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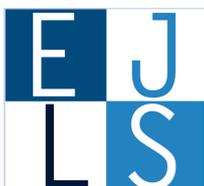
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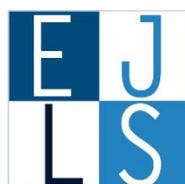
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EDITORIAL

THE "NEW NORMAL" IN ACADEMIA: WHAT COVID-19 REVEALS ABOUT (LEGAL) PUBLISHING AND ONLINE SCHOLARLY COMMUNICATION

Anna Krisztián  and Olga Ceran† 

The 2020 EJLS Autumn Issue is the second EJLS issue published in the new reality brought on by the spread of the novel coronavirus. As we released the EJLS 2020 Spring Issue in April, there was still hope that the pandemic would soon be under control. Now, in November 2020, it is clear that the time of the coronavirus is still not over and indeed the full impacts of the Covid-19 pandemic are yet to be seen. Already the initial emergency phase has brought about various legal challenges concerning the attempts to contain the pandemic. In the name of the preservation of public health and the effective prevention of the spread of the virus, many restrictions have been put in place, some of which have raised issues of proportionality in terms of public interference with individual freedoms. In several countries, the pandemic prompted further concerns about the progressive dismantling of the rule of law. Many entrepreneurs found themselves in urgent need of support and public aid programs of various forms were put in place. Immigration restrictions and the closing of state borders have had repercussions for frontier workers and transnational families that have proven difficult to address. Judicial efficiency has been affected, and many of the issues could not be tackled by courts immediately due to the lockdown measures and the difficulties caused by the move to online or hybrid measures that some jurisdictions decided to introduce.¹

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¹ Jane Croft, 'Courts Test Their Online Future, from Dress-down Lawyers to Witness Appearance' (*Financial Times*, 23 April 2020) <<https://www.ft.com/>

The research community has reacted to these challenges with unprecedented speed through various research and public engagement activities aimed at tackling the ongoing crisis.² A common aim shared by many initiatives was to maximize the accessibility of research results that might help address the current pandemic.³ This cooperative spirit is not to be overlooked, having sparked many projects facilitating knowledge transfers across borders and jurisdictions.⁴ International organizations jumped in quickly to clarify the application of their legal instruments in current circumstances,⁵ highlight the

content/936e04b6-7a8c-11ea-bd25-7fd923850377> accessed 29 October 2020; Lauren Kirchner, 'How Fair Is Zoom Justice?' (*The Markup*, 9 June 2020) <<https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice>> accessed 29 October 2020. See also 'C (A Child): The Judge Who Should Have Recused Herself (and the Perils of Remote Hearings)' (*Family Lore*, 25 July 2020) <<http://www.familylore.co.uk/2020/07/c-child-judge-who-should-have-recused.html>> accessed 29 October 2020.

² See e.g. 'EUI Covid-19 Knowledge Hub' (*European University Institute*) <<https://www.eui.eu/EUICovid19KnowledgeHub/Home.aspx>> accessed 4 October 2020; Martin Scheinin, 'Human Rights in the Age of Pandemics: A Checklist for COVID-19 Strategies' (*University of Oxford Faculty of Law*) <<https://www.law.ox.ac.uk/events/human-rights-age-pandemics-checklist-covid-19-strategies>> accessed 4 October 2020; 'COVID-19 Pandemic' (*Cadmus EUI Research Repository*) <<https://cadmus.eui.eu/handle/1814/66672>> accessed 4 October 2020.

³ See e.g. 'Manifesto for EU COVID-19 Research' (*European Commission*, July 2020) <https://ec.europa.eu/info/research-and-innovation/research-area/health-research-and-innovation/coronavirus-research-and-innovation/covid-research-manifesto_en> accessed 4 October 2020.

⁴ For a resource aimed at providing a repository of the first available comments and normative documents which have been prompted by the sanitary emergency, in belief that it may help 'our work as comparatists when the time will have come for more meditated reflections', see 'COVID-19 Law Lab' <<https://covidlawlab.org/>> accessed 4 October 2020; 'Comparative Covid Law' <<https://www.comparativecovidlaw.it/>> accessed 4 October 2020.

⁵ Hague Conference on Private International Law, 'Covid-19 Toolkit' (2020) <<https://assets.hcch.net/docs/538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf>> accessed 4 October 2020; Hague Conference on Private International Law, 'Toolkit for the 1980 Child Abduction Convention in Times of Covid-19' (2020) <<https://assets.hcch.net/docs/2aee3e82-8524-4450-8c9a-97b250b00749.pdf>> accessed 4 October 2020.

commitments of their respective stakeholders,⁶ and facilitate cooperation and knowledge exchange.⁷ In times of physical distancing, legal researchers and practitioners alike both needed and wanted to remain socially connected, for professional reasons or otherwise.

I. ACADEMIC PUBLISHING UNDER (OLD AND NEW) PRESSURES

In order to effectively tackle the new challenges, knowledge has to be accessible quickly and freely. Traditional journals have tried to meet the challenges of the pandemic by providing exceptional open access and a rapid peer review process for relevant articles. This reinvigorated old debates on the feasibility of different models of academic publishing. While rapid peer review might be workable in an emergency situation, the long-term sustainability of this model is disputable.⁸ Concerns regarding the (un)sustainability of a rapid peer review process, something which EJLS is known for in academic circles, are not unfamiliar to the editors of EJLS. While our exceptionally wide pool of readily available reviewers enables us to live up to such expectations, most academic journals are constrained by more limited review capacities. As such, while some see the current demands on publishers as a final push towards open access and faster peer review, others are more sceptical and emphasize that this model is still conditioned by the big players who expect that most if not all editorial tasks should be managed by already overwhelmed scholars.⁹

Independently of this push, the pandemic has brought an upsurge of papers published in open access and via pre-print platforms.¹⁰ This was probably most prevalent in natural and medical sciences, but law and economics are

⁶ 'Covid-19' (*Council of Europe*) <<https://www.coe.int/en/web/portal/covid-19>> accessed 4 October 2020.

⁷ 'COVID-19 Law Lab' (n 4).

⁸ Ewen Callaway, 'Will the Pandemic Permanently Alter Scientific Publishing?' (2020) 582 *Nature* 167.

⁹ Samuel Moore, 'Without Stronger Academic Governance, Covid-19 Will Concentrate the Corporate Control of Academic Publishing' (*LSE Impact Blog*, 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 12 October 2020.

¹⁰ Callaway (n 8).

two fields that caught up very quickly given the unavoidable (yet unclear) implications of the pandemic for global and local economies, legal systems, and ways of life. At the time of writing of this Editorial, there are more than 500 papers on law and the Covid pandemic on SSRN,¹¹ while LawArXiv¹² – a uniquely legal pre-print service – hosts a number of contributions on the topic as well. While such publication strategies have allowed research findings to be disseminated quickly and broadly, they are not without drawbacks.

Both SSRN and pre-print portals serve as platforms to disseminate early-stage research, prior to publication in academic journals.¹³ Most of the papers published this way have not yet been peer-reviewed. So, whereas the dissemination of research has been liberated, the basic function of traditional journals – providing peer review – has not been effectively replaced.¹⁴ The current situation hence brought to the fore some of the 'old' issues of research publishing. There have been concerns that speed has been prioritized over the quality and credibility of research,¹⁵ and that some sort of self-correcting mechanism or self-organizing peer review for pre-prints is

¹¹ 'You searched: COVID Law' (SSRN) <<https://papers.ssrn.com/sol3/results.cfm>> accessed 19 November 2020.

¹² 'LawArXiv' <<http://lawarxiv.info/>> accessed 12 October 2020.

¹³ Of course, as most legal scholars know, many published journal articles also feature on the SSRN website. This is however not the primary objective of this platform.

¹⁴ Some platforms offer a basic screening of the submissions that includes checks for basic scientific content, author background, and compliance with ethical standards. See 'Preprints' <<https://www.preprints.org/>> accessed 12 October 2020. There are, however, initiatives that aim at bridging this gap to allow researchers to comment on any published research or select valuable contributions to form individually edited periodicals. See 'Peeriodicals' <<https://peeriodicals.com>> accessed 12 October 2020; 'PubPeer' <<https://pubpeer.com/>> accessed 12 October 2020. For a platform for high-quality journal-independent peer review in the life sciences, see also 'Review Commons' <<https://www.reviewcommons.org/>> accessed 12 October 2020.

¹⁵ Tina Haux, 'The Rush to Research COVID-19 Risks Compromising Research Integrity and Impact' (*LSE Impact Blog*, 2 October 2020) <<https://blogs.lse.ac.uk/impactofsocialsciences/2020/10/02/the-rush-to-research-covid-19-risks-compromising-research-integrity-and-impact/>> accessed 12 October 2020.

necessary.¹⁶ The need to strike a balance is obvious, especially if pre-prints are to serve policy- and law-making purposes, something that legal research necessarily stays close to.¹⁷

The need for solid quality and relevance assessment, and not only for pre-prints, is indeed particularly important when a crisis strikes. While thousands of scholarly contributions have been published on the new coronavirus,¹⁸ studies show that less than half were research articles¹⁹ and the majority of publications on Covid-19 did not provide new information, possibly diluting the original data published on this disease and consequently slowing down the development of valid knowledge.²⁰ In a world craving for answers, many

¹⁶ Wang LingFeng, 'Self-Organising Peer Review for Preprints – A Future Paradigm for Scholarly Publishing' (*LSE Impact Blog*, 17 April 2019) <<https://blogs.lse.ac.uk/impactofsocialsciences/2019/04/17/self-organising-peer-review-for-preprints-a-future-paradigm-for-scholarly-publishing/>> accessed 12 October 2020; Joeri Tjink and others, 'Are Preprints a Problem? 5 Ways to Improve the Quality and Credibility of Preprints' (*LSE Impact Blog*, 23 September 2020) <<https://blogs.lse.ac.uk/impactofsocialsciences/2020/09/23/are-preprints-a-problem-5-ways-to-improve-the-quality-and-credibility-of-preprints/>> accessed 12 October 2020.

¹⁷ For an example of the role that social science research has to play in the pandemic, see Dr. Rachel Middlemass, 'What Is the Role of the Social Sciences in the Response to COVID-19? 4 Priorities for Shaping the Post-Pandemic World' (*LSE Impact Blog*, 25 August 2020) <<https://blogs.lse.ac.uk/impactofsocialsciences/2020/08/25/what-is-the-role-of-the-social-sciences-in-the-response-to-covid-19-4-priorities-for-shaping-the-post-pandemic-world/>> accessed 12 October 2020.

¹⁸ By June 2020, more than 23 thousand articles on coronavirus and the pandemic were published in major databases. Jaime A. Teixeira da Silva, Panagiotis Tsigaris and Mohammadamin Erfanmanesh, 'Publishing Volumes in Major Databases Related to Covid-19' [2020] *Scientometrics* <<https://doi.org/10.1007/s11192-020-03675-3>> accessed 12 October 2020. To our best knowledge, no such research exists (yet) on legal publications.

¹⁹ *Ibid.*

²⁰ Nicola Di Girolamo and Reint Meursing Reynders, 'Characteristics of Scientific Articles on COVID-19 Published during the Initial 3 Months of the Pandemic' (2020) 125 *Scientometrics* 795. However, this research focused on journal articles, not pre-prints, which suggests that the traditional publication infrastructure does not necessarily guarantee such a solid relevance assessment.

such publications are very quickly referenced further, featured in popular media, and disseminated online.²¹

The World Health Organization ('WHO') has noted that the current pandemic is the first in history in which technology and social media have played such a massive role in keeping people informed and connected.²² Already in pre-pandemic times, the digital world offered great tools to connect with others and disseminate information (including research outputs), both in more traditional and more novel formats. At the same time, however, technology has enabled an overabundance of information and jeopardized some of the efforts to come up with a research-grounded global response, a phenomenon labelled by the WHO as an 'infodemic'.²³ As shown above, the research world has not been immune to this infodemic. Even in 'normal times' social media poses certain challenges for the scholarly community in general, hence it comes as no surprise that the pandemic has brought to light more fundamental questions about the production, organization, and dissemination of (legal) knowledge.

II. THE USE OF NEW MEDIA IN ACADEMIC PUBLISHING AND SCHOLARLY COMMUNICATION

As we write this, our second EJLS editorial of the post-pandemic world,²⁴ we are increasingly aware that digital channels of scholarly communication are not only rapidly emerging but are here to stay. The coronavirus crisis has

²¹ According to one study, in the first months of the pandemic preprints on COVID-19 were shared on Twitter significantly more often than other preprints. Nicholas Fraser and others, 'Preprinting the COVID-19 Pandemic' (2020) bioRxiv <<https://doi.org/10.1101/2020.05.22.111294>> accessed 12 October 2020.

²² 'Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation: Joint Statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC' (World Health Organization, 23 September 2020) <<https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>> accessed 26 October 2020.

²³ Ibid.

²⁴ 'Post' is not meant in the sense that the pandemic is over, but in the sense that it already seems to have changed the world we live in forever.

forced academics (similarly to members of other professions) to discover the possibilities offered by modern technology. Virtual conferences, just to mention one example, have swiftly become the norm in academic circles. It has also led more and more academics to embrace the use of social media for scholarly communication, a trend which, of course, predates the recent proliferation of online conferences. As we mentioned in our Editorial of the EJLS Spring 2019 Issue,²⁵ studies have shown that social media platforms may serve the academic community in various beneficial ways.²⁶ For instance, articles published in academic journals with a strong social media presence receive a higher number of citations and get more widely disseminated. Social media also affords academics greater access to scholarly discussions, resources, information and global networking opportunities. In the present editorial we chose to delve into the details of this topic – given that it is timelier than ever.

When researching this subject matter, one encounters an abundance of academic and non-academic literature. Sources which reflect on the future of academic publishing²⁷ either map the current state of affairs in a neutral and objective manner²⁸ or highlight the benefits of this new phenomenon,²⁹

²⁵ Olga Ceran and Anna Krisztián, 'Editorial: From Inclusivity to Diversity: Lessons Learned from the EJLS' Peer Review Process' (2019) 11(2) *European Journal of Legal Studies* 1.

²⁶ E.g. Han Zheng and others, 'Social Media Presence of Scholarly Journals' (2019) 70(3) *Journal of the Association for Information Science and Technology* 256.

²⁷ Christine Tulley, 'Guest Post – Emerging Trends in the Academic Publishing Lifecycle' (*The Scholarly Kitchen*, 27 March 2019) <<https://scholarlykitchen.sspnet.org/2019/03/27/guest-post-emerging-trends-in-the-academic-publishing-lifecycle/>> accessed 12 October 2020; '5 Scholarly Publishing Trends to Watch in 2020' (*Scholastica*, 10 January 2020) <<https://blog.scholasticahq.com/post/scholarly-publishing-trends-to-watch/>> accessed 12 October 2020.

²⁸ Diego Ponte, Bozena I. Mierzejewska and Stefan Klein, 'The Transformation of the Academic Publishing Market: Multiple Perspectives on Innovation' (2017) 27 *Electronic Markets* 97; Andy Miah, 'The A to Z of Social Media for Academia' (*Times Higher Education*, 28 October 2019) <<https://www.timeshighereducation.com/a-z-social-media>> accessed 12 October 2020.

²⁹ 'Tips for Academics on Blogging and Social Media' (*Times Higher Education*) <<https://www.timeshighereducation.com/career/tips-academics-blogging-and-social-media>> accessed 12 October 2020. Andy Miah, 'Why Academics Should Make Time for Social Media' (*Times Higher Education*) <<https://www.>

occasionally providing tips and tricks on how to boost one's online presence with the aim of increasing their academic visibility. This also goes for publishing houses, which encourage authors to promote their own articles online and thereby, of course, the publishing house or journals as well.³⁰ Even the European Commission came out with a *Social media guide for EU funded R&I projects* under the auspices of the Horizon2020 Programme.³¹ Only a few of the available academic works, however, provide empirical evidence on the actual impact of the use of social media by scholars.³² As some authors point out, one of the benefits of using social media is that current trends transform 'the dissemination of scientific research from a 'pull' model to a 'push' model',³³ in that scholars might not have to spend any (or at least as much) time searching through various publications for relevant information, which is instead transmitted to them more directly. Whether this, which is at the end of the day a form of self-promotion, is really a benefit or rather a disadvantage (in that it further contributes to the centralisation of knowledge and the perpetuation of 'filter bubbles'), one may decide for themselves. Amidst browsing through this seemingly lively academic discussion one might easily overlook the fact that these accounts appear rather one-sided, in that they cherish the increasing importance of social media platforms for scholarly communication, without genuinely addressing the full picture. Since we strongly believe that this new phenomenon has important

timeshighereducation.com/comment/why-academics-should-make-time-for-social-media-app> accessed 12 October 2020.

³⁰ 'Promote Your Article' (*SAGE Publishing*, 19 May 2015) <<https://us.sagepub.com/en-us/nam/promote-your-article>> accessed 1 October 2020. 'Your Promotion Guide: Best Practice Recommendations for Your Article Promotion' (*Wiley*) <<https://authorservices.wiley.com/author-resources/Journal-Authors/Promotion/promotional-toolkit.html>> accessed 12 October 2020.

³¹ European Commission, 'H2020 Programme: Guidance: Social Media Guide for EU Funded R&I Projects' (7 January 2020) <https://ec.europa.eu/research/participants/data/ref/h2020/other/grants_manual/amga/soc-med-guide_en.pdf> accessed 12 October 2020.

³² Samara Klar and others, 'Using Social Media to Promote Academic Research: Identifying the Benefits of Twitter for Sharing Academic Work' (2020) 15(4) PLOS ONE <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229446>> accessed 12 October 2020.

³³ Ibid.

implications for the broader research infrastructure, below we share some more critical thoughts on the use of social media by academics.

One might wonder what brought about the rapid popularisation of shorter, non-peer reviewed scholarly content for which the online sphere is particularly suitable. A straightforward answer might have to do with the emerging crisis of peer review. While some scholars wax eloquent about the advantages of peer review³⁴ and insist that '[t]he importance of peer review has, if anything, increased in recent times',³⁵ others strike a more neutral tone suggesting ways to improve the current regime³⁶ or to change its underlying paradigm to a more open model.³⁷ Many others are sceptical about the very concept of peer review, pointing out that it often fails to fulfil its most basic functions, such as malpractice detection,³⁸ catching plagiarism and data manipulation,³⁹ and avoiding bias.⁴⁰

³⁴ Flaminio Squazzoni, 'Peer Review Is Not Just Quality Control, It Is Part of the Social Infrastructure of Research' (*LSE Impact Blog*, 12 June 2019) <<https://blogs.lse.ac.uk/impactofsocialsciences/2019/06/12/peer-review-is-not-just-quality-control-it-is-part-of-the-social-infrastructure-of-research/>> accessed 12 October 2020.

³⁵ Joseph Weiler, 'Best Practice – Writing a Peer-Review Report' (*EJIL:Talk!*, 22 July 2019) <<https://www.ejiltalk.org/best-practice-writing-a-peer-review-report/>> accessed 12 October 2020.

³⁶ Jessica Borger, 'Peer Review Has Some Problems – But the Science Community Is Working on It' (*The Conversation*, 12 July 2018) <<http://theconversation.com/peer-review-has-some-problems-but-the-science-community-is-working-on-it-99596>> accessed 12 October 2020.

³⁷ Maximilian Heimstädt and Leonhard Dobusch, 'To Address the Rise of Predatory Publishing in the Social Sciences, Journals Need to Experiment with Open Peer Review.' (*LSE Impact Blog*, 10 January 2020) <<https://blogs.lse.ac.uk/impactofsocialsciences/2020/01/10/to-address-the-rise-of-predatory-publishing-in-the-social-sciences-journals-need-to-experiment-with-open-peer-review/>> accessed 12 October 2020.

³⁸ Remco Heesen and Liam Kofi Bright, 'Is Peer Review a Good Idea?' [2020] *The British Journal for the Philosophy of Science* <<https://academic.oup.com/bjps/advance-article/doi/10.1093/bjps/axz029/5526887>> accessed 12 October 2020.

³⁹ S. P. J. M. Horbach and W. Halfmann, 'The Ability of Different Peer Review Procedures to Flag Problematic Publications' (2019) 118 *Scientometrics* 339.

⁴⁰ Christopher Tancock, 'When Reviewing Goes Wrong: The Ugly Side of Peer Review' (*Elsevier Connect*, 23 March 2018) <<https://www.elsevier.com/connect/>>

What other, non-peer reviewed formats are preferred by academics these days then (apart from pre-prints)? Can traditional journal articles compete with them in the age of 'digital scholarship'? It is nothing new that journals have gone digital and less and less of them bother to print their issues anymore, but today's readers also expect content to be (visually) appealing, not simply easily accessible online. In this climate, different forms of new media such as blogs, podcasts and videos seem to have been successful in the increasingly competitive struggle to capture scholars' attention.

Blogs seem to have been the first forum of social media to complete and occasionally replace traditional ways of disseminating scholarly work. Some of these outlets have gained considerable reputation and can now be considered quite authoritative in their respective fields. Typically, these platforms offer limited editing but no fully-fledged peer review. Some might argue that some quality scrutiny, a form of 'post-publication peer-review' occurs in this context too, in that the audience has the opportunity to comment on (and correct) such content. However, this might not fully address sceptics' concerns about the credibility and relevance of research being published in a world facing an overabundance of information.

Some established journals such as the European Journal of International Law now run successful blogs parallel to their traditional publications.⁴¹ Other forward-looking journals such as the German Law Journal also experiment with other non-traditional media formats, such as videos and podcasts.⁴² However, our own informal observations suggest that many of the most established journals⁴³ do not presently engage with non-standard formats of

editors-update/when-reviewing-goes-wrong-the-ugly-side-of-peer-review>
accessed 12 October 2020.

⁴¹ See 'EJIL:Talk!' <<https://www.ejiltalk.org/>> accessed 12 October 2020.

⁴² 'German Law Journal: GLJ Shorts and GLJ Specials' (*Spotify*) <<https://open.spotify.com/show/4ZHvGaLnJhYOkuAKC4gbbg?si=jDC8J-BTSP6hg3YBmCJZMg>> accessed 12 October 2020. Whether these contents are available free of charge or not is a different question.

⁴³ Obviously, there are significant debates about the necessity and accuracy of ranking journals in the academic world. Notwithstanding these debates, we looked at some – perhaps not unbiased – traditional rankings of journals when examining which journals experiment with more modern formats and were surprised to see that many of the more established ones tend to stick to their traditional formats.

scholarly knowledge dissemination. The reasons for this could be manifold. Perhaps these journals do not feel the need to distinguish themselves in the academic publishing market or fear that it might weaken their reputation for academic sophistication, or perhaps simply the agreements with their publishing houses do not allow for it. This would reinforce the perception that the new formats discussed here are also a way to 'stir up' the traditional model of academic publishing and knowledge dissemination.

Rapidly catching up to blogs, podcasts are becoming more and more significant in the world of legal communication. They are produced by a variety of sources: not only journals, but also law schools, independent blogs and sometimes even law firms.⁴⁴ Podcasts offer an entertaining, informative and quick format for acquiring relevant legal knowledge, and in this sense they can make information easier to consume – even on the go – than lengthy academic articles, which require focused attention and profound engagement with a written text. Even though EJLS does not offer this format yet, we have taken a step in the direction of working with audio content by commissioning our first ever review of an audiobook, which we eagerly look forward to publishing.

YouTube videos serve a similar purpose, and their diversity is comparable to podcasts, adding an additional visual dimension to content consumption. There are various types of YouTube channels discussing legal topics. Some target a specific audience and transfer knowledge in a narrowly defined area⁴⁵

Whereas these journals might not need to engage with their audience in more modern ways in order to maintain their readership, (many) authors do seem to be looking for alternative formats of knowledge sharing.

⁴⁴ See e.g. 'EJIL: The Podcast!' (*Spotify*) <<https://open.spotify.com/show/7k4Ixe6009YnaLKttl9h3I?si=TKu7mEODSHAqoyQcGMuDjA>> accessed 12 October 2020; 'Jus Cogens: The International Law Podcast' (*Spotify*) <<https://open.spotify.com/show/4UpFsjGSzMkWnAc9KdNFAA?si=bsEJI6rQS428iSTA-3C5yw>> accessed 12 October 2020; 'Law Out Loud' (*Spotify*) <<https://open.spotify.com/show/6dNDHwZJoihYgCsOe0LPZX?si=5eTl9QHPTEyVz1c0Kdmpnw>> accessed 12 October 2020; 'Studiekeuze Podcast' (*Spotify*) <https://open.spotify.com/show/2lwg3IWZx8nTKS8JGF1C1Z?si=EgFloRSUSxC4khYhB_ucNw> accessed 12 October 2020.

⁴⁵ See e.g. 'Influencer Law' (*YouTube*) <<https://www.youtube.com/channel/UCpmYfmTHVFPmk2rPhgwsC4w>> accessed 2 October 2020.

while others offer educational content in a broader sense.⁴⁶ It is noteworthy that some law faculties also have their own YouTube channels – even traditional universities that were in the past proud to offer exclusive knowledge only to a strictly selected group.⁴⁷ Certain journals also experiment with this format, but a quick search reveals that the few videos they have shared have not sparked a lot of engagement in terms of numbers of followers and views.⁴⁸ Last but not least, individual scholars are also active on this video sharing platform, with varying audience sizes.

One may of course wonder whether podcasts and videos, in the style of popular science, are the best formats for discussing legal matters. Is it really necessary to make legal scholarship trendy online? Regardless of one's standpoint, the fact remains that nowadays mobile devices exceed the sales of personal computers and that we are spending more and more of our time consuming digital media, often outside the traditional office environment (e.g. during commutes, which may be favourable for the consumption of audio-visual content such as podcasts and videos). Additionally, some have argued that the use of mobile devices makes reading open access literature easier, forcing journals to optimise their websites for smaller devices, and further contributing to the disruption of the infrastructure of journals 'that provide immediate access but require online payment to read'.⁴⁹ Either way, journals seemingly want to serve as alive forums and build communities

⁴⁶ See e.g. 'Learn Law Better' (*YouTube*) <https://www.youtube.com/channel/UCYSSg9rr-pgtK5UqkZdE_KQ> accessed 2 October 2020.

⁴⁷ See e.g. 'Harvard Law School' (*YouTube*) <<https://www.youtube.com/user/HarvardLawSchool>> accessed 12 October 2020, 'stanfordlawschool' (*YouTube*) <<https://www.youtube.com/user/stanfordlawschool>> accessed 12 October 2020; 'NYU School of Law' (*YouTube*) <<https://www.youtube.com/user/nyuschooloflaw/>> accessed 12 October 2020. For an example managed by a newer and more open university, see 'Law in Maastricht' (*YouTube*) <<https://www.youtube.com/user/lawinmaastricht>> accessed 12 October 2020.

⁴⁸ See e.g. 'The American Law Journal' (*YouTube*) <<https://www.youtube.com/user/LawJournalTV>> accessed 12 October 2020; 'The McGill Law Journal - La revue de droit de McGill' (*YouTube*) <https://www.youtube.com/channel/UCub_I9QfnHcePdKsXh7Fanw>.

⁴⁹ E.g. Haven Allahar, 'Academic Publishing, Internet Technology, and Disruptive Innovation' (2017) 7(11) *Technology Innovation Management Review* 47, 53.

buzzing around them rather than simply provide a one-way communication channel as before.

This brings us to the question of what role multimedia platforms (like the recently launched EU Law Live platform)⁵⁰ that offer a hybrid selection of audio-visual and textual content play within the broader legal community that encompasses both scholars and practitioners. What is the relationship today between journals and other platforms of scholarly production? They both are still largely research-based, but one might assume that maybe the same actors involved utilise alternative formats. While we cannot possibly answer such a broad question in this Editorial, we can establish that these developments have influenced publishing strategies both at an individual as well as an institutional level.

III. THE DOWNSIDE OF USING SOCIAL MEDIA IN SCHOLARLY COMMUNICATION

In our brave new world where the lines between 'publishing, journalism, information, scholarship, technology, epistemology, and science' are being perilously blurred,⁵¹ some important questions remain unaddressed. As mentioned above, state-of-the-art literature tends to focus more on the benefits of using social media in scholarly communication, whereas the downside is largely left undiscussed. While taking everything public and sharing it all on the internet is the new normal, certain worries about academic culture and ethical practices remain.

The flipside of the speed with which scholarly content (e.g. social media posts) can be published on these platforms is that content distributed in this way might contain incorrect and unchecked information which then might be rapidly and widely disseminated in the online sphere, similarly to what we discussed above in relation to research results published in pre-prints. In the age of disinformation, misinformation and fake news, scholars should be

⁵⁰ 'EU Law Live' <<https://eulawlive.com>> accessed 12 October 2020.

⁵¹ Kent Anderson, 'Trouble at Hand — How Mobile Devices Perpetuate Weak Business Models' (*The Scholarly Kitchen*, 24 July 2017) <<https://scholarlykitchen.sspnet.org/2017/07/24/trouble-hand-mobile-devices-perpetuate-weak-business-models/>> accessed 12 October 2020.

particularly vigilant not to slip into this territory and contribute to the spread of incorrect information. Scooping, intentional or unintentional plagiarism, the lack of proper referencing – whatever we might call it, is also a common occurrence in the online sphere. The above-referenced *H2020 Programme Guidance Social media guide for EU funded R&I projects* of the European Commission, which devotes a modest section to the risks of social media, does not offer much guidance on preventing this problem either, as it simply dismisses the worrying trend of plagiarism by stating that 'plagiarism is nothing new, so it's not a reason not to use social media'.⁵² Indisputably, public engagement on social media platforms also has other pitfalls, for instance being exposed to trolling and other forms of online abuse.⁵³

A universal code of good conduct for the use of social media in scholarly communication would be beneficial to steer scholars' behaviour in the online sphere in order to avoid malpractice and the misuse of others' academic work.⁵⁴ Nowadays you cannot go to a conference (or attend one virtually) without giving blank consent for your data, image, and voice to be used freely and distributed by the organisers. And this applies not only when you are invited as a speaker, but also when you are intervening as a member of the audience. Perhaps the gravity of this problem can be understood better by those who have fallen victim to this disturbing trend: We recently stumbled upon a recording of a talk we gave to a small circle of experts, which the conference organizers had published on the Internet as a podcast without any prior notice on the nature of the planned dissemination. One cannot help but

⁵² European Commission (n 31).

⁵³ Maria Tsapali and Tanya M. Paes, 'Social Media for Academics and Early Career Researchers: An Interview with Dr Mark Carrigan' (2018) 5 Cambridge Open-Review Educational Researcher e-Journal 104.

⁵⁴ In a broader context, the UNESCO Recommendation on Open Science, which is to be adopted by its Member States in 2021, is a welcome attempt to set global standards for the public dissemination of knowledge, the assessment of research output, the premature sharing of results etc. The first draft mentions social media explicitly on one account, stating that it is an important agent of interaction between professional knowledge creators and society at large. United Nations Educational, Scientific and Cultural Organization, 'Preliminary Report on the First Draft of the Recommendation on Open Science' (2020) CL/4333 enclosure 2 para 9(vii). We hope to soon see a global initiative focusing even closer on the problems discussed in this Editorial.

wonder where the line should be drawn between exploiting academic contributions and democratisation of academic knowledge.

A similar issue involves 'quoting' a speaker or member of the audience who intervened during a conference on social media, such as Twitter. Once again, on another occasion, after a roundtable organised for experts in a given field, we ran into a tweet that not only quoted, but indeed *misquoted* us. In the world of social media, the need to acquire permission from another person we wish to quote is not obvious, no matter how harmful the consequences might be. Even if correction mechanisms are available (i.e. the quoted person might ask the given user to remove or rectify the content of their post), wrong information might have already spread by that point, without the possibility of containing it or holding anybody accountable. Fortunately, some voices try to spread good academic practices when it comes to quoting and attributing others' work on social media.⁵⁵ In other instances, social media platforms themselves try to remedy the situation.⁵⁶ These questions also tap into the problem of sharing others' unpublished work (e.g. sharing a picture of a presentation slide shown during a conference). Some academics have discussed the reasons for and against sharing unpublished work of our own or that of others,⁵⁷ but further debate is necessary on this matter.

While providing a platform for (ideally) constructive discussions about law and/or academia, social media often turns out to be the most popular means through which academic frustration finds a way to express itself. Dissatisfaction with peer review is particularly widely discussed⁵⁸ with the infamous (yet anecdotal) 'Reviewer 2' being the 'ultimate boogeyman' of the

⁵⁵ Jonathan Bailey, 'Attribution and Citation on Twitter: Keeping Your Tweets Ethical...' (*Plagiarism Today*, 25 May 2017) <<https://www.plagiarismtoday.com/2017/05/25/attribution-and-citation-on-twitter/>> accessed 12 October 2020.

⁵⁶ Sarah Perez, 'Twitter Experiments with Adding a 'Quotes' Count to Tweets' (*TechCrunch*, 26 August 2020) <<https://social.techcrunch.com/2020/08/26/twitter-experiments-with-adding-a-quotes-count-to-tweets/>> accessed 12 October 2020.

⁵⁷ E.g. Elie Diner, 'Should Academics Share Their Presentations Online?' (*LSE Impact Blog*, 25 January 2019) <<https://blogs.lse.ac.uk/impactofsocialsciences/2019/01/25/should-academics-share-their-presentations-online/>> accessed 12 October 2020.

⁵⁸ Squazzoni (n 34).

process.⁵⁹ This highlights some of the most fundamental academic questions (e.g. what is the role of peer review in the research infrastructure and that of transparency and anonymity in this process, what quality means and how it should be measured, whether academics should be trained for peer review).⁶⁰ On a personal level, social media can provide community support to ease the disappointments of (admittedly at times poor, discriminatory or unfair) negative feedback. But social media as an outlet for dissatisfaction needs to be used with caution, both in terms of the kind of information that is being shared and how it is phrased. Even if one's channels are not fully public, one can never be sure if the very reviewer being criticized is not part of one's social or professional circle. It might turn out that Reviewer 2 who has just been ridiculed, or maybe even offended, is the person one has always wanted to work with, or a peer who has proved to be a valuable connection in the past. As journal editors we can confirm that such situations may compromise the blindness of the peer review process (imagine a reviewer reading the post ridiculing them!), leading to delays, uncomfortable confrontations, and even to withdrawing a given contribution from the publication process. So, instead of hating on the mythical Reviewer 2 on the internet, shouldn't we be asking ourselves questions about academic culture and the research infrastructure instead? This is not to deny, of course, that finding proper outlets or procedures for voicing discontent might now be more important than ever.

⁵⁹ '[T]he peer reviewer has been much maligned in academic lore, giving rise to numerous internet memes, academic blog posts, a Facebook group titled "Reviewer 2 Must Be Stopped," a Twitter hashtag (#reviewer2), and even an entry in UrbanDictionary.com, where the definition of Reviewer 2 is "Actively misinterprets everything you say".' Christine M. Tardy, 'We Are All Reviewer #2: A Window into the Secret World of Peer Review' in Pejman Habibie and Ken Hyland (eds), *Novice Writers and Scholarly Publication: Authors, Mentors, Gatekeepers* (Springer International Publishing 2019). For empirical research investigating whether Reviewer 2 is really as poor as their reputation would suggest, see David A.M. Peterson, 'Dear Reviewer 2: Go F' Yourself' (2020) 101(4) *Social Science Quarterly* 1648.

⁶⁰ Touching upon these topics, See e.g. Squazzoni (n 34); Tardy (n 58); 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) 12(3) *German Law Journal* 901.

A question related to the increasing use of social media in every corner of academic life concerns the application of 'altmetrics' which has also been heavily criticised, notwithstanding the problems surrounding more traditional impact measurement methods. As Roelofs and Gallien have put it,

[i]nitially spurred by the desire for professors to reach out and engage with the world outside the 'ivory tower', impact came to be measured by blogs, page views, download stats, and tweets. Academia is replicating the structure of the mass media. Academic articles are now evaluated according to essentially the same metrics as BuzzFeed posts and Instagram selfies.⁶¹

These words of caution should be taken seriously, given that empirical research on the topic (which is, as mentioned above, scarce) shows that factors driving shares on social media and traditional citations are different and hence the two cannot be seen as alternatives but as complements.⁶²

This Editorial of course cannot cover all of such discussions in depth. However, we hope that we were successful in bringing to the fore some of the most important questions regarding the implications of the new (online) forms of knowledge production and dissemination, in particular for quality and relevance assessment, evaluation practices, and ethical conduct in research. The pandemic has already had an impact on the research infrastructure, and the further push towards new models and modes of scholarly interaction will increasingly confront the academic community with at least some of them.

⁶¹ Portia Roelofs and Max Gallien, 'Clickbait and Impact: How Academia Has Been Hacked' (*LSE Impact Blog*, 19 September 2017) <<https://blogs.lse.ac.uk/impactofsocialsciences/2017/09/19/clickbait-and-impact-how-academia-has-been-hacked/>> accessed 12 October 2020.

⁶² Stefanie Haustein, Rodrigo Costas and Vincent Larivière, 'Characterizing Social Media Metrics of Scholarly Papers: The Effect of Document Properties and Collaboration Patterns' (2015) 10(5) *PLOS ONE* <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0120495>> accessed 12 October 2020. See also Cristina M. Pulido and others, 'Social Impact in Social Media: A New Method to Evaluate the Social Impact of Research' (2018) 13(8) *PLOS ONE* <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0203117>> accessed 12 October 2020.

IV. IN THIS ISSUE

The pandemic has also placed a lot of demands on the time and attention of legal scholars. One group whose productivity seems to have taken a hard hit during the pandemic are female academics.⁶³ This may be a consequence of their generally more vulnerable position in academia, further reinforced by the current crisis.⁶⁴ As such, the lockdown's costs have not been evenly distributed.⁶⁵ However, while some academics were struggling with uncertainty and/or caring responsibilities, for others the lockdown turned into a fruitful period of research and writing spent in a sweet solace of their homes.

It is interesting to observe that the lockdown period was indeed particularly busy for the EJLS.⁶⁶ From mid-March to the end of June, the EJLS reported

⁶³ Colleen Flaherty, 'Early Journal Submission Data Suggest COVID-19 Is Tanking Women's Research Productivity' (*Inside Higher Ed*, 21 April 2020) <<https://www.insidehighered.com/news/2020/04/21/early-journal-submission-data-suggest-covid-19-tanking-womens-research-productivity>> accessed 12 October 2020; Noriko Amano-Patiño and others, 'Who Is Doing New Research in the Time of COVID-19? Not the Female Economists' (*VoxEU & CEPR*, 2 May 2020) <<https://voxeu.org/article/who-doing-new-research-time-covid-19-not-female-economists>> accessed 12 October 2020; Chris Smith and Deirdre Watchorn, 'The Pandemic Is Making It Harder for Researchers but Women Are Hit the Hardest. 4 Findings from 80 Countries' (*LSE Impact Blog*, 17 September 2020) <<https://blogs.lse.ac.uk/impactofsocialsciences/2020/09/17/the-pandemic-is-making-it-harder-for-researchers-but-women-are-hit-the-hardest-4-findings-from-80-countries/>> accessed 12 October 2020.

⁶⁴ 'Editorial: Gender in Academic Publishing; The Legality of the Israeli Annexation – Redux; In This Issue' (2020) 31(2) *The European Journal of International Law* 387.

⁶⁵ See also *ibid.*

⁶⁶ The period chosen for this statistical analysis covers submissions received from 15 March to 30 June (first phase), and further to 30 September (second phase). This is somehow arbitrary as the different phases cannot be delineated clearly, of course. Italy (where the Journal is based) was chosen as the main reference, taking into account that in many countries the lockdowns started a little later, and that the severity of the introduced measures has also had impact on the working environment. The lockdown started in Northern Italy on 8 March 2020 and expanded to the whole country a day later. The most draconian measures ended in the second half of May, though the effects of the lockdown definitely lasted some

39% more submissions compared to the same period last year. However, this increase in submission seems to have slowed down after that, with the period until the end of September resulting in only 11% more submissions than last year. At the same time, as opposed to what has been observed elsewhere, the EJLS did not observe any decrease in the number of submissions coming from female authors. In previous years, the general representation of female authors was on average 32%.⁶⁷ This was the same for the period from mid-March to the end of June this year, and slightly increased (to 37%) until the end of September. It therefore seems that many of the EJLS' (female) authors found lockdown to be an opportunity to dive into their work. One explanation might be that early-career scholars, one of the target groups of EJLS, have on average fewer caring responsibilities than some more senior scholars.

As you will see, perhaps partially as a consequence of the Covid lockdown, the current issue is comprised of an unusually high number of articles. Since many articles have been finalised recently, it was not easy to decide where to draw a line for the papers to be included in the present Issue. The selection of articles we ultimately chose to bring to you (leaving others for *OnlineFirst* publication in the near future) opens with a New Voices article, a format available for early-career scholars. We are delighted to see that this format is indeed popular among our young contributors, and we look forward to announcing the winner of the 2020 Best New Voices Article Prize in early 2021.

In her engaging opening piece, Giovanna Gilleri explores alternative understandings to the *sex versus gender* dichotomy in light of recent international case law. By developing a 'hyperconstructivist' approach to this traditional dichotomy in law, Gilleri demonstrates how such a theoretical frame may soften the tensions originating from the fixity of sex/gender-based legal categories.

The Issue goes on with Alessandra Pietrobon's and Tarcisio Gazzini's gripping general article on multilingualism in European Union trade and

time longer. Hence, we drew the line at the end of June. However, many measures remain in force and as such we decided to continue monitoring the trends.

⁶⁷ Ceran and Krisztián (n 25) 3.

investment agreements. Pietrobon and Gazzini argue that the current practice of concluding EU trade and investment treaties in all official EU languages is detrimental to the interpretation of such treaties both under international and European Union law, as demonstrated in the CJEU's recent *Relocation Case*. The authors hence argue that the EU should, by revisiting its current practice, consider different alternative options, such as reducing the number of authentic language versions and giving priority to one of them.

Remaining at the intersection of EU and international law, Jakub Handrlica tackles the important question of whether the concept of 'EU international administrative law' exists. Handrlica draws both well-known and not so well-known parallels between international administrative law and international private law and asks whether the emergence of a 'union of composite administration' has triggered the emergence of similar processes regarding international administrative law. The article provides a convincing answer to this burning question.

The next article was penned by Eva Kassoti, and it offers some fresh reflections on the extraterritorial applicability of the EU Charter of Fundamental Rights after the *Front Polisario* saga. The article rejects the argument for the transposition of the extraterritoriality standard developed by the European Court of Human Rights and reflects instead on the field of application of the Charter as per its Article 51. Kassoti argues that what is decisive is the existence of an EU competence in the field, and that territorial considerations remain immaterial.

The Issue continues with an entirely new publication, which was not previously made available to our honoured readers in *OnlineFirst* format. Cara Donegan analyses a prevalent form of intersectional discrimination, namely discrimination experienced by Muslim women wearing headscarves in Europe. Donegan argues that the recognition of intersectional discrimination is hindered by the features of the present-day EU anti-discrimination framework, as evidenced by recent CJEU case law which failed to respond to situations of intersectional discrimination. In light of this the author suggests a novel hybrid solution which encompasses the duty of reasonable accommodation of religion in conjunction with proactive measures.

Moving beyond EU law but staying within the realm of European law in a broader sense, Diego Zannoni seeks to establish whether, in light of the case law of the European Court of Human Rights on end-of-life issues, the European Convention on Human Rights and the Convention on Human Rights and Biomedicine provide sufficient guidance to overcome the tension between the right to life and the right to respect for private life. Zannoni suggests that, at the present time, it is not possible to deduce from the Conventions neither the existence of a duty to live, nor that of a right to die. However, he maintains that the State Parties have certain positive obligations, in particular regarding specific and strict guidelines for euthanasia and assisted suicide that allow practitioners to ascertain the free will of the individual concerned.

Human rights are also at the centre of the next contribution in this Issue. Shinya Ito zooms in on the debate on business and human rights. The author notices that the prevalent soft-law-focused approach to such challenges works only under certain market conditions where companies have economic incentives to comply with human rights obligations. The article thus reconsiders how the International Covenant on Economic, Social and Cultural Rights may make a unique contribution to business and human rights global governance and overcome the limitation of soft law instruments when such economic incentives are not sufficient.

Francesca Lagioia and Giuseppe Contissa investigate yet another area of law that is still developing. From a socio-technical perspective, the authors analyse legal issues emerging from the adoption of clinical decision support systems based on artificial intelligence. Lagioia and Contissa suggest that specific features of such systems, in particular their level of automation, should be taken into account both when classifying these systems under the European regulations on medical device software and when allocating decision-making tasks between medical experts and AI systems and respective liabilities.

Matteo Bassetti analyses the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights in cases involving transgender people. In the author's opinion, rights of trans people have so far been inadequately protected under the right to private life, a qualified right. He suggests that prohibition from obtaining legal gender recognition or

imposition of coercive medical treatments should rather be considered as violations of the absolute right to be free from cruel, inhuman or degrading treatment.

The General Articles section continues with a contribution on the history of legal thought. Zeynep Kocak-Simsek argues that Marsilius of Padua, an important 14th-century Italian scholar and political figure, may be considered the first social contractarian of medieval jurisprudence to condition sovereignty on a covenant among individuals to form a legal entity with the authority to rule. She demonstrates how Marsilius arrived at the social contractarian theory drawing upon both his past and present political engagements, and the theoretical legal-political debates of his time.

Further on, Johan Rochel brings together insights from international law and political theory to reconstruct the principle of self-determination from a republican perspective. Rochel argues that this republican conception, firmly grounded within a clear conceptual and normative framework, both facilitates a greater understanding of International Court of Justice case law to date and opens up promising paths for future jurisprudential development. Overall, the article proposes a renewed interpretation of self-determination that is able to make sense of this key principle of international law, so often criticised as incoherent.

This EJLS Issue could not do without a book review section either. Matilda Merenmies engages with Alice Margaria's 'The Construction of Fatherhood' (published by Cambridge University Press in 2019). Margaria's book discusses how the European Court of Human Rights constructs fatherhood, and in that, how it develops and applies legal doctrines and adopts moral positions. In Merenmies' view, Margaria's comprehensive analysis of inconsistencies and vagaries of the Court's sometimes in-existent consensus analysis constitutes a truly valuable contribution to human rights law, family law, and law and gender literature. Building on this, Merenmies identifies also those aspects of the analysis that could benefit from further critical reflection.

Last but not least, our 2020 Autumn Issue closes with an insightful book review on Rasa Engstedt's work titled 'EURATOM: The Treaty and the Competences of the Community' (University of Eastern Finland 2020)

written by Jakub Handrlica. Handrlica perceived a renaissance of scholarly interest in the Euratom Treaty and observes in his review that Engstedt analyses the topic of Euratom competences from a perspective which has not been comprehensively addressed since the publication of a 1958 commentary. Similar to all other articles and reviews published in this issue, we wholeheartedly recommend Handrlica's critique of the book.

With this editorial we are saying goodbye, together with Lene Korseberg and Timothy Jacob-Owens who are stepping down as senior Executive Editors. It was a great challenge and great joy to have been responsible for the EJLS in various capacities for so long. We learned a lot, not only about technicalities of academic publishing, but also about the process of knowledge construction and the invaluable role of peer review in this process. We hope that the initiatives we contributed to, for instance setting up the *OnlineFirst* publishing model and strengthening the Journal's online presence, will be successfully carried forward by our successors, further strengthening the EJLS' position in the academic publishing market. We are now handing over to a new generation of editors, and we are positive that the EJLS is left in good hands. We will for sure keep the EJLS in our hearts as we continue our academic journeys. We wish you, for the last time in an EJLS editorial, a pleasant reading!

NEW VOICES

GENDER AS A HYPERCONSTRUCT IN (RARE) REGIONAL HUMAN RIGHTS CASE-LAW

Giovanna Gilleri* 

Traditional legal accounts of sex and gender in international human rights law have either erased or emphasised the distinction between the two concepts. According to mainstream interpretations, there are two sexes, on the basis of which gender is constructed as a separate notion. Some of these interpretations conflate sex with gender. Others oppose sex to gender in the same way as nature to nurture and biology to culture. However, differentiation between the two concepts is not that straightforward. This paper demonstrates that alternative understandings to the sex-versus-gender dichotomy are possible, such as those reflected in the Inter-American Court of Human Rights' (IACtHR) advisory opinion OC-24/I7 and the European Court of Human Rights' (ECtHR) judgment X v The Former Yugoslav Republic of Macedonia. These decisions are two rare yet paradigmatic examples of what I call a 'hyperconstructivist' approach to sex/gender in the law. Hyperconstructivism goes beyond constructivist ideas of the cultural genesis of gender by considering both sex and gender as cultural by-products. If gender is the social construction of sex and sex the result of a cultural inscription at birth through the lens of gender norms, gender is the construction of a construction, that is a 'hyperconstruction'. Hyperconstructivism applied to human rights norms may serve as a theoretical frame to soften the tensions between the fixity of sex/gender-based legal categories and the ever-changing sexed/gendered nature of human experiences.

Keywords: sex/gender, human rights, regional courts, queer legal theory

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I. INTRODUCTION

A plethora of sociological and legal scholarship has been written on the notions of sex and gender. This paper advances a reinterpretation of both sex and gender as constructs in the international human rights legal system. Traditional legal accounts of sex and gender have either erased or emphasised the distinction between the two concepts. Some interpretations conflate sex with gender. Others oppose sex to gender in the same way as nature to nurture and biology to culture. Yet, the differentiation of the two concepts is not that obvious. Alternative perspectives can shed light upon the complex interrelation of sex and gender. This paper aims to address the question of sex and gender under international human rights law from what I call a 'hyperconstructivist' perspective. By this neologism, I refer to a specific approach that is embodied in two very recent and unprecedented decisions: The Inter-American Court of Human Rights' (IACtHR) advisory opinion *OC-24/17*¹ and the European Court of Human Rights' (ECtHR) judgement *X v The Former Yugoslav Republic of Macedonia*.²

Sex and gender have been traditionally interpreted in oppositional (sex-nature ≠ gender-culture) or derivative (biological sex $\xrightarrow{\text{determines}}$ social gender) terms. Against these interpretations, the hyperconstructivist approach incorporated in the above-mentioned decisions shows that (i) both gender

¹ *Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo* [2017] Corte Interamericana de Derechos Humanos OC-24/17.

² *X v The Former Yugoslav Republic of Macedonia* App no 29683/16 (ECtHR, 17 January 2019).

and sex are social constructs and (ii) tensions exist between the fixity of law and the indeterminacy of human experiences. With these premises in mind, the paper follows a tripartite structure. Section 1 explores prevailing interpretations of sex and gender under international human rights law. Section 2 examines the two hyperconstructivist decisions by highlighting the socio-legal novelties they introduce. Finally, Section 3, as an open-ended conclusion, reflects upon the meanings and implications of reconceiving sex/gender under international human rights law in hyperconstructivist terms.

II. MAINSTREAM DICHOTOMIES

Dichotomies of and within sex and gender permeate the human rights grammar and its jargon.³ International sources of human rights law and their connected interpretations incorporate the opposition of sex to gender, nature to nurture, and biology to culture. Definitions are rare and came quite late in the timeline of the evolution of the human rights system.⁴ The so-called 'International Bill of Rights' refers to sex as ground of discrimination but does not define either 'sex' or 'gender'. The Universal Declaration of Human Rights (UDHR) provides for everyone's right to enjoy the rights and freedoms it enshrines without 'distinction of any kind', including 'sex'.⁵ Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) prohibit sex-based discrimination in order to achieve the

³ This section draws partially on my previous work. I start from these well-known premises to build in the present article a renewed understanding of sex and gender under international human rights law: Giovanna Gilleri, 'Gendered Human Rights and Medical Sexing Interventions upon Intersex Children: A Preliminary Enquiry' (2019) 3 *Asian Yearbook of Human Rights and Humanitarian Law* 79, 103–106.

⁴ The only definition of gender enshrined in an international instrument is contained in Article 7(3) of the Rome Statute and is therefore outside the realm of human rights law: '[...] the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above': Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

⁵ Art 2, Universal Declaration of Human Rights (adopted 10 December 1948) A/RES/810.

equality of men and women in the enjoyment of the rights enumerated in the Covenants.⁶ Similar provisions are contained at the regional level in the African Charter on Human and People's Rights (Banjul Charter),⁷ the American Convention on Human Rights (Pact of San José)⁸ and the European Convention on Human Rights (ECHR).⁹ The ICCPR also embeds the free-standing guarantee of equality before and equal protection of the law without discrimination.¹⁰ The Pact of San José¹¹ and Protocol 12 to the ECHR,¹² unlike the Banjul Charter, enshrine analogous protection.

Unlike the UDHR, ICCPR and ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopts an asymmetrical definition of discrimination, focusing on one sexed group, i.e. women, whose enjoyment of rights is to be gauged against another sexed group, i.e. men. CEDAW focuses on discrimination *against women* rather than *any* form of discrimination on the basis of sex.¹³ Discrimination is thus confined to *one* sexed identity group.¹⁴ CEDAW became the model for the definition of discrimination against women enshrined in the Protocol to

⁶ Art 2(2), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Art 2(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷ Art 2, African Charter on Human and Peoples' Rights (adopted 27 June 1998, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5 (Banjul Charter).

⁸ Art 1, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OASTS 36 (Pact of San José).

⁹ Arts 1, 14, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR).

¹⁰ ICCPR (n 6) Art 26.

¹¹ Pact of San José (n 8) Art 24.

¹² Art 1, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS 177.

¹³ Roberta Jacobson, 'The Committee on the Elimination of Discrimination against Women' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press 1992) 446.

¹⁴ Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98, 147–148.

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹⁵ although this excludes any reference to 'equality' between women and men.¹⁶ The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)¹⁷ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)¹⁸ do not define discrimination against women.

The key instrument to understand the current prevailing interpretations of sex and gender under international human rights law is the CEDAW Committee's General Recommendation no. 28 (2010). This interpretive document codifies the sex-gender divide as sex-biology *versus* gender-culture.¹⁹ It reads:

The term 'sex' here refers to biological differences between men and women. The term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and

¹⁵ Art 1(f), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

¹⁶ This choice was due to the refusal by some state parties of the draft guaranteeing equal rights for men and women; this relates to the equity versus equality debate, particularly lively in – but not exclusively – the African context: similar discussions were crystallised in the objections advanced during the drafting of and several reservations made to CEDAW: see Fareda Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal of African Law* 72, 74.

¹⁷ Art 3, Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) ETS 210 (Istanbul Convention).

¹⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) OASTS A-61 (Convention of Belém do Pará).

¹⁹ CEDAW, 'General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 para 5; CEDAW, 'General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)' (2004) HRI/GEN/1/Rev.9 (Vol. II) fn 2.

disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.²⁰

The opposition of sex *versus* gender has become the dominant vocabulary in the language of human rights supranational actors.²¹ Indeed, a similar definition of gender is substantially reproduced at the regional level in the Istanbul Convention,²² while the Convention of Belém do Pará and the Maputo Protocol do not define either sex or gender. More recently, in 2016, the Committee on the Rights of Persons with Disabilities' (CRPD) General Comment 3 adopted a simplified, and simplistic, version of the definition of sex and gender contained in CEDAW Committee's General Recommendation no. 28. For the CRPD, "sex" refers to biological differences and "gender" refers to the characteristics that a society or culture views as masculine or feminine'.²³ In sum, mainstream interpretations posit that there are two 'natural' sexes, on the basis of which gender is socially constructed as a separate concept. Gender is built on the binary configuration of sex as male/female. The next section explores alternative understandings to this dichotomy reflected in the case-law of two regional courts.

²⁰ CEDAW, 'General Recommendation No. 28' (n 19) para 5; CEDAW, 'General Recommendation No. 25' (n 19) fn 2.

²¹ This section outlines the prevailing interpretations of sex and gender, while for reason of space it is not possible to analyse a number of alternative authoritative interpretations; these conceptualise sex, gender, their relation and the connected notions variously by, for example, describing gender in broader terms as including performances linked to both sexual orientation and gender identity; see, inter alia: UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2009) A/64/2011 para 22; UNGA, 'Thematic Study on the Issue of Violence against Women and Girls and Disability: Report of the Office of the United Nations High Commissioner for Human Rights' (2012) A/HRC/20/5 4; CAT, 'General Comment No 2: Implementation of Article 2 by States Parties' (2008) CAT/C/GC/2 para 22.

²² Istanbul Convention (n 17) Art 3.

²³ CRPD, 'General Comment No 3 on Women and Girls with Disabilities' (2016) CRPD/C/GC/3 para 4(b).

III. *HYPERCONSTRUCTING* GENDERED HUMAN RIGHTS

Other conceptions of sex and gender exist both within and outside legal sources. This section abandons mainstream dichotomies of sex *versus* gender in the human rights discourse in order to embrace an understanding of sex/gender as a hyperconstruct. This renewed understanding elaborates upon feminist and queer theory and leads to an original conceptualisation of sex/gender, mirrored in two human rights decisions. We can understand hyperconstructivism better if we first explore how the (pre)existing literature explores two of its most crucial components: on the one hand, the body and, on the other hand, the interrelation of sex and gender.

The interaction of sex and gender takes manifold configurations. Different conceptions arise from various disciplines. I identify and summarise some of them as follows. First, (1) 'relationalism' assumes that the articulation of supposedly isolated concepts is relational in nature; the ontology of sex and gender is therefore dependent upon the relationship between the two genders.²⁴ Second, (2) the notion of 'performativity' stipulates that individual performance reiterated vis-à-vis the other is constitutive of one's identity: we do not have a gender, we perform a gender. Judith Butler further elaborates on Simone de Beauvoir's account of becoming a gender – 'one is not born a woman, but rather becomes one' – conceiving of sex as a performance and the body as a site of interpretive possibilities.²⁵ Third, (3) 'sex-discourse' shares the anti-essentialist matrix with performativity. Gender is not inextricably linked to sex. Since discourse is one of many performative practices, sex-gender discourses produce bodies, or sexed bodies. There is nothing prediscursive in the human body and human existence. The sex-gender

²⁴ Cf Monique Wittig, *The Straight Mind and Other Essays* (Beacon Press 1992); Luce Irigaray, *Speculum of the Other Woman* (Gillian Gill tr, Cornell University Press 1985); Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1st edn, Pantheon Books 1988) 7, 81.

²⁵ Cf John L Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa eds, Clarendon 1975); Candace West and Don Zimmerman, 'Doing Gender' (1987) 1 *Gender & Society* 125, 13; Simone de Beauvoir, *Le Deuxième Sexe - Vol. I* (Gallimard 1949); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 151; Judith Butler, 'Sex and Gender in Simone de Beauvoir's Second Sex' [1986] *Yale French Studies* 35, 45; Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

discourse turns the individual into a sexed-gendered subject.²⁶ Finally, (4) 'sexuation', a concept drawn from Jacques Lacan's psychoanalysis, is the process through which the individual attributes their personal meaning to the externally-driven system of sex and gender. Sexuality does not derive directly from anatomy or cultural expectations, but rather from the subjectification of sex (nature) and gender (culture). Sexuation is the process through which the subject reinvents the socio-culturally conditioned body, forming a style of inhabiting the body forged by social expectations.²⁷

Added to these conceptualisations is what I refer to with the neologism 'hyperconstructivism,' which puts special emphasis on the configuration of both sex and gender as constructs. Simone de Beauvoir's above-mentioned account of becoming a gender triggered the wave of constructivism(s).²⁸ The genesis of construction swings between free will and determinism. On the one extreme, Simone de Beauvoir's constructivism is volitional, as it implies an agent appropriating a certain gender. According to Judith Butler's reading of de Beauvoir, gender is a series of repeated acts open to resignification.²⁹ For Butler, however, construction does not stem from a fully free choice, but occurs within cultural constraints. Butler's view is thus midway between free will and determinism. On a fully determinist view, if a set of cultural norms construct gender, the biology-is-destiny essentialist paradigm is replaced by culture-is-destiny. Eventually, both biology and culture determine the fate of gender.³⁰ The body can be *either* a passive medium to which culture ascribes meanings (determinism) *or* an instrument of appropriation and interpretation through which the personal will elaborates cultural meanings (free will).³¹ In any case, the body is a

²⁶ Cf Nancy J Hirschmann, 'Freedom, Power and Agency in Feminist Legal Theory' in Dianne Otto, Vanessa E Munro and Margaret Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 59–60; Michel Foucault, *Histoire de la sexualité: La volonté de savoir* (Gallimard 1976) 103.

²⁷ See Jacques Lacan, *Il Seminario. Libro XVIII: Di un Discorso che Non Sarebbe del Sembiante* (1971) (Antonio Di Ciaccia and Jacques-Alain Miller eds, Antonio Di Ciaccia tr, Einaudi 2010) 26; Massimo Recalcati, *Jacques Lacan: Desiderio, Godimento e Soggettivazione*, vol 1 (Raffaello Cortina editore 2012) 470, 481.

²⁸ De Beauvoir (n 28).

²⁹ Butler (n 28) 45.

³⁰ *Ibid* 11.

³¹ *Ibid* 12.

construction, assuming its own existence only after the mark of gender has been impressed.

Post- and decolonial feminist theorists have also shown that the body has not always been at the centre of the definition of gender and that body-oriented conceptualisations of gender were introduced in some societies by western colonisers. Colonisation imposed the idea that biology serves as a rationale to organise society by determining the social category of gender. Gender is, for these scholars, a western invention. For instance, Oyèrónkẹ́ Oyěwùmí explains that Yorùbá society did not rely on 'gender' as an organisational principle before colonisation. In Yorubaland, the body did not constitute the basis of a specific (gendered) social role prior to westernisation of society.³² For María Lugones, colonisation penetrated all aspects of social life, giving rise to new social (gender) and geo-cultural (racial) identities. Gender became a form of power well beyond a mere organisational principle. Colonisation forced into being various gender configurations in line with new racial constructs. Indeed, the 'coloniality of gender'³³ resides in the specific tool of domination used by western colonisers to alter the indigenous sense of self and identity.³⁴

The construction of gender may assume diverse connotations beyond the simplistic and exclusionary male/female polarisation. For instance, the polarisation of anatomy between male and female that is usually enshrined in human rights law is in tension with the actual variety of sexed bodies. Consider the array of intersex traits and gender identifications.³⁵ Sex and

³² See Oyèrónkẹ́ Oyěwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

³³ María Lugones, 'The Coloniality of Gender' in Wendy Harcourt (ed), *The Palgrave handbook of gender and development: Critical Engagements in Feminist Theory and Practice* (Springer 2016).

³⁴ María Lugones, 'Toward a Decolonial Feminism' (2010) 25 *Hypatia* 742; María Lugones, 'Heterosexualism in the Colonial/Modern Gender System' (2006) 22 *Hypatia* 186; on the untranslatability of manifold native sexualities deriving from complex indigenous social fabrics, see Caroline Cottet and Manuela Lavinas Picq (eds), *Sexuality and Translation in World Politics* (E-International Relations Publishing 2019).

³⁵ See Julie A Greenberg, Marybeth Herald and Mark Strasser, 'Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?' [2010]

gender occupy various points in a multidimensional space which cannot be compressed between two poles. An amalgam of chromosomes, genitals, reproductive organs, gonads, hormones and secondary sex characteristics constitute the so-called 'biological sex'. The binary conception of sex sees the biological sex as unambiguously either male or female, permanently and predictably aligned. This is essentialism: the belief that (in this case) sex as an identity category mirrors innate features comprising the deep nature of the members of that category.³⁶ Essentialist theories fascinate many given the clarity they provide: there is no confusion in the world of nature!³⁷ However, claiming that sex is biological is insufficient to establish that sex is (1) stable from birth to death and (2) located outside the sphere of culture and personal choice. According to hyperconstructivist approaches to sex/gender, nothing in the formation of sex/gender is purely natural, prefixed or perpetually unchangeable.

The legal form of hyperconstructivism solves a portion of the tensions between the fixity of law and the indeterminacy of human experience. By considering sex and gender as socially constructed, legal hyperconstructivism incorporates the variety of human sexed appearance and gendered behaviour into human rights norms. What does this mean in practice? The legal hyperconstructivist approaches discussed here may ensure protection of a broader group of individuals (if not all individuals) than those interpretations that advance essentialist and/or binary conceptualisations of sex and gender. The next two subsections explore the IACtHR's conceptual leap (Section II.1) and the ECtHR's terminological development (Section II.2) with regard to the relationship between sex and gender.

Michigan Journal of Gender & Law 13; Kenneth Zucker, 'Gender Identity and Intersexuality' in Sharon E Sytsma (ed) (Springer 2006); Alice Dreger and Sharon E Sytsma, 'Intersex and Human Rights: The Long View', *Ethics and Intersex* (Springer 2006); Judith Halberstam, *Trans*: A Quick and Quirky Account of Gender Variability* (University of California Press 2018).

³⁶ Mimi Marinucci, *Feminism Is Queer: The Intimate Connection between Queer and Feminist Theory* (2nd edn, Zed Books 2016) 5.

³⁷ Jeffrey Weeks, *Sexuality* (4th edn, Routledge 2017) 79.

I. A Biological Construct

Hyperconstructivism is not an insubstantial word floating in the world of theoretical ideas. The unique Inter-American development in the human rights conception of gender and sex demonstrates that the hyperconstructivist stance is emerging in the law. Relying on a study conducted by the Inter-American Commission for Human Rights,³⁸ the IACtHR defines sex in its advisory opinion *OC-24/17* as a '*construcción biológica*', i.e. the biological construct referring to the genetic, hormonal, anatomical, and physiological characteristics according to which a person is classified as male or female at birth.³⁹ Observing that the protection of sexual rights vary considerably across the states of the Organization of American States, the Republic of Costa Rica requested that the IACtHR interpret the scope of the rights to a name, the rights to privacy, and the right to equal protection of the laws under the Pact of San José.⁴⁰ Costa Rica inquired as to whether: (1) states shall 'recognise and facilitate the name change of an individual in accordance with his or her gender identity';⁴¹ (2) the lack of administrative procedures allowing for name change shall be considered a breach of the Pact of San José; (3) under the Pact of San José states must recognise patrimonial rights deriving from a same-sex relationship; and (4) states must establish a specific mechanism to recognise all the economic rights deriving from same-sex relationships.⁴²

The Court responded to these questions in the affirmative. First, it maintained that the Pact of San José protects the change of name and the rectification of public records and identity documents in conformity with an

³⁸ Comisión Interamericana de Derechos Humanos, 'Orientación Sexual, Identidad de Género y Expresión de Género: Algunos Términos y Estándares Relevantes: Estudio Elaborado Por La Comisión Interamericana de Derechos Humanos 'CIDH' En Cumplimiento de La Resolución AG/RES. 2653 (XLI-O/11): Derechos Humanos, Orientación Sexual e Identidad de Género' (2012) OEA/Ser.G CP/CAJP/INF.166/12 para 13.

³⁹ *Opinión Consultiva* (n 1) para 32(a); Comisión Interamericana de Derechos Humanos (n 38) para 13. The advisory opinion is available in Spanish only; the following quotes from the advisory opinion are my translations.

⁴⁰ *Opinión Consultiva* (n 1) para 2.

⁴¹ *Ibid* para 3(1).

⁴² *Ibid* para 3(5).

individual's gender identity.⁴³ Secondly, the IACtHR recognised the obligation for states to extend all existing mechanisms, including marriage, to same-sex couples.⁴⁴ The Court's interpretation of human rights law resulted in what some describe as a landmark advisory opinion, with potential impact on future judgments⁴⁵ and intimate connections to strategic objectives at domestic level.⁴⁶

Against this backdrop, let us return to the IACtHR's configuration of sex and gender. In certain respects, the IACtHR mimics the CEDAW Committee's General Recommendation no 28: 'Gender,' the Court stipulates, 'refers to the socially constructed identities, functions and attributes for women and men and the social and cultural meaning for these biological differences'.⁴⁷ It might therefore appear that the IACtHR reproduces both the nature-nurture divide between sex and gender advanced by the CEDAW Committee. However, as noted above, the IACtHR considers sex to be a 'biological construct': 'sex assignment is not an innate biological fact. Rather, persons are socially assigned a sex at birth based on the perception others have of genitals'.⁴⁸ The IACtHR thus argues that sex assignment at birth is

⁴³ *Opinión Consultiva* (n 1) paras 37, 40–43, 56.

⁴⁴ *Ibid* paras 54, 61, 74.

⁴⁵ The existence of at least twenty IACtHR's judgments applying a number of criteria formulated in previous advisory opinions might suggest that the Court considers its advisory opinions binding: Jorge Ernesto Roa Roa, *La función consultiva de la Corte Interamericana de derechos humanos* (Universidad Externado 2015) 107–108; yet the Court itself is cautious about the (supposed) binding nature of the advisory opinion at stake here: see, for example, *Opinión Consultiva* (n 1) para 72.

⁴⁶ Nicolás Carrillo-Santarelli stresses that the rationale behind Costa Rica's request for an advisory opinion relates to domestic politics; where the advisory opinion confirms the 'human rightness' of the policy objectives, international action is strategic to face domestic opposition by lowering the obstacles to the accomplishment of such policy objectives: Nicolás Carrillo-Santarelli, 'The Politics behind the Latest Advisory Opinions of the Inter-American Court of Human Rights' (International Journal of Constitutional Law Blog, 2018) <<http://www.iconnectblog.com/2018/02/the-politics-behind-the-latest-advisory-opinions-of-the-inter-american-court-of-human-rights/>> accessed 28 May 2020.

⁴⁷ *Opinión Consultiva* (n 1) para 32(e).

⁴⁸ *Opinión Consultiva* (n 1) para 32(b); cf IACHR and OAS, 'Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas' (2015)

socially determined. The combined reading of 'sexo' and 'género' as defined in the advisory opinion leads to an interpretation of both gender and sex as social constructs.⁴⁹ Gender is stripped of the biological determinism of sex, because the determination of sex itself is not an 'innate biological fact'.⁵⁰

Against these polarised configurations, the IACtHR applies the same approach to the social understanding of intersexuality, defined as 'the lived experience of the socio-cultural consequences of being born with a body that does not fit the normative social constructions of male and female'.⁵¹ For the Court, intersexuality refers to 'all those situations in which an individual's sexual anatomy does not physically conform to the culturally defined standard for the female or male body'.⁵² Conceiving of intersexuality in these terms has two consequences. First, (1) intersexuality is freed from the notion of sex as a biological determinant. What matters is not the supposed 'natural' appearance but rather the encounter between the individual and the society and how the latter interprets and categorises sex characteristics. From this, it follows that (2) sex, like gender, is a cultural norm and thus a social construct.⁵³

If gender is the social construction of sex and sex is the result of a cultural ascription at birth through the lens of gender norms, gender is the

OAS/Ser.L/V/II.rev.1 para 16 <<http://www.oas.org/en/iachr/reports/pdfs/violencegbtipersons.pdf>> accessed 15 April 2020.

⁴⁹ On the social definition of sex organs and the language of nature as a naturalised language, see, inter alia: Pierre Bourdieu, *Masculine Domination* (Stanford University Press 2001) 14, 64; Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23 *Berkeley Journal of Gender, Law & Justice* 83, 88–89.

⁵⁰ *Opinión Consultiva* (n 1) para 32(b); cf IACHR and OAS (n 47) para 16.

⁵¹ Miriam van der Have and others, 'Statement to the UN Independent Expert on Sexual Orientation and Gender Identity' (Public consultation convened by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Geneva, 25 January 2017) 2 <<https://oiieurope.org/wp-content/uploads/2017/01/Intersex-intervention-Public-Consultation-UN-IE-SOGI-25th-January-2017.pdf>> accessed 28 May 2020.

⁵² *Opinión Consultiva* (n 1) para 32.

⁵³ See Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Rutledge 1993) 1–2; Noa Ben-Asher, 'The Necessity of Sex Change A Struggle for Intersex and Transsex Liberties' (2006) 29 *Harvard Journal of Law and Gender* 51, 53.

construction of a construction, that is a *hyperconstruction*. Sex is anatomy, a concrete and natural fact. But sex becomes a construct when it is observed, interpreted and understood through the societal lens conditioned by a certain preconception of sex and gender. The conceptual paradigm within which sex/gender occurs varies from society to society, from time to time, from space to space: it is historically contingent.⁵⁴ Both sex and gender are points in a multidimensional space.⁵⁵ This multidimensional configuration concerns both categories because, as the hyperconstructivist stance holds, they are both constructs.⁵⁶ I refer to this approach as hyperconstructivist because it goes beyond constructivist ideas of gender as produced by culture, by considering both sex and gender as cultural by-products.

2. *A Changing Vocabulary*

Concluding that both sex and gender are culturally produced is not synonymous with affirming that sex and gender are exactly the same. Why do sex and gender have a separate social existence? In what way do gender and sex differ as social constructs? Sex characteristics are biological in their origins, but the determination of sex is not purely biological. Sex determination, as an interpretive exercise, draws an imaginary dividing line between several types of sexes – traditionally, just two. That is, there is a distinction between the object as it is and the description of that object as it is *seen*, between the 'original sex' (characteristics) and the 'constructed sex' (social marker). The notion incorporated in the legal category of 'sex' is the constructed sex, which derives from a social determination.

For example, a vagina (sex characteristic) is conventionally considered a typical trait of a female (sex) body as it is read through the social understanding of what a certain sex should look like. The biological component (vagina) is univocally associated with a socio-legal categorisation (female) following a process of interpretation of the human body resulting in the recognition of, in our example, a 'female' legal sex. This process leading to the construction of sex logically anticipates the ascription of gender. The latter condenses those identities, roles, attributes, responsibilities and

⁵⁴ Marinucci (n 36) 8.

⁵⁵ Anne Fausto-Sterling, 'The Five Sexes, Revisited' (2000) 40 *The Sciences* 18, 22.

⁵⁶ See Suzanne J Kessler, *Lessons from the Intersexed* (Rutgers University Press 1998).

cultural meanings ('men'/'women') attached to socially constructed determinations of the sexed body ('male'/'female'). However, the ontological divergence between the two is blurred. For instance, Butler argued that 'gender is not to culture as sex is to nature'⁵⁷ meaning that gender cannot be the culturally-driven interpretation of the supposedly prediscursive sex since the designation of sex itself is *gendered*, that is, subject to cultural conditionalities. Echoing Michel Foucault, Butler understands gender as the discursive apparatus whereby sexes are determined – and usually described as 'natural,' 'pregiven,' and 'politically neutral'.⁵⁸

The gendered social positioning of individuals is therefore hardly detachable from the sex that the social eye assigned to them. To borrow from Anne Fausto-Sterling, 'labelling someone a man or a woman is a social decision. We may use scientific knowledge to help us make the decision, but only our beliefs about gender – not science – can define our sex'.⁵⁹ The interpretation of bodies is a socio-cultural practice because the conception of anatomical sex is based on biological differences shaped by social interactions.⁶⁰ I have referred to 'sex' so far as the anatomical root of a certain gender. Yet 'sex' is often understood in its second meaning as sexual intercourse, sexual activity or lust. Sex overlaps with gender and sexuality.⁶¹ Admittedly, explaining the operational and conceptual distinction between sex and gender is an intricate

⁵⁷ Butler even argues that 'the distinction between sex and gender turns out to be no distinction at all': Butler (n 28) 9–10; cf Judith Butler, 'Variations on Sex and Gender: Beauvoir, Wittig, Foucault' in Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: On the Politics of Gender* (University of Minnesota Press 1987).

⁵⁸ Ibid.

⁵⁹ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 3.

⁶⁰ Tom Dreyfus, 'The 'Half-Invention' of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles' (2012) 37 *Australian Feminist Law Journal* 33, 39, 46.

⁶¹ On the conflation and separation of sex and gender, see respectively Gayle Rubin, 'The Traffic in Women: Notes on the 'Political Economy' of Sex' in Raina Reiter (ed), *Toward an Anthropology of Women* (Monthly Review Press 1975) 159; Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge & Kegan Paul 1984) 169–170.

effort, and one that I do not intend to accomplish here.⁶² Terminological choices matter, though.

Besides the IACtHR, another human rights system is in the process of re-laborating its terminological choices. The relationship between sex and gender and the hyperconstructivist stance is not conceptually explicit, but nevertheless linguistically evident in a recent decision of the ECtHR. In *X v The Former Yugoslav Republic of Macedonia* (2019), the ECtHR embraces the vocabulary of 'sex/gender' in a case on the right to private life and recognition of identity. The case concerned the absence of a legislative framework and effective remedy for legal gender recognition, as well as the imposition of genital surgery as a prerequisite for the sex/gender marker to be altered in official records. The Court held that the lack of a 'quick, accessible, transparent procedure for legal gender recognition' constitutes a violation of Article 8 ECHR.⁶³ Here, I concentrate on the changes in the Court's language, in particular its use of the term 'sex/gender', as evidence of a possible conceptual move towards hyperconstructionism.

'Sex/gender' appears throughout the decision with reference to the sex/gender marker on the birth certificate, in the civil status register and, more generally, in official records.⁶⁴ The legal sex, including the sex assigned at birth and reproduced in registers and documents, is seen through the gendered lens. This is the circle of (re)construction of sex/gender, which makes any sex *versus* gender division logically irrelevant. Sex is understood according to gendered categorisations. The notion of constructed gender is based on the notion of constructed sex. The terminological choice 'sex/gender' entails that the construct of gender is the means to interpret a complex of biological factors which are not natural but constructed. Overall, notwithstanding the regional courts' different hermeneutic positionalities vis-à-vis gendered human rights, the IACtHR's conceptual reformulation

⁶² Similar conceptual difficulties pushed Lois Bibbings to propose to talk of sex and gender as one thing: Lois Bibbings, 'Heterosexuality as Harm: Fitting In' in Paddy Hillyard and others (eds), *Beyond Criminology: Taking Harm Seriously* (Pluto Press 2004) 223–224.

⁶³ *X v The Former Yugoslav Republic of Macedonia* (n 2) para 78.

⁶⁴ *Ibid* paras 8–9, 12, 17, 19, 21, 30, 39, 41, 56–57, 67.

and the ECtHR's renewed vocabulary recognise that sex is culturally ascribed by the norms of gender.

IV. OPEN ENDING: TOWARDS 'SEX/GENDER' IN HUMAN RIGHTS LAW?

Albeit timidly, hyperconstructivism has penetrated the human rights arena. Claiming that both sex and gender are constructs does not make them sites of sheer abstract contention, void of control, of power and the like. It is not unintentional that the biologist Anne Fausto-Sterling accompanies the unifying concept with the adjective 'embodied' to avoid any deprivation of materiality.⁶⁵ Sex and gender operate upon our bodies and condition the way in which we understand and use our bodies. The effects of the interaction of sex and gender are entirely lived by human beings. The story of sex/gender in human rights law is a story of bodies, bonds, and – oh yes! – pleasure and pain. The consequences of this are both conceptual and terminological.

Neither sex nor gender is prediscursive, innate or pre-given. Gender is not the social side of the strictly biological side of sex. There is nothing natural about the designation of sex, which is also subject to cultural conditionalities.⁶⁶ If both gender and sex are social constructs, the analytical advantage of distinguishing between the two is unclear.⁶⁷ Considering sex and gender from a non-dualistic viewpoint stresses that the two concepts are separate yet interrelated.⁶⁸ Hence, in many cases sex and gender should rather

⁶⁵ Anne Fausto-Sterling, 'Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?' (2019) 56 *The Journal of Sex Research* 529, 4.

⁶⁶ See, inter alia, Butler (n 28) 10; for an application of sex/gender to the analysis of international human rights law, see Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 198.

⁶⁷ Cf Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Service and Sweet and Maxwell 1997); Otto (n 69) 198.

⁶⁸ Anne Fausto-Sterling, *Sex/Gender: Biology in a Social World* (Routledge 2012); Victoria Pitts-Taylor, *The Brain's Body: Neuroscience and Corporeal Politics* (Duke University Press 2016); Sari M van Anders, 'Beyond Sexual Orientation: Integrating Gender/ Sex and Diverse Sexualities via Sexual Configurations Theory' (2015) 44 *Archives of Sexual Behavior* 1.

be referred to as 'sex/gender.' The latter recognises the contingent separability (/) of the two concepts, unlike alternative forms such as 'sex-gender' which creates an amalgam (-) of sex and gender. The IACtHR's advisory opinion and the ECtHR's judgment analysed above are two rare yet paradigmatic examples of a possible hyperconstructivist approach to sex/gender in international human rights law. With its inclusive and broad configurations of sex/gender, hyperconstructivism can provide human rights law with a theoretical frame to soften the tensions between the fixity of sex/gender-based legal categories and the ever-changing sexed/gendered nature of human experiences.

GENERAL ARTICLES

RECONSIDERING MULTILINGUALISM IN EU TRADE AND INVESTMENT AGREEMENTS IN LIGHT OF THE *RELOCATION CASE*

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Trade and investment agreements between the European Union (EU), its Member States and third states are currently concluded in 23 or 24 equally authoritative texts. Only the treaty recently concluded with Japan gives priority to the text in the language of the negotiations (English). The article argues that the interpretation of a treaty concluded in such large number of equally authentic texts is fraught with difficulties both in international law and in EU law, as demonstrated in the Relocation Case. It suggests that the EU and its Member States should reconsider the current practice and identifies the different options available and their respective advantages. The crux of the matter is how to strike a balance between the principle of multilingualism, which is fundamental in the European project, and the need to ensure the predictability and coherence of treaty interpretation. It is argued that such a balance may be struck by significantly reducing the number of authentic texts and giving priority to one of them.

Keywords: Multilingual treaties, Investment treaties, Trade agreements, Treaty interpretation, Vienna Convention on the Law of Treaties, European Union

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I. INTRODUCTION

It is the consolidated practice of the European Union (EU) to authenticate treaties with third states in no less than 23 equally authentic texts – all the official EU languages¹ – *plus* possibly the language of the partner, without giving to any of them formal priority in case of differences of meaning. Such practice parallels the ordinary linguistic regime applied to EU treaties and legislation. However, resort to such a broad multilingualism is definitely abnormal in international law: for example, the UN Charter as well as all agreements concluded within the United Nations (193 members) are normally authenticated in no more than six authentic texts (English, French, Spanish, Arabic, Russian and Chinese respectively).²

¹ For the time being, at the exclusion of Irish, see Council Regulation 2015/2264, OJ L 322/I, 8.12.1995. Agreements and arbitral decisions referred to in this article are available, respectively, <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements>> or <<https://investmentpolicyhub.unctad.org/IIA>>, and <www.italaw.com> (last accessed 31 March 2020).

² The Energy Charter Treaty (ECT) was concluded in six equally authentic texts (English, French, German, Italian, Russian and Spanish). The Comprehensive and

The paper attempts to answer the question of whether the EU and its Member States should reconsider their practice on treaty authentication and, if appropriate, to assess what the different options available are. It will focus on trade and investment treaties, especially since, under the Treaty of Lisbon, foreign investments fall within the exclusive competence of the EU. This means that the new European (multilingual) agreements will eventually replace previous (mostly bi-lingual) bilateral investment treaties (BITs), concluded by single Member States. Since investment treaties normally consist of very technical and complicated texts, linguistic problems might occur for these treaties more often than expected. Indeed, such problems were probably anticipated in the negotiations of the recent agreement with Japan. This has still been concluded in 24 authentic texts but provides that, in case of any divergence of interpretation, the text of the language in which the agreement was negotiated, namely English, prevails.³

The interpretation of multilingual treaties is notoriously difficult – even when authenticated in just two or three languages – since 'each language has its own genius, and it is not always possible to express the same idea in identical phraseology or syntax in different languages'.⁴ Although there are no decisions yet settling disputes concerning the interpretation and application of trade and investment agreements concluded by the EU⁵ – most

Progressive Agreement for Trans-Pacific Partnership was concluded in English (which will prevail in the event of any divergence), French and Spanish. The agreements of the World Trade Organization (WTO) were concluded in three equally authentic texts (English, French and Spanish). The ASEAN Comprehensive Investment Agreement, on the contrary was concluded only in English.

³ EU-Japan Economic Partnership Agreement, concluded 17 July 2018, entered into force 1 February 2019, art 23.8.2.

⁴ International Law Commission (ILC), *YBILC* (1966-II) 100.

⁵ Three disputes are currently pending. All of them have been initiated by the EU, see the requests for formal consultations under art. 77 of the Economic Partnership Agreement the Southern African Development Community Member States (SADC), Note verbale, 14 June 2019 <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf> (accessed 29 February 2020); for the establishment of a panel under art. 306 of the Association agreement of 21 March 2014 with Ukraine, Note verbale 20 June 2019, <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf> (accessed

of which have just entered into force – it is quite evident that these difficulties are unavoidably magnified when treaties are authenticated in 23 or 24 languages. A recent decision by the Court of Justice of the European Union (CJEU, formerly European Court of Justice, ECJ) – in which, it is argued, the interpretation of the Treaty on the Functioning of the EU (TFEU) is not entirely convincing⁶ – is a strong reminder of these difficulties.

In the first part, the article deals with the principles at the root of EU multilingualism, duly taking into account the unique nature of the EU legal system (Section II), and examines how the CJEU has interpreted EU treaties (Section III). It then offers an overview of the EU practice concerning the authentication of trade and investment agreements (Section IV) and verifies whether any mandatory rule under EU law would require concluding these agreements in all EU official languages (Section V). Moving to an international law perspective, Section VI concisely discusses the interpretation of multilingual treaties under the Vienna Convention on the Law of Treaties (VCLT). Finally, it will be possible to assess whether the current EU practice should be reconsidered (Section VII) and identify the options available to the contracting parties if this were to be done (Section VIII).

II. MULTILINGUALISM IN EU LAW

It is undisputed that the legal protection of multilingualism is an important principle and an indispensable guarantee for the functioning of the institutions of the European Union (EU), as well as for their relationships with EU citizens.⁷ Multilingualism not only promotes cultural, economic and

29 February 2020); and for the establishment of a panel of experts under art. 13.15 of the Free trade agreement with Korea, Ref. Ares(2019)4194229 - 02/07/20196 July 2019, <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf> (accessed 29 February 2020) as well as the First written submission by the EU, 20 January 2020, <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf> (accessed 29 February 2020).

⁶ See *Slovakia v Council* and *Hungary v Council*, note 25, and Section III.

⁷ See European Parliament, *Legal Aspects of EU Multilingualism*, Briefing, January 2017 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595914/EPRS_BRI

social integration, it also enhances the legitimacy and non-discriminatory nature of the entire supranational project.⁸ It has been observed that

[a]s a supranational entity, for the sake of the achievement of the shared objectives of which Member States have relinquished part of their national sovereignty, the EU has consciously opted for the preservation of linguistic diversity, as a matter of political necessity, in the firm belief that European integration can only be achieved if this diversity is respected.⁹

The Treaty on European Union (TEU) and the TFEU are drafted in all official languages, but each treaty remains a *single text* with a *single meaning*. Each of the 24 equally authentic texts is independent and does not derive from a principal, original one, assumed to bear the exact meaning.¹⁰

As for EU legislation, a rule requiring an equally broad multilingualism was set in the very first regulation. At the time, official languages were just four, but every enlargement of the Community/Union to new Member States required a corresponding amendment of the regulation.¹¹ Any EU act of general application has to be enacted in every official language. The

[%282017%29595914_EN.pdf](#)> (accessed 29 February 2020). Art 22 of the Charter of Fundamental Rights, 2004 OJ (C 310/41), commits the EU to respect linguistic diversity.

⁸ European Parliament, *Framework Strategy for Multilingualism*, Resolution 1/6/2006, 2004 OJ (C 310/41). Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the EU', (2013) 3 *Int. Journ. of Law, Language & Discourse* 16, has emphasised the 'right to rely on the authentic text of the EU legislation in their own language without discriminatory effects'. For Geert. Van Calster, 'The EU's Tower of Babel – Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language', (1997) *Yearbook of European Law* 363, 391, '[m]ultilingualism remains a consideration of decency which the Union owes its citizens.'

⁹ Phoebus Athanassiou, *The Application of Multilingualism in the EU Context*, European Central Bank, Legal Working Papers, Series 2, March 2006 <<https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp2.pdf>> (accessed 29 February 2020).

¹⁰ See Isolde Burr, 'Article 55. Languages and Deposit of the Treaty', in Hermann-Josef Blanke, Stelio Mangiameli (eds), *The Treaty on European Union* (Springer 2013) 1461; Elina Paunio, *Legal Certainty in Multilingual EU Law* (Routledge 2013) 5.

¹¹ EEC Council, Regulation No 1, OJ 17, 6.10.1958, p. 385; lastly amended and consolidated by Council Reg. (EU) No. 517/2013, 13/5/2013 OJ L 158, 10.06.2013, 2.

complexity and length of the legislative procedure is well known.¹² Even before becoming a formal proposal, the initial draft may be changed and revised time and again, in order to accommodate requirements or suggestions by the several actors and stakeholders taking part – more or less formally – in the political debate. This is why even the first official proposal of a regulation or a directive, when transmitted by the Commission to the Council and the Parliament, may have been already translated several times (and not always by the same translators). After possibly long negotiations and discussions by the Council and the Parliament – which may lead to amendments of the original proposal – some vagueness may still remain in the final text, sometimes deliberately. As it has been sharply pointed out, 'EU translators are part of the legislator'.¹³

However, multilingualism is not always required in such a full version. Individual acts are officially drafted and authenticated only in the addressee's language and subsequently translated for the public. In turn, individuals are entitled to use their own language when dealing with the European Institutions. According to the CJEU's rules of procedure, set out in Articles 39-41 of the Statute of the CJEU, judgments are authentic in the language of the case and are subsequently translated into all the others.

The remarkable increase in the EU official languages, however, has raised concern and multilingualism has been challenged as impractical and prohibitively expensive,¹⁴ and ultimately threatening legal certainty.¹⁵ It is worth noting that the Commission has conceded that multilingualism often represents an obstacle in the context of the reform of contract law and pointed out that basic terms such as 'contract' or 'damage' are particularly

¹² The ordinary legislative procedure – that applies to most general acts – is set by art 289 TFEU.

¹³ Paunio (n 10) 18. According to the same author, moreover, 'exact equivalence between different texts remains a fiction due to the very nature of natural languages'.

¹⁴ For a recent and accurate account, see Mattias Derlén, 'Multilingualism and the European Court of Justice: Challenges, Reforms and the Position after Brexit', in Emmanuel Guinchard, Marie-Pierre Granger (eds), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer 2018) 341

¹⁵ See, in particular, Šarčević (n 8).

problematic.¹⁶ Even *within* the EU, therefore, 'EU multilingualism is in bad need of reform'.¹⁷

III. THE BUILDING OF AN AUTONOMOUS EUROPEAN LEGAL LANGUAGE AND THE SIDE EFFECTS OF THE LINGUISTIC REGIME

The European treaties are the founding charter of a new legal order, resembling a national constitution rather than an "ordinary" international treaty. Indeed, only in its very first judgment on the issue, delivered in 1963, did the Court refer to the (then) EEC as a 'legal order of a new kind *in the field of international law*'.¹⁸ The Court subsequently abandoned any reference to international law to strongly promote a *supranational* conception of this new legal order. The conclusion is based on the unprecedented nature of the EU, as an entity that counts as its subjects not only the Member States, but also their citizens. Then, it comes as no surprise that when interpreting the EU founding treaties, the CJEU does not refer explicitly to the law of treaties, but rather relies on some specific EU principles and rules that may – but also may *not* – coincide with those set for the interpretation of "ordinary" international treaties.¹⁹

The reasoning of the CJEU in dealing with interpretation issues due to linguistic discrepancies will now be considered. Then, the reasons underpinning the full multilingual regime will emerge. At that point, it will be necessary to assess whether those same reasons might compel us to consider the full multilingualism option as essential even for EU treaties with third countries. This assessment, in turn, will require considering a peculiar EU law issue, closely linked to the *supranational* nature of the EU legal order: the issue

¹⁶ Communication from the Commission to the Council and the European Parliament on European Contract Law, OJ C 255, 13.9.2001.

¹⁷ Derlén (n 14) 356.

¹⁸ Case 26/62, *Van Gend & Loos*, C/1963:1. See also Case 6/64, *Costa v. ENEL*, C/1964:66.

¹⁹ Richard Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford University Press 2012) 140, observed that 'it is disappointing that the ECJ has not explicitly endorsed the application of the complete set of VCLT rules on interpretation'.

concerning the possibility for treaties with third countries to produce direct effects.²⁰

Facing interpretation issues due to linguistic discrepancies in the texts of EU treaties or legislation, the Court often disregards the meaning of a notion in one or more languages and prefers a different meaning common to others, which is believed to carry the proper "European" content. The chosen meaning does not prevail just because of it being common to a majority of languages, but rather because it better fits the purposes of the act. Such an operation might require the departure from literal interpretation, to move to a more productive teleological reasoning. The opposite way may also be followed in the sense that teleological reasoning might precede literal interpretation, the latter being performed to check the outcome of the teleological reasoning.²¹ Either way is equally possible, showing that the interpretation of EU treaties and law does not proceed according to a hierarchy of methods, since the choice is eventually left to the CJEU. Such flexibility, however, affects the predictability of the outcome. The jurisprudence reveals how the language of EU law has its own *genius*. This is mostly perceivable in the 'autonomous notions', construed by the Court by giving to some legal concepts a specific "European" interpretation, which does not necessarily mirror any of the domestic law meanings of the same concept.²²

²⁰ Literature on the nature of the EU legal order is huge, only some references will be made here, to works where further bibliography will be found: as for the some first comments, see Jan A. Winter, 'Direct Applicability and Direct Effect – Two Distinct and Different Concepts in Community Law', in (1972) 9 *Common Market Law Review* 425. On further developments, see Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig, Gráinne De Burca (eds) *The Evolution of EU Law* (Oxford University Press 2011) 323.

²¹ See Cornelis J.W. Baaij, 'Fifty Years of Multilateral Interpretation in the EU', in Peter M. Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 217, 224.

²² In Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, C:1982:335, para 19, the CJEU held that 'even where the different language versions are entirely in accord with one another, [...] Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States'.

However, certain cases in the body of CJEU jurisprudence reveal remarkable side effects of teleological interpretation in such a broad multilingual context. Some decisions could not avert harming the same basic principles that multilingualism is meant to protect. This happened, for instance, when the Court ruled that the European meaning of the word *vehicle* includes not only cars (and other land means of transportation), but also boats and locomotives. The conclusion was reached even if the word used in the text under scrutiny – the Danish one – could actually include only land vehicles. The Court held that

the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the *purpose and general scheme* of the rules of which it forms a part.²³

Though definitively consistent with the purpose of the relevant directive, the outcome of the interpretation runs in contrast both with the principle of equality of languages and with the fundamental guarantee of certainty and predictability of legislation, at least for the Danish addressees of the act.

Further controversial implications of the same method unfolded in a recent decision, where the usual teleological interpretation induced by multilingualism efficiently solved the practical problem at stake, but also disclosed delicate interpretative issues concerning the very nature of the judicial function.²⁴ In the joint cases *Slovakia v Council* and *Hungary v Council (Relocation Case)*, decided by the Grand Chamber on 6 September 2017, the applicants challenged the validity of a decision by the EU Council concerning provisional measures for the relocation of migrants from Italy and Greece to

²³ Case C-428/02, *Fonden Marselisborg Lystbådehavn v Skatteministeriet and Skatteministeriet v Fonden Marselisborg Lystbådehavn*, C:2005:126, para 28.

²⁴ Teleological reasoning may – more or less inadvertently – blur the distinction between the roles of the judiciary and the legislator, letting the judge evaluate the merits of the act to be interpreted. An issue concerning possible limits to discretion of the judge in teleological interpretation might have to be explored even within the EU system, as it is presently discussed in relation to the US Supreme Court, see Gary Lawson, 'Did Justice Scalia Have a Theory of Interpretation?' (2017) 92 *Notre Dame Law Review* 2143.

other Member States.²⁵ One of the reasons adduced focused on the interpretation of Article 78.3 TFEU. In fifteen authentic texts of the Treaty, the provision reads:

In the event of one or more Member States being confronted by an emergency situation *characterised by* a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament (emphasis added).

The remaining nine authentic texts, however, do not use words meaning '*characterised by*', but terms or expressions that the Court considered equivalent to '*caused by*'. The Court concluded that

although a minority of the language versions of Article 78(3) TFEU do not use the word 'characterized' but rather the word 'caused', in the context of that provision and in view of its objective of enabling the swift adoption of provisional measures in order to provide an effective response to a migration crisis, *those two words must be understood in the same way*, namely as requiring there to be a *sufficiently close link* between the emergency situation in question and the sudden inflow of nationals of third countries.²⁶

The Court did not undertake a true comparison of the different texts of the provision. Instead, it rapidly turned to teleological considerations and acknowledged that the decision was meant to provide 'an effective response to a migration crisis'. It then assumed that, to this purpose, *the two different terms could be considered as bearing the same meaning*.²⁷ The teleological reasoning takes into consideration the solidarity principle, grounding the relocation system that the decision in question had made mandatory for all Member

²⁵ *Slovakia v Council and Hungary v Council*, Join Cases C-643/15 and C-647/15, C:2017:618. The act under scrutiny was the Council Decision 2015/1601, OJ L 248 24 September 2015.

²⁶ Joined Cases C-643/15 and C-647/15, para 125 (emphasis added). The ECJ followed the Opinion of Advocate General Bot, 26 July 2017, para 122 (emphasis added), according to whom the words 'characterized' and 'caused' demonstrate that 'there must be a *close relationship* between the emergency situation requiring the adoption of provisional measures and the sudden inflow of nationals of third countries is expressed'.

²⁷ *Ibid*, para 125.

States.²⁸ The Court eventually considered and dismissed the other arguments of the applicants, and concluded that the decision was indeed valid.²⁹

The decision is not entirely convincing for several reasons. The first striking element is that the Court did not undertake any true comparison of the different texts of the provision. It rather placed itself in the perspective of the English language, on the assumption that terms different from 'characterized' used by some other languages – such as 'aufgrund' in German, or 'ten gevelde' in Dutch – could be considered equivalent to 'caused'. The Court's approach falls short of true multilingualism and does not respect the equality and the different *genius* of the EU official languages.³⁰

Even more importantly, the Court unpersuasively treated the words 'characterized' and 'caused' as if they were synonyms. The two terms are not only semantically different, but they also imply different grounds for the adoption of provisional measures under Article 78 to tackle an emergency situation.

The *legal* term 'caused' refers to the concept of causation, or, in other words, a link between a *cause* and its *effects*. Several related issues might come into consideration when adopting provisional measures under Article 78.3. Yet, it would be necessary to consider proximity or remoteness of causation on the one hand and the relevance of direct and indirect effects attributable to the same cause on the other. The crisis enabling the Council to take a provisional decision, therefore, should be *determined* by the flow of migrants.

²⁸ The applicant states argued that relocation measures could not be established by a decision adopted by qualified majority, but only by a decision taken unanimously or "in the form of voluntary allocations agreed by Member States": *ibid*, para 136 ff.

²⁹ For a full analysis, see Bruno De Witte and Evangelia Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the EU' (2018) 55 *Common Market Law Review* 1457. The authors, however, do not discuss the linguistic issue. Without actually undermining the solidarity principle, a different solution could have ruled out the possibility of resorting to art 78.3 as a legal basis for the decision in question, to declare that the appropriate legal basis was to be found in a different provision of the Treaty.

³⁰ Interestingly, the term 'characterized' could have been translated into German as 'gekennzeichnet'.

The term 'characterized', on the contrary, describes a *factual* situation as presenting a specific feature – the sudden flow of migrants – which is decisive for the adoption of provisional measures under Article 78.3. The scenario might therefore be quite different, i.e. a crisis (originally due to other reasons) that is worsened by the massive flow of migrating people. From this perspective, it is not indispensable to establish a causal link between flow of migrants and the crisis; it may be sufficient to ascertain an important impact of the former on the latter. The decision based on Article 78.3, therefore, could definitely address the situation existing at the time in Greece, in which economic and financial reasons were at the origin of the severe crisis affecting the country, while the flow of migrants worsened the already critical situation.

This case demonstrates how linguistic discrepancies can not only hide but also remain undetected for years, even in the text of a treaty as fundamental as the TFEU, whose different authentic versions were meticulously checked and compared. The Court's reasoning is just emblematic of how linguistic discrepancies may widen the margin for teleological interpretation, sometimes involving delicate political issues. The case stands as a warning for the possible difficulties that a broad multilingualism could entail for EU treaties with third countries, notwithstanding all consideration and attention paid to assure consistency of the equally authentic texts.

IV. EU PRACTICE ON TRADE AND INVESTMENT TREATIES

Keeping in mind the importance of multilingualism within the EU as well as the difficulties that the interpreter may encounter when dealing with EU treaties, it is appropriate to examine the practice of the EU related to trade and investment agreements concluded with other states. With the exception of the treaty recently concluded with Japan, the practice of the EU on the authentication of trade and investment agreements has been very consistent and paralleled the practice related to other EU treaties. These agreements have been concluded in all official EU languages *plus* – when appropriate – the language of the partner, without giving to any of them formal priority in case of differences of meaning. The Free Trade Agreement (FTA) with Korea, for instance, was concluded in Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian,

Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Korean, each of these texts being equally authentic.³¹ The FTA with Japan has still been concluded in 24 authentic texts, but departs from the well-established practice insofar as in case of any divergence of interpretation, the text of the language in which the agreement was negotiated (English) shall prevail.³²

It must be said from the outset that the VCLT rules on treaty interpretation reflect customary international law and therefore apply to the treaties concluded between the EU and third states.³³ This has been reiterated in the text of several agreements concluded by the EU, which expressly direct the interpreter to apply them in accordance with 'customary rules of interpretation of public international law, as codified in the VCLT',³⁴ or other expressions which can be considered as equivalent, as demonstrated by the use of different ones in the same agreement (e.g. CETA).³⁵

The following features of EU trade and investment agreements deserve to be mentioned for the purpose of the present study. To start with, the relevant final provisions of trade and investment agreements concluded by the EU occasionally indicate that 'in the event of a contradiction, *reference shall be*

³¹ EU – Korea Free Trade Agreement, concluded on 6 October 2010, provisionally applied since July 2011 and ratified in December 2015, art 15.16.

³² EU – Japan Economic Partnership Agreement (n 3) art 23.8.2.

³³ See Section VI.

³⁴ See Investment Protection Agreement EU - Vietnam, concluded on 30 June 2019 and not in force yet, art 3.21.

³⁵ Comprehensive Economic and Trade Agreement EU and Canada (CETA), concluded 30 October 2016 and provisionally entered into force 21 September 2017, at the exclusion of the chapter on investment, arts 8.31 and 29.17. See also EU – Vietnam Free Trade Agreement, concluded on 30 June 2019 and not in force yet, art 15.21; EU-Vietnam Investment Protection Agreement (n 34) art. 3.21 and art. 3.42.4; Agreement with Japan (n 3) arts 16.18.2 and 21.16; EU – Korea FTA (n 31), 14.16; Association Agreements with Ukraine (art 320), Moldova (art 320), Georgia (art 265), all concluded 27 June 2014, entered into force 1 July 2016; Trade Agreement EU - Colombia and Peru, concluded 26 June 2012, entered into force 1 June 2013, art 317; Economic Partnership Agreement with the Eastern Africa Community, concluded 16 October 2014 (not in force yet), art 123.

made to the language in which this agreement was negotiated'.³⁶ The FTA with Singapore provides that 'in the event of any divergence over the interpretation of this Agreement, the arbitration panel *shall take account* of the fact that this Agreement was negotiated in English'.³⁷

While these expressions can be considered equivalent and the modal 'shall' suggests a mandatory nature, it is difficult to precisely define the meaning of the expressions 'taking into account' – also used in Article 31.3 VCLT – and 'reference shall be made'. Both expressions hardly introduce a formal hierarchy in favour of the language in which the treaty was negotiated, as this would contradict the legal equality of all authentic languages. However, the text used during the negotiations could inform the choice between several plausible interpretations. This would at once respect the formal equality of all authentic texts and be expected to better reflect the intention of the contracting parties as recorded in the treaty.

Under several EU trade and investment agreements, moreover, the obligations which are identical to the obligation under the WTO Agreement shall be interpreted in accordance with any 'relevant interpretation established in rulings of the WTO Dispute Settlement Body',³⁸ or 'relevant interpretations in panel and Appellate Body reports adopted by the DSB'.³⁹ Other agreements admit a more flexible and broader approach. CETA, for instance, states that the interpreter shall 'take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body'.⁴⁰ This provision is equally mandatory – as demonstrated by the modal 'shall' – but the duty of the interpreter is to carefully consider in good faith the relevant decisions, without any obligation to follow them. Such a duty is not confined to identical obligations, but concerns in principle any trade provisions that has been applied and

³⁶ See, for instance, art 120 of the FTA with the Southern Africa Development Community (SADC), concluded 10 June 2016, entered into force 10 October 2016.

³⁷ Signed 19 October 2018, entered into force 21 November 2019, Annex 14 A, art 48.

³⁸ See, for instance, Agreement EU – Korea (n 31) art 14.16.

³⁹ See, for instance, Agreement EU – Japan (n 3) art 21.16.

⁴⁰ Agreement EU – Korea (n 31) art 29.17. For other examples, see the agreement with Vietnam (n 34) art 15.21; or Ukraine (n 35) art 320.

interpreted by the WTO adjudication bodies. This may explain its soft wording.

WTO languages are sometimes also relevant for the purpose of the language of proceedings before tribunals charged with settling disputes arising out of the treaties under discussion. While these treaties recognise the freedom of the contracting parties to choose the language of the proceedings, different arrangements are put in place in case the parties are unable to reach such an agreement. The treaties concluded with the former Soviet Republics, for instance, provide that each party makes its written submissions in its chosen language and provides a translation in the language chosen by the other party, unless its submissions are written in one of the working languages of the WTO.⁴¹

Interestingly, the EU-Vietnam Investment Protection Agreement provides that in investment disputes, in case of disagreement between the parties on the language of the proceedings, the Tribunal determines the language to be used. This shall be done after consulting the parties with a view to ensure the economic efficiency of the proceedings and avoid any unnecessary burden on the resources of the parties and the Tribunal. A footnote further specifies that

[i]n considering the economic efficiency of the proceedings, the Tribunal should take into account the costs of the disputing parties and of the Tribunal in processing case-law and legal writings which will potentially be submitted by the disputing parties.⁴²

Trade and investment agreements concluded by the EU frequently contain in-built mechanisms to ensure their proper interpretation. Some of them establish joint committees of representatives of the parties that are entrusted with several functions, including the adoption of binding interpretations. Under Article 8.31.3 of CETA, for instance, where 'serious concerns arise as regards matters of interpretation that may affect investment', the Joint Committee may adopt interpretations that shall be binding on investment

⁴¹ See, for instance, Georgia (n 35) Annex XX, art 42.

⁴² Investment Protection Agreement EU - Vietnam (n 34) art 3.50.2.

tribunals.⁴³ Importantly, binding interpretations are intended 'to avoid and correct any misrepresentation of CETA by Tribunals'.⁴⁴

From this perspective, the parties maintain effective control on the interpretation of the treaty and may intervene when they believe that the interpretation given by a tribunal does not reflect their intentions as recorded in the treaty. This obviously presupposes agreement amongst all parties. Joint Committees may also decide that an interpretation shall have binding effect from a specific date.⁴⁵

Some of the treaties under discussion also expressly allow the party or parties not appearing before the arbitral tribunal to submit formal documents on its or their positions with regard to the interpretation of the relevant treaty provisions. According to Article 8.38.2 CETA, for example, the investment Tribunal 'shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement'. Interestingly, the treaty indicates that the non-disputing party is either Canada, if the EU or a Member State is the respondent, or the EU, if Canada is the respondent. Accordingly, the Member States of the EU cannot submit non-disputing party submissions.

V. DOES EU LAW REQUIRE AUTHENTICATING TRADE AND INVESTMENT AGREEMENTS IN ALL EU OFFICIAL LANGUAGES?

After sketching the practice of the EU and before assessing whether it could be reconsidered, it is necessary to verify whether the authentication of the treaties concluded with other states in all official languages is required under EU law. The principle of equality underpinning the EU supranational system applies not only to states, but also to individuals. In fact, not only states but also legal and natural persons can be directly affected by EU treaties and legislation. For this reason, every EU provision producing direct effects – i.e. conferring rights or obligations upon individuals – has to be drafted in every official language. The Court made this very clear, to the point that a

⁴³ CETA (n 35).

⁴⁴ Joint Interpretative Instrument on the CETA, Doc. 13541/16, Brussels, 27 October 2016, 27 October 2016, OJ L 11/3, 14.1.2017, para 6 (e).

⁴⁵ See, for instance, CETA (n 35) Art 8.31.3.

regulation was held not opposable to an individual because it had not been published in his national language, notwithstanding the evidence that the person actually concerned was all the same aware of the content of the act.⁴⁶

A full analysis on the legal and political implications of direct effects of trade and investment agreements goes beyond the scope of this article. Nonetheless, it is necessary to assess whether the treaties under discussion can produce such effects. In the affirmative, the reduction of authentic texts – favouring individuals whose languages is selected as authentic – could hardly be reconciled with the principle of equality (as applied among all the possible beneficiaries of the norms to whom some direct effects can be attached). In the negative, conversely, such reduction could be considered.

It is undisputed that the EU institutions can agree with the other contracting party 'what effects the provisions of the agreement are to have in the internal legal order of the contracting Parties'.⁴⁷ If the treaty is silent on the issue, it is for the CJEU to assess its possible direct effects,⁴⁸ by applying the same

⁴⁶ In Case C-161/06, *Skoma-Lux sro v Celní ředitelství Olomouc*, C:2007:773, para 38 (emphasis added), the Court held that 'the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (see also Case C-370/96, *Covita AVE v Elliniko Dimosio (Greek State)*, C:1998:567, para 27; Case C-228/99, *Silos e Mangimi Martini SpA v Ministero delle Finanze*, C:2001:599, para 15; and Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v Asda Stores Ltd and Hygrade Foods Ltd*, C:2003:296, para 95). It is worth noting that such conclusion was taken notwithstanding the fact that the official electronic format of the regulation in question was available in the internet.

⁴⁷ Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, C:1982:362, para 17. In Joined Cases C-120706 and C-121/06, *Fabbrica Italiana Accumulatori Motocarri Montecchio Spa (FIAMM) et al v Council and Commission*, C:2008:476, para 108, the Court stressed the importance of 'the agreement's spirit, general scheme or terms'. See also Joint Cases C-404/12 P and C-405/12, *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, C:2015:5, para 45.

⁴⁸ Case 181/73, *R. & V. Haegeman v. Belgium*, C:1974:41, paras 3-5, concerning an Association agreement with Greece.

criteria used with regard to the provisions of directives.⁴⁹ The CJEU has regularly held that a treaty is directly applicable

when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁵⁰

In assessing such conditions, the Court seems to be following two different approaches, which could be defined as 'functionalist' and 'protective',⁵¹ with regard to bilateral agreements and GATT/WTO agreements. As for the first, the Court has been inclined to recognize direct effects to bilateral agreements of partnership, association and cooperation.⁵² The main reason for this is that domestic courts can be called to enhance uniform implementation of the treaty throughout the EU.⁵³ On the other hand, by following a protective approach, the Court has systematically refused to recognize direct effects to the General Agreement on Trade and Tariffs

⁴⁹ Case C-167/17, *Volkmar Klohn v. An Board Plenála*, C:2018:833, para 33, relying on *Demirel* (n 50).

⁵⁰ Case 12/86, *Meryem Demirel v. Stadt Schwäbusch Gmünd*, C:1987:400, para 14. The ECJ has systematically referred with approval to *Demirel* (n 50) as for instance in Case C-18/90, *Office national de l'emploi v. Bahia Kziber*, C:1991:36, para 15; Case C-366/10; *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*, C:2011:864, para 33; *Klohn* (n 49) para 33.

⁵¹ See Federico Casolari, 'The Acknowledgment of the Direct Effect of EU International Agreements: Does Legal Equality Still Matter?' in Lucia S. Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 83, 86.

⁵² See Marc Maresceau, 'The Court of Justice and Bilateral Agreements', in Allen Rosas *et al.* (eds), *The Court of Justice and the Construction of Europe* (Asser 2014) 693.

⁵³ See the opinion of GA Trabucchi in Case 87/75, *Conceria Bresciani v. Amministrazione Italiana delle Finanze*, C:1976:3, 148. For a substantial list of the relevant association/partnership/cooperation agreements and the related pronouncements by the ECJ, see Casolari (n 51) 89-90. For a couple of examples, see Case 416/96, *Nour Eddline El-Yassini v Secretary of State for Home Department*, C:1999:107 para 32, concerning art 40 of the EEC-Morocco Agreement concluded on 26 September 1978, in which the Court expressly relied on *Demirel* (n 50); Case C-265/03, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, C:1999:574, para concerning art 23(1) of the Communities-Russia Partnership Agreement; Case C-97/05; *Mohamed Gattoussi v Stadt Rüsselsheim*, C:2006:780, para 28, concerning art 64(1) of the Euro-Mediterranean Agreement with Tunisia.

(GATT)⁵⁴, as well as to the WTO agreements⁵⁵ and decisions of the Dispute Settlement Body.⁵⁶ Its *rationale* is that recognizing direct effects to these agreements could pave the way to a non-uniform application of WTO law by the tribunals of the Member States. Such 'protective' jurisprudence has attracted a good deal of perplexity and criticism.⁵⁷

The denial of any direct effects of WTO agreements has strongly influenced the recent EU practice related to trade and investment agreements. This is certainly due to the close relationships between these agreements and WTO law, as demonstrated *inter alia* by the substantial incorporation into the former of WTO disciplines and the frequent references to WTO jurisprudence. As a result, recent trade and investment agreements explicitly and almost systematically exclude the possibility of producing direct effects.⁵⁸ The express exclusion of direct effects has been described as 'a paradigm shift' that occurred around 2008.⁵⁹

The production of direct effects of trade and investment agreements can be precluded in two main ways: by a specific provision inserted towards the end

⁵⁴ Case 21.24/72, *International Fruit Company v Produktschap voor Groenten en Fruit*, C:1972:115.

⁵⁵ Case C 268/94, *Portuguese Republic of Portugal v. Council*, C:1999:574.

⁵⁶ Joined Cases C-120706 and C-121/06, *FIAMM* (n 47). See Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Brill 2012) 249.

⁵⁷ See, in particular, Judson Osterhoudt Berke, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting' (1998) 9 *European Journal of International Law* 626; Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue'. Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11 *JIEL* 885; Thomas Cottier, 'International Trade Law: the Impact of Justiciability and Separations of Powers in EC Law' (2009) 5 *European Constitutional Law Review* 307; H el ene Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 *European Journal of International Law* 151.

⁵⁸ See the useful matrix in Casolari (n 51) 109–110.

⁵⁹ Marco Bronckers, 'Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 *Journal of International Economic Law* 655, 663.

of the treaty or by a specific article included in the Council decision authorizing the signing or the provisional application of the treaty.

Several agreements, including those with the South African Development Community (SADC)⁶⁰, Colombia and Peru⁶¹, Japan⁶², Vietnam⁶³, Singapore⁶⁴, and Central America⁶⁵ provide that nothing 'shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law'. The trade and investment agreement with Vietnam also recognizes that 'Vietnam may provide otherwise under Vietnamese domestic law'.⁶⁶

More sophisticated is the relevant provision of CETA,⁶⁷ which reads:

Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

The exclusion of direct effects can also be obtained, alternatively or jointly with a treaty provision, through the Council decision authorizing the negotiation, the signature or the provisional application of the agreement. The decision concerning the agreement with Korea, for instance, states that the treaty 'shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and

⁶⁰ Agreement EU – SADC (n 36) art 122.

⁶¹ Agreement EU – Colombia-Peru (n 35) art 336.

⁶² Agreement EU – Japan (n 3) art 23.5.

⁶³ Investment Protection Agreement EU – Vietnam (n 34) art 17.20.

⁶⁴ Agreement EU – Singapore (n 37) art 16.16.

⁶⁵ Association between the European Union and its Member States, on the one hand, and Central America, signed 29 June 2012, provisionally in force since 1 August 2013 with Honduras, Nicaragua and Panama, since 1st October 2013 with Costa Rica and El Salvador, and since 1 December 2013 with Guatemala, art 356.

⁶⁶ Agreement EU – Vietnam (n 34) art 4.18.

⁶⁷ CETA (n 35) art 30.6.

tribunals'.⁶⁸ Similar provisions are contained in Council decisions related to the treaties with Central America,⁶⁹ Colombia and Peru,⁷⁰ Eastern Africa Community,⁷¹ Moldova,⁷² SADC,⁷³ and Ukraine.⁷⁴

When trade and investment agreements do not produce direct effects upon individuals in the EU – the overwhelming majority of those recently concluded by the EU⁷⁵ – the authentication of the treaty in all EU official languages is not indispensable. It is accordingly possible to reconsider the EU practice concerning their authentication, taking due account of the relevant international law provisions on treaty interpretation, which will be sketched in the next section.

VI. INTERPRETATION OF MULTILINGUAL TREATIES UNDER VCLT

General international law norms on interpretation of multilingual treaties are codified in Article 33 VCLT,⁷⁶ as consistently held by the International Court of Justice (ICJ),⁷⁷ as well as several investment tribunals.⁷⁸

⁶⁸ Agreement EU – Korea (n 31). Respectively Council Decision 2011/265/EU, 16 September 2010, OJ 2011 L 127/7, art 8, and Council Decision (EU) 2015/265/2169, 1 October 2015, OJ 2015 L 307/2, art 7.

⁶⁹ Agreement EU – Central America (n 65).

⁷⁰ Agreement EU – Colombia and Peru (n 35).

⁷¹ Agreement EU and EAC (n 35).

⁷² Agreement EU and Moldova (n 35).

⁷³ Agreement EU – SADC (n 36).

⁷⁴ Agreement EU – Ukraine (n 35).

⁷⁵ In literature, see Alik Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *Common Market Law Review* 1125; Casolari (n 51). In general, see Mario Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013).

⁷⁶ Concluded 23 May 1969, entered into force 27 January 1980 (116 Parties), 1155 UNTS 331. An identical provision appears in the VCLT between states and international organisations or between international organisations, concluded 21 March 1986 (not yet in force), UN Doc. A/CONF. 129/15.

⁷⁷ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, Preliminary Objections, Judgment of 17 March 2016, para 33.

⁷⁸ *Kiliç v. Turkmenistan*, ICSID ARB/10/1, Decision on art. VII.2 of the Turkey-Turkmenistan BIT, 7 May 2012, para 6.4. According to the WTO Appellate Body, arts 33.3 and 33.4 mirror customary international law: see, *US – Final Countervailing*

Article 33 VCLT provides that all authentic texts have the same meaning and each of them is equally authoritative, unless the parties have agreed that in case of a divergence a particular one shall prevail. In the absence of a prevailing text, Article 33.4 states that

when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Article 33.4 VCLT involves a comparison of the texts aimed at finding the *single meaning* of the multilingual treaty, which remains a single legal instrument with a 'single set of terms'.⁷⁹ Comparison can help clarifying the meaning of ambiguous or obscure terms used in one or more versions.⁸⁰ It might also reveal unexpected discrepancies due to 'the different genius of the languages, the absence of a complete consensus *ad idem*, or lack of sufficient time to co-ordinate'.⁸¹

Relying on a single text may lead to inaccurate and possibly conflicting interpretations by domestic and international tribunal alike, even when the text relied upon is crystal clear. The decision by the CJEU in *Ferriere* clearly illustrates this point.⁸² The comparison of the different texts allowed the Court to detect the discrepancy and ensure uniform interpretation. Without comparison, differences between authentic texts could go undetected for years and the treaty be interpreted differently by domestic and international courts.

Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R, 17 February 2004, para 59. The ILC has acknowledged that 'there are significant indications in the case law that art. 33, in its entirety [...] reflects customary international law', UN Doc. A/71/10, 12 August 2016, 127-128, para 6.

⁷⁹ International Law Commission, *Commentary to Article 31*, YBILC (1966-II) 225.

⁸⁰ Ibid. In literature, see Gardiner (n 19) 354.

⁸¹ International Law Commission (n 79) 225.

⁸² Case C-219/95, *Ferriere Nord S.p.A. v. The Commission of the EU*, C:1997:375, para 15. The Italian version of then art. 85 TEC, which the Court described as 'clear and unambiguous', prohibits certain agreements which have as their 'object *and* result' the prevention, restriction or distortion of competition. The other texts of art. 85 EC refer to the two criteria as alternative rather than cumulative ('object *or* result').

Article 33 VCLT does not require the interpreter to consider *all* authentic texts,⁸³ although at least in theory this would be the obvious prudent course.⁸⁴ However, when the treaty is concluded in more than 20 equally authentic languages, as in the case of the treaties under discussion, such an exercise would be too cumbersome, if not impracticable. The same ICJ, having to apply the Convention on Diplomatic and Consular Relations, considered only two (English and French) of the five (at the time) equally authentic texts of the treaty, thus confirming that there is no need to take into account all texts.⁸⁵

When the comparison of the authentic texts reveals 'differences of meaning', interpretation problems can still be solved relatively easily if one or more versions are just ambiguous, or allow for multiple interpretations, including the one attached to the other authentic texts.⁸⁶

Alternatively, Article 33.4 directs the interpreter to remove the difference in meaning by applying Articles 31 and 32 *cumulatively* to all authentic texts, rather than to each of them, in search for a single meaning.⁸⁷ The role of the interpreter becomes more ingenious as the exercise aims at removing differences in meaning between the authentic texts, again on the assumption that all authentic texts bear the same meaning (Article 33.3).

The interpreter must establish the meaning that best reconciles the authentic texts, having regard to the object and purpose of the treaty. The operation is called *reconciliation* of the texts. It is not a matter of selecting one or several languages deemed to express correctly the meaning of the text, but rather of extracting from the different texts 'the best reconciliation of the

⁸³ See the comments of the special rapporteur Waldock, *YBILC* (1966-I) 100.

⁸⁴ Gardiner (n 19) 421.

⁸⁵ *La Grand (Germany v. United States)*, Judgement, *I.C.J. Reports 2001*, 466.

⁸⁶ Wadlock, 3rd Report, *YBILC* (1964-II) 62. See also *Renée Rose Levy and Gremcitel S.A. v. Peru*, ICSID Case ARB/11/17, Award, 15 January 2015, para 165; *Kiliç v. Turkmenistan* (n 78) para 9.23.

⁸⁷ See Alain Papaux and Rémi Samson, 'Article 33', in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press 2011) 868, 880.

differences'.⁸⁸ Needless to say, the exercise becomes particularly arduous when the treaty is concluded in a large number of equally authoritative texts.

Furthermore, an international treaty – especially in the field of trade and investment – never has a 'single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.⁸⁹ In such a situation, reference to the 'object and purpose' of the treaty could be puzzling⁹⁰ and the interpreter could consider *also* the specific object and purpose of that part or provision.⁹¹

In order to increase legal certainty, additional interpretative canons have been suggested. For some authors, when Article 33 does not lead to a persuasive interpretation, preference should be given to the text in which the treaty was negotiated.⁹² However, such a canon runs against the principle of equality of authentic languages. It was not adopted within the ILC⁹³, mentioned in the VCLT, nor endorsed by the ICJ.⁹⁴ Unless the parties have indicated that the language in which the treaty has been negotiated would prevail in case of divergence – as done in the agreement between EU and Japan – no formal supremacy should be given to any text.

⁸⁸ Gardiner (n 19) 442-3.

⁸⁹ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 130. The CETA preamble, for instance, refers to 12 objects. See also, with regard to the ECT, Thomas W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 724, 759.

⁹⁰ See Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997) 8 *Finn. YIL* 138. For Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm Evans (ed.), *International Law* (5th edn, Oxford University Press 2018) 166, 182, the expression is 'vague and ill-defined, making it an unreliable tool for interpretation'.

⁹¹ In *LaGrand* (n 85) para 102, for instance, the Court considered the object and purpose of Art 41 of its Statute.

⁹² Verdross, *YBILC* (1966-I-2) 208, para 5; Ago, *YBILC* (1966-I-2) 210, para 22. See also Dinah Shelton, 'Reconcilable Differences. The Interpretation of Multilingual Treaties' (1997) 20 *Hastings Int'l & Comp. Law Review* 611.

⁹³ *YBILC* (1966-II) 226.

⁹⁴ In *LaGrand* (n 85) para 100, however, the Court had regard to the fact that the treaty had been negotiated in French.

In conclusion, Article 33.4 VCLT can hardly be considered satisfactory, as regularly held in the literature.⁹⁵ There is a concrete risk that reconciliation of the texts might simply prove impossible, as indeed conceded by the ILC and certain governments, even in the case of just two or three authentic texts.⁹⁶ As a last resort, 'the interpretation should be left to be determined in the light of all the circumstances',⁹⁷ a prospect that inevitably magnifies the subjective element inherent in the interpretation process.

VII. IS IT TIME TO RECONSIDER CURRENT EU PRACTICE?

The problems affecting multilateralism in the EU and the difficulties encountered by the CJEU in interpreting EU treaties as well as the undisputed shortcomings of Article 33 VCLT militate in favour of reconsidering the current prevailing practice of the EU concerning the authentication of trade and investment agreements. However intuitive the case for reconsidering such practice, it is necessary to briefly discuss the advantages and disadvantages of multilingualism in trade and investment agreements.

In the first place, EU governments and citizens benefit from having the text of the agreements in their own official language. Multilingualism would enhance the legitimacy of the process leading to the conclusion of the agreements as governments may use the text of the agreement in their official language for the purpose of interacting with the EU institutions as well as with the relevant stakeholders within their own jurisdictions. It would also make public participation and scrutiny more efficient, especially with regard to consultations during the negotiation and drafting of the agreements. Moreover, the EU, its members and the trading partners are committed throughout the entire life of the treaty to engage all stakeholders and seek their active involvement, which is obviously facilitated if the relevant documents are available in all official languages.⁹⁸

⁹⁵ For Mala Tabory, *Multilingualism in International Law and Institutions* (Sijthoff Noordhoff 1980) 213, art 33.4 fails 'to provide sufficiently firm guidelines'. In the same vein, Gardiner (n 19) 419.

⁹⁶ See, in particular, the position of the United States, A/Conf.39/C.1/L.197.

⁹⁷ Waldock, *YBILC* (1966-I) 210-211.

⁹⁸ Joint Interpretative Instrument on the CETA (n 44) para 6 (b).

Having the treaty available in all official languages may be expected also to improve its implementation by the competent domestic authorities at all levels. It would make the adoption of the domestic legal instruments required to ensure compliance with the treaty more accurate and efficient, also with regard to the integration of these instruments in the domestic legal order and their co-ordination with relevant legislation.

Finally, the authentication of the treaty in all EU official languages may assist domestic courts as well as arbitral tribunals for they will always have the treaty in the language of both the claimant and the respondent. This is particularly important, as often they need to assess whether domestic measures are consistent with the relevant treaty. Having the treaty in the official language of the respondent may facilitate the tribunal's task, although the tribunal should not rely exclusively on one or two authentic texts of the agreement. Furthermore, several of the treaties under discussion expressly provide that tribunals 'shall follow' the prevailing interpretation of domestic legislation given by domestic courts or authorities.⁹⁹

To what extent the perceived advantages of multilingualism sketched above are real, however, depends on the true possibility of establishing the meaning of the treaty in all its authentic texts, or in other words on treaty interpretation. The challenge is ensuring sufficient legal certainty, attaching a uniform meaning to the relevant treaty provisions and, if necessary, overcoming linguistic differences between different texts.

The major disadvantage of multilingualism remains precisely the complexity and uncertainty of the interpretative process. International law rules on interpretation of multilingual treaties – as set by Article 33 VCLT – proved rather difficult to apply, even when the number of languages was much smaller (never more than six languages). In particular, the rule providing for ultimate reliance on the object(s) and purpose(s) of the treaty remains extremely problematic.¹⁰⁰

⁹⁹ See, for instance CETA (n 35) art 8.3I.2.

¹⁰⁰ See Section VI. At the Vienna Conference, the United States pointed out that '[t]he difficulties were particularly serious when the treaty dealt with legal problems and two or more systems of law were involved. It often happened that there was no legal concept in one system which corresponded to a legal concept in

Furthermore, from the standpoint of EU Law, 'the requirement of full multilingualism is practically impossible for all actors, except the CJEU itself'.¹⁰¹ Indeed, only the CJEU is equipped to handle the daunting task of dealing with 24 languages. Yet, it is regrettable that the CJEU engages in multilingual interpretation only in relatively few cases¹⁰² and not always delivers entirely convincing interpretations of multilingual treaties, as clearly showed in *Slovakia v Council* and *Hungary v Council*.¹⁰³

Trade and investment tribunals are not equipped to deal with large numbers of authentic texts and could hardly be expected to consider several, not to mention all, authentic texts. Suffice here to recall that some investment tribunals dealing with treaties authenticated in Russian decided to use the non-official English text as none of its members could speak Russian.¹⁰⁴ Time, language skills and resource restraints might well induce these tribunals to deal only with a very few authentic texts (including the language or languages of the proceedings). A partial comparison could lead to an inaccurate interpretation and fail to detect possible incongruences. The risk would always be that subsequent tribunals – by taking into account all authentic languages or just a different selection of them – adopt diverging interpretations.

The risks are amplified by the nature of the mechanism for the settlement of trade and investment disputes. In agreements such as CETA, trade disputes are settled by sovereign panels constituted for the settlement of specific disputes. They deliver final decisions outside any institutional structure designed to maintain coherence, as it is the case in the WTO either through guidance and assistance by the secretariat during the proceedings, or by the

the other. An equivalent term was employed, but it rarely expressed the legal concept in question', Doc. A/CONF.39/CI/SR34, 189, para 41. See also Communication from the Commission (n 16).

¹⁰¹ Derlén (n 14) 343.

¹⁰² Derlén (n 14) footnote 16, relying on Baaij (n 21) 219.

¹⁰³ See Section III.

¹⁰⁴ *Kılıç v. Turkmenistan* (n 78).

authoritative resolution of conflicts between diverging interpretation by the Appellate Body.¹⁰⁵

Diverging interpretations of an EU trade agreement may not only generate legal uncertainty within the agreement, but also undermine the authority of the WTO Appellate Body. Likewise, investment disputes are settled by sovereign tribunals that may retain 'a different solution for resolving the same problem'.¹⁰⁶ Indeed, inconsistency of investment decisions has attracted a good deal of concern and criticism.¹⁰⁷ The risk of inconsistent decisions might be reduced, but not removed altogether, with the creation of permanent investment courts and appeal mechanisms such as those envisaged for CETA.¹⁰⁸ Furthermore, the interpretation of investment treaties requires a 'particular duty of caution'¹⁰⁹ since in investor-state arbitration the parties to the treaties do not coincide with the parties to the dispute. Last but not least, investment disputes tend to be rather acrimonious.¹¹⁰

¹⁰⁵ See Stephan W. Schill and Geraldo Vidigal, *Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals*, IBD – ICTSD, April 2018 <<http://ei5initiative.org/publications/reforming-dispute-settlement-in-trade-the-contribution-of-mega-regionals>> (accessed 29 February 2020) 5.

¹⁰⁶ *AES Corporation v. Argentina*, ICSID ARB/02/17, Jurisdiction, 26 April 2005, para 30. In literature, see Eric de Brabandere, *Investment Treaty Arbitration and Public International Law* (Cambridge University Press 2015), especially 93-98.

¹⁰⁷ See in particular IBA, Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, October 2018 <[file:///C:/Users/prd17cfu/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/InvestmentTreatyArbitrationReport2018%20\(1\).pdf](file:///C:/Users/prd17cfu/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/InvestmentTreatyArbitrationReport2018%20(1).pdf)> (accessed 29 February 2020).

¹⁰⁸ In Opinion 1/17, 30 April 2019, the ECJ confirmed that the CETA Investment Court is consistent with EU Law <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548>> (accessed 29 February 2020).

¹⁰⁹ Frank Berman, dissenting opinion in *Lucchetti v Peru*, ICSID ARB/03/4, Annulment, 5 September 2007, para 9.

¹¹⁰ In *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758, para 74, the Court of Appeal of Ontario quoted the following declaration by the respondent: 'We're going to

During the proceedings, the parties to a dispute, especially foreign investors, can dig into the different authentic texts of the treaty in search of the most convenient wording and exploit any possible discrepancies. This exercise would be entirely legitimate given the equal standing of each authentic text. It can even be argued that it would eventually do a good service to legal certainty by revealing discrepancies, which could possibly be addressed by joint committees,¹¹¹ if not directly by the states themselves, in accordance with the law of the treaties.

The crux of the matter inexorably remains that the larger the number of authentic texts of a treaty, the more their interpretation becomes complex, expensive and time consuming. The poor drafting of multilingual investment treaties may further exasperate the difficulties of interpretation as confirmed in arbitration practice. In *Kılıç v. Turkmenistan*, for instance, the Tribunal and the dissenting arbitrator described the wording used in the English authentic text of the relevant treaty provision, respectively as 'grammatically incorrect'¹¹² and 'undisputedly defective'.¹¹³

Furthermore, differences in the authentic texts of trade and investment provisions contained in EU agreements may go undetected for years. It is worth recalling that in *Slovakia v Council* and *Hungary v Council* the difference in the authentic texts of a treaty as fundamental as the TFEU went unnoticed until 2017. Undetected differences would unavoidably erode the perceived advantages mentioned above with regard to the implementation of the treaty.

A party to the treaty may well rely on the authentic text in its own official language and, if necessary, reproduce or incorporate it into domestic law. Then, domestic authorities would just act accordingly. If later it turns out that the text does not reflect the proper meaning of the treaty, serious problems may arise with regard to the liability of the concerned state, which may have complied with the defective text in good faith, while being unable

fight this until hell freezes over. And then we'll fight it out on the ice.' See also Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID Review 17.

¹¹¹ See Section IV.

¹¹² *Kılıç v. Turkmenistan* (n 78) para 9.14.

¹¹³ *Ibid.* Dissenting opinion W.W. Park, para 8.

to detect the discrepancy by using due diligence. Moreover, the difference in meaning may be reproduced in the domestic law of the concerned state, leading to distorted interpretation of the treaty by domestic courts. Then, a further intervention by the judiciary or even by the legislator may become necessary.

It is quite clear that interpreting trade and investment treaties concluded in a high number of equally authoritative texts is fraught with difficulties. The risk of legal uncertainty arguably outweighs the perceived advantages of full multilingualism. Accordingly, the current EU practice should be reconsidered.

The difficulties concerning the interpretation of multilingual treaties may be attenuated by several mechanisms to correct possible divergences between authentic texts or clarify their meaning. Firstly, the correction of the texts would always be possible as expressly provided for in Article 79 VCLT. The mechanism has proved efficient on a number of occasions, for instance in relation to the Spanish version of the EU Association Agreement with Central-America.¹¹⁴ The procedure can be triggered at any time, even after the entry into force of the treaty, and with regard to any type of errors.¹¹⁵

Yet, relying on Article 79 VCLT for correcting substantive errors might just be too optimistic, as the positive outcome of a correction procedure would eventually require the consent of all the parties. The higher the number of parties and of authentic texts, the higher the risk of objections. If the difference is as serious and political sensitive as in the case of Article 78.3 TFEU (see section III) an agreement may be difficult to reach. Furthermore, since the line separating corrections from amendments is not always clear,¹¹⁶ the risk of disguised alterations of the agreement cannot be excluded.

Likewise, authoritative interpretations by a Joint Committee requires the consent of all the parties, which could prove difficult to obtain, and the

¹¹⁴ Letter from the Commission, Ref. Ares(2018)772788 - 09/02/2018, on file with authors.

¹¹⁵ See Robert Kolb, 'Article 79', in Corten, Klein (eds) (n 87) 1770.

¹¹⁶ See George Korontzis, 'Making the Treaty', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2012) 177, 191.

agreement might eventually be amended rather than just interpreted.¹¹⁷ The problem is particularly acute in the case of investor-state arbitration due to the hybrid character of this mechanism for dispute settlement,¹¹⁸ as demonstrated by the interpretative note on Article 1105 NAFTA.¹¹⁹ Nevertheless, Joint Committees cannot escape the difficulties inherent in the interpretation of treaties concluded in an abnormally high number of equally authentic texts. They too may eventually be unable to overcome linguistic discrepancies.

VIII. OPTIONS AVAILABLE

The analysis conducted in the previous sections validates the proposition to reconsider the dominant current EU practice to authenticate trade and investment agreement in all official languages without any of them prevailing in case of differences. But what would be the options available to contracting parties?

1. Conclusion of the Agreement in One Single Language

The first option could be concluding these agreements in one single language, as in the case of ASEAN, or some bilateral investment treaties.¹²⁰ However,

¹¹⁷ In *Enron Corporation and Ponderosa Assets, LP v Argentina*, ICSID ARB/01/3, Award, 22 May 2007, para 337, the Tribunal held that 'States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries'.

¹¹⁸ See Zachary Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration', (2003) 74 *British Year Book of International Law* 151.

¹¹⁹ Free Trade Commission, *Notes of Interpretation of Certain Chapter XI Provisions*, 31 July 2001, available <www.naftaclaims.org>. For a sharp critique, see Second Opinion of Jennings in *Methanex v. US*, UNCITRAL (NAFTA) <<https://www.italaw.com/sites/default/files/case-documents/ita0983.pdf>> (accessed 29 February 2020).

¹²⁰ See, for instance, the BITs between Switzerland and Uzbekistan, concluded on 20 February 1993, entered into force on 5 November 1993 (with French translation <<https://www.admin.ch/opc/fr/classified-compilation/19983459/index.html>>) (accessed 29 February 2020); Pakistan and Australia, concluded on 7 February 1998, entered into force on 14 October 1998; Argentina and Japan, concluded on 1 December 2018, not entered into force yet.

this option would immediately be dismissed as too drastic a departure from the principle of multilingualism that underpins EU law.

2. Conclusion of the Agreement in All Official Languages with One of them Prevailing in Case of Differences

The second option is to provide for the formal supremacy of one text, as done in the agreement with Japan.¹²¹ This rule would provide a clear and predictable solution to overcome differences. If the prevailing text is in the same language in which the negotiations were conducted, an additional advantage would be the more efficient and accurate use of preparatory works, if appropriate.

As pointed out by the ILC, however, it remains unclear at which point during the interpretative process the provision giving priority to a particular text should apply.¹²² The ILC confined itself to raise – but left unanswered – two questions:

Should the "master" text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of "divergence?"¹²³

Both alternatives presuppose that the interpreter considers some, if not all, authentic texts. The first one suggests that *textual differences* (as opposed to *differences of meaning*) would trigger the priority rule. The interpreter just needs to compare the different texts of the agreement. The second option is much more sophisticated as the interpreter would go through the entire interpretive process, before eventually relying on the priority rule.

The priority rule option may provide a practically workable solution and reduce the dependence on teleological considerations, but the entire exercise remains cumbersome, if not impracticable, in case of large number of authentic texts. In such a case, the interpreter may be tempted to focus immediately on the text that would prevail in case of differences. By so doing,

¹²¹ Agreement EU – Japan (n 3).

¹²² International Law Commission (n 79) 224.

¹²³ Ibid.

the interpreter might consider the other authentic texts only to overcome *lacunae*, uncertainty or ambiguities, or just to confirm the meaning attached to the prevailing text. This approach would significantly undermine the value of multilingualism and possibly overstretch the presumption that all authentic texts bear the same meaning, that applies also when the treaty provides for a priority rule.

3. Conclusion of the Agreements in the WTO Official Languages

A third option is limiting the official texts to the official languages of the WTO (English, French and Spanish), plus (if different) the language of the counterpart. The three WTO languages are spoken within the EU by roughly 130 million people, 25.5 per cent of the population. They are also the UN official languages spoken in the EU. Incidentally, the UN recommends the conclusion of treaties only in the UN official languages in order to facilitate their registration under Article 102 of the UN Charter.¹²⁴

This option would allow the interpreter to promptly detect incongruences, carefully consider the meaning of the treaties in the different languages and ultimately deliver coherent and persuasive decisions. The particularly broad discretion that any interpreter could exploit when it is necessary to turn to teleological reasoning would be reduced.

This option would also improve the interpretation of provisions of the treaties under discussion that incorporate WTO disciplines and often need to be considered in the light of WTO jurisprudence.¹²⁵ In such cases, interpretation would be even more efficient, accurate and predictable when the languages of both the relevant texts and the related decisions were the same.

This option should also be beneficial from the standpoint of the coherence of decisions rendered in relation to trade disputes under EU agreements and

¹²⁴ Art 4.3 of the Secretary General's Bulletin (ST/SGB/2001/7) reads: 'Every endeavour shall be made to ensure that the texts of treaties and international agreements to be deposited with the Secretary-General are concluded only in the official languages of the UN' <<https://treaties.un.org/doc/source/publications/THB/English.pdf>> (accessed 29 February 2020).

¹²⁵ See Section IV.

under WTO agreements. It would also enhance the authority of the WTO Appellate Body in the settlement of trade disputes. It may finally enhance the correspondence between the authentic texts and the language of proceedings, which may be expected to simplify the settlement of disputes, ensure a better use of resources, and ultimately contribute to the creation of a clear, stable and predictable legal framework.¹²⁶

Incidentally, the WTO official languages coincide with the official languages of the International Labour Organisation (ILO), whose conventions and declarations are referred to in some of the agreements under discussion, including in the FTA with Korea. It is worth noting that the current dispute between the EU and Korea precisely concerns compliance with the obligation to respect, promote and realize the principles concerning fundamental rights, 'in accordance with the obligations deriving from membership in the ILO and the 1998 ILO Declaration on Fundamental principles and rights at Work and its follow up'.¹²⁷

Last but not least, it may be expected that all arbitrators and judges settling disputes arising out of the treaties under discussion would easily master one or more of the languages in which the treaties have been authenticated.

4. Conclusion of the Agreements in the WTO Official Languages Plus One or Two Additional Languages

A fourth option is authenticating the agreements in the official languages of the WTO plus some other languages, as well as in the language of the EU counterpart, if appropriate.¹²⁸ The combination including German and Italian, for instance, will cover roughly 280 million persons living in the EU, roughly 55.5 per cent of the population. Incidentally, these languages would coincide with those of the ECT, apart obviously from Russian.

Although to a lesser extent, this option offers the same advantages mentioned above with regard to the reduction of the authentic texts to the WTO official languages. The specific advantage of this option is that it would

¹²⁶ See text (n 41) and text (n 42).

¹²⁷ Article 13.4(3) of the Agreement between the EU and Korea (n 31).

¹²⁸ A combination excluding any WTO official language would be counterproductive for the consideration made in the previous sub-section.

better reflect the main languages spoken in the EU and require a less draconian departure from the principles of multilingualism and equality. This option would strike a fair balance between the goal of a full EU multilingualism and the practical needs of external relations, ensuring that more than half of the EU population had access to the treaty in its own official language.

This option requires a political decision motivated by considerations of efficiency and legal certainty. It would not infringe the principle of equality as EU law does not impose the authentication of trade and investment agreements in all EU official languages. This has been confirmed by the Commission,¹²⁹ and is hardly surprising considering that the WTO agreements are concluded in three languages and the ECT in six languages (five of which are EU official languages).

5. Conclusion of the Agreements in a Limited Number of Authentic Texts with One of Them Prevailing in Case of Differences

The last option combines the reduction of the number of authentic texts and the priority given to one of them in case of differences. This option would provide an appealing response to the two main problems related to the interpretation of multilingual treaties discussed above. On the one hand, it would recognize the importance of multilingualism while keeping it within manageable levels. Interpreters would thus be able to proceed to a real comparison of a reasonable number of authentic texts and truly respect their equality. On the other hand, it would offer the interpreter a clear solution when differences of meaning of the authentic texts cannot be reconciliated under Article 33.4 VCLT.

IX. CONCLUSIONS

Multilingualism in its current scale is problematic within the EU as well as in its relationships with third states. The recent *Relocation Case* is emblematic of how difficult interpretation of multilingual treaties can be even for the CJEU,

¹²⁹ Letter from the Commission (n 114).

which possesses resources and expertise that trade and investment tribunals clearly lack.

It is argued that the practice of authenticating EU trade and investment agreements in all official languages of the Member States should be reconsidered. This is possible as these treaties exclude direct effects, as expressly provided by all major agreements concluded in the last decade.

The novelty introduced by the agreement recently concluded with Japan, which gives priority to the language in which the agreement was negotiated, is a welcome development as it facilitates a clear and predictable solution to overcome possible differences between the different texts.

From this perspective, the number of authentic texts could be drastically reduced. One suitable option is to authenticate these agreements in the official languages of the WTO – which coincide with the UN languages spoken in the EU – plus possibly the official language of the third state. This option appears particularly appropriate as the agreements under discussion frequently refer to or incorporate WTO disciplines and often direct tribunals to consider WTO jurisprudence. As an alternative, should Member States be reluctant to cut the number of languages so drastically, they can add some other EU official languages, tentatively German and Italian.

A final option, arguably the most appropriate one, combines the reduction of the number of authentic texts and the priority accorded to one of them in case of differences. This option would strike a balance between promoting a manageable level of multilingualism and enhancing legal certainty, efficiency and predictability.

IS THERE AN EU INTERNATIONAL ADMINISTRATIVE LAW? A JURISTIC DELUSION REVISITED

Jakub Handrlica* 

International administrative law emerged in legal scholarship as a kind of parallel to international private law. While international private law constitutes an integral part of private law, international administrative law represents a special discipline of administrative law, providing norms for relations with foreign elements. These norms are referred to as "delimiting norms" in legal scholarship. Governing various aspects of legal relations, both international private law and international administrative law share a common characteristic: both have emerged and been traditionally perceived as national projects. Emergence of an 'union of composite administration' within the European union trigger the question of whether we can also identify similar processes regarding international administrative law. Reflecting the classical thesis that international administrative law represents a special branch of domestic administrative law, this article argues that the sources of EU administrative law provide for a comprehensive set of delimiting rules, which can be labelled as an 'EU international administrative law'.

Keywords: international administrative law, delimiting norms, choice-of-law, isolationism, EU administrative law, EU international administrative law

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*What is presented as international administrative law,
or something similar, is just a juristic delusion.¹*

Karl Neumeyer (1869-1941)

I. INTRODUCTION

The emergence of EU international private law as a special branch of EU law has been discussed over the last two decades by legal scholarship.² Traditionally, international private law had been understood as a part of national private law, providing for special conflict-of-law rules designed to deal with those private relations where certain 'foreign elements' are involved.³ Despite a certain degree of internalisation by means of international agreements, international private law was characterised by a

¹ Karl Neumeyer, 'Vom Recht der Auswärtigen Verwaltung und verwandten Rechtsbegriffen' (1913) 31 *Archiv des öffentlichen Rechts* 129.

² See Aude Fiorini, 'The Evolution of European Private International Law' (2008) 57 *International & Comparative Law Review* 969, Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 *Journal of Private International Law* 64, Geert van Calster, *European Private International Law* (2nd edn, Hart Publishing 2016), Dominik Dusterhaus, 'Does the European Court of Justice constitutionalise EU Private International Law?' (2017) 6 *Cambridge International Law Journal* 159, Leonhard Huebner, 'Coherence in the International Private and Procedural Law of the European Union' (2018) 82 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 811, Jan von Hein, Eva-Maria Kieninger and Gisela Rühl (eds), *How European is European Private International Law? Sources, Court Practices, Academic Discourse* (Intersentia 2019) etc.

³ In this respect, the English scholarship understood international private law as 'that part of the law of England, which deals with cases having a foreign element'. See Lawrence Collins (ed), *Dicey and Morris on Conflict of Laws, Vol. 1* (13th edn, Sweet & Maxwell 2000) 3.

considerable level of isolation, as each legal order provided for its own particular set of rules⁴.

Facing the gradual harmonisation of those areas that have traditionally been covered by conflict-of-law rules governing relations of private law, this article will investigate whether we can also identify similar processes in the field of administrative law. Thus, the article aims to address the question of whether we can speak of the recent emergence of a distinct 'EU international administrative law'. This research question will be addressed as follows.

Firstly, the article will argue that the scholarship of administrative law traditionally paid particular attention to those administrative relations where certain 'foreign elements'⁵ were involved. This attention emerged into a special discipline of administrative law, which has been referred to as international administrative law.⁶ The main aim of the conceptualisation of this special (sub)discipline of law was to identify overall principles and rules, as applicable in relation to those administrative relations, where a foreign element arose.⁷ Even so, while international private law became a widely recognised academic discipline, its lesser famous *doppelgänger* – international administrative law – never gained such levels of attention. Therefore, section II presents a review of existing literature, dealing with this special discipline of administrative law.

⁴ Alberto H. Neidhardt, 'The Transformation of European Private International Law. A Genealogy of the Family Anomaly' (Ph.D. thesis, European University Institute 2018) 27-28.

⁵ E.g. a foreign act (driving licence, passport, university diploma), a foreign administrative authority being active in "inland" (eg. a foreign border officer in a domestic train), domestic administrative authority being active beyond the territory of the state etc.

⁶ Internationales Verwaltungsrecht, diritto amministrativo internazionale, droit administratif international, derecho administrativo internacional.

⁷ See Klaus Vogel, 'Qualifikationsfragen in Internationalen Verwaltungsrecht' (1959) 84 *Archiv des öffentlichen Rechts* 54, Günther Beitzke, 'Extraterritoriale Wirkung von Hoheitsakten' in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (De Gruyter 1960) 505, Giuseppe Biscottini, 'L'efficacità des actes administratifs étrangers' (1961) 104 *Recueil des cours de l'Académie de Droit International* 638.

After exploring the existing literature on international administrative law, section III will be devoted to the identification of characteristic features of this particular discipline. Here, relations of international administrative law to two other branches of law – international private law and international public law respectively – will be analysed and major differences will be identified. Further, this part will also argue that international administrative law is created by a special set of norms, referred to as "delimiting norms" in legal scholarship, governing those administrative relations where certain foreign elements are involved. Such delimiting norms address these administrative relations by limiting applicability of domestic administrative law and allowing foreign administrative law to gain effect.⁸ In this respect, international administrative law will be outlined as an integral part of domestic administrative law, which deals with those administrative relations where 'foreign elements' occur. Despite certain links to international public law,⁹ the presented understanding of international administrative law implies a certain degree of isolation, as one can speak about German, French, Austrian and Italian international administrative law. Consequently, the viewpoint of this article is that of the domestic administrative law of a sovereign state.

Subsequent to outlining the existence of international administrative law as a special discipline, section IV will address the question of whether such delimiting norms may similarly be identified in the sources of EU administrative law. Also here, the viewpoint of this article will be that of the domestic administrative law of a Member State, which is part of the EU 'union of composite administration' on one hand, but executes the public administration by means of its own domestic administrative law at the same time. Reflecting the existence of international administrative law as an integral part of the domestic administrative law of each of the Member States, this article aims to address the question of whether the sources of EU administrative law also contain delimiting norms, governing administrative

⁸ For a very recent study on the nature of delimiting norms see Adrian Hemler, *Die Methodik der "Eingriffsnorm" im modernen Kollisionsrecht* (Mohr Siebeck 2019) 63.

⁹ A delimiting norm can represent reception of an obligation, arising from an international agreement (e.g. a delimiting norm, provided by a statutory law of the domestic administrative law, can provide for mutual recognition of a foreign act, as required by an international agreement).

relations with certain 'foreign elements'. This research question has only rarely been addressed in legal scholarship.¹⁰ However, it has important consequences, as the results of the existing scholarship on international administrative law can be applied also to delimiting norms existing under EU law.

Thus, section IV aims to give a final answer to the research question outlined in the title of this article. If the sources of EU administrative law do provide for a comprehensive set of delimiting norms, one may argue for the existence of a distinct 'EU international administrative law', which would represent a special (sub)discipline of the international administrative law of each of the Member States. At the same time, it would also represent a new (sub)discipline of EU administrative law. The existence of an 'EU international administrative law' will constitute a major change in the traditional perception of international administrative law as a purely national project. An such, an affirmative answer to the research question presented above would lead to the conclusion that a isolationistic perception of international administrative law is to be considered – at least to certain degree – as an anachronism.

II. REVIEW OF LITERATURE

When dealing with administrative law, scholarship has traditionally and mainly paid attention to legal relations having an exclusively domestic character. Despite this, one can track academic interest in administrative relations, where certain foreign elements appear, to the very beginning of the 1900s.¹¹

In 1901, Prospero Fedozzi outlined his hypothesis on the existence of an international administrative law as a separate (sub)discipline of

¹⁰ See eg. Christine E. Linke, *Europäisches Internationales Verwaltungsrecht* (Peter Lang 2001) and Jörg Terhechte and Christoph Möllers, 'Europäisches Verwaltungsrecht und Internationales Verwaltungsrecht' in Jörg Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos Verlag 2019) 1445.

¹¹ Klaus Vogel, 'Administrative Law: International Aspects' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, 9 – International Relations and Legal Cooperation in General* (North Holland 1986) 2-7.

administrative law.¹² In Fedozzi's understanding, international administrative law had emerged as a consequence of gradual internationalisation of administrative relations. In this respect, he understood the emergence of international administrative law as a parallel to the emergence of international maritime law, international private law, international criminal law and so on.¹³ Fedozzi's hypothesis on the existence of international administrative law as a special branch of law was very soon reflected in the works of other scholars, in particular those of Umberto Borsi and Donato Donati.¹⁴

The concept of international administrative law was further developed by German scholars.¹⁵ Beside Ernst Isay and Fritz Stier-Somlo, it is the academic work of Karl Neumeyer in particular that contributed to the further development of this field.¹⁶ Neumeyer understood international administrative law as 'legal statutes that delineate the administration of one autonomous community *vis-à-vis* other autonomous communities and

¹² Prospero Fedozzi, *Il diritto amministrativo internazionale (nozioni sistematiche)* (Unione tipografica cooperativa 1901) 12-13. In this respect, Fedozzi referred to Lorenz von Stein, who addressed the existence of international administrative law (*internationales Verwaltungsrecht*) in his *Die Verwaltungslehre* (Verlag der J. G. Cotta'schen Buchhandlung 1866). However, in strict contrast to Fedozzi, Stein limited his explanations to a statement about the existence of this branch of law, without analysing it further in detail.

¹³ Fedozzi (n 12) 5-6.

¹⁴ See Umberto Borsi, 'Carattere e oggetto del diritto amministrativo internazionale' (1912) *Rivista di diritto internazionale* 352 and Donato Donati, *I trattati internazionali nel diritto costituzionale* (Unione tipografico-editrice torinese 1906) 12-13. Recently, the contribution of Borsi was summarised by Bernardo G. Mattarella, 'Umberto Borsi e il diritto amministrativo internazionale' (2005) 15 *Rivista italiana di diritto pubblico comunitario* 933.

¹⁵ See Ernst Isay, 'Internationales Verwaltungsrecht' in Fritz Stier-Somlo and Alexander Elster (eds), *Handwörterbuch der Rechtswissenschaft. Bd. 3* (De Gruyter Recht 1928) 344 and Fritz Stier-Somlo, 'Grundprobleme des internationalen Verwaltungsrechts' (1930/1931) 5 *Internationale Zeitschrift für Theorie des Rechts* 222.

¹⁶ For an outstanding study on the contribution of Neumeyer to the legal scholarship see Henriette von Breitenbuch, *Karl Neumeyer – Leben und Werk (1869-1941)* (Peter Lang 2013).

provide for the promotion of foreign administration in its realm'.¹⁷ Pursuant to his concept, this aim of international administrative law is realised by a body of special norms that Neumeyer referred to as delimiting norms.¹⁸ These norms determine whether the administrative law of the concerned state is to be applied and, if so, to what extent and under what preconditions the application of the domestic administrative law is limited.

Thus, Neumeyer provided a far-reaching analysis of delimiting norms existing in the administrative law of the German Empire and in the subsequent Weimar Republic. He began by identifying these norms in provisions of acts governing passports and residence permits, university diplomas, titles and degrees.¹⁹ Subsequently, Neumeyer analysed delimiting norms in the provisions of substantive law on natural resources, free professions, various types of insurance and various types of transport.²⁰ In the aftermath, Neumeyer published the final volume of his monumental series, dealing with general theoretical issues that arose from the concept of delimiting norms in international administrative law.²¹

In order to obtain permission to teach (*venia legendi*) at the University of Munich, Neumeyer addressed the scientific council of this institution through a lecture. The thesis of the lecture argued that 'international administrative law is a newly emerging branch of international private law'.²² It is significant

¹⁷ Karl Neumeyer, 'Le droit administratif international' (1911) 18 *Revue générale de droit international public* 492.

¹⁸ '*Grenznormen*' in the original German formulation.

¹⁹ Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung I.* (J. Schweitzer Verlag 1910). For an English review of this volume see Paul S. Reinsch, 'Internationales Verwaltungsrecht' (1913) 7 *American Journal of International Law* 666.

²⁰ See Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung II.* (J. Schweitzer Verlag 1922) (this volume was reviewed in English by George C. Butte, 'Internationales Verwaltungsrecht' (1923) 17 *American Journal of International Law* 411) and Karl Neumeyer, *Internationales Verwaltungsrecht, Innere Verwaltung III.* (J. Schweitzer Verlag 1926).

²¹ Karl Neumeyer, *Internationales Verwaltungsrecht, Allgemeiner Teil.* (Verlag für Recht und Gesellschaft 1936).

²² Karl Neumeyer, 'Internationales Verwaltungsrecht' in Max Fleischmann and Karl Freiherr von Stengel (eds), *Wörterbuch des deutschen Staats- und Verwaltungsrechts* (2nd ed, J.C.B. Mohr 1913) 444.

that, more than three decades after the lecture took place, Neumeyer bitterly observed that his assertion had not attracted any major attention by the members of the scientific council.²³ This disinterest also continued over the following decades; contemporary scholarship was only occasionally dealing with the issue of administrative relations with foreign elements and the topic was only exceptionally addressed in the textbooks of administrative law.²⁴

It was not until 1962 that Neumeyer's contribution on international administrative law (as written in 1913) was replaced in the *Handbook on International Public Law* by a more contemporary entry, authored by Ernst Steindorff.²⁵ Consequently, the actual existence of international administrative law became questioned by some scholars. For example, Klaus Vogel referred to a 'so called' international administrative law in the title of his splendid monograph on the territorial applicability of administrative law,²⁶ whereas Franz Matscher, some ten years later, asked whether there is such a thing as international administrative law at all.²⁷ The fact is that, in strict contrast to international private law, international administrative law has never achieved comparable status and recognition within legal academia.

²³ Neumeyer (n 21) III.

²⁴ See Umberto Fragola, *Diritto amministrativo internazionale: Manuali di scienze giuridiche ed economiche* (Pallerano & Del Gaudio 1951), Hans J. Schlochauer, 'Internationales Verwaltungsrecht' in Franz Giese (ed) *Die Verwaltung* (Schriftenfolge zur staatswissenschaftliche Fortbildung der Beamten und Behördenangestellten 1956) 56, Prosper Weil, *Le droit administratif international: bilan et tendances* (Institut des hautes études internationales 1962), Giuseppe Biscottini, *Diritto amministrativo internazionale. La rilevanza degli atti amministrativi stranieri* (Antonio Milani 1964), Giuseppe Biscottini, *Diritto amministrativo internazionale, La circolazione degli uomini e delle cose* (Antonio Milani 1966), Günther Hoffmann, 'Internationales Verwaltungsrecht' in Ingo Münch (ed), *Besonderes Verwaltungsrecht* (De Gruyter 1985) 851.

²⁵ Ernst Steindorff 'Internationales Verwaltungsrecht' in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts* (De Gruyter 1962) 581

²⁶ Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm. Eine Untersuchung über die Grundfragen des sog. Internationalen Verwaltungs- und Steuerrechts* (Alfred Metzner 1965).

²⁷ Franz Matscher, 'Gibt es ein internationales Verwaltungsrecht?' in Otto Sandrock (ed), *Festschrift für Günther Beitzke* (De Gruyter 1979) 641.

In the last two decades, however, the problem of delimiting norms again became the subject of attention in legal scholarship.²⁸ Here in particular, the monographs of Christoph Oehler and Martin Kment deserve mention.²⁹ International administrative law also became the subject of attention by those scholars dealing with the phenomenon of EU administrative law.³⁰ Meanwhile, other authors criticized the concept of international administrative law as a parallel to international private law. For example, Eberhardt Schmidt-Aßmann argued that 'administrative law scholarship should abandon the inaccurate parallel and radically reorder the formation of terminology'.³¹ Consequently, other authors relativized the existence of international administrative law, as constituted by Neumeyer, by arguing that it still represents a field of emerging research, rather than an established area of law.³²

Despite some renewed interest in international administrative law in legal scholarship, the relations between international administrative law and the European integration processes have been much neglected in contemporary research. The dissertation of Christine E. Linke, published nearly twenty years ago, represents a salient exception.³³

²⁸ See Christine Breining-Kaufmann, 'Internationales Verwaltungsrecht' (2006) 125 *Zeitschrift für schweizerisches Recht* 7, Ming Son Nguyen, 'Droit administratif international' (2006) 125 *Zeitschrift für schweizerisches Recht* 75.

²⁹ See Christoph Oehler, *Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck 2005) and Martin Kment, *Grenzüberschreitendes Verwaltungshandeln* (Mohr Siebeck 2005).

³⁰ See Eberhardt Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, Springer Verlag, 2006) 383, Christoph Möllers, 'Internationales Verwaltungsrecht' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 1, Stephan Kadelbach, 'From Public International Law to International Public Law' in Armin von Bogdandy (ed), *The Exercise of Public Authority by International Institutions* (Springer Verlag 2010) 35.

³¹ Eberhardt Schmidt-Aßmann, 'The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship' (2008) 9 *German Law Journal* 2077

³² Terhechte and Möllers (n 10).

³³ Linke (n 10).

III. INTERNATIONAL ADMINISTRATIVE LAW: AN ACADEMIC DISCIPLINE REINTRODUCED

Before addressing the research question of this article, the discipline of international administrative law must be reintroduced to the reader. When presenting this specific area of law, authors usually begin with reference to the feature of 'territoriality' of administrative law.³⁴ This feature is 'Janus-faced' and has two dimensions.

On the one hand, administrative law is, in principle, only applied in the territory of the concerned state, i.e. by its public administration, courts and other legal authorities. Simultaneously, the feature of territoriality implies that the administrative authorities exclusively apply domestic administrative law in the matters of public administration.³⁵ On the other hand, the existing scholarship has regularly pointed out the fact that administrative law (i.e. statutory laws) can – and regularly do – refer to certain facts arising from outside the territory of the state. This means, for example, that administrative law may oblige a domestic source of environmental pollution to use certain counter-measures, irrespective of whether the pollution occurs in the concerned state or abroad. It may also take periods of employment abroad into consideration for the purposes of social security payments and so

³⁴ See Neumeyer (n 21) 94, Vogel (n 11) 5, Kment (n 29) 74, Hemler (n 8) 63, etc. Thus, while the traditional scholarship of administrative law has to a large extent marginalised the concept of territoriality, leaving it basically to the treaties of international public law, the scholarship of international administrative law has understood this concept a key issue and starting point. Concerning the concept of "territoriality" of administrative law and its exceptions, see also Thomas Merkli, Michael Eichberger and Andreas Batliner, 'Internationales Verwaltungsrecht: das Territorialitätsprinzip und seine Ausnahme' in *XIII. Treffen der obersten Verwaltungsgerichtshöfe Österreichs, Deutschlands, des Fürstentums Liechtensteins und der Schweiz* (Bundesgericht 2002) 82.

³⁵ See Carlos Esplugues, Jose Luis Iglesias and Guillermo Palao (eds), *Application of Foreign Law* (European Law Publishers 2011) 72. Here, the authors outline principal differences between the application of foreign law by the courts and the "non-judicial authorities" (public notaries, civil register officers, land registrars, immigration officers, guardianship authorities) and also point out major problems, arising by analysing the problem with regard to the field of public administration.

on. Such territorial extensions are frequently referred to as 'extraterritorial' applications of administrative law.³⁶

A clear border is thus provided by the limit between the features of 'inland' and 'abroad' in administrative law, as imposed by international public law. This provides that any administrative activity of a state within the sovereign territory of another state will, in practice, be illegal. Having said this, it would be theoretically possible for a sovereign state to deny any effects of foreign administration in its own territory.³⁷ However, such an approach would certainly be impractical. Consequently, international administrative law represents a legal vehicle that 'allows domestic administrative law, which aims primarily at protecting public interests and also to find its consequent application to administrative relations with a foreign element'.³⁸

Reflecting the review of existing literature outlined above, this section aims to sketch out the specific features of international administrative law as a special (sub)discipline of administrative law. Firstly, the subject will be defined with respect to other existing branches of law. Thus, the relation of international administrative law to two related, yet different areas of law – international private law and international public law – will be analysed and the main differences identified. Secondly, international administrative law as a 'delimiting law' – a special (sub)discipline of domestic administrative law – will be demarcated. This demarcation will represent a virtual bridge to

³⁶ See Werner Meng, 'Extraterritorial effects of legislative, judicial and administrative acts of State' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law* (North-Holland 1987) 155, William S. Dodge, 'Understanding the Presumption against Extraterritoriality' (1998) 16 *Berkley Journal of International Law* 85, Mathias Audit, 'La Compétence extraterritoriale en droit administrative' in *La compétence* (LexisNexis 2008) 69, Menno T. Kamminga, 'Extraterritoriality' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 125, Zachary D. Clopton, 'Extraterritoriality and Extranationality: A Comparative Study' (2013) 23 *Duke Journal of Comparative and International Law* 217, Joanne Scott, 'Extraterritoriality and Territorial Extension' (2014) 62 *American Journal of Comparative Law* 87.

³⁷ Under such approach, the state will neither recognise a foreign passport, nor a foreign driving licence, or a diploma, issued by a foreign university.

³⁸ Christoph Oehler, 'Internationales Verwaltungsrecht – ein Kollisionsrecht eigener Art?' in Stefan Leible and Matthias Ruffert (eds), *Völkerrecht und IPR* (Jaener Wissenschaftlicher Verlag 2006) 131.

answering the research question of this article, which will be addressed in section IV below.

1. International Administrative Law and International Private Law

As mentioned above, Neumeyer understood international administrative law as a kind of parallel to international private law and, in the very early stages of his research, he even claimed international administrative law as being its particular subdiscipline.³⁹ Since Neumeyer, international administrative law has been understood as a kind of parallel of international private law in legal scholarship.⁴⁰ However, certain important differences were identified between these two branches of law, leading to the thesis on the 'emancipation of international administrative law from the realm of international private law'.⁴¹

Firstly, under international private law, the legal frameworks governing relations of private law in various states are understood as being normatively equal.⁴² Consequently, states allow for the application of foreign private law in those cases where a foreign element is involved. On the contrary, under administrative law, such equality is not recognised.⁴³ Administrative law, as a matter of principle, exclusively recognises its own rules as applicable in administrative relations and these rules are to be decided upon by the competent administrative authorities of the concerned state. There is no

³⁹ Neumeyer (n 21) III. In fact, the original thesis of Neumeyer on international administrative law being a subdiscipline of international private law gained reception in particular in Latin American scholarship— see e.g. Huberto M. Ennis, *Derecho internacional privado* (D. T. Lelong Editores 1953) 571.

⁴⁰ See Josef Weisbart, 'Internationales Privatrecht und öffentliches Recht' (1956) 6 *Juristenzeitung* 769, Paul H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts* (J. C. B. Mohr 1976) 5, Claus Dieter Classen, 'Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' in Christian Hillgruber (ed), *Die Leistungsfähigkeit der Wissenschaft des Öffentliches Rechts* (De Gruyter 2007) 392.

⁴¹ Konrad Zweigert, 'Aussprache' in *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (Hansischer Gildenverlag 1964) 141.

⁴² Alex Mills, 'Connecting Public and Private International Law' in Veronica Ruiz Abou-Nigm, Kaey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 12.

⁴³ Vogel (n 11) 5.

place for any equality of domestic and foreign administrative law under this regime, a feature that has been referred to as the 'unilaterality of delimiting norms' in German scholarship.⁴⁴ Thus, in contrast to the conflict-of-law rules of international private law, the delimiting rules of international administrative law are not decisive in answering the question of applicable law between the domestic and the foreign one. They merely limit the application of domestic administrative law in those cases where a foreign element is involved in the relations of administrative law. Consequently, Neumeyer distinguished 'delimiting law' – international administrative law – from the conflict-of-law rules – international private law.⁴⁵ This strict distinction was not always consistently reflected by later scholarship of international administrative law. However, this article will follow Neumeyers' approach.⁴⁶

⁴⁴ Kurt Siehr wrote about 'introvert unilaterality of the international administrative law' in '*Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht*' (1988) 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 41. Regarding the feature of 'unilaterality' in international administrative law, see also Anton K. Schnyder, *Wirtschaftskollisionsrecht: Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter Berücksichtigung von Marktrecht* (Schulthess 1990) 45, Matthias Niedobitek, *Das Recht der grenzüberschreitenden Verträge* (Mohr Siebeck 2001) 366, Matthias M. Siems, 'Die Harmonisierung des Internationalen Deliktsrechts und die »Einheit der Rechtsordnung«' (2004) 9 *Recht der internationalen Wirtschaft* 662, Anatol Dutta, *Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr Siebeck 2006) 399. For an overview of existing theoretical consideration regarding the concept of 'unilaterality' see Hemler (n 8) 62, who also argues for a gradual erosion of this concept).

⁴⁵ Neumeyer (n 21) 105.

⁴⁶ See in particular Schlochauer (n 24) 3, Hoffmann (n 24) 855 and recently Oehler (n 38) 131. Here, the authors argued that certain conflict-of-law rules may be provided also in international administrative law. Such rules - which appear to be quite infrequent in administrative law – may provide for application of foreign administrative law by domestic administrative authorities. See also Jakub Handrlica, 'Foreign Law as Applied by Administrative Authorities' (2018) 68 *Zbornik Pravnog fakulteta u Zagrebu* 193. Other authors strictly denied such constructions, see eg. Hemler (n 8) 63, who explicitly opposes applicability of foreign administrative law by domestic administrative authorities. A third line of scholarship argues that the international administrative law exclusively provides

Secondly, there is an important formal difference between these two branches of law. In the area of international private law, the conflict-of-law rules have become the subject of frequent codification by national legislators. This is not the case for the delimiting rules of international administrative law, which are often embodied in the sources of substantive – as opposed to procedural – law, since this delimitation is a prerequisite for the application of substantive administrative law. The quotation on juristic delusion mentioned at the very beginning of this article reflected this special and very particular nature of the subject under discussion.⁴⁷ This difference between international private law and international administrative law has certainly caused difficulties for the coherent research of the latter subject and simultaneously given rise to prominence for the former.

Despite such differences between these two branches of law, certain similarities are also to be mentioned that are relevant to the scope of this article. The concept of international administrative law outlined above, understood as an integral part of domestic administrative law, has important consequences when analysing the subject from a comparative perspective. The subject of research, presented in the work of Neumeyer, was the international administrative law of the Weimar Republic. Two decades later, Giuseppe Biscottini provided a review of the *diritto amministrativo internazionale* and Prosper Weil presented an overview of *droit administratif international*. Both referred to their own domestic legal frameworks – Italian and French.⁴⁸

Indeed, the very traditional understanding in the discussed field was based on a consideration that there are isolated structures of international administrative law in each sovereign state. Consequently, one can argue that

for conflict-of-law rules – see e.g. Ulrike Wolf, *Deliktsstatut und internationale Umweltrecht* (Duncker & Humblot 1995) 99. These dogmatic divergencies also confirm the fact that today, more than one hundred years after Neumeyer published his works, international administrative law remains to represent to some extent a ‘juristic delusion’. Reflecting this situation, Jörg Terhechte and Christoph Möllers recently stated, international administrative law still represents an area of emerging research, rather than an established discipline. See Terhechte and Möllers (n 10) 1449.

⁴⁷ Wilhem Wengler, *Internationales Privatrecht* (De Gruyter 1981) 12.

⁴⁸ See Biscottini (n 24) and Weil (n 24).

under this very traditional understanding, international administrative law is a typical national project.⁴⁹ At this point, we find a shared characteristic feature with international private law, which also has – despite certain attempts at internationalisation – largely emerged as a national project. As Gerhard Kegel states,

when we speak about international private law, or international administrative law, we do not refer to statutory laws which are universal in their nature. These branches of law are termed so only, because they govern certain relations, which are of international nature. However, each State has its own international private law, international administrative law etc.⁵⁰

Thus, a certain degree of isolation is characteristic of both international private law and international administrative law.

2. International Administrative Law and International Public Law

A delimitation between international administrative law and international private law may serve for further clarification of the nature of the subject discussed.⁵¹ In this regard, it must be mentioned that international administrative law was not primarily designed to govern the administrative relations of a sovereign state *vis-à-vis* other states, or other subjects of international public law, such as international organisations.⁵² The governing of these types of relations was left to international public law. As such, the

⁴⁹ Stefan Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss* (Mohr Siebeck 1999) 3.

⁵⁰ Gerhard Kegel, *Probleme des internationalen Enteignungs- und Währungsrechts* (Westdeutscher Verlag 1956) 6.

⁵¹ It has been in particular the German scholarship of international public law that paid traditionally attention for delimitation towards the area of international administrative law – see Alfred Verdross, *Völkerrecht* (Springer 1959) 377, Eberhard Menzel, *Völkerrecht* (C. H. Beck 1962) 5, Wolfgang Graf Witzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Wolfgang Graf Witzthum (ed), *Völkerrecht* (4th ed., De Gruyter 2007) 21. The issue of mutual relations between the two branches of law has been crucial also for the scholarship of international administrative law – see in particular Karl Neumeyer, 'Internationales Verwaltungsrecht: Völkerrechtliche Grundlage' in Karl Strupp (ed), *Wörterbuch des Völkerrechts und der Diplomatie* (Walter de Gruyter & Co. 1924) 577.

⁵² Neumeyer (n 21) 68.

delimiting norms of international administrative law mainly aim at governing the relations between the subjects under the jurisdiction of the concerned state and its competent administrative authorities. At the same time, international administrative law is in essence following the principle of sovereign equality of states, as provided by international public law.⁵³ This concept supposes that it is up to each sovereign state to decide to which extent it will exclusively use its jurisdiction to apply and execute its own administrative law within its own territory. Under this concept, only the law of the concerned state is capable of providing any legal effects of foreign legal frameworks *vis-à-vis* domestic administrative law.

In addition to the dichotomy outlined above, there are several problems of mutual relationships that deserve to be clarified further. Firstly, a delimiting norm can reflect obligations of states that arise from international public law. In the legal frameworks, which follow the dualistic model of mutual relation between the international public law and the domestic law, the delimiting norms frequently react upon obligations arising from international agreements.⁵⁴ As outlined above, a delimiting norm can never cause any legal effect *vis-à-vis* a foreign legal framework.⁵⁵ Consequently, it is always the delimiting norm in the domestic administrative law that provides for such items as a foreign driving licence, a *laissez-passer* for a corpse, a pilot licence and so on, when the mutual recognition of all these acts are based on existing international agreements.⁵⁶ Further, the scholarship has recognised that a delimiting norm may also reflect a *custom* as a source of international public law.⁵⁷ Thus, the classical approach to international administrative law has

⁵³ Ibid 169.

⁵⁴ For a rather rare analysis of the concept of international administrative law in a monistic system of relation between international public law and international administrative law, see Christian Tietje, *Die Internationalität des Verwaltungshandelns* (Duncker & Humblot 2001) 98.

⁵⁵ Klaus König, *Die Anerkennung der ausländischen Verwaltungsakten* (Verlag C. Heymann 1965) 45.

⁵⁶ See the Berlin Convention on the Transport of Corpses of 1937, The Geneva Convention on Road Traffic of 1949, the Vienna Convention on Road Traffic of 1968, the Chicago Convention on International Civil Aviation of 1944 and the Agreement of the Transport of Corpses of 1973 etc.

⁵⁷ Neumeyer (n 21) 45. Here, the author argued that granting of a citizenship by one State being recognised by other States, is based on the custom as a source of

always recognised that a source of international public law can represent the *origin* of a certain delimiting norm. However, reflecting the dualistic model of mutual relations between international public law and domestic administrative law, the scholarship has paid little attention to international agreements as sources of delimiting norms. This approach was supported by two additional facts: on the one hand, international agreements providing for delimiting norms were rare and, on the other, they did not follow any coherent approach to the issue of delimiting norms. Consequently, in strict contrast to the area of international private law, the scholarship of international administrative law has never developed any theory of reunification with the field of international public law.⁵⁸

Secondly, an international agreement may also provide for competencies of certain international organisations *vis-à-vis* private persons and undertakings.⁵⁹ Powers of the International Atomic Energy Agency to send its inspectors in order to execute the controls related to its safeguard systems serves as a good example. Reflecting the dualistic model of mutual relation between international public law and domestic law, such competencies must also be provided by a corresponding norm of domestic administrative law.

Thirdly, certain parts of international public law cover issues that might well be *materially* linked to the area of administrative law. In principle, this concerns those international agreements providing for cooperation and assistance among the competent administrative authorities of the concerned states. Here, we are neither dealing with mutual relations among states in the traditional understanding, nor primarily with administrative relations

international public law. Consequently, a delimiting norm, providing for legal effects of such foreign citizenship for domestic administrative law, rather reflects the customary law than a written international agreement.

⁵⁸ See Joel R. Paul, 'The Isolation of Private International Law' (1988) 7 *Wisconsin International Law Journal* 173 (arguing for "reunification of public and private international law") and more recently Alex Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1 (arguing that the thesis is a myth that public and private international law are discrete, distinct disciplines).

⁵⁹ See Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin von Bogdandy (ed), *The Exercise of Public Authority by International Institutions* (Springer Verlag 2010) 727.

between the citizen and the administrative authority, but with mutual relations among administrative authorities of different states. Such relations are usually of a technical nature, the relations created by the delivering of administrative decisions abroad representing a good example. The traditional approach to international administrative law, which reflects the dualistic dichotomy of *international public law vs. international administrative law*, paid only marginal attention to this area.⁶⁰ However, involving primary relations between the competent administrative authorities, these relations also provide certain effects towards residents of the concerned state(s) and, consequently, one can also argue for the presence of delimiting norms in these relations.⁶¹

So, international administrative law on the one hand and international public law on the other represent two different legal frameworks. While international administrative law governs relations between a citizen and the state, international public law governs mutual relations between states. However, as already outlined above, there is a strong link between the two branches of law.

3. *International Administrative Law and Administrative Law*

When dealing with international administrative law, virtually all contemporary authors refer to the monumental work of Neumeyer as the basic source.⁶² This fact is sometimes described as a kind of *fascination* by

⁶⁰ Schmidt-Aßmann (n 31) 18.

⁶¹ Anne van Aaken, 'Transnationales Kooperationsrecht nationaler Aufsichtsbehörden als Antwort auf die Herausforderung globalisierter Finanzmärkte' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 219.

⁶² See e.g. Benedict Kingsbury, 'The Administrative Law Frontier in Global Governance' (2005) 99 *American Society of International Law Proceedings* 145, Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 395, Dirk Ehlers and Hans U. Erichsen (eds), *Allgemeines Verwaltungsrecht* (14th edn, De Gruyter 2010) § 4, Jörg Menzel, *Internationales Öffentliches Recht* (Mohr Siebeck 2011) 16, Jakub Handrlica, 'Two faces of international administrative law' (2019) 9 *Tribuna Juridica – Juridical Tribune* 293, Hemler (n 8) 63 (and the extensive list of references in footnote 317).

these authors.⁶³ International administrative law, as constituted by Neumeyer, was understood as an integral part of administrative law, rather than international public law.⁶⁴ However, instead of constituting a coherent branch of substantive law, international administrative law is comprised of a set of delimiting norms, which are provided among the substantive law (such as tax law, social security law, university law, traffic law, police law, immigration law, natural resources law, confessional law etc.). In this regard, Neumeyer argued that a delimiting norm can provide for legal effects of foreign administrative measures by limiting the application of domestic administrative law in certain cases where a foreign element is present.⁶⁵ So, for example, statutory laws governing traffic may provide for legal consequences of a foreign driving licence, statutory laws governing university education can provide for legal consequences of a diploma issued by a foreign university and so on.

Figure 1. Mutual relations between international administrative law and substantive parts of domestic administrative law



⁶³ See e.g. Schmidt-Aßmann (n 31) 18.

⁶⁴ So explicitly Neumeyer (n 21) 19.

⁶⁵ Ibid 295. See also Fritz Reu, *Anwendung fremden Rechts: Eine Einführung* (Junker und Dünhaupt 1938) 102 (here, the author argued that international administrative law represents a special – from municipal administrative law separated – branch of law).

Thus, the denomination 'international' does not *primarily* refer to any link to international public law, but merely to the fact that norms of international administrative law govern those administrative relations where certain foreign (or international) elements occur. In this respect, some authors have opted for using the term 'administrative international law' in referring to the branch of administrative law that deals with relations with a foreign element.⁶⁶ Others argue for abandoning it and replacing it with another suitable designation.⁶⁷

This article argues that rather than representing an area of administrative law governing certain coherent sections of public administration, delimiting norms are embodied in the respective provisions of other branches of substantive administrative law. They are also more closely connected to the structure and policies of the substantive law in question. In this respect, Klaus Vogel argued that 'it would be impossible to a large extent to treat these provisions separately from substantive law, since they fail to constitute a province of law of their own'.⁶⁸ Thus, in this context, the scholarship also frequently refers to special subdisciplines of administrative law, which aim at addressing relations with a foreign element.⁶⁹ This is the case of international tax law, international social security law and international environmental law.⁷⁰ This disintegrated and unharmonized nature of international

⁶⁶ For an attempt to find a new umbrella term for the discussed area of law, see Eberhard Schmidt-Aßmann, 'Verfassungsprinzipien für den europäischen Verwaltungsverbund' in Wolfgang Hoffman-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, Band I* (C. H. Beck 2006) § 17. See also Franz C. Mayer, 'Internationalisierung des Verwaltungsrechts?' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 54.

⁶⁷ Oehler (n 29) 3.

⁶⁸ Vogel (n 11) 5.

⁶⁹ Giovanni Biaggini, 'Die Entwicklung eines internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft' in Christian Hillgruber (ed), *Die Leistungsfähigkeit der Wissenschaft des Öffentlichen Rechts* (De Gruyter 2007) 414 (with several other examples in footnote 8).

⁷⁰ See Ekkehart Reimer, 'Transnationales Steuerrecht' (for the area of international tax law), Markus Glaser, 'Internationales Sozialverwaltungsrecht' (for the area of international social security law) and Wolfgang Durner, 'Internationales Umweltverwaltungsrecht' (for the area of international environmental law) in

administrative law contributed to a certain marginalisation of the legal research in this area.⁷¹

However, despite failing to cover a coherent area of public administration, this article argues that the aim of delimiting norms – to govern administrative relations with a foreign element – represents a uniting element that leads to a classification of international administrative law as a separate (sub)discipline of administrative law. In the past decades, this line of argument was explicitly supported by several scholars.⁷²

IV. IS THERE AN EU INTERNATIONAL ADMINISTRATIVE LAW?

In the previous sections, the existence of international administrative law as a special (sub)discipline of domestic administrative law was outlined. Despite certain links to international public law, this article understands international administrative law as a national project, so we can speak about German, French, Italian international administrative law and so on. This means that a certain degree of isolationism remains a characteristic feature of the discussed branch of law. In line with the existing scholarship, this article also argued that the body of international administrative law in each of these jurisdictions represents a separated set of delimiting norms, which govern relations of administrative law with 'foreign elements'. Thus, if approaching the issue from the perspective of the European Union, this section presumes that each of the Member States possesses its own set of rules, which constitute their own domestic international administrative law.

As outlined above, these delimiting norms in the sources of international administrative law may be the result of obligations, provided by existing

Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 187, 73 and 121.

⁷¹ Matscher (n 27) 645.

⁷² See Thomas Fleiner-Gerster, *Grundzüge des Allgemeinen und schweizerischen Verwaltungsrecht* (2nd edn, Schulthess 1980) § 10 ('In fact, we can today refer about international administrative law as about an independent discipline'), Christine Breining-Kaufmann, 'Internationales Verwaltungsrecht' (2006) 125 *Zeitschrift für schweizerisches Recht* 72 ('international administrative law represents a legal discipline *sui generis*'), Jakub Handrlica, 'Revisiting international administrative law as a legal discipline' (2018) 39 *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1237.

international agreements. This section aims to address the question of whether we can identify delimiting norms also in the sources of EU administrative law and if they represent a compact set of rules.⁷³

This question will be analysed with regard to the model of *indirect* application of EU administrative law by the national administrative authorities under the scheme, which is referred to as the 'union of composite administration' in legal scholarship.⁷⁴ This scheme is recently understood as an administrative concept, which facilitates execution of EU administrative law within the European Union by the authorities of the Union and, at the same time, by the national administrative authorities.

The question will be analysed from the viewpoint of the international administrative law of the Member States. Here, two remarks must be made.

Firstly, the classical approach to international administrative law worked with the dichotomy *foreign authority – domestic authority*.⁷⁵ With certain reservation, this dichotomy is applicable also when analysing the relations between the administrative authorities of the Member States under the

⁷³ In this context, it could be argued that certain developments towards harmonisation of delimiting rules can be identified also under the umbrella of the Council of Europe. However, while e.g. the Agreement on the Transfer of Corpses of 1973 and the European Convention on the Service Abroad of Documents Relating the Administrative Matters of 1977 do provide for certain degree of harmonisation in very specific areas of public administration, we can barely find a coherent approach towards establishing any kind of an 'European international administrative law' here.

⁷⁴ For more details on the concept of the 'union of composite administration', see Eberhardt Schmidt-Aßmann, 'Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrecht' in Eberhardt Schmidt-Aßmann and Bettina Schöndorf-Haubold (eds), *Der Europäische Verwaltungsverbund* (Mohr Siebeck 2005) 7. See also Matthias Ruffert, 'Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund' in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) and more recently Paul Craig, *EU Administrative Law* (3rd ed., Oxford University Press 2018) 28 (here, the author tries to reconcile various approaches towards definition of the administration, as executed by and within the EU).

⁷⁵ See Neumeyer (n 21) 80.

'union of composite administration'.⁷⁶ From the viewpoint of a Member State, the administrative authority of another Member State remains a *foreign* authority. Therefore, an act issued by such an authority, which takes on certain legal consequences under the legal framework of another Member State, is still to be regarded as a 'foreign element'. If any applicable norm deals with the legal consequences of such a foreign act, this norm is to be considered as a delimiting norm. To a certain extent, this approach is being blurred under the existing schemes of the 'union of composite administration', as the concerned authorities of the other Member States and of the EU here protect the interests of the other Member States as well.⁷⁷ However, it is a matter of fact that under the scheme of the 'union of composite administration', administrative authorities of various Member States are still to be considered as foreign authorities under the scheme of domestic administrative law.

Secondly, facing the myriad of forms of administrative measures, the following paragraphs will use the terms 'administrative act' and 'foreign act' as umbrella terms for all unilateral administrative measures, which produce legal effects *vis-à-vis* individual addressees. Such an approach is also currently followed by other scholars.⁷⁸

⁷⁶ See Stefan Burbaum, *Rechtsschutz gegen transnationales Verwaltungshandeln* (Nomos Verlag 2003) 23 and Timothée Paris, 'La reconnaissance des actes administratifs étrangers' (2014) 66 *Revue internationale de droit comparé* 631.

⁷⁷ For further details and many other examples see Gernot Sydow, 'Jeder für sich oder einer für alle? Verwaltungsmodelle für die Europäische Union' in Gabrielle Bauschke (ed), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen* (Boorberg 2003) 9 and Jakub Handrlica, 'International Administrative Law and Administrative Acts: Transterritorial Decision Making Revisited' (2016) 7 *Czech Yearbook of Public & Private International Law* 86.

⁷⁸ E.g. Angelos S. Gerontas, 'Deterritorialisation in Administrative Law: Exploring Transnational Administrative Decisions' (2013) 19 *Columbia Journal of European Law* 423.

1. In Search for Delimiting Norms in the 'Union of Composite Administration'

Under the 'union of composite administration', EU law may be executed according to two different models.⁷⁹ On the one hand, there is the model of *direct* administration, where EU law is being executed by the authorities of the EU. In parallel, the administrative authorities of the Member States may execute EU law under the scheme of *indirect* administration.⁸⁰ The latter model will be the subject of interest in this part.

From the viewpoint of administrative law of a Member State, the indirect administration can currently be realised under these four basic schemes:

- (i) isolated scheme,
- (ii) trans-territorial scheme,
- (iii) reference scheme,
- (iv) co-ordinated scheme.

⁷⁹ For delimitation of direct and indirect administration within the 'union of composite administration', see Stephan Kadelbach, 'European Administrative Law and the Law of a Europeanised Administration' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167 and Jacques Ziller, 'Les concepts d'administration directe, d'administration indirecte et de co-administration et de fondements du droit administrative européen, in Jean-Bernard Auby and Dutheil de la Rechère (eds), *Traité de droit administrative européen* (2nd ed, Larcier 2014) 241. Recently, some authors point out certain erosion of these two classical models by introducing various consultation and co-operation schemes – see e.g. Herwig Hofman, 'Composite decision making procedures in EU administrative law' in Herwig Hofman and Alexander Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009) 136 and more recently Andreas Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre* (Mohr Siebeck 2013) 3

⁸⁰ For more details concerning the model of *indirect* application of EU law, see Jürgen Schwarze, *Europäisches Verwaltungsrecht* (2nd ed, C. H. Beck 2005) 25 and Edoardo Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications' in Herwig Hofman and Alexander Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009) 9.

While in the first scheme the national administrative authorities are applying EU law in an isolated way, in other words without any interaction between the competent administrative authorities of the Member States, the three other schemes are based on certain forms of transboundary effects of administrative measures, issued by the administrative authorities of one Member State (i.e. home state) in the administrative law of another Member States (i.e. host state).⁸¹

The effect of the trans-territorial scheme on domestic administrative law has attracted serious academic attention so far as, under this scheme, a classical concept of recognition of a foreign administrative act *ex lege* was reinvented and implanted into the numerous sources of EU law.⁸² In the trans-territorial scheme, the legal effects of a foreign administrative act arise directly as a result of domestic administrative law and, consequently, no additional act of recognition is required. This concept was also known in the past from certain international agreements that provided for an obligation of mutual recognition of certain foreign acts (such as driving licences, *laissez-passer* for a corpse etc.).⁸³ Its multiplication under EU law enables its further appraisal from the viewpoint of international administrative law.

⁸¹ For a detailed review of the four schemes of indirect administration, see Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004) 122.

⁸² See Matthias Ruffert, 'Der transnationale Verwaltungsakt' (2001) 7 *Die Verwaltung* 453, Henrik Wenander, 'Recognition of Foreign Administrative Decisions' (2011) 71 *Heidelberg Journal of International Law* 755, Luca De Lucia, 'Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts' (2012) 6 *Review of European Administrative Law* 17, Herwig Hofmann, 'Dealing with Trans-Territorial Executive Rule Making' (2013) *Missouri Law Review* 423, Marie Gautier, 'Acte administratif transnational' in Jean-Bernard Auby and Dutheil de la Rechère (eds), *Traité de droit administrative européen* (2nd ed, Larcier 2014) 1303. For a recent evaluation of the trans-territorial scheme see Luca De Lucia, 'From Mutual Recognition to EU Authorisation: A Decline of Transnational Administrative Acts?' (2016) 8 *Italian Journal of Public Law* 90.

⁸³ E.g. the Convention with Respect to the International Circulation of Motor Vehicles of 1909, the International Convention Relating to Vehicular Traffic of 1926, International Convention on the Transport of Corpses of 1937, the Vienna Convention on Road Traffic of 1968, the Agreement on the Transfer of Corpses of 1973 etc.

It is a fact that while legal scholarship has already paid considerable attention to the newly emerged trans-territorial scheme, the relevance of this scheme for the area of international administrative law of the concerned Member States has so far not attracted much attention.⁸⁴ The trans-territorial scheme is being realised mostly by the directives providing that certain administrative acts, as issued by a competent administrative authority of the home state, must be *ex lege* recognised by other Member States (host states).⁸⁵ Currently, this is the case for authorisations relating to undertakings of collective investment in transferable securities as well as authorisations for pursuing investment services, insurance services, management of alternative investment funds, the activity of credit institutions and so on.⁸⁶ Driving licences and boat-masters' certificates for the carriage of goods and passengers by inland waterways also belong to this scheme.⁸⁷

Here, the recognition of the act is being realised by a special norm of the corresponding domestic legislation of the host Member State. This norm

⁸⁴ See overview of literature in fn 82.

⁸⁵ See Volker Neßler, *Europäisches Richtlinienrecht wandelt deutsches Verwaltungsrecht* (Verlag Köster 1994) 863 (here, the author argues that the trans-territorial scheme is in principle based on directives).

⁸⁶ See Directive 2009/65/EC, Art. 5.1. ('No UCITS (undertakings for collective investment in transferable securities) shall pursue activities as such unless it has been authorised in accordance with this Directive. Such authorisation shall be valid for all Member States'), Directive 2014/65/EU, Art. 6.3. ('The authorisation shall be valid for the entire Union and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Union, either through the right of establishment, including through a branch, or through the freedom to provide services'), Directive 2009/138/EC, Art. 15.1. ('An authorisation pursuant to Article 14 shall be valid for the entire Community. It shall permit insurance and reinsurance undertakings to pursue business there, that authorisation covering also the right of establishment and the freedom to provide services'), Directive 2011/61/EU, Art. 8.1. ('Authorisation shall be valid for all Member States'), Directive 2013/36/EU, Art. 17 ('Host Member States shall not require authorisation or endowment capital for branches of credit institutions authorised in other Member States').

⁸⁷ See Directive 2006/126/EC, Art. 2.1. ('Driving licences issued by Member States shall be mutually recognised'), Directive 96/50/EC, Art. 1.4 ('The Group A or Group B certificate issued by Member States in conformity with this Directive shall be valid for all Group A or Group B waterways in the Community').

provides for legal effects of the foreign act in the sphere of the domestic administrative law. The norms of domestic administrative law of the home Member State are, in principle, unable to provide any legal effects in the legal sphere of the host Member State. Therefore, it is, in principle, the norm of the host Member State that provides for legal effects of the foreign acts and thus limits the application of its own domestic administrative law. Consequently, if analysing the trans-territorial scheme from the perspective of international administrative law of a Member State, one can see that it is in fact based on a robust body of delimiting norms. While in the past delimiting norms were frequently the product of reception of certain obligations arising from international agreements, the delimiting norms discussed in this section are the product of implementation of the respective directives.

The use of delimiting norms under the trans-territorial scheme goes far beyond the recognition of foreign administrative acts, as outlined above. The trans-territorial scheme triggers a need to guarantee administrative surveillance *vis-à-vis* the addressee of the foreign administrative act, who is conducting activities in the territory of the host state. In essence, two different approaches have emerged towards addressing this goal.⁸⁸ In the decentralised model, it is exclusively the host state that pursues competencies in its territory. In contrast, there is the competitive model in which these competencies are executed exclusively by the home state. This model reflects the fact that, even after the enlargement of its legal effects, the act concerned remains governed by the law of the home Member State. Consequently, it is the administrative authority of the home Member State that is in the best position to evaluate to what extent the addressee complies with its arising obligations.

While some directives have opted for introducing the competitive model, other provide for a mixture of both models.⁸⁹ In this regard, any case of execution of competencies of the authority of the home Member State in the

⁸⁸ See Kenneth Armstrong, 'Mutual Recognition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2002) 225.

⁸⁹ See Directive 2009/65/EC, Art. 19.2. ('The competent authorities of the management company's home Member State shall be responsible for supervising compliance with paragraph 1'.)

legal sphere of the host Member State requires a corresponding delimiting norm being provided for in the domestic administrative law of the latter. Such norms limit the application of domestic administrative law (i.e. competence of the competent administrative authority of the host Member State) and enables the effects of a foreign administrative measure.

Furthermore, the trans-territorial scheme is also being realised in the form of regulations. At present, this is for example the case for authorisations of the export of dual-use items, including the export of cultural goods and decisions by customs authorities.⁹⁰ Here, the norms providing for enlargement of the effects of the foreign act into the sphere of the domestic administrative law are provided directly by the corresponding regulation, without it being necessary to implement them further.

While the two remaining schemes of indirect administration do not constitute any direct effects of foreign acts in the host states, they also provide that foreign acts do have certain consequences in other Member States. Also here, one may argue that such consequences are to be identified solely based on delimiting norms, which are provided by the international administrative law of the host states. Under the co-ordinated scheme, the administrative authorities of the concerned Member States are required to conduct administrative proceedings in mutual coordination. This means, for example, that an administrative proceeding in France must be coordinated with a parallel proceeding being conducted in Spain. Consequently, the competent French and Spanish authorities are under this scheme obliged to issue decisions based on mutual coordination. Such decisions have effect exclusively in the concerned Member State, although it is substantially linked to the corresponding decision of the other Member State. Coordinated decisions that are to be issued by competent regulatory authorities

⁹⁰ See Regulation (EC) 428/2009, Art. 9.2. ('All the authorisations shall be valid throughout the Community'), Regulation (EC) 116/2009, Art. 2.3. ('The export licence shall be valid throughout the Community'), Regulation (EU) 952/2013, Art. 26 ('Except where the effect of a decision is limited to one or several Member States, decisions relating to the application of the customs legislation shall be valid throughout the customs territory of the Union').

concerning projects of common interest are a good example.⁹¹ Also here, the link to the foreign act must be provided by a corresponding delimiting norm.

Lastly, the reference scheme is realised in a similar fashion, where a corresponding delimiting norm provides for an obligation on the part of the concerned host state to recognise a foreign act.⁹² This is realised by the administrative act, issued by the competent authority of the host state, when specific requirements are met.

2. *An Attempt at Classification*

In the previous part, this article argued that the norms providing for effects of foreign acts under the various schemes of the 'union of composite administration' fell under the category of the 'delimiting norms', as understood in the classical scholarship of international administrative law. From the viewpoint of the EU Member States, these delimiting norms represent an integral part of their domestic administrative law and, importantly, they belong to the discipline of international administrative law. At the same time, the increasing number of cases in which the sources of EU law provide for legal effects of foreign acts opens the door for a more comprehensive academic classification of these delimiting norms.

The starting point of this endeavour will be the fact that German scholarship already paid serious attention to the nature of effects arising by various schemes of indirect administration. In this regard, Eberhardt Schmidt-Aßmann has argued for distinguishing those legal effects as either *genuine* or *mediated*, a classification later accepted by other scholars.⁹³ Building on the results presented by early German scholarship, this article will present an

⁹¹ See Regulation (EU) 347/2013, Art. 12.4 ('the national regulatory authorities shall, after consulting the project promoters concerned, take coordinated decisions on the allocation of investment costs').

⁹² See Directive 2001/82/EC, Art. 22 (within 90 days of receipt of the assessment report, the host Member State shall either recognise the decision of the home Member State and the summary of the product characteristics as approved by it or, if it considers that there are grounds for supposing that the authorization of the veterinary medicinal product concerned may present a risk to human or animal health or the environment, it shall apply the procedures set out in Articles 33 to 38).

⁹³ See Schmidt-Aßmann (n 74) 270; for further reception of this classification see Sydow (n 81) 146 and Ruffert (n 74) 478.

attempt at classification of delimiting norms, which exist in the international administrative law of Member States as a result of the 'union of composite administration'. The classification stands as follows.

On the one hand, we can argue for the existence of *mediated* delimiting norms existing in the statutory laws as a result of the implementation of a directive.⁹⁴ The aim of these delimiting norms is to *limit* the application of the domestic administrative law in certain administrative relations and to *allow* the effects of a foreign administrative act in the host Member State. For example, Directive 2011/61/EU provides in its Article 8.1. that an authorisation for management of alternative investment funds, issued by a competent authority of one Member State, shall be valid for all other Member States. In order to implement this requirement for mutual recognition, the corresponding statutory law of the Member State must introduce a delimiting norm, providing for effects of those authorisations, issued abroad in other Member States. Being the result of implementation of a directive, this delimiting norm may be labelled as a *mediated* one.

Table 1. Function of a mediated delimiting norm under the 'union of composite administration'

Legal framework of Member State "a"			Legal framework of Member State "b"		
<i>Authorisation, issued by the competent authority of Member State "a"</i>	→	→	<i>mediated delimiting norm, provided by the statutory law of Member State "b"</i>	→	<i>effects of the authorisation in the legal framework of Member State "b"</i>
			<i>implementation into the statutory law of Member State "b"</i>		

⁹⁴ See Gerontas (n 78) 452.

		<i>delimiting norm in an EU directive, providing effects of the authorisation, issued by a competent authority of the Member State</i>		
		<i>implementation into the statutory law of Member State "a"</i>		
<i>effects of the authorisation in the legal framework of Member State "a"</i>	←	<i>mediated delimiting norm, provided by the statutory law of Member State "a"</i>	←	<i>Authorisation, issued by the competent authority of Member State "b"</i>
Legal framework of the Member State "a"			Legal framework of the Member State "b"	

When compared to the classical concept of delimiting norms, as understood by Neumeyer, these *mediated* delimiting norms demonstrate certain peculiarities. As outlined above, the classical understanding of delimiting norms was characterised by the feature of 'unilaterality'. In fact, this feature is being modified to a certain degree when analysing mediated delimiting norms resulting from directives. We can find a touch of unilaterality here, as the delimiting norm of the home state is *incapable* by itself of causing any consequences in the host state. The effects of the foreign act will be, in principle, exclusively the result of the delimiting norm, provided for in the statutory law of the host state.⁹⁵ At the same time, the feature of 'unilaterality' is blurred here by the fact that scholars have also acknowledged arising effects of foreign acts in those cases where a directive has been implemented *incorrectly* or not been *implemented* at all.⁹⁶ Such considerations would imply the argument that delimiting norms are contained directly in the directives, rather than in the implementing statutory laws.

⁹⁵ See Sydow (n 81) 150.

⁹⁶ See Neßler (n 85) 863.

In addition to such *mediated* delimiting norms, however, this article argues for the existence of *genuine* delimiting norms. These are provided by directly applicable regulations.⁹⁷ Such delimiting norms have the same purpose as the *mediated* ones: they limit the application of domestic administrative law and provide for legal effects of certain foreign administrative act. As a regulation is to be considered an integral part of the legal framework of each Member State, one may argue that the feature of unilaterality is also given here. With respect to the *genuine* delimiting norms, a dispute arose whether they can be provided indirectly, without any explicit reference to the provision of written law.⁹⁸ While several contemporary authors have argued against such a possibility, we must bear in mind that Neumeyer argued in favour of such *implicit* delimiting norms, if the *aim of the respective provision* is followed.⁹⁹ Consequently, this case triggers the point that theoretical concepts developed by the classical scholarship of international administrative law is also applicable to the current situation.

3. *EU International Administrative Law: a 'Delimiting Law' Reinvented*

In the past, delimiting norms were frequently the reflection of certain obligations, arising from international agreements. However, the existence of delimiting norms in a state's international administrative law is not necessarily the product of a new international agreement. In many cases, delimiting norms are provided by the national law-maker in order to reflect a frequent appearance of 'foreign elements' in certain administrative relations, without being based on reciprocity.

The multiplication of administrative relations that falls under various schemes of indirect administration under the umbrella of the 'union of

⁹⁷ See Gerontas (n 78) 454.

⁹⁸ This was the case of the Regulation 258/97, which provided in its Art. 4.2. that 'following the procedure referred (...), the Member State referred to in paragraph 1 shall inform the applicant without delay that he may place the food or food ingredient on the market (...)'. In this concern, a question arose, whether such information had legal effects for the whole market (i.e. also territory of the other Member States), or was limited to the territorial jurisdiction of the concerned administrative authority.

⁹⁹ For arguments against, see Sydow (n 81) 145 and Gerontas (n 78) 454. For argumentation of Neumeyer, see Neumeyer (n 21) 19.

composite administration' has implied an increasing number of norms, enabling certain consequences of foreign acts in the administrative law of Member States. As outlined above, such norms represent an integral part of domestic administrative law and, reflecting their characteristic features, they belong to the family of delimiting norms.¹⁰⁰ Thus, this article argues that this group of norms represents a newly emerging part of the international administrative law of each of the Member States.

Figure 2. Mutual relations between administrative law, international administrative law and the EU international administrative law



From the viewpoint of the Member States, the delimiting norms arising from either directives or regulations represent an integral part of their domestic administrative law. This viewpoint, outlined in the figure above, does follow the very traditional approach to international administrative law as a national project of a sovereign state. Under this approach, we can barely speak about any regional, or universal international administrative law, but there are numerous frameworks existing in each of the different states.¹⁰¹ While

¹⁰⁰ See also Matthias Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts' in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht* (Mohr Siebeck 2007) 395.

¹⁰¹ See Jakub Handrlica, 'A Treatise for International Administrative Law' (2020) 10 *Lawyer Quarterly* 283.

certain international agreements do provide for some obligations, which have been reflected in the form in delimiting norms, such agreements basically fail to constitute any coherent structure, as they follow a myriad of forms and approaches.¹⁰²

However, the existence of relatively coherent schemes under the 'union of composite administration' opens the door for approaching this issue also from the viewpoint of EU administrative law. Recently (and obviously inspired by the German model of the 'Special part of administrative law'¹⁰³), attempts were made by several scholars to analyse various substantive areas of the EU administrative law.¹⁰⁴ The existence of a coherent set of delimiting norms, being provided for under the three schemes of indirect administration, enables one to argue that these norms represent a distinct EU international administrative law. The term *international* does not here refer to any source of international public law, but to the fact that the delimiting norms address the occurrence of 'foreign elements' in the relations of administrative law of the concerned Member States.¹⁰⁵

¹⁰² See Wenander (n 82) 768.

¹⁰³ See e.g. Udo Steiner and Ralf Brinktrine (eds.), *Besonderes Verwaltungsrecht* (9th ed., C. F. Müller 2018), Friedrich Schoch, *Besonderes Verwaltungsrecht* (C. H. Beck 2018), Irmgard Rath-Kathrein and Karl Weber (eds.), *Besonderes Verwaltungsrecht* (11th ed., Studia Universitätsverlag 2018).

¹⁰⁴ Special part of administrative law (*Besonderes Verwaltungsrecht*) is dealing with various substantive parts. It regularly accompanies the general part (*Allgemeines Verwaltungsrecht*). For most recent attempt to address the issue of the Special part of the EU administrative law, see Herwig C. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Specialised Administrative Law of the European Union* (Oxford University Press 2018).

¹⁰⁵ See Jakub Handrlica, 'Qualification Problem in Administrative Law' (2020) 28 *Casopis pro pravni vedu a praxi* 457.

Figure 3. Mutual relations between EU international administrative law and substantive parts of EU administrative law



When approaching the issue of international administrative law from the viewpoint of EU administrative law, this article argues that EU international administrative law does not cover any comprehensive substantive part of EU administrative law. It rather contains a set of delimiting norms, governing the approach to the occurrence of 'foreign elements' in various areas of administration, for example in the EU traffic law, EU customs law, EU insurance law, EU banking law and so on.

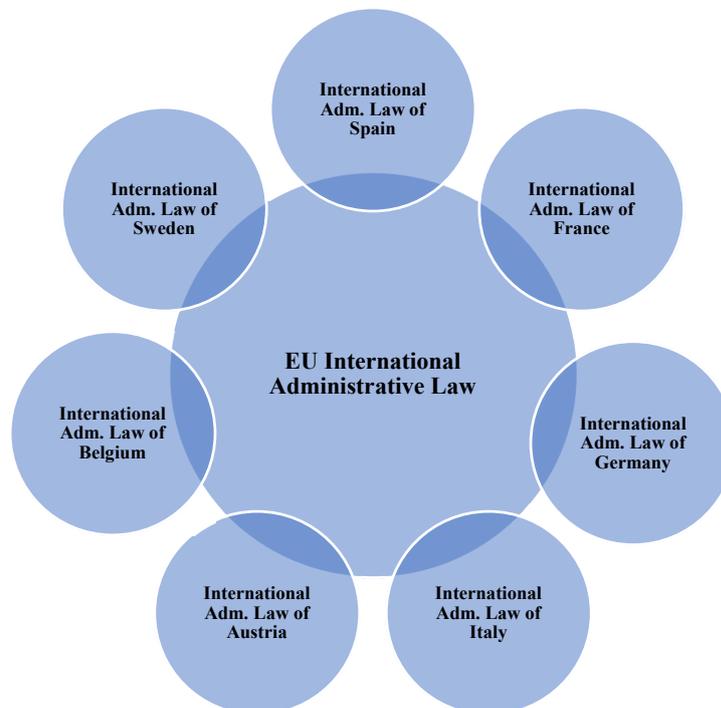
The picture above serves for further clarification of this concept. From this viewpoint, the concept of EU international administrative law may also be considered as a kind of *juristic delusion*, as argued by Neumeyer in 1913. Thus, one may repeat the concerns of Franz Matscher regarding the existence of international administrative law and argue that EU international administrative law does not cover any coherent area of public administration and, consequently, can only barely represent a realm of its own.¹⁰⁶ However, the existence of a robust structure of *genuine* and *mediated* delimiting norms, aiming at limiting the application of domestic administrative law, can serve

¹⁰⁶ Matscher (n 27) 641.

as a persuasive argument in favour of existence of this particular (sub)discipline of EU administrative law.

Reflecting the existence of various schemes of indirect administration under the 'union of composite administration' and the consequent multiplication of delimiting norms, which facilitate the execution of this type of administration, this article argues that EU international administrative law represents an emerging branch of international administrative law. In contrast to international administrative law in traditional understanding, EU international administrative law is not an isolated product of one particular state, but represents a coherent regional framework. Yet at the same time, EU international administrative law does not at present provide for any uniform legal framework governing administrative relations with a foreign element within the EU. This is due to the fact that, in parallel to the delimiting norms provided by EU law, a number of other delimiting norms do exist in the various national regimes of international administrative law. These mutual relations are outlined in the figure below.

Figure 4. Mutual relations between EU international administrative law and international administrative law of the Member States



V. CONCLUSIONS

Under the classical approach, international administrative law was understood as a special discipline of domestic administrative law, governing administrative relations with certain 'foreign elements'. This approach, developed by Neumeyer, reflected the dual concept of mutual relations between domestic law and international public law.

Consequently, while reflecting the fact that international administrative law can be influenced by international agreements, the classical understanding of the subject was that international administrative law is the *national project* of each individual state. At the same time, international administrative law *has never been understood* as a branch covering a coherent area of substantive administrative law. On the contrary, in similar fashion to international private law, international administrative law has represented *an auxiliary legal vehicle* enabling interfaces of the respective parts of substantive administrative law with foreign elements. This peculiar character of international administrative law and its disintegrated and unharmonized nature has contributed to a certain marginalisation of legal research in this area. Consequently, international administrative law never acquired the recognition and prominence of its more famous legal *doppelgänger* – *international private law*. The fact that even Neumeyer labelled the field of his life-long studies as a *juristic delusion* is quite symptomatic.

Facing a strengthening of horizontal administrative relations under the umbrella of 'the union of composite administration', this article has argued that the classical concept of international administrative law is undergoing a process of gradual transformation and that a new special branch of international administrative branch – EU international administrative law – is emerging. This process can be observed from two different viewpoints. On the one hand, it can be seen from the perspective of the Member States and their own administrative law. On this view, a new set of delimiting norms is appearing in the domestic legal framework as a result of the implementation of those directives, which facilitates the functioning of the 'the union of composite administration'. The delimiting norms of the EU international administrative law here represent an integral part of the domestic international administrative law of each Member State.

The issue can also be approached from a rather different perspective, which is fairly new, stemming from the traditional perception of international administrative law as a national project. Due to the emergence of a comprehensive set of delimiting rules, which are facilitating the indirect administration under 'the union of composite administration', one may argue that EU international administrative law also represents a particular (sub)discipline of EU administrative law. Consequently, this EU international administrative law has a regional character. In similar fashion to the classical understanding of international administrative law, the newly emerging EU international administrative also retains its *delusional* character. Rather than governing a coherent part of public administration, it has the character of a delimiting norm and serves an auxiliary function with respect to other substantive areas of EU administrative law.

THE EXTRATERRITORIAL APPLICABILITY OF THE EU CHARTER OF
FUNDAMENTAL RIGHTS: SOME REFLECTIONS IN THE AFTERMATH OF
THE *FRONT POLISARIO* SAGA

Eva Kassoti* 

The Front Polisario cases before the Court of Justice of the European Union (CJEU) brought to the forefront the question of whether the EU is bound by the Charter of Fundamental Rights when it concludes trade agreements with third states that may affect the enjoyment of fundamental rights abroad. This is closely linked to the broader issue of the extraterritorial application of the Charter. In light of these developments, the article purports to revisit this question with a view to ascertaining the current state of the law. It examines and rejects the argument in favour of transposing the extraterritoriality standard developed by the European Court of Human Rights. Against this backdrop, the article continues by focusing on Article 51 of the Charter, which prescribes the Charter's field of application. The main argument advanced is that territorial considerations are immaterial in the context of determining the Charter's applicability; what seems to matter in this context is whether the situation in question is covered by an European Union (EU) competence.

Keywords: EU Charter of Fundamental Rights, extraterritorial application, European Court of Human Rights, effective control standard, material scope of the Charter, personal scope of the Charter

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I. INTRODUCTION

Is the EU bound by human rights obligations towards individuals outside the territory of its Member States¹ when it concludes trade agreements with third countries? In the literature, the question has been viewed as part of the broader issue of the 'extraterritorial scope'² of the EU Charter of Fundamental Rights³, which, until recently, had received scant scholarly attention.⁴ However, recent developments have rekindled interest in the

¹ For the territory of the Member states to which the EU treaties apply see art 52 TEU and art 355 TFEU. See also Dimitry Kochenov, 'European Union Territory from a Legal Perspective: A Commentary on Art. 52 TEU, 355, 349, and 198-204 TFEU' (2017) University of Groningen Faculty of Law Working Paper 2017-05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956011> accessed 20 January 2020.

² Cedric Ryngaert, 'EU Trade Agreements and Human rights: From Extraterritorial to Territorial Obligations' (2018) 20 *International Community Law Review* 374 at 375. Extraterritorial obligations have been defined as 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'. Clause 8(a) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pir%5BdownloadUid%5D=23_> accessed 20 January 2020.

³ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

⁴ The seminal work on the topic is Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steven Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, (Hart/Beck 2014) 657. See also more generally Lorand Bartels, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071; Enzo Cannizzaro, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 *European Journal of International Law* 1093; Aravind Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2015) 37 *Michigan Journal of International Law* 475. By way of contrast, the question of the EU's complicity in internationally wrongful acts committed by a third state, namely the violation of a number of human rights of individuals located in that third state, through the conclusion of trade agreements with that third state under the law of international responsibility has gained considerable traction over the last few years. See for example: Eva Kassoti, 'The Legality under International Law of the EU's

topic.⁵ More particularly, the judgement of the General Court (GC)⁶, as well as the Opinion of Advocate General Wathelet,⁷ in the context of the *Front Polisario* cases before the CJEU have provided a more solid basis for engagement with the issue of the EU's duty to protect human rights extraterritorially.

The *Front Polisario* cases concerned an action for annulment brought by Front Polisario, the main Saharawi national liberation movement, against the Council decision⁸ adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ('Liberalization Agreement')⁹ in so far as that Agreement extended to the territory of

Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Paper Series 2017/3, <https://www.asser.nl/media/3934/cleer17-3_web.pdf> accessed 20 January 2020; Francois Dubuisson, 'The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements' (2014) <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf> accessed 20 January 2020. For the procedural and evidentiary difficulties of proving complicity in international law, see Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel case' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (Routledge 2012) 315 – 334; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016) 101-103, 218-234.

⁵ Cedric Ryngaert (n 2); Antal Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) 5 *Europe and the World: A Law Review* 1.

⁶ Case T-512/12, *Front Polisario v Council of the European Union* EU:T:2015:953.

⁷ Case C-104/16 P *Council of the European Union v Front Polisario* EU:C:2016:677, Opinion of AG Wathelet.

⁸ Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/2.

⁹ Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization

Western Sahara. According to the applicant the decision breached EU and international law.¹⁰ The General Court (GC) ruled that since the Liberalisation Agreement facilitated the export into the EU of products originating from Western Sahara, the Council should have ensured that the production of the goods in question is not conducted to the detriment of the population of the territory and that it does not entail infringements of fundamental rights.¹¹

It needs to be noted that the GC simply assumed the extraterritorial application of the Charter – namely its application vis-à-vis the peoples of the Western Sahara – without providing more by way of explanation. The GC concluded that the Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the Decision, and thus it annulled the contested Decision insofar as it approved the application of the Liberalisation Agreement to Western Sahara.¹² On appeal, while Advocate General Wathelet agreed that fundamental rights may, in some circumstances, produce extraterritorial effects, he argued that the conditions for the extraterritorial application of the Charter were not fulfilled *in casu*.¹³

The European Court of Justice (ECJ) did not have an opportunity to pronounce on the matter since it concluded, on the basis of relevant international law applicable between the parties (namely the EU and Morocco), that neither the EU-Morocco Association Agreement¹⁴ nor the Liberalization Agreement were intended to cover the territory of Western

measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/4. (Hereinafter referred to as the 'Liberalization Agreement').

¹⁰ *Front Polisario* (n 6) para 117.

¹¹ *Ibid* paras 228, 241.

¹² *Ibid* paras 242-248.

¹³ Opinion of AG Wathelet (n 7) paras 270-272.

¹⁴ Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2. (Hereinafter referred to as the 'Association Agreement').

Sahara, thus quashing the GC's judgment.¹⁵ As such, although the precedential value of the GC's judgment is limited due to the peculiarities of the case, the question of whether the EU is bound by the Charter when it concludes agreements that may affect the enjoyment of fundamental rights of distant strangers still looms large.

The purpose of this article is to revisit the question of the extraterritorial scope of the Charter in light of this new jurisprudential development and to evaluate the current state of the law. There are good reasons to do so. As it will be shown below, the position adopted by Advocate General Wathelet amounts, in essence, to the transposition of the 'jurisdictional clause' of the European Convention of Human Rights into the scheme of the Charter. This contradicts the mainstream view in the literature as propounded in 2014 by Moreno-Lax and Costello, namely that 'EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law'.¹⁶

Although not binding, the Opinion of the Advocate General carries some authoritative weight. For example, Cremona wrote in 2019 that the 'precise degree to which the EU Charter of Fundamental Rights applies in extraterritorial contexts may still be debated'.¹⁷ Here she highlighted the extraterritoriality model put forward by Advocate General Wathelet in *Front Polisario* – while mentioning in a footnote that Moreno-Lax and Costello take a different view.¹⁸ Furthermore, in the context of the *X and X v. Belgium* case, the Belgian government also shared the approach taken by Advocate General Wathelet in *Polisario* with regards to the question of the extraterritorial

¹⁵ Case C-104/16 P *Council of the European Union v Front Polisario* EU:C:2016:973, paras 81-115. For comment see Eva Kassoti, 'The *Council v Front Polisario* Case: The Court of Justice's Selective Reliance on Treaty Interpretation' (2017) 2 *European Papers* 23; Jed Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario). Case C-104/16P' (2017) 111 *American Journal of International Law* 731.

¹⁶ Moreno-Lax and Costello (n 4) 1658.

¹⁷ Marise Cremona, 'Introduction' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 16.

¹⁸ *Ibid* 17 and fn 33.

applicability of the Charter.¹⁹ In this light, the question arises: does the model put forward by Moreno-Lax and Costello still hold persuasive force, or should it be replaced by the model proposed by Advocate General Wathelet?

The need to clearly articulate the position with regards to the issue of the Charter's extraterritoriality is further reinforced by the fact that recent literature on the topic has not engaged with the approach adopted by Advocate General Wathelet *in extenso*. More particularly, commentators have largely ignored the arguments against importing extraneous models to delimit the extraterritorial application of the Charter made by Advocate General Mengozzi in his Opinion in *X and X v. Belgium*.²⁰

This article fills this gap in the literature and identifies the weaknesses of Advocate General Wathelet's approach – thereby proving the continuing relevance of the extraterritoriality model first developed by Moreno-Lax and Costello. By doing so, it also brings together scattered pieces of literature on the Charter's extraterritoriality, thereby providing a reference point which will hopefully assist in moving the debate on the topic forward. Finally, the article links the question of the EU's duty to protect human rights abroad to broader debates regarding the Charter, clarifying that (seemingly) different approaches to the Charter's scope of application (personal versus material) are not inherently incompatible.

II. IMPORTING EXTRANEIOUS MODELS TO DELIMIT THE EXTRATERRITORIAL APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS?

In contrast with some human rights instruments, the Charter does not contain a clause defining its territorial scope. Articles 52 TEU and 355 TFEU are of little avail in establishing the territorial scope of the Charter since they merely define the Member States' territory to which the TEU and the TFEU apply.²¹ In a similar vein, the Charter's applicability has not been conditioned

¹⁹ Case C-638/16 PPU *X and X v Belgium* Case, Opinion of AG Mengozzi, EU:C:2017:173, para 95.

²⁰ Ibid.

²¹ Moreno-Lax and Costello (n 4) 1664. For analysis of arts 52 and 355 TFEU, see Kochenov (n 1).

upon the threshold criterion of jurisdiction.²² In the context of human rights law, it is widely accepted that human rights instruments may impose certain obligations upon state parties to protect individuals outside their territory and that the concept of "jurisdiction" is central to this matter.²³ Jurisdiction in the context of human rights law should be distinguished from the homonymous concept under general international law.²⁴ As Besson explains, public international law jurisdiction is about '*the competence* of each State to prescribe, enforce and adjudicate, primarily on its territory, but also in exceptional cases outside the latter',²⁵ whereas international human rights law jurisdiction is '*a threshold criterion* for the application of human rights, i.e. state jurisdiction qua relationship between a certain state party and certain

²² See for example art 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'): 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 January 2020. Art 2 of the International Covenant on Civil and Political Rights ('ICCPR'): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...' International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 20 January 2020. See also generally Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed, Oxford University Press 2015) 22-26.

²³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 2004, para 112. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 2005, para 217. See also Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' (2018) 31 *Leiden Journal of International Law* 315 at 316.

²⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 21-41.

²⁵ 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 at 869. (Emphasis added). Also sharing the view that jurisdiction under public international law and jurisdiction in human rights law are different concepts, Milanovic (n 24) 21-41. Ryngaert (n 22) 22-26.

individuals'.²⁶ In other words, jurisdiction in the context of human rights treaties is a tool defining the scope of such treaties²⁷, namely a threshold criterion that needs to be met by a state in relation to an individual in order for human rights obligations to arise.²⁸ For example, the term 'jurisdiction' in Article 1 ECHR – which makes the application of the rights under the Convention dependent upon the jurisdiction of the state parties – has been interpreted by the European Court of Human Rights (ECtHR) as meaning the exercise of some factual power, authority or control over territory or people.²⁹ The different meaning of "jurisdiction" under public international

²⁶ Besson (n 25) 59. (Emphasis added). See also *Lopez Burgos v Uruguay*, Communication No 52/1979 (views of 29 July 1981) UN Doc CCPR/C/13/D/52/1979, para 12.2: 'The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" [...] is not to the place where the violation occurred, but rather to the relationship between the individuals and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.

²⁷ Maarten Den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford, Wouter Vandenhoe, Martin Scheinin, and Willem Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 158-162.

²⁸ *Lopez Burgos v Uruguay* (n 26) paras 12.2, 12.3; Milanovic (n 24) 19. See also Besson (n 25) 863 - describing jurisdiction in human rights law as a 'normative trigger of human rights'.

²⁹ See for example *Loizidou v Turkey* (1995) 20 EHRR 99, para 62; *Bankovic v Belgium* (2001) 44 EHRR SE5, para 71; *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18, paras 138-150; *Ocalan v Turkey* (2005) App no 46221/99 (ECtHR, 12 May 2005), para 91; *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, paras 77-86; *Hirsi Jamaa and Others v Italy* (2012) App No 27765 (ECtHR, 23 February 2012), paras 70-75. See also Vassilis P 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 at 141-142. See also Milanovic (n 24) 41; Besson (n 25) 872-874; Den Heijer and Lawson (n 27) 165 *et seq.* See also the concurring opinion of Judge Loucaides in *Assanidze v Georgia* (2004) 39 EHRR 32/653: 'To my mind "jurisdiction" means *actual authority*, that is to say the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Parties or outside that territory [...] The test should always be whether the person who claims to be within the "jurisdiction" of a High Contracting Party, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned'. (Emphasis added).

law on the one hand and under human rights law on the other reflects the idea that there is (and that there should be) a distinction between the *entitlement* to exercise power, authority or control over people or territory and the *facticity* of exercising actual power, authority or control over people or territory, as a trigger of duty towards individuals.³⁰ As Den Heijer and Lawson highlight:

In situations where States act beyond their [public international law] 'jurisdiction', the personal scope of human rights protection is therefore not a question of *legitimacy* but of *fact*. It is not relevant whether a State has a legal title to act, but it is relevant whether the link between the individual affected and the State is sufficiently close as to oblige the State to secure that individual's right.³¹

As mentioned earlier, the lack of a jurisdictional clause in the Charter has led Moreno-Lax and Costello to argue that it reflects 'an assumption that EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law'.³² However, this view has not gone unchallenged. Others have argued that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights of the ECHR, provided for under Article 52(3) of the Charter³³, allows the transposition of the jurisdictional clause of Article 1 ECHR to the fundamental rights regime of the Charter. This is the approach followed by Advocate General Wathelet in his Opinion in the *Front Polisario* case before the ECJ.³⁴ The Advocate

³⁰ Raible (n 23) 324; Den Heijer and Lawson (n 27) 64-165.

³¹ Den Heijer and Lawson, *ibid.* See also Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 76.

³² Moreno-Lax and Costello (n 4) 1658.

³³ Art 52(3) of the Charter stipulates that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

³⁴ Opinion of Advocate General Wathelet in case C-104/16 P (n 7). See also Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, 'Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies: Frontex, Europol and the European asylum Support Office, report

General applied by analogy the ECtHR's effective control standard and concluded that the Charter would apply 'where an activity is governed by EU law *and* carried out under the effective control of the EU and/or its Member States but outside their territory'.³⁵

There are many reasons militating against the "importation" of the effective control standard developed by the ECtHR. As Ryngaert observes, the development of this particular extraterritoriality standard by the ECtHR has been to a large degree influenced by the type of cases that have come before the court in question, namely extraterritorial military operations conducted by ECHR contracting parties.³⁶ Such cases typically involve state conduct outside its territory and, as such, the development of the effective control standard in order to determine the reach of the Convention is arguably logical in this particular context. However, as Ryngaert stresses, 'normally the EU will not engage in such extraterritorial *conduct*, but rather take decisions that may have extraterritorial *effects*'.³⁷ The factual scenario of the *Front Polisario* case, involving the conclusion of a trade agreement with a third state that might have affected the enjoyment of fundamental rights by individuals in that third state, attests to the inappropriateness of extrapolating from this strand of ECtHR case law.

In this context, it would seem more apt to derive guidance from the ECtHR's case law involving measures with extraterritorial effect, rather than focusing on the Court's jurisprudence involving extraterritorial conduct. However, as

requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs' (2011) European Parliament Directorate General for Internal Policies Policy Study pp 48-50 <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET\(2011\)453196](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET(2011)453196)> accessed 20 January 2020.

³⁵ Opinion of Advocate General Wathelet in case C-104/16 P (n 7) para 270 and fn 24 citing relevant ECtHR case-law regarding the extraterritorial application of the ECHR. (Emphasis added).

³⁶ Ryngaert (n 2) 382. Milanovic (n 24) 118-127. For an overview of the relevant case-law see the fact-sheet of the ECtHR on 'Extraterritorial Jurisdiction of States Parties to the European Convention on Human Rights' (ECtHR, July 2018) <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf> accessed 20 January 2020.

³⁷ Ryngaert (n 2).

Bartels notes, while there is a plethora of judgments regarding the application of the ECHR to extraterritorial conduct, cases regarding its application to measures with extraterritorial effects are not only few and far between but also contradictory.³⁸ The examples furnished by Bartels highlight this point. In *Kovačić*, the ECtHR acknowledged the principle that when 'acts of the [state's] authorities continue to produce effects, albeit outside [that state's] territory, [...] such that [state's] responsibility under the Convention could be engaged'.³⁹

Conversely, in *Ben El Mahi*, the Court found inadmissible an application against Denmark for permitting the publication of allegedly offensive caricatures of the Prophet Muhammad since there was no jurisdictional link between the applicants – a Moroccan national resident in Morocco and two Moroccan associations based and operating in Morocco – and Denmark.⁴⁰ Thus, according to the Court in *Ben El Mahi*, persons affected by a measure adopted by a contracting party are not considered as falling within its jurisdiction. This, however, is a proposition that is hard to reconcile with the principle established in *Kovačić*.⁴¹ Overall, the ECtHR has generated some inconsistent case-law on extraterritoriality and it may, in practice, be of little guidance in ascertaining the outer boundaries of extraterritorial jurisdiction.⁴² As Lord Rodger succinctly put it in *Al-Skeini v. Secretary of State for Defence*:

What is meant by "within their jurisdiction" in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights [...] The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present

³⁸ Bartels (n 4) 1077.

³⁹ *Kovačić and Others v Slovenia* App Nos 44574/98, 45133/98, 48316/99, (ECtHR, Decision on Admissibility, 09 October 2003 and 1 April 2004) 55.

⁴⁰ *Ben El Mahi and Others v Denmark* App No 5853/06 (ECtHR, 11 December 2006).

⁴¹ Bartels (n 4) 1077.

⁴² See in general Marco Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121.

considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.⁴³

There are further reasons to reject the transposition of the extraterritoriality standard developed by the ECtHR, especially as there is no textual support for this argument. Article 51 of the Charter, which expressly purports to prescribe its field of application, makes no reference to territory or jurisdiction as a threshold criterion for the applicability of the Charter.⁴⁴ More particularly, nothing in the Charter itself (or in the Explanations thereto) justifies the imposition of a superadded jurisdictional condition to its applicability.

One could argue that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights under the ECHR, provided for under Article 52(3) of the Charter, entails that the limitations to ECHR rights (*in concreto* the jurisdictional limit of Article 1 ECHR) should also apply to the Charter as a whole. This was the position adopted by the Belgian government in the *X and X v. Belgium* case.⁴⁵ However, as the Opinion of Advocate General Mengozzi in the same case stresses, this view is erroneous on a number of grounds. In particular, this position conflates the question of *applicability* of the Charter⁴⁶ (namely, its field of application as provided for under Article 51 of the Charter) with that of the *scope and content*

⁴³ Lord Rodger's judgment in *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL26, paras 65 and 67.

⁴⁴ Art 51 of the Charter reads: '1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify the powers and tasks as defined in the Treaties'. See also the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 32.

⁴⁵ Case C-638/16 PPU *X and X v Belgium* EU:C:2017:173, see also the Opinion of AG Mengozzi (n 19) para 95.

⁴⁶ See the text of art 51 Charter and the Explanations thereto.

of the obligations enshrined therein⁴⁷ (namely, the scope and interpretation of the Charter rights as provided for under Article 52 of the Charter).⁴⁸

Simply put, Article 52(3) of the Charter merely enshrines the rule that 'the law of the ECHR prevails where it guarantees protection of the fundamental rights at a higher level'.⁴⁹ As the text of Article 52 and the Explanations thereto make clear, the rights of the ECHR and the pertinent case law of the ECtHR are relevant in the context of interpretation of the Charter rights to the extent that the Charter provisions *correspond* to those of the ECHR.⁵⁰ *A contrario*, in so far as the Charter does not correspond to the ECHR – and Article 51 which pertains to the Charter's field of application certainly does not – no equivalence between the two instruments is envisaged.

Furthermore, Article 52(3) of the Charter specifies that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights of the ECHR 'shall not prevent Union law from providing more extensive protection'. As the Explanations to Article 52 of the Charter make clear, this caveat against a "lock, stock and barrel" transposition of the meaning and scope of ECHR rights is an expression of the autonomy of the EU legal order which allows for divergences from the ECHR, provided that the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.⁵¹ If one accepts that the "scope and meaning" of the rights enshrined in the Charter (Article 52(3) of the Charter) also encompasses the jurisdictional limit of Article 1 ECHR, this would mean that the EU is required to apply to Charter rights *the exact same limitations* as those accepted in the scheme of the ECHR.⁵² This reading of Article 52(3) of the Charter would not only render the explicit reference to the Union's ability to guarantee more extensive protection redundant,⁵³ but it would also

⁴⁷ See the text of art 52 Charter and the Explanations thereto.

⁴⁸ Opinion of AG Mengozzi (n 19) para 101.

⁴⁹ Ibid para 98.

⁵⁰ See art 52(3) of the Charter of Fundamental Rights [2012] OJ C 326/391, see also Explanations to the Charter (n 44) 33.

⁵¹ Ibid.

⁵² Opinion of AG Mengozzi (n 19) para 99.

⁵³ Ibid.

undermine the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.⁵⁴

III. THE EXTRATERRITORIAL SCOPE OF THE CHARTER: PERSONAL OR MATERIAL SCOPE?

As seen earlier, in lieu of a jurisdictional clause, the Charter only contains a provision stipulating its field of application. Article 51(1) of the Charter specifies that the provisions of the Charter 'are addressed to the institutions of the Union [...] and to the Member States only when they are implementing Union law'.⁵⁵ The wording of Article 51(1) of the Charter suggests that the application of the Charter has been defined exclusively *rationae materiae*.⁵⁶ Since the Charter applies to acts of the institutions of the Union and to national acts implementing EU law,⁵⁷ the crux of the matter is whether a situation is covered by an EU competence.⁵⁸

⁵⁴ Vivian Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019) 31; Moreno-Lax and Costello (n 4) 1660, 1682.

⁵⁵ In the Explanations to the Charter it is also stressed that art 51 of the Charter 'seeks to clearly establish that the Charter applies primarily to the institutions and bodies of the Union', whereas Member States are only bound by the Charter 'when they act in the scope of Union law'. Explanations to the Charter (n 44) 32. For commentary on art 51, see Angela Ward, 'Article 51—Scope', in Steven Peers et al. (eds) (n 4) 1413-1454.

⁵⁶ Thomas Van Danwitz and Katherina Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2017) 35 *Fordham International Law Journal* 1396 at 1399. According to Tridimas: 'The Charter does not apply unless a situation is governed by Union law by virtue of a connecting factor other than the Charter [...] Nonetheless, within the ambit of EU law, there is no limitation *rationae materiae* in the scope of application of the Charter'. Takis Tridimas, 'Fundamental Rights, General Principles of EU law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361 at 381.

⁵⁷ On what constitutes 'implementation of Union law' by the Member States, see generally Benedikt Pirker, 'Mapping the Scope of Application of EU Fundamental Rights: A Typology' (2018) 3 *European Papers* 133.

⁵⁸ Kube (n 54) 34.

It has been suggested that Article 51(1) of the Charter 'implies that the institutions, bodies, offices and agencies of the EU are bound by the Charter as such, namely when they act *in the capacity as an EU institution, body, office or agency*'.⁵⁹ This argument appears to assume that the scope of application of the Charter is personal rather than material; the determinant factor being whether an act has been issued by an EU institution. Proponents of this view have derived support for this argument from the Court's case law concerning EU law obligations applicable to "borrowed" EU institutions under the European Stability Mechanism (ESM) Framework.⁶⁰ It is beyond the ambit of the article to examine this argument *in extenso*, especially since it is based on a particular line of case law, namely cases regarding the application of the Charter to EU action undertaken under parallel international agreements concluded by Member States in the field of economic and monetary affairs. However, a few general remarks regarding this view are called for at this juncture. This is especially the case since recent works on the scope of application of Article 51(1) of the Charter simply ignore or paper over the existence of these two (seemingly) different approaches.⁶¹

⁵⁹ Sandra Hummelbrunner, 'Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad' (2019) CLEER Paper Series 19/02, 23 <https://www.asser.nl/media/679407/cleer_19-02_web.pdf> accessed 20 January 2020. (Emphasis in the original). See also Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 EU Constitutional Law Review 37 at 52-53.

⁶⁰ Peers (n 59) 52. Hummelbrunner (n 59) 22-24. See the Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, The Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland ('ESM Treaty') (adopted 02 February 2012, entered into force 27 September 2012) <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf> accessed 20 January 2020.

⁶¹ For instance, Kube seems to oscillate between these approaches. On the one hand, she accepts that 'Article 51(1) of the Charter links the application solely to the *addresses of the obligations* [...] For EU organs [...] this provision essentially means that *they are always bound to the Charter* since they are themselves a creation of EU law'. Kube (n 54) 30 (emphasis added). This extract strongly suggests that the

Indeed, in *Ledra Advertising*, both the Advocate General and the Court argued that the Charter is binding on EU institutions irrespective of whether they act inside or outside the EU legal framework.⁶² Upon closer inspection however, this view is not at odds with the one put forward here. The argument to the effect that the scope of the Charter appears to be a personal one (when it comes to acts of the EU institutions) is premised on the exercise of a competence by an EU institution. In the great majority of cases, competences are conferred on EU institutions on the basis of EU law and, in some cases, on the basis of international law instruments concluded by the Member States. These are, however, closely intertwined with EU law - *in casu* the ESM treaty. As Tridimas notes:

The ESM treaty is intended to supplement the EU framework and promote the objectives of economic union and safeguard the financial stability of the euro area. Both in terms of its substantive objectives and its institutional support, it is not self-standing but operates as a satellite treaty which falls within the broader project of European integration.⁶³

Thus, while the ESM treaty is an international agreement, its functioning is closely linked to EU law. The treaty's link with EU law has been further strengthened following the adoption of Regulation 472/2013 which provides a significant role for the Commission in the monitoring of the Member States to which financial assistance has been granted in the context of the ESM treaty.⁶⁴ By ensuring compliance with the conditionalities contained in the

author assumes that the scope of the Charter is personal rather than material. On the other hand, at other points in the same chapter, Kube argues that the criterion regarding the application of the Charter 'is not whether a situation is located inside EU territory but only whether it is covered by *the competence of the EU*' – something that implies a competence-based reading of the scope of the Charter (namely, the application of a material criterion). *Ibid* 34 (emphasis added).

⁶² Joined Cases C-8/15 P, C-9/15P and C-10/15P *Ledra Advertising Ltd et al v European Commission and European Central Bank* EU:C:2016:701, para 67; Joined cases C-8/15 P, C-9/15P and C-10/15P *Ledra Advertising Ltd et al v European Commission and European Central Bank*, EU:C:2016:701, Opinion of AG Wahl, para 85. See also Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* EU:C:2012:675, Opinion of AG Kokott, para 176.

⁶³ Tridimas (n 56) 388-389.

⁶⁴ See art 7 of Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of

macroeconomic adjustment programme as provided by Article 7 of Regulation 472/2013, the Commission acts, in essence, both under an EU law instrument and under the ESM treaty.⁶⁵

Thus, it seems that, in all cases, the determinant factor in establishing the applicability of the Charter remains in essence a material one; once there is EU action – in the exercise of competences conferred on EU institutions either on the basis of EU law or on the basis of a mandate lawfully granted to them by the Member States – the Charter applies. This proposition is further supported by the text of the *Ledra* judgment itself. In *Ledra*, the obligation of the Commission to comply with the Charter in the design and implementation of Memoranda of Understanding concluded with Member States seeking support from the ESM was justified by the Court with reference to the fact that

the Commission [...] retains, within the framework of the ESM treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.⁶⁶

The relevance of a competence-based reading of the Charter's scope of application was also highlighted by Advocate General Bot in Opinion 1/17. According to the Advocate General,

it is necessary to clarify that it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part. The European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their

Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

⁶⁵ For criticism of the Court's failure to take into account Reg. 472/2013 which added an important EU component to the ESM framework of granting financial assistance in the context of the *Ledra* judgment, see Anastasia Poulou, 'The Liability of the EU in the ESM Framework' (2017) 24 *Maastricht Journal of European and Comparative Law* 127 at 134.

⁶⁶ Joined Cases C-8/15 P, C-9/15P and C-10/15P (n 62) para 59.

compatibility with, in particular, the Treaties, general principles of law and fundamental rights.⁶⁷

Finally, taking into account that the scope of application of the Charter is strictly circumscribed by the competences which the Treaties have conferred on the EU, the proposition to the effect that the scope of application of the Charter is *purely personal* would go against the language and spirit of Article 51(2). The Explanations to the Charter make it abundantly clear that:

The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.⁶⁸

IV. THE IRRELEVANCE OF TERRITORIAL CRITERIA FOR DETERMINING THE CHARTER'S EXTRATERRITORIAL APPLICABILITY

The analysis above vindicates the view that Article 51(1) of the Charter envisages a parallelism between EU action and application of the Charter.⁶⁹ The only limitation contained in the relevant provision pertains to the material scope of the Charter, which has been limited in so far as action by Member States is concerned.⁷⁰ As the Court explained in its seminal judgment in *Akerberg Fransson*:

[S]ituations cannot exist which are covered [...] by European Union law without those fundamental rights being applicable. The applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter.⁷¹

This construction suggests that territorial criteria bear no relevance in the context of determining the applicability of the Charter.⁷² In this light, the

⁶⁷ *Opinion 1/17* EU:C:2019:341, Opinion of AG Bot, para 195.

⁶⁸ Explanations to the Charter (n 44) 32.

⁶⁹ Opinion of AG Mengozzi (n 19) para 91.

⁷⁰ *Ibid* para 97; Opinion of AG Wahl (n 62) para 85.

⁷¹ Case C-617/10 *Aklagaren v Akerberg Fransson* EU:C:2013:105, para 21. See also Case C-390/12 *Robert Pfleger and Others* EU:C:2014:281, para 34.

⁷² Kube (n 54) 34-36.

model propounded by Moreno-Lax and Costello in 2014 still holds great explanatory force. According to them:

The scope of application *ratione loci* of the Charter is [...] to be determined by reference to the general scope of application of EU law, following autonomous requirements. The Charter applies to a particular situation once EU law governs it. There is no additional criterion, of a territorial character or otherwise, that needs to be fulfilled in this context.⁷³

Advocate General Mengozzi also shared this view in his Opinion in *X and X v. Belgium*. The case concerned a request for a short-term visa (visa with limited territorial validity) on the basis of Article 25 of the Visa Code⁷⁴ submitted at the Belgian Embassy in Lebanon by a Syrian family living in Aleppo.⁷⁵ According to Mengozzi, Article 51(1) implies that the fundamental rights recognised by the Charter

are guaranteed [...] *irrespective of any territorial criterion*. If it were to be considered that the Charter does not apply where an institution or a Member State implementing EU law acts extraterritorially, that would amount to claiming that situations covered by EU law would fall outside the scope of the fundamental rights of the Union⁷⁶

– thereby undermining the parallelism between EU action and application of the Charter envisaged under Article 51(1) of the Charter. Although the ECJ found that the Charter was not applicable *in casu*, this was done on the ground that Article 25 of the Visa Code did not apply to the situation at hand since the X family were intending to stay in Belgium for more than 90 days and not on the basis of absence of a territorial link with the EU. According to the Court, '[s]ince the situation at issue in the main proceedings is not [...] governed by EU law, the provisions of the Charter [...] do not apply to it'.⁷⁷ Thus, although the Court did not address the question of extraterritorial applicability of the Charter expressly, it did (at least indirectly) link the

⁷³ Moreno-Lax and Costello (n 4) 1679-1680.

⁷⁴ Art 25(1)(a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.

⁷⁵ Case C-638/16 PPU *X and X v Belgium* (n 45) para 19.

⁷⁶ Opinion of AG Mengozzi (n 19) paras 89, 92. (Emphasis in the original).

⁷⁷ Case C-638/16 PPU *X and X v Belgium* (n 45) para 45.

question of applicability of the Charter solely to the question of whether the situation at hand falls within the scope of EU law.

The GC's judgment in *Front Polisario* further attests to the rejection of any territorial considerations as a precondition for the applicability of the Charter. According to the GC, the Council, in concluding an agreement with a third state, must examine all the relevant facts in order to ensure that the agreement does not impact the enjoyment of fundamental rights abroad.⁷⁸ In other words, according to the GC, the Union institutions bear extraterritorial obligations under the Charter once their actions may entail infringements of fundamental rights abroad.⁷⁹

The case law of the CJEU regarding targeted sanctions against individuals located abroad⁸⁰ further supports the proposition that territorial

⁷⁸ Case T-512/12 *Front Polisario* (n 6) para 228.

⁷⁹ Olivier De Schutter, 'The implementation of the Charter of Fundamental Rights in the EU institutional framework' (study requested by the European Parliament's Committee on Constitutional Affairs, November 2016) 57, <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU\(2016\)571397_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf)> accessed 20 January 2020. Ryngaert (n 2) 381.

⁸⁰ The fact that cases involving targeted sanctions enforced in the territory of a State party against individuals located abroad have not, thus far, raised any issues of "jurisdiction" within the meaning of art 1 ECHR in the context of ECtHR case law (see for example *Nada v Switzerland* App No 10593/08 (ECtHR, 12 September 2012) does not necessarily mean that they do not raise issues of extraterritoriality. For criticism on the ECtHR's sidestepping of the question of extraterritoriality of the ECHR in the *Nada* judgment, see Marko Milanovic, 'European Court Decides *Nada v. Switzerland*' (EJIL: Talk!, 23 February 2012) <<https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/>> accessed 20 January 2020. This is especially the case if one takes into account the definition of extraterritorial obligations contained in Clause 8(a) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (n 1). As previously mentioned Clause 8(a) of the Maastricht Principles defines extraterritorial obligations as 'obligations relating to the acts and omissions of a State, *within or beyond its territory*, that have effects on the enjoyment of human rights outside of that State's territory'. (Emphasis added). See also Milanovic (n 24) 7: '*Extraterritorial* application simply means that at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title. Extraterritorial application of a human

considerations are immaterial in determining the applicability of the Charter and that the only relevant question in this context is whether an entity has been affected by EU action.⁸¹ As Kube convincingly demonstrates there is more case law to support this proposition.⁸² The *Mugraby* case concerned an action for damages in respect of injuries that occurred because of the failure of the EU to adopt appropriate measures against Lebanon (suspending aid programs) under a human rights clause in the EU-Lebanon Association Agreement following Lebanon's fundamental rights violations.⁸³ While the action failed on the merits, the Court did not question the applicants' assumption that the EU may bear responsibility vis-à-vis a non-EU national for violation of his fundamental rights in a third country.⁸⁴ Finally, in this context, mention should be made to the *Zaoui* case involving an action for damages for the loss of a family member killed by Hamas.⁸⁵ According to the applicant the EU was responsible because of its funding of education in Palestinian territory which allegedly incited hatred and thus led to the attack.

rights treaty is an issue which will most frequently arise from an *extraterritorial state act*, i.e. conduct attributable to the state, either of commission or of omission, performed outside its sovereign borders [...] However – and this is a crucial point – extraterritorial application does not *require* an extraterritorial state act, but solely that the individual concerned is located outside the state's territory'. (Emphasis in the original). See contra Linos-Alexandre Sicilianos, 'The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization' (2017) 66 *International and Comparative Law Quarterly* 783 at 793.

⁸¹ Ward (n 54) 423: '[E]merging case-law shows that once the legal interests of an entity have been affected by EU law, and it is pertinent to the resolution of a dispute, then the Charter will apply, even if that entity is located outside of the EU'. Kube (n 54) 34. In Case C-200/13 P *Council of the European Union v Bank Saderat Iran* EU:C:2016:284, para 47, the Court stated that: 'Bank Saderat Iran puts forward pleas alleging an infringement of its rights of defence and of its right to effective judicial protection. Such rights may be invoked by any natural person or any entity bringing an action before the Courts of the European Union'. See also Case T-494/10 *Bank Saderat Iran v Council of the European Union* EU:T:2013:59, paras 34-44; Case C-176/13 P *Council of the European Union v Bank Mellat* EU:C:2016:96, para 49; Case C-130/10 *European Parliament v Council of the European Union* EU:C:2012:472, para 83.

⁸² Kube (n 54) 34-35.

⁸³ Case C-581/11 P *Mugraby v Council of the European Union* EU:C:2012:466.

⁸⁴ *Ibid* para 81; Bartels (n 4) 1076; Kube (n 54) 35.

⁸⁵ Case C-288/03 P *Zaoui and Others v Commission* EU:C:2004:633.

Although the action failed because the applicants did not manage to prove causality, the Court (again) did not question the assumption that the EU could be held responsible for extraterritorial violations of fundamental rights.⁸⁶

Furthermore, different EU instruments show that Union institutions remain bound by the Charter even when they act outside the territory of EU Member States. A prime example here is Regulation 2016/1624 on the European Border and Coast Guard.⁸⁷ According to the Regulation, in performing its tasks, which, *inter alia*, expressly include training⁸⁸ and co-ordination of border management activities on the territory of third states,⁸⁹ the European Border and Coast Guard Agency 'shall guarantee the protection of fundamental rights [...] in accordance with relevant Union law' and 'in particular the Charter'.⁹⁰ More interestingly for present purposes, the Commission's Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures⁹¹ lend further support to the

⁸⁶ Ibid paras 3, 13-15; Bartels (n 4) 1076; Kube (n 54) 35.

⁸⁷ Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation No 863/2007 of the European Parliament and of the Council, Council Regulation No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1.

⁸⁸ Ibid art 36(7).

⁸⁹ Ibid art 54(1) – (3).

⁹⁰ Ibid art 34(1). One could argue that the text of the Regulation itself forms the basis for the extraterritorial applicability of the Charter. However, this argument is misguided to the extent that it does not take into account the *Fransson* judgment (see above n 71). To the extent that the Regulation envisages that the European Border and Coastal Guard may operate outside the territory of the EU in accordance with EU law, this triggers the applicability of the Charter since as per the *Fransson* judgment, the applicability of EU law entails the applicability of the Fundamental Rights guaranteed by the Charter. See also Violeta Moreno-Lax, *Accessing Asylum In Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 298.

⁹¹ European Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures' (DG Trade, 2 July 2015) <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> accessed 20 January 2020.

argument advanced here. The Guidelines highlight that the purpose of identifying human rights impacts is to assess

how trade measures which might be included in a proposed trade-related policy initiative are likely to impact: *either on the human rights of individuals in the countries or territories concerned*; or on the ability of the EU and the partner country/ies to fulfil or progressively realise their human rights obligations.⁹²

De Schutter stressed, in a 2016 study commissioned by the European Parliament, that this

confirms the understanding (illustrated by the *Front Polisario* case [...]) that fundamental rights that are binding in the EU legal order should be complied with also for the benefit of individuals situated outside the territories of the Member States: such fundamental rights have in other terms, an "extraterritorial" scope...⁹³

In this context, it is also worthwhile noting that the Guidelines explicitly provide that '[r]espect for the Charter of fundamental rights in Commission acts and initiatives is a *binding legal requirement* in relation to both internal policies and external action'.⁹⁴

Overall, the existing case law on the extraterritorial application of the Charter as well as several EU instruments support the conclusion reached above on the basis of a textual analysis of Article 51(1), thereby highlighting the continuing relevance of the extraterritoriality model established by Moreno-Lax and Costello in 2014. Whether or not the EU institutions exercise their powers within the territory of the Member States is immaterial; what matters in the context of triggering the applicability of the Charter is whether the situation at hand is covered by an EU competence.

V. CONCLUSION

The *Front Polisario* saga before the CJEU has brought to the forefront the question of whether the EU is bound by the Charter of Fundamental Rights when it concludes trade agreements with third states that may affect the enjoyment of fundamental rights abroad. In turn, this question is closely

⁹² Ibid 2 (Emphasis added).

⁹³ De Schutter (n 79) 2.

⁹⁴ European Commission Guidelines (n 90) 5 (Emphasis in the original).

linked to the broader (and still nebulous) question of the extraterritorial application of the Charter. In this light, the article revisited the question of the extraterritoriality of the Charter by taking stock of recent developments, with a view to ascertaining the current state of the law.

The article argued that the attempt to import into the fundamental rights regime of the Charter the extraterritoriality standard developed by the ECtHR is misguided on a number of grounds. It was shown that the ECtHR developed the effective control standard primarily in the context of cases involving extraterritorial conduct. By way of contrast, the factual scenario of the *Front Polisario* cases (involving the conclusion of trade agreements with third states that may have an adverse effect on the enjoyment of fundamental rights by distant strangers) does not concern extraterritorial conduct *per se*; rather, it pertains to taking decisions that may have extraterritorial effects. The article further argued that the argument in favour of "importing" the ECtHR's extraterritoriality standard finds no textual support in Article 51 of the Charter – which expressly purports to define the Charter's field of application.

Next, the article addressed the claim to the effect that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights under the ECHR, provided for under Article 52(3) of the Charter, entails that the jurisdictional limit enshrined in Article 1 ECHR is applicable in the scheme of the Charter. It was shown that such a reading of Article 52(3) of the Charter is erroneous to the extent that it conflates the issue of applicability of the Charter with that of the interpretation of the scope and content of the obligations enshrined therein and that it, ultimately, undermines the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.

Against this background, the article continued by clarifying that the Charter's scope of application is essentially material; once a situation is covered by an EU competence, the applicability of the Charter is triggered. Next, the article focused on the question of the extraterritorial applicability of the Charter. The main argument advanced was that a textual analysis of Article 51 of the Charter, in conjunction with the existing case law on the extraterritorial application of the Charter as well as different EU instruments, support the conclusion that territorial considerations are

immaterial in the context of determining the Charter's applicability. In this context, what seems to matter is whether the situation in question is covered by an EU competence.

**THINLY VEILED DISCRIMINATION:
MUSLIM WOMEN, INTERSECTIONALITY AND THE HYBRID SOLUTION
OF REASONABLE ACCOMMODATION AND PROACTIVE MEASURES**

Cara Donegan*

*This article examines the discrimination experienced by Muslim women wearing headscarves in Europe, identifying this as a form of intersectional discrimination. Despite the recognition of intersectional discrimination being hindered by obstacles inherent in the current framework of European anti-discrimination law, a number of academics have suggested that the Court of Justice of the European Union is nonetheless capable of responding to this form of discrimination. However, this article demonstrates that it remains unlikely that the Court will respond to intersectional discrimination within the remit of the current law, as exemplified by its failure to do so in the recent cases of *Achbita v G4S Solutions* and *Bougnaoui v Micropole SA*. As it appears that Muslim women's right to wear the headscarf is not adequately protected under the current law, a novel hybrid solution is suggested, based on the introduction of an employer duty of reasonable accommodation of religion in conjunction with proactive measures aimed at combating intersectional discrimination. Such an approach would provide an immediate stopgap to prevent the position of Muslim women in Europe declining further, as well as initiating long-term efforts to tackle the problem of intersectional discrimination.*

Keywords: CJEU, intersectional discrimination, Islamophobia, religious symbols, religious discrimination

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I. INTRODUCTION

It is undeniable that discrimination against Muslim women in Europe is rife. In the aftermath of 9/11, further Islamist terrorist attacks in France, Belgium, Germany and the UK, and the European refugee crisis, Islamophobia and anti-Muslim rhetoric have escalated alarmingly.¹ As Muslim women are immediately identifiable as such when wearing the hijab, niqab or burqa (referred to here collectively as 'the headscarf' for ease of reference), they have borne the brunt of this, encountering a greater likelihood of being discriminated against when wearing the garment.²

However, the discrimination experienced by Muslim women wearing the headscarf cannot be regarded as solely based on their religion: as the garment

¹ Jim Wolfreys, *Republic of Islamophobia: The Rise of Respectable Racism in France* (Hurst Publishers 2018) 22.

² European Union Agency for Fundamental Rights, *EU-MIDIS Data in Focus Report 5: Multiple Discrimination* (2010) 4.

is worn exclusively by women and predominantly by those with ethnic minority or immigrant status, their discrimination must be recognised as additionally situated on the grounds of gender and ethnic origin. Thus, they face intersectional discrimination, which not only means that their unique 'synergistic' experience of discrimination is different to that which would be experienced under any of the three grounds alone; it is also marked as particularly harmful: '[i]t gets worse when you're not just a Muslim; you're a woman, you're visibly Muslim, possibly you're an immigrant'.³ Despite these factors compounding Muslim women's experience of discrimination, they are often disregarded in the discussion of their right to wear the headscarf. As the headscarf is widely perceived to be emblematic of the oppression of women under Islam, it is deemed incongruent with the protection of women's rights, and its intersectionality is obscured.⁴

Notwithstanding the evident ignorance and stereotype informing this opposition to the headscarf, these views have played a role in the increasing ubiquity of headscarf bans across the continent, which have so far been introduced in Germany, France, Belgium and Austria.⁵ Whilst previously confined to public spaces including courts and schools, such bans have recently been legitimised in the private workforce, with the Court of Justice of the European Union (CJEU) holding in *Achbita* and *Bougnaoui* that employer policies prohibiting the wearing of religious symbols do not constitute religious discrimination.⁶ Absent from the judgement was any

³ Kimerlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 139; Jason D'Souza and Ash Kelly, 'Vancouver Woman Says Hijab Invites Racial Abuse, Harassment' (*CBC.CA*, 28 May 2017) <<http://www.cbc.ca/news/canada/british-columbia/vancouver-woman-says-hijab-invites-racial-abuse-harassment-1.4134789>> accessed 17 March 2018.

⁴ Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 16.

⁵ Matthew Weaver, 'Burqa Bans, Headscarves and Veils: A Timeline of Legislation in the West' (*The Guardian*, 14 March 2017) <<https://www.theguardian.com/world/2017/mar/14/headscarves-and-muslim-veil-ban-debate-timeline>> accessed 28 November 2017.

⁶ Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203; Case C-188/15 *Bougnaoui v Micropole SA* EU:C:2017:204.

consideration of how such bans disproportionately affect Muslim *women* and are thus intersectionally discriminatory.

It is, however, questionable as to whether the CJEU has the ability to respond to such intersectional discrimination within the current legal framework. This article examines the obstacles inherent in European anti-discrimination law that prevent intersectional discrimination from being addressed. The paper further considers arguments raised by Sandra Fredman, Dagmar Schiek and Karon Monaghan, all of whom suggest that despite these obstacles the CJEU remains able to recognise intersectional claims.⁷ These arguments are questioned in light of recent case law: the Court's failure to recognise the intersectional discrimination at play not only in *Achbita* and *Bougnaoui*, but also in its first case regarding discrimination explicitly on the basis of a combination of two grounds, *Parris v Trinity College Dublin*, suggests that recognition of intersectionality under the current framework is ultimately unlikely.⁸ Whilst *Achbita* and *Bougnaoui* have previously been examined from an intersectional perspective, this article seeks to fill a gap by demonstrating how specific obstacles present in European anti-discrimination law operated to prevent the intersectional discrimination apparent in these cases from being addressed by the Court.⁹

In light of the fact that it is unlikely that the CJEU will address intersectional discrimination within the current framework, it is submitted that a change in

⁷ Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (European Network of Legal Experts in Gender Equality and Non-Discrimination 2016); Dagmar Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 427; Karon Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2011) 13 *European Anti-Discrimination Law Review* 20, 25.

⁸ Case C-443/15 *Parris v Trinity College Dublin* EU:C:2016:897.

⁹ Eugenia Pastor, 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational Courts, Two Different Approaches' (2016) 5(2) *Oxford Journal of Law and Religion* 255, 255; Mathias Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: Parris' (2017) 54(6) *Common Market Law Review* 1835, 1848; Dagmar Schiek, 'On Uses, Abuses and Non-uses of Intersectionality before the European Court of Justice' (2018) 7(3) *International Journal of Discrimination and the Law* 82, 95.

the law is required in order to better protect Muslim women's right to wear the headscarf and to better combat intersectional discrimination. A novel hybrid solution is suggested, based on the combination of a reasonable accommodation model alongside the implementation of proactive measures. Such an approach would allow for the immediate enhancement of protection against discrimination for Muslim women at work via accommodation of the headscarf – which would be better able to respond to the intersectionality of such discrimination through a highly individualised response – whilst long-term efforts against systematic disadvantage are initiated by proactive measures, ensuring that the need to dismantle the societal roots of such discrimination is not disregarded.

Section II first introduces the concept of intersectionality before providing further analysis of Muslim women's experience of this type of discrimination. It then examines the Eurocentric perceptions of the headscarf that operate to obscure the intersectional nature of Muslim women's experience of discrimination as the basis for a subsequent argument that reform of religious discrimination law alone will not be enough to combat the socially ingrained nature of Muslim women's disadvantage. Section III examines the framework of European anti-discrimination law in order to demonstrate that it is ill-equipped to recognise and respond to intersectional discrimination. Assertions that the CJEU still has the capacity to address this issue are then considered. Analysis of its failure to do so in *Parris*, *Achbita* and *Bougnaoui* demonstrates that it is unlikely that the Court will in practice respond to intersectional discrimination within the remit of the current law and that it is thus unable to address the marginalisation of Muslim women.

Section IV presents legislative changes to combat intersectional discrimination that have been suggested previously in the literature, before making the case for the hybrid solution as a preferable response to this problem. It first addresses the advantages and disadvantages of the implementation of reasonable accommodation from an intersectional perspective, concluding that whilst such a model would be beneficial in affording greater protection for the individual, it does not work to combat the socially ingrained roots of such discrimination. Proactive measures are presented as a means of overcoming this inherent weakness. The hybrid solution, based on a combination of these two approaches, is thus suggested

as the ideal means of combating the issue of intersectional discrimination against Muslim women. In order to demonstrate this, *Achbita* and *Bougnaoui* are re-examined to show how the obstacles inherent in the current law would have been overcome had the hybrid solution been in place.

II. INTERSECTIONALITY AND MUSLIM WOMEN

The concept of intersectional discrimination encapsulates the unique form of disadvantage experienced by those who exhibit more than one protected characteristic. Muslim women who wear the headscarf are an archetypal example of persons facing intersectional discrimination: not only do they encounter disadvantage based on the manifestation of their religion, but the marginalisation they incur in comparison to Muslim men when wearing the headscarf marks them as further discriminated against on the grounds of gender, which is also compounded by the fact that the majority of Muslim women wearing the headscarf are of ethnic minority origin.¹⁰ However, the gender discrimination at play in the discrimination accrued due to wearing the headscarf is often obscured. As the Eurocentric perception of the headscarf denounces the garment as incongruent with the principles of gender equality, the disadvantage Muslim women experience *as women* is generally disregarded. This section addresses these factors in turn to develop an understanding of the present position of Muslim women in Europe from an intersectional perspective.

I. Intersectionality

The term 'intersectionality' was coined by Kimberlé Crenshaw in order to identify the cumulative disadvantage experienced by individuals who encounter discrimination on the basis of multiple grounds.¹¹ Using the analogy of traffic at an intersection to conceptualise intersectionality, Crenshaw noted that '[i]f an accident happens in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them'.¹² Similarly, if an ethnic minority woman experiences

¹⁰ European Union Agency for Fundamental Rights, *EU-MIDIS II: Muslims – Selected Findings* (2017) 7.

¹¹ Crenshaw (n 3) 140.

¹² Crenshaw (n 3) 139.

discrimination, her suffering could result from sex discrimination, race discrimination or other forms of discrimination – but most often, it arises due to their confluence. Thus, it is not possible to pinpoint the harm as arising from a single ground of discrimination; rather, their concurrence results in a different experience from that which would have been encountered under any of the grounds alone. The result is thus qualitatively different or 'synergistic'.¹³ This form of discrimination is widely considered to be particularly severe, 'just as an accident caused by cars from all directions leads to more damage'.¹⁴

Crenshaw observed that such an experience is not generally catered for by the law as each ground of discrimination is typically defined from the perspective of the most privileged of that group, whose circumstances are not influenced by a further compounding protected characteristic.¹⁵ Conaghan notes that the result of this 'top-down' model is that, for example, in gender discrimination cases, the experience of white women is often 'the measure of subordination overall', obscuring the fact that ethnic minority women's disadvantage is also routed through their ethnic minority status.¹⁶ The standard single-axis approach of anti-discrimination law is therefore unable to adequately capture and respond to this form of disadvantage.¹⁷

A further disadvantage of the law's 'tendency to compartmentalise' individuals into discrete categories is that this approach fails to encapsulate the lived experience of the person discriminated against.¹⁸ Because 'human beings do not exist as compartmentalised entities', the effort to achieve equality based on the single-axis approach can necessarily only partially succeed in providing what is needed for equality to be experienced by the

¹³ Fredman (n 7) 7; Crenshaw (n 3) 139.

¹⁴ Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU Law Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Network of Legal Experts in the Field of Gender Equality 2009) 4.

¹⁵ Crenshaw (n 3) 152.

¹⁶ Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 21, 25.

¹⁷ Crenshaw (n 3) 140.

¹⁸ Conaghan (n 16) 27.

individual.¹⁹ Crenshaw therefore recommended that the focus of the law should instead be on the lived experience of those who are intersectionally discriminated against, in order to accurately capture the disadvantage faced and the protection thus needed.²⁰ Such an intersectional approach based on individualised and lived experience is advantageous in that it is conducive to the achievement of substantive equality.²¹ Whilst formal equality dictates that 'likes be treated alike', such a uniform approach does nothing to acknowledge the institutionalised marginalisation of certain groups and thus tends to reproduce the sexual, racial and class inequality at the root of society by treating everyone the same.²² The recognition of intersectional discrimination therefore works to eliminate disadvantage beyond that which can be deciphered by assuming all persons with a particular characteristic have the same experience.

Beyond the aim of representing and providing an adequate remedy for the individual's lived experience of discrimination, intersectionality aims to promote the idea that disadvantage does not flow from identity categories or grounds of discrimination itself, but rather the 'historically constituted structures ... of racism, colonialism, patriarchy, [and] sexism' that perpetuate it.²³ Cooper suggests that the intersectional approach to opposing social inequality therefore demands an effort be undertaken to dismantle these structures, as any attempt to eradicate inequality without tackling its root cause will necessarily be temporary and short-lived.²⁴ By recognising and

¹⁹ Schiek (n 7) 441.

²⁰ Crenshaw (n 3) 152.

²¹ Fredman (n 7) 36.

²² Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562, 562; Iris Marion Young, 'Structural Injustice and the Politics of Difference' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 274.

²³ Rita Dhamoon, 'Considerations on Mainstreaming Intersectionality' (2011) 64(1) *Political Research Quarterly* 230, 234.

²⁴ Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press 2004) 191; Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Ineke Boerefijn et al. (eds), *Temporary Special Measures: Accelerating the de facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia 2003) 125.

responding to the lived experience of the most marginalised in order to achieve substantive equality for all, and in working to eradicate the structural causes of inequality, intersectionality has the potential to reverse 'not just the epiphenomenon of discrimination but its underlying political economy'.²⁵ Such an approach would be of profound value for Muslim women wearing the headscarf, a prime example of persons suffering from intersectional discrimination.

2. The Headscarf as the 'Paradigm Symbol' of Intersectionality

Muslim women are discriminated against on the grounds of their religion, their sex, and their ethnicity. As the headscarf operates as a religious symbol worn exclusively by women and predominantly by those with ethnic minority status, it thus appears as 'the paradigm symbol of intersectionality'.²⁶ The effect of the intersectional discrimination experienced by headscarf wearers is deeply concerning. As the Open Society Institute reports, many Muslim women perceive their only options as being 'to accept their exclusion from mainstream employment or to remove their headscarf'.²⁷ Where removing their headscarf is not an option they wish to pursue, many Muslim women adopt professionally detrimental 'coping strategies', such as avoidance of customer contact, seeking alternative employment within the bounds of their own religious or ethnic community, or ultimately resigning from the workplace altogether.²⁸ Research by the European Union (EU) Agency for Fundamental Rights substantiates this claim, revealing that Muslim women who usually wear a headscarf outside their home are in employment to a lesser extent than women who do not (29% and 40%, respectively).²⁹ The intersectionality of the discrimination faced by headscarf wearers, and the

²⁵ Gerard Quinn, 'Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law' (2016) 15 *Equal Rights Review* 63, 72.

²⁶ European Union Agency for Fundamental Rights (n 10) 7; Frédérique Ast and Riem Spielhaus, 'Tackling Double Victimization of Muslim Women in Europe: An Intersectional Response' (2012) 16 *Mediterranean Journal of Human Rights* 357, 362.

²⁷ Open Society Institute, *Muslims in Europe: A Report on 11 EU Cities* (2010) 127.

²⁸ European Network Against Racism, *Forgotten Women: The Impact of Islamophobia on Muslim Women* (2016) 20.

²⁹ European Union Agency for Fundamental Rights (n 10) 30.

gravity of its consequences, is undeniable. Recognition of the intersectional nature of their disadvantage is the only means of formulating an adequate remedy to it, which is impossible when their discrimination is considered as solely based on their religion.

3. *Perceptions of the Headscarf – Obscuring Intersectionality?*

Although it has been established that Muslim women face intersectional discrimination on the grounds of religion, ethnic origin and gender, this latter element is often obscured in considerations of their right to wear the headscarf, as the Eurocentric lens through which the headscarf is viewed regards it as irreconcilable with the protection of women's rights.³⁰ As the headscarf is commonly viewed as an instrument of the oppression of women under Islam, the promotion of gender equality is frequently utilised as an argument in favour of the restriction of the headscarf in Europe.³¹ However, this interpretation of gender equality is arguably just as paternalistic and oppressive to women as that which it aims to combat. On the assumption that the West must liberate them from their oppressive religion, Muslim women are presumed to be incapable of self-determination and are denied their 'freedom as autonomous persons in their own right'.³²

This 'gender equality' argument was employed by the ECtHR in *Dablab v Switzerland* and *Şahin v Turkey*.³³ In the former case, the Court rejected the claim of a Muslim primary school teacher that her school's ban on headscarves violated her freedom of religion under Article 9 and amounted to sex discrimination under Article 14 of the European Convention on Human Rights (ECHR), noting that the headscarf 'appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to

³⁰ Anna Korteweg and Gökçe Yurdakul, *The Headscarf Debates: Conflicts of National Belonging* (Stanford University Press 2014) 12.

³¹ Peter O'Brien, *The Muslim Question in Europe: Political Controversies and Public Philosophies* (Temple University Press 2016) 141.

³² Susan Rottmann and Myra Feree, 'Citizenship and Intersectionality: German Feminist Debates About Headscarf and Antidiscrimination Laws' (2008) 15(4) *Social Politics* 481, 485; Irene Zampi and Neil Chakraborti, *Islamophobia, Victimisation and the Veil* (Palgrave Pivot 2014) 10; Jill Marshall, 'Women's Right to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion' (2008) 14 *Res Publica* 177, 189.

³³ ECHR 2001-V; ECHR 2005-XI.

square with the principle of gender equality'.³⁴ In the latter case, the Court held that the applicant's exclusion from university due to her desire to wear the headscarf was not a violation of Article 9, as upholding the principle of secularism was necessary to protect the democratic system in Turkey, which also held gender equality to be a fundamental principle.³⁵ In these cases the ECtHR's Eurocentric interpretation of 'gender equality' as being incongruent with the right to wear the headscarf ultimately obscured the intersectional discrimination at play. The Muslim women's status as female was rendered 'so disconnected from their identities' that the concept of gender equality was used *against* the women, with the result that they were excluded from the workplace and from higher education.³⁶

Notably missing from the European debate surrounding Muslim women's right to wear the headscarf is any consideration of their views on the matter. The assertion that the headscarf is an oppressive symbol mandated by the Koran fails to acknowledge that the garment is not only voluntarily worn by Muslim women, but is defended by them on the basis that it represents an exercise of agency and an expression of 'bold and brave individualism'.³⁷ The Eurocentric lens through which the headscarf is viewed obfuscates the lived experience of Muslim women, disregarding the value of the garment for its wearers and dismissing the intersectional nature of the discrimination experienced as a result of its restriction.

III. INTERSECTIONALITY AT THE CJEU?

Despite the evident need for the law to acknowledge and respond to intersectional discrimination, the current European anti-discrimination framework presents numerous obstacles precluding the recognition of such claims. Notwithstanding these obstacles, Fredman, Schiek and Monaghan maintain that the CJEU is still capable of responding to intersectional discrimination within the remit of the present law. However, the Court's

³⁴ Ibid 13.

³⁵ *Şabin* (n 33) para 116.

³⁶ Anastasia Vakulenko, 'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16(2) *Social and Legal Studies* 183, 189; Ast and Spielhaus (n 26) 367.

³⁷ Nancy Hirschmann, 'Western Feminism, Eastern Veiling and the Question of Free Agency' (2002) 5(3) *Constellations* 345; O'Brien (n 31) 141.

failure to do so in three recent cases – *Parris*, in which the Court failed to recognise this form of discrimination in its first explicitly intersectional claim, and *Achbita* and *Bougnaoui*, in which it failed to recognise the intersectional nature of the headscarf – suggests that this is unlikely. This section addresses these points in turn, focusing on five distinct obstacles presented by the current legal framework: the segmentation of directives, the single-axis approach, the need for the identification of a comparator, the CJEU’s impact-oriented approach, and the analysis of justification and proportionality.

I. Obstacles Posed by the Current Framework

The segmentation of workplace anti-discrimination law into three different sets of directives – one concerning race and ethnic origin, one concerning religion or belief, disability, age, or sexual orientation, and one concerning gender discrimination – presents an obstacle, as claims brought to the CJEU which span different directives may have to be brought under more than one of them.³⁸ This is particularly problematic for Muslim women, as the gender aspects of headscarf bans in the workplace will not be dealt with in depth where their claim is brought on the ground of religion or belief under Directive 2000/78/EC (hereafter, the Directive).

The single grounds-based approach of EU anti-discrimination law manifestly fails to capture the 'complexity' and synergistic nature of intersectional discrimination.³⁹ Even if a claim under two grounds is brought, the victim's experience is not reflected – as previously established, the harm of intersectional discrimination is due to the confluence of discrimination

³⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2000/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23; Fredman (n 7) 62.

³⁹ Maria Onufrio, 'Intersectional Discrimination in the EU Legal Systems: Toward a Common Solution?' (2013) 14(2) *International Journal of Discrimination and the Law* 126, 130.

grounds, not their addition. Thus, where a Muslim woman encounters the law regarding her headscarf, bringing a claim under religious discrimination or gender discrimination, consideration under each ground precludes contemplation of the necessarily *gendered* aspect of her religious claim and the *religious* aspect of her gender claim. Therefore, her lived experience is disregarded; the analysis under either ground is necessarily more simplistic than the actual factors at play and the intersectional experience is erased from the examination.

Analysis of both direct and indirect discrimination requires the identification of a comparator or a comparator group that does not possess the specific characteristic on which the discrimination is alleged to be grounded. This process creates a significant obstacle to the recognition of intersectional discrimination, as demonstrated by the fact that a Muslim woman claiming a headscarf ban constituted discrimination based on the intersection of her religion and gender would be defeated on the basis that neither Muslim men nor non-Muslim women experience such discrimination. Both analyses work to conceal 'the true nature of her disadvantage and the discrimination suffered', as they do not encapsulate the synergistic nature of discrimination resulting from the combination of grounds.⁴⁰

As Cloots demonstrates, the CJEU often demarcates direct from indirect discrimination by focusing on the impact a measure has on distinct groups of employees.⁴¹ In order for a rule to amount to direct discrimination, it must have the effect that all of the people who are disadvantaged by the rule belong to the protected group and all of the people who are not disadvantaged by the rule do not belong to the protected group.⁴² Due to the single-axis approach, this has the potential to preclude cases of intersectional discrimination from being recognised as direct discrimination. As it may be the case that not *all* Muslim people and not *all* women would be affected by a headscarf ban in a particular workplace, the rule will not be found to be directly discriminatory,

⁴⁰ Karon Monaghan, 'Multiple and Intersectional Discrimination in EU Law' (2011) 13 *European Anti-Discrimination Law Review* 20, 25.

⁴¹ Elke Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? Achbita and Bougnaoui' (2018) 55 *Common Market Law Review* 589, 602.

⁴² *Ibid* 603.

as it does not disadvantage only and all of the members of a recognised protected group. Although *all* Muslim women might be affected, thus suggesting a case of direct discrimination, this will not be addressed as Muslim women are not currently recognised as a protected group in their own right.

The ability of the CJEU to undergo a satisfactory analysis of justification and proportionality in regard to indirect discrimination claims is also hampered by the single-axis approach. In its analysis of indirect discrimination, the Court's inability to consider how gender and, secondarily, ethnicity feed into the religious discrimination produced by a seemingly neutral rule blinds it to the particularly disproportionate impact such religious 'neutrality' policies have on Muslim women. The particular 'effects of exclusion' for Muslim women as a result of neutrality policies, for example, are undermined when only the religious aspect of such rules are considered; failure to consider the impact of gender and ethnicity thus results in an incomplete analysis.⁴³

2. *Potential for Recognition?*

Despite these obstacles, the current anti-discrimination framework does recognise the existence of intersectional discrimination. The preambles to both Directive 2000/43/EC and Directive 2000/78/EC stipulate that

[i]n implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim [...] to promote equality between men and women, especially since women are often the victims of multiple discrimination.⁴⁴

On this basis, Fredman, Schiek and Monaghan argue that the obstacles posed by the current framework do not preclude the CJEU from being able to recognise intersectional discrimination. Fredman and Schiek propose that the Court has solutions to the current obstacle of the single-axis approach. Schiek argues that as EU employment equality law encompasses all grounds of discrimination, it should be read as prohibiting discrimination not only on single grounds, but also on combined grounds.⁴⁵ Fredman suggests that the

⁴³ Ast and Spielhaus (n 26) 19.

⁴⁴ Directive 2000/43/EC (n 38) preamble recital 14; Directive 2000/78/EC (n 38) preamble recital 3.

⁴⁵ Schiek (n 7) 465.

Court could take a 'capacious' view of the existing grounds of discrimination, such that all aspects of an individual's identity are considered regardless of the ground under which the claim is brought.⁴⁶ This would reveal the other factors of disadvantage that may be compounding the victim's experience of discrimination, rather than the perspective of only the most privileged of that group. Monaghan further purports that the comparator issue is not 'conceptually insurmountable', in that in an intersectional claim the Court could require that the comparator be a person who does not have any of the characteristics at issue, thus allowing the synergistic nature of the discrimination to be illuminated.⁴⁷

Despite its arguable capacity to do so, it appears unlikely that the CJEU will in practice respond to intersectional discrimination within the current anti-discrimination framework. This is apparent from the recent decision in *Parris v Trinity College Dublin*, in which the Court faced its first explicitly intersectional claim, yet failed to recognise this as a distinct form of discrimination.⁴⁸ In this case, Mr Parris' civil partner was prohibited from accessing his survivor's pension, which was only payable if the individual concerned had married or entered into a civil partnership before the age of sixty; the men had been unable to do so legally in Ireland until Mr Parris was sixty-four years old.⁴⁹ The Court was referred the question as to whether, in the absence of a finding of discrimination on the separate grounds of age or sexual orientation, the rule was discriminatory based on the 'combined effect' of age and sexual orientation.⁵⁰ Finding no discrimination based on either ground in isolation, the Court dismissed the suggestion that there may have been discrimination based on the two grounds combined, stating that 'no new category of discrimination' could exist where none was found on the grounds taken separately.⁵¹

⁴⁶ Fredman (n 7) 69.

⁴⁷ Monaghan (n 7) 26.

⁴⁸ Case C-443/15 *Parris v Trinity College Dublin* EU:C:2016:897, Opinion of AG Kokott, para 149.

⁴⁹ *Parris* (n 8) paras 17–26.

⁵⁰ *Ibid* para 29.

⁵¹ *Ibid* paras 80–81.

The Court thus missed the reality of the discrimination at play. The pension scheme at hand did not discriminate against homosexual persons nor persons over sixty; only homosexual people born before 1951 were disadvantaged by the rule.⁵² The discrimination was thus inherently intersectional. In its single-axis analysis, the Court failed to acknowledge and respond to a rule that clearly disadvantaged Mr Parris due to the confluence of his sexual orientation and his age and was unwilling to respond to the unique harm suffered due to this.

As has already been recognised, there is little difference between this case and the one used by Crenshaw to conceptualise intersectionality and the weakness of single-axis discrimination analyses, namely *DeGraffenreid v General Motors*.⁵³ In this case, the plaintiffs alleged that they had been discriminated against due to General Motors' past failure to hire black women. The Court held that as black men and white women had both been hired, there had been no discrimination, and refused to consider 'the creation of new classes of protected minorities'.⁵⁴ The similarity of the decision here and that of the CJEU in *Parris* is striking and considering the prominence of Crenshaw's use of this example in the creation of intersectionality theory – the facts of the case have been used in European Commission reports to explain intersectional discrimination, and Crenshaw's article containing her discussion of *DeGraffenreid* was even mentioned in Advocate General (AG) Kokott's Opinion on this case – the Court not only failed to acknowledge the

⁵² Alina Tryfonidou, 'Another Failed Opportunity for the Effective Protection of LGB Rights Under EU Law: *Dr David L Parris v Trinity College Dublin and Others*' (EU Law Analysis, 1 December 2016) <<http://eulawanalysis.blogspot.co.uk/2016/12/another-failed-opportunity-for.html>> accessed 9 April 2018.

⁵³ Möschel (n 9) 1848; Schiek (n 9) 95; Shreya Atrey, 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*' (2018) 47(2) *Industrial Law Journal* 278, 282; Raphaële Xenidis, 'Multiple Discrimination in EU Anti-Discrimination Law: Towards Redressing Complex Inequality?' in Uladzislau Belavusau and Kristen Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing 2018) 71; *DeGraffenreid v General Motors* [1976] 413 F Supp 142 (US Federal Court of Appeals).

⁵⁴ *DeGraffenreid* (n 53) 145.

existence of intersectional discrimination in this claim, but disregarded the work that has been done to raise awareness of its existence.⁵⁵

The improbability of the Court addressing intersectional discrimination within its current framework thus appears to be undeniable, despite the aforementioned assertions that it has the capacity to do so. This was further exemplified in the specific context of Muslim women in the cases of *Achbita* and *Bougnaoui*.

3. Obstacles Exemplified in *Achbita* and *Bougnaoui*

Both cases concerned Muslim women who were dismissed by their employers due to their wish to wear the headscarf in the workplace; the judgements were handed down four months after *Parris*. While the fact that intersectional discrimination was at play in these cases has been acknowledged, no analysis of how the obstacles in the current framework of European anti-discrimination law prevented this from being addressed by the Court has yet appeared in the literature.⁵⁶ This section presents an analysis of this sort, demonstrating that the aforementioned impediments in the current framework prevented the intersectional discrimination faced by the women from being recognised and that the CJEU will therefore remain unlikely to respond to intersectional discrimination within the remit of the current law. As Ms Achbita's and Ms Bougnaoui's ethnic origin is indeterminable from the judgements, the section focuses on the intersectional discrimination on the basis of religion and gender, notwithstanding the prior observation that Muslim women most often encounter intersectional discrimination on all three grounds.

In *Achbita*, the employee was dismissed when she began wearing the headscarf to work in contravention of the company's policy banning the wearing of religious, political or philosophical symbols or engagement in any observance of such beliefs.⁵⁷ The question referred to the Court was whether the prohibition of wearing a headscarf in the workplace resulting from the employer's policy constituted direct discrimination under Article 2(2)(a) of

⁵⁵ Fredman (n 7) 28; Kokott (n 48) para 150.

⁵⁶ Pastor (n 9) 255; Möschel (n 9) 1348; Schiek (n 9) 95.

⁵⁷ Achbita (n 6) para 15.

the Directive.⁵⁸ In *Bougnaoui*, the employee was dismissed when she continued to wear her headscarf in the workplace following a disciplinary interview in which she was warned that whilst she was in 'contact internally or externally with the company's customers, [she] would not be able to wear the veil in all circumstances'.⁵⁹ The question referred was whether the difference in treatment did not amount to discrimination on the basis that the wish of a customer to no longer have services rendered by an employee wearing a headscarf was a genuine and determining occupational requirement under Article 4(1) of the Directive.⁶⁰

A. Failure to Recognise Intersectionality

Although the questions referred in *Achbita* and *Bougnaoui* were not explicitly related to intersectional discrimination as in *Parris*, arguably the Court should have recognised the intersectional discrimination inherent in policies prohibiting the headscarf and operated beyond a single-axis analysis, especially given that neither question referred to the Court was explicitly worded as regarding religious discrimination – both questions simply referred to the headscarf as the factor at play.

The segmentation of the anti-discrimination directives is obviously an issue here: as the questions referred were regarding Directive 2000/78/EC, detailed consideration of gender discrimination was precluded. Arguably the Court could still have acknowledged the gender discrimination inherent in the cases: in light of the references to gender equality in the preamble to the Directive (see section III.2), the European Commission's 2007 Report on Multiple Discrimination suggested that the Directive is intended to work together with existing provisions on gender discrimination in the workplace.⁶¹ Pastor further noted before the judgements were handed down that given the open list of non-discrimination grounds contained in Article 21 of the EU Charter of Fundamental Rights, the Court did have the

⁵⁸ Ibid para 21.

⁵⁹ *Bougnaoui* (n 6) para 14.

⁶⁰ Ibid para 19.

⁶¹ Directorate-General for Employment, *Social Affairs and Equal Opportunities, Tackling Multiple Discrimination: Practices, Policies and Laws* (European Commission 2007) 18.

opportunity to analyse the gender aspect of the discrimination claims.⁶² Its failure to do so is thus disappointing.

This failure is particularly disappointing considering the attention given to gender equality in AG Sharpston's Opinion on *Bougnaoui*. Rather than considering whether the request that Ms Bougnaoui remove her veil had an effect on gender equality, AG Sharpston only raises the issue that some perceive the headscarf to be a 'feminist statement' whilst others consider it to be a 'symbol of oppression of women', ultimately recommending that the Court refrain from taking a position on this matter.⁶³ It is surprising that AG Sharpston recognises the issue of gender equality that arises in relation to the headscarf, but fails to actually examine whether gender discrimination was at play in Ms Bougnaoui's dismissal, demonstrating how perceptions of the headscarf can operate to obscure the gender discrimination suffered by its wearers.

B. Comparator

Article 2(2)(a) of the Directive establishes that direct discrimination on the grounds of religion or belief shall be taken to occur where 'one person is treated less favourably than another is, has been or would be treated in a comparable situation'. On this ground, the CJEU ruled in *Achbita* that G4S's neutrality policy 'refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction'.⁶⁴ The Court therefore held that the policy must 'be regarded as treating all workers of the undertaking in the same way by requiring them [...] to dress neutrally'.⁶⁵ As the rule was not applied differently to Mrs Achbita than to any other worker, the Court concluded that it 'does not introduce a difference of treatment that is directly based on religion or belief', thus not constituting direct discrimination for the purposes of the Directive.⁶⁶

⁶² Pastor (n 9) 266.

⁶³ Case C-188/15 *Bougnaoui v Micropole SA* EU:C:2017:204, Opinion of AG Sharpston, para 75; Schiek (n 9) 95.

⁶⁴ *Achbita* (n 6) para 30.

⁶⁵ *Ibid.*

⁶⁶ *Ibid* para 32.

In focusing on the comparison between employees who manifest their political, philosophical or religious belief, the Court missed the opportunity to use the appropriate comparator from an intersectional perspective, namely someone who lacked both of Ms Achbita's protected characteristics: being female *and* religious. If the Court had done so, perhaps it would have concluded that Ms Achbita had been treated less favourably.

C. Impact-Oriented Approach

The Court's impact-oriented distinction between direct and indirect discrimination is clear in its conclusion that Ms Achbita was not directly discriminated against because the rule did not only disadvantage religious people, but those with political and philosophical beliefs as well. However, the Court has occasionally departed from this approach and found direct discrimination to exist where the parties disadvantaged by a rule extend beyond the relevant protected group. In *CHEZ*, a company had placed electricity meters at varying heights off the ground, disadvantaging those who lived in districts populated mostly, but not exclusively, by Roma people, and providing those living in other districts less populated by Roma people with an advantage.⁶⁷ Even though the company's practice did not exclusively disadvantage Roma people, the CJEU considered that it was based on ethnic stereotypes or prejudices and therefore held that it amounted to direct discrimination.⁶⁸ Clouts notes that it is surprising that the Court did not similarly take stereotypes and prejudices against Muslim people into account when considering whether the neutrality policy in *Achbita* amounted to direct discrimination.⁶⁹ Given the wide-ranging perceptions held in Europe about the Islamic headscarf specifically, such an examination into potential prejudices informing G4S's neutrality policy could have perhaps yielded a conclusion that recognised the intersectional nature of the discrimination at hand and potentially revealed the policy to be directly discriminatory.

⁶⁷ Case C-83/14 *CHEZ Razpredelenie Bulgaria v Komisia za zashtita ot diskriminatsia* EU:C:2015:480.

⁶⁸ *CHEZ* (n 67) paras 82 and 91.

⁶⁹ Clouts (n 41) 611.

D. Justification and Proportionality

Despite the question referred in *Achbita* focusing on direct discrimination, the Court went on to consider whether the neutral rule banning religious, philosophical or religious symbols constituted indirect discrimination under Article 2(2)(b) of the Directive. The Court found that 'it is not inconceivable' that the referring court might conclude that the neutral rule in this case was indirectly discriminatory, but ultimately held that the disadvantage resulting from the rule was justified by the company's aim to project an image of neutrality to its customers.⁷⁰ The Court held that such an aim 'must be considered legitimate', referring to the employers' freedom to conduct a business under Article 16 of the EU Charter of Fundamental Rights as the basis for this conclusion.⁷¹ The Court did not engage with this further in *Bougnaoui*, merely referring to *Achbita* as the basis for the conclusion that if a difference in treatment was found to be based on a neutral rule, it would be justified by the legitimate aim of 'a policy of neutrality vis-à-vis its customers'.⁷²

As Śledzińska-Simon recognises, reconciling the employer's freedom to conduct a business with the fundamental right not to be discriminated against requires 'striking a fair balance' between the competing interests.⁷³ However, she notes that the freedom to conduct a business should be narrowly construed, 'especially taking into account the structural nature of discrimination'.⁷⁴ Although the importance of projecting an image of religious neutrality is arguably more significant for employers in secular states such as Belgium, the national court of which referred the case, the Court's lack of consideration for the structural inequality arising from this principle is profoundly disappointing from an intersectional perspective. Neutrality in general perpetuates a Eurocentric worldview: 'ethno-national-religious

⁷⁰ *Achbita* (n 6) para 37.

⁷¹ *Ibid* para 38.

⁷² *Bougnaoui* (n 6) para 33.

⁷³ Anna Śledzińska-Simon, 'Is There a Place for the Islamic Veil in the Workplace? Managerial Prerogatives and the Duty of Reasonable Accommodation in the EU Anti-Discrimination Governance' (2016) 17 *ERA Forum* 203, 207.

⁷⁴ *Ibid*.

neutrality is simply the majority standard'.⁷⁵ The Court's limited analysis of the legitimacy of this aim precludes the recognition of the structural discrimination that 'neutrality' perpetuates. If it had considered this, perhaps a fairer balance would have been struck between the employer's freedom to conduct a business and the employee's interests, and Ms Achbita's right to wear the headscarf would have been protected.

The Court's proportionality analysis is also concerning from an intersectional perspective. As summarised by AG Kokott, the proportionality analysis requires that measures adopted to achieve the legitimate aim must be appropriate, must not go beyond what is necessary and must not cause disadvantage disproportionate to the aims pursued.⁷⁶ In determining that the restriction in question was appropriate for the purpose of ensuring the neutrality policy was properly applied, and that it would be limited to what is strictly necessary where it covered only those employees who interact with customers, the Court concluded that the ultimate dismissal of Ms Achbita would only be 'strictly necessary' where the company considered whether it would have been possible to offer her a post not involving any visual contact with customers instead of a dismissal. The Court's endorsement of the 'ghettoisation' of Muslim women in the workplace is alarming, especially 'given just how many roles can be public-facing', and may have the effect of further discouraging Muslim women's participation in the workforce.⁷⁷ If the Court had accounted for the intersectional discrimination faced by Muslim women – and the aforementioned duty to promote equality between men and women because of this, as stipulated in Article 3 of the Preamble to the Directive – arguably it would have recognised that the result of this ruling would be to exclude a large section of the female workforce from certain positions, in total contradiction with the duty to promote gender equality.

⁷⁵ Veit Bader et al., 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction' (2013) 13(2) *International Journal of Discrimination and the Law* 54, 57.

⁷⁶ Case C-157/15 *Achbita v G4S Secure Solutions NV* EU:C:2017:203, Opinion of AG Kokott, para 97.

⁷⁷ Sarah Fraser Butlin, 'The CJEU Confused Over Religion' (2017) 76 *Cambridge Law Journal* 246, 248; Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8(3) *European Labour Law Journal* 232, 252.

Therefore, if the Court had acknowledged Ms Achbita's discrimination as intersectional, it could have recognised the restriction of Muslim women to back-office positions as an unacceptable solution.

Finally, the Court's failure to address the final step in the proportionality test, namely verifying whether the neutrality policy imposes a disproportionate burden in comparison to the aims pursued, is regrettable; it might otherwise have recognised that such exclusion from the workplace was unacceptable and thus disproportionate. If the Court had acknowledged the intersectional discrimination at play, it may have engaged in a stricter proportionality test, allowing it to arrive at this conclusion. In *Parris*, AG Kokott noted in her Opinion that a difference of treatment resulting from the combination of two or more grounds of discrimination 'may also mean that, in the context of the reconciliation of conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight'.⁷⁸ Although the Court did not follow AG Kokott's Opinion on this ground in that case, Möschel points to her comment as suggesting that intersectionality may influence the way in which the Court conducts its proportionality analysis, in that 'the defendant will have to bring more stringent justifications for the differential treatment'.⁷⁹ The Court's failure to engage with the intersectional disadvantage suffered by Ms Achbita unfortunately ruled out such a possibility in this case.

IV. THE HYBRID SOLUTION

As the above analysis demonstrates, it remains unlikely that the CJEU will respond to intersectional claims within the remit of the current law. The present need for reform is undeniable, given that the structural inequality faced by Muslim women continues to be perpetuated by Eurocentric perceptions of the headscarf and their potential for marginalisation in the workplace is now exacerbated by the legitimisation of headscarf bans in private workplaces in *Achbita* and *Bougnaoui*.

⁷⁸ Kokott (n 48) para 157.

⁷⁹ Möschel (n 9) 1849.

Fredman has previously made suggestions for reform in order to address intersectional discrimination.⁸⁰ She proposes that new protected grounds of discrimination could be introduced, such as being a woman of colour or a disabled gay person, so that those facing intersectional discrimination would not have to make a claim based on one protected characteristic.⁸¹ Such an approach would be very difficult to implement, as it would necessitate creating a list of all the possible combinations of protected characteristics to ensure that all intersectional experiences are protected. Fredman also suggests the possibility of combining grounds within the existing list of protected characteristics so as to recognise discrimination arising from more than one ground, without regarding these as new subgroups.⁸² This approach is arguably unsuited to combating intersectional discrimination, which is synergistic and qualitatively different to the addition of different grounds of discrimination (see section II.1). This section therefore addresses a gap in the literature that remains regarding an operable solution to address intersectional discrimination in European anti-discrimination law.

In order to address the inadequacies of the current law, and the resultant inequality for Muslim women, it is evident that any reform must focus on the individual experience of discrimination and the dismantling of the societal structures that work to sustain it. It is submitted that a solution can be found within the combined approach of reasonable accommodation of religion and the implementation of proactive measures. The former approach allows for an immediate, operable enhancement of the protection of religious expression in the workplace, whilst the latter works to address the structural causes of marginalisation, in order to provide a long-term solution ensuring that individuals are not institutionally disadvantaged. Whilst reasonable accommodation has been recommended by various scholars as a means of enhancing protection for religious rights in the workplace, its benefits have not yet been acknowledged from an intersectional perspective.⁸³ Proactive

⁸⁰ Fredman (n 7) 66.

⁸¹ Ibid.

⁸² Ibid 68.

⁸³ Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience and the Rights of Others' (2014) 3(1) *Oxford Journal of Law and Religion* 2; Matthew Gibson, 'The God "Dilution"? Religion, Discrimination and the Case for Reasonable Accommodation' (2013) 72(3) *Cambridge Law Journal* 578; Katayoun Alidadi,

measures have been recommended as a means of dismantling the structural inequalities that perpetuate intersectional discrimination, but recommendation of their use in conjunction with reasonable accommodation is novel. In order to make the case for such a hybrid approach, this section examines each solution separately to identify their strengths and weaknesses, before suggesting that the implementation of both measures together would be preferable.

1. Reasonable Accommodation of Religion

The reasonable accommodation of religion model is based on the premise that religious persons are prevented from accessing and operating freely in certain workplaces due to their protected characteristic as they may have clothing or working time requirements that are not catered for due to rules enforced by their employer.⁸⁴ In order to achieve equality of access for that person and for them not to be unduly discriminated against by such rules or conditions, it is necessary for the employer to consider whether they can make an individual adjustment to workplace conditions in order to accommodate that person.⁸⁵ Such accommodation is limited to what is 'reasonable' in order to avoid disproportionate burden being suffered by the employer.⁸⁶ This model is currently in place in Canada and the United States, yet the concept of reasonable accommodation in the EU is limited to that required for disabilities.⁸⁷ Just as the highly differential forms of disability require a highly individualised response, reasonable accommodation has been recognised as a means of providing adequate protection for the various forms

'Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union's Anti-Discrimination Approach to Employment?' (2012) 37(6) *European Law Review* 693.

⁸⁴ Emmanuelle Bribosia et al., 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17(2) *Maastricht Journal of European and Comparative Law* 137, 138.

⁸⁵ Andrew Hambler, *Religious Expression in the Workplace and the Contested Rule of Law* (Routledge 2015) 236.

⁸⁶ Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination' (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 403, 410.

⁸⁷ Directive 2000/78/EC (n 38) art 5.

of religious manifestation in society.⁸⁸ Indeed, 'the freedom of religion and non-discrimination can be seen as "empty" or "nugatory" without a corresponding duty of reasonable accommodation'.⁸⁹

Many scholars have recommended that a reasonable accommodation of religion model be introduced in Europe.⁹⁰ The Parliamentary Assembly of the Council of Europe recently recommended that member states take legislative or other measures to ensure that employees may lodge requests for reasonable accommodation of their religion or belief, and to establish dispute resolution mechanisms to respond to employers' refusal to accommodate, although these recommendations were not ultimately included in the resulting Resolution.⁹¹ The reasonable accommodation approach itself is therefore at the frontline of academic scholarship and policy discussion on religious discrimination, and the benefits for Muslim women have been recognised.⁹² However, much of the work advocating for reasonable accommodation of religion is focused on the benefits this would have regarding clashes between religious and sexual orientation rights.⁹³ A call for reasonable accommodation based on its ability to better respond to intersectional discrimination has not yet been made. This section demonstrates the advantages of the reasonable accommodation model from an intersectional perspective and shows how the implementation of this model could correct the issues with the current law that prevent intersectional discrimination against Muslim women from being recognised.

⁸⁸ Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing 2008) 221.

⁸⁹ Alidadi (n 83) 695.

⁹⁰ Leigh and Hambler (n 83) 2; Gibson (n 83) 578; Alidadi (n 83) 693.

⁹¹ Council of Europe, *The Protection of Freedom of Religion or Belief in the Workplace* (Committee on Legal Affairs and Human Rights 2019) 2; Parliamentary Assembly of the Council of Europe, Resolution 2318 on the protection of freedom of religion or belief in the workplace (Text adopted by the Assembly on 29 January 2020 at the 5th sitting).

⁹² Alidadi (n 83) 699.

⁹³ Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29(4) *Oxford Journal of Legal Studies* 729.

A. Advantages

It has previously been suggested that the individualised response generated by reasonable accommodation is not suited to tackling religious discrimination, which is instead best dealt with by focusing on the disadvantage suffered by the religious group.⁹⁴ However, from an intersectional perspective, an individualised response focusing on the individual's lived experience is paramount (see section II.1). As reasonable accommodation operates around adjustment of workplace rules on a highly individualised basis, it is aptly suited to recognising and accommodating the unique experience of those who are intersectionally discriminated against.⁹⁵ Such an individual approach requires contextual analysis of all of the factors of a given case, enabling the employer to acknowledge and respond to the cumulative disadvantage generated by the existence of more than one characteristic, which would have been rendered invisible by attempts to fit the experience under one discriminatory ground.⁹⁶ As a result, gender discrimination against Muslim women, repeatedly rendered invisible under the law's current framework, would be illuminated. Furthermore, as the reasonable accommodation process is intended to encourage dialogue between employee and employer, this model has the potential to restore Muslim women's voices in articulating what their headscarf means to them, which has been disregarded in contemporary debates on the headscarf (see section II.3).⁹⁷ As the 'power of intersectionality lies in its potential to give voice to the individual', the ability for Muslim women to express their individual needs through this model is instrumental in achieving this aim.⁹⁸

As discussed in section II.1, intersectionality strives for substantive rather than formal equality in order to respond to the differing needs of the

⁹⁴ Emmanuelle Bribosia and Isabelle Rorive, *Reasonable Accommodation Beyond Disability in Europe?* (European Network of Legal Experts in the Non-Discrimination Field 2014) 38.

⁹⁵ Gibson (n 83) 579.

⁹⁶ Stychin (n 93) 749.

⁹⁷ Jennifer Jackson-Preece, 'Positive Measures and the EU Equality Directives: Closing the Protection Gap Between "New" and "Old" Minorities Through the Reasonable Accommodation of Religion?' (2010) 9(1) *European Yearbook of Minority Issues* 519, 535.

⁹⁸ Conaghan (n 16) 26.

institutionally disadvantaged. Reasonable accommodation is also advantageous from this perspective: in requiring adaptation of workplace rules, the model emphasises to employers the need to adapt to the variable needs of people from diverse backgrounds.⁹⁹ This model could help to achieve substantive equality for Muslim women, in that their professional opportunities would no longer be thwarted by policies of religious neutrality.

The recognition of intersectional discrimination via reasonable accommodation would not be subject to the aforementioned constraints evident in the current European anti-discrimination law framework. The obstacle posed by the need for a comparator, difficult in cases of intersectional discrimination due to the existence of multiple discrimination grounds generating distinctive cumulative disadvantage, would no longer prevent cases being brought forward, given that reasonable accommodation 'focuses solely on any omission to provide [the] accommodation in the first place'.¹⁰⁰ The focus on the omission to provide reasonable accommodation would be particularly beneficial where the disadvantage stems from a seemingly neutral rule, because this model does not require that the rule be objectively justified by a legitimate aim, as the analysis of indirect discrimination currently does. Whilst at first this may appear problematic in that the rule creating a difference of treatment goes uncontested, it is suggested that this is actually an advantage: as secularism is a principle of fundamental importance in many European states, it is arguable that avoidance of the loaded question as to whether religious expression should take precedence over neutrality is to be welcomed. Such an approach would be beneficial in allowing the Court to protect Muslim women from intersectional discrimination in the workplace without fear of the reaction of member states to a perceived threat to the principle of neutrality. Berthou notes that where large French companies have discreetly allowed prayer rooms and accommodation of religious dietary requirements, they are reluctant to publicise such efforts due to fear of being seen as making a

⁹⁹ Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' (2006) 6 *European Human Rights Law Review* 610, 647.

¹⁰⁰ Gibson (n 83) 592.

political statement.¹⁰¹ Avoiding the discussion of religious freedom over secularism through the reasonable accommodation model may thus be further advantageous in that employers in secular states are more likely to welcome accommodating practices. The lack of analysis in the reasonable accommodation model as to whether the neutrality policy necessitating the accommodation was a 'legitimate aim' is additionally beneficial, as it avoids the possibility that neutrality policies be granted blanket justification – as occurred in *Achbita* and *Bougnaoui* – by focusing on the question of whether accommodation would have placed a disproportionate burden on the employer. As the duty of reasonable accommodation requires that the existence of such a disproportionate burden be tangibly proven by the employer, it is arguable that this model would be more effective in protecting Muslim women's rights to wear the headscarf.¹⁰² As Jackson-Preece points out, uniform exceptions are not 'likely to be particularly onerous in financial or other terms'.¹⁰³

B. Disadvantages

Reasonable accommodation is not, however, a 'panacea' for Europe's religious discrimination problem, and it is certainly not faultless from an intersectional perspective.¹⁰⁴ As identified in section II.1, the objective of intersectionality is not just to appreciate and respond to lived experiences of multiple difference, but simultaneously to 'locate these specific differences within social patterns of hierarchy and division'.¹⁰⁵ Whilst the highly individualised approach of the reasonable accommodation model is beneficial in providing an immediate avenue for protection for Muslim women facing intersectional discrimination, its operation as a 'reactive'

¹⁰¹ Katell Berthou, 'The Issue of the Voile in the Workplace in France: Unveiling Discrimination' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 281, 314.

¹⁰² Vickers (n 88) 223.

¹⁰³ Jackson-Preece (n 97) 538–539.

¹⁰⁴ Gibson (n 83) 611.

¹⁰⁵ Momin Rahman, 'Theorising Intersectionality: Identities, Equality and Ontology' in Emily Grabham et al. (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 353.

measure to individual complaints would mean that the underlying cause of their discrimination goes unchallenged.¹⁰⁶

If reasonable accommodation alone were implemented in Europe, the Eurocentric perspectives that operate to exclude Muslim women would continue to prevail. This is because the language of 'accommodation' is assimilationist in itself: the model implies that social norms are to be determined by the cultural majority within which '[d]ifference becomes the special exception', further marginalising minority groups.¹⁰⁷ This implicit acceptance of the dominant societal narrative precludes any consideration of its inherent majority bias and, as Day and Brodsky highlight, allows rules and practices that favour the privileged in society to be maintained, as long as concessions are made to those who are disadvantaged by them.¹⁰⁸ The inability of the reasonable accommodation model to combat structural inequality is the main criticism of the Canadian model. Whilst it has been recognised as 'an effective short-term strategy yielding certain tangible short-term benefits', its ability to progress the objective of substantive equality in the long term has been questioned.¹⁰⁹ As stated in section II.1, the recognition of intersectionality aims to achieve substantive equality by responding to institutionalised marginalisation. Efforts to dismantle the structures that cause it are imperative if true equality is to be achieved.

It is thus necessary to recognise that whilst reasonable accommodation may be effective as a response to intersectional discrimination in the workplace and would be successful as a stopgap in preventing the increasing marginalisation of Muslim women in Europe, it is not enough to change their position in the long-term. Whilst the response to intersectional discrimination requires acknowledgement of a given individual's lived experience, a sole focus on individuals precludes the possibility of collaborative change for the whole of society.¹¹⁰ It is therefore necessary that,

¹⁰⁶ Vickers (n 88) 221.

¹⁰⁷ Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit?' (1996) 75 *Canadian Bar Review* 433, 435; Vrinda Narain, 'The Place of the Niqab in the Courtroom' (2015) 9 *Vienna Journal on International Constitutional Law* 41, 49.

¹⁰⁸ Day and Brodsky (n 107) 435.

¹⁰⁹ Narain (n 107) 50.

¹¹⁰ Conaghan (n 16) 27.

alongside reasonable accommodation, corresponding action be taken to challenge the root cause of Muslim women's discrimination.

2. *Proactive Measures*

The term 'proactive measures' denotes many forms of organised action aiming at institutional change.¹¹¹ In such a scheme, initiative lies with policy makers to mount political pressure with the aim of achieving structural change and to implement educational measures to promote understanding about issues such as intersectional discrimination and the need for substantive equality. New legislative and policy measures would need to be evaluated from an intersectional perspective in order to ensure they are not 'biased to one axis of inequality' and to adjust them accordingly where necessary.¹¹² As regards education, proactive measures would require initiatives and campaigns to raise awareness of the existence and nature of intersectional discrimination amongst employers, public authorities and the judiciary.¹¹³ This work would allow 'institutional and structural causes of inequality [to] be diagnosed and addressed collectively and institutionally', better enabling efforts to combat the roots of this inequality.¹¹⁴

As '[p]ositive duties need to be championed by those at the top of the institutional hierarchy', the ability of such measures to render substantive change for individuals could take a significant amount of time.¹¹⁵ This is demonstrated in the failure of previous policy-based attempts to address intersectionality. Despite calls for its recognition first being made in 2006 in Europe's Roadmap for Equality Between Women and Men, this effort received criticism in its conclusion from the European Parliament's Committee on Women's Rights and Gender Equality, which highlighted that the problem of intersectional discrimination still needed to be

¹¹¹ Sandra Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Network of Legal Experts in the Field of Gender Equality 2010) 3.

¹¹² Mieke Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13(3) *European Journal of Women's Studies* 211, 223.

¹¹³ Directorate-General for Employment, Social Affairs and Equal Opportunities (n 61) 54.

¹¹⁴ Fredman (n 7) 80.

¹¹⁵ Fredman (n 7) 82.

addressed.¹¹⁶ It is unclear what follow-up there has been: the subsequent Strategy for Equality Between Women and Men 2010-2015 fails to mention intersectional discrimination at all.¹¹⁷ The prolonged time period for such a top-down approach to substantially change individuals' lives is of particular concern given the increasing marginalisation of Muslim women, combined with the discouraging results of *Achbita* and *Bougnaoui*. It is clear that change which has the potential to rectify Muslim women's situation in the present needs to be implemented, in addition to such long-term structural change.

3. *The Hybrid Solution*

Given that the introduction of either solution by itself is problematic, it is submitted that a hybrid approach based on a legal duty of reasonable accommodation of religion, supplemented by the implementation of proactive measures to combat the root causes of intersectional discrimination, is preferable.

A. Implementation of the Hybrid Solution

Reasonable accommodation of religion could be implemented by expanding Article 5 of Directive 2000/78/EC, which currently provides for the duty to reasonably accommodate disabled persons, to provide for the duty to reasonably accommodate religious persons as well. Aside from the need to add uniform and workplace dress policy adjustments to the list of appropriate measures of accommodation, the current law outlining what amounts to a disproportionate burden for the employer and what the duty of accommodation entails would apply.¹¹⁸ This change in the law would therefore be straightforward for member states and employers to adjust to,

¹¹⁶ Commission, 'A Roadmap for Equality for Equality Between Women and Men 2006-2010' COM (2006) 92 final, ch I, art 4; Committee on Women's Rights and Gender Equality, *An Assessment of the Results of the 2006-2010 Roadmap for Equality Between Women and Men, and Forward Looking Recommendations* (2009) Explanatory Note.

¹¹⁷ Commission, 'Strategy for Equality Between Women and Men 2010-2015' COM (2010) 491 final.

¹¹⁸ Directive 2000/78/EC (n 38) preamble recital 20 and 21.

already being familiar with the process regarding the duty to reasonably accommodate disabled persons.

This change in the law would provide for a duty to accommodate a wide variety of religions and religious manifestations but would be particularly useful for Muslim women. This change would provide an alternative means of remedy to workplace regulations restricting the headscarf and would acknowledge and respond to intersectional discrimination through an individualised approach responding to context and lived experience. As noted in section II.2, Muslim women are increasingly excluding themselves from the workplace due to their experience of intersectional discrimination when wearing the headscarf. As their presence in the workforce is ever more threatened in the aftermath of *Achbita* and *Bougnaoui*, such an alternative means of protection is paramount.

Proactive measures in instituting policy change and education have the potential to address structural inequality by aiming to bring the issue of intersectional discrimination to the fore. I suggest that such proactive measures should follow Fredman's 'four ingredients' of a proactive model – responsibility, participation, monitoring and enforcement.¹¹⁹ This model was conceived specifically in relation to gender equality; in the context of intersectional discrimination, I suggest that education must be added as another key ingredient. Given the widespread misconceptions about the headscarf, education is particularly important in the effort to combat the intersectional discrimination of Muslim women. More precisely, I suggest that responsibility should be given to the relevant equality body in each member state, such as the Equality and Human Rights Commission in the United Kingdom. Given that Member States are required to have such an equality body, and that they already have the role of investigating and responding to complaints of discrimination, they are best suited to imposing the scheme of proactive measures suggested below.¹²⁰ Each equality body would assess new policy and legislative measures through an intersectional lens and recommend potential changes if necessary. They would monitor the situation of intersectional discrimination in the relevant member state, via consultation with trade unions, employers and potential victims to identify

¹¹⁹ Fredman (n 111) 5.

¹²⁰ Directive 2000/43/EC (n 38) Article 13(1).

existing problems and suggest solutions at company level. Such investigations are already sometimes undertaken by equality bodies, such as the UK Equality and Human Rights Commission's investigation into gender equality at the BBC.¹²¹

The most important role for these bodies in the context of proactive measures against the intersectional discrimination of Muslim women would, in my view, be in the context of education. Educational campaigns centred on intersectional discrimination and perceptions of the headscarf could be set up by these equality bodies to be filtered through participating trade unions and NGOs to employers, aiming to educate managers, colleagues and customers on how they can avoid intersectional discrimination and how they can contribute to the integration of the person facing it. It is suggested that the hybrid solution would necessitate the education of the judiciary about Eurocentric perceptions of the headscarf. The headscarf is not a measure used for the oppression of Muslim women, and this assumption cannot be relied upon to rationalise its restriction.

Finally, equality bodies could also be given enforcement powers. Fredman suggests a 'pyramid of enforcement', whereby complaints could be made to the equality body in response to non-compliance of employers.¹²² The equality body would then initiate a process of discussion and negotiation with the relevant employer.¹²³ Should this discussion be unsuccessful, the employer would then be subject to a compliance order issued by the equality body. Were this further step to fail, Fredman recommends that fines or other judicially enforced sanctions could be utilised.¹²⁴ I recommend that trade unions could be involved in this system of enforcement, by demanding a commitment to combating intersectional discrimination via collective bargaining or other industrial action.

¹²¹ Equality and Human Rights Commission, 'Investigation: Does the BBC Pay Women and Men Equally for Equal Work?' (2019) <<https://www.equalityhumanrights.com/en/inquiries-and-investigations/investigation-does-bbc-pay-women-and-men-equally-equal-work>> accessed 12 May 2020.

¹²² Fredman (n 111) 7.

¹²³ Ibid.

¹²⁴ Fredman (n 111) 7.

Such proactive measures would combat institutionalised disadvantage in the long term. The measures proposed should therefore be implemented alongside reasonable accommodation. This novel approach provides a means of achieving both aims of the intersectionality project, namely responding to the synergistic lived experience of discrimination and dismantling the structures that cause it.

B. The Hybrid Solution in the Context of *Achbita* and *Bougnaoui*

The potential utility of the hybrid solution in protecting Muslim women's right to wear the headscarf and combating their experience of intersectional discrimination can be demonstrated by reference to *Achbita* and *Bougnaoui*. Had a duty of reasonable accommodation been applied in *Achbita*, it would have first necessitated a dialogue between Ms Achbita and G4S, in which she would request an individualised adjustment to the workplace neutrality policy and discuss its potential implementation with her employer. If her desire to wear her headscarf had not then been accommodated, Ms Achbita would have been able to claim that her dismissal amounted to discrimination due to her employer's failure to reasonably accommodate her religious belief. In order to maintain that they did not discriminate against her, it would have been necessary for G4S to prove that allowing her to wear her headscarf would have imposed a disproportionate burden on the company. Upon examination of the facts of the case, it is likely that it would be found that allowing Ms Achbita to wear her headscarf would not have imposed such a disproportionate burden, given that no customer had complained about it and there was therefore no evidence that allowing her to wear it would negatively impact the business. In the absence of such evidence, G4S would have had to make an individual exception to their neutrality policy for Ms Achbita, perhaps on the condition that her headscarf be in muted or company colours as a concession to the neutrality policy.¹²⁵

In the case of *Bougnaoui*, it may have been found that allowing Ms Bougnaoui to wear her headscarf when interacting with the particular customer who had complained about it would indeed have caused Micropole a disproportionate burden, as it might have affected that customer's relationship with the company or negatively impacted the business. However, Ms Bougnaoui's

¹²⁵ Kokott (n 76) para 105; Sharpston (n 63) para 123.

dismissal might still have been found to be a failure to make a reasonable accommodation. In the context of disability, Directive 2000/78/EC notes that a reasonable accommodation might include an adjustment to the 'distribution of tasks' within the workplace.¹²⁶ Whilst the financial cost of such an effort and the financial resources of the organisation must be taken into account, the duty of reasonable accommodation of religion might in this instance have necessitated an investigation into whether Ms Bougnaoui could continue working at Micropole with different customers who had not complained or within the company in a non-customer facing role.¹²⁷ Given that Ms Bougnaoui spent 95% of her working time in such a non-customer-facing role, it is unlikely that this minor reorganisation would be considered a disproportionate burden.¹²⁸ Consequently, it appears that had the reasonable accommodation aspect of the hybrid solution been in place, both Ms Achbita and Ms Bougnaoui would have been able to continue working for their respective employers whilst wearing their headscarves.

Additionally, had the proactive measures suggested in the hybrid solution been in place, further issues would have been mitigated at both the level of Ms Achbita and Ms Bougnaoui's workplaces and at the CJEU. At the workplace level, given that the proactive measures suggested include education about intersectional discrimination and perceptions of the headscarf, companies such as G4S might have been aware of the detrimental impact a neutrality policy would have had for Muslim women and avoided the policy in the first place. Indeed, for Ms Bougnaoui, it is hoped that Micropole would not have indulged its customer's perception of the headscarf to the extent of dismissing Ms Bougnaoui. Even if the facts of the cases had remained the same, given the judicial education proposed in the hybrid solution, the CJEU might potentially have been more aware of the intersectional aspect of these cases, and thus the higher disproportional impact these women were facing, when striking a balance between their interests and their employers' freedom to conduct a business. The outcome of the cases might therefore have been different. Even if they were not, and for instance Ms Achbita was still found to not have been discriminated

¹²⁶ Directive 2000/78/EC (n 38) preamble recital 20.

¹²⁷ Ibid preamble recital 21.

¹²⁸ Sharpston (n 63) para 131.

against, the enforcement mechanism suggested in the hybrid solution would mean that she had another means of redress, namely the process of discussion and negotiation mediated by the relevant national equality body.

V. CONCLUSION

This article has examined the issue of intersectional discrimination as faced by Muslim women, who encounter synergistic disadvantage in the face of increasing restriction of their right to wear the headscarf. It has been demonstrated that the CJEU is unlikely to respond to intersectional discrimination within the current framework of European anti-discrimination law, as exemplified by its judgments in the cases of *Parris*, *Achbita* and *Bougnaoui*. In the latter two cases, the Court's legitimisation of employers' ability to ban headscarves in the private workplace looks set to further the marginalisation of Muslim women in employment. In order to remedy this, it has been argued that legal reform is paramount. The proposed reform is a novel hybrid solution involving the implementation of a reasonable accommodation model in conjunction with proactive measures. Such an approach would provide a means of recognising and responding to the intersectional discrimination of Muslim women, substantially improving the protection of their right to wear the headscarf in the workplace, whilst working to tackle the societal roots of their marginalisation.

**RIGHT OR DUTY TO LIVE?
EUTHANASIA AND ASSISTED SUICIDE FROM THE PERSPECTIVE OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS**

Diego Zannoni* 

The aim of this analysis is to direct the attention of legal scholars and legislators towards the legalisation of assisted suicide and euthanasia. This topic will sooner or later make inroads into the legal systems of all Council of Europe Member States, to the extent that it has not already. Two principles are at stake here: the protection of human life, on the one hand, and self-determination, on the other. The unconditional adherence to the principle of protection of life would entail that life should always be protected, even against the will of the person concerned. The unconditional adherence to the principle of self-determination would entail that each individual should have the right to die upon request, provided that their decision is based on their free will and informed. This article clarifies that, in their absoluteness, both alternatives should be rejected, and seeks to provide a reading of the limits of Member States' margin of discretion in end-of-life issues.

Keywords: euthanasia, assisted suicide, right to life, right to die, artificial nutrition, medical treatment

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I. INTRODUCTION

The extraordinary possibilities of medicine and its technical-scientific apparatus have made it possible to cure many previously incurable or fatal diseases, and even to save patients with serious health conditions from dying. At least some of the dilemmas presented in the present article arise because medical progress has generated situations which would have 'resolved' themselves spontaneously and rapidly in the past. Patients finding themselves in such precarious conditions not only ask for palliative care and pain management programmes. At times, they explicitly ask for assistance to die, to spare themselves great physical suffering or to avoid the perceived indignity of a dependent existence. In fact, living with an irreversible debilitating condition, potentially one even that ties them to technological support, can induce patients to reject medical assistance altogether, considering it futile, disproportionate, or dehumanising. Some people fear being forced to linger on in old age or in a state of advanced physical or mental decrepitude, a prospect which conflicts with their strongly held ideas of their own self and personal identity.¹

The ability to choose and to exact those choices is increasingly perceived as an essential element of individual autonomy. Some patients demand the freedom to decide by what means and at what point their life should end. A 'de-absolutisation' of the value of life is taking place, both from an objective point of view (not every life is by default worthy of living) and from a subjective one (nobody can be obliged to live a life they deem intolerable), in the sense that life is not always and no longer considered an absolute right.

¹ In *Gross v. Switzerland*, the applicant was not suffering from a terminal illness. She claimed her right to die to avoid the decline of her physical and mental faculties as a result of her advanced age. *Gross v. Switzerland* [GC], ECHR 2014-IV.

Against this growing tendency, one might argue that, because of its intrinsic dignity, human life is not disposable.² The healthcare situation in some countries raises the concern that a decriminalisation or legalisation of so-called medically assisted suicide and euthanasia, along the lines of what already exists in other European countries, will lead to a slippery slope.³ More precisely, legislation permitting euthanasia and assisted suicide in particular, well-defined circumstances could be stretched to cover cases such as dementia or depression, which had not originally been intended.⁴ The legalisation of euthanasia and assisted suicide, initially proposed for exceptional cases, could become a method of resource-led population control in a society marked by a progressively aging population and restricted healthcare expenditure. The basic concern is that legalisation could lead to certain conditions being considered generally unworthy of protection, which could ultimately culminate in a kind of 'duty to die', by which vulnerable groups would be disproportionately affected.⁵

The public debate concerning assisted suicide and euthanasia shows how difficult it is to reconcile two principles of bio-ethical relevance: the protection of human life on the one hand, and the autonomy and self-determination of the individual on the other. In its decisions on end-of-life issues, the European Court of Human Rights (ECtHR or 'the Court') has consistently focused on Articles 2 and 8 of the European Convention on Human Rights (ECHR), protecting the right to life and the right to respect for private life, respectively. Different ways of balancing these principles raise a series of bio-ethical concerns that are not easy to resolve on the legal level. Unconditional adherence to the principle of protection of life would entail that life should always be protected, even against the will of the person concerned. Unconditional adherence to the principle of self-determination

² See *infra* section 3.

³ Jean Morange, 'Les dangers d'un droit à l'euthanasie' (2018) *Questions of International Law, Zoom-in* 7, 15-16.

⁴ Davide Paris, 'Dal diritto al rifiuto delle cure al diritto al suicidio assistito (e oltre)' (2018) *Corti supreme e salute* 489, 496.

⁵ Luciano Eusebi underlines the fine line between right and moral duty to die. Luciano Eusebi, 'Dignità umana e indisponibilità della vita. Sui rischi dell'asserito "diritto" di morire', in Enrico Furlan (ed), *Bioetica e dignità umana* (Franco Angeli 2009), 218.

would entail that each individual should have the right to die upon request, provided that their decision is based on their free and informed will.

This paper seeks to establish whether, in light of the ECtHR case law, the ECHR and the Convention on Human Rights and Biomedicine (Oviedo Convention)⁶ provide sufficient guidance to overcoming the conflict between the protection of the right to life and self-determination. As we will see, the will of the patient is a fundamental (though not the only) value to consider. Therefore, while involuntary euthanasia (against a person's will) is clearly inadmissible, the issue of whether euthanasia upon request is compatible with the ECHR deserves careful examination. A deeper analysis will show that the interpretation of factual reality is often difficult. When patients have never been competent and their wishes never been expressed,

⁶ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4 April 1997, European Treaty Series - No. 164. The Oviedo Convention as such does not produce any international obligations for countries such as Italy, who have not ratified it, or for countries like Germany, who are not even signatories to it. The Oviedo Convention can therefore not be said to be a formal legal source for these countries. Nevertheless, the ECtHR has taken the Oviedo Convention as a reference to interpret ECHR norms in a number of cases, for example when the consent to medical treatment was at stake or for defining the legal protection of embryos. For references to the Oviedo Convention and to its additional Protocols, albeit within the field of application of the ECHR, see ECtHR, *Glass v the United Kingdom*, App no 61827/00 (ECtHR, 9 March 2004) para 58; *Vo v France*, App no 53924/00 (ECtHR, 8 July 2004), paras 35 and 84; *Evans v the United Kingdom*, App no 6339/05 (ECtHR, 10 April 2007) para 50. With this it becomes a material source of law for all EU Member States, for the twofold reason of their being a party to the ECHR and because the Court of Justice of the EU makes reference to the ECtHR jurisprudence to interpret the EU Charter of Fundamental Rights. On the use of other international instruments to interpret the ECHR by the ECtHR, see Cesare Pitea, 'Interpreting The ECHR In the Light Of "Other" International Instruments: Systemic Integration Or Fragmentation Of Rules On Treaty Interpretation?', in Nerina Boschiero and others (eds), *International Courts And the Development Of International Law* (Springer 2013) 545-559. Some principles affirmed in the 'Oviedo system' are directly binding for EU Member States in any case, albeit only in respect of cases regulated by EU law, because they are reiterated in Articles 1 and 3 of the EU Charter of Fundamental Rights.

can euthanasia be deemed voluntary or should it be classified as forced euthanasia? Based on the conclusion reached, the paper will point out specific limits to Member States' margin of discretion.

II. EUTHANASIA AND ASSISTED SUICIDE

A preliminary clarification is necessary on whether the notion of voluntary euthanasia can include assisted suicide. From a phenomenological point of view, the distinction seems clear: voluntary euthanasia involves people who wish to die but cannot achieve this objective single-handedly. Therefore, the fatal act must be carried out by a third party. Assisted suicide, on the other hand, requires the person concerned to commit the fatal act, limiting assistance to preparation of the means. In some cases, the procedure involves the use of machines to help patients with limited physical capacity to take a lethal dose of medication. In short, the term euthanasia is used to describe the intentional termination of life by someone other than the person concerned, whereas assisted suicide consists in providing assistance to someone who actively terminates their own life. Consequently, suicide remains an act committed by the person concerned. At least from an ethical point of view, letting someone die seems different from killing a person, even at their request.

Yet, from an ethical and legal point of view, these two phenomena are often linked. Arguably, helping a person who wishes to die to die 'single-handedly' and being the author of their death is substantially equivalent. In either case, the person concerned wants to die and the outcome is the same. Therefore, when defining the safeguards to prevent slipping down the slope, the distinction between assisted suicide and voluntary euthanasia could seem futile. Suicide, which by definition is an individual act when the person concerned commits it without third-party assistance, ceases to be suicide where they do receive assistance.⁷

If we assume that euthanasia refers to situations where a doctor administers a lethal dose of medication to a patient to make them die, the withdrawal from or refusal of life-support such as liquids and nutrients will never be

⁷ On this debate, see further the Advisory Opinion of the Comitato nazionale di Bioetica, *Riflessioni bioetiche sul suicidio medicalmente assistito*, 18 July 2019.

euthanasia. This remains the case regardless of the intentions of those requesting it and those who carry it out. But the lexical border can easily be crossed. For this reason, when it comes to the extremely delicate balance between the protection of human life and of freedom of choice, clinging onto a mere terminological distinction is inadequate. A factual approach, based on the similar outcome of both practices, rather than a formal approach merely based on the terms used, is adopted in this article. This provides the first safeguard to prevent slipping down the slope.

III. DIGNITY AND QUALITY OF LIFE

According to Article 1 of the Oviedo Convention, State Parties 'shall protect the dignity and identity of all human beings'. The Charter of Fundamental Rights of the European Union (EU) states even more categorically that: 'Human dignity is inviolable. It must be respected and protected'.⁸ Similarly, in Protocol no. 13 to the ECHR, dignity is described as 'inherent' in all human beings.⁹ This is an undisputed constraint with which States must comply when they regulate end-of-life issues.¹⁰ However, the concept of dignity is as ambiguous as it is evocative and is, in itself, unable to offer a univocal solution to the questions arising at the end of life. Assuming that dignity is an indefectible attribute of all human life, it cannot increase or decrease by reason of quality of life. Under this perspective, its intrinsic dignity would prevent human life from being considered disposable. Some authors note that if the law, in principle, considered human life disposable (even if only in exceptional cases), this would imply an element of arbitrariness. Those put in charge of deciding on the limits of such disposability would hold the power

⁸ Art. 1, EU Charter of Fundamental Rights.

⁹ Preamble to the Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances Vilnius, 3 May 2002.

¹⁰ See also the Preamble and Article 1 of the Universal Declaration of Human Rights and the Preamble common to the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Among the many contributions on dignity, see Giorgio Resta, 'La dignità', in Stefano Rodotà, Mariachiara Tallacchini (eds), *Trattato di biodiritto* vol. I (Giuffrè 2010) 259-291.

to recognise certain individuals as subjects of law while excluding others.¹¹ Dignity – in the legal sense of the term – should therefore not be derived from any further characterisation, whether physical, cultural, or moral, but rather be dependent on the sole condition of belonging to the human species.

This conception may nonetheless expose us to the risk of reducing human life to the level of pure material existence, ignoring the fact that emotional and intellectual faculties, as well as moral and spiritual facets, set 'human' life apart from other forms of biological existence. No doubt, individuals with limited or no capacity to interact with their surroundings can build an inner life full of meaning. And yet, in the case of terminal conditions, the possibility of a meaningful inner life is often lacking, because the disease puts at stake precisely what allows us to build our 'I' (memory, intelligence, ability to relate to others). In practice, there is a risk that, by adopting such a vision, we fall into the trap of protecting life 'at any price', even when patients perceive their own lives as intolerable. Conversely, one might argue that dignity depends on the quality of life, which would suggest that not all lives are worth living and protecting to the same extent. In this respect, quality of life becomes a *discrimen* below which the protection of life is no longer indisputable and assured.¹²

Quality of life is a *leitmotiv* in the case law dealing with individuals who have never reached a degree of capacity allowing them to formulate wishes about the withdrawal of treatments. In the *Gard* case, for instance, the domestic decisions repeatedly referred to 'quality of life' to dismiss the parents' claims and conclude that it was in the best interest of the child to be allowed to pass away peacefully, without any additional pain and suffering.¹³ The focus on quality of life can offer an important warning, inviting us not to neglect the importance of the aforementioned emotional, intellectual, moral, and

¹¹ In this sense, the opinion of Francesco D'agostino attached to the Advisory Opinion of the Comitato Nazionale per la Bioetica sulla proposta di risoluzione del Parlamento Europeo avente per oggetto l'assistenza ai pazienti terminali, 6 September 1991, 53

¹² Quality of life also becomes a method for determining how scarce resources should be allocated. On this issue see further Hazel Biggs, *Euthanasia. Death with Dignity and the Law* (Hart 2001) 42-43.

¹³ See the domestic decisions quoted in *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) paras 27 and 44.

spiritual elements which distinguish human life from a mere 'organic' datum, and to safeguard its specificity.

However, if quality of life was a prerequisite for the protection of life, we would have to admit that there may be human beings whose dignity is worthy of being respected, but not of full protection.¹⁴ This thesis seems to find legal support in the Oviedo Convention, under which State Parties shall protect the dignity and identity of all 'human beings' and guarantee 'everyone' – '*à toute personne*' in French – respect for their integrity, as well as other rights and fundamental freedoms.¹⁵ The different terms used – 'human beings' versus 'everyone'/'*à toute personne*' – seem to suggest that only persons are entitled to rights and freedoms. Human beings solely possess dignity.¹⁶ The Oviedo Convention neither provides a definition for the notion of 'human being' nor for that of 'person'. It therefore does not clarify whether a patient in a permanent vegetative state, for example, falls within either one category or neither. The Explanatory Report specifies that, in the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the Convention.¹⁷

¹⁴ On the related philosophical debate, see Adriano Pessina, *Bioetica. L'uomo sperimentale* (Mondadori 1999) 79-81. Paolo Zatti, *Maschere del diritto volti della vita* (Giuffrè 2009) 15-21.

¹⁵ Article 1 of the Oviedo Convention.

¹⁶ In this sense, see Antonello Tancredi, 'Genetica umana ed altre biotecnologie nel diritto comunitario ed europeo' in Nerina Boschiero (ed), *Ordine internazionale e valori etici* (Editoriale Scientifica, 2004), 393-394; B. Mathieu supports the view that the distinction between person and human being in Article 1 of the Oviedo Convention is not a coincidence. Cf. Bertrand Mathieu, 'De la difficulté d'appréhender l'emploi des embryons humains en termes de droits fondamentaux' (2003) *Revue trimestrielle de droits de l'homme* 387, 390.

¹⁷ Explanatory Report to the Oviedo Convention, 4 April 1997, para 18 (hereinafter Explanatory Report). Along the same lines, the preamble to Directive 2004/23/EC specifies that "this Directive should not interfere with provisions of Member States defining the legal term 'person' or 'individual'". The Directive therefore assumes that the two concepts do not, or at least may not, overlap. Cf. Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing,

The attempts to distinguish between human being and person, between rights-bearing subject and protected object, between life understood purely in the biological sense of 'being alive' and life in the biographical sense of 'having a life', all have something in common. They are all attempts to precisely restrict the field of legal protection to those who are effectively endowed with a will, even if all they may be capable of is oppose somebody else's decision, while denying the same subjectivity to those who are not yet or no longer capable of expressing their will.¹⁸ And yet, long after the abolition of slavery, it is difficult to suggest that some human beings may not be persons¹⁹ and that dignified human beings may have no rights. In addition, there is no consensus on the exact meaning of 'quality of life', the elements on the basis of which a boundary line between good and poor quality of life can be drawn, and who is competent to assess the quality of a person's life.²⁰ As long as quality of life becomes the *discrimen* of protection, it seems difficult to find adequate objections to those wishing to reduce or suspend social and medical care for severely impaired subjects purely for cost-benefit reasons. These observations make clear how difficult and risky it is to invoke the concept of quality of life to establish a limit for the protection of life. In this respect, it is noteworthy that, in the reasoning of the ECtHR, the notion of 'quality of life' takes on significance under Article 8 ECHR and not under Article 2.²¹

processing, preservation, storage and distribution of human tissues and cells [2004] OJ L102, recital no. 12.

¹⁸ 'What is the overriding reason, in the circumstances of the present case, justifying the State in not intervening to protect life? Is it financial considerations? None has been advanced in this case. Is it because the person is in considerable pain? There is no evidence to that effect. Is it because the person is of no further use or importance to society, indeed *is no longer a person and has only "biological life"?*'. [Emphasis added]. Partly Dissenting Opinion of Judges Hajiyev, Šikuta, Tsotsoria, De Gaetano and Gritco, in *Lambert and Others v. France*, App no 46043/14, (ECtHR, 5 June 2015) para 4.

¹⁹ In this sense, Andrés Ollero, 'Il rispetto per la dignità umana. Una prospettiva biogiuridica' in Enrico Furlan (ed), *Bioetica e dignità umana* (Franco Angeli 2009) 226-227.

²⁰ On this issue see sections 10 and 11.

²¹ *Pretty v the United Kingdom*, ECHR 2002-III, paras 39, 65.

The emphasis on the right to die with dignity can be found both in the writings of those who consider euthanasia at the request of the patient and assisted suicide a dignified way of dying and in the writings of those who consider it the most undignified end conceivable. This shows the ambivalence of the notion 'dignity' across radically opposed positions. There is a lack of convergence among ECHR State Parties on the concept of human dignity. While some States lean towards solutions favouring a conservative approach to human dignity, others follow a utilitarian approach and therefore balance interventions and interferences in a different way.²² To some extent, all of this erodes the prescriptive capacity of dignity, accentuating the space for political and jurisprudential discretion. When dealing with end-of-life issues, the ECtHR has coherently focused not on dignity, but on the right to life and to respect for private life.

IV. THE FIRST TERM TO BALANCE: THE RIGHT TO LIFE

Article 2 ECHR protects the right to life. Strict interpretation and scrutiny are required for the limited circumstances in which deprivation of life may be justified.²³ The Court explains this limitation by reference to the very nature of the right to life, which cannot be disposed of within the same margins established by norms granting freedoms, with life being the very foundation of other rights and freedoms, and an indispensable prerequisite for their enjoyment.²⁴ The 'negative' aspect of, for example, freedom of religion, trade union freedom, or the right to representative democracy itself incorporates the freedom not to believe in any religion, not to join any union, or not to exercise one's 'right' to vote. By contrast, the Court has firmly rejected the

²² Francesco Salerno, 'International Protection and Limits to the Right to Self-Determination for the Bio-Technological Strengthening of One's Own Person' in Debora Provolo, Silvio Riondato and Feridun Yenisey, *Genetics, Robotics, Law, Punishment* (Padua University Press 2014) 452; Francesco Francioni, 'Genetic Resources, Biotechnology and Human Rights: The International Legal Framework' in Francesco Francioni (ed), *Biotechnologies and International Human Rights* (Hart 2007) 20.

²³ *McCann and Others v the United Kingdom*, App no 18984/91 (ECtHR, 27 September 1995) para 147; *Pretty v the United Kingdom*, ECHR 2002-III, para 37.

²⁴ *Ibid*, para 39.

thesis that Article 2 protects 'the right to life and not life itself'.²⁵ According to the Court, Article 2 ECHR is unidirectional, because it cannot 'without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die'.²⁶ Accordingly, the Court finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.²⁷

According to the Court's case law, Article 2 ECHR 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.²⁸ Thus, Article 2 ECHR imposes positive obligations on the State Parties,²⁹ such as the obligation to effectively criminalise offences against the person, the obligation to protect an individual whose life is at risk,³⁰ and, under certain circumstances, even the obligation to protect individuals against themselves.³¹ In the public health sphere, such positive obligations require States to make regulations compelling hospitals, whether private or public,

²⁵ Ibid, para 35.

²⁶ Ibid, para 39.

²⁷ Ibid, para 40.

²⁸ *LCB v the United Kingdom*, App no 23413/94 (ECtHR, 9 June 1998) para 36; *Pretty v the United Kingdom*, ECHR 2002-III, para 38; *Lambert and Others v France*, App no 46043/14, (ECtHR, 5 June 2015), para 117.

²⁹ The alternative between positive and negative obligations is not as rigid as to be neatly 'designed' for a specific protection. Cf. *Odievre v France*, App no 42326/98 (ECtHR, 13 February 2003), para 40; *Godelli v Italy*, App no 33783/09 (ECtHR, 25 September 2012) para 47; *Knecht v Romania*, App no 10048/10 (ECtHR, 2 October 2012) para 55. See further Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe 2007).

³⁰ *Osman v the United Kingdom*, App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 115; *Kılıç v Turkey*, App no 22492/93 (ECtHR, 28 March 2000) para 62.

³¹ The Court has acknowledged a positive obligation to protect the individual against their own suicidal attempts in cases concerning detainees: *Keenan v the United Kingdom*, App no 27229/95 (ECtHR, 3 April 2001) para 91; *Trubnikov v Russia*, App no 49790/99 (ECtHR, 5 July 2005) paras 68-69; *Renolde v. France*, App no 5608/05 (ECtHR, 16 October 2008) para 83; *Ketreb v France*, App no 38447/09 (ECtHR, 19 July 2012) para 71, and in cases concerning army members: *Gündüz and Others v Turkey*, App no 4611/05 (ECtHR, 11 January 2011) para 63, i.e. situations where individuals are vulnerable and face situations of distress and pressure under the control of State authorities.

to adopt appropriate measures for the protection of patients' lives.³² Precisely by leveraging the positive obligations stemming from Article 2 of the ECHR, as interpreted by the Court, one could argue against the legitimacy of medically assisted suicide and euthanasia.

However, the ECtHR has already balanced the protection of life with other values.³³ According to the most recent case law, Article 8 presents a high degree of protection capable of sacrificing other aspects also granted by the ECHR. For example, the ECtHR includes within the right to family life also the right to have children, if necessary through assisted fertilisation techniques that the State has a positive obligation to grant.³⁴ It also comprises the 'negative right' not to have children.³⁵ For this reason, the ECtHR includes in Article 8 the right to abortion as a legitimate expression of the mother's self-determination. The right to one's own private and family life therefore entails a restriction of the potential right to life of the suppressed foetus or embryo, such that it has no right to life under Article 2 of the ECHR.³⁶

In the *Lambert* case, where the ECtHR dealt precisely with the end-of-life issue, the ECtHR stated that 'reference should be made, in examining a possible violation of Article 2, to Article 8 of the Convention, and to the right to respect for private life and the notion of personal autonomy which it encompasses'.³⁷ The opposite is also true, because in the context of examining a possible violation of Article 8 ECHR, it is appropriate to refer to

³² *Lambert and Others v France*, App no 46043/14, (ECtHR, 5 June 2015) para 140.

³³ See also the following emblematic statement of the Italian Court of Cassation: "la concezione della vita come oggetto di tutela, da parte dell'ordinamento, in termini di "sommo bene" [...] è percorsa da forti aneliti giusnaturalistici, ma è destinata a cedere il passo al raffronto con il diritto positivo" [The concept of life in terms of the 'highest good' to protect [...] is rich with naturalistic yearnings, yet has to retreat when facing against positive law]. Corte di Cassazione, Sez. III-Judgement, 2 October 2012, no 16754.

³⁴ *Knecht v Romania*, App no 10048/10 (ECtHR, 2 October 2012) para 54.

³⁵ *Evans v the United Kingdom*, App no 6339/05 (ECtHR, 10 April 2007) para 71; *A, B and C v Ireland*, App no 25579/05 (ECtHR, 16 December 2010) para 212.

³⁶ *Evans v the United Kingdom*, App no 6339/05 (ECtHR, 10 April 2007) paras 54-56.

³⁷ *Lambert and Others v France*, App no 46043/14, (ECtHR, 5 June 2015) para 142.

Article 2 of the Convention.³⁸ Therefore, the next step must be the analysis of the scope of the second term to balance: the right to respect for private life under Article 8 ECHR.

V. THE SECOND TERM TO BALANCE: SELF-DETERMINATION

The right to refuse medical treatment is probably the first bioethical rule established in the post-WW2 period. This right was affirmed as early as the 1947 decision in *United States of America v. Karl Brandt and others*³⁹ and then incorporated into the so-called Nuremberg Code.⁴⁰ The role of informed consent as an ethical, deontological, and legal constraint was then progressively strengthened and with it the emphasis on therapeutic alliance.⁴¹ The EU Charter of Fundamental Rights contains a provision on consent in its Chapter I, which is dedicated to 'Dignity' and suggests that free and informed consent is an indispensable safeguard for human dignity.⁴² In similar terms, the Oviedo Convention attributes a crucial role to patient consent: 'An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it'.⁴³ The Convention further includes special norms for persons not able to consent.

The ECtHR jurisprudence makes it clear that any medical treatment requires the free and informed consent of the person concerned, as it is a

³⁸ Ibid.

³⁹ Military Tribunal I, *United States of America v. Karl Brandt et al.* (Case 1), 21 November 1946 – 20 August 1947.

⁴⁰ 'The voluntary consent of the human subject is absolutely essential'. Article 1, Nuremberg Code (1947).

⁴¹ Plato already emphasised the importance of the patient's consent: 'But the free-born doctor is mainly engaged in visiting and treating the ailments of free men, and he does so by investigating them from the commencement and according to the course of nature; he talks with the patient himself and with his friends, and thus both learns himself from the sufferers and imparts instruction to them, so far as possible; and he gives no prescription until he has gained the patient's consent, and only then, while securing the patient's continued docility by means of persuasion, does he attempt to complete the task of restoring him to health'. Plato, *The Laws*, IV.

⁴² Art. 3, para 2, EU Charter of Fundamental Rights.

⁴³ Art. 5, Oviedo Convention.

projection of the right to private life protected by Article 8 ECHR.⁴⁴ Indeed, with Article 8 ECHR being a 'principle', several 'rules' of various content stem from it and adapt to the continuous evolution of the State parties' 'legal conscience'. These prescriptive indications are not alien to the object of the ECHR, to the extent that the Court considers them an autonomous expression of the right to private life.

Article 8 ECHR therefore also covers the right to physical and psychological integrity and choices about one's own body in the negative sense. A person is entitled to make choices about their own body, even where the conduct poses a danger to health or, arguably, where it is of a life-threatening nature.⁴⁵ Consider, for example, the Court's case law on consensual sadomasochistic activities.⁴⁶ The same applies to the refusal of medical treatment. When the negative aspect of the consent to (read: refusal of) medical treatment is at stake, the relevance of respect for private life is perhaps even clearer. The focus shifts from physical and psychological integrity to a subjective dimension related to the personal way of conceiving one's relationship with illness, with one's own body, and ultimately with one's dignity and personal identity, as defined by each person's notion of life. A patient who rejects a transfusion, refuses the amputation of a limb, despite the surgical intervention being potentially life-saving, or asks for the discontinuation of artificial ventilation, might seek to protect the values and ideals that constitute personal identity, which might even prevail over their wish to stay

⁴⁴ *Storck v Germany*, App no 61603/00 (ECtHR, 16 June 2005) paras 143-144; *Jehovah's Witnesses of Moscow and others v. Russia*, App no 302/02 (ECtHR, 10 June 2010) para 135; *Shopov v. Bulgaria*, App no 11373/04 (ECtHR, 2 September 2010) para 41; *Pretty v the United Kingdom*, ECHR 2002-III, para 63. 'There is a general consensus based on Article 8 of the European Convention on Human Rights (ETS no 5) on the right to privacy, that there can be no intervention affecting a person without his or her consent'. Resolution 1859 (2012) Protecting human rights and dignity by taking into account previously expressed wishes of patients, 25 January 2012, para 1.

⁴⁵ *Pretty v the United Kingdom*, ECHR 2002-III, para 62.

⁴⁶ According to the case law of the ECtHR, the State's imposition of compulsory or criminal measures regarding consensual sadomasochistic behaviour posing a danger to health or life impinges on the private life of the person concerned within the meaning of Article 8, paragraph 1 and requires justification in terms of the second paragraph. *Laskey and others v the United Kingdom*, App nos. 21627/93; 21628/93; 21974/93 (ECtHR, 19 February 1997) paras 35-36.

healthy and alive. A Jehovah's Witness declining consent to a blood transfusion wishes to live but prefers death to eternal damnation.

The ECtHR correctly pointed out that, in the medical field, refusal to accept a particular treatment might lead to a fatal outcome. Yet, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with a person's physical integrity in a manner which could violate the rights protected under Article 8, paragraph 1 of the ECHR. Thus, a person may claim to exercise their choice to die by refusing their consent to a treatment which might prolong their life.⁴⁷ In this manner, as a substantive value, Article 8 ECHR balances and limits the scope of the State's obligation to protect life.

Along the same lines, assisted suicide and euthanasia, insofar as they are an expression of self-determination of a competent subject, find their foundation and protection under Article 8 ECHR. In *Pretty*, the Court declared that it was 'not prepared to exclude' that preventing a person from exercising a choice to avoid what they consider will be an undignified end of life may constitute an interference with the right to respect for private life under Article 8 ECHR.⁴⁸ Thus, notwithstanding the indirect formulation and the use of the term 'choice', the Court accepted that the wish to be assisted in committing suicide falls within the notion of private life.

In *Haas*, the ECtHR went further still. It considered that Article 2 requires national authorities to prevent individuals from taking their lives if the decision was not taken freely and based on the full understanding of what is involved.⁴⁹ Personal autonomy was therefore already implicitly considered as a possible counter-interest to be balanced against the right to life. Moreover, instead of referring to a 'choice', it considered that a right was at stake: the 'individual's right to decide by what means and at what point his or her life will end',⁵⁰ and specified that, when an individual is capable of freely making a decision and acting upon it, this right 'is one of the aspects of the right to

⁴⁷ *Pretty v the United Kingdom*, ECHR 2002-III, para 63; *Jehovah's Witnesses of Moscow and others v. Russia*, App no 302/02 (ECtHR, 10 June 2010) para 135.

⁴⁸ *Pretty v the United Kingdom*, ECHR 2002-III, para 67.

⁴⁹ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 54.

⁵⁰ *Ibid*, para 51; *Koch v Germany*, App no 497/09 (ECtHR, 19 July 2012) para 52.

respect for private life within the meaning of Article 8 of the Convention'.⁵¹ But of course to conclude that a person's wish to die falls under the protective umbrella of Article 8 ECHR does not imply the existence of a right to die, whether at the hands of a third person or with the assistance of a public authority.⁵²

VI. THE LACK OF A EUROPEAN CONSENSUS

Only three Member States of the Council of Europe – the Netherlands, Belgium, and Luxembourg – allow active euthanasia in their domestic law. Switzerland does not permit euthanasia, but it allows doctors to prescribe lethal drugs and considers assistance to suicide unlawful only when carried out for 'selfish motives'.⁵³ In the legal systems of the other Council of Europe Member States, killing on request and assisting others in committing suicide are generally criminal offences. Thus, the vast majority of Member States seem to attach more weight to the protection of the individual's life than to his or her right to terminate it.⁵⁴ Experience shows that where there is no

⁵¹ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 51. *Gross v Switzerland*, App no 67810/10, (ECtHR, 14 May 2013) para 60. Jean Morange sharply criticises the legal reasoning followed by the ECtHR: '*on conçoit difficilement comment l'Article 8, qui avait pour finalité de protéger la vie privée et familiale des individus contre des intrusions extérieures, pourrait fonder le droit de demander une intervention extérieure, médicale en l'occurrence, pour mettre fin à ses jours*' [it is difficult to understand how Article 8, which was intended to protect the private and family life of individuals against external intrusions, could be used as a legal basis for a right to request an external intervention, eventually a medical one, to end their life] (my translation). According to the author, this is an abuse of power on the part of the ECtHR. Morange (n 3) 17.

⁵² In *Haas*, the Court cautiously assumes but does not affirm: 'even assuming that the States have a positive obligation to adopt measures to facilitate the act of suicide with dignity, the Swiss authorities have not failed to comply with this obligation in the instant case'. *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 61.

⁵³ Art. 115 Swiss Criminal Code.

⁵⁴ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 55. See also the univocal, but in its absoluteness outdated, Recommendation 1418 (1999), Protection of the human rights and dignity of the terminally ill and the dying, Parliamentary Assembly, 25 June 1999, para 9 (c) sub 3: 'a terminally ill or dying

specific rule permitting euthanasia and assisted suicide, domestic judges often become interpreters of social expectations, because the claims for individual rights to die are left for them to respond to.⁵⁵

In view of the lack of a 'common consensus' within the Member States of the Council of Europe with regard to an individual's right to decide how and when his or her life should end,⁵⁶ and taking into account the sensitive scientific, legal, and ethical issues concerning the end of life,⁵⁷ the ECtHR has generally deduced that, in the balancing exercise, Member States enjoy a wide margin of appreciation between the individual right to respect for one's own autonomy and dignity, on the one hand, and the need to guarantee the protection of life and of vulnerable individuals, on the other.⁵⁸ There is therefore no positive obligation for the State to assist people in anticipating their own death, nor is there a right for individuals to die. Nevertheless, the wide margin of discretion State Parties enjoy in this respect does not mean that they are completely free to take any initiative, either preclusive or permissive. Specific limits can be deduced when focusing on the true meaning of the terms to balance. An interpretation will be proposed here, through

person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death'.

⁵⁵ The Italian situation is in this respect paradigmatic. See, for instance, the judgement of the Corte di Cassazione, n. 21.748 of 16 October 2007; and the already recalled decision of the Italian Constitutional Court, no 207 of 24 October 2018.

⁵⁶ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 55; *Koch v Germany*, App no 497/09 (ECtHR, 19 July 2012) para 70; *Nicklinson and Lamb v the United Kingdom*, Applications nos. 2478/15 and 1787/15, (ECtHR, 23 June 2015) para 85. Campiglio coherently stated that in this realm, "privatisation" is still at an early stage. C. Campiglio, 'Valori fondamentali dell'ordinamento interno e scelte di cura transfrontaliere' (2016) *Rivista di diritto internazionale privato e processuale* 371, 406.

⁵⁷ *Nicklinson and Lamb v the United Kingdom*, Applications nos 2478/15 and 1787/15 (ECtHR, 23 June 2015) para 85; *Lambert and Others v France*, App no 46043/14, (ECtHR, 5 June 2015) para 144.

⁵⁸ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 55; *Koch v Germany*, App no 497/09 (ECtHR, 19 July 2012) para 70; *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015) para 145; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 84.

which Articles 2 and 8 ECHR reciprocally enhance and clarify rather than conflict with each other.

VII. THE PROVISION OF SPECIFIC AND STRICT REQUIREMENTS

The first obligation for State Parties is to draft clear and comprehensive legal guidelines setting out the conditions for euthanasia and assisted suicide. The absence thereof entails a violation of the right to respect for private life under Article 8 ECHR,⁵⁹ and is also incompatible with the right to life under Article 2 ECHR.⁶⁰ The requirement of clarity is of course satisfied even by the extreme solution of a blanket ban which, the ECtHR deemed proportionate, albeit cautiously, in the *Pretty* case.⁶¹ On the substantive level, it seems that, if a State Party chooses to allow assisted suicide and euthanasia, they *must* in any case be subject to strict requirements and limited to extreme situations. The Italian Constitutional Court, for instance, identified four cumulative requirements which justify on the part of a third party the execution of or collaboration with the patient in putting an end to their life: a patient must be affected by an irreversible pathology causing them intolerable physical or psychological suffering and must be kept alive through life-sustaining treatments, while also being capable of taking free and informed decisions.⁶²

Mere tiredness of life or the intention to avoid old age and the related decline of physical and mental faculties do not seem sufficient to trigger the protection of Article 8 ECHR balancing and limiting the right to life. The exclusion of a right to die *ad libitum* stems from the absolute nature of the right to life in the first place. It is true that in the *Gross* case, having regard to the principle of subsidiarity, the ECtHR considered that it is primarily up to the domestic authorities to decide whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life.⁶³ And yet, although the Court did

⁵⁹ *Gross v Switzerland*, App no 67810/10 (ECtHR, 14 May 2013) paras 63-69.

⁶⁰ *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015) para 160; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 31.

⁶¹ *Pretty v the United Kingdom*, ECHR 2002-III, paras 75-76.

⁶² In this sense: the Italian Constitutional Court, decision no 207 of 24 October 2018.

⁶³ *Gross v Switzerland*, App no 67810/10 (ECtHR, 14 May 2013) paras 68-69.

not explicitly contemplate the limit defended here, it is an implicit assumption: the Court repeatedly emphasised the principle of sanctity of life, which arguably means that life shall be protected and prevents the deliberate taking of life except in very narrowly defined circumstances. If a right to die *ad libitum* were admitted, the principle of sanctity of life would be meaningless.⁶⁴

Upon closer inspection, the exclusion of a right to die *ad libitum* is a limit inherent in Article 8 ECHR which cannot be overcome. Indeed, the patient's individual right to self-determination regarding their own lives is neither absolute, nor a dogma.⁶⁵ Despite the radical implications for the right to self-determination acknowledged by Article 8 ECHR, self-determination is limited whenever it could irreversibly deprive a person of their own capacity for self-determination. Since the exercise of the claimed freedom to die instantly determines the annihilation of that freedom and of its subjective basis, it seems contradictory to support the existence of a right to die as a direct expression of one's autonomy.⁶⁶ In itself, choosing and 'imposing' one's own death does not affirm self-determination, but rather destroys it.⁶⁷ Thus, a domestic practice legitimising euthanasia and assisted suicide upon simple request and with no requirements whatsoever would be incompatible with Article 2 ECHR and arguably with Article 8 ECHR.

⁶⁴ See *ex multis Pretty v the United Kingdom*, ECHR 2002-III, para 65. On the principle of sanctity of life, see Zatti (n 14) 299-300.

⁶⁵ The Explanatory Report to the Oviedo Convention explicitly states that 'this principle [the freedom of consent] does not mean, for example, that the withdrawal of a patient's consent during an operation should always be followed. Professional standards and obligations as well as rules of conduct which apply in such cases under Article 4 may oblige the doctor to continue with the operation so as to avoid seriously endangering the health of the patient'. Explanatory Report (n 17) para 38.

⁶⁶ Eusebi (n 5) 214; Antonio D'Aloia, 'Il diritto di rifiutare le cure e la fine della vita. Un punto di vista costituzionale sul caso Englaro' (2009) *Diritti umani e diritto internazionale* 370, 381.

⁶⁷ See further: Francesco Cavalla, 'Praeter legem agere. Appunti in tema di struttura e fenomenologia dell'atto libero' in Francesco D'Agostino (ed), *L'indirizzo fenomenologico e strutturale nella filosofia del diritto italiana più recente* (Giuffrè 1988) 53-73.

In this regard, it is worth noting that, following the logic of the human being as a 'social animal',⁶⁸ the ECHR legitimises measures that limit the sphere of liberties to protect the general interest of the human population as a whole⁶⁹ or whenever there is an 'abuse of rights' under Article 17 ECHR for the prejudicial effects deriving from the exercise of a legitimate right within another person's individual sphere. This is particularly relevant in this context, because there is no choice concerning the end of a human life that does not involve others, namely all those who are or will be involved in a person's decision to die (be they doctors, guardians, relatives, and so on). If life can be conceived as a construction, it is the result of a process of interaction with, for, or because of others. Nobody builds their own life; nobody builds the lives of others. We could claim that life was ours because it is the product of our personal history. However, we could also claim that it is not ours, because our personal history is inevitably linked to the people we meet throughout our lives.⁷⁰

This does not imply that forms of individual self-determination which radically diverge from the conventional model of coexistence among human beings, such as the decision to live as a hermit, are prohibited. In such cases, there may at best be a need to control their individual self-determination if their behaviour, without being illegal, may pose a risk to society. Article 5, para 1 ECHR considers the figure of the 'vagrant' or other similar categories such as the persons of unsound mind, alcoholics, or drug addicts: the purpose is not to 'criminalise' choices of this kind, but rather to justify measures limiting the personal freedom of individuals who make such choices in order to protect general interests. This shows that the ECHR authorises States to

⁶⁸ Article 8 ECHR protects 'to a certain degree the right to establish and develop relationships with other human beings'. *Niemietz v Germany*, App no 13710/88 (ECtHR, 16 December 1992) para 29.

⁶⁹ According to the European Commission of Human Rights, 'the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests'. European Commission of Human Rights, *Bruggemann and Scheuten v Germany*, App no 6959/75, 12 July 1977, para 56.

⁷⁰ Francesca Zanuso, 'Introduzione – Per un biodiritto dialettico' in Francesca Zanuso (ed), *Diritto e desiderio* (Franco Angeli 2015) 22-23.

prevent and repress behaviours resulting from lawful self-determination but with a potentially detrimental effect on society as a whole.

Obviously, the more serious the potential harm in question and the more widespread and profound the choice expressed by the individual, the heavier it will weigh when balancing considerations of public health and safety and crime prevention against the countervailing principle of personal autonomy.⁷¹ In particular, the identification of specific and strict requirements for euthanasia and assisted suicide is well justified in order to avoid any devaluation of human life which might result from permitting the termination of life at peoples' discretion and to protect vulnerable individuals from potential abuse.

VIII. THE DUTY TO ASCERTAIN THE TRUE WILL OF THE PATIENT

From the combination of Articles 2 and 8 ECHR, a further obligation arises: State Parties must prevent a person from dying, especially if that person is vulnerable,⁷² 'if the decision has not been taken freely and with full understanding of what is involved'.⁷³ Forced euthanasia is therefore immediately inadmissible. This limit should not be ignored, as obvious as it may seem. Forced euthanasia has been practiced at various times in history – usually based on economic-demographic considerations, although most often 'justified' by humanitarian arguments – and was revived last century by Binding and Hoche in their book, *Die Freigabe der Vernichtung lebensunwerten Lebens*, which formed the theoretical basis for the eugenics selection

⁷¹ *Pretty v the United Kingdom*, ECHR 2002-III, para 74. Any interference with the right to private life is lawful on the condition that it is justified in accordance with the terms of the second paragraph of Article 8, namely as being 'necessary in a democratic society' for one or more of the legitimate aims listed therein. According to the Court's settled case law, the notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the listed legitimate aims pursued by the authorities.

⁷² Article 2 ECHR creates for public authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives. *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011), paras 54-56 and see *supra* footnote n 31. See further, Stefano Semplici, 'Quali sono le caratteristiche del rapporto fra diritto e scienze della vita?' (2014) *Forum, Biolaw Journal – Rivista di BioDiritto*, 30.

⁷³ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) para 54

programme promoted by Nazism (the so-called *Aktion T4* programme).⁷⁴ However, as outlined above, the 'danger' of 'lives unworthy of being lived' being conceived did not disappear with the end of the Third Reich's *Aktion T4* programme. For this reason, it is necessary to stress once again that, in our pluralist and personalist societies, a right for society to suppress human lives by reason of their assumed lack of dignity cannot be accepted.⁷⁵

In addition, the combination of Articles 2 and 8 ECHR gives rise to an obligation to ascertain that the will of the patient requesting euthanasia and assisted suicide is a genuine expression of the subject's autonomy, i.e. explicit, informed, aware, and free.⁷⁶ One might wonder whether a terminally ill patient can truly be capable of freely and rationally expressing such a wish. Indeed, one could argue – this being the core argument of those against the legalisation of assisted suicide and euthanasia – that terminally ill patients live in a limbo dominated by anxiety and uncertainty and are therefore far from being unequivocal in their views.⁷⁷ Their attitude is often ambivalent and inconsistent. They are often frail, distressed by the fear of suffering and lack of autonomy, sometimes plagued by economic and family problems, uncertain of their future, needing relief from the weight of making burdensome decisions, in a state of confusion or depression. Such conditions of terminally ill patients should be taken seriously to avoid that such people are abandoned in the name of an unconditional adherence to the principle of self-determination of the patient. However, it seems that those factual considerations are not such as to necessarily invalidate the self-determination of suffering people, nor can they justify limiting their freedom. Otherwise, additional burdens would be imposed on patients who already have enough

⁷⁴ Karl Binding and Alfred Hoche, *Die Freigabe der Vernichtung lebensunwerten Lebens* (Leipzig 1922).

⁷⁵ Art. 2 (*Primacy of the human being*), Oviedo Convention. 'Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited'. Resolution 1859 (2012) Protecting human rights and dignity by taking into account previously expressed wishes of patients, 25 January 2012, para 5. But see *infra* section 11 on the issue of the withdrawal of life-sustaining treatment to a patient in permanent vegetative state.

⁷⁶ See also Human Rights Committee, General Comment no 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para 9.

⁷⁷ In this sense, see Morange (n 3) 12.

to bear. If it is possible to ascertain the will of the person requesting the withholding or withdrawal of life-saving therapies,⁷⁸ which will lead to their death, it is hard to support the view that it is not possible to do the same for a person who asks for other types of assistance to achieve the same result.

By virtue of the combination of Articles 2 and 8 ECHR, any State Party that decides to open the way to assisted suicide and euthanasia certainly must establish conditions and procedures capable of ensuring that the decision to end somebody's life does correspond to the free will of the individual concerned, without being a mere passive acquiescence or acceptance of suggestions by others, nor the result of external pressures trying to take advantage of their state of vulnerability. In the view of the ECtHR, for example, a medical prescription issued on the basis of a full psychiatric assessment could be a means of satisfying this obligation by ensuring that an undiscerning patient does not receive a lethal dose of drugs.⁷⁹ Free will means that assistance to suicide can in no way affect the deliberative path of the patient by determining or reinforcing the purpose of their suicide. Assistance should merely consist of material conduct. As we have seen, the right to withdraw or withhold a particular medical treatment is protected under Article 8 ECHR, even in the event of a fatal outcome. Precisely in the event of a potentially fatal outcome, and in line with the factual approach recommended above, Member States should ascertain the true will of the patient, as in the case of request for euthanasia and assisted suicide. Otherwise, vulnerable people could end up being exposed to abuse in the name of unconditional adherence to the principle of self-determination and in violation of Articles 2 and 8 ECHR.

IX. BEYOND THE FREE WILL OF THE PATIENT

Whether death is a consequence of refusal of life-saving or life-sustaining treatment, or request for assisted suicide or euthanasia, doctors cannot simply accept the will expressed by the patient. It goes without saying that they cannot impose life-saving or life-sustaining treatment, but by virtue of the positive obligations of State Parties derived from Article 2 ECHR, they

⁷⁸ See *supra* section 5.

⁷⁹ *Haas v Switzerland*, App no 31322/07 (ECtHR, 20 January 2011) paras 56-58.

are in any case required to protect life by non-coercive means, such as information, dialogue, encouragement, or psychological support, and to propose, whenever possible, alternative treatments to those which the patient refuses. The same applies to cases in which patients request the withdrawal of life-sustaining treatments combined with continuous deep sedation. In Italy, for example, Law 219/2017 allows a patient to ask for the withdrawal of medical treatment, including artificial nutrition and hydration.⁸⁰ Thus, through continuous deep sedation and without nutrients and liquids, patients already have the right to die if they so desire: regardless of whether or not they are terminally ill, exclusively depending on their will. In this case, the patient enters a permanent state of unconsciousness leading to occurrence of death as a consequence of the withdrawal of life-sustaining treatments. This leads to the same result as euthanasia and assisted suicide, even if death occurs slowly and not immediately in this case.⁸¹

By virtue of the positive obligations stemming from Article 2 ECHR, whenever a patient expresses their wish to die, the doctor must inform them (and medical records must provide evidence of such activity) about the nature of their pathology (if any), the possible developments of a multidisciplinary therapy, medication targeted at their pathology which is currently being tested and might eventually become available, as well as the effective

⁸⁰ Law 22 December 2017, no 219, *Norme in materia di consenso informato e di disposizioni anticipate di trattamento*. (18G00006) (GU Serie Generale n.12 del 16-01-2018), Art. 1 para 5. See further: Comitato Nazionale per la Bioetica, *Sedazione palliativa profonda continua nell'imminenza della morte*, Advisory Opinion of 29 January 2016. See also, in similar terms, the French *Loi no 2016-87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie*, Art. 2.

⁸¹ The Italian Constitutional Court correctly pointed out that '*la decisione di lasciarsi morire potrebbe essere già presa dal malato, sulla base della legislazione vigente, con effetti vincolanti nei confronti dei terzi, a mezzo della richiesta di interruzione dei trattamenti di sostegno vitale in atto e di contestuale sottoposizione a sedazione profonda continua*' [according to the existing legislation, the decision to allow oneself to die could already be taken by the patient, with binding effects on third parties, by requesting withdrawal of ongoing life-sustaining treatment coupled with continuous deep sedation] (my translation). Italian Constitutional Court, decision no 207/2018, 24 October 2018. On continuous deep sedation, see Simona Cacace, 'La sedazione palliativa profonda e continua nell'imminenza della morte: le sette inquietudini del diritto', (2017) *Rivista italiana di medicina legale* 469.

possibility of enrolling on a palliative programme. In particular, through the provision of information related to the availability of palliative therapy, patients can be induced to reformulate their wish to die into a request for help not to suffer. Because of the potential role palliative care may play in certain cases, State Parties shall ensure that, unless the patient chooses otherwise, a terminally ill or dying person will receive adequate pain relief and palliative care.⁸² On the other hand, the obligation to protect life cannot be extended to legitimise therapeutic obstinacy, even where a patient insists on receiving a certain treatment which the doctor considers futile.⁸³ The ECtHR has repeatedly denied that the State has a duty to allow access to experimental treatment under Article 2 ECHR, pointing out that, even within the EU, this matter remains within the competence of the Member States and that the ECHR Contracting States deal differently with the conditions and manner of providing access to unauthorised medicinal products. Given the absence of a general consensus, the margin of appreciation is very wide in this context.⁸⁴

X. IN THE ABSENCE OF A TERM TO BALANCE

The Oviedo Convention represents a development and an expansion of the underlying principles of the ECHR and contains specific norms to protect individuals who have never been able to or have lost their capacity to give their consent. The number of judgements dealing with these issues is

⁸² Recommendation 1418 (1999) (n 54) para 9 (a).

⁸³ Letizia Mingardo, 'Il testamento biologico e le ultime volontà del paziente sovrano' in Francesca Zanuso (ed) *Diritto e desiderio* (Milano, Franco Angeli, 2015) 109. The limit of therapeutic obstinacy is of course not univocal, but rather offers a general guideline. It needs to be defined for each specific case, as several factors – both medical and non-medical – come into play, including the patient's personal perception of their burden. Demetrio Neri, 'Il diritto di decidere la propria fine', in Stefano Canestrari and others (eds), *Trattato di Biodiritto*, vol. II (Giuffrè 2011), 1788-1789.

⁸⁴ *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) paras 77-78, 87. *Hristozov and others v Bulgaria*, App nos 47039/11 and 358/12 (ECtHR, 13 November 2012) para 108.

increasing and they are also the most delicate to solve, particularly when patients have never had the capacity to consent and to express their wishes.⁸⁵

After specifying that 'an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit', Article 6 of the Oviedo Convention further specifies that

where, according to law, an adult does not have the capacity to consent to an intervention because of a mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.⁸⁶

Of course, the patient who is not able to consent at the time of the intervention might have been able to express in the past, through living wills, their aspirations regarding the type and extent of medical treatment they find acceptable.⁸⁷ Living wills are the sole means through which individuals who once were competent can maintain some control over treatment decisions instead of becoming mere objects of decisions made about them by others.⁸⁸

By definition, however, these are not actual decisions. Having been drafted before a pathology develops or an accident occurs, they cannot take into account the circumstances giving rise to these conditions.⁸⁹ New therapies

⁸⁵ To assume that mere inferred wishes are the wishes of the person concerned is fiction. *Contra* the ECtHR: 'whilst CG [Charlie Gard] could not express his own wishes, the domestic courts ensured that *his wishes were expressed* through his guardian, an independent professional appointed expressly by the domestic courts for that purpose' [emphasis added]. *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 92.

⁸⁶ Article 6, para 3, Oviedo Convention, for minors see para 2 of the same article. The Explanatory Report clarifies that: 'the term 'similar reasons' refers to such situation as accidents or states of coma, for example, where the patient is unable to formulate his or her wishes or to communicate them'. Explanatory Report (n 17) para 43.

⁸⁷ Examples include advance refusals of blood transfusion or particular types of surgical intervention necessary to preserve life, where the treatment could, if given, restore health and prolong life.

⁸⁸ See principle 1 (*Promotion of self-determination*), Recommendation CM/Rec(2009)11 of the Committee of Ministers to member States on principles concerning continuing powers of attorney and advance directives for incapacity, 9 December 2009.

⁸⁹ Informed consent refers to a specific medical treatment, living wills have instead a general scope.

are continually being developed and people often revise their opinions about the kinds of treatment they find acceptable when they are actually confronted with the practicalities of an illness. Once again, there is a tension between respect for the individual's autonomy, as expressed in the past, and the protection of life here and now. What if the person concerned were to change their mind if they could?

The Oviedo Convention stipulates that previously expressed wishes 'shall be taken into account'.⁹⁰ Thus, the Convention uses the term 'wishes' ('*soubaits*' in French), which is weaker than 'will' and does not clarify the reasons that a doctor could legitimately invoke to disregard the wishes of the person concerned having taken them into account.⁹¹ The Explanatory Report only provides an example: if a patient's wishes were expressed a long time before the intervention and science has since progressed, there may be grounds for not heeding them. The practitioner should thus ascertain to the best of their knowledge and belief that the patient's wishes apply to the present situation and are still valid, especially with a view to medical advances.⁹² It seems clear that the application of the living wills cannot be automatic and uncritical. The interpretative filter of the doctor is necessary to guarantee the actual correspondence and adjustment of the patient's will to the concrete situation. The patient's wishes would otherwise become the sole criterion for reaching a decision, in the same manner as doctors paternalistically took every decision alone in the past.⁹³ In any case, when there is doubt regarding the interpretation of living wills, the protection of life prevails over the self-

⁹⁰ Article 9, Oviedo Convention. The Explanatory Report specifies that Article 9 covers not only emergencies but also situations where individuals have foreseen that they might be unable to give their valid consent, for example in the event of a progressive disease such as senile dementia. Explanatory Report (n 17) para 61.

⁹¹ Principle 15 (*Effect*) of Recommendation CM/Rec(2009)11 does not take position and leaves the right to decide to what extent advance directives should have binding effect to the Member States, while specifying in any case that 'advance directives which do not have binding effect should be treated as statements of wishes to be given due respect'.

⁹² Explanatory Report (n 17) para 62.

⁹³ Carlo Casonato, 'Consenso e rifiuto delle cure in una recente sentenza della Cassazione' (2008) *Quaderni costituzionali* 545, 547.

determination that can no longer be exercised: *in dubio pro vita*.⁹⁴ In the absence of living wills, the combination of Article 6, paragraphs 1 and 3 and Article 9 of the Oviedo Convention seems to lead to the conclusion that the person with the power to authorise or reject a treatment must, as far as possible, reconstruct the will of the person concerned.⁹⁵ They should decide 'as if' the person concerned were to decide. This delicate hermeneutic activity is even more complex when the decision to be made concerns the withholding or withdrawing of life-sustaining treatments: artificial nutrition and hydration.

XI. ARTIFICIAL NUTRITION AND HYDRATION

The use of artificial nutrition and hydration is a matter of some debate.⁹⁶ No doubt, if the patient has refused life-sustaining treatments in the terminal phase or before through living wills, their wishes should be respected because of the consent requirement for any medical treatment.⁹⁷ The most critical situation is when a patient has not previously expressed and can no longer express their wish to that effect.⁹⁸ According to one view, putting a patient on life-sustaining treatments when they are highly unlikely to regain consciousness would constitute a disproportionate and even aggressive action, i.e. an unreasonable obstinacy. An opposing view suggests that artificial nutrition and hydration constitute a form of care that meets the individual's basic needs, and for this reason cannot be withdrawn. The result

⁹⁴ 'In case of doubt, the decision must always be for life and the prolongation of life'. Recommendation 1418 (1999) (n 54), para 9 (b) sub 4.

⁹⁵ In this sense, see also Cristina Campiglio, 'Decisioni di fine vita: la sentenza del Bundesgerichtshof tedesco nel contesto della prassi europea' (2010) *Diritti umani e diritto internazionale* 543, 551.

⁹⁶ The Guide on the Decision-making Process Regarding Medical Treatment in End-of-life Situations (Council of Europe 2014), qualifies as 'disputed' the issues of limiting, withdrawing, and withholding artificial nutrition and hydration.

⁹⁷ *Ex multis* Lorenzo D'Avack, 'Fine vita e rifiuto di cure' in Stefano Canestrari and others (eds), *Trattato di Biodiritto*, vol. II (Giuffrè 2011), 1929-1930. The author correctly points out that artificial nutrition and hydration, being an invasion into the physical sphere of the patient, both require their consent.

⁹⁸ On this debate, and on the use of the principle of dignity to support both theses, see further Luca Marini, *Il Diritto internazionale e comunitario della bioetica* (Giappichelli 2006) 408.

would be to precipitate death, which would otherwise not occur in the foreseeable future and would have to be construed as a form of genuine forced euthanasia.⁹⁹

Even among the Council of Europe Member States, there is a lack of consensus in this respect. Two paths of reasoning were available to the ECtHR here. One possibility was to emphasise the positive obligations stemming from Article 2 ECHR regarding the protection of life, particularly that of vulnerable individuals, a category within which persons in a vegetative state no doubt fall.¹⁰⁰ The second possible path was to emphasise the alleged lack of consensus in favour of permitting the withdrawal of artificial life-sustaining treatment, with the consequent wide margin of appreciation for Member States as to the balance between the right to life and respect for private life,¹⁰¹ as well as to the organization of the decision-making process, including the designation of the person who takes the final decision.¹⁰² This is the precise path the ECtHR has consistently followed in its case law.¹⁰³

Problems arise especially when the various elements to be taken into consideration push in opposite direction, for instance where there is disagreement among the relatives or between relatives and doctors on the final decision to take. Indeed, the ECtHR has never pronounced on the balance of interests at stake nor provided substantive answers as to the prevailing consideration.¹⁰⁴

⁹⁹ Partly Dissenting Opinion in *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015) para 9.

¹⁰⁰ In this sense: *ibid*, para 1.

¹⁰¹ *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), paras 147-148; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 29.

¹⁰² *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), para 165; 168; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 38.

¹⁰³ The ECtHR nonetheless admits that the majority of States appear to allow the withdrawal of artificial life-sustaining treatment. *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), para 147; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 83. *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 28.

¹⁰⁴ *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), para 162; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 91; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 35.

The Court has nonetheless developed three requirements for Member States to comply with when administering or withdrawing treatments.¹⁰⁵ Firstly, there must exist in domestic law and practice a regulatory framework compatible with the requirements of Article 2, which essentially means, once again, that the legal framework must be clear.¹⁰⁶ Secondly, the applicant's previously expressed wishes and those of the persons close to them, as well as the opinions of other medical personnel, shall be taken into account. Thus, even in this context, the paramount importance of the patient's wishes in the decision-making process, whether expressed previously or merely inferred, is undebatable.¹⁰⁷ Moreover, and *a fortiori* here, such wishes should be considered together with other opinions in a dialectic procedure. To this end, being 'the natural and fundamental group unit of society'¹⁰⁸ and the first context where the personal identity of the individual develops and their rights are protected, the family of the patient unable to consent is invariably the first point of contact for the doctor in defining the therapy programme. Finally, there should be a possibility to approach the courts in the event of doubts or, most notably, in the event of conflict as to the best decision to be taken in the patient's interest.¹⁰⁹ The Court has recalled several times that Member States enjoy a wide discretion in designating the person who takes the final decision. However, this discretion can only be applied if there are no doubts or disagreements between the parties involved. Otherwise, no such discretion exists and a judge is called upon to decide.

¹⁰⁵ *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), para 143; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 80; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 27.

¹⁰⁶ *Lambert and Others v France*, App no 46043/14 (ECtHR, 5 June 2015), para 160; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 89; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 31.

¹⁰⁷ *Lambert and Others v France*, App no 46043/14, (ECtHR, 5 June 2015), para 147; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) para 83; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) para 28.

¹⁰⁸ Articles 23 of the International Covenant on Civil and Political Rights.

¹⁰⁹ *Glass v. the United Kingdom*, App no 61827/00 (ECtHR, 9 March 2004) para 83; *Gard and Others v United Kingdom*, App no 39793/17 (ECtHR, 27 June 2017) paras. 96-97, 106; *Afiri and Biddarri v France*, App no 1828/18 (ECtHR, 23 January 2018) paras 42-46.

XII. FINAL REMARKS

It has been observed that the provision of appropriate information related to the availability of palliative care can induce patients to reformulate their request for euthanasia or assisted suicide into a request for help not to suffer.¹¹⁰ In fact, adequate palliative care can be an effective response for sufferers who simply seek relief from intolerable pain. However, it would be illusory to think that palliative care, pain therapies, medical-psychological assistance, and human solidarity support¹¹¹ would suffice to eliminate all requests for euthanasia and assisted suicide. In some cases, suffering is uncontrollable and some patients may refuse continuous deep sedation because they consider it contrary to their dignity. Such patients may prefer a more rapid path to death, in which case palliative care would not be an alternative, but preliminary to and synergistic with euthanasia or medically assisted suicide.

At the present time, it is not possible to deduce from the ECHR the existence of a duty to live, nor that of a right to die. It is therefore primarily for States to prohibit or allow euthanasia and assisted suicide after assessing the risk and the likely incidence of abuse in the event that the general prohibition not to kill was relaxed or if further exceptions were to be created.¹¹² However, we have seen that the wide margin of discretion State Parties enjoy in this respect does not mean that they are completely free to take any initiative, either preclusive or permissive. Articles 2 and 8 ECHR entail that State Parties must draft clear and comprehensive legal guidelines setting out the conditions for euthanasia and assisted suicide. The ECtHR case law so far suggests that the requirement of clarity is met even by the extreme solution of a blanket ban. If a State opts to open the way to assisted suicide and euthanasia, the argument of a slippery slope remains valid if understood as an invitation to caution. State Parties should establish precise and stringent conditions of admissibility and procedures capable of ensuring that the decision to end somebody's life does correspond to the free will of the individual concerned. Moreover, by virtue of the positive obligations stemming from Article 2 ECHR, doctors are in any case required to protect

¹¹⁰ See *supra* section 9.

¹¹¹ Recommendation 1418 (1999) (n 54) para 9 (a) 3.

¹¹² *Pretty v the United Kingdom*, ECHR 2002-III, para 74.

life by non-coercive means such as information, dialogue, encouragement, or psychological support, and to propose, whenever possible, alternative treatments to those which the patient refuses, including palliative treatments.

Despite all the controversy surrounding this matter, it is easy to foresee a future where the ECtHR will be prompted to judge it a violation of Article 8 ECHR if euthanasia and assisted suicide are not legalised at least in extreme situations. Indeed, little attention has so far been paid to how death occurs following the withdrawal of treatment. A patient who needs a ventilator to survive will suffocate if it is removed, and those who are deprived of food and fluid will die from the effects of dehydration, despite being sustained by adequate palliation of their symptoms. Overall, slipping down the slope is still possible and can be even more dangerous in the absence of a regulation defining and limiting the possibility of euthanasia and assisted suicide. Experience shows that in Member States where there is no specific regulation, judges become the interpreter of social expectations, because individuals' wishes to die are left for them to respond to.¹¹³ In this context, the domestic judge either unconditionally adheres to the prohibition to kill, whose exceptions are not open to analogy, or takes an evolutionary approach to interpreting domestic provisions which were not drafted to deal with bioethical issues. Either way, the slippery slope of discretion widens, and with it the chances of slipping further down. This situation is all the more difficult to manage because, within the framework of the Oviedo Convention, no specific body is in charge of compliance control and the ECtHR has little inclination to tackle bioethical issues. The previously identified general principles could guide national legislators and, in case of their inertia, domestic judges, to guarantee at least minimum standards for the protection of human rights and to avoid bioethical 'dumping' practices between States.¹¹⁴ In particular, domestic judges can use them to draw up interpretative guidelines, elements of regulation in case of lacunae in the domestic system, and as a framework for assessing the legitimacy of domestic rules.

¹¹³ See *supra* (n 55).

¹¹⁴ See also Stefano Rodotà, 'Modelli culturali e orizzonti della bioetica', in Stefano Rodotà (ed), *Questioni di bioetica* (Laterza 1993), 421-422.

TAKING THE SOCIAL RIGHTS COVENANT MORE SERIOUSLY IN BUSINESS AND HUMAN RIGHTS: A GLOBAL GOVERNANCE PERSPECTIVE

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The business and human rights (BHR) debate has so far concentrated its attention on soft law initiatives, most notably the United Nations Guiding Principles on Business and Human Rights, resulting in rare mention of universal human rights treaties. This article reconsiders how the International Covenant on Economic, Social and Cultural Rights (ICESCR) could make a unique contribution to BHR global governance. In particular, it focuses on human rights challenges in global supply chains, the issue addressed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 24. The analysis finds that the ICESCR state reporting procedure offers a relevant forum that improves state BHR measures through a pragmatic operationalization of extraterritorial obligations, while the individual communication procedure under the Optional Protocol to the ICESCR contains many obstacles to effectively deal with such matters. Ultimately, this article argues that the ICESCR could offer a vital impetus to overcome a limitation of BHR soft law instruments by obliging states to hold corporations legally accountable for their negative impacts on human rights even where enterprises do not have sufficient economic incentives to respect these rights. As such, it is essential to take the ICESCR more seriously to enhance legal responses to BHR challenges.

Keywords: business and human rights, International Covenant on Economic, Social and Cultural Rights, extraterritorial obligations, state reporting procedure, individual communication procedure

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I. INTRODUCTION

A notable trend in the contemporary debate on business and human rights (BHR) in international human rights law scholarship is its predominant focus on soft law instruments.¹ As noted by Choudhury, the current global governance framework for BHR primarily consists of the following four initiatives:² (i) the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises;³ (ii) the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy;⁴ (iii) the United Nations Global Compact;⁵ and (iv) the United Nations Guiding Principles on Business and Human Rights (UNGPs).⁶ Interestingly, despite

¹ For BHR generally, see Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge 2016); Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020). On the concepts of soft and hard law, see Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 *International and Comparative Law Quarterly* 961.

² Choudhury (n 1) 966.

³ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011).

⁴ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (5th edn, ILO Office 2017).

⁵ Global Compact, 'The Ten Principles | UN Global Compact' <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 4 November 2020.

⁶ UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31 (21 March 2011). The UNGP consists of three pillars: (i) the state duty to protect human rights; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy.

forming the basis of normative content in such soft law documents,⁷ the United Nations human rights treaties commonly referred to in the discussion of international protection of human rights are missing from the list. Does this mean that new challenges brought by corporations render traditional state-focused human rights treaties outdated and irrelevant in the context of BHR? What unique functions, if any, can human rights treaties perform in BHR, and how effective are they?

Against this background, this article examines the role and limitations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) for BHR with some references to human rights challenges in global supply chains.⁸ This core universal human rights treaty, which establishes legal obligations on state parties for the realization of economic, social and cultural (ESC) rights, offers a good starting point to rethink the significance of human rights treaties for BHR. In 2017, six years after the publication of a brief statement on the topic,⁹ the Committee on Economic, Social and Cultural Rights (CESCR), the monitoring body of the ICESCR, elaborated a detailed interpretation of 'State obligations under the [ICESCR] in the context of business activities' in its General Comment No. 24.¹⁰ The normative content

⁷ See OECD (n 3) para 39; ILO (n 4) para 8; Global Compact (n 5) Principle 1 Commentary; UNHRC (n 6) Principle 12 Commentary.

⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter: ICESCR).

⁹ CESCR, *Statement: The Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1 (12 July 2011).

¹⁰ CESCR, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24 (10 August 2017). Given its non-legally-binding nature, General Comment No. 24 is a soft law instrument. However, it is different from aforementioned BHR soft law initiatives in its closer linkage to existing hard law. General Comment No. 24 is a norm-filling soft law that gives specific meaning to abstract obligations in existing legally binding standards, and as such it always has to be read together with the ICESCR. On the other hand, BHR soft law initiatives, such as the UNGP, are primarily a norm-creating soft law. They express new normative content (corporate human rights responsibilities) in areas where no binding international standards exists, potentially paving the way towards the establishment of new hard law. As such, although some of their normative content does require a reference to existing hard law treaties (see section III on the

contained therein deserves an in-depth assessment for its far-reaching significant functions. General Comments 'serve to clarify the content of the norms contained in the Covenant, to aid States in the preparation of their reports regarding the implementation of the rights enshrined therein, and to inform the activities of both State and international actors likely to impact on economic, social and cultural rights'.¹¹ In addition, they 'provide individuals with a foundation for their own arguments on human rights questions before national and international courts'.¹²

Whereas the term "BHR" broadly covers the whole spectrum of human rights, encompassing both civil and political rights as well as ESC rights,¹³ General Comment No. 24 limits its focus on BHR as a cross-cutting issue in the protection of ESC rights. One of the ESC rights most closely related to BHR is labor rights, comprised of the right to work,¹⁴ the right to just and favourable conditions of work,¹⁵ and trade union-related rights.¹⁶ That being said, the above approach implicitly recognizes the indivisibility, interdependence, and interrelatedness of labor rights with other rights in the ICESCR.¹⁷ As such, a reference to human rights or ESC rights in the

obligation to protect), BHR soft law initiatives have a certain degree of autonomy from existing hard law. Despite their commonality of non-legally-binding form, because of these functional differences, this article distinguishes General Comment No. 24 from BHR soft law initiatives. For the norm-filling and norm-creating functions of soft law, see Thomas Gammeltoft-Hansen, Stéphanie Lagoutte, and John Cerone, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 6-7.

¹¹ Mara Tignino, 'Quasi-judicial Bodies' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 245.

¹² Ibid 255.

¹³ See, for example, UNHRC (n 6) Principle 12.

¹⁴ ICESCR, art 6.

¹⁵ ICESCR, art 7.

¹⁶ ICESCR, art 8.

¹⁷ Vienna Declaration and Programme of Action (adopted 25 June 1993) UN Doc. A/CONF.157/23, chapter I para 5. For instance, a violation of the right to just and favourable conditions of work resulting from a failure to secure '[s]afe and healthy working conditions' may, at the same time, also constitute a violation of the right

following discussion is made with labor rights in mind, but it does not necessarily exclude other ESC rights, even if they are not explicitly mentioned.

The particular importance of General Comment No. 24, as discussed below in detail, lies in its articulation of the extraterritorial obligation to protect ESC rights. It is intended to address an accountability gap in global supply chains. Home states of multinational enterprises may establish strict regulations in their domestic labor law. Still, corporations can escape from such undesired requirements simply by picking countries that do not have the capacity and/or willingness to uphold international human rights and labor standards as their host states.¹⁸ Even more worryingly, it is reported that 50 of the world's largest companies directly employ only 6 per cent of their supply chain workers, leaving the remaining 94 per cent as the hidden workforce of global production.¹⁹

In response to these problems, the extraterritorial obligation to protect ESC rights requires a home state to ensure that the corporations under its control do not infringe on these rights, even if their operations and those of their business partners, including subcontractors, are conducted outside its national border. Remarkably, such a requirement goes far beyond the guidance contained in any BHR soft law instrument. However, BHR literature has so far produced very little analysis of this General Comment and emerging practices applying its content.²⁰ Filling this gap, this article

to health and even the protection of children and young persons in the case of child labor. See respectively ICESCR, art 7 (b), 12, and 10 (3).

¹⁸ Anne Peters, 'Global Constitutionalism: The Social Dimension' in Takao Suami, Anne Peters, Dimitri Vanoverbeke, and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018) 315.

¹⁹ International Trade Union Federation, *Scandal: Inside the Global Supply Chains of 50 Top Companies* (International Trade Union Federation 2016) 4.

²⁰ A commentary on General Comment No. 24 by Van Ho has highlighted some of its importance, but not discussed how its normative content may be applied in the subsequent CESCR practice, because of its nature as a short introductory note. Tara Van Ho, 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)' (2019) 58 *International Legal Materials* 872. For

argues that the ICESCR contributes to the development of legal regulations that make enterprises accountable for their negative impacts on human rights even under circumstances in which corporations do not have sufficient economic incentives to comply with BHR soft law.

The discussion starts by situating the ICESCR within the global governance structure of BHR norms (section II). This is followed by an analysis of how state obligations under the ICESCR have evolved to cope with new challenges resulting from the recent expansion of global supply chains (section III). The subsequent assessment of two main compliance monitoring mechanisms for the ICESCR reveals contrasting results. On the one hand, the state reporting procedure under the ICESCR has strong potential to enhance legal responses to BHR issues through a pragmatic operationalization of extraterritorial obligations. Based on the periodic assessments of the measures taken by state parties, the CESCRC has urged governments to improve their domestic legislation so that the law has positive impacts on the enjoyment of human rights in third states, for example, where corporations under their control are conducting their business activities (section IV). On the other hand, the individual communication procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) entails

another commentary which became available only one month after the publication of General Comment No. 24, see Diane Desierto, 'The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCRC General Comment No. 24 (August 2017)' (EJIL: *Talk!*, 13 September 2017) <<https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>> accessed 4 November 2020. Further, notwithstanding the remarkable developments of extraterritorial obligations in General Comment No. 24, the 'Blog Symposium on Business, Human Rights and Extraterritoriality' of the Business and Human Rights Journal does not contain a detailed analysis of this General Comment except for a brief mention in relation to terminology. See 'Blog Symposium on Business, Human Rights and Extraterritoriality' (Business and Human Rights Journal - Cambridge Core Blog, 29 April 2019 – 9 May 2019) <<https://www.cambridge.org/core/blog/tag/business-and-human-rights-journal/>> accessed 4 November 2020.

many limitations with regard to extraterritorial obligations.²¹ Save for a few very exceptional cases, the jurisdictional clause in the OP-ICESCR is likely to prevent the CESCR from deciding on communications submitted by alleged victims claiming a violation of extraterritorial obligations by a state in whose territory he/she is not present (section V).

II. THE ICESCR IN BHR GLOBAL GOVERNANCE

The normative structure of BHR is commonly characterized by the term 'global governance',²² which emphasizes the usefulness of employing soft law in addition to hard law.²³ The present study needs to start by considering how to situate the ICESCR in BHR global governance.

A remarkable difference between BHR soft law documents and the ICESCR lies in the different addressees of the instruments, which also explains the lack of consideration of the ICESCR in the existing BHR literature. The wording of the ICESCR is so general that it applies to a broad range of factual situations, covering BHR issues as well as countless other human rights

²¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc. A/63/435 (hereinafter: OP-ICESCR).

²² Choudhury (n 1); Larry Catá Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara Journal of International Law 37.

²³ Global governance is concerned with management processes of social issues not only through 'formal institutions and regimes empowered to enforce compliance [certain hard law treaties]', but also through 'informal arrangements that people and institutions either have agreed to or perceive to be in their interest [soft law]'. The Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford University Press 1995) 2. Such 'growing complexity of the international legal system ... reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior with regard to an ever-growing number of transnational problems' has also been a significant issue in international law scholarship. Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 17.

challenges that do not involve corporations.²⁴ The problem is that, although corporations are the entities that primarily need to deal with BHR issues, all the ICESCR can do in this respect is to address their responsibilities indirectly,²⁵ due to its focus on states as its sole duty-bearers. Because it was precisely their purpose to overcome this inherent limitation of human rights treaties,²⁶ BHR soft law instruments are now occupying a central place in the BHR debate. The guidance contained in such documents is very specific as a result of their focus on the application of human rights in the specific context of BHR. These instruments directly indicate what enterprises should do to respect human rights in their daily operations.²⁷

Another possible factor that has further diminished interest in the ICESCR in the BHR field is the principal roles assigned to specialized institutions and

²⁴ Note that the denial of ESC rights as human rights is now largely, if not completely, a thing of the past. See Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014); Christina Binder, Jane A. Hofbauer, Flávia Piovesan, and Amaya Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020).

²⁵ See ICESCR, art 5 (1). 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.' It is possible to see corporations as a 'group' mentioned in this provision. See also CESCR (n 10) para 11.

²⁶ Alston's observation that '[i]n practice, if not in theory, too many [non-state actors, including corporations,] currently escape the net cast by international human rights norms and institutional arrangements' well describes the primary motivation behind the normative development of BHR soft law instruments. Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 6.

²⁷ For example, what are companies expected to do to secure '[s]afe and healthy working conditions' as a component of the right to just and favourable conditions of work? ICESCR, art 7 (b). The practical suggestions are found in the ILO (n 4), rather than General Comment No. 23, which gives specific meaning to the abstract concept of '[s]afe and healthy working conditions' but mainly indicates how states can implement their obligations. Compare ILO (n 4) paras 43-46 with CESCR, *General Comment No. 23: The Right to Just and Favourable Conditions of Work*, UN Doc. E/C.12/GC/23 (27 April 2016) paras 25-30, 74-76.

processes, rather than the generalist CESCER, in the codification and implementation of norms in those narrowly confined areas. To give a few examples, the ILO, an institution that possesses much more labor-related experience and expertise than the CESCER, is seen as 'best placed to lead global action for decent work in global supply chains'.²⁸ Likewise, Ruggie's consultations during the UNGP drafting process with business enterprises, an actor usually excluded from intergovernmental negotiations of international human rights instruments but situated at the core of BHR issues, contributed to a broad corporate acceptance of this soft law document.²⁹

Directly defining the responsibilities of corporations, BHR soft law instruments may offer an opportunity to reduce, if not close, the gap between the doctrinal concept of 'subject of international law' and the reality of factual power that non-state actors are exercising at the global level.³⁰ Despite the lack of legal enforcement mechanisms, compliance with BHR soft law is still promoted through market mechanism linked to the reputation of each corporation. Companies with poor human rights records may lose their appeal to both their consumers and investors, which creates business incentives for compliance.³¹

²⁸ ILO, *Conclusions concerning Decent Work in Global Supply Chains, adopted by the International Labour Conference at its 105th Session* (2016) para 14. See also Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 275: '[b]ecause of its much wider mandate, and resource and expertise limitations, the CESCER cannot be expected to match the level of sophistication of the ILO system in reviewing labour standards even for the more limited purpose of Article 6 (or Article 7, 8 or 9 [of the ICESCER])'.

²⁹ See Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process Towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012) 85.

³⁰ Christoph Good, 'Mission Creeps: The (Unintended) Re-enforcement of the Actor's Discussion in International Law through the Expansion of Soft Law Instruments in the Business and Human Rights Nexus' in Lagoutte, Gammeltoft-Hansen, and Cerone (eds) (n 10) 265.

³¹ See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 770-771, 784 (on consumers); David

It should be noted, however, that such normative content does not always build on a legal foundation. For example, while the UNGP clearly states that business enterprises must respect the core internationally recognized human rights and the ILO workers' rights,³² this corporate responsibility arises on the basis of political, moral or social factors rather than legal ones.³³ In its wording, the UNGP thus distinguishes human rights 'abuses' committed by business enterprises from human rights 'violations' committed by states, reflecting the dichotomy of business responsibility and state obligation.³⁴ In short, while reliance on BHR soft law is certainly pragmatic to some extent, the problem is that corporate compliance with such instruments is expected only as long as business and moral considerations align.³⁵ To effectively ensure corporate respect towards human rights at all times, irrespective of market factors, the desirability of establishing legal obligations on enterprises through hard law has not disappeared in the long term. The proposed BHR treaty currently under inter-state negotiation is intended to fill that lacuna,³⁶

Weissbrodt, 'Roles and Responsibilities of Non-State Actors' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 730 (on investors).

³² UNHRC (n 6) Principles 11-24.

³³ Peters (n 18) 313.

³⁴ Stéphanie Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Lagoutte, Gammeltoft-Hansen, and Cerone (eds) (n 10) 247.

³⁵ See also Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (2nd edn, Oxford University Press 2020) 472: '[s]tandard-setting activities [of corporate human rights obligations] in other forums [than the CESCR] have produced a plethora of largely non-binding instruments, but these have been effective mainly around the edges rather than at the heart of the problem'.

³⁶ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, OEIGWG Chairmanship Second Revised Draft 06.08.2020* (released 6 August 2020) <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_)
[Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_)

but there is no prospect of its adoption for the moment. The domestic implementation of the ICESCR, i.e. giving effect to its normative content through domestic legislation, thus remains an important hard law approach to BHR.

Significantly, global governance considers a sole focus on either hard or soft law inadequate. Rather, what matters is the coordination of these types of law to most effectively address the actual BHR problems. Indeed, it was precisely such 'a smart mix of reinforcing policy measures' transcending 'the [mere] mandatory-vs.-voluntary dichotomy' that Ruggie intended to create through the UNGP in order to achieve cumulative progress on BHR challenges.³⁷ In other words, instead of viewing itself as the exclusive BHR norm, the UNGP envisages cooperation with other laws and norms that adopt different approaches to the realization of human rights for the ultimate goal of optimization of BHR global governance. From this perspective, it is worth examining what complementary role, if any, the ICESCR may assume for BHR, bearing in mind its interaction with other relevant norms. The key is contained in the CESCR General Comment No. 24, examined below. Admittedly, a crucial limitation of the ICESCR lies in its inability to bind the United States of America, a central hub of global business activities, which has signed but not ratified the Covenant. Nevertheless, this should not distract from the impressive number of 171 state parties to the ICESCR, which demonstrates its potentially profound influence on the overwhelming majority of the international community.³⁸

III. GLOBAL SUPPLY CHAINS AND EVOLVING STATE OBLIGATIONS

The term "global supply chains" refers to 'the full range of activities that firms, farmers and workers carry out to bring a product or service from its conception to its end use, recycling or reuse ... [which is] distributed among

Human_Rights.pdf> accessed 4 November 2020 (hereinafter: Second Revised Draft).

³⁷ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company 2013) xxiii.

³⁸ 'Status of Ratification Interactive Dashboard' (OHCHR) <<https://indicators.ohchr.org/>> accessed 4 November 2020 (hereinafter: Status of Ratification).

many firms scattered around the world'.³⁹ Although serving as a positive force for economic growth and job creation in a number of countries, working conditions in global supply chains vary considerably both across and within them.⁴⁰ In some cases, particularly in informal sectors associated with non-standard forms of employment, serious decent work deficits have been reported as to working conditions, including occupational safety and health, wages and working time.⁴¹ Such situations, which often involve non-compliance with international human rights and labor standards, persist especially in those nations that lack the capacities and resources to effectively monitor and enforce labor regulations.⁴² Both the production of goods and employment-related responsibilities are fragmented in global supply chains. Hiding behind the corporate veil, 'the parent company [often] seeks to avoid liability for the acts of the subsidiary [that is located in another state] even when it would have been in a position to influence its conduct'.⁴³ This transnational fragmentation of human rights and labor accountability

³⁹ Stefano Ponte, Gary Gereffi and Gale Raj-Reichert, 'Introduction to the Handbook on Global Value Chains' in Stefano Ponte, Gary Gereffi, and Gale Raj-Reichert (eds), *Handbook on Global Value Chains* (Edward Elgar Publishing 2019) 1. The quotation was originally for a description of 'global value chain', but this term is often used interchangeably with 'global supply chains'. Note that there are some variations for the definition of 'global supply chains'. See International Labour Organization Governance and Tripartism Department, *Achieving Decent Work in Global Supply Chains: Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains (Geneva, 25–28 February 2020)* (International Labour Office 2020) paras 23–29.

⁴⁰ International Labour Organization Governance and Tripartism Department (n 39) paras 19, 36.

⁴¹ ILO (n 28) para 3. See also International Labour Office, *Decent Work in Global Supply Chains* (International Labour Office 2016).

⁴² International Labour Organization Governance and Tripartism Department (n 39) para 19.

⁴³ CESCR (n 10) para 42. A case in point was Nike in the 1990s. When its suppliers in Pakistan were using child labor and those in Vietnam were using excessive amounts of an adhesive containing a chemical that caused respiratory illness in workers, Nike initially did not admit that it was responsible for these issues, emphasizing that these incidents did not occur at the factories owned by Nike in legal terms. Ruggie (n 37) 3–6. Although Nike later showed an increased human rights awareness by becoming a founding member of the United Nations Global Compact, such problems remain widespread.

resulting from the fragmentation of production across international borders is precisely the background of normative developments in the CESCR General Comment No. 24.

Whereas the specific content of state obligations on ESC rights is now commonly identified through the tripartite typology of state obligations (obligation to respect, to protect, and to fulfil), the following discussion focuses on the obligation to protect.⁴⁴ This is a positive obligation that requires a state to prevent human rights violations committed by non-state actors, including corporations, and to provide effective remedies to victims.⁴⁵ The UNGP also lists this obligation as its first pillar.⁴⁶ However, the UNGP itself does not establish any legal obligation. It is a mere statement that such an obligation exists in human rights treaties, requiring a substantial analysis of the ICESCR (or any other relevant human rights treaty outside the scope of the present discussion) in this regard. In response to, among other factors, 'the emergence of global supply chains' over '[t]he past thirty years',⁴⁷ General

⁴⁴ See more fully Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 31-36. The CESCR has adopted the tripartite typology of state obligations since its General Comment No.12. CESCR, *General Comment No. 12: The Right to Adequate Food*, UN Doc. E/C.12/1999/5 (12 May 1999) para 15. To provide a short explanation of the other two types of obligations, the obligation to respect means a negative obligation that prohibits a state from interfering with the enjoyment of human rights. A typical such measure violating labor rights is an introduction of salary scales in the public sector that discriminate against female workers. On the other hand, the obligation to fulfil refers to a positive obligation that broadly requires a state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of human rights. One example in the context of labor rights is the formulation and implementation of an employment policy aimed at reducing the unemployment rate of disadvantaged and marginalized social groups.

⁴⁵ See also Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press 1995) 112. According to Craven, the absence of an explicit intention with regard to the horizontal effect of the ICESCR during its drafting process is not conclusive: '[t]here has to be an overriding assumption, given that the drafters were committed to ensuring the fundamental rights of every individual, that States would be under an obligation to protect the rights of the individual against violation by others'.

⁴⁶ UNHRC (n 6) Principles 1-10.

⁴⁷ CESCR (n 10) para 25.

Comment No. 24 clarifies the specific content of the obligation to protect in the context of business activities. The elaboration is particularly based on the general obligation provided in Article 2 (1) of the ICESCR.⁴⁸ As this obligation applies to all substantive rights listed in Part III (Articles 6 - 15) of the Covenant, this normative development has profound implications in considering the function of the ICESCR as to BHR. As shown below, notwithstanding the formal distinction between two types of obligations (territorial and extraterritorial), in substance they are closely interrelated.

According to the CESCR, the territorial obligation to protect ESC rights includes, *inter alia*, a positive obligation to adopt a legal framework that requires business entities to conduct human rights due diligence to identify, prevent, and mitigate the risk of ESC rights violations.⁴⁹ Due diligence should address ESC rights abuses 'in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners'.⁵⁰ This pronouncement is significant. Under BHR soft law, the importance of human rights due diligence is recognized as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks'.⁵¹ However, it is envisaged only as something that corporations should do,⁵² and states are merely recommended to use domestic legislation to create incentives for companies to do so 'including

⁴⁸ ICESCR, art 2 (1): '[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. See also CESCR, *General Comment No. 3: The Nature of States Parties' Obligations*, UN Doc. E/1991/23 (14 December 1990).

⁴⁹ CESCR (n 10) para 16.

⁵⁰ *Ibid.*

⁵¹ UNHRC, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/11/13 (22 April 2009) para 71.

⁵² OECD (n 3) paras 45-46; ILO (n 4) para 10(d); Global Compact (n 5) Principle 1 Commentary; UNHRC (n 6) Principles 17-21.

[i.e. not necessarily] through mandatory requirements'.⁵³ Much stronger than this, the ICESCR is now interpreted as requiring states to introduce a human rights due diligence law that establishes a mandatory requirement for corporations to perform such due diligence.

In other words, unlike the UNGP, which recognizes the obligation to protect in general as a legal obligation but leaves specific measures to states' discretion,⁵⁴ the interpretation of the ICESCR has now evolved to a level that translates some of those measures into the realm of legal obligations. Under the ICESCR general obligation, states are explicitly required to take steps by all appropriate means, including the adoption of legislative measures, towards the full realization of ESC rights.⁵⁵ As recognized during its drafting process, the idea of 'progressive realization' signals a dynamic element that 'the realization of [ESC] rights [does] not stop at a given level'.⁵⁶ It is thus possible to argue that the creation of legal, institutional and procedural conditions for the effective realization of ESC rights in accordance with changing social situations falls within the ICESCR general obligation. As such, the state parties are obliged to continuously enhance the effectiveness of such measures.⁵⁷ General Comment No. 24, although itself not legally binding, highlights this point in connection with the recent expansion of

⁵³ UNGA, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/73/163 (16 July 2018) para 93.

⁵⁴ UNHRC (n 6). Compare Principle 1 using 'must' with Principles 2-10 using 'should'.

⁵⁵ ICESCR, art 2 (1).

⁵⁶ Mr Whitlam (Australia) in UN Doc. E/CN.4/SR.308 (1952) reproduced in Ben Saul (ed), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948 – 1966* (Oxford University Press 2016) 1255-1256.

⁵⁷ See also the description of evolutionary interpretation of treaties given by the International Court of Justice in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (2009) ICJ Rep 213 para 66: 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'.

global supply chains that had not yet occurred at the time of the adoption of the ICESCR.

In addition, extraterritorial obligations arise from the fact that the ICESCR expresses its obligations without any restriction linked to territory or jurisdiction and that it even refers to international cooperation as a means of fulfilling ESC rights:⁵⁸

[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.⁵⁹

Such corporations 'domiciled in its territory and/or under its jurisdiction' include enterprises that are incorporated under its laws or that have their core administration or main business area in its territory.⁶⁰ More specifically, under the extraterritorial obligation to protect ESC rights, a state is required to take steps towards the prevention of, and redress for, an infringement of ESC rights that occurs outside its territory but results from an activity of a business entity over which the government can exercise its control.⁶¹ It must establish appropriate monitoring and accountability procedures to scrutinize whether corporations are genuinely making their best efforts to respect ESC rights.⁶² A state is in breach of this obligation 'where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event'.⁶³

⁵⁸ CESCR (n 10) para 27 referring to ICESCR, art 2 (1).

⁵⁹ Ibid para 28.

⁶⁰ Ibid para 31.

⁶¹ Ibid para 30.

⁶² Ibid para 33.

⁶³ Ibid para 32. This means that the obligation to protect, particularly that of extraterritorial character, is an obligation of conduct, and not of result. Since it is impossible for states to prevent every single human rights violation committed by corporations, state responsibility for this matter is not unlimited. Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-territorial Obligations of States that Bind Corporations' in

This pronouncement, again, stands in stark contrast to the UNGP. The UNGP's underlying position is that the question of whether the extraterritorial obligation to protect exists or not 'remains unsettled in international law'.⁶⁴ Hence, under the UNGP, such state regulations for the extraterritorial protection of human rights are neither required nor prohibited, and states are only expected to set out a clear expectation that all corporations domiciled in their territories and/or under their jurisdiction respect human rights in their operations.⁶⁵ This view has attracted much criticism. De Schutter argues that this is an area where the UNGP obviously sets the bar below the present level of international human rights law.⁶⁶ Likewise, Augenstein and Kinley criticize it as shifting extraterritorial human rights impacts of transnational corporations from law to policy issues. This means confusing two different questions, i.e. the prescriptive question (obliged) and the permissive question (permitted), which results in a marginalization of the former. By reducing the legally mandated actions under the ICESCR to ones that are at states' discretion, the UNGP *de facto* undermines the existing hard law standard of the ICESCR, instead of supplementing it.⁶⁷

Given such controversy, the CESCR pronouncement on extraterritorial obligations in the specific context of BHR has a considerable impact. Certainly, it does not mark the end of the debate. General Comment No. 24, in itself, has not offered a complete explanation of the contested theoretical foundation and nature of extraterritorial obligations. This has led O'Brien to maintain that the position taken in the UNGP remains correct as a matter of law even after the publication of this General Comment.⁶⁸ That being said, it is now also more difficult for states to simply behave as if such extraterritorial

Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 292.

⁶⁴ See UNHRC (n 51) para 15.

⁶⁵ UNHRC (n 6) Principle 2 and its Commentary.

⁶⁶ Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41, 45.

⁶⁷ Augenstein and Kinley (n 63) 278-279.

⁶⁸ Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 *Business and Human Rights Journal* 47.

obligations do not exist at all. In the words of the International Court of Justice, interpretations adopted by human rights treaty bodies should be ascribed 'great weight' to ensure the clarity and consistency of international law as well as legal security to individuals as rights-holders and states as duty-bearers.⁶⁹ What is truly interesting is that the CESCR has already found a pragmatic way to operationalize extraterritorial obligations, at least to some extent, without delving into complex doctrinal issues. In parallel with the continuing debates on the precise theoretical nature of extraterritorial obligations,⁷⁰ an analysis of such emerging practices is also necessary. This is conducted below with particular attention to global supply chains.

IV. THE STATE REPORTING PROCEDURE AS A RELEVANT FORUM TO ASSESS STATE BHR MEASURES

Unlike BHR soft law with no mandatory monitoring mechanism, the ICESCR offers a relevant forum to assess whether state measures have indeed contributed to the improvement of BHR issues. A case in point is the state reporting procedure, where the CESCR periodically assesses a report submitted by a state party describing its implementation of the ICESCR.⁷¹ This procedure is substantially different from litigation. Litigation is focused on a particular individual or a group of individuals alleging a violation of human rights and demanding compensation for the damage. Nevertheless, this is often just the tip of the iceberg, since such violations frequently result from structural causes such as inadequate domestic legislation. The state reporting procedure under the ICESCR deals with this aspect. It aims to 'assess the stage of implementation of treaty obligations in a given country

⁶⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* {2010} ICJ Rep 639 para 66.

⁷⁰ A comprehensive treatment of this aspect lies beyond the scope of this short contribution. See Malcolm Langford, Wouter Vandenhole, Martin Scheinin, and Willem van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013).

⁷¹ ICESCR, arts 16-17. The initial report must be submitted to the CESCR within two years of the entry into force of the ICESCR for the state party concerned, and the subsequent reports at five-year intervals. CESCR, *Rules of Procedures of the Committee*, UN Doc. E/C.12/1990/4/Rev.1 (1 September 1993) Rule 58.

comprehensively and holistically' and to 'identify systemic failures in a state or shortcomings stemming from institutional weaknesses' with a view to enhancing the enjoyment of human rights.⁷² Such a comprehensive assessment enables the CESCR to ensure the interdependence of ESC rights. The Committee can review the enjoyment of all ESC rights equally, even though in practice it may particularly focus on some of the rights due to their pressing importance and/or pragmatic reasons, including the limited time available for conducting an assessment.⁷³

Following a constructive dialogue on the submitted report between governmental delegates and committee members, the CESCR adopts concluding observations. Concluding observations are viewed as 'authoritative pronouncements on whether States have or have not complied with the Covenant's provisions', and accumulated findings now form 'a body of jurisprudence that provides insight on the interpretation of the Covenant's provisions'.⁷⁴ Carefully tailored to the situation in respective state parties, the observations present 'considerable insight into the problems addressed and the broader context'.⁷⁵ They are not legally binding *per se*, but not completely equal to mere recommendations.⁷⁶ As the wording 'progress made in achieving the observance of the rights' indicates,⁷⁷ the procedure expects continuing improvements in the enjoyment of ESC rights.⁷⁸ Indeed, as the

⁷² Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 60, 40.

⁷³ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013) 184-185.

⁷⁴ Tignino (n 11) 244-245.

⁷⁵ Alston (n 35) 470.

⁷⁶ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 233 (describing concluding observations as 'no more than recommendations to the state concerned').

⁷⁷ ICESCR, art 16 (1): '[t]he States Parties ... undertake to submit ... reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.'

⁷⁸ See Kälin (n 72) 32, noting the point in relation to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 40 (1). A very similar wording can be found in ICESCR, art 16 (1).

CESCR itself explained in its first General Comment, such periodic evaluations of the extent of progress made are particularly pertinent to the notion of 'progressive realization' in the ICESCR.⁷⁹ Combined with the principle of good faith,⁸⁰ states are expected, at a minimum, to take note of the CESCR suggestions on policies and strategies, and to give some reasoning at the next reporting if they decide not to follow the recommendations.⁸¹ Thus, recommendations contained in concluding observations entail some legal weight.

Certainly, the state reporting procedure is not without serious shortcomings. To name only a few, substantial delays in the submission of state reports, considerable backlogs in the examination of the reports, and lack of compulsory enforcement mechanisms for concluding observations have all been well-known sources of strong frustration among human rights lawyers.⁸² Nevertheless, it is also true that such regular public scrutiny, with which states are generally cooperative,⁸³ has had a significant impact on actual state behavior, especially in the case of ESC rights. To maintain their reputation, governments often comply with non-binding recommendations by changing their administrative practice and law, the latter not infrequently including constitutional provisions.⁸⁴ In particular, the CESCR can provide an impetus

⁷⁹ CESCR, *General Comment No. 1: Reporting by States Parties*, UN Doc. E/1989/22 (1989) Annex III paras 6-7 referring to ICESCR, art 2 (1).

⁸⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 26.

⁸¹ Kälin (n 72) 32.

⁸² Surya P. Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge 2017) 88-97.

⁸³ Odello and Seatzu (n 73) 178.

⁸⁴ Eibe Riedel, 'Economic, Social, and Cultural Rights in Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 466. One recent example is the Constitution of Kenya, 2010. Influenced by the ICESCR, it 'protects what used to be considered solely as "needs" and "services" as fully justiciable entitlements at par with civil and political rights', including the right to health, to housing, to food, to water, to social security, and to education. Manisuli Ssenyonjo, 'Influence of the ICESCR in Africa' in Daniel Moeckli and Helen Keller (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 116.

for the fuller realization of domestic human rights objectives, when engagement of non-governmental organizations (NGOs) is substantial and sustained in the examination of state reports (submission of shadow reports to the CESCR) and the domestic implementation of concluding observations (systematic follow-up of state efforts).⁸⁵

Remarkably, the CESCR has recently started to include a BHR section in its concluding observations, offering detailed recommendations to states with references to General Comment No. 24. For example, one of the recommendations to Korea is to create a legal obligation that (i) requires companies to conduct human rights due diligence to identify, prevent and mitigate the risks of ESC rights violations and (ii) makes them accountable for the negative impacts on ESC rights resulting from their decisions and operations. The obligation needs to cover corporations domiciled in Korea as well as those entities over which such enterprises are exercising their control, including those in their supply chains such as subcontractors, suppliers, and franchisees.⁸⁶ This recommendation implies a need for new domestic legislation, a measure corresponding to the territorial obligation to protect.⁸⁷ Importantly, despite not using the term 'extraterritorial obligations', this type of territorial obligation is obviously aimed at enhancing the enjoyment of human rights in third states, and thus extraterritorial in effect.⁸⁸

See also CESCR, *Concluding Observations: Kenya*, UN Doc. E/C.12/KEN/CO/1 (1 December 2008) para 9.

⁸⁵ Scott Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 129.

⁸⁶ CESCR, *Concluding Observations: Korea*, UN Doc. E/C.12/KOR/CO/4 (19 October 2017) para 18. For similar findings, see also CESCR, *Concluding Observations: Denmark*, UN Doc. E/C.12/DNK/CO/6 (12 November 2019) paras 18-20; CESCR, *Concluding Observations: Switzerland*, UN Doc. E/C.12/CHE/CO/4 (18 November 2019) paras 10-11.

⁸⁷ See CESCR (n 10) para 16.

⁸⁸ See also *ibid* para 33. Such extraterritorial impacts of human rights due diligence obligations in domestic law, according to the CESCR, do not imply the exercise of extraterritorial jurisdiction by the states concerned.

Another relevant case is the concluding observations to Mauritius, where the CESCR presents the following concern with regard to its domestic law: the Public Procurement Act 2006 of Mauritius requires a procurement contract to protect the rights of workers engaged in the execution of the contract. Still, when read in conjunction with the Employment Rights Act 2008, the workers employed by subcontractors may in fact be excluded from that protection.⁸⁹ In urging the government to address this gap by extending the protection to all workers concerned under these procurement contracts, the Committee explicitly mentioned 'paragraph 33 of its general comment No. 24' that falls within the section titled '[e]xtraterritorial obligation to protect'.⁹⁰ Again, by blurring the boundaries between territorial and extraterritorial obligations through relevant domestic law, the CESCR has pragmatically operationalized the extraterritorial obligation to protect without dealing with contentious theoretical questions surrounding this obligation. For instance, it was not necessary for the Committee to decide the precise scope of extraterritorial obligation or to identify specific criteria for attribution of state responsibility for a supposed breach of this type of obligation. If properly implemented, this *de facto* application of extraterritorial obligation is likely to mitigate some of the accountability gap in global supply chains, when decent work deficits are occurring in a country that permits the suppliers' business activities but lacks the willingness and/or capacity to ensure human rights and labor standards. It is an important task for the CESCR to constantly monitor whether such complementary regulations from the buyer side of states are genuinely based on the multilaterally agreed normative content of the ICESCR. Otherwise, the regulations may simply result in an inappropriate imposition of unilateral standards that reflects power difference among nations.

Moreover, concluding observations may also complement the efforts initiated by the UNGP. Two points deserve particular attention. First, for the UNGP to be fully implemented, a national plan of action on BHR is essential. The CESCR urges states to expedite the adoption of such a plan if

⁸⁹ CESCR, *Concluding Observations: Mauritius*, UN Doc. E/C.12/MUS/CO/5 (5 April 2019) para 11.

⁹⁰ *Ibid* para 12.

they have not done so.⁹¹ Even if a state has a plan, the Committee may still find several legal gaps as to the guarantees to ensure that corporations comply with their obligation to exercise human rights due diligence.⁹² This includes the exclusively voluntary nature of due diligence and the lack of monitoring mechanisms.⁹³ Indeed, because of its exclusive focus on the process of conducting due diligence, human rights due diligence law often does not oblige corporations to achieve a particular human rights outcome. This characteristic leads companies to comply with the legislation only superficially with no real prospect of change in corporate policies and practices.⁹⁴ The state reporting procedure thus offers a useful opportunity to evaluate the effectiveness of human rights due diligence law. Second, with frequent emphasis on the need for enhanced access to effective remedies through domestic law, the CESCR has been strengthening the third pillar of the UNGP, i.e. access to remedy.⁹⁵ With regard to the German legal system, for instance, the CESCR has proposed an introduction of disclosure procedure so that claimants have less difficulty in proving their rights being violated by the conduct of a corporation. This may be supplemented by an introduction of corporate criminal liability and collective redress mechanisms in civil proceedings as well as increasing legal aid for the victims, especially for non-German victims.⁹⁶

These practices indicate that the non-binding nature of concluding observations should not necessarily be viewed as a deficit of this procedure. Rather, the fact that the observations never entail an imposition on states allows the CESCR to make bold recommendations both in terms of specific issues in global supply chains and on BHR more broadly.

⁹¹ CESCR, *Concluding Observations: New Zealand*, UN Doc. E/C.12/NZL/CO/4 (1 May 2018) paras 16–17.

⁹² CESCR, *Concluding Observations: Spain*, UN Doc. E/C.12/ESP/CO/6 (25 April 2018) para 8.

⁹³ CESCR, *Concluding Observations: Germany*, UN Doc. E/C.12/DEU/CO/6 (27 November 2018) para 7.

⁹⁴ International Labour Organization Governance and Tripartism Department (n 39) paras 60, 66.

⁹⁵ UNHRC (n 6) Principles 25–31.

⁹⁶ CESCR (n 93) paras 9–10.

V. LIMITATIONS OF THE INDIVIDUAL COMMUNICATION PROCEDURE

The individual communication procedure, which has been put into practice following the entry into force of the OP-ICESCR in 2013, is another unique mechanism that does not exist in BHR soft law. It permits (i) an alleged victim or (ii) a group of alleged victims of a violation of ESC rights contained in the ICESCR or (iii) those working on behalf of such victims (typically NGOs) to submit their claim to the CESCR, subject to the fulfilment of admissibility criteria such as the exhaustion of domestic remedies.⁹⁷ Should the CESCR find that the alleged violation of ESC rights amounts to a violation of the ICESCR, the state concerned must 'give due consideration to the views of the Committee' despite their non-legally-binding form.⁹⁸ The views may be accompanied by recommendations which are classified, *inter alia*, into four types. That is, (i) recommending appropriate remedial action (e.g. compensation); (ii) requesting the state to remedy the situations leading to a violation of ESC rights; (iii) suggesting a range of measures to implement the CESCR recommendations; and (iv) proposing a follow-up accountability mechanism.⁹⁹ Through interpretation and application of relevant ICESCR provisions into real complex factual situations, this quasi-judicial procedure performs at least two main functions: it not only provides remedies in individual cases (though arguably not as effective as domestic courts with compulsory enforcement power of their judgments), but also develops the normative content and corresponding obligations of ESC rights, potentially contributing to greater recognition of justiciability of ESC rights in the international community.¹⁰⁰

However, the capacity of the individual communication procedure under the OP-ICESCR to serve as an effective forum for addressing BHR issues in

⁹⁷ OP-ICESCR, arts 2-4. See generally Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48.

⁹⁸ OP-ICESCR, art 9 (2).

⁹⁹ CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UN Doc. E/C.12/2007/1 (21 September 2007) para 13.

¹⁰⁰ Liebenberg (n 97) 50.

global supply chains is severely constrained. The challenges inherent in this procedure are not solely attributable to the limited number of 24 state parties to the OP-ICESCR.¹⁰¹ A more fundamental problem lies in its wording. In particular, the jurisdictional limitation set out in Article 2 of the OP-ICESCR may substantially curtail the role of extraterritoriality under the individual communication procedure. While the ICESCR does not contain any wording that limits its scope of application,¹⁰² the OP-ICESCR confines the CDESCR's competence to receive communications to those submitted by alleged victims (or their legal representatives) 'under the jurisdiction of a State Party'.¹⁰³ As illustrated below with some examples, due to this jurisdictional clause, the individual communication procedure is primarily aimed at addressing potential violations of the ICESCR at territorial level. This means that the OP-ICESCR is designed to address extraterritorial obligations on ESC rights mainly, if not exclusively, through the inter-state communication procedure or the inquiry procedure,¹⁰⁴ rather than via the individual communication procedure.¹⁰⁵ This legal structure does not conclusively deprive the CDESCR of any possibility to interpret the jurisdictional clause in a creative manner when dealing with future individual

¹⁰¹ Status of Ratification (n 38). Still, active participations from 11 European countries (Belgium, Bosnia and Herzegovina, Finland, France, Italy, Luxembourg, Montenegro, Portugal, San Marino, Slovakia, Spain) and 8 Latin American nations (Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Honduras, Uruguay, Venezuela) are noteworthy. The remaining are 4 African states (Cabo Verde, Central African Republic, Gabon, Niger) and 1 Asian country (Mongolia).

¹⁰² ICESCR, art 2 (1).

¹⁰³ OP-ICESCR, art 2. The relevant part reads as follows: '[c]ommunications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.'

¹⁰⁴ See respectively OP-ICESCR, arts 10 and 11-12. The present contribution does not engage in further examinations of these two procedures. The availability of these opt-in procedures is so limited that it requires not only the ratification of the OP-ICESCR for the state concerned, but also additional consents from the government for the CDESCR's competence on such mechanisms.

¹⁰⁵ See also Christian Courtis and Magdalena Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' (2009) 27 *Nordic Journal of Human Rights* 54.

communications. Yet it poses a severe challenge to the victims of extraterritorial ESC rights violations.

The problem is exacerbated by the absence of an explicit mention of extraterritorial obligations in the OP-ICESCR. The insufficient recognition of this type of obligations is particularly evident in Article 14 on international assistance and cooperation.¹⁰⁶ Problematically, it reduces the question of extraterritorial obligations to a mere issue of development cooperation and further limits its focus on technical advice or assistance from United Nations institutions.¹⁰⁷ As a consequence, this provision covers only some segments of the extraterritorial obligation to fulfil and neglects to directly deal with the extraterritorial obligation to respect and to protect. In effect, extraterritorial obligations are given a very limited space, if any, in the OP-ICESCR. As cautioned by Vandenberg and Vandenhole, '[b]y omitting or denying the existence of extraterritorial obligations ... the OP-ICESCR runs the risk of being detached from today's political, legal and economic reality'.¹⁰⁸ This is unfortunately the case with global supply chains as shown below.

The seven views decided on the merits so far have been concerned neither with BHR nor extraterritorial obligations.¹⁰⁹ This makes recourse to

¹⁰⁶ OP-ICESCR, art 14.

¹⁰⁷ Arne Vandenberg and Wouter Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in light of the Drafting Process' (2010) 10 Human Rights Law Review 207, 232. As rightly observed by the authors at 219, this is one of the regrettable results of the inter-state negotiation process of the OP-ICESCR, where its text was substantially weakened for the instrument to be eventually adopted by consensus. In the political bargaining process, the long-standing ideological prejudices against ESC rights prevailed over the attempts to create an effective mechanism to address violations of ESC rights based on the consideration of specificity of these rights.

¹⁰⁸ Ibid 237.

¹⁰⁹ Up to the CESCR sixty-eighth session that ended on 16 October 2020. *I.D.G. v. Spain*, CESCR Communication No.2/2014, UN Doc. E/C.12/55/D/2/2014 (13 October 2015); *Rodríguez v. Spain*, CESCR Communication No.1/2013, UN Doc. E/C.12/57/D/1/2013 (20 April 2016); *Djazia and Bellili v. Spain*, CESCR Communication No.5/2015, UN Doc. E/C.12/61/D/5/2015 (21 July 2017); *Calero v. Ecuador*, CESCR Communication No.10/2015, UN Doc. E/C.12/63/D/10/2015 (14 November 2018); *S.C. and G.P. v. Italy*, CESCR Communication No.22/2017, UN

hypothetical examples necessary to highlight the problems in the context of global supply chains.

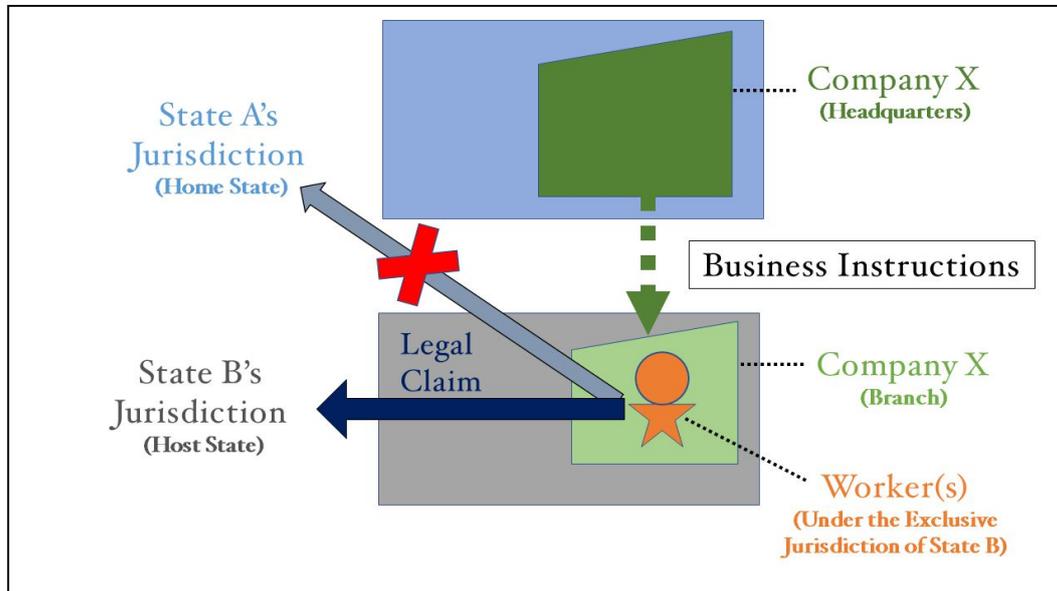


Figure (i) A situation where workers are under the exclusive jurisdiction of a corporation's host state

First, as visualized in Figure (i), suppose that a branch of company X, whose main headquarters are domiciled in state A, has violated ESC rights, say labor rights, of workers in state B. In this case, whereas it is possible to invoke a communication against the host state of company X (state B), it may be difficult to also include the home state (state A) in the communication. While company X is under the jurisdiction of both states A and B, workers are only under the jurisdiction of state B and do not have a direct legal linkage to state A.

Likewise, as shown in Figure (ii), it is unlikely that a worker employed by company Y in state C, a subcontractor of company Z domiciled in state D, is able to establish a violation of the extraterritorial obligation to protect imposed on state D when his/her ESC rights are violated by company Y. Since the worker has a jurisdictional link only with state C, he/she can only claim a

Doc. E/C.12/65/D/22/2017 (28 March 2019); *Albán v. Spain*, CESCR Communication No.37/2018, UN Doc. E/C.12/66/D/37/2018 (29 November 2019); *Pardo v Spain*, CESCR Communication No.52/2018, UN Doc. E/C.12/67/D/52/2018 (14 April 2020).

violation of the territorial obligation to protect imposed on state C in relation to company Y.

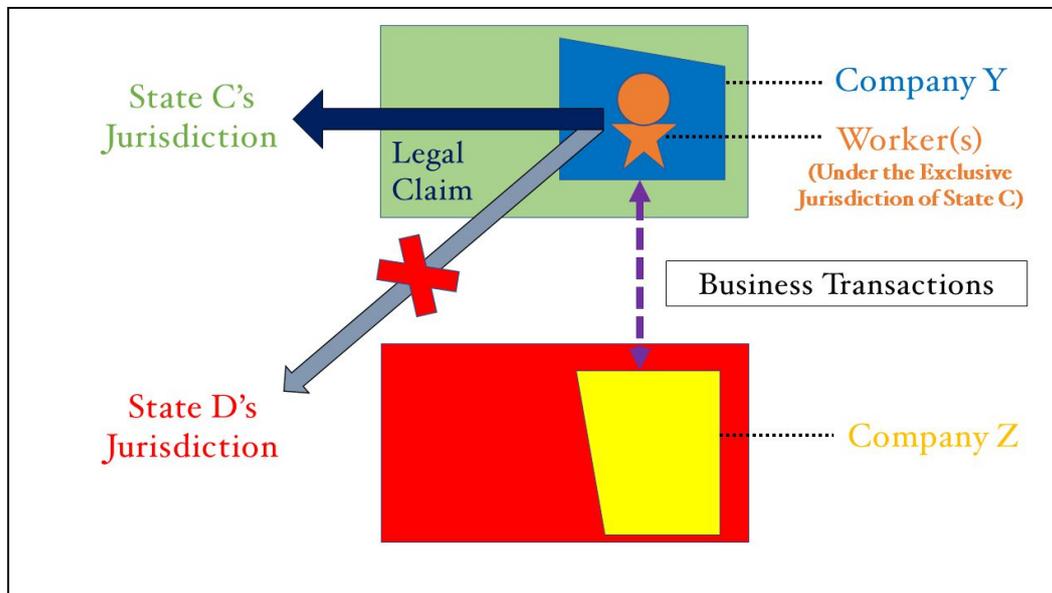


Figure (ii) A situation where workers are under the exclusive jurisdiction of the state where a subcontractor corporation operates

A possible exception to this case might be the situation presented in Figure (iii), where company Z is (a) exercising governmental authority of state D (e.g. a state-owned enterprise) or (b) acting under the instructions, direction, or control of state D, or (c) its conduct is acknowledged and adopted by state D as its own.¹¹⁰ For example, suppose that company Z, which meets one of the above three criteria, often visits company Y's factories and demands that the latter improves its productivity by adopting working conditions that are detrimental to the health of its employees. In such cases, it might be argued that a worker in state C is also indirectly under the jurisdiction or control of state D, which then may enable him/her to claim a violation by both states C and D. Nevertheless, considering that it is the petitioners who bear the burden of proof in establishing the claim,¹¹¹ sadly it would not be surprising if they face difficulties in gathering sufficient factual evidence to demonstrate

¹¹⁰ See CESCR (n 10) para 11 (three situations where states may be held directly responsible for an action or inaction of business entities). See also Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598, 606-615.

¹¹¹ Courtis and Sepúlveda (n 105) 58.

such a complex legal relationship.¹¹² After all, these situations are quite far from the usual human rights landscape in global supply chains.

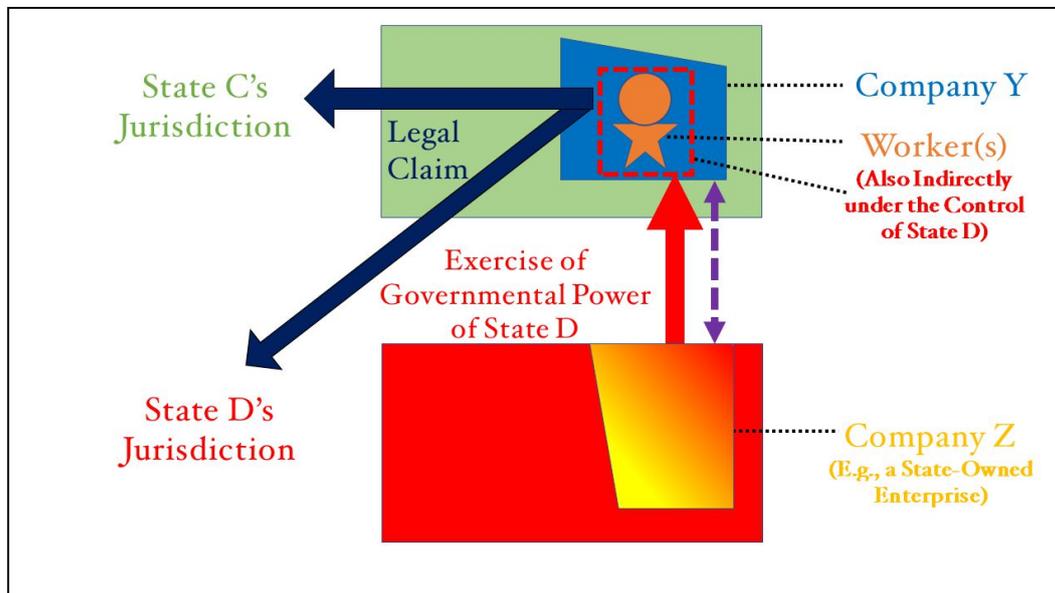


Figure (iii) An exceptional situation where workers are under the jurisdiction of both states C and D

It is clear from these hypothetical cases that the individual communication procedure under the OP-ICESCR maintains some difficulties to realize the full potential of extraterritorial obligations. What is a possible way to overcome this challenge? There are useful hints in the CESCR General Comment No. 24. As part of the extraterritorial obligation to protect, it mentions international cooperation in the form of the adoption of international instruments that strengthen the obligation to cooperate for improved accountability and access to remedies for the victims of transnational ESC rights violations.¹¹³ Accordingly, one potential approach is to include a social clause, which specifies how to better deal with extraterritorial cases like those considered above, in bilateral, regional and

¹¹² Aubry notes a similar difficulty for the demonstration of a causal link between a state's action or omission and an alleged extraterritorial human rights violation. Sylvain Aubry, 'Advancing the Accountability of Corporations for their Impact on Economic, Social, and Cultural Rights: Reflections on the Use of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013) 142.

¹¹³ CESCR (n 10) para 35. It also reduces conflicts of jurisdiction.

multilateral trade and investment agreements that promote global supply chains. It may utilize existing mechanisms like domestic courts and/or establish a new system such as international arbitrations. Needless to say, the degree to which this approach succeeds considerably depends on political will of governments. Even if such clauses are incorporated, their existence alone does not necessarily guarantee its effectiveness, just like the OP-ICESCR.¹¹⁴ That being said, such a dilemma between the pursuit of justice and *realpolitik* is not a concern that is unique to the extraterritorial obligations under the ICESCR. It is rather a perpetual inescapable reality for any international lawyer. At least, given that no BHR soft law instruments have proposed international cooperation towards an effective access to remedies for the victims of extraterritorial ESC rights violations, General Comment No. 24 presents an important agenda for international legal order to fully realize human rights of everyone.

VI. CONCLUSION

Despite being rarely mentioned in the BHR debate, the ICESCR has some unique advantages in binding and monitoring states to continuously enhance the effectiveness of ESC rights protection in global supply chains. As suggested in section II, a significant challenge for BHR global governance is how to achieve its optimization through a combination of relevant hard and soft law instruments, each with its own strength and weaknesses. Thus, a legal analysis of BHR issues cannot be completed with sole reference to soft law initiatives. As discussed in section III in relation to the obligation to protect in the UNGP, it is the ICESCR that gives substance and binding effect to some of the key concepts contained in soft law. Moreover, as shown by the extraterritorial obligation to protect in the CESC General Comment No. 24, such normative content of the ICESCR may subsequently develop, even beyond the level initially envisaged under BHR soft law, through an

¹¹⁴ For an observation of how human rights clauses in trade agreements may be abused for political purposes by powerful nations, see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007) 108-111. For an analysis of trade agreements in light of the CESC General Comment No. 24 (although not focusing on BHR), see Shinya Ito, 'Reevaluating a Conflict between WTO law and the Right to Food: The Case of Public Food Stockholding' (forthcoming) *Manchester Journal of International Economic Law*.

evolutionary interpretation. Indeed, a review of the CESCR concluding observations in section IV shows the ICESCR's contributions to the overall effectiveness of BHR global governance. The state reporting procedure under the ICESCR has already engaged in *de facto* application of extraterritorial obligations and reinforcement of the efforts made by other relevant BHR domestic law and soft law. Nevertheless, these remarks are not to suggest that the ICESCR is always superior to other BHR norms in terms of effectiveness. This is especially the case with access to remedies, which is currently better dealt with by domestic law. As analyzed in section V, the individual communication procedure under the OP-ICESCR differs significantly from BHR soft law by granting access to remedies directly to the victims of ESC rights violations. However, its potential role is quite limited in the context of global supply chains, due to the jurisdictional clause in the OP-ICESCR. In addition, the fact that the ICESCR obligations are binding only on states, not on corporations, does not alter the current situation that BHR soft law instruments, most notably the UNGP, are still more relevant as the code of conduct for business enterprises.¹¹⁵

To conclude, although itself not providing a 'panacea',¹¹⁶ the ICESCR constitutes a crucial part of BHR global governance that needs much more academic and practical consideration. The prevalent soft law-focused approach to BHR challenges works only under certain market conditions where companies have no option but to care about their human rights records for their own economic profits. Notwithstanding the lack of compulsory enforcement mechanisms at the international level, the ICESCR still provides a vital impetus to overcome this limitation of BHR soft law.¹¹⁷ It obliges states to adopt and implement effective domestic legislation that makes corporations accountable, irrespective of their market considerations,

¹¹⁵ Note that even the second revised draft of the proposed BHR treaty has failed to directly impose legal obligations on companies. Second Revised Draft (n 36).

¹¹⁶ See CESCR, *Statement: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2001/10 (10 May 2001) para 6.

¹¹⁷ Indeed, 'an impetus' was exactly the word that Leckie used to highlight the significance of the state reporting procedure under the ICESCR. Leckie (n 85) 130. The present contribution uses this term more broadly, covering the state reporting procedure as well as other CESCR functions such as the clarification of normative content of the ICESCR through the adoption of General Comments.

to their violations of human rights within and even beyond national borders. This is further supplemented by international cooperation towards organizing a suitable forum that effectively permits individuals to bring cases concerning extraterritorial obligations. For a variety of reasons, these measures may not be achieved all at once. Be that as it may, given that the ICESCR has the potential to induce some meaningful differences in the long term, such a prospect represents an added value of this Covenant in BHR global governance. Consequently, as far as the 171 state parties to the ICESCR, the vast majority of the international community, are concerned, taking the ICESCR more seriously in BHR¹¹⁸ is an essential step for enhanced, even if not perfect, ESC rights protection for workers in global supply chains. The theoretically rudimentary stage of extraterritorial aspects of the ICESCR invites further explorations that analyze future practices.

¹¹⁸ This expression is obviously inspired by Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

THE STRANGE CASE OF DR. WATSON:
LIABILITY IMPLICATIONS OF AI EVIDENCE-BASED DECISION SUPPORT
SYSTEMS IN HEALTH CARE

Francesca Lagioia*  and Giuseppe Contissa†‡ 

This paper investigates the legal issues emerging from the adoption of clinical decision support systems (CDSS) based on artificial intelligence (AI). We explore a set of questions whose answers may affect the allocation of liability in misdiagnosis and/or improper treatment scenarios. The characteristic features of new-generation CDSS based on AI raise new challenges. In particular, the argument is made that a new shared decision-making authority model shall be adopted, in line with the analysis of the task–responsibility allocation. It is also suggested that the level of automation should be taken into account in classifying these systems under the European regulations on medical device software. This classification may indeed affect not only the certification procedures but also the allocation of liability. To this end, we finally design some scenarios providing variations on the possible causes of failure in the decision-making process and the consequent liability assessment.

Keywords: Artificial Intelligence, Clinical Decision Support Systems, Liability and Automation

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I. INTRODUCTION

The ageing of populations is becoming one of the most important phenomena of the 21st century. Over the past decades, life expectancy has significantly increased: 12 per cent of the world population is currently over the age of 60, and, by 2050, this percentage is expected to rise to 21.¹ While this is a large triumph for modern science and medicine, it places a huge strain on the delivery of healthcare services, owing to the increasing costs and inexorable decrease in the number of medical personnel relative to the number of patients.² The advent of big data and the artificial intelligence (AI) era is usually considered part of the solution. The increased focus on preventing medical errors, coupled with the introduction of clinical decision

¹ Patrick Love, *OECD Insights Ageing Debate the Issues: Debate the Issues* (OECD Publishing 2015).

² Ibid.

support systems (CDSS), have been pointed out as key to the effort to improve healthcare quality and patient safety.³ The adoption of CDSS for diagnosis and treatment should also facilitate evidence-based practice, which is regarded as the gold standard for decision-making in health care.⁴

In this context, the IBM Watson system is one of the most promising AI technologies developed in recent years. Initially designed to compete with human champions at the *Jeopardy!* quiz show,⁵ Watson is currently being experimented with as an evidence-based CDSS. It is based on the DeepQA technology, which exploits natural language processing and a variety of search techniques to analyse both unstructured information, for example natural language documents, and structured information, such as relational databases and knowledge bases.⁶ DeepQA is trained on a set of documents on which human experts annotate all instances of pairs of questions and answers. The system learns how to identify and correlate questions and answers on the basis of the examples within the training set. It applies the acquired knowledge in analysing new input questions and generates new possible candidate answers, through a broad search on massive volumes of information that have never been annotated. For each candidate answer, a new hypothesis is generated. Then, for each hypothesis, DeepQA tries to find evidence that either supports or refutes the hypothesis in question. The process outputs a ranked list of candidate answers – a potential diagnosis – with an associated confidence score.

This paper investigates some legal issues emerging from the adoption of Watson and similar AI CDSS in health care, especially as concerns medical practice and liability for accidents. Furthermore, it calls for new models of

³ Linda T Kohn and others (eds), *To Err Is Human: Building a Safer Health System* (National Academies Press 2000).

⁴ David L Sackett and others, *Evidence Based Medicine: What It Is and What It Isn't* (British Medical Journal Publishing Group 1996).

⁵ Jeopardy! is an American television game show based on a quiz competition in which contestants are presented with general knowledge clues in the form of answers, and must phrase their responses in the form of questions. David Ferrucci et al, 'Building Watson: An overview of the DeepQA project' (2010) *AI magazine* 31(3) 59-79.

⁶ David Ferrucci, Anthony Levas, Sugato Bagchi, David, Gondek, and Erik T. Mueller, 'Watson: Beyond Jeopardy!' (2013) *Artificial Intelligence* 199, 94.

allocating decision-making tasks between medical experts and AI systems. Even though the analysis is mainly focused on Watson, results can be extended to all AI CDSS systems sharing similar features.

The liability for damages caused by AI systems has been addressed in a number of studies with regard to civil⁷ and criminal law,⁸ and recently also in legal disputes and legislative initiatives, such as the report on Civil Law Rules on Robotics, issued by the Committee on Legal Affairs of the European Parliament,⁹ the AI Strategy of the European Commission, and the High-Level Expert Groups on AI.¹⁰ However, the liability resulting from the use of AI systems in the health domain has mainly focused, with some exceptions,¹¹

⁷ See, among others, Ugo Pagallo, *The Laws of Robots* (Springer 2013); Paulius Čerka, Grigienė Jurgita, and Sirbikytė Gintarė, 'Liability for Damages Caused by Artificial Intelligence' (2015) 31(3) *Computer Law & Security Review* 376-389.

⁸ Ugo Pagallo, 'AI and Bad Robots: The Criminology of Automation' in the *Routledge Handbook of Technology, Crime and Justice* (Routledge 2017); Francesca Lagioia and Giovanni Sartor, 'AI Systems Under Criminal Law: a Legal Analysis and a Regulatory Perspective' (2019) *Philosophy & Technology* 1-33.

⁹ Civil Law Rules on Robotics European Parliament resolution of 16 February 2017 (P8_TA (2017)0051), with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103 INL).

¹⁰ On 25 April 2018, the EU Commission set up three different groups of experts on (i) the ethics of AI; (ii) whether and to what extent to amend the directive on liability for defective products; and, (iii) liability and new technologies formation, available at: <<https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence>> accessed 27 June 2020. See also the Commission's document on Artificial intelligence: Commission outlines a European approach to boost investment and set ethical guidelines, IP/18/3362; European Commission, White Paper On Artificial Intelligence - A European approach to excellence and trust (2020) (available at <https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf> accessed 27 June 2020); European Commission, Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics (2020) COM(2020) 64 final. For an extensive literature analysis of the foreseeable threats of AI crimes see Thomas C King, Nikita Aggarwal, Mariarosaria Taddeo and Luciano Floridi, 'Artificial Intelligence Crime: An Interdisciplinary Analysis of Foreseeable Threats and Solutions' (2018) 26(1) *Science and Engineering Ethics* 89-120.

¹¹ Andreas Holzinger, 'Interactive Machine Learning for Health Informatics: When Do We Need the Human-in-the-Loop?' (2016) *Brain Informatics* 3, 2, 119-131; W. Nicholson Price II, 'Regulating black-box medicine' (2017) *Mich. L. Rev.* 116, 421;

on robotic surgery, telemedicine and smart prosthetics.¹² Moreover, the literature is still fragmented and a comprehensive and unified approach is still missing. Indeed, in this context, the legal analysis requires a systemic approach in order to consider the functioning and goals of the health system, calling for a novel method for analysing the roles and tasks of the actors involved and the associated responsibilities. A socio-technical perspective¹³ – resulting from the combination of technical artefacts (surgical robots, decision-support systems, robotic prosthetics, etc.), human operators and users (physicians, paramedics, clinicians, caregivers, patients, etc.), and social artefacts (including laws, medical procedures, technical manuals, and institutions, such as hospitals, national institutes of health, and regulatory agencies) – provides the means to investigate what activities are entrusted to AI CDSS and the role that such systems play in health care.

In this paper, this perspective is adopted in order to explore a set of questions whose answers may heavily affect the allocation of liability in misdiagnosis and/or improper treatment scenarios. In particular, section II explores the distinctive features of AI based CDSS by comparison with traditional ones. This analysis is meant to provide the necessary technological framework for evaluating how and to what extent these new AI technologies can change the medical practice and the potential risks associated with this transformation. At the same time, given the potential of such technologies to be

Jason Millar and Ian Kerr, 'Delegation, Relinquishment and Responsibility: The Prospect of Expert Robots' (2013) Available at SSRN: <<https://ssrn.com/abstract=2234645>> accessed 27 June 2020.

¹² Andrea Bertolini, 'Robotic Prostheses as Products Enhancing the Rights of People with Disabilities. Reconsidering the Structure of Liability Rules' (2015) 29(2-3) *International Review of Law, Computers & Technology* 116-136; Shane O'Sullivan, Nathalie Nevejans, Colin Allen, Andrew Blyth, Simon Leonard, Ugo Pagallo, Katharina Holzinger, Andreas Holzinger, Mohammed Imran Sajid and Hutan Ashrafian, 'Legal, Regulatory, and Ethical Frameworks for Development of Standards in Artificial Intelligence (AI) and Autonomous Robotic Surgery' (2019) *The International Journal of Medical Robotics and Computer Assisted Surgery* 15(1), e1968.

¹³ Pieter Vermaas, Peter Kroes, Ibo van de Poel, Maarten Franssen and Wybo Houkes, 'A Philosophy of Technology: From Technical Artefacts to Sociotechnical Systems' (2011) in *Synthesis Lectures on Engineers, Technology, and Society*, vol. VI(1) 1-134, 70.

transformative, there is a need to analyse how they are regulated by the existing legal framework and whether this is adequate or fail to provide appropriate solutions and guidance. Thus, section III deals with the legal qualification and the conformity-assessment procedure of AI-based CDSS under the European Regulation on medical device software. This analysis is meant to evaluate whether additional criteria for classifying these systems are needed and how they can influence the certification procedures and medical liability as well.

Once the analysis of the specific technological features of AI CDSS and the regulatory framework governing their classification and certification is completed, the focus will fall on the allocation of tasks and activities and on the interaction between medical experts and AI CDSS. In particular, section IV explores how and to what extent the level of automation may affect the allocation of liability. The analysis shall consider what activities are being delegated to the Watson system, as an example of AI CDSS, and what changes this introduces into interactions, and what new capacities and power relations are consequently engendered. This investigation is meant to address the connection between delegation and responsibilities and the relations of influence, leading to different legal responsibilities.

Section V investigates whether and to what extent the features of the Watson system raise questions with regard to the source of decision-making authority. Section VI designs some scenarios, providing variations on the possible causes of failure in the decision-making process and the consequent liability assessment. It may be the case that, under the current legal regimes and without adequate adjustments, the allocation of liability will end up being unfair or inefficient. The adoption of a socio-technical perspective and the resulting liability analysis may be viewed as a governance mechanism¹⁴ by which to enhance the functioning of the healthcare system.

¹⁴ Gordon Baxter and Ian Sommerville, 'Socio-Technical Systems: From Design Methods to Systems Engineering' (2011) 23(1) *Interacting with Computers* 4–17.

II. DR. WATSON VS. TRADITIONAL CLINICAL DECISION SUPPORT SYSTEMS

This section considers the CDSS as a technological component of the healthcare socio-technical system (STS). It focuses on the comparison between Watson, as an example of new-generation AI CDSS, and those based on the more traditional knowledge-based approach. As mentioned above, this analysis is meant to provide the necessary framework for assessing how and to what extent these new AI technologies can transform medical practice and pose new risks.

In particular, three main features are identified that distinguish Watson, and all the new AI CDSS, from traditional expert systems.¹⁵ They are based on the formal representation of the specific domain knowledge: (1) the data-driven approach, (2) unpredictability by design, and (3) the possible stronger impact on the decision-making process. All these features pose new questions with regard to medical practice and the regulatory framework, under which current rules may fail to provide appropriate governance mechanisms.

1. The Data-Driven Approach

The first feature pertains to the widespread adoption of data-driven methods in AI research and development, which are gradually replacing the traditional knowledge-based approach in specific domains of application. Traditional decision-support systems are computer-based information systems that use expert knowledge to attain high-level decision performance in a structured and narrow problem domain.¹⁶ As a result, such systems are suitable for dealing with, and providing advice on, repetitive problem areas, rather than with ad hoc and unique situations.

Human expertise has to be elicited and represented symbolically. In particular, symbolic reasoning is based on algorithms to make inferences grounded in the knowledge base using forward chaining (from data to

¹⁵ For an overview on traditional expert systems see Jay E Aronson, Ting-Peng Liang, and Richard V MacCarthy, *Decision Support Systems and Intelligent Systems* (Pearson Prentice-Hall 2005), ch. 3, 103ff.

¹⁶ Jay E Aronson, Ting-Peng Liang, and Richard V MacCarthy, *Decision Support Systems and Intelligent Systems* (Pearson Prentice-Hall 2005) 549.

conclusion) and backward chaining (from conclusion to data).¹⁷ Such expert systems are typically based on classical procedural algorithms. The first examples were MYCIN and ONCOCIN, both developed at Stanford University in the early 1980s. In particular, the MYCIN system was developed to identify bacteria causing blood infections to arrive at a probable diagnosis, based on reported symptoms and medical test results, and to recommend a course of treatment.¹⁸ Similarly, ONCOCIN was an oncology-protocol management system designed to assist physicians in the treatment of cancer patients through a rule-based reasoner that encompasses the necessary knowledge of cancer chemotherapy. In generating its recommendation, the system combined initial data about the patient's diagnosis, results of laboratory tests, and the protocol-specific information in its knowledge base.¹⁹

Despite the great interests and appeal generated by these technologies and applications, they have not fundamentally transformed medical practice. This is mainly due to the so-called knowledge representation bottleneck: in order to build a successful application, the required information — including tacit and common-sense knowledge — had to be represented in advance using formalised languages. This proved to be very difficult, and in many cases impractical or impossible, also due to the endless evolution of medicine and new discoveries in medical science.

In the last decade, the focus of AI research has shifted to the possibility of applying machine-learning algorithms to vast amounts of data making an impressive leap forward. Data-driven AI systems, like Watson, use big-data analytics and data-mining techniques to discover patterns, with the help of machine-learning algorithms and statistics. Given the massive amount of processed structured and unstructured information, such systems are able to infer rules from data and develop models for making classifications,

¹⁷ Ibid.

¹⁸ Edward Hance Shortliffe, *MYCIN: A Rule-Based Computer Program for Advising Physicians regarding Antimicrobial Therapy Selection* (Stanford University Department of Computer Science 1974).

¹⁹ Edward H Shortliffe and others, 'An Expert System for Oncology Protocol Management' in BG Buchanan and EH Shortliffe (eds) *Rule-Based Expert Systems: The MYCIN Experiments of the Stanford Heuristic Programming Project* (1984) 656.

predictions, and decisions. It is important to note that these AI systems present a high level of complexity. First of all, they are not a single technology but rather a diverse set of different technologies.²⁰ For instance, the Watson system includes the Deep QA architecture, which goes from question analysis and answer type determination to search and then answer selection, and the Apache Unstructured Management Architecture (UIMA)²¹ for content analytics. The latter provides a component software architecture for the development, discovery, composition, and deployment of multi-modal analytics for the analysis of unstructured information and integration with search technologies. Furthermore, these different technologies and components are in turn based on a combination of a variety of methods and algorithms performing their various functions. For instance, for the *Jeopardy* Challenge, computer scientists working on Watson used more than 100 different techniques for analysing natural language, identifying sources, generating hypotheses, finding and scoring evidence, and merging and ranking hypotheses.²²

A further dimension of this complexity concerns the internal complexity of the algorithms involved and the composition of the training sets used by such systems to learn methods for achieving their goals. It may be increasingly difficult to identify the source of possible problems and what ultimately caused harms and injuries.

2. Unpredictability by Design

The second feature, unpredictability by design, stems from the previous one. The reason is twofold. First of all, data-driven AI systems are able to learn and infer rules from data and make predictions on those data, rather than working on a set of predefined if-then rules, and secondly, they are trained on

²⁰ The complexity AI systems is reflected in the multiplicity of components, software, parts, combined together. See, European Commission, *Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics* (2020) COM(2020) 64 final, 2.

²¹ David Ferrucci, and Adam Lally, 'UIMA: An Architectural Approach to Unstructured Information Processing in the Corporate Research Environment' (2004) 10(3-4) *Natural Language Engineering* 327-348.

²² David Ferrucci et al, 'Building Watson: An overview of the DeepQA project' (2010) 31(3) *AI magazine* 59-79.

constantly changing datasets.²³ Algorithms may evolve through self-learning by developing new heuristics (problem-solving strategies) and modifying their internal data and structure, or even by generating new algorithms.²⁴ Furthermore, due to their nature, such systems are open, since they often interact with other systems or data sources in order to function properly, thus allowing external input either via some hardware plug or through some wireless connection, and they come as hybrid combinations of hardware, software, continuous software updates, and various continuous services.²⁵

Machine-learning-based (ML-based) systems present both advantages and disadvantages if compared to classical rule-based systems. The former are easier to develop and maintain, but the possible outputs are not fully predictable, and the systems' behaviour cannot be fully explained by reference to the source code. Indeed, such systems are designed to respond to, identify, and classify new and not necessarily predefined stimuli and to link them to a corresponding decision, selected among all the possible decisions. Moreover, they do not have the capability to explain the reasoning process behind the decision-making. This is a capability that is necessary for understanding why decisions are made in a certain way and providing explanations to their users (which are required by physicians).

²³ Jason Millar and Ian Kerr, 'Delegation, relinquishment, and responsibility: The prospect of expert robots' in *Robot Law* (Edward Elgar Publishing 2016) 107.

²⁴ For instance, genetic algorithms are the most widely used form of evolutionary computation for medical applications. They are a class of stochastic search and optimisation algorithms based on natural biological evolution. They work by creating many random solutions to the problem at hand. This population of many solutions will then evolve from one generation to the next, ultimately arriving at a satisfactory solution to the problem. The best solutions are added to the population while the inferior ones are eliminated. The process is repeated among the better elements, so that improvements will occur in the population, survive and generate new solutions. Genetic algorithms are applied to perform several types of tasks like diagnosis and prognosis, medical imaging and signal processing. See, for example, A.N. Ramesh, C. Kambhampati, J.R.T. Monson and P.J. Drew, 'Artificial Intelligence in Medicine' (2004) 86(5) *Annals of the Royal College of Surgeons of England* 334.

²⁵ See the Report commissioned by the EU Commission: Expert Group on Liability and New Technologies – New Technologies Formation (2019) 'Liability for Artificial Intelligence and Other Emerging Digital Technologies' 33.

As a result, AI-based CDSS, opaque by their nature,²⁶ enable so-called black-box medicine, since grounds for decisions are at least partly unknown and unknowable.²⁷ As will be discussed in section V, these characteristics raise new issues, in particular with regard to AI transparency, trustworthiness and accountability.²⁸ This complicates the possibility of discovering the reasons behind AI evaluations and decisions and thus establishing the causes of potential failures in the diagnosis and treatment process.

3. Impact on the Decision-Making Process

The third feature concerns the possible impact of AI technologies on the decision-making process. Experiments done at the Sloan-Kettering Hospital in the United States suggest that Watson diagnoses are better and more accurate than those of physicians.

According to Sloan-Kettering, only around 20 per cent of the knowledge that human doctors use when diagnosing patients and deciding on treatments relies on trial-based evidence. It would take at least 160 hours of reading a week just to keep up with new medical knowledge as it is published, let alone consider its relevance or apply it practically. Watson's ability to absorb this information faster than any human should, in theory, fix a flaw in the current healthcare model. Wellpoint's Samuel Nessbaum has claimed that, in tests, Watson's successful diagnosis rate for lung cancer is 90 per cent, compared to 50 per cent for human doctors.²⁹

²⁶ W. Nicholson Price II, 'Black-Box Medicine', (2015) 28 *Harvard Journal of Law and Technology* 433

²⁷ W. Nicholson Price II, 'Describing Black-Box Medicine' (2015) 21 *Boston University Journal of Science and Technology Law* 347; Alex John London, 'Artificial Intelligence and Black-Box Medical Decisions: Accuracy versus Explainability' (2019) 49(1) *Hastings Center Report* 15-21.

²⁸ For a recent contribution on the importance of robotics transparency, interpretability and accountability see Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, 'Transparent, Explainable, and Accountable AI for Robotics' (2017) *Science Robotics* 2.6.

²⁹ Ian Steadman, 'IBM's Watson Is Better at Diagnosing Cancer Than Human Doctors' (*Wired*, 11 February 2013) <<https://www.wired.co.uk/article/ibm-watson-medical-doctor>> accessed 27 June 2020.

As a result, three key factors can be identified that may strongly influence the decision-making process. The first factor is the ability of Watson and similar AI-based CDSS to overcome human cognitive limitations in collecting and processing information. The second one consists in their capacity to outperform human doctors in diagnosis. The last one pertains to the adoption of an evidence-based approach, focused on clinical trials, in making diagnoses and recommending treatment. The latter is often considered a strong argument for justifying and trusting the decision-making of the system, as examined in the following sections.

Given the potential impact of these technologies on medical practice, there is the need to examine the existing regulatory framework in order to evaluate whether it is adequate or may fail to provide appropriate governance mechanisms.

III. THE EUROPEAN LEGAL FRAMEWORK ON MEDICAL DEVICE SOFTWARE: ITS LEGAL QUALIFICATION AND THE CONFORMITY-ASSESSMENT PROCEDURE

This section deals with the social component of the healthcare STS. In particular, it analyses the legal qualification and the conformity-assessment procedure of AI CDSS like Watson under European Regulation 2017/745.³⁰

The certification procedure sets the necessary requirement for obtaining the European Conformity (CE) mark, through which a medical device is certified as compliant with product-safety and performance requirements. The analysis is meant to assess whether additional criteria for classifying these systems are needed and how they can affect the certification procedures, in which lies the necessary requirement for placing a medical device on the market. We shall also examine how the mentioned criteria and the certification processes may impact on medical liability in case of

³⁰ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC. It will be applicable three years after its entry into force, i.e. 25 May 2017.

technological failures and more generally in misdiagnosis and/or improper treatment scenarios.

1. The Legal Qualification

According to Article 2(1) of the Regulation, Watson can be classified as a medical device for diagnostic, prediction, and treatment purposes.³¹ Under the Regulation, medical devices can be sorted into four different classes — class I (low risk), class IIa (moderate risk), class IIb (medium risk), and class III (high risk) — depending on the purpose of the device and its inherent risks. In particular, Annex VIII sets out three main classification criteria, which take into account (1) the duration of use (e.g. transient, short-term, long-term); (2) whether the device is invasive (i.e. any device which, in whole or in part, penetrates inside the body, either through a body orifice or through the surface of the body); and (3) whether the device is active (i.e. whether a device depends on a source of electrical energy or any source of power other than that directly generated by the human body or by gravity and works by converting this energy). For example, enema kits and elastic bandages fall under class I devices, because their potential for harm is minimal. Conversely, devices sustaining or supporting life, such as

³¹ Under Article 2(1) of the Regulation (EU) 2017/745, a medical device is defined as 'any instrument, apparatus, appliance, software, implant, reagent, material or other article intended by the manufacturer to be used, alone or in combination, for human beings for one or more of the following specific medical purposes: — diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of disease, — diagnosis, monitoring, treatment, alleviation of, or compensation for, an injury or disability [...].' Rule 11 of Annex VIII of the Regulation (EU) 2017/745 reads: 'Software intended to provide information which is used to take decisions with diagnosis or therapeutic purposes is classified as class IIa, except if such decisions have an impact that may cause: — death or an irreversible deterioration of a person's state of health, in which case it is in class III; or — a serious deterioration of a person's state of health or a surgical intervention, in which case it is classified as class IIb. Software intended to monitor physiological processes is classified as class IIa, except if it is intended for monitoring of vital physiological parameters, where the nature of variations of those parameters is such that it could result in immediate danger to the patient, in which case it is classified as class IIb. All other software is classified as class I'.

implantable pacemakers and breast implants, fall under class III, given their higher potential risks for patients' life and well-being.

According to Rule 11 of Annex VIII, decision-support systems generally fall under class IIa devices (moderate risk), unless they may seriously affect the patient's state of health, in which case they may fall under class IIb (medium risk) or class III (high risk).³²

In combination with the classification criteria in Annex VII, the definition provided in Rule 11 presents some challenges. First, under Rule 11, Watson cannot be clearly classified as a class III device. This classification appears to be predicated on an assessment as to whether patients can suffer irreversible damage to their health or a serious deterioration in their state of health. However, this assessment can only be made on a case-by-case basis, depending on the patient's specific clinical situation, and only once the design phase is completed. It may not always be possible to determine, for example, whether in the event of a patient's death, the latter is the consequence of a misdiagnosis and/or treatment or of the clinical course of the specific pathology.

Second, the level of risk posed by a device depends on its intended use, which is determined on the basis of the claims made by the manufacturer in labelling the device. In the case of AI CDSS, the risk associated with the device does not arise from physical interaction with the patient's body but rather from the way the AI recommendations are used by clinicians and from their influence on the decision-making process. Thus, in evaluating the risk level of AI CDSS, the parameter should be based on the accuracy of the data provided and the intended impact on a physician's clinical decision-making.

Focusing on the classification criteria specified in Annex VII, it is important to note that the level of automation of a medical device in no way influences its risk class. However, as better specified and analysed in sections IV, V and VI, the level of automation deeply affects the division of tasks between humans and machines in performing different cognitive functions, including acquiring and analysing information, making decisions, and acting on them. Delegation is in fact a risk, since its rationality closely depends not only on

³² See ch V, sec 1, art 51, of Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices.

the likelihood of properly achieving a certain objective but also on the costs associated with a possible failure.³³ In the health context, a misdiagnosis, with the consequent failure to deliver the appropriate medical treatment, poses a high risk to the patient's health and safety.

AI CDSS are characterised by a high level of automation, particularly with regards to certain cognitive functions, such as the acquisition and analysis of information and the decision-making process (see section IV). These levels affect the degree of the associated risks, with regard to (i) the way AI CDSS affect the traditional decision-making process; (ii) transparency issues and medical awareness (as discussed in section V); and (iii) possible technological failures, misdiagnosis, or wrong-treatment scenarios. Consider, for instance, a computer-aided detection device like the AlertWatch:OR, which is intended for 'secondary monitoring of patients within operating rooms and by supervising anaesthesiologists outside of operating rooms'.³⁴ These devices pose moderate risks by comparison with the risks posed by systems like Watson, which do not simply provide additional information but also suggest and indicate a specific clinical decision to be made. Thus, AI CDSS for diagnosis and medical treatment should not be classified under the same risk class as former CDSS devices.

The level of automation in AI CDSS also affects the degree of risk with regard to transparency and medical awareness. This is especially the case given that AI lacks the ability to explain the internal reasoning process behind the decision-making, which should support diagnosis and treatment recommendations (see sections II and V). In addition, there are risks associated with possible technological failures, misdiagnosis, or wrong-treatment scenarios, which may significantly affect patients' health and safety.

It clearly appears that the level of automation of a medical device should be considered an essential parameter for properly assessing the risk class of AI-

³³ Cristiano Castelfranchi and Rino Falcone, 'Towards a Theory of Delegation for Agent-Based Systems (1998) 24(3-4) *Robotics and Autonomous Systems* 141.

³⁴ Sachin Kheterpal, Amy Shanks, and Kevin K Tremper, 'Impact of a Novel Multiparameter Decision Support System on Intraoperative Processes of Care and Postoperative Outcomes' (2018) 128(2) *Anesthesiology: The Journal of the American Society of Anesthesiologists* 272.

based medical devices. This is even more so if it is considered that a different conformity-assessment procedure is defined for each class depending on the associated inherent risk. This is discussed in the following section.

2. The Conformity-Assessment Procedures

According to Article 2 of EU Regulation 2017/745, conformity assessment means the process demonstrating whether the legal requirements relating to a device have been fulfilled.

This process ranges from a basic conformity-assessment procedure for class I devices to a full quality assurance for class III devices (Article 52).³⁵ In the first case, the assessment of compliance with the Regulation can be carried out under the sole responsibility of the manufacturer, with regard to what the manufacturer claims in the EU declaration of conformity (Article 19 of the

³⁵ Given the lower risk level in the first case, i.e. devices in class I, the conformity-assessment procedure can be carried out under the sole responsibility of the manufacturer (art 19). Under class IIa, the manufacturer is required to establish and implement a quality management system (annex IX ch. I and III), and provide technical documentation for representative devices, without expert review. The notified body must approve and periodically audit (surveillance assessment) the quality-management system and assess its conformity with the required standard (alternatively, a manufacturer may provide technical documentation aligned with annexes II and III and select a conformity-assessment avenue based on annex XI). The conformity-assessment procedure for a class IIb non-active and non-implantable device is identical to the procedure for a class IIa (chs I and III of annex IX). In the case of implantable devices, the technical documentation must be provided for every device without expert review. In the case of active devices, the technical documentation must be provided for every device with expert panel involvement. Generally, manufacturers of class III devices are subject to a conformity assessment as specified in annex IX, including full quality assurance audit and full technical documentation review. Additionally, for class III implantable devices, an expert panel is involved in the evaluation. While standards are voluntary, one way of presuming conformity to the GSPR (General Safety and Performance Requirements in annex I) and meeting the provisions of full quality assurance is to obtain a harmonized EN ISO 13485 standard certification (alternatively, the manufacturer may choose to apply a conformity assessment as specified in annex X (Type-Examination) coupled with a conformity quality management assessment focused on production and controls, as specified in annex XI).

Directive). In the second case, however, the full quality-assessment procedure demands the involvement of both a notified body and an expert panel in evaluating and verifying the performance and the clinical safety of a medical device, including its ability to achieve its intended purpose as claimed by the manufacturer through labels, instructions for use, and the assessment of benefits and risks. Indeed, as specified in Article 2(52) the clinical performance of a device refers to its ability 'to achieve its intended purpose as claimed by the manufacturer, thereby leading to a clinical benefit for patients, when used as intended by the manufacturer', as resulting 'from any direct or indirect medical effects which stem from its technical or functional characteristics, including diagnostic characteristics'.

The full quality-assessment procedure secures the highest level of security and safety guarantees, creating reasonable expectations regarding both the functioning and the trustworthiness of class III medical devices. This reasonable expectation, as well as the role played by the notified body and the expert panel, may significantly affect the liability assessment in case of injuries suffered by patients as a consequence of the use of class III devices, for example through a technological failure.

In this scenario, the conformity-assessment procedure can affect the applicability of the legitimate expectation principle.³⁶ According to Article 6 of Council Directive 85/374/EEC, on liability for defective products, a legitimate expectation is determined by circumstances such as (a) the presentation of the product; (b) its intended use; and (c) the state of the art at the time it was put into circulation. Additionally, under Article 3 of Council Directive 85/374/EEC, the conformity of a product to the general safety requirement is to be assessed by taking account of multiple elements, including (a) national and European standards, (b) the Commission recommendations setting guidelines on product safety assessment, (c) product safety codes of good practice in force in the sector concerned; (d) the state of the art and technology; and (e) reasonable expectations about safety.

³⁶ For an application of the legitimate expectation principle in product liability, see the UK decision *A & Others v National Blood Authority* [2001] 3 All ER 289, and the advocate general's opinion in CJEU *Joined Cases C-503/13 and C-504/13 Boston Scientific Medizintechnik* [2015] ECLI:EU:C:2015:148.

In particular, the CE mark may impact the applicability of the legitimate expectation principle in different ways depending on whether it assumes a merely formal or a substantive nature. If conformity is assessed under the sole responsibility of the manufacturer, then the CE mark should only have formal relevance. Conversely, whenever the procedure demands the involvement of both the notified body and the expert panel, under the full quality-assurance procedure the CE label should assume substantive relevance. The substantive nature of the certification is crucial to enabling the applicability of the legitimate expectation principle as a liability shield for physicians in the event of technological failure.³⁷ Since the class III classification of Watson raises some difficulties, the applicability of the legitimate expectation principle remains uncertain, simply in view of the high-risk class.

As noted, the conformity assessment procedure affects the expected level of product safety and quality. We believe that rather than focusing on the intended use of medical devices, the classification criterion should take into account the level of automation and how clinicians use the devices in practice, including the extent to which they may impact, affect, and even guide their decisions. In conclusion, AI CDSS like Watson, which have high levels of automation related to different cognitive functions, should be classified under class III. The highest level — the level afforded by the full quality-assurance procedure — would act as a guarantee not only for physicians, enhancing the reliability of AI CDSS and allowing for the applicability of the legitimate expectation principle, but also for patients, ensuring a higher level of safety. In line with the above, the High Level Independent Expert Group on AI, set up by the European Commission, recently published a set of Guidelines for Trustworthy AI. They highlight the need for certification procedures that should apply standards developed for

³⁷ The Italian Supreme Court of Cassation, sez. IV, ruling n° 18140/2012, stated that in the event of death caused by a defective medical device carrying a CE mark, it should be possible to apply the legitimate expectation doctrine, unless the defect is manifest and readily recognisable. In ruling no 40897/2011, the same court stated that with the full quality assurance procedure, the CE mark for class III devices would assume substantive relevance, since it provides the basis for legitimate expectation and the relationship of trust between the doctor-user and the notified body.

different application domains and AI techniques, appropriately aligned with industrial and societal standards in different contexts.³⁸

IV. THE LEVEL OF AUTOMATION AS A TASK-RESPONSIBILITY CRITERION

This section explores the interaction between AI systems and human operators to investigate how and to what extent the level of automation may affect the allocation of liability. As mentioned above, the healthcare system can be described as a complex STS, combining technological artefacts, social artefacts, and humans.³⁹

Technological artefacts, which to some extent involve the use of automated tools and machines, determine what can be done in and by an organization, amplifying and constraining opportunities for action according to the level of automation of the technology at issue. Social artefacts, including norms and institutions, determine what should be done, governing tasks, obligations, goals, priorities, and institutional powers. Humans play an essential role in the functioning of STSs, including health care, providing them with governance and maintenance and sustaining their operation.⁴⁰ In particular, the healthcare system is increasingly reliant on AI technologies, and it operates by interconnecting information systems, as well as by employing AI technologies, which sometimes replace humans, though they are more often part of human-machine interaction processes.

In failure scenarios leading to patient injuries, a key aspect that should be considered in allocating liability is the level of automation of technological artefacts, since they may affect how the decision-making process is split between human experts (e.g. physicians) and AI systems. This is strictly

³⁸ High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI* (European Commission, 2019).

³⁹ Jan K.B. Olsen, Stig A. Pedersen, and Vincent F.A. Hendricks, *Companion to the Philosophy of Technology* (John Wiley & Sons 2012).

⁴⁰ Pieter Vermaas and others, 'A Philosophy of Technology: From Technical Artefacts to Sociotechnical Systems' (2011) 6(1) *Synthesis Lectures on Engineers, Technology, and Society* 1.

related to the allocation of task-responsibilities, namely the allocation of duties pertaining to the correct performance of a certain task or role.

On the one hand, the violation of such duties may result in personal liability for human experts.⁴¹ Whenever there is a failure in a complex system, such a failure is usually connected with the non-execution or inadequate execution of a task, and with the natural or legal person responsible for that task. As a consequence of the failure to comply with their task-responsibilities, such persons may be subject to liability under civil and criminal law.

On the other hand, it may be necessary to identify the task-responsibilities of AI systems, in other words the requirements they ought to meet. As task-responsibilities are progressively delegated to technology, the risk of liability for damage and injuries contextually shifts from humans to the organisations that designed and developed the technology and defined its context and uses, and are responsible for its deployment, integration, maintenance, and certification. Thus, responsibilities may change relative to the changing functionalities and automation levels that devices are taking on through the implementation of AI.

It is necessary to adopt a systematic approach⁴² for matching automation levels to the different responsibilities of both human experts and AI systems.⁴³ Here, in order to determine how tasks ought to be allocated between human experts and AI CDSS, reliance is made on the Level Of Automation Taxonomy (LOAT),⁴⁴ based on the taxonomy developed by

⁴¹ Mark F. Grady, 'Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion' (1987) (82) *Northwestern University Law Review*. 293.

⁴² Erik Hollnagel, 'The Human in Control: Modelling What Goes Right versus Modelling What Goes Wrong' in Pietro Carlo Cacciabue, Magnus Hjalmdahl, Andreas Luedtke and Costanza Riccioli (eds), *Human Modelling in Assisted Transportation* (Springer 2011) 3.

⁴³ Giuseppe Contissa and others, 'Liability and Automation: Issues and Challenges for Socio-Technical Systems' (2013) 2(1-2) *Journal of Aerospace Operations* 79.

⁴⁴ Luca Save and Beatrice Feuerberg, 'Designing Human-Automation Interaction: A New Level of Automation Taxonomy' (2012) *Proc. Human Factors of Systems and Technology* 2012.

Endsley and Kaber,⁴⁵ and on the principles set out by Parasuraman, Sheridan, and Wickens.⁴⁶

LOAT provides criteria for allocating tasks under four different cognitive functions: information acquisition (A), information analysis (B), decision-making (C), and action implementation (D). Figure 1 illustrates a simplified version of LOAT.⁴⁷ Each column starts with a 0-level of automation, corresponding to a fully manual performance of a certain task, without any technical support.

Figure 1: LOAT (simplified version)

A INFORMATION ACQUISITION		B INFORMATION ANALYSIS		C DECISION AND ACTION SELECTION		D ACTION IMPLEMENTATI ON	
A0	Manual Information Acquisition	B0	Working-memory based Information Analysis	C0	Human Decision-Making	D0	Manual Action and Control
A1	Artefact Supported Information Acquisition	B1	Artefact Supported Information Analysis	C1	Artefact-Supported Decision-Making	D1	Artefact Supported Action Implementation
A2	Low-Level Automation	B2	Low-Level Automation	C2	Automated Decision Support	D2	Step-by-step Action Support

⁴⁵ David B Kaber and Mica R Endsley, 'The Effects of Level of Automation and Adaptive Automation on Human Performance, Situation Awareness and Workload in a Dynamic Control Task' (2004) 5(2) *Theoretical Issues in Ergonomics Science* 113.

⁴⁶ Raja Parasuraman, Thomas B Sheridan, and Christopher D Wickens, 'A Model for Types and Levels of Human Interaction with Automation' (2000) 30(3) *Systems, Man and Cybernetics, Part A: Systems and Humans*, IEEE Transactions, 286.

⁴⁷ For a complete LOAT version see Luca Save and Beatrice Feuerberg, 'Designing Human-Automation Interaction: A New Level of Automation Taxonomy' (2012) *Proc. Human Factors of Systems and Technology* 2012, n 44.

	Support of Info Acquisition	Support of Info Analysis		
A3	Medium-Level Automation Support of Info Acquisition	B3 Med.-Level Automation Support of Info Analysis	C3 Rigid Automated Decision Support	D3 Low-Level Support of Action Sequence Execut.
A4	High-Level Automation Support of Info Acquisition	B4 High-Level Automation Support of Info Analysis	C4 Low-Level Automatic Decision Making	D4 High-Level Support of Action Sequence Execut.
A5	Full Automation Support of Info Acquisition	B5 Full Automation Support of Info Analysis	C5 High-Level Automatic Decision Making	D5 Low-Level Automation of Action Sequence Exec
			C6 Full Automatic Decision Making	D6 Medium-Level Automat. of Action Seq. Execut.
				D7 High-Level Automation of Action Seq. Execut.
				D8 Full Automation of Action Sequence Exec

At level 1, the task is performed with "primitive" technical tools, i.e. low-tech nondigital artefacts. From level 2 upwards, "real" automation is involved, and the role of the machine becomes increasingly significant, up to the level where the task is fully automated. A certain technology may have different levels of automation under the four cognitive functions, expressing varying levels of interaction between humans and technology.

In the following, the IBM Watson system is considered as an example of AI CDSS, and its levels of automation are assessed. Even though this section is mainly focused on Watson, results can be extended to all AI CDSS systems

sharing similar features and levels of automation. A complete technological analysis, especially with regard to the level of automation, should always be grounded in the technical specifications of the AI system in question and in its concept of operations. Watson was chosen as a focus of investigation because ample information is available about its functioning and architecture.⁴⁸ Additionally, Watson is a representative example of AI CDSS as reported in the literature.⁴⁹

As concerns information acquisition (A), Watson supports human experts in acquiring information on the process they are following. The system integrates data from different sources, such as personal health records, medical datasets containing domain-specific literature, and clinical trial reports. It then filters and/or highlights the relevant information items by selecting, for example, the results of clinical trials on cancer diseases rather than leukaemia. The criteria for integrating, filtering, and highlighting the relevant information are predefined at design level and not available to physicians. Thus, with regard to the first cognitive function, Watson reaches level A5 (full automation support of information acquisition).

As concerns the second cognitive function, namely the analysis of information (B), Watson compares and analyses the available data based on parameters defined at design level, reaching level B5 (full automation support of information analysis). In the LOAT classification, this level usually implies that the system triggers visual and/or sound alerts whenever a certain result requires human expert attention. Consider, for instance, an arrhythmia-detection alert generated by an electrocardiograph (ECG). Even though we

⁴⁸ For a general overview on Watson, see for instance Kevin D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press 2017)

⁴⁹ See, for example Alicja Piotrkowicz, Johnson Owen and Geoff Hall, 'Finding Relevant Free-Text Radiology Reports at Scale with IBM Watson Content Analytics: A Feasibility Study in the UK NHS' (2019) 10(1) *Journal of Biomedical Semantics* 21. David Ferrucci, Anthony Levas, Sugato Bagchi, David Gondek, and Erik T Mueller, 'Watson: Beyond Jeopardy!' (2013) *Artificial Intelligence* 199, 93–105; Marjorie Glass Zauderer, Ayca Gucalp, Andrew S. Epstein, Andrew D. Seidman, Aryeh Caroline, Svetlana Granovsky, Julia Fu, Jeffrey Keesing, Scott Lewis, Heather Co, et al, 'Piloting IBM Watson Oncology within Memorial Sloan Kettering's regional network' (2014) 32(15) *Journal of Clinical Oncology* 2014.

can imagine a near future in which Watson will be connected to other kinds of medical devices, such as ECGs, the analysis of information lies in the internal process of the system, and it is not accessible to human experts.

With regard to decision and action selection (C), Watson generates a ranked list of diagnoses (differential diagnosis) with an associated confidence score. It proposes one or more alternative decisions to clinicians, leaving them the possibility and freedom to generate alternative options. The ability to explore alternative hypotheses (diagnoses), along with the confidence score and the associated supporting evidence, is a key feature of the DeepQA technology. Physicians can evaluate these diagnoses along different kinds of evidence extracted from a patient's electronic medical record (EMR) and other related sources of data. These kinds of evidence include symptoms, findings, patient history, family history, current medications, demographics, and so on. Each diagnosis links back to the original evidence that DeepQA uses to produce the associated confidence scores, and it supports the adoption of evidence-based medicine. Physicians can select any of the alternative diagnoses proposed by the system, or they can choose their own diagnosis, whenever, for example, they are aware of contextual circumstances (e.g. a certain medical condition, the patient's values, and others) unknown to or ignored by the system, as well as in cases where they have evidence of errors by the AI system. As a consequence, under the third cognitive function, the system reaches level C2 (automated decision support).

As it concerns action implementation (D), namely the administration of medical treatments, human experts (physicians, caregivers, etc.) execute and control all actions without any kind of AI system intervention. Thus, Watson reaches level Do (manual action and control).

It clearly appears that, even though Watson reaches full automation in information acquisition and analysis, physicians may play a central role with regard to the selection of decisions and actions, as well as to their implementation. This task allocation raises questions with regard to the source of decision-making authority, as analysed in the following section.

V. THE SOURCE OF DECISION-MAKING AUTHORITY AND THE ROLE OF WATSON IN HEALTH CARE

In recent years, there has been an increased interest in examining the role of AI in decision-making and whether it should be used for supporting or augmenting human decision-making or rather for replacing and automating the whole process.⁵⁰ These technologies expand the scale of collected and processed evidence, broadening the questions about whether human experts can still cope with the expertise and capacity of AI systems, and whether there is the need to rethink the role of humans in the decision-making process.

Given the characteristic features of Watson and those of new AI-CDSS sharing similar levels of automation, in particular with regard to information acquisition and analysis, this section investigates whether the source of decision-making authority should be attributed only to human experts (e.g. clinicians and physicians), whether it should be completely shifted to AI systems or, finally, whether a shared decision-making model is possible and even preferable.

Human decision-making authority. In the first hypothesis, human decision-making authority, the AI system would be considered as a simple information-management tool supporting human experts. The standard of care would remain what is reasonable to expect from the average physician in the specific medical field in question.

However, AI technologies such as Watson are purposely designed to interfere with human-decision making:⁵¹ they are used on the assumption that

⁵⁰ See for example Steven M. Miller, 'AI: Augmentation, more so than automation' (2018) 5(1) *Asian Management Insights* 1–20. The author argues the imperative of a new human-machine symbiosis and calls for the rethink of 'how humans and machines need to work symbiotically to augment and enhance each other's capabilities'. See also H. James Wilson and Paul R. Daugherty, 'Collaborative Intelligence: Humans and AI are joining forces.' (2018) 96(4) *Harvard Business Review* 115–123; and Council of Europe, *Study on the Human Rights Dimensions of Automated Data Processing Techniques (in particular algorithms) and Possible Regulatory Implications* (2017) 3.

⁵¹ Andrew D Selbst, 'Negligence and AI's Human Users' (March 11, 2019) *Boston University Law Review* (forthcoming); UCLA School of Law, *Public Law Research*

they can outperform humans, overcoming not only their cognitive limitations⁵² but also time-sensitive ones in accessing, reading, understanding,⁵³ and incorporating evidence.⁵⁴ According to some scholars, this assumption would provide the basis for relinquishing control to AI CDSS, like Watson, as the better approach to reach the gold standard of evidence-based practice.⁵⁵ If there is strong evidence to suggest a particular diagnosis-and-treatment procedure, then that diagnosis and treatment is the most justifiable one.

AI decision-making authority. The second hypothesis, shifting the decision-making authority to AI CDSS, is generally supported by two main arguments: (1) the normative pull of evidence-based practice,⁵⁶ which it would be questionable to ignore; and (2) the greater success rate over human experts. On this hypothesis, medical malpractice law would eventually require a superior ML-generated medical diagnosis as the standard of care in clinical settings.⁵⁷ As a consequence, medical experts, not being in a position to reach the same standard, would be bound by the decisions of AI systems, even in cases where such decisions go beyond their comprehension and control. In the event of failures resulting in patients being harmed or injured, any

Paper No. 20-01, 16. Available at SSRN <<https://ssrn.com/abstract=3350508>> accessed 27 June 2020.

⁵² See for example Cassie Deskus, 'Fifth Amendment Limitations on Criminal Algorithmic Decision-Making' (2018) 21 *New York University Journal of Legislation and Public Policy* 237, 250, stating that human capacity for judgement is inferior to that of mathematical models when it comes to prognostic evaluations.

⁵³ Andrew D. Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085.

⁵⁴ Memorial Sloan-Kettering Cancer Center, 'IBM to Collaborate in Applying Watson Technology to Help Oncologists' press release, available at <press/us/en/pressrelease/37235.wss#resource> accessed 28 March 2019.

⁵⁵ Jason Millar and Ian R Kerr, 'Delegation, Relinquishment, and Responsibility: The Prospect of Expert Robots' (2013) SSRN <<http://dx.doi.org/10.2139/ssrn.2234645>> accessed 20 June 2020.

⁵⁶ Memorial Sloan-Kettering Cancer Center (n 54).

⁵⁷ A Michael Froomkin, Ian R Kerr, and Joëlle Pineau, 'When AIs Outperform Doctors: Confronting the Challenges of a Tort-Induced Over-Reliance on Machine Learning' (2019) 61(1) *Arizona Law Review* 33.

departure from the advice of an AI system may lead to the physician being held professionally liable for medical negligence.⁵⁸

Relinquishing control to AI systems in medicine raises some legal issues with regard to (i) patients' peculiarities and the concept of evidence-based medicine; (ii) the role of explanation in decision-making; and (iii) the role of trust in medical practice.

1. Patients' Peculiarities and the Concept of Evidence-Based Medicine

The first issue has to do with patients' uniqueness and the concept of evidence-based medicine. Even though the latter is regarded as the gold standard, and is considered the best argument in favour of AI decision-making authority, a number of limitations and criticisms emerge when evidence-based medicine is applied to individual patients. These criticisms point to the occurrence of biological variations, the need to consider the individual patient's values, and the limits in describing evidence to patients in order to facilitate shared decision-making.⁵⁹ A broader understanding of evidence-based medicine 'requires a bottom-up approach that integrates the best external evidence with individual clinical expertise and patients' choices.'⁶⁰

Although it is true that the alternative to AI evidence-based diagnosis is not a perfect diagnosis but rather human diagnosis with all their flaws, the care process should be regarded as a complex and multidimensional concept. It can not only be based on the best external evidence supporting a specific diagnosis and treatment,⁶¹ but should also consider the uniqueness of patients, their biological variations, and the diversity of individual values, moral attitudes, goals, and choices.

⁵⁸ Jeffrey M. Senger and Patrik O'Leary, 'Big Data and Human Medical Judgment Regulating Next-Generation Clinical Decision Support' in Glenn Cohen, Holly F. Lynch, Effy Vayena, and Urs Gasser (eds), *Big Data, Health Law, and Bioethics* (Cambridge University Press 2018).

⁵⁹ Sharon E Straus and Finlay A McAlister, 'Evidence-Based Medicine: A Commentary on Common Criticisms' (2000) 163(7) *CMAJ* 837.

⁶⁰ David L Sackett and others, *Evidence Based Medicine: What It Is and What It Isn't* (British Medical Journal Publishing Group 1996).

⁶¹ London (n 27).

In this regard, medical experts cannot be reduced to that of mere executors of AI systems' advice or to that of intermediaries between AI CDSS and patients. In many cases, the best solution consists in integrating human and automated judgements by enabling physicians to review and eventually adapt the suggestions of AI to individual patients' goals and preferences. Moreover, the limitation in accessing and describing evidence is directly related to the second issue, namely the role of explanation in decision-making.

2. The Role of Explanation in Decision-Making

The second issue concerns AI explainability and accountability, and the possibility of obtaining human-intelligible and human-actionable information. As noted in section II, AI CDSS like Watson are essentially black-box systems, in other words opaque systems⁶² that provide diagnosis and treatment recommendations without supporting explanations. They lack the capability to explain the internal process of reasoning behind the decision-making, or the reasons why decisions are made in a certain way and/or why they are recommended. These decisions, in other words, do not come with any supporting justifications. Medical experts make diagnoses by relying on multiple sources of knowledge, such as scientific literature, relevant past cases, and their trained common sense. They also use these sources of knowledge for generating explanations and ground their diagnoses and treatment decisions.

The question is whether and to what extent statistical evidence provided by AI CDSS like Watson – referring to probabilities or statistical relationships between certain symptoms and diagnoses or between specific treatments and recovery – is sufficient to provide an exhaustive explanation. The explainability of AI systems is required as well under Articles 13 and 14 of the European General Data Protection Regulation (GDPR), according to which 'meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing' is to be provided when decision-making is automated. Indeed, AI explainability has recently become central in the scientific debate as one of the core principles in developing AI systems, along with the principles of beneficence, non-

⁶² Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) *Big Data & Society* 3(1) 3.

maleficence, autonomy, and justice.⁶³ Some authors have raised the question whether the explanation should provide an account of (a) *all* the patterns and variables taken into account by the system (a model-centric explanation) or (b) only those that are relevant to the specific patient's case (subject-centric explanation).⁶⁴ Regardless of the ability to outperform human experts, the explanation plays an essential role in the medical decision-making process for both medical experts and patients.

To properly understand the concept of explanation and its role within the health domain, we need to focus on who the explanation is provided for. As noted by Miller,⁶⁵ explanation can also be seen as a communication problem. From this perspective, it is necessary to consider the interaction between two roles, explainer and explainee, recognising that there are certain 'rules' that govern this interaction. Indeed, the concept of explanation may assume different meanings, being subject to specific rules, depending on what perspective is adopted. Furthermore, different aspects may be relevant, depending on whether the explainee is the medical expert or the patient.

From a computer-science perspective the explanation needs to include three elements. First of all, it needs a model explanation, i.e. an interpretable and transparent model, capturing the whole logic of the obscure system. Secondly, it requires a model inspection, i.e. a human-comprehensible representation of the specific properties of an opaque system and its prediction, making it possible to understand how the black box behaves internally depending on the input values, namely its sensitivity to certain attributes (e.g. specific symptoms), up to and including, for instance, the connections in a neural network. Finally, it needs an outcome explanation,

⁶³ Luciano Floridi, Josh Cows, Monica Beltrametti, Raja Chatila, Patrice Chazerand, Virginia Dignum, Christoph Luetge and others, 'AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations' (2018) 28(4) *Minds and Machines* 689-707; Andrew D. Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085.

⁶⁴ Lilian Edwards and Michael Veale, 'Slave to the Algorithm: Why a Right to an Explanation Is Probably Not the Remedy You Are Looking For' (2017) 16 *Duke Law and Technology Review* 18.

⁶⁵ Tim Miller, 'Explanation in Artificial Intelligence: Insights from the Social Sciences.' (2019) 267 *Artificial Intelligence* 1-38.

making it possible to understand the reasons for certain decisions, i.e. the causal chains leading to a certain outcome in a particular instance.⁶⁶

While the first two models, the model explanation and the model inspection, seem to be mostly directed at computer scientists and IT experts, the outcome explanation is also relevant for medical experts, for a variety of reasons.

First, research in social science suggests that providing explanations for recommended actions deeply influences users' confidence in, and acceptance of, AI-based decisions and recommendations.⁶⁷ From this perspective, medical experts would benefit from causal explanation, providing the rationales behind AI decisions and facilitating further investigations. Physicians should be able to assess the coherence of the arguments supporting the suggestions of the system in relation to the medical literature, clinical practice, past cases similar to the one in question, and individual patients. The explanation would also enable physicians to determine the extent to which a particular input was determinative or influential in yielding the output⁶⁸ and to evaluate whether and to what extent they can rely on the AI CDSS recommendations.

For instance, it may prove necessary to determine whether a patient's interests were taken into account in recommending a certain diagnosis and treatment, as well as whether a certain factor (e.g. a certain symptom, the patient's age) was crucial in determining the diagnosis at issue and the

⁶⁶ See Riccardo Guidotti, Anna Monreale, Salvatore Ruggieri, Franco Turini, Fosca Giannotti, and Dino Pedreschi, 'A Survey of Methods for Explaining Black Box Models' 51(5) *ACM Computing Surveys (CSUR)* (2019) 93; Rich Caruana, Yin Lou, Johannes Gehrke, Paul Koch, Marc Sturm, and Noemie Elhadad, 'Intelligible Models for Healthcare: Predicting Pneumonia Risk and Hospital 30-Day Readmission.' (2015) *Proceedings of the 21th ACM SIGKDD International Conference on Knowledge Discovery and Data Mining*, 1721-1730. ACM.

⁶⁷ L Richard Ye and Paul E Johnson, 'The Impact of Explanation Facilities on User Acceptance of Expert Systems Advice' (1995) 19(2) *MIS Quarterly* 157.

⁶⁸ Finale Doshi-Velez and Mason Kortz, 'Accountability of AI under the Law: The Role of Explanation' [2017] Berkman Klein Center Working Group on Explanation and the Law, Berkman Klein Center for Internet & Society working paper <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:34372584>> accessed 27 June 2020.

suggested treatment. From this perspective, the role of medical experts remains central in considering factors which may affect decisions, such as symptoms that AI CDSS are unable to perceive (e.g. a specific body odor or the consistency of tissue to the touch) and the patient's values, attitudes, and preferences. As experts in the medical domain, physicians are the only ones who can integrate such factors with the evidence and suggestions provided by AI CDSS.⁶⁹ All these factors are necessary for eventually identifying possible counterarguments, which, if taken into account, may lead to different decisions. Thus, medical experts should play an oversight and monitoring role. This is even more relevant and necessary if we consider that current AI CDSS do not support a meaningful explanation function.

On the other hand, explanation is essential for patients as well, making it possible to ensure a patient-centered care process, informed decision-making with regard to care and treatment, and ultimately the acceptability of medical advice. Thus, if not only physicians but also patients are considered as addressees of the explanation, its dialectical dimension becomes crucial, in particular to make the explanation accessible and comprehensible to non-domain experts and to laypersons.

From this perspective, social scientists have focused on the communicative aspect of explanation, arguing for the following approaches⁷⁰: (i) contrastive explanation; (ii) selective explanation; (iii) causal explanation; and (iv) social explanation. While contrastive explanation is used to specify what input values determined the adoption of a certain decision (e.g. treating the condition with certain drugs) rather than possible alternatives (e.g. recommending a different drug or a surgical procedure), selective explanation is based on those factors that are most relevant according to human judgments. The latter is the case since causal chains are often too large to

⁶⁹ For an overview, see Eliza Strickland, 'IBM Watson, Heal Thyself: How IBM Overpromised and Underdelivered on AI Helath Care' (2019) 56(4) IEEE Spectrum 24–31. See also Sandra Wachter, Brent Mittelstadt, and Chris Russell, 'Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR.' (2017) 31 Harvard Journal of Law and Technology 841.

⁷⁰ Tim Miller, 'Explanation in Artificial Intelligence: Insights from the Social Sciences' (2019) Artificial Intelligence 267, 1–38.

comprehend,⁷¹ especially for those who lack the specific domain competence, such as patients. Causal explanation focuses on causes, rather than on merely statistical correlations. If we consider patients as addressees, the most likely explanation is not always the best explanation. Referring to probabilities and statistical generalizations, provided by AI CDSS, is not as effective as referring to causes; for example, a certain diagnosis or medical treatment can be explained by the patient's clinical condition, rather than by the kind of symptoms that are common to patients affected by a certain disease. Finally, the explanation has a social nature. It is useful to adopt an interactive and conversational approach in which information is tailored to the recipient's beliefs and way of understanding. For instance, physicians may need to keep track of the state of the explanation by noting what has been already communicated to the patient and inferring what the patient has inferred him/herself.

In this dialectical sense, the role of medical experts would remain essential not only in making explanations accessible and meaningful to patients, but also in tailoring such explanations to individual patients, possibly considering their emotional state and reactions as well. Even if we imagine a future where AI systems will be able to provide human-understandable evidence and explanations, physicians would not be reduced to acting as mere intermediaries, for two reasons. First, only medical experts have the specific domain knowledge needed to interpret the pull of evidence and explanation — assuming AI explainability — and to evaluate its reliability and correctness. Secondly, in the ability to explain lies the keystone of the interaction and relationship of trust between doctors and patients across the entire care process as they cooperate in devising a treatment.

3. The Role of Trust in Medical Practice

As a consequence, the third issue pertains to trust. Trust is traditionally considered a cornerstone of interpersonal relationships,⁷² and in health care it is regarded as the effective foundation of the patient-doctor relationship.

⁷¹ Kake M. Hofman, Amit Sharma, and Duncan J. Watts, 'Prediction and Explanation in Social Systems' (2017) 355(6324) *Science* 486–488.

⁷² Roger C Mayer, James H Davis, and F David Schoorman, 'An Integrative Model of Organizational Trust' (1995) 20(3) *Academy of Management Review* 709.

The need for interpersonal trust is owed to the patient's vulnerability, to the information asymmetry deriving from the specialistic nature of medical knowledge,⁷³ and to the uncertainty regarding the skills and intentions of the physician, on whom the patient is dependent. Where trust is concerned, arguing in favour of the decision-making authority of AI CDSS would necessarily undermine the patient-doctor relationship, which would be replaced with a patient-AI system relationship. This would ultimately lead to a concurrent transfer of the trustee role from medical experts to AI CDSS.

The patient-doctor trust relationship can, for different reasons, be argued to be still essential in the care process. First, medical competence encompasses more than knowledge, judgment, and skill in technical functions. It also includes the ability to help patients feel at ease, conversing with them sensitively and effectively to elicit relevant symptoms and patient's concerns, and providing responsive and meaningful feedback.⁷⁴ Removing such interpersonal human skills from the trust relationship may undermine the patient's trust in the competence of AI CDSS, even leading to a mistrust and unwillingness to follow the advice of AI.

This information asymmetry is owed to the specialistic nature of medical knowledge. Even though this asymmetry also shapes the relationship between the medical expert and the AI CDSS, the imbalance would be even greater when it comes to patients, since they cannot be expected to have any domain-specific knowledge and would thus typically never be able to understand and interpret data and assess evidence and explanations. A meaningful understanding of the data, as well as the ability to access evidence and explanations, is essential to making informed decisions about whether to opt in or to opt out of AI recommendations.

The shared decision-making model. Given the criticisms just mentioned, neither the human decision-making authority model nor the AI decision-making authority model is supported here. Both models fail to fully explain the allocation of tasks and roles in the interaction between medical experts

⁷³ Monika Hengstler, Ellen Enkel, and Selina Duelli, 'Applied Artificial Intelligence and Trust—the Case of Autonomous Vehicles and Medical Assistance Devices' (2016) 105 *Technological Forecasting and Social Change* 105.

⁷⁴ David Mechanic, 'The Functions and Limitations of Trust in the Provision of Medical Care' (1998) 23(4) *Journal of Health Politics, Policy and Law* 661.

and AI CDSS in the healthcare STS. Thus, a shared decision-making authority model is here advocated. This model rests on the concept of a joint cognitive system. It has been observed that when humans and AI systems interact in working toward a goal, it would be better to describe humans and technology not as two interacting 'components' but as making up a joint cognitive system, where control is shared between the human cognitive system and the AI system.⁷⁵ Thus, tasks traditionally associated with the role of physician will be attributed to the joint cognitive system, so that they are distributed between the human expert and the AI CDSS. From this perspective, the standard of care would result from a combination of the standard of care for medical practice and the standard resulting from ML-generated medical diagnosis. The first dimension should be taken into account with regard to the tasks assigned to the human expert, while the second one to those assigned to the AI CDSS.

As a result, the human should maintain the ability to oversee the AI CDSS overall activity (including its legal and ethical impact in the care process) and the ability to decide whether and how to use the system and rely on its recommendations. In case of failure resulting in injuries for patients, liability should be assessed taking into account the task allocation as discussed in section IV. The shared model allows physicians to ground their decisions not only in the pool of literature and clinical evidence, but also in the individual patient's biological variation, values, and preferences, as well as in factors the AI CDSS is unable to properly perceive, including their emotional state and beliefs. The reliability of a decision will be based on both statistical evidence and the physician's ability to interpret such evidence — at least when it comes to detecting whether or not there is good evidence contradicting the AI suggestion or evidence of errors by the AI CDSS — and to provide meaningful explanations to patients.

This model leads to a three-dimensional trust relationship involving the AI CDSS, the human expert, and the patient. In the context of AI, control over the system is constitutive of trust.⁷⁶ As noted, given the specialistic nature of

⁷⁵ Erik Hollnagel and David D Woods, *Joint Cognitive Systems: Foundations of Cognitive Systems Engineering* (CRC Press 2005).

⁷⁶ Cristiano Castelfranchi and Rino Falcone, 'Trust and Control: A Dialectic Link' (2000) 14(8) *Applied Artificial Intelligence* 799.

medical knowledge, such control can be exercised only by medical experts, at least partly, while avoiding the risk of exacerbating the information asymmetry between AI and patients. The patient-doctor trust relationship would remain unchanged, relying on the full and deep concept of medical competence.

In conclusion, AI CDSS cannot replace the human expert as the source of decision-making authority. This remains essential when interpreting evidence, detecting AI CDSS errors, and providing explanations to patients. Furthermore, the human expert is needed in order to take account of the patient's legal and ethical values and principles, preferences and morality, and other information not available or accessible to such systems.

VI. VARIATIONS ON A THEME: POSSIBLE FAILURES AND LIABILITY SCENARIOS

In the previous sections, the levels of automation of Watson and its influence and role in the decision-making process have been analysed. The findings provide the basis for assessing the connection between delegation and responsibilities. In particular, this section provides variations on some possible failures in the decision-making process and the related liability assessment in the event of injuries suffered by a patient as a consequence of misdiagnosis and/or improper treatment.

As previously noted, Watson is used to analyse symptoms, make a diagnosis, and find the most appropriate treatment for specific diseases. In particular, it acquires the relevant information, integrating data from different sources, and analyses the available data. The system generates a number of hypotheses, before going through a process of evidence-testing.

Watson collects and classifies all potentially emerging diagnoses and the respective therapeutic plans, assigning specific confidence scores to them and ranking answers according to the probability of them being correct. In this way, the system supports the adoption of evidence-based medicine, taking the best available evidence obtained from the scientific method and

applying that evidence to medical decision-making through an abductive reasoning process in the form of inference to the best explanation.⁷⁷

As an example, it will be helpful to consider a case where a patient dies as a consequence of misdiagnosis or improper medical treatment. In order to assess the allocation of liability, we have designed four main scenarios. Each scenario is related to a failure in the execution of a specific cognitive function in the decision-making process.

1. Failures in the Acquisition-of-Information Phase

In a first scenario, the patient's death is causally related to a failure in the acquisition-of-information phase. In this scenario, two different hypotheses can be considered:

Hypothesis 1: missing, incorrect, and/or incomplete source information.

Here, some information—such as a personal health record, the literature dataset, or the clinical trial reports—is missing, incorrect, or incomplete. We are dealing with an error not in the acquisition phase but rather in the source information. Watson may not be able to detect such an error, which might be owed to different causes, such as a human error (by physicians, nurses, knowledge engineers and so on) in collecting and recording the information, or a technical failure in the medical examination process (for example an ECG malfunction). Under this hypothesis, it seems that liability cannot be attributed to the medical staff that is using Watson or to the actors involved in the system development and certification process.

Hypothesis 2: failure in retrieving and selecting the relevant information.

In this scenario, the failure is caused by an error in retrieving and selecting relevant information in making a diagnosis and recommending a medical treatment. According to the classification laid out in section IV, Watson reaches level A₅ (full automation support of information acquisition). As noted, the criteria for integrating, filtering, and highlighting the relevant information are defined in advance at design level and are not available to physicians. As a consequence, liability may be attributed to the actors

⁷⁷ Charles Sanders Peirce, 'Abduction and Induction' in Justus Buchler (ed), *Philosophical Writings of Peirce* (Dover 1955) 150.

involved in defining such criteria and in the design process. Actors involved in the certification process, such as the notified body and members of the expert panel, may be found liable only if they were involved in evaluating and assessing the system design. Under this hypothesis, liability should not be attributed to users, i.e. the medical staff using Watson, since they usually do not intervene in retrieving, integrating, filtering, and highlighting the relevant information.

It may be asked whether the system user interface should be designed so as to alert the human expert if some critical information is unavailable or unreadable. Consider, for instance, the case in which Watson, failing to detect that a certain patient is pregnant, recommends drugs that cannot be administered to pregnant women, in that they may cause serious problems in the foetus. In these cases, additional liabilities may be attributed to the manufacturer for the defective design of the interface (not providing the alert) and to the medical staff for ignoring the missing-information alert.

It should be noted that since the criteria for the acquisition of information are defined at design level, if the system is certified under the full quality-assurance procedure, the legitimate expectation principle should shield the human expert from liability in choosing to trust the system and its ability to carry out the delegated task. The only exception lies in cases where the human expert is aware or should have been aware that some relevant information was missing, or when there is evidence that they were negligent in ignoring the missing-information alert.

2. Failure in the Information-Analysis Phase

Also worth considering are cases of failure in the information-analysis phase, involving the generation of a diagnosis, the evaluation of positive and negative evidence supporting or rejecting each diagnosis and possible treatments, and the assignment of the related confidence scores. According to the classification laid out in section IV, Watson reaches level B₅ (full automation support of information analysis). As noted, the parameters for comparing and analysing the available data are defined in advance at design level (and may not be visible to physicians, and in any case may not be

meaningful for humans).⁷⁸ Under this hypothesis, liability may be attributed to the manufacturer, where a design defect or a manufacturing defect occurs as a consequence of selecting and implementing certain parameters in the design process, as well as to the notified body and members of the expert panel, if they were involved in evaluating and assessing the system design and functioning.⁷⁹

⁷⁸ Riccardo Guidotti, Anna Monreale, Salvatore Ruggieri, Franco Turini, Fosca Giannotti, and Dino Pedreschi, 'A Survey of Methods for Explaining Black Box Models' (2019) 51(5) *ACM Computing Surveys (CSU)* 93.

⁷⁹ Following the PIP Breast Implant Case (C-219/15) scandal, in which the CJEU states that the Medical Device Directive does not create a right to patients to obtain damages from notified body, a number of additional measures have been taken by the European Commission, including the new Medical Device Regulation 2017/745 (MDR), in force from 2020. The latter has indeed tightened the regulatory framework in which notified bodies operate. First of all, the public law supervision of the activities of notified bodies has been intensified, so that the Member States retain the ultimate control on the market. Article 6 of Annex XI provides for the possibility that the Member State in which the notified body is based assumes liability for the actions of notified bodies. With regard to the State liability, see for example Carola Glinski and Peter Rott, 'The Role and Liability of Certification Organisations in Transnational Value Chains.' (2018) 23 *Deakin Law Review* 83. This suggestion at the same time indicates that a privately organised scheme may fail in serving the public interest. See also Rob Van Gestel, and Hans-W. Micklitz, 'European Integration through Standardization: How Judicial Review Is Breaking Down the Club House of Private Standardization Bodies.' (2013) 50 *Common Market Law Review* 145. While a tighter Member States' control improves public supervision, in no way suggests that notified bodies themselves are not responsible. In this regard it is important to highlight that, the new MDR includes a number of important changes with regard to the obligations of notified bodies. Interestingly, all the obligations claimed in Schmitt (C-219/15) under the previous Medical Device Directive, e.g. to carry out unannounced inspections at least once in every five year (Article 3.4 of Annex IX, taking samples of the certified products to assess whether they comply with the design dossier (Article 3.4 of Annex IX), have now been expressively incorporated in the Regulation. Moreover, notified bodies have to verify that the amount of raw materials used by the manufacturer is consistent with the number of products which have been manufactured (Article 3.5 of Annex IX). Beyond the conformity assessment procedure, notified bodies will have to satisfy new requirements as regards inter alia their organisational structure, independence and impartiality, qualifications of personnel and contracted experts (Articles 1.1, 1.2, 3.2 and 3.4 of Annex VII). For a general overview, see Peter Rott, 'Certification

Also worth considering is the case in which the system may trigger visual and/or sound alerts, requiring attention by medical staff, as in the previously introduced ECG example. If the failure is causally linked to such a functionality (because it is defective or missing), liability will be attributed to the manufacturer, possibly for product defect. Conversely, members of the medical staff may be found liable if the failure is attributable to their behaviour, consisting, for instance, in negligently ignoring an alert.

As in the previous scenario, the parameters for analysing information are defined at design level. Thus, if the system is certified under the full quality-assurance procedure, the legitimate expectation principle should shield the human expert from liability in choosing to trust the system and its ability to carry out the delegated task. The only exception would be the case where the human expert negligently ignored an alert. Additionally, since AI CDSS like Watson are capable of analysing and processing massive amounts of information⁸⁰ in a way that would be impossible for any human expert, and their output is not fully predictable, it is not reasonable to assign to such experts the legal duty to be in control of the internal processing activity of the system.

3. Failure in the Decision-and-Action-Selection Phase

On the basis of the results that have emerged from information analysis, Watson generates a ranked list of diagnoses with associated confidence scores, proposing alternative diagnoses and the associated treatments. It thus leaves clinicians the possibility and freedom to select the best hypothesis and/or to generate alternative options. According to the classification set out in section IV, Watson reaches level C2 (automated decision support). In this scenario, different hypotheses may be considered.

of Medical Devices: Lessons from the PIP Scandal' in *Certification–Trust, Accountability, Liability* (Springer 2019), 189–211; and Paul Verbruggen and Barend Van Leeuwen, 'The liability of notified bodies under the EU's new approach: The implications of the PIP breast implants case.' (2018) 43(3) *European Law Review* 394–409.

⁸⁰ Jason Millar and Ian R. Kerr, 'Delegation, Relinquishment, and Responsibility: The Prospect of Expert Robots' in Ryan Calo, A. Michael Froomkin and Ian Kerr (eds), *Robot Law* (Edward Elgar Publishing 2016) 105.

Hypothesis 1: Watson generates a correct diagnosis, along with an associated treatment. In the following, four different sub-hypotheses are considered:

- a) The diagnosis and the associated treatment generated by Watson are both correct, and the human expert follows its suggestion. This case is relatively unproblematic, since no conflict emerges between the human expert and the AI system, and no failures can be detected at the decision-and-action-selection stage.
- b) The diagnosis and the associated treatment are both correct, but the human expert does not follow the system suggestion; they may, for instance, generate a new diagnosis or a different treatment. Under this sub-hypothesis, a failure may emerge from the divergent human expert's decision. From a liability perspective, some authors have noted that the outcome depends on which expert judgment will be considered as the source of the decision-making authority.⁸¹ In particular, if Watson is considered as such a source, then liability can be attributed to human experts (e.g. the liability of physicians) under a specific duty to follow the advice of the system. Any divergent decision should be considered a violation of such a duty. However, as noted in section V, given the trust relationship⁸² between patients and doctors, it is debatable whether Watson should be considered a decision-making authority. Conversely, both on human-expert and shared decision-making authority models, their liability should be connected to cases of medical negligence and/or malpractice. In this case, the full quality-assurance certification process may work as a guarantee of the system trustworthiness,⁸³ and may be considered the effective cornerstone for the applicability of the legitimate expectation principle.
- c) The diagnosis is correct, but the associated treatment is wrong, and the human expert follows the suggestion of the system. One might

⁸¹ Jason Millar and Ian R. Kerr (n 80); A.D. Selbst, 'Negligence and AI's Human Users' (Boston University Law Review [Forthcoming]) 16.

⁸² D. H. Thom and B. Campbell, 'Patient-Physician Trust: An exploratory study' (1997) 44(2) *The Journal of Family Practice* 169.

⁸³ European Commission, White Paper On Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final (2020) 23.

want to consider here the case where the wrong treatment derives from an internal failure of the system in generating the medical treatment. In this case, the manufacturer may be found liable for the defective technology, and so may the notified body and the members of the expert panel, if during the full quality-assurance procedure some anomalies emerged in the clinical testing phase. Conversely, it is doubtful that the physicians' liability can be based solely on following the suggestion of the system, with the exception of cases where they had good evidence contradicting the advice of the system or had evidence-based reasons for not trusting such advice, e.g. on the basis of wrong results in similar previous cases. Thus, on the shared decision-making-authority model, the liability shield can be grounded in the application of the legitimate expectation principle whenever the system has been certified under the full quality-assurance procedure and the former relies on a correct performance of the delegated task. The wrong treatment may also result from the negligent behaviour of the human medical experts who neglect specific contextual circumstances such as a medical condition of the patient unknown to or ignored by Watson, as in the example of drugs administered to pregnant women.

- d) The diagnosis is correct, but the associated treatment is wrong, and the human expert does not follow the suggestion of the system. This case is relatively unproblematic with regard to a possible conflict between the human expert and the AI system. In the event of undesirable outcomes, the liability of human experts may derive only from their negligent behaviour and/or medical malpractice.

Hypothesis 2: Watson generates a wrong diagnosis and an associated treatment. In the following, two relevant sub-hypotheses are considered:

- a) Both the diagnosis and the associated treatment generated by Watson are wrong, and the human expert follows the suggestion of the system. In this case, the manufacturer may be found liable for the defective technology, and so may the notified body and the members of the expert panel, if they were involved in the assurance procedure and some anomalies emerged in the clinical testing phase. It is debatable whether the liability of human experts may be based solely on their

having followed the advice of the system, with the exception of cases where they had good evidence contradicting the suggestion of the system or evidence-based reasons for not trusting such advice, e.g. on the basis of wrong results in similar previous cases. As noted, under the full quality-assurance procedure, the liability shield should be grounded not in the human expert's delegation of such authority to the AI system but rather in the application of the legitimate expectation principle.

- b) Both the diagnosis and the associated treatment are wrong, but the human expert does not follow the suggestion of the system. Even though a conflict between the human expert and the AI system emerged, this case remains unproblematic, since undesirable outcomes may only result from the negligent behaviour of clinicians and/or their medical malpractice.

4. Failure in the Action-Implementation Phase

In this scenario, a possible failure may only result from the human expert's behaviour, as in cases where caregivers overdose the drugs to be administered. As noted in section IV, under LOAT, Watson reaches level Do (manual action and control), since the human expert executes and controls all actions without any kind of AI system intervention. Therefore, liability may only be attributed to human experts, for example clinicians and caregivers, as a result of negligent behaviour and/or medical malpractice.

VII. CONCLUSION

In this contribution, the liability issues emerging from the adoption of AI CDSS in healthcare was explored from a socio-technical perspective by analysing the technological features of new-generation AI CDSS compared to traditional ones; the regulatory framework in place, especially with regard to the legal qualification of AI CDSS and the certification procedures; and the allocation of decision-making tasks between medical experts and AI systems. The adopted systemic approach shed light on the functioning of the healthcare system, making it possible to assign liability by analyzing the human-machine interaction.

With regard to the technological component of the healthcare STS, the specific features of new AI CDSS are going to improve the quality of health care and patients' safety, given their ability to outperform medical experts in certain activities, such as clinical diagnosis and treatment recommendations. However, we showed how such features coupled with and the highest level of automation in performing different cognitive tasks can have a stronger impact on both the decision-making process and the inherent risk posed by AI medical devices.

From the social-component perspective, the regulatory framework in place, and in particular the criteria for assessing the risk class of medical devices and the related conformity-assessment procedures, does not consider the level of automation of a medical device as a risk factor. However, automation may affect medical practice, influencing or even directing clinicians' decisions. Thus, rather than focusing on the intended use of medical devices, the classification criterion should take account of the level of automation. Indeed, the latter may affect how the decision-making process is split between human experts (e.g. physicians) and AI systems, also becoming a criterion by which to assess possible liabilities in case of failure.

With regard to the interaction between medical experts and AI CDSS, some scholars considered their ability to outperform humans in diagnosis and recommendations as one of the main reasons to doubt that humans can still be considered as the source of decision-making authority. In fact, AI systems have demonstrated an ability to successfully act in a domain traditionally entrusted to the trained intuition and analysis of humans.

However, relinquishing control to AI systems presents some challenges. Although it is true that the alternative to AI diagnosis is not a perfect diagnosis, but rather human diagnoses with all their flaws, the care process should be regarded as a complex and multidimensional concept. It cannot only be based on the best external evidence supporting a specific diagnosis and treatment, but should also consider the uniqueness of patients, their biological variations and the diversity of individual values, moral attitudes, goals and choices. Medical experts cannot be reduced to mere executors of AI systems' advice or to intermediaries between AI CDSS and patients. In many cases, the best solution consists in integrating human and automated judgments by enabling physicians to review AI suggestions and patients to

request a meaningful explanation of the diagnosis and the recommended treatment, taking account of its communicative and dialectical dimension. If the trustworthiness and explainability of AI are to be promoted, there will need to be an emphasis on transparency, while developing methods and technologies that enable human experts to analyse and review automated decision-making.

The future challenge will consist in finding the best combination between human intelligence and AI intelligence, taking into account the capacities and the limitations of both. On these grounds, an argument was made here in favour of a shared decision-making authority model, which relies on a broader understanding of evidence-based medicine and the care process. On this model, the reliability of a decision will depend not only on the statistical evidence generated by the AI system but also on physicians' ability to interpret such evidence. From this perspective, the standard of care would be determined by combining the standard of care for human-expert medical practice and the standard resulting from ML-generated evidence-based diagnosis. This model also leads to a three-dimensional trust relationship involving the AI system, the human expert, and the patient. Finally, a shared model is consistent with the concept of a joint cognitive system and the allocation of tasks between humans and AI, where control is accomplished by coupling the human cognitive system with an AI system that exhibits goal-directed behaviour.

All these elements were taken into account in analysing liability under the existing regulatory framework, given the technological features of AI CDSS, their level of automation, and their interaction with medical experts. The ways in which activities and the related liabilities are attributed and distributed between humans and AI systems should also be taken into account in a proactive way, during the design phase of a new operational concept/system, to address possible legal issues arising from future potential accidents or malfunctions. The adoption of a socio-technical perspective also makes it possible to assess and improve the existing regulatory framework by analysing legal risks that AI technology introduces in complex STS.

In conclusion, if valuable practices surrounding the use of AI in the healthcare domain are to be promoted, it needs to be ensured that the development and deployment of AI tools takes place in a socio-technical

framework — inclusive of technologies, human skills, organisational structures, and norms — where individual interests and the social good are both preserved and enhanced.

HUMAN RIGHTS BODIES' ADJUDICATION OF TRANS PEOPLE'S RIGHTS: SHIFTING THE NARRATIVE FROM THE RIGHT TO PRIVATE LIFE TO CRUEL AND INHUMAN OR DEGRADING TREATMENT

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Trans people suffer severe violations of their human rights. Human rights bodies and institutions have only addressed these issues to a very limited extent under the right to private life, severely underestimating the harm imposed on trans people. This paper critically analyses the harm caused by the prohibition to obtain Legal Gender Recognition and the requirement to undergo coercive medical treatments to have their identities legally recognized. Through an analysis of regional and international human rights bodies' jurisprudence, the paper re-frames the treatments, and argues that both the pathologisation of trans individuals and the prohibition to obtain Legal Gender Recognition constitute cruel and inhuman or degrading treatment.

Keywords: Trans Rights, Transgender, Legal Gender Recognition, Pathologisation, Pathologization, CIDT

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I. INTRODUCTION

Trans people's rights are routinely violated throughout the world by both state and non-state actors. The life expectancy of a trans woman in Latin America is less than 35 years.¹ As a result of discrimination, one in four trans people in Europe have attempted suicide at least once in their lifetime.² In the Asia Pacific region, the vast majority of trans people lack access to basic healthcare.³

Throughout the past centuries, trans people's gender identities and expressions have been criminalised under laws that prohibit both homosexuality and cross-dressing.⁴ Even today, 69 countries continue to criminalise same-sex sex, and 15 explicitly criminalise cross-dressing.⁵ Only a small number of countries in the world do not require trans people to undergo any surgery, psychiatric diagnosis or hormonal therapy to access Legal Gender Recognition (LGR).⁶ The rest either prohibit trans people from

¹ Inter-American Commission of Human Rights, *Violence against LGBTI persons in the Americas* (OAS/Ser.L/V/II.rev.I 2015) 15.

² Adam Smiley et al, *Over Diagnosed but Underserved. Trans Healthcare in Georgia, Poland, Serbia, Spain and Sweden: Trans Health Survey* (Transgender Europe 2018) 21.

³ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific* (2015) 2.

⁴ Jonathon Egerton-Peters et al, *Injustice Exposed: The Criminalisation of Transgender People and Its Impact* (The Human Dignity Trust 2019) 13.

⁵ Ibid.

⁶ Grietje Baars, 'Queer Cases Unmake Gendered Law, or, Fucking Law's Gendering Function' (2019) 45 *Australian Feminist Law Journal* 22.

accessing LGR, or impose coercive medical treatments as a requirement to access legal recognition. Within this context, human rights bodies have severely underestimated the harm suffered by trans people when they are prohibited from accessing LGR, and when requiring trans people to undergo medical procedures in order to access LGR.⁷

This paper argues that when a state prohibits trans people from obtaining LGR or imposes coercive medical treatments, they violate trans people's right to be free from Cruel, Inhuman or Degrading Treatment (CIDT). The paper is divided in four sections.

First, the paper will analyse how and why human rights bodies have failed to challenge a system pathologising trans identities. This analysis will be conducted both through a review of the case-law concerning trans people's rights, and an analysis of the gendered structures of human rights law. The analysis will focus on both regional and international human rights systems. However, as the African system remains silent on transgender issues, it is not incorporated in the main analysis.⁸

Section III will analyse the requirements for a treatment to be considered as a Cruel, Inhuman or Degrading Treatment, and argue that trans-specific forms of suffering are severely underestimated. Through an analysis of case law and literature, this section will focus mainly on the evaluation of the subjective elements necessary for an assessment of whether a treatment constitutes CIDT.

The next part of the paper will analyse and re-frame human rights violations deriving from the denial of access to LGR and the imposition of medical treatments to have one's gender legally recognised. Section IV will argue that the prohibition to obtain LGR leads to human rights violations amounting to CIDT, both directly and indirectly. Section V will argue that coercive medical requirements, imposed as part of the pathologising medico-legal model, constitute CIDT. The paper specifically analyses the issues of coercive sterilisation, hormonal replacement therapy and psychiatric diagnoses. It argues that the adjudication of trans rights under the right to

⁷ See *Christine Goodwin v the UK*, Application no. 28957/95 (ECtHR July 11, 2002).

⁸ Zhan Chiam et al, *Trans Legal Mapping Report: Recognition Before the Law* (ILGA 2016) 17.

private life for the past thirty years has allowed the pathologising model to thrive and has enabled states to continue to violate trans people's fundamental rights.

II. HUMAN RIGHTS BODIES' CURRENT APPROACH TO TRANS RIGHTS

Even though trans rights violations are well documented by both non-governmental organisations (NGOs) and United Nations (UN) organs,⁹ the harm suffered by trans people continues to be severely underestimated by human rights bodies and institutions. In order to analyse the rights of trans people within the context of LGR, it is fundamental to first acknowledge the gendered structures present in the international legal system.

Feminist legal scholars argue that men's long-term domination of international institutions has led to the perception that men's issues are human rights issues, thus portraying women's issues as marginal.¹⁰ Celina Romany explains this paradigm, arguing that states are 'jurisprudentially male'. This is due to the fact that women are highly under-represented in such institutions, inducing the institutions to often take a male standpoint, continuing to perpetrate gender relations of subordination.¹¹ As a result, the state and its legal system cannot be considered genderless. Since international organisations are largely composed by states, these dynamics are not structurally challenged but instead transposed to the international level. Thus, international organisations perpetrate those gender relations of subordination perpetrated by states.

⁹ See Usha Jugroop, *Laws and Policies Affecting Transgender Persons in Southern Africa* (Southern Africa Litigation Centre 2016); Inter-American Commission of Human Rights (n 1); Smiley et al (n 2); European Union Fundamental Rights Agency, *Being Trans in the European Union: Comparative Analysis of EU Survey Data* (2014).

¹⁰ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 625.

¹¹ Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 93.

Feminist legal scholars have challenged the assumption in International Human Rights Law (IHRL) that women are passive objects of the law rather than active subjects, and that the legal 'standard' is male.¹² However, although the human rights law framework made it possible for them to start challenging the assumed hierarchy of gender, most scholars and advocates left the assumption of dualistic binary genders unquestioned and fundamentally unchallenged.¹³ As a result, trans people's needs and issues remain marginal to the human rights discourse. Dianne Otto argues that this also stems from certain feminists having opposed a disengagement of sex/gender from its biological moorings.¹⁴

As a consequence of this process and of widespread homo-transphobia, human rights bodies largely ignored LGBTI rights until the 1990s. The result was that the discourse surrounding the social construction of gender in human rights remained constricted to a binary gender model. Human rights institutions have not embraced the fact that gender is socially and culturally constructed. They have therefore failed to acknowledge the existence and rights of trans, gender non-conforming and intersex individuals.¹⁵

While women's oppression is maintained through a patriarchal model that shapes domestic and international institutions, trans people's oppression is maintained through a cis-normative¹⁶ binary gender model. This model rigidly classifies both sex and gender in two distinctive and separate categories, which in turn legitimises the institutional discrimination of trans, gender non-conforming and intersex individuals.¹⁷ The oppression of trans

¹² Dianne Otto, 'International Human Rights Law: Rethinking the Sex/Gender Dualism' in Margaret Davies, Vanessa E Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

¹³ Dianne Otto, 'Queering gender [identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 302.

¹⁴ Otto (n 12) 205.

¹⁵ Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity?' (2015) 15 *Human Rights Law Review* 8.

¹⁶ Cisgender is the opposite of transgender and is a term used to define all people whose gender identity correspond to the sex they have been assigned at birth.

¹⁷ Silvan Angius and Christa Tobler, *Trans and Intersex People Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (European Commission Directorate-General for Justice 2011) 13.

people is thus perpetrated through both formal policies of criminalisation and pathologisation, and informal toleration of discrimination and exclusion.

This long-term criminalisation and pathologisation have led to a systematic underestimation of harm perpetrated by states on trans people. The dehumanising effects of both the criminalisation and the pathologisation of trans identities not only normalise discrimination, but also have severe consequences for trans people's enjoyment of human rights.

Pathologisation consists in the formal identification of a group of people as inherently disordered. Rebecca Cook argues that in order to identify a human rights violation, the harm being inflicted has to be recognised and named as such.¹⁸ However, international institutions have sanctioned the pathologisation of trans people through instruments such as the International Classification of Diseases (ICD),¹⁹ and by failing to challenge the medico-legal pathologisation imposed by individual states. By sanctioning the pathologisation of trans people, international institutions have hindered the process of identification of harm caused by prohibitive requirements for LGR, such as coerced sterilisation and other medical treatments.

As a result of the deeply gendered structure of international law, the UN human rights mechanisms did not acknowledge in any significant way human rights violations on the basis of gender identity until the late 1990s.²⁰ The ECtHR started to adjudicate transgender cases concerning the right to obtain LGR in the early 2000s.²¹ However, it has not yet challenged the

¹⁸ Rebecca J Cook and Simone Cusack, *Gender Stereotyping* (University of Pennsylvania Press 2010) 38.

¹⁹ The World Health Organisation has pathologized trans identities through the International Classification of Diseases until late 2018, when the 11th version of the classification has been adopted. The 10th edition classifies "transsexualism" as a mental and behavioural disorder under the code F64.0.

²⁰ Melanie Bejzyk, 'Criminalisation on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to Include Freedom from Torture and Inhuman and Degrading Treatment' (2017) 29 *Canadian Journal of Women and the Law* 382.

²¹ ECHR, 'Gender Identity factsheet' (Council of Europe, 2019) available at <https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf> accessed on 30 August 2019.

systematic pathologisation of trans identities that continues to be enforced throughout Europe.

The Inter-American Court of Human Rights (IACtHR) published its first judgement on LGBTI rights in 2012.²² However, it has not yet adjudicated a case on trans rights, despite the fact that most states under its jurisdiction have either deeply discriminatory policies towards trans people, or fail to protect them from endemic violence.²³ In 2017, however, it published an Advisory Opinion on Costa Rica with highly progressive views on trans issues.²⁴ Notably, in the Advisory Opinion, the Court adopts a progressive model and calls for a depathologisation of trans identities. The IACtHR here argues that the imposition of medical requirements to obtain LGR would violate trans people's right to personal integrity to the extent of violating the right to be free from CIDT.²⁵

In the past thirty years, trans rights have mostly been litigated and advocated through the right to private life at the international level. The arguments under the right to private life were developed in the first successful trans rights cases argued before the ECtHR. In these cases, the court recognised trans people's right to LGR after acknowledging gender identity as an important aspect of one's personal identity, protected under the right to private life, along with one's sexual orientation, name and sexual life.²⁶

This paper argues that the right to private life does not adequately deal with transgender rights for a number of reasons. Under the right to private life, human rights bodies have left the structure of the pathologising model fundamentally unchallenged. Under pathologising systems, trans people who wish to undertake gender affirming medical procedures or obtain LGR are required to undergo coercive medical treatments. In most states adopting such models, trans people are required to obtain a diagnosis of gender identity disorder, regardless of the state of their mental health. Often, they

²² *Case of Atala Riffo and Daughters v. Chile*, Case 12,502 (IACtHR 2012).

²³ Inter-American Commission of Human Rights (n 1).

²⁴ Advisory Opinion OC-24/17 (IACtHR 2017).

²⁵ *Ibid* para 146.

²⁶ Pieter Cannoot, 'The Pathologisation of Trans Persons in the ECtHR's Case Law on Legal Gender Recognition' (2019) 37 *Netherlands Quarterly of Human Rights* 19.

are further required to undergo sterilisation and hormonal replacement therapy to access LGR.²⁷

The right to private life is a qualified right. This means that interferences with aspects of one's life protected under this right can be justified if they are non-arbitrary and provided by law.²⁸ Various human rights bodies have different tests to determine which interferences are deemed lawful and justified. However, under such provisions, the imposition of coercive medical treatments as requirements to obtain legal gender recognition has never been considered arbitrary. In most cases, the states' argument that the imposition of coercive medical treatments on trans people were necessary for the public interest, have been accepted as legitimate.²⁹

When the IACtHR challenged for the first time the pathologizing system in its Advisory Opinion, it did so under the right to humane treatment.³⁰ Under the right to private life, human rights bodies have failed to challenge the system of pathologisation, and left unhindered states' imposition of either sterilisation, hormonal therapy or a psychiatric diagnosis as requirements to obtain LGR. By accepting and leaving unquestioned the pathologisation of trans people by states, human rights bodies continue to sanction the definition of gender diversity as a mental illness. They further fail to recognise that defining gender diversity as a mental illness is 'unfounded, discriminatory and without demonstrable clinical utility'.³¹

The pathologisation of trans persons is one of the root causes behind many of the human rights violations trans people face.³² By imposing trans people

²⁷ Kara Sheherezade, *Gender Is Not an Illness: How Pathologizing Trans People Violates International Human Rights* (GATE 2017).

²⁸ American Convention on Human Rights, art 11; European Convention on Human Rights, art 8; Covenant on Civil and Political Rights, art 17.

²⁹ *A.P., Garçon and Nicot v France*, App no 79885/12 (ECtHR 2017) paras 136-144.

³⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

³¹ Maria Elisa Castro-Paranza et al, 'Gender Identity: The Human Rights of Depathologization' (2016) 16 *International Journal of Environmental Research and Public Health*.

³² OHCHR, 'Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness - Joint Statement for International Day against Homophobia, Transphobia and Biphobia' (United Nations Human Rights Office of The High Commissioner, 12 May 2016)

to undergo medical and psychological procedures before LGR, states continue to actively violate trans people's personal autonomy and integrity.³³ The majority of trans rights cases concerning one's right to access LGR adjudicated under the right to private life have left the pathologisation system widely unchallenged.³⁴ They thus leave the medico-legal structure that led to the violations in place.

III. ASSESSMENT OF THE SEVERITY REQUIREMENTS FOR A TREATMENT TO BE CONSIDERED CIDT

On the basis of this overview, this paper argues that both the prohibition to obtain legal gender recognition and the pathologisation of trans people constitute inhuman or degrading treatment.

I. Legal Definitions of CIDT

Currently there is no universal definition of the scope of Cruel, Inhuman or Degrading Treatment (CIDT).³⁵ CIDT is usually defined in relation to the act of torture, as they are often protected under the same provision. The International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment'.³⁶ The European Convention on Human Rights (ECHR)'s definition similarly does not formally distinguish between the categories of Torture and CIDT.³⁷ The Human Rights Committee (HRC) has stated that the distinction between Torture, Cruel and Inhuman or Degrading treatment 'depends on the nature, purpose and severity of the treatment applied'.³⁸ Under Article 5 of the American Convention on Human Rights (ACHR), 'every person has the right to have his physical, mental and moral

available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>> accessed 8 August 2019.

³³ Sheherezade (n 27) 8.

³⁴ O'Brien (n 15) 5.

³⁵ Rhona K. M. Smith, *Textbook on International Human Rights* (Oxford University Press 2012) 239.

³⁶ ICCPR art 7.

³⁷ ECHR art 3.

³⁸ HRC, 'General Comment n. 20: Article 7 on Prohibition of Torture, or Other Cruel and Inhuman or Degrading Treatment' (1992) para 4.

integrity respected' and 'no one shall be subjected to torture or cruel, inhuman or degrading treatment'.³⁹

Sir Nigel Rodley has argued that, for the HRC, 'the threshold for entry into the scope of torture and ill-treatment was "degrading treatment", which grossly humiliated a person or drives him to act against his will or conscience'.⁴⁰ The ECtHR states that a treatment itself is not degrading 'unless the person concerned has undergone – either in the eyes of others or in his own eyes - humiliation or debasement attaining a minimum level of severity'.⁴¹ Therefore, in order to determine if a treatment constitutes CIDT, the severity of the treatment has to be analysed.

2. *The CIDT Minimum Severity Threshold: Recognition of Psychological Suffering*

Trans rights violations, arising from the prohibition to legally transition and/or the imposition of prohibitive requirements, result in both physical and mental suffering. In order to classify such treatments as breaches of the right to be free from CIDT, this section will analyse the physical and mental suffering standards adopted by human rights bodies.

Human rights bodies have been slow to fully recognise that mental pain and ill-treatment alone can constitute CIDT, since there is a tendency to consider them secondary to physical injuries.⁴² When classifying an act as torture or CIDT, consideration must be given not only to what is done to a person in terms of practical actions, but also to the overall situation and circumstances and individual susceptibilities and vulnerabilities.⁴³ This

³⁹ ACHR art 5.

⁴⁰ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2009) 86.

⁴¹ *Campbell and Cosans v. the United Kingdom*, Application no. 7511/76 (ECtHR 1982) para 28.

⁴² Katherine Mayall et al, 'Reproductive 'Rights Violations as Torture or Ill-Treatment' in Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, *Gender Perspectives on Torture: Law and Practice* (Washington University College of Law 2017) 268.

⁴³ Hernan Reyes, 'The Worst Scars Are in the Mind: Psychological Torture' (2007) 89 *International Review of the Red Cross* 599.

means that the effects provoked on the person have to be considered as part of the assessment.

While conducting the analysis, one of the relevant issues to determine the severity of the act is the personal significance of the psychological maltreatment.⁴⁴ The ECtHR has defined a treatment to be degrading if 'it arouses feelings of fear, anguish and inferiority capable of breaking an individual's moral and physical resistance'.⁴⁵ In *Vuolanne v. Finland*, the HRC stated that the assessment of whether a treatment constitutes ill-treatment, depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim.⁴⁶ In cases concerning the treatment of trans people, there are some trans-specific factors that should be taken into account.

The humiliation in the eyes of the victim or others can derive from treatment that is purely psychological or, as described by the ECtHR, has a strong 'symbolic' component.⁴⁷ Humiliation has been described as the state in which a person in being ridiculed, unjustly degraded and in particular when one's identity is demeaned or devalued.⁴⁸ Humiliation refers to the debasement of a person's identity rather than to practical actions.⁴⁹ To determine whether an act is humiliating towards a trans person, personal factors and vulnerabilities must be taken into account. For example, not having an identity document matching one's gender identity and expression, and thus having to explain one's gender history to strangers on a regular basis, is humiliating for many trans people. Not having a matching ID may also arouse feelings of anguish, fear and inferiority. It exposes trans people to a high risk of discrimination and violence on a daily basis when they are forced to reveal their trans status to strangers such as post officers, bank employees,

⁴⁴ Pau Pérez-Salez, *Psychological Torture: Definition, Evaluation and Measurement* (Routledge 2017) 78.

⁴⁵ *Pretty v. UK*, App no 2346/02, (ECtHR 2002) para 52.

⁴⁶ *Vuolanne v. Finland*, CCPR/C/35/D/265/1987 (HRC 1989).

⁴⁷ Pérez-Salez (n 44) 77.

⁴⁸ Linda M Hartling and Tracy Luchetta, 'Humiliation: Assessing the Impact of Derision, Degradation and Debasement' (1999) 19 *The Journal of Primary Prevention* 264.

⁴⁹ *Ibid* 263.

librarians, waiters, ticket controllers, club bouncers and public administrators .

Evaluating the subjective elements, various human rights bodies found that stripping a prisoner naked may constitute CIDT.⁵⁰ Whether this treatment reaches the severity threshold of CIDT, however, depends on the victim's cultural, religious and personal sensitivities. Forcing a person to act against their religion has also been found to constitute CIDT due to the humiliation provoked.⁵¹ Scholars agree that forced sterilisation often involves the destruction of an essential feature of a person's identity.⁵² This is dependent on the cultural importance of reproduction for women in today's society. The ECtHR further found that strip-searches by a person of the opposite sex can constitute a violation of a person's integrity and dignity and thus amount to CIDT, since it creates a feeling of humiliation.⁵³ In this case, the Court focused on the feeling of humiliation provoked in the victim and the solely psychological suffering which ensued.

For these reasons, the analysis of the severity of treatment cannot be narrowed down solely to a consideration of the objective elements, but must take into account the subjective experience of humiliation and degradation.

One of the elements often considered in the evaluation of the severity of treatment is its duration. The ECtHR found that even premeditated threat of ill-treatment for a short amount of time constituted CIDT, since the person was in a state of vulnerability.⁵⁴ There is therefore no established minimum time limit for a treatment or act to be considered a violation of the right to be free from CIDT.

⁵⁰ Reyes (n 43).

⁵¹ Ibid 596-599; Metin Basoglu et al, 'Torture vs Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent' (2007) 64 Archives of General Psychiatry 281.

⁵² Ronli Sifris, 'Conceptualising Involuntary Sterilisation as "Severe Pain or Suffering" for the Purposes of Torture Discourse' (2010) 28 Netherlands Quarterly on Human Rights 537.

⁵³ Pérez-Salez (n 44) 77.

⁵⁴ *Gafeng v. Germany*, App no 22978/05 (ECtHR 2010) paras 101-108.

Physical forms of pain and suffering are more easily identified than psychological forms of suffering.⁵⁵ Some physical treatments or invasion of one's bodily integrity always reach the minimum severity threshold.⁵⁶ As will be seen in the next section, coerced sterilisation is one of such treatments. When analysing trans rights cases, it needs to be taken into consideration that the definitions of torture and CIDT have been written having in mind the politically motivated act of torture against cisgender heterosexual men.⁵⁷ As a result, such definitions have excluded for a long time grave violations of women's rights. Today, they continue to exclude acts perpetrated against trans individuals.

Feminist legal scholars have engaged in a long battle to have human rights bodies recognise female-specific forms of pain and suffering as serious human rights violations.⁵⁸ The battle to recognise rape as torture stems from this analysis. For a long time, human rights bodies refused to recognise the severity and instrumental use of largely female-specific forms of suffering such as rape. However, the recognition of severity of a certain treatment is fundamental to obtain both guarantees of non-repetition and redress. Trans rights are still at the beginning of a similar process of recognition. The Special Rapporteur on Torture in a recent report stated that 'gender stereotypes play a role in downplaying the pain and suffering that certain practices inflict on women, girls, and lesbian, gay, bisexual and transgender persons'.⁵⁹

Currently, trans-specific forms of suffering are not recognised as political or severe enough for constituting torture or CIDT by most human rights bodies. As will be argued later, even when trans people are subjected to non-trans specific violations, such as coercive sterilisation and other forms of coercive medical treatment, their suffering is underestimated and classified

⁵⁵ Reyes (n 43) 596.

⁵⁶ Hilary Charlesworth and Christine Chinkin 'The gender of *Jus Cogens*' (1993) 15 Human Rights Quarterly 70.

⁵⁷ Alyson Zurieck, '(En)Gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman or Degrading Treatment' (2015) 38 Fordham Journal of International Law 101.

⁵⁸ Ibid 103

⁵⁹ United Nations General Assembly, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/31/57 2016) para 9.

under a qualified right. This paper wants to highlight how such exclusion actively sanctions the violation of trans people's fundamental rights. The lack of recognition of the severity of psychological suffering of trans people as a consequence of coercive medical treatments or prohibition to access LGR is therefore influenced by systematic discrimination. This must be changed in order to guarantee trans people their fundamental rights.

IV. PROHIBITION TO OBTAIN LEGAL GENDER RECOGNITION: SHIFTING THE NARRATIVE TOWARDS CIDT

When trans people are unable to obtain Legal Gender Recognition, they are *de facto* not recognised before the law and therefore more exposed to human rights violations. As stated by the IACtHR, the 'non-recognition of [gender] identity may mean that a person has no legal record of his or her existence, which makes it difficult to fully exercise his or her rights'.⁶⁰ However, throughout the past twenty years, human rights bodies have failed, or rather refused, to recognise the severity of the harm provoked by states when not allowing trans people to access LGR.

Both the HRC and the ECtHR argued that the prohibition to obtain LGR only constituted a violation of the right to private life. The first successful trans rights cases were litigated before the ECtHR in the early 2000s, and challenged states' prohibition to change legal sex on documents and birth certificates.⁶¹ Those first cases aimed at establishing two legal concepts: first, that gender identity is a central aspect of a person's identity and second, that gender identification, name and sexual life should be protected from undue state interferences under the right to privacy.⁶²

When the ECtHR challenged the prohibition to transition through the right to private life, it did so through the endorsement of a highly pathologising discourse. In the early 2000s, the Court was mainly concerned with the analysis of whether or not the impermissibility to change one's legal sex was proportionate with regards to the public interest.⁶³ In 2002, for the first time,

⁶⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 98.

⁶¹ *Christine Goodwin v. the UK* (n 7).

⁶² *Van Kuck v. Germany*, App no 35968/97 (ECtHR 2003) para 69.

⁶³ *Ibid* para 56.

the ECtHR said that states had to provide trans people with the possibility of obtaining LGR.⁶⁴ In *Christine Goodwin v. The United Kingdom*, the Court applied the principle of proportionality and argued that

no concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from the change of status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate certain inconvenience to enable individuals to live in dignity and worth [...]⁶⁵

However, this case only mentions 'post-operative transsexuals', *de facto* endorsing the state's refusal to recognise those trans people who had not been coerced to undergo surgical sterilisation.

From this case onwards, human rights bodies continued to use the right to private life to adjudicate trans cases.⁶⁶ The right to private life is a qualified right. This means that human rights bodies weigh the individual's right against the public interest, to determine whether the limitations on their rights are proportionate. According to the reasoning adopted under the right to private life, coercing a trans person to be surgically sterilised or undergo hormonal therapy for a fixed number of years, may be justified by the public interest and will thus be proportional.

In 2007 the ECtHR stated that the impossibility to obtain LGR 'left the applicant in a situation of distressing uncertainty vis-à-vis his private life'.⁶⁷ However, defining it as a 'distressing uncertainty' under a qualified right further demonstrates the ECtHR's unwillingness to grant trans people their fundamental rights. As will be argued below, the impossibility to change one's documents in order to match one's gender identity and expression exposes trans people to severe violence, discrimination and humiliation, and therefore amounts to ill-treatment.

⁶⁴ *Christine Goodwin v. the UK* (n 7) para 90.

⁶⁵ Ibid.

⁶⁶ *S.V. v. Italy*, App no 55216/08 (ECtHR 2019); *L. v. Lithuania*, App no 27527/03 (ECtHR 2007); *A.P., Garçon and Nicot v. France* App no 79885/12 (ECtHR 2017).

⁶⁷ *L. v. Lithuania*, App no 27527/03 (ECtHR 2007) para 57.

The HRC has similarly framed trans people's right to obtain LGR as a matter falling under the right to private life, rather than an absolute right.⁶⁸ The IACtHR, on the other hand, only recognised trans people's rights in 2017 with an Advisory Opinion on Costa Rica.⁶⁹ In the Advisory Opinion, the Court was the first to recognise the severity of violations and partially framed them under the right to be free from ill-treatment.

This paper argues that not being allowed to legally transition gives rise to two main issues which, alone or cumulatively, constitute a violation of the right to be free from CIDT. First, the non-recognition before the law *per se* provokes psychological suffering of a severity that may constitute CIDT. Second, not being recognised before the law exposes trans people to further human rights violations.

1. Non-Recognition Before the Law Constitutes CIDT per se

The IACtHR in its Advisory Opinion on Costa Rica stated that the lack of juridical personality deriving from the impossibility to obtain LGR 'harms human dignity because it is an absolute denial of a person's condition as a subject of rights'.⁷⁰ An act or policy constitutes CIDT if it humiliates and debases a victim 'in their own eyes or in the eyes of others'.⁷¹ As previously stated, the evaluation of the severity of the violation must take into consideration the individual's vulnerabilities and the overall circumstances.⁷²

When a state prohibits trans people from obtaining LGR, it actively denies the existence of trans people. With this, it deprives trans people of the possibility of ever being able to be officially recognised as themselves. The consequences of this systematic delegitimization of trans people's identity are extremely profound. Through this prohibition, states actively discredit trans people and deprive them of legal protections. They are forced to continuously expose intimate aspects of their lives, as well as their status as

⁶⁸ See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland* (CCPR/C/IRL/CO/3 2008) para 8.

⁶⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 98.

⁷⁰ *Ibid* para 102.

⁷¹ *Campbell and Cosans v. the United Kingdom*, App no 7511/76 (ECtHR 1982) para 28; *Tyrer v. the United Kingdom*, App no 5856/72 (ECtHR 1978) para 30-32.

⁷² Reyes (n 43) 599.

individuals not recognised by the law. This constant exposure leads to severe humiliation.

Contextually, the UNHCR states that 'being compelled to conceal one's gender identity may result in significant psychological or other harm'.⁷³ As stated in section II, due to systematic discrimination, trans people's suffering is severely underestimated by human rights bodies. Several studies on trans people's mental health further shows that being unable to live in their true gender induces severe psychological suffering.⁷⁴ As a result of transphobia, the evaluation of the severity of psychological suffering continues to be underestimated and considered to not reach the minimum standard for degrading treatment.

Human rights bodies have further argued that when a person is forced to act against their religion or their will, the treatment can constitute inhuman or degrading treatment.⁷⁵ Not being able to ever obtain official documents representing one's gender identity and expression coerces one into either hiding one's gender identity or revealing one's gender history on a daily basis. This *de facto* forces trans people to continuously act against their will, in order to justify their existence as trans individuals and navigate the world. Forcing a person to act against their will is comparable to forcing a person to act against their religion and thus reaches the minimum threshold required for degrading treatment.

2. Violation of Other Human Rights Obligations

A gradual understanding of the severity of the psychological harm inflicted on trans people when they are unable to have matching documents is slowly emerging. However, human rights bodies continue to fail to clearly establish that the prohibition to obtain LGR violates trans people's personal integrity to the extent of inhuman and degrading treatment.

Trans people's lives are severely hindered when states do not allow LGR. Without matching documents and social security number or without a bank card with the appropriate name, participation in society becomes very

⁷³ UNHCR, *Guidelines on International Protection n. 9* (HRC/GIP/12/09 2012) para 33.

⁷⁴ European Union Fundamental Rights Agency (n 9) 78.

⁷⁵ Nigel Rodley and Matt Pollard (n 40) 86.

difficult.⁷⁶ The prohibition to obtain LGR also leads to the violation of civil, political, economic and social rights. The amount and severity of human rights violations of trans people stemming from the impossibility of obtaining LGR is not compatible with the use of the right to private life. As previously stated, within the context of CIDT, humiliation has been described as the state in which a person is being ridiculed, unjustly degraded and in particular when one's identity is demeaned or devalued.⁷⁷ Amongst other reasons, the use of the right to private life to argue for trans people's right to obtain LGR is inadequate because it does not take into account the cumulative effects of all the violations that may result from having unmatching documents.

Trans people are often suspected of identity fraud when performing essential activities such as opening a bank account or paying with a credit card, because their legal name does not match their gender.⁷⁸ Having matching documents is often a decisive factor when applying for a job. In countries that do not provide LGR, trans people have much lower chances of employment.⁷⁹ Trans rights organisations argue that equal access to employment is not a reality for trans people across much of the world.⁸⁰ Endemic employment discrimination leads trans people into a cycle of poverty that further exacerbates societal discrimination.

The suspicion of identity fraud arising from the un-matching documents also hinders trans people's freedom of movement. When trans people without matching IDs attempt to cross a border or board a plane, they are often stopped and questioned by authorities, whom again suspect identity fraud.⁸¹ When trans people are stopped and questioned concerning the un-matching documents, authorities often engage in lengthy interrogations and invasive

⁷⁶ European Union Fundamental Rights Agency (n 9) 19.

⁷⁷ Hartling and Luchetta (n 48) 264.

⁷⁸ Jugroop (n 9) 10; Jack Byrne, *License to Be Yourself: Responding to National Security and Identity Fraud Arguments* (Open Society Foundations 2016) 10.

⁷⁹ Sam Winter et al, *Denied Work: An Audit of Employment Discrimination on the Basis of Gender Identity in South East Asia* (Asia Pacific Network and United Nations Development Programme 2018) 18.

⁸⁰ Ibid.

⁸¹ Byrne (n 78) 10.

body searches.⁸² It needs to be taken into account that trans people are at a high risk of being subjected to ill-treatment when subjected to body searches.⁸³ The high level of discrimination and difficulties encountered by trans people when travelling *de facto* limits their right to freedom of movement as protected by Article 12 ICCPR.

Trans people are also particularly vulnerable when in detention settings. The general population's risk of being exposed to ill-treatment rises in cases of deprivation of liberty;⁸⁴ the risk for trans people of ill-treatment when their legal gender does not match their gender identity and expression is even higher. In such situations, it is well established that the proper identification of the individual is the first guarantee to state accountability. Therefore, having a form of identification and being recognised before the law are fundamental elements for the protection from arbitrary arrest and detention, torture and ill-treatment.⁸⁵

Furthermore, when deprived of their liberty, trans people with un-matching documents are often placed in the section of their sex assigned at birth.⁸⁶ In these situations they are at heightened risk of violence, rape and sexual victimisation.⁸⁷ Violence, sexual abuse and rape are conducted both by fellow prisoners with the acquiescence of the authorities, and at the hands of the guards themselves.⁸⁸ In particular, trans women with un-matching

⁸² Paisley Currah and Tara Mulqueen, 'Securitizing Gender: Identity, Biometrics, and Transgender Bodies' (2011) 78 *Social Research* 562.

⁸³ United Nations General Assembly, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/31/57, 2016) para 36.

⁸⁴ Ilias Bantekaas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 323.

⁸⁵ United Nations General Assembly, *Report of the Independent Expert on Sexual Orientation and Gender Identity* (A/73/152 2018) para 24.

⁸⁶ OHCHR, 'Living Free and Equal: What states are doing to tackle violence and discrimination against LGBTI people' (United Nations Office of the High Commissioner for Human Rights, 2016) available at <<https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>> 43.

⁸⁷ Inter-American Commission of Human Rights (n 1) 99.

⁸⁸ Redress and Amnesty International, *Gender and Torture Conference Report* (2011) 29.

documents are routinely placed in male detention facilities without regards for their safety.⁸⁹

Trans people without matching documents encounter discrimination when attempting to access healthcare and social security schemes. In the Asia Pacific region, where few countries provide for LGR, trans people face significant barriers in exercising their human rights. Social exclusion and the difficulty in finding employment lead to a situation where trans people often lack an adequate standard of living, and do not have access to adequate healthcare.⁹⁰ In South-East Asia, as a direct or indirect result of having un-matching documents, in the vast majority of countries, trans people lack access to basic healthcare.⁹¹ Having un-matching documents often provides a justification for discrimination in healthcare settings, leading to refusal of care and discriminatory treatments.⁹² Furthermore, trans people unable to obtain LGR are often discriminated against when trying to access social security systems.⁹³ In particular, they face heightened levels of discrimination when accessing pension schemes and other gender-segregated services.⁹⁴ The IACHR has further emphasised that the discrimination affecting LGBTI persons places them in a cycle of exclusion that tends to culminate in poverty due to lack of services, opportunities and social benefits.⁹⁵

Given the interdependence and indivisibility of rights, grave violations of economic, social and cultural rights can lead to a violation of civil and political

⁸⁹ Ibid 102; Cristina Castagnoli, *Transgender Persons' Rights in the EU Member States* (European Parliament Directorate-General for Internal Policies 2010) 13.

⁹⁰ Health Policy Project, Asia Pacific Transgender Network and United Nations Development Programme (n 3) 2.

⁹¹ Ibid.

⁹² Michele Lanham et al, 'We're Going to Leave You for Last Because of How You are: Transgender Women's Experiences of Gender-Based Violence in Healthcare, Education and Police Encounters in Latin America and the Caribbean' (2019) 1 *Violence and Gender* 41.

⁹³ European Union Agency for Fundamental Rights, *Being trans in the European Union: Comparative analysis of EU LGBT survey* (2014) 79.

⁹⁴ Peter Dunne and Marjolijn van der Brink, *Trans and Intersex Equality Rights in Europe – A Comparative Analysis* (European Commission Directorate-General for Justice and Consumers 2018); *Christine Goodwin v. The United Kingdom* (n 7) para 62.

⁹⁵ Inter-American Commission of Human Rights, *Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas* (2018) 13.

rights.⁹⁶ In the *Xamok Kasek Indigenous Community v. Paraguay*, the IACtHR argued that the severe deprivation of the right to health, underlying determinants of health and right to education, violated the right to life of the indigenous community.⁹⁷ In those cases, the state was deemed responsible for the violations because it was aware of the situation, and failed to protect and fulfil its duty concerning the indigenous community's rights. Similarly, numerous violations of trans people's economic, social and cultural rights may lead to severe mental and physical suffering to such an extent that it reaches a level of suffering sufficient to constitute degrading and inhumane treatment.

As seen in this section, the possibility of accessing Legal Gender Recognition is fundamental for trans people in order to have a dignified life and have their basic human rights respected. The prohibition to obtain LGR in most cases leads to multiple and continuous violations of trans people's rights and severely limits their possibility to live a dignified life. Human rights bodies must acknowledge that not allowing trans people to have their gender identity legally recognised exposes them to a level of psychological suffering and forces them to act against their will to an extent that it reaches the minimum threshold for degrading treatment. The extent of psychological and physical suffering resulting from this policy cannot be encompassed within the right to personal integrity as protected by the right to private life. When human rights bodies frame it as a private life issue, they are thus purposefully excluding trans people from the protection of human rights law.

V. PATHOLOGISATION AND IMPOSITION OF COERCIVE MEDICAL REQUIREMENTS AS CIDT

Most of the countries that allow LGR require trans people to undergo several medical procedures and to undergo a psychiatric diagnosis in order to change their legal name and gender.⁹⁸

⁹⁶ Ioana Cismas, 'The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights' in Gilles Giacca et al (Eds) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 455.

⁹⁷ *Xamok Kasek Indigenous Community v. Paraguay*, Series C.124 (IACtHR 2010) para 192 -193.

⁹⁸ Chiam et al (n 8) 3.

Until very recently, human rights bodies left most of the prohibitive requirements unchallenged. The pathologisation of trans identities creates a dependency on a psychiatric diagnosis to access both LGR and gender affirming medical procedures.⁹⁹ The World Health Organisation (WHO) defined 'transsexualism' as a mental and behavioural disease until 2018.¹⁰⁰ However, the pathologisation of trans identities continues to legitimise the imposition of coercive medical treatments as requirements to obtain LGR.

The prohibition of non-consensual medical interventions is one of the core concepts entrenched in the prohibition of torture and CIDT. Under Article 7 of the ICCPR, 'no one shall be subjected without his free consent to medical or scientific experiments'.¹⁰¹ The Oviedo Convention on Biomedicine further states that 'an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it'.¹⁰² The Special Rapporteur on Health further argued that patients have to give free and informed consent even for medically necessary treatments, unless the situation is life-threatening and the patient is unconscious.¹⁰³ Coercive treatments that are not physically irreversible may well reach the threshold of mental suffering required to be considered CIDT under human rights law.¹⁰⁴ When considering whether a treatment constitutes CIDT, elements such as the long-term impact on a victim's

⁹⁹ Sheherezade (n 27) 6.

¹⁰⁰ Maria Elisa Castro-Peranza et al, 'Gender Identity: the Human Right to Depathologization' (2019) 16 *International Journal of Environmental Research and Public Health* 3; *International Classification of Diseases*, section V, F.64.0 <<https://icd.who.int/browse10/2016/en#/V>> accessed 29 September 2020.

¹⁰¹ ICCPR art 7.

¹⁰² *The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (1997) ETS N. 164, art 5.

¹⁰³ United Nations General Assembly, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (A/64/272 2009) para 12.

¹⁰⁴ Herman Reyes, 'The Worst Scars are in the Mind: Psychological Torture' (2007) 89 *International Review of the Red Cross* 597.

physical and psychological well-being and effects on their ability to pursue life goals must be taken into account.¹⁰⁵

Consent is only valid when provided voluntarily and without coercion, undue influence or misrepresentation.¹⁰⁶ In this context, coercion includes conditions of duress and undue influence includes 'situations in which the patient perceives there may be an unpleasant consequence associated with refusal of consent'.¹⁰⁷ Thus, when the alternative to undergoing medical intervention is not being able to obtain LGR, the consent provided by trans people cannot automatically be considered to be valid. The Special Rapporteur on Torture has also stated that intrusive and irreversible medical treatments that lack a therapeutic purpose and are administered without free and informed consent may constitute CIDT.¹⁰⁸

As previously argued, not being able to obtain LGR constitutes CIDT. Therefore, when a medical procedure is required by the state in order to obtain LGR, there is no free consent because the consequences of refusing treatment amount to CIDT. On this issue, the IACtHR stated that the procedure to obtain LGR

cannot require supporting evidence of total or partial surgery, hormonal therapy, sterilisation, or bodily changes in order to grant the request or to prove the gender identity in question because this could be contrary to the right to personal integrity recognised in Article 5(1) and 5(2) [right to humane treatment].¹⁰⁹

States throughout the world impose different medical requirements. However, due to space constraints, this paper will focus on the most common ones.

¹⁰⁵ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57.

¹⁰⁶ UNGA, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (2009) A/64/272, para 13- 14.

¹⁰⁷ Ibid.

¹⁰⁸ HRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mèndez' (2013) A/HRC/22/53, para 32.

¹⁰⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

I. Coercive Sterilisation

Some states specifically require trans people to be unable to procreate in order to change their legal gender, while other states only have a general requirement to undergo medical treatments.¹¹⁰ Coercive sterilisation gives rise to both mental and physical suffering. The physical pain derives from the surgeries necessary to remove one's reproductive organs. The severe mental distress comes from the imposition of a coercive medical procedure and invasion of a person's physical and moral integrity.¹¹¹ Furthermore, while sexual and reproductive rights are often not considered when evaluating the consequences of coercive sterilisation for trans people, it is important to note that trans people may want to have biological children. In such cases, coercive sterilisation would destroy their life plans.¹¹² In the past thirty years, human rights bodies have expanded the scope of the right to be free from CIDT to include rape, domestic violence, coercive sterilisation, female genital mutilation and corporal punishment of children.¹¹³ These are acts or treatments that were once not considered to be violations of the right to be free from CIDT, but which are now accepted as such.¹¹⁴

As a result, some human rights bodies have recently argued that the suffering imposed on trans people as a result of coerced sterilisation may amount to CIDT.¹¹⁵ This is a result of a long process not based on trans people's rights, but rather on women's rights.

Feminist scholars have for a long time argued for the classification of enforced sterilisation as a violation of CIDT, given the severity of violations of women's right to moral and bodily integrity in cases of coerced sterilisation.¹¹⁶ The classification of sterilisation as CIDT therefore is not the

¹¹⁰ Chiam et al (n 8) 3, 39.

¹¹¹ Sifris (n 52) 537.

¹¹² UNGA, 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, para 31.

¹¹³ Zurieck (n 57) 102; *Selmouni v. France*, Application n. 25803/94 (ECtHR 2000) para 100.

¹¹⁴ See *Selmouni v. France* (n 113) para 100.

¹¹⁵ See *A.P., Garçon and Nicot v. France* (n 66).

¹¹⁶ World Health Organisation, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation. An Interagency Statement of the OHCHR, UN Women, UNAIDS, UNDP, UNICEF and WHO* (2014).

result of a recognition of the suffering imposed on trans people by pathologising their identities, but rather the application of a pre-existing reasoning to trans cases. Otherwise, other coercive medical treatments would have been classified as CIDT alongside sterilisation. As will be seen later, this is not the case.

The Special Rapporteur on Torture stated that invasive and irreversible medical treatments lacking a therapeutic purpose performed without free and informed consent, may constitute torture or ill-treatment.¹¹⁷ He further acknowledged that in many countries transgender persons are required to undergo coercive sterilisation to obtain LGR, and called on states to outlaw forced or coerced sterilisation in all circumstances.¹¹⁸ In its concluding observation on Hong Kong, the United Nations Committee Against Torture (UNCAT) expressed concerns about the sterilisation requirement to obtain LGR. It further urged the territory's authorities to respect trans people's autonomy and psychological integrity by removing the sterilisation requirement.¹¹⁹

The IACtHR argued that the requirement of sterilisation violates trans people's autonomy to the extent of violating trans people's right to be free from CIDT.¹²⁰ The ECtHR on the other hand only partially recognised the harm done to trans people when coercing them to undergo sterilising surgeries, and only found this requirement to violate the right to private life.¹²¹ In *S.V. v. Slovakia*, the ECtHR stated that

[i]n order for treatment to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond the inevitable element of

¹¹⁷ HRC, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez' (2013) A/HRC/22/53, para 32.

¹¹⁸ Ibid paras 78, 88.

¹¹⁹ UNCAT, 'Concluding Observations of the Fifth Periodic Report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, paras 28-29.

¹²⁰ Advisory Opinion OC-24/17 (IACtHR 2017) para 146.

¹²¹ See *A.P., Garçon and Nicot v. France* (n 66); *G. v. Australia*, App no 2171/2012 (HRC 2017).

suffering or humiliation connected with a given form of legitimate treatment.¹²²

In the same case, the ECtHR stated that coercive sterilisation constitutes a major interference with a person's health status and therefore found that the coercive sterilisation of a cisgender woman amounted to CIDT.¹²³ However, when assessing the requirement to undergo sterilisation to obtain LGR, the ECtHR found that the coercive sterilisation of a trans person only amounted to a violation of the right to private life.¹²⁴ Therefore, the ECtHR adopted a double standard when discussing cases concerning the coercive sterilisation of trans individuals.

Similarly, the HRC has repeatedly framed the issue of coercive sterilisation of women under the right to be free from CIDT.¹²⁵ When encountering the issue of coerced sterilisation of trans people, however, the HRC only recognised it as a violation of the right to private life, *de facto* adopting a double standard.¹²⁶

Coercive sterilisations as a requirement to obtain LGR constitute inhuman or degrading treatment, since the medical treatment is not consensual and is of an invasive and irreversible nature. Framing coercive sterilisation of trans people as a matter falling under the right to private life implies that according to human rights law, trans people's impossibility to reproduce could be deemed proportionate and necessary for the public interest and/or the protection of other people's rights.

2. Other Medical Requirements

In addition to sterilisation, states often impose other medical requirements that, according to the present analysis, violate the right to be free from CIDT. The two main requirements are (A) psychiatric diagnosis of gender identity disorder, and (B) having undergone irreversible changes through

¹²² *V.C. v. Slovakia*, App no 18968/07 (ECtHR 2011) para 104.

¹²³ *Ibid* para 120.

¹²⁴ *A.P., Garçon and Nicot v. France* (n 66) paras 127-135.

¹²⁵ HRC, 'General Comment No. 28: Article 3 on the Equality of Rights Between Men and Women' (2000) CCPR/C/Rev.1/Add.10, para 11.

¹²⁶ See for example HRC, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' (2015) CCPR/C/KOR/CO/4, para 14.

hormonal replacement therapy.¹²⁷ Invasive medical exams are also imposed on trans people (C).

The severity of the harm procured by coercive medical requirements that do not involve sterilisation is severely underestimated by human rights bodies. In cases that do not involve sterilisation, human rights bodies have systematically failed to recognise the physical and psychological harm provoked.

Only in a few cases have human rights bodies found that coercive medical treatments for trans people violate human rights law. In its observation on Hong Kong, UNCAT used a general language requiring the authorities to remove abusive preconditions for legal gender recognition so as to respect trans people's autonomy and psychological integrity.¹²⁸ At the time of the recommendation, Hong Kong required trans people to undergo surgical sterilisation to obtain LGR. The requirements to undergo hormonal replacement therapy and psychiatric diagnosis should be considered abusive regardless of their partial reversibility, due to the coercive nature of their imposition.

The IACtHR argued that the procedures for the rectification of one's gender 'should not require evidence of surgery and/or hormonal therapy',¹²⁹ and that coercive medical treatments amount to CIDT. The ECtHR, while to some extent recognising that the harm caused by coerced sterilisation, failed altogether to recognise the harm provided by the requirement of psychiatric diagnosis and other medical treatments.¹³⁰ Indeed, the Court stated that the requirement to undergo a psychiatric diagnosis did not affect a person's physical integrity, and therefore did not constitute a human right violation.¹³¹

¹²⁷ Kara Sheherezafé, *Gender is Not an Illness: How Pathologizing Trans People Violates International Human Rights Law* (GATE 2017) 6.

¹²⁸ UNCAT, 'Concluding Observations on the Fifth Periodic Report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5, paras 28-29.

¹²⁹ Advisory Opinion OC-24/17 (IACtHR 2017) para 160.

¹³⁰ *A.P., Garçon and Nicot v. France* in Chiam et al (n 8) 4.

¹³¹ *A.P., Garçon and Nicot v. France* (66) para 139.

A. Psychiatric Diagnosis

Most states continue to require trans people to undergo a psychiatric diagnosis to access gender affirming medical care and LGR. Legal and medical transitions should be accessible to trans people and based on an informed consent system, rather than on a mental illness diagnosis.¹³² The requirement to obtain a psychiatric diagnosis violates trans people's rights for two reasons.

First, it violates trans people's moral integrity because it is imposed on them through coercive means. In the evaluation of state practice, the coercive nature of a psychiatric diagnosis which entails that one's identity is pathological, has not even been recognised as a violation of the right to privacy. Any coercive medical treatment that is not necessary to save a person's life violates the right to personal and bodily integrity and may amount to CIDT. Second, the requirement to obtain a psychiatric diagnosis humiliates trans people since it entails that one's gender identity is a pathology. In 2018, the Council of Europe's bioethics committee recognised that gender identity disorder diagnosis should never constitute a justification for imposing involuntary medical treatment.¹³³ . The absolute necessity of informed consent even for medically necessary treatments has been reiterated by the Special Rapporteur on Health.¹³⁴ As a result, without free consent, the requirement to submit oneself to a coercive psychiatric diagnosis constitutes a coerced medical treatment, and therefore violates the right to be free from CIDT

At the moment of writing, the vast majority of states continue to require a psychiatric diagnosis of gender dysphoria to access legal gender recognition.¹³⁵ Coercive psychiatric diagnosis to obtain LGR have only been considered to amount to CIDT in the most extreme situations. In Ukraine,

¹³² Advisory Opinion OC-24/17 (IACtHR 2017) para 171.

¹³³ Council of Europe Committee on Bioethics, *Draft Explanatory Report to the Additional Protocol on the Protection of the Human Rights and Dignity of Persons with Mental Disorders with Regards to Involuntary Placement and Involuntary Treatment* (2018) 3.

¹³⁴ UNGA, 'Report of the Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health' (2009) A/64/272, para 12.

¹³⁵ Chiam et al (n 8) 3.

to obtain the required diagnosis, trans people are interned in a psychiatric institution for up to 45 days.¹³⁶ The HRC argued that the compulsory confinement in a psychiatric institution has to be replaced by a less invasive measure, and that the state should respect the principle of informed consent.¹³⁷ In less extreme cases, human rights bodies failed to acknowledge the severity of the harm provoked.

The HRC, in the concluding observations on states that require a coercive psychiatric diagnosis without internment, found that the coercive diagnoses do not constitute a violation of either the right to private life or CIDT.¹³⁸ When considering laws regulating legal gender recognition, the Committee failed to mention the coercive nature of psychiatric diagnoses as an element worth addressing.

The ECtHR, in *A.P., Garçon and Nicot v. France*, did not find any violation when analysing the requirement to undergo medical treatments in order to obtain LGR other than sterilisation.¹³⁹ Again, the Court failed to address the fact that trans people are coerced to undergo a number of medical treatments. The IACtHR on the other hand, in its recent Advisory Opinion stated that the requirement of a psychiatric diagnosis would violate a person's moral integrity as protected by the right to be free from CIDT.¹⁴⁰

The requirement to obtain a psychiatric diagnosis of gender identity disorder entails that trans people are mentally ill. This has both discriminatory and dehumanising effects on trans people.¹⁴¹ The diagnosis required by most countries is that of Gender Identity Disorder, and it classifies trans people as having a disorder of personality and behaviour. Other personality and behavioural disorders featuring in the International Classification of Diseases currently adopted by most countries, include pathological

¹³⁶ HRC, 'Concluding Observations on the Seventh Periodic Report Ukraine' (2013) CCPR/C/UKR/CO/7, para 10.

¹³⁷ *Ibid* para 10.

¹³⁸ See for example the absence of any mention of transgender rights violations from the concluding observations on pathologising countries such as Italy, France, Japan and many other states.

¹³⁹ *A.P., Garçon and Nicot v. France* (n 66).

¹⁴⁰ Advisory Opinion OC-24/17 (IACtHR 2017) paras 132, 146, 160.

¹⁴¹ Smiley et al (n 2) 24; Advisory Opinion OC-24/17 (IACtHR 2017) para 130.

gambling, exhibitionism, voyeurism, and paedophilia.¹⁴² To contextualise the discriminatory power of such diagnosis, until the 1980s, the International Classification of Diseases classified homosexuality as a mental illness under the same chapter used to pathologise trans people today. When trans people are required to obtain a gender identity disorder diagnosis, it means that one of the most fundamental aspects of their identity is considered to be a disorder. Being coerced to obtain such a diagnosis severely violates trans people's personal and psychological integrity.

To conclude, requiring trans people to obtain a psychiatric diagnosis of gender identity disorder to access LGR should be classified as constituting CIDT. Both the right to private life and the right to be free from discrimination are not adequate to cover this violation. By defining trans people as inherently ill, notwithstanding the actual state of their mental health, the diagnosis itself dehumanises and profoundly humiliates them. Such humiliation produces a level of harm and severe psychological suffering that reaches the minimum level to be classified as inhuman or degrading treatment. As previously stated, a treatment is considered inhuman or degrading if, for example, it humiliates a person, forces them to act against their own will or religion, and if it provokes severe psychological harm. The classification under the right to private life is thus inadequate due to its nature as a qualified right.

The requirement to obtain a psychiatric diagnosis of gender identity disorder is not only a violation of one's own psychological integrity, but also hinders the enjoyment of other rights. Many states require trans people to accept a psychiatric diagnosis not only to obtain LGR, but also to access medical transition.¹⁴³ As a result of this process, trans people's access to healthcare is severely hindered by the diagnostic process.¹⁴⁴ Lack of access to medical and legal transition also hinders their access to basic and non-trans-specific

¹⁴² See chapter five of the ICD-10, available at <<https://icd.who.int/browse10/2016/en#/F64>>.

¹⁴³ Sheherezafé (n 127) 6.

¹⁴⁴ Smiley et al (n 2) 25.

medical services, because of the fear of discrimination, overall social exclusion and distrust in the medical profession.¹⁴⁵

B. Hormonal Replacement Therapy

Some states require trans people to undergo irreversible changes as a result of hormonal replacement therapy in order to obtain LGR.¹⁴⁶ The decision to undertake a gender transition is motivated by one's desire to affirm one's gender identity. Gender transitions are not composed by a singular event, but rather they are a social, medical and legal process that unfolds over time.¹⁴⁷ Trans people may want to undergo only some gender affirming treatments or no medical treatment, and this should not prevent them from being recognised before the law.

Many trans people want to undergo hormonal replacement therapy in order to align their gender identity with their appearance. However, if this is not a free choice based on informed consent, but a coerced choice made in order to access legal gender recognition, it constitutes CIDT.¹⁴⁸ The full severity of the psychological suffering that follows from being coerced to undergo a medical treatment, must be considered by human rights bodies even when it entails supporting the auto-determination of trans people. The same reasoning used in sterilisation cases based on the inviolability of one's bodily integrity and the consequences of such violation, should be adopted also in trans-specific cases not involving sterilisation. As previously stated, medical requirements imposed by the state in order to obtain LGR are coercive and therefore may constitute, alone or cumulatively, CIDT.

¹⁴⁵ Ibid 6; Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme (n 3) 2.

¹⁴⁶ UNGA, 'Report of the Independent Expert on Sexual Orientation and Gender Identity' (2018) A/73/152, para 28.

¹⁴⁷ Lisa R Millner and Eric A Grollmen, 'The Social Costs of Gender Non-Conformity for Transgender Adults: Implications for Discrimination and Health' (2015) 30 *Sociological Forum* 810.

¹⁴⁸ Advisory Opinion OC-24/17 (IACtHR 2017) para 160.

C. Compulsory Medical Examinations

When a country imposes medical requirements to obtain LGR, trans people are often forced to undergo invasive medical examinations to prove that they have undergone a specific surgery or treatment.

In *A.P., Garçon and Nicot v. France*, one of the applicants claimed that the court-mandated genital examinations, to prove that she had been sterilised by a court-appointed doctor, breached her moral and physical integrity. The ECtHR did not find any violation of either the right to private life or the right to be free from CIDT.¹⁴⁹ The coercive element of the court-mandated exam was not analysed by the Court. Coercive medical examinations of trans people, for the purpose of LGR, can be compared to body searches, as they are not medically necessary and involve close bodily examinations for legal purposes.

Human rights bodies agree that when conducted in a disproportionate, humiliating or discriminatory manner, body searches may amount to CIDT.¹⁵⁰ In *X. and Y. v. Argentina*, a woman and her daughter had to undergo invasive vaginal searches as a condition to visit their husband and father in prison. The IACHR argued that this type of search may be legal only if absolutely necessary, proportionate and carried out in a humane manner.¹⁵¹ The search was not absolutely necessary and inevitable, and therefore violated the right to be free from CIDT.¹⁵² The ECtHR also stated that non-strictly-necessary invasive body searches constitute CIDT.¹⁵³ In *X and Y. v. Argentina*, the applicants were not forced to submit to an invasive body search. However, as this was a precondition to visit a family member in a prison they were in practice coerced. Similarly, trans people are not forced in the strict sense to submit themselves to unnecessary and invasive medical exams, but as this is a precondition towards LGR it is *de facto* coercive. Coercive medical examinations, especially those involving genital

¹⁴⁹ *A.P., Garçon and Nicot v. France* (n 66) para 153.

¹⁵⁰ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57, para 23.

¹⁵¹ *X and Y v. Argentina*, Case n. 10.506 (IACtHR, 1996) paras 69- 73.

¹⁵² *Ibid* para 89.

¹⁵³ See for example *El Shennawy v. France*, App no 28541/95 (ECtHR 1999).

examinations, can be equated with invasive body searches and therefore amount to CIDT.

Personal vulnerabilities have to be taken into account when considering the severity of harm inflicted on a person. Trans individuals are particularly vulnerable in situations that involve body searches.¹⁵⁴ Trans people are routinely discriminated against in healthcare settings and often encounter difficulties in accessing such services.¹⁵⁵ Furthermore, the extremely elevated number of trans people that are physically and sexually attacked, or threatened with sexual violence increases their vulnerability to genital examinations.¹⁵⁶ In countries that criminalise homosexuality, men suspected of same-sex sexual activity are subjected to non-consensual anal examination intended to obtain physical evidence of homosexuality.¹⁵⁷ The UNCAT has stated that such practice is medically worthless and constitutes torture or CIDT, given its humiliating nature.¹⁵⁸

The same reasoning should be applied to coercive medical examinations for trans people. When trans people are coerced to undergo medical exams to prove whether they have undergone a sterilising procedure or to determine whether one's genitals match their legal gender, their right to bodily integrity is violated. Considering personal vulnerabilities, the fact that the procedure is not medically necessary, that it includes examination of one's genitals, and that it is coercive, it can be concluded that such examination may amount to CIDT.

¹⁵⁴ OHCHR, 'Living Free and Equal (n 86) 43.

¹⁵⁵ European Union Fundamental Rights Agency (n 9) 41- 43; Asia Pacific Transgender Network, 'Blueprint for the Provision of Comprehensive Healthcare for Trans People and Trans Communities in Asia and the Pacific' (Futures Group: Health Policy Project 2015) 2.

¹⁵⁶ European Union Fundamental Rights Agency (n 9) 51.

¹⁵⁷ UNGA, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57, para 36.

¹⁵⁸ *Ibid.*

VI. CONCLUSION

In the past thirty years, the adjudication of trans rights under the right to private life has allowed the pathologising model to thrive. It has enabled states to further violate trans people's rights.

Trans people's physical and psychological integrity are severely violated by restrictive and pathologising laws and policies. The prohibition to obtain LGR amounts to ill-treatment for two main reasons. First, not having the possibility of being equally recognised before the law severely violates a person's psychological integrity. The lack of recognition before the law negates trans people's condition as subjects of rights. Secondly, non-recognition before the law gives rise to a number of other human rights violations, including freedom of movement, ill-treatment in detention, right to health, social security and adequate standards of living.

The severe violation of civil, political, economic, social and cultural rights has such effects that the non-recognition of one's gender violates the right to be free from CIDT. When a state requires medical treatments as a condition for LGR, it *de facto* coerces trans people to undergo such treatments and therefore violate the right to be free from CIDT. In the past, human rights bodies have stated that coercive medical treatments constitute CIDT. However, when adjudicating cases regarding trans people, they have mostly failed to recognise the coercive nature of such medical treatments. Human rights bodies must therefore recognise the severity of harm inflicted not only by states, but also the re-perpetration of harm caused by their unwillingness to uphold trans people's fundamental rights.

The analysis presented in this paper is far from complete. However, it aims to highlight that trans people's fundamental rights have been disregarded for an extremely long time by human rights bodies. For decades, the trans community has called for depathologisation, trying to shed light on the harm provoked by this system. Only in the past few years, some academics have started arguing for depathologisation. However, these critiques have not focused on the role of human rights bodies, which continue to be influenced by structural transphobia. In order to uphold the fundamental rights of trans people, human rights bodies have to embrace the call for depathologisation

as the only means to fully apply human rights treaties, and uphold trans people's rights.

MARSILIUS OF PADUA: THE SOCIAL CONTRACTARIAN

Zeynep Koçak-Şimşek*

This article aims to demonstrate that Marsilius of Padua's Defensor Pacis (1324) encompasses the basics of the social contract theory. Marsilius arrives at the social contractarian theory drawing upon both his past and present political engagements, and the theoretical legal-political debates of his time. He reconciles his background in the city-state of Padua, which struggled with the Holy Roman Empire to keep its autonomous legal order of republican liberties, with his political tendency to and his engagement with the imperial order. Yet, in constructing his political thought, he benefits immensely from the legal and political debates that had been going on since the beginning of the 10th century with the emergence of the Bologna law school, as well as the revival of both Aristotelian scholarship and Ulpian's contribution to the Digest. All of this had a decisive impact on the scope of the debates. The legal debates sought the legitimate origin of the Holy Roman Emperor's sovereignty. However, by breaking sovereignty into parts as executive power and legislative power, Azo Portius introduced the possibility of the separation of powers into the debate. Armed with his engagement with the Aristotelian 'doctrine of the wisdom of the multitude' and the renaissance of the Codex, Marsilius was able to further what Azo had dismantled by shifting the power that underlay the sovereignty from a bundle of legislative and executive powers to merely legislative ones. Through a convention that he derived from lex regia, he constituted the first version of the social contract. However, he applied to his newly formed conventio (contract) the prevailing legislative authority of the populus.

Keywords: Marsilius of Padua, modern state, *lex regia* (royal law), *iurisdictio* (authority to give law), *populus* (people), *multitudo* (multitude), *valentior pars* (prevailing part), sovereignty, Holy Roman Empire

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I. INTRODUCTION

In this paper, I make two claims. My central claim is that the Italian medieval scholar, Marsilius of Padua's (1275-1342) political thought encompasses the basics of the template of civil social contract theory (SCT). Further to this point, I claim that instead of assigning a corporate independent body a collection of powers to govern, Marsilius's social contractarian theory declares the Primary Human Legislator a corporate body, thus appointing the legislative body as the sovereign that can use coercive power, rather than a body that reflects a fusion of powers.

Marsilius's arrival at SCT was a response to the political and legal considerations of his era. The prevailing political and legal debate, namely the *lex regia* (royal law), centered around the legitimacy of the ruler—a concept that had been subject to debate since the 10th century and particularly since the grouping of Bologna Lawyers through the revival of Ulpian's *Codex*. The *lex regia* debate reflected a contractarianism of the constitutional sort, a contract between the ruler and the *popolo* as a unity, and was similar to David's contract with the free people of Israel.¹ The debates were hastened and deepened by the Church's involvement as a claimant of sovereignty over *Regnum Italicum*, and as an agent that attempted to subordinate the imperial power to itself. Theories of republican liberties discussed primarily within the context of city-states regarding their struggle for the de facto autonomy also contributed to these debates.

¹ Otto Friedrich von Gierke, *Political Theories of the Middle Age* (Cambridge University Press 1936) 39. On the contrary, the civil SCT reflected a contract among people that aimed to legitimately establish an independent body as a coercive political authority.

In the *Defender of the Peace* Marsilius aimed to offer a solution to the 12th century debates on the legitimacy of the sovereignty of the ruler.² He was politically engaged in the campaign of German claimant to the Holy Emperor, Ludwig IV, against the Church. Nonetheless, the republican discussions about the city-states also contributed strongly to Marsilius's thought. In his attempt to reconcile the sovereignty of the Holy Roman Empire in a manner that would embrace republican liberties, he drew upon the tools of existing *lex regia* debates from the newly revived Codex and Roman Law as well as Aristotelian thought, which was adopted in European lands through Averroes's translation.

In his narrative, Marsilius offered a civil contract for the members of a pre-existing yet quasi-lawless society, which established the law and civil society at the same time. Concurrently, this contract established an independent legislative and corporate body that acted on behalf of and in the name of the consenting *popolo* (free people), the Primary Human Legislator. The authority of the Human Legislator was irrevocable because it was established as a collection of wills of the *popolo*, and the unity that was formed through an Aristotelian idea of multiplicity was the only means to faultlessly execute the common good.

This body, the Primary Human Legislator, would be the sovereign. In that sense, instead of a constitutional SCT that drew on the *lex regia* debate, Marsilius offered a civil SCT that sought the legitimacy of the coercive political authority. By establishing the sovereign as the legislative body, Marsilius diverged methodologically from the medieval discourse regarding the holder of sovereignty. He went beyond the contextual quandary of the *lex regia* debate about the relationship between the *multitudo* (multitude) and the ruler in regard to sovereignty. Marsilius was, perhaps accidentally, a revolutionary who represented a dramatic break with the past.³ His SCT can be better put in context through a consideration of the *lex regia* debate and particularly through the contribution of Azo of Bologna's (Azolenus) (fl. 1150-

² Marsilius of Padua, *The Defender of the Peace* (Annabel Brett tr, Cambridge University Press 2005). I will refer to *The Defender of the Peace* as DP (as an abbreviation of *Defensor Pacis*) in the rest of the paper.

³ Isaiah Berlin, *Against the Current: Essays in the History of Ideas* (The Viking Press 1955) 37.

1230). Marsilius's idea of the sovereign was not constituted through a contract between the ruler and the *popolo* in which the *irrevocability was a matter of contractual terms*.⁴ In fact, Marsilius's was not a contract with a ruler at all. Instead it was a contract among the multitude that would establish the corporate personality of the Primary Human Legislator, which would then decide upon the institutions of the newly formed legal order.

In my attempt to reread Marsilius's theory as a SCT, I demonstrate that neither the Imperial nor the republican approach explains the entirety of his political thought. To explain this point, I demonstrate the extent to which he was influenced by his engagement with the Empire and his encounters in Padua and Paris. In the second section, I set out the legal debates of *lex regia* in the 12th century to present the differences between the *lex regia* contract and Marsilius's SCT. In the third section, I give a brief definition of SCT touching upon the basic elements that can be employed when comparing the SCT and *lex regia* contracts to Marsilius's theory. Accordingly, for this comparison, I elaborate on Marsilius's narrative of the origin of society, the establishment of civil society through a convention among the *popolo*, and lastly the creation of the Primary Human Legislator as the sovereign.

II. HISTORICAL CONTEXT: THE POLITICS OF CITY-STATES AND THE *LEX REGIA* DEBATE

The political structure and conflicts in the 12th and 13th centuries in Italian lands shaped the legal debates that dominated the main discussion concerning the origin of the legitimate power of the ruler. The beginning of the discussions corresponds to the early twelfth century, when a new autonomous political structure of the city-state was introduced in northern Italy, primarily with the consular government of Pisa in 1085.⁵ By the end of the century, many northern Italian cities had declared their autonomy in order to adopt the city-state structure.

The main political conflict that led to discussions over sovereignty was between the Holy Roman Emperor, the Church and the city-states of

⁴ Gierke (n 1) 146.

⁵ Quentin Skinner, *The Foundations of Modern Political Thought: Volume 1, The Renaissance* (Cambridge University Press 1978) 3.

Northern Italy. By that time, the German emperors had already obtained the right to rule *Regnum Italicum*. Thus, the newly formed city-states in Northern Italy posed a threat to the German claim to rule, since the autonomy and the self-governing model of the city-states did not comply with the Emperor's claims of dominion. Several German emperors expedited to Northern Italy to regain the full dominium, but the Papacy was ready to manipulate the conflict to suit its own interests.⁶ Aiming to establish its own dominium over the newly-autonomous northern city-states, the Papacy prevented the Holy Roman Empire from gaining full command over the lands. By manipulating the internal politics of the city-states, and by supporting the German Emperor's possible but not-yet-decided heirs to the throne, the Papacy held the Holy Roman Emperor back from the northern Italian lands while succeeding 'in winning direct temporal control of a large area of central Italy, as well as considerable measure of influence over most of the major cities of Regnum Italicum'.⁷

Caught between two powerful institutions, the city-states fought back with arms; yet the theoretical attempt to legitimize the phenomenon of the autonomous city-state self-governing model was equally important in the fight. The theorists of the Italian city-states needed 'most of all [...] a form of political argument capable of vindicating their liberty against the Church without involving them in ceding to anyone else'.⁸ *De iure* liberation from the Holy Roman Empire was not possible, but the newly earned *de facto* autonomy of the city-states was at stake. Bartolus of Sassoferrato (1314-1357) of the post-Glossator school of Commentators, seemed to have sought independence from the Empire,⁹ and Marsilius apparently sought independence from the Church.¹⁰

Nevertheless, both the Commentators and Marsilius were students of the previous scholarship that debated the legitimate source of authority in the 11th and 12th centuries—the medieval *lex regia* debate that prevailed before and

⁶ Ibid 12-13.

⁷ Ibid 14.

⁸ Ibid 18.

⁹ Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2014) 48.

¹⁰ Skinner (n 5) 18.

during Marsilius's time.¹¹ These debates shaped the theoretical discussions over the autonomy of the Italian city-states, and the debates are important in understanding the background to Marsilius's idea of popular sovereignty and the idea of the Human Legislator.

Lex regia, or royal law, was an instrument in the Roman Empire's civil law tradition that enabled the transfer of plenary public authority from the Roman people to the Roman emperor. It was a form of social contract, a constitutional SCT, that corresponded to a contract between the *popolo* and one person as the ruler. As Lee suggests,

its purpose was not to function only as a kind of enabling act whereby the powers traditionally held by the *populus* in the Republic would thereafter be exercised by the Emperor, or princeps, but also as a constitutional (re)foundation of Rome itself *de novo*.¹²

Originally *lex regia* was a concept of private law: 'it was a merely revocable grant made by the Roman people to the emperor'.¹³ It was one of Ulpian's¹⁴ greatest efforts to legitimize Augustus in giving law in the name of, on behalf of, and for the people, and was referred to in *Digest* as such: 'What pleases the emperor has the force of law: this is because, by *lex regia*, which has been enacted about his *imperium* (imperial authority), the people confer upon him, and to him, all their *imperium* and *potestas*'.¹⁵ In Ulpian's time, the aim of *lex regia* was merely historical: it was a connection between 'otherwise disjointed eras of Roman constitutional history in one continuous narrative,' namely the Principate and the Republic.¹⁶ Furthermore, it provided historical legitimacy to the Roman emperor.

However, when the *Digest* and Ulpian's *lex regia* debate were revived in medieval Italy and were applied to public law, the doctrine morphed into a

¹¹ Hwa-Yong Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (Peter Lang 2008) 64.

¹² Lee (n 9) 27.

¹³ Walter Ullman, *Law and Politics in the Middle Ages: The Sources of History, Studies in the Uses of Historical Evidence* (Cornell University Press 1975) 250.

¹⁴ Joseph Canning, *A History of Medieval Political Thought* (Routledge 2005) 8.

¹⁵ Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press 1998) I.4.1.

¹⁶ Lee (n 9) 30.

more complicated one. The second life of Roman law, as Vinogradoff calls it,¹⁷ had an end that Ulpian would likely never have foreseen. Led by Irnerius, the four jurists from Bologna pieced together Justinian's *Corpus Iuris Civilis* to come up with a tool to finally analyze the link between the Emperor and the people. At first sight, Ulpian's articulation in the book was simple: the Roman *populus* conferred their original lawmaking authority upon the Roman princeps by a general comitial act which thereby established the constitution of the Augustan Principate and legitimized, thereafter, the emperor's lawmaking authority over all Romans.¹⁸

The Glossators, on the other hand, did not take Ulpian's definition as simply as it was originally articulated. Two main camps emerged among Glossators:

Two principal positions emerged among the Glossators in response to this interpretive puzzle in medieval legal thought. On the one hand, the *lex regia* could be understood as a translation imperii—an irrevocable transfer, conveyance, and even alienation of authority—such that the Roman *populus* divested itself completely of its original authority, and thus, retained no residual claim over the authority given to the princeps. On the other hand, the *lex regia* could be understood as a mere concession—a temporary or conditional grant of authority—such that princely authority was understood to be a revocable investiture and held and exercised theoretically only by the permissive will of the people.¹⁹

Surprisingly, the differences between the two interpretations of *lex regia* would prevail for centuries and would influence popular sovereignty doctrines. As Gierke commented,

in the Middle Age the thought of Popular Sovereignty was connected in manifold wise with the thought of Ruler's Sovereignty, there was here a foundation on which the most diverse constitutional systems of an abstract kind could be erected: systems which might range from an Absolutism grounded on the alienation of power by the people, through Constitutional Monarchy, to Popular Sovereignty of the Republican sort.²⁰

Both the translation theory and the concession theory accepted the basic assumption that the source of legitimate powers of ruling and law-making

¹⁷ Paul Vinogradoff, *Roman Law in Medieval Europe* (Clarendon Press 1929) 13.

¹⁸ *The Digest* (n 15) I.4.I; Inst. 2.I.6; C. I.17.I.7.

¹⁹ Lee (n 9) 33.

²⁰ Gierke (n 1) 38.

belonged to the people. However, the two theories differed in the revocability of the transferred rights. The translation theory (*translatio imperii*), in which the *populus* irrevocably renounced its power through the contract and thus stood down from any legislative power it had once had, seems to have been favored by the majority of the Glossators.²¹ On the other hand, the concession theory, represented by Azo Portius,²² stated that the transfer of the rights from *populus* to the prince was a mere *concessio*, 'whereby an office and a *usus* (right of the user) were conveyed, while the substance of the Imperium still remained in the Roman People'.²³ There is no doubt that the debate between the translation theory and the concession theory over the revocability of the transferred rights had a critical impact on Marsilius's thought. In addition to this debate was another equally important question that was embedded in the first: what was the essence of *potestas leges condendi* (the capacity/authority/power to make law)? In Roman classical law, the concept *populus liber* (free people) was derived from that of *ius gentium* (law of nations/peoples).²⁴ All law-making self-governing peoples (*populi*) were free people. According to Gaius, *ius gentium* was inherent in all *populi*. It was the *potestas* of the *populus* to legislate (as Gaius says, *potestas leges condendi*, 'the

²¹ Walter Ullman, *The Medieval Idea of Law as Represented by Lucas De Penna: A Study in Fourteenth-Century Legal Scholarship* (Methuen 1946) 48-49. It seems that *translatio imperii* later evolved to the constitutional SCT, however this is only an intuition and must be researched thoroughly. It must be noted, however, that *translatio imperii* is not the same as the civil SCT, even though there is an irrevocability of the contract in both. While the *translatio imperii* establishes the irrevocability of a contract that gives power to an individual, the civil SCT theory establishes a corporate body with a distinct legal personality to transfer its *potestas* irrevocably.

²² Azo Portius, *Summa Azonis*, Lyon, 1557, fol. 7 [on C.I.I4. (17), §8]: 'For even after they had transferred their power to make laws, they were nevertheless able to revoke that transfer at a later stage, as it is reported in [D.I.2.2.3, I.2.2.14, I.2.2.24].' (Translation Lee (n 9) 37).

²³ Gierke (n 1) 43.

²⁴ In the case of Marsilius, we are dealing with a *populus-liber* because the core of Marsilius's interrogation lies on the transfer of *potestas* of the *populus* through the contract. For a *populus* to be able to transfer their rights to an emperor or prince, they had to be free of an already established rule. Thus, Marsilius's *populus* corresponds to what Gaius and Cicero identify as the *populus liber*, due to *ius gentium*, not to *populus Romanus* who are already subject to the Roman Imperium.

capacity/authority to make law') that made a people free. This was the case for all the free people including, as Gierke suggests, the people of Israel, when they voluntarily and collectively made a convention with David in Hebron.²⁵ The Glossators accepted this stance, stating that according to the *ius gentium*, all free people may decide on a superior over themselves.²⁶ *Populus* seemed to be the rightful and natural holder of the *potestas*.

As Gierke states, the medieval doctrine was all about the element of limitation.²⁷ This limitation started with debates regarding the legal boundaries of the ecclesiastical, and extended to the temporal sphere of monarchy, especially the Holy Roman Emperor's powers. At the core of the limitation of the medieval idea of monarchy lay what Gierke calls the doctrine of rights of the community. Lothair, a representative of the majority among the Glossators, claimed that 'the Roman people no longer poses the *potestas* to make laws they originally possessed', for the reason that 'by the *lex regia*, the *populus* transferred to the emperor every right they possessed'.²⁸ Azo, on the contrary, claimed that neither the *merum imperium* (pure authority/absolute sovereignty), nor the *iurisdictio* (to declare what is law), belonged solely to one person, including the emperor. Through Azo's analysis, the Glossators redefined '*iurisdictio* in such a way that it became the conceptual cornerstone for medieval public law, by encompassing within it all types of powers, including the coercive power of the sword, the *merum imperium*'.²⁹ Azo claimed that the *potestas* of the *populus* (the authority/power of the people) in regard to *lex regia* manifested itself as *iurisdictio* (authority to give law), not as *merum imperium* (absolute power/pure authority) or *mixtum imperium* (mixed authority, the power that could be held by both public magistrates and private persons). Rather, he located the *iurisdictio in genere sumpta* (*iurisdictio* understood as a *genus*) above all else and made the *Imperium* (both *merum* and *mixtum*) and *iurisdictio simplex* (legally limited right to declare law) subordinate to it. Even though Ulpian's original explanation of *iurisdictio* implied merely an office entitled to produce legislation, its application to

²⁵ Gierke (n 1) 39.

²⁶ Gierke (n 1) 146, ft. 139.

²⁷ Gierke (n 1) 36-37.

²⁸ Azo Portius, *Lectura Azonis et Magni Apparatus ad Singulas Leges Duodecim Librorum Codicis Iustiniani*, Paris 1581, I. XIV 11, 44.

²⁹ Lee (n 9) 88.

public law in the medieval revival of Roman law was taken much further. *Iurisdictio* in medieval Italy was the legal function of any person to 'declare what law is', later articulated by Azo as 'the power introduced for the public arising from the necessity of making law, and of establishing equity'.³⁰

Still, there was a problem with the holder of the *potestas*, and the scope of the *potestas leges condendi* (authority/power to make law). Azo's broad interpretation of *iurisdictio* stated that anybody could possess it. Lee summarizes:

Just as the emperor can have *iurisdictio* over the whole world, so too could a king have *iurisdictio* over his kingdom and a magistrate over his *civitas*. Moving even further down the scale of jurisdictional authority, minor judges and officers could also, in theory, be said to have a share of *iurisdictio*, albeit to a lesser degree, in certain specified manners. Even private persons can be said to have *iurisdictio*—fathers over their children, husbands over their wives, even tutors over their pupils. As a general principle, then, Azo allowed a perfect correspondence between the holder of *iurisdictio*, on the one hand, and the type of *iurisdictio* thought to be 'proper' to that holder on the other. A father had his paternal species of *iurisdictio*; a magistrate had his magisterial species of *iurisdictio*; a king had his royal species of *iurisdictio*; an emperor had his *plenissima iurisdictio*—all coexisting alongside each other in a jurisdictional hierarchy of hierarchies.³¹

As Calasso states regarding Bartolus de Saxoferrato, the *iurisdictio* could not have been assigned as a mere *potestas de iure publico* (public law's power) to the individual as the *persona publica* (public person).³² If that had been the case, Calasso remarks, there would have been no difference 'between the power of the husband, or of the owner, and that of the political community as such'.³³ There had to be a difference between private citizens who did not hold any office and those who held at least some kind of legislative office. Yet, this was not the only important difference. According to Azo, all the magistrates shared part of the *iurisdictio* with the legislative authority of the time – the

³⁰ Azo, *Summa Azonis*, columns 176-177.

³¹ Lee (n 9) 89.

³² Francesco Calasso, 'Jurisdictio nel diritto comune classico' in *Studi in onore di Vincenzo Aragio-Ruiz nel XLV anno del suo insegnamento*, IV (1953).

³³ Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Delft 2007) 147-148.

prince or the emperor – and there was a need to distinguish between the emperor's *iurisdictio* given to him by a plenary grant of the Roman people through *lex regia*, and those from the jurisdictional authority of the magistrates, let alone an individual law-making practice over other individuals by means of a hierarchical social supremacy. Azo came up with this new definition, *plenissima* (fullest) *iurisdictio*, which implied the exclusive power transferred to the emperor through *lex regia*, and which included all powers in itself, the *iurisdictio*, 'declaration of what law is' as well as the *merus imperium*—the power of enforcement.

To conclude, *populus liberi* (free people) of the *ius gentium* (law of free people), namely *populus* who had not yet transferred their powers through *lex regia* to any emperor or ruler, held the *potestas leges condendi*—this was the definition of 'free people' both in Roman Law and in its medieval recovery. The *potestas leges condendi* produces the *iurisdictio*, the authority to declare what law is. It is true, referring to Azo's words, that every individual has the right to *iurisdictio*. However, this personal and individual authority affects only a personal sphere and does not correspond to a *civitas*-level authority to legitimately decide what the laws should be. In Azo's words, *iurisdictio* at the *civitas* level is the *plenissima iurisdictio* (fullest authority to declare law), and is different from both the 'lawful and rightful power over something or someone [*legitima potestas*]'³⁴ and the share of *iurisdictio* of the magistrates. It belongs to the Empire; it is the authority to make laws in such a way that all the other law-makers (such as the magistrates and notaries) have to abide by it. It additionally encompasses *merum imperium*, which is the right to enforce, and is given to the emperor through the will of the *populus* through *lex regia*. Skinner is thus right in this regard: no one can give someone else something that he does not possess.³⁵ Hence, the individual, the *persona publica*, cannot transfer a *potestas di plenissima iurisdictio* to the emperor because they do not possess it. It is only the collection of the individuals who hold the *potestas di plenissima iurisdictio* and, as such, it is only the *totus populus* that can transfer its rights to the emperor. Thus, Skinner refers to Azo's words from the *Lectura*: 'From this it follows that, although the emperor possesses greater potestas

³⁴ Referring to Fasolt, Lee (n 9) 89.

³⁵ Quentin Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge University Press 2018) 36–37.

than any individual member of the people, he does not possess greater *potestas* than the *totus populus*, the people as a whole'.³⁶

In place of a conclusion and before delving into Marsilius's theory, there are a couple of points to make in light of the historical debate regarding *lex regia*. These points constitute the backbones of Marsilius's theory and reflect his struggle with the existing explanations about the source of legitimate authority. The first is the fact that Marsilius's theory, while employing an Aristotelian explanation of popular sovereignty, heavily depends on bits and pieces of the *lex regia* debate. As will be seen below, Marsilius uses the elements and cornerstones of the *lex regia* debate to create a new system. He chooses to follow the *lex regia* debate in his path to legitimize the power of the authority. Thus, his point of origin is popular sovereignty. However, he seems to have agreed with Azo's idea that individuals by themselves are not enough to hold a plenary public authority and that the *potestas di plenissima iurisdictio* belongs only to the *totus populus* (the entirety of the populus). Marsilius seems to have blended this idea with the *persona ficta* of corporatist theory to create the fictitious person, the Human Legislator, as part of his political thought. Benefitting further from Azo, Marsilius dismantles the accumulation of *merum imperium* and *plenissima iurisdictio* in one body. Instead, he primarily assigns his fictitious sovereign corporate body, the Human Legislator, the *plenissima iurisdictio*. In that sense, he shifts the definition of the type of power entitled to create the *regnum* and assigns the legislative power as the primary source of authority.

III. MARSILIUS'S RECEPTION: BETWEEN THE EMPIRE AND THE REPUBLIC

As Lewis puts it, 'perhaps no important publicist has baffled in interpretation more persistently than Marsilius of Padua'.³⁷ The diverse pallet of available interpretations mostly originates from different identifications of the historical contexts within which the *DP* is placed.³⁸ One of the two main camps, led by Rubenstein, Gewirth and Skinner, puts Marsilius's political

³⁶ Ibid 36-37.

³⁷ Ewart Lewis, 'The 'Positivism' of Marsiglio of Padua' (1963) 38 *Speculum* 541.

³⁸ Cary J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis* (Rowman & Littlefield 1995) 2-5.

thought on the side of the republican values in the northern Italian cities of the 13th and 14th centuries.³⁹ According to Skinner, the central concept of Marsilius's thought is his practical interest in minimizing the risk of factious disturbances among the city-states, apart from the threats from the Church and the Empire.⁴⁰ Hyde takes the republican interpretation to an extreme, arguing that *DP* provided a 'virtual blueprint of the inner workings of Italian (or more especially Paduan) communal government'.⁴¹ Skinner accuses Lagarde, Wilks and Quillet for being 'in virtual isolation from the circumstances in which it [*DP*] was composed'.⁴² To Skinner, it was 'evident that Marsiglio was not merely writing an abstract work of constitutional thought [...] [but] a new and radical answer to the question of how these liberties might be secured'.⁴³

The opposing scholars, mainly those who believe that Marsilius was an Imperialist, believe that when Marsilius spoke of a defender of the peace, he had the Holy Roman Emperor in mind. While it was a curious relationship between them, it is an apparent fact that Marsilius of Padua was devoted to the German king and imperial claimant, Ludwig of Bavaria. There are, of course, varying narratives about the exact beginning of their relationship, but the differences between these narratives do not lead to diverse interpretations: Discourse III of *DP*, one way or another, was devoted to the king, as were Marsilius's consultancy services.⁴⁴ Further, it is a fact that Marsilius found refuge at Ludwig's court in 1325 after leaving Paris and with John of Jandun, Marsilius accompanied Ludwig in his campaign between 1327 and 1328 to Rome. Nederman even claims that what looked like an escape

³⁹ Joseph Canning, *Ideas of Power in the Late Middle Ages: 1296-1417* (Cambridge University Press 2011) 84-85.

⁴⁰ Skinner (n 5) 60.

⁴¹ John Kenneth Hyde, *Padua in the Age of Dante* (Manchester University Press 1966) 210-212.

⁴² Skinner (n 5) 51-52.

⁴³ In *ibid* 52: 'We have already considered the second of the two Discourses into which the book [*Defensor Pacis*] is divided, in which Marsiglio seeks to defend the liberty of the City Republics against the encroachments of the Church.'

⁴⁴ George Klosko, *History of Political Theory: An Introduction* (Oxford University Press 2012) 297.

from Paris together with John was not an escape at all.⁴⁵ It was, for both of them, a calculated and deliberate decision to join Ludwig's service.⁴⁶ Finally, when Ludwig's venture failed, his papal candidate, Nicholas V, fell. After Ludwig's excommunication, Marsilius returned to Munich with the king and remained under imperial service until his death. The close relationship is, perhaps, insufficient in proving the point made by the pro-Imperialist scholarly camp that Marsilius's thought does not involve any elements of a city-state political model. However, it does imply that, in choosing the side of the Empire against the Church, Marsilius's political theory in *DP* was influenced heavily by his close relationship with the king.

Yet, neither the pro-Imperial nor the republican explanations seem to refer to Marsilius's political thought. In a search to pull Marsilius to either side, either as an advocate of republican liberties or of the Imperial power, both approaches fail to engage with Marsilius as a whole, both in regard to his political biography and in regard to the legal debates of the time. While Skinner claims that the pro-Imperialist approach stands 'in virtual isolation from the circumstances in which it [*DP*] was composed',⁴⁷ the republican approach that Skinner represents omits Marsilius's continuous political engagement with King Ludwig. As such, the pro-Imperialist approach, claiming that Marsilius's only purpose was to defend the Empire against the Church, failed to address the legal and political debates that influenced Marsilius both in Padua and in Paris in a more republican manner. In that sense, this paper aims to reconcile both approaches and attempts to form a new approach that takes into consideration everything that influenced Marsilius, particularly in regard to the social contractarianism that his theory encompassed, which is elaborated in the next section of the paper.

There is a third point to consider. In the midst of newly acquired theoretical tools and revived Roman Law and Code to help re-interpret the teleological

⁴⁵ Cary Nederman, 'A Heretic Hiding in Plain Sight: The Secret History of Marsiglio of Padua's *Defensor Pacis* in the Thought of Nicole Oresme' in Ian Hunter, John Christian Laursen, Cary J. Nederman (eds), *Heresy in Transition: Transforming Ideas of Heresy in Medieval and Early Modern Europe* (Hants 2005).

⁴⁶ According to Nederman, Marsilius left Paris to Ludwig's court even before he was declared a heretic; and Marsilius's excommunication by the Pope was not directed at him, but at discrediting Ludwig.

⁴⁷ Skinner (n 5) 51-52.

assumptions of the princely power, as Lagarde commented, we are still not sure where Marsilius stands with regard to the limits of his knowledge.⁴⁸ The two essential reasons for this inaccessibility, according to Lewis, are that Marsilius was not a jurist and that he did not always cite his sources, as he liked to put things in his own words. If we limit his sources to those he cited, as Prévité-Orton did, it is easy to conclude that Marsilius was unaware of a significant part of the preceding political-legal thought.⁴⁹ The same vagueness is also present in Marsilius's lack of engagement with the Averroist interpretation of Aristotle, which he encountered both as a student and as the rector of the University of Paris. He was present in the Averroist-Parisian circles, but as Lewis states, 'attempts to trace the major features of his thought to Averroist influences have revealed differences far greater than similarities'.⁵⁰

Nederman points out that 'the available biographical evidence about Marsiglio is consistent with either of these interpretations of Marsiglio's intentions in composing the *Defensor Pacis*'.⁵¹ Garnett was probably right when he said '[t]hey [many of the modern historians] have substituted their own modern words for Marsilius'.⁵² As Skinner highlighted, Marsilius was more than aware of the fact that before the Empire, 'the cities had no means of investing them with any legal force',⁵³ and before the Church only the Empire could stand, by the means of its armed forces. Perhaps not the direct connections to the Galen, but the logic that Kaye presents would reflect Marsilius's stance the best: an attempt for balance.⁵⁴

⁴⁸ Georges de Lagarde, *La naissance de l'esprit laïque au déclin du moyen âge, II: Marile de Padoue*, Saint-Paul-Trois-Châteaux (1934) 60-94.

⁴⁹ Charles William Prévité-Orton, 'The Authors Cited in the *Defensor Pacis*', in HWC Davis (eds), *Essays in History Presented to R.L. Poole* (Oxford University Press 1927).

⁵⁰ Lewis (n 37) 545.

⁵¹ Nederman (n 37) 9.

⁵² George Garnett, *Marsilius of Padua and the Truth of History* (Oxford University Press 2006) 3-14.

⁵³ Skinner (n 5) 7.

⁵⁴ Joel Kaye, *A History of Balance, 1250-1375: The Emergence of a New Model of Equilibrium and its Impact on Thought* (Cambridge University Press 2014) 303-314.

It seems that Marsilius never gave up the republican belief in which he was raised; even though he was not schooled in law, he was aware of the revival of the Roman Laws and the *lex regia* debate to some extent; and he certainly knew the Aristotelian principles. He was active in Parisian-Averroist circles, but his knowledge also derived from the then mainstream rediscovery of the main corpus of Aristotle's works, together with William of Moerbeke's translation of the *Politics* from 1250. Never had anyone in his era had such a diverse pallet of tools and sources to reconcile, but in doing just that, Marsilius came up with his theory of the social contract.

IV. MARSILIUS: THE SOCIAL CONTRACTARIAN

The agents, the aims and the elements of SCT vary greatly and thus it would be unwise to attempt to give 'an operational definition of something so heterogeneous', but a brief definition of what Boucher and Kelley define as 'civil contractarianism' can be given.⁵⁵ Civil contractarianism 'is a form of social compact [...] whose role is either to legitimize coercive political authority, or to evaluate coercive constraints independently of the legitimization of the authority from which they drive'.⁵⁶ Through civil SCT, moral and rational constraints that go beyond mere preferences are consolidated, extended or transformed. Boucher and Pelley make a distinction between civil SCT and constitutional contractarianism, which is crucial for our purposes. Constitutional contractarianism, which is an essentially juridical conception of medieval jurisprudence, is what corresponds to the debates in *lex regia*:

In this respect, civil society itself is not necessarily posited to rest upon consent, it is instead the relationship between the ruler and the ruled that is said to be contractual, explicitly or implicitly, and which specifies or implies the respective rights and duties of the contractees.⁵⁷

⁵⁵ Davide Boucher and Paul Kelley (Eds) *The Social Contract from Hobbes to Rawls* (Routledge 2005) 2-3. It must be noted that this paper does not claim to have covered the whole debate of social contractarianism, but rather is an attempt to use a definition that suits the purpose of better analysing Marsilius.

⁵⁶ Boucher and Kelley (n 55) 4.

⁵⁷ Ibid 10.

In that sense, the origin of authority is the *popolo* in both constitutional and civil SCT. Nonetheless, there are three differences between constitutional SCT and civil SCT in terms of the contracting parties who are eligible to sign the contract, the irrevocability of the contract, and the establishment of a legal personality.

As a template, the distinctive features of civil SCT can be classified in four ways: the presence of a convention, the establishment of a civil community, the establishment of an independent corporate body to govern, and the irrevocability of this convention.⁵⁸ The convention, which expressed the general will of the people, had to be made through the consent of the entirety of the people.⁵⁹ The contract itself was the origin of the political community and civil society, through which the consenting *populus* established the legitimacy of the authority of the ruler over themselves. Since this convention represented the uncontentious collective will of the people, it had to be irrevocable. In turn, the *populus* had to give up its *potestas* to act as a corporate and independent body. A close reading of Marsilius's narrative, though not as widely circulated as the works of other social contractarians, corresponds to the basics of the SCT template.

In order to fully understand Marsilius's *convention* as an element of civil SCT, we have to look at the origins of the abstraction of his social contract. A student of Aristotelian tradition, Marsilius's contemplation on the origins of the city reflects at first sight a natural historical sequence. Its historicisation resembles Aristotle's narrative of the origins of the civil community.⁶⁰ For both Marsilius and Aristotle, the village was 'the first community arising from several households and for the sake of non-daily needs', reflecting the ultimate goal of the city, which was being able to live a self-sufficient life purely for the sake of living well.⁶¹ The difference between Marsilius and his conciliar was that while Aristotle synchronised the birth of law with the birth

⁵⁸ Michael Lessnoff, 'Social Contract Theory' in William Connolly and Steven Lukes (eds), *Readings in Social and Political Theory* (New York University Press 1990).

⁵⁹ Peter McCormick, 'Social Contract: Interpretation and Misinterpretation' (1976) 9 *Canadian Journal of Political Science* 22.

⁶⁰ According to Aristotle (Book I252b/25-30) 'the complete community, arising from several villages, is the city'.

⁶¹ Aristotle, Book I252a/10-15.

of the household, for Marsilius the village was still ruled by quasi-natural law, and was thus close to but not yet a perfect civil community.⁶² He agreed with Aristotle that the first communities could also be called civil,⁶³ but they were bound by the fate of natural law and thus could never achieve the true meaning of law.⁶⁴ The perfected civil community was the city.⁶⁵ This perfection not only stemmed from the concurrent birth of law itself but also the *civilitas* (politics), an adaptation of Aristotle's *politeia*, namely, the civil order. For Marsilius, the civil order was the legal order, in other words, it was the order of the civil community exercised through the implementation and execution of (earthly) law.

However, there was a crucial divergence in Marsilius's theory and the uninterrupted Aristotelian development of the city. This is mostly because Marsilius did not provide the same natural order in the birth of law. For Marsilius, law was not a natural outcome or an inevitable conclusion in the formation of civil society. It is true that the perfect community was the only way to fulfill the desire to live well and was thus the inevitable conclusion. However, this continuation was merely a logical one, not a methodological

⁶² Marsilius, DP, I.3.IV:

⁶³ Marsilius, DP, I.3.IV: 'Now as long as human beings were in one single household, all their actions, and especially those we shall later call 'civil', were regulated by the elder among them as by the more discerning: without, however, any law or custom, in that these could not yet have been discovered.'

⁶⁴ See Brett's footnote 5 on p. 16: 'For Marsilius's rejection of a natural law in the true sense of law.'

⁶⁵ However, it must be noted that, Marsilius did not really want to call the first communities (household and the village) 'civil'. The distinction between the civil community and the perfect civil community was only once made in DP I.3.IV. In the rest of the book, he uses 'community' for the civil community and 'civil community' for the perfect civil community. In other words, in the rest of the book when he uses 'community' in regard to the formation of the origins of the city, he means the household and the village that were run by the elders due to the precepts of natural law; however, when he uses 'civil community', he means the city that was regulated by proper, human-made law. Thus, I am going to ignore the distinction made in DP I.3.IV and employ the easier/shorter distinction, where community is the household and the village, and the civil community is the city. See Cary J. Nederman, 'Private Will, Public Justice: Household, Community and Consent in Marsiglio of Padua's *Defensor Pacis*' (1990) 43 *The Western Political Quarterly* 699.

one that could necessarily provide a causal link. According to Marsilius, for the city to be established, an intervention was inevitable.

At the beginning of *DP*, Marsilius says, 'men gathered to form a civil community and to ordain the law'.⁶⁶ The multitude, presumably in the form of villages or households, was scattered. In this order governed by quasi-law, the division of labor that rendered life not only as livable, but worthy of living, was missing. As the number of people grew, the wisdom and the consciousness of expertise grew, eventually changing the conception of a good life for the village residents. The growth in both numbers and expertise led the way to a division of arts and crafts, which required proper governance. Yet the need for proper governance due to the expansion of the division of labor in society was not the only reason that Marsilius's idea of *populus* opted for a legal order. There were no states of war in the pre-city communities, but the residents living in the households and villages were certainly vulnerable to both the partial and unfair rule of the patrons and elders, as well as attacks from other united groups.⁶⁷ Pre-*civitas*, there was nothing preventing the rulers from making decisions that suited them and only them. In contrast to this distribution of authority, the basis for a tranquil and peaceful city was, for Marsilius, fairness, and it could only be achieved through law.⁶⁸ Eventually, in the face of these threats and the possibility (or most probably, a reality) of disorder, wise, resourceful and heroic men called in the *populus* to work together towards creating the perfect community. The men of the villages answered the call of the wise, resourceful and heroic men, and agreed to create the perfect community that would be called the city.

This calling and gathering resulted in the creation of political society. Since the perfected legal order could not be 'retained except by their mutual communication',⁶⁹ they created the *communitas* through a *communicatio ad invicem*, a communion between one another.⁷⁰ This creation of communion was acted upon through a *conventio*: 'Convenerunt enim homines ad civilem

⁶⁶ DP I.9.II; DP. II.22.XV.

⁶⁷ DP I.9.IV.

⁶⁸ DP I.II.I.

⁶⁹ DP. I.4.IV.

⁷⁰ Michael Wilks, 'Corporation and Representation in the Defensor Pacis' (1972) 15 *Studia Gratiana* 251.

communionem propter commodum et vitae sufficientiam consequendam et oppositum declinandum'.⁷¹

The accumulated result of the convention is interesting. The obvious and expected creations were the law and the *civitas*. Likewise, Marsilius openly states that by virtue of the contract, the political community would be created. However, the Human Legislator was created as the political body itself, as the sole body that could exercise sovereignty that belonged to the *totus populus* in the form of *auctoritas* (as *merum imperium*) and *potestas plenissima iurisdictio*. Thus, it was the citizens that form the political community. In other words, the political community is a collective of each person in the newly formed *civitas*. Citizens are those among the multitude who are reasonable, good and right enough to actively participate in the primary political act, which would be the convention. Through participating in this primary political act, they would create their own representative persona of 'citizenship'.

However, the political body authorized by the citizens to make law, namely the Human Legislator, as Marsilius repeats over and over again, is not a collective but a unity of this political community: 'the legislator, i.e. the primary and proper efficient cause of the law, is the people or the universal body of the citizens or else its prevailing part', *universitas civium*.⁷² As Brett notes in her translation of *DP*, *universitas* is derived from its corresponding term in Roman law: 'In Roman law, it is equivalent to our idea of a 'corporation' or a 'corporate entity,' i.e. a number of people forming one body, and this is the sense in which it is used in medieval Roman and canon law'.⁷³ The *universitas*, then, is the Human Legislator itself, which is the embodiment of the united and collective wills of the citizens in a council, which is the *valentior pars*. This Human Legislator is the primary and efficient cause of the law, the primary human authority to pass laws, and law is above

⁷¹ DP I.12.VII. Annabel Brett's translation does not consider the 'convention' aspect of the gathering: 'For men gathered into a civil community in order to pursue their benefit and the sufficient life and to avoid their contraries'. The original sentence was taken from Marsilius of Padua, *Defensor Pacis*, ed. R. Scholz: 2 vols (Hanover 1932-1933). Marsilius refers to the convention again in DP II.22.XV: 'Sicut enim ad civilem communitatem et legem ordinandam convenerunt homines a principio'.

⁷² DP. I.12.III; DP I.12.V; DP I.13.I; DP I.13.II; DP I.13.III; DP I.15.II and so on.

⁷³ Brett, Notes on the translation, *The Defender of the Peace*, 1-2.

everything else in the city. The Primary Legislator is the first Human Legislator, and the decisions taken after the contract ought to be in accordance with its decisions.⁷⁴

There is an obvious question about whether or not the legal personality of the Human Legislator actually reflects a form of sovereignty in the *civitas*. According to Ullman, Marsilius's breakthrough was his introduction of people's sovereignty to political philosophy, while according to Wilks, Marsilius promoted 'a totalitarian democracy of the type later to be preached by the revolutionaries in France'.⁷⁵ It is true that neither a Rousseauian nor a Westphalian theory of sovereignty can be expected from Marsilian theory. Yet, there is no doubt that the foundation of the birth of modern sovereignty theories are rooted in medieval jurisprudence.⁷⁶ As such, Skinner claims that Marsilius cannot be accepted as 'a theorist of state sovereignty'.⁷⁷ Rather, he sees Marsilius as merely a continuation of the *lex regia* debate of constructing a convention that would let the *populus* give power to someone to rule over

⁷⁴ DP I.12.III: 'This is so whether the said body of the citizens...commits the task to another or others who are not and cannot be the legislator in an unqualified sense but only in certain respect and at a certain time and in accordance with the authority of the primary legislator.'

⁷⁵ DP I.12.III: 'This is so whether the said body of the citizens...commits the task to another or others who are not and cannot be the legislator in an unqualified sense but only in certain respect and at a certain time and in accordance with the authority of the primary legislator.'

⁷⁶ Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Delft 2007). London Fell argued that von Gierke looked at secular and national prototypes, deeming theocratic ideals as an obstacle. He traced von Gierke's position back to the political ideology supporting the edification of the Prussian and Bismarckian Reich, characterized by the tendency to make the sovereign legally omnipotent.' See A. London Fell, *Origins of Legislative Sovereignty and the Legislative State* (Praeger 1991).

⁷⁷ Skinner, *From Hobbes to Humanism* (Cambridge University Press 2018) 41: 'But the legal person to whom these theorists refer is never the *persona civitatis*, the person of the state; it is always the *persona populi*, the person constituted by the body of the people...none of these writers, in other words, is a theorist of state sovereignty. The question they address is never about the Powers of the *civitas*, but always about the disposition of power between *populus* and *princeps*, the people and the prince.' Skinner also states that, in the ft. 206, 'It is thus misleading to associate these discussions of legal personality with Hobbes, as I did in Skinner 2002a.'

them; this view was adopted by the Monarchomach or the king-killing writers of the French religious wars.⁷⁸ The two parties of the convention, according to Skinner, would still have the legal status of a party to enter a contract with each other because the government in *lex regia* acquired a legal persona that was different from that of the *totus populus* (the entirety of the people). Thus, after the contract, there were two legal personalities: the governmental legal personality and the *totus populus*.⁷⁹ Marsilius, deriving his terminology from the legal theory of corporations, which took its origins from the school that used '*universitas*' for the *populus*, ascribed a *populus* a legal personality.⁸⁰

Yet, Marsilius's construction of the concept of the Human Legislator, and the citizen body advances a completely different proposition than either Gierke or Skinner contemplate. It is true that many aspects of Marsilius's convention were not unheard of. As both Wilks reminds us, it was

highly unlikely that Marsilius remained unaware of the highly artificial nature of the 'People' and the popular will in the bulk of medieval legal discussion. The idea of the *populus* or the *universitas* as a single juristic person, its government by laws seen as an expression of the will of this corporate personality...all were common features of Roman corporation law.⁸¹

However, Marsilius's convention diverges greatly from the ways in which both Azo and the translation theorists viewed *lex regia* in regard to the transfer of the *potestas di plenissima iurisdictio*. Firstly, Marsilius's convention shifts the body that receives the powers from the *populus*, from a monarch to a legislative body. In *lex regia*, the emperor receives the *merum imperium* and the *plenissima iurisdictio* together. In this regard, Skinner is right because even with Azo and the other canonists, the transfer is always about the power

⁷⁸ Quentin Skinner, *The Foundations of Modern Political Thought, Volume II: The Age of Reformation* (Cambridge University Press 1978) 302-348.

⁷⁹ These are to be derived from Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State' (1999) 7 *Journal of Political Philosophy* 1.

⁸⁰ Quentin Skinner, *Visions of Politics, Volume II: Renaissance Virtues* (Cambridge University Press 2002) 390-393.

⁸¹ Wilks (n 68) 255. See also Arthur P. Monahan, *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (McGill-Queen's University Press 1987) 255.

disposition between the *populus* and the emperor. In *lex regia*, the united will of the *totus populus* represents both *merum imperium* and *plenissima iurisdictio* and they are both manifested in the *populus*. Yet, Marsilius does not consider the transfer of *merum imperium* worthy of mentioning when he explains the convention. On the contrary, he highlights the transfer of legislative power and authority. It is clear that the element of enforcement and enforceability is central to his conception of law and, further, it is the main argument excluding the papal claims from an earthly legal order. The reason for this is that law, given by human agency, is above everything else. Thus, because it is the utmost power that the *populus* can hold, it also includes and creates both the terms of the *merum imperium* and the body that exercises it. Because the *dominium* is associated with the right to legislate, for Marsilius the power of legislation is the origin and the executive power is derived from the decision of the legislative body. In that sense, Marsilius diverges from medieval jurisprudence by shifting the sovereign body from one that holds both legislative and enforcement powers to one that is assigned legislative authority to decide upon everything else. In this way, Marsilius also shifts from the prince as the legislator, to the people as the legislator.⁸²

Further, by locating the Human Legislator and the law it makes through a convention at the top of the hierarchical power of the city, he introduces an interrupted historiography. In *lex regia*, the contracts are mainly decisions of the *populus* on the appointment of the ruler, then the *lex regia* contract is one about the formation of the body of the ruler. Yet Marsilius's convention is one that interrupts the natural historical course by serving not only as an appointment of a ruler, but as a foundational agreement which introduces a set of new rules that can range from the regime of the *civitas* to the limitations to the authority of the prince. In this regard, while *lex regia*'s social/communal agreement is a temporary appointment, Marsilius's convention is one that establishes—or provides the Human Legislator with the legal tools to

⁸² Monahan (n 79) 222-223.

establish—a new system of governance and legislation.⁸³ It is, as Skinner remarks, 'a sovereignty by Institution, not a sovereignty by Acquisition'.⁸⁴

Moreover, a ruler who comes to power through *lex regia* is temporary and is always prone to be brought down by the *populus*. The power of *lex regia* kings is revocable by the *populus*, and thus the contract resembles the Monarchomachs and the king-killers of the Huguenots.⁸⁵ In Azo's view, on the other hand, the *populus* can always reclaim power from the ruler in the case of injustice or bad governance: because the *populus* is the original holder of power, it will remain as such even if it transfers its rights to a ruler for a limited amount of time. Thus, power is for the *populus* to reclaim whenever it wishes. Marsilius's city, on the other hand, was established with the aim of avoiding strife, and as the opposite of the strife. This is why the book is titled 'The Defender of the Peace'. Strife, as shall be discussed in the next part, is the opposite of the ultimate aim of the city, which is to achieve tranquility. However, it must be noted that Marsilius's political thought, even though it sought a secular understanding of the law and state, was not rooted in an amoral sphere. Marsilius's political theory finds its justifications in *reason*, not in pure positive law theory. Hence because the city would dissolve due to strife, 'which threatens no little harm to all communities', 'anyone who has the will and the ability to perceive the common advantage is duty-bound to devote attentive care and painstaking labour to this end'.⁸⁶ Since the city is established through the collective and united will of the *populus*, everyone in the city already tries to sustain and maintain this tranquility. Thus, Marsilius's sovereign body, contrary to that of *lex regia*, by definition cannot be in an act of bad governance and thus cannot be reclaimed and revoked.

There was another reason, besides the impossibility of Marsilius's Human Legislator to do wrong, for the irrevocable character of the contract. Another equally crucial reason is that the Human Legislator is the embodiment of the

⁸³ It is important to note that Marsilius avoids dictating what the best regime is to his mind. He actually avoids saying anything about what he thinks is best for the *populus* at all. This is because of his firm belief in the foundational aspect of the Primary Legislator. See DP I.11.I. (n 66).

⁸⁴ Skinner (n 77) 10.

⁸⁵ Skinner (n 76) 310-340.

⁸⁶ DP I.1.4.

populus: it is 'the corporate personality as a single juristic person' that aims to have a 'government by laws as an expression of the will of this corporate personality'.⁸⁷ As with Cicero and Augustine, *res publica* is a *People* rather than the people—it is a public thing as opposed to the general public.⁸⁸ However it is not, as said before, distinct from the body of the *populus*.⁸⁹ Instead, it is the fictitious corpus of the united personality of the collective of individuals.⁹⁰ It is important what Skinner touches upon in the case of David contracting with the *universitas* of Israel: the king and the *universitas* of the *populus* entered the contract as different parties. This is a typical form of *lex regia*—the *populus* can reclaim its rights from the ruler because it is party to the contract. Thus, if the contract is not fulfilled by one party through the negligence or malpractice of duties, the other party has the right to terminate the contract, in this case by reclaiming the powers from the ruler. However, in Marsilius's treatise, there is no second party to the contract: the men gather and they collectively decide to establish a Human Legislator. The contract they enter into is not with another party but with each other and the established representative body is thus not party to the contract but a product of the contract.

On this point, Wilks agrees with Skinner: 'The initial grant of authority by the people to the *pars principans* is revocable and the *legislator humanus*, as the name implies, retains the right to make law, even though in practice most of

⁸⁷ Wilks (n 68) 255-256.

⁸⁸ Cicero, *De re publica*, I.25.XXXIX.

⁸⁹ Skinner (n 77) 18. Here Skinner is speaking about Hobbes's institution and Hobbes's establishment of the artificial personality of the collective: 'The only means by which they [the multitude] can do so [institute a legitimate commonwealth or state], he argues, is by transforming themselves into an artificial person by way of authorizing some natural person or persons to represent them. This is not in the least to say that the multitude acts in the manner of a single persona in agreeing to set up a government...The author of the *Vindiciae*, *Contra Tyrannos*, for example, had argued in discussing the exemplary case of Israel that the king had acted as one party to the covenant and the people as the other. Both were able to contract as single persons, the king because he was a natural person, the people because they constituted a *universitas* and 'were therefore able to play the part of a single person'.

⁹⁰ Wilks (n 68) 258-259.

the administrative work of government falls into the hands of prince'.⁹¹ This analysis of the application of *lex regia* to Marsilian political thought might have been meaningful only if Marsilius accepted the prince as party to the convention, but the prince is not party to the convention. Furthermore, even the corporate body of the Human Legislator is not party to the convention: it is a purely fictive representative body that has the authority to legislate and to make legislation. If there is an irrevocability in Marsilian thought, contrary to Skinner's and Wilks's understandings, it would not be between the prince and the Human Legislator or the *populus*. Rather, it would be between the Human Legislator and the *populus* because the *potestas* of the *populus* is given to the Human Legislator, not the prince. Although it is true that the princely office is revocable in Marsilian thought, this does not imply a revoking of the *potestas di plenissima iurisdictio* of the *populus*, because the *populus* as a *totus* never transfers its *potestas* to the prince in the first place. It is the Human Legislator that grants the prince the authority to rule. The possibility of a revocation does not have a place in the Marsilian contract.

V. AN ANALYSIS OF MARSILIUS'S SCT

What defines civil SCT is how it differs from the contract offered by *lex regia*, namely constitutional SCT. The 12th century's sovereignty debates revived Aristotelian contractarianism and the Codex, where the *multitudo* as a unity contracted with a ruler to transfer *potestas*. The definition of *potestas dei populi*, which is defined using different terminology by both Aristotle and the jurists after the 10th century, corresponds to a bundle of executive and legislative powers collected in a body that is authorized to rule by the *populus*. This is the core of the *lex regia* debate in 12th century: the emperor was seeking to legitimize his rule in the face of the newly formed autonomous units in northern Italian city-states. As Skinner states, the limits of imagination of the jurists who participated in the *lex regia* debate never went beyond a question addressing 'the disposition of power between *populus* and *princeps*, the people and the prince'.⁹² It is indeed the case, as seen in several examples,

⁹¹ Michel Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge University Press 1964) 186.

⁹² Skinner (n 75) 41-44.

that the jurists refer to similar examples, one being the contract between David and the Israeli free folk.

Three elements were distinctive about the *lex regia* contract. The first element was the *popolo* holding the legal status of being a party to a contract. In other words, the *populus* was party to a contract to something that was not represented by the *populus* itself. The *populus* contracted with some other party, the ruler, who was not a part of the *populus*. The second element was the right of rescission. The free folk, as a unity, entered into a contract with a natural person in order to transfer the *potestas* it had as a unified *populus*. Both David and the Israeli free folk were covenants of that contract, which, particularly due to a strong private law tradition that was demonstrated in *Digest*, implies that the right of rescission existed for both parties. In other words, since the *populus* as a unity was a covenant of the contract, if there was a breach, the *populus* had the right to an annulment and to ask for restitution. In this case, restitution implied reclaiming the *potestas*. The third element was the temporary unity that the *populus* demonstrated only during the signing of the contract, without transferring its rights to a legal personality other than the ruler. This is where the corporation theory is embedded in the *lex regian* contract: the *persona ficta* status of the *populus* in both the corporation theory and *lex regia* starts when the *multitudo*, the free folk, unify together to give consent to a ruler to rule over them. During the actual act of signing, the *multitudo* is a corporate, fictive person, but only temporarily. Once the contract is completed, the *populus* possesses neither the *potestas* nor the corporate personality anymore, until or if they are to reclaim their *potestas* back again.⁹³ On the other hand, the ruler, as a contractor, never possesses the

⁹³ Skinner (n 87) 18-21. Skinner here proposes a fourth element of the *lex regia* contract. Or rather, he defines a fourth element of the *lex regia* contract by taking Hobbes's theory as the central point. He accuses the *lex regia* of never addressing 'the powers of the civitas', because the legal person of the *populus* in the *lex regia* contract 'is never the *persona civitatis*, the person of the state, it is always the *persona populi*, the person constituted by the body of people'. Thus, the fourth element of *lex regia* appears through a converse reading of this page: not sustaining the possession of a legal personality as a *civitas* after the contract. Yet, there are two problematic points of this interpretation. The first corresponds to what the modern law calls retrospectivity: the evaluation of the contract itself cannot be done by evaluating what happens after the contract. In other words, the legal entitlements of the multitude after the contract has very little to do with the

right to be the *popolo* itself, but is limited by the contract. To summarize, the three elements of the *lex-regia* contract are: the *populus* being a party, the *populus* having the right to rescission, and the *populus* having a temporary corporate, fictitious personality.

Let us return to Marsilius's theory. First of all, Marsilius's contracting parties did not involve a ruler. The covenants gathered together, answering the call of the wise men who were already the opinion leaders of the pre-existing legal order, but that is the end of the role of the wise men. The covenants of Marsilius's contract were not a ruler and a *populus*, but individuals who were eligible to enter into a contract. Thus, the parties to the covenant were the individuals of the multitude, and they contracted with one another. Further, since it was a contract among individuals, Marsilius's contract did not, by its nature, stipulate a unity of the *populus* that existed before the contract. On the contrary, Marsilius's *persona ficta*, the Human Legislator, was constructed through the contract together with the legal order itself. While in *lex regia* the order was established after the contract by the ruler due to the transfer of *potestas*, in Marsilius's theory the sovereign body was established with a distinct legal personality through the contract itself. Lastly, rescission of the contract was not possible because anything that was constituted after the contract had to correspond to what the Primary Legislator had set out.⁹⁴

characteristic of the contract. Thus, not leaving the multitude with an entitlement of a *persona civitatis* once it's signed cannot be considered as one of the characteristics of a *lex regia* contract. The second problem is the interesting similarity between the *lex-regia* theory and the Hobbesian contract, which Skinner places at the center of all his argument.

⁹⁴ This, I am aware, requires more explanation. This claim has a lot to do with how Marsilius identifies the Primary Legislator, its prevailing part, as well as Marsilius's perception of the common good and a tranquil city. According to Marsilius, as Janet Coleman remarks, the Human Legislator cannot be understood similarly to 'Rousseau's will of all, made up of individual, free, self-interested wills which, when summed, produce majority opinion'. Instead, the will about the common good of those who are eligible to legislate is the same because there is only one sensible and truthful choice to make. It is likely Wilks's definition that best grasps what a citizen really is when he states that 'Marsilius thought that anyone who dissents from or refuses to recognize the common benefit withdraws himself from his status of citizen'. See Janet Coleman, *A History of Political Thought: From Middle Ages to the Renaissance* (Blackwell Publishing 2000) 154; Wilks (n 68) 251-292. Thus, in

Correspondingly, Marsilius's contract has very little in common with what *lex regia* has to offer in regard to the legitimate source of the *populus*'s sovereignty.

The characteristic of the civil social contract that Marsilius's theory demonstrates is not the limit of his revolutionary political proposal. As mentioned above, a very primitive notion of the separation of powers was not unheard of at that time. Azo, by then, had already established the *iurisdictio*, assigning to it a much broader scope than the *Digest* did. Azo developed the conceptual understanding that even if it was accepted that the emperor had all the legislative and executive powers to himself, as long as judges existed, such a claim would be false at best. Thus, *iurisdictio*, the authority to rule, was already distributed among the magistrates and, at worst, that implied the distribution of the power to legislate. The idea of the separation of the emperor's power from local governing activities, in other words, *merum* and *mixtum imperii*, were already debated before Azo. However, Marsilius, in my opinion as a direct interpretation and application of Azo's *iurisdictio*, re-organized the way that this supposed separation of powers served for the legitimization of sovereign power. According to Black,

this was a revolution in scholastic political theory, a direct expression of the communal tradition. It was made possible by Marsiglio's carefully argued distinction between legislature and executive, which also had roots in communal civic practice going back over two centuries.⁹⁵

Marsilius's theory, the non-existence of rebellion or revolt is not due to state sovereignty, but to the very nature of political agency that every good and sound person wishes for the common good. As such, Marsilius, DP I.13.2: 'On the contrary, those not-willing the polity to survive are counted as slaves, not citizens, as are certain foreigners; hence Aristotle in Politics VII, chapter 13: 'For together with the subjects are all those throughout the region whose will is to rebel', and he then argues 'and that they should be of such a multitude in the political order', sc. the rebellious, or those who do not care to live in a civil manner, 'that they are prevalent over all of these', viz. those who want to live a political life, 'this is impossible'...If therefore the prevailing multitude of men wills the polity to survive (as seems soundly said), then it also wills that without which the polity cannot endure'.

⁹⁵ Anthony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (Methuen & Co 1984) 91-92.

The type of regime or governmental processes does not influence the fundamental distribution of authority 'since the ruling part is subordinated to the whole citizen body'.⁹⁶ In that sense, ultimate political authority does not seem to have been located in any government, but in the law, 'which is made by the corporation of citizens or some agent responsible to it'.⁹⁷ At this point, I believe that he combined his Aristotelian understanding of popular sovereignty with a transformed approach to forming the social contract that he acquired from the *lex regia*, and assigned the sovereignty legislative power. The Primary Legislator was the first Human Legislator, who emerged at the same moment as the emergence of a legal order which was the perfect community.

VI. CONCLUSION

On the basis of the foregoing analysis, it can be confidently claimed that Marsilius's complex understanding was not rooted in any one of his pro-Aristotelian views, his republican city-state past, or his political engagement in the emperor's campaign. If he succeeded in managing the methodological shift he applied on the right-transferring aspect of *lex regia*, it is because he was surrounded by the Averroist Aristotelian tradition that gave him the idea of the *populus* as a sovereign to substitute the 12th century's concept of a ruler as the holder of all political power. As such, if he managed to create an understanding of *regnum* in which the emperor was accountable to the *civitates*, it was the ideological outcome of his past in the participatory structure of the Italian city-states. Likewise, if he was one of the prominent thinkers who struggled to find a legitimate way to free earthly affairs from the ecclesiastical, it was because he was the head of a university immediately following the *lex regia* jurists' debate about the legitimate source of sovereignty. Overall, Marsilius may be considered the first social contractarian of medieval jurisprudence to condition sovereignty on a covenant among individuals to form a legal entity with the authority to rule.

Being the first is, of course, only mildly significant in and of itself. Yet, Marsilius's theory is crucial because of its implications for state sovereignty,

⁹⁶ Ibid 91.

⁹⁷ Ibid 95-97.

which aimed to unify the will of the multitude not as an authority to rule, but to make law before everything else. The displacement of the act of ruling with *iurisdictio* seems to imply analyzing the modern state of today as the continuation of a Hobbesian state and, further, approaching and evaluating the possible power that a multitude can hold.

FOR THEY HAVE SOWN NON-DOMINATION...
TOWARDS A REPUBLICAN ACCOUNT OF SELF-DETERMINATION

Johan Rochel* 

The general objective of this article is to reconstruct the principle of self-determination from a republican perspective. Based on a definition of freedom as non-domination, this republican conception offers a consistent reconstruction of the International Court of Justice (ICJ) approach, including the 2019 Chagos Opinion. It also explains the different functions fulfilled by self-determination in international law: a structuring function and an aspirational one. These functions are linked to different bodies of international law relating to self-determination, mainly the law of states and human rights law. In addition to this descriptive dimension, I claim that the republican conception is able to lay down a promising path for rethinking the links with the international regimes of secession and minority protection. Overall, the article proposes a renewed interpretation of self-determination which is able to make sense of this key principle of international law beyond the Chagos Opinion and its focus on decolonization.

Keywords: self-determination, UN Charter, political philosophy, international law theory, republicanism

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I. INTRODUCTION

The self-determination of peoples is a topic frequently addressed in newspaper headlines. The armed struggles in Crimea, the looming crisis in Taiwan, the Kosovo conflict or the colonial heritage in Mauritius are examples which remind us that issues of self-determination have been, and still are, at the core of many major conflicts.¹ In the aftermath of the Advisory opinion on *Chagos* by the International Court of Justice (ICJ), interpreting self-determination continues to raise many legal and political questions.² The stakes remain very high, as already made clear by the *Kosovo* Opinion.³ Overall, as put by Fernando Tesón, 'no other area of international law is more indeterminate, incoherent and unprincipled than the law of self-determination'.⁴ In taking up the challenge posed by this diagnosis, the objective of this article is to propose a reconstruction of the principle of self-determination from a broader republican perspective. This reconstruction is intended to fulfil a double objective: to account for the current interpretation

¹ For a historical overview, Jörg Fisch, *Das Selbstbestimmungsrecht Der Völker: Die Domestizierung Einer Illusion* (C.H. Beck 2010).

² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Reports 95 [hereafter: *Chagos* Opinion]. See Thomas Burri, 'Two Points for the International Court of Justice in Chagos: Take the Case, All of It – It Is a Human Rights Case' (2019) 55 *Questions of International Law* 93-105; Jan Klabbers, 'Shrinking Self-Determination: The Chagos Opinion of the International Court of Justice' (2019) 8/2 *ESIL Reflections* 1-9.

³ *On the Accordance with International Law of the Unilateral Declaration of Independence in Kosova (Advisory Opinion)* [2010] ICJ Reports 403 § 80. [hereafter: *Kosovo* Opinion]. On the context of Crimea, Brad R. Roth, 'The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention' (2015) 16/3 *German Law Journal* 384-415.

⁴ Fernando R. Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 1.

by the ICJ, and to highlight further potential developments of self-determination as an international legal norm.

The contributions of this article are three-fold, each of them corresponding to the following sections. First, it presents a methodological argument in the form of a reflective equilibrium, which brings together insights from international law and political theory. In this respect, the article represents a timely example of the advantages of more explicitly connecting these two disciplines, their conceptual tools and their epistemic communities.⁵

Second, against the background of this methodological proposition, this article gathers the relevant case law by the ICJ and the most influential interpretations given thereof by legal scholars. It then interprets this legal material from a republican perspective in which self-determination is understood as non-domination. This perspective is based upon the works by political philosopher Philip Pettit. I will show how his approach might be put into dialogue with the approach proposed by political philosopher Iris Marion Young in her work on a relational account of self-determination. I argue that a republican conception is able to address the various situations in which claims to self-determination arise and to establish a relational and political definition of which groups are to count as "peoples". More fundamentally, it also provides a normative framework for the simultaneously structuring and aspirational functions of self-determination in international law.

Third, this republican conception of self-determination is capable of providing guidance in interpreting related challenges in international law, most importantly on secession and minority protection. I will show below that different types of domination might in general justify different mechanisms to secure self-determination. The republican conception outlines how different incentives might transform conflict situations regarding claims to self-determination into institutionalized disagreements.

Overall, this article contributes to the rich literature on self-determination in international law by trying to meet the challenge formulated by Robert

⁵ For the broader theoretical framework at stake here, Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 1-33.

MacCorquodale almost twenty years ago: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework.⁶ In comparison to exclusively philosophical accounts of self-determination, the article takes the law of self-determination seriously and engages with it.⁷ In doing so, it does not ignore the normative ambition to prescribe how current legal interpretations should be changed in order to better fulfil the ideal of self-determination as non-domination.⁸

II. METHODOLOGY

The methodological approach I would like to present takes the form of an instrument for integrating tools and concepts from both public international law and political theory in a reflective movement.⁹ This instrument is broadly inspired by the 'reflective equilibrium' famously coined by political philosopher John Rawls.¹⁰ This instrument aims at describing a process of normative exchanges. A new point of 'equilibrium' is reached when a first state of reflections has been challenged and improved by integrating legal and philosophical elements.¹¹

⁶ Robert Mccorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43/4 *International and Comparative Law Quarterly* 857-85, 857.

⁷ For a purely philosophical account, see e.g. Daniel Philpott, 'In Defense of Self-Determination' (1995) 105 *Ethics* 352-85. Ohlin seems to clearly distinguish between positive law and its foundations in form of natural and moral rights. Jens David Ohlin, 'The Right to Exist and the Right to Resist' in Fernando R. Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 70-93, 71-72.

⁸ For a similar ambition to link legal analysis and political theory on the issue of self-determination, James Summers, *Peoples and International Law* (Martinus Nijhoff 2013). See also Hurst Hannum, 'Rethinking Self-Determination' (1993) 34/1 *Virginia Journal of International Law* 1-59.

⁹ I have used a first version of this tool in the context of justice issues in international trade law. Johan Rochel, 'Intellectual Property and Its Foundations: Using Art. 7 and 8 to Address the Legitimacy of the TRIPS' (2019) 23/1 *The Journal of World Intellectual Property*.

¹⁰ For the original formulation, John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971) 18-22, 46-53.

¹¹ As put by Daniels, 'a reflective equilibrium is the end-point of a deliberative process in which we reflect on and revise our beliefs about an area of inquiry, moral or non-

This concept of reflective equilibrium is used in contrast to a top-down characterisation of the relationship between law and political theory.¹² This equilibrium better crystalizes the mutual and reflective process of normative interactions.¹³ The reflexivity comes from the back-and-forth movement between an initial definition of specific values (such as freedom), the current interpretation of the relevant norms by the ICJ, the normative reconstruction of this interpretation (the republican reading of self-determination) and back again to judicial practice to highlight potential developments in the way self-determination could be interpreted.

For the sake of clarity, three elements of this methodological approach must be explained: the object of the reflective equilibrium, the underlying conception of interpretation, and the place which the republican approach takes in the reflective process.

First, this instrument is especially interesting for the sake of interpreting a specific object, what we could call legal values and principles. What makes these norms specific is not so much their semantic denomination, but rather their nature and their function within a specific legal regime. As to their nature, these norms represent general and foundational legal norms.¹⁴ As

moral'. See Norman Daniels, 'Reflective Equilibrium' in Edward N. Zalta (ed) *Stanford Encyclopedia of Philosophy* (2011) <<https://plato.stanford.edu/archives/sum2020/entries/reflective-equilibrium/>> accessed 25 November 2020.

¹² For the use of bottom-up/top-down, see Kalypso Nicolaidis and Justine Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms' (2003) 1 *Order and Justice in International Relations* 125-55, 128; Samantha Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution?' (2006) 6/2 *Human Rights Law Review* 323-60, 328.

¹³ This on-going process could be said to share important commonalities with the reflective equilibrium. See Daniels (n 11). See also the original formulation in Rawls (n 10) 18-22, 46-53.

¹⁴ For this position, Roberto Guastini, 'Les Principes De Droit En Tant Que Source De Perplexité Théorique' in Sylvie Caudal-Sizaret (ed), *Les Principes En Droit* (Economica 2008) 113-26; Samantha Besson, 'General Principles in International Law - Whose Principles?' in Samantha Besson, Pascal Pichonnaz and Marie-Louise Gächter-Alge (eds), *Les Principes En Droit Européen - Principles in European Law* (Schulthess 2011) 19-65.

general legal norms, they are gradually opposed to more specific legal norms.¹⁵ As explained by Joseph Raz in dealing with principles, these special norms need to be individuated through interpretation and reasoning.¹⁶ In this respect, we will see below how the principle of self-determination is instantiated by the ICJ in specific circumstances. Furthermore, as foundational legal norms, they grasp and express the political and moral values upon which a specific regime is founded.¹⁷ This view explains why legal values and principles represent challenging opportunities and, at the same time, good resources for an exercise of justification.¹⁸ As we will see, self-determination, as a foundational norm, represents such an opportunity for the UN regime and for public international law in general.

Second, the main strength of the proposed methodology is its ability to provide support to the interpretation of these specific legal norms. From a jurisprudential point of view, the idea is to transform what could be described as a fuzzy norm into a *locus* where political theory can contribute to clarity and consistency. As noted by Samantha Besson with respect to human rights law, the idea is to 'theorise the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice'.¹⁹ Concepts and arguments developed by political theory are interesting resources to draw upon as part of this legal interpretation.

¹⁵ This is opposed to the influential Dworkinian position according to which the distinction is qualitative, not only gradual. In a jusnaturalist tradition, the importance of principles is addressed by Judge Cançado Trindade in his Separate opinion to *Chagos* (n 2) para 288 ff.

¹⁶ Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81/5 *The Yale Law Journal* 823-54, 838.

¹⁷ Besson (n 14) 26-28. This echoes the proposal formulated by Molinier to refer to the general principles as 'principes fondateurs.' Joël Molinier, *Les Principes Fondateurs de l'Union Européenne* (Droit Et Justice; PUF 2005).

¹⁸ This point seems to be shared by Tomuschat when he writes that political sciences have contributed to the understanding of the legitimacy of self-determination and secession. Christian Tomuschat, 'Secession and Self-Determination' in Marcelo Gustavo Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 25.

¹⁹ Samantha Besson, 'The Law in Human Rights Theory' (2013) 7 *Zeitschrift für Menschenrechte – Journal for Human Rights* 120-50, 126.

This approach is connected to a growing interest in the theoretical dimension of the process of interpretation in international law.²⁰ As noted by Peat and Windsor, it is essential to be as explicit as possible with regards to the presuppositions one holds when it comes to interpreting legal norms.²¹ Without engaging in depth with this issue, it can be stated that the methodology defended here relies upon a constructive understanding of interpretation.²² This point might be illustrated in drawing upon Marmor's example of the 'hypothetical speaker'.²³ It might be useful to refer to the construction of meaning through interpretation from the perspective of a hypothetical speaker whose identity should be specified (e.g. states, the international community or individuals in international law).

In accordance with the type of hypothetical speaker that one adopts to construct meaning, specific normative presuppositions are infused into the process of interpretation. It might, for instance, be argued that a specific interpretation of self-determination is proposed from the perspective of an impartial hypothetical speaker endorsing broadly liberal values, such as equality and freedom; meanwhile, a different speaker defending state sovereignty at any cost would come to a diverging interpretation. The idea of the 'speaker' is used as conceptual shorthand, to make the ultimate reliance of the interpreter and their interpretation – i.e. the construction of meaning – upon specific normative presuppositions tangible.²⁴ In that sense, the

²⁰ For instance, Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015).

²¹ Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation on Meaning and Metaphor in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 3-33, 9.

²² The approach proposed here shares strong commonalities with James' constructivist political theory of global trade. Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford University Press 2013) 15 ff.

²³ Andrei Marmor, *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1995) 3-28.

²⁴ For instance, see the distinction between originalists and evolutionarists in the context of the WTO, Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 445-74, 452-54.

present contribution stems from the perspective of a republican speaker looking at the legal norm of self-determination. In making the perspective of this speaker explicit, I will draw upon resources coined by political theorists, which will be used in the context of the legal interpretation of self-determination.²⁵

Assuming that interpretation is especially demanding for legal values and principles, different adjudicating bodies might be considered. For the sake of this paper, I will focus on the ICJ case law on self-determination, while taking into account interplays with political bodies such as the United Nations General Assembly (UN-GA). I specifically focus on the ICJ because it plays a key role with respect to the authority of public international law.²⁶ However, two caveats are important. First, this focus is by no means exclusive. A similar methodology might be applied to national case law referring to self-determination. Second, a focus on the ICJ does not imply a single, unitary approach to self-determination. Though I shall focus on the main interpretations adopted by the ICJ, this should not negate the richness and diversity of perspectives defended in converging or diverging opinions.²⁷

Third, the place of the republican reading within the reflective equilibrium shall be articulated. Republicanism is but one possibility for giving meaning to the interpretation chosen by the ICJ. Freeman proposed a useful classification of six different ways to justify self-determination.²⁸ Assuming this classification, the republican approach defended here is a combination of the 'liberal' and 'democratic' positions. It does give fundamental

²⁵ On the use of such resources as part of a legal argument, Jeremy Waldron, 'Dignity, Rank, and Rights' (2009) *The Tanner Lecture on Human Values* 209, 209-10.

²⁶ For the jurisprudential background of the claim, Joseph Raz, 'Why Interpret?' (1996) 9/4 *Ratio Juris* 349, 357.

²⁷ The *Chagos* Opinion (n 2) is a good example of this danger to 'flatten' self-determination when only referring to the general decisions taken. If the general decision of this case is clear and supported by an almost unanimity, the diverging and concurring opinions address several important points, such as the importance given to GA-decisions (Judges Trindade and Robinson) or the idea that the Court has not gone far enough in declaring self-determination in decolonization context *jus cogens* (Judges Sebuntinde and Trindade).

²⁸ Michael Freeman, 'The Right to Self-Determination in International Politics: Six Theories in Search of a Policy' (1999) 25/3 *Review of International Studies* 355-70.

importance to an individual claim to freedom defined as non-domination, and integrates it into a non-dominating institutional setting in which democratic credentials are essential.

But more importantly than claims regarding labels, the methodology I adopt here does not require a claim that republicanism is the "best" interpretative approach. Overall, I shift the focus from a putative "best" interpretation to a plausible and normatively fruitful interpretation. "Plausible" is linked to the capacity of the approach to descriptively apprehend the interpretation given by the ICJ. "Fruitful" should be read together with Buchanan's call for 'moral progressivity'. In his words, the successful implementation of a prescriptive theory shall be synonymous with a 'significant moral improvement over the status quo'.²⁹ The republican approach shall be assessed in light of its capacity to formulate and justify proposals for a renewed interpretation of a specific legal norm.³⁰ Following Sangiovanni, these two elements should be assessed *a posteriori*, i.e. on the basis of the investigation as a whole.³¹ I shall come back to these two requirements in the conclusion of this piece.

III. RECONSTRUCTING THE ICJ'S APPROACH TO SELF-DETERMINATION

Self-determination is one of the key principles of the UN Charter and the international legal order.³² In its latest Opinion on *Chagos*, the ICJ confirmed

²⁹ Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2004) 63.

³⁰ For this general theoretical approach, see Ibid 22 ff; S. Besson, 'Institutionalizing Global Democracy' in Lukas Meyer (ed), *Justice, Legitimacy and Public International Law* (Cambridge University Press 2009) 58-91, 59.

³¹ Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16/2 *Journal of Political Philosophy* 137, 149-52.

³² The principle of self-determination is found in art 1(2) of the UN Charter. The principle of equal rights and self-determination of peoples appears as one of the measures that could strengthen universal peace. Art 55 of the Charter also mentions self-determination. A right of self-determination for peoples is also recognized in the common art 1 of the two International Covenants (1966). For a general overview, see T. Burri and D. Thürer, 'Self-Determination' (2010) *Max Planck Encyclopedia of Public International Law*.

that 'respect for the principle of equal rights and self-determination of peoples is one of the purposes of the United Nations'.³³

According to the reflective equilibrium approach outlined above, I start by providing a working definition of what republicanism as a conception of freedom is about. This working definition shall be used as a resource to explain how the ICJ's interpretation of self-determination might be viewed as republican.

1. Working Definition of Non-Domination

Within the scope of this piece, I will use the term 'domination' with reference to Pettit's seminal approach. An individual is dominated by another individual or entity when the latter has the capacity to interfere on an arbitrary basis with certain important choices that the individual is in a position to make. To "interfere with" means worsening the situation of an individual by affecting his or her ability to consider choices independently, for example by influencing the range of options available, the expected payoffs of these options and/or the actual outcomes of these options.³⁴ For the present argument, three features of the general republican concept of non-domination are important.

As a first feature, republicanism focuses on the threat to freedom that arbitrary interference represents.³⁵ Republican theorists have focused on the

³³ *Chagos* Opinion (n 2) para 146.

³⁴ This is Pettit's classical characterization of a relationship of domination, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997) 52 ff. For a slightly different account, see Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press 2010). For an overview on republican theories in relation to legal problems, see Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 347.

³⁵ For the seminal formulation, see Pettit (n 34) 52 ff. The formulation proposed by Pettit has evolved. In 2008, he writes that 'Interference will be non-arbitrary [...] to the extent that, being checked, it is forced to track the avowed or avowal-ready interests of the interferee; and this, regardless of whether or not those interests are true or real or valid, by some independent moral criterion.' Philip Pettit, 'Republican Liberty: Three Axioms, Four Theorems' in C. Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 102, 117. For the

requirement to promote non-arbitrary interferences, that is, interferences that have to respect certain procedural requirements intended to "force" them to track the relevant interests of the interfeeree. By contrast, freedom can be defined as a function of the sheer number of interferences – according to the motto: "the less the better" – setting aside the modus of these interferences.³⁶ The potential sources of dangers for freedom are manifold, ranging from the state, to private groups (e.g. companies) or other states and international organizations.³⁷

A second feature of the republican reading concerns the robustness of the outlined concept of self-determination.³⁸ Most importantly, the mere capacity to interfere arbitrarily – i.e. to potentially dominate others – is normatively relevant. For domination to occur, there is no requirement for actual arbitrary interference. As in the well-known example of the benevolent dictator, the mere possibility of an arbitrary interference already represents domination.³⁹ Even in the total absence of interference, individuals may be considered to be dominated if they are at the mercy of decisions made by others.⁴⁰ Non-domination calls for individuals to be empowered to be free,

latest book, see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 26 ff.

³⁶ Young opposes self-determination as non-domination to self-determination as 'non-interference'. For her, in the 'non-interference' model, the focus lies on avoiding any kind of interferences, not just arbitrary ones. Iris Marion Young, *Global Challenges: War, Self-Determination and Responsibility for Justice* (Polity Press 2007) ch 2. Similarly, Valentini uses the concept of 'freedom as option-availability' to grasp the core of the non-interference model. See: Laura Valentini, *Justice in a Globalized World: A Normative Framework* (Oxford University Press 2011) 157 ff.

³⁷ Philip Pettit, 'A Republican Law of Peoples' (2010) 9/1 *European Journal of Political Theory* 70-94.

³⁸ For a similar focus, see Arthur Ripstein, 'Authority and Coercion' (2004) 32/1 *Philosophy & Public Affairs* 2-35; Christian List, 'Republican Freedom and the Rule of Law' (2006) 5/2 *Politics, Philosophy & Economics* 201-20.

³⁹ Pettit (n 34) 73 ff; Richard Bellamy, 'Republicanism: Non Domination and the Free State' in G. Delanty and S. P. Turner (eds), *Routledge Handbook of Contemporary Social and Political Theory* (Routledge 2011) 130-39, 132.

⁴⁰ Young (n 36) 64. Young uses the example of the Gaza Strip being put at the mercy of Israel and therefore being subjected to domination. The arbitrariness condition is fulfilled insofar as the Israeli state does not have to track the relevant interests of the Palestinians. It can be said to act in a discretionary manner.

freedom being understood as autonomy or, as Laura Valentini writes, as 'independence'.⁴¹ This point explains why each citizen in a political community should be empowered to be free, but also why political communities need to be protected in their collective freedom. Following Cécile Laborde, the republican ideal calls for free citizens as members of a self-determined political community.⁴²

A third feature concerns the particular suitability of this definition of non-domination in the context of permanent political, social, and economic interactions.⁴³ The importance of the secured enjoyment of freedom defined as non-domination is particularly attractive as a relational account, that is, an account that considers the multiple patterns of influences that exist among individuals and between political communities.⁴⁴ It can also acknowledge the particular risks attached to power imbalances among different actors and the sometimes diffuse risks these relations can represent in terms of (potential) arbitrary interferences. I shall come back to this point when attempting to define the type of groups considered as "peoples".

In light of this working definition, my main descriptive hypothesis is that the ICJ's approach on self-determination might be interpreted from a republican perspective. This concerns first the general approach chosen by the ICJ, second the relational account of a "people", and third the functions which self-determination fulfils in public international law.

2. Describing the ICJ's General Approach to Self-Determination

The general approach taken by the ICJ on self-determination can be structured as a two-pillared approach. On the one hand, the Court has tried to interpret the principle of self-determination as containing the normative core of self-determination. On the other hand, drawing from this normative

⁴¹ Valentini (n 36) 162. As Halldenus put it, the specificity of this republican model lies in its 'modal' aspect, namely the 'claimable and secure enjoyment' of conditions of freedom. See: Lena Halldenus, 'Building Blocks of a Republican Cosmopolitanism' (2010) 9/1 *European Journal of Political Theory* 12-13, 20.

⁴² C. Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9/1 *European Journal of Political Theory* 48-69, 62.

⁴³ This point was already taken by Young as key presupposition, Young (n 36) 65.

⁴⁴ *Ibid* 39-58.

spring, it has identified several circumstances in which there is a substantial right to self-determination that takes the form of a customary rule. This reconstruction is inspired by the works by Antonio Cassese, Jan Klabbers and Matthew Saul.⁴⁵ This two-pillared approach is opposed to doctrinal contributions trying to isolate a single right to self-determination.⁴⁶ My contribution is to briefly recall the main features of this two-pillared approach and to interpret them from a republican perspective. On this basis, I will try to explain how we should make sense of the *Chagos* Opinion and its ambition to largely limit self-determination to the context of decolonization.⁴⁷

In *Western Sahara*, the Court formulated the 'principle' of self-determination as the 'need to pay regard to the free and genuine expression of the will of the people concerned'.⁴⁸ According to Cassese, this principle can be interpreted as the normative 'essence' of self-determination.⁴⁹ This essence of self-determination must be understood as the requirement to adhere to a procedure, which sets out a standard for decisions affecting the destiny of a people.⁵⁰ This finding represents a common theme across the case law developed by the ICJ. In the *Chagos* Opinion, the Court writes that self-

⁴⁵ For a similar interpretation, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures; Cambridge University Press 1995); Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28/1 Human Rights Quarterly 186-206, 191; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11/4 Human Rights Law Review 609-44.

⁴⁶ For references and criticisms, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002) 30.

⁴⁷ For this reading, see Klabbers (n 2).

⁴⁸ *Western Sahara (Advisory Opinion)* [1975] ICJ Reports 12 [hereafter: *Western Sahara* opinion] para 59. The definition is also the last sentence of the advisory opinion (para 162); Cassese (n 45) 317-20.

⁴⁹ Raič speaks of the 'raison d'être' of self-determination and defines it as 'the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity or individuality (the self) of a collectivity, that is, of a people [...]'. David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 220 ff.

⁵⁰ For a similar analysis, see Klabbers (n 45) 11. See also the concurring position by Burri and Thürer (n 32) para 26 ff.

determination might be achieved through different options, but that it 'must be the expression of the free and genuine will of the people concerned'.⁵¹ The Court recalls that, if Principle VI of General Assembly resolution 1541 lists three general options for realizing self-determination – emergence of a sovereign state, free association with a sovereign state, and integration into a sovereign state – Principle VII of the same resolution clearly emphasises the procedural quality required for the underlying decision.⁵² This procedural quality is claimed to be the normative core of the principle of self-determination.

In addition to this principle of self-determination, the Court has recognised the specificity of certain circumstances and their implications for self-determination.⁵³ In specifying these implications, the Court has identified specific rights to self-determination in the form of customary rules. Since the recognition of its *erga omnes* character in *East Timor*⁵⁴, the Court has also specified the implications of a lack of respect for self-determination both for the state directly at stake, but also for all other states.⁵⁵

The first customary rule recognises the right of colonised peoples to external self-determination, i.e. the possibility to freely choose one's international status, from independent statehood to an association with existing state or intrastate autonomy.⁵⁶ Authoritative statements on the question of self-determination for colonial people were rendered by the ICJ in two early

⁵¹ *Chagos Opinion* (n 2) para 157.

⁵² *Ibid* para 157; GA Resolution Defining the Three Options for Self-Determination 1541 (XV) 1960 (1961) UN Doc A/RES/1541.

⁵³ I focus on the notion of 'circumstances' in order to clarify that the development of the law of self-determination has always been very context-dependent. In a similar sense, Burri and Thürer speak of 'instances'.

⁵⁴ *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Reports 90, para 29.

⁵⁵ On the consequences, see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136 [hereafter: *Wall opinion*], para 159.

⁵⁶ GA Resolution Defining the Three Options for Self-Determination 1541 (XV), 1960 (1961) UN Doc A/RES/1541.

advisory opinions (*Namibia* and *Western Sahara*⁵⁷) and reinforced by several UN Declarations on the matter.⁵⁸

The 2019 *Chagos* Opinion reasserts this ambition to bring colonialism to an end. The Opinion is limited to the questions raised by the UN-GA and clearly responds to these questions by reaffirming the 1960 Declaration of Independence to Colonial Countries and Peoples. On the one hand, this clear focus might be read as an attempt to limit self-determination to the colonial context.⁵⁹ On the other hand, the references to decolonization might be interpreted as a sign of caution by the Court in light of potential misuses of self-determination, but not as an exclusive focus. In that sense, a short sentence in the Opinion might be interpreted as brief reference to the other circumstances of self-determination: 'The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application.'⁶⁰ This interpretation is in line with the argument to come. The broad scope of application might refer to the further customary rules we will address below. Furthermore, the explicit reference to self-determination as a human right raises the question of the function of self-determination in international law.

The second customary rule addresses the people who live under foreign military occupation. In distinguishing this issue from the colonial question, emphasis is put on the possibility of exploitation, domination and subjugation outside of the colonial context. This provision is, however, limited to specific cases of exploitation and domination. It does not encompass economic exploitation or ideological domination, but rather covers 'those situations in which any one power *dominates* the people of a *foreign territory* by recourse to *force*'.⁶¹ The wall constructed by Israel and

⁵⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Reports 16 [hereafter: *Namibia* opinion], para 52-53; *Western Sahara* opinion (n 48) para 162.

⁵⁸ Most importantly, as clearly stated by the ICJ in its *Chagos* opinion, see the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Resolution 1514 (XV) 1960 (1961) UN Doc A/4684.

⁵⁹ For this interpretation, see Klabbers (n 2).

⁶⁰ *Chagos Opinion* (n 2) para 144. On this point, see Burri (n 2).

⁶¹ Original emphasis, Cassese (n 45) 99.

addressed in the *Wall* Opinion by the ICJ might be considered an example of this form of domination by recourse to force. In its Advisory Opinion, the ICJ considered that the route of the wall chosen by Israel 'severely impedes the exercise by the Palestinian people of its right to self-determination'.⁶² The Court went on to specify the legal consequences for Israel but also, because self-determination has an *erga omnes* character, for other states as well.⁶³

Several commentators argue that a third customary rule highlighting a people's claim to internal self-determination should be recognised.⁶⁴ According to Cassese, this rule runs as follows: racial groups living within a sovereign state who are denied equal access to government have the right to internal self-determination, meaning that they should have equal access to representation within governmental institutions.⁶⁵ This customary rule takes root in the Declaration Concerning Friendly Relations and Co-Operation and in subsequent practice of states.⁶⁶ The 'saving clause' of paragraph 7 explicitly states that the government of a state should represent 'the whole people belonging to the territory without distinction of race, creed or colour'. Translated into a positive formulation, this provision stipulates that the government is representative if it grants equal access to its governmental institutions and if it does not exclude groups on the grounds of race, creed or colour.⁶⁷ This third rule should be interpreted in light of profoundly racist regimes, such as the Apartheid regime in South Africa.⁶⁸

⁶² *Wall* Opinion (n 55) para 122.

⁶³ *Ibid* 148 ff.

⁶⁴ For complete references, Cassese (n 45) 108-26; Raič (n 49) 252.

⁶⁵ Cassese (n 45) 108-26.

⁶⁶ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 26/25 (XXV) (adopted 24th October 1970).

⁶⁷ For references to the distinctions, see Raič (n 49) 251-52.

⁶⁸ Sterio proposes to consider the legal action of Georgia against Russia on the issues in South Ossetia and Abkhazia. Although the action was formally based upon the International Convention on Elimination of all Forms of Racial Discrimination (Georgia arguing that Russia has not respected its legal engagements under the Convention), the issue is relevant to self-determination in that it highlights the racial justification for a potential claim to internal self-determination. After having

This third rule could be expanded by linking it to the protection of minorities, especially to recent developments regarding the rights of indigenous peoples. As explained by Anaya, indigenous people are ideal candidates for the right to internal self-determination in that they form a community that faces specific challenges within a broader legal and social context.⁶⁹ Although their right to self-determination might not amount to a right to secede, it could justify important intrastate mechanisms of autonomy or prerogatives of co-decision.⁷⁰ This interpretation can be supported by decisions made by the UN-GA, most importantly the 2007 Declaration on the Rights of Indigenous Peoples.⁷¹ This Declaration may be seen as a landmark in the discussion on self-determination, not least because of the relevance of the UN-GA Declarations in the crystallisation of interpretation patterns and the emergence of new customary rules.⁷²

3. *Reconstructing the ICJ's Approach*

On the basis of this brief overview of the two-pillared approach, we can now turn to the hypothesis according to which the republican approach outlined above can be used to reconstruct the ICJ's general approach on self-determination. One of the important challenges is to explain the tightened approach which the Court seems to take in its *Chagos* Opinion.

issued an order indicating provisional measures in 2008, the ICJ has considered in 2011 that it has no jurisdiction in this case. For this argument, see Milena Sterio, *The Right to Self-Determination under International Law: "Selfistans", Secession, and the Rule of the Great Powers* (Routledge 2013) 66-67.

⁶⁹ See *infra*. For general overview, S. James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004).

⁷⁰ For a similar point, Joshua Castellino, 'International Law and Self-Determination: Peoples, Minorities, and Indigenous Peoples' in Christian Walter, Antje Von Unger-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University 2014) 39 ff.

⁷¹ Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2007) UN Doc A/Res 61/295. It should be noted that four important states originally rejected the Declaration with respect to the issue of indigenous peoples (Australia, Canada, New Zealand and the United States).

⁷² For a general overview, B. Kingsbury, 'Indigenous Peoples' (2011) *Max Planck Encyclopedia of Public International Law*.

To keep the same structure, let us first focus on the cases related to colonial power, in other words, the external dimension. They display the classical case of political domination. Under the assumption of the existence of a bounded community, it is relatively uncontroversial to argue that the inhabitants are dominated (in the sense described by Pettit) and have no say in the political arrangements imposed on them. Colonial powers have the capacity to interfere arbitrarily with the inhabitants of the colony. It is by no means required that the colonial power tracks the interests of the inhabitants in question and take them into account. In this first case, the procedural credentials of self-determination clearly come to light. The 'need to pay regard to the free and genuine expression of the will of the people concerned' identified by the ICJ might be interpreted as crucial procedural protection to secure non-domination. If this general protection is provided, we might assume that inhabitants of a given territory have the capacity to make their interests heard and to force public authorities to take them into account.

Interestingly, the *Chagos* Opinion addresses the validity of the 1965 Lancaster House Agreement in which Mauritius ceded the relevant territory to the United Kingdom. The ICJ makes it clear that the quality of consent of such an "agreement" must be scrutinized. It states that the "consent" given by the dominated to the dominating entity was not sufficient and concludes that the 'detachment was not based on the free and genuine expression of the will of the people concerned'.⁷³

As a second scenario, representing the internal dimension, a sub-group within a broader community might be put under domination. Cases such as the Apartheid regime or the situation of indigenous people are examples in which an important part of the population is generally excluded from the decision-making process about common institutions or is excluded from specific questions. In the proposed republican framing, an important part of the population is here under domination. In a similar vein, the claim formulated by Kosovo – as an identified community within a broader political entity – can also be explained by this framing. Individuals from a specific territorial region, who share specific political challenges and in their

⁷³ *Chagos* Opinion (n 2) para 172.

majority have the political ambition to form their own state, were not respected as equal citizens and were persistently dominated.

It is important to underline that non-domination should be conceived against the background of the equal moral worth of every individual.⁷⁴ Self-determination as non-domination is not compatible with the existence of a benevolent master. Even if black people during the Apartheid were treated well (in a 'benevolent master' scenario), the domination would remain. The white minority would have the possibility to change its policy and to arbitrarily interfere with black people's interests, without being required to track relevant interests. The requirement to respect the core procedural principle of self-determination should rather be understood as conditions for political coexistence as free and equal human beings, all living in conditions where domination is prevented from happening.

Drawing upon our previous discussion of the third customary rule, there seems to be different levels of domination at stake. Official and open racial domination (e.g. Apartheid) might be considered different to the more institutional domination exercised upon indigenous people or a minority like in the situation of Kosovo. In general, despite their differences, these cases all display – albeit to different degrees – patterns of domination, which are considered relevant for the international law on self-determination. I will show below that different types of domination might justify different mechanisms to secure self-determination.

Interestingly, the three customary rules provide different answers to the question of which kind of group counts as a "people".⁷⁵ If one focuses upon the different cases of decolonization, identification of the potential "peoples" would be relatively easy. But I have argued along the two-pillared approach that other circumstances remain relevant, thereby raising the question of whether this definition is accurate. Specifically, challenges to this definition might come from two distinct directions. On the one hand, the

⁷⁴ Similarly, S. James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Chartres and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 184-99, 188.

⁷⁵ For further references on this question, see Saul (n 45) 620 ff; Tomuschat (n 18) 23 ff; Tesón (n 4) 3 ff.

situation of indigenous peoples highlights the requirement to further refine the account of what the term "people" encompasses. At first glance, indigenous peoples do not appear to be fully congruent with situations of colonial domination. On the other hand, the situation of geographically more or less dispersed groups of individuals claiming self-determination also require a better definition of "people". In the next section, I shall take up this challenge in presenting a relational and political account of "people". As outlined above, it is a strength of republicanism to be able to take into account deeply entrenched economic, social, and political relations among individuals and communities. Indeed, these relations are often triggers for domination and need to be addressed as such.

4. A Relational and Political Conception of the "People"

Addressing the question of the "people" from a republican perspective first requires the disentanglement of three distinct issues: what it means to be a group which is able to be a right-holder; what justifies the recognition of one of these groups as having a right to self-determination; and what a group with a right to self-determination might rightly claim under specific conditions. The first issue has been the object of numerous contributions on the matter of collective agency.⁷⁶ For the purpose of this article we can take an ecumenical view of these contributions. It seems sufficient to say that a group must reach a threshold of unity and identity and possess some sense of agency if it is to be potentially capable of bearing rights. There should be common ground on what is needed for a group to qualify as potential right-holders. The main issues for this contribution are the second and third questions raised, namely the justification of a specific group having a right to self-determination (among all the potential groups that qualify as right-holders), and the conditions by which this group can activate its right to self-

⁷⁶ See e.g. the distinction proposed by Jones between the 'corporate' and the 'collective' identities of groups. Peter Jones, 'Group Rights' in Edward N. Zalta (ed) *Stanford Encyclopedia of Philosophy* (2008) <<https://plato.stanford.edu/archives/sum2016/entries/rights-group/>> accessed 25 November 2020. See also Anna Moltchanova, 'Collective Agents and Group Moral Rights' (2009) 17/1 *Journal of Political Philosophy* 23-46.

determination (namely, to investigate under which conditions this group has this right and what this right amounts to).

In addressing the question of justification, I would like to propose a relational and political conception by drawing upon the insights developed by Young.⁷⁷ In brief, my hypothesis is that a "people" in the relevant sense for matters of self-determination is composed by individuals (a) facing common political challenges and conflicts and (b) considering themselves as members of an identifiable political group. The first criterion gives meaning to the relational account by highlighting that individuals form a group in the relevant sense if they share a common reality.⁷⁸ This common reality implies common challenges and conflicts. A similar idea is at the core of the 'territorial' conception defended by Waldron.⁷⁹ This communality bears upon the relevance granted to the deep and permanent interactions between individuals and the requirement to establish common political institutions and legal mechanisms for addressing potential conflicts.

However, it could be difficult for Waldron to account for the case of a group claiming self-determination that is not territorially organized, for example a geographically dispersed minority within a state or across distinct states, such as the Kurds or the Roma. This tension could be solved by considering the geographical proximity advanced by Waldron as a specific, but not exclusive indication of the more general criterion of shared reality and challenges. Individuals living as neighbours have no choice but to face common political challenges and conflicts, but this does not prevent non-geographically concentrated groups from facing shared political challenges.

The second criterion focuses on the political identity of the group by asking whether individuals see themselves as part of a specific political group. Individuals identify with this political group by recognising that they, like the other members, face shared challenges and conflicts. I do not claim that this self-perception is purely voluntary. As rightly noted by Young in discussing

⁷⁷ Young (n 36) 41-42.

⁷⁸ Ohlin seems to go further when he considers the criterion of 'some interrelations as a functioning society'. Ohlin (n7) 79-80.

⁷⁹ Jeremy Waldron, 'Two Conceptions of Self-Determination' in Samantha Besson and José Luis Martí (eds), *The Philosophy of International Law* (Oxford University Press 2010) 397-413, 411.

the feature of 'throwness', we are 'thrown' into specific identities, sometimes against our will.⁸⁰ This self-perception as a member of a political group is often grounded in the common experience of situations of domination, for example by minorities such as the Roma who experience discrimination.

The political conception is clearly different from the 'identity' conception identified by Waldron.⁸¹ In the identity conception, the value of self-determination relies upon an ethno-cultural homogeneous people claiming political control over its political institutions. For the political conception, common language or religion is an explanation for the common experiences of facing political challenges (such as discrimination on ground of religion) and an explanation for self-perception as members of this political group. However, these common languages or religions are not necessary conditions as such.⁸²

Among all potential groups fulfilling the relational and political conception, groups in a situation of domination could activate their right to self-determination as a means of correcting an unacceptable situation. On the basis of my definition of domination, I am able to account for the various situations identified in the ICJ's approach: colonial domination, military occupation, systematic and persistent patterns of racial discrimination, but also its unsatisfactory dealing with the situation of indigenous people and other important minorities.

Situations of domination form the requirement for the right to self-determination to be activated by a specific people. This analysis might be

⁸⁰ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 46.

⁸¹ Waldron (n 79) 401 ff. For this argument, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995); Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87/9 *Journal of Philosophy* 439-61.

⁸² The political conception rather echoes the work by Moore in her political theory of territory. For Moore, three conditions are to be met in the definition of a people for matters of self-determination. A people should be in a position of being individuated (it should be recognizable as such), it should be able to exist in a certain period of time without losing its existence, and its members should be able to change over time while still remaining the same people. Margaret Moore, *A Political Theory of Territory* (Oxford University Press 2015) 54.

refined using the distinction proposed in the republican tradition between the 'extent' and the 'intensity' of domination.⁸³ Domination is at its peak when a group of individuals is dominated in every important aspect of their life (extent), without any possibility of avoiding arbitrary interferences (intensity). As to the 'extent', the situation of indigenous peoples reflects specific areas of domination, which have been recognized by the international community in the UN Declaration on the Rights of Indigenous Peoples. The 5th paragraph of the Preamble lists, inter alia, the colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. The situation might be made worse by changing the 'intensity' of domination, for instance through the suppression of legal or administrative protection mechanisms which force the majority to track the interests of indigenous peoples. As explained above when referring to the ICJ's case law, there is no single form of self-determination, but a set of mechanisms meant to ensure non-domination.⁸⁴ There are several institutional options to make sure that people can freely determine their political status and freely pursue their economic, social and cultural development.

5. The Court's Approach and Functions of Self-Determination

The previous sections have interpreted the two-pillared approach and the definition of a "people" from a republican perspective. This section shifts the focus towards the function which self-determination fulfils in public international law.

Through the lens of the two-pillared strategy, the Court's decisions might be reconstructed to preserve the normative flexibility of the principle of self-determination. The Court first secured an important interpretative margin

⁸³ Pettit (n 34) 58. The intensity of domination depends on 'how arbitrary the interference can be, how easy it is for the dominator to interfere, and how severe are the measures that can be taken.' This is what I grasped by the concept of 'modus of interaction'. By contrast, the extent of domination depends on 'which areas of a person's life are subject to arbitrary interference, and the range of their options'.

⁸⁴ Anaya (n 74) 189. This shall also allow respecting art 46 of the UN Declaration on the Rights of Indigenous Peoples.

for itself in order to react to the evolution of self-determination. Second, the Court consequently tried to link the specification of what the principle would require to the identification of (emerging) customary rules. As a general matter, D'Argent notes that the Court is very cautious in referring to principles that it cannot directly link to customary law.⁸⁵

This dual character of self-determination can be highlighted from the perspective of distinct bodies of international law and can be interpreted from a republican perspective.⁸⁶ On the one hand, self-determination as general principle of the international legal order is understood by the Court as a foundational structuring norm. Like other general norms, it represents a key element of the normative architecture of the international legal system.⁸⁷ The structuring function of self-determination is related to the classical body of the international law of states. It offers a normative rationale for the existence of states and their claims to sovereignty.⁸⁸ The procedural core of self-determination is interpreted as a set of mechanisms used by inhabitants to take back control over their political autonomy. In these cases, the function of self-determination is to re-align the legitimate bearers of popular sovereignty with the political institutions of their state. Self-determination represents the foundation of the republican 'free state'.

On the other hand, the Court has used self-determination as a norm with strong aspirational components. This was highlighted in the decolonisation cases,⁸⁹ but also in the effects that the norm exercises on the development of

⁸⁵ Pierre D'argent, 'Les Principes Généraux À La Cour Internationale De Justice' in Samantha Besson and P. Pichonnaz (eds), *Les Principes En Droit Européen / Principles in European Law* (Schulthess 2011) 107-20, 119. On the issue of self-determination, Burri and Thürer (n 32); James Crawford, 'The General Assembly, the International Court and Self Determination' in Vaughan Lowe (ed), *Fifty Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 586-605.

⁸⁶ Anaya (n 74) 185 ff.

⁸⁷ For this reflection around the function of self-determination, Waldron (n 79) 412.

⁸⁸ Burri and Thürer (n 32) para 31 ff.

⁸⁹ As elucidated by Burri, self-determination is 'a trigger that initiates and a catalyst that facilitates a process.' Thomas Burri, *Models of Autonomy: Case Studies of Minority Regimes in Hungary and French Polynesia* (Schulthess 2010) 14.

specific parts of international law (such as the law on indigenous people).⁹⁰ The more aspirational function can be framed by reference to the conceptual body of human rights law. Analytically, this function shifts the focus from the state-level to the claims held by a group of individuals to protect their capacity to decide autonomously upon specific issues (such as their economic, social and cultural developments).⁹¹

Historically, this function can be found in the context of decolonisation. For instance, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples clearly links self-determination and the protection of human rights (Articles 1-2). When dealing with intrastate mechanisms of autonomy, the Court reinforced this conceptual linkage between self-determination and human rights. In this context, Burri and Thürer speak of a 'new constitutional dimension' of self-determination by focusing on intrastate mechanisms of political arbitration.⁹² In the *Chagos* Opinion, the Court has recalled that the right to self-determination is a 'fundamental human right'.⁹³

Two aspirational dimensions converge: the justification of self-determination as a human right and its justification of diverse institutional mechanisms securing self-determination, shifting away from a statehood-or-nothing argument. These two aspirational dimensions enable the possibility to justify claims to intrastate autonomy based upon the international law of self-determination understood as the joint exercise of human rights by a group of individuals. In the words of Allen Buchanan, claims to self-determination should be regarded as 'backups for failures to protect individual human rights [...], not as something to which groups have a right simply because they are nations or partake of a distinct culture or are distinct

⁹⁰ For the latter point, Burri and Thürer (n 32) para 30-33. See for instance the ICJ in the *Kosovo* Opinion (n 3) loudly thinking about conceiving the principle of self-determination as giving rise to a right to secede in a specific constellation (para 82).

⁹¹ Reus-Smit has argued that the decolonisation context is the moment in which sovereignty and human rights appear as the two normative elements of a single, contradictory, normative regime. Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27/4 *Review of International Studies* 519-38.

⁹² Burri and Thürer (n 32) para 33 ff.

⁹³ *Chagos* Opinion (n 2) para 144.

"peoples".⁹⁴ As interpreted by Anaya, they are 'rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence'.⁹⁵

When interpreting self-determination, the Court must reconcile these two poles. As expressed by Macklem, self-determination is always at the core of a movement that reinforces the normative foundations for the current state-based structure of international law and challenges these same foundations, most importantly in terms of human rights.⁹⁶ By finding a pragmatic way between these two normative poles, the Court underscores that self-determination has to be considered as an important value among other values which are anchored within international law.⁹⁷ For instance, the Court has always been very reluctant to change existing territorial demarcations, even though an important number of them were determined in the aftermath of grave injustices.⁹⁸ In the balance of sometimes conflicting principles, overall stability has systematically been deemed as crucial.⁹⁹

The normative pressure exercised by self-determination recalls that, ideally, doctrines on sovereignty and human rights precepts, including those associated with self-determination, work in tandem to promote a stable and peaceful world. If not, self-determination as non-domination could be used as a normative device to arbitrate diverging claims. In that sense, one of the key contributions of the republican approach is to make clear that the two functions of self-determination (structuring and aspirational) should be

⁹⁴ Buchanan (n 29) 405.

⁹⁵ Anaya (n 74) 186.

⁹⁶ Patrick Macklem, 'Self-Determination in Three Movements' in Fernando R. Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press 2016) 94-119.

⁹⁷ Waldron (n 79) 399.

⁹⁸ Being arguably a proxy for the safeguard of stability and peace, the principle of territorial integrity and its colonial 'emanation,' the principle of *uti possidetis*, best display the tensions between self-determination and other fundamental objectives pursued by international law. See Giuseppe Nesi, 'Uti Possidetis Doctrine' (2001) *Max Planck Encyclopedia of Public International Law*; Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial "National" Identity* (M. Nijhoff 2000).

⁹⁹ For a similar thesis, see Mccorquodale (n 6) 879 ff.

interpreted as parts of a single conceptual framing, which sometimes justifies diverging claims, depending on the exact characterization of domination in a specific situation. We shall come back to this point in the next section.

6. Criticisms: Circularity and Insufficiency of Non-Domination

In the first stage of the reflective equilibrium, the republican conception of self-determination has been shown to be useful for reconstructing the case law developed by the ICJ, addressing the definition of a "people" and accounting for the two functions of self-determination in international law (structuring and aspirational). Taken together, these three sections outline a general conception of self-determination as currently interpreted by the ICJ. They give substance to the descriptive hypothesis formulated above. They represent the first element of an answer to the challenge formulated by MacCorquodale: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework.

Before concluding this section and shifting to the perspectives offered by this republican conception, I shall consider two lines of criticism. The objective is not to discuss at length the various criticisms raised towards republicanism in general, but to focus on the relevant ones in the context of self-determination. The first is derived from Jacob Levy who claims that the republican argument on self-determination is circular.¹⁰⁰ He illustrates this danger by imagining a disputed case. In a dispute, who is to decide if the specific matter must be settled by either the people alone (falling within its prerogatives of self-government) or through negotiations? There are two difficulties here. First of all, the issue of which legitimate body is to decide upon this question is far from easy to settle. Second, even if parties can find such a legitimate body, the fact that this body has to decide whether the matter falls within the power of the people or whether it has to be discussed within the cooperative framework is in fact already relevant to the core of the dispute itself.

¹⁰⁰ Jacob T. Levy, 'Self-Determination, Non-Domination, and Federalism' (2008) 23/3 *Hypatia* 60-78, 70 ff.

This important line of criticism is mainly directed towards the consideration of non-domination as a norm against which all questions could be addressed. This is not the case, as correctly highlighted by Levy when he focuses on non-domination as a jurisdictional rule. Non-domination should be considered as a political ideal, which we could refer to when assessing and justifying institutional mechanisms.¹⁰¹ For the sake of the present argument, non-domination is one of the relevant ideals used to account for the ICJ's interpretation of self-determination. The ideal of non-domination should guide the creation of a non-dominating environment. In that sense, it inspires a specific interpretation. But it might also inspire an institutional mechanism, for instance the establishment of an independent body having the last word on potential disputes, in line with Levy's focus.

The second line of criticism can be found in Patchen Markell's account of the 'insufficiency of non-domination'.¹⁰² According to him, non-domination alone is not sufficient to account for distinct kinds of threats and should be complemented by the notion of 'usurpation'. Contrary to Pettit, he argues that we shall not exclusively understand agency as control (and the corresponding focus on the requirement to prevent arbitrary interferences), but that we should broaden our understanding and also entail involvement (and the corresponding ambition to prevent usurpation).¹⁰³

For my purposes, the interest of the criticism pushed by Markell is to highlight the possibility of situations in which non-arbitrary powers play an important role. These situations are normatively speaking not covered by a republican ideal exclusively focused on securing non-domination. The main reply to this criticism would be that, if such situations were to happen, my account of self-determination would allow for adding the idea of involvement and usurpation to the normative corpus of non-domination. There is *prima facie* no strict incompatibility between these values.¹⁰⁴

¹⁰¹ For this response, see Ibid 74-76.

¹⁰² Patchen Markell, 'The Insufficiency of Non-Domination' (2008) 36/1 Political Theory 9-36.

¹⁰³ Ibid 12.

¹⁰⁴ This seems to be the line of reply favoured by Pettit, arguing that non-domination is 'not the only value in politics', but it 'serves a gateway role'. Pettit (n 35) 127.

This strategy of integration is especially clear when addressing the issue of democracy.¹⁰⁵ If, as claimed by Markell, Pettit's democracy is exclusively instrumental in securing conditions of non-domination – by a mix of election and contestation, forcing the state to take the relevant interests of its citizens into account – I could add an inherent value of democracy to my account. As formulated by the ICJ as a procedural core, self-determination would then be about the instrument of giving a people the means to decide for itself and together with the parties with which it interacts (thereby preventing domination), *and* about the inherent value of involvement by the individuals who compose a people. Although I shall not try to make the case for this more substantial value of self-determination as preventing usurpation by securing involvement, it is sufficient to note that this argument can be integrated into my conception of self-determination as non-domination. As claimed by Markell,¹⁰⁶ and echoing our former discussion of Levy's criticism, non-domination is not seen as an exclusive political ideal.

IV. REFORMING INTERNATIONAL LAW OF SELF-DETERMINATION

The start of this section marks a new stage for the reflective equilibrium. This section shifts the focus towards a more prescriptive stance on potential interpretation of self-determination. Two main claims derived from the republican conception are defended. First, this conception offers a sound justification for the 'isolate and proliferate' strategy for achieving self-determination conceived by Buchanan. It also represents a promising basis from which to conceptualize and rethink the links between self-determination and two related regimes: secession and minority protection.

1. Realizing Self-Determination: Isolate and Proliferate

Self-determination as non-domination offers a cogent justification for Buchanan's 'isolate and proliferate' strategy.¹⁰⁷ On the one side, we 'proliferate' institutional mechanisms to achieve non-domination. On the other, we 'isolate' cases where self-determination should not be attained through the typical mechanisms which secure non-domination but,

¹⁰⁵ Markell (n 103) 28 ff.

¹⁰⁶ Ibid 31.

¹⁰⁷ Buchanan (n 29) 401-03.

exceptionally, through a secession. The republican contribution offers a general justification for this strategy, thereby building upon former reflections on the different functions and different bodies of law touched upon by self-determination.

As to the 'proliferation' part, the challenge is to secure non-domination through mechanisms of intrastate autonomy. This point recalls that freedom as non-domination must be conceived within the limits of respect for and cooperation with other entities with whom it interacts and stands in relation.¹⁰⁸ In this 'proliferation' strategy, the republican approach calls for a shift from the members of a political entity who claim self-determination towards a normative environment in which all entities arbitrate their claims to self-determination. In Young's words, 'claims to self-determination are better understood as a quest for an institutional context of non-domination'.¹⁰⁹ Young opposes a model of non-domination and a model of non-interference. She defines non-interference in the following way:

In this model, self-determination means that a people or government has the authority to exercise complete control over what goes on inside its jurisdiction, and no outside agent has the right to make claims upon or interfere with what the self-determining agent does.¹¹⁰

To conceive the multiplicity of those possible institutional arrangements, an 'unbundling' strategy is required.¹¹¹ Underlining this point, Young speaks of 'federalism' as 'the general name for governance arrangements between self-governing entities in which they participate together in such cooperative regulation'.¹¹² Overall, depending on the circumstances, self-determination as non-domination therefore leads to different federalist mechanisms

¹⁰⁸ Young (n 36) 65.

¹⁰⁹ Ibid 59.

¹¹⁰ Ibid 45.

¹¹¹ Ibid 67.

¹¹² Iris Marion Young, 'Self-Determination as Non-Domination' (2005) 5/2 *Ethnicities* 139-59, 149. Burri and Thürer propose to interpret the creation of the Swiss canton Jura in the late 20th century as example of the federalist potential of self-determination. Burri and Thürer (n 32) para 38.

guaranteeing people's autonomy.¹¹³ Among many authors, Burri has analysed and presented a number of institutionalised mechanisms.¹¹⁴

The 'isolate' component of Buchanan's 'isolate and proliferate' strategy pertains to the issue of direct secession. Thanks to its relational account of a people and its claim to a non-dominating institutional environment, the republican conception offers a justification for what has been discussed in the literature under the heading of 'remedial secession'.¹¹⁵ In brief, when all other options have failed and the members of a people are dominated in a particularly grave manner, international law should ensure a right to non-domination, which could take the form of secession.¹¹⁶ The model of self-determination as non-domination considers secession as *ultima ratio* in two dimensions: the fulfilment of strict criteria that delimit a situation of emergency and the exhaustion of all other potential measures meant to secure non-domination.

On the first point, the right to secession depends upon a threshold of particularly grave patterns of domination. The criteria discussed in the literature can be integrated into the republican conception. For instance, Buchanan identifies three types of situations in which secession should be allowed: unjust taking of the territory of a legitimate state, large-scale and persistent human rights violations to members of the seceding group, and major and persisting violations of intrastate autonomy agreements by the

¹¹³ Buchanan (n 29) 401-24. Similarly, Castellino identifies five model of political self-determination, Castellino (n 71) 40-41.

¹¹⁴ For a comprehensive discussion and practical examples, see Burri (n 90).

¹¹⁵ Burri and Thürer (n 32) para 41-45; Tomuschat (n 18) 38 ff. For a similar claim (albeit not defended upon non-domination), see Buchanan (n 29); Raič (n 49). For critical analysis, Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6/1 *St Antony's International Review* 37-56; Antonello Tancredi, 'A Normative 'Due Process' in the Creation of States through Secession' in Marcello G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 171-207. The jurisprudential position taken by the Canadian Supreme Court on Québec might be understood as supporting a 'remedial secession' doctrine. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

¹¹⁶ For the latest overview, Simone Van Den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge Intersentia 2015).

state.¹¹⁷ In a similar sense, Raič holds the view that this position corresponds to the actual legal stand on secession. He describes it as a 'qualified secession doctrine' where a right to secession depends on four (remedial) criteria. These criteria include: the existence of a minority, a territorial bond, serious and widespread violations of human rights, and the exhaustion of all effective judicial remedies and realistic political arrangements as attempts to solve the problem.¹¹⁸ Republicanism offers a general normative account of these criteria. They could all be expressed as threats to the essence of non-domination, namely the capacity of individuals to exist as political community and to decide without being put at the mercy of others.

On the second point, the requirement to exhaust other potential measures changes the political logic at work in matters of secession. Secession should not be considered as an objective on its own, but rather as the most extreme institutional form of non-domination. Secession would only be authorised as a matter of international law if other measures could be proven ineffective. This conception puts strong normalising incentives into force, only rebuttable in cases of extreme emergency.

Going further, republicanism also impacts the way in which a potential secession should be realized. The seceding entity, as soon as the most pressing danger has been prevented, should enter processes of negotiation at the international level with its former state. In order to prevent domination and settle common matters (such as shared natural resources), Cassese notes that the seceding nation should enter into a sort of 'international or regional association' with its former state.¹¹⁹ The key point is not a formally independent state, but an effectively non-dominating environment for all stakeholders.

This republican conception also impacts the difficult concern of the territorial claim held by a people. If secession is only justified as an *ultima ratio* solution, taking control of territory is also justified only as a necessary part of a solution to face the graveness and urgency of the domination of peoples. For all other situations, the model of non-domination prescribes the

¹¹⁷ Buchanan (n 29) 401-03.

¹¹⁸ Raič (n 49) 447-48. See further Tomuschat (n 18) 37 ff.

¹¹⁹ Cassese (n 45) 362.

achievement of common control over resources and territory along institutionalized mechanisms of political arbitration. As in the case of indigenous people, who define themselves through their relation with nature and the territory that surrounds them, this solution could grant the different entities what they care about the most, namely control over resources, without sparking political discussions over territory "taken away."

Finally, this view on secession has an important consequence for the scope of validity of secession as a matter of international law on self-determination. Secession as a last remedy could exclusively be justified in illiberal states. Situations such as the one between Quebec and Canada or indigenous peoples within liberal states, should not lead to secession, with the exception of the two parties voluntarily accepting this solution.¹²⁰ In a liberal framework, intrastate solutions considered to guarantee non-domination should – or must – deliver that which is necessary to preserve the capacity of a people to decide for itself. The case is far less obvious in illiberal states, where mechanisms of non-domination will be much more difficult to implement and uphold and where, as a consequence, a remedial secession could be justifiable.

2. Linking Minority Protection and Self-Determination

In the continuation of this strategy of 'isolate and proliferate', the model of non-domination offers a promising basis upon which to conceptualize the links between minority protection and self-determination.¹²¹ The model of

¹²⁰ This has also been acknowledged by the Canadian Supreme Court. It leaves open the possibility of a remedial secession doctrine, but not for the case of Quebec. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217.

¹²¹ Besides requirements of non-discrimination, art 27 of the Covenant on Civil and Political Rights might be considered the main provision related to the protection of minorities. For general overview, Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 373-80. Further, see Anaya (n 70) 131-41. Other provisions of the Covenant on Civil and Political Rights are also very important to the safeguard of minorities and their prosperity as a group, for instance arts 22 (freedom of association), 25 (participation in the government) and 26 (equality before the law). On regional level, the European Framework Convention for the Protection of National Minorities is also a convention of central importance. See also UN Declaration on the Rights of

non-domination has rendered this move not only possible, but also desirable in the sense that it would better take into account the group dimension of claims held by minorities.¹²²

First, the republican conception softens difficulties between the regime of minority protection and self-determination. Because it insists on the requirement to clearly uncouple a right to self-determination from a right to secession, the republican conception addresses the political unwillingness to give too much latitude to the claims of minorities.¹²³ Secondly, the protection ensured to the minority group is dynamic and active in recognising the important capacity of group members to decide how they want to be organised. The protection focuses on the institutional mechanisms that should be put into place to empower members to enjoy autonomy.

As an example, the Declaration on the Rights of Indigenous Peoples offers an insight into how this non-domination for minorities can be secured through institutional mechanisms. According to Holder, the Declaration can be interpreted as securing indigenous people a right to 'develop and interpret a way of life that is distinctively one's own'.¹²⁴ This includes prerogatives for dealing with one's resources, an issue of extreme importance for indigenous people.¹²⁵ But this first level only addresses a single dimension of domination.

Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) GA Resolution 47/135, 1992, UN Doc. A/Res/47/135.

¹²² For a similar claim, see Cassese (n 45) 349-50; Macklem (n 97) 109.

¹²³ For a similar conclusion, Will Kymlicka, 'Minority Rights in Political Philosophy and International Law' in Samantha Besson and José Luis Martí (eds), *The Philosophy of International Law* (Oxford University Press 2010) 377-96, 395-96.

¹²⁴ Holder has usefully summarized the different articles in her text, although it shall be noted that she worked with the Draft Declaration (Draft Declaration on the Rights of Indigenous Peoples 1994). See Cindy Holder, 'Self-Determination as a Basic Human Right: The Draft UN Declaration on the Rights of Indigenous Peoples' in Eisenberg Avigail and Spinner-Halev Jeff (eds), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press 2004) 294-316, 295-96.

¹²⁵ See e.g. the case law by the Inter-American Court of Human Rights, 'for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.' *Case of the*

A second level of institutional mechanisms is more clearly directed towards the prevention of domination and the promotion of cooperation. Following Holder, Articles 15, 33, or 34 of the Declaration might be interpreted as securing what she calls the 'institutional underpinning of life'.¹²⁶ These articles are prerogatives enjoyed by peoples to set up their own institutions and rules of membership. Most importantly, the Declaration foresees – by means of guaranteeing that the voice of the people be heard – that common institutions with other entities have to be set up in order to meet the challenges of domination. In light of the republican account, the Declaration might be interpreted as laying down a republican framework to regulate the way a people enters into relationships with various other entities.

V. CONCLUSION: FOR THEY HAVE SOWN NON-DOMINATION...

Working with a back-and-forth movement between law and political theory, this article has laid down the path towards a republican conception with the objective of meeting the challenge formulated by MacCorquodale: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework. In the methodological section, I formulated two objectives for the republican conception: to be plausible and fruitful. The republican conception is claimed to be plausible with respect to the descriptive hypothesis – explaining the ICJ's case-law – while the prescriptive part – providing guidance in interpretation – is claimed to be fruitful in outlining further potential developments for self-determination.

The republican conception draws upon self-determination as being relational in nature, in other words respectful of the prerogatives claimed by others. In this context, I have proposed the conception of self-determination as a quest towards institutionalized conditions of non-domination. Self-determination as non-domination has integrative effects. We move from a logic of division and separation to a logic of cooperation and conflict resolution. By forcing all entities involved into institutionalized mechanisms of discussion and cooperation, the model enhances the chances of fostering an understanding

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, (Judgement of 31 August 2001) Series C, No. 79, para 149.

¹²⁶ Holder (n 124) 296.

of identity that is not ethnoculturally based. The point is not to criticize ethnocultural identity *per se*, but rather to contest its legitimacy when justifying a claim to self-determination as a matter of international law. Non-domination paves the way for an evolution of the people's own understanding of its identity towards a more political understanding.¹²⁷

On the public international law level, the conception of non-domination helps in making sense of the various facets which self-determination can have. On the one hand it accounts for its structuring function, linked to the law of states. Self-determination lays down a powerful rationale for the claim to autonomy held by individuals organised in the form of a state-entity. On the other hand, non-domination accounts for the aspirational dimension of self-determination, as framed through human rights law. Tensions between these two facets do not disappear. But the republican approach lays down a promising and consistent framework to address both. In that respect, it could facilitate the development of a modern international law of self-determination.

¹²⁷ For a similar thesis, see Iris Marion Young, 'A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy' (1997) 4/1 *Constellations* 48-53, 196; Waldron (n 79) 412-13.

BOOK REVIEWS

ALICE MARGARIA, *THE CONSTRUCTION OF FATHERHOOD*
(CAMBRIDGE UNIVERSITY PRESS 2019)

Matilda Merenmies*

Alice Margaria's *The Construction of Fatherhood* is an excellent and valuable contribution to human rights literature and law and gender research.¹ Her book is a thorough look into both how the European Court of Human Rights (ECtHR or the Court) constructs fatherhood in particular and how the Court develops and applies doctrine and adopts moral positions in general. This book will be of interest to those interested in gendered aspects of the Court's case-law, but also to those seeking to better understand the Court's use of its doctrines of interpretation and the inconsistencies in their application.

I. FATHERHOOD IN THE ECtHR

The ECtHR is constantly engaged in the difficulties of applying a convention drafted in 1948 to modern day realities, traversing the task of interpreting the Convention without veering too much into criticism-drawing judicial activism² or entrenching restraint.³ This is where the Court's doctrines of

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¹ Alice Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (Cambridge University Press 2019), ISBN: 9781108475099, 85 €. Margaria's book is built on the foundation of her PhD thesis, written under the supervision of Ruth Rubio-Marin and successfully defended in 2015 at the Department of Law, European University Institute.

² See e.g. Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can Be Done' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar Publishing 2013) 72-78.

³ See e.g. Alastair Mowbray, 'Between the will of the Contracting Parties and the needs of today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of*

interpretation come into play. They allow the Court to read the Convention as a 'living instrument', interpreted in light of present day-conditions, with the purpose of maintaining an effective and meaningful system for human rights protection.⁴ It is exactly into this difficult act of navigation and balancing that Margaria's meticulous study looks. Her focus is on fatherhood, which in addition to being an interesting subject in its own right, provides Margaria with a distinctive window into the Court's use and development of the margin of appreciation doctrine and the consensus test.

Family life is one of the areas of society that is seeing the most rapid evolution. This is reflected in both societal and technological advancements, resulting in numerous human rights cases dealing with issues which were unforeseeable during the drafting of the Convention. The previously prevalent understanding of fatherhood in the European context has been based on the default family model of a heterosexual married couple with children, where the husband is the breadwinner and mother is the carer of home and offspring.⁵ The commonness of divorce and separation and the weakening of the role of marriage in child-bearing has led to a certain 'fragmentation' of fatherhood, where fathers are often parenting from a distance or cohabiting with their children part-time, making fatherhood a concept increasingly more difficult to define.⁶ Margaria utilizes the concept of "fragmented" or "fragmenting fatherhood" throughout the book to illustrate the evolving legal recognition of diversity in parenting practices.

The author explores the Strasbourg Court's construction of fatherhood through four principal developments in the realities of European families and the Court's corresponding reactions to these developments. The judgements

Human Rights (Cambridge University Press 2013) and Eva Brems (ed) *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013).

⁴ See e.g. George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 108-122.

⁵ See e.g. Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 81-82.

⁶ Sally Sheldon, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68 *The Modern Law Review* 523, 527-531.

analysed have been selected and grouped based on these four sociological categories, the structure of the book mirroring these. The first development examined is the introduction of assisted reproductive technologies (ARTs) and the types of fatherhood enabled through these technologies, including trans-fatherhood and the legal difficulties of intended fatherhood.⁷ The second grouping of cases involves post-separation and unmarried fatherhood, tied to the diminishing significance of marriage, evident in a continuing increase in unmarried cohabitation and childbearing, and also the increased availability of DNA testing.⁸ The third development is in women's growing participation in the labour force also after childbirth and the consequent redistribution of child-care. This development has given rise to cases involving child-care related financial and social entitlements.⁹ The fourth and final stream of cases is that of fatherhood and homosexuality, relating to the on-going process of increasing social acceptance and legal recognition of same-sex partnerships and same-sex parenthood.¹⁰

The book examines the construction of fatherhood through the interpretation of Article 8, which provides for the right to respect for private and family life, and Article 14, which enshrines the prohibition of discrimination, and is often referred to in conjunction with Article 8.

II. THE BOOK'S MAIN CONTRIBUTIONS

Previous works that comprehensively delve into the Court's jurisprudential evolution on specific social questions of gendered character include those on homosexuality¹¹ and equality and non-discrimination.¹² Fatherhood in the ECtHR has also been discussed through the commentary of individual pivotal cases.¹³ Margaria's book, however, represents the first endeavour to

⁷ Margaria (n 1) 48-71.

⁸ Ibid 72-108.

⁹ Ibid 109-127.

¹⁰ Ibid 128-154.

¹¹ E.g. Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).

¹² Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, vol 74 (Martinus Nijhoff Publishers 2003).

¹³ Some examples include the following interventions on *Gas and Dubois v France* and *Konstantin Markin v Russia*: Paul Johnson, 'Adoption, Homosexuality and the

systematically address the Court's construction of fatherhood through its case-law. As such it is a much needed and appreciated contribution to the literature.

The main arguments put forth by the book are twofold. First, even though the Court has come to increasingly emphasise paternal care in its case-law,¹⁴ it has not departed from a 'conventional' conception of fatherhood.¹⁵ Second, the materialisation of the Court's understanding of a new kind of fatherhood is not only a matter of (moral) choice, but rather the consequence of the combined workings of the Court's moral and doctrinal decision making.

III. 'CONVENTIONAL' AND 'NEW' FATHERHOOD

Margaria highlights the strides that the Court has taken in its jurisprudence in advancing an understanding of what she characterizes as 'new fatherhood', incorporating the element of 'care' which encompasses nurturing intentions, interest, commitment, and establishment of close personal ties with the child. Conversely, 'conventional fatherhood' relies on a biological (genetic) link with the child, a marital relationship¹⁶ with the child's mother, breadwinning, heterosexuality and heteronormativity.¹⁷

Despite supporting this new emphasis on care, and successfully eschewing stereotypes, the Court still relies on a 'conventional' understanding of fatherhood. Margaria makes the persuasive argument that instead of departing from a conventional definition of fatherhood, based on the special status of marriage, the bread-winner model, and heteronormativity,¹⁸ the

European Convention on Human Rights: *Gas and Dubois v France*' 75 *The Modern Law Review* 1136 and Alexandra Timmer, 'From inclusion to transformation: rewriting Konstantin Markin v. Russia' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013).

¹⁴ In the form of what Margaria refers to as 'new fatherhood'.

¹⁵ Margaria's understanding of 'conventional fatherhood' draws from McGlynn's dominant ideologies of fatherhood: McGlynn (n 5) 81-82.

¹⁶ Or equivalent marriage-like relationship, such as opposite-sex cohabitation or sexual relationship between opposite-sex partners.

¹⁷ McGlynn (n 5) 81-82.

¹⁸ The Court has taken on the task of dismantling gender stereotypes, of which Margaria has identified three present in case-law concerning fatherhood: 1) the

Court rather builds its conception of 'new fatherhood' as a layer on top of the old, conventional, characterisation of fatherhood. This causes the court to be caught in a mutually reinforcing model of change and continuity in its understanding of fatherhood.¹⁹

Biology still plays a crucial role in how the Court understands fatherhood. Even when elements of 'care' are present, the biological link between father and child is a decisive factor, as is evidenced by the opposite outcomes in *Mennesson v. France* on the one hand, and *Paradiso and Campanelli v. Italy* on the other.²⁰ Likewise, biology determined the outcome in *Z, Y and Z v. the UK* to the disadvantage of the applicant, a transsexual father, even though evidence of 'care' was undisputed.²¹ Furthermore, the Court continues to award special status to marriage, and has used this special status to justify the exclusion of certain parental rights from same-sex couples and gender minorities.²²

The author also builds on her previous work while positing that the strides that the Court has taken in rejecting the gender stereotype of men as primary breadwinners and women as primary caretakers in the landmark judgement of *Konstantin Markin*²³ are limited. Fathers are awarded financial entitlements related to parenting only through their role as wage-earners and, as such, the

'man-breadwinner/woman-homemaker' trope, 2) unmarried fathers as irresponsible and uninterested in their children and 3) gay as unfit to be a parent.

¹⁹ Margaria (n 1) e.g. 156, 159-160.

²⁰ *Mennesson v. France*, no 65192/11, § 100 ECHR 2014 (extracts) and *Paradiso and Campanelli v. Italy [GC]*, no 25358/12, § 207-208, 24 January 2017. Both cases involve surrogacy, but in *Mennesson*, unlike in *Paradiso and Campanelli*, the child resulting from the surrogacy arrangement was genetically related to the applicant. In *Mennesson*, the biological link secured a violation of the child's article 8 rights, whereas in *Paradiso and Campanelli* the absence of a genetic link led to Court not finding even the presence of family life under article 8 and the removal of the child from the intended parents did not constitute a violation of the Convention.

²¹ *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II.

²² See e.g. *Gas and Dubois v. France*, no 25951/07, § 68 ECHR 2012 and Loveday Hodson, 'A Marriage by Any Other Name? *Schalk and Kopf v Austria*' 11 Human Rights Law Review 170-179.

²³ *Konstantin Markin v. Russia [GC]*, no 30078/06 ECHR 2012 (extracts).

extension of entitlement schemes to fathers serves to reinforce a breadwinner model.²⁴

The dissonance in the Court's navigation between change and continuity is markedly displayed in the case of *Salgueiro da Silva Mouta v. Portugal*.²⁵ As Margaria points out, the case looks to represent the Court's departure from a conventional, heterosexual understanding of fatherhood and was undeniably significant, especially considering the year of its decision. The applicant is a homosexual man who had become a father in the context of a marriage with a woman and had been denied parental access after the divorce because of his homosexuality. However, ultimately the applicant in this case is a conventional father in most ways: the child was born in wedlock and is genetically related to the applicant, and the father appears to be gainfully employed. The only unconventional characteristic would appear to be that of homosexuality. The Court is thus able to depart from convention while not straying too far from it.

IV. THE ROLE OF DOCTRINES IN THE CONSTRUCTION OF FATHERHOOD

The way doctrines are employed varies depending on the doctrine and case in question. In line with the principle of subsidiarity, the Court will defer to states in how they secure Convention rights through the application of the margin of appreciation, which can vary from wide, where the scrutiny applied by the Court is less stringent, to narrow, where the Court will be more strict in its supervisory role.²⁶ The Court does not have a systematic way of granting states a margin of appreciation, and sometimes will reference the margin in

²⁴ Alice Margaria, "'New Fathers' and the Right to Parental Leave: Is the European Court of Human Rights Satisfied with Just Breadwinning?' in Rosie Harding, Ruth Fletcher and Chris Beasley (eds), *Revaluing Care in Theory, Law and Policy: Cycles and Connections* (Routledge 2016).

²⁵ *Salgueiro da Silva Mouta v. Portugal*, no 33290/96 ECHR 1999-IX. The Court found that the applicant had been discriminated against because of his sexual orientation and found a violation of article 14 in conjunction with article 8 (privacy). The Court explicitly departed from the state's assertions that the applicant's sexuality was 'abnormal' and possibly detrimental to the wellbeing of the child.

²⁶ See e.g. Andreas Føllesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral Or Political?* (Oxford University Press 2018).

the conclusions of the judgement for the first time with no further elaboration on how the margin applies. The same is true of the consensus test utilised in theory by the Court to evaluate the limits in the scope of its evolutive interpretation. Often times the analysis of consensus will be absent completely and the existence or non-existence of a consensus will only be referred to in passing.²⁷

What emerges from Margaria's detailed analysis of fatherhood case-law is a refined critique of the Court's inconsistent use of its doctrines of interpretation. It would appear that where the Court has been more inclined to methodological rigour, the Court's understanding of fatherhood has developed more or less systematically towards the direction of 'new fatherhood'. Margaria's examination of case-law shows that this tendency is mostly true in cases involving the rearrangement of care responsibilities and child-care related entitlements. In other case categories, however, the use of doctrines would appear more irregular. Margaria argues that this variable use of doctrines implies the Court's primary reliance on its own moral standpoints on fatherhood as determining the doctrinal choices in any given case. This finding is in keeping with previous criticism specifically aimed at the Court's application of the margin of appreciation and the consensus test.²⁸ In the cases Margaria analyses in her study, the consensus test would mostly seem to operate as a matter of choice on the part of the Court. Not implying that consensus is out-right fabricated by the Court, rather her analysis supports the suggestion that the Court might be utilizing consensus to add persuasiveness to its adopted moral position, in this case, that of 'new fatherhood' with 'conventional' foundations.

V. CONCLUDING THOUGHTS

The Court seems in the habit of avoiding politically difficult issues it labels 'morally and ethically delicate', such as same-sex marriage²⁹ and recognition of children born through surrogacy, with the almost automatic application of a wide margin of appreciation, often referring to the (lack of) European

²⁷ Ibid 286-288.

²⁸ See Lawrence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' 26 *Cornell International Law Journal* 133 154.

²⁹ *Schalk and Kopf v. Austria*, no 30141/04 ECHR 2010.

consensus. The Court does not have a consistent approach to evaluating consensus, in some cases relying on a simple statement on the existence of consensus as fact, or in others displaying different levels and methods of consensus review. Margaria rightly homes in on the inconsistencies and vagaries of the Court's sometimes inexistent consensus analysis, but in the end devotes less page space to flesh out the Court's evident habit of hiding behind the margin of appreciation. The same methodological inconsistencies evident in the Court's application of the consensus test are also apparent in the application of the margin of appreciation. This tendency of the Court merits more attention. With the signatory states' mounting calls for further subsidiarity and more emphasis on the margin of appreciation, the Court is under pressure to defer to states on issues where the margin doctrine applies.³⁰

This brings me to discuss other possible limitations of Margaria's book, of which there are very few. If there is something the book is missing it would be a critical discussion on the concept of fatherhood as "male parenthood".³¹ The Court has so far been committed to a binary approach to gender, and this is reflected in analysis of its case-law. As societal and legal conceptions of gender evolve, will the concepts of "fatherhood" and "motherhood" evolve as well, possibly focusing the discussion on "parenthood" involving parents of all genders, separate or encompassing of fatherhood and motherhood? In international law there is a tendency for 'gender identity' to be used only in reference to transgender, which leaves other gender identities obscured.³² Margaria's focus on fatherhood specifically as male parenthood provides a valuable and profound contribution and is undoubtedly an appropriate

³⁰ Protocol 15 of the ECHR will amend the phrasing of the preamble of the Convention to include explicit mentions of both the subsidiarity principle and the margin of appreciation. Some scholars have argued that the Court has already reacted by increasingly referencing the margin doctrine, see firstly Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9(2) *Journal of International Dispute Settlement* 199.

³¹ This definition is relied on broadly, see e.g. Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Bloomsbury Publishing 2008).

³² Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299, 314.

choice for the focus of this book. However, this book could have benefited from a critical reflection on how centering analysis on motherhood or fatherhood can leave some aspects of parenthood hidden. Are all fathers necessarily men, and all mothers women, and how should parents who do not fit this binary be discussed by Courts and in literature? These discussions will hopefully gain more substance as legal and social recognition of non-binary genders and trans identities continues to evolve.

In conclusion, Alice Margaria has written a truly valuable contribution to human rights law, family law, and law and gender literature. This book offers a deeper understanding of the ECtHR and its doctrines besides a rich discussion on fatherhood in its evolving forms. Moreover, this book is an enjoyable read, the arguments and analysis unfolding with apparent ease and a clear progression. Not only does Margaria engage in nuanced and in-depth analysis of the Court's discussion of fatherhood and masculinity, she succeeds in thoughtfully analysing the Court's use of doctrine and the significant role this plays in the construction of fatherhood.

RASA ENGSTEDT, *EURATOM: THE TREATY AND THE COMPETENCES OF THE COMMUNITY* (UNIVERSITY OF EASTERN FINLAND 2020)

Jakub Handrlica* 

After decades of disinterest, the legal issues arising with respect to the existence of the European Atomic Energy Community (thereinafter 'Euratom' or 'Euratom Community') have begun again to trigger academic interest. In 2016, Iлина Cenevska published her study, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within*.¹ Two years later, Anna Södersten published *Euratom at the Crossroads*.² Both works were well received in academic circles.³ Now, in 2020, Rasa Engstedt has completed a new monograph, *Euratom: The Treaty and the Competences of the Community*.⁴ These publications show a renewed academic interest in the Euratom Community, which in the 1960s was already referred to as 'forgotten'.⁵ Indeed, the previous comprehensive monograph on Euratom was published by Jaroslav G. Polach in 1964.⁶ After Polach's study, Euratom has only occasionally been the subject of academic attention, with authors dealing exclusively with specific issues, such as security of supply, non-proliferation and safeguards, nuclear safety, reform attempts, etc.⁷ Thus, the

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¹ Iлина Cenevska, *The European Atomic Energy Community in the European Union Context: The 'Outsider' Within* (Brill Nijhoff 2016).

² Anna Södersten, *Euratom at the Crossroads* (Edward Elgar 2018).

³ See Athanase Popov, 'Iлина Cenevska: The European Atomic Energy Community in the European Union Context: The 'Outsider' Within' (2019) 56 *Common Market Law Review* 296, Jakub Handrlica, 'Anna Södersten: Euratom at the Crossroads' (2019) 11 *European Journal of Legal Studies* 143.

⁴ Rasa Engstedt, *Euratom: The Treaty and the Competences of the Community* (University of Eastern Finland 2020).

⁵ Theo W. Vogelaar, 'Euratom: de vergeten gemeenschap' (1967) 8 *Nieuw Europa: maandblad van de Europese Beweging in Nederland* 14.

⁶ Jaroslav G. Polach, *Euratom: Its Background, Issues and Economic Implications* (Oceana Publications 1964).

⁷ Donald W. Allen, 'The Euratom Treaty, Chapter VI: New Hope or False Dawn?' (1983) 20 *Common Market Law Review* 473, Darryl A. Howlett, *EURATOM and*

three recently published books – all of which are based on academic dissertations – clearly illustrate that the Euratom Community still represents a fertile ground for legal scholarship.

While Cenevska mainly addressed issues of environmental law, Södersten focused on the legal implications of the continued separate existence of the Euratom within the European Union (EU). Both authors correctly argued that even six decades after its establishment, Euratom still remains a kind of *terra incognita* for a majority of recent scholars of EU law.⁸ Consequently, Engstedt is not bringing owls to Athens in publishing her new book, which is devoted exclusively to the problem of competences of the Euratom Community. On the contrary, her study analyses the topic from a perspective which has not been comprehensively addressed by a single book since the publication of a 1958 commentary edited by Jacques Errera.⁹

The importance of her work is clear, given the ongoing discussion of the competences within the EU. In fact, since the signing of the Lisbon Treaty, the EU's competences have been a high-profile and much-researched subject.¹⁰ By contrast, very little research has been done on the competences

Nuclear Safeguards (Palgrave Macmillan 1990), Christiane True, 'Energierrecht, Gesundheitsschutz und Umweltschutz und die Position der Euratom nach dem Verfassungsentwurf des Konvents' (2004) *Juristenzeitung* 779, Nuria Prieto Serrano, 'Wakening the Serpent: Reflections on the Possible Modification of the Euratom Treaty' (2006) 1 *International Journal of Nuclear Law* 14, Christiane True, 'The Euratom Community Treaty's Prospects at the Start of the New Millenium' (2006) 1 *International Journal of Nuclear Law* 247, Sebastian Wolf, 'Zur Zukunft des Euratom-Vertrags' (2006) 29 *Integration* 297, Anna Södersten, 'Brexite, Euratom und Nuclear Proliferation' (2016) 98 *Nuclear Law Bulletin* 47 etc.

⁸ Cenevska (n 1) 7, Södersten (n 2) 1.

⁹ Jacques Errera et al., *Euratom: Analyse et Commentaires du Traité* (Librairie Encyclopédique 1958).

¹⁰ See, for example, Lucia S. Rossi, 'Does the Lisbon Treaty Provide for a Clearer Separation of Competences between EU and Member States?' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012), Loïc Azoulay, 'Introduction: The Question of Competence' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014), Robert Schütze, 'EU Competences: Existence and Exercise' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), Timothy Roes, 'The Question of

of Euratom; where Euratom has been mentioned, the focus has been primary on the comparison with the competencies of the EU.¹¹ Engstedt herself began her research in this area with a paper on mutual relations between the competences of the EU and the Euratom Community.¹²

Engstedt devotes her study exclusively to the competences of the Euratom Community.¹³ She further elaborates the goal of the study into three specific objectives (p. 22): (1) to analyse the scope, content and exercise of the competences with respect to (a) the wording of the Euratom Treaty, (b) the extent to which these competences have been used in secondary legislation, and (c) the case-law of the Court of Justice of the European Union (CJEU); (2) to evaluate relations, similarities and differences between the respective competences by using a systematic comparative analysis; and (3) to systematise the competences of the Euratom Community.

In order to address these objectives, Engstedt divides her study into two major parts. The first part deals with the evaluation and general aspects of Euratom's competences (pp. 25-52). After outlining the meaning of 'competence', the author analyses the objectives and tasks of the Community as provided by the Euratom Treaty. Here, Engstedt further addresses the thorny issue of the (in)applicability of the legal regime, as established under the Euratom Treaty, vis-à-vis defence (military) installations operated within

Competence in the European Union' (2015) 40 *European Law Review* 946, Sacha Garben, 'Confronting the Competence Conundrum' (2015) 35 *Oxford Journal of Legal Studies* 55.

¹¹ See, for example, Thomas F. Cussack, 'A Tale of Two Treaties: an Assessment of the Euratom Treaty in Relation to the EC Treaty' (2003) 40 *Common Market Law* 177, Juan Sellarés Sella, 'El Euratom subsiste, invisible e incompatible con el tinglado comunitario' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa: la salida de la crisis constitucional* (Iustel 2007).

¹² Rasa Ptasekaite, *The Euratom Treaty vs. Treaties on the European Union: limits of competence and interaction* (Swedish Radiation Safety Authority 2011).

¹³ To define 'competence', Engstedt refers (p. 15) to Gerard Conway, *EU Law* (Routledge 2015) 259. Conway defines the term as 'the ability or capacity of a natural, legal person or institution to do something that is legally binding or has some legally valid effect.'

the territory of the Euratom Community.¹⁴ The author argues that while 'the Commission has interpreted the provisions of the Euratom Treaty as creating Euratom competences in the military applications, the Court has concluded that activities falling within the military sphere are outside the scope of the Euratom Treaty' (p. 45). However, the CJEU has also stated that this

finding does not by any means reduce the vital importance of the objective of protecting the health of the public and the environment against the dangers related to the use of nuclear energy, including for military purposes. In so far as the EAEC Treaty [Treaty establishing the European Atomic Energy Community] does not provide the Community with a specific instrument in order to pursue that objective, it is possible that appropriate measures might be adopted on the basis of the relevant provisions of the EC Treaty [Treaty establishing the European Community].¹⁵

The author does not address this possibility of governing safety issues relating to nuclear military installations by the means of EU law.

In the first part of the study, the author finally turns her attention to the 'flexibility' clause provided in Article 203 of the Euratom Treaty.¹⁶ This provision has attracted attention since the establishment of the Euratom Community.¹⁷ Engstedt not only provides a very detailed analysis of the secondary legislation enacted on the basis of this provision, but also a precise overview of the applicable case law of the CJEU. The 'flexibility' clause has been used several times in the past as a legal basis for secondary legislation in those cases where the EU and Euratom Community share competences.¹⁸ In

¹⁴ This particularly concerns two Member States (France and the United Kingdom), which operate nuclear military installations in their territory (e.g. military research reactors, installations serving for refuelling of nuclear submarines etc).

¹⁵ C-65/04 *Commission v United Kingdom* EU:C:2006:161, para 28.

¹⁶ 'If action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

¹⁷ See Hugo J. Hahn, 'Euratom: The Conception of an International Personality' (1958) 71 *Harvard Law Review* 1040. Hahn refers to Article 203 as an 'extension' clause.

¹⁸ See, for example, Council Regulation (EC, Euratom) No 480/2009 of 25 May 2009 establishing a Guarantee Fund for external actions, OJ L 145, 10.6.2009, 10-14.

only the rarest instances is Article 203 of the Euratom Treaty the sole legal basis for a secondary legal act. In this context, Engstedt presents Regulation (Euratom) No 237/2014, which establishes an Instrument for Nuclear Safety Co-operation to finance measures supporting the promotion of high level of nuclear safety in third countries, as a unique example of a secondary legislation based solely on Article 203 (pp. 48-52).¹⁹ The author also briefly mentions other existing proposals to use this provision as a legal basis for further legislative initiatives, e.g. in the area of nuclear liability.²⁰ In this way, Engstedt gives a comprehensive account of the 'flexibility' clause, which has been addressed only partially in the legal literature so far.²¹ However, the proposal discussed, namely to use the 'flexibility' clause for facilitating the field of nuclear liability within the Euratom Community, is already a decade old. The analysis would therefore have benefitted from a more up-to-date evaluation of the provision's prospective usage.

The second part of the book addresses the specific competences provided by the Euratom Treaty: promotion of research (pp. 53-72), dissemination of information (pp. 73-82), health and safety (pp. 83-111), investments (pp. 113-122), joint undertakings (pp. 123-132), nuclear supplies (pp. 134-156), safeguards (pp. 158-172), property ownership (pp. 173-179), nuclear common market (pp. 180-193) and external relations (pp. 194-215). With respect to the three specific objectives outlined in the introduction, Engstedt proposes a systematisation of the respective competences of the Euratom Community.

Firstly, with respect to the scope of the competences as provided directly by the Euratom Treaty, the author argues (pp. 217-223) for their classification based on either (a) the legislative amendment procedure or (b) the level of regulatory detail in the provisions of the Euratom Treaty.²² When applying the second criterion, Engstedt argues that three groups of competencies can be identified: (a) those in respect of which the level of regulatory detail in

¹⁹ Council Regulation (Euratom) No 237/2014 of 13 December 2013 establishing an Instrument for Nuclear Safety Cooperation, *Of L* 77, 15.3.2014, 109-116.

²⁰ See Jakub Handrlica, 'Harmonisation of Nuclear Liability in the European Union: Challenges, Options and Limits' (2009) 84 *Nuclear Law Bulletin* 45.

²¹ For example, Cenevska (n 1) 70, Prieto Serrano (n 7) 14.

²² The amendment procedure can be realised either through the ordinary revision procedure, as provided by the Treaty on European Union or through the special amendment procedure, as provided by the Euratom Treaty

primary law is fully appropriate;²³ (b) those in respect of which the level of regulatory detail in primary law is generally appropriate, but where certain improvements could be recommended;²⁴ and (c) those in respect of which the primary law regulation may be considered too detailed.²⁵ With respect to this classification, the question arises whether to place the competences of the Euratom Community in the field of nuclear supplies in the first category. These competences have never been executed by the Euratom Community, as foreseen in the provisions of primary law.²⁶ On the contrary, a simplified, so-called 'co-signing' procedure has in practice been used for decades regarding supply of nuclear ores from third countries. Given this contrast between the procedure foreseen in the Euratom Treaty and the standard procedure used in the practice by the Community and its Member States, one might doubt whether this area really belongs with those where the level of regulatory detail in primary law is fully appropriate, as the author suggests.

Secondly, the author proposes a classification based on how the existing competences were exercised in secondary legislation (pp. 223-230). Analysing the topic from this viewpoint, the author argues that two analytical approaches can be applied. On the one hand, a quantitative approach may be used. Here, the competences can be classified as: (a) those used to a great extent by the Euratom Community to enact secondary legislation²⁷ and (b) those used only to a limited extent.²⁸ Concerns might be raised here regarding the methodology. While the author announces at the beginning of the section that the principal focus will be on secondary legislation (p. 223), international agreements concluded by the Euratom Community are also taken into consideration (pp. 224-225). Engstedt further proposes a

²³ In this category, the author placed the competences in the fields of research, investments, joint undertakings, nuclear supplies, safeguards and external relations.

²⁴ Health and safety, property ownership and nuclear common market.

²⁵ Dissemination of information.

²⁶ See Allen (n 7) 473 and André Bouquet, 'How Current are Euratom Provisions on Nuclear Supply and Ownership in View of the European Union's Enlargement?' (2001) 68 *Nuclear Law Bulletin* 7.

²⁷ The author argues that the competences in the area of safety and health and in the area of external relations belong to this category.

²⁸ Dissemination of information, joint undertakings, nuclear supplies and property ownership.

classification of competences based on whether they were executed in accordance with the way in which they were drafted in the Euratom Treaty. In this respect, the author argues for three different groups of competences: (a) those which have been executed in a narrower way, namely that provided by primary law;²⁹ (b) those which were executed in accordance with the wording of the Euratom Treaty;³⁰ and (c) those which were executed in a broader manner than primary law foresees (p. 228). The secondary legislation enacted based on the chapter on health and safety, which currently covers the field of safety of nuclear installations, is included in the latter category. While one might agree with the last category, certain doubts might be expressed about adding the provisions on external relations into the second one. The enactment of secondary legislation in the field of nuclear safety was the direct consequence of adherence by the Euratom Community to the Convention on Nuclear Safety in 2000. Given that both the adherence of Euratom to this Convention and the secondary legislation concern the area of nuclear safety, it would seem logical to place both areas of competence into a single category.

Reflecting on the analysis provided vis-à-vis the respective competences, the last section of the Engstedt's book tackles the question of Euratom's 'immunity' to any substantial changes (pp. 236-240). The Euratom Treaty has not undergone any substantial modification since its adoption, having even managed to evade the amendments provided by the Lisbon Treaty.³¹ The 'Euratom Treaty's notorious resistance to change' has had a mixed reception among legal scholars.³² Several authors have expressed criticism regarding

²⁹ Dissemination of information.

³⁰ Investments, joint undertakings, nuclear common market and external relations.

³¹ The Euratom Treaty was, however, amended by the Maastricht Treaty (Title IV: Provisions amending the Treaty establishing the European Atomic Energy Community and Title VII: Final Provisions which extended the institutional changes introduced to the EC Treaty and the ECSC Treaty to the Euratom Treaty), the Treaty of Amsterdam (Articles 1, 4, 7, 8, 9, 10, 11 and relevant protocols applicable to Euratom), the Treaty of Nice (Articles 1, 3, 7, 9 and relevant protocols applicable to Euratom) and lastly, by the Lisbon Treaty (see Protocol No. 2, "Amending the Treaty establishing the European Atomic Energy Community" and other protocols applicable to the Euratom). However, notwithstanding several non-substantial changes, the text of the Euratom Treaty has essentially remained the same since 1957.

³² Cenevska (n 1) 1.

these developments.³³ The general argument made is that several provisions of the Euratom Treaty have become obsolete or inapplicable in the current circumstances due to the lack of any substantive amendments since the 1960s. On the other hand, other authors have taken a more positive stance towards Euratom, pointing out the increasing importance of the Community in the areas of nuclear safety, environmental protection, and international relations.³⁴ Concerning the strengths and effectiveness of its legal framework, Euratom is viewed as one of the most effective regional energy communities.³⁵ Euratom has also been presented as a potential model for other regional nuclear communities.³⁶

In light of this difference of opinion in the current literature, Engstedt's book offers clear added value in its conclusions, compared to the two other recently published monographs on Euratom. Cenevska called for a

³³ See, among others, Allen (n 7) 473 (referring to Euratom as a 'Chinese girl-child, exposed after birth because the parents did not want it to live'), Prieto Serrano (n 7) 14 (referring to Euratom as a 'dormant serpent'), Sellarés Sella (n 11) 112 (describing Euratom as an 'invisible').

³⁴ For this line of argumentation, see Werner Schröder, 'Die Euratom: Auf dem Weg zu einem Umweltgemeinschaft' (1995) *Deutsches Verwaltungsblatt* 322. Jürgen Grünwald, 'Der Euratom-Vertrag: nie war er so wertvoll wie heute' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 481, Pamela M. Barnes, 'The Resurrection of the Euratom Treaty: Contributing to the Legal and Constitutional Framework for Secure, Competitive and Sustainable Energy in European Union' in Thijs F. Etty and Han Somsen (eds), *Yearbook of European Environmental Law* (OUP 2008) and more recently Jakub Handrlica, 'The Splendid Durability of the Provisional: A Tribute to Euratom' (2018) 14 *Croatian Yearbook of European Law & Policy* 161.

³⁵ See Jakub Handrlica, 'Nuclear Law Revisited as an Academic Discipline' (2019) 12 *Journal of World Energy Law and Business* 62.

³⁶ See Grégoire Mallard, 'Can the Euratom Treaty inspire the Middle East? The Political Promises for Regional Nuclear Communities' (2008) 15 *Nonproliferation Review* 459, Mustafa Kibaroglu, 'Managing the Atom in the Middle East: Hints from the Euratom Experience', Policy Paper 2013/20, Robert Schuman Centre for Advance Studies (EUI 2013), Grégoire Mallard and Paolo Foradori, 'The Middle East at a Crossroads: How to Face the Perils of Nuclear Development in a Volatile Region', Policy Brief 2013/06, Robert Schuman Centre for Advance Studies (EUI 2013).

'rejuvenation' of Euratom,³⁷ while Södersten argued that Euratom is 'at a crossroad'.³⁸ By contrast, Engstedt argues (pp. 239-240) that

the stagnation of the Euratom Treaty and the fact that the substantive law contained in this primary legal act has never undergone amendment has not had a significant effect on the Euratom Community's system of competences [...] This study has established that, in general, the Euratom Community and its competences have stood the test of time.

Given the contribution the Euratom Community has made in the last decades through its secondary legislation in the areas of nuclear safety and environmental protection, one can fully support this conclusion.

Overall, Engstedt's book represents a valuable contribution to the renewed academic discourse on the Euratom Community. The book is based on profound, deep and long-lasting scientific research on the existing sources and their subsequent analysis. The author succeeded in her goal of providing a comprehensive analysis of the competences of the Community and of proposing a systematic classification of these competences. Consequently, I believe that the study will become a much-used reference work on Euratom's competences in the coming decades. A final observation is to be made: while for decades this area was dominated by male professionals, all three recently published monographs on the topic were written by women. Engstedt has thus also contributed to the 'feminisation' of the discourse on the Euratom Community.

³⁷ Cenevska (n 1) 31.

³⁸ Södersten (n 2) 235. For a critical response of this argument, see Handrlica (n 3) 150.