*

In early February 2020, disturbing news swept across the academic world like a shockwave. A few days earlier the Editorial and Advisory Boards of a highly respected journal in the field of European law resigned en masse in protest against a reported infringement of the journal's academic independence by the publishing house behind the periodical.[1] The (now former) Editors-in-Chief of the said journal – who, like a number of other members of the Editorial and Advisory Boards, both happen to be alumni of the European University Institute (EUI) – explain in the blogpost cited above how they consider certain actions of their publisher to have been detrimental to academic freedom and thus intolerable for any self-respecting academic community.

This is not the first time such a mass walkout was staged by the editorial board of an academic journal following rows with their commercial publishers.[2] Tension between editors of (certain) journals and their publishers has been a prominent issue in the recent past. And yet, the reaction of the broader

* Editor-in-Chief of the European Journal of Legal Studies and Ph.D. candidate at the Law Department of the European University Institute (Florence, Italy).

1 'What a Journal Makes: As We Say Goodbye to the European Law Journal – European Law Blog' <https://europeanlawblog.eu/2020/02/04/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/> accessed 4 February 2020.

2 'Journal Editor Hopes Mass Walkout Quickens Open Access Progress' (*Times Higher Education (THE)*, 19 January 2019) <https://www.timeshighereducation.com/news/journal-editor-hopes-mass-walkout-quickens-open-access-progress> accessed 18 February 2020.

 doi:10.2924/EJLS.2019.018

academic community to this mass resignation in the online sphere was powerful, swift, and overwhelmingly supportive. Individual scholars[3] and representatives of other journals[4] alike quickly expressed their sympathy and extended their support to the affected editors via various digital platforms, triggering discussions about questions of the *de jure* and *de facto* ownership of academic journals, and about the (un)sustainability of current models of academic publishing more generally.

With much of the invaluable global research output being locked away behind paywalls and inaccessible for much of academia and society at large, pressure to publish open access is now coming from all corners of the academic world, including not only authors in favour of open access publishing, but also libraries, university boards, funding bodies and governments. Yet, the presence of stakeholders with competing interests, such as commercial publishers and scholars opposing the idea of open access publishing – who also themselves contribute to the kaleidoscope of academic publishing – offers no easy solution to this conundrum.[5] The emergence of disruptive technologies in this field further complicates the picture, raising questions beyond the realm of academic publishing in the strict sense.[6]

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3 'Mass Resignations at Wiley Journal over Academic Independence' (*Times Higher Education (THE)*, 7 February 2020) <https://www.timeshighereducation.com/news/mass-resignations-wiley-journal-over-academic-independence> accessed 18 February 2020.

4 Weiler, Joseph H.H.; de Búrca, Gráinne, 'Wiley and the European Law Journal' (*Verfassungsblog*) <https://verfassungsblog.de/wiley-and-the-european-law-journal/> accessed 5 February 2020. Comments - 'What a Journal Makes: As we say goodbye to the European Law Journal' (*Verfassungsblog*) <https://verfassungsblog.de/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/> accessed 19 February 2020. 'European Law Journal' (*European Papers*) <http://www.europeanpapers.eu/en/authors/european-law-journal> accessed 5 February 2020.

5 Marcus Düwell, 'Editorial: Open Science and Ethics' (2019) 22 Ethical Theory and Moral Practice 1051.

6 'A Librarian Perspective on Sci-Hub: The True Solution to the Scholarly Communication Crisis Is in the Hands of the Academic Community, Not

In 2007, when the European Journal of Legal Studies was established, its founders cast their votes in favour of open access, and hence over the past 13 years the Journal has contributed completely free of charge to the enrichment of scholarly knowledge with many excellent articles written in the areas of European law, international law, comparative law and legal theory. 'Completely free of charge', that is, without imposing article processing charges (APC), subscription fees or any other publication fees on authors, readers or institutions. This does not mean, however, that the production of the EJLS happens at zero total cost. Quite the contrary: the EJLS has since its establishment relied on the commitment and zeal of generations of EUI researchers, who have, either as reviewers or managers of the Journal, dedicated tens of thousands of hours to making the functioning of the EJLS possible. Their efforts have continuously improved the Journal's reputation and, I believe, enhanced our authors' publishing experience.

Peer review conducted on a voluntary basis is of course a widespread practice in academic publishing and by no means unique to EJLS. The message I am merely trying to convey is that every single editor of the Editorial Board and the Executive Board of the EJLS deserves recognition for their hard work. Therefore, once again, in my capacity as Editor-in-Chief, I thank you all for your continued efforts and for making the EJLS a wonderful academic enterprise! There is no better illustration of your round-the-clock commitment than at the time of writing of this Editorial, when the Republic of Italy, similarly to other countries affected by the Coronavirus disease (COVID-19) pandemic,[7] is under national lockdown. With academic

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Librarians' (*Impact of Social Sciences*, 9 November 2018) <https://blogs.lse.ac.uk/impactofsocialsciences/2018/11/09/a-librarian-perspective-on-sci-hub-the-true-solution-to-the-scholarly-communication-crisis-is-in-the-hands-of-the-academic-community-not-librarians/> accessed 20 February 2020.

7 The pandemic has been referred to by different names. At the time of writing, the World Health Organisation refers to it as quoted. 'Coronavirus Disease (COVID-19) Pandemic' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> accessed 15 March 2020.

institutions closed and free movement of persons severely restricted, editors and managers of the EJLS work together remotely in order to ensure the publication of our Spring 2020 Issue in a timely manner. Teamwork at its best!

When it comes to extending our gratitude to persons who make the functioning of the EJLS possible, the invaluable institutional support of the European University Institute should not go unrecognised either. Numerous organisational units, among them especially the President's Office, the Library, the Communications Service, and the ICT Service provide excellent support to the EJLS whenever needed, which has enabled the continuous professionalisation of the Journal over the years. Admittedly, the EJLS is in a privileged position irrespective of the hardships it occasionally faces, and we acknowledge that not every law review in the world is fortunate enough to enjoy such outstanding institutional support as we do, for which the editors of the Journal are immensely grateful.

Given the engagement of EJLS editors and the institutional support behind the Journal, we hope that against all odds we will be able to uphold our open access publishing policy, in whose value the EJLS Editorial Board firmly believes. This is notwithstanding the fact that the open access movement has also received criticism which, depending on the discipline, might be well-founded.[8] Considering the EJLS' mission as a law journal however, open access remains our preferred solution. Fortunately, there are signs indicating that open access journals and publishing houses, at least academic ones, can cooperate in mutually beneficial partnerships.[9] Hopefully, this marks the dawning of a new era, in which open access publication can be offered as a sustainable model that is truly beneficial for all stakeholders involved

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8 'Read-and-Publish Open Access Deals Are Heightening Global Inequalities in Access to Publication' (*Impact of Social Sciences*, 21 February 2020) <https://blogs.lse.ac.uk/impactofsocialsciences/2020/02/21/read-and-publish-open-access-deals-are-heightening-global-inequalities-in-access-to-publication/> accessed 28 February 2020.

9 'The GLJ - Cambridge Partnership' (*Cambridge Core*) </core/journals/german-law-journal/information/glj-cambridge-partners> accessed 19 February 2020.

globally.[10] Until this is realised, however, journals will need to keep on relying on the solidarity and benevolence of networks of scholars.

In This Issue

We are delighted to bring you a Spring Issue with papers on a diversity of topics in the areas of European and international law, as well as two book reviews dealing with topics beyond strict legal doctrine. This is the first ever EJLS issue that encompasses articles that had previously been published *OnlineFirst* in accordance with our reformed publication policy. Articles accepted for publication may now be published *OnlineFirst* ahead of the publication of the next regular issue, containing a unique and final identifier (DOI) which enables the citation of these articles. We were delighted to receive positive feedback on our new publication policy both from authors and our distinguished readership.

The EJLS 2020 Spring Issue begins with Riikka Koulu's insightful contribution on a rapidly developing yet still under-researched topic, the use of algorithmic decision-making applications in various fields. Koulu discusses this matter from the perspective of EU policy on trustworthy artificial intelligence, and argues that human control over automation does not necessarily do away with the negative consequences data-driven technologies may have on existing societal biases.

The second article of this Issue also falls within the scope of European Union (EU) law: Luca Leone explores another emerging field of law, namely animal rights in the EU. Animal welfare and dignity are increasingly recognised

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[10] Whether the current global state of emergency caused by the COVID-19 pandemic will act as a catalyst or an impediment to the spread of open access publishing, will have to be seen. 'Without Stronger Academic Governance, Covid-19 Will Concentrate the Corporate Control of Academic Publishing' (Impact of Social Sciences, 17 April 2020) <https://blogs.lse.ac.uk/impactofsocialsciences/2020/04/17/without-stronger-academic-governance-covid-19-will-concentrate-the-corporate-control-of-academic-publishing/> accessed 17 April 2020.

values in the Union, yet, as Leone argues, a number of legal hurdles prevent welfarism from living up to its full potential. The article focuses on the ongoing reform of the common agricultural policy and labelling issues as case studies.

Moving on to contributions that touch upon institutional questions of the EU, first, Matteo Frau and Elisa Tira shed light on the constitutional need for control by the European Parliament on military interventions, with a focus on Permanent Structured Cooperation on security and defence (PESCO) and the prospect of a European army. Frau and Tira argue that the European Parliament should be directly involved in EU military operations, in contrast to the current institutional allocation of tasks, and scrutinise ways in which the democratic control of future EU missions could be increased.

Our 2020 Spring Issue continues with Michal Ovádek's, Wessel Wijtvliet's and Monika Glavina's empirical piece on the European Union's preliminary reference system and, more precisely, on the role of national courts occupying different levels of hierarchy in that procedure. The authors discuss what importance the CJEU attributes to each individual case, depending on whether they are referred by 'peak' courts or lower level courts in the national legal system. The authors found, having examined all preliminary rulings delivered by the CJEU between 1961 and 2018 including, that the Court considers references from 'peak' courts to be more important.

Staying within the realm of European law but moving beyond the European Union, Alexandros Demetriades addresses two of the long-standing controversies surrounding the extraterritorial application of the European Convention on Human Rights: the conceptual foundations of jurisdiction, and the responsibility of respondent States concerning extraterritorial violations of rights protected by the Convention. Based on his analysis of the Court's case law, Demetriades proposes a 'concurrent and tailored' model of extraterritorial State responsibility, making two interesting propositions.

Moving to the field of international law, Pierfrancesco Rossi examines the role of national courts in the enforcement of international law, more precisely, in the protection of the international rule of law. Rossi reflects on

the recent *Diciotti* affair, and examines, through this example in the field of migration, to what extent the Italian judiciary is well-placed to compel national authorities to comply with international law. His findings are undoubtedly worthy of scholarly attention.

The 2020 Spring Issue closes with two insightful book reviews. Olga Ceran shares her intriguing critique of the book *Evaluating Academic Legal Research in Europe. The Advantage of Lagging Behind*, edited by Rob van Gestel and Andreas Lienhard and published by Edward Elgar in 2019. Perhaps surprisingly in light of the usual content of the EJLS' book review section, this book does not analyse a distinct topic of black letter law, but rather engages with and sheds light on certain systemic shortcomings of legal scholarship at large, that is, troubles with current practices of academic legal evaluations. Ceran's to-the-point comments give an informative overview of both the merits and the weakness of this work.

Kerttuli Lingenfelter reviews Rostam J. Neuwirth's *Law in the Time of Oxymora: A Synaesthesia of Language, Logic and Law*, published by Routledge in 2018. Though not a typical read for a legally trained eye, Lingenfelter manages to capture the essence of the book which draws on a diverse array of linguistic, religious, legal, and philosophical sources, and explores the impact of oxymora in the arts and sciences, as well as law. As Lingenfelter puts it, the book is a 'colourful addition to the growing body of literature on questions of "law and ..." and "law in ..."', and hence it provides an important contribution to the knowledge on the interplay of law and language, even if it suffers from certain limitations.

On behalf of the EJLS Editorial Board, I wish you pleasant reading in these trying times!

GENERAL ARTICLES

HUMAN CONTROL OVER AUTOMATION: EU POLICY AND AI ETHICS

Riikka Koulu*

In this article I problematize the use of algorithmic decision-making (ADM) applications to automate legal decision-making processes from the perspective of the European Union (EU) policy on trustworthy artificial intelligence (AI). Lately, the use of ADM systems across various fields, ranging from public to private, from criminal justice to credit scoring, has given rise to concerns about the negative consequences that data-driven technologies have in reinforcing and reinterpreting existing societal biases. This development has led to growing demand for ethical AI, often perceived to require human control over automation. By engaging in discussions of human-computer interaction and in post-structural policy analysis, I examine EU policy proposals to address the problematizations of AI through human oversight. I argue that the relevant policy documents do not reflect the results of earlier research which have undeniably demonstrated the shortcomings of human control over automation, which in turn leads to the reproduction of the harmful dichotomy of human versus machine in EU policy. Despite its shortcomings, the emphasis on human oversight reflects broader fears surrounding loss of control, framed as ethical concerns around digital technologies. Critical examination of these fears reveals an inherent connection between human agency and the legitimacy of legal decision-making that socio-legal scholarship needs to address.

Keywords: algorithmic governance, AI ethics, automation, human control, oversight, EU law, legal theory

* Assistant Professor, Director of University of Helsinki Legal Tech Lab, Helsinki.
I would like to thank Jacquelyn Burkell (U Ottawa) for pointing me in the direction of post-structural policy analysis as well as Jörg Pohle (HIIG), Ida Koivisto (Helsinki), Anne Klinefeldter (UNC), and anonymous reviewers for their valuable comments on earlier versions of this article.

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I. INTRODUCTION: HUMAN CONTROL FOR ALGORITHMIC DECISION-MAKING?

Algorithmic decision-making (ADM) systems are used across various fields either to assist and facilitate or to completely automate processes, which previously had mostly been conducted by human decision-makers. Increasing reliance on algorithms, defined as encoded procedures for solving problems by transforming input data into a desired output,[1] is said to contribute to the 'algorithmization' of governance, a distinct form of social ordering that becomes entwined with autonomous algorithm-driven software.[2] Algorithmization has given rise to concerns about the negative

[1] Tarleton Gillespie, 'The Relevance of Algorithms' in Tarleton Gillespie, Pablo J. Boczkowski and Kirsten A. Foot (eds), *Media Technologies: Essays on Communication, Materiality, and Society* (MIT Press 2014) 167.

[2] Aneesh Aneesh, 'Global Labor: Algocratic Modes of Organization' (2019) 27(4) Sociological Theory 27(4) 347; Karen Yeung and Martin Lodge, *Algorithmic Regulation* (Oxford University Press 2019).

consequences of data-driven digital technologies, artificial intelligence (AI) and machine learning (ML), terms which are often used interchangeably to refer to the recent phases of the on-going computational turn. In this article, I examine the algorithmization of legal decision-making and the need for AI regulation from a socio-legal perspective.[3] By focusing on how AI use is problematized in the European Union's (EU) emerging AI policy, I explore the problems associated with ADM that law should respond to and the question whether human control over automation is a feasible legislative strategy for addressing these problems. It should be noted that what constitutes a policy problem is not straightforward. Instead, problematizations are created in policy-making.

The emphasis in current algorithm studies has been on algorithmic bias as the most pressing issue related to AI, following the realization that ADM systems reproduce and reinforce existing societal inequalities.[4] In May 2015, an independent news outlet, ProPublica, published an exposé on algorithmic discrimination posed by the presentencing software COMPAS, demonstrating how the system systematically produced higher risk scores for racialized defendants compared to white defendants.[5] Since then,

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3 Some scholars distinguish between algorithmic and automated decision-making, see e.g. Maja Brkan, 'Do Algorithms Rule the World? Algorithmic Decision-Making and Data Protection in the Framework of the GDPR and Beyond' (2019) 27(2) International Journal of Law and Information Technology 91, 94. I use these terms interchangeably, as I consider algorithmic decision-making as data-driven automation.

4 Muhammad Ali et al., 'Discrimination through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes' (2019) arXiv preprint arXiv:1904.02095; Bo Cowgill, 'Bias and Productivity in Humans and Machines' (2019) Upjohn Institute Working Paper 19-309, <https://ssrn.com/abstract=3433737> accessed 27 November 2019; Sara Hajian, Francesco Bonchi, Carlos Castillo, 'Algorithmic Bias: From Discrimination Discovery to Fairness-Aware Data Mining' in Balaji Krishnapuram et al (eds), *Proceedings of the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining* (Association for Computing Machinery 2016) 2125-2126; Sandra G. Mayson, 'Bias in, Bias out' (2019) 128(8) Yale Law Journal 2122; Betsy Anne Williams, Catherine F. Brooks, Yotam Shmargad, 'How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications' (2018) 8 Journal of Information Policy 78.

5 Jeff Larson, Surya Mattu, Lauren Kircher and Julia Angwin, 'How We Analyzed the COMPAS Recidivism Algorithm' *ProPublica* (23 May 2016)

algorithmic discrimination and other ADM concerns have been widely discussed topics in research as well as in policy-making and the mainstream media.[6] The body of academic literature is rapidly growing and researchers working at the intersections of data science, AI ethics, law and policy studies discuss algorithmic fairness and different means to secure sustainability of ADM systems. The discussions have not emerged out of thin air. For example, computer scientists have long engaged in discussions on what it exactly means for AI systems to be construed as fair.[7]

Against this background, it is somewhat surprising that algorithmization has mostly remained at the margins of socio-legal research.[8] Karen Yeung and

<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> accessed 15 August 2019. The software's compliance with legal norms have been adjudicated on in Wisconsin Supreme Court's judgment in 2017 in which the court found that the criminal defendant's right to due process was not infringed by the ADM use. See *State vs. Loomis* 881 N.W.2d 749 (2016). See e.g. Liu Han-Wei, Lin Ching-Fu, and Chen Yu-Jie, 'Beyond State v Loomis: Artificial Intelligence, Government Algorithmization and Accountability' (2019) 27(2) International Journal of Law and Information Technology 122. On algorithmic discrimination, e.g. Sam Corbett-Davies, Emma Pierson, Avi Feller, Sharad Goel, and Aziz Huq, 'Algorithmic Decision Making and the Cost of Fairness' (KDD '17 Proceedings of the 23rd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining 2017 797) <https://arxiv.org/abs/1701.08230> accessed 22 August 2019 797–806; Sloane Mona, 'Inequality Is the Name of the Game: Thoughts on the Emerging Field of Technology, Ethics and Social Justice' (Weizenbaum Conference. DEU, 2019).

6 See e.g. Ghaffary Shirin, 'New York City Wants to Make Sure the AI and Algorithms It Uses Aren't Biased. That's Harder Than It Sounds' *Vox* (11 April 2019) <https://www.vox.com/2019/4/11/18300541/new-york-city-algorithms-ai-automated-decision-making-sytems-accountable-predictive-policing> accessed 22 August 2019; Kevin Roose, 'A Machine May Not Take Your Job, but One Could Become Your Boss' *The New York Times* (23 June 2019) <https://www.nytimes.com/2019/06/23/technology/artificial-intelligence-ai-workplace.html> accessed 22 August 2019.

7 See e.g. Ben Hutchinson and Margaret Mitchell, '50 Years of Test (Un)fairness: Lessons for Machine Learning' (Proceedings of the Conference on Fairness, Accountability, and Transparency. ACM, 2019) <https://arxiv.org/abs/1811.10104> accessed 22 August 2019.

8 ADM in the legal domain is by no means a new phenomenon but instead takes place against the historical backdrop of automation of legal processes through technical

Martin Lodge attribute this underlap of research to doctrinal boundaries that contribute to siloed disciplinary approaches.[9] Some legal scholars have attempted to provide a systematic overview of the ongoing developments. For example, Julie Cohen draws attention to the dynamic reciprocity of technology adoption by noting how law plays a core role in shaping the dynamics of change while being simultaneously restructured in the process.[10] In turn, Mireille Hildebrandt and Katja de Vries emphasize the growing importance of due process and the right to contestation in the face of the computational turn.[11] The socio-legal perspective can be seen as particularly important as it enables us to assess the sufficiency of existing legal and procedural safeguards. The existence of adequate safeguards separates legal decision-making from the many daily decision-making processes now being automated, as the first needs to cater to the overall expectations of coherence, rule of law, and legitimacy of the legal system. Simply put, there is a difference between adequate legal protection when an ADM system is used to curate search engine results compared to automated decisions on refugee status or citizenship, between profiling and decisions with enforceable legal consequences. But in order to assess the existing legal framework of algorithmized governance, we first need to understand what the problems are and what challenges these systems pose. In other words, in the context of

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systems that has been discussed extensively since the 1950s. Much of the discussion has been framed in terms of AI & Law, although it should be noted that the concept of artificial intelligence (AI) is ambiguous at best. On origins of AI research, see John McCarthy, Marvin Minsky, Nathaniel Rochester, Claude Shannon, 'A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, August 31, 1955' (2006) 27(4) AI Magazine 12. Also, definitions of AI change over time depending on technological advancements as well as the so-called AI effect, where tasks successfully simulated by machines are no longer deemed AI, see Pamela McCorduck, *Machines who Think: A Personal Inquiry into the History and Prospects of Artificial Intelligence* (A K Peters 2004) 204. For an overview of the development of AI & Law field, see Trevor Brench-Capon, 'A History of AI and Law in 50 Papers: 25 Years of the International Conference on AI & Law', (2012) 20(3) Artificial Intelligence and Law 215.

9 Yeung and Lodge (n 2).

10 Julie Cohen, *Between Truth and Power* (Oxford University Press 2019).

11 Mireille Hildebrandt and Katja de Vries (eds), *Privacy, Due Process and the Computational Turn: The Philosophy of Law meets the Philosophy of Technology* (Routledge 2013).

which concrete concerns are we to evaluate the functioning of law, the effectiveness of existing accountability mechanisms, and the sufficiency of procedural safeguards?

As a response to the public outcry, governments, industry and non-governmental organizations alike are developing ethical frameworks in the hope of enabling fair and trustworthy ADM applications. These AI ethics guidelines provide an opportunity to pose the question above, given that such documents unavoidably need to reflect the perceived problems of AI and to simultaneously construct ethical standards as a solution. In other words, these documents encompass narratives about AI that justify the need for their existence. Sometimes framed as 'ethics-washing', the instruments have been criticized for their non-binding nature, the lack of a clear scope of application, and limited interpretative advice of fairness for programmers and administrators of justice alike, all of which contributes to their limited ability to regulate the development and use of AI systems.[12] In terms of legal sources, these instruments can be described as soft law[13] that lack formal validity but influence how policy issues are perceived. Not all soft law instruments are alike, however; instruments created by powerful supranational institutions such as the EU also rely on the authority of the institutions and not simply on the strength of their arguments. In this sense, soft law may also foster the creation of hard law by providing early conceptualizations of relevant AI policy issues that allegedly need to be addressed. The AI ethics guidelines usually advocate human oversight as a meaningful protection against the negative consequences of technology use.

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[12] See e.g. Thilo Hagendorff, 'The Ethics of AI Ethics: An Evaluation of Guidelines' (2019) <https://arxiv.org/abs/1903.03425> accessed 22 August 2019; Brent Mittelstadt, Patrick Allo, Mariarosaria Taddeo, Sandra Wachter, Luciano Floridi, 'The Ethics of Algorithms: Mapping the Debate' (2016) 3(2) Big Data & Society 1; Daniel Greene, Anna Lauren Hoffmann, and Luke Stark, 'Better, Nicer, Clearer, Fairer: A Critical Assessment of the Movement for Ethical Artificial Intelligence and Machine Learning' (Proceedings of the 52nd Hawaii International Conference on System Sciences. 2019) DOI: 10.24251/HICSS.2019.258 accessed 22 August 2019.

[13] See e.g. Alan Boyle, 'Some reflections on the Relationship of Treaties and Soft law' (1999) 48(4) International and Comparative Law Quarterly 901, 901-913. According to Boyle, soft law is defined by its non-binding nature, focus on general principles instead of rules, and lack of direct enforceability.

Does this mean that hard law regulation should also aim to include human control as a legal protection?

This article does not repeat the critique against AI ethics in policy-making, although the established shortcomings do form its starting point. I discuss one solution proposed in the EU's policy-making, namely human control, referred to as Human-in-the-loop (HITL), human oversight or intervention, human-on-the-loop (HOTL), or human-in-command (HIC).[14] There is also a terminological connection between human control and the so-called human-centric approach, which also poses a similar linguistic focus on human agency.

Answering the question on legislative strategy for ADM requires us to assess the feasibility of human control from a socio-legal perspective, particularly as the EU is now developing the structures and processes to govern ADM systems, which are then established as legal rights, obligations, and safeguards. Political choices on regulatory objectives are translated into legal concepts and thus operationalized within the legal system. Once employed, these objectives and regulatory choices can become embedded within the legal structures and cannot be fundamentally contested. Human oversight may become a central procedural mechanism for automated decisions, but once it defines procedural rights and obligations it is more difficult to present a fundamental critique of its feasibility. That is the reason why it is important to ask now whether human control can fulfil its promise, requiring us to consider the problems of AI that call for human control. A regulatory strategy built on false beliefs about the strengths of human control may fail to provide adequate legal protection for those subjected to automated legal decision-making.

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[14] European Commission, Independent High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (8 April 2019) <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> accessed 22 August 2019 (Hereinafter Guidelines), 16; see also Communication COM(2019) 168 final from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions on Building Trust in Human-Centric Artificial Intelligence [2019] <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-168-F1-EN-MAIN-PART-1.PDF> accessed 22 August 2019, 4.

At first glance, human control seems like a plausible solution, as ultimately it aligns with law's anthropocentricity, reflected in the fact that law recognizes only human actors as objects of regulation, not machines. At times, law goes to great lengths to uphold at least the fiction of this anthropocentricity, for example by granting legal personhood to corporations and non-human organizations. Hence, it is perhaps not surprising that the importance of keeping humans in control of automation is widely agreed upon in legal scholarship.[15] The reasons given may be instrumental, such as of the need to allocate responsibility to human actors due to legal liability regimes.[16] However, there seems to be a more fundamental argument that considers the human element as being intrinsically indispensable, although this is not elaborated on in great length. Instead, human agency, participation and control are portrayed as uncontestable necessities that are ultimately connected with democratic legitimacy. For example, John Danaher contends that '[l]egitimate decision-making procedures must allow for human participation in and comprehension of those decision-making procedures' and that, because reliance on ADM limits active human participation, the systems impose a fundamental threat to legitimacy that he considers difficult to accommodate or resist.[17] In her work on the intersections of law, technology and philosophy, Mireille Hildebrandt addresses similar issues of justification and discusses the need for protection of 'what is uncountable, incalculable or incomputable about individual persons', which comes under threat in the context of automated decision-making, where contestation by those subjected to automation plays a vital role.[18] In contrast, others focus on

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15 See e.g. Woodrow Hartzog, 'On Questioning Automation' (2017) 48 Cumberland Law Review 1; Michael Schmitt and Jeffrey Thurnher, 'Out of the loop: autonomous weapon systems and the law of armed conflict' (2012) 4 Harvard National Security Journal 231; Danielle Keats Citron and Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 Washington Law Review 1.

16 Madeleine Elish, 'Moral Crumple Zones: Cautionary Tales in Human-Robot Interaction' (2019) 5 Engaging Science, Technology, and Society 40, 41.

17 John Danaher, 'The Threat of Algocracy: Reality, Resistance and Accommodation' (2016) 29(3) Philosophy & Technology 245, 254.

18 Mireille Hildebrandt, 'Privacy as Protection of the Incomputable Self: From Agnostic to Agonistic Machine Learning' (2019) 20(1) Theoretical Inquiries in Law 83, 83-121.

the fabricated and performative nature of human intervention. For example, Sheila Jasanoff draws attention to the 'human pretensions of control over technological systems', which demands for critical re-examination.[19]

This article is built on Jasanoff's call for critical examination of the feasibility of human control over automation. I argue that the focus on human control in policy decisions over automation is insufficient and misguided. I build this argument in two steps. In section II, I discuss the origins and limitations of human control over automation, considering research conducted on human-computer interaction (HCI). The HCI literature provides insight into the potential and shortcomings of human control and hence explains the situations and conditions in which human control may be worthwhile. This HCI perspective is often missing in both policy-making as well as in socio-legal scholarship. In section III, I engage in critical analysis of the EU's three policy documents on AI in order to identify the situations in which the documents advocate for human control as a meaningful precaution. While the explicitly expressed problems do form a starting point for this analysis, they do not provide an exhaustive overview. Instead, policy documents come embedded with implicit assumptions about the problems they aim to target and these problematizations are not necessarily the same as those explicated. The acknowledgment of how AI is problematized both explicitly and implicitly is necessary to assess the feasibility of human control for legal protection. By engaging in post-structural policy analysis, described in further detail in section II.2, I aim to reveal the implicit assumptions behind the chosen approach to human control. By contrasting the explicit and implicit problematizations, we can provide a more nuanced understanding of the perceived problems with AI that human control is thought to address. Finally, in section IV, I return to the discussion of human control as a regulatory strategy and the role of human agency in the legitimacy of decision-making. By incorporating perspectives from legal theory and European law, HCI and policy analysis, I hope to combine theoretical assessment of the feasibility of human control with a close reading of policy documents and interconnect these with *de lege ferenda* discussions surrounding AI. This approach contributes to a more comprehensive socio-

[19] Sheila Jasanoff, 'Technologies of Humility: Citizen Participation in Governing Science' (2003) 41(3) Minerva 223.

legal overview of the object of AI regulation and the complex interconnections between law, technology, and policy.

II. Origins and Limitations of Human Control

1. Human-Machine Interaction Research

In this section, I discuss some of the early research in human-computer interaction in order to demonstrate the context in which the early formulations of human control over automation emerged. Such genealogical analysis is necessary in order to understand what it means to establish human control as the core means of organizing the division of labor, as well as legal liability, between the human decision-maker and the ADM system. Human control over automation comes with conceptual baggage related to its early context and the level of technological development at the time that we need to understand in order to critically examine its feasibility as a potential regulatory strategy.[20] The early work on human control was built on perception that humans and machines have differing capabilities, requiring a separation between the tasks entrusted to humans and machines respectively. This human/machine dichotomy has since been challenged by research focused on collaboration rather than division, but it still provides an important framing. In policy documents, the historical context of human control is typically not elaborated, meaning that the underlying assumptions remain outside the scope of policy debate.

Originally framed in terms of human-in-the-loop rather than human control, early iterations are often traced back to post-war work on aviation security.[21] Some of the early iterations of human-in-the-loop were developed in human factors research in relation to aviation security in the US, with the objective of reducing human error and enhancing safety through a focus on the interaction between humans and computers. The early work on human factors was interested in function allocation, i.e. which tasks should be

[20] On conceptual baggage of key concepts see, e.g. Jan Ifversen, 'About Key Concepts and How to Study Them' (2011) 6(1) Contributions to the History of Concepts 65, 73.

[21] See e.g. Elish (n 16) 40–60.

automated by computers and which ones should remain within human control.

A starting point for this line of inquiry can be traced back to 1951, which saw the publication of the so-called Fitts list, which was meant to provide background information for policy makers. The list was drafted by Paul Fitts, a former US Air Force Lieutenant Colonel and psychologist at the University of Ohio, who went on to develop a mathematical model to predict human motion called Fitts's law. The so-called HABA-MABA model ('humans are better at, machines are better at') included 11 statements to describe tasks humans are better at accomplishing and which are more easily performed by machines. According to Fitts, humans surpass machines in cognitively challenging tasks such as perception, judgment, improvisation, and long-term memory, whereas machines are better than humans in tasks that require speed, power, computation, replication, simultaneous operations, and short-term memory.[22] Fitts list has remained a seminal work of function allocation research and, as will be examined in further detail in section III, the foundational assumptions have later been adopted and expanded in broader discussions on the necessity of human control over technology, most recently in AI ethics discussions.[23]

While the HABA-MABA model now seems somewhat outdated, in its time it provided an adequate description of which tasks could be automated. The model reflected the contemporary state-of-the-art of technological development. In addition to technological progress, early iterations of human control also reflected political and ideological choices of the time, as

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[22] Paul M. Fitts (ed), *Human Engineering for an Effective Air-Navigation and Traffic-Control Aystem* (National Research Council, Division of Anthropology and Psychology, Committee on Aviation Psychology 1951).

[23] See e.g. Joost de Winter and Dodou Dimitra, 'Why the Fitts List has Persisted Throughout the History of Function Allocation' (2014) 16(1) Cognition, Technology & Work 104. On criticism, see Meg Leta Jones, 'The Ironies of Automation Law: Tying Policy Knots with Fair Automation Practices Principles' (2015) 18 Vanderbilt Journal of Entertainment & Technology Law 77, 106: 'The Fitts List has been heavily criticized as an intrinsically flawed descriptive list, little more than a useful starting point, insufficient, outdated, static, and incapable of acknowledging the organizational context and complementary nature of humans and machines'.

the model was adapted to the highly politicized topic of space travel in the Apollo program in 1960-1972. In space aviation, the involvement of a human operator was also considered necessary for automated operations with the concession that inclusion could take place remotely.[24] Due to the geopolitical dimension, organization of human control became a question of ideological choice. David Mindell describes how preference given to human control reintroduced the perceived political differences between the American and Soviet approaches.[25] Interestingly, the HABA-MABA model still persists as a key conceptualization of human-machine interaction and, as such, is often referred to in legal discussions on automation, albeit often critically.[26] In the 1980s, the human/machine dichotomy was increasingly superseded by the notion of 'human-centered design',[27] although it is unlikely that the latter concept actually signified separation from the earlier doctrine, despite the terminological shift. Simply put, if everyone still refers to the HABA-MABA model, even critically, the model still persists as the locus of discussions on the central framing of human-computer interaction, and consequently continues to frame considerations concerning potential solutions.

Function allocation research and later work on teleoperations, human-machine interaction, and cognitive engineering have demonstrated some of

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[24] 'One of the pre-requisites for taking the man out of the systems operation must be the capability to describe very carefully, and in some detail, the characteristics of the operation before it starts. Of course, in some instances the man can be included by leaving him on the ground and providing him with necessary intelligence'. See Richard Horner, 'Banquet Address before the first Annual Awards Banquet of the Society of Experimental Test Pilots' (1957) 2(1) SETP Quarterly Review 1, 7, as referenced in David Mindell, *Digital Apollo: Human and Machine in Space Flight* (MIT Press 2008) 19.

[25] 'Keeping the astronauts "in the loop," overtly and visibly in command with their hands on a stick, was no simple matter of machismo and professional dignity (though it was that too). It was a well-articulated technical philosophy. It was also necessary to achieve the political goals of the space program and show that the classical American hero—skilled, courageous, self-reliant—had a role to play in a world increasingly dominated by impersonal technological systems (especially in contrast to the supposedly over-automated Soviet enemy)'. See Mindell (n 24) 5.

[26] See Jones (n 23) 130. In fact, citations on the Fitts list have steadily increased during the last decades. See De Winter and Dodou (n 23) 2.

[27] Jones (n 23) 112.

the inherent shortcomings of human control over automation. For various reasons, from boredom at routine monitoring to automation bias and alert fatigue, humans generally perform badly as supervisors of automated technical systems.[28] These 'ironies of automation' were discussed in 1983 by Lisanne Bainbridge, who explained how automation design 'still leaves the operator to do the tasks which the designer cannot think how to automate', despite the intention to replace human control. These tasks usually include monitoring and take-over functions which humans have been shown to perform badly.[29] Bainbridge argues that 'by taking the easy part of his task, automation can make the difficult parts of the human operator's task more difficult'.[30] Similarly, the notion that accidents related to technical systems follow from human error was contested by sociologist John Perrow, according to whom systemic or 'normal accidents' follow from combined effects of tightly coupled complex systems that have high risk potential.[31] Thus, accidents are unavoidable in the sense that they cannot be prevented by simple design choices. In light of technological development and the introduction of the relatively autonomous ADM systems currently in use, the recent HCI research discussed above seems to provide a better account of the limitations of human control than the human/machine dichotomy. Based on these insights, the scope for human control over automation seems relatively narrow in practice.

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28 'There is much evidence that people are not good monitors of automation' for various reasons, including boredom that ensues from monotonous tasks, see Thomas B. Sheridan, Skaar S. B., Ruoff C. F., 'Human Enhancement and Limitation in Teleoperation' (1994) 161 Progress in Astronautics and Aeronautics 43, 54; Elish (n 16) 50 'skills atrophy when automation takes over'; on alert fatigue in the medical field, see Rush Jess et al., 'Improving Patient Safety by Combating Alert Fatigue' (2016) 8(4) Journal Graduate Medical Education 620, 620–621.

29 Lisa Bainbridge, 'Ironies of Automation' (1983) 19(6) Automatica 775, 775-779.

30 Interestingly, she considers human oversight as a necessity for complex automation: 'There will always be a substantial human involvement with automated systems, because criteria other than efficiency are involved, e.g. when the cost of automating some modes of operation is not justified by the value of the product, or because the public will not accept high-risk systems with no human component'. Ibid 777.

31 John Perrow, *Normal Accidents: Living with High-Risk Technologies* (Basic Books 1984).

One might expect that AI policy would be informed by these observations. Instead, it seems that the early human/machine dichotomy is still reproduced in policy-making without including later critical appraisals. Hence, policy documents portray human control in opposition to unstoppable technological change, rather than as hybridization of complex socio-technical systems, i.e. seamless collaboration between humans and artificial systems. In their critical analysis of AI ethics documents, Greene et al. point out that

> the precise reasons why AI/ML are matters of ethical concern differ from organisation to organisation. Some lean on the language of distributive justice, arguing AI/ML's benefits and penalties will be unevenly distributed.[32]

Greene et al. argue that AI ethics guidelines reflect ethical universalism and determinism, which means that ethical concerns are seen as a universal, cross-species force of nature to which humans can only react. Simultaneously, human agency is advocated as a plausible solution, although in the form of expert oversight instead of public mass movement. Jones draws attention to the arbitrariness of policy-making that operates on the logic of human oversight: 'when presented with an automation-related problem, law and policy responses have been to preserve or protect an explicit value by simply inserting or removing a human from the loop, which actually ends up backfiring'.[33]

Furthermore, Madeleine Clare Elish suggests, human oversight may be used detrimentally to assign guilt and responsibility to humans. Elish introduces the concept of 'a moral crumple zone to describe how responsibility for an action may be misattributed to a human actor who had limited control over the behavior of an automated or autonomous system'.[34] Drawing on investigations of the Three Mile Island nuclear accident in 1979 and the Air France Flight 447 crash in 2009, Elish demonstrates how in these two cases, the accidents were attributed to human error despite the fact that both resulted from a complex set of factors related to human-machine interaction, as well as to system design. According to Elish, law and policy play a role in the creation of moral crumple zones, as attribution of liability in aviation

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32 Greene et al. (n 12) 2127.

33 Jones (n 23) 81.

34 Elish (n 16) 40.

demonstrates: certification standards recognize only mechanical failure to give rise to accountability and hence only a human pilot can be the source of malfunction in situations of shared control.[35]

Limitations and problems of human oversight are widely acknowledged in research, leading to efforts to improve the inherently flawed human-facing control of automation. For example, Brkan discusses the minimum acceptable level for meaningful human oversight in light of EU legislation, thus addressing the issue of 'rubber stamping', when human control becomes mostly performative.[36] Drawing from the research field of AI & Law and 'by design' approaches, Almada proposes reinterpretation of human intervention in a manner that would complement post hoc oversight with an ex ante approach he calls 'contestability by design', through which the safeguards and data of the subject's rights stipulated in article 22 of the General Data Protection Regulation (GDPR)[37] would be embedded in the technical design of the ADM system.[38] In turn, from the computer science perspective, Sirajum et al. argue that HITL should be a central system design principle, requiring solutions to certain challenges, most important of which is to determine 'how to incorporate human behavior models into the formal methodology of feedback control'.[39]

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35 Ibid 50.

36 See e.g. Brkan (n 3), where she contends that rubber stamping is not enough for meaningful intervention necessitated by GDPR article 22 but instead the overseer needs to possess authority and capability to change the decision.

37 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.

38 Marco Almada, 'Human Intervention in Automated Decision-Making: Toward the Construction of Contestable Systems' (International Conference on Artificial Intelligence and Law ICAIL'19, 2019) <https://www.researchgate.net/profile/Marco_Almada/publication/327602212_Human_intervention_in_automated_decision-making_Toward_the_construction_of_contestable_systems/links/5cc64eb8a6fdcc1d49b76103/Human-intervention-in-automated-decision-making-Toward-the-construction-of-contestable-systems.pdf> accessed 23 August 2019.

39 Sirajum Munir et al., 'Cyber Physical System Challenges for Human-in-the-Loop Control' (8th International Workshop on Feedback Computing, 2013)

Others have provided alternative problematizations of, while still advocating some form of human control as a potential solution. For example, Liu et al. attribute the problem partly to the current focus on the technical perspective of AI development that disguises the embedded heterogenous power relations.[40] Rahwan assigns the problem to a lack of societal commitment, which could be resolved by 'looping in' society.[41] Within the Human-AI Interaction field, Amershi et al. identify the core problem as being the unpredictability of AI-infused systems, which results from uncertainty and leads to false positives and false negatives; the remedy lies, they suggest, in improving user interface design following generally accepted design guidelines.[42]

In summary, decades of research on human-machine interaction have developed nuanced approaches to human control and simultaneously demonstrated its practical limitations over automated systems. But does policy-making reflect these insights? And if not, do AI ethics guidelines end up reproducing these 'human pretensions of control over technological systems'?[43] Do the AI policy documents take it for granted that human control ensures adequate ethical and legal safeguards?

2. Engaging in Post-Structural Policy Analysis

The fact that human control is advocated in AI policy, despite the limitations established by HCI, suggests that either the policy-making is built on false assumptions about the potential of such control or, alternatively, that the emphasis on human control serves a purpose other than *de facto* oversight. As discussed in section I, this purpose might involve the justification and overall legitimacy of decision-making, as some legal scholars suggest. But in order to

<https://www.usenix.org/system/files/conference/feedbackcomputing13/feedback13-munir.pdf> accessed 23 August 2019.

40 Liu et al. (n 5).

41 Iyad Rahwan, 'Society-in-the-Loop: Programming the Algorithmic Social Contract' (2018) 20(1) Ethics and Information Technology 5, 7.

42 Saleema Amershi et al, 'Guidelines for Human-AI Interaction' (Proceedings of the 2019 CHI Conference on Human Factors in Computing Systems, ACM, 2019) <https://dl.acm.org/citation.cfm?id=3300233> accessed 23 August 2019.

43 Jasanoff (n 19).

substantiate this claim, we need to look closer at the policy documents to identify the problems which human control is considered to address.

What does a problem description in a policy document entail? I proceed from the observation that problematizations are fabricated in the course of policy-making. In this sense, problem representations in policy-making are not neutral. Instead, linguistic choices reflect the power to decide which issues are worthy of policy action and which issues are not. This perspective aligns with the argument presented by Liu et al., namely that the narrow focus on technology diverts attention from the heterogenous power relations of AI development.[44] In a similar vein, I argue that AI policy documents include, in addition to the problems they explicitly point to, implicit assumptions about the problems underlying the proposed solution of human control. To understand the intricacies of problem presentations better, I have employed a Foucault-influenced post-structural policy analysis called the 'What's the Problem Represented to Be?' or WPR approach in order to reveal how human control reinforces the old distinction between human and machine and attributes legitimacy creation only to human agency.

What is the added value of this focus on problematizations for AI policy analysis? Foucauldian sociology has been particularly interested in the intricate ways in which power works through language, which often remains beyond the scope of more socio-legal approaches to policy analysis. Although such analysis might seem merely descriptive from the legal viewpoint, the objective of Foucauldian policy analysis is in fact diagnostic. As Nikolas Rose puts it, analytics of governmentality 'seek an open and critical relation to strategies for governing, attentive to their presuppositions, their assumptions, their exclusions, their naivities and their knaveries, their regimes of vision and their spots of blindness'.[45] Consequently, the focus on problematizations aims to broaden the space of possible policy solutions. Hence, this diagnostic examination serves the needs of the socio-legal perspective as it provides a deeper understanding to support informed policy decisions on *de lege ferenda*. Other socio-legal scholars have conducted similar analyses in other fields of law. For example, Dent applies Foucauldian analysis

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44 Liu et al (n 5).

45 Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press 1999) 9.

to examine the copyright regime as a governmentalist practice diffused throughout society.[46] At the core of governing lies the process of subjectification, how subjecthood is not naturally given but created through governing practices that contribute to the process in which human persons turn themselves into subjects of governing. He argues that the field cannot be characterized by any single problematization but rather is filled with different government rationalities that can be made visible through a complete genealogical examination of copyright practices. In his analysis, 'problematization is both a process of governance and a technique for investigating the acts of governing'.[47] To this end, he argues, the advantage of problematizations is that it enables us to perceive multiple rationalities and purposes instead of a static 'monolithic, ahistorical problematization of (self-) expression'.[48]

Similarly based on the Foucauldian sociology of problematizations, Carol Bacchi has explored how problems are constituted in policy documents and how governance is organized through these problematizations, with the objective of exposing how the political agenda behind 'chosen' problems insidiously defines what is possible or impossible to ask, which outcomes are desired or undesired, which perspectives are included and which excluded – in short, what the policy debate is about.[49] The WPR approach contests 'the common view that the role of governments is to solve problems that sit outside them, waiting to be "addressed"' and provides step-by-step

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46 Chris Dent, 'Copyright, Governmentality and Problematisation: An Exploration' (2009) 18(1) Griffith Law Review 129, 131.

47 Ibid 133.

48 Ibid 141.

49 'To say that policies *create* "problems" as particular sorts of problems, does not mean to suggest that governments set out to *produce* homelessness or poverty, or even to deliberately represent homelessness or poverty in particular ways. Rather, the proposition is that the specific policy or policy proposal contains *within it* an implicit representation of the 'problem', referred to as a problem representation. This proposition relies upon a simple idea: That what we propose to do about something indicates what we think needs to change and hence what we think is problematic – that is, what the 'problem' is represented or constituted to be'. See, Carol Bacchi, 'Problematizations in Health Policy: Questioning How 'Problems' Are Constituted in Policies' (2016) SAGE open <https://doi.org/10.1177/2158244016653986> accessed 23 August 2019.

instructions for elaborating how problems are made within policy-making practices.[50] The analysis involves 'working backwards' from proposed solutions to problem representations and, following a set of questions, drawing attention to the underlying presuppositions and assumptions as well as the emergence and effects of the said problem representation. In the context of the present paper, this means working backwards from the proposed solution of human control over automation to question what are construed as the 'problems' of ADM systems and AI in general. For my analysis, this means looking at how human control is formulated in the policy documents in order to reveal the embedded assumptions the solution presupposes. What does human control tell us about the nature of AI problems in the EU's policy? What history, context, and narrative are generated in these policy documents? Do the policy documents reflect a reasonable understanding of the possibilities and limitations of human control as they are discussed in HCI research?

The WPR approach lists potential questions that guide the critical analysis, starting by identifying problem representations in search of 'a way to open up for questioning something that appears natural and obvious'.[51] I focus in particular on questions that aim to reveal the hidden ontological assumptions behind policy formulations and what is left unsaid (and thus excluded from discussion) by these formulations: what deep-seated presuppositions or assumptions underlie this representation of the 'problem'? What is left unproblematic in this problem representations? Where are the silences? Can the 'problem' be conceptualized differently?[52] The last step in Bacchi's approach is self-problematization, the reflexive application of the critical approach to the analyzer's own argumentation to reveal the selective choices that motivate it. In line with this approach, I argue that human control as a

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50 Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis: A Guide to Practice* (Palgrave 2016) 14. WPR approach is not interested in 'how different *people* might problematize the issue but how the *policy itself* problematizes it' (p. 17). Hence, the focus is on how problematizations are created by policy *itself*, not how individuals and organizations involved in policy-making processes perceive them. Complex policy documents often contain more than one problem presentation (p. 20), as is also the case with the EU's AI ethics documents.

51 Ibid 20.

52 Ibid 20-21.

solution to AI problems is built on a premise not unlike that of human/machine dichotomy of HABA-MABA model, namely that the actions of humans and technological systems can be clearly distinguished from one another and the former put in charge of the latter. The policy documents ultimately build a hopeful narrative: AI risks are construed as potentially harmful for human autonomy, but with human control these harms can effectively be prevented. Although aspirational, the narrative does not necessarily hold true in light of HCI research.

III. Making the Implicit Explicit: AI Problematizations in EU Policy

1. The Explicit Objectives of EU Policy: Putting People at the Center of AI Development

In this section, I analyze three documents that reflect the EU's current policy on AI ethics. The first of these documents is the Commission's communication on Artificial Intelligence for Europe from spring 2018 ('the Strategy'), mandated by the Council, which establishes the need for a European approach in order to reap the advantages of AI.[53] The second document is the Ethics Guidelines for Trustworthy AI ('AI HLEG') drafted by the Independent High-Level Expert Group set up by the Commission.[54] The expert group delivered its first draft in December 2018 and, after stakeholder consultation, a revised version in April 2019.[55] The third document is the Commission's communication in April 2019 on Building Trust in Human-Centric Artificial Intelligence ('Communication') that incorporates the key points of the AI HLEG guidelines.[56] I first discuss how AI policy issues are framed and positioned in these documents, considering

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53 Communication COM(2018) 237 final from the Commission to the European Parliament, the European Council, The Council and the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe [2018] <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-237-F1-EN-MAIN-PART-1.PDF> accessed 22 August 2019, 2.

54 Ibid section 3.3.

55 See COM(2019) 168 final (n 14). As soft law, the Guidelines are meant to be adopted by stakeholders on a voluntarily basis.

56 Ibid.

the terminological ambiguity of AI and what the perceived relationship between law and ethics is. In addition, I examine the intended usage and form as well as explicit expectations linked with human control. In section III.2, I then locate what has been left unsaid in the hope of finding out what remains beyond the scope of these policy initiatives.

To understand better the explicit problems of AI these documents aim to address, we first need to look into what is meant by AI, i.e. from which qualities do perceived problems emerge. Interestingly, AI is not defined in technological terms in any of the documents but instead by reference to digital transformation and the increasing autonomy of AI systems. According to the Strategy, AI is one of the most strategic technologies of the 21st century and is transforming the world, society, and industry like the steam engine and electricity in the past. AI is defined as 'systems that display intelligent behavior by analyzing their environment and taking actions – with some degree of autonomy – to achieve specific goals'.[57] The systems are both software-based and embedded in hardware and often require data to improve their performance. Hence, AI is seen to refer to relatively autonomous algorithmic models that infer outputs from input data. In short, AI is perceived as a combination of relatively autonomous data-driven technologies. This conception of AI is unsurprising given that data governance is at the core of EU technology policy. Furthermore, the GDPR creates a normative basis for automated decision-making that connects data subject's legal protection with human intervention. Article 22(1) of the GDPR provides for the right for a data subject not to be subjected to a decision based solely on automated data processing. Although exceptions to the main rule are stated in article 22(2), these may only be applied with suitable measures for the data subject's legal protection, the minimum standard stated in 22(3) being the data subject's 'right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision'.[58] The existing regulation also forms the basis for the development of an AI-specific framework around human intervention.

What then are the stated objectives of the policy documents? The Communication states that the aim of the emerging AI ethics regime is to

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57 COM(2018) 237 final (n 53) 2.

58 On GDPR article 22, see e.g. Brkan (n 3).

place people at the center of the development of AI – hence the formulation, 'human-centric AI'.[59] In the Strategy, the goals are described somewhat differently, in terms of boosting the EU's technological and industrial capacity, preparing for socio-economic changes brought by AI, and ensuring an appropriate ethical and legal framework.[60] Understandably, the focus of the policy actions is on economic measures, given the EU's legislative mandate. The Strategy identifies the lack of trust and accountability as key AI-related problems. The new opportunities generated by AI are contrasted with the possible uses of AI for 'malicious ends', whereas the challenges and risks are located in the 'areas of safety and liability, security (criminal use or attacks), bias and discrimination'.[61] The proposed solution is to develop AI ethics guidelines in collaboration with all stakeholders following the European Council's original mandate.

The Strategy connects the ethical standards with the EU Charter of Fundamental Rights and the values listed in article 2 of the Treaty on European Union: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The Guidelines reflect the problems identified in the Commission's Strategy, i.e. the lack of trust and accountability, suggesting people's mistrust would prevent the adoption of AI: 'without AI systems – and the human beings behind them – being demonstrably worthy of trust, unwanted consequences may ensue and their uptake might be hindered, preventing the realization of the potentially vast social and economic benefits that they can bring'.[62] It is thus claimed that the crucial problem related to AI is that applications would not be used, a problem that can be solved by increasing trustworthiness. Trustworthiness, in turn, is seen to be achieved by a combination of legal compliance, ethical principles, and technical and social robustness.[63] The Guidelines do perceive that AI

59 COM(2019) 168 final (n 14) 1.

60 COM(2018) 237 final (n 53) 4.

61 Ibid.

62 Guidelines (n 14) 4-5.

63 Ibid 5.

applications also present other risks, although these are not further elaborated on.[64]

Ultimately, it is human autonomy that is seen to be threatened. Human autonomy is constituted as the protected good and the core ethical principle that necessitate human oversight as a safeguard:

> The fundamental rights upon which the EU is founded are directed towards ensuring respect for the freedom and autonomy of human beings. Humans interacting with AI systems must be able to keep full and effective self-determination over themselves, and be able to partake in the democratic process. AI systems should not unjustifiably subordinate, coerce, deceive, manipulate, condition or herd humans. Instead, they should be designed to augment, complement and empower human cognitive, social and cultural skills. The allocation of functions between humans and AI systems should follow human-centric design principles and leave meaningful opportunity for human choice. This means securing human oversight over work processes in AI systems. AI systems may also fundamentally change the work sphere. It should support humans in the working environment, and aim for the creation of meaningful work.[65]

This means that the perceived threat of AI is the loss of human autonomy, particularly of those humans who find themselves interacting with AI systems. The proposed solutions are human-centric design and opportunities for human choice, which can be realized through human oversight of AI systems. This proposal implies that human control is all that is needed to ensure ethical AI systems. However, this is contestable given the insights from HCI research, which demonstrated the limited capabilities of humans as overseers of automated systems. Simply put, human control over automation often fails in practice. Furthermore, there is a more fundamental challenge to this approach: imposing responsibility for ethical AI on the human controller might be unreasonable from the perspective of the controller's legal protection.

Human control as the solution to AI problems becomes visible particularly in the HLEG Guidelines, which present oversight as being necessary to

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64 'While offering great opportunities, AI systems also give rise to certain risks that must be handled appropriately and proportionately', see ibid 4.

65 Ibid 12.

ensure that 'an AI system does not undermine human autonomy or cause other adverse effects'.[66] This formulation explicates the problem as follows: without such oversight, the machines may be detrimental to human self-determination. Human control seemingly does not need to be comprehensive in order to be considered effective protection. The Guidelines explain different degrees of human oversight from step-by-step monitoring in the form of human-in-the-loop to overall monitoring of human-in-command, noting that lower levels of human oversight should be accompanied by other safeguards:

> Human oversight helps ensuring that an AI system does not undermine human autonomy or causes other adverse effects. Oversight may be achieved through governance mechanisms such as a human-in-the-loop (HITL), human-on-the-loop (HOTL), or human-in-command (HIC) approach. HITL refers to the capability for human intervention in every decision cycle of the system, which in many cases is neither possible nor desirable. HOTL refers to the capability for human intervention during the design cycle of the system and monitoring the system's operation. HIC refers to the capability to oversee the overall activity of the AI system (including its broader economic, societal, legal and ethical impact) and the ability to decide when and how to use the system in any particular situation. This can include the decision not to use an AI system in a particular situation, to establish levels of human discretion during the use of the system, or to ensure the ability to override a decision made by a system. Moreover, it must be ensured that public enforcers have the ability to exercise oversight in line with their mandate. Oversight mechanisms can be required in varying degrees to support other safety and control measures, depending on the AI system's application area and potential risk. All other things being equal, the less oversight a human can exercise over an AI system, the more extensive testing and stricter governance is required.[67]

Finally, the Guidelines bring forward a concrete assessment list targeted towards AI practitioners, with questions meant to ensure adequate human oversight. The list includes a set of questions on the level of human involvement, identification of the human overseer and moments and tools for intervention, existence of detection and response mechanisms for

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66 Ibid 16.

67 Ibid.

autonomous AI systems, and the inclusion of a stop button or procedure for safely aborting an operation.[68]

The expert group's recommendations on human oversight were included almost word for word in the Commission's 2019 communication, 'Building Trust in Human-Centric Artificial Intelligence'. In addition to formatting and slight changes of wording, the Communication connects human control measures with the adaptability, accuracy and explainability of AI-based systems, which in the Guidelines were discussed in terms of technical and social robustness and data governance.[69] The Communication also contains a preamble to the description of human oversight as a key requirement for trustworthy AI. Finally, the user's overall wellbeing is highlighted as being central to the system's functionality.[70] The Communication also sets out the next steps in establishing an AI framework, which include, inter alia, stakeholder feedback on the feasibility of the assessment list and potential revisions, as well as building the EU's leadership role in international policy settings with the objective of creating a related assessment mechanism. In addition, more funding will be targeted to research on explainability and advanced human-machine interaction.

In summary, the EU's policy documents on AI ethics create high expectations that human oversight will safeguard human autonomy in the development and use of AI applications. The Commission's Strategy considers the lack of trust and accountability as the main concerns associated with AI, whereas the expert group's Guidelines present the undermining of human autonomy as one of the main problems that can be remedied by human oversight. The Communication of 2019 repeats these concerns and, unlike the earlier documents, connects required human control with accuracy and explainability. Interestingly, the question of interaction between humans and machines is only mentioned in the conclusions of this most recent policy document. Based on these observations, the policy documents reflect the assumption that human control constitutes an

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68 Ibid 27.

69 Ibid 17-18.

70 COM(2019) 168 final (n 14) 4.

effective accountability mechanism for the protection of human autonomy in the face of increasing AI use.

2. Discovering the Implicit: Human Autonomy as the Last Stand against the AI Tidal Wave

As discussed, post-structural policy analysis is particularly interested in locating the silences created in policy-making, as these frame the scope of what is construed as possible policy action. Policy documents typically aim to justify legislative action by imposing them as the right solutions to identified problematizations, but these stances are ultimately opinions about what needs to be fixed.[71] How does this perspective play out with the EU's AI policy? What is left unsaid? I address these questions by working backwards from the proposed solution of human oversight, with the specific objective to follow to which actions and by whom the human control is extended. Who is the object of human oversight?

The Commission's Strategy on Artificial Intelligence for Europe recognized the need to 'ensure an appropriate ethical and legal framework', suggesting that the current framework is not sufficient to ensure trust and accountability. In other words, the legal and ethical framework needs fixing. What, then, are the proposed solutions? The Commission's proposal is to carry out as soon as possible the Commission's agenda as defined in an earlier policy document, the Digital Single Market Strategy, including measures such as enabling free flow of non-personal data 'that will be a key enabler for the development of AI'.[72] At the same time, the quick adoption of these measures is 'essential as citizens and businesses alike need to be able to trust the technology that they interact with, have a predictable legal environment and rely on effective safeguards protecting fundamental rights and freedoms'.[73]

These statements reveal a two-sided and inherently conflicting perception of AI: on the one hand, AI is a good thing and needs to be actively enabled by regulatory measures; on the other, AI threatens fundamental rights and

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71 See n 49.

72 COM(2018) 237 final (n 53) section 3.3.

73 Ibid.

therefore needs to be reined in with legal and ethical guidance. The general public's trust, in turn, is linked with its understanding about the technical underpinnings of AI systems and thus explainability of the system is a key measure for solving AI-related problems:

> To further strengthen trust, people also need to understand how the technology works, hence the importance of research into the *explainability of AI systems*. Indeed, in order to increase transparency and minimize the risk of bias or error, AI systems should be developed in a manner which allows humans to understand (the basis) of their actions.[74]

This statement is built on the assumptions that, firstly, humans are indeed capable of understanding complex technical systems and, secondly, that the human activities of seeing and understanding are enough to protect those values that are threatened by AI. Read this way, the problem with AI is also about people's lack of understanding that can be solved by human oversight which addresses this understanding.

These risks are portrayed as unavoidable characteristics of the current technologies and thus constructed as 'normal' AI-related problems. By the use of passive language, these problems are attributed to the technology itself, not to the software developers and system architects, to institutional practices or organizational and market structures. In the Strategy, legal and ethical concerns are addressed by product liability, data protection, cybersecurity and intellectual property rights. At the same time, other legal mechanisms like competition law, administrative and procedural law, as well as tax law are excluded from examination, although these fields do provide effective mechanisms to ensure legal protection. Competition law in particular could be considered, because regulation of markets is a powerful tool that can also be used to guide commercial AI development.[75] In light of these three AI policy documents, AI problems, it seems, are problems created by the technology, not by humans, and these problems should primarily be addressed by product liability and data protection regimes, i.e. only certain areas of law. This focus on certain legal fields frames socio-legal

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74 Ibid.

75 Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2016).

problem solving, pushing us to address AI issues primarily within these legal regimes, which then diverts attention from alternative legal remedies.

The policy documents construe risks and errors of AI not as products of human action but of AI technology, attributing error-creating agency to technology. This becomes apparent through the language employed. Although the need for ethical and legal frameworks raises concerns regarding AI being used for malicious ends, it is noticeable how passive language is still used: AI systems 'display intelligent behavior by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals'.[76] Similarly, it is AI technologies that 'require data to improve their performance',[77] not developers employing certain ML techniques; once 'they [AI technologies] perform well, they can help improve and automate decision making'.[78] Active language is used only when technology is seen to act, attributing a sort of agency to AI. AI systems are thus established as autonomous agents that need to be controlled by humans. At the same time, there is a sense of urgency that reflects technological determinism: these are societal problems that require legislative action immediately. This urgency indicates that this is a new situation, a tidal wave of digital transformation for which we need to brace ourselves, dictated by the inevitability of our novel historical situation. This sense of urgency resembles Ifversen's observation about the use of words such as 'crisis' or 'terrorism' to create necessity and legitimacy for policy action: 'such concepts defined for combat are used to frame a situation – or rather an event – that risks getting out of control'.[79] Because problems are portrayed as created by technology and not by economic and societal structures, AI is presented as a novelty and hence separate from the historical continuum of earlier forms of automation. The lack of acknowledgment of history also detaches policy dialogue from the lessons learned about the implementation of information systems in organizational decision-making in the 1960s and 1980s. This detachment makes it harder to contextualize AI problems in a meaningful way.

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76 COM(2018) 237 final (n 53) 2.

77 Ibid.

78 Ibid.

79 Ifversen (n 20) 86.

At a textual level, the Guidelines create a contrast between human agency and the agency of AI systems, which again is established by the use of active language: 'AI systems ***should support*** human autonomy and decision making'; 'AI systems ***should both act as enablers*** to democratic, flourishing and equitable society by supporting the user's agency and foster fundamental rights, and ***allow for*** human oversight'.[80] Hence, there is a silence in the AI policy documents when it comes to humans. Only abstractions of humans are present, the human in control, but not the humans who could be perceived as objects of regulation. The abstraction of human control seems to imply that it is the closest human operator who is implicated in legal and ethical protection. Simultaneously, the technological focus ends up assigning subjectivity to AI and mystifying human capabilities as the last line of defense against this tide of foreign intelligence. In any case, attribution of agency to technology seems to be at the core of AI problematizations. It is the technology that needs to be subjugated.

In the Guidelines, human agency is presented as being under threat from AI systems and human oversight is proposed as the solution to protect this agency. The agency of humans is threatened by the agency of technology, signaling that the AI systems need to be forced to allow for human oversight to protect the latter's autonomy. Again, the human actors are missing. AI is anthropomorphized into an autonomous agent that might be malicious towards humans: AI systems 'may harness sub-conscious processes, including various forms of unfair manipulation, deception, herding and conditioning, all of which may threaten individual autonomy'.[81] It is this agency of technology that we need to be protected against and which poses a threat to fundamental rights and human agency, the latter of which is defined as the autonomy of the human user. Similarly, the Communication reflects an anthropomorphization of AI systems, locating the problem in the systems' ability to learn, which makes them autonomous from humans,[82] echoing the deeply-rooted concern for the loss of control. Humans remain out of sight, are hidden from sight: it is as if the AI systems develop independently to surpass humans, instead of programmers, systems architects and human

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80 Guidelines (n 14) 15 [emphasis added].

81 Ibid 16.

82 COM(2019) 168 final (n 14) 2.

supervisors actively evaluating and implementing process automation by AI methods. But ultimately, the threat of technological agency to human autonomy is contained by human oversight. Despite the statement that oversight does not need to be total and continuous, there is no discussion on the implications of human oversight, whether and how human overseers are able to perform their oversight tasks nor what would be the criteria for human intervention or whether an overseer should possess some particular expertise.

3. Locating Silences: Promise of Control and Missing Humans

To summarize, the policy documents attribute autonomy and agency to AI systems and portray this agency as something that needs to be enabled and reined in at the same time. The attribution of agency to AI systems is particularly blatant in the use of active language: in the context of the problem representations, only AI systems are portrayed as actors. The technological agency is contrasted with threatened human values and rights. The threat, it seems, comes from the technology itself, not the developers nor implementing organizations. Humans remain absent except for the abstract formulations of human agency, autonomy and oversight that are the object and the subject of legal protection. Similarly, situations of shared control or hybridization of decision-making are not discussed, further emphasizing the juxtaposition of human and machines. In short, the EU policy documents reintroduce the human/machine dichotomy from the Fitts list into AI policy setting.

In addition, there is an apparent assumption that decision-making has been and still is a human exercise, but that this is about to change. The coming of AI is like a force of nature and the questions that remain are how to react to it and how to safeguard the fundamental values that are apparently in danger. It is assumed that AI systems are advanced enough to take independent action. The question is not raised as to what AI techniques can actually accomplish and what they cannot, nor why and how these techniques should be evaluated independently from other forms of automation. The fact that AI as such is not defined also raises the question of the extent to which these problematizations reflect the broader societal discussion on the perceived existential dangers of 'strong' general AI instead of narrow AI, which most

current applications are. At the same time, human understanding is perceived to be enough to rein in this powerful technology. In the end, we are absolved by the triumph of human cognitive skills, capable of seeing, understanding and acting on machine mistakes, demonstrating that these policy documents mystify the capabilities of human agency. Ultimately, humans trump machines.

There are several silences, most importantly the surprising absence of humans, despite the stated objective to place people at the center of AI development. Humans are present only as abstractions as the human in control or the human whose autonomy is at risk. These abstractions, however, detach control from context. Give that it is the context that defines applicable law and ensuing legal mechanisms to exercise control, it remains unclear how a human controller would be able to exercise meaningful oversight. In this sense, it is possible that the technological focus could lead to a regulatory standstill, due to the role of technological neutrality as a central legislative technique.

The focus on the importance of ethical standards prevents us from questioning the feasibility of soft law approaches rather than hard law regulation through binding accountability measures and market regulation. By assigning ethical concerns to technological agency, the discussion is framed in terms of the human/machine dichotomy. But do the ethical concerns described in particular in the Strategy, such as safety and liability, discrimination, cyber-attacks, not also exist outside the AI context? To what extent are the concerns, challenges and risks described related to particular AI techniques rather than broader trends of datafication, standardization, and automation? And, finally, how should we conceptualize and regulate situations of shared control over complex socio-technical systems, those in which human labor is inseparable from technological tools, in a way that does not unfairly assign responsibility to the closest human operators?[83]

As discussed above, the final step in the WPR analytical approach is self-reflexivity, which aims to make the analyzer's own problem representations explicit. I analyzed the three EU documents at a textual level, trying ascertain

[83] As Elish discusses, boundaries of agency become hard to pinpoint in situations of shared control over complex socio-technical systems. See Elish (n 16) 54.

whether or not the aforementioned academic discussions reflected in them. For example, was the shift from human/machine juxtaposition (the Fitts list) to problems of automation present in the policy documents and to what extent was the policy influenced by the interaction approach? Were the subjective ideological roots of human oversight normalized into objective knowledge? Where were the humans and technical systems at the textual level and which human agents were recognized as influencing the ethical and legal concerns of AI? Where do the vague ethical concerns emerge from and who creates them? These questions, although critical, take as a given the fact that human oversight often fails in repetitive monitoring tasks[84] and that the focus on human operators hides other human actors from sight. Based on the earlier research, the analysis built on the assumption that human oversight refers primarily to operators not systems designers, architects, and developers. However, the policy documents did not reflect this assumption, instead describing human agency only in abstract terms. On close critical reading, the absence of human actors becomes apparent and this silence further draws attention to the conspicuous use of passive language, which emphasizes the agency attributed to technology.

As my analysis was motivated by the concept of human control as a solution to AI problems and the observation of active/ passive language, I focused on relations between technical systems and human agents. Alternative approaches might focus on relations between different policy measures and their respective fields of law or discuss the economic agenda advocated particularly by the Commission. It should be noted, however, that inevitably there are other problem representations in these documents. As Bacchi and Goodwin note:

> it is highly likely that a WPR analysis may well need to be applied *more than once* in any particular applications. This is because problem representations tend to lodge or 'nest' one within the other.[85]

The need for repeated analysis of problematizations may become particularly vital when the EU's approach to AI governance is expanded from soft law guidelines to hard law instruments.

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[84] See e.g. Bainbridge (n 29).

[85] Bacchi and Goodwin (n 50) 24.

IV. The Supremacy of the Human Overseer: Human Agency as Justification

Based on these observations, human agency, in the form of varying levels of human oversight, is portrayed as a central tool for overcoming the ethical concerns and risks associated with AI systems, regardless of the obvious limitations of human capabilities in monitoring automation. In the EU's AI policy, human decision-making is contrasted with algorithmic decision-making, thus invoking the human/machine dichotomy instead of collaboration in socio-technical systems. Through the process of juridification, the notion of human oversight becomes a legal concept, binding it to the internal rationality of law. This in turn limits the scope for critique: law only accepts critique when it is framed in terms law understands. Simply put, the dichotomy becomes embedded in legal doctrine and frames future socio-legal discussion.

The human control approaches reflect the assumed need to engage humans in algorithmic decision-making in order to ensure fairness and, ultimately, to address fears associated with automation and machines. Human oversight is about controlling unknowns, particularly unknowns of the technological variety. In this sense, human oversight as control over technology reflects something almost aspirational, a source of trust in the face of uncertainty. This promise of control is not simply about the feasibility of human oversight over automation, which has the obvious shortcomings discussed above. Could it be that human oversight carries this promise of control particularly because the fears and risks are attributed to technology, not the humans? This would suggest that humans are 'in the loop' to provide legitimacy, which is not necessarily linked to the practical feasibility of human oversight. Given this justificatory dimension of human agency, the feasibility of these approaches should be critically assessed before they are implemented as governance models, given that they may not in reality provide the solutions to the implicit problematizations. Instead, assigning problem-solving capabilities to human intervention might lead us astray as human oversight enables us to maintain law's 'human-facedness'.

Why then, despite the limitations of human control and its connection with the legal liability regime, do we still maintain the expectation that human input in decision-making is fundamental? It seems that this emphasis reveals

something relevant about law's self-reflection: a connection between human agency, legitimacy of decision-making, and social expectations of fairness.[86] The legal system produces 'human-faced' law, conceptualizing law in terms of human agents, which the problematizations around ADM reveal. However, by juxtaposing machines and humans we seem to imply that ADM systems are somehow fundamentally different decision-making mechanisms. But as the algorithmic bias discussion demonstrates, human subjectivity becomes embedded in ADM systems, making them, in many ways, as biased, arbitrary and subjective as human-driven decision-making albeit implemented on a different level. Do we still unconsciously expect our technological tools to be less subjective than we are? It seems that we often still assign objectivity to technology and feel betrayed when our expectations are not met.

Ultimately, however, human subjectivity wins against automation, as human oversight seems to imply. The strong preference towards human control, despite its limitations, suggests a deeper connection between human agency and the legitimacy of decision-making. In this sense, the policy documents use human control to justify the increase of automation. This reading echoes Elish's notion of humans as moral crumple zones and Jasanoff's pretensions of control, referred to above. In this sense, the emphasis on human control as the right policy solution for fundamental rights issues linked to ADM provides a particularly interesting viewpoint to the presumed socio-legal and regulatory challenges of AI.

There is a sense of urgency about AI presented in the policy documents, a call for action, which still boils down to voluntary soft law instead of hard law approaches. The emphasis on soft law may seem surprising, as the limitations of voluntary implementation are obvious. If the urgency portrayed in the guidelines is justified, why then only soft law? The chosen soft law strategy may be explained by the division of labor, as the President of the European

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[86] Self-evidently conceptions of fairness are very much dependent on individuals, contexts, disciplines, fields, and theoretical backgrounds. On quantitative definitions see, Hutchinson and Mitchell (n 7); on human perceptions see e.g. Nina Grgic-Hlaca, Khrisna Gummadi, Elissa Redmiles, Adrian Weller, 'Human Perceptions of Fairness in Algorithmic Decisions Making: A Case Study of Criminal Risk Prediction' (Proceedings of the 2018 World Wide Web Conference. International World Wide Web Conferences Steering Committee, 2018) <https://dl.acm.org/citation.cfm?id=3186138> accessed 23 August 2019.

Commission, Ursula von der Leyen, intends to propose a comprehensive European approach to AI regulation in her first 100 days in office during spring 2020.[87] Nonetheless, the policy documents suggest that the problem with AI is not the lack of a legal framework as such but instead the more vague notion of an independent artificial agency. Perhaps the importance attributed to human input reflects the idea that legal decision making should not be about automated information processes but about processes that produce justification and legitimacy. Perhaps these policy statements come with a promise for renewed interest in the ritualistic elements and societal values present in legal decision making or, put another way, in conflict management, the production of justification through procedural structures.

Accountability mechanisms built on the assumption of a supreme human overseer are inherently flawed, if adopted without criticism. Such approaches can embed and reinforce the implicit human/machine dichotomy and mystify human agency. But it should be noted that the emphasis on human agency may serve a purpose outside monitoring automation, namely in justifying legal decisions. The importance attributed to humans in automation is not arbitrary but instead reflects the legal system's foundational concepts and ideologies that are built on anthropocentricity. In other words, juxtaposing algorithmic and human decision-making reveals law's self-reflection on what constitutes legal decision-making. Simply put, law's acknowledgement of legal agents capable of decisions is limited to humans or fictions of human agents such as organizations that are conceptualized as legal (although not natural) persons. Following this, justification of decision-making has traditionally been connected to human agency even when, in practice, decisions are arrived at through intra-organizational processes. In this sense, human control over automation can be seen simply as another formulation of human justification.

This analysis has attempted to demonstrate that problematizations do matter, perhaps more so in discussions concerning technological governance

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[87] Ursula von der Leyen, 'A Union That Strives for More My Agenda for Europe' (2019) <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> accessed 27 November 2019.

than in other fields less plagued by misplaced metaphors.[88] It is not the objective of the WPR approach to provide alternative policy recommendations but instead to provide tools for critical analysis and to enable egalitarian politics.[89] By employing measures of critique, we are able to open the door to critical examination of automation of legal decision-making, the role played by human, non-human and hybrid actors in justification production, and ultimately, the feasibility of anthropocentric legal concepts to address this hybridisation. We can call attention to the justification of decisions and the legitimacy of decision-making processes and examine what exactly changes through implementation of ADM systems. Finally, the promise of this approach lies in a more nuanced understanding of how decisions come about. After acknowledging the fabricated nature of the problems associated with ADM, we can start thinking about meaningful partnerships between human agents and the automation of legal decision-making.

V. Conclusion: Implications for AI Policy and Socio-Legal Research

What implications follow from this analysis of the EU's AI policy focus on human control over automation? Two particular future avenues for analysis emerge. Firstly, what can and should we regulate and how can socio-legal scholarship facilitate the development of new effective regulatory strategies? As discussed, there is an inherent tension between technology-oriented policy and the principle of technological neutrality as guiding legislative strategy. This tension needs to be addressed if we want to pursue technological governance from an AI-specific perspective. The focus on technology may also be problematic due to the terminological ambiguity of AI and a significant theoretical issue relates to the legal system's limited focus on humans as objects of regulation. Difficult policy choices become entwined

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88 See e.g. Sheldon Ungar, 'Misplaced Metaphor: A Critical Analysis of the "Knowledge Society" (2003) 40(3) Canadian Review of Sociology 331, 331-347; Marinus Ossewaarde, 'Digital Transformation and the Renewal of Social Theory: Unpacking the New Fraudulent Myths and Misplaced Metaphors' (2019) 146 Technological Forecasting and Social Change 24, 24-30.

89 Bacchi and Goodwin (n 50) 25.

with the need for critical socio-legal scholarship: should we forego the principle of technological neutrality or should we hold on to law's anthropocentricity? What exactly would these choices entail? If we stick with regulating human behavior, what criteria should be used to identify the 'human' in complex socio-technical systems? In any case, discussion of the objectives of AI regulation is unavoidable. To this end, a careful and context-specific analysis of the current legislative framework is needed to understand better whether existing legal safeguards possess enough interpretative flexibility to address the problems related to AI in the policy context. Such an examination also needs to address the efficiency of administrative and procedural safeguards beyond human control and contextualize the current debate within the broader historical development from the introduction of standards to data-driven automation of legal decision-making processes through information systems. If regulation is pursued, special attention should be paid to the creation of accountability mechanisms in a manner that does not impose unrealistic expectations on human operators but instead pursues a more rigorous interaction design. If we ignore the hybridization of legal decision-making that ADM models impose, there is a danger of assigning human decision makers the role of rubber-stampers with problematic consequences for legitimacy and justification.

Secondly, policy debates around AI ethics provide an interesting context in which to discuss the relationships between law, politics, and ethics, and reveals a way to examine the juridification of technological governance from soft law to hard law. As discussed, soft law guidelines are bound to frame the societal debate concerning AI challenges and their proposed solutions may have normative consequences in shaping future hard law instruments. The juridification of such concepts, i.e. their translation into binding concepts of positive law, also disguises the heterogenous value-laden and ideological choices present in the political creation of AI ethics guidelines. The juridification binds concepts established in policy-making to the legal sphere's internal perspective. This process reflects the long-standing distinction between the political and legal systems and their separate societal functions, built on the idea that the political system debates societal objectives and establishes a compromise in the form of legislation, after which the legal system takes over its application and interpretation. This means that within the legal system there is limited space for fundamental

critique about the acceptability of legislative intent. In other words, the translation from politics to law limits the grounds on which these concepts can be criticized: from the legal system's normative view, only immanent critique preserving law's internal rationality is recognized as valid.[90]

What makes human control over automation such a tempting solution for digital technologies is its relatively easy implementation. Human control comes with the promise of a relatively simple and operational way to address AI-related issues: to operationalize human control both within the legal system and software development requires relatively easy political choices that can be met by establishing a legal right to human oversight and then creating technical design solutions for implementing this right within the technological architecture. Especially if the alternative is to engage in grueling societal debates over the dynamics of technological change and the critical analysis of existing societal power imbalances, such solutions provide attractive and straightforward policy actions.[91] But perhaps the latter is exactly what is needed. To better understand the complexities and societal issues related to the ongoing algorithmization and to assess different policy options, it is necessary to broaden the discussion from the current focus on technology and ethics to discussions about societal structures and law.

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[90] On immanent critique, see Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002) 29–30. See also Riikka Koulu, *Law, Technology, Dispute Resolution: Privatisation of Coercion* (Routledge 2019) 37.

[91] Cf. Kenneth C. Laudon, *Computers and Bureaucratic Reform: The Political Functions of Urban Information Systems* (John Wiley & Sons 1974) 52-53.

FARM ANIMAL WELFARE UNDER SCRUTINY: ISSUES UNSOLVED BY THE EU LEGISLATOR

Luca Leone*

In the European Union (EU) innovation society, animal welfare has reached its normative status, together with the increased ethical concerns of citizens and civil society in relation to animal welfare and dignity. However, several problems are impeding welfarism from gaining full traction on the European stage. This paper aims at scrutinizing some of those legal problems, using the ongoing (2019) CAP reform and labelling issues as case studies. Is the process of the CAP reform in line with the aim of fully integrating farm animal welfare into EU agricultural policy? Is animal welfare labelling gaining ground as an ethical-legal tool that certifies the achievement of high standards in livestock farming? These are the questions explored in this contribution. Both a historical perspective of farm animal welfare in Europe and an evaluation at the international level will enrich their analysis. The core argument of this study posits that legal answers to the CAP post-2020 and to animal welfare labelling schemes can legitimate a more sustainable model of EU agriculture. What is needed is a model of agricultural practices capable of aligning citizens' interests with the EU animal welfare strategy 2012-2015, while enhancing and strengthening the Union's normative approach to animal dignity.

Keywords: Animal welfare, CAP, Labelling, Private Standards, TBT Agreement

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* Researcher – Università Cattolica del Sacro Cuore – Faculty of Business and Law – Piacenza (Italy) – luca.leone@unicatt.it. My thanks go to the anonymous reviewers for their precious suggestions and helpful comments, which have further developed my thinking in reshaping the content of this paper. All errors are my own.

I. INTRODUCTION

Since the last decade of the 20th century, the institutions of the European Union (EU) have always sought – mostly through conventions,[1] as well as horizontal[2] and species-specific legislation[3] – to efficiently deal with the welfare of farm animal species. In doing so, Europe has tried to tackle many of the problems related to it: the protection of laying hens kept in battery cages, transport measures, the welfare of chickens kept for meat production, housing conditions, the traceability of sheep and goats and so on. This assortment of rules was not included among the EU's core values and objectives set out in Articles 2–3 TEU.[4] Instead, it was adopted on the basis

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1 See The European Convention for the protection of animals kept for farming purposes (ETS No. 87) of 1976, revised in 1992 (ETS No. 145); the European Convention for the protection of animals during international transport (ETS No 65) of 1968, revised in 2003 (ETS No 193); the European Convention for the protection of animals for slaughter (ETS No 102) of 1979.

2 Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes [1998] OJ L 221/23.

3 For an overview, see Paige M. Tomaselli, 'Detailed Discussion of International Comparative Animal Cruelty Laws' (Animal Legal and Historical Center 2003) <https://www.animallaw.info/article/detailed-discussion-international-comparative-animal-cruelty-laws> accessed 22 February 2019; Nicholas K. Pedersen, 'Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn' (Animal Legal and Historical Center 2009) <https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn> accessed 22 February 2019; Peter Stevenson, 'European Union Legislation on the Welfare of Farm Animals (Compassion in World Farming 2012), <https://www.ciwf.org.uk/media/3818623/eu-law-on-the-welfare-of-farm-animals.pdf> accessed 22 February 2019.

4 This legal gap is discussed by Diane Ryland and Angus Nurse, 'Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) 22(3) European Energy and Environmental Law Review 101.

of other Treaty objectives, such as the common agricultural policy (CAP), the internal market, the environmental policy and the common commercial policy. Simultaneously, animal sentience gained its normative status in Protocol No. 33, annexed to the 1997 Treaty of Amsterdam.[5] Later, with the adoption of the Lisbon Treaty, the recognition of non-human animals (hereafter 'animals') as sentient beings has been embedded in Article 13 TFEU.[6]

In spite of those legal advancements,[7] however, the institutionalization of cruel practices on farm animals, the scarce regulation of living conditions for some widely-kept animal species (e.g. dairy cows, rabbits, ducks, and turkeys), and the complex problems of the low enforcement of legislation[8] have been obstacles for welfarism to gain ground within Member States. The welfare of several farmed animals, such as broiler chickens, cows, rabbits, trout and salmon, continues to be undermined by problems related to space and resources,[9] while lacking in fulfilment of animals' needs.[10]

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5 On this subject, see Tara Camm and David Bowles, 'Animal Welfare and the Treaty of Rome—A Legal Analysis of the Protocol on Animal Welfare and Welfare Standards in the European Union' (2000) 2 Journal of Environmental Law 197.

6 Article 13 TFEU states: 'In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'.

7 See Jessica Vapnek and Megan Chapman, 'Legislative and Regulatory Options for Animal Welfare' (FAO 2010).

8 For a deep analysis of these issues, see European Parliament, 'Animal Welfare in the European Union', Policy Department C: Citizens' Rights and Constitutional Affairs (European Union 2017).

9 Ibid 51ff.

10 In this respect, a new set of standards – the Better Chicken Commitment – has been promoted by the Royal Society for the Prevention of Cruelty to Animals (UK RSPCA) and other groups to spread across food businesses the use of slower growing breeds and to guarantee chicken health and welfare by assuring more space, natural light and more humane methods of slaughter. See RSPCA, 'One billion chickens are slaughtered for meat in the UK each year' (RSPCA 2019) <https://www.rspca.org.uk/getinvolved/campaign/cheapchicken> accessed 05 March 2019.

Scholarly criticism has highlighted three significant problems stemming from the EU's progressive legislation on animal welfare. First, a slowdown in the period since 2003 in four distinct areas: the failure to initiate bold new normative patterns; problems with the enforcement of existing laws; the Court of Justice of the EU's (CJEU) lenient approach when ruling on regulation in the area of animal protection; and EU legislatures' shift towards a crackdown on animal extremists.[11] Second, the normative paradox that clearly emerges from the changes that animal welfare legislation has gone through, where rules on the commercial use of animals – relying on the image of animals as products[12] – coexist with rules conveying moral respect for, and protection of, animals as sentient beings.[13] Finally, the acknowledgment that most scientific reports on animal welfare produced by the European Food Safety Authority (EFSA)[14] have not been implemented in legislation.[15]

Against this backdrop, this paper aims at scrutinizing further legal problems that are affecting the EU's normative approach to farm animal welfare, using the ongoing (2019) CAP reform and labelling issues as case studies. The reasons for focusing on these issues are related to their potential contribution to a better implementation of Article 13 TFEU and the increased ethical concerns of consumers and civil society in relation to animal sentience and

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11 Pedersen (n 3).

12 This conception recalls the Kantian thought of animals as 'instruments' in the hands of humans for human ends (Immanuel Kant, *Lectures on Ethics* (trans. Louis Infield) (Harper Torchbooks 1963).

13 Katy Sowery, 'Sentient Beings and Tradable Product: The Curious Constitutional Status of Animals under Union Law' (2018) 55 Common Market Law Review 55.

14 On the role played by the Authority in the activities related to animal welfare, see Franck Berthe, Philippe Vannier, Per Have, Jordi Serratosa, Eleonora Bastino, Donald Maurice Broom, Jörg Hartung and James Michael Sharp, 'The Role of EFSA in Assessing and Promoting Animal Health and Welfare' (2012) 10 EFSA Journal 19.

15 For example, EFSA, 'The Welfare Risks Related to the Farming of Sheep for Wool, Meat and Milk Production' (2014) 12(12) EFSA Journal 1; EFSA, 'The Welfare of Cattle Kept for Beef Production and the Welfare in Intensive Calf Farming Systems' (2012) 10(5) EFSA Journal 2669.

dignity[16] – as they emerge from the *End the Cage Age European Citizens' Initiative*.[17]

The new CAP post-2020 could play a key role in the support for a higher commitment to animal welfare, in the pursuit of a sustainable production as promoted by the United Nations' Intergovernmental Panel on Climate Change (IPCC) in its 2019 report on global land use and agriculture.[18] Likewise, using labels to address the ethical factors surrounding the relationship between animal treatment and public concerns might provide appropriate protection of the interests at stake and reach higher levels of standards, while increasing awareness and producing improvements in farming practices, consumer choices and legislation.

In this respect, it may not come as a surprise that after the experience gained through the 2006-2010 Action Plan on the Protection and Welfare of Animals,[19] the current EU 2012-2015 strategy[20] on the matter is following lines of actions aimed at, *inter alia*, optimising synergies with the CAP and

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16 Rebeca García Pinillos, Michael Appleby, Xavier Manteca, Freda Scott-Park, Charles Smith and Antonio Velarde, 'One Welfare-A Platform for Improving Human and Animal Welfare' (2016) 179 Veterinary Record 412.

17 Compassion in world farming, 'End the Cage Age' (Compassion in world farming 2019) <https://www.endthecageage.eu/> accessed 14 August 2019.

18 IPCC, 'IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems Summary for Policymakers Approved Draft' (WMO/UNEP 2019) <https://www.ipcc.ch/site/assets/uploads/2019/08/Edited-SPM_Approved_Microsite_FINAL.pdf > accessed 14 August 2019.

19 European Commission, 'Communication from the Commission to the European Parliament, the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010' COM(2006) 13 final.

20 European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015' COM(2012) 6 final/2. The EC's silence on the repeated requests made by the EP for a new and ambitious animal welfare strategy for the 2016-2020 period (see European Parliament, 'Resolution of 26 November 2015 on a New Animal Welfare Strategy for 2016-2020' (2015/2957(RSP)); European Parliament, 'Report on a European One Health Action Plan against Antimicrobial Resistance (AMR)' (2017/2254(INI)), Point 57) is emblematic of the impasse underpinning the EU approach to the matter.

providing the public with appropriate information. Both of them are meant and boosted as significant initiatives that can strongly enhance the competitiveness of EU agriculture in the near future. Indeed, as the strategy itself affirms,

> the diversity of farming systems, climatic conditions, land realities in the different Member States have led to considerable difficulties in agreeing on unitary rules and even more difficulties in ensuring their correct implementation.[21]

However, as intricate as these subjects can be, they bring some significant questions to the forefront. Is the process of the CAP reform in line with the aim of fully integrating farm animal welfare into EU agricultural policy? Is animal welfare labelling gaining ground as an ethical-legal tool that certifies the achievement of high standards in livestock farming? These are the questions explored in this contribution.

To this end, a historical overview of farm animal welfare in Europe will forerun the analysis. This outlook will help identify the theoretical underpinnings of EU legislation, in order to delineate the legal basis that the CAP agenda and rules on standards and labelling rely on. In the face of this scenario, section III will scrutinize the main changes the CAP policy has been going through, by showing positive and negative aspects concerning the protection of farm animal welfare as they stem from the European Parliament's (EP) ongoing work.

Section IV will then focus attention on the relationship and the correlated problems existing between the simultaneous application of private and governmental animal welfare standards. In addressing this issue, the extent to which private standards have the capacity to fuel a 'race to the top'[22] will be analysed, with it now being generally understood that, in certain circumstances at least, they may become *de facto* mandatory. Hence, there will be scope to expand the discussion on labelling to the international arena, with specific reference to the rules of the World Trade Organization (WTO).

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[21] Ibid 4.

[22] Yoshiko Naiki, 'The Dynamics of Private Food Safety Standards: A Case Study on the Regulatory Diffusion of GLOBALG.A.P.' (2014) 63 (1) International & Comparative Law Quarterly 137.

In particular, attention will be paid to the potentially confusing plethora of animal welfare labels, including consideration as to whether harmonising measures might be appropriate so as to secure an EU-wide label, akin to that for organic produce. As for the international scenario, an elaboration on the opportunities and constraints imposed by the Agreement on Technical Barriers to Trade (TBT) will be presented, given that the distinction between 'technical regulations' and 'standards' under the TBT Agreement are relevant for the present purposes. In the international world trade context, moreover, it will be illustrated how the EU has shown a more animal welfare-oriented approach there than it has domestically.

The following discussion will demonstrate that international trade law and private standards are beginning to encourage dialogue on Union matters related to animal welfare labelling, by building powerful "bridges of knowledge" between public authorities and civil society. To conclude, the final argument of this contribution posits that legal answers to the CAP post-2020 and to animal welfare labelling schemes – as suggested in sections III and IV of this paper – can legitimate a more sustainable model of EU agriculture. Indeed, the concept of sustainability entails, among its multifaceted traits,[23] a model of agricultural practices meant as a supplier of public goods and characterized by a peculiar relationship with the search for quality – such as the demand for the spread of organic farming methods. Sustainability, moreover, is also correlated to a farming method capable of aligning citizens' interests with the EU legal and policy framework on welfarism, while enhancing and strengthening the Union's normative approach to animal dignity.[24] Such a model of EU agriculture can make the humanist and animalist perspectives cohesive in co-producing a more widely shared vision of fair and environmentally sustainable livestock farming in the years to come.

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[23] On the multifaceted nature underpinning the concept of sustainability, see Marc A. Rosen, 'Issues, Concepts and Applications for Sustainability' (2018) 3 Glocalism-Journal of Culture, Politics and Innovation 1.

[24] On the potential underpinning and surrounding the concept of "dignity" in its relationship with animal welfare issues, see Anne Lansink, 'Technological Innovation and Animal Law: Does Dignity Do the Trick?' (2019) 10(1) European Journal of Risk Regulation 80.

II. A Matter of Welfare

From the 1976 Council of Europe Convention[25] to Directive 98/58/EC on the protection of farm animals,[26] EU legal documents on animal welfare have been anchored on a vision of animal welfare science[27] that was far from the developments successively brought to light by applied ethology,[28] cognitive science[29] and neuroscience.[30] These various fields of study have shaped animal ethics – that is the moral reflection concerning animals and human beings – by overcoming the classification of animals as property.[31] In the light of the similarity among beings shown by genetics, biological, evolutionary and behavioural sciences, artificial classifications of species have been opposed by the consideration that 'the real world consists only of individuals who are more or less closely related to each other by virtue of descent from one or more common ancestors'.[32] However, notwithstanding its growing appeal, animal sentience continues to be the fulcrum of inexhaustible *quérelles*, which oppose the theories advocating against all forms of animal exploitation in favour of arguments supporting the use of animals when they are treated humanely.

This last perspective on the animal condition comes from the techno-scientific domain, where the term 'animal welfare' has become an indicator of a characteristic of the individual animal as a potentially measurable state varying from the good or positive to the poor or negative.[33] Defined in these

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25 Council of Europe, 'European Convention for the Protection of Animals kept for Farming Purposes' (Strasbourg 1976).

26 Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes [1998] OJ L 221/23.

27 For some examples in this regard, see European Parliament (n 8) 16.

28 Harold W. Gonyou, 'Why the Study of Animal Behavior Is Associated with the Animal Welfare Issue' (1994) 72(8) Journal of Animal Science 2171.

29 Marc Bekoff, Colin Allen and Gordon M. Burghardt (eds), *The Cognitive Animal: Empirical and Theoretical Perspectives on Animal Cognition* (MIT Press 2002).

30 Robert Francescotti, 'Animal Mind and Animal Ethics: An Introduction' (2007) 11 The Journal of Ethics 239.

31 Gary L. Francione, *Animals, Property and the Law* (Temple University Press 1995).

32 Robin I.M. Dunbar, 'What's in a Classification?' in Paola Cavalieri and Peter Singer (eds), *The Great Ape Project* (St. Martin's Press 1993) 110.

33 Donald M. Broom, *Sentience and Animal Welfare* (CABI 2014).

terms, which take into account animals' feelings and needs, together with the possibility for animals to be in harmony with their environment, welfarism has acquired its formal affirmation in the ethical and legal domain. As such, it acts in today's Europe as an instrument of co-production between a value-laden science and a science-based ethics.[34]

This has happened for two reasons. Firstly, the core structure of the EU regulatory framework on animals refers directly to citizens' knowledge and values on the matter. Secondly, there has been a rise of interest and commitment to the 'EU knowledge society'[35] about animal welfare, which includes the use of expert knowledge, increased ethical awareness, and increased legal protection of animals.

This social construction of farm animal welfare[36] has turned welfarism into a matter of societal choice.[37] It finds its roots in the criticism strongly advanced in the 1960s by Ruth Harrison's famous book *Animal Machine*,[38] which argues against the detention, treatment, and suffering of food-producing animals used in intensive farming. After the investigation commissioned in 1965 by the British Government into the problems related to intensive livestock systems, the inquiry committee suggested what would become the best-known 'Five Freedoms', as later modified by the Farm Animal Welfare Council (FAWC).[39] The established freedoms from hunger and thirst, from discomfort, from pain, injury or disease, to express normal behaviour and

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34 Mariachiara Tallacchini, 'Gli animali nella "società europea della conoscenza": contraddizioni e prospettive' (2015) 4(12) Animal Studies 9.

35 Brian Wynne et al., 'Taking European Knowledge Society Seriously', Report of the Expert Group on Science and Governance to the Science, Economy and Society Directorate (Office for Official Publications of the European Communities 2007).

36 The welfare of animals used in experimentation, performing in circuses, confined in zoos, or of companion animals are beyond the remit of this work.

37 Bettina Bock and Henry Buller, 'Healthy, Happy and Humane: Evidence in Farm Animal Welfare Policy' (2013) 53(3) Sociologia Ruralis 390.

38 Ruth Harrison, *Animal Machine* (CABI 2013).

39 FAWC (Farm Animal Welfare Council), 'Farm Animal Welfare in Great Britain: Past, Present and Future' (FAWC 2009) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319292/Farm_Animal_Welfare_in_Great_Britain_-_Past__Present_and_Future.pdf> accessed 27 February 2019.

from fear and distress, have contributed through the years to the genesis and legitimization of animal welfare science as recognized in today's 'Innovation Union'.[40] From here, the inextricable link between facts and values that pointed to economic, safety and quality purposes[41] has fuelled the normative consideration and attention towards welfarism, helping the establishment and evolution of EU regulation and policy on the matter.

In the agri-food domain, the advent of the bovine spongiform encephalopathy (BSE) crisis, which undermined public confidence in food safety and in policy-making institutions,[42] made animal welfare one of the 'legitimate factors' essential for EU food safety policy – albeit in close connection with animal health – 'for the health protection of consumers and the promotion of fair practices in food trade'.[43] From here, the agricultural product quality policy[44] came to identify welfare among the 'most stringent farming requirements' for high quality foodstuffs.[45] The EU Commission (EC)[46] and the EP[47] strongly called for a framework of labelling being suitable to identify standardised animal health indicators and to encourage informed

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40 European Commission, 'State of the Innovation Union 2015', Directorate-General for Research and Innovation (European Union 2015).

41 Corrado Carenzi and Marina Verga, 'Animal Welfare: Review of the Scientific Concept and Definition' (2009) 8 Italian Journal of Animal Science 21.

42 Matteo Ferrari, *Risk Perception, Culture, and Legal Change. A Comparative Study on Food Safety in the Wake of the Mad Cow Crisis* (Ashgate Publishing 2009).

43 European Commission, 'White Paper on Food Safety' COM(1999) 719 final, Points 15 and 70.

44 European Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on agricultural product quality policy' COM(2009) 234 final.

45 Ibid 4.

46 Commission of the European Communities, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals' COM(2009) 584 final.

47 European Parliament, 'Resolution on a Community Action Plan on the Protection and Welfare of Animals 2006-2010' (2006/2046(INI)), Points 26, 39 and 42; European Parliament, 'Resolution of 4 July 2012 on the European Union Strategy for the Protection and Welfare of Animals 2012–2015' (2012/2043(INI)), Points 49 and 67.

purchasing decisions consistent with the purposes of the EU's food policy.[48] Furthermore, animal welfare was framed within the CAP agenda as a statutory management requirement for the attribution of direct payments and as a high standard to be adopted for support in the framework of rural development policy.[49]

Article 13 TFEU reflects and summarizes this manifold picture, by balancing the common commitment towards animals' welfare needs with the Member States' religious rites and cultural preferences.[50] From a formal point of view, the disposition represents the mainstreaming of regulatory action and a parameter for the legitimacy of Union acts. This means that, when interpreting Union acts and guaranteeing the free movement of goods under national laws on animal welfare, animal protection should be prevalent, by taking 'legal precedence over all internal market policies' – as the EP itself affirmed.[51]

The importance of animal welfare as a point of general interest has also been confirmed by several rulings of the Court of Justice of the EU (CJEU).[52] In February 2019, for example, the Court ruled that Halal meat from animals slaughtered by religious ritual without having first been stunned cannot be

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48 See Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1, Article 5(1).

49 See Eleonora Sirsi, 'Il benessere degli animali nel Trattato di Lisbona' (2011) 2 Rivista di diritto agrario, 220.

50 For the several interpretations this article conveys, see Kea Ovie, 'Harmonized Approaches in Intensive Livestock Production Systems in Europe' in Gabriela Steier and Kiran K. Patel (eds), *International Farm Animal, Wildlife and Food Safety Law* (Springer 2017).

51 European Parliament 2012 (n 47) Point 2.

52 See, for instance, Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* EU:C:2018:335; Case C-355/11 *G. Brouwer v Staatssecretaris van Economische Zaken, Landbouw en Innovatie* ECLI:EU:C:2012:353; Case C-189/01 *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij* ECLI:EU:C:2001:420.

labelled organic, as it fails to observe the highest animal welfare standards.[53] As for national laws and practices, the term 'implementation' in Article 13 shall be interpreted as including national regulations affecting the application of Union law.[54] In these terms, a full implementation of Article 13 concurs with increasing public attitude and sensitivity towards the protection of farm animal welfare,[55] which has reached levels of deep awareness[56] amongst EU citizens over the last few years, extending also beyond animal welfare issues to embrace the reduction or even elimination of livestock production.[57]

However, the shift from the idea and legal classification of animals as 'agricultural goods' to their recognition as sentient creatures in Article 13 TFEU does not seem to have reached its full and complete normative guarantee and enforcement. When dealing with ideas and concepts stemming from such a multifaceted issue, in fact, legal thought on animal welfare struggles to find normative tools and ground-breaking solutions. Legislatures still appear stuck on legal anthropocentricism, intertwined with the protectionist view preserving present and future human interests rather than affirming and recognizing animal dignity.[58] In this respect, the analysis of two fields affected by this legal impasse, namely the CAP reform and

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53 Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others* ECLI:EU:C:2019:137.

54 Adelina Adinolfi, 'Il trattamento degli animali nel diritto dell'Unione europea tra interessi commerciali, protezione ambientale e "benessere": verso lo sviluppo di valori condivisi?' in *Scritti per Luigi Lombardi Vallauri* (Wolters Kluwer-CEDAM 2016), 39.

55 A final report of the first EU-wide citizens' consultation on future priorities of the EU showed that 1 out of 7 citizens mentioned animal welfare among their hopes for the future EU priorities. 13% of citizens also affirmed that decisions taken at EU level for the welfare of animals would make them prouder to be European. See European Commission, 'Online Consultation on the Future of Europe Second Interim Report' (Kantar Public 2019).

56 EU DG Health and Food Safety, 'Special Eurobarometer 442 Attitudes of Europeans towards Animal Welfare' (European Commission 2016).

57 See, for example, Walter Willett et al., 'Food in the Anthropocene: The EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems' (2019) 393(10170) The Lancet 447.

58 Paola Sobbrio, 'The Relationship between Humans and Other Animals in European Animal Welfare Legislation' (2013) Relations 33.

animal welfare labelling, will allow reflection on how the solution of some legal aspects pertaining to them could help welfarism to gain full traction in the EU's current regulatory strategy.

III. TOWARDS THE CAP POST-2020

Despite the several waves of reforms[59] that the CAP has undergone since the 1990s and the huge levels of citizens' involvement and interest in the topic,[60] the CAP has not fully reached effective outcomes on animal welfare issues.[61] Not only is animal welfare not yet perceived as a public good in itself,[62] but CAP's subsidies have also been criticized for leading to the intensification of animal production.[63] Yet, the 2003 CAP reform[64] resulted in a more animal welfare-orientated policy, by introducing the 'meeting standards' payment –

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59 For a deep and critical overview on the matter, see Joseph A. McMahon and Michael N. Cardwell (eds), *Research Handbook on EU Agriculture Law* (Edward Elgar Publishing 2015).

60 ECORYS, 'Modernising and Simplifying the CAP. Summary of the Results of the Public Consultation' (European Commission-DG AGRI 2017).

61 Compassion in World Farming, 'Animal Welfare Article of the Treaty on the Functioning of the European Union is Undermined by Absence of Access to Justice' (Compassion in World Farming, December 2014) <https://www.ciwf.org.uk/media/7427367/article-13-tfeu-undermined-by-lack-of-access-to-justice-december-2014.pdf > accessed 17 March 2019.

62 The concept of "public goods" as goods non-excludable and non-rival entered the CAP in 2007 in the environmental context through greening under Pillar I.

63 Eurogroup for Animals, 'EU Citizens Want Future CAP to Improve Animal Welfare' (Eurogroup for Animals, 12 July 2017) <https://www.eurogroupforanimals.org/eu-citizens-want-future-cap-improve-animal-welfare > accessed 12 March 2019).

64 See Organisation for Economic Co-operation and Development (OECD), 'Analysis of the 2003 CAP Reform' (OECD Publications 2004).

to help farmers adapt to EU animal welfare standards based on minimum legislative requirements[65] – and enhanced animal welfare payments.[66]

After the specific support of Regulation 1257/1999[67] and the 2009 Direct Payment Regulation[68] for the practice of enhanced animal welfare standards, farm animal welfare in agriculture emerged in the EC's 2010 Communication on the CAP reform.[69] The section pertaining to one of the objectives of the (then) future CAP stressed the obligation for farmers to respect the high standards relating to animal welfare objectives requested by EU citizens.[70] One year later, the EP called for the new CAP to comply with Directive 98/58[71] due to the positive impact animal-welfare-friendly methods of production have on animal health, food quality and food safety.[72] The reformed CAP instruments adopted for the period 2014-2020, however, have been described as an 'opportunity missed [...] to continue along the path of

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65 See Council Regulation (EC) No. 1783/2003 of 29 September 2003 amending Regulation (EC) No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) [2003] OJ L270/70.

66 Reg. 1783/2003. Both of the above-mentioned payments were embedded in Council Regulation (EC) No. 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2005] OJ L 277/1, Article 20(c)(i) and Article 40.

67 Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations [1999] OJ L 160, Chapter VI.

68 Council Regulation (EC) No. 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers [2009] OJ L 30, Article 68(1)(iv).

69 European Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. The CAP towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future' COM(2010) 672 final.

70 Ibid 7.

71 European Parliament, 'Resolution of 23 June 2011 on the CAP towards 2020: Meeting the Food, Natural Resources and Territorial Challenges of the Future' (2011/2051(INI)), Point 41.

72 Ibid Point 42.

animal welfare reform advocated by Fischler in 2003'.[73] Two peculiar aspects are in dispute in this context: the cross-compliance system and the Rural Development Regulation.[74]

The cross-compliance system, which correlates most CAP payments[75] to compliance with other rules on animal welfare, includes provisions for protecting calves[76] and pigs[77] and the general farm animals Directive. One concern pertains to the exception stated for those farmers who participate in the small farmer's scheme[78] under the Direct Payments Regulation.[79] In the event of non-compliance, this provision could prevent farmers who go beyond the minimum statutory management requirements from taking advantage of respecting animal welfare standards.[80] The exception might thus negatively affect the welfare of food producing animals.

As for the CAP rural development policy, concerns revolve around the 'animal welfare payments' (measure 14), which provide support for high standards of animal husbandry. This voluntary measure, renewable annually

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73 Diane Ryland, 'Animal Welfare in the Reformed Common Agricultural Policy: Wherefore Art Thou?' (2015) 17(1) Environmental Law Review 22, 43.

74 Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 [2013] OJ L 347, Article 33.

75 Direct payments, payments for restructuring and conversion of vineyards and green harvesting, and area related payments and animal welfare payments.

76 Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves [2008] OJ L10/7, Articles 3 and 4.

77 Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs [2008] OJ L47/5, Articles 3 and 4.

78 Regulation (EU) No. 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No. 352/78, (EC) No. 165/94, (EC) No. 2799/98, (EC) No. 814/2000, (EC) No. 1290/2005 and (EC) No. 485/2008 [2013] OJ L 347, Article 92 para 2.

79 Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2013] OJ L 347, Article 61.

80 Ryland (n 73) 34.

from one to seven years, has not led Member States to robustly devote their budget to improving standards for animal agriculture.[81] In fact, although Article 33 of Regulation 1305/2013 recognises payments to farmers undertaking animal welfare commitments related to areas such as water, feed and animal care, housing conditions and outdoor access, in the CAP 2014–2020 only 35 out of 118 rural development programmes included measure 14.[82]

According to the assessment carried out in 2018 by the EU Court of Auditors on compliance with animal welfare legislation, the 'Animal Welfare' measure's cost-effectiveness was reduced because

> it supported farms that did not respect certain minimum standards on pig welfare, there was a risk of deadweight due to overlap with the requirements of private schemes, and the common monitoring framework lacked indicators for improvements in animal welfare.[83]

The Court hence suggested challenging Member States on the use of the animal welfare measure in sectors where there is evidence of widespread non-compliance (such as pig tail docking), as well as the exchange of good practices and impact indicators for animal welfare measure for the programming period post-2020.

Working on the simplification and modernisation of the CAP, in 2017 the EC adopted *The Future of Food and Farming* policy document,[84] which focuses on challenges, objectives, and possible avenues for a "future-proof" CAP pointing to more sustainable agriculture. The proposed new model of the CAP is expected to be simpler, smarter and more modern, as well as suitable for facing critical health issues, such as those related to antimicrobial resistance (AMR) caused by inappropriate use of antibiotics. As regards animal welfare, the final aim is related to a better application of EU rules on

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81 Olga Kikou, 'CAP and Animal Welfare: Simply Incompatible' (EURACTIV, 22 February 2016) <https://www.euractiv.com/section/agriculture-food/opinion/cap-and-animal-welfare-simply-incompatible/> accessed 12 March 2018.

82 European Court of Auditors, 'Animal Welfare in the EU: Closing the Gap between Ambitious Goals and Practical Implementation' (2018) Special Report No 31.

83 Ibid 50.

84 Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. The Future of Food and Farming' COM(2017) 713 final.

the matter, while bolstering standards through voluntary initiatives both within and outside Europe.[85] After the EP's 2018 Resolution[86] supporting this scenario and – of note – calling for the recognition of animal welfare as a 'public good', on 1 June 2018 the EC adopted a legislative proposal[87] delineating the plausible pattern for the CAP after 2020.

A positive change comes from establishing animal welfare as a clear objective under the policy's Pillar I.[88] The cross-compliance system is replaced by that of conditionality, which links full receipt of CAP support to the compliance by beneficiaries with basic standards concerning, *inter alia*, animal welfare. Specifically, under the system of conditionality, Article 11 states that

> an administrative penalty shall be imposed on beneficiaries receiving direct payments [...] who do not comply with the statutory management requirements under Union law and the standards for good agricultural and environmental condition of land established in the CAP Strategic Plan [...] relating to [...] animal welfare.

Despite improvements compared to the current CAP and the public involvement requested when creating Member States' CAP Strategic Plans,[89] the Eurogroup for Animals disapproved of the proposal as it 'fails to effectively promote animal welfare'.[90] Specific concerns stressed by the NGO regard: the non-mandatory nature of pursuing animal welfare

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85 Ibid 24.

86 European Parliament, 'Resolution of 30 May 2018 on the Future of Food and Farming' (2018/2037(INI)).

87 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council' COM(2018) 392 final.

88 Ibid Article 6.

89 Ibid Article 94.

90 Eurogroup for Animals, 'CAP Takes One Small Step for Animal Welfare, When a Giant Leap is Required' (Eurogroup for Animals, 5 June 2018) <https://www.eurogroupforanimals.org/cap-takes-one-small-step-for-animal-welfare-when-a-giant-leap-is-required > accessed 13 March 2019.

measures/practices;[91] the lack of a defined budgetary allocation; the linkage of subsidies to farms' size rather than to farms' contribution towards animal and environment friendly production; and the lack of sufficient time in forming and approving National Strategic Plans. Also, the NGO Compassion in World Farming criticised the proposal for delivering a mere 'business-as-usual approach' that ends up fostering intensification and the productivist model, which increases flexibility without increasing accountability.[92]

Against these criticisms, the amendments voted for on 14 February 2019 by the EP's Committee on the Environment (ENVI Committee) went towards favouring welfarism in livestock farming.[93] Four major aspects were in fact addressed: the reduction of the density[94] of farms for which beneficiaries receive subsidies in order not to keep animals in extreme confinement; the ineligibility of industrial farm animal production for rural development funds; the adoption of a regulatory definition for 'Concentrated Feeding Operations' (CAFOs) as buildings where animals are confined and deprived of outdoor access; and the inclusion of the poultry directives and the regulation on slaughter (for animals killed on farms) to the mechanism of conditionality.

Although applauded for boosting the shift towards a 'more humane CAP'[95] inclined to promote animal friendly livestock farming, this series of amendments have not been taken into account by the Committee on

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91 In this regard, however, it is worth noticing that effectively mandatory animal welfare obligations are to be imposed by conditionality (albeit on a limited scale).

92 Four Paws in Europe, 'CAP Proposal Fails EU Citizens on Animal Welfare' (Four Paws in Europe, 16 August 2018) <https://www.vier-pfoten.eu/our-stories/eu-press-releases/cap-proposal-fails-eu-citizens-on-animal-welfare> accessed 13 March 2019.

93 Eurogroup for Animals, 'The European Parliament's Committee on the Environment Votes for more Humane CAP' (Eurogrup for Animals, 18 February 2019) <https://www.eurogroupforanimals.org/the-european-parliaments-committee-on-the-environment-votes-for-a-more-humane-cap> accessed 15 March 2019.

94 Density (also called 'stocking density' or 'livestock density') refers to the number of animals kept on a given space.

95 In this way, Eurogroup for Animals (n 93).

Agriculture (AGRI Committee). Its votes[96] adopted in April 2019 still appear somewhat problematic. They include, on the one hand, an amendment enabling good animal welfare practices in the food chain and, on the other hand, an eco-schemes incentive programme encouraging farmers who want to receive CAP subsidies to go beyond legal standards when it comes to the treatment of animals. As they are likely to encourage intensive farming production across Europe, rather than fostering a smarter agricultural sector, a much stronger commitment towards animal welfare is hoped for and strongly encouraged[97] to foster genuine higher welfare farming practices.

IV. Animal Welfare Standards and Labelling

Whether the current reforms to implement the CAP post-2020 have the potential to strongly support the welfare of animals reared for food, the use of labelling to address animal welfare issues does represent a further legal pathway for overcoming the shortfalls of the CAP agenda. In light of this, the two topics explored below concern the increasing use of public and private animal welfare standards and the correlated need to label them on food products. Two main arguments will be posited in this respect.

The first argument holds that, although private standards may potentially undermine the "integrity" and implementation of public standards, it is worth noticing, on the other hand, that private initiatives can fuel a quality threshold to exceed public standards, leading to what has been termed a 'race to the top'.[98] It follows that public/private-sector partnerships have all the potential to create a two-way dialogue between public and private standards

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96 Jan Jakubov, 'Protecting Farmers and Quality Products: Vote on EU Farm Policy Reform Plans' (European Parliament News, 01 April 2019) <https://www.europarl.europa.eu/news/en/press-room/20190401IPR34586/protecting-farmers-and-quality-products-vote-on-eu-farm-policy-reform-plans > accessed 09 May 2019.

97 Eurogruop for Animals, 'Baby Steps for Animal Welfare in the CAP – But Boat Missed for Systemic Change' (Eurogruop for Animals, 2 April 2019) <https://www.eurogroupforanimals.org/baby-steps-for-animal-welfare-in-the-cap-but-boat-missed-for-systemic-change> accessed 09 May 2019.

98 Naiki (n 22).

that is capable of positively and efficaciously impacting on the welfare of food-producing animals in agriculture.

As for the issue of farm animal welfare labelling, a radical shift may come from using labelling as a "citizenship factor", where the reality of animal farming in the supply chain would emerge "literally", together with a renovated way of informing consumers about animal welfare credentials for animal products. Indeed, by conveying the implementation of standards, labels give consumers the opportunity to express their ethical considerations when making food choices.[99] From here, the purposes underpinning labelling schemes rely on consumer empowerment and information provision, while potentially triggering the achievement of higher animal welfare standards in livestock production systems.

1. On the Role of Standards

Over the last three decades, an assortment of private animal welfare assurance schemes[100] have been initiated by the processing industry

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[99] Morven G. McEachern and Gary Warnaby, 'Exploring the Relationship between Consumer Knowledge and Purchase Behaviour of Value-based Labels' (2008) 32 International Journal of Consumer Studies 414.

[100] In the light of the proliferation and evolution of private agri-food standards and the emergence of multiple organisations setting them, scholarly work has distinguished four key dimensions of diversity: 1) private company standards versus collective private standards; 2) standards for risk management versus standards for product differentiation; 3) standards directly linked to brands/symbols that are communicated to consumers ('visible' standards) versus business-to-business standards ('invisible' standards); and 4) standards that are set nationally versus standards that are set internationally (Spencer Henson and John Humphrey, 'Understanding the Complexities of Private Standards in Global AgriFood Chains' (2010) 46(9) Journal of Development Studies 1628). However, notwithstanding such an assortment of legal instruments, some common features allow to combine the vast array of them. Firstly, all standards involve measurements, and all of them constitute points of comparison. Secondly, they are always interconnected with economic activity, involving judgements about acceptability and the economic consequences deriving from their adoption. Moreover, they inevitably reflect social values and policy decisions, including values regarding health, trade, safety and the environment. Finally, standards provide norms for performance and acceptable deviations from it, so as to be associated with the idea of excellence

(slaughterhouses and dairy plants), primary producers' organisations (farmers' organisations), retailer chains, and various non-governmental organisations.[101] The force driving this normative flourishing[102] is mostly related to strategic considerations linked to retailer firms' reputation[103] in terms of proposing products of a high quality and safety,[104] as well as the need to respond to consumers' demand for animal-friendly products.[105] Examples of private schemes span from the Soil Association standards,[106] to the RSPCA Freedom Food Scheme[107] covering every aspect of animals' lives, to the GLOBALG.A.P. Integrated Farm Assurance (IFA) Standard, that is built on a system of modules enabling those producers that agree with its terms of reference.[108]

From a legal stance, the "hybrid nature" of animal welfare standards in agriculture relies on their voluntary status becoming *de facto* mandatory in

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when they are used (Liora Salter, *Mandated Science. Science and Scientists in the Making of Standards* (Kluwer Academic Publishers 1988) 20-24).

101 Isabelle Veissier, Andrew Butterworth, Bettina Bock and Emma Roe, 'European Approaches to Ensure Good Animal Welfare' (2008) 113 Applied Animal Behaviour Science 279.

102 For an insightful analysis on the rise of private standards, see Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation. Mapping the Labyrinth' (2012) CEPS Working Document No 370.

103 Nicky Amos and Rory Sullivan, 'The Business Benchmark on Farm Animal Welfare' (BBFAW 2018) <https://www.agrociwf.fr/media/7435685/bbfaw_report_2018.pdf> accessed 06> accessed March 2019.

104 Carolina T. Maciel, *Public Morals in Private Hands? A Study into the Evolving Path of Farm Animal Welfare Governance* (Wageningen University 2015).

105 Frauke Pirscher, 'Consuming for the Sake of Others: Whose Interests Count on a Market for Animal-friendly Products?' (2016) 29 Journal of Agricultural and Environmental Ethics 67.

106 Soil Association, 'What are Organic Standards?' (Soil Association 2019) <https://www.soilassociation.org/our-standards/what-are-organic-standards> accessed 10 May 2019.

107 RSPCA Assured, 'Good Welfare is Good Business' (RSPCA Assured 2019) <https://www.berspcaassured.org.uk/> accessed 10 May 2019.

108 GLOBALG.A.P., 'A Modular Approach to Integrated Farm Assurance' (GLOBALG.A.P. 2019) <https://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/> accessed 10 May 2019.

order for producers to gain access to the global food market.[109] As such, regulatory concerns have emerged as regards to the credibility, multiplicity and often lack of transparency of private standards developed so far,[110] due to the fact that private businesses' main priority is normally stakeholder profit rather than any corporate social responsibility. Further problems are correlated to the added cost implications[111] for, on the one hand, small and medium sized enterprises and farmers in developing countries to comply with private regulations and, on the other, for consumers that have to pay a higher price for the final product.

Moreover, this "normative toolbox" has evolved alongside the science-based public standards contained in the World Organisation for Animal Health's (OIE) Terrestrial Animal Health Code[112] (TAHC), which embeds general guiding principles for the welfare of animals in livestock production systems. What characterizes these international standards is their regular update – as new scientific information comes to light – through established transparent and democratic procedures that require the final approval of the World Assembly of Delegates at the OIE General Assembly.[113]

The co-existence of standards having a different nature poses questions of utmost significance.[114] Are private standards all science-based or partly market driven? Must public and private types of governance systems be

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109 Diane Ryland, 'Animal Welfare Standards in Agriculture: Drivers, Implications, Interface?' in Mariagrazia Alabrese, Margherita Brunori, Silvia Rolandi and Andrea Saba (eds), *Agricultural Law* (Springer 2017).

110 Simon J. More, Alison Hanlon, Joanna Marchewka and Laura Boyle, 'Private Animal Health and Welfare Standards in Quality Assurance Programmes: A Review and Proposed Framework for Critical Evaluation' (2017) Veterinary Record doi: 10.1136/vr.104107.

111 WTO, 'Private Standards and the SPS Sgreement (2007) Note by the Secretariat. G/SPS/GEN/746.

112 OIE, 'International Terrestrial Animal Health Code: Section 7 Animal Welfare' (OIE 2016), <https://www.oie.int/standard-setting/terrestrial-code/> accessed 10 May 2019.

113 See OIE, 'OIE Animal Welfare Standards' (OIE 2019) <https://www.oie.int/animal-welfare/an-international-network-of-expertise/> accessed 31 August 2019.

114 Elena Fagotto, 'Private Roles in Food Safety Provision: The Law and Economics of Private Food Safety' (2014) 37(1) European Journal of Law & Econnomics 83.

considered as complementary or in competition with each other? Explorations into such intricate quandaries are beyond the scope of this contribution. What is worth noticing here is that, although private standards may potentially impede OIE standards from being fully implemented, it is also true that private initiatives have the potential to push farmers to reach standards that are higher than the public international ones.[115] This sort of competition would surely turn out to be fruitful for the improvement and strengthening of farm animal welfare. This implies that for a successful regulatory diffusion, local contexts must be properly taken into account, to preserve diversity and reinforce the scientific basis of OIE standards.

This could be achieved through some sort of play of balances between private and public forces and values that mutually reinforce and re-shape each other, in order to effectively and legitimately co-operate within the agri-food chain. In this way, the flexibility of market-driven tools can point to the higher animal welfare standard agri-produce, albeit under the standardisation and oversight of science-based public tools.[116] This bidirectional relationship would be beneficial in preventing private animal welfare assurance schemes from conflicting with the public standards of the OIE, thus allowing each institution's values to co-exist and to be properly and efficaciously protected.[117]

An illustration of this may be found in the ISO technical specification 'ISO/TS 34700:2016, Animal welfare management – General requirements and guidance for organizations in the food supply chain'.[118] Following the cooperation agreement signed in 2011 with OIE, this technical specification is intended as a soft law tool of governance for business operators in the food supply chain to drive trade objectives and animal welfare in parallel, building a normative bridge of commitment on animal

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115 Naiki (n 22).

116 Ryland (n 73).

117 Carsten Daugbjerg and Linda C. Botterilli, 'Ethical Food Standards Schemes and Global Trade: Paralleling the WTO?' (2012) 31 Policy 307.

118 ISO, ISO/TS 34700:2016. Animal Welfare Management — General Requirements and Guidance for Organizations in the Food Supply Chain' (ISO Technical Committee for Food Products, Dember 2016) <https://www.iso.org/standard/64749.html> accessed 13 May 2019.

welfare management issues.[119] It supports the food and feed industry in developing an animal welfare plan that is aligned with the principles of the OIE TAHC and ensures the welfare of farm animals across the supply chain.

Undoubtedly, the voluntary character of such "soft" (not legally binding) tools poses intricate problems concerning their implementation and enforcement.[120] Nonetheless, although their lack of binding force may reduce the level of enforcement on the short-term, a rigid compliance with their prescriptions cannot be prevented, due to the reasons for their creation and spread. From this perspective, soft law can be considered mostly law rather than soft, becoming itself binding for the actors involved. Once it is set up in these terms, soft law is no longer in sharp opposition to hard law, but is rather bound to it in a complementary function.

In such a normative frame, ISO compliance constitutes a way for food business operators to demonstrate their commitment to animal welfare management, as their products meet the stringent, internationally recognized animal welfare standards set by the OIE. Moreover, as ISO standards respect the principles of openness, transparency, impartiality and consensus – as well as those of effectiveness, relevance and coherence – agreed to by the WTO's TBT committee, their use do not create obstacles to international trade.[121] What follows is that higher animal welfare standards are gradually becoming a prerequisite to enhancing business efficiency and profitability, while satisfying international markets and meeting consumers' needs and expectations.[122]

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[119] Sandrine Tranchard, 'New ISO Specification for Better Management of Animal Welfare Worldwide' (ISO, 1 December 2016) <https://www.iso.org/news/2016/12/Ref2147.html> accessed 13 May 2019.

[120] For a general overview on this matter, see Linda Senden, *Soft Law in European Community Law* (Hart Pub Ltd 2004).

[121] IEC/ISO/ITU, 'International Standards & Trade Agreements' (IEC/ISO/ITU 2019) <https://www.iso.org/files/live/sites/isoorg/files/standards/benefits_of_international_standards/WSC_International_Standards_%26_trade_agreements_2018.pdf> accessed 02 September 2019.

[122] William Avis, 'Promotion of Animal Welfare in Commercial Agriculture' (2018) 4KD Helpdesk Report <https://assets.publishing.service.gov.uk/media/5af97121ed915d0df19690c6/Promotion_of_animal_welfare_in_commercial_agriculture.pdf> accessed 31 August 2019.

2. Labelling Animal Welfare Standards

Alongside these initiatives, the simultaneous rise of markets for animal friendly products (including organic, freedom food, free range etc.) is triggering the demand for regulating animal welfare labelling.[123] Indeed, animal welfare logos in-store and on-pack that are multiplying in the marketplace often represent the consumer interface of a regulatory scheme.

At the international level, the TBT Agreement differentiates between the "technical nature" of the label[124] – which makes it able to interfere with the free movement of goods[125] – from standards by the fact that compliance with

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[123] Mara Miele and John Lever, 'Civilizing the Market for Welfare Friendly Products in Europe? The Techno-ethics of the Welfare Quality Assessment' (2013) 48 Geoforum 63.

[124] According to international (GATT/WTO system) and EU business law, labelling rules are 'technical rules,' namely technical specifications 'contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures' (Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241, Article 1(c)). According to the TBT Agreement, "technical regulations" are 'mandatory laws or provisions specifying the characteristics of products, the processes or production methods for creating products or the terminology, symbols, packaging, marking, or labelling requirements for products' (TBT Agreement, Annexure 1.1, Apr. 15 1994, 1868 U.N.T.S. 120).

[125] For instance, the dispute on "Beef Hormone" that broke out between the EU and the US following the enacting of Directive 96/22, forbade the use of hormones to feed cattle, and created a non-tariff barrier for beef-trading countries such as the US and Canada. Provided that they labelled beef to inform the customer on the presence of hormones, after losing in appeal, the EU suggested the removal of the import ban. In view of the US refusal, the EU decided to keep the ban, facing severe commercial sanctions. (On this matter, see Denise Prévost, 'The Role of Science in Mediating the Conflict between Free Trade and Health Regulation at the WTO: The EC – Biotech Products Dispute' in Marjolein B.A. van Asselt, Michelle Everson and Ellen Vos (eds), *Trade, Health and the Environment. The European Union Put to the Test* (Routledge Taylor & Francis Group 2014). In 2009, after a series of WTO dispute consultations, settlement panels, arbitration proceedings, and

the former is mandatory, while with the latter it is voluntary.[126] In such a view, single national laws on labelling that require non-harmonized mandatory rules might be included in the category of the so-called 'technical barriers to trade'. This normative distinction has led the EU to proceed very cautiously in implementing animal welfare regulations without violating WTO rules. As clear as the distinction between mandatory versus voluntary compliance may appear, however, the question of when a measure is a technical regulation and when it is a standard remains an open and controversial issue. Two disputes concerning the WTO's approach to animal welfare are exemplary in this respect.

In the *US – Tuna I*[127] and *II*[128] cases, a threshold issue was whether the US measure that monitored and enforced a private voluntary label on tuna, the 'dolphin-safe' label,[129] fell within the definition of a 'technical regulation'. While, in the first case, the Panel took a pro-trade approach, by considering the US measure as a technical regulation because it contained some mandatory features, in 2012 the Appellate Body held that the dolphin safe label was consistent with the TBT. Significantly, not only did the Appellate Body determine that intentionally setting nets on dolphins is 'particularly harmful' to them,[130] it also found that the measure's goal to protect dolphins was legitimate and as such could justify restricting trade.[131] Put differently,

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formal appeals, the EU signed a memorandum of understanding (MOU), granting market access to US exports of beef raised without the use of growth promotants. The United States, instead, have suspended higher duties for imported EU products listed under the dispute (see Renée Johnson, 'The U.S.-EU Beef Hormone Dispute' (2015) CRS Report <https://fas.org/sgp/crs/row/R40449.pdf> accessed 09 May 2019).

126 See the TBT Agreement, Annex I.

127 *WTO United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (2011) WT/DS381/R, para 2.12.

128 *WTO United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Report of the Appellate Body* (2012) WT/DS381/AB/R, para 303-06.

129 Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d)(1) (1999) (providing for the use of a voluntary "Dolphin Safe" label if certain criteria are met, such as prohibiting intentional setting on dolphins for tuna harvested in the ETP).

130 See *US—Tuna Report of the Appellate Body*, para. 289, 297.

131 Ibid para 341-42.

the TBT Agreement recognised the possibility for governments to set labelling schemes with technical requirements to meet the (non-exhaustive) list of 'legitimate objectives', which include measures to protect animal life or health or the environment.[132] Although referring to wildlife, this line of reasoning – permitting countries' laws to distinguish between production methods as they relate to animals – may also be considered applicable to farm animal practices and measures prohibiting certain practices that are more harmful to animals.[133]

Certainly, the interrelation of lay knowledge in this field with the everyday practices of eating and shopping constitutes a big challenge to the emergence of labelling as a method of farm animal welfare governance.[134] The use of ethical labels is in fact connected to motivation and understanding, which are inevitably affected by tacit ethical imperatives (such as shopping, eating, cooking, and care of self),[135] demographic characteristics, and country differences.[136] It has been shown, for instance, that animal welfare labelled products – such as meat and dairy products communicating animal welfare

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[132] However, it was not until 2018 that the *US-Tuna II* case was finally resolved in favour of the full WTO-compatibility of the 'dolphin-friendly' label, after a 2015 appeal by Mexico concerning the US regime establishing the conditions (namely, the 'eligibility criteria,' the 'certification requirements' and the 'tracking and verification requirements') for labelling tuna products as 'dolphin safe' (See WTO, 'United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products' (WTO 2019) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> accessed 27 June 2019).

[133] Andrew Lurié and Maria Kalinina, 'Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements' (2015) 30(3) American University International Law Review 431.

[134] Adrian B. Evans and Mara Miele, 'Enacting Public Understandings: The Case of Farm Animal Welfare' (2019) 99 Geoforum 1.

[135] Adrian Evans and Mara Miele, 'Between Food and Flesh: How Animals Are Made to Matter (and not matter) within Food Consumption Practices' (2012) 30(2) Environment and Planning D-Society and Space 298.

[136] Klaus G. Grunert, Sophie Hieke and Josephine Wills, 'Sustainability Labels on Food Products: Consumer Motivation, Understanding and Use' (2014) 44 Food Policy 177.

standards – can lead to positive consumer reactions,[137] in spite of the socio-economic constraints pertaining to the costs associated with labels.[138]

At the same time, however, it is also true that an overload of information could negatively affect the adequacy of the information itself,[139] which is particularly true in cases where an EU animal welfare labelling scheme overlaps with other quality standards (such as organic farming or environmental protection). Simplification and the framing of information are instead considered as adequate and useful tools through which to provide citizens with clear and meaningful information, in the light of the insights coming from behavioural sciences literature.[140] Yet, to date, a plethora of animal welfare labelling schemes – variously focusing on animal welfare only (e.g. Freedom Food, Neuland), on aspects including animal welfare (e.g. organic certification, Label Rouge), or on aspects with positive side effects of animal welfare (e.g. Protected Designation of Origin Certification) – continues to proliferate across Europe.

The German Animal Welfare Association, for instance, has developed a two-level (basic and premium) voluntary animal welfare label for fattening pigs, with the aim of strengthening consumer confidence in livestock farming and ensuring openness and transparency along the entire production chain.[141] In alliance with partners from industry, academia and the extension services, the label – used throughout Germany – is based on high standards that provide

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137 Carolien Hoogland, Joop de Boer and Jan J. Boersema, 'Food and Sustainability: Do Consumers Recognize, Understand and Value On-package Information on Production Standards?' (2007) 49 Appetite 47.

138 While the costs of mandatory labelling are generally passed on to all consumers, in a voluntary scheme, those who wish to have the information pay for it.

139 To address this issue, the UK charity Compassion in World Farming is campaigning for clear food labelling, by providing consumers with a quick guide on how to read the labels available on animal products. See Compassion in World Farming, 'Know Your Labels' (Compassion in World farming 2019) <https://www.ciwf.org.uk/your-food/know-your-labels/> accessed 13 May 2019.

140 Cass R. Sunstein and Lucia A. Reisch (eds), *The Economics of Nudge* (Routledge 2017).

141 Federal Ministry of Food and Agriculture, 'The BMEL supports introduction of an independent animal welfare label' (Federal Ministry of Food and Agriculture 2019) <https://www.bmel.de/EN/Animals/AnimalWelfare/_Texte/Tierschutzlabel.html > accessed 13 May 2019.

better animal welfare for housed animals. Likewise, voluntary labelling and registration systems have been developed by *Agrarmarkt Austria Marketing GmbH* (AMA-Marketing) for animal production.[142] Their hallmark lies on the three pillars of high quality, transparent origin and independent inspections.

Against this unharmonized landscape, moreover, a further issue comes from the fact that the EU has been showing over the years a more animal welfare-oriented approach on the international stage than it has domestically. In 1998, for instance, the CJEU ruled that a Member State observing the 1988 Recommendation concerning cattle[143] could not

> rely on Article 36 of the Treaty and, in particular, on the grounds of public morality, public policy and/or the protection of the health or life of animals laid down therein, in order to justify restrictions on the export of live calves with a view to preventing those calves from being reared in the veal crate systems used in other Member States.[144]

This ruling is clearly emblematic of how, at least in that period, the EU took trade interests as its point of departure, thus limiting the possibility for Member States to address non-economic interests as opposed to the objectives of free trade.[145]

In 2009, in contrast, the EU law banning the import and export of most products made from seals[146] was aimed in part at improving animal health and welfare, while grounding animal protection on widely held ethical beliefs about the nature of cruelty towards animals. Specifically, Regulation 1007/2009 was justified by the acknowledgment that the hunting of seals had generated concerns among EU citizens and governments due to the 'pain,

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142 See ANCO, 'ANCO Knowledge: What Matters to Quality Pork Producers' (ANCO, 11 July 2016) <https://www.anco.net/pig-production-quality-pork-producers/> accessed 15 May 2019.

143 Council of Europe, Recommendation concerning cattle adopted by the Standing Committee on 21 October 1988.

144 Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited* ECLI:EU:C:1998:113.

145 For an analysis of the judgment, see Katrin Vels, 'Trade Restrictions on Animal Welfare Grounds in the European Union' (2004) RGSL Working Papers No 18.

146 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products [2009] OJ L 286/36.

distress, fear and other forms of suffering which the killing and skinning of seals' impose.[147] In the WTO dispute settlement process[148] (*EC-Seal Products*) that arose on this matter, Canada and Norway contested the EU ban as a trade restrictive measure violating WTO law since it was based on anti-cruelty concerns. The Panel, however, recognised it as a measure falling within the ambit of public morals under Article XX(a) of the 1994 General Agreement on Tariffs and Trade (GATT).[149] It also affirmed that the protection of public morals related to seal hunting is a legitimate objective pursuant to the TBT Agreement.[150]

With animal welfare thus acknowledged as a matter of public morals, the "relative character" attributed to the concept of public morals itself has been key to base the former on traditions, values, or sensitivities of public opinion, rather than on scientific tests.[151] In this way, the 'animal turn' – namely, the phenomenon in the natural and social sciences that has focused intellectual attention on the status of animals and on human relationships with them – has made its way into international law.[152]

As a consequence, in light of the EU's unharmonized labelling framework and the potential pathway that occurred at an international level, a stronger commitment towards animal welfare labelling could represent a turning point for governance system and market regulation in the EU. As early as in 2007, the Council acknowledged the need to introduce 'a label to recognise compliance with EU and/or recognised equivalent animal welfare standards,

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147 Ibid Recital 4.

148 *WTO European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body* (2014) WT/DS400/AB/R, WT/DS401/AB/R, para 2.196, 5.138.

149 Ibid para 7.639

150 Ibid para 7.419-.420.

151 Xavier Fernández-Pons and Carolina Lembo, 'The Case EC – Seal Products: The WTO Dispute Settlement System Before a "Trilemma" Between Free Trade, Animal Welfare, and Rights of Indigenous Peoples' in Alberto do Amaral Júnior, Luciana de Oliveira Sá Pires and Cristiane Lucena Carneiro (eds), *The WTO Dispute Settlement Mechanism* (Springer 2019).

152 Katie Sikes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection' (2016) 5(1) Transnational Environmental Law 55.

including the possibility of voluntary animal welfare labelling'.[153] The following impact assessment,[154] carried out in 2009 by what was then known as the Directorate-General for Health and Consumers[155] (DG SANCO), identified the harmonised requirements for voluntary animal welfare claims and/or a Community animal welfare label as the most feasible options to be implemented. As the EC acknowledged,

> improved information among consumers offers the prospect of a virtuous cycle where consumers create a demand for food products sourced in a more animal welfare friendly manner, which is transmitted through the supply chain back to the primary producer.[156]

Perhaps the establishment of the new 'Platform on Animal Welfare'[157] to (among other things) share information and encourage dialogue on Union matters related to animal welfare might contribute to build "bridges of knowledge" between authorities and civil society. This is because innovation – understood in its broad meaning – entails a comprehensive and evolutionary approach to food information, aimed at 'covering information provided also by other means than the label'.[158] It must be said, however, that

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153 Council of the European Union, 'Press Release. 2797th Council Meeting Agriculture and Fisheries' (2007) 15.

154 European Commission, 'Commission staff Working Document accompanying the Report from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions-Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals' SEC(2009) 1432.

155 The current name is Directorate-General for Health and Food Safety (*DG SANTE*).

156 European Commission, 'Commission staff Working Document accompanying the Report from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals' COM(2009) 584 final, 2.

157 Commission Decision of 24 January 2017 establishing the Commission Expert Group "Platform on Animal Welfare" [2017] OJ C 31/61.

158 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC,

labelling still remains the most useful means through which to make an informed choice in the agri-food market.

To date, the only EU-wide system of compulsory labelling on animal welfare is that for table eggs, based on the EU legislation for laying hens.[159] Although the EU strategy 2012-2015 on animal welfare does not plan to extend compulsory labelling on animal welfare beyond eggs, several proposals[160] have been advanced for mandatory animal-welfare labelling, also in light, from a legal viewpoint, of its compatibility with WTO rules,[161] as the *US-Tuna II* dispute exemplifies.

Against the lack of clarity, credibility and standardization that animal-welfare disclosure seems to be affected by, a harmonised labelling program within market regulation[162] is considered suitable to, first, reduce transaction costs in consumers' search for high-welfare animal products; second, offer retailers attractive logistical simplicity; and third, improve consumers' ability to compare information, while increasing their valuation of enhanced-welfare animal products. Harmonization, additionally – be it reached at

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Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 [2011] OJ L 304, Recital 14. On this Regulation, see Alessandra Di Lauro, 'Labels, Names and Trade Marks' in Luigi Costato and Fernando Albisinni, *European and Global Food Law* (Wolters Kluwer 2016); Silvia Bolognini, 'Linee-guida della nuova normativa europea relative alla "fornitura di informazioni sugli alimenti ai consumatori"' (2012) 4 Le nuove leggi civili commentate 613.

159 Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L 203.

160 Sean P. Sullivan, 'Empowering Market Regulation of Agricultural Animal Welfare through Product Labeling' (2013) 19 Animal Law 391.

161 RSPCA, 'Responding to the Government's Consultation on Health and Harmony: The Future for Food, Farming and the Environment in a Green Brexit' (2004) 9 <https://www.rspca.org.uk/webContent/staticImages/Downloads/RSPCA_Responses_Brexit.pdf> accessed 13 May 2019.

162 Paul T.M. Ingenbleek, David Harvey, Vlatko Ilieski, Victor M. Immink, Kees de Roest and Otto Schmid, 'The European Market for Animal-Friendly Products in a Societal Context' (2013) 3(3) Animals (Basel) 808.

national (as requested by the Italian NGO Legambiente[163]) or supra-national level (as suggested by the Federation of Veterinarians of Europe[164] (FVE)) – may provide through its organisational structure a continuous monitoring of claim compliance through the enhanced-welfare producers' pursuit of their own self-interests.[165]

To this end, the Farm Animal Welfare Forum[166] (FAWF) has called for mandatory, clear and unambiguous labelling of all animal-derived products according to method of production, so as to give consumers information on the potential for high welfare that the farming system offers when the system is well-managed. Such universal and harmonised labelling would ensure maximum transparency about the provenance of animal-based foods and the welfare of the animals that produced them. Others suggested, instead, the adoption of a labelling scheme in the form of a certified logo or a rating system to align consumers' consumption habits with their farm animal welfare preferences.[167] Further proposals[168] supported the design of a label

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163 CIWF Italia, 'Metodo di allevamento in etichetta: una bussola per acquisti consapevoli' (CIWF Italia 2019) <https://action.ciwf.it/page/36021/data/1?supporter.appealCode=CAPWE_IT0119&utm_campaign=labelling&utm_source=link&utm_medium=media > accessed 31 August 2019.

164 According to FVE, the introduction of EU-wide Animal Welfare Labelling should involve essential basic principles, such as higher ranked labels for animal friendly housing, the promotion of this labelling by the market, and the widespread of this information to consumers. See FVE, 'Recommendations of the FVE on Animal Welfare Labelling', FVE/08/doc/036 <https://www.fve.org/cms/wp-content/uploads/fve_08_036_concept_paper_aw_labeling_jan09.pdf> accessed 31 August 2019.

165 Brian Roe and Ian Sheldon, 'Credence Good Labeling: The Efficiency and Distributional Implications of Several Policy Approaches' (2007) 89 American Journal of Agricultural Economics 1020.

166 FAWF, 'Labelling Food from Farm Animals. Methods of Production Labels for the European Union', A Paper for Consultation with Stakeholders <http://www.fawf.org.uk/sites/default/files/2018-09/FAWF_Labelling_Food_FINAL.pdf> accessed 13 May 2019.

167 Ariane Kehlbacher, Richard Bennett and Kelvin Balcombe, 'Measuring the Consumer Benefits of Improving Farm Animal Welfare to Inform Welfare Labelling' (2012) 37 Food Policy 627.

168 Paola Fossati, 'Labeling Animal Welfare, Empowering Citizens' Ethics' (2011) Intervention at the *International Conference Innovating Food, Innovating the Law. An*

providing the maximum amount of animal welfare information, for example about animal-treatment practices.

All these ideas exemplify the potentiality for animal welfare labelling to restore a more trustworthy relationship between consumers and foods and food companies, as well as to rethink and reshape the concept of traceability. The flourishing of a (sort of) "ethics traceability" could allow EU citizens' ethical considerations to surface, contributing to enhancing and reinforcing awareness of animal distress, while fostering technological changes towards more welfare-friendly forms of husbandry.

V. Final Remarks

Animals deserve protection according to two criteria, namely value and subjectivity.[169] In spite of much more attention than in the past towards animals' feelings and needs, the EU legal framework currently in force remains paradoxical in its facets. Due to a form of compassion approach to the matter – largely focused on human sentiment and the importance of animals for citizens' well-being – EU animal law does not yet rely on an innovative model of human-animal relationship that might favour human moral responsibility and agency toward animals.[170] Although animal welfare emerges in the EU regulatory framework as a recognised legal obligation, it is neither fully meant as an alignment between science and society nor fully guaranteed by a complete implementation of Article 13 TFEU.[171] From this

Interdisciplinary Approach to the Challenges in the Agrifood Sector <https://www.slideshare.net/FondazioneBassetti/06-innovating-food-innovating-the-law-paola-fossati> accessed 06 March 2019.

169 Value-based protection is part of the broader framework of biodiversity protection; subjectivity is ascertained through the study of central nervous systems and behaviours (biology, neurology, and ethology). Luigi Lombardi Vallauri, 'La questione animale come questione filosofico-giuridica' (2014) 2 Rivista di filosofia del diritto 521, 523.

170 Richard L. Cupp, 'Moving Beyond Animal Rights: A Legal/Contractualist Critique' (2009), Legal Studies Research Paper Series Paper Number 2009/11, 27-84.

171 Mariachiara Tallacchini, 'Dignità, etica science-based, democrazia: la tutela animale nella società europea della conoscenza' in Giuseppe A. Chizzoniti and Mariachiara Tallacchin (eds), *Cibo e religioni: diritto e diritti* (Libellula 2010).

perspective, intellectual and practical efforts of dialogue with public powers may give animal welfare those forms of civic accreditation it still lacks.

The domains our analysis has focused on may fruitfully contribute to the prosperity and resilience of future farming practices in their approach to animal dignity. As regards the future "CAP architecture", the ongoing work by the EP is hoped to foster a smarter and more sustainable agricultural sector, taking into full consideration the knowledge value of animal sentience. In particular, there is scope for optimising synergies between the future CAP and the overall animal welfare legislation, by boosting the system of conditionality and making animal welfare one of the specific objectives of rural development between 2021 and 2027.[172] These actions will permit efforts to 'improve the response of EU agriculture to societal demands on [...] animal welfare,'[173] as set forth by the proposals for the CAP's post-2020 period. As for welfarism-related information, a paradigm shift may come from using labelling as a matter of "ethical citizenship", suitable to reflect the ethical and critical nature of food consumption, while bolstering compliance by farmers and food business operators with high animal welfare standards.

In this respect, for instance, the new 2018 Regulation on organic farming[174] appears to suitably fit in with the perspective of enhancing animal welfare standards in EU farming, supporting farmers in adopting sustainable agricultural practices and empowering citizens through labelling. Indeed, as

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172 See European Court of Auditors (n 82) 9.

173 European Commission, 'The Future Is Rural: The Social Objectives of the Next CAP' (European Commission, 18 February 2019) <https://ec.europa.eu/info/news/future-rural-social-objectives-next-cap-2019-feb-15_en> accessed 21 December 2019.

174 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 [2018] OJ L 150. The new Regulation represents solely the 'Basic Act' on organic agriculture, as the details of the legal text are planned to be developed in 2019 and 2020 throughout delegated and implementing acts. For its genesis and analysis, see Luca Leone, *Organic Regulation–A Legal and Policy Journey between Europe and the United States* (Libellula 2019); Nicola Lucifero, 'Il regolamento (UE) 2018/848 sulla produzione biologica. Principi e regole del nuovo regime nel sistema del diritto agroalimentare europeo' (2019) Rivista di diritto agrario, 477.

Recital 3 of the new Regulation 2018/848 explicitly affirms, 'the objectives of the organic production policy are embedded in the objectives of the CAP'. By depicting the organic field as 'an overall system of farm management and food production that combines best environmental practices, a high level of biodiversity, the preservation of natural resources and the application of high animal welfare standards,'[175] the reformed legal framework allows for the health and well-being of farm animals to gain terrain within the agri-food domain. In fact, the legal text recognises the need to take any 'preventive measures at every stage of production, preparation and distribution, where appropriate [...] to avoid negative effects on [...] animal health'.[176]

From the ban of chemically produced allopathic medicinal products (including antibiotics),[177] to the promotion of housing conditions and husbandry practices satisfying animals' behavioural needs, up to the guaranteeing of permanent access to open-air areas for exercise,[178] the new rules aim at avoiding or keeping to a minimum any suffering, pain or distress at all stages of animals' lives.[179] In such a perspective of 'contributing to high animal welfare standards and, in particular, to meeting the species-specific behavioural needs of animals,'[180] the EU organic logo[181] comes as the symbol that brings and embeds peculiar guarantees about high standards of animal welfare.

Certainly, problems in the regulation exist and may neglect animal welfare considerations. The perpetuation of poor animal management practices – such as breeding, tethering and mutilation – can end up undermining, rather than ensuring, consumer confidence in organic animal products across the EU. At the same time, though, the specific conditions requested for those

175 Ibid Recital 1. The general principles which organic production relies on are listed in Article 5.

176 Ibid Recital 24 and Article 3(4).

177 Ibid Recital 43.

178 Ibid Recital 44.

179 Ibid Annex II, Part II.

180 Ibid Article 4, let. e.

181 Ibid Article 33.

practices[182] – together with the quest for additional rules[183] for bovine, ovine, caprine, and equine animals (as well as for poultry, rabbits and bees)[184] – are emblematic of the increasing attention the EU legislator is devoting towards achieving higher animal welfare standards in more sustainable farming practices.

Beyond the field of organics, as this contribution has explored, the definition – at national or communitarian level – of a unique, voluntary, species-specific labelling that makes the husbandry method explicit is strongly supported as a further proactive step towards the welfare of animals reared for food. It is meant as a compass that can orient consumers' purchases and facilitate informed choices, by promoting those farming systems that are more respectful of animals and provide them with better living conditions. Such a form of labelling – in the Italian NGO Legambiente's words – is what puts citizens in contact with what occurs at the first step of the agri-food chain, as well as with the animal from which food comes from.[185] Regulation on food information is emblematic in this regard. It suggests providing Union consumers, in the context of a future Union strategy for the welfare of animals, with information on the stunning of animals, because of the increasing interest in implementing the animal welfare rules at the time of slaughter.[186]

In conclusion, addressing the legal issues related to the CAP post-2020 and labelling could permit animal welfare questions to be properly addressed and integrated into the EU food policy (or 'Common Food Policy'?[187]), in the pursuit of more sustainable methods of husbandry in EU agriculture. A well-

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182 Ibid Recital 44.

183 For example, requirements for stocking density, minimum surfaces and characteristics, as well as technical requirements for housing.

184 Reg. 2018/848, Recital 45.

185 This vision is at the core of the petition launched by the NGOs Compassion in World Farming (CIWF) and Legambiente in January 2019. See CIWF Italia (n 161).

186 Reg. 1169/2011, Recital 50.

187 Olivier De Schutter, 'Towards a Common Food Policy for the European Union. The Policy Reform and Realignment that is Required to Build Sustainable Food Systems in Europe' (IPES FOOD Panel-International Panel of Experts on Sustainable Food Systems 2019).

structured CAP framework, together with harmonized labelling rules, can definitely help define the "normative identity" of EU philosophy on animal welfare, allowing the humanist and animalist perspectives to converge and interact with each other. Both citizens' faith in legislators and animal industry's competitive advantage can only benefit from EU legislation and policy that are positively constructive in approaching farm animal welfare and dignity.

PESCO AND THE PROSPECT OF A EUROPEAN ARMY: THE 'CONSTITUTIONAL NEED' TO PROVIDE FOR A POWER OF CONTROL OF THE EUROPEAN PARLIAMENT ON MILITARY INTERVENTIONS

Matteo Frau[*] and Elisa Tira[†]

The article examines the implications of the creation in 2017 of a 'Permanent Structured Cooperation on security and defence' (PESCO), that could lead to the gradual construction of a European Army. In particular, it focuses on the institutional issues linked to the possibility of deploying European armed forces in conflict scenarios and analyses the governance of the European common security and defence policy. In this respect, the decision-making power in matters of common defence and PESCO is concentrated in the hands of the Council and of the High Representative of the Union for Foreign Affairs and Security Policy, without the European Parliament being directly involved in the relevant decision-making processes. The article aims to illustrate the constitutional reasons in favour of greater involvement of the European Parliament in this area. Moreover, it will evaluate the ways in which the democratic control on future EU military missions could be increased.

Keywords: PESCO, European army, Common Security and Defence Policy, European Parliament

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[*] Assistant Professor of Comparative Public Law at the Department of Law of the University of Brescia (Italy).

[†] Assistant Professor of Public Law at the Department of Economics of e-Campus University (Italy).

I. INTRODUCTION

A new event, which had the potential to be of extraordinary importance in the process of European integration within the Common Security and Defence Policy, occurred at the end of 2017. This was the creation of a 'Permanent Structured Cooperation on security and defence' (PESCO), pursuant to Article 42, paragraph 6, of the Treaty on European Union (TEU). The permanent structured cooperation involves, as Article 42(6) TEU states, 'Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions'. PESCO was originally conceived as a 'locomotive' designed to drive the entire common security and defence policy,[1] the latter of which constitutes, within the meaning of Article 42, 'an

[1] On the European security and defence policy, see, among the others: Alyson J. K. Bailes, 'The EU and a Better World: What Role for the European Security and Defence Policy?' (2008) 84 International Affairs 115; Anne Deighton, 'The European Security and Defence Policy' (2002) 40 Journal of Common Market Studies 719; Tuomas Forsberg, 'Security and Defense Policy in the New European Constitution: A Critical Assessment' (2004) 3 Connections 13; Jolyon Howorth, *Security and defence policy in the European Union* (Palgrave 2007); Jolyon Howorth, 'European Defence and the Changing Politics of the European Union: Hanging Together or Hanging Separately?' (2001) 39 Journal of Common Market Studies 765; Chris J. Bickerton, Bastien Irondelle, Anand Menon, 'Security Co-operation beyond the Nation-State: The EU's Common Security and Defence Policy' (2011) 49 Journal of Common Market Studies 1; Hanna Ojanen, 'The EU and Nato: Two

integral part of the common foreign and security policy' of the European Union.[2] As such, PESCO seems able to facilitate the achievement of the various stages of the integration process outlined in the second paragraph of Article 42: 'The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides'. The leap in quality made by PESCO lies precisely in the binding nature of the commitments undertaken by the Member States in this very delicate area.

The overarching aim of the integration process set out in Article 42 is very ambitious and ultimately consists in the gradual construction of a European supranational military power able to intervene in conflict scenarios on a mandate and under the aegis of the European Union. The achievement of this goal would allow the Union to express a unified stance in matters of common foreign and defence policy and to become one of the main actors on the international scene, being the bearer of an EU Global Strategy. Thus, Europe, with its own European Army, could become a decisive player in the context of NATO and the UN. Additionally, it could enter into direct dialogue with national military superpowers, which until now have been the undisputed protagonists both in armed conflicts and in subsequent 'reconstruction' policies.

The implications of PESCO are many and concern, not only the future, but also the present. First of all, PESCO sets the foundation for unprecedented cooperation in the fields of military industry, training and mobility of the armed forces, sharing of strategic information and so on. Moreover, in the Community tradition the common market has always been a driver of integration. This is why the drive to achieve ever more ambitious military

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Competing Models for a Common Defence Policy' (2006) 44 Journal of Common Market Studies 57.

[2] On the common foreign and security policy, see, among the others: Douglas Hurd, 'Developing the Common Foreign and Security Policy' (1994) 70 International Affairs 421; Maria-Gisella Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 The International and Comparative Law Quarterly 77; Nadia Klein and Wolfgang Wessels, 'CFSP Progress or Decline after Lisbon?' (2013) 18 European Foreign Affairs Review 449.

industrial projects at the European level could facilitate the gradual formation of a European army and, consequently, the basis for a strong common foreign and defence policy. On the other hand, this cooperation also affects the relevant issues pertaining to the relationship between the EU, NATO and the UN, and to the internationalist profiles of military missions. However, as this strictly relates to international law, it falls outside the scope of this work.

Each of these aspects raises a series of questions that are of great legal – and non-legal – interest and hence it is necessary to carefully delimit the context of the present research. This article focuses on the institutional issues linked to the future prospect, now less distant than in the past, of the birth of a strong common defence policy of the European Union, based on the possibility of deploying European armed forces in operational scenarios.

The extensive literature on the European security and defence policy (ESDP) mainly deals with describing and analysing the activities of the European Union in relevant crisis areas and the connected foreign policy missions,[3] the impact of the ESDP,[4] or the institutional framework developed to support the ESDP.[5] With specific reference to PESCO, the literature focuses above all on the concrete implications and on the effectiveness and efficiency of the Permanent Structured Cooperation,[6] with particular regard to the legal nature and enforceability of the binding commitments agreed to.[7] In contrast, relatively little attention is paid to whether or not the internal management of the EU defence governance is adequate with respect to

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3 See, for example, Alessia Biava, 'The Emergence of a Strategic Culture within the Common Security and Defence Policy' (2011) 16 European Foreign Affairs Review 41.

4 See, among the others, Anand Menon, 'Empowering Paradise? The ESDP at Ten' (2009) 85 International Affairs 227.

5 See, for example, Hans-Georg Ehrhart, 'The EU as a Civil-Military Crisis Manager: Coping with Internal Security Governance' (2006) 61 International Journal 433.

6 See, for example, Sven Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration' (2008) 13 European Foreign Affairs Review 431.

7 See Steven Blockmans, 'The EU's Modular Approach to Defence Integration: an Inclusive, Ambitious and Legally Binding PESCO?' (2018) 55 Common Market Law Review 1785.

general legal principles like democracy. The latter issue is the subject of the present research.

Adopting a constitutional approach, this article aims to analyse the governance of the European common defence policy, looking specifically at the prospect of military interventions carried out under the aegis of the European Union.[8] The crux of the matter is the lack of involvement of the European Parliament (EP) in the decision of the EU to set up a military mission involving the sending of European armed forces in conflict scenarios.

Constitutional law generally does not provide an exhaustive regulation of the power to intervene militarily in conflict scenarios. However, the institutional practice of contemporary democracies and the interpretation of the relevant constitutions normally seek to achieve a difficult balance between the need to guarantee the effectiveness and efficiency of military missions and the need to subordinate the exercise of the power of military intervention to democratic-parliamentary control (section II). In contrast, on the supranational level, the decision-making power in matters of common defence and PESCO is concentrated in the hands of the Council and of the High Representative of the Union for Foreign Affairs and Security Policy, without the European Parliament being directly involved in the relevant decision-making processes (section III).

The present article aims to verify whether or not the current legislative framework of the TEU contradicts some basic constitutional principles that are part – or have now become part – of the 'constitutional' heritage of the EU (section IV). The principles with which the current governance of the European common defence could conflict belong to two main categories: 1) those that emerge directly from the Treaties, such as the principle of institutional balance and the principle of representative democracy, which can no longer be relegated to the scope of the old 'first pillar'; and 2) those that emerge from the common constitutional traditions of the Member States. In this respect, in many EU Member States the need to subordinate the sending of the armed forces in conflict scenarios to specific parliamentary

8 For a review of the literature on EU governance, see, among others, John Peterson, 'The choice for EU theorists: Establishing a common framework for analysis' (2001) 39 European Journal of Political Research 289.

authorization or to prior parliamentary debate has in recent years been affirmed. Indeed, this principle has been expressly sanctioned or interpreted by the constitution of those Member States, with the exception of cases of urgency and necessity (section V).

This paper assumes that the EP is an essential organ for ensuring a minimum level of institutional balance, transparency, open political confrontation and democratic method in the supranational decision-making processes and in the formation of the Union's policies. This is so within the delimited framework of the EU institutional set-up and of 'European constitutionalism', even if the EP is not comparable to national parliaments.[9] Moreover, since the Lisbon Treaty has sanctioned the removal of the pillar structure and determined the definitive fusion of the Communities within the European Union, the current governance of common foreign and security policy can no longer be considered completely detached from the real Community dimension. On the contrary, the common foreign and security policy is now partly integrated into the Union legal order and, consequently, can no longer take shape fully as a form of intergovernmental cooperation.

On this basis, at the end of the present analysis we will evaluate how the redistribution of powers could be made in order to establish a power of effective control of the EP on future EU military missions and to increase democratic control of the latter (section VI).

II. Democratic Control versus Military Efficiency: The Difficult Search for Balance

Normally, constitutional law does not provide an exhaustive regulation of the power to intervene militarily in conflict scenarios. This is because constitutional texts have often not been updated in this area and therefore are influenced by the now obsolete concept of war in the formal sense, namely war 'lawfully waged', based on constitutional and international rules.

9 Because of the issue of the democratic deficit referred to it. See, for example, Jean Blondel, Richard Sinnott, Palle Svensson, *People and Parliament in the European Union: Participation, Democracy, and Legitimacy* (Oxford University Press 1998); Michael Goodhart, 'Europe's Democratic Deficits through the Looking Glass: The European Union as a Challenge for Democracy' (2007) 5 Perspectives on Politics 567.

Furthermore, it is inevitable and even appropriate that a written constitution leaves much of the regulation of this complex subject to organic laws implementing the constitutional provisions, to parliamentary rules, to constitutional conventions and application practices.

In any case, the institutional practice of contemporary democracies and the interpretation of the respective constitutions generally seek to achieve a difficult balance between the need to guarantee the effectiveness and efficiency of military missions and the need to subordinate the exercise of the power of military intervention to democratic-parliamentary control.[10] In many constitutional democracies, this balance has been found in the allocation of the decision-making power to commence a military action to the executive body, and of the power of prior authorization/approval of such decision to the parliamentary body (see below, section V). Among the countries that have developed this solution, by means of conventions and/or legislative acts, there are some – such as Belgium, Germany and Italy – which are particularly relevant for the present research. They represent a significant constitutional parameter capable of influencing the evolution of the European Union's legal system in this matter.

Apart from some exceptions, in the evolution of democratic states the parliament's power to approve or authorize the declaration of war in a formal sense established itself across all the main forms of government (see below, section V). Although in the practice of the main constitutional democracies this principle has not had continued application, the power in question must be considered as a sort of unavoidable parliamentary attribution, like legislative and budgetary power.[11]

As war in the formal sense has become mostly obsolete, it seems reasonable that even the power of war in a substantial sense, namely the power to deploy

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[10] See Dirk Peters and Wolfgang Wagner, 'Between Military Efficiency and Democratic Legitimacy: Mapping Parliamentary War Powers in Contemporary Democracies, 1989–2004' (2011) 64 Parliamentary Affairs 175.

[11] See Tapio Raunio and Wolfgang Wagner, 'Towards Parliamentarisation of Foreign and Security Policy?' (2017) 40 West European Politics 1; Daan Fonck and Yf Reykers, 'Parliamentarisation as a Two-Way Process: Explaining Prior Parliamentary Consultation for Military Interventions' (2018) 71 Parliamentary Affairs 674.

the armed forces in conflict scenarios with or without an 'international coverage',[12] should be subject to parliamentary authorization. Indeed, similar to arguments justifying the conferral to parliament of legislative functions, also with reference to the decision-making processes related to military missions the involvement of the parliamentary body would allow the full participation of all the represented political forces. It thus allows the opposition to give its contribution to the discussion, whatever the majority decides.[13] In contrast, the executive cannot guarantee the complexity, depth and transparency of the decision-making processes ensured by the parliamentary body, both within parliamentary committees and within the plenary assembly.

However, these greater guarantees of the decision-making procedures of parliamentary bodies are sometimes incompatible with the needs pertaining to the exercise of military and war powers, which for this reason are traditionally conferred to the executive.[14] In many cases, the political decision to start a military action requires speed and unity of purpose; moreover, the secrecy of operational plans is often a necessary condition for their effective realisation. These needs can certainly justify a proportionate and reasonable limitation of the supervisory power of parliament over the military powers of the executive, but can never lead to its complete exclusion.

In principle, the complete exclusion of parliament and of the relevant parliamentary committees from the decision-making process related to the commencement of a military action can only be justified by the need to respond to a serious and immediate threat to national security. However, this is on the understanding that the problem of the executive's wide discretion in the assessment of that need persists.

The assessment of the needs related to military-defensive efficiency requires a great deal of balance and consideration which, by necessity, focuses on the

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12 War in a substantial sense includes the different types of military missions that cannot be defined as 'war' in a formal sense.

13 See Patrick A Mello and Dirk Peters, 'Parliaments in security policy: Involvement, politicisation, and influence' (2018) 20 The British Journal of Politics and International Relations 3.

14 See J. Locke, 'Two Treatises of government', in *The Works of John Locke* (vol. II, London, printed for John Churchill 1714) 199, sec. 147.

discretion of the executive. Of course, the executive may consider that, due to higher requirements related to national security, it is necessary to sacrifice the prior parliamentary control of the power to intervene militarily. In such cases, the only guarantee of democratic control remaining would consist, *ex post*, in the political accountability of the government to the parliament and/or to the voters, depending on the form of government.

In fact, such decision could hardly be subject to control by the ordinary courts[15] and in this respect the case law of the United Kingdom and of the United States is particularly significant.[16] As we will try to illustrate, recent developments in the European Union's common security and defence policy suggest that many of these issues could arise, *mutatis mutandis*, even in the European supranational context.

III. The Current Regulation of PESCO and the Absence of an Adequate Form of Democratic Control

As a preliminary point, it is worth briefly recalling the main steps that led to the creation of PESCO in December 2017. An important impulse was given by the conclusions adopted by the European Council on 22/23 June 2017, which promoted the need to create an 'inclusive and ambitious' Permanent Structured Cooperation. The European Council's mandate was to draw up, within three months,

> a common list of criteria and binding commitments fully in line with Articles 42(6) and 46 TEU and Protocol 10 to the Treaty - including with a view to the most demanding missions [...], with a precise timetable and specific

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15 Rather, if provided for in the single legal system in question, a possible appeal to the Constitutional Court could be involved. In that case, the possible breach of the duty of prior consultation of the parliamentary body could be established only after the military intervention. Such a control could nevertheless be useful both for the purpose of clarifying the constitutional interpretation, and to enforce, in the most serious cases, the legal and institutional liability of the members of the Government for an illegitimate exercise of their functions.

16 For example, on the position of the Supreme Court and on the role of the Courts in deciding whether the President has overstepped his power in conducting warfare, see Jules Lobel, 'The Commander in Chief and the Courts' (2007) 37 Presidential Studies Quarterly 49.

> assessment mechanisms, in order to enable Member States which are in a position to do so to notify their intentions to participate without delay.[17]

On 13 November 2017 the Foreign and Defence Ministers of 23 countries, since increased to 25 – all Member States except the United Kingdom, Denmark and Malta – signed a common notification regarding their intention to participate in Permanent Structured Cooperation.[18] At the third point of Annex I (Principles of PESCO) it states:

> PESCO is a crucial step towards strengthening the common defence policy. It could be an element of a possible development towards a common defence should the Council by unanimous vote decide so (as provided for in article 42.2 TEU). A long term vision of PESCO could be to arrive at a coherent full spectrum force package - in complementarity with NATO, which will continue to be the cornerstone of collective defence for its members.[19]

Despite the latter reassuring concession to NATO, the creation of a 'future' European army will be primarily functional as an independent foreign and defence policy of the Union. Indeed, this seems to be precisely the idea underlying the following point 8 of Annex I:

> An inclusive PESCO is as a strong political signal towards our citizens and the outside world: Governments of EU Member States are taking common security and defence seriously and pushing it forward. For EU citizens it means more security and a clear sign of willingness of all Member States to foster common security and defence to achieve the goals set by EU Global Strategy.

A European army and its use in conflict scenarios will therefore be not only an instrument to be made available to the Atlantic Pact or the UN resolutions authorizing an armed intervention. In fact, it will primarily be an instrument that may be used in the EU Global Strategy, although at present the political conditions for this common strategy seem to be some time away.

Finally, with the decision of 11 December 2017, the Foreign Affairs Council of the European Union, following the common notification of 13 November

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17 European Council meeting, 22 and 23 June 2017, Conclusions.

18 Notification on Permanent Structured Cooperation (PESCO), 13 November 2017.

19 Ibid, Annex I (Principles of PESCO).

and acting by qualified majority (Article 46.2 TEU), sanctioned the official birth of the 'Permanent Structured Cooperation on security and defence'.[20]

The creation of a European military force that can be deployed in operational scenarios is a possibility already fully shaped by Article 43 TEU, which clarifies the content of the missions 'in the course of which the Union may use civilian and military means', to which Article 42(1) refers. They include, *inter alia*, 'conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'. Article 43 also states that '[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories'. This is clearly confirmed by Protocol 10 relating to PESCO. Indeed, Article 1 of this Protocol established the achievement in 2010 of the ambitious objective of forging supranational battlegroups to be used for the purposes of Article 43 TEU.

As regards the regulation of the decision-making processes related to PESCO, first of all it must be considered that the 'common security and defence policy', regulated in Section 2 of Chapter 2 of Title V of the TEU, is part of the wider 'common foreign and security policy'. The latter is regulated in the whole of Chapter 2, which is in turn included in the general subject of the 'Union's external action' treated by the whole Title V. Chapter 1 of Title V contains 'general provisions on the Union's external action', while Chapter 2 contains 'specific provisions on the common foreign and security policy', which includes the 'common security and defence policy'. It follows that many of the rules of the whole Title V, being general rules, apply also to the more specific subject of the 'common security and defence policy'.

If we examine the general provisions on the Union's external action contained in Chapter 1 of Title V, it is possible to immediately find a general prevalence accorded by the TEU to the European Council and to the High Representative of the Union for Foreign Affairs and Security Policy in the matters falling under the former second pillar. Pursuant to Article 22, in fact, the European Council 'shall identify the strategic interests and objectives of the Union' relating to the external action and to the common foreign and

[20] Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States, 11 December 2017.

defence policy. The High Representative may instead 'submit joint proposals to the Council' for the area of common foreign and security policy, while the Commission can submit joint proposals to the Council 'for other areas of external action'.

Chapter 2 broadly confirms this general approach. Article 24 establishes that the common foreign and security policy is 'defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'. As better specified in Article 26, while the European Council must establish the general guidelines for the common foreign and security policy, the Council must define and implement it in concrete terms.

On the other hand, Article 24 gives the High Representative of the Union, who also chairs the Foreign Affairs Council, the power to 'put into effect' the common foreign and security policy. This 'executive' function is better defined in Articles 26 and 27, which assign to the High Representative the important function of external representation of the Union that is connected to their appellative.

A very marginal position is therefore left to the European Parliament and to the Commission. Firstly, because in this matter 'the adoption of legislative acts shall be excluded' (Article 24, first paragraph). Secondly because, with regard to the functions of the European Parliament and of the Commission, Article 24 merely states that their specific role 'in this area is defined by the Treaties'. As such, the scope for action of the EP and the Commission is limited to the powers specifically granted by the Treaties.

The Court of Justice, then, is completely excluded from any possibility of intervention, with the exception of its jurisdiction to monitor compliance with Article 40 of TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union (TFEU). Article 40, in particular, contains a 'residual' clause, according to which

> the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Despite the apparent narrowness of this concession, it must be disclosed that such a general clause could theoretically allow, in the future, significant creative judgments. Indeed, it could allow some kind of re-evaluation of the role that the EP and the Commission could play in this matter, through an interpretation of the Treaty of which the Court of Justice should take charge (see below, section VI).[21]

With regard to the limited competences that are specifically attributed to the EP by Title V on the common foreign and security policy, the most relevant provision is Article 36. This concerns the duty of the High Representative to inform and regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy. The High Representative must also ensure that the views of the European Parliament are duly taken into consideration. Article 36 then states that the European Parliament can address questions and make recommendations to the Council or to the High Representative, and that a debate on progress made in this area must be held twice a year. Apart from the right to be informed and consulted, the EP has no direct decision-making power to prevent the Council from assuming certain choices of common foreign and security policy. Conversely, a certain influence could be exercised indirectly on the High Representative, who has the task, on the one hand, to implement the Council's decisions, but, on the other hand, also has to take care that the views of the EP are duly taken into consideration. However, we still remain in the field of moral suasion.

Also with regard to the regulation of the Union's common security and defence policy, the Council and the High Representative of the Union remain the undisputed protagonists of the decision-making processes. It is indeed the Council which, acting unanimously, decides to start a mission on the proposal of the High Representative or of a Member State. In short, the Council holds the power to decide the entry of the European Union in an armed conflict.

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[21] After all, the history of the Union is one of founding acts and deliberate institution-building, as well as informal and gradual institutional evolution where common practices have been codified into formal-legal institutions; see Johan P. Olsen, 'Reforming European Institutions of Governance' (2002) 40 Journal of Common Market Studies 581.

In addition, under Article 44, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. These Member States, in association with the High Representative, shall then agree among themselves on the management of the task. This means that some delicate operational decisions related to the management of military missions carried out in the name of the European Union will be taken only by the governments of the states entrusted together with the High Representative.

Finally, it is still the Council that, as already mentioned, decides by qualified majority the constitution of PESCO after consulting the High Representative. It remains then the protagonist of the related decision-making processes, as emerges from Article 46 TEU.

This succinct and unexhaustive description suffices to demonstrate the substantial exclusion of the European Parliament from the determinations that the EU can adopt in the area of the common security and defence policy. However, the need to provide for some forms of control on the part of the supranational Parliament, in such a delicate matter, is undeniable.

It must be considered that the 'Community method' has partially contaminated the decision-making processes relating to the former second pillar,[22] especially for the following two aspects. First of all, the High Representative, who chairs the Foreign Affairs Council and who is also Vice-President of the Commission, is fully involved in the decisions and in the implementation of decisions concerning the Union's tasks.[23] Secondly, there

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[22] The 'Community method' is characterised by the sole right of the European Commission to initiate legislation, by the co-decision power between the Council and the European Parliament and by the use of qualified majority voting in Council. It contrasts with the intergovernmental method of operation used in decision-making, according to which the Commission's right of initiative is confined to specific areas of activity, the Council generally acts unanimously and the EP has a purely consultative role.

[23] For a partially different opinion, see Leendert Erkelens and Steven Blockmans, 'Setting up the European External Action Service: an act of institutional balance' (2012) 8 European Constitutional Law Review 246, for which the post-Lisbon arrangements in the field of EU external action have resulted in a small move away from the 'Community method' towards a more intergovernmental way of EU foreign policy.

is limited openness to the rule of qualified majority instead of unanimity with regard to Council decisions.

In any case, this partial contamination of the intergovernmental method that traditionally reigned in matters of the Union's foreign and defence policy barely hides the deep divide that still today, despite the progress made with the Lisbon Treaty, separates the old first pillar from the other two. In particular, the clear exclusion of the EP from the decision-making processes in the field of foreign and security policy represents an evident break with Community method and contents. Therefore, the governance of the common security and defence policy has a series of problems of a 'supranational constitutional' nature which are of crucial importance for the very fate of the European Union and for its evolution in an authentically democratic and federalist sense.

IV. Constitutional Reasons for the Involvement of the European Parliament in the Common Defence Policy

The constitutional reasons for the European Parliament's involvement in political decisions regarding possible Union interventions in conflict scenarios are to be found first of all in the need to guarantee the values and general principles of EU law. More specifically, these reasons concern the need to respect: 1) the principle of representative democracy in the organization and action of the European Union; and 2) the principles of institutional balance and of loyal cooperation between institutions.

These principles, moreover, are closely linked to other fundamental constitutional principles, such as freedom, human dignity, equality, respect for human rights, including the rights of persons belonging to minorities, the rule of law and pluralism. These are values common to the Member States on which the European Union is founded, according to Article 2 TEU. Therefore, compliance with the former may also have effects on the guarantee of the latter.

1. The Need to Respect the Democratic Principle

Firstly, the European Parliament's lack of effective powers of control could seriously undermine the democratic principle, one of the values on which the

European Union is founded (Article 2 TEU). The Preambles and the general principles enshrined in the Treaties, starting from the Single European Act and the Maastricht Treaty, contain a strong reference to the attachment to democracy, the commitment to strengthen the democratic functioning of the institutions, and the need to build a Europe where decisions are taken as close as possible to the citizens.[24] In fact, even before the democratic principle found explicit recognition in the Treaties, it had been indicated as the foundation of the Community's constitutional system in the Declaration on European Identity adopted in Copenhagen in December 1973 by the Heads of State or Government. That Declaration affirmed the intention to 'defend the principles of representative democracy, of the rule of law, of social justice and of respect for human rights', which 'are fundamental elements of the European Identity'.[25]

Furthermore, the promotion of democracy has had strong recognition in the case law of the Court of Justice of the European Union, starting with the Roquette Frères judgment of 1980.[26] In that sentence, the Luxembourg Court annulled a Council regulation for lack of a EP opinion, because the EP consultation provided for by the Treaty 'is the means which allows the Parliament to play an actual part in the legislative process of the Community'. The Court emphasized that, 'although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'. Accordingly, 'due consultation of the Parliament in the cases provided for by

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24 On the democratic principle in the EU, see, among the others: Jos de Beus, 'Quasi-National European Identity and European Democracy' (2001) 20 Law and Philosophy 283; Lindsay Lloyd, 'European approaches to democracy promotion' (2010) 65 International Journal 547; Kalypso Nicolaïdis, 'We, the Peoples of Europe...' (2004) 83 Foreign Affairs 97; Joseph H. H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals' (1997) 7 The Good Society 26; Elisabeth Zoller, 'The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union' (2005) 12 Indiana Journal of Global Legal Studies 391.

25 Declaration on European Identity, Copenhagen, 14 December 1973.

26 Case 138/79 *Roquette Frères v Council* EU:C:1980:249.

the Treaty [...] constitutes an essential formality disregard of which means that the measure concerned is void'.[27]

As is known, in the matter of common foreign and security policy, ruled by Title V TEU, there is no room for legislative acts.[28] This could lead one to believe that it is not also essential in this context to ensure an effective involvement of the EP in the decision-making process in order to respect the democratic principle. Nevertheless, political decisions aimed at allowing a military action imputable to the European Union will always have an enormous impact not only on the interests of all Member States but also, directly, on the interests of European citizens. This means that, in the common foreign and security policy, the effective involvement in the decision-making process of the European Parliament – the only institution democratically representative of the Europeans citizens – is the only way to ensure, albeit in a minimal form, respect for the principle of representative democracy.

Moreover, the democratic principle today finds a clear and explicit recognition in Article 10 TEU, according to which '[t]he functioning of the Union shall be founded on representative democracy' and '[c]itizens are directly represented at Union level in the European Parliament'. The democratic principle is also referred to in Chapter 1 of Title V of the TEU, concerning the 'General provisions on the Union's external action'. Article 21, paragraph 1, TEU states that

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Paragraph 2(b) of Article 21 indicates among the objectives of the Union's external action the aim to 'consolidate and support democracy, the rule of

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27 Ibid para 33.

28 According to Article 24, paragraph 1, TEU '[...] The common foreign and security policy is subject to specific rules and procedures. [...] The adoption of legislative acts shall be excluded [...]'.

law, human rights and the principles of international law'. And again, paragraph 3 provides that:

> The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

It follows from the rules of the Treaty on European Union that the democratic principle is one of the constituent values of the common constitutional heritage capable of defining the common European identity. Furthermore, it is one of the objectives pursued by the European Union through its external action and it is explicitly indicated by the Treaty as one of the principles that the Union must respect, including in the context of its external action.

This demonstrates the presence of a contradiction between, on the one hand, the abstract affirmation of the principle of representative democracy as a fundamental value of the Union and, on the other hand, the failure to implement the principle in question in the part of the TEU concerning the common foreign and security policy.

2. The Need to Respect Principles of Institutional Balance and Loyal Cooperation

A similar conclusion can be reached by considering two other EU principles, closely related to each other and, for this reason, worthy of being treated together: the principle of institutional balance and, above all, that of loyal collaboration between institutions, both provided for by Article 13, paragraph 2, of the TEU.[29] Indeed, both these principles seem to impose, irrespective of the need for 'democracy' mentioned above, a greater involvement of the European Parliament in the decision to intervene militarily.

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[29] According to Article 13, paragraph 2, TEU 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

The principle of institutional balance states that every institution shall act within the limits of the powers conferred on it in the Treaties and must respect the competences attributed by the Treaties to the other institutions. This principle was clearly outlined by the Court of Justice in its judgment of 22 May 1990, *European Parliament v. Council*, with which the right to bring an action for annulment was recognized to apply also to the EP. For the Court, the Treaties

> set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.[30]

Moreover, '[o]bservance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions' and it 'also requires that it should be possible to penalize any breach of that rule which may occur'.[31] Therefore the Court stated that:

> The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.[32]

So far, the institutional balance seems mainly aimed at preserving the competences of the single institutions by imposing the observance of an ideal division of powers adapted to the sphere of the European Union. This first impression could give rise to the doubt that the principle of institutional balance mainly concerns the former first pillar. In this context, indeed, the division of competences between the institutions crosses the issue of the distinction between the legislative and the executive function. Parliament, through the exercise of the important functions attributed to it, has a role of

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30 Case C-70/88 *European Parliament v Council* EU:C:1990:217, para 21.

31 Ibid para 22.

32 Ibid para 26.

primary importance in the formation of acts and therefore also of the political will of the Union.[33]

In contrast, in the governance of the subject referred to in Title V TEU, the distinction of functions operates within a completely different scheme (see Articles 24-26 TEU), in which the European Council, the Council and the High Representative are the protagonists of a basically unitary decision-making process. The latter is structured, roughly, on three levels: in a first phase, it is up to the European Council to set the general objectives and guidelines for the EU's action; in a second phase, it is up to the Council to take concrete decisions in accordance with those general guidelines; and finally, in a third phase, it is primarily up to the High Representative to implement these decisions. Therefore, in the context of Title V TEU, considering the very limited role played by the EP in this matter, it could be assumed that the principle of institutional balance guarantees only the European Parliament's right to be informed and consulted by the High Representative on the basis Article 26 TEU.[34]

However, such an interpretation appears reductive for at least three reasons. First of all, the principle of institutional balance has a dynamic, rather than a static, nature. This is evidenced by the fact that this principle was not originally codified and that its evolution went hand in hand with the evolution of the functions of the European Parliament, legitimizing the expansion of the attributions of the latter beyond the letter of the Treaties.[35] Indeed, this principle is firmly linked to both the principle of loyal

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33 On the evolution of the institutional balance between Council, European Council, Commission and European Parliament, see Paul Craig, 'The Community Political Order' (2003) 10 Indiana Journal of Global Legal Studies 79.

34 See above, section III.

35 Suffice it to mention what happened with reference to the budgetary procedures. In this context, the powers of the European Parliament have gradually expanded, until The Lisbon Treaty put the EP on an equal footing with the Council in the annual budgetary procedure.

collaboration[36] and the democratic principle,[37] so that the evolution of these three fundamental constitutional elements of the EU is simultaneous.

Secondly, the principle of institutional balance, which has also been defined as a 'normative, actionable formal principle',[38] works with a clear constitutional vocation. Although this principle is not comparable to the principle of division of powers as it has evolved and transformed in the constitutional state experiences, it is inspired by state traditions. This implies that the area of the common foreign and security policy cannot be totally extraneous to the possibility for the EP to really influence the most important decisions, such as launching EU military missions in situations of armed conflict. This would breach the general principle of the balance of powers understood as a general criterion of a constitutional nature, referable, at least in theory, to the entire governance of the Union.

Finally, it must be considered that the Lisbon Treaty has strengthened the implications and the dynamic dimension of the principle of institutional balance. It increasingly draws inspiration from the model of the state parliamentary democracies, as demonstrated, for example, by the new formulation of the provisions concerning the procedure for the Commission's formation and the regulation of legislative acts, where the powers of the EP have been expanded. It is very difficult to believe that the governance of the subjects related to in Title V is completely extraneous to

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36 In this sense see the position of Roland Bieber, 'The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty' (1984) 21 Common Market Law Review 505, which criticizes the aleatory character and the rigidity of the principle of institutional balance outlined by the Court of Justice, while emphasizing the importance of the principle of autonomy of the institutions in synergy with the principle of cooperation and the dynamic character of the institutional system. Without reaching Bieber's conclusions, however, the idea of a dynamic dimension of the balance of powers, as evidenced by the close connection with the principle of loyal cooperation, is nevertheless shareable. In the writers' opinion, this dynamic evolution has long been (slowly) proceeding in the direction of a continuous expansion of parliamentary attributions towards the model (for now far) represented by the parliamentary State democracies.

37 See Götz Von Hippel, *La séparation de pouvoirs dans les communautés européennes* (Nancy, Publications du Centre européen universitaire 1965) 4-5.

38 Case C-101/08 *Audiolux and Others* EU:C: 2009:626, Opinion of AG Trstenjak, para 105.

this progressive adoption of solutions inspired by the state models of organization of powers, especially if we consider that the Lisbon Treaty has removed the pillar structure.

The principle of institutional balance is, as mentioned, closely linked to that of loyal collaboration. The latter was originally provided for only with reference to the relationships between Member States and the European Community, being imposed by the then Article 10 TEC (now Article 4, paragraph 3, TEU) on the Member States towards the Community. Progressively, the Court of Justice derived from it also the principle of sincere cooperation between the European institutions, today explicitly enshrined in Article 13(2) TEU. In particular, in the judgment of 27 September 1988, *Greece v. Council*, the Luxembourg Court affirmed that

> the operation of the budgetary procedure, as it is laid down in the financial provisions of the Treaty, is based essentially on inter-institutional dialogue. That dialogue is subject to the same mutual duties of sincere cooperation which, as the Court has held, govern relations between the Member States and the Community institutions.[39]

Concerning the relationship between the EP and the Council in the consultation procedure, in its ruling of 30 March 1995, case C-65/93, the Court held that, even in this circumstance, the same mutual obligations of sincere cooperation governing the relationships between Member States and the Community institutions prevail.[40] Furthermore, in its judgment of 24 November 2010, C-40/10, the Court of Justice stated that the Commission 'must observe the duty of cooperation in good faith between the institutions, recognised by the caselaw [...] and, since the entry into force of the Treaty of Lisbon, expressly enshrined in the second sentence of Article 13(2) TEU'.[41]

In the case of military interventions in conflict scenarios decided by the Union, the respect for the principle of institutional balance and for the duty of sincere cooperation between institutions could undoubtedly establish an obligation to involve the EP in the relevant political decision.

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39 Case 204/86 *Greece v Council* EU:C:1988:450, para 16.

40 Case C-65/93 *European Parliament v Council* EU:C:1995:91, para 23.

41 Case C-40/10 *Commission v Council* EU:C:2010:713, para 80.

3. Response to Possible Objections to Greater Parliamentary Involvement

Having clarified the constitutional arguments for a greater EP involvement, the possible objections should also be considered. Among these objections, the following must be addressed. First of all, in many cases, the political decision to start a military action requires speed and unity of purpose, and the secrecy of operational plans is often a necessary condition for their effective realization. Secondly, the alleged democratic deficit of the supranational decision-making processes could be considered filled by the fact that, since in this matter the rule of unanimity is mainly applied, a military mission of the Union would presuppose a complete sharing by all the governments involved and, indirectly, also by the national parliaments exercising control over them. Thirdly, the exclusion of the European Parliament from the decision-making processes outlined in Title V could be considered balanced by the presence of other forms of parliamentary control, such as the power to be informed and consulted, the power of the purse and the power of no-confidence.

However, these objections do not invalidate the thesis of the necessary EP involvement in the decision-making processes related to future military missions of the EU. As for the first, it must be highlighted that the executive can always undertake military actions without the prior involvement of parliament in emergency cases. In any case, the need to guarantee the effectiveness and efficiency of military missions can certainly justify a proportionate and reasonable limitation of the supervisory power of Parliament, but can never lead to its complete exclusion.

With respect to the second argument, any provision for parliamentary scrutiny within the Member States is not enough to solve the problem of democratic deficit caused by a lack of parliamentary control at the supranational level. On the basis of Article 46 TEU, when decisions concerning PESCO are to be taken – by a qualified majority or by unanimity, as the case may be – only members of the Council representing the participating Member States shall take part in the vote. This means that, within PESCO, some important decisions do not involve all the Union's Member States, but only the participating members. Despite this, such decisions are taken in the name of the European Union and may have significant effects on the interests of the entire Union itself, of all its members and of European citizens. This means that, according to the

principle of subsidiarity,[42] by reason of the scale and effects of such decisions, the involvement of national parliaments is not sufficient and an effective involvement of the European Parliament is necessary.

As for the third argument, first of all it must be observed that, although it is true that the power to be informed and consulted facilitates transparency and debate on issues, it nevertheless turns out to be a blunt weapon if it is not accompanied by the power of prior authorization to the use of force or by other possible forms of indirect control of military power. Regarding the Parliament's power to control military spending through the approval of the budget and of the spending laws, in the current EU framework and within PESCO, the possibility of an effective control of military expenditure by the EP seems to be excluded.

As for the power of no-confidence towards the executive, the EP has no power to politically undermine the Council by voting on a motion of censure. The motion of censure under Article 234 TFEU can affect the High Representative as a member of the Commission; in that case, however, the latter resigns only with regard to the functions exercised within the Commission. Consequently, with reference to the executive and representation powers exercised in the field of common foreign and defence policy, the High Representative seems not to be parliamentary accountable.

V. Member States' Requirement of Parliamentary Involvement in Military Missions Abroad

Another reason in support of the European Parliament's involvement in EU defence and military policies is related to the existence of a constitutional tradition common to the Member States that could be applicable also to the Union's legal system. We refer to the progressive framing, in the context of European constitutional law, of a constitutional principle that requires prior

[42] According to Article 5, paragraph 3, TEU, 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

parliamentary involvement in the decision to participate in a military mission.

The comparative analysis carried out by various scholars and research institutes clearly demonstrates that the principle of prior parliamentary approval of significant military missions is prevalent in the Member States' legal systems, as a constitutional rule explicitly stated or as an implicit constitutional principle.[43]

In some legal systems, such as Denmark, the Netherlands and Sweden, the necessary parliamentary authorization for the use of military force is expressly provided for. In Germany the *Bundesverfassungsgericht*, with a ruling of 1994, established that from the *Grundgesetz* a constitutional principle can be derived, according to which the use of the armed forces abroad, even if decided by the government, is subject to the prior authorization by parliament. Following this and a subsequent similar ruling, the German legislator has accepted the (implicit) constitutional principle of parliamentary authorization for the actions of the German armed forces abroad.[44] Thanks to this, in Germany 'the Bundestag has been an

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[43] See, for example, Roman Schmidt-Radefeldt, *Parlamentarische Kontrolle der internationalen Streitkräfteintegration* (Duncker und Humblot 2005); Hans Born and Heiner Hänggi (eds), *The "Double Democratic Deficit": Parliamentary Accountability and the Use of Force under International Auspices* (Ashgate 2004); Hans Born, Axel Dowling, Teodora Fuior and Suzana Gavrilescu, *Parliamentary Oversight of Civilian and Military ESDP Missions: The European and National Levels* (European Parliament 2007), study requested by the European Parliament Subcommittee on Security and Defence; Sandra Dieterich, Hartwig Hummel, Stefan Marschall, 'Strengthening Parliamentary "War Powers" in Europe: Lessons from 25 National Parliaments' (2008) DCAF Policy Paper n. 27. Conversely Wolfgang Wagner, Dirk Peters, Cosima Glahn, 'Parliamentary War Powers Around the World, 1989-2004. A New Dataset' (2010) DCAF Policy Paper n. 22, claim that 'There is no discernible trend towards a parliamentarisation of war powers' and note that 'When existing rules are changed, parliaments are usually the losers' because 'several central and eastern European states have abolished parliament ex ante veto powers in the process of Nato accession'; however these authors could not consider the subsequent parliamentary powers evolution in some European countries, like France, Britain and Italy (see below in this section).

[44] BVerfGE 90, 286. The principle that requires a prior parliamentary authorization of the Bundestag for the use of armed forces was subsequently expanded and

exceptionally powerful and active parliament in controlling the deployment of armed forces'.[45] In Italy, Article 78 of the Constitution states that 'Parliament has the authority to declare a state of war and vest the necessary powers into the Government'. As such, it does not contain the explicit provision of a power of authorization of the parliament concerning the military missions that cannot be defined as 'war' in the formal sense. Yet, following the correct interpretation of the constitutional dictate, law no. 145 of 2016 ('Provisions concerning the participation of Italy in international missions') provides, in Article 2, that the government deliberations regarding participation in international missions are transmitted to the Chambers. The latter shall 'promptly discuss and [...] authorize for each year the participation of Italy in international missions, possibly defining commitments for the Government, or deny the authorization'.

Moreover, with the new millennium, a tendency to strengthen parliament's influence on the exercise of military power has emerged, albeit in different forms and sizes, in other European states. Even if it refers to a state that is set to leave the European Union, the example of what happened in the United Kingdom is extremely significant. In the UK, the *Cabinet Manual* of 2011 recognized the existence of a new constitutional convention that imposed the rule, albeit not 'justiciable', of the prior involvement of the House of Commons in the decision-making process concerning the use of military force in conflict situations.[46] As such, a full debate and a substantive vote by the lower House today seem to have become necessary steps – at least on the conventional level – to undertake any significant military action, with the exception of emergency cases.[47] In France, although the decision to intervene

strengthened by the *Bundesverfassungsgericht* itself on the occasion of another important ruling of 7 May 2008 (BVerfGE 121, 135).

45 Wolfgang Wagner, 'The Bundestag as a Champion of Parliamentary Control of Military Missions' (2017) 35 Sicherheit und Frieden 60.

46 The Cabinet Manual. A Guide to Laws, Conventions and Rules on the Operation Of Government, paragraph 5.38.

47 See Philippe Lagassé, 'Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control' (2017) 70 Parliamentary Affairs 280; Gavin Phillipson, *Parliament's Role in the Use of Military Action after the Syria Vote* (presentation at The Constitution Unit, University College London 2014); James Strong, 'Why Parliament Now Decides on

belongs to the executive, the *loi constitutionnelle* no. 2008-724 amended Article 35 of the Constitution, adding three new paragraphs to strengthen the parliament's role in the determinations concerning the employment of the French armed forces abroad. In particular, it introduced a duty of timely information on the part of the government and, above all, the parliament's power to authorize the extension of a military action lasting more than four months. Finally, in 2003, in the Cyprian presidential system a veto power of parliament concerning the deployment of the armed forces abroad was introduced.

It is not possible to describe here the different constitutional and legislative procedures related to the decision to intervene militarily in all 28 Member States of the European Union. However, the abovementioned comparative analysis shows that, in the European context, a constitutional principle – in some cases implicit, in other explicit – for which, outside of emergency cases, the involvement of the national parliament in the decision to use the armed forces in conflict scenarios is necessary, seems to have gradually been established at the level of the legal systems of the Member States.

The few exceptions that exist concern almost exclusively those Member States that do not have a parliamentary form of government, such as France[48] or Poland, which have a semi-presidential system, or Cyprus (where, as said, in 2003 a parliamentary veto power was introduced), which has a presidential system.[49]

In some countries, such as Hungary and other Eastern European states, a distinction between international mandatory operations (including NATO and EU missions) and other operations is made, in order to exempt the former from the requirement of parliamentary approval. This means that parliamentary approval is necessary for 'other operations', while it is not necessary for international mandatory operations, including EU missions. This demonstrates, from a different point of view, the need to involve at least

War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17 British Journal of Politics and International Relations 604.

48 However, as said, the *loi constitutionnelle* no. 2008-724 has given parliament an increased role.

49 See Article 136 of the Polish Constitution, Article 35 of the French Constitution and Article 50 of the Constitution of Cyprus.

the European Parliament in the defence policy-making process, in order to ensure parliamentary control also on these interventions.

It should be noted that some scholars are skeptical towards the hypothesis of a progressive parliamentarisation of war powers in contemporary democracies. However, most of them recognise that state systems always establish, if not a veto power, at least an involvement of parliament in the decision-making processes, for example through the consultation of the whole Parliament or of individual MPs within the defence councils.[50]

In addition to those general principles of European Union law originating from the case-law of the Court of Justice and belonging to the primary sources of law, there are also those principles which are derived from the parallel examination of the national legal systems, and which are therefore borrowed from the 'common constitutional traditions' of the Member States. The Treaty on European Union explicitly mentions them in Article 6, paragraph 3, where it states that

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Even the Treaty on the Functioning of the European Union cites them in Article 340, paragraph 2:

> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Although Article 6 TEU refers only to fundamental rights and Article 340 TFEU has a scope limited to the non-contractual liability of the EU, the Court of Justice has made use in many cases – and also in different matters – of the principles common to the national legal systems, both in the

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[50] Wagner, Peters, Glahn (n 44) 26: 'Taking a closer look at the deployment rules in all countries, it becomes clear that both the complete exclusion of parliament from decision-making over military deployments and full-blown parliamentary veto over all military operations are only two extreme cases; in between there is a wealth of different forms of parliamentary inclusion'.

interpretation of written law and to fill the gaps in the Treaties. The reference to the principles which are generally accepted in the national systems is in fact constant in the jurisprudence of the European Court.

The Court has expressly underlined that, in pursuance of the tasks conferred on it by the Treaty, it can rule

> in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.[51]

It has also affirmed that

> the second paragraph of Article 215 of the Treaty [now Article 340 TFEU] refers, as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.[52]

Furthermore, it is not necessary that these common principles are in force in all Member States. The construction of the 'synthesis' between the various legal systems by the Court and the identification of the solution to be transposed at the supranational level are not subordinated to the number of convergent systems, but to the quality of the solution to be chosen. In other words, the comparative elements deriving from the examination of the national legal systems constitute a source of inspiration within which the Court selects the instruments that are most suitable for the objectives and structure of the European legal order.

In light of the elements referred to, the principle of prior parliamentary authorization of armed interventions – which is today provided for by many European countries – could be considered as a 'common principle for the Member States'. This constitutes a further and independent reason, in addition to those indicated in section IV, for justifying the need for involvement of the EP in the decision of an EU military intervention.

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[51] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* EU:C:1996:79, para 27.

[52] Ibid para 41.

VI. The Prospects of Establishing a Power of Control of the European Parliament over EU Military Missions

At present, two perspectives can be glimpsed for the involvement of the European Parliament in the decision-making processes related to the possible future EU military missions: the first on the basis of existing regulation, the second on the basis of regulation that could be approved in the future.

1. Reform Based on Existing Regulation

According to the current legislation, the power of control of the European Parliament could already be affirmed by way of interpretation, as shown by the analysis carried out in the previous section. In this regard, we must also consider the possibility of an intervention by the EU Court of Justice, which could affirm this principle with a binding ruling, thus completing the EU law under this specific aspect. Article 275 TFEU does indeed state that the Court of Justice 'shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions'. However, pursuant to paragraph 2 of the same article, 'the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union' and to rule on certain proceedings. In accordance with Article 40 TEU:

> The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Using this competence established by Article 275 TFEU, the Court of Justice could 're-evaluate' the role of the EP and resolve by means of interpretation what – otherwise – would appear to be a serious illogicality of the EU legal system.[53] Something similar happened in Germany, where, as already

[53] The Court of Justice has already had occasion to deal with the EP's role in the external action of the Union, even if with regard to the conclusion of international agreements concerning also the CFSP and not to the specific area of defence and military missions. The EU Court in two cases has partly accepted the European Parliament's claims, annulling two Council's decisions because of the infringement

mentioned, the principle involved was first introduced by the Federal Constitutional Court[54] and then developed by the legislator.[55]

Regardless of the possible intervention by the Court, institutional practice can always compensate for the lack of parliament's 'constitutional war powers', as demonstrated by the constitutional tradition of several Member States. Even in these contexts, constitutional law often does not provide an exhaustive regulation of parliamentary powers of war. Firstly, this is because constitutional texts have not been updated in this area and therefore are influenced by the now obsolete concept of war in the formal sense. Secondly, it is inevitable and even appropriate that the written constitutions leave much of the regulation of this complex subject to the organic laws implementing the constitutional provisions, parliamentary rules, conventions and application practices. The example of Belgium is significant in this regard. In the silence of the constitution, which deals only with the king's power to declare war,[56] a practice developed that provides for the allocation to the parliament of the power to authorize the government's

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of the information requirement laid down in Article 218(10) TFEU. According to this rule, Parliament must be 'immediately and fully informed at all stages of the procedure' with reference to all international agreements concluded by the European Union, including those within the scope of the CFSP. This obligation 'is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action' (Case C-658/11 *European Parliament v Council* EU:C:2014:2025, para 79). Therefore, '[w]hile, admittedly, the role conferred on the Parliament in relation to the CFSP remains limited, since the Parliament is excluded from the procedure for negotiating and concluding agreements relating exclusively to the CFSP, the fact remains that the Parliament is not deprived of any right of scrutiny in respect of that European Union policy' (Case C-263/14 *European Parliament v Council* EU:C:2016:435, para 69). Indeed 'participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly' (ibid para 70).

54 See the rulings of the *Bundesverfassungsgericht* of 12 July 1994 (BVerfGE 90, 286) and of 7 May 2008 (BVerfGE 121, 135).

55 On 18 March 2005 the German Parliament passed an Act ('Parliamentary Participation Act') requiring in principle prior parliamentary consent for the 'deployment of armed forces abroad' (2005, Bundesgesetzblatt I 775).

56 See Article 167 of Belgian Constitution.

decision to intervene militarily. Indeed, the Belgian practice provides for the instrument of the *resolution parlementaire*. In Italy, as mentioned in section V, a very similar practice was recently codified within a new ordinary law.

Therefore, as already seen in other fields, even in this area the Union's institutional practice could take the cue from the aforementioned trends, which now concern a large part of the Member States' legal systems. The 'contamination' of the multilevel systems, the importance of comparative law in the courts' judgments and the influence of the common constitutional traditions of the Member States suggest that, at least theoretically, such a legal solution could also be pursued within the current institutional framework of the Union.

2. Reform Based on Future Regulation

The principle of the prior parliamentary authorization of the Union's tasks (or at least of an effective involvement of the European Parliament in the relevant decision-making process) could be introduced in the European context also through the inclusion within the TEU of a rule similar to that explicitly laid down in the constitution of some Member States. For example, Article 16 of Chapter 15 of the Swedish Constitution ('Deployment of armed forces') states that:

> The Government may send Swedish armed forces to other countries or otherwise deploy such forces in order to fulfil an international obligation approved by the Riksdag. Swedish armed forces may also be sent to other countries or be deployed if: 1. it is permitted by an act of law setting out the conditions for such action; or 2. the Riksdag permits such action in a special case.[57]

Article 100 of the Constitution of the Netherlands provides that

> 1. The Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include the provision of humanitarian aid in the event of armed conflict.

[57] The Constitution of Sweden <https://bit.ly/2QE6pAR> accessed 31 May 2019.

> 2. The provisions of paragraph 1 shall not apply if compelling reasons exist to prevent the provision of information in advance. In this event, information shall be supplied as soon as possible.[58]

Article 19, paragraph 2, of the Constitution of Denmark states that:

> Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall immediately be submitted to the Folketing. If the Folketing is not in session it shall be convoked immediately.[59]

Furthermore, according to paragraph 3 of Article 19:

> The Folketing shall appoint from among its Members a Foreign Affairs Committee, which the Government shall consult prior to the making of any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by Statute.

Therefore, the theoretical possibilities of establishing – by way of interpretation or through a revision of the Treaties – a power of effective control of the European Parliament on EU military missions exist. However, it is necessary, first of all, to raise awareness that the current TEU rules on the role of the European Parliament in the common defence policy are largely inadequate.

VII. Conclusions

Contemporary democracies must strike a difficult balance between the need for effectiveness and efficiency of military interventions and the demand for full democratic control over the use of force. In the European context, many constitutions explicitly or implicitly find this balance in the allocation to the executive body of the decision-making power to commence a military action on the one hand, and of the power of prior approval of such decision to the parliamentary body on the other. Generally speaking, the possible complete

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58 The Constitution of the Kingdom of the Netherlands <https://bit.ly/2oz6nMU> accessed 31 May 2019.

59 The Constitutional Act of Denmark <http://www.stm.dk/_p_10992.html> accessed 31 May 2019.

exclusion of parliamentary control over the decision-making process related to the commencement of a military action can only be justified as a last resort, in the presence of a serious and immediate threat to national security.

Moving to the supranational level, despite the gradual construction of a European supranational military power lastly increased by PESCO, the EU defence governance does not provide for any adequate form of parliamentary control. The presence of a European Parliament with a direct popular election, representative of European citizens and equipped with fundamental functions within the EU which, nevertheless, cannot intervene with a truly incisive power in the determination of the common security and defence policy, appears to be contradictory.

The lack of involvement of the EP in this area conflicts, first and foremost, with some important EU general principles, such as democracy, institutional balance and subsidiarity, which in turn are linked to other principles like equality, respect for human rights and pluralism. Moreover, it does not take into account the progressive framing, in almost all European countries, of a constitutional principle that requires the prior parliamentary involvement in the decision to participate in a military mission. This could be considered as a 'common principle for the Member States', applicable also to the Union's legal system, being moreover linked to the democratic principle, to the principle of institutional balance and to the principle of mutual sincere cooperation between institutions.

There are important arguments for greater EP involvement. Political decisions aimed at allowing a military action imputable to the European Union have enormous direct impact on the interests of all European citizens. The parliamentary body is the only one that allows the full involvement of all the political forces represented in it, so that the opposition can give its fundamental contribution to the discussion, whatever the majority decides. This guarantees the complexity, depth and transparency of the decision-making processes.

Moreover, although for now there is no certainty about the concrete development prospects of the Union's foreign and defence policy and about future EU military missions, it can reasonably be expected that the enhancement of the EP's role could lead to the rejection of some – or several

– of these missions. For these reasons, establishing a power of control of the European Parliament in the context of common security and defence policy is a necessary step for the evolution of the European Union in a genuinely democratic and federalist sense.

WHICH COURTS MATTER MOST? MEASURING IMPORTANCE IN THE EU PRELIMINARY REFERENCE SYSTEM

Michal Ovádek,* Wessel Wijtvliet† and Monika Glavina‡

In this article we contribute to a recent strand of literature that revisits the role of hierarchically different national courts in the process of European integration. While the received view emphasizes the dominance of lower courts in the preliminary reference procedure, more recent work documents the rise of peak courts as key interlocutors of the Court of Justice of the European Union (CJEU). Our contribution adds a hitherto underexplored variable to the existing research by focusing not only on how many references national courts send to Luxembourg but also what importance the CJEU attributes to each individual case. We find that peak court references are generally treated as more important than questions submitted by non-peak courts. Consequently, peak courts have bolstered their position vis-à-vis the CJEU in the process of legal integration. We base our findings on the most comprehensive preliminary rulings dataset to date (n = 10,609) that includes all cases received and decided by the Court between 1961 up to and including 2018.

Keywords: CJEU, preliminary references, national courts, quantity vs. quality, court formation

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* PhD candidate at KU Leuven Faculty of Law, Centre for Legal Theory and Empirical Jurisprudence, michal.ovadek@kuleuven.be. The authors gratefully acknowledge financial support from European Research Council Grant No. 638154 (EUTHORITY).

† Research fellow at KU Leuven Faculty of Law, Centre for Legal Theory and Empirical Jurisprudence, and Legal Engineer at Loyens & Loeff, the Netherlands, wessel.wijtvliet@kuleuven.be. This article has been written in a personal capacity and does not necessarily reflect the views of Loyens & Loeff or any other natural person or entity. Neither is it intended as, nor does it constitute, legal or tax advice.

‡ Research fellow at KU Leuven Faculty of Law, Centre for Legal Theory and Empirical Jurisprudence, monika.glavina@kuleuven.be.

I. INTRODUCTION

In this article, we grapple with the question of whether the Court of Justice of the European Union (CJEU or the Court) treats cases submitted by courts at different levels of the domestic hierarchy in a systematically different way. In order to answer our question, we propose two opposing hypotheses drawn from the literature on the role of national courts in the preliminary ruling procedure. The hierarchy hypothesis suggests that the CJEU values references from national peak courts the most as a consequence of their standing at the apex of national judiciaries. The divide-and-conquer hypothesis, on the other hand, proposes that the Court prefers to bolster its relationship with lower courts in an effort to circumvent the gatekeeping power of national peak courts.

To test these two opposing hypotheses, we constructed a dataset of 10,609 preliminary references that encompasses all cases received and decided by the CJEU between 1961 and 2018.[1] We classify the importance of references based on whether the Court rendered a decision by means of the Grand Chamber, in a five or three judge chamber with an Advocate General opinion, in a five or three judge chamber without an Advocate General opinion, or by

[1] 1961 marks the year of the first preliminary question ever submitted to the CJEU (*Gerechtshof 's-Gravenhage* Case 13/61 Bosch [1962]). 2018 is the last full year before writing the present article.

a reasoned order. This measure leverages the discretionary power of the Court in deciding how to respond to a reference. The CJEU has over time developed several instruments which enable it to prioritize cases it considers more important than others. For example, the Court can rule on a preliminary reference with an order rather than a judgment if it determines that the question is manifestly inadmissible or already answered in its previous case law. The Court can also decide that a written Advocate General opinion is not necessary. Most importantly, it can assign a case to the Grand Chamber which is typically reserved for cases of the highest importance. This stratification of preliminary references constitutes a major innovation compared to existing quantitative studies on Article 267 TFEU which are liable to create oversimplified images of referral activity.

This article proceeds as follows. Section II surveys key literature on national courts' incentives for participating in the preliminary ruling procedure and situates the mechanism in the broader judicial landscape in Europe. Section III introduces theoretical reasons behind our two hypotheses on why the CJEU may treat cases stemming from different levels of the national judicial hierarchy distinctly. Section IV describes our measurement strategy and introduces the dataset. Section V presents the main analysis and results before concluding in Section VI.

II. National Courts' Participation in the Referral System

Over the course of just a few decades, the CJEU managed to constitutionalize what was initially an international treaty and contribute to creating a veritable European legal order.[2] Commentators attest to the importance of the preliminary ruling procedure in that process when they refer to it as a

[2] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 The American Journal of International Law 1; Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.

'proven and effective motor of integration',[3] 'critical to the CJEU's influence',[4] and 'the jewel in the crown of the CJEU's jurisprudence'.[5]

The quantitative evolution of the CJEU's caseload confirms the learned intuitions of these scholars. The graph in Figure 1 depicts the CJEU's case law for the period 1953-2018 by splitting it up according to the type of procedure. Referrals evidently make up the largest share of the Court's caseload.[6] Its share has, moreover, increased throughout the years, leaving infringement procedures and annulments lagging behind, in particular in the last decade. The attention devoted to the preliminary ruling procedure by legal scholars and political scientists therefore has substantial empirical justification.[7]

3 Catherine Barnard and Eleanor Sharpston, 'The Changing Face of Article 177 References'(1997) 34 Common Market Law Review 1113, 1169.

4 Clifford J Carrubba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 International Organization 399, 399.

5 Paul Craig, *EU Administrative Law* (3rd ed, University Press 2018) 828.

6 The data have been collected in the context of the EUTHORITY project, see https://euthority.eu/data.

7 Nonetheless, we should not lose sight of the fact that national courts across the EU deal with millions of cases each year. In only a few of these cases do courts feel inclined to ask advice from Luxembourg. In that respect, preliminary references are an extremely rare event.

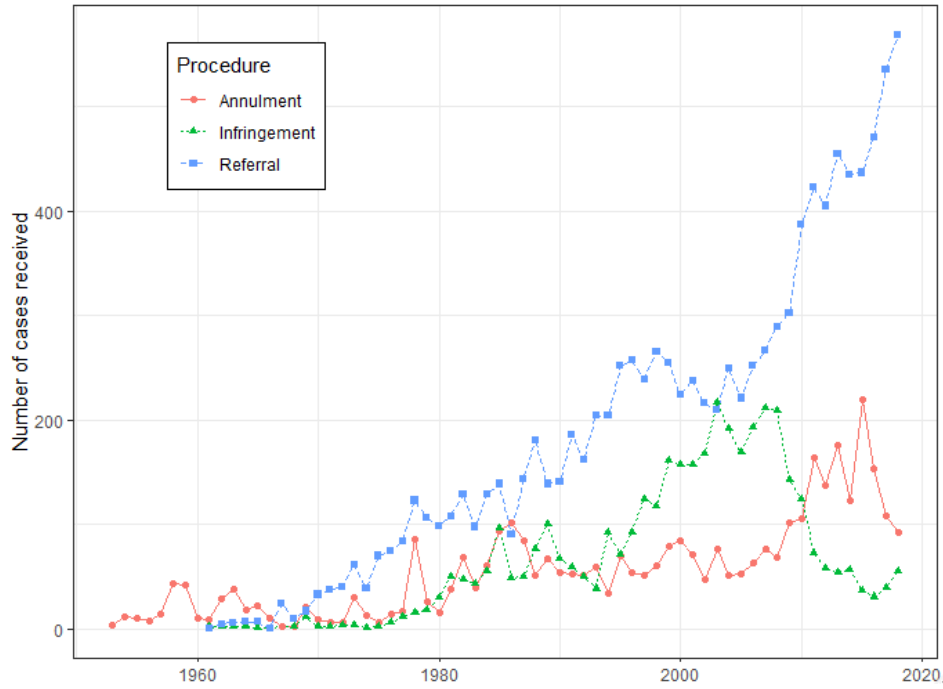

Figure 1: Number of cases received by the CJEU according to the type of procedure, 1953-2018

When the CJEU ruled on its first preliminary reference in 1963, however, few expected that the mechanism would become indispensable for the legal, political and economic integration of Europe.[8] After all, the mechanism has an in-built dependence on the participation of other actors, notably private litigants and national courts.[9] The necessary reliance on other actors has both advantages and disadvantages for the CJEU. The advantages of jurisprudential development through preliminary rulings for the Court are obvious. By shifting focus from participation of Member States' governments to subnational actors such as litigants, lawyers and courts, the Court decreases its reliance on the capricious willingness of Member States to use and implement EU law.[10] The immediate interests of litigants and lawyers

8 Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 International Journal of Constitutional Law 136, 146.

9 Stein (n 2).

10 Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41, 58.

who operate across borders align more strongly with those of the Court.[11] Interaction with these actors has strategic value for the CJEU.

Even though cooperation is far from an unequivocal success story,[12] participation by national courts has formed a crucial element in the reference procedure and, as a result, has helped cement the EU legal order. Weiler even considers national courts the 'most consequential interlocutors' of the CJEU.[13] Their participation, however, is less self-evident than the willingness of litigators to engage with the Court. Accepting doctrines such as supremacy and judicial review bring about structural changes to a national judicial organization that have, over time, become deeply entrenched in their respective legal systems.[14] To take the example of the UK, the introduction of EU law fundamentally altered the judicial hierarchy and its relationship with other branches of government.[15]

Early work in the 1990s that tried to make sense of national court participation emphasized the role of lower courts in the preliminary reference procedure. According to Weiler and Alter, it was the desire of lower court judges to empower themselves vis-à-vis other branches of the government[16] or vis-à-vis higher courts in the national judicial hierarchy[17] that

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11 Alec Stone Sweet and Thomas L Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95'(1998) 5 Journal of European Public Policy 66; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Arthur Dyevre and Nicolas Lampach, 'The Origins of Regional Integration: Untangling the Effect of Trade on Judicial Cooperation'(2018) 56 International Review of Law and Economics 122.

12 Lisa J Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002).

13 Joseph HH Weiler, 'A Quiet Revolution: "The European Court of Justice and Its Interlocutors"' (1994) 26 Comparative Political Studies 510, 518.

14 Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 29.

15 Damian Chalmers, 'The Positioning of EU Judicial Politics within the United Kingdom', West European Politics 23, no. 4 (October 2000) 173.

16 Weiler (n 13).

17 Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne Marie Slaughter, Alec Stone Sweet, Joseph Weiler (eds), *The European courts and national courts - Doctrine and Jurisprudence* (Hart Publishing 1998).

drove the number of referrals across the EU. In doing so, lower national courts – so the reasoning goes – contributed greatly to the legal, political and economic integration of Europe.

In the same decade, Stone Sweet and Brunell took issue with the suggested centrality of lower courts by pointing out that over a longer period of time appellate courts referred much more prominently. In contrast to lower courts, these judicial bodies play a different role in domestic litigation that involves more legal interpretation and conflicts of law. Accordingly, it should not come as a surprise that appellate courts are an important interlocutor of the CJEU.[18] Contemporary scholarship stresses the importance of peak courts as well. Research of Dyevre and co-authors indicates that lower courts may have submitted many references in the early years of integration but that peak courts became numerically more active by the turn of the century.[19] As recent work of Pavone and Kelemen shows, peak courts started slowly but managed to reassert their position in their respective legal systems by taking the lead in the development and use of EU law.[20] It is hard to pinpoint exactly what share of non-peak courts use Article 267 TFEU because we miss longitudinal data on the number of courts in Member States. Nevertheless, it is safe to assume that the number of non-peak courts in a country is much larger than the number of peak courts, which provides us with a relevant intuition.

The comparatively decreasing number of non-peak court judges in the reference practice suggests that, proportionally speaking, judges in the highest echelons of national legal systems have become the most important CJEU interlocutor while non-peak courts have mostly played out their role in the preliminary ruling proceedings. Such reasoning, however, is based solely on a quantitative analysis in which each observation of a reference is treated equally, creating a narrative that solely depends on the supply of cases

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18 Stone Sweet and Brunell (n 11) 90.

19 Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' [2019] Journal of European Public Policy 1 (published online 16 Jun 2019).

20 Tommaso Pavone and R Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' [2019] European Law Journal 1.

by national courts. Hence, the approach fails to account for the possibility that the CJEU, despite the growing involvement of peak courts, treats references coming from non-peak courts in a qualitatively different way.[21]

The bare fact that peak courts are more active in the preliminary reference procedure provides little insight into the way in which the CJEU deals with cases it receives. In order to shed light on that side of the equation, we construct two hypotheses derived from a theoretical investigation of how the CJEU treats cases stemming from either peak or non-peak courts. The hierarchy hypothesis stresses that the Court attaches greater importance to cases coming from peak courts. The divide-and-conquer hypothesis, inversely, lays out a rationale for why the CJEU would actually bequeath non-peak court cases with a treatment that positively emphasizes their importance. Both hypotheses stand in contrast to the null-hypothesis that the Court does not treat peak courts and non-peak courts differently. We discuss the two theoretical expectations in the next section.

III. Theoretical Expectations Concerning Case Importance

For a number of reasons, the CJEU may prefer assigning a different measure of importance to either peak or non-peak court references. Before we discuss these, we introduce a potential strategic mechanism that may help explain the behaviour of the CJEU regardless of the hypothesis at stake. That being said, we acknowledge that the two hypotheses presented below do not exhaust the range of possible explanations of CJEU decision-making behaviour. Potential differences in treatment may also depend on subject area or legal or policy pertinence of cases. Nevertheless, we focus on those theoretical explanations which were most prominently discussed in the literature on judicial behaviour and preliminary references, namely the role of strategic decision-making and judicial hierarchy.

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[21] By quality we refer to the element of importance of preliminary reference, not to the "legal quality" of the question submitted. Although such quality may affect CJEU reception, we do not see the theoretical grounds for its potential influence. Also due to measurement constraints, "legal quality" for now remains beyond the scope of existing research on Article 267 TFEU.

1. Importance as a Strategic Device

A central theoretical assumption in the empirical literature on judicial behaviour proposes that judges choose specific goals and subsequently strategize with those goals in mind. Depending on the context and situation, judges can have widely divergent goals. Consequently, researchers modelling judicial behaviour have to decide for themselves what goal-oriented behaviour drives judicial decision-making under specific circumstances.[22] These may include furthering the workings of the democratic legal system by making sense of the incoherent system of rules created by the legislature,[23] creating good law and good policy marked by legal accuracy and legal clarity,[24] or solely creating good law.[25] Most commonly, though, application of this so-called strategic model assumes that judges pursue legal policy goals, which loosely translates to decision-making based on an ideological attitude.[26] Although the centrality of policy preferences has long dominated the American literature on judicial decision-making, this somewhat myopic emphasis has come under increasing attack in favour of including a wider set of potential judicial motivations.[27]

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[22] Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998) 11–12.

[23] John Ferejohn and Barry Weingast, 'Limitation of Statutes: Strategic Statutory Interpretation'(1991) 80 Georgetown Law Journal 565, 571, 574.

[24] Ferejohn and Weingast (n 23); Lawrence Baum, The Puzzle of Judicial Behavior (University of Michigan Press 1997) 21, 25.

[25] Pablo T Spiller and Emerson H Tiller, 'Invitations to Override: Congressional Reversals of Supreme Court Decisions' (1996) 16 International Review of Law and Economics 503.

[26] Lee Epstein and Jack Knight, The Choices Justices Make (CQ Press 1998) 10. Important works include Jeffrey Allan Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Lee Epstein, William M Landes and Richard A Posner, *The Behavior of Federal Judges. A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013).

[27] Charles M Cameron and Lewis A Kornhauser, 'Rational Choice Attitudinalism?', European Journal of Law and Economics (September 7 2015) 1–20. Even proponents of the ideological analysis of judicial behaviour plead guilty to this charge. As Epstein and Knight apologetically explain: 'theoretically, yes, strategic and, more generally, rational choice accounts of judicial behavior can accommodate different or even multiple motivations. But in practice we adopted the conventional (political science) party line and argued that maximizing policy is

Following the development of this empirical literature, we entertain the possibility that CJEU judges use court formation and procedural instruments as strategic devices, though not ones informed by ideological preferences. Court formation is an inherent element of a resource-constrained environment like that of the CJEU, which necessitates treating references differently. The Court may partly use its discretion for strategic reasons to bolster its relationship with either national peak courts or non-peak courts. It can do so by rewarding a reference with a review by a court formation that signals the importance of the legal issue at stake and conveys a sign of respect. Conversely, the Court can signal its lack of interest by deciding a case by a reasoned order. The CJEU may want to act in this fashion to induce specific interlocutors into participation (and vice versa) in a project of the Court's choosing. The mechanism itself is merely a strategic way of attaining a goal and does not in and of itself specify the substance of that project. As we will see, we can propose radically different answers to that substantive question under each hypothesis.

2. The Hierarchy Hypothesis: Attaching Greater Importance to Peak Courts' References

Our first hypothesis expects that peak court references are more likely to receive case review associated with a higher importance score. We have several theoretical arguments to support this hypothesis, all of which revolve around the position of these courts at the top of the judicial hierarchy.

First, the CJEU may have strategic reasons to bolster its relationship with national peak courts because of their position atop the judicial hierarchy. As highest courts, these courts generally enjoy the most legal authority within their respective national systems. By attaching its jurisprudential developments to cases from courts that hold most legal sway over other,

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of paramount, even exclusive, concern. We were wrong. Data and research developed by scholars (mostly from other disciplines) have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges. The evidence is now so strong that it poses a serious challenge to the extremely (un)realist(ic) conception of judicial behavior that has dominated the study of law and legal institutions for generations'. Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences', Annual Review of Political Science 16, no. 1 (May 10, 2013) 12–13.

lower national courts, the CJEU can increase the visibility of its own case law, lend greater authority to it and positively nudge the likelihood of its acceptance. With this goal in mind, the Court can reinforce its partnership with peak courts by rewarding their references with case handling expressive of high importance.

Second, possibly higher importance score for peak court references may also in part be affected by case difficulty. These courts generally deal with the most indeterminate cases. If such cases involve the application of EU law, the reasoning goes, then the ambiguity aspect pertaining to EU law logically also needs review by the highest type of EU court. Elements of the team model of judicial behaviour and the case selection hypothesis underwrite this intuition.

The team model presupposes that all judges in the national judicial hierarchy share the same objective, which is maximizing the number of "correct" judicial outcomes.[28] In achieving this objective, judicial hierarchy has several advantages over a flat system of laterally related courts. First, it allows for the allocation of workload and resources across different tiers of courts to achieve an efficient division of labour.[29] Second, hierarchy creates an impetus for specialisation. For instance, trial courts have at their disposal little time and resources to spend on individual cases. Hence, their range of duties involve mostly fact-finding and swift dispute resolution.[30] Higher courts, by contrast, enjoy a lighter caseload while having access to more resources. If peak courts have more resources and fewer cases than non-peak courts, then they face fewer constrains to participate in the preliminary reference

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[28] Charles M Cameron and Lewis A Kornhauser, 'Appeals Mechanism, Litigant Selection, and the Structure of Judicial Hierarchies' in James R Rogers, Roy B Flemming and Jon R Bond (eds), *Institutional Games and the U.S. Supreme Court* (University of Virginia Press 2006) 178.

[29] Lewis A Kornhauser, 'Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System Symposium on Positive Political Theory and Law' (1995-1994) 68 Southern California Law Review 1605–30.

[30] Francisco Ramos Romeu, 'Law and Politics in the Application of EC Law: Spanish Courts and the CJEU 1986-2000' (2006) Common Market Law Review 43 395–421.

procedure.[31] Hence, they shoul be more likely to refer cases the CJEU deems important.

The increase in both time and resources also create fertile ground for a focus on law-finding and law-creation.[32] The preoccupation with legal development by peak courts generates a system of precedence and doctrinal categories that help guide lower courts in conflict resolution.[33] Likewise, preliminary questions only address points of law, which relates more closely to the creative aspect of judging present in peak court decision-making.[34] It therefore stands to reason that peak courts are more likely to handle law-making cases with an EU dimension that require a CJEU court formation expressive of exactly this legal aspect.

That peak courts focus strongly on the creative aspect of decision-making may not only depend on resource management but also on the type of cases that most likely make its way to their dockets. The Priest-Klein effect is a selection hypothesis that suggest that the decision to litigate depends on rational expectations of parties about the likely outcome of a case. Such prediction is possible because legal rules are generally clear.[35] Especially cases

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31 Dyevre, Glavina and Atanasova (n 19) 9.

32 Lewis A Kornhauser, 'Judicial Organization & Administration' in Boudewijn Bouckaert and Gerrit de Geest (eds) *Encyclopedia of Law and Economics* (Edward Elgar, 2000) 27–43; Romeu (n 30).

33 Kornhauser, 'Adjudication by a Resource-Constrained Team' (n 29); Francisco Ramos Romeu, 'Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior' (2002) 2 Global Jurist Frontiers 1; Romeu (n 30); Arthur Dyevre, Angelina Atanasova and Monika Glavina (n 19).

34 Dyevre, Glavina and Atanasova (n 19) 8.

35 This insight has a long pedigree in legal scholarship. Even American legal realists were acutely aware of it. As Max Radin explained, '"the law" as a generalization of legal judgments is always incomplete since it is always concerned with a specific question not yet decided, as well as thousands already decided. The prognosis of that decision involves an estimate in advance of the factors that will determine the future judgment. In spite of the possible variety and number of these factors, the advance estimate is so highly probable in a number of cases that the statement of the law can be made with a fair degree of certainty and precision, and no decision will be required to test its accuracy since most men will regard the decision as a foregone conclusion. Decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact

with a win-rate of 50 per cent for both plaintiff and appellant make it attractive to try one's luck in court. Divergent prior estimates merely lead to settlement outside of court, or so the hypothesis suggests. The clarity of the legal solution merely dissuades litigants from going to court.[36]

In many cases, first instance court judges can reach a decision with a fair degree of certainty and precision. Plenty of litigants accept these decisions as final. Unsuccessful litigants who appeal court rulings generally have a clear understanding of the facts of the case and wield the ability to spot legal inaccuracies in decisions of trial judges.[37] These are likely 'marginal cases, in which prognosis is difficult and uncertain'.[38] Such difficulty and uncertainty is equally present when the legal rules at stake are indeterminate. Marginal cases refer more colloquially to 'hard cases'. These are the subset of legal conflicts that manage to capture the imagination and attention of legal scholarship.[39] Appellate cases are, however, exceedingly rare.[40] Therefore, the number of cases that make their way through the judicial hierarchy declines at each litigation stage while the share of indeterminate cases increases.[41] Hence, the dockets of peak courts tend to be overrepresented with difficult and indeterminate cases. These require judgement under incomplete legal guidance and necessarily contain a creative element, whether the legal norms at stake are national or European.

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that makes the entire body of legal judgments seem less stable than it really is'. Max Radin, 'In Defense of an Unsystematic Science of Law' (1942) 51 The Yale Law Journal 1271.

36 Richard L Revesz, 'A Defense of Empirical Legal Scholarship'(2002) 69 University of Chicago Law Review 169, 172–173.

37 Jonathan P Kastellec, 'The Judicial Hierarchy: A Review Essay' [2016] Oxford Research Encyclopedia of Politics 6.

38 Radin (n 35) 1271.

39 Max Radin, 'Scientific Method and the Law' (1931) 19 California Law Review 164, 170.

40 Frederick Schauer, 'Judging in a Corner of the Law' (1987) 61 Southern California Law Review 1717.

41 Arthur Dyevre, 'Outline of a Legal Realistic Approach to Legal Integration' in Ulla B Neergaard and Ruth Nielsen (eds), *European legal method: towards a new legal realism* (DJØF Publishing 2013) 59.

As the team model suggests, national peak courts have more time and resources to draft a preliminary question than non-peak courts. Moreover, they are more often faced with cases that address difficult and indeterminate legal norms, which the case selection hypothesis merely confirms. Statistically speaking, such conflicts are more likely to involve questions pertinent to the interpretation of EU law as well. Indeed, the preliminary ruling procedure itself inherently focuses on those situations in which the law is unclear and requires uniform interpretation across the legal systems of the Member States by the CJEU. Such questions most likely crop up in cases that make their way to peak courts, which, in comparison to lower courts, already have more time and resources available to think carefully about law making.[42]

3. The Divide-and-Conquer Hypothesis: Attaching Greater Importance to Lower Courts' References

National courts have been characterized as 'the motors of European integration'.[43] As Alter explains, these courts have many incentives to participate in the preliminary ruling procedure. Her inter-court competition hypothesis likens courts to bureaucratic organizations that pursue their own interests. Legal integration, however, incentivizes peak courts and non-peak courts differently. For example, the EU provides lower courts with an additional argumentative repository that allows them to circumvent peak court jurisprudence. By incorporating an EU dimension into their decision-making, these courts can shield themselves from possible legal criticism when they disregard national jurisprudence. However, the reference to EU law is not necessarily a constant. Lower courts may just as easily alternate it with acquiescence in national peak court case law if the outcome aligns more closely with their preferences.[44]

This side of Alter's theory mostly focuses on the choice architecture of lower court decision-making and cannot explain why the CJEU would like to collaborate with them. Weiler called EU integration a simple narrative of judicial empowerment that gave national courts sufficient incentives to cooperate with the CJEU in a mutually advantageous European endeavour

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42 Dyevre, Glavina and Atanasova (n 19).

43 Alter (n 17); Weiler (n 2).

44 Alter (n 17) 241–246.

that has led political scientists to coin the phrase 'reciprocal empowerment'.[45] The preliminary reference procedure gives national courts and especially those in the lowest echelons the power of judicial review. As a potentially intrusive form of judicial decision-making, this particular power was, for a long time, the sole prerogative of a handful of peak courts. EU law and its supremacy vis-à-vis national legislation thus distributed the possibility of judicial policy-making throughout the judicial hierarchy. The increase in power proved difficult to resist. On an institutional level, the power of the judicial branch vis-à-vis other branches of government changed as well, adding to the overall empowerment.[46]

The advantages for domestic non-peak courts seem clear. The collaborative element present in the reference mechanism provides national courts as well as the CJEU valuable shelter from potential political backlash. Non-peak courts can refer to the existence of a legal duty to refer questions relevant to the uniform interpretation and validity of EU law to the Court. Judges in Luxemburg for their part never directly resolve the case itself but merely render a ruling on the interpretation of the relevant European law. Peak courts are less likely to participate enthusiastically in this dynamic. The advent of EU law namely poses a threat to their hierarchical position as ultimate interpreters of legal norms in the national system. In order for the CJEU to achieve its goal of increasing its power and the acceptance of its case law, it may thus favour circumventing the control of peak courts and remain working closely with lower courts.[47] The aligned interests between both actors may explain why the CJEU prefers collaborating with domestic non-peak courts.

Gaining the power of judicial review may seem sufficiently incentivizing for lower courts to participate in the preliminary ruling procedure without worrying too much about the importance the Court assigns to a case. However, the 1990s saw the increasing *de jure* acceptance of European integration.[48] As Alter herself expected, lower court reference activity may

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45 Burley and Mattli (n 10) 64.

46 Weiler (n 2) 2426.

47 Alter (n 17) 241–246.

48 David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 1998) 388.

eventually lead peak courts to accept the supremacy of EU law and the corresponding guidance of the CJEU. As more and more non-peak courts accept CJEU supremacy and as the number of legal subfields that EU law touches accrues, continued obstruction against the expansion of EU law by peak courts becomes increasingly futile, she predicts.[49] As the work of Pavone and Kelemen shows, this theoretical possibility seems to pass empirical muster.[50] The seemingly inevitable acceptance of supremacy by peak courts has a potential trade-off, however. In accepting the importance of EU law, peak courts have the additional incentive to minimize the number of references by lower courts.[51] If these courts manage to become the main interlocutor of the CJEU in the preliminary reference procedure, then they effectively gain a monopoly on litigant access to the Court. As the main gatekeepers of EU law litigation, peak courts *de facto* increase their power vis-à-vis the judges in Luxembourg.

There are additional reasons for the CJEU to resist peak courts from monopolizing participation in the preliminary ruling procedure. First, the existence of a monopoly could be a reason for EU sceptical Member State governments to pack peak courts with judges not so keen on EU integration. Second, many litigants never make it to the top of the judicial hierarchy, whether this is due to financial constraints or lack of procedural stamina.[52] To prevent this from happening, the CJEU may want to keep non-peak courts in the reference game by means of positive reinforcement through a reward system based on case disposition. It signals to lower courts that despite the centrality of peak courts they too are of fundamental importance for European legal integration.

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49 Alter (n 17) 343.

50 Pavone and Kelemen (n 20).

51 Pavone has highlighted the constraining effect of strong hierarchy on EU law use by lower courts in a case study of the French administrative law system. See Tomasso Pavone, 'The Ghostwriters: Lawyers and the Politics Behind the Judicial Construction of Europe' (Princeton University Forthcoming).

52 Pavone and Kelemen (n 20) 21; Lisa Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries' in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) 109.

IV. DATA AND METHODOLOGY

For a variety of theoretical reasons, we now have two different expectations regarding the way in which the CJEU attributes importance to preliminary references coming from peak courts or non-peak courts. We therefore turn our attention to how we measure case law importance and which data we use for this purpose.

1. Measuring Importance

Attributing a "true" measure of importance to preliminary references is difficult. We therefore simplify matters and follow the observable behaviour of the CJEU itself. Court formation and case handling options are relevant in this respect. Five and three judge chambers are the standard by which the CJEU operates.[53] The Court deviates from this standard if the difficulty, importance or particular circumstances require it to assign the case to the Grand Chamber that usually consists of fifteen or thirteen judges.[54] Regardless of the material circumstances, Member States may make a request to the similar effect. The Court may decide to refer a case it deems of exceptional importance to the Full Court, which consists of at least 17 judges.[55] Additionally, the Statute of the Court of Justice state that the CJEU can decide to conclude a case without a submission from the Advocate General, 'where it considers that the case raises no new point of law'.[56] All these deviations from the standard indicate that these are relatively more important cases than three and five judge-chamber cases from the point of view of the Court.

The Rules of Procedure of the Court are rather vague as far as the conditions for the assignment of cases to the Grand Chamber are concerned. Nevertheless, most authors seem to agree that case assignment relates to case importance. To begin with, a division of labour between CJEU judges makes

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53 Statute of the Court of Justice of the European Union (1-5-2019) 1, Art 16(1).

54 Ibid Art 16(2).

55 Ibid Art 16(5), Art 17(4).

56 Ibid Art 20(5).

it exceedingly efficient to dispose of the day-to-day business of the Court.[57] Considering that the Court consists of 28 judges, one from every EU Member State, it stands to reason that small chambers adjudicate the bulk of cases and leave only the most contentious issues to the Grand Chamber. Although Bobek expresses his scepticism about the degree to which court formation indicates importance, he does suggest that the Grand Chamber consists of 'more senior members of the Court'.[58] In a similar vein, Aleksander Kornezov interprets the involvement of the Grand Chamber as a measure of legal salience since it decides the more difficult and important cases.[59] This sentiment is more widely shared as an inclination that cases lacking simple resolve rarely if ever end up in smaller chambers.[60] In the same vein, both Kornezov[61] and Galetta[62] consider a request for an opinion of an Advocate General as a proxy for case importance. Signals to the contrary are possible as well. A refusal by the Court to answer a question and, instead, produce a reasoned order indicates a lack of importance. Such cases are either manifestly inadmissible, fall outside the scope of EU law or their resolution can be readily deduced from the existing body of case law.[63] As such, scholars

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57 Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 Common Market Law Review 1611, 1637.

58 Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1157841 20.

59 Alexander Kornezov, 'When David Teaches EU Law to Goliath: A Generational Upheaval in the Making' in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Bloomsbury Publishing, 2015) 247–248.

60 Krzysztof Lasinski-Sulecki and Wojclech Morawski, 'Late Publication of EC Law in Languages of New Member States and Its Effects: Obligations on Individuals Following the Court's Judgment in Skoma-Lux'(2008) 45 Common Market Law Review 705, 714.

61 Kornezov (n 59) 247.

62 Diana-Urania Galetta, 'European Court of Justice and preliminary reference procedure today: national judges, please behave!' in Ulrich Becker and Jürgen Schwarze (eds), *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag* (1. Aufl, Nomos 2014).

63 The Court of Justice of the EU, Consolidated Version of the Rules of Procedure of the Court of Justice (2012) Art 99.

generally consider such cases of little importance to the jurisprudence of the CJEU.[64]

Of course, procedural choices relating to case disposition are not necessarily a perfect proxy. The Court may decide to send a case to a smaller chamber not because of a lack of importance but merely for reasons of resource management.[65] Although possible, its influence should be fairly limited when analysing the entire jurisprudence of the Court. Its implication would merely be that in a perfect world a subset of cases with a definitive quality would always be sent to the Grand Chamber. Since resources are limited, however, the cut-off point merely fluctuates from year to year but still provides relevant information. Importance is a matter of degree and its determination happens in relations to other cases, not to an absolute standard that dictates forum choice. The advantage of adopting the case disposition choice by the Court is that it duplicates this relative order of importance. Regardless of possible fluctuations throughout the years, we may safely assume that the average case decided by the Grand Chamber is of relatively higher importance than the garden-variety case handled by a three-judge chamber.

We understand procedural decisions of the CJEU about case handling as indicative of how much the Court values the reference in legal terms. We thus explicitly measure case importance *from the perspective of the CJEU*. Although the importance attached to a case by the referring national court might correlate with our indicator, we restrict ourselves to measuring case importance as a function of CJEU decisions. Based on these assumptions, we develop a new ordinal measure for the importance of a preliminary reference consisting of four categories. In order of importance, we attribute different scores to decisions rendered by 1) the Grand Chamber; 2) three or five judge chambers that include an Advocate General opinion; 3) three or five judge chambers; and 4) reasoned orders. The Grand Chamber traditionally rules on the most important and difficult questions. Because Full Court decisions are extremely rare, we merge them with Grand Chamber cases. Advocate General opinions are mandatory in the former category of cases. In other

64 Michal Bobek, 'Talking Now? Preliminary Rulings in and from the New Member States' (2014) 21 Maastricht Journal of European and Comparative Law 782, 786; Kornezov (n 59) 245–246; Galetta (n 62) 3.

65 Bobek (n 64) 786.

court formations they merely give their opinion if the case raises new questions of law. We therefore use the Advocate General opinion as a criterion to distinguish between the perceived importance of cases handled by smaller chambers.

Finally, we entertain the possibility that importance could also be measured in another manner. It is intuitively possible that the CJEU signals importance by resolving cases from some courts faster than from others. In relation to our main hypothesis this would mean that cases referred by peak courts are resolved quicker than cases coming from non-peak courts. Nonetheless, because the thrust of existing scholarship emphasizes case disposition rather than celerity as a signal of case importance, our interest in the latter is more exploratory.

2. Data

To test the two hypotheses discussed in the previous sections, we created a preliminary ruling dataset that includes judgments, orders and Advocate General opinions delivered between 1963 up to and including 2018. For each of the 10 609 observations in the dataset we code referral year, case duration, referring court, country of referring court, type of decision (judgment or order), joined case or not, Advocate General involvement and Grand Chamber involvement. Table 1 summarizes the variables in our dataset.

Variable	**Type**	**Explanation**
Year of submission	Continuous	Specifies the year within the range 1961-2018
Case duration	Continuous	Specifies the number of days from reference submission to CJEU ruling
Referring court	Nominal	Specifies the name of the referring court
Referring peak court	Binary	Specifies whether the referring court is a peak or non-peak court

Country of origin	Nominal	Specifies the Member State of the referring court
Type of CJEU decision	Binary	Specifies whether the reference ended in a judgment or an order
Joined case	Binary	Specifies whether the case was joined or not
Advocate General opinion	Binary	Specifies whether the Advocate General wrote an opinion or not
Grand Chamber	Binary	Specifies whether the Grand Chamber decided the case or not

Table 1: Summary of Main Variables in the Dataset

In some instances, the coding of "peak court" raises questions. If a court of appeal, such as the Court of Appeal for England and Wales, occupies a very important place in the judicial hierarchy and its decisions are rarely appealed further, should it really be coded as "non-peak"? We follow a conservative coding scheme according to which only courts whose decisions can virtually never be appealed are coded as "peak" courts. Only courts standing truly at the top of a domestic judicial hierarchy are therefore coded as peak courts (thus only the Supreme Court in the UK). Other coding schemes are thinkable, but all would at some point hit the barrier of imperfect commensurability of different legal systems in Europe. A court of appeal in one country might in practice have a very different role than its counterpart in name in another. Ultimately, the proof of whether different delineations matter for our analysis are in the empirical pudding. Because our approach to peak courts is if anything under-inclusive, the results below can be interpreted as the minimum effect for the hypothesized relationship.[66]

[66] We have tried coding more courts – such as the Court of Appeal (EWCA) and the High Court of Justice (EWHC) – as peak courts and our results were not significantly affected.

V. Analysis and Results

We begin by presenting an overview of referral trends in the EU, conditional on our variables of interest. Figure 2 shows the proportion of peak court references in the total number of questions submitted in each Member State. Overall, there is considerable variation between countries, which may reflect differences in the hierarchization of Member States' judiciaries. The stark differences between peak and non-peak court reference activity in the UK exemplifies this aspect of the preliminary ruling procedure best. Formally, only the UK Supreme Court and the Scottish Court of Session qualify as peak courts. These two courts are not frequent users of the referral mechanism. The High Court of Justice and Court of Appeal for England and Wales, on the other hand, are not peak courts but nevertheless occupy an important position in the judicial hierarchy and refer many questions to Luxembourg. Perhaps more than in any other country, these two courts approximate closely the role of apex courts, which might go some way towards explaining the particularly lopsided division of total UK referrals.

Trends in most countries evolve over time, sometimes reverting the distribution of referral activity between peak and non-peak courts. In France, non-peak courts engaged with the CJEU first before peak courts increasingly asserted themselves as the primary interlocutor in preliminary ruling proceedings. Germany is by far the most active country in the procedure with a total of 2,488 cases sent to Luxembourg over a period of 60 years. Its share of references by peak and non-peak courts is also remarkably stable.

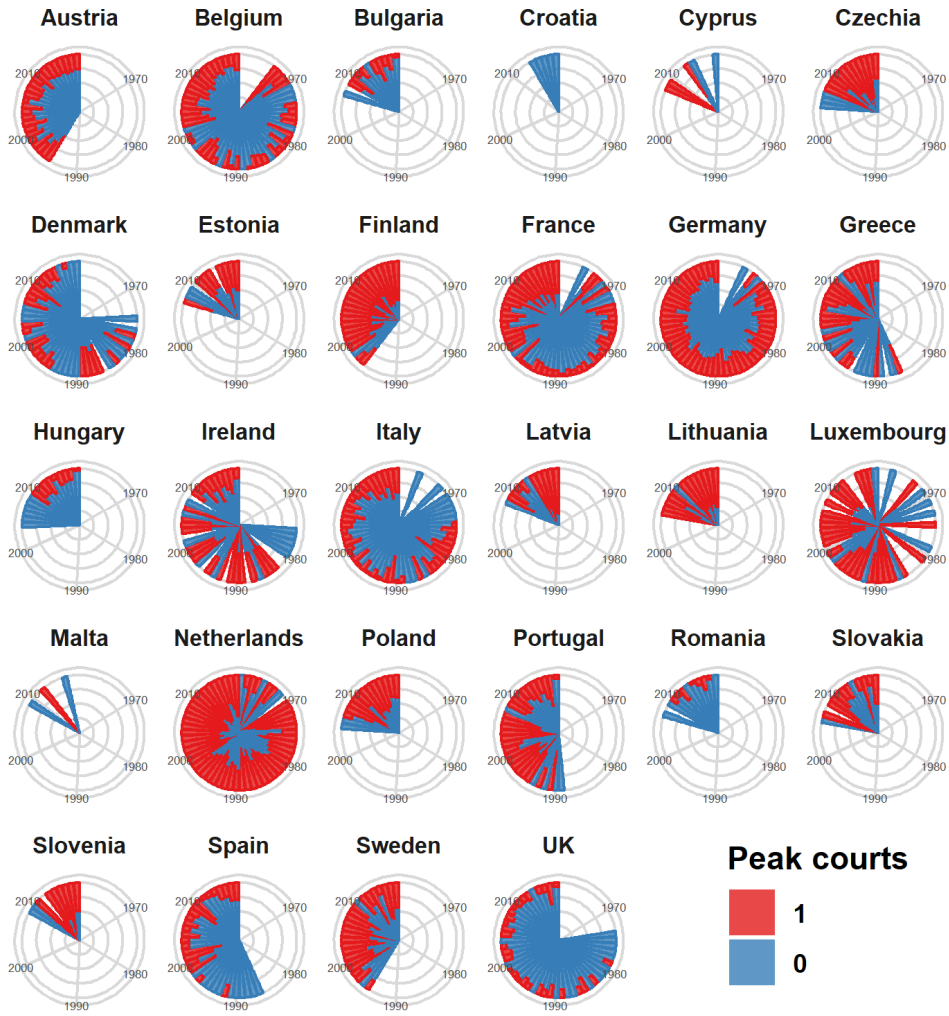

Figure 2: Proportion of peak court references by country (1 = yes, it is a peak court; 0 = no, it is not a peak court). Passage of time is captured clockwise in each circle.

Figure 3 shows the total number of cases submitted by peak and non-peak national courts to the CJEU during the entire history of European integration. We can observe that non-peak courts – that is first instance and appellate courts – have always referred more questions than peak courts.[67]

[67] At the time of writing we only had complete data for 2017 but a preliminary look at 2018 data revealed that the gap in reference activity of peak and non-peak courts has grown.

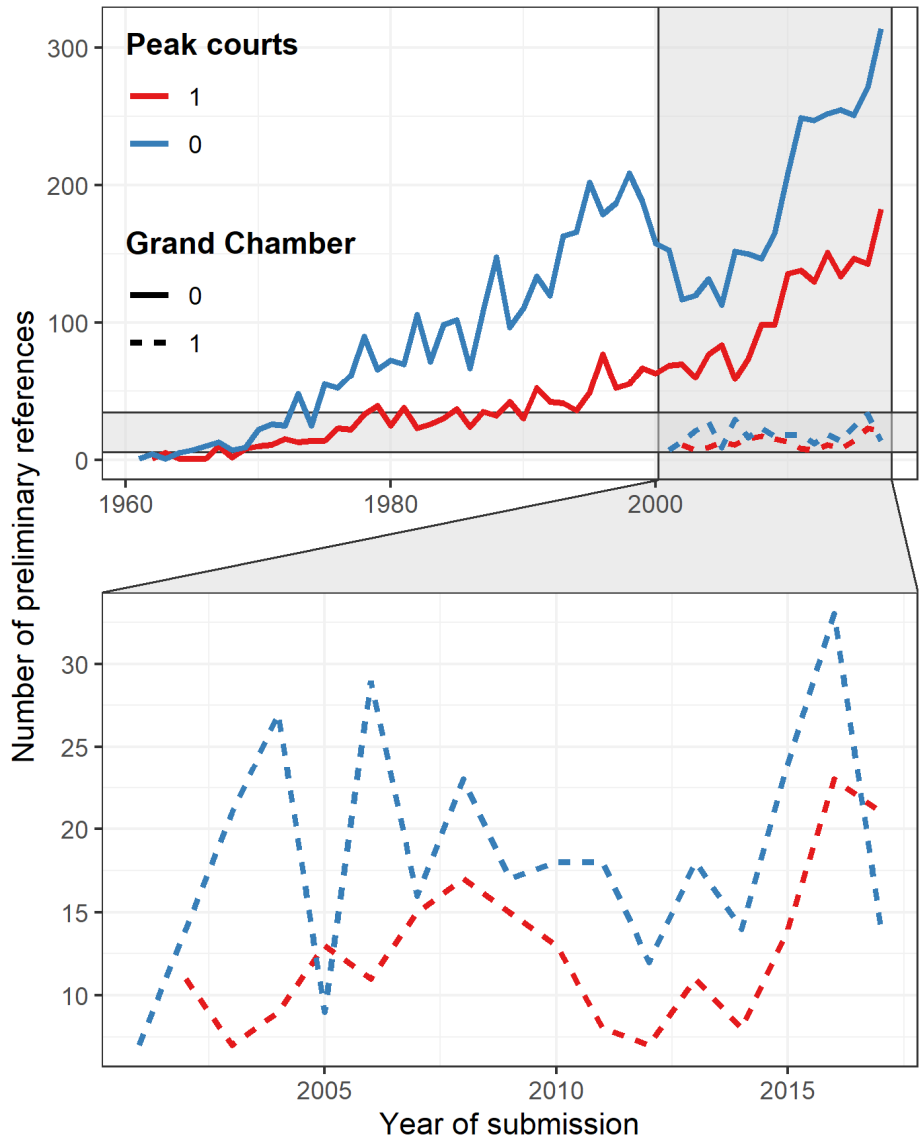

Figure 3. Overall number of preliminary references submitted by (non-)peak courts and those decided by the CJEU's Grand Chamber (1961-2017). Note the drop at the end is due to references submitted but not yet decided by the CJEU.

However, the picture becomes more mixed once we introduce the element of Grand Chamber decision-making. Although the total number of non-peak court referrals decided by the Grand Chamber is higher than that of peak courts, Grand Chamber cases constitute a higher proportion of peak court questions. Peak courts' references go before the Grand Chamber on average

in 10 per cent of their cases, while for non-peak court this proportion is 7.8 per cent. These findings are robust regardless of whether we separate joined cases or not.[68]

In the next step, we expand our analysis to encompass the full measure of case importance as described above. Figure 4 shows the proportion of preliminary references according to our scale, differentiating the patterns of peak courts from non-peak courts. The larger share of Grand Chamber judgments among peak court questions seems part of a broader trend in EU law litigation. In comparison to their counterparts in the lower rungs of the national judicial hierarchy, peak courts are less likely to receive a reasoned order. Additionally, they are more likely to receive Advocate General involvement.

Our main measure of importance relies on variation in procedural disposition of cases and as such increases in its power to differentiate with regard to importance from 2004. Prior to 2004, the Grand Chamber did not exist and the workload of the CJEU was relatively low. Increase in workload, however, forces the CJEU to economize on the amount of attention it pays to individual references. Especially the dramatically falling numbers of cases in which the Advocate General writes an opinion illustrate this effect well; as resources grow scarcer, the relative importance of this instrument increases. Nonetheless, even in earlier periods of European integration we can observe that the lower two levels of our measure (orders and no Advocate General opinion) were applied proportionally more often to references from non-peak courts.

[68] In Figure 3, each case is counted individually regardless of whether it was later joined in a judgment or not. The ratio of peak to non-peak and Grand Chamber to other does not change even if we discount the effect of joined cases.

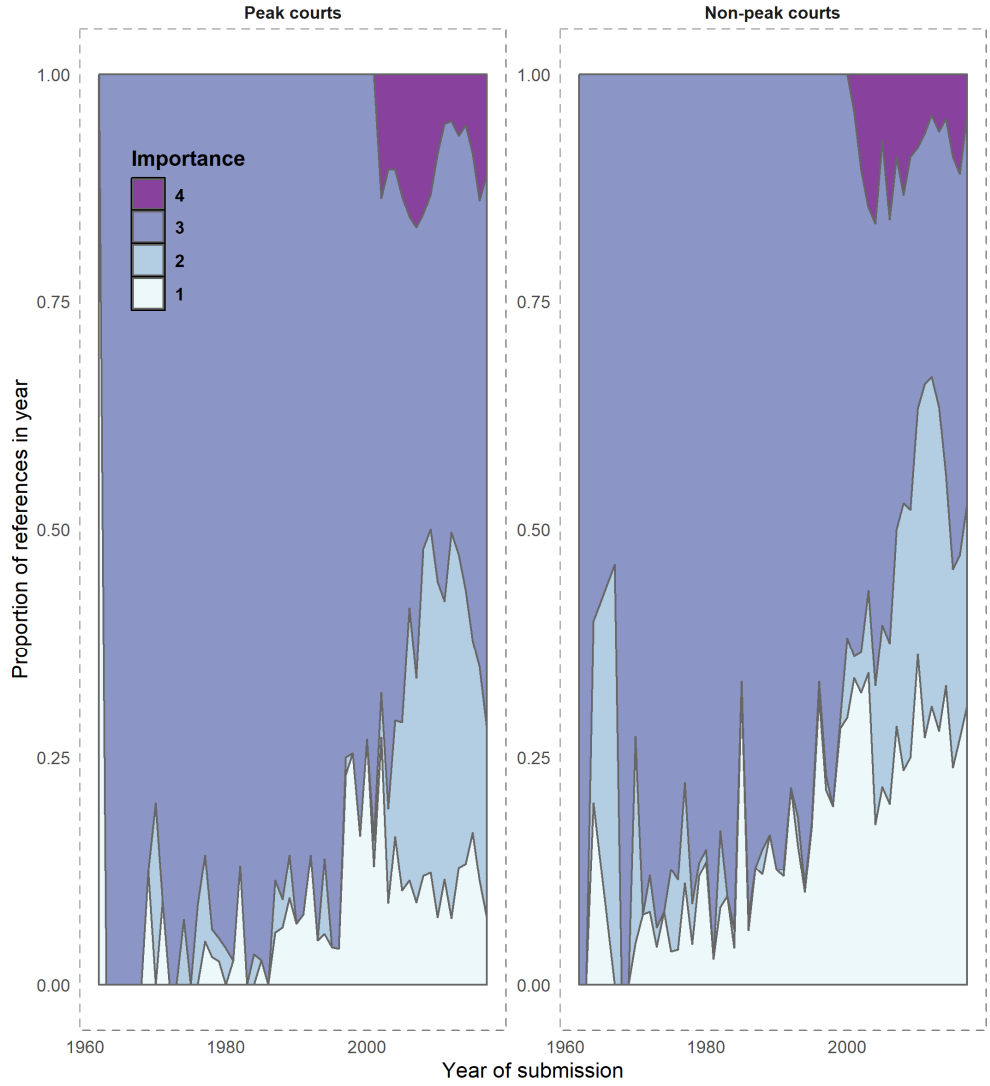

Figure 4: Proportion of preliminary references according to the importance attached to them by the CJEU. 1 = cases decided by an order; 2 = Chamber judgments without AG opinion; 3 = Chamber judgments with AG opinion; 4 = Grand Chamber judgments (includes AG opinion). The proportion is expressed as an interval between 0 and 1, which is the same as 0 per cent and 100 per cent.

Finally, having observed seemingly systematic differences between treatment of peak and non-peak courts,[69] we are interested in knowing whether these

[69] The mean importance on the four-level scale is 2.45 for non-peak courts and 2.67 for peak courts (with unresolved cases dropped).

can be considered statistically significant. If there is in fact no significant difference between the two groups of courts, the results of an ordinal logit regression should indicate that whether a national court is a peak court has no significant impact on the level of importance attributed to a case by the CJEU. As a matter of exploration, we also test whether there is a significant difference in terms of case duration, which would indicate that the CJEU gives priority treatment to peak court references.

	Dependent variable:					
	Importance			Duration		
	Ordered logistic			*OLS*		
	(1)	(2)	(3)	(4)	(5)	(6)
Peak court	0.460***	0.382***	0.508***	-0.929	7.439	2.320
	(0.043)	(0.046)	(0.047)	(5.721)	(5.920)	(5.106)
FE Country	X	✓	✓	X	✓	✓
FE Year	X	X	✓	X	X	✓
Constant				543.278***	628.680***	262.965
				(3.325)	(12.392)	(204.239)
Observations	10,328	10,328	10,328	8,274	8,274	8,274
AIC	21,754	21,191	20,641	114,595	114,271	111,559
Note:				*p<0.1;	**p<0.05;	***p<0.01;

Table 2: Ordered logit model of peak court effect on degree of CJEU importance and ordinary least squares regression estimating the impact of the same on length of proceedings. "FE" stands for fixed effects, "AIC" for Akaike Information Criterion. We include country and year fixed effects in order to isolate the effect of the variable of interest (peak court). Lower AIC implies better model fit.

The results of the ordered logit model reported in Table 2 confirm that the difference between peak courts and non-peak courts is statistically significant. The odds ratio[70] of a preliminary reference assuming greater importance (moving up to a higher importance score on the scale of 1-4) is 1.58 times greater in the baseline model when the referring court is a peak court than in other cases.[71] The effect is still present when we include country and year fixed effects, which strengthens our confidence in the robustness of the results. Additionally, we do not find evidence that the CJEU would take less time to adjudicate references from peak courts in comparison to non-peak courts.[72] We were not wedded to this alternative measurement instrument due to a lack of theoretical justification but include the results for exploratory purposes. We can conclude that the data show greater support for the hierarchy hypothesis, meaning that the CJEU values peak court references on average more than those of non-peak courts and that importance is manifested through a procedural rather than a temporal channel.[73] Given the trends we observe and the strengthening of CJEU-peak court cooperation,[74] we speculate that the relative importance of peak courts' references is only going to increase in the coming years.

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70 We get the odds ratio from the model output by exponentiating $e^{0.460} = 1.58$.

71 In other words, the two groups (peak and non-peak) are significantly different from each other in terms of CJEU importance. Running a Welch two sample t-test explicitly rejects the null hypothesis that peak and non-peak courts are treated the same: t = 12.271, df = 7170, p-value < 2.2e-16.

72 If the Court was more expedient to signal importance to peak courts, we would expect a negative coefficient for the peak court variable, because the dependent variable is measured as the number of days between submission and decision (so a higher value means more delay). The coefficients are not statistically significant, however, and they are also sensitive to including country and year fixed effects which might indicate omitted variable bias. It would be possible to envisage a more precise model that would additionally control for variation in case facts and legal difficulty. However, no reliable indicators of these variables are available at present.

73 These results corroborate the finding of Pavone and Kelemen, based on a more limited dataset, that courts higher up the judicial hierarchy are less likely to have their case answered by an order, including declared inadmissible (Pavone and Kelemen (n 20) 19–20.

74 The CJEU section of the 2019 Draft General Budget of the European Union describes the creation of the 'Judicial Network of the European Union', which comprises the constitutional and supreme courts of the Member States and is

As a secondary point of interest, we look at how our measure of importance feeds into country and court variation. Interestingly, Ireland has the largest share of Grand Chamber judgments among its references. As we can deduce from Figure 5, countries that account for the biggest chunk of reference activity like Germany, the UK and the Netherlands in general also receive higher importance scores than countries that send fewer references like Italy and Portugal. Contrary to its Eurosceptic reputation, UK courts account for a large number of Grand Chamber references and overall cases of high importance. Figure 5 also illustrates that references are a marginal phenomenon in "new" Member States. Not only do their courts refer fewer questions, the case handling also indicates that the CJEU assigns lower importance to these cases.

coordinated by the CJEU. The network is operational since January 2018 and it 'seeks to reinforce the cooperation between the Court and the national courts by means of a multilingual platform which will enable them to share, in a perfectly secure environment, a range of information and documents intended to promote mutual knowledge of the case law of the European Union and that of the Member States, and the deepening of the dialogue between the Court of Justice and the national courts in the context of requests for a preliminary ruling'.

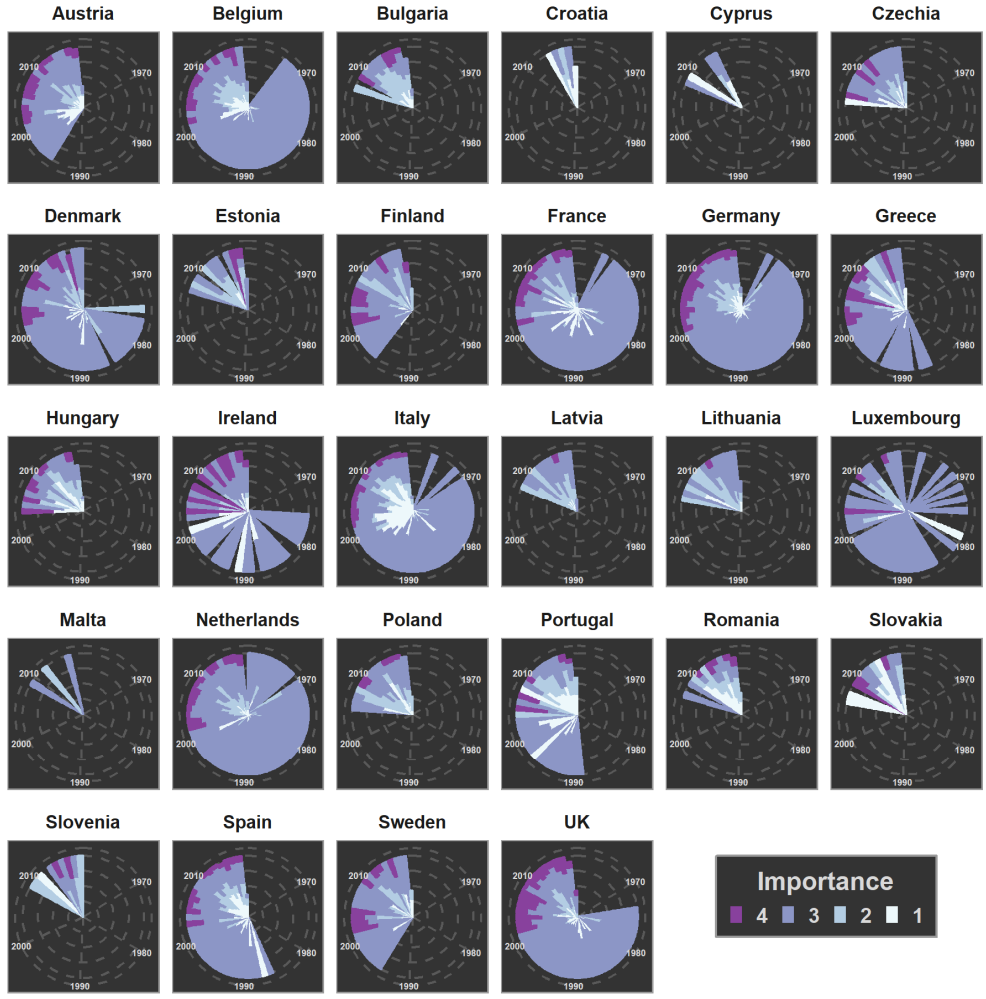

Figure 5: Country comparison in terms of CJEU case importance. Bars represent proportions of each country's referrals in a given year. For years with no coloured bars there were no references sent from that country. The different starting points therefore also reflect different accession moments (first references).

Finally, we are interested in the performance of individual courts in order to obtain an even more granular view of CJEU attention allocation. When we weight preliminary references by our measure and order national courts accordingly, we can isolate national courts that in aggregate contribute the most important cases. Figure 6 shows the results. Eight of the ten highest-ranking courts are peak courts and this court type also makes up the top three. We observe considerable disparities among the two non-peak courts

on this list as well. The High Court of Justice (England and Wales) is a key domestic judicial player by virtue of the specific constellation of the national legal system and it refers more cases decided by the Grand Chamber than any other court in the EU.[75] Yet, references from the other non-peak court in our top ten, the German Finanzgericht Hamburg, barely ever make it before the most important CJEU court composition.

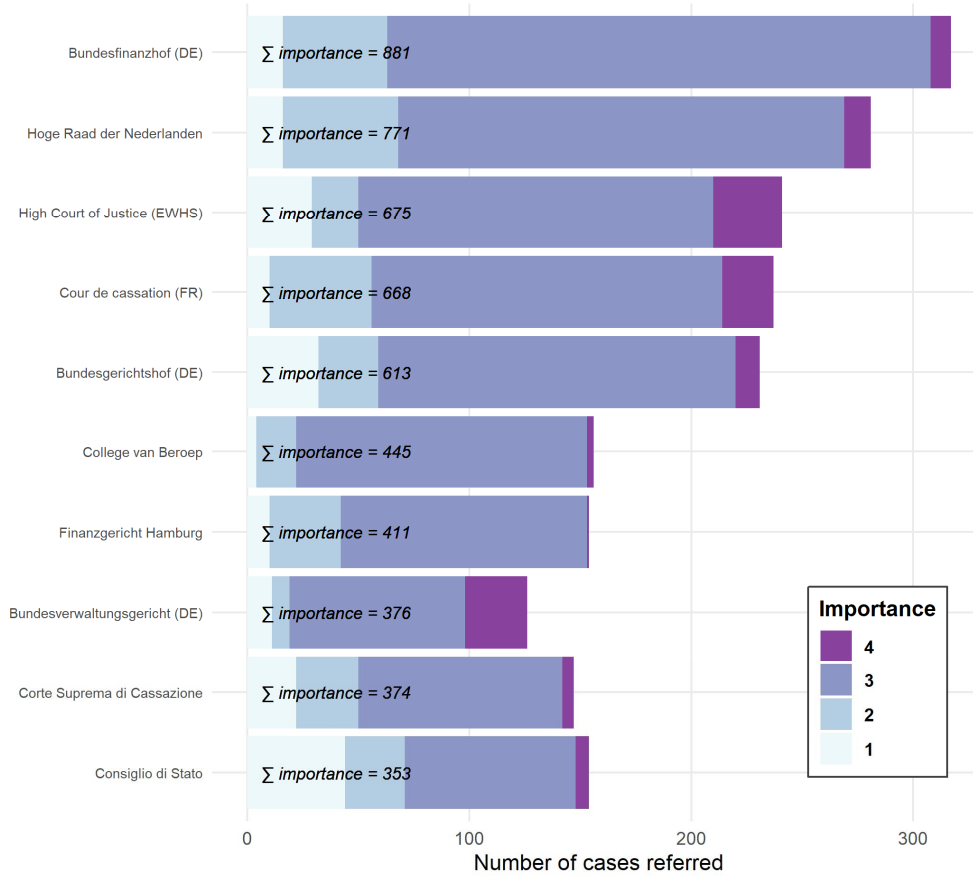

*Figure 6: Top ten court comparison in terms of CJEU case importance between 1961-2018. The national courts are ordered by weighted count, calculated as n_i * importance$_i$ where importance is measured on the ordinal 1-4 scale.*

Bundesfinanzhof's domination is due to the sheer number of cases decided with an Advocate General opinion rather than their Grand Chamber

75 Brexit is therefore liable to have an indirect impact on CJEU doctrinal development.

worthiness. Nonetheless, it is somewhat surprising that compared to its fellow German Supreme Court (Bundesgerichtshof), far fewer of its cases were disposed of by an order. On this statistic, however, it is the Consiglio di Stato that fares particularly badly with 44 cases answered by a CJEU order. This is a record high for any peak court in the EU. On the contrary, its German counterpart – the Bundesverwaltungsgericht – has such a high proportion of Grand Chamber judgments that it ranks above the Consiglio di Stato in terms of importance despite referring fewer cases in total.

We additionally examine how our proposed metric compares with the prevailing method of plainly counting each preliminary reference as a single observation of equal weight. Table 3 shows that taking into account the weight attached to references by the CJEU can alter the order of "top" national courts. We focus on the post-2003 period during which the CJEU introduced more variation in court formation, notably through introduction of the Grand Chamber. In comparison to the full time-series presented in Figure 5, the Bundesfinanzhof has been less active in the previous 15 years. Although the first two columns are similar, two Italian courts fall outside the top 10 when we account for case importance.

Rank	By unweighted count	By weighted count	By average importance
1	Hoge Raad der Nederlanden [158]	Hoge Raad der Nederlanden [415]	Rechtbank Den Haag [3.17]
2	Cour de cassation (FR) [146]	Cour de cassation (FR) [405]	Bundesverwaltungsgericht (DE) [3.04]
3	Bundesgerichtshof (DE) [141]	Bundesgerichtshof (DE) [361]	Bundesarbeitsgericht (DE) [2.97]
4	Bundesfinanzhof (DE) [112]	Bundesfinanzhof (DE) [293]	High Court (IE) [2.97]
5	Consiglio di Stato [110]	Consiglio di Stato [249]	Østre Landsret (DK) [2.95]
6	High Court of Justice (EWHC) [81]	High Court of Justice (EWHC) [229]	Grondwettelijk Hof (BE) [2.93]

7	Raad van State (NL) [78]	Raad van State (NL) [214]	Supreme Court (UK) [2.90]
8	Tribunale amministrativo regionale di Lazio [77]	Oberster Gerichtshof [209]	Sąd Najwyższy (PL) [2.89]
9	Oberster Gerichtshof [73]	Bundesverwaltungsgericht (DE) [204]	Oberster Gerichtshof [2.86]
10	Corte Suprema di Cassazione [71]	Verwaltungsgerichtshof (AT) [179]	Court of Appeal (EWCA) [2.84]

Table 3. Most salient national courts by different metrics of preliminary references 2004-2018. In order not to focus extensively on outliers, we exclude courts that have referred fewer than 15 cases (one case a year on average). Unweighted count is simply the total number of references n. Weighted count is calculated as n_i * importance$_i$ *where importance is measured on the ordinal 1-4 scale. Average importance is* $\frac{1}{n}\sum_i^n importance$.

Our measure makes the most difference when we look at average importance of cases referred by national courts. Surprisingly, the Rechtbank Den Haag has referred, on average, the most important cases between 2004 and 2018. Upon closer inspection, we can see that its references relate predominantly to the processing of asylum applications and prompted three Grand Chamber judgments.[76] At the same time, as a first-instance court, the Rechtbank Den Haag is the odd-one out in the broader picture painted by case importance. All other courts are either peak courts or appeal courts with an important standing in the domestic judicial hierarchy, such as the Court of Appeal (England and Wales) and the Østre Landsret in Denmark. Generally, courts from "new" Member States merely seem to play a supporting role in the reference system. Hence, the appearance of the Supreme Court of Poland on the list of courts with the highest average importance offers a rare glimpse behind the former Iron Curtain.

[76] Joined Cases C-47/17 and C-48/17 *X and X v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2018:900; Case C-331/16 *K. v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2018:296; Case C-163/16 *Christian Louboutin and Christian Louboutin Sas v van Haren Schoenen BV* ECLI:EU:C:2018:423.

VI. Conclusion

In a bid to move beyond assessments of the preliminary reference procedure that merely count the number of rulings indiscriminately, this article introduced a new ordinal measure of case importance at the CJEU. Consistent with existing observations in the literature, we exploit variation in case disposition by the Court of Justice. We deploy this measure to investigate whether the Court considers references stemming from national peak courts or non-peak courts as more important. We construct our indicator on the basis of the largest dataset of preliminary references to date (n = 10,609).

To test potential variations in treatment, we formulate two different expectations about CJEU attention division based on the dichotomous position of courts within national judicial hierarchies. The hierarchy hypothesis predicts that the Court allots more importance to references from peak courts because these wield more legal authority in their respective systems, have more time and resources at their disposal or generally handle difficult and indeterminate cases. The divide-and-conquer hypothesis, on the other hand, expects the CJEU to attach more significance to non-peak court cases as a way to stimulate the use of EU law throughout the entire national judicial hierarchy. The Court acts this way to prevent peak courts from becoming the *de facto* gatekeepers of EU law use by monopolizing the preliminary ruling procedure.

Our empirical assessment of CJEU treatment of references suggests that peak courts generally send more important references to Luxembourg. This finding leads us to believe, as others increasingly suggest as well,[77] that the importance attached to different preliminary references by the CJEU reflects a growing preference for cooperation with peak courts. Because resources of the Court are limited, decreasing attention to non-peak court referrals is merely the flipside of the CJEU's relationship with peak courts growing closer. This is not to say that cases from some non-peak courts cannot receive favourable treatment by the Court, as demonstrated by the Rechtbank Den Haag in recent years. Nonetheless, all the trends in the data that we examine

[77] Dyevre, Glavina and Atanasova (n 19); Pavone and Kelemen (n 20).

in this article corroborate the inclination of the CJEU to deem peak court references as more important.

Despite not being able to definitively identify the mechanism behind the CJEU's peak court preference, our findings are highly relevant. Peak courts not only account for a large number of references but are also more likely than non-peak courts to refer cases that the CJEU deems legally important. Peak courts have thus increasingly managed to establish a central position in the system through which the CJEU dispenses its doctrine. Importantly, the preliminary ruling mechanism depends on such cooperation of national courts. As a result, peak courts may just have bolstered their *de facto* position vis-à-vis the CJEU in the development of EU law.

Our research leaves room for further investigation. First, our measure of importance surpasses the confines of the substantive dimension examined here. Scholars can use it to shed light on other aspects of European law and judicial politics. Second, future research could tease apart how much the different theoretical reasons contribute to explaining why the CJEU favours close cooperation with domestic peak courts over non-peak courts. Considering the relative power increase of these courts vis-à-vis the CJEU, it also remains to be seen how peak courts assert their growing influence on EU law. Moreover, peak courts from "old" Member States generally drive European legal integration. Some courts deviate from this rule. The Rechtbank Den Haag is a first instance court whose cases the CJEU nevertheless deems of the utmost importance. Likewise, the Polish Supreme Court is a peak court from a "new" Member State that finds favourable reception in Luxembourg. These and other exceptions warrant closer inspection through case studies that enable researchers to dig deeper into the particular circumstances of individual domestic courts, such as the ongoing struggle over judicial independence in Poland.[78] This ties in with our more general conviction that further qualitative investigation is necessary to fully unpack the mechanisms at play in the interaction between the CJEU and its national interlocutors.

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[78] Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 Common Market Law Review 6 1827–1854.

RECONCEPTUALISING EXTRATERRITORIALITY UNDER THE ECHR AS CONCURRENT RESPONSIBILITY: THE CASE FOR A PRINCIPLED AND TAILORED APPROACH

Alexandros Demetriades*

The law surrounding the extraterritorial application of the European Convention on Human Rights raises two key controversies which have troubled legal scholars for over two decades. First, the conceptual foundations of jurisdiction remain unclear. Secondly, the nature and extent of a respondent State's responsibility regarding extraterritorial violations of Convention rights has been bedevilled by uncertainty. This paper aims to clarify these issues. The author advocates a purposive interpretation of the case law which would give rise to what may be termed a 'concurrent and tailored' model of extraterritorial State responsibility. In devising this model, the paper makes two propositions. First, it explores the doctrinal basis of jurisdiction and argues that when a High Contracting Party to the Convention is operating in the territory of another signatory State, this should lead to the concurrent jurisdiction of both States under Article 1 ECHR. Secondly, the paper examines the nature of a respondent State's obligations and consequent responsibility when it is acting extraterritorially. The author proposes that this responsibility should be tailored according to that State's factual ability to secure the enjoyment of Convention rights in the circumstances of each case.

Keywords: Extraterritoriality, ECHR, concurrent responsibility, jurisdiction, positive obligations, attribution

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* LL.M. (LSE); B.A. (Hons) (Cantab) (Downing College). Email address: alexandros.demetriades94@gmail.com.

I. INTRODUCTION

The European Convention on Human Rights ('ECHR' or 'the Convention') is the bedrock of human rights protection in Europe. Article 1 ECHR imposes an international law obligation on State Parties to 'secure' the Convention rights of all persons within their jurisdiction. The provision

refers to the jurisdiction of each High Contracting Party to the Convention.[1] A State's jurisdiction, along with its obligations under the Convention, is usually confined to its territory.[2] Exceptionally, the European Court of Human Rights ('ECtHR' or 'the Court') has held that a State's jurisdiction under Article 1 (and, therefore, its obligations) may be extended beyond its territory (i.e. extraterritorially).[3]

The law regarding the extraterritorial application of the ECHR has become increasingly important as more State Parties to the Convention engage in cross-border activities. The Court has developed the law of extraterritoriality to ensure that States are held accountable for the commission of human rights violations, even if these occur outside their own territory. The aim was to avoid the creation of 'a regrettable vacuum in the system of human-rights protection'.[4]

Two elements of the law regarding the extraterritorial application of the ECHR are particularly controversial. First, the conceptual nature of jurisdiction under Article 1 ECHR is uncertain. This compromises the ability of applicants to determine whether they come within the purview of a State's jurisdiction and, consequently, whether that State is obliged to secure their Convention rights.

Secondly, the nature and extent of the obligations imposed on respondent States, when acting extraterritorially, is unclear. The Court's jurisprudence does not specify whether the obligations imposed on States are positive (to ensure the enjoyment of rights) or negative (to respect rights). This is significant because, while positive obligations are tailored to the factual (i.e. *de facto*) ability of the respondent State to secure the Convention rights of the victim, negative obligations are not. Without distinguishing between different types of obligations, it becomes impossible to ascertain the extent of the responsibility incumbent on respondent States when their obligations

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1 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 862.

2 *Banković v Belgium* App no 52207/99 (ECtHR, 12 December 2001) para 59.

3 Ibid para 61.

4 *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 78.

are breached.[5] In turn, the measures required of States in order to discharge this responsibility become indeterminable.

To address these issues, this paper proposes an alternative interpretation of the case law. This will lead to the adoption of what may be termed a 'concurrent and tailored' model of State responsibility. This model is based on two novel propositions. First, the exercise of extraterritorial jurisdiction by a respondent State under the Convention should give rise to the concurrent responsibility of the State on whose territory the violation is committed, as well as the State acting extraterritorially.[6] Secondly, the respective responsibility of each State should be tailored to its ability to secure the victim's Convention rights on the facts of each case. This tailoring of obligations could be achieved by recognising that positive obligations are incumbent on both the territorial State and the State acting extraterritorially. The proposed model goes some way towards achieving the 'functional' approach advocated by some commentators.[7] However, the present approach is rooted in the doctrinal framework developed by the ECtHR.

The analysis begins by establishing the premise that a principled and tailored approach to determining State responsibility is desirable. This article will then examine the doctrinal basis for achieving these end goals beginning with jurisdiction. It is argued that jurisdiction is a creature of both law and fact. In cases of extraterritoriality, there is a theoretical fragmentation of jurisdiction so that one State possesses the legal right to exercise jurisdiction and another State exercises it in fact. It will be argued that this divergence leads to concurrent jurisdiction under Article 1 ECHR.

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5 Responsibility is the difference between the standard expected of the State (i.e. its obligation) and the actual conduct of the State. It follows that the scope of a State's responsibility is contingent upon the extent of its original obligations.

6 The responsibility in question is 'concurrent' rather than 'shared'. This is because each respondent State's responsibility arises out of the breach of a distinct primary obligation. This is evident in the analysis below.

7 Youval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) Law and Ethics of Human Rights 47.

Having established concurrent jurisdiction and therefore concurrent obligations, this paper will distinguish between the different models of extraterritorial jurisdiction (those based on territorial control and those based on personal control over the victim). It is argued that, depending on the model used, different obligations should be incumbent on the respondent States. These respective obligations (and consequent responsibility) should be tailored to the State's factual ability to safeguard the Convention rights in the circumstances. The main doctrinal tool used to attain this tailored approach is the distinction between positive obligations and negative obligations. This dichotomy depends on whether the relevant conduct can be attributed to the respondent States.

Finally, the proposed model of concurrent responsibility will be evaluated to determine whether it achieves the prevalent purpose of the law on extraterritoriality by filling the 'vacuum' in human rights protection, whether it is consistent with the jurisprudence of the ECtHR and with related areas of public international law, and whether it constitutes a politically acceptable model.

II. Should a Principled and Tailored Approach be adopted to determine State Responsibility under the ECHR?

This paper proposes a principled approach that will allow the extraterritorial responsibility of Contracting Parties to be tailored according to the States' ability to secure the enjoyment of Convention rights in the circumstances of each case. The first step is to ask whether this ultimate goal is desirable.

1. The Need for a Principled Approach

For the purposes of this paper, a principled approach is one which is characterised by clarity and doctrinal consistency. In order to attain such clarity, the ECtHR should identify the type of obligation which binds the respondent State when it acts extraterritorially, as well as the extent of this obligation. To achieve doctrinal consistency, the law of extraterritoriality must not be internally incoherent. Furthermore, where possible, the law of extraterritoriality should be consistent with the norms of public international law unless the Court explicitly states that it is attributing a *sui generis* meaning to certain concepts. Adopting a principled approach would

allow the Court to devise a theoretically sound conception of jurisdiction under Article 1 ECHR. It would also enable respondent States to predict *ex ante* the extent of their responsibility arising out of human rights violations.

It has been judicially acknowledged that the law of extraterritoriality 'has [...] been bedevilled by an inability [...] to establish a coherent and axiomatic regime'.[8] Admittedly, the Court's task of developing an impartial legal doctrine of extraterritorial jurisdiction is unenviable. Such cases often arise in politically charged conditions, such as the war on terror.[9] Nevertheless, given the politically contentious issues raised, a coherent legal analysis of State responsibility is necessary. The alternative would be, through lack of guidance, to allow unlimited discretion to the Committee of Ministers ('Committee') when supervising the execution of the Court's judgments.[10] Putting these politically sensitive cases before this political body, without legal constraints, could lead to the collapse of legal doctrine into political chaos.

This paper argues that the Court should explicitly delimit States' responsibility within its judgments, without rejecting the orthodox view that the Court's judgments are 'essentially declaratory'.[11] The Court could provide the parameters of responsibility, without necessarily prescribing a remedy, thereby providing legal guidance to the Committee. This proposition is consistent with the Court's practice of becoming increasingly involved in the execution of its own judgments.[12]

2. Is a Tailored Approach Desirable?

The proposed model of 'concurrent and tailored responsibility' aims to ensure that the responsibility of each respondent State is 'tailored' to its ability to secure the enjoyment of the Convention rights in the

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8 Concurring Opinion of Judge Bonello, *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011) para 4.

9 *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011).

10 Article 46 ECHR.

11 *Assanidze v Georgia* App no 71503/01 (ECtHR, 24 March 2004) para 202.

12 Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 European Human Rights Law Review 46, 55-56.

circumstances. This will depend on the degree of control that the respondent State exercises over the situation which gives rise to a violation of Convention rights.

Support for this tailored approach to extraterritorial obligations had been given by Sedley LJ in the UK Court of Appeal in *R (on the application of Al-Skeini) v Secretary of State for Defence*.[13] However, he correctly concluded that, at the time, such an approach could not be reconciled with the Strasbourg jurisprudence.[14] At that time, *Banković v Belgium* was high authority on extraterritoriality. This case concerned the aerial bombing of the Serbian Television headquarters in Belgrade by NATO forces. The Court held that the Convention States which partook in the operation did not have jurisdiction under Article 1 ECHR. In doing so, the Grand Chamber explicitly rejected that Convention rights could be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.[15]

Since *Banković*, the Grand Chamber has reassessed this position. In *Al-Skeini v UK*, the Court dealt with the deaths of the applicants' relatives at the hands of British soldiers in Southern Iraq during the UK's security operations there. The Court held:

> It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention *that are relevant to the situation of that individual*. In this sense, therefore, the *Convention rights can be 'divided and tailored'*.[16]

Some writers have suggested that this judgment has overruled *Banković* on this point, thereby allowing the Court to 'tailor' the extraterritorial responsibility of respondent States according to the degree of control exercised over the impugned situation.[17] Even on a narrow reading of the

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13 [2005] EWCA Civ 1609, para 197.

14 Ibid para 207.

15 *Banković* (n 2) para 75.

16 *Al-Skeini* (n 9) para 137 [emphasis added].

17 Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 3.19.

judgment, it is clear that it is open to future judgments to consider whether a tailored approach to extraterritorial responsibility is appropriate. Given this opportunity, it is necessary to make the case for consolidating this dictum.

The argument in favour of the tailored approach to extraterritorial State responsibility is based on the untenability of the alternative approach. The alternative is what may be termed a '*standardised*' conception of State responsibility (i.e. equivalent to the responsibility of the State if the violation had occurred by the State's agents in its own territory). This would likely give rise to a responsibility to remedy the violation through nothing less than *restitutio in integrum*.[18] 'Standardised responsibility' is objectionable because it disregards the hostile institutional context in which human rights operate.[19] Therefore, human rights obligations (and responsibility) should be determined pragmatically. The tailored approach will preserve the integrity of the European human rights regime. Conversely, standardised responsibility could lead to the imposition of an 'unrealistic'[20] level of responsibility on Convention States. This responsibility would be impossible to discharge through individual or general measures because the respondent State may lack the requisite control to implement such measures extraterritorially. Hence, the responsibility imposed by the Court will not translate into tangible results, undermining the integrity of the ECHR regime. This explains the Court's unwillingness to impose 'an impossible or disproportionate burden' on respondent States.[21] It follows that, if the Court's judgments are to contribute to 'the maintenance and further realisation of human rights',[22] they must adopt a tailored approach by making

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18 *Papamichalopoulos v Greece (Just Satisfaction)* App no 14556/89 (ECtHR, 31 October 1995) para 34.

19 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 95.

20 Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 185, 205.

21 *Osman v UK* App no 87/1997/871/1083 (ECtHR, 28 October 1998), para 116; Concurring Opinion of Judge Yudkivska, *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015).

22 Statute of the Council of Europe (entered into force 5 May 1949) 87 UNTS 103, Article 1(b).

State responsibility commensurate to each State's ability to secure the enjoyment of Convention rights in the circumstances.

III. Jurisdiction under Article 1 ECHR

Article 1 ECHR indicates that a State's obligation to 'secure' Convention rights is confined to persons within that State's jurisdiction. Hence, jurisdiction is a necessary hurdle when devising a principled approach to State obligations and consequent responsibility under the ECHR.[23]

It will be argued that jurisdiction can emanate either from legal right or from factual (i.e. *de facto*) control. When these two elements are exercised by different States (as in cases of extraterritoriality), this should trigger concurrent jurisdiction.

1. 'Primarily Territorial' Jurisdiction

The ECtHR has held that jurisdiction is 'primarily territorial'.[24] Implicit in this dictum are two presumptions. First, there is a negative presumption that a State will not exercise its jurisdiction beyond its lawful territorial borders. This presumption is normative (i.e. based on the norms of public international law regarding territorial title) and will be rebutted 'exceptionally'.[25] It is always displaced in cases of extraterritorial jurisdiction.

Secondly, the positive presumption of territoriality operates so that a State is presumed to exercise jurisdiction throughout the whole of its *de jure* territory.[26] The Court has applied this positive presumption in cases where the respondent State had no factual control over the area in question.[27] Therefore, this appears to be a normative presumption that the State with territorial title in international law also has jurisdiction under Article 1

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23 Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'' in Alphonsus Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 131.

24 *Banković* (n 2) para 59.

25 Ibid para 61.

26 *Ilascu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 312.

27 Ibid para 331.

ECHR. The generally accepted view is that this presumption may be rebutted in 'exceptional circumstances'.[28]

2. Establishing Extraterritorial Jurisdiction

Jurisdiction answers the question of whether the victim is sufficiently proximate to a respondent State. There are three ways to establish this link extraterritorially.

A. Customary Extraterritoriality

A State may have extraterritorial 'jurisdiction resulting from non-territorial legal competence'.[29] This form of extraterritoriality may be exercised through consular agents and other instances recognised by customary international law.[30]

B. 'Effective Overall Control' ('The Spatial Model')

Alternatively, extraterritorial jurisdiction may be established over a territory using the 'spatial model'.[31] This model was devised in *Loizidou v Turkey (Preliminary Objections)*.[32] That case concerned a Greek-Cypriot woman who was prevented from accessing her property located within the territory of the 'Turkish Republic of Northern Cyprus' ('TRNC'), a subordinate local administration established by Turkey within the *de jure* territory of Cyprus. In its judgment, the ECtHR formulated the test of 'effective overall control' to establish extraterritorial jurisdiction over a territory. The Court emphasised that extraterritorial jurisdiction may be found when the

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[28] Partly Dissenting Opinion of Judge Bratza *et al.*, *Ilascu* (n 26), para 3. See Kjetil Mujezinović Larsen, 'Territorial Non-Application of the European Convention on Human Rights' (2009) 78 Nordic Journal of International Law 73, 93.

[29] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, 522.

[30] *Banković* (n 2) para 73.

[31] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel Law Review 503.

[32] App no 15318/89 (ECtHR, 23 March 1995).

respondent State exercises factual control over the territory, even if such control is unlawful in international law.[33]

The 'effective overall control' threshold was subsequently lowered in *Ilascu v Moldova and Russia*, which arose as a result of the applicants' imprisonment and ill-treatment within the territory of the 'Moldavian Republic of Transdniestria' ('MRT'), a secessionist local administration within Moldova. In this case, the Court established Russia's extraterritorial jurisdiction over the territory of the 'MRT' because Russia exerted 'decisive influence' over the 'MRT' administration.[34] This less demanding threshold focuses on 'military, economic, financial and political support', rather than military presence.[35] 'Decisive influence' has been established when the military presence of the respondent State is minimal, as long as the local administration survived '*by virtue'* of the support rendered by the respondent State Party.[36] The Court has used the two tests together and interchangeably, particularly in its judgments concerning the 'Nagorno-Karabakh Republic' ('NKR').[37]

C. 'State Agent Authority and Control'[38] ('The Personal Model')

Extraterritorial jurisdiction may also be established on the 'personal model'.[39] This is premised on the respondent State bringing the applicant within its *de facto* control through the operation of its agents outside its own territory. This too is a factual relationship between the respondent State and the applicant, irrespective of the lawfulness of the State's actions.[40]

The personal model was applied in *Öcalan v Turkey*, where the leader of the Kurdistan Workers' Party was held to have entered Turkey's jurisdiction as

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33 Ibid para 62.

34 *Ilascu* (n 26) para 392.

35 Ibid paras 382-394.

36 *Catan v Moldova and Russia* App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) paras 111-123.

37 *Chiragov v Armenia* App no 13216/05 (ECtHR, 16 June 2015) para 186.

38 *Al-Skeini* (n 9) paras 133-137.

39 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) 173.

40 *Al-Skeini* (n 9) paras 136-137.

soon as he was within the 'authority and control'[41] of Turkish officials, even though this occurred in Kenya. This model unequivocally applies when applicants are in the custody of the respondent State. Moreover, the personal model will apply when State agents operate extraterritorially in territories where the sending State wields 'public power'.[42] It remains unclear whether the mere use of force by State agents will trigger extraterritorial jurisdiction.[43]

It should be noted that establishing jurisdiction extraterritorially is contingent on the operation of persons which can be attributed to the respondent State outside the latter's territory.[44] Attribution is determined according to the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA').[45]

3. The Conceptual Foundations of Jurisdiction

A. Purely Legal?

In *Banković*, the Court held that jurisdiction under Article 1 ECHR should mirror the meaning of the term in public international law.[46] In this sense, '[j]urisdiction is the term that describes the limits of the legal competence of a State ... to make, apply, and enforce rules of conduct upon persons'.[47]

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41 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) para 91.

42 Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, 131.

43 Cf. *Banković* (n 2) and *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) para 25.

44 Vasilis Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129, 136.

45 ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the work of its Fifty-third session, (A/56/10) (2001); See also *Loizidou v Turkey (Merits)* App no 15318/89 (ECtHR, 18 December 1996) para 52, where the ECtHR stated that it adheres to the public international law rules of attribution.

46 *Banković* (n 2) para 61.

47 Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 309.

This dictum should not be read as suggesting that Article 1 jurisdiction is a *purely legal* relationship between the respondent State and the victim. There are two objections to this interpretation. First, the Court has recognised that extraterritorial jurisdiction can be established when the respondent State exercises unlawful factual control over the victim both pre-*Banković*[48] and post-*Banković*.[49] Secondly, a purely legal notion of jurisdiction should not be adopted because, in that case, jurisdiction (and the human rights obligations attached to it) could only be established when the State was acting within its legal competence. A State acting unlawfully would therefore be able to freely violate human rights.[50] Thus, the predominant view is that jurisdiction incorporates a factual element.[51]

B. Purely Factual?

Most commentators suggest that Article 1 jurisdiction denotes a factual relationship between the perpetrating State and the victim.[52] Milanovic argues that jurisdiction should be established whenever a State exercises *de facto* power over a victim.[53] While there is a compelling case for *including* a factual element within jurisdiction, it is unclear why jurisdiction should denote an *exclusively* factual relationship between the respondent State and the victim.

It is argued that a unitary factual doctrine of jurisdiction is inappropriate because: (i) it is inconsistent with the case law; (ii) it is theoretically incoherent; and (iii) it may lead to the creation of a 'vacuum' in the human rights regime.

First, an exclusively factual concept cannot be reconciled with the Court's case law. On a factual view of jurisdiction, actual power will give a State

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48 *Loizidou (Preliminary Objections)* (n 32) para 62.

49 *Chiragov* (n 37) para 186.

50 King (n 29) 536.

51 Wilde (n 31) 508.

52 Karen Da Costa, *Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers 2013) 253.

53 Milanovic (n 39), 41. See also Loukis Loucaides, 'Determining the extra-territorial effect of the European Convention: Facts, Jurisprudence and the Bankovic case', (2006) 4 European Human Rights Law Review 391, 394.

jurisdiction over a person. Logically, the loss of power should lead to the absence of jurisdiction. This has consistently been refuted in the judgments concerning the 'MRT'.[54] In these cases, the Court has held that Moldova, as the sovereign territorial State, retains jurisdiction over the relevant territory, even though it does not meet the factual threshold required (i.e. 'effective overall control' or 'decisive influence'). Moreover, the Court has clarified that jurisdiction was found '*because* Moldova was the territorial State'.[55] Another rejection of the purely factual view came in *Sargsyan v Azerbaijan.* In this case, the ECtHR held that Azerbaijan retained jurisdiction even though control over the relevant territory was disputed. The Court stated:

> Even in exceptional circumstances, when a State is prevented from exercising authority over part of its territory...it does not cease to have jurisdiction within the meaning of Article 1 of the Convention.[56]

Such cases cannot be explained on a purely factual view as jurisdiction clearly emanates from legal title over the territory.[57]

Furthermore, the factual conception of jurisdiction cannot explain instances of extraterritorial jurisdiction recognised in international law and under the ECHR. For example, the actions of diplomatic agents may bring an individual outside their State's territory within the scope of its jurisdiction under the Convention.[58] This extraterritorial jurisdiction emanates from the State's 'lawful competence' and not from factual control.[59]

The second objection is theoretical. In advancing his factual perspective, Milanovic argues that 'the source [of sovereignty] is in the effectiveness of State power over a territory and its inhabitants'.[60] However, a constitutionally organised entity does not necessarily amount to a sovereign State. Illustrative of this point are pseudo-states, such as the 'TRNC',

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54 *Ilascu* (n 26) para 333; *Braga v Moldova and Russia* App no 76957/01 (ECtHR, 17 October 2017) paras 22-23.

55 *Mozer v Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016) para 99 [emphasis added].

56 App no 40167/06 (ECtHR, 16 June 2015) para 130.

57 Milanovic (n 39) 107.

58 *X v Federal Republic of Germany* App no 1611/62 (ECommHR, 25 September 1965).

59 King (n 29) 537.

60 Milanovic (n 39) 59.

established on territory over which Cyprus remains sovereign, despite the lack of factual control. Therefore, it is argued that sovereignty necessarily includes a legal element. Furthermore, sovereignty is a precondition for jurisdiction under the Convention because only sovereign States may ratify the Convention, thereby obtaining jurisdiction under Article 1 ECHR. Hence, jurisdiction cannot be viewed in purely factual terms.

Finally, a purely factual view of jurisdiction is undesirable on policy grounds. If a State Party cedes administration of a territory to another body, thereby relinquishing its factual control, then, on the purely factual view of jurisdiction, no Contracting Party will have jurisdiction over this territory. For example, while Cyprus retains sovereign title over the buffer zone on the island, it has ceded control of that territory to the United Nations Force in Cyprus ('UNFICYP'). If the ECtHR does not recognise the jurisdiction of Cyprus over the buffer zone, this would create a human rights 'vacuum' within the *éspace juridique* of the Convention. This limitation has been recognised even by proponents of the factual conception of jurisdiction.[61]

C. Dual Nature

It is clear that, to align the concept of jurisdiction with the case law, jurisdiction must encompass both factual and legal elements.[62] One should attempt to give this view some coherent theoretical foundations.

It is argued that jurisdiction, in the public international law sense, has two component elements: (i) a subject and (ii) an object. The 'subject' of jurisdiction is the delimitation of different States' rights to exercise jurisdiction *in international law* so as to avoid a 'clash of sovereignties'.[63] In this respect, jurisdiction is limited to cases where the State has a sovereign right to act. Conversely, the 'object' of jurisdiction in the public international law sense is *municipal law* jurisdiction[64] (i.e. the ability of a State to constitutionally organise itself in order to make and enforce rules). This is a matter of domestic law and is therefore treated as fact from the perspective

61 Larsen (n 28) 84.

62 King (n 29).

63 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 22.

64 Besson (n 1) 870.

of international law.[65] Domestic law jurisdiction may exist in contravention of international law.

Usually, the legal right to exercise jurisdiction coexists with the ability to do so in fact (i.e. domestic law jurisdiction). However, in cases of extraterritoriality, there is a fragmentation between the two components so that one State has the right to exercise jurisdiction in international law (*de jure* jurisdiction) and another has the *de facto* ability to control the individual through municipal constitutional organs (*de facto* jurisdiction). In order to be considered an exercise of jurisdiction, the actions of these municipal constitutional organs must reflect the acts of a sovereign State.[66]

It is argued that the Court has treated each constituent element of what may collectively be called 'public international law jurisdiction' as being able, in itself, to establish jurisdiction under Article 1 ECHR. This explains why sometimes jurisdiction may be established through legal right (*de jure* jurisdiction) while, in others, it may be established through factual control (*de facto* jurisdiction). Thus, jurisdiction, for the purposes of Article 1, is exclusive only when factual control is justified by virtue of a sovereign right in international law so that *de facto* and *de jure* jurisdiction are exercised by the same State.[67]

4. Concurrent Jurisdiction in Extraterritorial Cases

If each constituent element of public international law jurisdiction satisfies the Article 1 threshold, it follows that when different Contracting Parties exercise sovereign rights and factual control over the victim or territory respectively, concurrent jurisdiction is established under the ECHR.[68] Given

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65 *German Interests in Polish Upper Silesia (Germany v Poland)*, [1926] PCIJ Rep Series A No 7, 19.

66 Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 European Journal of International Law 1223, 1245. A similar concept to *de facto* jurisdiction has been developed by Miller in the form of 'functional sovereignty'. However, her view differs from that propounded here because she ignores the legal nature of intra-territorial jurisdiction absent any factual control.

67 Besson (n 1) 869.

68 Tzevelekos (n 44) 164-166.

that factual jurisdiction is well established and set out above, this section will focus on the argument in favour of retaining the sovereign State's intra-territorial *de jure* jurisdiction, even if that State has no factual control over the victim.[69] This *de jure* jurisdiction will operate concurrently with the *de facto* jurisdiction of the respondent State, which exerts factual control over the victim.

It should be recognised that concurrent jurisdiction was not always the norm. In the early case of *An v Cyprus*,[70] the (now defunct) European Commission of Human Rights ('ECommHR') held that the Republic of Cyprus could not be held responsible for violations occurring within the territory of the 'TRNC'. This suggests that the *de jure* jurisdiction of Cyprus over the relevant territory had been displaced because it did not factually control that territory.

It is argued that *An* does not reflect the current position of the law. First, the case has little precedential value as it was decided prior to the development of the law of extraterritoriality. Moreover, the Commission had reached an incorrect result in *Loizidou* itself.[71] Secondly, *An* has arguably been overruled by a string of cases recognising that the sovereign State will retain its *de jure* jurisdiction over a given territory, even if it does not control that area in fact. This will operate concurrently with the *de facto* jurisdiction of the State acting extraterritorially. The above proposition was first endorsed in *Ilascu* where, despite concluding that Russia exercised *de facto* jurisdiction over the 'MRT', the Grand Chamber held:

> ... [W]here a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation ... it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory.[72]

The principle that sovereignty will trigger Article 1 jurisdiction was reaffirmed in absolute terms in *Sargsyan*.[73] It appears that, since *An*, the ECtHR has never explicitly displaced the positive presumption that a

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69 *Al-Skeini* (n 9) paras 133-140.

70 App no 18270/91 (ECommHR, 8 October 1991).

71 *Chrysostomos, Papachrysostomou and Loizidou* App nos 15299/89, 15300/89 and 15318/89 (ECommHR, 4 March 1991).

72 *Ilascu* (n 26) para 333.

73 *Sargsyan* (n 56) para 130.

sovereign State exercises jurisdiction under Article 1 ECHR over the whole of its *de jure* territory (i.e. the positive presumption of territoriality), even in cases where the sovereign State lacks factual control. Consequently, this presumption has crystallised into an immovable rule of law.[74]

The logical first query is why the Court has not recognised concurrent jurisdiction in the cases pertaining to the 'TRNC'. The applicants in these cases alleged that Turkey violated their Convention rights. If the applicant only brings a claim against one State, then only that State's responsibility may be determined by the ECtHR.[75] Those who argue that concurrent jurisdiction in *Ilascu* is an aberration and that *Loizidou* is the rule are suggesting that the Court's omissions are more authoritative than its statements.[76]

In *Cyprus v Turkey*, the Court stated that, had it found that Turkey did not have jurisdiction over the 'TRNC', this:

> would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account...[77]

De Schutter interprets this statement as establishing that Turkey's effective overall control over the 'TRNC' had displaced Cyprus' jurisdiction for the purposes of Article 1.[78] However, he recognises that this is contrary to the subsequent judgment of *Ilascu.* With hindsight, the better view is that the Court was not using a legal term of art. Rather, it was describing the practical situation which would have occurred.

It must be recognised that the argument for an irrebuttable positive presumption of territoriality is unorthodox. Some writers maintain that it is 'possible for a State to lose jurisdiction under Article 1 over a part of its

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74 Antal Berkes, 'The Nagorno-Karabakh Conflict before the European Court of Human Rights: Pending Cases and Certain Forecasts on Jurisdiction and State Responsibility' (2013) 52 Military Law & Law of War Review 379, 425.

75 *Jaloud v The Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 153.

76 *Loizidou (Merits)* (n 45).

77 *Cyprus v Turkey* (n 4).

78 De Schutter (n 20) 218.

territory'.[79] To support this proposition, they cite *Azemi v Serbia*, which dealt with Serbia's responsibility for the non-enforcement of a Kosovar court's judgment. The Court declared the application inadmissible *ratione personae* for the unrelated reason that the applicant failed to challenge a 'particular action or inaction' of Serbia.[80]

Even if *Azemi* is considered to be authority that Serbia's jurisdiction over Kosovo has been eliminated, this does not disprove the absolute presumption that a sovereign State retains jurisdiction over the whole of its *de jure* territory. Istrefi has argued that, while falling short of recognising Kosovo's sovereignty, *Azemi* has created a 'presumption of neutrality' over the territory in question, thereby implicitly recognising that Serbia had ceased to be the lawful sovereign.[81] This would distinguish the present case from *Ilascu* and would explain the ECtHR's decision. Indicative of this underlying influence in the Court's reasoning is the reference to the applicant as 'a national of Kosovo'.[82] This may be contrasted with the Court's reference to the applicants in *Behrami and Behrami v France* as residents of 'Mitrovica in Kosovo, Republic of Serbia'.[83]

It is argued that the loss of sovereignty is the only 'exceptional circumstance' where the Court will disapply the positive presumption that the State will retain jurisdiction over the whole of its *de jure* territory. In any other constraining factual situation, the Court will merely 'limit' the positive presumption.[84] In this case, the respondent State would retain jurisdiction by virtue of its sovereign title but would only owe positive obligations to take measures within its power to secure the enjoyment of human rights in the relevant territory.[85]

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79 Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs White & Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 101.

80 App no 11209/09 (ECtHR, 5 November 2013) para 47.

81 Kushtrim Istrefi, '*Azemi v Serbia*: Discontinuity of Serbia's d*e jure* Jurisdiction over Kosovo' (2014) 4 European Human Rights Law Review 388, 393.

82 *Azemi* (n 80) para 1.

83 App no 71412/01 (ECtHR, 2 May 2007) para 1.

84 *Ilascu* (n 26) paras 312-313.

85 Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdiction, Duties and

One should also briefly mention the personal model. It is argued that, in *Al-Skeini*,[86] the victims were also, theoretically, within the jurisdiction of Iraq as the territorial State. However, Iraq is not a party to the Convention. Therefore, the ECtHR rightly refrained from giving judgment on Iraq's obligations.[87]

The above analysis reveals that the positive presumption that the sovereign State will retain jurisdiction throughout the whole of its lawful territory will not be rebutted unless sovereign title to that territory is lost. Therefore, cases of extraterritoriality should always engage the concurrent responsibility of the State on whose territory the violation occurs, as well as the State which establishes extraterritorial *de facto* jurisdiction. Judge Yudkivska has given support to the aforementioned proposition by arguing, both extrajudicially[88] and in her Concurring Opinion in *Sargsyan*,[89] that concurrent jurisdiction in cases concerning extraterritoriality is now the norm.

IV. Extraterritoriality as 'Concurrent and Tailored' Responsibility under Article 1 ECHR

Having established that concurrent jurisdiction should be triggered in cases of extraterritoriality and that concurrent responsibility could arise, it is necessary to examine the doctrinal tools used to tailor each State's responsibility. This analysis is based on two key distinctions: (i) between positive and negative obligations under the ECHR and (ii) responsibility arising from territorial and non-territorial situations.

Responsibilities' in Anne Van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and International Law* (Oxford University Press 2018) 161.

86 *Al-Skeini* (n 9).

87 Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 Journal of International Dispute Settlement 361, 373.

88 Ganna Yudkivska, 'Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues Under Article 1 of the European Convention' in Anne Van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and International Law* (Oxford University Press 2018).

89 *Sargsyan* (n 56).

1. Positive and Negative Obligations

Article 1 ECHR imposes an 'obligation to secure' the Convention rights on Convention States. Implicit in the wording are two types of obligations: negative obligations and positive obligations.[90]

Negative obligations are the State's obligations to respect the rights of persons within its jurisdiction. This requires State agents to refrain from interfering with individuals' enjoyment of their Convention rights.[91] Negative obligations are breached through the actions of State organs. Therefore, the standard applied when assessing this breach is one of strict liability because a State is presumed to have absolute control over its own organs.[92] There is no support in the jurisprudence for a tailored approach to determining the extent of negative obligations.[93] Therefore, upon the finding of a violation, the responsibility imposed on the respondent State is standardised.

Conversely, positive obligations are obligations 'to adopt reasonable [...] measures to protect the rights of individuals'.[94] Such obligations require respondent States to act in order to safeguard human rights within their jurisdiction. This includes an obligation to prevent human rights violations committed by private actors.[95]

The ECtHR has held that the scope of substantive positive obligations ('positive obligations') is determined according to the standard of due diligence (i.e. what can reasonably be expected from a diligent State in the circumstances),[96] even though it did not explicitly use this term.[97] Hence,

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90 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 569.

91 Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe 2007) 11.

92 William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 101.

93 *Banković* (n 2) para 75.

94 Akandji-Kombe (n 91) 7.

95 Shelton and Gould (n 90) 563.

96 Ibid 577.

97 *Osman* (n 21) para 116; Tzevelekos (n 44) 133.

whether the State has discharged its positive obligation will be 'subjectively' tailored according to its ability to secure Convention rights through the prevention of the relevant violations.[98] Positive obligations could therefore impose 'obligations of conduct',[99] which may be discharged when the State takes the necessary measures towards achieving a result, even if that result is not attained.[100] Such tailored obligations will, in case of a breach, give rise to a similarly tailored responsibility.

The extent of the positive obligation of the notional diligent State is determined according to the degree of control exercised by the respondent State over the situation which leads to the violation. In assessing the relevant level of control, it is suggested that the Court should take into account factors such as the State's relationship with the perpetrators of the violation, the State's ability to assert its authority over the relevant situation, and the measures which it could have taken to alleviate the damage done to the victim. An equivalent analysis is implicitly employed by the Court to mitigate the positive obligations owed by respondent States in accordance with a 'constraining *de facto* situation'.[101]

The Court has refused to draw a clear distinction between the two types of obligations, stating that:

> The boundaries between the State's positive and negative obligations [...] do not lend themselves to precise definition. The applicable principles are nonetheless similar.[102]

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98 *Ilascu* (n 26) para 313; See also Christos Rozakis, 'The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights' in *The Status of International Treaties on Human Rights* (Council of Europe 2005) 70.

99 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide ("Bosnian Genocide Case") (Bosnia and Herzegovina v. Serbia and Montenegro*) [2007] ICJ Rep 43, para 430.

100 Timo Koivurova, 'Due Diligence', *Max Planck Encyclopedia of Public International Law* (2010) paras 1-3.

101 *Ilascu* (n 26) para 333.

102 *Joannou v Turkey* App no 53240/14 (ECtHR, 12 December 2017) para 89.

However, as is evident from the above analysis, one cannot argue that the principles governing the two types of obligations are analogous.[103] Therefore, the Court should distinguish between negative and positive obligations.

The basis of the aforementioned dichotomy lies in the concept of attribution. Negative obligations can only be engaged when the violating *acts* are attributable to the State (i.e. committed by State agents). Conversely, positive obligations are breached by the *omission* of State authorities to prevent a violation within the State's jurisdiction. Therefore, positive obligations to protect are engaged when the perpetrating conduct is committed by actors which are *not* attributable to the State when committing these acts.

2. Remedying a Conceptual Paradox

Usually, whether the State is in breach of its positive or its negative obligations is clear. However, in cases of extraterritoriality, it may not be clear whether the perpetrators' actions are imputable to the State through the application of ARSIWA (e.g. are the actions of the local administration of the 'MRT' attributable to Russia?).

This is problematic. Whether there is a violation by the State will depend on whether the obligation is positive or negative. The former imposes a due diligence standard on the State, whereas the latter imposes strict liability. However, whether an obligation is positive or negative can only be determined retrospectively, after identifying whether the violating actions are imputable to the respondent State. Thus, the Court cannot apply the classic sequence of identifying a primary breach of an international obligation followed by an application of the secondary rules on attribution. Instead, the Court should determine whether the relevant conduct is attributable to the State and *then* establish whether that State has violated its primary obligations depending on whether these are positive or negative.

3. Responsibility under the Personal Model

The personal model of establishing extraterritorial jurisdiction applies when agents attributable to the respondent State (i.e. State agents) operate outside

[103] Tzevelekos (n 44) 152-157.

the territory of their State. In this rubric, extraterritorial jurisdiction emanates from control over the *victim* and is therefore non-territorial. Having established that *Al-Skeini* permits a tailoring of the State's obligations (and consequent responsibility) in such cases, it is necessary to examine how this adjustment should occur.[104]

Given the non-territorial nature of the jurisdiction in question, it is argued that the State's extraterritorial responsibility should be limited in three respects: (i) the obligations should only be owed to persons under the authority of State agents; (ii) the obligations should only be owed in relation to the rights relevant to the situation; and (iii) the extent of the positive obligations owed should depend on the State's ability to secure the relevant rights on the facts of each case.[105] Therefore, the responsibility imposed on the respondent State will be tailored according to its ability to secure the Convention rights.

Limitation (i) follows from the fact that, on the personal model, only certain individuals will be brought within the State's jurisdiction. Limitation (ii) is evident in *Al-Skeini*, where the Court held that the UK would only be responsible for the rights 'that are relevant to the situation of that individual'.[106] Limitation (iii) arises because the extent of positive obligations is determined according to what can reasonably be expected from a diligent State in the circumstances. It is argued that positive obligations may, in principle, be imposed on the respondent State which exercises personal extraterritorial jurisdiction. However, it is likely that these obligations will be mitigated because a diligent State can do very little to ensure the enjoyment of Convention rights without a governmental apparatus in the territory.[107] For example, one cannot expect State agents operating extraterritorially to secure the applicant's right to a fair trial (Article 6 ECHR), absent an 'impartial tribunal' in the relevant territory.[108]

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104 *Al-Skeini* (n 9) para 137.

105 King (n 29) 538.

106 *Al-Skeini* (n 9) para 137.

107 Cf. Milanovic (n 39) 210 who argues that positive obligations should not arise at all unless the State's extraterritorial jurisdiction is established on the basis of territorial control.

108 King (n 29) 540.

This tailored responsibility of the State acting extraterritorially is supplemented with that of the State on whose territory the violation occurs. As established above, the *de jure* territorial State will retain jurisdiction over the applicant. As with all situations within its territory, the State will be responsible for 'securing' the Convention rights *in toto*. Therefore, in principle, it will owe both positive and negative duties to individuals within its jurisdiction.

The territorial State's obligations will also be commensurate to its ability to secure the Convention rights. If its agents did not participate in the infringement of the applicant's rights, the violating conduct cannot be attributed to the territorial State. This should only engage this State's positive obligations to prevent violations. Therefore, the extent of these obligations will depend on the degree of control exercised by the territorial State over the situation which gave rise to the violation.[109]

4. Responsibility under the Spatial Model

When a State exercises extraterritorial jurisdiction based on its *de facto* control over territory (i.e. the spatial model), it will be obliged 'to secure, within the area under its control, *the entire range of substantive rights* set out in the Convention'.[110] The State, whose jurisdiction is 'territorial-based', will owe both positive and negative obligations under Article 1 ECHR.[111] When the respondent State's agents commit human rights violations in a territory over which it has factual control, that State is in breach of its negative obligations because the impugned conduct is attributable to it by virtue of Article 4 ARSIWA. Therefore, the ensuing responsibility is 'standardised' and cannot be tailored.

It is unclear whether the actions of the subordinate local administration (which is often created where extraterritorial jurisdiction is established on the spatial model) should be imputed to the respondent State. A starting point is the *Cyprus v Turkey* judgment. The Grand Chamber held:

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109 Tzevelekos (n 44) 162.

110 *Al-Skeini* (n 9) para 138 [emphasis added].

111 King (n 29) 542. In this respect, it is immaterial whether jurisdiction emanates from the respondent State's sovereign right or its factual control over the territory.

> Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.[112]

The Court uses the obscure term 'responsibility engaged'. It does not specify how Turkey's responsibility arises. This uncertainty is exacerbated as the Court continues by stating that the acts of private individuals may also 'engage that State's responsibility'.[113] Given that the actions of private individuals can only engage Turkey's positive obligations to prevent a violation, this indicates that the cited paragraph could encompass responsibility arising out of a breach of both Turkey's negative *and* its positive obligations. The interpretations open to the Court are considered in turn.

On one interpretation, the Court may be stating that Turkey is responsible for the actions of its own agents *and* for the actions of the local administration under Article 4 ARSIWA. There are two objections to this interpretation. Primarily, this would mean that the actions of the local administration would always engage Turkey's negative obligations. In case of violation, this would lead to 'standardised responsibility', thereby precluding any tailored approach. Secondly, the actions of the 'TRNC' administration would probably not be attributable to Turkey under Article 4 ARSIWA. This is because the administration is not a State organ under Turkey's internal law.[114] Furthermore, it is unlikely that the 'TRNC' administration will satisfy the high threshold of 'complete dependence' which is required in order to be attributed to Turkey as a *de facto* State organ.[115] Even if the 'TRNC' is held to be 'completely dependent' on Turkey, attribution under Article 4 ARSIWA cannot be convincingly applied across all cases of extraterritoriality. For example, it would be fictitious to view the agents of the 'MRT' administration as Russian State organs given the lesser degree of control exercised by Russia.[116] Indicative of this is *Catan v Moldova and Russia*, where the 'MRT' administration shut down schools which used the Latin alphabet,

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112 *Cyprus v Turkey* (n 4) para 77.

113 Ibid para 81.

114 *Bosnian Genocide* (n 99) para 388.

115 Ibid paras 392-394.

116 Berkes (n 74) 415.

despite Russian efforts to the contrary.[117] Therefore, due to the internal incoherence which this approach would create within the law of extraterritoriality, it should be rejected.

On an alternative interpretation, the actions of Turkey's State organs and the 'TRNC' administration may, once again, both be attributable to Turkey. However, the acts of the local administration may be so attributed under Article 8 ARSIWA if it is subject to the 'direction and effective control'[118] of Turkey. In the *Bosnian Genocide Case*, the International Court of Justice ('ICJ') confirmed that effective control must be exercised 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken'.[119] This indicates the difficulty of successfully invoking Article 8 ARSIWA.

In stark contrast, the ECtHR has held that:

> It is not necessary to determine whether [...] Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious [...] that her army exercises effective overall control over that part of the island. Such control [...] entails her responsibility for the policies and actions of the 'TRNC'.[120]

This different approach by the ECtHR may indicate that it is adopting a lower threshold for attribution which is *sui generis* to the ECHR. However, the Court has maintained that it is applying the public international law rules of State responsibility.[121]

A further objection to the lax approach to Article 8 ARSIWA is that it would lead to internal incoherence within the law of extraterritoriality. This is because the issue of attribution arises at two stages when determining extraterritorial responsibility. First, a finding of extraterritorial jurisdiction is usually premised on the operation of *agents* attributable to the State outside its territory.[122] The imputability of these agents to their State is determined

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117 *Chiragov* (n 37) para 149.

118 Tzevelekos (n 44) 137. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1984] ICJ Rep 392, paras 115-116.

119 *Bosnian Genocide* (n 99) paras 396-400.

120 *Loizidou (Merits)* (n 45) para 56.

121 Ibid para 52.

122 Milanovic (n 39) 51-52.

according to ARSIWA. However, an issue of attribution also arises at a later stage, when the Court is considering whether the *violating act* is attributable to the respondent State. It is at this later stage that the Court purports to employ the more lenient approach to attribution.

This less stringent approach to Article 8 ARSIWA would require the Court to apply the same doctrine of attribution at each stage of the assessment, but with diverging meanings. This division of attribution would undermine the clarity of the law. Consequently, it is argued that the *Loizidou* 'effective overall control' test should only be read as a test to establish jurisdiction over the relevant territory, and not as an alternative to the *Bosnian Genocide* test of attribution.[123]

Despite these difficulties, the Court appears to have adopted this interpretation, stating that 'violations are [...] imputable to Turkey'.[124] However, the *violation* would be attributable to the respondent State, even if it arose from a breach of a positive obligation by omitting to prevent the actions of private parties. This is because only the respondent State owed primary obligations under the ECHR. The relevant question, which the Court did not answer clearly, was whether the *conduct* which amounted to the violation was attributable to the State. In light of this uncertainty, the adoption of the aforementioned interpretation cannot be considered unequivocal.[125]

The Court should have adopted a different interpretation. The better view is that the responsibility of the *de facto* controlling State (i.e. the respondent State with extraterritorial *de facto* jurisdiction) could be engaged *either* through a breach of its negative obligations (due to the acts of its own organs) *or* by virtue of a breach of its positive obligations (by failing to prevent the agents of the local administration from committing a violation).[126] This is the only interpretation open to the Court if it wishes to conform to the principles of public international law as, on the application of the *Bosnian Genocide*

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123 Ibid 49-50.

124 *Manitaras v Turkey* App no 54591/00 (ECtHR, 3 June 2008) para 27.

125 Rick Lawson, 'Life after Banković: On the Extraterritorial Application of the ECHR' in Alphonsus Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 99.

126 Milanovic (n 39) 46-51.

'effective control' test, it is unlikely that the local administration's conduct will be attributable to the respondent State. A similar interpretation was endorsed by Judge Ziemele in *Chiragov*.[127]

Given that the obligation binding the respondent State is a positive one, its extent will vary according to that State's factual control over the relevant situation. In principle, if a considerable degree of control is exercised over the impugned conduct, the obligation could be equivalent to that imposed if the local administration had been a conventional organ of the respondent State. However, where the factual control exercised by that State is reduced, the Court will be free to impose a mitigated obligation and, if that obligation is breached, tailored responsibility.

In addition to the responsibility of the *de facto* controlling State, the sovereign State retains jurisdiction over the whole of its *de jure* territory. Consequently, any violation of Convention rights which occurs within this territory also engages its own positive obligations under the ECHR, which are tailored to the constraining factual circumstances, provided its own agents were not involved.[128]

The proposed approach is consistent with the Court's willingness to hold Parties to the Convention concurrently responsible for their omissions in the face of violations by private actors.[129] Furthermore, the most recent jurisprudence of the Court appears to be moving towards the 'concurrent and tailored' model. One such example can be found in the case of *Güzelyurtlu v Turkey and Cyprus*, in which the Grand Chamber held that both Turkey and Cyprus had jurisdiction in relation to the investigation of the murder of three Turkish Cypriot victims, which had occurred on territory controlled by Cyprus.[130] As a result, a positive obligation to carry out an effective

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127 Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, *Chiragov* (n 37), para 12. However, Judge Ziemele suggested that positive obligations could arise even in the absence of the respondent State's jurisdiction over the territory in question. This is contrary to the wording of Article 1 ECHR.

128 *Ilascu* (n 26) para 333.

129 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 1 July 2010).

130 App no 36925/07 (ECtHR, 29 January 2019).

investigation under Article 2 ECHR was incumbent on both respondent States.

5. The Problem of 'Extra-extraterritoriality'

The advocated approach is not without its own difficulties. One problem is that of 'extra-extraterritoriality' which may be illustrated by way of example: if an agent of the 'TRNC' local administration commits a human rights violation in the UN-administered buffer zone, under the proposed model, Turkey would not be held responsible for their conduct.[131] This is because, on the orthodox *Bosnian Genocide* test, the actions of the agent may not be attributed to Turkey. Therefore, their conduct will not extend Turkey's extraterritorial jurisdiction further on the personal model, as this is contingent upon the actions of an agent attributable to Turkey.[132] This is problematic because only Cyprus will be held accountable for the agent's violation and it will only owe a mitigated positive obligation to the victim. Therefore, the applicant's protection under the ECHR will be compromised.

In dealing with the above scenario in *Isaak v Turkey (Admissibility Decision)*, the ECtHR held that violations committed by Turkish and 'TRNC' agents in the buffer zone could extend Turkey's jurisdiction by bringing the victim within the authority and control of Turkey.[133] The Court did not distinguish between the two types of agents. This suggests that the 'TRNC' agents were attributable to Turkey and could, therefore, extend the scope of its jurisdiction.

To reconcile *Isaak* with the proposed model, the Court could introduce a presumption that the actions of the local administration are imputable to the *de facto* controlling State. This would enable the Court to extend Turkey's extraterritorial jurisdiction, while remaining consistent with public international law. The presumption should arise in all cases where the applicant proves spatial extraterritorial jurisdiction. In order to rebut this presumption, the ECtHR should require that the respondent State prove that the specific actions of the local administration's agents cannot be

131 This territory is not under the 'effective overall control' of Turkey.

132 *Al-Skeini* (n 9) para 133.

133 App no 44587/98 (ECtHR, 28 September 2006) 20-21.

attributed to it under the *Bosnian Genocide* 'effective control' test. Where the respondent State's spatial jurisdiction is established and the presumption is rebutted, the Court will be able to fall back on the tailored approach outlined above. The Court could apply this presumption flexibly in order to reach a just result on the facts of each case.[134]

This presumption is justified both practically and theoretically. On a practical level, imposing the burden of proof on the respondent State is warranted because the respondent State should be better able to access evidence in the possession of the subordinate local administration. The shift of the burden of proof may also be explained on three theoretical grounds. Primarily, upon establishing extraterritorial jurisdiction, the Court invariably finds that the support given by the respondent State is a 'but-for' cause for the continuing existence of the local administration.[135] Hence, this connection between the agent of the local administration and the respondent State justifies imposing the burden of proof on the latter. Secondly, this proposition is not a presumption of liability. The presumption is in favour of finding jurisdiction. It is still open to the respondent State to rebut the presumption or to argue that it has discharged its obligations. Finally, the proposed presumption will prevent signatory States from laundering human rights violations by refracting them through various legally void situations. Therefore, the State will be universally accountable for violations to which it is connected. This is consistent with the aim of filling the 'vacuum'.

V. Evaluating 'Concurrent and Tailored' Responsibility in Context

1. Tailored Responsibility rather than Tailored Jurisdiction

De Schutter has argued that jurisdiction, rather than responsibility, should be tailored according to the respondent State's ability to secure the

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134 See *Isaak v Turkey* App no 44587/98 (ECtHR, 24 June 2008) paras 107-108 which indicates that the ECtHR is willing to manipulate the burden of proof when establishing whether a violation has occurred.

135 *Catan* (n 36) para 111.

enjoyment of the Convention rights.[136] In support of this relative concept of jurisdiction he cites *Ilascu*:

> Nevertheless, such a factual situation reduces the scope of that *jurisdiction* in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory.[137]

It is argued that responsibility is a more appropriate stage at which to introduce flexibility. First, the orthodox view is that jurisdiction is a binary threshold.[138] Secondly, the flawed logic in the aforementioned statement is evident. Jurisdiction cannot be 'considered [...] in [...] light of the [...] State's [...] positive obligations' because, prior to establishing jurisdiction, no such obligations exist.[139] For this reason, it is preferable to use responsibility as the conceptual stage at which flexibility can be incorporated. The Court has recently acknowledged that a restrictive factual situation will limit the State's responsibility and not its jurisdiction.[140]

2. Does the Model Remedy the 'Vacuum' Concern?

As suggested, the jurisprudence on extraterritoriality developed in order to avoid a 'vacuum' in the European human rights regime. It is argued that the advocated model effectively addresses this concern. According to the proposed model, the *de jure* sovereign State retains jurisdiction over its territory and is therefore obliged to secure all the Convention rights therein. Hence, when the victim is within the *éspace juridique* of the Convention,[141] they will, at least, have the full protection of the Convention, as guaranteed by the *de jure* territorial State.

3. The Doctrinal Advantages of 'Concurrent and Tailored' Responsibility

The proposed approach should give rise to various doctrinal advantages which contribute to the creation of a principled approach to the law of

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136 De Schutter (n 20) 222.

137 *Ilascu* (n 26) para 333 [emphasis added].

138 Besson (n 1) 878.

139 *Issa v Turkey* App no 31821/96 (ECtHR, 16 November 2004) para 66.

140 *Sargsyan* (n 56) paras 139-140.

141 *Banković* (n 2) para 80.

extraterritoriality. Primarily, adopting a 'concurrent and tailored' model of State responsibility will align the ECtHR jurisprudence on extraterritoriality with related concepts of public international law. As argued, the proposed interpretation of the case law will align the Court's approach to attribution with the ICJ jurisprudence. Furthermore, tailored obligations are imposed in related fields of international law. Under the law of occupation, which may impose parallel obligations to the ECHR,[142] Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land will impose a tailored obligation on the occupying State in relation to the governing of the occupied territory.[143] Given that extraterritorial obligations under the ECHR may arise even when the respondent State exercises a lower level of territorial control than an occupying State (e.g. Russia over the 'MRT'), it would be counterintuitive to impose more onerous obligations on the respondent State under the ECHR. Therefore, imposing tailored obligations under the ECHR on States exercising extraterritorial jurisdiction will be consistent with those States' parallel obligations in public international law.

The advocated model will also enable the Court to achieve internal coherence within the law of extraterritoriality by aligning the case law on extraterritoriality with the 'pseudo-extraterritorial' cases on *non-refoulement*.[144] While these cases are, strictly speaking, not extraterritorial because the violations occur within the territory of the extraditing State, the Court has consistently treated them as being part of the law of extraterritoriality.[145] An example can be found in *Loizidou (Preliminary Objections),*[146] which cites *Soering v UK* as authority that jurisdiction can be extended extraterritorially.[147]

In extradition cases, the Court has also applied a model of concurrent responsibility. Under the Court's approach, the State to which the applicant

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142 Schabas (n 92) 102.

143 Convention concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (entered into force 26 January 1910) [1910] UKTS 10.

144 Tzevelekos (n 44) 157.

145 Maarten Den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 6 *Netherlands International Law Review* 411, 423.

146 *Loizidou (Preliminary Objections)* (n 32) paras 61-62.

147 App no 14038/88 (ECtHR, 7 July 1989).

is being extradited will be liable regarding any violation of human rights which occurs on its territory. The extraditing State has an independent obligation not to extradite to a place where there is a 'real risk' that the individual's Convention rights will be infringed.[148] This latter obligation is a positive one which requires the extraditing State to prevent violations by a third State.[149] Therefore, a due diligence standard should be applied.[150] Illustrative of this line of cases is *M.S.S. v Belgium and Greece*.[151] In this case, Greece, to which the victim was extradited, was found to be in violation of the applicant's rights under Article 3 ECHR. Moreover, Belgium, as the expelling State, was also held responsible for the violation of Article 3 because its authorities were aware of the risks of degrading treatment posed by the Greek asylum procedure and knowingly exposed the victim to these risks.[152] The similarities with the proposed approach to extraterritoriality are evident. Both lines of cases give rise to concurrent responsibility and both use a subjective notion of State fault in order to determine the extent of responsibility.

4. 'Concurrent and Tailored' Responsibility May Provide More Comprehensive Protection

The recognition of *de facto* and *de jure* jurisdiction under Article 1 ECHR could provide more comprehensive protection for the applicant's Convention rights. This may be illustrated through an example. Take the facts of *Loizidou*, where the applicant was denied access to her property, which was located in the 'TRNC'.[153] It is clear that the applicant has a claim against Turkey for the loss of use of her property under Article 1 Protocol 1 ECHR. This is because Turkey's unlawful actions led to an interference with the applicant's rights in fact. Consider the following scenario. The banks in the Republic of Cyprus prevent the applicant from taking out a mortgage on the legal title of her property. The interference with the applicant's rights operates purely on the legal title to the property. This legal title is not

148 Ibid paras 85-91.

149 Den Heijer (n 145) 422-423.

150 Tzevelekos (n 44) 160.

151 App no 30696/0 (ECtHR, 21 January 2011).

152 Ibid paras 362-368.

153 *Loizidou (Merits)* (n 45).

recognised by Turkey. It would therefore be odd to make Turkey liable for an interference that operates purely at the level of the legal title, which exists by virtue of the State apparatus of the Republic of Cyprus. Recognising the *de jure* jurisdiction of Cyprus over the territory of the 'TRNC', where the property is located, would mean that Cyprus would be subject to a positive obligation to ensure that the applicant is allowed to take advantage of the legal title to her property. This will, in turn, ensure that the applicant could have an effective remedy for interferences with her Convention rights which occur purely on the legal plane.

5. A Practical Obstacle to 'Concurrent and Tailored' Responsibility?

One may argue that recognising concurrent jurisdiction of Contracting Parties would require the applicant to exhaust domestic remedies in both jurisdictions prior to bringing a claim before the ECtHR.[154] Such a requirement would increase the procedural burden on the applicant and would render the possibility of launching a claim against two States merely theoretical. It is argued that the applicant should only have to exhaust domestic remedies in one of the two jurisdictions to render their claim admissible against both States. This is controversial. Nevertheless, the Court has applied this admissibility requirement 'tak[ing] realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant'.[155] Moreover, it has indicated that, when an applicant brings concurrent claims against two States, it will accept that domestic remedies should only be exhausted in one jurisdiction, at least in cases where the authorities in the other jurisdiction had the opportunity to remedy the alleged violation but failed to do so.[156] This 'relaxed approach' to the non-exhaustion of municipal remedies extends to extraterritorial cases.[157]

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154 Article 35 ECHR.

155 *Akdivar v Turkey* App no 21893/93 (ECtHR, 16 September 1996) para 69.

156 *Güzelyurtlu v Cyprus and Turkey* App no 36925/07 (ECtHR, 4 April 2017) paras 197-201.

157 Marko Milanovic, 'The Nagorno-Karabakh Cases' (*EJIL: Talk!*, 23 June 2015) <www.ejiltalk.org/the-nagorno-karabakh-cases/> accessed 24 March 2018.

6. 'Concurrent and Tailored' Responsibility as a Political Compromise

While the above analysis is primarily doctrinal, the politically contentious nature of the law of extraterritoriality requires that we consider the political ramifications of the 'concurrent and tailored' model of responsibility. The extraterritorial application of the Convention has generated political resistance in various respondent States. This resistance has included refusals by respondent States to execute the judgments of the ECtHR,[158] as well as calls to invoke Article 15 ECHR.[159]

It is argued that the proposed model presents an opportunity for a new political compromise regarding the extraterritorial application of the ECHR. First, the model provides a doctrinal framework that allows the respondent State, which is acting extraterritorially, to challenge the extent of its obligations. This differs from the Court's current approach, which does not clearly delimit the scope of these obligations. Under the current approach, a respondent State would have to challenge the applicant's claim by alleging that it lacks jurisdiction. If this challenge fails, then the obligations incumbent on the State would be 'standardised'. This would impose a disproportionate burden on the State which would foster resistance. Conversely, the 'concurrent and tailored' model would allow a respondent State to launch an additional challenge against such claims by arguing that its obligations are mitigated due to the constraining circumstances of the case. This would enable the Court to continue to develop the law of extraterritoriality, extending the jurisdiction of Contracting Parties under Article 1 ECHR in pursuit of according universal protection for Convention rights. The tailored nature of the obligations would ensure that this expansion of jurisdiction will not subject respondent States to obligations which would be impossible to discharge.

Secondly, a respondent State which retains its intra-territorial jurisdiction is likely to accept its potential responsibility under the proposed model for two reasons. First, the obligations incumbent on such States would be mitigated

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158 Interim Resolution CM/ResDH(2014)185 'Execution of the judgments of the European Court of Human Rights in the cases Varnava, Xenides-Arestis and 32 other cases against Turkey' (25 September 2014).

159 Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange 2015) 8.

and can therefore be discharged relatively easily. Even if the Court finds a violation, the responsibility of the State would be tailored, thus facilitating the execution of the judgment. Secondly, the 'concurrent and tailored' model provides that sovereign legal rights could form the basis for the respondent State's jurisdiction under Article 1 ECHR. Given that the territorial State continues to claim sovereignty over the contested territory, it would probably not dispute the Court's finding of jurisdiction. In exchange, the Court will reaffirm that the respondent State retains its sovereignty over the relevant territory.

VI. Conclusion

The need for a creative reassessment of the law of extraterritoriality has been acknowledged by senior officials at the Council of Europe.[160] It is contended that this reformulation must be conducted with a view to tailoring State obligations and responsibility according to each State's ability to secure the Convention rights on the facts of each case. This tailoring of State responsibility will ensure that the Court's judgment can realistically be executed. This paper has argued that a model of 'concurrent and tailored' State responsibility should be adopted in the case law concerning the extraterritorial application of the ECHR. This model makes two novel propositions. First, it provides that jurisdiction is a creature of both law and fact. Hence, concurrent jurisdiction should be recognised when one State has the legal right to regulate the situation in question, whereas another State has the *de facto* ability to do so. This occurs when one State is acting extraterritorially. Secondly, the model suggests that the obligations of respondent States could be tailored by recognising that respondent States will often be subject to positive obligations when acting extraterritorially.

The Court appears to be moving towards the recognition of concurrent responsibility by consistently holding that the sovereign State's intra-territorial jurisdiction is retained, even in the absence of factual control over

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160 'Enforcing Strasbourg Court's Judgments concerning the Transnistrian region of the Republic of Moldova' (Council of Europe, 19 February 2018) <www.coe.int/en/web/human-rights-rule-of-law/-/enforcing-strasbourg-court-s-judgments-concerning-the-transnistrian-region-of-the-republic-of-moldova> accessed 25 March 2018.

a given victim or territory.[161] The responsibility of the territorial State therefore operates alongside the responsibility of the State which exercises extraterritorial jurisdiction. However, it is argued that the Court should explicitly state that concurrent jurisdiction and responsibility are now the norm in cases concerning the extraterritorial application of the ECHR. Furthermore, the Court is progressively realising the need for a tailored approach to State responsibility, rejecting the old standardised approach to State obligations under the Convention.[162] Nevertheless, the existing jurisprudence is marred by doctrinal uncertainty and does not clearly operate in favour of tailoring State obligations and their ensuing responsibility under the Convention. As advocated above, the case law may be reinterpreted so that extraterritorial violations will usually engage the respondent State's positive obligations. As stated, the extent of these obligations is commensurate to the State's factual ability to secure Convention rights. It has been argued that positive obligations should therefore be used to introduce a tailored approach to State responsibility.

The Court will have ample opportunity to reconsider its approach to extraterritoriality. In the coming years the extraterritorial application of the ECHR will become increasingly important as cases regarding Turkey's military operations in Syria and Russia's support for separatist regimes in the Ukraine reach the ECtHR.[163] Therefore, it is imperative that the Court develops a clear and coherent doctrine of extraterritoriality, which will enable it to fulfil its purpose as the gatekeeper of human rights in Europe.

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161 *Sargsyan* (n 56) para 130.

162 *Al-Skeini* (n 9) para 137; *Banković* (n 2) para 75.

163 Mark Lowen, 'Syria war: Turkish-led forces oust Kurdish fighters from heart of Afrin' (BBC, 18 March 2018) <www.bbc.com/news/world-middle-east-43447624> accessed 25 March 2018; *Ayley and Others v Russia* App nos 25714/16 and 56328/18 (Case Communication, 4 April 2019).

THE ROLE OF NATIONAL COURTS FOR THE INTERNATIONAL RULE OF LAW: INSIGHTS FROM THE FIELD OF MIGRATION

Pierfrancesco Rossi*

This paper evaluates the theory that national courts can act as agents for the protection of the international rule of law, i.e. the idea that, under certain conditions, national courts may compensate for the lack of international mechanisms of law enforcement and ensure that their own governments comply with international law. This theory is tested against a paradigmatic case study from the field of migration, the Diciotti affair, which serves as an example of international law violations caused by governmental policies of migration containment. In this incident, migrants rescued at sea by an Italian Coast Guard ship were confined onboard for a number of days in apparent violation of international legal standards. The breaches of international law which occurred during the incident were at the center of civil and criminal cases before the Italian courts. Even though, prima facie, the response of the Italian judiciary would appear to be a textbook confirmation of the view of national courts as guardians of the international rule of law, the paper argues that the Diciotti affair also suggests that caution is required as regards the actual powers of national courts to compel state authorities to respect international law.

Keywords: international rule of law, national courts, international migration law, international law of the sea, international human rights law, migration control

* Postdoctoral Research Fellow in International Law, Luiss Guido Carli University, Rome, rossip@luiss.it. An earlier version of this paper was presented at the Workshop on 'Migration and the Rule of Law' organized by the European Society of International Law (ESIL) Interest Group on Migration and Refugee Law in the framework of the ESIL Research Forum on 'The International Rule of Law and Domestic Dimensions: Synergies and Challenges', University of Göttingen, Germany, 3 April 2019. The author is grateful to Kristof Gombeer, Maria Varaki, all the organizers and participants of the Workshop, and the two anonymous referees for their thoughtful comments. All errors remain the author's own.

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I. INTRODUCTION

It is frequently argued that national courts can play a fundamental role in supporting the international rule of law (IRL).[1] By providing remedies for violations of international law committed by the state, they may compensate for the lack of international mechanisms of coercive enforcement against national authorities and thus fulfill one of the essential requirements of any definition of rule of law: the accountability of public authorities for their breaches of the law.[2]

The field of migration constitutes an ideal testing ground for this theory. Alleging the existence of supposed 'migration emergencies',[3] the political

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1 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011). For a more thorough review of the relevant literature see below Section II.

2 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 45.

3 See Jaya Ramji-Nogales, 'The Role of Human Rights Law in Constructing Migration Emergencies' (EJIL: Talk!, 24 February 2017)

authorities of a significant number of countries are implementing policies of migration control in defiance of international legal standards of migrants' protection.[4] These standards – collectively termed 'international migration law' – consist of norms pertaining to various areas of international law, including human rights law, humanitarian law, labor law and the law of the sea.[5] In such a fragmented legal landscape, international mechanisms allowing for an independent ascertainment of state breaches of international migration law are scant and sectorial, the most prominent example being, in the field of human rights law, the European Court of Human Rights (ECtHR). Nor do there exist international means of enforcing international migration law against unruly national governments. It is therefore natural to wonder if national courts may fulfill the role of a systemic force for the IRL in the field of migration, ensuring governmental compliance with international migration law and even turning the tide of weakening international legal regimes.[6]

Against this backdrop, this contribution focuses on national courts' responses to breaches of international law caused by governmental policies of migration control. It does so primarily through the lens of a case study, the 2018 *Diciotti* affair, concerning apparent violations by Italy of international migration law following a migrant rescue operation in the Mediterranean Sea. This incident is paradigmatic because of the consequences such violations entailed before the Italian courts. Not only was a civil action brought against

<https://www.ejiltalk.org/the-role-of-human-rights-law-in-constructing-migration-emergencies-esil-blog-symposium/> accessed 16 May 2019; Muhammad Shahabuddin, 'Postcolonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 Asian Journal of International Law 334.

4 See e.g. Lena Riemer, 'How Trump's Migration Policy Erodes National and International Standards of Protection for Migrants and Asylum Seekers' (EJIL: Talk!, 28 November 2018) <https://www.ejiltalk.org/how-trumps-migration-policy-erodes-national-and-international-standards-of-protection-for-migrants-and-asylum-seekers/> accessed 16 May 2019.

5 Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 7-12.

6 The role of national courts is crucial even in the strongly integrated context of the European Convention on Human Rights: see e.g. Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015).

the state by a number of victims, but criminal proceedings were also initiated against members of the Italian government.[7]

After reviewing the main theoretical approaches to the role of national courts in supporting the IRL (section II), this article provides a brief description of the facts of the *Diciotti* affair as well as an analysis of the international legal norms that would appear to have been breached during the incident, notably in the fields of the law of the sea and human rights law (section III). The focus then turns to how the Italian courts reacted to such violations and to their efforts to ensure the executive's accountability, situating these efforts within the broader framework of the theory of national courts as agents for the promotion of the IRL (section IV). The article concludes by arguing that the *Diciotti* affair may suggest that caution is required as regards the actual powers of domestic courts to compel state authorities to respect international law, in the sense that, in practice, even a fiercely independent judiciary may end up being a valuable but imperfect instrument for the IRL (section V).

Of course, as a matter of methodology, caution is due when extrapolating from a single case. It is not the purpose of this paper to make sweeping or conclusive arguments for or against any of the theories put to the test. What is argued is merely that the analysis of a concrete case may provide some depth to concepts which are often posited at a higher level of abstraction, revealing both strengths and shortcomings of the capacity of national courts to review governmental acts violating international law. And while, as will be shown, some features of the *Diciotti* affair are closely dependent on the characteristics of the European and the Italian legal settings, other features arguably exemplify difficulties that any independent judiciary may encounter when attempting to enforce international law against its own government.

II. National Courts: Agents for the Protection of the International Rule of Law?

The idea that national courts may serve as agents of the international legal order finds its roots in the thought of George Scelle. Given the lack of centralized international organs fulfilling legislative, executive and judicial

[7] A more detailed account is below Section IV(1).

functions, the celebrated French author maintained that those three functions of the international legal order were to be performed, as it were, in a delocalized form. National organs would thus act as international organs, fulfilling an international function, whenever they acted in the international legal sphere, along the lines of what Scelle called '*dédoublement fonctionnel*' (role splitting).[8]

More recent scholarship rarely subscribes to the view that national courts would constitute fully fledged *organs* of the international legal order.[9] It is instead commonly acknowledged that it would be purely fictitious to treat them as institutionally detached from the state of which they are a part.[10] Rather, what has survived of Scelle's thought – and has in fact thrived in subsequent literature – is the view that national courts may fulfill an international *function*, namely that of filling the enforcement gap that international law continues to experience and that could diminish its effectiveness.[11] This gap stems from the fact that, on the one hand, the areas

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8 George Scelle, *Précis de droit des gens: principes et systhèmatique*, vol. I (Recueil Sirey 1932) at 43, 54-56 and 217; Id, 'Règles générales du droit de la paix' (1933) 46 Recueil des cours 327, at 358-359 (terming the *dédoublement fonctionnel* 'la loi essentielle des rapports internationaux'). For comments on Scelle's theory, see *ex multis* Haro F. van Panhuys, 'Relations and Interactions Between International and National Scenes of Law' (1964) 112 Recueil des cours 1, at 8-11; Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 European Journal of International Law 210.

9 There are echoes of this view in Richard A. Falk, 'The Role of Domestic Courts in the International Legal Order' (1964) Indiana Law Journal 429, at 436-437, speaking of 'national courts as international institutions, that is, as institutions responsible for upholding international law and for displaying it as a common system of law peculiar to no single state'.

10 Massimo Iovane, 'L'influence de la multiplication des juridictions internationales sur l'application du droit international' (2017) 383 Recueil des cours 233, at 320, noting that 'les tribunaux internes [...] fonctionnent normalement comme des instruments de la justice nationale, même quand ils sont tenus d'appliquer des normes internationales' and adding in ft. 127 '[a] moins d'accepter la thèse du dédoublement fonctionnel qui finit par considérer tous les organes internes comme des organes internationaux'.

11 See e.g. Yuval Shany, '*Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges', in Filippo Fontanelli, Giuseppe Martinico and Paolo

regulated by international law have expanded considerably in recent decades, causing its domain to overlap to a great extent with that of national law (e.g. in the field of human rights)[12] while, on the other hand, the development of international mechanisms of law enforcement has not managed to keep pace. Because states retain exclusive control of coercive authority within their own borders, international law remains, somewhat paradoxically, entirely dependent for its domestic implementation on the very subjects whose actions it aims to constrain.[13] It is precisely this 'increasing disparity between [international law's] growth of normative content and its lack of enforcement mechanism' that led Benedetto Conforti to assert that a 'truly legal function of international law' could only be achieved through the action of 'domestic legal operators' and, most relevantly, national courts.[14]

André Nollkaemper has recently developed and popularized this view by combining it with theories of the IRL, i.e. the scholarly attempts to apply the concept of rule of law to the international realm.[15] Nollkaemper's view is based on two main premises. Firstly, the rejection of any distinction between the rule of law at the domestic level and at the international level in favor of a unified notion of rule of law, at least where there is an overlap in the subject-

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Carrozza (eds), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law 2010) 27, at 40.

12 Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 Recueil des cours 9, at 63, describing international law as a 'comprehensive blueprint for social life'; James Crawford, 'International Law and the Rule of Law' (2003) Adelaide Law Review 3, at 6-8, noting that international law is increasingly concerned with the states' internal matters.

13 Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 Harvard International Law Journal 327, at 343.

14 Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff 1993) at 7-12; Id (Massimo Iovane ed), *Diritto internazionale*, 11th ed. (Editoriale Scientifica 2018) at 8-9. Similarly, see Henry G. Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3 Leiden Journal of International Law 77, particularly at 78-79.

15 See generally Arthur Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15; Stéphane Beaulac, 'The Rule of Law in International Law Today', in Palombella and Walker (eds) (n 2) 197.

matters of international law and municipal law.[16] Secondly, the inclusion within such a unified notion of rule of law of both formal and substantive elements.[17] The 'formal' prong encapsulates the need for compliance with the law, requiring public power to be brought under the law and held accountable for its breaches, while the 'substantive' prong focuses on the content of the law, requiring that it conforms to fundamental human rights.[18] Against this backdrop, it is argued that national courts may promote the (domestic as well as) international rule of law as long as a number of conditions are realized, namely that: (i) they have jurisdiction over an international claim; (ii) they are independent from the national political branches; (iii) they are entitled by domestic law to apply international law; and (iv) private parties have standing to invoke the international norm as the basis of their claim.[19] This conclusion largely echoes the content of a 1994 resolution of the Institut de Droit International, which suggested that in order for national courts to operate in the guise of international courts they should be allowed by domestic law to apply international law independently from their own governments.[20] For the

16 Nollkaemper (n 1) at 3. For a similar view see Yuji Iwasawa, 'Domestic Application of International Law' (2015) 378 Recueil des cours 12, at 184, arguing that application of international law by national courts 'is an effective means to enforce international obligations against the reluctant Government and promote the rule of law in the state'.

17 See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) at 91 ff., proposing a scale, ranging from 'thin' to 'thick' versions, to describe the different models of rule of law.

18 Nollkaemper (n 1) at 3-5.

19 Ibid at 21-113.

20 See the resolution of the Institut de droit international 'The Activities of National Judges and the International Relations of their State' (1994) 65(II) Annuaire de l'Institut de droit international 318, particularly Art. 1.2 (national courts should 'bas[e] themselves on the methods followed by international tribunals') and Art. 5.3 (they should 'mak[e] every effort to interpret it as it would be interpreted by an international tribunal and avoid [...] interpretations influenced by national interests').

sake of brevity, in the following pages this theory on the role of national courts for the IRL will be referred to as the 'internationalist model'.[21]

The above views, it should be noted, have not gone unchallenged. A first counterargument is that, even where on paper domestic law empowers them to apply international law in an impartial and independent manner, national courts would still tend not to apply international law to review governmental acts in politically sensitive situations. To this end, they would resort to an array of judicial techniques collectively termed 'avoidance doctrines', including, for example, the so-called 'political question' doctrine, the 'act of state' doctrine and the doctrine of self-execution of treaties.[22] Second, it has been contended that national courts are prone to national biases even where they apply international law.[23] This is because, as Andreas Paulus has put it, 'they do so because domestic law requires it, not because they are organs of the international community'.[24] Eyal Benvenisti has claimed that national courts could never be impartial in the sense envisioned by Nollkaemper, i.e. so as to operate as if they were international tribunals, because 'their chief motivation is not to promote global justice but to protect primarily, if not exclusively, the domestic rule of law'.[25] Moreover, national courts may apply international law merely as a tool to safeguard the discretion of national governments against 'the attempts of interest groups and powerful foreign

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21 The same terminology is used by Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law 19.

22 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 159, at 169-173. On the 'political question' doctrine see further below Section IV.1.

23 Wolfgang G. Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) at 146-147.

24 Andreas Paulus, 'National Courts and the International Rule of Law – Remarks on the Book by André Nollkaemper' (2012) 4 Jerusalem Review of Legal Studies 5, at 9.

25 Eyal Benvenisti, 'Comments on the Systemic Vision of National Courts as Part of an International Rule of Law' (2012) 4 Jerusalem Review of Legal Studies 42, at 45; Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 European Journal of International Law 59, at 61.

governments to influence them'.[26] In a somewhat similar, although less radical, fashion, Karen Knop has criticized the 'internationalist model' as reducing the role of national courts to a mere 'compliance mechanism', and has contended that the use of international law in domestic courts should be regarded as a process less of enforcement and more of translation. An inescapable feature of the national judicial function would be to interpret and apply international norms in a way which is influenced by the national legal and cultural background.[27]

In sum, the key trait common to such skeptical views is the challenge to the equivalence between international and domestic rule of law. While these approaches generally do not deny that national courts may faithfully apply international law under certain circumstances, they highlight that this outcome is entirely dependent on considerations of domestic law and, for this reason, more elusive than the 'internationalist model' suggests. This stance may be reinforced by noting that national courts of any jurisdiction – even those where international law is respected as a matter of course – show some degree of resistance towards international legal regimes, at least when it comes to safeguard principles of domestic law perceived as fundamental.[28]

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[26] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 241, at 244. Similarly, Antonio Cassese criticized Scelle for neglecting cases in which national organs, although acting within the international legal sphere, pursue chiefly national interests instead of 'metanational values or long-term, communal objectives': Cassese (n 8) at 219.

[27] Karen Knop, 'Here and There: International Law in Domestic Courts' (1999-2000) 32 NYU Journal of International Law and Politics 501, at 503-505. Compare to Francesco Francioni, 'The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience', in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff 1997) 15, at 16, arguing that independent judges should act 'as *la bouche de la loi*, as instruments of the impartial application of international law'.

[28] See the studies collected in Fulvio Maria Palombino, *Duelling for Supremacy. International Law vs. National Fundamental Principles* (Cambridge University Press 2019); Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in Javier Couso, Alexandra Huneeus, Rachel Sieder (eds), Cultures of Legality: Judicialization and Political Activism in Latin America (Cambridge University Press 2010) 112, at 134-135;

III. Governmental Violations of International Migration Law: the Example of the *Diciotti* Affair

As mentioned in section I, the field of international migration law offers a particularly suitable testing ground for the role that national courts can play in the effective enforcement of international law. This is not only because international law violations frequently occur in this area, but also because such violations may concern norms of fundamental importance, including those protecting basic human rights. This section illustrates these points by concentrating on a case which recently unfolded in Italy and which constitutes a prime example of violations of international migration law produced by current governmental policies of migration containment. The next section then considers the national courts' reaction to such breaches within the framework of the above theories on the role of national courts for the IRL.

The case at hand originated from an August 2018 incident involving a vessel of the Italian Coast Guard (the *Diciotti*) carrying 177 migrants rescued in the Mediterranean Sea. After a five-day wait off the coast of Lampedusa island, the *Diciotti* was authorized to dock in the Sicilian port of Catania. However, the migrants were prevented from disembarking for two more days, in the case of 27 unaccompanied minors, and five more days for all the others. Members of the Italian government declared that the impasse would continue until the European Union found a solution for the allocation of migrants to states other than Italy.[29] People onboard were allowed to go ashore only after the Catholic Church, Ireland and Albania agreed to a redistribution plan.[30]

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[29] Steve Scherer and Gabriela Baczynska, 'Italy clashes with EU over migrants stranded on rescue boat' *Reuters* (24 August 2018) <https://www.reuters.com/article/us-europe-migrants-italy/italy-clashes-with-eu-over-migrants-stranded-on-rescue-boat-idUSKCN1L9181> accessed 19 April 2019.

[30] To the knowledge of the present author, this plan was never fully implemented. In particular, no migrant would appear to have been transfered to Albania: see Nicola Pedrazzi, 'Nessun asilante della Diciotti è mai arrivato in Albania' *OBC Transeuropa* (4 February 2019) <https://www.balcanicaucaso.org/aree/Albania/Nessun-asilante-della-Diciotti-e-mai-arrivato-in-Albania-

The events of the *Diciotti* incident should be looked at within the broader framework of the strategies of immigration containment implemented by various Italian governments in recent years.[31] Such strategies have taken on different forms, ranging from so-called 'push-backs' to Libya directly performed by Italian authorities – which the ECtHR censured in the notable case of *Hirsi Jamaa*[32] – to cooperation with Libya,[33] which was regulated by a controversial agreement between Italy and the Government of National Accord led by Fayez al-Sarraj.[34] More recently, the Italian government put in place yet another approach to migration through the Mediterranean, consisting *inter alia* in closing Italy's ports to ships carrying migrants rescued

192453?fbclid=IwAR0Wxr1Tmjpss4bGz81_bUqZhTJcy4-_gdYMyz7rnarl3udWMr5rVhXUD0s>.

31 See *ex multis* Marina Mancini, 'Italy's New Migration Control Policy. Stemming the Flow of Migrants from Libya Without Regard for Their Human Rights' (2017) 27 Italian Yearbook of International Law 259.

32 *Hirsi Jamaa and Others v Italy*, App. No. 27765/09 (ECtHR, 23 February 2012). See Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 Human Rights Law Review 574.

33 Federica Mussi and Nikolas Feith Kan, 'Comparing Cooperation on Migration Control: Italy–Libya and Australia–Indonesia' (2015) 10 Irish Yearbook of International Law 87; Jean-Pierre Gauci, 'Back to Old Tricks? Italian Responsibility for Returning People to Libya' (EJIL: Talk!, 6 June 2017) <https://www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/> accessed 19 April 2019.

34 Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (Italy – Libya) (2 February 2017) <http://www.governo.it/sites/governo.it/files/Libia.pdf> (in Italian), accessed 19 April 2019. On the controversies with regard to this agreement, see Anna Liguori, *Migration Law and the Externalization of Border Controls: European State Responsibility* (Routledge 2019); Marina Mancini, 'Il Memorandum d'intesa tra Italia e Libia del 2017 e la sua attuazione', in Natalino Ronzitti and Elena Sciso (eds), *I conflitti in Siria e Libia. Possibili equilibri e le sfide al diritto internazionale* (Giappichelli 2018) 191; Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4 Italian Law Journal 489.

at sea.[35] Under the 'closed ports policy', boats run by non-governmental organizations (NGOs) have been denied access to Italian coastal cities on multiple occasions.[36] Even against this backdrop, however, the *Diciotti* incident constitutes something of an anomaly, because it concerned the Italian Coast Guard's own boat being prevented by the Italian government from disembarking migrants in an Italian port.

1. The Diciotti *Affair and the International Law of the Sea*

The international law assessment of the incident should be performed separately with respect to the international law of the sea and international human rights law, i.e. the areas of international law that are most directly relevant to migration at sea. As regards the former, the relevant legal framework is contained in the UN Convention on the Law of the Sea (UNCLOS)[37] and two International Maritime Organization (IMO) Conventions, namely the 1974 Safety of Life at Sea Convention (SOLAS) and the 1979 Search and Rescue Convention (SAR).[38] Italy is a party to all three

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35 See generally Pasquale De Sena and Francesca De Vittor, 'La "minaccia" italiana di "bloccare" gli sbarchi e il diritto internazionale' (SIDIBlog, 1 July 2017) <http://www.sidiblog.org/2017/07/01/la-minaccia-italiana-di-bloccare-gli-sbarchi-di-migranti-e-il-diritto-internazionale/?fbclid=IwAR1gO1pZrNPRT2ik_Y67MuHUfgVMtw7h6vUCpX3tAVLGN5wsjtru-iPJT10> accessed 19 April 2019.

36 'Dalla Mediterranea alla Diciotti: tutte le navi respinte da Salvini' *Il Sole 24 Ore* (5 July 2019) <https://www.ilsole24ore.com/art/dalla-mediterranea-diciotti-tutte-navi-respinte-salvini-ACr4AtW> accessed 12 July 2019; 'Migrant crisis: Italy minister Salvini closes ports to NGO boats' *BBC News* (30 June 2018) <https://www.bbc.com/news/world-europe-44668062> accessed 19 April 2019. See e.g. Melanie Fink and Kristof Gombeer, 'The Aquarius incident: navigating the turbulent waters of international law' (EJIL: Talk!, 14 June 2018) <https://www.ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/> accessed 19 April 2019; Martina Ramacciotti, 'Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di search and rescue (SAR)' (2018) 101 Rivista di diritto internazionale 213.

37 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

38 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 276 (SOLAS); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into

Conventions. Article 98 UNCLOS sets forth a general duty to render assistance to people in distress at sea, while the two IMO Conventions flesh out this principle in more detail. The SAR Convention, in particular, requires coastal states to ensure search and rescue services within the marine area under their responsibility, so-called Search and Rescue Region (SRR), and establishes an obligation for states to cooperate in the performance of search and rescue duties.[39] In 2004, both the SAR Convention and the SOLAS Convention were amended to read as follows:

> The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.[40]

In the case of the *Diciotti* incident, the rescue operation took place in the Maltese SRR but was performed by Italian vessels acting under directions of the Maritime Rescue Coordination Center of the Italian Coast Guard. The Italian authorities performed the rescue operation shortly after receiving a

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force 22 June 1985) 1405 UNTS 97 (SAR). Both Conventions have been amended in 2004. On this legal regime see Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98 International Review of the Red Cross 491.

39 See in particular SAR Convention, Annex, Chapter 3. On the Convention regime see further Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin, 'Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 International and Comparative Law Quarterly 315.

40 Ibid para 3.1.9; SOLAS Convention, Chapter V, Regulation 33, para 1.1 (with minor textual differences). Both amendments were adopted with a view to clarifying the states' obligations in the aftermath of the *Tampa* affair, when the Australian government refused to allow a Norwegian cargo ship to disembark 433 migrants rescued from a vessel in distress. On this incident see Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 American Journal of International Law 661; Matteo Fornari, 'Soccorso di profughi in mare e diritto di asilo: questioni di diritto internazionale sollevate dalla vicenda della nave Tampa' (2002) 57 Comunità internazionale 61.

distress call from the ship carrying migrants.[41] In this initial phase, Italy's actions appear to be fully in line with the relevant international obligations. In referring to a 'primary responsibility' of the state responsible for the SRR, the IMO Conventions implicitly acknowledge that states may perform search and rescue services in other states' SRRs. This is also consistent with the SAR Convention's emphasis on cooperation. The Convention further provides that '[o]n receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided'.[42] Given Malta's notorious unwillingness to intervene in its SRR,[43] Italy rightly took responsibility for the search and rescue operation upon receiving the distress call.[44]

The legal assessment of the events which took place in the following ten days, however, is more complex. The day after conducting the search and rescue operation, the *Diciotti* requested from the authorities of both Italy and Malta the indication of a place of safety for the migrants to disembark. Because the two governments disagreed about the port of disembarkation, neither country responded to the vessel's request, thus leaving it standing by off the coast of Lampedusa. Two days later, the *Diciotti* received orders from the

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41 The factual circumstances of the incident are summarized in the Tribunal of Catania's request to Parliament for authorization to proceed against the Minister of the Interior, <http://www.senato.it/service/PDF/PDFServer/BGT/1097913.pdf> accessed 21 May 2019 at 6-8 (hereinafter 'Request'). On this document see further below Section IV(1).

42 SAR Convention, Annex, Chapter 2, para 2.1.1.

43 In the case under scrutiny, the Maltese authorities refused to intervene by questioning that the migrant vessel was actually in distress: see 'New standoff: Malta says migrants were not in distress, refused help' *The Malta Independent* (16 August 2018) <http://www.independent.com.mt/articles/2018-08-16/local-news/New-migration-standoff-brewing-as-Salvini-threatens-to-renege-on-Aquarius-agreement-6736194975> accessed 19 April 2019.

44 This is further confirmed by the 2016 International Aeronautical and Maritime Search and Rescue Manual, a non-binding document jointly published by the IMO and the International Civil Aviation Organization (ICAO): see Volume II, Section 3.6: '[w]hen an RCC or RSC receives information indicating a distress outside of its SRR, it should immediately notify the appropriate RCC or RSC and take all necessary action to coordinate the response until the appropriate RCC or RSC has assumed responsibility'.

Italian maritime authorities to sail towards Sicily and to dock in the port of Catania. All this happened without the Italian authorities formally declaring Catania to be the 'place of safety' where the migrants could disembark; on the contrary, the captain of the *Diciotti* was informed that Catania only constituted a temporary port of call. A formal designation as place of safety was still lacking when the migrants were eventually allowed ashore.[45]

Two points are relevant for the assessment of Italy's management of the incident from the perspective of the international law of the sea. Firstly, the terms of the Conventions, requiring disembarkation to be effected 'as soon as reasonably practicable' and by having regard to the 'particular circumstances of the case', do not demand immediate disembarkation. Secondly, and most crucially, the above-quoted passage of the IMO Conventions requiring the country responsible for the SRR to ensure that the rescued people are brought to a 'place of safety' is commonly interpreted as an obligation to 'take the lead in finding a port for disembarkation'[46] and not as a duty to disembark people in the coordinating state itself (this duty can logically be extended to any country taking on responsibility for a particular search and rescue operation).[47] In principle, therefore, the IMO Conventions are without prejudice to the international law rule that entitles a state to regulate access to its ports as an exercise of its sovereignty.[48] As a matter of fact, the lack of a default state of disembarkation or a standard procedure for determining such a state has been termed 'the main *lacuna* in the current SAR regime'.[49] A delay of some days in the disembarkation, while

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45 Request (n 41) at 7-8.

46 Fink and Gombeer (n 36).

47 Efthymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017). On the notion of place of safety, see Martin Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) 33 Australian Yearbook of International Law 81.

48 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment) [1986] ICJ Rep 14, para 213.

49 Patricia Mallia, 'The MV Salamis and the State of Disembarkation at International Law: The Undefinable Goal' (ASIL Insights, 15 May 2014)

consultations are conducted between the coastal states involved, is rather run-of-the-mill in the functioning of the ILO Conventions.[50]

The above may lead to the conclusion that no violations of the law of the sea seemingly occurred while the *Diciotti* awaited instructions off the coast of Lampedusa. This conclusion may be reinforced by noting that thirteen migrants in need of medical assistance were allowed ashore in Lampedusa without further delay.[51] With regard to the days spent in the port of Catania, however, a different conclusion is probably warranted. Once the ship docked in a port, the disembarkment of all migrants was certainly reasonably practicable, therefore making the further delays hardly justifiable under the terms of the Conventions.

Interestingly, some government officials advanced the argument that the ship itself, while docking in the port of Catania, could constitute a place of safety.[52] This argument implies that, for Italy to meet its obligations, disembarkation of the migrants was unnecessary. But such a view neglects the fact that the IMO Conventions expressly provide for a general duty to disembark. The IMO Maritime Safety Committee Guidelines on the Treatment of Persons Rescued at Sea support the view that a ship may serve as a place of safety only 'temporarily',[53] and that 'alternative arrangements' should be made as soon as possible.[54]

<https://www.asil.org/insights/volume/18/issue/11/mv-salamis-and-state-disembarkation-international-law-undefinable-goal#_edn5> accessed 19 April 2019.

50 On the many cases in which vessels carrying migrants rescued in the Meditteranean had to wait for days before a port for disembarkment could be identified see Kristof Gombeer, 'Human Rights Adrift? Enabling the Disembarkation of Migrants to a Place of Safety in the Mediterranean' (2015) 10 Irish Yearbook of International Law 23.

51 Request (n 41) at 5.

52 Ibid 31.

53 MSC 78/26/Add.2, 20 May 2004, para. 6.13.

54 Ibid. See also para. 6.14: '[a] place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination'.

2. *The* Diciotti *Affair and International Human Rights Law*

The events under scrutiny should also be evaluated from the standpoint of international human rights law. The most relevant provision in this respect is Article 5 of the European Convention on Human Rights (ECHR), which enshrines the prohibition of arbitrary deprivation of liberty. Pursuant to this Article, in order to be lawful, a deprivation of liberty must: (i) fall within one of the admissible grounds listed at para. 1;[55] (ii) be prescribed by law;[56] and (iii) be subject to prompt and speedy judicial review.[57] In its rich case law concerning this provision, the ECtHR has clarified that a breach of Article 5 may occur regardless of whether the alleged deprivation of liberty is qualified as such under domestic law. What is required is merely that a person has been confined without his/her consent in a restricted space for a non-negligible period of time, a notion which may include deprivations of a relatively short duration.[58]

When applying such standards to the events of the *Diciotti* case, the main issues arise with regard to Article 5(1)(f), which provides for a lawful ground of deprivation of liberty in the case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. In the *Khlaifia v Italy* case, the ECtHR applied this principle to the detention of irregular migrants in a reception center and on a ship.[59] It should be noted, however, that the facts in *Khlaifia* were different from

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55 Article 5(1)(a)-(f) of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR). The list is exhaustive and the exceptions must be interpreted restrictively: see *S, V and A v Denmark*, App Nos 35553/12, 36678/12 and 36711/12 (ECtHR, 22 October 2018) para 73. On Article 5 ECHR, see William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) at 219-263.

56 Article 5(1) ECHR.

57 Article 5(3)-(4) ECHR.

58 See e.g. *Storck v Germany*, App No 61603/00 (ECtHR, 16 June 2005) paras 73-74; *Rantsev v Cyprus and Russia*, App No 25965/04 (ECtHR, 7 January 2010) para 317.

59 *Khlaifia and Others v Italy*, App No 16483/12 (ECtHR, 15 December 2016). See the comment by Jill I. Goldenziel (2018) 112 American Journal of International Law 274; and Maria Rosaria Mauro, 'Detention and Expulsion of Migrants: the Khlaifia v. Italy Case' (2015) 25 Italian Yearbook of International Law 85.

Diciotti, in that the migrants were already present on Italian territory and were awaiting deportation from the country. What is of interest here is instead the first limb of Article 5(1)(f), which recognizes that states have a right to control aliens' entry into their territory.[60] Clearly, this provision acknowledges that states can detain immigrants, and this also applies to asylum seekers.[61] Therefore, a violation of Article 5 cannot be inferred from the mere fact that the migrants were detained for some time.

It is rather the particular features of this detention that raise serious doubts about its compatibility with the Convention. Firstly, the confinement of migrants on the *Diciotti*, while it was anchored in the harbor of Catania, was neither prescribed by domestic law nor carried out according to any pre-established procedure; rather, it was an act of arbitrariness.[62] Secondly, the fact that the detention was realized in violation of a specific international law obligation to disembark is relevant in the assessment of its lawfulness under the ECHR. Indeed, to determine whether a deprivation of liberty is 'prescribed by law', the Strasbourg Court refers to procedural standards set not only by domestic law but also, when appropriate, by international law.[63] Thirdly, it can be presumed that the migrants were not promptly informed of the reasons (whatever they might be) for their detention, in breach of Article

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60 See e.g. *Amuur v France*, App No 19776/92 (ECtHR, 25 June 1996) para 41.

61 As was the case in *Saadi v United Kingdom*, App No 13229/03 (ECtHR, 29 January 2008).

62 As noted by Francesca Cancellaro and Stefano Zirulia, 'Controlling Migration through De Facto Detention: The Case of the "Diciotti" Italian Ship' (Border Criminologies, 22 October 2018) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling> accessed 19 April 2019, Italian law prescribes that migrants can be detained for the sole purposes of executing a deportation order, and only within 'deportation centers': see Art. 13-14 of Legislative Decree n. 286 of 1998. The arbitrariness of the detention from the standpoint of domestic law is further confirmed by the fact that no formal administrative act forbidding disembarkation was issued during the stand-off: see 'Accesso civico ai Ministeri dell'interno e dei Trasporti: nessun provvedimento formale di chiusura dei porti' (ASGI, 10 January 2019) <https://www.asgi.it/media/comunicati-stampa/chiusura-porti-accesso-civico/> accessed 19 April 2019.

63 *Medvedyev and Others v France*, App No 3394/03 (ECtHR 29 March 2010) para 79; *Toniolo v San Marino and Italy*, App No 44853/10 (ECtHR, 26 June 2012) para 46.

5(2) ECHR. In *Saadi v United Kingdom*, the ECtHR found a breach of this provision in the UK authorities' 76-hour delay in informing the applicant, an asylum seeker, of the reasons for his detention in a reception center, even though the detention itself was not found to be unlawful under Article 5(1) ECHR.[64] Lastly, the migrants' confinement on the *Diciotti* was not subject to any form of judicial review.

In conclusion, it can be asserted that Italy most likely breached Article 5 ECHR.[65] It should be noted that 41 migrants have already announced their intention to bring the case to the Strasbourg Court.[66] Comparable provisions of other international conventions may also be said to have been breached, primarily Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[67] and (with regard to the situation of the minors onboard the *Diciotti*) Article 37(b) of the Convention on the Rights of the Child.[68]

It has been suggested that the confinement of the migrants on the *Diciotti* may also constitute a violation of Article 3 ECHR, pursuant to which '[n]o one shall be subjected to torture or to inhuman or degrading treatment or

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64 *Saadi v United Kingdom* (n 61).

65 In this sense see Massimo Frigo, 'The Kafkaesque "Diciotti" Case in Italy: Does Keeping 177 People on a Boat Amount to an Arbitrary Deprivation of Liberty?' (OpinioJuris, 28 August 2018) <http://opiniojuris.org/2018/08/28/the-kafkaesque-diciotti-case-in-italy-does-keeping-177-people-on-a-boat-amount-to-an-arbitrary-deprivation-of-liberty/> accessed 19 April 2019.

66 'Migrants appeal to European Court in kidnapping case' *AdnKronos* (21 February 2019) <https://www.adnkronos.com/aki-en/security/2019/02/21/migrants-appeal-european-court-kidnapping-case_R15awdcGcp00s488BuNggK.html?refresh_ce> accessed 19 April 2019.

67 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). On Article 9, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (Oxford University Press 2013) at 340-391.

68 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. On Article 37, see William Schabas and Helmut Sax, *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers 2006). See further Roberto Virzo, 'Coastal States and the Protection of Migrant Children at Sea', in Francesca Ippolito and Giacomo Biagioni (eds), *Migrant Children: Challenges for Public and Private International Law* (Editoriale Scientifica 2016) 3.

punishment'.[69] In its case law, the ECtHR has clarified that only cases of ill-treatment attaining a 'minimum level of severity' fall within the scope of this provision.[70] With particular regard to detained persons, the Court has held that the 'unavoidable level of suffering inherent in detention' is not sufficient to produce a breach of Article 3, as long as the conditions are compatible with respect for human dignity and the detainee's health is adequately protected.[71] The ECtHR assesses whether these conditions are respected on a case-by-case basis by taking into account all the factual circumstances of the case, which may include duration, age and state of health of the affected people, or whether there was a situation of extreme overcrowding.[72]

In more practical terms, in *Khlaifia v Italy* the ECtHR found that the detention of migrants on two ships for five to seven days did not constitute a violation of Article 3 on the part of Italy in light of multiple factors, namely the fact that the detainees were provided with medical assistance, satisfactory food and drink, water and electricity, adequate bedding and clothing.[73] While there is no indication that the *Diciotti* migrants were denied adequate health assistance, food and water, the conditions on the *Diciotti* were arguably harsher than in *Khlaifia*. The Tribunal of Catania described the migrants' condition as 'precarious', for example because they were forced to sleep on the ground on the ship's deck, but also noted that the ship's captain actively tried to ensure decent living conditions.[74] All things considered, it is hardly possible to make a conclusive judgment on whether the ECtHR would find Article 3 to have been violated in this case. This would depend on a more detailed assessment of the specific conditions to which the migrants were

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69 Carmelo Danisi, 'What "Safe Harbours" Are There for People Seeking International Protection on Sexual Orientation and Gender Identity Grounds? A Human Rights Reading of International Law of the Sea and Refugee Law' (2018) 5 GenIUS 6, <http://www.articolo29.it/wp-content/uploads/2018/11/genius-2018-02.pdf> accessed 19 April 2019, at 17.

70 *Khlaifia and Others v Italy* (n 59) para 159.

71 *Rahimi v Greece*, App No 8687/08 (ECtHR 5 April 2011) para 60.

72 This principle was first expressed in *Ireland v United Kingdom*, App No 5310/71 (ECtHR 18 January 1978). See *inter alia Kalashnikov v Russia*, App No 47095/99 (ECtHR 15 July 2002) para 102 (on duration); and *Mursič v Croatia*, App No 7334/13 (ECtHR 20 October 2016) para 104 (on severe overcrowding).

73 *Khlaifia and Others v Italy* (n 59) para 207.

74 Request (n 41) at 27.

subjected on the *Diciotti* during the stand-off, as well as on the personal conditions of each individual migrant.

IV. Testing the Limits of Governmental Accountability before National Courts: Lessons from the *Diciotti* Affair

This article now turns to the role that national courts may play in remedying violations of international migration law and ensuring governmental accountability. In this regard, the example of the *Diciotti* affair again proves illustrative. This section focuses on the reaction of the Italian courts to the governmental breaches of international law which occurred during the incident and on their efforts to scrutinize the legality of the state authorities' actions. As will be seen, some elements of the analysis clearly confirm the main premises of the theory of national courts as guardians of the IRL. However, other features of this case also shed light on the limitations that national courts may encounter in their attempts to ensure executive accountability for international law violations.

1. The Power of National Courts: International Law as a Limit on Governmental Action

Some elements of the *Diciotti* case clearly conform to the 'internationalist model' of the role of national courts in supporting the IRL.[75] In particular, the violations of international law committed during the incident produced two strands of disputes before national courts: one civil and the other criminal. As regards the former, 41 people who were confined onboard the *Diciotti* sued the Italian government for damages before the Tribunal of Rome.[76] The basis of their claim, on which the court has yet to rule, was a violation of the right to personal liberty under Article 5 ECHR and Article 13 of the Italian Constitution.[77] With regard to the criminal consequences of

[75] See above Section II.

[76] 'Diciotti migrants file for damages' *Ansa* (21 February 2019) <http://www.ansa.it/english/news/politics/2019/02/21/diciotti-migrants-file-for-damages_e0427f34-b737-4d63-b384-e5e71a6915cf.html> accessed 19 April 2019.

[77] The text of the appeal is available at <https://www.panorama.it/wp-content/uploads/2019/02/RICORSO-EX-ART.-702-BIS.pdf> accessed 21 May 2019.

the incident, shortly after the disembarkation of the migrants, a public prosecutor initiated proceedings against the Italian Minister of the Interior, Matteo Salvini, who allegedly masterminded the state's response. The charge was that keeping people onboard the *Diciotti* amounted to illegal deprivation of liberty insofar as it violated multiple norms of both national and international law. Further criminal cases were later initiated on the same grounds against other members of the executive, including the President of the Council of Ministers, Giuseppe Conte, but these charges were dismissed.[78]

For the purposes of the present discussion, the criminal case against the Minister of the Interior is particularly notable and deserves further comment.[79] On 22 January 2019, the Tribunal of Catania confirmed the charges of kidnapping and requested Parliament to authorize a trial.[80] Pursuant to the Italian Constitution, in order for ministers to be tried for acts committed in the exercise of their functions, authorization by one of the Chambers of Parliament is required.[81] In its request to Parliament for authorization to proceed, the Tribunal of Catania attached great importance to international law, referring in particular to limits set by international treaties to the exercise of governmental action and administrative discretion. As a matter of principle, the Tribunal correctly recalled that, by virtue of the Constitution, the treaties to which Italy is a party cannot be subject to

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78 'Diciotti: procura Catania chiede archiviazione per Conte, Di Maio e Toninelli' *Reuters Italia* (20 February 2019) <https://it.reuters.com/article/topNews/idITKCN1Q91Z6-OITTP> accessed 19 April 2019.

79 It should be noted that the strictly criminal law aspects, including the soundness of the criminal charges levied against the Minister, lie outside of the scope of the present analysis, which focuses only on the aspects of the request to Parliament which are relevant from the standpoint of international law.

80 For the text of the request for authorization to proceed see Request (n 41). All charges against the other members of the government were instead dismissed on account that the alleged criminal conducts could not to be attributed to them: see 'Diciotti: archiviazione per Conte, Di Maio e Toninelli' *AdnKronos* (21 March 2019) <https://www.adnkronos.com/fatti/politica/2019/03/21/diciotti-archiviazione-per-conte-maio-toninelli_zzkKMI6DY7anUkeqC6KJlL.html?refresh_ce> accessed 10 April 2019.

81 Italian Constitution, Article 96.

derogation by decisions of either Parliament or any other political authority.[82] Article 117(1) of the Italian Constitution indeed provides that 'legislative power is exercised by the state and the regions in compliance with [...] the constraints deriving from [...] international obligations'. The Constitutional Court has interpreted this provision as meaning that, after incorporation, treaties possess a rank higher that ordinary legislation in the Italian hierarchy of norms.[83] Consequently, the Tribunal of Catania affirmed that '[political] discretion in the management of migratory flows is constrained, pursuant to the Constitution [...] [by] the norms of binding international treaties'.[84]

While the above statements of principle may seem uncontroversial, the way in which the Tribunal applied them to the circumstances under its review is more distinctive. The key issue with which the Court was confronted was whether Minister Salvini's actions with regard to the *Diciotti* incident fell within the legal definition of kidnapping, i.e. an 'unlawful deprivation of physical liberty'.[85] Having affirmed that deprivation of liberty which does not conform to the requirements of international law must be considered unlawful,[86] the Court embarked on an examination of a number of international legal sources, including the UNCLOS, the SOLAS and SAR Conventions, and the IMO Maritime Safety Committee Guidelines on the Treatment of Persons Rescued at Sea.[87] This led it to conclude that, once the

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82 Request (n 41) at 9. It should be noted that the principle of prevalence of international treaties over ordinary laws was traced back by the Tribunal to Articles 10, 11 and 117 of the Constitution. In fact, only the referene to Article 117 is pertinent, while the other two provisions have no relevance for the domestic rank of treaties.

83 Constitutional Court, Judgments Nos. 348 and 349 of 24 October 2007.

84 Request (n 41) at 42 (translation by the author).

85 Ibid 27, quoting from Court of Cassation, Fifth Criminal Section, No. 19548/2013 (in the original: 'illegittima restrizione della [...] libertà fisica'). The crime of kidnapping is provided for in Article 605 Italian Penal Code.

86 Request (n 41) at 30.

87 Ibid 9-12 and 30-35.

ship was docked in the port, preventing disembarkation for two to five days constituted a violation of the international law of the sea.[88]

A further interesting feature of the decision of the Tribunal of Catania relates to its treatment of the political connotation of the decision to close Italy's ports. The age-old problem of the intersection of politics and adjudication originates from a variety of considerations. One such consideration, which falls outside the scope of the present discussion, relates to the supposedly political nature of law itself. As is well known, a popular scholarly view sees international legal discourse as inherently political,[89] though the extent to which this is the case is very much contested.[90] Secondly, judicial decisions may have the effect of thwarting the choices of democratically elected organs: this is referred to as 'counter-majoritarian difficulty' in US legal circles.[91] Thirdly, from the standpoint of the principle of separation of powers, it is argued that some decisions should be taken by the legislature and executive only and not by the courts.[92] In Italian judicial practice, this last concern has given rise to the doctrine of the so-called *atto politico*,[93] a form of judicial

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88 Ibid 32. It should be noted that the Tribunal of Catania's jurisdiction did not extend to the events between the rescuing of the migrants and the arrival in the port of Catania. Such events had instead been previously examined by the Tribunal of Palermo, in order to assess whether the Minister of the Interior had committed any crimes in that phase. Some excerpts contained in the decision of the Tribunal of Catania clarify that the Tribunal of Palermo (whose ruling has not been made public) held that no violations of international law had been committed until the *Diciotti* reached Catania: see ibid 5.

89 Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (2nd edn, Cambridge University Press 2005); David Kennedy, *International Legal Structures* (Nomos 1987).

90 James Crawford, *Chance, Order, Change: The Course of International Law* (AIL-Pocket 2014) at 157-178.

91 Francois Venter, 'The Politics of Constitutional Adjudication' (2005) 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 129.

92 Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597.

93 On which see, *ex multis*, Cesare Dell'Acqua, *Atto politico ed esercizio di poteri sovrani* (CEDAM 1983); Giuseppe Di Gaspare, *Considerazioni sugli atti di governo e sull'atto politico: l'esperienza italiana e francese nello stato liberale* (Giuffré 1984); Gabriele Pepe, 'Il principio di effettività della tutela giurisdizionale tra atti politici, atti di alta amministrazione e leggi-provvedimento' (2017) 22 Federalismi.it.

abstentionism analogous to the US 'political question' doctrine or the French *acte de gouvernement*.[94] In the *Marković* case, for example, the Italian Court of Cassation held that the Italian courts had no jurisdiction over a claim for compensation brought against Italy by Serbian nationals whose relatives had been victims of the 1993 NATO bombing of Belgrade. The Court held that the conduct of hostilities by the executive branch constituted an *atto politico* and was thus outside the reach of judicial review.[95]

The problem raised by the 'political question'/*atto politico* doctrine is essentially one of a tradeoff between separation of powers and the rule of law. In shielding political acts from judicial review, this doctrine entails an obvious tension with the idea that the political branches should be held accountable for breaches of the law. This also applies as far as the IRL is concerned. Indeed, when the 'political question' doctrine is applied to the field of foreign affairs, it constitutes one of the typical 'avoidance doctrines' used by courts to refrain from applying international law in politically sensitive cases. As such, it has been criticized as severely limiting the effectiveness of international law within domestic legal orders: in practice, it may lead any international law claim against the government to fail on procedural grounds.[96]

In the present case, one of the issues before the Court was whether the acts of the Minister could be subject to judicial review even though they were expressions of a political decision by the executive. The prosecutor argued that the facts under scrutiny constituted a legitimate political choice, not subject to judicial review on account of the principle of separation of powers.[97] However, the Court struck the balance between the prerogatives

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94 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) at 83-87 and 103-110.

95 *Presidency of the Council of Ministers v Markovic and ors*, Order No. 8157 of 8 February 2002, ILDC 293 (IT 2002). For the doctrine's classic restatement in the US legal system, see *Baker v Carr*, 369 US 186 (1962).

96 Benvenisti (n 22) at 169-170. See further Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese Journal of International Law 99. On the concept of 'avoidance doctrines' see also above Section II.

97 Roberto Bin, 'Halloween! Il Caso Diciotti e il fantasma dell'atto politico' (laCostituzione.info, 1 November 2018)

of the political branches and their accountability decisively in favor of accountability. It stated that only acts laying down the governmental political agenda in a general and abstract way can be free from judicial review, mentioning, by way of example, the government's request for a vote of confidence or the management of foreign relations. By contrast, this does not apply to political decisions which have the capacity to directly impinge on individual rights.[98]

Such a restrictive understanding of the notion of *atto politico* – as well as the ensuing enhancement of governmental accountability – is certainly commendable from the standpoint of the IRL. It also appears reasonable from the standpoint of domestic constitutional law. As a matter of fact, the Court proved to be well aware of separation of powers concerns and did not rule out that certain areas of governmental action may lie outside the realm of judicial scrutiny. It simply limited such an exemption to those decisions that the Constitution expressly allocates to the legislature and executive only. This approach distances itself from the *Marković* precedent, and with good reason: with regard to that case, it had been noted in the literature that specific military actions 'are not to be considered as political decisions, but rather as executive activities undertaken in the implementation of a previous political decision' and should thus be amenable to judicial review.[99] What the Italian Constitution does entrust to the parliament, which also confers upon the executive the necessary authority in this field, is the authority to decide to engage in military operations, so that, as a consequence, only such political decisions may not be subject to judicial scrutiny.[100] *Mutatis mutandis*, the

<https://www.lacostituzione.info/index.php/2018/11/01/halloween/> accessed 19 April 2019.

98 Request (n 41) at 48.

99 Micaela Frulli, 'When are States Liable towards Individuals for Serious Violations of Humanitarian Law? The Marković case' (2003) 1 Journal of International Criminal Justice 406, at 411-412.

100 Ibid. For critical views of the 'political question' doctrine from the standpoint of constitutional law see further Jonathan I. Charney, 'Judicial Deference in Foreign Affairs' (1989) 83 American Journal of International Law 805, at 806-807, noting that the idea that the judiciary should play no role in the area of foreign affairs is an unproven assumption; and, with regard to Italy, Francesco Bilancia, 'Ancora sull'"atto politico" e sulla sua pretesa insindacabilità giurisdizionale. Una categoria tradizionale al tramonto?' (2012) Rivista AIC,

Tribunal of Catania's approach to the notion of *atto politico* seems to fall squarely within this approach. Furthermore, the 'political question' doctrine is not the only way of safeguarding the prerogatives of the political branches from judicial encroachment. A restrictive understanding of that doctrine may well combine with other means of protecting the separation of powers, such as the adoption of techniques of judicial review of variable intensity. These may include resorting to the (broader) 'unreasonableness' test or to the (stricter) proportionality test.[101]

In light of the above, the response of the Italian judiciary to the governmental breaches of international law in the context of the *Diciotti* affair might appear to be a textbook confirmation of the view of national courts as guardians of the IRL. From an institutional standpoint, Italian courts are certainly independent and empowered by domestic law to apply international law, whose municipal hierarchical rank is moreover higher than ordinary legislation. In the course of the *Diciotti* case, the courts showed no proclivity for the protection of executive policies, nor did they overtly or covertly resort to any 'avoidance doctrines' with a view not to enforcing international law. On the contrary, the Tribunal of Catania was willing to use the relevant international norms as standards of review of the legality of executive action. And this was not limited to reparation claims against the state, but the courts even attempted to hold members of the executive individually liable from a criminal standpoint. All the elements would seem to be in place for effectively ensuring respect for the IRL, along the lines of what the 'internationalist model' suggests.

<https://www.rivistaaic.it/images/rivista/pdf/F.%20Bilancia.pdf> accessed 12 July 2019. Different considerations apply to cases where a constitution expressly rules out judicial review of governmental action; but this is a rare occurrence. See e.g. Art. 19(3) of the Hong Kong Basic Law: 'The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs'.

[101] Amoroso (n 96) at 123-124.

2. The Limits of National Courts: Structural and Functional Obstacles to Holding Governments Accountable

But this is not the whole story. Indeed, the *Diciotti* case also allows us to identify possible shortcomings of the 'internationalist model', highlighting at least three reasons for caution as regards national courts' capacity to contribute to the IRL. These reasons concern: (i) the relationship between domestic and international rule of law; (ii) the effectiveness of the remedies provided by national courts; and (iii) the issues relating to national courts' international law expertise. The first two points are more substantial in that they relate to structural limitations on the role of national courts, i.e. they are constraints originating from the domestic legal framework. As a consequence, a national court normally has no power to overcome them. The third point instead concerns a functional limitation on the courts' ability to effectively apply international law, i.e. a difficulty produced by the court itself and specific to a concrete case.[102]

A first issue highlighted by the *Diciotti* case is that conflating the IRL and the domestic rule of law comes at the risk of some oversimplification.[103] As a matter of fact, what the two concepts require may very well diverge in practice, even in cases where there is a substantive overlapping between international law and national law. Consider the criminal prosecution against the Minister of the Interior. As noted above, the Tribunal of Catania requested parliament to authorize the prosecution to proceed, on the basis that the Constitution necessitates such an authorization. However, Parliament eventually refused to grant authorization, thus barring the enforcement of (domestic and) international law against members of the executive.[104] Was parliament's refusal compliant with the rule of law? If only one notion of the rule of law existed, the answer to this question would be

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[102] See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014) at 180.

[103] On this equivalence, see Nollkaemper (n 1) at 3. See further above Section II.

[104] 'Diciotti: il Senato nega l'autorizzazione a procedere per Salvini' *Ansa* (20 March 2019) <http://www.ansa.it/sito/notizie/politica/2019/03/19/diciotti-in-aula-al-senato-il-voto-su-salvini-diretta_e77b11bc-d840-4f9f-b49f-424054ca8167.html> accessed 19 April 2019.

unequivocal. Arguably, however, such an evaluation varies depending on whether one adopts an international law or a domestic law perspective.

From the standpoint of the IRL, parliament's vote cannot but be judged negatively, in that it stood in the way of governmental accountability for violations of international law and effectively diminished the courts' ability to act as agents for the promotion of the IRL. Conversely, from the viewpoint of the domestic rule of law, there is simply no accountability gap. Parliament's refusal to authorize prosecution belongs to the physiology of the domestic legal system. Indeed, Article 9(3) of Constitutional Law No 1 of 1989, whose legal value in the Italian legal system is equal to the Constitution, provides that parliament may deny the authorization to proceed if it considers that the Minister acted 'for the protection of a constitutional interest of the State or for the pursuit of a pre-eminent public interest in the exercise of the function of Government'. Parliament's decision is expressly qualified as not subject to external review. Thus, it is the domestic constitutional framework itself which allows for violations of the law when they are directed at pursuing prominent public interests, and this decision is bestowed on parliament only. This may offer support to the view that national courts are first and foremost bound to the promotion of the *domestic* rule of law.[105] They may also promote the IRL when the two concepts happen to coincide; however, where the IRL and the domestic rule of law set differing standards – as may well be the case – the former is inevitably destined to give way.

The failure of the *Diciotti* prosecution also provides a second insight into the structural limits faced by national courts in the application of international law. The 'internationalist model' is premised on the idea that domestic courts can provide international law with effective mechanisms of enforcement. However, there may be a risk of overstating the effectiveness of the remedies that domestic law can provide. National courts normally intervene *ex post facto* and their intervention is often confined to the area of monetary compensation. While this may ensure redress for the victims, it is hardly a

[105] Benvenisti and Downs (n 25) at 61. See further above Section II.

means which can effectively alter state policies challenging the IRL and avoid breaches of international law.[106]

Notably, while the civil case against the Italian government for breaches of international law occurred during the *Diciotti* incident is still pending, Italy's policies of migration containment (particularly the 'closed ports policy') have continued unaltered,[107] thus creating the risk of new violations of international migration law. This situation is not surprising. A civil case brought against the state as a whole, where claimants ask for modest amounts of compensation,[108] is hardly a powerful incentive to avoid breaches of international law – even more so for governments feeding on migration control for political gains. The *Diciotti* prosecution was an attempt by the Italian courts to turn the tables, in that holding members of the executive individually liable for breaches of international law is certainly a much more effective means to condition future state policies and avoid further breaches

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[106] Importantly, there are relevant exceptions where national courts can prevent breaches of international law from occurring. The most relevant exception occurs in situations where courts can alter domestic legislation, e.g. by declaring domestic statutes inconsistent with international law to be null and void. This may happen in the Italian legal order, where the Constitutional Court can quash statutes conflicting with either general international law (see Italian Constitutional Court, Judgment No. 131 of 15 May 2001) or international treaties (see Italian Constitutional Court, Judgments No. 348 and 349 of 24 October 2007). But of course this remedy is only able to prevent breaches of international law which are directly produced by legislation. This was not the case with the *Diciotti* incident, where the breaches of international law were caused by acts of government. In yet other cases, national courts do not merely intervene *ex post facto* but may order cessation of an ongoing illegal act (e.g. an unlawful detention). But again, this was not the case for the *Diciotti* migrants, whose deprivation of liberty was not subject to any judicial review.

[107] As of September 2019, the 'closed ports policy' is being reconsidered in consequence of a change of government: see 'Conte migrant summit with Lamorgese' *Ansa* (12 September 2019) <http://www.ansa.it/english/news/world/2019/09/12/conte-migrant-summit-with-lamorgese_26afc861-3988-40fe-b9be-d5a0d5e74b69.html> accessed 17 September 2019.

[108] In the civil case before the Tribunal of Rome, the 41 appellants asked compensation ranging from around 1000 to 1700 euros per migrant: see the appeal (n 77) at 33.

of international law. But, as the case at hand proves, a constellation of procedural obstacles may make this option impracticable. Therefore, there appears to be an intrinsic limit to the powers of national courts. Their primary role is to provide remedies for breaches that have already occurred,[109] not to guarantee compliance with international obligations in the first place.

In addition to the above structural problems, another difficulty arises from the fact that the Tribunal of Catania's analysis of international law betrayed a serious lack of international law expertise. Had the Parliament allowed the criminal case to proceed, these flaws might have proven to be serious hurdles in the subsequent stages of the trial. This confirms the scholarly warnings that an insufficient knowledge of international law among judges frequently proves to be a significant obstacle to the implementation of international law, perhaps not less relevant than large-scale institutional deficits in a country's domestic law.[110]

There were two main weaknesses in the way the Tribunal of Catania handled the crucial issue of the unlawfulness of the deprivation of liberty. First, it assumed too much with regard to violations of the law of the sea. The Court found a breach of international law in the refusal by the Italian authorities to formally answer to the *Diciotti*'s request for a place of safety.[111] However, the Conventions do not set forth any such obligation. They merely require the rescued people to be brought to a location which meets the required standard

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[109] David Sloss, 'Domestic Application of Treaties', in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 367, at 392-393, noting that if executive officials correctly interpret and apply international law a corrective intervention by national courts may not be needed in the first place.

[110] Many authors have noted that a deficient application of international law in domestic legal systems may stem from a lack of familiarity of judges and lawyers with it, or from the courts' unconscious penchant for domestic law. See e.g. Huneeus (n 28) at 134-135; Harold H. Koh, 'Why the President (Almost) Always Wins in Foreign Affairs – Lessons on Iran-Contra Affair' (1988) 97 Yale Law Journal 1255, at 1315-1316, noting the importance of the background and personality of judges; Bakhtiyar R. Tuzmukhamedov, 'International Law in the Russian Constitutional Court' (2000) 94 American Society of International Law Proceedings 166, at 170, citing as hearsay the case of a US judge who refused to apply the ICCPR 'because he had never heard of it'.

[111] Ibid 31.

of safety, not that such location should be expressly and formally designated as a 'place of safety' under the terms of the treaty.[112] Second, and more importantly, the Court only analyzed the international law of the sea and failed to consider the international obligations in the field of human rights law, particularly those arising from the ECHR. However, as seen above, the jurisprudence of the ECtHR is directly concerned with the notion of unlawful deprivation of liberty, and thus would have constituted a much sounder basis on which to affirm that international obligations had been breached.[113] This failure is all the more surprising when considering that the Court did mention the ECtHR *Khlaifia v Italy* judgment in another passage of its decision, but merely in order to sustain the (rather obvious) principle that inviolable human rights should be recognized also to illegal migrants.[114]

Of course, one should be cautious to draw general conclusions from specific cases where courts showed a lack of international law expertise. Where the misapplication of international law derives simply from negligence or careless methodology, the issue may perhaps be brushed off by blaming domestic judges for lack of professionalism. However, national courts' frequent ignorance of international legal regimes appears to raise a more profound and systemic red flag. Even where all the institutional conditions required under an 'internationalist model' for national courts to function as agents of the international legal order are realized – jurisdiction, independence, ability to apply international law, and standing – one should not simply expect national

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[112] The reason for such a misreading of the IMO Conventions lies in the fact that, in order to identify the relevant international obligations, the Court also relied on a non-binding document by the Italian Ministry of Infrastructure and Transport and the Italian Coast Guard containing the standard procedures for the identification of places of safety in the management of migratory flows: see 'Procedure operative standard per l'individuazione del "POS – place of safety" nell'ambito di operazioni SAR connesse all'emergenza flussi migratori via mare', SOP 009/15, <https://www.lastampa.it/rw/Pub/Prod/PDF/Standard%20Operating%20Procedure.pdf> (in Italian) accessed 19 April 2019. Because this document was adopted with a view to implementing the obligations flowing from the international law of the sea, the Court seemingly assumed that its contents were fully consonant with such obligations. But the procedural aspects of this regulation are of purely internal relevance and find no correspondence in the Conventions.

[113] See above Section II.

[114] Request (n 41) at 43.

courts to start acting as a 'a conveyor belt that delivers international law to the people'.[115] Similarly, also the courts' *willingness* to apply international law may not suffice.[116] The Court in the *Diciotti* case misconstrued international law despite being both institutionally empowered and clearly willing to apply it.

In concreto, in order to solve this issue, it may prove necessary to *actively provide* national courts with the necessary expertise, and this may require support from other agencies of the state. Just by way of example, many domestic legal systems confront this issue by promoting better legal training and information or by adopting legislation implementing or reproducing international norms which would be already part of national law.[117] At other times, national courts may rely on the executive's expertise for ascertaining the content of international law or for its interpretation. This form of judicial deference in international legal matters is normally criticized by the proponents of the 'internationalist model' as an undue interference by executives in judicial affairs, as if it would necessarily diminish the international legal function of national courts.[118] While this opinion is certainly justified in cases where courts are *obliged* to conform to executive

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115 Knop (n 27) at 505.

116 The relevance of the national courts' willingness to apply international law to the maximum extent allowed by their own domestic legal order is stressed by Benedetto Conforti (Massimo Iovane ed), *Diritto internazionale* (11th end, Editoriale Scientifica 2018) at 8.

117 Gennady M. Danilenko, 'Implementation of International Law in CIS States: Theory and Practice' (1999) 10 European Journal of International Law 51, at 56; Sloss (n 109) at 375-376.

118 The term judicial deference is generally used to describe all situations where national courts, 'out of respect for the legislature or the executive [...] decline to make their own judgment on a particular issue': see Richard Clayton, 'Principles for Judicial Deference' (2006) Judicial Review 109, at 109. See Conforti, *International Law* (n 14) at 17-20, advocating the disposal of all forms of judicial deference to the executive; Pierre Pescatore, 'Conclusion', in Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987) 273, at 277, arguing that judicial deference to the executive in treaty interpretation 'cannot be reconciled with the very idea of the rule of law'.

interpretation,[119] national courts' insulation from their domestic institutional environment is not necessarily a condition to be hoped for. Independent national courts can get it wrong, as the *Diciotti* case shows. And if some institutional support from other state agencies, including the executive, can enable them to obtain a better knowledge of international law, it is hard to see how that would not be a positive outcome for the IRL.[120]

V. Conclusion

The foregoing consideration of the *Diciotti* incident gives a mixed picture regarding national courts' capacity to contribute to supporting the IRL. Some elements certainly give reasons to trust in national judiciaries. The governmental breaches of international law committed in the course of the incident entailed two strands of cases, one civil and the other criminal, before the Italian courts. Regarding the criminal case, the competent court, the Tribunal of Catania, confirmed the charges brought against the Minister of the Interior and asked parliament to authorize a trial, as required under the Italian Constitution. The principles espoused by the Tribunal of Catania in its request to parliament are especially notable. The Court uncompromisingly stated that international law constitutes a limit to the exercise of political and administrative discretion in the management of migratory flows. It also discarded the argument that the governmental choice to 'close' Italy's ports was not subject to judicial review by reason of its political nature. The Court instead construed the notion of 'political question' restrictively and affirmed that any decision of the political

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[119] Notably, the French practice to reserve treaty interpretation to the Minister of Foreign Affairs was found by the European Court of Human Rights to be illegitimate, because in violation of the right to access to an independent and impartial tribunal: see *Beaumartin and Others v France*, App No 15287/89 (ECtHR 24 November 1994).

[120] Julian Arato, 'Deference to the Executive. The US Debate in Global Perspective', in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 198, particularly at 213, noting that 'a degree of interpretive discretion for national executives may be a good thing for the international legal order'. For a similar position in the context of the UK Human Rights Act 1998, see Alison L. Young, 'In Defence of Due Deference' (2008) 72 Modern Law Review 554.

authorities can be subject to judicial review as long as as it directly compresses individual rights.

However, other elements of the *Diciotti* affair suggest that some degree of caution is required. Firstly, the courts' capacity to hold the government accountable for its breaches of international law was limited by parliament's vote barring the hearing of the criminal case. This outcome, which is consistent with the Italian Constitution, highlights that the IRL and the domestic rule of law cannot be easily conflated. What is desirable from the standpoint of the former may run counter to the domestic constitutional framework and, thus, to the domestic rule of law. Secondly, the case at hand shows that the effectiveness of national courts' tools to enforce international law should not be overstated, particularly because national courts normally intervene in the remedial phase and may not be capable of guaranteeing compliance with international law in the first place. The cases initiated before the Italian courts produced no tangible effects on the governmental policies of migration containment from which the *Diciotti* incident, and the ensuing breaches of international law, originated. Thirdly, the lack of international law expertise shown by the Tribunal of Catania when dealing with the events of the *Diciotti* suggests that national courts may be unable to correctly apply international law even where they are both institutionally empowered and willing to do so. It might perhaps be advisable, therefore, to reconsider the view that national courts' insulation from other state branches is a necessary precondition for them to contribute to the IRL.

All things considered, the *Diciotti* affair seems to offer some support for the view that one should not put unlimited trust in the power of national judiciaries to enforce international law against unruly governments. While it is undeniable that they perform an important international legal function, they cannot be a panacea for all international law violations, not only because they cannot normally prevent breaches of international law, and mainly intervene in a remedial phase, but also because their remedial powers can be severely constrained by limitations set forth in domestic law. Briefly put, national courts are valuable yet imperfect systemic instruments for the

IRL.[121] Difficult though it may be, state compliance with international law normally requires efforts on the part of the state machinery as a whole.

[121] In these terms see Amoroso (n 96) at 133-134.

BOOK REVIEWS

ROB VAN GESTEL AND ANDREAS LIENHARD (EDS), *EVALUATING ACADEMIC LEGAL RESEARCH IN EUROPE. THE ADVANTAGE OF LAGGING BEHIND* (EDWARD ELGAR 2019)

Olga Ceran*

Some time ago, Anna Krisztian and I were writing an editorial for an issue of the European Journal of Legal Studies (EJLS). In one of the very first sentences, we wrote that the EJLS aspires 'to contribute to a scholarly communication of the highest academic standard'.[1] But it felt uncomfortable. Managing a multilingual journal makes one fully aware of the very different academic traditions authors come from. What 'high quality' means in the context of scholarly publications, and even a basic understanding of what an 'academic article' looks like, are neither clear-cut nor set in stone. In the end, that sentence gained a new addition - 'as we know it'.[2] What 'the highest academic standard' means to us, the authors of the editorial, might not be universal. And we did not want to suggest otherwise.

The lack of clarity when it comes to quality standards in academic legal research, especially in a transnational context, was exactly what prompted the authors of the book discussed here to commit themselves to this joint project. *Evaluating Academic Legal Research in Europe. The Advantage of Lagging Behind*, edited by Rob van Gestel and Andreas Lienhard,[3] undertakes the –

* Doctoral Researcher, Department of Law, European University Institute; Managing Editor and Media Coordinator at the European Journal of Legal Studies. The author is grateful to the anonymous reviewers for their comments on earlier versions of this review. All mistakes and opinions are the author's own. E-mail: olga.ceran@eui.eu.

1 Olga Ceran and Anna Krisztian, 'From Inclusivity to Diversity: Lessons Learned from the EJLS' Peer Review Process' (2019) 11 European Journal of Legal Studies 1.

2 Ibid.

3 The eBook version is priced from £22/$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

not easy – task of providing information on what quality of academic legal research means throughout Europe: why and how academic legal research is currently evaluated, and what sorts of criteria, indicators and assessment methods are being applied. The authors pose a number of questions: what purposes does the research evaluation serve? Which methods are being used, and by what kinds of evaluators? What sorts of consequences are attached to the outcomes of the evaluations? To what extent are these methods, and their future, a topic of debate?

The discussion about law's nature and identity as an academic discipline has been ongoing for years. Law has been described as 'a discipline in crisis',[4] a 'science at the crossroads'[5] or 'the odd man out in the university'.[6] Scholars in Europe and elsewhere have been discussing whether – and how – legal scholarship could aspire to the status of a science, and what it would mean for its methods and quality standards,[7] taking into account law's 'distinctiveness' – whatever that may mean.[8] There has been a growing body of literature on the internationalization of legal education and scholarship, and the challenges posed by those processes.[9] To a great extent, those discussions build on what law schools and legal scholars produce; on their output in form of various publications, their evaluation, and the relation between evaluation and quality. Indeed, in many volumes touching upon the (future) nature of law as an academic discipline one can find contributions on publication

4 Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Pub 2012) 1.

5 Ibid 6.

6 CJJM Stolker, *Rethinking the Law School Education, Research, Outreach and Governance* (Cambridge University Press 2014) 89.

7 Rob van Gestel, Hans-W Micklitz and Edward L Rubin, *Rethinking Legal Scholarship : A Transatlantic Dialogue* (Cambridge University Press 2016).

8 Smits (n 4); Stolker (n 6) 200–230.

9 Jan Klabbers and MNS (Mortimer NS) Sellers (eds), *The Internationalization of Law and Legal Education* (Springer 2008); Christophe Jamin and William van Caenegem (eds), *The Internationalisation of Legal Education* (Springer International Publishing: Imprint: Springer 2016); Jan M Smits, 'European Legal Education, or: How to Prepare Students for Global Citizenship?' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1719118 <https://papers.ssrn.com/abstract=1719118> accessed 20 April 2017.

fashions,[10] evaluation strategies,[11] or issues of management, accessibility and readership.[12]

While the issues of assessment practices in various contexts have been discussed before,[13] no legal scholar has attempted to address the question of what exactly the differences between different systems are, and what it means for legal scholarship more broadly. As such, this volume is, as the editors claim, the first book ever to attempt to analyse and compare quality criteria and research evaluation methods in the field of law in Europe. The authors do not attempt to take sides in the debate about the nature of law as an academic discipline, or to promote a certain view on quality management in academia.[14] Rather, based on the comparative overview of the legal and policy norms impacting the evaluation of academic legal research, they are tracing disagreements and potential convergence trends.[15]

The Introduction is engaging and does well at providing context for the debates. It constitutes a succinct but exhaustive overview of the literature on academic evaluation practices in general, the debates about the (dis)advantages of peer review and bibliometrics, and the relationship between methodological accountability and quality of research. Against this

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10 Reza Dibadj, 'Transatlantic Publication Fashions: In Search of Quality and Methodology in Law Journal Articles' in Hans-W Micklitz, Edward L Rubin and Rob Van Gestel, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) </core/books/rethinking-legal-scholarship/transatlantic-publication-fashions/0F58B7E37EAEE7BA0280E65B41CEF99F> accessed 9 July 2019.

11 Rob van Gestel, 'Ranking, Peer Review, Bibliometrics and Alternative Ways to Improve the Quality of Doctrinal Legal Scholarship' in Hans-W Micklitz, Edward L Rubin and Rob Van Gestel, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) </core/books/rethinking-legal-scholarship/ranking-peer-review-bibliometrics-and-alternative-ways-to-improve-the-quality-of-doctrinal-legal-scholarship/879D67992FBD1FE7E7D5753125B1DA8F> accessed 9 July 2019.

12 Stolker (n 6) 231–262.

13 See, for example: Thierry Tanquerel and Alexandre Flückiger, *L' Évaluation de La Recherche En Droit : Enjeux et Méthodes* (Bruylant 2015).

14 Rob van Gestel and Andreas Lienhard, *Evaluating Academic Legal Research in Europe the Advantage of Lagging Behind* (Edward Elgar Pub 2019) 14.

15 Ibid 15.

background, the editors draw attention to those features of legal scholarship that are often seen as ultimately distinctive in comparison to other disciplines (for example the variety of publications addressing multiple audiences, such as courts, legislators, practitioners, and other academics). By doing so, they motivate a separate discussion on the evaluation of academic legal research, as undertaken in this book.

The volume continues with a collection of individual reports on different academic contexts, including the United Kingdom, the Netherlands, Germany, Austria, Switzerland, Sweden, Finland, Italy, France, Spain, Slovenia, and the EU as a whole.[16] The chapters focus on four situations in which legal publications are evaluated: evaluations of law faculties and/or other research institutions; evaluations of legal research projects (ex-ante or ex-post); evaluations of (academic) legal publications by publishers; and evaluations of legal researchers in the context of tenure/promotion. Although specifically focusing on the evaluation of *publications*, the chapters generally provide the reader with much more information. For example, when standards for PhD dissertations are discussed, knowledge about the process of PhD examination committees' appointments or the internationalization of PhD programmes is also presented.[17] Additionally, every chapter includes a brief overview of institutional frameworks in which legal education and legal research function (e.g. whether there are private universities, and how this might reflect on the quality assessment), and sometimes even their historical context.[18] The value of this should not be underestimated, as it allows for a more insightful comparison of different quality management systems at the end of the book.

The chapters generally follow a uniform outline, although not all categories are relevant for all of the countries discussed to the same degree. They are primarily descriptive, as the main objective of this explorative study was 'to

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16 The countries are listed in the order presented in the book.

17 See, for example, the chapter on Italy that introduces a reader to an additional PhD certification in this country – 'Doctor Europaeus' – that requires satisfying certain conditions above the 'normal' PhD requirements.

18 See, for example, the chapter on Slovenia where Janja Hojnik mentions the impact of the dissolution of the Former Socialist Yugoslav Republic on the – suddenly considerably smaller – legal academic community in Slovenia.

gather factual information instead of opinions'.[19] Discussing such a relative concept as quality in the context of national academic traditions cannot however fully escape some subjectivity, especially where there is little data and relatively little discussion. In light of this, some rapporteurs had to draw from anecdotal evidence and confidential interviews with colleagues,[20] or refer to their own opinions or intuitions.[21] This, however, does not undermine the main objective but rather adds additional layers to the description, emphasizing the lack of an institutionalized reflection on quality standards of legal research in given countries. Despite that, all contributions achieve a great depth of description. Although undoubtedly providing considerable academic strength, this may nevertheless be considered a weakness by some readers, as certain audiences may find it difficult to follow the detailed descriptions of, for example, bibliometric evaluations.

The chapter on the assessment of academic legal research in the EU context is a welcome and significant addition to the discussion. While most other chapters do not discuss it explicitly,[22] there is no doubt that research evaluation practices on the European level influence the strategic behaviour of researchers, and therefore also affect national evaluation frameworks. What gets highlighted in this context is that the European Research Council puts a lot of emphasis on methodological rigour of funded projects, which – with law being assimilated with other disciplines – constitutes a challenge for legal scholars. Further, legal scholars should be aware of the tension between the requirement of 'scientific excellence', by many understood as clarity of a research problem and methodological rigour, and the search for novel and ground-breaking research, as well as the discrepancies in geographical and institutional allocation of grants – with researchers from institutions perceived as of high quality receiving more funding.

While this tension is true for all scientific fields, the lack of methodological uniformity within the legal field poses additional challenges and could potentially reinforce this effect. What is not discussed in the book, but which may perhaps gain importance in the future, is the indirect evaluation of

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19 Van Gestel and Lienhard (n 14) 15.

20 See, for example, the chapter on Germany: Ibid 89.

21 See, for example, the chapter on Spain: Ibid 302.

22 The chapter on Sweden is, for instance, an exception.

research institutions at the EU level. For example, this happens already in relation to the Erasmus Mundus Joint Master Degrees or Doctorates,[23] where consortiums of law schools and/or legal faculties also have to compete with other institutions, including those of other academic fields.[24]

The last chapter of the book, 'Conclusion and discussion', is divided into two parts. The Conclusion serves as a very good summary of the chapters' main points, juxtaposing the rich information on the different countries together. The Discussion offers deeper insight into evaluation of legal academic research in Europe, resulting from the comparison of national policies and practices. Following the same outline as the individual chapters, the editors offer some food for thought regarding the future of the evaluation of legal scholarship. While the efforts undertaken in this book were envisaged as explorative, the authors do not shy away from posing bold questions regarding what measuring research quality means for law as a discipline, and legal education, on a more fundamental level. What do our evaluation choices mean for academic values such as integrity and freedom of research? Do legal scholars perform better if they are constantly evaluated? Should all areas of legal scholarship be evaluated the same way? Would it be better if European law schools competed on a transnational level according to harmonized assessment standards? Should European legal journals have a uniform format for academic articles, and is it even feasible?

These questions all build upon the underlying idea of the book: law's 'advantage of lagging behind'.[25] While other disciplines struggle with their

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[23] The main objective of the EMJMD programme is to attract, select, and fund excellence, understood i.a. in terms of academic quality of the participating organisations. See: 'Erasmus+ Programme Guide 2019' (the European Commission 2019) 295 <https://ec.europa.eu/programmes/erasmus-plus/resources/documents/erasmus-programme-guide-2019_en> accessed 7 March 2019.

[24] And indeed – similarly to research projects – law degrees are relatively few compared to other disciplines. See, for example: the European Master In Law And Economics; the Law, Science and Technology Joint Doctorate; or the European Joint Doctorate in Law and Development (in which participating institutions come also from outside of Europe).

[25] This is not the first time when Rob van Gestel talks about 'the advantage of lagging behind'. See, for example: Van Gestel, Micklitz and Rubin (n 7) 355; Tanquerel and Flückiger (n 13) 32, 48–53.

increasingly complex evaluation practices, quality standards and evaluation benchmarks in law are – still – often implicit. As such, on their quest to establish more transparent quality indicators, legal scholars can learn from the mistakes made elsewhere, especially in humanities and other social sciences. Law, as a discipline lagging behind, still has the advantage of addressing the questions posed above in a proactive manner. Therefore, the authors of this volume believe that there should be a strong internal drive within the discipline to respond to current challenges.[26] Otherwise, law will continue to be looked upon by other disciplines with suspicion, and risks that "foreign" quality standards will be imposed upon it.

The book, keeping in mind its explorative nature, is certainly successful in making its case. What it does outstandingly well is the presentation of the interdependency of many evaluation situations, and the interactions between national and transnational levels. With different quality indicators employed by different evaluators (universities, publishers, funding bodies, governments – not only on the national level), it demonstrates why and how legal academics have to make strategic decisions regarding their career and publication choices. None of the elements of these systems functions in a vacuum, and in an increasingly transnational academic world mutual trade-offs are a must. On the other hand, this can be frustrating and difficult to navigate, and does not necessarily contribute to the quality of research outputs. This both explains and justifies the book's main argument that the current state of affairs calls for a revision.

The book follows previous research projects on the evaluation of legal research undertaken in the Netherlands and Switzerland. The rich expertise of the editors when it comes to issues of legal education, legal publishing and evaluation of legal research is clearly shown both in the Introduction and in the concluding chapter.[27] They should also be commended for their selection

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[26] Van Gestel and Lienhard (n 14) 12.

[27] Van Gestel, Micklitz and Rubin (n 7); Rob Van Gestel, Karin Byland and Andreas Lienhard, 'Evaluation of Legal Research: Comparison of the Outcomes of a Swiss and Dutch National Survey' (2018) 23 Tilburg Law Review; Rob Van Gestel, *Sense and Non-Sense of a European Ranking of Law Schools and Law Journals* (2015); Rob Van Gestel and Jan Vranken, *Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach* (2011); Martin Schmied, Karin Byland and Andreas Lienhard, 'Procedures and Criteria for Evaluating

of countries and national rapporteurs, and their clear explanation of methodological choices in this regard.[28] It is especially praiseworthy that they attempted to include both "new" and "old" EU countries, as well as non-EU countries, and to strike a balance between Northern and Southern countries. However, although the book claims to have reached a balanced representation of jurisdictions, with the exception of Slovenia, Central and Eastern Europe still seems to be underrepresented in the analysis. In that context, one could also wonder to what extent Austria can still be said to be a "new" EU Member State, especially as Finland and Sweden – that also acceded to the EU in 1995 – are not being described this way.

While Central and Eastern Europe can be expected to share some common features and/or problems with other European countries, there are certain elements that make the region different. Importantly, one must take into account its common historical heritage and related structural problems of the higher education sector,[29] such as the selection of young academics 'based on their ability to understand and obey the informal omertà of the system, rather than on scientific merits'.[30] The strong distrust in public experts, often seen as a common feature of post-socialist countries where funding of research was for years subordinated to political decisions rather than dependant on any

Academic Legal Publications: Results of a Survey in Switzerland' (2018) 27 Research Evaluation 335; Andreas Lienhard and others, 'L'evaluation de La Recherche En Droit En Suisse' in Thierry Tanquerel and Alexandre Flückiger (eds), *L' évaluation de la recherche en droit : enjeux et méthodes* (Bruylant 2015).

28 Following the order of presentation in the book, individual chapters were written by: Daithi Mac Sithigh (the United Kingdom), Rob van Gestel and Marnix Snel (the Netherlands), Kai Purnhagen and Niels Petersen (Germany), Elisabeth Maier (Austria), Andreas Leinhard, Karin Byland and Martin Schmied (Switzerland), Antonina Bakardjieva Engelbrekt (Sweden), Pia Letto-Vanamo (Finland), Ginevra Peruginelli (Italy), Delphine Costa (France), Albert Ruda (Spain), Janja Hojnik (Slovenia), and Marnex Snel (the EU level).

29 Antal Szerletics and Lidia Rodak, 'Introduction: Legal Education in Europe. Challenges and Prospects' (2017) 7 Challenges and Prospects (December 13, 2017). Oñati Socio-Legal Series 1584.

30 Ibid 1585.

evaluation of performance,[31] had significant influence on how evaluation practices were designed and have been perceived in those countries.[32]

Additionally, there are certain editorial issues that need to be highlighted. While some of them are very minor and do not influence the reception of the content (e.g. on page 16, there is a mention of 10 countries selected, while in reality there are 11 discussed in the book), one is more significant. The editors say that while designing the study, they opted for a questionnaire for which they developed a standard format, allegedly presented to a reader in Appendix 1.[33] Unfortunately, there is no Appendix in the book, nor in the e-book version. Naturally, the structure of individual chapters suggests the format. However, having direct access to the questionnaire could be ouf use to other scholars wishing to build on the work presented in this study and progress the debate further. Furthermore, it would contribute to better methodological consistency across this field of study.[34]

This book, while providing some answers, poses even more questions – and this is indeed its greatest strength. The reader unfamiliar with the subject will find in the book a helpful introduction to the many problems it attempts to address, while the more informed reader will appreciate the degree of detail of the individual chapters, and the depth of the comparison undertaken by the editors. Without any doubt, as the authors themselves promise, this book will serve as a food for thought to a broad range of audiences: policy makers in higher education, university and/or faculty management, evaluation experts, research foundation and funding bodies, and legal publishers. Overall, I consider this book to make a valuable contribution to the discussion about the future of legal scholarship, both in Europe and beyond. Taking into account the relative lack of literature on quality standards for

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31 Julita Jabłecka and Benedetto Lepori, 'Between Historical Heritage and Policy Learning: The Reform of Public Research Funding Systems in Poland, 1989–2007' (2009) 36 Science and Public Policy 697, 700–701; Emanuel Kulczycki, 'Assessing Publications through a Bibliometric Indicator: The Case of Comprehensive Evaluation of Scientific Units in Poland' (2017) 26 Research Evaluation 41, 41.

32 See, for example: Kulczycki (n 31); Barbara Good and others, 'Counting Quality? The Czech Performance-Based Research Funding System' (2015) 24 Research Evaluation 91.

33 Van Gestel and Lienhard (n 14) 16.

34 The Appendix was, however, shared with the author of this review upon request.

academic legal research in Europe, this volume opens new debates that will hopefully be taken up in the coming years.

ROSTAM J. NEUWIRTH, *LAW IN THE TIME OF OXYMORA: A SYNAESTHESIA OF LANGUAGE, LOGIC AND LAW* (ROUTLEDGE 2018)

Kerttuli Lingenfelter*

I. INTRODUCTION

Have you ever wondered whether an oxymoron might change human evolution and, ultimately, fate? Until I read Rostam J. Neuwirth's new book, I, for one, had not. In *Law in the Time of Oxymora*, Neuwirth invites the reader into an abundant and curious amalgam of thoughts and theorisations. Drawing on linguistic, religious, and legal sources, as well as philosophy, (neuro)science and fiction, the book explores the impact of increasing oxymora in art, science and law upon human senses and the mind. Neuwirth proposes that dualistic logic, even if universal and inherent to humans, may be losing its validity.[1] Instead, the author argues, we ought to shift toward oxymoronic thinking and a holistic 'theory of everything'.[2] The book boisterously postulates that, in our rapidly changing world, by enabling paradoxical problem-solving skills and cognitive coherence, such a theory can aid the establishment of 'a global legal framework adequate for the challenges in the governance of global affairs'.[3]

Neuwirth's book is a colourful addition to the growing body of literature on questions of "law and ..." and "law in ...".[4] Most importantly, the book delves into the importance of language as a means of communication and thought, including within the realm of law. In this sense, its pronounced contribution

* Doctoral Researcher, Department of Law, European University Institute.

1 Rostam J Neuwirth, *Law in the Time of Oxymora: A Synaesthesia of Language, Logic and Law* (Routledge 2018) 184.

2 Ibid 227–228.

3 Ibid 243.

4 For instance, see William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press 1997); Upendra Baxi, Christopher McCrudden and Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts* (Cambridge University Press 2015); Peer C Zumbansen, 'Transnational Law as Socio-Legal Theory: The Challenges for "Law in Context" in a Divided World' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3505560.

 doi:10.2924/EJLS.2019.020

is to an old and 'current legal issue', i.e. legal knowledge on the relationship between law and language.[5] For its rhythm, flow and themes, it brings to mind vibrant explorations of law from a literary perspective.[6]

Its ambition is, however, where the book falters. While Neuwirth proposes to discard the dualist methodology and logic of the law, the book's main limitation is the lack of suggestions as to how, practically, one would do so. Moreover, the proposed grand theory of everything comes across as a lofty ideal – suitable for food for thought but, perhaps, not yet ripe for serious scientific exploration. I willingly admit, however, that *Law in the Time of Oxymora* provoked me to grapple with the paradoxes and dichotomies apparent in my own thinking and writing. Herein, I suggest, lies the value of Neuwirth's work. While the book sometimes seems far removed from law as lawyers usually understand it, its theory pushes one to reconsider the language and concepts one commonly – and, perhaps, too casually – employs, including when discussing law and events mediated through law. I will return to the compelling quandaries the book offers (section III), following a summary of Neuwirth's main argumentation.

II. Summary

In simple terms, Neuwirth hypothesises that, in our increasingly fast-paced and changing world,'essentially oxymoronic concepts' are on the rise and may be able to help us overcome binary thinking. At once, these concepts both correspond with the current need for new language to describe our changing world and may change the very condition of humanity.[7] The author provokes, '[e]ventually, we need to ask if oxymora and paradoxes will, after affecting first our language, then our thinking, and possibly our perception, at some point also alter our biological appearance, our organs and eventually our

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5 See also Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues Volume 15* (Oxford University Press 2013); Andrei Marmor, *The Language of Law* (Oxford University Press 2014); Brian Bix, *Law, Language, and Legal Determinacy* (Oxford University Press 1995).

6 A favourite of mine, for example, is Colin Dayan, *The Law Is a White Dog* (Princeton University Press 2011).

7 Neuwirth (n 1) 114.

fate?'[8] Classical logic, which perpetuates binary contradictions, may, according to the author, become replaced by a 'synaesthesia of senses'.[9] Such a synaesthesia could allow for global justice by laying the groundwork for global cognitive coherence and a common language. To demonstrate this elaborate claim, Neuwirth takes multiple steps.

First, the author defines "essentially oxymoronic concepts" as consisting of oxymora, enantiosis and paradoxes. As a point of departure, Neuwirth frames these concepts as the logical successor for their harbinger, the "essentially contested concept". By combining seemingly contradictory fields, qualities and sensations, essentially oxymoronic concepts can undermine the competitive and dichotomous thinking present in the essentially contested concepts. From the very outset of the book, Neuwirth advances the conception of law as discourse, thus entangled with language and logic.[10] Indeed, he writes, 'the idea underlying this book' is 'the role of concepts and language in law as a means of organizing life and governing societies'.[11] It is for this reason, it seems, that law is often equated with language within the book; insofar as oxymoronic concepts may prompt new ways of thinking and perceiving, they can subsequently allow for fresh attempts at solving individual as well as collective and even global contradictions and challenges. Law is presented as one language for exercising this new mode of perception and thought. As such, law, as a (not-yet-) global language of governance, has important promise, if only it can adapt to our increasingly changing world.[12]

As a second step, covering copious examples of his essentially oxymoronic concepts in art and science (chapter 4) and in law (chapter 5), Neuwirth seeks to demonstrate an increase in their use. As the author points out, art, science and law are all contested concepts, which provides fruitful ground for oxymora.[13] That law, in particular, is strongly based upon dualistic logic gives rise to some discontentment - the author asks whether such law can '[transcend] problems caused by a non-dualistic or fuzzier category of

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8 Ibid 143.

9 Ibid 244.

10 Ibid 2.

11 Ibid 3.

12 Ibid 23.

13 Ibid 25, 60.

problems', meaning, apparently, the fuzzy, non-dualist character of problems arising in lived, human reality. The dualism of the law, which mandates a choice between justice and injustice, and between guilt and innocence, is not an adequate language for describing all situations. For this reason, oxymoronic contradictions arise in the human mind. These contradictions are reflected in the language of the law, spanning from 'forced consent' to 'wilful negligence', and from 'intellectual property' to 'the free market'.[14]

Lastly, Neuwirth situates the proposed increase in essentially oxymoronic concepts into his broader hypothesis and the latter half of the book is dedicated to what seems like Neuwirth's own theory of "everything". These chapters situate essentially oxymoronic concepts into a framework of old and new science, philosophy and logic. In essence, the chapters narrate how languages change, and how that change can potentially be linked to the evolution of human thinking, perception and cognition. Penultimately, Neuwirth contends that, as language may fundamentally shift human nature, 'the principal challenge [in the time of oxymora] is to find out how law can both deal with change and produce the desired changes by using language'.[15]

While the author refrains from providing a definite answer to this challenge, the conclusions indicate that essentially oxymoronic concepts may prove crucible. Their importance is due to their capacity to enhance human's ability to accept contradictions and to generate a new 'organ of cognition' (something Neuwirth offers as a future possibility, i.e. an organ which integrates many of our seemingly separate senses).[16] Through the aforementioned capacities, essentially oxymoronic concepts could 'stimulate intuitive thinking', which 'will increase global connectivity in the brain'.[17] In resemblance to Cammiss' proposition that storytelling, as a proxy for human experience, can offer 'space for voices that have traditionally been excluded from legal discourse',[18] Neuwirth propounds a view of a legal language that is

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14 Ibid 69–71, 79, 91.

15 Ibid 115.

16 Ibid 4.

17 Ibid 250.

18 Steven Cammiss, 'Stories in Law: Providing Space for "Oppositionists"?' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues Volume 15* (Oxford University Press 2013) 221.

more holistic and intuitive, and does not abide by the dominant Western dualism. A language that more accurately reflects the human mind at an intrapersonal level could, then, allow for increased coherence and understanding among individuals locally as well as globally, including through the language of the law.

III. DIALOGUE

Law in the Time of Oxymora grapples with questions old and new, and ties together a variety of fields and sciences (whether it does so oxymoronically, holistically or otherwise remains for the reader to determine). The book raises salient questions about the law as language, and its potential impact on our minds in the short and long runs. If you are looking for clear answers and positive law, this is not the book for you. Yet for anyone seeking to engage in a philosophically-tinted exploration of (law's) language, meaning, logic and future, this book may offer provocative insights and arguments.

Law in the time of Oxymora treads between highly stimulating and threadbare argumentation. There are two aspects, in particular, that I would like to raise as examples of this tension. The first regards the relationship between oxymora and dualistic logic. *Law in the Time of Oxymora* relies on the suspicion that oxymora transcend binary thinking.[19] Such a claim has as its predisposition a unidirectional view of language as the source of evolving meaning and logic. The author asserts that, based on this influence, oxymoronic concepts may give rise to consensus and universal meaning.[20] In sum, since words change faster than language as a whole, and language changes faster than logic, oxymora might influence how we think, feel, reason, speak and perceive.[21]

If, however, change in language corresponds to changes in the real world, thus reflecting a change in our perception, are the resulting parses still oxymoronic? Neuwirth often posits as paradoxical the combination of two formalistically or conventionally separate fields – *culture industry* appears to be a favourite of his. What Neuwirth's book does not delve into, however, is

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19 Neuwirth (n 1) 3, 138.

20 Ibid 11, 51.

21 Ibid 124.

whether two previously unrelated concepts brought together by human perception or science constitute an oxymoron or paradox when describing perceived reality. When our interdisciplinary reality, not individual poetic phrases, challenges strict (human-made) classifications and disciplinary boundaries, is the linguistic reflection paradoxical?

On a similar note, the medical doctor and poet William Carlos Williams wrote: 'meanings have been lost through laziness or changes in the form of existence which have let words empty'.[22] In other words, words, phrases and language may change at a pace different than that of our experience of reality, whereby language simply does not coincide with our cognition. Even the author seems to admit to this; he writes that, despite differing languages, cognitive processes 'seem to be universal'.[23] In this sense, change in language may also lag behind change in 'form of existence'.[24]

I tend to contemplate, maybe even more so since reading this book, that oxymoronic thinking is itself inherently dualist. At the very least, the description of something as paradoxical requires that the person doing the describing simultaneously continues to perceive a conflict. Is the thing itself oxymoronic at all if the combined terms or fields are not perceived as separate or contradictory? Neuwirth himself acknowledges that conflicts and contradictions exist not in reality but in the human mind.[25] This subtly differs from, for instance, James' view that reality, experience, is just as much outside as it is inside the mind – where it is often counted twice over, without us even noticing the difference between reality and the percepts we impose upon it.[26] What I am proposing is that if a contradiction is not experienced as such, it ceases to exist. Thus, the percept of oxymoron or paradox fades away. To me, this is the case with, *inter alia*, culture industry, whereby the combination of these words serves as an accurate description of an experience of reality, not as a contradiction that is actually present, of which I have merely become conscious. When Neuwirth frames it as such, I can recognize why culture

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22 William Carlos Williams, *Spring and All* (New Directions Publishing 2011) 20.

23 Neuwirth (n 1) 244–245.

24 Williams (n 22) 20.

25 Neuwirth (n 1) 183–184, 208–209.

26 William James, 'Does "Consciousness" Exist?' (1904) 1 The Journal of Philosophy, Psychology and Scientific Methods 477, 483.

industry could be seen as a paradox, and find the duality behind that quality. Still, the concept does not appear to me as such in and of itself. Rather, oxymoronic thinking results in counting the experience twice (or thrice) over, whereby:

> As 'subjective' we say that the experience represents; as 'objective' it is represented. What represents and what is represented is here numerically the same; but we must remember that no dualism of being represented and representing resides in the experience per se. In its pure state, or when isolated, there is no self-splitting of it into consciousness and what the consciousness is 'of.' Its subjectivity and objectivity are functional attributes solely, realized only when the experience is 'taken,' i.e., talked-of, twice...[27]

In this sense, oxymoronic thinking would not be, as the author posits, 'holistic and dynamic',[28] but an inconstant coupling of reality-experienced and a dualist perception that sees contradiction. Instead, only by losing the percept of dualism, which allows one to identify an oxymoron or paradox, could one experience holistically.

This brings us to the second, deeper quandary. Namely, considering that we have not yet postulated a determinative account of, among infinite others, the relationship between language, experience and the human mind, and free will *versus* fate,[29] it seems reasonable to question human ability, at this stage, to form a theory of *everything*.[30] A synaesthesia of senses provides little relief; while Neuwirth proposes it could combine and integrate separate senses, which would aid us humans in navigating complexity,[31] neuro science suggests that that is exactly what our brains already do.[32] Supposedly, 'a profound truth

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27 Ibid 485.

28 Neuwirth (n 1) 253.

29 Cf. ongoing debates between determinists and compatibilists, for example Sam Harris, *Free Will* (Simon and Schuster 2012); Daniel C Dennett, 'Reflections on Sam Harris' "Free Will"' (2017) 8 Rivista internazionale di Filosofia e Psicologia 214; Derk Pereboom, 'Response to Dennett on Free Will Skepticism' (2017) 8 Rivista internazionale di Filosofia e Psicologia 259.

30 Neuwirth (n 1) 227–228.

31 Ibid 179.

32 Robert M Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Random House 2017) 40.

surfaces' from 'the paradox of free will and fate'.[33] Neuwirth does not, however, present either the truth or the paradox, or engage with the lively debate about brains, free will and fate. This is problematic insofar as law, as we conceive it, relies on copious legal fictions about the human and her rationality and freedom.[34] The less convenient truth may simply be that there is no known truth about the matter yet. Along these lines, while the author criticises the prioritisation of analysis over synthesis,[35] it may just be too early to synthesise, as we have so far, in most fields, insufficiently analysed.

IV. Conclusion

Neuwirth's book, *Law in the Time of Oxymora*, suggests that by embracing essentially oxymoronic concepts, we may be able to adopt a new non-binary way of thinking about our ever-changing world and human experiences. The language of these concepts would, the author precipitates, change how we think about and apply the law. Replacing dichotomous logic with fuzzy logic would allow for coherence and synaesthesia on the individual and collective levels, eliciting the possibility for a true global language (and law).

Law in the Time of Oxymora offers a new vocabulary for discussing legal concepts and logic. While the book may not entirely have succeeded at challenging the limits of current legal reasoning and method, it proffers fresh angles through which to examine the language lawyers use to describe the human experience. By highlighting the friction between humans' perceived reality and the dualist logic underlying law, Neuwirth makes a case for paying closer attention to when, how, what and why we express though paradoxes and oxymora. It seems that either-or options do not serve their intended purpose in a world of many shades. This triggers deep questions about truth,

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33 Neuwirth (n 1) 258.

34 For example, Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 Journal of Law and Society 193; Alessandro Capone, 'The Role of Pragmatics in (Re)Constructing the Rational Law-Maker' in Alessandro Capone and Francesca Poggi (eds), *Pragmatics and Law: Philosophical Perspectives* (Springer International Publishing 2016); Paul G Nestor, 'In Defense of Free Will: Neuroscience and Criminal Responsibility' (2019) 65 International Journal of Law and Psychiatry 101344.

35 Neuwirth (n 1) 255.

justice and the purpose of law. Many of these questions remain unanswered and, likely, unanswerable for now, but *Law in the Time of Oxymora* compels one to seek further (inter-disciplinary) deliberation and (fuzzy) thought.