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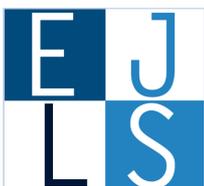
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Published 9 June 2021  
Catalogue no.: QM-AZ-21-001-EN-N  
ISSN: 1973-2937





European Journal of Legal Studies  
Vol. 13 No. 1 (Spring 2021)

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## EDITORIAL

### WHITENESS IN THE IVORY TOWER

Timothy Jacob-Owens\* 

It is fitting that perhaps the most common metaphor used to refer to academic institutions evokes an image of whiteness. The European University Institute (EUI) – our host institution, whose new logo features an actual white tower – is an almost caricatured illustration of this: a scattering of Tuscan villas surrounding the historic belfry of the Badia Fiesolana and populated, in the main, by white staff and students. As the authors of a recent internal discussion paper put it:

the EUI community today is overwhelmingly white in all units and at all levels of hierarchy. The few people of colour working at the EUI are predominantly in the outsourced maintenance companies. The vast majority of researchers, professors, institutional leaders, administrative and supporting staff are white. The whiteness at the EUI sharply contrasts the general population of the EU, which is much more diverse.<sup>1</sup>

This state of affairs is by no means exceptional. Recent figures indicate, for example, that while people of African-Caribbean heritage account for (at least) three per cent of the United Kingdom's population, not even one per cent of professors at British universities are black.<sup>2</sup> As Iyiola Solanke points

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<sup>1</sup> Arpitha Kodiveri, Emdjed Kurdnidjad, Elizabeth Banks, Gemma Fenton, Martijn Hesselink and Ruth Nirere-Gbikpi, 'Whiteness at the EUI – A Discussion Paper' (2020). Unpublished – quoted with permission.

<sup>2</sup> Sean Coughlan, 'Only 1% of UK University Professors are Black' *BBC* (19 January 2021) <<https://www.bbc.com/news/education-55723120>> accessed 13 April 2021. The headline for this article is misleading: according to the figures quoted, just 155 out of 23,000 (0.67 per cent) professors at UK universities are Black.

out, there are 'even fewer' black professors elsewhere in Europe.<sup>3</sup> For the most part, as these examples suggest, Europe's ivory towers are overwhelmingly white spaces.<sup>4</sup>

The problem of racial inequality in academic institutions extends well beyond the underrepresentation of racialised groups in faculty positions. Those who make it into such positions receive lower scores in student evaluations than their white male colleagues.<sup>5</sup> Scholars of colour are disproportionately undercited, both in law and in other fields of research.<sup>6</sup> Faculty of colour are also frequently saddled with the 'invisible labour' of carrying their university's 'diversity mission', acting, in Patricia Matthew's words, as 'the racial conscience of their institutions while not ruffling too many of the wrong feathers' – something that is rarely recognised or rewarded in academic hiring or promotion procedures.<sup>7</sup> A similar 'invisible' burden falls on those students of colour mobilising to 'decolonise' their law school curricula, which remain notoriously male, pale, and stale.<sup>8</sup> In short, patterns

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<sup>3</sup> Iyiola Solanke, 'Where Are the Black Female Professors in Europe?' (*Gunda Werner Institute*, 27 May 2019) <<https://www.gwi-boell.de/en/2019/05/27/where-are-black-female-professors-europe>> accessed 28 April 2021.

<sup>4</sup> This observation is echoed in the Twitter hashtag #BlackInTheIvory. See <<https://blackintheivory.net/>> accessed 4 May 2021.

<sup>5</sup> For recent evidence, see Kerry Chávez and Kristina Mitchell, 'Exploring Bias in Student Evaluations: Gender, Race, and Ethnicity' (2020) 53(2) *PS: Political Science & Politics* 270.

<sup>6</sup> Victor Ray, 'The Racial Politics of Citation' (*Inside Higher Ed*, 27 April 2018) <<https://www.insidehighered.com/advice/2018/04/27/racial-exclusions-scholarly-citations-opinion>> accessed 4 May 2021. See also Kecia Ali, 'The Politics of Citation' (*Gender Avenger*, 31 May 2019) <<https://www.genderavenger.com/blog/politics-of-citation>> accessed 4 May 2021.

<sup>7</sup> Patricia Matthew, 'What Is Faculty Diversity Worth to a University?' *The Atlantic* (23 November 2016) <<https://www.theatlantic.com/education/archive/2016/11/what-is-faculty-diversity-worth-to-a-university/508334/>> accessed 29 April 2021. See also Social Sciences Feminist Network Research Interest Group, 'The Burden of Invisible Work in Academia' (2017) 39 *Humboldt Journal of Social Relations* 228.

<sup>8</sup> Jing Min Tan, 'The Many Layers of Invisible Labour Decolonising the Academy' (*TWAILR: Reflections*, 2 March 2021) <<https://twailr.com/the-many-layers-of-invisible-labour-decolonising-the-academy/>> accessed 4 May 2021.

of racialised inequality and exclusion pervade more or less every conceivable aspect of academic life.

Viet Thanh Nguyen recently described mainstream American literature as 'poetry and fiction written by white, well-educated people and regulated by a reviewing, publishing and gate-keeping apparatus that is mostly white and privileged'.<sup>9</sup> Substitute 'pithy prose' for 'poetry' (and fiction?) and the same might more or less be said of academic legal publishing in Europe. Figures shared on Twitter by Talita Dias show that none of the 141 international law books published in the Cambridge Studies in International and Comparative Law series were written by African scholars.<sup>10</sup> Similarly, no African, Caribbean or Latin American authors are represented in the *Oxford Monographs in International Humanitarian and Criminal Law* series, while just one of the *Oxford Monographs in International Law* was written by a woman from the Global South.<sup>11</sup> The drastic inequality of representation in the outputs of these elite, 'global' publishing houses (with offices, *inter alia*, in Mexico, India, and South Africa) is a striking illustration of the Eurocentric, racialised exclusion that persists in academic publishing.

In 2020, the global rise of the Black Lives Matter movement following the tragic murder of George Floyd by police in the United States prompted some response – albeit limited and long overdue – from a number of high-profile academic publishing outlets. Harvard University Press, for example, issued a statement declaring that it will increase 'efforts to seek out Black scholars to give voice to their work' and 'enact change [...] to amplify the Black voices that must be heard'.<sup>12</sup> The editors of *EJIL:Talk!* – the blog of the European

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<sup>9</sup> Viet Thanh Nguyen, 'The Post-Trump Future of Literature' *New York Times* (22 December 2020) <<https://www.nytimes.com/2020/12/22/opinion/fiction-poetry-trump.html>> accessed 13 April 2021.

<sup>10</sup> Talita Dias (Twitter, 18 March 2021) <<https://twitter.com/tdesouzadias/status/1372511034167164932>> accessed 28 April 2021.

<sup>11</sup> Talita Dias (Twitter, 17 March 2021) <<https://twitter.com/tdesouzadias/status/1372193944495357958>> accessed 28 April 2021; Talita Dias (Twitter, 17 March 2021) <<https://twitter.com/tdesouzadias/status/1372189404798783499>> accessed 28 April 2021.

<sup>12</sup> 'Black Lives Matter' (Harvard University Press Blog, 15 June 2020) <[https://harvardpress.typepad.com/hup\\_publicity/2020/06/black-lives-matter.html](https://harvardpress.typepad.com/hup_publicity/2020/06/black-lives-matter.html)> accessed 13 April 2021.

Journal of International Law – convened an online symposium on the topic of Black Lives Matter and international law.<sup>13</sup> A 2020 issue of the International Journal of Constitutional Law featured a guest editorial on systemic racism and the law.<sup>14</sup> And more recently, UCLA Law Review has devoted a special issue to the topic of 'transnational legal discourse on race and empire'.<sup>15</sup>

In our own small way, the European Journal of Legal Studies (EJLS) has begun to grapple with the problem of racialised exclusion in academic publishing. Particularly given our stated aim to act as a platform for 'emerging legal scholars', it seems vital that we do not simply reproduce the existing racial (and other) inequalities that currently pervade the academic world. Our obviously limited power to bring about meaningful change is no excuse for failing to actively acknowledge and engage with this issue: in Reni Eddo-Lodge's words, white privilege (enjoyed by the vast majority of our board members) is 'dull, grinding complacency'.<sup>16</sup> I do not pretend to have all (or even any) of the answers but wish nonetheless to share some of the ideas we have discussed so far in the hope of prompting further reflection among our readers.

One obvious, if somewhat trite, concern is the 'blindness' of the review process. Like some other journals, while our peer-review procedure is double-blind, our initial 'desk review' stage is not. This means that authors' identities are known to those who decide whether to send out submissions for peer review. These decisions may therefore be adversely affected by negative biases based on (say) the author of a given piece having a 'non-European' name or an institutional affiliation in the Global South. This is not to suggest a lack of confidence in our desk reviewers, but merely that, in the absence of

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<sup>13</sup> See Gail Lythgoe and Mary Guest, 'Black Lives Matter and International Law' (EJIL:Talk!, 19 June 2020) <<https://www.ejiltalk.org/black-lives-matter-and-international-law/>> accessed 13 April 2021.

<sup>14</sup> Iyiola Solanke, 'Editorial: Systemic Racism and Creative Emotion' (2020) 18 International Journal of Constitutional Law 673.

<sup>15</sup> See the editors' introduction: E. Tendayi Achiume and Asli Bâli, 'Race and Empire: Legal Theory Within, Through, and Across National Borders' (2021) 67 UCLA Law Review 1386.

<sup>16</sup> Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race* (Bloomsbury 2017) 87.

a fully blind procedure, the possible influence of (un)conscious biases cannot be ruled out. In an effort to address this issue, we are currently looking into technical solutions that would allow us to introduce a fully 'blind-from-the-point-of-entry' system, whereby desk reviewers would know nothing about an author's identity until they have made a decision about the merits of a particular submission. Watch this space...

Another, more significant, consideration pertains to language. Academics, perhaps especially early career researchers, are under considerable pressure to publish in English, given its increasing dominance in global communication. It is probably fair to say that it is now very difficult, if not impossible, to establish an 'international reputation' without at least some English-language publications. This state of affairs obviously privileges native Anglophones and, to a lesser extent, those with easy access to relevant opportunities for language learning.<sup>17</sup> By the same token, the global hegemony of English clearly disadvantages non-native speakers, who are forced to write in what might be their second, third, or even fourth or fifth language.<sup>18</sup> This disadvantage is perhaps most acute for non-Anglophone scholars from the Global South, where access to English-language materials and instruction may be much more limited than in the 'elite' institutions of the Global North (with the caveat that English-language education remains standard in certain parts of the Global South as a legacy of British colonialism).<sup>19</sup> Linguistic disparities thus (partially) track the racialised inequalities of the North-South divide.

At EJLS, we are keen that language should not be a barrier to publication. Under our review procedure, language issues alone cannot be grounds for

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<sup>17</sup> On the broader dynamics of this issue, see Philippe van Parijs, *Linguistic Justice for Europe and for the World* (Oxford University Press 2011).

<sup>18</sup> See Mary Jane Curry and Theresa Lillis, 'The Dangers of English as Lingua Franca of Journals' (Inside Higher Ed, 13 March 2018) <<https://www.insidehighered.com/views/2018/03/13/domination-english-language-journal-publishing-hurting-scholarship-many-countries>> accessed 6 May 2021.

<sup>19</sup> See Julia Emtseva, 'Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch Up with the Western International Lawyers' (2021) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2021-11 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3837283](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837283)> accessed 6 May 2021.

rejection; our reviewers must instead provide sufficient substantive justification. If a submission is accepted for publication, our (Anglophone) executive editors work with authors to refine the grammar, style, and structure of their texts, typically going through several rounds of proofreading and copyediting. This service goes some way to redressing the imbalance between native and non-native speakers of English.

Addressing Anglocentrism in academic publishing is not simply a matter of language 'correction', however. Writing from a Latin American perspective, Alonso Gurmendi and Paula Baldini Miranda da Cruz have recently highlighted how the dominant structural and stylistic conventions in the Anglophone world are perceived quite differently in other academic cultures:

under many regional cultures, an introduction of a paper is often simply composed of a clear statement of the research problem and questions. [...] revealing the conclusion in the introduction can be seen as rude, 'spoiling' the article for the reader. Similarly, some writing cultures presume that a well-written piece should not have roadmaps or signposts because they would make it redundant. Rather many times articles can start with an anecdote or a story that sets the scene for the legal arguments involved in the text. Other times, articles do not even need a separate section for conclusions, since it is presumed that the audience will read the entire piece thoroughly and arrive at their own conclusions. [...] In Spanish, it is polite to write articles in *pluralis modestiae* ('we believe') rather than singular ('I believe'), since this can be seen as dismissive of the reader and its role in the interpretation of the argument.<sup>20</sup>

As Gurmendi and Baldini Miranda da Cruz go on to point out, given the dominance of Anglophone writing conventions in 'international' publishing, 'peripheral scholars who do not adapt their communication risk having their scientific work obfuscated by their writing and argumentation styles'.<sup>21</sup> In reviewing and editing submissions, it is therefore critical that we strike an appropriate balance between editorial consistency and respect for the diversity of academic writing cultures, both within and beyond Europe. In

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<sup>20</sup> Alonso Gurmendi and Paula Baldini Miranda da Cruz, 'Writing in International Law and Cultural Barriers (Part I)' (Opinio Juris, 7 August 2020) <<https://opiniojuris.org/2020/08/07/writing-in-international-law-and-cultural-barriers-part-i/>> accessed 6 May 2021.

<sup>21</sup> Ibid.

recognition of this issue, we have recently rewritten our author guidelines to include the following statement: 'EJLS welcomes the broadest possible range of writing styles and seeks to promote scholarship from all academic cultures'. We will continue to consider how to reflect this commitment in our reviewing and editing procedures.

Efforts to address global linguistic inequalities in academic publishing can go further still. Justina Uriburu has suggested that actively embracing multilingualism in (international) legal scholarship might also help to combat the exclusionary effects of Anglocentrism.<sup>22</sup> Under its statute, EJLS is expressly committed to promoting linguistic diversity and we are, in principle, happy to receive submissions in any language, subject to the competences of our editorial board. Over the years, we have published a total of 48 articles in languages other than English, namely Dutch, German, French, Italian, Portuguese, Romanian, and Spanish.<sup>23</sup> As this list indicates, the competences of the board are strongly weighted in favour of 'European' languages. This follows from the fact that the members of our core editorial team are all researchers at the EUI, who in turn come largely from the Member States of the European Union (EU). As a consequence, for example, we were recently forced to reject a submission in Arabic simply on the grounds that we did not have enough board members competent to review it.<sup>24</sup> In future, we might look to expand our roster of ad hoc and external reviewers in order to cater for a wider, more globally representative range of languages.

'Formal' considerations of blindness and language can only take us so far. In evaluating the potentially exclusionary effects of our publishing process, it is

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<sup>22</sup> Justina Uriburu, 'Between Elitist Conversations and Local Clusters: How Should We Address English-centrism in International Law?' (Opinio Juris, 2 November 2020) <<https://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/>> accessed 6 May 2021.

<sup>23</sup> Olga Ceran and Anna Krisztian, 'From Inclusivity to Diversity: Lessons Learned from the EJLS Peer Review Process' (2019) 11(2) *European Journal of Legal Studies* 1, 6.

<sup>24</sup> This is not to suggest, of course, that there are no Arabic-speaking EU citizens. However, for reasons partially alluded to above, they do not tend to end up at the EUI.

also crucial to address matters of substance. As Antony Anghie, writing in the inaugural issue of the *Third World Approaches to International Law (TWAAIL) Review*, recently put it:

A journal represents a tradition, whether that tradition is understood in terms of an approach, or subject matter, or national tradition. Journals may present themselves as eclectic, catholic, universal, open to all forms of inquiry and intent only on publishing 'good scholarship'. Experience suggests however that it is through the lens of a particular tradition that any work submitted to a journal is inevitably assessed and deemed worthy to be included, engaged with.<sup>25</sup>

While EJLS is not wedded to any particular *national* tradition, the membership and expertise of our editorial board creates a likely bias in favour of broadly 'European' approaches. This is further compounded by the fact that Eurocentrism dominates the fields of research in which we publish. Comparative law, as Sherally Munshi writes, 'remains resolutely Eurocentric', with 'painfully little discussion about legal cultures outside of Europe'.<sup>26</sup> Discussing racism in international legal scholarship, Mohsen al Attar has recently pointed out how European perspectives and experiences likewise continue to dominate the (mainstream) study of international law.<sup>27</sup> As Martijn Hesselink argues, Eurocentrism is also deeply problematic for European law and legal theory, in that it universalises and reifies a particular (white, 'Western') worldview to the exclusion of others, such as those of racialised European citizens.<sup>28</sup>

A related substantive concern is the relative lack of critical engagement with the relationship between law and race – and the attendant intersections, *inter alia*, with empire and imperialism – in 'mainstream' publishing outlets. James

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<sup>25</sup> Antony Anghie, 'Welcoming the *TWAAIL Review*' (2020) 1 *Third World Approaches to International Law Review* 1, 2.

<sup>26</sup> Sherally Munshi, 'Comparative Law and Decolonizing Critique' (2017) 65 *American Journal of Comparative Law* 207, 225.

<sup>27</sup> Mohsen al Attar, 'Subverting Racism in/through International Law Scholarship' (Opinio Juris, 3 March 2021) <<http://opiniojuris.org/2021/03/03/subverting-racism-in-international-law-scholarship/>> accessed 11 May 2021. See also Anthea Roberts, *Is International Law International?* (Oxford University Press 2017).

<sup>28</sup> Martijn Hesselink, 'Towards a Critical Theory of Justice in European Private Law' (2021) <<https://ssrn.com/abstract=3752748>> accessed 13 May 2021.

Thuo Gathii has shown, for instance, that just 24 out of 7,475 items published in the American Journal of International Law (AJIL) and none of those published in AJIL Unbound 'substantially engaged with race in the body of their text'.<sup>29</sup> This marginal(ised) position belies the fact that critical race theory (CRT) and related approaches can transform our understanding of foundational questions in the study of law. To take just two examples, E. Tendayi Achiume and Devon Carbado have recently highlighted how CRT and TWAIL reveal the white supremacist underpinnings of such core concepts as 'citizenship' and 'sovereignty' in constitutional and international law.<sup>30</sup> Similarly, likewise drawing on insights from CRT, Nadine El-Enany has shown that the foundation of the European project involved 'the fortification of a space of white European supremacy', wherein Algerian workers – for example – were excluded from the principle of free movement despite holding French citizenship.<sup>31</sup>

To be genuinely anti-racist, academic publishing must surely take seriously the need to 'decentre' Europe and to promote 'peripheral', critical voices. Platforms like the TWAIL Review and the recently launched African Journal of International Economic Law clearly have a central role to play in this respect.<sup>32</sup> Nonetheless, it strikes me as perhaps equally important that supposedly 'generalist' journals in Europe and elsewhere take active steps to create space for otherwise marginalised regional perspectives and/or critical approaches to the study of law. Otherwise, in treating these as solely 'specialist' matters outside the 'mainstream', there is a risk of maintaining in legal scholarship a hierarchical division akin to the one observed by Charles Mills in American political philosophy, which he has characterised as "'Jim

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<sup>29</sup> James Thuo Gathii, 'Studying Race in International Law Scholarship Using a Social Science Approach' (2021) 22(1) Chicago Journal of International Law <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793974)> accessed 31 May 2021.

<sup>30</sup> E. Tendayi Achiume and Devon Carbado, 'Critical Race Theory Meets Third World Approaches to International Law' (2021) 67 UCLA Law Review 1462.

<sup>31</sup> Nadine El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester University Press 2020) 184.

<sup>32</sup> See James Thuo Gathii and Olabisi D. Akinkugbe, 'Introduction to the Inaugural Issue of the African Journal of International Economic Law' (2020) 1 African Journal of International Economic Law vi.

Crow social justice theory," in which issues of race are separate and unequal'.<sup>33</sup> Efforts to address racialised exclusion in academic legal publishing will remain no more than partial if this continues to be ignored.

Our own efforts to address these substantive issues are under way. The newly revised EJLS author guidelines declare that 'we particularly welcome contextual, interdisciplinary, *and critical* approaches to legal scholarship'. Our inaugural book symposium also represents a step in this direction (see further below). And again, we will continue to explore how to embed this commitment into our review process. This is not to suggest that we have (or should) become the European Journal of Critical Legal Studies; rather, to be a truly *generalist* journal, we should be as much a platform for (currently) peripheral, critical voices as for more conventional, 'mainstream' approaches. The 'European' in our name should, in my view, be no more than a geographic descriptor and a nod to our institutional affiliation. In Anghie's words, 'a journal, and everything that accompanies it, is a community, and every writer needs a community and the solidarity it provides'.<sup>34</sup> I hope that, in years to come, the EJLS community will continue to become more inclusive and representative of wider (academic) society, both within Europe and beyond.

## IN THIS ISSUE

As it happens, as much by accident as by design, this issue contains more than the usual share of critique. We begin with **George Hill's** New Voices article on international law and cartography. Hill points to the two disciplines' shared colonial origins to unsettle widespread assumptions about the supposed neutrality of maps and, drawing on a case study of the West Bank, suggests that 'counter-cartographies' have the potential to give legal voice to more participatory mapping practices. In another topical New Voices piece, **Mirko Forti** explores the tensions between the use of artificial intelligence

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<sup>33</sup> Daniel Steinmetz-Jenkins, 'Charles Mills Thinks Liberalism Still Has a Chance' *The Nation* (28 January 2021) <<https://www.thenation.com/article/culture/charles-mills-thinks-theres-still-time-to-rescue-liberalism/>> accessed 28 April 2021. Mills attributes this to the legacy of John Rawls, arguing that 'his obtuseness to [white supremacy] [...] effectively greenlighted its evasion in the vast literature his work would generate, both sympathetic and critical'.

<sup>34</sup> Anghie (n 25) 3.

(AI) to improve public health and the protection of privacy rights and personal data under the EU's General Data Protection Regulation (GDPR), arguing that the two can be reconciled provided further steps are taken to keep pace with rapid technological advances. **Orlando Scarcello** rounds off the New Voices section with a discussion of proportionality in the decisions of the Court of Justice of the EU in *Weiss* and of the German Constitutional Court in *PSPP*. Pointing to key differences in the respective approaches of the two courts, Scarcello casts doubt on the possibility of establishing a general standard for the assessment of proportionality in public law adjudication.

We then turn to our inaugural book symposium, for which we invited four rising stars in the critical study of international law to reflect on Ntina Tzouvala's *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020). **Kanad Bagchi** praises Tzouvala's Marxist-deconstructionist approach to the 'standard of civilisation', exploring its implications for other critical approaches to legal scholarship and for the strategic potential of international law as a tool of emancipation. **Julie Wetterslev** highlights the book's inattention to the role of Christianity in early capitalist expansion before discussing how Tzouvala's insights are reflected in the titling of lands as indigenous communal property in Nicaragua. **Daniel R. Quiroga-Villamarín** welcomes *Capitalism as Civilisation's* landmark *theoretical* contribution to Marxist international legal scholarship, but argues for a more radical departure from conventional sources in the *history* of international law. Finally, **Rohini Sen** explores the scope and limits of textual 'reading(s)' as method, pointing to 'non-textual academic modes of intervention' as a productive means of engaging with/against mainstream international lawyers. In her response, **Ntina Tzouvala** opts to 'create a new text out of the silences, omissions and slippages of the book', focusing on the role of source(s) and subject(ivity) in the critical study of international law. The conversation will continue at a 'live' roundtable discussion to be held online in the coming months. Further details to follow soon.

The first of our general articles revisits Hans Kelsen's 'pure theory' of law. Drawing on Derridean deconstruction, **Kristina Čufar** reveals Kelsen's

widely overlooked 'critical edge', locating this in his scepticism about the presumed link between morality and legality.

Next, in a self-consciously provocative piece on 'bullshit', **Matthews Evans** offers a sceptical take on current trends in critical legal theory, focusing in particular on the (mis)use of Foucault and human rights critique. Evans cautions against 'uncritical critique', urging critical theorists to remain sufficiently grounded to mobilise the radical change they wish to see.

**Tetyana (Tanya) Krupiy** then explores whether law and economics approaches offer an adequate theoretical account of the operation of international humanitarian law (IHL). The answer, the author contends, is no: these approaches reduce IHL to 'humanitarian economics', failing to capture its constructivist and ethical characteristics.

**Justin Lindeboom** gives us a Hartian account of the autonomy of EU law, finding the famous rule of recognition in 'internal recognitional statements' issued by the European Court of Justice. In the final part of the article, Lindeboom addresses potential objections from the perspective of national courts regarding the doctrines of direct effect and supremacy of EU law.

Moving from theory to doctrine, **Gabriella Perotto** assesses current EU law measures to combat harmful tax competition. Finding traditional approaches wanting, Perotto emphasises the potential importance of a Common Consolidated Corporate Tax Base as a means of limiting the incentives for aggressive tax planning and profit-shifting strategies.

Remaining in the world of EU law, **Marco Bodellini** discusses the role of deposit guarantee schemes in the management of banking crises. Bodellini suggests that the use of such schemes should be expanded and addresses a series of potential legal obstacles arising, *inter alia*, from the application of EU state aid rules.

Finally, in addition to our *Capitalism as Civilisation* symposium, this issue contains two regular book reviews. **Maria Patrin** discusses Anu Bradford's *The Brussels Effect*, explaining how the book 'challenges the conventional narrative of Europe's declining power' and pinpoints the global impact of EU regulation. Bringing the issue to a close, **Grigoris Bacharis** provides an overview of the Elgar *Research Handbook on Remedies in Private Law*, which he

characterises as 'a comprehensive reference work' with the potential to 'open up new debates and rejuvenate old ones'.

#### CHANGING OF THE GUARD

Since the publication of our last issue, we have said goodbye to a number of long-standing members of our executive team: Anna Krisztián as editor-in-chief, Olga Ceran and Léon Dijkman as managing editors, Lene Korseberg as executive editor, and Yusef Al Tamimi as head of section for legal theory. On behalf of the entire board, I thank them all for their years of service for the Journal. In their place, I am very pleased to now be working with Marc Steiert and Helga Molbæk-Steensig as managing editors, Max Münchmeyer and Ian Murray as executive editors, and Adrian Rubio as head of section for legal theory. Jaka Kukavica, Kerttuli Lingenfelter, and Nastazja Potocka-Sionek have helped to steady the ship, remaining in their positions as heads of section for European law, international law, and comparative law, respectively.

I am extremely grateful to all our authors and to the entire EJLS team for working so diligently to bring this issue to life, despite the ongoing stresses and strains of the coronavirus pandemic. Let us hope that the end will soon be in sight.

Take care – and enjoy the issue!



## NEW VOICES

### THE MAP AND INTERNATIONAL LAW'S STIFLED VISUAL DISCOURSE

George Hill\* 

*Traditional accounts of international law cast the map as a passive narrator of its divisions, violence, and predilections, leaving its place in international legal discourse under-explored and under-theorised. This paper seeks to reframe the map as a particular and contingent technology designed to enact and entrench hegemonies within international law, whilst itself enjoying a quiet monopoly over the discipline's limited visual discourse. It contends that the map, as one of international law's visual conduits, dominates its imagination without adequate critique. With the support of a case study of mapping practices in the West Bank, this paper suggests that the ubiquitous 'world picture' stifles radical and transformative images conducive to global justice. Against this backdrop, it explores routes to alternative visual imaginaries, such as 'deep' and 'participatory' mapping, through which international law might better accommodate the layered socio-spatial realities of the modern world, state and city.*

**Keywords:** international law; cartography; critical geography; deep mapping; territoriality

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## I. INTRODUCTION

It is no surprise that international lawyers are sentimental about maps. International law and cartography share a common goal in the ordering of subject and space, a common origin in the Westphalian and colonial projects, and, fundamentally, a common understanding of how statehood, territoriality, and voice are constituted. This paper seeks to dislodge that sentimentality. Mainstream histories of international law tend to fixate on textual sources and thus overlook the role of the map, as international law's primary visual conduit, in shaping the international legal imagination. Authors have addressed maps as evidence in international law<sup>1</sup> and drawn analogies between law and map,<sup>2</sup> but few have confronted the map as an active and prescriptive presence in international law.<sup>3</sup> Drawing insights from critical

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<sup>1</sup> See e.g. Guenter Weissberg, 'Maps as Evidence in International Boundary Disputes: A Reappraisal' (1963) 57 *American Journal of International Law* 781; Hyung K Lee, 'Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law' (2005) 14 *Pacific Rim Law and Policy Journal* 159; William Thomas Worster, 'Maps Serving as Facts or Law in International Law' (2018) 33 *Connecticut Journal of International Law* 278; William Thomas Worster, 'The Frailties of Maps as Evidence in International Law' (2018) 9 *Journal of International Dispute Settlement* 570.

<sup>2</sup> See e.g. Boaventura de Sousa Santos, 'Law: A Map of Misreading: Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279, 282; Sally Engle Merry, 'Anthropology, Law, and Transnational Processes' (1992) 21 *Annual Review of Anthropology* 357, 358; Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 *Leiden Journal of International Law* 621, 621–22.

<sup>3</sup> Notable exceptions include Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2009); Jordan Branch, *The Cartographic State: Maps, Territory and the Origins of Sovereignty*

geography, this paper suggests that, by revitalising the world map through new practices of mapping, international law might enhance its capacity for radical, subaltern, and proletarian conceptualisations of space.

Section II unpacks the map's structural prescriptions before Section III explains their historical entanglement with international legal praxis. Section IV then explores how, at present, these prescriptions condition the discursive production of 'place' in international legal argument. On these terms, Section V explores alternative mappings of space that might better accommodate the intricacies and idiosyncrasies of lived space.

## II. DISSECTING THE MAP AS AN ARTEFACT OF INTERNATIONAL LAW

In order to address the map as a contingent and particular technology of governance, it is important to identify what distinguishes the cartographic representation of space from its natural subject. With the advent of the 'world picture',<sup>4</sup> the conversion of natural space into the visual lexicon of constitutive units became a fixture of international governance. Indeed, the post-1945 international legal order has ossified around this 'statist visual imaginary' and its implication that life, politics and commerce transpire exclusively and evenly through the absolute, static, and opaque unit of the nation-state.<sup>5</sup> This image has become particularly ubiquitous in the post-

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(Cambridge University Press 2013); Nikolas M Rajkovic, 'On Fragments and Geometry: The International Legal Order as Metaphor and How It Matters' (2013) 6 *Erasmus Law Review* 6; Nikolas M Rajkovic, 'The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis' (2018) 31 *Leiden Journal of International Law* 267; Jean d'Aspremont and Eric De Brabandere, 'Paintings of International Law' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018).

<sup>4</sup> On the notion of the 'world picture', see Martin Heidegger, 'The Age of the World Picture' in William Lovitt (tr), *The Question Concerning Technology and Other Essays* (Garland 1977); Benjamin Lazier, 'Earthrise; or, The Globalization of the World Picture' (2011) 116 *American Historical Review* 602; Gianni Vattimo and Robert T Valgenti, *Of Reality* (Columbia University Press 2016).

<sup>5</sup> Rajkovic, 'The Visual Conquest of International Law' (n 3) 272.

decolonisation world, as sovereign states now occupy the near entirety of the planet's landmass.<sup>6</sup>

Problematically, this visual taxonomy portrays the planet as a smooth surface, with states interrupted only by the single valve of the capital city, through which pure, unadulterated sovereignty emanates. This officialised world picture represses the layering of socio-spatial divisions – cultural, political, emotional, ethnic, economic, linguistic, national, religious, semantic, proprietary – upon which lived spaces are built.<sup>7</sup> Lefebvre, for example, advocates an understanding of space that emerges from – not in spite of – its occupation by 'an organic, living, and thinking being'.<sup>8</sup> Every space exists in spatial relation to its neighbours, in historical relation to its past, and in aspirational relation to its future.

Despite this, official maps present an internationally sanctioned façade that overlooks the relationality and liminality of lived spaces and represses the inconvenient truths of contestation, variegation, and rupture.<sup>9</sup> Critically, they impose new, eternally foreign fictions onto complex spaces instead of empathising with their occupants. Indeed, it is by virtue of this very capacity to censor and simplify that the map's neat delineations have become synonymous with order, discipline, and legibility.<sup>10</sup> In this sense, the map

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<sup>6</sup> Surabhi Ranganathan, 'Decolonization and International Law: Putting the Ocean on the Map' [2020] *Journal of the History of International Law* 1, 1.

<sup>7</sup> For an account of 'division spaces' characterised by this layering, see Scott Newton, 'Parallel Worlds: Cold War Division Space' in Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War* (Cambridge University Press 2019).

<sup>8</sup> Henri Lefebvre, 'Space and the State' in Neil Brenner and Stuart Elden (eds), *State, Space, World: Selected Essays* (Gerald Moore, Neil Brenner and Stuart Elden trs, University of Minnesota Press 2009) 229.

<sup>9</sup> Henri Lefebvre, *The Production of Space* (Donald Nicholson-Smith tr, Blackwell 1991) 363.

<sup>10</sup> Robert D Sack, 'Human Territoriality: A Theory' (1983) 73 *Annals of the Association of American Geographers* 55; Vasuki Nesiiah, 'Placing International Law: White Spaces on a Map' (2003) 16 *Leiden Journal of International Law* 1; Saskia Sassen, 'When Territory Deborders Territoriality' (2013) 1 *Territory, Politics, Governance* 21; Mickelson (n 2); Henry Jones, 'Lines in the Ocean:

orders not only natural space, but also the complex social relations that are inextricably bound up with it.

### III. THE MAP'S ENTRENCHMENT IN INTERNATIONAL LAW'S *BILDUNGSROMAN*

In understanding international law's quiet reliance upon cartography, it is crucial to understand that international law has never existed without, outside, or beyond the map. The disciplines originated, in their modern forms, as twin technologies through which foreign spaces were pulled into the carto-administrative rubric of European sovereignty.<sup>11</sup> For the governing elites of post-renaissance Europe, the Westphalian map provided a neat, legible format through which the reach of state power could be visually asserted, exhibited and authenticated. Yet this reification was reciprocal: As international law championed the map, the cartographic precepts of territoriality and jurisdiction acquired legal significance as the key parameters for participation in international community.<sup>12</sup> This relationship only deepened as Westphalian map was laid out like a tile floor over the non-European world.<sup>13</sup>

#### *1. Cartography as Colonial Currency*

The classical international legal doctrine of Grotius, Vitoria, and Suárez was primarily concerned with what Antony Anghie terms 'the grand redeeming project of bestowing sovereignty on the dark places of the earth'<sup>14</sup> and the imposition of European concepts (and images) of sovereignty upon non-

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Thinking with the Sea about Territory and International Law' (2016) 4 *London Review of International Law* 307.

<sup>11</sup> Benjamin Schmidt, 'Mapping an Empire: Cartographic and Colonial Rivalry in Seventeenth-Century Dutch and English North America' (1997) 54 *The William and Mary Quarterly* 549, 552.

<sup>12</sup> Sassen (n 10); Upendra Baxi, 'Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law' (2016) 23 *Indiana Journal of Global Legal Studies* 15, 19.

<sup>13</sup> Benton (n 3).

<sup>14</sup> Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739, 741.

European people and places.<sup>15</sup> The flourishing of European cartography in the sixteenth and seventeenth centuries was directly attributable to its recognised ability to entwine commerce, empire, and law, and to market the resulting tapestry as objective fact.<sup>16</sup> Whereas in Europe borders were inferred from political reality, the non-Westphalian world was mapped by force. Whether cast as 'cartographic violence'<sup>17</sup> or the more banal 'cartogenesis',<sup>18</sup> the map validated imperial Europe's legal proclamations of order and civility by compiling a new visual codex through which the world was to be read and, by implication, governed. In this way, the map was integral to the erasure of pre-colonial and non-European landmarks, boundaries and readings of space; an erasure that was subsequently sanctioned by imperial international law.<sup>19</sup>

The colonial project was ground zero for the modern map as an instrument of legal assertion. Law and map were united by a common goal that endures to this day: to flatten, order, and discipline colonial and post-colonial spaces. The map emerged not only as a means of making sense of the world, but as a constitutive force in its own right. It is relevant not only that the map was the conduit for the enduring subjugation of the Global South, but also that it originated (and continues to operate) as an instrument of visually enshrining that subjugation.

## 2. *Cartography as a Science*

Cartography served the colonial project through its façade of uniformity, empiricism and officialdom. 'For centuries', Carl Schmitt claims, 'humanity had a mythical image of the earth, but no scientific understanding of it as a

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<sup>15</sup> See generally Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2001); Gerry Simpson, *Great Powers and Outlaw States* (Cambridge University Press 2004); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

<sup>16</sup> Kate Miles, 'Insulae Moluccae: Map of the Spice Islands, 1594' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018) 249.

<sup>17</sup> Mark Neocleous, 'Off the Map' (2003) 6 *European Journal of Social Theory* 409.

<sup>18</sup> Rajkovic, 'The Visual Conquest of International Law' (n 3).

<sup>19</sup> Miles (n 16) 257–58.

whole<sup>20</sup> – the map played that role. As romantic cityscapes, evocative cartouches, and fantastical creatures gave way to the omniscient eye of the modern world picture, both law and map advanced the 'encrustation of the world picture'.<sup>21</sup> A remarkable study of enlightenment-period maps by political scientist Steve Pickering traces a conspicuous shift in cartographical style around the signing of the Westphalian treaties in 1648.<sup>22</sup> Lined maps replaced pictorial views and cartography came to be viewed as scientific rather than artistic. In this way, discourse over the map's subjectivity was set aside.

The emergence and proliferation of a top-down perspective on the globe inculcated an ontological arrogance shared by international lawyer and cartographer alike, and the 'taxonomic categorisation' of territory became a scientific and intellectual pursuit both worthy of devotion and commanding of deference.<sup>23</sup> The turn towards orthogonal (top-down) projection also prompted shifts in the way that space was visualised and knowledge about space was communicated. By depicting the colony as a flat, contiguous whole, the colonial cartographer imbued his creations with an illusion of homogeneity.<sup>24</sup> This suppressed the colony's 'tangled and interrupted' spaces and the 'changing and locally differentiated qualities of rule'.<sup>25</sup> The visual expulsion of nuance and contestation insulated the map from resistance or

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<sup>20</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (first published 1950, GL Ulmen tr, Telos Press 2006) 50.

<sup>21</sup> John Brian Harley, 'Deconstructing the Map' in Trevor J Barnes and James S Duncan (eds), *Writing Worlds: Discourse, Text and Metaphor in the Representation of Landscape* (Routledge 2006) 241–42.

<sup>22</sup> Steve Pickering, 'Borderlines: Maps and the Spread of the Westphalian State from Europe to Asia' (2013) XL-4/W3 International Archives of the Photogrammetry, Remote Sensing and Spatial Information Sciences III <<https://www.int-arch-photogramm-remote-sens-spatial-inf-sci.net/XL-4-W3/III/2013/>> accessed 15 March 2021.

<sup>23</sup> Nesiah (n 10) 10.

<sup>24</sup> Miles (n 16) 252.

<sup>25</sup> Benton (n 3) 3.

critique. The map has, in turn, become integral to international law's territorialised 'way of thinking'.<sup>26</sup>

The qualities that attracted the colonial cartographer to the map are arguably the same ones that have made it so ubiquitous in international legal discourse today. While maps have been individually contested for their contents, the medium itself eludes critique. The world map became coterminous – in both physical and conceptual terms – with the Westphalian system and the assertion of European sovereignty over foreign lands and peoples. The map, fundamentally designed to reimagine particular and contingent acts of governance as pseudo-scientific acts of 'discovery', warrants resistant, alternative and proletarian readings of space that might dislodge its visual hegemony.

#### IV. CONTESTING THE MAP IN INTERNATIONAL LEGAL ARGUMENT

As international law has evolved with the map, it has come to perceive it as a visual precondition to international legal voice. It presumes, as in the 1933 Montevideo Convention, that statehood is bound up in the existence of a defined territory, a fact invariably ascertained by recourse to the map.<sup>27</sup> In essence, appeals to international legal attention must resonate with the visual structure that the map has prefigured for international legal argument. International legal voice is thus contingent on being present, or at least placeable, on the world map.

In this way, international legal argument is conditioned by the map as a particular and contingent form. It forces local actors to re-articulate local spaces as at odds with the presumed contentment of Westphalian cartography in order to capture the international attention. This section unpacks this phenomenon by locating it within the 'war of maps' over the

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<sup>26</sup> Dino Kritsiotis, 'Public International Law and Its Territorial Imperative' (2009) 30 *Michigan Journal of International Law* 547, 547; Sara Kendall, 'Cartographies of the Present: "Contingent Sovereignty" and Territorial Integrity' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016* (TMC Asser 2017) 4.

<sup>27</sup> Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 UNTS 3802 (Montevideo Convention) art 1.

West Bank and the interplay of visual and legal forms seen in the disciplining of the Occupied Palestinian Territories ('OPT') as a site of carto-legal contestation.<sup>28</sup>

### *1. Perspective and Framing: Mapping the West Bank*

If the map signifies order, then claims of disorder and illegality must dislodge that presumed order. In his seminal *Forensic Architecture*,<sup>29</sup> Eyal Weizman describes the introduction of a topographical model to the Israeli High Court in the *Beit Sourik* proceedings.<sup>30</sup> His understated account of the process exposes an important detail: 'When a topographical model showing the path of the Wall was brought to court, at the request of the judges, the parties had to leave their designated places and assemble around it.'<sup>31</sup> In both metaphorical and concrete terms, the introduction of multi-dimensionality into the courtroom uprooted and disrupted the quotidian order of legal proceedings and their presumed mapping of the Beit Sourik locality.<sup>32</sup> This is a prime example of how international legal attention can be harnessed in new ways by disrupting the map and overcoming international law's apathetic approach to visual forms.

Even the most formalistic, empirical maps incorporate a set of aesthetic choices that temper our perception of subject and space.<sup>33</sup> In the words of the late legal anthropologist Sally Engle Merry, 'law [...] like a map, represents/distorts reality through the mechanisms of scale, projection, and symbolization.'<sup>34</sup> In sites such as the OPT that rupture the map's neat taxonomy of space, these variables facilitate the weaponization of

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<sup>28</sup> Christine Leuenberger and Izhak Schnell, 'The Politics of Maps: Constructing National Territories in Israel' (2010) 40 *Social Studies of Science* 803, 817–18.

<sup>29</sup> Eyal Weizman, *Forensic Architecture: Violence at the Threshold of Detectability* (Zone Books 2017).

<sup>30</sup> HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* [2004] IsrSC 58(5) 807, IsrLR 264. See also Martti Koskenniemi, 'Occupied Zone—"a Zone of Reasonableness"?' (2008) 41 *Israel Law Review* 13.

<sup>31</sup> Eyal Weizman, 'Maps of Israeli Settlements' (Open Democracy, 24 April 2002), <[https://www.opendemocracy.net/en/article\\_631jsp/](https://www.opendemocracy.net/en/article_631jsp/)> accessed 16 March 2021.

<sup>32</sup> *Ibid* 125.

<sup>33</sup> Shari Motro, 'Lessons From the Swiss Cheese Map' [2005] *Legal Affairs* 46, 47.

<sup>34</sup> Merry (n 2) 358.

cartography to political ends.<sup>35</sup> During the negotiation of the Oslo II Accord, in which the territorial limits of the West Bank and Gaza were defined, an Israeli map came close to sabotaging negotiations with Arafat's Palestinian Liberation Organisation.<sup>36</sup> This so-called 'Swiss Cheese' Map colour-coded the PLO's territorial administration in such a way as to portray it as an 'archipelago' of disconnected pockets of land, causing PLO leader Arafat what was described as 'insufferable humiliation'.<sup>37</sup>

This example invites us to treat counter-cartographies with caution. In cartographical dialectics, framing and perspective become exceptionally important. In a 2007 study, Vandello, Goldschmied and Richards showed two maps of Israel to participants in order to explore the 'appeal of the underdog'.<sup>38</sup> The first group was shown a map which focused exclusively on Israel, presenting Israel as the 'topdog' relative to the OPT, whereas the second group viewed a larger-scale map of the Middle East in which Israel appeared as the smaller 'underdog'. Of the first group, 70% considered the Palestinians as the underdog; of the second group, 62.1% saw Israel as the underdog.<sup>39</sup> This study demonstrates the contingency of virtually any depiction of space, and the elusiveness of objective mapping. It is a testament to this that the Israeli submissions to the ICJ disposed of maps altogether, perhaps in order to avoid giving visual credence to the West Bank as a contiguous, coherent whole.<sup>40</sup>

## 2. Counter-Cartographies in the West Bank

It is no surprise, then, that one of the richest uses of visual media in international legal cartography is that of the Palestinian written statement in

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<sup>35</sup> Leuenberger and Schnell (n 28) 817–818.

<sup>36</sup> Worster, 'Maps Serving as Facts or Law in International Law' (n 1) 288.

<sup>37</sup> Motro (n 33) 47.

<sup>38</sup> Joseph A Vandello, Nadav P Goldschmied and David AR Richards, 'The Appeal of the Underdog' (2007) 33 *Personality and Social Psychology Bulletin* 1603.

<sup>39</sup> *Ibid* 1607.

<sup>40</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Written Statement of the Government of Israel)* [2004] ICJ Pleadings 1579 <<https://www.icj-cij.org/public/files/case-related/131/1579.pdf>> accessed 15 March 2021.

the Israeli Wall advisory opinion.<sup>41</sup> It maps and re-maps the West Bank through no fewer than seven different lenses, showing the spread of Israeli settlements in the West Bank,<sup>42</sup> shifts in population,<sup>43</sup> the spread of water resources,<sup>44</sup> and its natural topography,<sup>45</sup> while also tracing these cartographies over satellite imagery.<sup>46</sup> In going beyond a top-down, orthogonal projection of space, the Palestinian submission breaks rank from the standard framing of space in international law and continues a broader lineage of counter-cartographies in the West Bank.<sup>47</sup> This is particularly clear in its use of photographic evidence to convey the lived experiences of residents in the West Bank. Though born from conflict, the visuo-cartographical discourse around the West Bank may well represent a blueprint for the contestation of official cartographies in less explicitly oppressed spaces.

By illuminating the contingency and partisanship bound up in the map, this example might warn international lawyers away from counter-cartographies and reaffirm their institutional affiliation to the Westphalian image. However, this does not justify institutional retreat from the discourse that the partisan map evokes. If contingency and partisanship are inevitable in depictions of contested spaces, then why not embrace, employ and address them as such? Disavowing the map on the basis of subjectivity would free that subjectivity from critique. Rather than rejecting the map, we should embrace it as a tool and instrument of discourse. De-empiricising and re-sentimentalising the map would provide fertile ground for the richer visual discourse that international law currently lacks. Looking beyond the bland portrayal of official politico-administrative divisions would give voice to the layered socio-spatial realities that the map has long oppressed. As further

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<sup>41</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Written Statement submitted by Palestine)* [2004] ICJ Pleadings 1555 <<https://www.icj-cij.org/public/files/case-related/131/1555.pdf>>.

<sup>42</sup> *Ibid*, maps 3, 5, 7-8.

<sup>43</sup> *Ibid*, map 9.

<sup>44</sup> *Ibid*, map 10.

<sup>45</sup> *Ibid*, map 11.

<sup>46</sup> *Ibid*, maps 12a-k.

<sup>47</sup> Weizman (n 29) 140-41; Christine Leuenberger, 'Maps as Politics: Mapping the West Bank Barrier' (2016) 31 *Journal of Borderlands Studies* 1, 20.

investigated in the following section, visual depictions of inequality, liminality, and segregation could serve to repurpose the map towards a redistributive ethic in international legal authorship.

## V. 'DEEP MAPPING' INTERNATIONAL LAW

The foregoing discussion leads the international lawyer into unfamiliar territory – official maps have dominated international law's spatial-visual matrix since its very beginnings. To address this discomfort, the de-mapping of international law could invite a rich variety of multimedia responses. This article takes only tentative steps towards a mode of mapping that disrupts the official and hegemonic model to which modern mapping readily adheres.

Weizman expresses the rationale for counter-cartographies eruditely: 'Access to truth can be obtained by local communities and groups rather than only by institutional science and law, but this "positional" truth has to be fought for.'<sup>48</sup> Here, the concept of the 'deep map' is instructive.<sup>49</sup> Roberts situates 'deep mapping' as a practice of spatial anthropology, primed to 'highlight the ways in which qualitative and humanistic forays into the representation and practice of space and place are multi-faceted, open-ended and – perhaps more contentiously – irreducible to formal and programmatic design.'<sup>50</sup>

In contrast to the traditional 'thin map', the deep map accommodates the layered identities of lived space and attempts to evolve with them. Its rich anthropological aspect invites autonomous, experiential mapping uncompromised by the search for officialdom and veracity. On these terms, Clifford McLucas describes the deep map as one that engages 'the insider and the outsider [...] the amateur and the professional, the artist and the scientist, the official and the unofficial, the national and the local' and, crucially, is 'a

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<sup>48</sup> Weizman (n 29) 128.

<sup>49</sup> David J Bodenhamer, John Corrigan and Trevor M Harris (eds), *Deep Maps and Spatial Narratives* (Indiana University Press 2015).

<sup>50</sup> Les Roberts, 'Deep Mapping and Spatial Anthropology' (2016) 5 *Humanities* 5, 6.

conversation and not a statement.<sup>51</sup> The deep map is thus innately attuned to the socio-historiographical contestation that underlies the map, rather than deaf to it. The deep map thus bridges chasms between past and present, natural and artificial, international and local, and appreciates the dynamic transitions between them.

In practice, the construction of a 'deep map' in international legal argument would require a consultative cartographic ethic. While this would be quite a departure from the discipline's longstanding penchant for prescriptivism, it could nonetheless be achieved through techniques such as participatory mapping, here signifying mapping practices that involve the participation of the relevant area's inhabitants<sup>52</sup> or simply through a more empathic approach to discussing local spaces as active participants in international law. Beyond the immediate obstacles lies a space in which legal conventionality could admit a deeper connection with the experiences of its subjects, whether natural persons or lived spaces. By re-mapping a site of conflict around, for instance, a victim's relationship to it, international law would confront local spaces in a more involved way, actively helping to reaccommodate victim experiences and give victims voice within legal arenas.

Some steps have been taken towards deep and participatory mapping in law. As explained by Kirsten Anker, the Australian National Native Title Tribunal admitted as evidence a painting produced by fifty indigenous artists depicting their understanding of the land. Critically, she observes that '[t]he use of such a painting in evidence may undermine the exclusivity of both

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<sup>51</sup> Quoted in Selina Springett, 'Going Deeper or Flatter: Connecting Deep Mapping, Flat Ontologies and the Democratizing of Knowledge' (2015) 4 *Humanities* 623, 627–29, fn 5.

<sup>52</sup> See Rainforest Foundation UK, 'Participatory Mapping' (Mapping for Rights) <<https://www.mappingforrights.org/participatory-mapping/>> accessed 12 November 2020; Rainforest Foundation UK, 'The Mapping For Rights Methodology: A New Approach to Participatory Mapping in the Congo Basin' (October 2015) <<https://www.rainforestfoundationuk.org/media.ashx/2909565-eng-low-res.pdf>> accessed 15 March 2021; Bjørn Sletto and others (eds), *Radical Cartographies: Participatory Mapmaking from Latin America* (University of Texas Press 2020).

western cartography and western law'.<sup>53</sup> Through counter-mappings of this kind, new cartographical practices hold the potential to give cartographic voice to those against whom the map has been deployed. In this way, deep mapping offers a valuable alternative to the map's disciplining of indigenous communities.

It is beyond the scope of this paper to dictate the form that a 'deep map' should take in international legal process, and indeed to do so would risk reinscribing new imaginative prescriptions in place of those that deep mapping seeks to dislodge. It is critical, however, that frameworks are identified within which minority, indigenous, and subaltern geographies can be given voice and place in international legal discourse and argument. At this stage, it might be apt for the 'deep map' to be introduced into legal discourse as a term signifying a more nuanced ethic when confronting social space, and as a reminder of the narrow socio-spatial matrix into which the map has contorted international legal argument. This point surely merits further enquiry by lawyers, critical cartographers, and anthropologists alike.

## VI. CONCLUSION

This paper has taken steps towards a more critical engagement with the relationship between international law and the map. It has sought to reframe the map as an active participant at the foreground of international legal thought and discourse, and also as a restrictive matrix through which international legal argument is conditioned. This critique reveals the need for alternative imaginations of space in international law, as critical discourses in and around international law lack the visual expression that they merit. By raising a critical consciousness of cartographical dialectics in sites such as the West Bank and giving legal voice to emergent practices of deep mapping and participatory mapping, perhaps international law and cartography can achieve a new, more constructive duality.

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<sup>53</sup> Kirsten Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title' (2005) 9 *Law Text Culture* 91, 93.

# THE DEPLOYMENT OF ARTIFICIAL INTELLIGENCE TOOLS IN THE HEALTH SECTOR: PRIVACY CONCERNS AND REGULATORY ANSWERS WITHIN THE GDPR

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*This article examines the privacy and data protection implications of the deployment of machine learning algorithms in the medical sector. Researchers and physicians are developing advanced algorithms to forecast possible developments of illnesses or disease statuses, basing their analysis on the processing of a wide range of data sets. Predictive medicine aims to maximize the effectiveness of disease treatment by taking into account individual variability in genes, environment, and lifestyle. These kinds of predictions could eventually anticipate a patient's possible health conditions years, and potentially decades, into the future and become a vital instrument in the future development of diagnostic medicine. However, the current European data protection legal framework may be incompatible with inherent features of artificial intelligence algorithms and their constant need for data and information. This article proposes possible new approaches and normative solutions to this dilemma.*

**Keywords:** artificial intelligence, algorithm, medicine, health, privacy, data protection, GDPR

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## I. INTRODUCTION

The deployment of Artificial Intelligence (AI) instruments in the medical sector has led to significant diagnostic innovations. AI tools, due to their capacity to elaborate vast amounts of data in real-time, can individuate common patterns undetectable for human physicians.<sup>1</sup> The global diffusion of mobile and wearable technology, like smartphones and smartwatches, enables the collection and uploading of vast amounts of data into AI algorithms.<sup>2</sup> These technological instruments take into account an extensive array of patients' genetic features to provide tailored medical treatments. A relatively new speciality of the medical field called predictive medicine<sup>3</sup> involves the processing of genetic and laboratory tests using AI tools to predict the outbreak of a disease. Thus, the control and ownership of data are particularly relevant legal concerns for medical care.

The General Data Protection Regulation<sup>4</sup> (GDPR, the Regulation) is the core of the European Union's (EU) approach regarding privacy and data

<sup>1</sup> Charles A. Taylor and others, 'Predictive Medicine: Computational Techniques in Therapeutic Decision-Making' (1999) 4 *Computer Aided Surgery* 231.

<sup>2</sup> Jason P. Burnham and others, 'Using Wearable Technology to Predict Health Outcomes: a Literature Review (2018) 25 *Journal of the American Medical Informatics Association* 1221.

<sup>3</sup> Maxwell Y. Jen and others, 'Predictive Medicine' [2020] *StatPearls* <<https://www.ncbi.nlm.nih.gov/books/NBK441941/>> accessed 15 July 2020.

<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

protection. It formulates normative standards with which algorithms must also comply. However, the GDPR dates back to an era when AI algorithms did not yet play a fundamental role in everyday life. As a result, central components of AI tools may raise compliance concerns. Most significantly, the reasoning routine of AI algorithms is obscure and undetectable due to the inherent opaqueness of AI tools. An external human observer cannot detect and recreate the reasoning pattern chosen by the algorithm system, even if the output delivered by the AI tool is available.<sup>5</sup> This lack of understanding and reproducibility, known as the 'black-box' status of AI,<sup>6</sup> is incompatible with the fundamental requirements of transparency, fairness and accountability enshrined in the GDPR to ensure lawful and legitimate processing of personal data.

However, opening the black box would mean showing the functioning mechanism of the algorithm to market competitors, which could stifle innovation unless more transparent forms of AI became eligible for patent protection.<sup>7</sup> Moreover, making the working processes of this software detectable would be technically impossible: AI algorithms continuously change their working routine to follow new patterns and perform tasks in an ever more efficient way.<sup>8</sup> Changing their computing patterns allows them to produce more reliable diagnostic outcomes. Accordingly, a human observer would not be able to understand the reasoning process of AI tools and its relationship to the data processed, even if these were visible. Ultimately, this lack of interpretability<sup>9</sup> can result in a lack of trust in the effective

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<sup>5</sup> Robin C. Feldman and others, 'Artificial Intelligence in the Health Care Space: How We Can Trust What We Cannot Know', (2019) 30 *Stanford Law and Policy Review* 399.

<sup>6</sup> Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation' (2018) 31 *Harvard Journal of Law and Technology* 889.

<sup>7</sup> See Ana Ramalho, 'Patentability of AI-Generated Inventions: is a Reform of the Patent System Needed?' (2018) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3168703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168703)> accessed 19 November 2020.

<sup>8</sup> Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 1 *Big Data and Society* 10.

<sup>9</sup> Feldman (n 5); William J. Murdoch and others, 'Definitions, Methods and Applications in Interpretable Machine Learning' (2019) 116 *PNAS* 22071.

functioning of AI algorithms because researchers and physicians must base their clinical decisions on the correct functioning of black-box algorithms.

Can the current European legal framework adequately address the main privacy-related issues that arise from the use of AI software for diagnostic purposes? More specifically, can the European Regulation foster the development of predictive medicine and, at the same time, protect the rights of patients involved in the medical treatments? Starting from previous scholarship, such as the work of Ann Cavoukian regarding the principle of privacy by design,<sup>10</sup> this article seeks to find normative solutions within the GDPR to address the deployment of AI tools in the medical sector. Furthermore, it attempts to find a point of balance between two opposing interests: on the one hand, the privacy rights of every individual and, on the other hand, the general interest to stimulate scientific and medical research and, in more general terms, the right to public health.<sup>11</sup>

The article begins by addressing the most relevant norms of the GDPR to highlight the privacy-related issues arising from the deployment of AI tools in the medical sector. More specifically, it focuses on the main legal uncertainties arising from incompatibilities between the use of AI tools for predictive medicine and norms like the principles of transparency, fairness and lawfulness, the issue of free, informed and specific consent, the right to be forgotten, and the prohibition of automated decisions. The article then provides a few reflections about the main privacy threats raised by the development of predictive medicine and how to overcome them. The inherent opaqueness of AI algorithms may present a challenge for the transparent and lawful functioning of predictive medicine. However, the concepts of privacy by design and privacy by default<sup>12</sup> could represent the

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<sup>10</sup> Ann Cavoukian, 'Privacy by design: the 7 foundational principles. Implementation and mapping of fair information practices' (*Data Protection Industries*) <<http://dataprotection.industries/wp-content/uploads/2017/10/privacy-by-design.pdf>> accessed 24 February 2020.

<sup>11</sup> Shane O'Sullivan and others, 'Legal, Regulatory and Ethical Frameworks for Development of Standards in Artificial Intelligence (AI) and Autonomous Robotic Surgery' (2019), 15(1) *The International Journal of Medical Robotics and Computer Assisted Surgery* 1.

<sup>12</sup> GDPR, art 25.

normative basis on which AI algorithms can be made compliant with the provisions of the GDPR.

## II. THE PRINCIPLES OF FAIRNESS, TRANSPARENCY AND LAWFULNESS APPLIED TO DATA PROCESSING IN THE MEDICAL FIELD

The recent approval and entry into force of the GDPR established new privacy standards for data protection at a European level.<sup>13</sup> While in one respect the GDPR actually reduces obligations for data controllers regarding access to clinical data compared to previous legislation, it also limits utilisation of health data without consent, regulates its secondary use (that is, use of data for purposes beyond those originally planned),<sup>14</sup> and requires data processing activities in all fields, including predictive medicine, to comply with certain fundamental principles. The principles of fairness, transparency and lawfulness are the cornerstones of the current European privacy legal framework.<sup>15</sup> They form the main thread uniting all processing activities and ensure the protection of the fundamental rights of people involved.

### *1. The Principle of Fairness in the Functioning of AI Algorithms*

The principle of fairness is central to the relationship between the controller and the data subject<sup>16</sup> and is particularly crucial in the functioning of AI algorithms. These predictive tools may exacerbate discriminatory trends if they process prejudicial data. In the healthcare sector this may have fatal

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<sup>13</sup> Mélanie Bourassa Fourcier and others, 'Integrating artificial intelligence into health care through data access: can the GDPR act as a beacon for policymakers?' [2019] *Journal of Law and the Biosciences* 317.

<sup>14</sup> William Lowrance, 'Learning from the Experience: Privacy and the Secondary Use of Data in Health Research', (2003), 8 *Journal of Health Services Research & Policy* 2.

<sup>15</sup> GDPR, art 5.1

<sup>16</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Data Protection Law* (Publications Office of the European Union 2018) 118.

consequences for patients. Discriminatory factors, such as race<sup>17</sup> or gender,<sup>18</sup> could shape the final predictive outcome, implicating the ethical obligation of non-maleficence<sup>19</sup> according to which every medical treatment should promote patient safety and recovery.<sup>20</sup> Meanwhile, relying on a neutrality<sup>21</sup> conception for AI algorithms, where these tools produce standardized (neutral) outcomes ignoring the peculiar differences between patients, could be likewise detrimental.<sup>22</sup> The challenge is to design AI algorithms capable of taking into account environmental and societal factors<sup>23</sup> and inherent biological differences to provide fair and reliable health predictive outcomes. Not all subjects react in the same way as the average model to a specific medical treatment. In other words, fairness does not mean equality at all costs. A "fair" algorithm deployed for diagnostic purposes should be aware of the limitations of model predictions caused by social determinants of health and biological peculiarities.

Overcoming the issue of biased outputs may require human intervention. Physicians can reformulate medical questions to reduce bias.<sup>24</sup> They can rely on causal knowledge to verify the algorithmic decision and identify medical problems where the consequences of datasets biases are relatively negligible; in other words, reformulating the input to generate a fairer output.

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<sup>17</sup> Ziad Obermeyer and others, 'Dissecting racial bias in an algorithm used to manage the health of populations' (2019) 366 *Science* 447.

<sup>18</sup> Davide Cirillo and others, 'Sex and Gender Differences and Biases in Artificial Intelligence for Biomedicine and Healthcare' (2020) 3(81) *NPJ Digital Medicine* 1.

<sup>19</sup> Gunnar B.J. Andersson and others, 'Do Not Harm: The Balance of "Beneficence" and "Non-Maleficence"' (2010) 35(9S) *Spine* S2; Vittorio Bufacchi, 'Justice as Non-Maleficence' (2020) 67(162) *Theoria* 1.

<sup>20</sup> Melissa D McRadden and others, 'Ethical Limitations of Algorithmic Fairness Solutions in Health Care Machine Learning, (2020) 2 *The Lancet Digital Health* E221.

<sup>21</sup> Ruha Benjamin, 'Assessing Risk, Automating Racism' (2019) 366(6464) *Science* 421.

<sup>22</sup> McRadden (n 20).

<sup>23</sup> Michael Marmot, 'Social Determinants of Health Inequalities' (2005) 365(9464) *The Lancet* P1099.

<sup>24</sup> Nanette K. Wenger, 'Cardiovascular Disease: The Female Heart Is Vulnerable. A Call to Action from the 10Q Report' (2012) 35 *Clinical Cardiology* 134.

Developing guidelines to standardize reporting of predictive models delivered by AI algorithms can also reduce discrepancies between outcomes and help validate diagnostic products.<sup>25</sup> Thus, physicians can choose in a transparent way which kind of algorithms they should use according to the peculiarities of the specific medical case.

## 2. *The Principle of Transparency as a Safeguard for the Privacy Rights of Data Subjects*

The principle of transparency requires the controller to inform the data subject about every phase of the processing operation and explain these phases in a clear and understandable way. Transparency in data processing is strictly correlated with the principle of purpose limitation. In order for a data subject to exercise their privacy rights, the individual must know the reasons for which their data is being collected and processed.<sup>26</sup> Processing without a specific, determined goal is unlawful. However, due to the black-box nature of AI algorithms, scientists and physicians can neither *ex ante* inform their patients regarding every possible outcome of the AI working process nor forecast possible future uses of data already elaborated.

In the medical sector, the goal is to make the diagnostic routine more user-centric, protecting the identity rights of the patients. New technological approaches could help.<sup>27</sup> For instance, so-called federated learning (a machine learning technique to process data through decentralized devices, in which each server assembles its own dataset) facilitates collaborations across

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<sup>25</sup> Gary S. Collins and others, 'Transparent Reporting of a Multivariable Prediction Model for Individual Prognosis or Diagnosis (TRIPOD): The TRIPOD Statement' (2015) 13 BMC Medicine <<https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-014-0241-z>> accessed 23 November 2020.

<sup>26</sup> Article 29 Working Party, 'Opinion 03/2013 on Purpose Limitation' (2 March 2013) 00569/13/EN WP 203 <[https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203\\_en.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf)> accessed 28 February 2020.

<sup>27</sup> Casimir Wierzynski, 'Advancing Both AI and Privacy Is Not a Zero-Sum Game' (*Fortune*, 27 December 2018) <<https://fortune.com/2018/12/27/ai-privacy-innovation-machine-learning/>> accessed 21 July 2020.

multiple institutions without sharing patient data.<sup>28</sup> Data controllers can adjust and improve the effectiveness of their data processing model and then share these improved algorithms with other subjects through a trusted server, thereby obtaining a trained AI algorithm without sharing personal data with third parties. Similarly, the advanced technique of homomorphic encryption allows algorithms to elaborate data without decoding encrypted information,<sup>29</sup> and thus without identifying the underlying data subject.

### 3. *The Principle of Lawfulness and the Secondary Use of Data*

The principle of lawfulness requires each data processing procedure to be grounded on one of six legal bases specified in the GDPR. These include, *inter alia*, performing a contract, protecting the vital interest of a person, or safeguarding public interests. The secondary use of sensitive data is considered lawful when the processing activities are for scientific purposes,<sup>30</sup> including reasons of public health, but only if the utilised dataset does not permit identification of any data subject previously involved.<sup>31</sup> Using the same dataset for several purposes is fundamental to the correct development of scientific research,<sup>32</sup> but the strict normative provisions of the GDPR could discourage scientists and physicians from fully exploiting the research possibilities intended by the European legal framework.<sup>33</sup>

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<sup>28</sup> Micah J. Seller and others, 'Federated Learning in Medicine: Facilitating Multi-Institutional Collaborations without Sharing Patient Data' (2020) 10 *Scientific Reports* <<https://www.nature.com/articles/s41598-020-69250-1>> accessed 19 November 2020.

<sup>29</sup> Mohamed Alloghani and others, 'A Systematic Review on the Status and Progress of Homomorphic Encryption Technologies' (2019) 48 *Journal of Information Security and Applications* 1.

<sup>30</sup> GDPR, art 89.1 of the GDPR.

<sup>31</sup> GDPR, recital 156.

<sup>32</sup> Gauthier Chassang, 'The Impact of the EU General Data Protection Regulation on Scientific Research' (2017) 11 *ecancermedicalscience* 709.

<sup>33</sup> Fourcier (n 13).

### III. FREELY-GIVEN, SPECIFIC AND INFORMED CONSENT IN BLACK-BOX MEDICINE

Consent is central to data-elaborating activities. The collection of so-called sensitive data, such as information regarding an individual's health conditions, is prohibited unless there is room to apply one of the exemptions listed by the GDPR, including explicit consent.<sup>34</sup> Such consent requires the free, informed, specific and unambiguous indication of the agreement stated by data subjects regarding the processing of their personal data.<sup>35</sup> Data subjects must have a real choice to provide legitimate consent,<sup>36</sup> and thus must be aware of specific details regarding the processing activities. These include the identity of the data controller, the purposes of every operation for which they gave their consent, the possibility to withdraw consent at any time, without experiencing technical difficulties,<sup>37</sup> and information about the use of their data for automated decision making, if applicable.<sup>38</sup> Furthermore, the data subject should be able to understand every feature and characteristic of the processing procedures.<sup>39</sup> However, the GDPR does not state anything in terms of competence and capacity of the data subject.<sup>40</sup> The consequences of the GDPR provisions about informed consent on the scientific research context are still a highly debated issue.<sup>41</sup>

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<sup>34</sup> GDPR, art 9.

<sup>35</sup> GDPR, art.4.11; Mary Donnelly, Maeve McDonagh, 'Health Research, Consent and the GDPR Exemption' (2019) 26 *European Journal of Health Law* 97.

<sup>36</sup> European Data Protection Board, 'Guidelines 05/2020 on Consent under Regulation 2016/679' (4 May 2020) <[https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_202005\\_consent\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf)> accessed 20 November 2020.

<sup>37</sup> GDPR art 7.

<sup>38</sup> European Data Protection Board (n 36).

<sup>39</sup> Article 29 Working Party, Guidelines on Transparency under Regulation 2016/679 (11 April 2018) 17/EN WP260 rev.01 <[https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=623051](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051)> accessed 2 March 2020.

<sup>40</sup> On the issue of capacity to consent, see Michelle Biros, 'Capacity, Vulnerability, and Informed Consent for Research' (2018) 46 *The Journal of Law, Medicine & Ethics* 72

<sup>41</sup> Chassang (n 32); Niam Clarke and others, 'GDPR: An Impediment to Research?', (2019) 188 *Irish Journal of Medical Science* 1129; Miranda Mourby and others, 'Governance of Academic Research Data under the GDPR – Lessons from the UK' (2019) 9 *International Data Privacy Law* 192.

Respecting the consent requirements listed by the GDPR could be problematic in the field of predictive medicine. Firstly, the functioning of AI algorithms is unintelligible for human observers: Even if there is a clear outcome from the working process of the system, the reasoning pattern remains obscure. Thus, the data subject cannot understand how their personal data are collected and processed: Consent could not be defined as 'informed' as required by the GDPR. Secondly, consent is not even 'specific' because AI algorithms usually follow adaptive patterns to perform their interpretative tasks, changing their working routine in light of new circumstances. It is therefore not possible for data subjects to know all the specific features of the processing activities when they provide consent. This also prevents people from giving their approval freely, considering all potential consequences, or meaningfully, taking into account all possible variables and suitable alternatives.<sup>42</sup>

The development of machine learning systems requires a rethinking of the legal category of consent. It is necessary to transcend the traditional paradigm of consent, focused on a single specific purpose, to find a new legal solution compatible with the inherent features of AI working routine. Two approaches are worth briefly mentioning. Firstly, the broad consent<sup>43</sup> model, usually applied in the context of biobanks, informs data subjects about the overall scope and modalities of the data processing activities but not the specific processes behind these procedures. Secondly, the dynamic consent<sup>44</sup> solution establishes a constant dialogue, through a digital platform, between data subjects and controllers, allowing patients to understand how their data is processed in successive diagnostics operations and exercise continuous control over the processing of their personal data, including by withdrawing their previous consent.

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<sup>42</sup> Article 29 Working Party, Guidelines on Consent under Regulation 2016/679 (10 April 2018) 17/EN WP259 rev.01 <[https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=623051](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051)> accessed 2 March 2020.

<sup>43</sup> Mark A. Rothenstein, 'Broad Consent for Future Research: International Perspectives' (2018) 40(6) *Ethics & Human Research* 7

<sup>44</sup> Jane Kaye and others, 'Dynamic Consent: A Patient Interface For Twenty-First Century Research Networks' (2014) 23 *European Journal of Human Genetics* 141.

#### IV. THE RIGHT TO BE FORGOTTEN: HOW CAN AN AI ALGORITHM FORGET ITS "MEMORY"?

AI algorithms' need to train datasets to improve their processing capabilities could raise problems with one of the most relevant innovative features introduced by the GDPR: the so-called right to be forgotten.<sup>45</sup> Formulated by the Court of Justice of the European Union in the famous judgement *Google Spain*, it recognizes the data subject's right to obtain from the controller the erasure of personal data concerning them without undue delay.<sup>46</sup> The right to be forgotten applies to different circumstances enumerated by the GDPR itself, such as when data are no longer needed for the original purposes, or when data subjects withdraw their consent. Where an individual exercises their right to be forgotten, the data controller must take reasonable measures to erase the data from the public domain, also removing any links related to them.

From a practical perspective, the inherent technological features of AI algorithms may complicate the application of the right to be forgotten within the field of predictive medicine. Physicians feed medical data to the algorithms to train the computer programmes, which acquire new information to increase the overall knowledge of algorithms. Thus, the data to be erased are no longer a separate unit, but part of the AI software experience. As a result, it would be technologically impossible to extract a single piece of data without interfering with the reasoning process of the algorithm. Removing data from the AI system would radically change in production of outcomes, potentially harming patients.

#### V. THE PROHIBITION OF AUTOMATED DECISION-MAKING AND PROFILING ACTIVITIES UNDER THE GDPR AS A REGULATORY CHALLENGE FOR THE DEVELOPMENT OF BLACK-BOX MEDICINE

AI algorithms can produce outcomes autonomously, or at least with minimal involvement of human observers. This raises ethical and legal concerns about safeguarding the fundamental rights of people subject to the action of

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<sup>45</sup> GDPR, art 17.

<sup>46</sup> Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* [2014] ECR 317.

automated processing activities. Specifically, the GDPR grants the data subject the 'right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'.<sup>47</sup> The main goal is to prevent the outcomes of decision-making algorithms from infringing people's fundamental rights,<sup>48</sup> as machine and computer systems can formulate decisions based on inaccurate or harmful data sets that yield a misleading or biased interpretation of reality.<sup>49</sup>

Under the GDPR, automated decision-making activities based on sensitive data are unlawful without the prior explicit consent of the data subject except in cases of overriding public interest.<sup>50</sup> On its face, this prohibition purports to apply only to decisions taken without any human intervention whatsoever. Since the working routine of AI tools still often requires some sort of external action, such a restriction would apply only very rarely. Thus, the precise scope of this prohibition is open to interpretation; perhaps it applies only to decisions made by the algorithm without a *meaningful* human involvement.<sup>51</sup>

The general prohibition of decisions based solely on automated processes could deter the development of black-box medicine. Humans have only a

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<sup>47</sup> GDPR, art 22.1

<sup>48</sup> Art 22.3 of the GDPR prescribes that the data controller shall provide '*suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision*'. More specifically, Recital 71 of the GDPR explains that such safeguards should include 'specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to *obtain an explanation* of the decision reached after such assessment and to challenge the decision'. Gianclaudio Malgieri, 'Automated Decision-Making in the EU Member States: The Right to Explanation and "Suitable Safeguards" in the National Legislations' (2019) 35 Computer Law & Security Review 105327.

<sup>49</sup> Milena A. Gianfrancesco and others, 'Potential Biases in Machine Learning Algorithms Using Electronic Health Record Data' (2018) 178 The Journal of American Medical Association 1544.

<sup>50</sup> GDPR, art 22.4.

<sup>51</sup> Gianclaudio Malgieri and Gianni Comandè, 'Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 243.

secondary role in black-box medicine. Physicians make treatment decisions by considering the outcomes produced by the AI algorithms, but cannot replicate the reasoning process of the machine. Limiting the use of AI programmes to cases of previous explicit consent or overriding public interest is too narrow in scope. It is crucial to find an appropriate balance between the right to privacy and data protection of every individual and the use of innovative tools to guarantee higher health standards for the entire community. The challenge is to set boundaries between the right to health and the protection of personal data.

The GDPR could provide valuable indications to minimize doubt. It already recognizes that the protection of personal data is not an absolute right, but rather 'must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality'.<sup>52</sup> It already sanctions processing activities 'carried out in the public interest'.<sup>53</sup> It is unquestionable that the right to public health is an issue of public interest. Nonetheless, fundamental safeguards to privacy rights must be preserved even in the functioning of AI algorithms for healthcare.

Several proactive and preventive data protection measures in AI algorithms could adequately safeguard the privacy rights of patients involved in diagnostic treatments. Firstly, a counterfactual explanation model could allow individuals to better understand the reasoning process behind a predictive outcome.<sup>54</sup> This would explain what factors would need to change to obtain a different result, permitting scientists and physicians to understand the relationship between processed data and the above-mentioned principles of data processing. Secondly, a co-governance system of algorithms based on a multi-level design could allow humans to intervene in the reasoning patterns to ensure the respect of fundamental rights of the

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<sup>52</sup> GDPR, recit 4.

<sup>53</sup> GDPR, art 6.4.

<sup>54</sup> Sandra Wachter and others, 'Counterfactual Explanations Without Opening the Black Box' (2018) 31 *Harvard Journal of Law & Technology* 841.

patients involved.<sup>55</sup> Thirdly, the so-called 'agonistic machine learning'<sup>56</sup> approach, where AI providers should formulate alternative ways of modelling and describing the same object, could provide new diagnostic patterns compliant with the fundamental rights framework. AI algorithms usually rely on machine-readable information about what is the 'truth': for instance, in the health care sector, medical exams or diagnoses. Providing different inputs from several sources would help algorithms overcome possible biases in the datasets and produce more reliable outcomes. This may lead to a more accountable and transparent decision-system, complying with the data protection framework.

## VI. PRIVACY BY DESIGN AND PRIVACY BY DEFAULT IN THE ERA OF AI ALGORITHMS

The GDPR requires compliance with the principle of data minimisation,<sup>57</sup> whereby controllers must process only the necessary amount of information. The principle of privacy by design, developed by Ann Cavoukian,<sup>58</sup> is a proactive approach to data minimisation, integrating privacy measures into the hardware and software utilised in data processing upon their creation to ensure that only the necessary amount of data is processed. Privacy by design requires data controllers to implement adequate privacy safeguards, such as pseudonymisation, from the first phases of the processing activities.<sup>59</sup>

This principle could conflict with the inherent nature of AI algorithms. AI tools constantly need data to train their working routine to perform their diagnostic tasks more efficiently.<sup>60</sup> Furthermore, algorithms adapt to constantly changing environments; maintaining the same data protection features may be technically impossible, though technical approaches like

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<sup>55</sup> Margot E. Kaminski, 'The Right to Explanation, Explained' (2019) 34 Berkeley Technology Law Journal 189.

<sup>56</sup> Mireille Hildebrandt, 'Privacy as Protection of the Incomputable Self: From Agnostic to Agonistic Machine Learning', (2019) 19 Theoretical Inequalities of Law 83.

<sup>57</sup> GDPR, art 5.

<sup>58</sup> Cavoukian (n 10).

<sup>59</sup> GDPR, art 25.

<sup>60</sup> European Parliamentary Research Service, *The Impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence* (European Union 2020).

counterfactual explanations, co-governance systems of algorithms or agonistic machine learning could help bridge the gap.

Ultimately, the working of machine learning tools should be considered compliant with the GDPR provisions to ensure a normative safeguard for the rights of data subjects against the risk of obsolescence of the Regulation. The privacy by design principle could play a fundamental role to avoid this kind of risk and keep the pace of technological progress. This proactive and preventive approach would make the user—the patient in the medical setting—the focus of the entire data processing activity. Embedding privacy issues in the construction of AI algorithms would also help to keep track of the reasoning patterns chosen to produce a specific output. Privacy by design would encourage dialogue between AI providers, scientists and privacy advocates to build privacy-compliant AI algorithms that could help physicians and scientists manage the risks related to processing health data, taking into account the privacy rights of people involved.

## VII. CONCLUDING REMARKS

In a time of new approaches to data protection, the GDPR remains the 'gold standard' in the European framework. However, the GDPR reflects an era when AI had not yet reached the current levels of technological development and, more specifically, the field of predictive medicine was in its infancy. As a result, the Regulation is not fully compatible with the inherent features of machine learning tools. The resulting legal uncertainty could obstruct the development of AI technologies, increasing costs and reducing benefits for users and patients.<sup>61</sup> The EU must act to bridge this gap and fully regulate the use of AI tools in everyday life, including the medical sector, and achieve a uniform and coherent policy approach regarding AI matters. Encouragingly, the European Commission has acknowledged the threats to privacy posed by machine learning applications and cleared the way for adjusting relevant EU legislative frameworks.<sup>62</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> European Commission, 'White Paper on Artificial Intelligence – A European Approach to Excellence and Trust' COM (2020) 65 final.

GDPR norms are often vague and undefined,<sup>63</sup> which may be a normative choice to keep pace with the ongoing technological progress. Specific mandatory requirements aimed at AI tools may become rapidly obsolete. It is necessary instead to create a trustworthy environment for developing AI applications for healthcare purposes with patient privacy rights in mind. The GDPR already provides valuable instruments, such as the privacy by design principle,<sup>64</sup> that could help reach this goal. Embedding data protection features in diagnostics routines would help overcome the black-box barrier of algorithms. Software providers would train their AI tools to respect privacy rules from the very first phases of their working patterns, securing lifecycle protection for the user during the entire duration of data processing activities. The patient would become the focus of the diagnostic process. Scientists and physicians would coordinate the work of AI algorithms. Humans would control the entire process; not machines. This would ensure the full respect of human rights of every individual involved, resolving the tension between the privacy rights of the individual and the public health needs of society.

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<sup>63</sup> Ibid.

<sup>64</sup> Cavoukian (n 10).

# PROPORTIONALITY IN THE *PSPP* AND *WEISS* JUDGMENTS: COMPARING TWO CONCEPTIONS OF THE UNITY OF PUBLIC LAW

Orlando Scarcello\* 

*This article compares the conceptions of proportionality in the Weiss judgment of the Court of Justice of the European Union (ECJ) and the PSPP judgment of the German Constitutional Court (GCC). It will be pointed out that the two courts embrace a quite similar view when it comes to the structure of the test for proportionality, but a different one on the intensity of review. While the ECJ accepts a minimalist 'manifest error' standard of review, the GCC performs a more demanding scrutiny. As a result, the two judgments expose different conceptions of the "unity" of public law: all decisions by public authorities can become the subject of judicial scrutiny through a proportionality assessment, but the intensity of review can vary greatly. This, in turn, brings about serious consequences for the relations between reviewing and reviewed authorities. Finally, it will be claimed that the inner limitations of proportionality make strong views on the "correct" method for carrying out the test problematic.*

**Keywords:** proportionality, *PSPP*, *Weiss*, deference doctrine, standard of review

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## I. INTRODUCTION

In this article, I compare the proportionality assessment performed by the German Constitutional Court (GCC) in the pivotal *PSPP* decision<sup>1</sup> to that used by the Court of Justice of the European Union (ECJ) in the earlier *Weiss* judgment regarding the Public Sector Purchase Program (PSPP) by the European Central Bank (ECB).<sup>2</sup> The GCC famously ruled that the *Weiss* decision was *ultra vires* and criticised its proportionality assessment. I will focus on this disagreement to argue that the concept of proportionality is flexible enough to accommodate different interpretations and that it is questionable whether it is possible to draw substantive conclusions based on methodological disagreements as to the proportionality assessment.

To do so, I will first briefly recapitulate the broader context of the *Weiss-PSPP* saga (section II) and then compare the proportionality assessments employed (section III). I will then move to the two substantive claims of the article. First, that depending on how the assessment is performed, the relations between the reviewing and the reviewed authorities change considerably, ranging from deference towards the rule-maker's choices to a much more intrusive review (section IV). In contrast to jurisdictions in which public law is "bifurcated" by the coexistence of different standards of review, in the context of the European Union (EU) and of Germany, the general application of proportionality engenders a certain unity of public law. In other words, unity derives from the extension of instruments of judicial control initially conceived for administrative law, like proportionality, to the constitutional level, so that no area of public law is left unconstrained. Beneath the surface of alleged unity, however, the flexibility of proportionality allows duality to appear again. Through proportionality, the reviewing authorities (usually the judiciary) have the discretionary power to leave a wider or a narrower margin of maneuver to those under review (the legislative or the executive). The comparison between *Weiss* and *PSPP* illustrates this point.

Second, proportionality itself does not recommend or prescribe a specific level of scrutiny. It is up to the reviewing authority to choose how to structure

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<sup>1</sup> BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras 1-23.

<sup>2</sup> Case C-493/17 *Weiss and others v Bundesregierung* EU:C:2018:114.

the test. Since this choice is discretionary, serious doubts arise as to any claim of "objective" methods to assess proportionality (section V). As a result, the view expressed by the GCC that alternative reconstructions of proportionality are methodologically mistaken is questionable.

## II. BACKGROUND AND REASONING

As the context of the two decisions is well known, I will limit this section to a few recapitulating remarks. On 22 January 2015, the ECB Governing Council announced the PSPP program as part of the broader Expanded Asset Purchase Program (EAPP), with the aim of increasing monetary supply and inflation, to ultimately reach the target of a 2% inflation rate in the Eurozone. The PSPP was established by means of the ECB's Decision 2015/774 and allowed for purchase of public sector securities on the secondary market. Four different groups of complainants indirectly challenged the decision by alleging that German constitutional authorities (the Federal Parliament, the Federal Government, and the German Federal Bank) were not faithful to their responsibilities towards European integration by not taking steps against the implementation of the program in Germany. On 18 July 2017, the Second Senate of the GCC suspended the proceedings and referred to the ECJ *ex* article 267 of the Treaty on the Functioning of the European Union (TFEU). It asked five questions regarding the possible violation of articles 123(1) TFEU (preventing direct monetization of public debt), 119 and 127(1 and 2) TFEU (restricting ECB's competences to monetary policy only), 125 TFEU (preventing mutualization of Member States' public debts), 4(2) of the Treaty on European Union (TEU, preserving Member States' national identity), 5(1) TEU (principle of conferral), and 5(4) TEU (principle of proportionality). The ECJ issued its *Weiss* judgment on 11 December 2018 and no violation of the Treaties was identified. The ECJ also engaged in a long assessment of the proportionality of Decision 2015/774.<sup>3</sup>

The GCC received the preliminary ruling and issued its final decision on 5 May 2020. According to the Federal Court, *Weiss* had to be declared *ultra vires*. While the primary responsibility for the interpretation and application of EU law fell to the ECJ, in extreme circumstances the GCC considered

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<sup>3</sup> *Weiss* (n 2) paras 71-100.

itself justified to step in. Article 123 TFEU was not infringed, but according to the GCC, the proportionality assessment in *Weiss* failed to hold the PPSP program accountable: it was manifestly untenable from a methodological perspective. In particular, the assessment failed to give consideration to a series of competing economic interests affected by the program: the monetary measures within the PSPP had a wide economic impact and the ECB did not employ a sufficiently detailed proportionality assessment considering the effects on competing interests, nor did the ECJ require the ECB to do this.<sup>4</sup> As a result, the *Bundesbank* (German Federal Bank) would no longer be entitled to participate in the PSPP in three months, unless the ECB Governing Council adopted a new decision demonstrating the proportionate character of the measures.

### III. ANALYSIS: TWO ROADS TO PROPORTIONALITY

Having set the scene, I now focus on the comparison between the two conceptions of proportionality. These are interesting because they epitomize two different understandings of proportionality and of its role in public law. Proportionality is an argumentative structure aimed at assessing whether a certain decision is acceptable in pursuing some legally recommendable goals, while at the same time not causing unnecessary or excessive sacrifice of competing interests. It is structured in three<sup>5</sup> or four<sup>6</sup> steps: legitimacy, suitability, necessity, and proportionality *stricto sensu*. The rule of legitimacy prescribes that the goal pursued through a certain public measure shall be itself legally acceptable. According to the rule of suitability, given a measure realizing a certain interest while compromising a competing one, if the measure harms the latter interest while not realizing the former, it is not suitable. As for necessity, given two measures equally suitable to realize a certain principle, other things being equal, one must choose the one which entails the lesser sacrifice for the competing interest.<sup>7</sup> Finally,

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<sup>4</sup> BVerfG (n 1) para 133.

<sup>5</sup> Samantha Besson, *The Morality of Conflict* (Hart Publishing 2005) 451-453. The three-stage test omits the legitimacy assessment.

<sup>6</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 181-204.

<sup>7</sup> Both the rule of suitability and that of necessity are instances of the general criterion of Paretian efficiency. See Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131, 135-136.

proportionality in a narrow sense calls for balance between the sacrificed and the realized interests: a large sacrifice would be disproportionate if paired with a modest enhancement.<sup>8</sup>

Did the ECJ and the GCC abide by this argumentative structure? Generally speaking, they did. Yet, they showed a rather different understanding of the correct way to perform this task.

### 1. Proportionality in Luxembourg: The Manifest Error Test

The ECJ devotes a significant amount of the *Weiss* judgment to the adjudication of whether Decision 774/2015 was proportionate overall.<sup>9</sup> As for its structure, the Court just recalls suitability and necessity,<sup>10</sup> although *de facto* some remarks on proportionality *stricto sensu* are added.<sup>11</sup> Starting with suitability, the Court recalls the documents and observations received by the ECB regarding the appropriateness of the measure to reach the desired inflation target and refers to the recitals of Decision 774/2015.<sup>12</sup> From these materials, the ECJ infers that the means are suitable for the purported aim. As for necessity, the Court claims that, given the context of persistent low inflation and the fruitless deployment of less intrusive measures, no other means would be equally effective.<sup>13</sup> Moreover, according to the ECJ, guarantees of less restrictive application of the PSPP were successfully arranged, namely the not selective nature of the purchase program, its temporary character, the presence of eligibility criteria for bonds' purchase, and the limits on total purchase volumes.<sup>14</sup> As a result, overall, the measure passed the necessity test. Finally, the ECJ considers the proportionality *stricto*

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<sup>8</sup> Ibid 135-136. On the various stages of proportionality and their definitions, see also Bernard Schlink, 'Proportionality' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 722-725.

<sup>9</sup> *Weiss* (n 2) paras 71-100. For a wider assessment of *Weiss*, see Annelieke A.M. Mooij, 'The Weiss judgment: The Court's further clarification of the ECB's legal framework' (2019) 26 *Maastricht Journal of European and Comparative Law* 449, 449-465.

<sup>10</sup> *Weiss* (n 2) para 72.

<sup>11</sup> Ibid paras 93-100.

<sup>12</sup> Ibid paras 74-78.

<sup>13</sup> Ibid paras 79-92.

<sup>14</sup> Ibid paras 82-89.

*sensu* of the program.<sup>15</sup> It is pointed out that the ECB balanced various interests and adopted a series of safeguards to ensure that the risk of losses for central banks, which inevitably derives from the open market operations, was mitigated.<sup>16</sup> Apart from the safeguards already mentioned (which also make the PSPP less restrictive), the ECJ recalls the duty on each national central bank to only purchase securities of issuers within its own jurisdiction. Moreover, it points out that shared losses of national central banks are limited to those generated by securities issued by eligible international organizations (by design 10% only of the purchased securities). As a result, the ECJ concludes that the PSPP program did not infringe the principle of proportionality.<sup>17</sup>

The ECJ repeats several times that the adopted scrutiny is the 'manifest error' rule. In other words, and in agreement with Advocate General Wathelet,<sup>18</sup> given the highly technical nature of the issue at stake and the broad discretion enjoyed by the European System of Central Banks (ESCB) and by the ECB in particular on monetary policy,<sup>19</sup> the Court only broadly evaluates the reasonableness of the decision, rather than strictly questioning its correctness. This can be seen when considering the phrases used to assess each stage: 'manifest error of assessment', 'manifestly beyond what is necessary', or 'disadvantages which are manifestly disproportionate' are recurring wordings.<sup>20</sup> These must be coupled with the Court's remarks on the 'duty to state reasons'<sup>21</sup> according to which, although the ECB is obliged to justify its decisions, if an act is of general application, 'a specific statement of reasons for each of the technical choices made by the institutions cannot be required'.<sup>22</sup> To sum up, the ECJ accepts the classic three-step assessment of proportionality, but the degree of scrutiny is cursory and deferent towards the ECB. This is not new, as the Court is known for changing the degree of scrutiny depending on the evaluated measure and for often applying

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<sup>15</sup> Ibid paras 93-99.

<sup>16</sup> Ibid paras 92 and 98.

<sup>17</sup> Ibid paras 100.

<sup>18</sup> Case C-493/17 *Weiss and others v Bundesregierung* EU:C:2018:114., Opinion of AG Wathelet, paras 96-101.

<sup>19</sup> *Weiss* (n 2) para 73.

<sup>20</sup> Ibid paras 78, 79, 81, 86, 91, 92, 93.

<sup>21</sup> Ibid paras 30-33.

<sup>22</sup> Ibid para 32.

proportionality in a looser manner when the discretionary power of an EU institution is involved.<sup>23</sup>

## *2. Proportionality in Karlsruhe: a Comprehensive Assessment*

Moving to the GCC, we find a stronger understanding of judicial review.<sup>24</sup> The test is structured according to the classic three-step scheme,<sup>25</sup> but the 'manifest error' degree of scrutiny is rejected. Instead, the court considers that proportionality must compensate for the broad discretion enjoyed by the ECB and the judges must engage in a deep substantive assessment.<sup>26</sup> The argument of the ECJ that deference must be grounded in the technical expertise of the ECB does not occur in the reasoning of the Federal Court: in the several paragraphs of the decisions devoted to proportionality, the GCC talks about the technical nature of the measures only once, and only to recall the position of the ECJ.<sup>27</sup> Overall, the 'self-imposed restraint' and the consequent standard of 'manifest error' makes the review 'not conducive'.<sup>28</sup>

As a result, according to the GCC, the loose proportionality assessment by the Court of Justice is unfit to preserve the principle of conferral. Most importantly, in the hands of the ECJ proportionality becomes 'not comprehensible' from a methodological perspective.<sup>29</sup> The GCC states that the ECJ takes for granted the mere assertion that the PSPP has monetary nature, without questioning the underlying factual assumptions or at least reviewing whether the respective reasoning is comprehensible.<sup>30</sup> Thus, the GCC argues that the ECJ fails to check whether it also is overall

<sup>23</sup> See the seminal work by Gráinne De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105, 115-126 and 146. See also Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) *European Law Journal* 158, 171-172; Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 138; Robert Schütze, *European Constitutional Law* (Cambridge University Press 2015) 267-268.

<sup>24</sup> BVerfG (n 1) paras 123-178. On the consistency of a stronger view of proportionality with the "German" understanding of judicial review, see Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 *German Law Journal* 979, 989.

<sup>25</sup> BVerfG (n 1) paras 125-126.

<sup>26</sup> *Ibid* para 140-145.

<sup>27</sup> *Ibid* para 131.

<sup>28</sup> *Ibid* para 156.

<sup>29</sup> *Ibid* para 11, 133, and 141.

<sup>30</sup> *Ibid* para 137.

proportionate in the light of the competing economic interests at stake. Here, the reasoning of the GCC is slightly unclear: it identifies a decisive problem in the third stage of the test, yet it is difficult to ascertain whether it considers the third stage to be missing<sup>31</sup> or wrongly executed (by not considering some fundamental interests).<sup>32</sup> The most charitable interpretation here is perhaps that the GCC conceives it as so weak to be practically missing. In any case, the suggestion is that, in order to perform the assessment properly, one cannot just evaluate the risk of central banks' losses but must also look at other affected interests, ranging from the financing conditions of Member States to the risk of financial bubbles and losses for citizens.<sup>33</sup> Finally, according to the GCC, the behaviour of the ECJ is even more incomprehensible and methodologically flawed, given that in many other areas of EU law the ECJ usually takes into account the consequences of institutional decisions and therefore engages in stricter judicial review.<sup>34</sup>

These remarks recapitulating the tests of proportionality performed by the ECJ and the GCC allow us to now move to more theoretical considerations. The adopted standard of review, I argue, changes the relations between the reviewing and the reviewed authorities considerably and is the result of a discretionary choice, since there is no single 'method' of proportionality.

#### IV. PROPORTIONALITY AND THE UNITY OF PUBLIC LAW

What we see in the two decisions is divergence in the conceptions of proportionality. There is little novelty in this *per se*: proportionality is known for being open to different interpretations and applications. However, by performing the assessment in different ways, the two courts *de facto* also shape the relations between the reviewing authority (the judiciary) and the one under review (the central bank) in different ways. The ECJ leaves an area of loosely controllable discretion to the reviewed authority, something that the GCC is not ready to accept, and this happens through disagreement on proportionality.

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<sup>31</sup> Ibid paras 138 and 141.

<sup>32</sup> Ibid para 132.

<sup>33</sup> Ibid para 170-175.

<sup>34</sup> Ibid paras 145-153.

I will illustrate this point by recalling a recent debate in common law jurisdictions regarding the necessity to 'bifurcate' public law by confining the proportionality review to infractions of constitutional rights (standard of correctness). Other cases, involving merely indirect interference with rights, shall instead better be subject to a narrower standard of review (through the *Wednesbury* reasonableness standard).<sup>35</sup> In fact, while the former requires a certain quest for reason-giving on behalf of decision-makers, the latter avoids seeking detailed factual and legal explanations and leaves appropriate room for political decision. Some argue in favour of this bifurcation,<sup>36</sup> while others take the view that proportionality should apply to varying degrees across the entire spectrum of public law.<sup>37</sup>

Comparing the conceptions of judicial review in *Weiss* and *PSPP*, one feels a certain distance from the common law environment: in the continental context, proportionality is extensively accepted, as the GCC itself underlined in the judgment.<sup>38</sup> Here, in other words, we seem to have reached a certain unity of public law,<sup>39</sup> specifically through the idea that, at least in principle, no decision by public authorities is a purely discretionary legal 'black hole', completely exempt from any review. So, reason-giving assessed

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<sup>35</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. According to the *Wednesbury* standard, there has been an abuse of discretion when an act of discretion is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (229).

<sup>36</sup> Michael Taggart, 'Proportionality, Deference, *Wednesbury*' (2008) 3 *New Zealand Law Review* 423, 425 and 469-480.

<sup>37</sup> David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014), 235-237 and 254-258.

<sup>38</sup> BVerfG, (n 1) para 125. Proportionality is in fact an extremely widespread category, part of the 'post-war paradigm', in the words of Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* 96 (Cambridge University Press 2006). Yet, it never fully penetrated common law jurisdictions, such as the USA. See Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins', (2010) 8 *International Journal of Constitutional Law* 263, 264-286. In general, on the difficulties in transplanting proportionality in the English-speaking world, see Malcolm Thorburn, 'Proportionality' in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016), 309-313.

<sup>39</sup> David Dyzenhaus, 'Baker: The Unity of Public Law?' in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing 2004), 1-2.

through proportionality, initially developed in administrative law for justiciable decisions, is now also used at the level of highly discretionary administrative and even legislative decisions. In this sense, the 'administrativization' of constitutional law is quite advanced in Europe and, at least in principle, no legal black hole is admissible,<sup>40</sup> while proportionality goes across the entire spectrum.

However, the comparison of *Weiss* and *PSPP* shows that in the continental context of Germany and the EU, the distinction between a standard of unreasonableness and one of correctness (which is also a debate about appropriate deference) translates into one about the proper 'intensity' of proportionality. Thus, in the continental context too '[t]he selection of a standard of review by an appellate or reviewing court signals the degree of deference or latitude that it is prepared to cede to the initial decision-making body',<sup>41</sup> but this happens *within* the proportionality assessment. Thus, no black holes are admitted, yet the possibility of grey areas remains given the different conceptions of proportionality. The flexibility of proportionality allows the interpreter to possibly "break" the unity of public law by applying different standards of review under a common label.

As a result, proportionality might well be, as argued elsewhere,<sup>42</sup> the main tool of the 'culture of justification', so that ideally every exercise of public powers must be substantively justified or justifiable to those affected by the decisions. However, by performing the assessment differently, the reviewing authorities can narrow the distance between the European unity of public law and the view of those arguing for the reasonableness-correctness divide. By leaving a certain discretion to the ECB, the ECJ is close to embracing the latter view, while the GCC rejects it: the difference between *Weiss* and *PSPP* can be understood as a conflict about the role of the judiciary via diverging applications of proportionality.

After noting the significant divergence in different assessments of proportionality, we can move to the question of whether the structure of the

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<sup>40</sup> Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *The American Journal of Comparative Law* 463, 487-490.

<sup>41</sup> Taggart (n 36) 451.

<sup>42</sup> Cohen-Eliya and Porat (n 40) 474-482.

test itself privileges one conception over the other for methodological reasons. This, I will argue, is a rather problematic idea.

## V. A MATTER OF METHOD?

The comparison underlines an inner tension in the GCC's decision. The *PSPP* judgment has a theoretical backbone which goes beyond a mere account of the proper division of competences between the national and supranational level.<sup>43</sup> That is the conception of the Member States as the masters of the Treaties, involving a strict interpretation of the principle of conferral and a sceptical view of democracy at the EU level. This is not new, as it goes back to the *Maastricht* judgment in 1993.<sup>44</sup> Yet the *PSPP* decision entails something more, namely a strong conception of judicial review as the proper site to display public reason (at least in opposition to administrative bodies). This strong view, in turn, presupposes a certain optimism towards the possibilities of judicial reasoning when analysing public policies. It is slightly ironic that a conception of judicial review as the institutional embodiment of public reason through proportionality, which was suggested as a tool to find an equilibrium between the national and the supranational level,<sup>45</sup> is now used to ground an *ultra vires* decision.

Be that as it may, even if optimism is justified, the GCC's conception does not derive from proportionality itself: the assessment cannot guide the reviewing authority in choosing the appropriate standard of review, i.e. the appropriate degree of scrutiny through proportionality. On the contrary, it leaves open a series of puzzling questions. Should the decision-maker be left with some discretion in choosing the appropriate option among a series of reasonably unrestrictive ones or should they be strictly required to pick the

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<sup>43</sup> Consider Vinx's comments on the conception of democracy exposed by the Federal Court in the *Lissabon* judgment. See Lars Vinx, 'The incoherence of strong popular sovereignty' (2013) 11 *International Journal of Constitutional Law* 101, 114-124. Vinx is tellingly recalled by Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 18 May 2020) <<https://verfassungsblog.de/germanys-failing-court/>> accessed 10 March 2021, and this might hint at a certain continuity in the Federal Court's view on democracy.

<sup>44</sup> BVerfG, decision of 12 October 1993, 89, 155.

<sup>45</sup> Mattias Kumm, 'The Moral Point of Constitutional Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 232-242.

least restrictive one? Should we leave the choice regarding what interests deserve to be balanced to the decision-maker or is it preferable that the judiciary has a say in that? Should we adopt a different standard of review when the institution under scrutiny is an independent agency such as a central bank?<sup>46</sup> Proportionality alone cannot answer these questions.

In the context of the *Weiss-PSPP* saga, it has been noticed that the list of competing interests to be balanced in the third stage might well extend beyond those listed in paragraphs 170-175 of the *PSPP* judgment, for example to include environmental considerations under article 11 TFEU.<sup>47</sup> Therefore, the choice by the ECJ to limit its balancing to central banks' losses might well be arbitrary to a certain extent, but so is that of the Federal Court. More abstractly,

[t]he assumption that the identification of interests can be divorced from political judgment either results from including all interests asserted by anyone to be relevant or brushes aside the prior question as to who is identifying the 'relevant' interests and according to what standard or criterion.<sup>48</sup>

Similarly, when it comes to necessity, determining that two monetary policies are equally effective, but that one is less restrictive, is not easy. Perhaps it would be more realistic to say that two measures are reasonably analogous in their effects, yet one is less damaging to competing interests.<sup>49</sup> Moreover, if it is true that, as the former president of the Israeli Supreme

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<sup>46</sup> On the ECB's independency in the context of the *PSPP* judgment see Diane Fromage, 'Weiss: The Bundesverfassungsgericht's over-expansive interpretation of the Bundestag's 'responsibility for integration' and the need to adapt judicial review procedures to the E(S)CB's specificities', (2020) *EULaw Live Weekend Edition*, <[https://issuu.com/eulawlive/docs/2020\\_018?e=40736167/78350760](https://issuu.com/eulawlive/docs/2020_018?e=40736167/78350760)> 6-14 accessed 10 March 2021.

<sup>47</sup> Antonio Marzal, 'Is the BVerfG *PSPP* decision 'simply not comprehensible'?', (*Verfassungsblog*, 9 May 2020) <<https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>> accessed 10 March 2021. On environmental considerations in ECB's monetary policy, see Javier Solana, 'The Power of the Eurosystem to Promote Environmental Protection' (2019) 30 (4) *European Business Law Review* 547, 562-575.

<sup>48</sup> Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law and Jurisprudence* 179, 191.

<sup>49</sup> Cass Sunstein, *Legal Reasoning and Political Conflict*, (2nd edn Oxford University Press 2018) 72: 'When two cases appear obviously identical to us, it is because we have disregarded, as irrelevant, their inevitable differences'.

Court Aharon Barak says, '[t]he objective test [on necessity] is determined, largely, by the standard of common sense',<sup>50</sup> then it will be hard for judges to perform it in a nonarbitrary fashion when the evaluated polices are technically complex.

The need to draw lines is inescapable, yet these lines are inevitably arbitrary to a certain extent,<sup>51</sup> even more so in intricate matters of monetary policy.<sup>52</sup> The assessment of proportionality involves more than merely applying a pre-structured reasoning which mechanically ensures an appropriate result.<sup>53</sup> Proportionality involves both moral reasoning and the multi-layered evaluation of large-scale policies, which comprises a variety of interests. The judge is required to make inevitably disputable political choices and there seems to be no one right way to assess proportionality,<sup>54</sup> not even for the apex court of the jurisdiction where it was born.<sup>55</sup> This conclusion allows us to ultimately advance the second claim of this essay: criticizing another decision based on methodological considerations seems possible but problematic, since a detailed, single method directly resulting from the concept proportionality itself is non-existent. Consequently, if there is some inevitable discretion in proportionality, then was it so clear that *Weiss* was 'manifestly' mistaken? If not, and given the enduring acceptance by the GCC of a 'manifest violation' standard of review set in *Honeywell*,<sup>56</sup> was the disagreement on proportionality the appropriate justification for an *ultra*

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<sup>50</sup> Aharon Barak, *Proportionality*, (Cambridge University Press 2012) 327.

<sup>51</sup> See Webber (n 48) 180: 'Indeed, the way in which the principle of proportionality generates particular conclusions is difficult to discern: concluding whether legislation "strikes the right balance" or is "proportionate" in relation to constitutional rights is, for the most part, asserted rather than demonstrated'.

<sup>52</sup> See the comment by Karen Alter, 'Is it a Dance or is it Chicken?' (*Verfassungsblog*, 13 May 2020) <<https://verfassungsblog.de/is-it-a-dance-or-is-it-chicken/>> accessed 10 March 2021.

<sup>53</sup> See Webber (n 48) 196.

<sup>54</sup> Considering a continental jurisdiction quite close to Germany, think about the various standards used by the Italian Constitutional Court (balancing, reasonableness, proportionality). See Marta Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' (2016) 8 *The Italian Journal of Public Law* 37, 53-55.

<sup>55</sup> On the German roots of proportionality and its transplant at the supranational level, see Cohen-Eliya and Porat (n 38) 271-276 and Barak (n 50) 175-188.

<sup>56</sup> BVerfG, decision of 6 July 2010, 2 BvR 2661/06, paras 55-61.

*vires* decision?<sup>57</sup> The even deeper choice on the degree of deference to be shown by the judiciary, which determines the intensity of scrutiny through proportionality, is itself not obvious.

In sum, while it is easier to assess whether the structure of proportionality has been adhered to, adjudicating on the appropriate standard of review hardly seems a matter of objectivity. Declaring a position such as the ECJ's in *Weiss* not only debatable but manifestly and methodologically mistaken seems, so to say, disproportionate.

## VI. CONCLUSIONS

In this article, I have compared the different conceptions of proportionality displayed by the ECJ and by the GCC in the *Weiss-PSPP* saga. The flexibility of the assessment allows for a certain difference and the comparison shows a much more deferent approach in the interpretation of the ECJ, while the GCC is willing to use proportionality to scrutinize in detail the content of the decisions by an administrative agency like the ECB.

Based on this comparison, two claims were advanced. First, that through proportionality, the relations between reviewing and reviewed authorities can be shaped differently. Although proportionality is part of a common legal language of public law in Europe, which significantly constrains the removal of decisions from review (especially by the judiciary), still its flexibility allows for grey areas where the level of scrutiny is comparatively quite low. The unity of public law, in which every public decision is in principle subject to scrutiny, is accomplished in different degrees by means of the flexible structure of proportionality.

Second, this flexibility makes any possibility of talking about a single and objective method for performing the proportionality assessment quite questionable. At the very least, proportionality provides an ordered check list of the reasons and issues to consider when assessing a measure, so that it turns out to be an extremely helpful tool in modern public law. But it is no algorithm or theorem. The test has limits and often involves a certain amount of discretion too, which is rather hard to overcome. We should thus question our faith in its heuristic power. As a result, the paragraphs devoted by the

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<sup>57</sup> BVerfG (n 1) paras 105-115.

GCC to the purported identification of an objective method to assess proportionality seem more puzzling than illuminating.



## BOOK SYMPOSIUM: *CAPITALISM AS CIVILISATION*

### MATERIALISM, CULTURE AND THE STANDARD OF CIVILIZATION

Kanad Bagchi\*

#### I. INTRODUCTION

Ntina Tzouvala's book *Capitalism as Civilisation: A History of International Law*<sup>1</sup> (*CaC*) is a remarkable feat in international legal scholarship, not only for its core insight that the 'standard of civilization', far from being a relic of the past, remains ubiquitous and all-pervasive, but also for the way that the book engages with different theoretical and methodological approaches to international law without being polemical and, yet, still holding its own. *CaC* attempts to understand international law not in isolation but as part of its broader history, structure and, most importantly, embeddedness in political economy. Tzouvala demonstrates that 'civilization' is deeply anchored into international law's 'grammar and syntax',<sup>2</sup> making the relative decline in the use of the term largely inconsequential. Moreover, treating "civilization" as an 'argumentative pattern'<sup>3</sup> allows Tzouvala to explore the contradictions, indeterminateness and persistence of "civilization" both historically and in contemporary practise.

What makes Tzouvala's work distinctive is that she conceives the argumentative structure of "civilization", with all its instability, oscillations and contradictions, as a reflection of the material realities of capitalism, a system that itself produces contradictory patterns of homogeneity and

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<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

<sup>2</sup> *Ibid* 14.

<sup>3</sup> *Ibid*.

unevenness. *CaC* is therefore a critique of the *internal* argumentative structure of "civilization" – and a powerful one at that. More fundamentally, though, it is also a critique of 'capitalism and the way in which its contradictions structure an international legal argument'.<sup>4</sup> While Tzouvala comes to this from a rigorous Marxist perspective, she also strikes up a conversation with, and draws inspiration from, other critical traditions, most notably critical legal studies (CLS) and its international law cousin New Approaches to International Law (NAIL), as well as Third World Approaches to International Law (TWAAIL). Together, *CaC* adds to the growing body of Marxist international legal scholarship by offering a sombre yet attentive material-institutional account of international law and its role in mediating the contradictory imperatives of capitalist relations.

For those of us who have followed Tzouvala's work, her effort to fuse different strands of critique comes out prominently, as does her unwavering commitment to fairer material outcomes.<sup>5</sup> At a time when neoliberal hegemony, authoritarianism and racial injustice seem to have entirely co-opted the institutions of our daily lives, Tzouvala's call for a comprehensive, structural critique is most welcome and indeed urgent. In this regard, *CaC* is truly a reflection of the scholar that Tzouvala is: someone who is not afraid to confront her own contradictions<sup>6</sup> but is genuinely anxious about the material ills of our society.

After going over the core argument of the book in Section II, I explain in Section III *CaC*'s engagement with Marxist critique of international law, its relationship with imperialism and colonialism and what kind of

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<sup>4</sup> Ibid 34.

<sup>5</sup> Some of her other recent reflections on different strands of critique include Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27 *European Journal of International Law* 215–233; Ntina Tzouvala, 'Salvaging the "RF": Radical Feminism and Trans Exclusion' (Critical Legal Thinking, 3 February 2021) <<https://criticallegalthinking.com/2021/02/03/salvaging-the-rf-radical-feminism-and-trans-exclusion/>> accessed 24 April 2021; Ntina Tzouvala, Review Essay: Settler Colonialism, Race, and the Law: Why Structural Racism Persists (2021) 21(2) *Melbourne Journal of International Law* (forthcoming).

<sup>6</sup> She has mentioned in a number of book launch discussions that *CaC* is a conversation with her old self and the 'Marxist Positivist' approach she adopted when writing her PhD, from which this book emerged.

conversations that starts with other critical traditions. Finally, in Section IV, I offer some reflections on what it means for the emancipatory role of international law that it cannot resolve the contradictions of capitalism.

## II. THE STANDARD OF CIVILIZATION: BETWEEN 'EXCLUSION AND CONDITIONAL INCLUSION'

Tzouvala's work on "civilization" sits alongside a number of other thorough contributions that have emphasized how the very foundations of international law rest on a divide between Europe and the rest, rooted in conceptions of racial and cultural superiority.<sup>7</sup> As Anghie writes, "civilization" was a means of rejecting 'non-Western values, of non-Western identity and even of legal personality'.<sup>8</sup>

Above all else that 'civilization' might mean, it was, as Koskenniemi tells us, fundamentally a rhetorical devise, a 'short hand'<sup>9</sup> employed by lawyers to legitimize an almost permanent exclusion of certain political communities from the realm of international law and, consequently, for normalizing patterns of inequality and hierarchy within the international legal system. In much the same way, Tzouvala's starting point is her "lawyerly" intuition that rather than a 'unitary legal concept', "civilization" is best understood as a 'mode of legal argumentation' that comes with lasting consequences.<sup>10</sup>

As an 'argumentative pattern', "civilization" offers reasons to justify and explain the 'unequal distribution of rights and duties under international law'.<sup>11</sup> Moreover, "civilization" is neither coherent nor stable, but rather is

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<sup>7</sup> See e.g. Anthony Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Villanova Law Review 887; David P Fidler, 'The Return of the Standard of Civilization' (2001) 2 Chicago Journal of International Law 137; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press 2016).

<sup>8</sup> Anghie, *Imperialism* (n 7) xii.

<sup>9</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 103.

<sup>10</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 2.

<sup>11</sup> *Ibid* 33.

riddled with internal contradictions. These contradictions, however, do not take away from the normativity and potency of the concept as a means to stratify, prioritize and separate societies. "Civilization" constantly oscillates, Tzouvala writes, between, on the one hand, a distaste for and suspicion of the non-Western world's 'equal inclusion' on account of its perceived 'racial or cultural inferiority' and, on the other hand, a promise of redemption through wholesale remaking of its political, social and economic institutions in the image of 'capitalist modernity'.<sup>12</sup> The book captures this duality through the twin "logics" of "improvement" and "biology", the former inspiring optimism that it is possible – if not imperative – for non-Western communities to reform themselves and become worthy of membership in the civilized world, while the latter endlessly delays and impedes this membership on account of insurmountable differences. These two logics do not work separately; rather, they 'co-exist and even collapse into each other' as legal argumentation evolves and responds to particular situations.<sup>13</sup>

In other words, "civilization" is not simply a means of keeping certain societies 'beyond the pale of civilization',<sup>14</sup> but also and equally a far-reaching, transformational agenda of diffusing, consolidating and structuring in the periphery a particular form of social relations centred around the capitalist mode of production, with all its attending institutions and rules. It is a form of both 'exclusion and conditional inclusion'.<sup>15</sup> How does one explain this contradictory and opposing set of logics at play?

It is in posing and answering this particular question that *CaC* makes a distinctive break from other scholarship. Tzouvala argues that the oscillatory trajectory of "civilization" is not a product of bad lawyering or, for that matter, of the "indeterminacy" of law and legal concepts alone, 'but rather a feature of its operation within the broader structures of international law'<sup>16</sup> – structures that are deeply rooted in the contradictions of capitalist expansion itself. Capitalism's inherent tendency for limitless spatial expansion and the

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<sup>12</sup> Ibid 19.

<sup>13</sup> Ibid 211.

<sup>14</sup> Anghie, *Imperialism* (n 7) 65.

<sup>15</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 2.

<sup>16</sup> Ibid 214.

'need of a constantly expanding market for its products'<sup>17</sup> leaves in its wake a situation of 'combined and uneven development'<sup>18</sup> that is invariably rife with 'conflict and contingency'.<sup>19</sup> Conditioned by the social norms that capital sustains, the contradictions of "civilization" are nothing but a reflection of those 'very real contradictions of capitalism'.<sup>20</sup> By locating the contradictions of "civilization" within the broader structural constraints of capitalism – a system rooted in exploitation, domination and violence – Tzouvala brings a refreshingly materialist lens to the study of international law and its relationship with capitalism.

Studying *CaC* allows us to see the "civilizing mission" as a continuous process of making and re-making of the non-Western world that did not end with the formal denunciation of colonialism, but instead acquired newer and subtler forms through expanding imperial relations. In other words, while the 'structure' of the concept of "civilisation" has stood the test of time unchanged, its specific content has evolved in response to the ever-changing sensibilities of our times.<sup>21</sup> International law and institutions assumed a central role in capitalist state-building and in managing capitalism's contradictions.

From here on, the book tracks the evolution and persistence of 'civilization' within the history of the discipline from the 19<sup>th</sup> century to our present day. Chapter 2, among other things, crucially highlights the role of non-Western lawyers including figures like Carlos Calvo who were too quick to accept the logic of civilization "wholeheartedly embracing the process of capitalist transformation" within their territories.<sup>22</sup> Chapter 3 studies the League and the Mandate System and foregrounds the work of expertise within those institutions such that the explicit use of the term 'Civilization' was no longer needed. Chapter 4 revisits the infamous South West Africa cases to show

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<sup>17</sup> Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (first published 1848, Samuel Moore (tr), Marxists Internet Archive 2010) 16.

<sup>18</sup> BS Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 *European Journal of International Law* 57, 66.

<sup>19</sup> Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31 *Yale Journal of Law & the Humanities* 389, 392.

<sup>20</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 35.

<sup>21</sup> *Ibid* 5.

<sup>22</sup> *Ibid* 84.

how third world lawyers made a radical attempt to use 'Civilization' to their advantage, but ultimately failed to do so. Finally, chapter 5 brings the concept of 'Civilization' closest to our generation and applies it to the war on terror and one of its more specific illustrations: the "unwilling and unable" doctrine. Tzouvala's concluding chapter ties the different strands of the book together and calls for a critique of the law while recognizing that it is perhaps one amongst several other logics that makes the unequal and inhabitable world around us possible.

### III. MATERIALISM, INDETERMINACY AND CULTURE

#### *1. Finding Peace Between Deconstruction and Marxism*

One of the major strengths of *CaC* lies in disentangling deconstructionist and Marxist critiques. CLS and Marxist approaches to international law have often spoken past each other, if not directly questioned each other's explanatory potential.<sup>23</sup> As David Kennedy himself anticipated from within the CLS movement, Marxists find the indeterminacy of CLS divorced from materiality and from 'real problems and real solutions, real politics and real suffering'.<sup>24</sup> The internal critique of the law that CLS pursues, argues Chimni, is ahistorical and apolitical, invisibilizing international law's complicity in colonial and imperial exploitation. In other words, Marxists are deeply sceptical about the 'politics of deconstruction in and for law', claiming that law invariably determines particular outcomes when it concerns the oppressed.<sup>25</sup> On the other hand, CLS scholars have decried Marxists for being rigid and overly deterministic, as well as for thinking in terms of the "totality" of social relations and ignoring the contingency, variability and, most importantly, the relative autonomy of the law. Though CLS scholars have

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<sup>23</sup> Akbar Rasulov, 'CLS and Marxism: A History of an Affair' (2014) 5 *Transnational Legal Theory* 622.

<sup>24</sup> David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 *New York Journal of International Law and Politics* 335, 464. See also the discussion in BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017) 262.

<sup>25</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 37.

been sympathetic to Marxist theory and vocabulary, they have always maintained a certain distance.<sup>26</sup>

*CaC* engages with CLS/NAIL and especially its most persuasive proponents, David Kennedy and Martti Koskenniemi. Broadly put, the central insight of the CLS/NAIL movement is that law and international law is wholly internally indeterminate and contradictory and therefore cannot really determine legal outcomes; that international law constantly oscillates between 'concreteness' and 'normativity' and is hopelessly both 'over- and under-legitimizing'.<sup>27</sup> Legal arguments can thus justify and support any outcome. These contradictions in international law and legal argumentation arise for Koskenniemi because of the contradictions of the political form of liberalism and international law's embeddedness within it.

While Tzouvala accepts the indeterminacy thesis, she disagrees that contradictory patterns of legal argumentation are due to contradictions of liberalism. Rather, she argues that they reflect the inherent contradictions of capitalism as a system of social relations that is marked by the simultaneous homogenization and differentiation of communities. China Miéville has mounted a similar criticism, stating that Koskenniemi cannot explain *why* these patterns of contradictions are embedded within the specific legal form that is international law. Miéville found the indeterminacy and contradiction of international law to be a product of the contradictions of the "commodity form", which structures both the content and the legal form of international law.<sup>28</sup> Tzouvala does not take this Pashukanian path of reducing the essence of the law to the essence of the commodity form. Instead, she argues that the indeterminacy and contradictions of "civilization", while indeed structured by global patterns of contradictory capitalist relations, provide interpretive possibilities for legal argumentation, however limited they may be. In this

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<sup>26</sup> Hunter (n 19).

<sup>27</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 67.

<sup>28</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 48-60.

regard, Tzouvala does not locate the essence of the law in the essence of capitalism, but instead recognizes the co-constitutive nature of the two.<sup>29</sup>

Going back to Koskenniemi, Tzouvala makes the following claim:

It appears to me that these objections [from Marxists] are correct so far as they are directed not to deconstruction and the indeterminacy thesis as such, but rather to the conclusions Kennedy and Koskenniemi drew from it.<sup>30</sup>

In other words, the indeterminacy thesis in and of itself does not take away anything from the structuralism of Marxist approaches. Rather, it only shifts the focal point from whence such indeterminacy arises to the contradictions and unevenness of the capitalist system. No amount of lawyerly "self-reflexivity" or "disciplinary will" is likely to make those contradictions go away, because such lawyerly activity takes place within the broader structures of capitalist social relations. A Marxist critique thus limits the terrain of possibilities for progressive forces that indeterminacy might otherwise appear to offer.

To be fair, it is not as though Koskenniemi, or for that matter CLS broadly speaking, is blind to overarching structures. In fact, Koskenniemi himself has pointed to the persistence of 'structural bias' in the institutions of international law that operates to tilt the balance of scales towards particular preferences and outcomes.<sup>31</sup> However, he provides no clear answer as to what those preferences are or how are they interact with legal argumentation. Tzouvala reframes Koskenniemi's thesis to argue that indeterminacy and structural bias should not be seen as operating on different planes, or for that matter in different institutional settings, but that they inhere in legal argumentation itself: 'Bias and indeterminacy [...] are joined at the hip'.<sup>32</sup>

This is where Tzouvala's 'materialist framework for understanding legal indeterminacy'<sup>33</sup> offers great potential as it situates the indeterminacy of legal

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<sup>29</sup> For a different view, see Daniel R. Quiroga-Villamarín, 'Victorian Antics: The Persistence of the "Law as Craft" Mindset in the Critical Legal Imagination' (2021) 13(1) *European Journal of Legal Studies* 101.

<sup>30</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 38.

<sup>31</sup> Koskenniemi, *From Apology to Utopia*, (n 27) 607.

<sup>32</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 215.

<sup>33</sup> *Ibid* 38.

texts and arguments within the concrete material conditions of life. In a truly Marxist fashion, she frames the specific form that indeterminacy assumes, in this case the imperatives of capitalist modernity with all its contradictions, as the fullest expression of international law's bias. While this opens up radically different ways of perceiving international law's complicity in exploitation and violence, it also raises some difficult questions of method and approach.

The task of "reconciliation" between Marxism and deconstruction is fundamentally fraught with difficulties. For one thing, legal texts and material processes do not necessarily correspond to each other in concrete situations. Material processes of change and transformation, when they do transpire, are often a product of radical movement and struggle, the nature and momentum of which might surpasses the ability of language to adapt. This is not to suggest that language is static, but that 'languages change more slowly than do economic, political, or religious systems'.<sup>34</sup>

To be sure, Tzouvala fully recognizes the problem of 'trac[ing] legal indeterminacy back to extra-disciplinary, "biggest picture" structure'.<sup>35</sup> However, she does not truly engage with these concerns in the book. She mentions Jacques Derrida and his tryst with "text" and "material institutions" only in passing and in a highly decontextualized manner. Derrida's acknowledgement of materialism, which Tzouvala accepts as his embrace of outside structures, does not fully account for the fact that, for Derrida, it was always through 'texts' that one could discern reality and thus also partly make it. Moreover, Derrida's relationship with Marxism is anything but straightforward. For instance, *Specters of Marx*,<sup>36</sup> Derrida's attempt at situating his own project within Marxist discourse, reveals an extremely ambivalent and inconsistent posture. Some have even pointed out that Derrida's reading essentially strips Marx's works of their most central tenants, making emancipation itself a problematic goal.<sup>37</sup>

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<sup>34</sup> David R Dickens, 'Deconstruction and Marxist Inquiry' (1990) 33 *Sociological Perspectives* 147, 156.

<sup>35</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 16.

<sup>36</sup> Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (first published 1993, Routledge 2006).

<sup>37</sup> Eleanor Macdonald, 'Deconstruction's Promise: Derrida's Rethinking of Marxism' (1999) 63 *Science & Society* 145.

Scholars who might further engage with *CaC* need to acknowledge this nuance but also ask what implications it has for the way we perceive exploitation, oppression and international law's role in both. The danger, of course, is that if the task of linking indeterminacy with structuralism is done in an abrupt manner, there is every chance that the radical potential for critique that both these approaches offer is considerably impoverished.

These remarks do not, however, detract anything from Tzouvala's book. Bringing the insights of Marxism to bear on deconstruction is already a significant step in correcting the misperception that they are fundamentally misaligned. This has implications not only for abstract theory but also for the community of practising international lawyers. *CaC* essentially holds up a mirror to the work that lawyers – especially progressive lawyers – do in the real world by demonstrating the inherent limitations and contradictions within which they operate, and which are almost impossible to navigate. In other words, *CaC* not only provides a frame for 'dissecting and problematizing all the various practices and experiences'<sup>38</sup> that the legal community routinely encounters, but also unpacks those moments of despair and confoundment by connecting them to persistent overarching structures.

## *2. Sharpening the Tools of Marxist Critique – A Focus on Primitive Accumulation*

Over the past two decades, there has been growing engagement with Marxist approaches to international law, perhaps because the ills that beset our societies – not least, enduring poverty, economic exploitation, inequality and racial subjugation – have increasingly laid bare the inadequacy of conventional thinking.<sup>39</sup> Marxist international lawyers have thus adopted the lens of global class struggle, foregrounding the role of ideology and, more

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<sup>38</sup> Akbar Rasulov, 'From Apology to Utopia and the Inner Life of International Law' (2016) 29 *Leiden Journal of International Law* 641, 647.

<sup>39</sup> For an extremely useful resource, see Robert Knox, 'Bibliography of Marxist Approaches to International Law' (Oxford Bibliographies, 28 March 2018) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml>> last accessed 24 April 2021.

recently, the process of interpellation to explain the impact of international law in the distribution of rights, burdens, power and wealth.<sup>40</sup>

Despite this rich literature, what remains overlooked is Marx's crucial claims regarding law's structuring of imperial and colonial violence.<sup>41</sup> Almost a decade ago, Mark Neocleous pointed out how only a handful of international lawyers have carefully studied international law's enduring complicity in colonialism and imperialism, especially from a Marxist lens.<sup>42</sup> He noted that Marx's theory of 'primitive accumulation' – a process central to the very foundations of capitalist relations and territorial expansion – has remained relatively undertheorized, taking away some of the critical edge in contemporary Marxist scholarship.

Tzouvala's description of Marx's critique of the capitalist mode of production as the singular pursuit of extracting surplus-value, together with her careful sketch of his less-theorised concept of 'primitive accumulation' and its relationship with international law, goes a long way towards correcting that omission. After outlining the extreme violence, exploitation and dispossession that marked the birth of capitalism as a historically-specific mode of production, she focuses on those writings of Marx that centrally feature the interrelationship between colonialism and primitive accumulation.<sup>43</sup> Crucially, Marx used 'primitive accumulation' to denote the process through which capital and the state, with all its legal instrumentalities of (extra-economic) force came together, in the first step, to separate workers from the ownership of their property and, as a second, to 'free' them to the

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<sup>40</sup> See e.g. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000); Chimni, *International Law and World Order* (n 24); Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019).

<sup>41</sup> Notable exceptions include Umut Özsu, 'Grabbing Land Legally: A Marxist Analysis' (2019) 32 *Leiden Journal of International Law* 215; Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 306.

<sup>42</sup> Mark Neocleous, 'International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization' (2012) 23 *European Journal of International Law* 941.

<sup>43</sup> Tzouvala (n 1) 23.

disposition of the market. Divorced from their own means of production, workers were left with no choice but to sell their labour power.<sup>44</sup>

Capitalist accumulation did not, of course, stop at the borders of the Western world, but was brought to bear on the colonies as well. In fact, the crisis of capitalism in Europe necessitated the expansion of capital to the colonies, which Europe then sought to transform into social spaces that would be safe and productive for capital accumulation. For Marx, the very nature of the colonial enterprise and the forms of violence it engendered in the colonial territories – enslavement, plunder, conquest – were, to quote a familiar line, nothing other than the 'dawn of the era of capitalist production' and 'chief moments of primitive accumulation'.<sup>45</sup>

Tzouvala goes a step further, positing that primitive accumulation and the violence it entails is not a thing of the past. Capitalist relations of production, once put in place, constantly produce and "reproduce" themselves in different spaces and territories. As Rosa Luxemburg most articulately put it in the context of European colonialism, violence 'has been a constant method of capital accumulation as a historical process, not merely during its emergence, but also to the present day'.<sup>46</sup> To illustrate not only the persistence, but also the adaptability of capitalist accumulation, Tzouvala points to the continuous process of expropriation and dispossession of land in the context of 'settler colonialism'. Accounts of settler colonialism, with its centrality of land dispossession, offer a way to think about primitive accumulation not as part of the 'pre-history'<sup>47</sup> of capitalism, but as a permanent and continuous process facilitated by the explicit or implicit violence of the state.

Here, Tzouvala distances herself from Pashukanian "commodity form" theory of law, which posits that the legal form is a mere reflection of, and derives from, the relationship between commodity owners.<sup>48</sup> Since the form

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<sup>44</sup> See Karl Marx, *Capital: A Critique of Political Economy*, vol 1 (first published 1867, Ben Fowkes tr, Penguin Books 1990) pt VIII.

<sup>45</sup> Ibid 915.

<sup>46</sup> Peter Hudis and Paul Le Blanc (eds), *The Complete Works of Rosa Luxemburg*, vol 2 (George Shriver tr, Verso 2011) 267.

<sup>47</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 27.

<sup>48</sup> See Miéville (n 28) 75-97.

of commodity relations only arose as a result of the capitalist system, for Pashukanis, law did not exist in pre-capitalist societies. This misses the point that law and 'legal, semi-legal and para-legal violence of the state' was central to the very constitution of capitalist relations.<sup>49</sup> Chimni also points to this crack in Pashukanis conception of the law: "He was forgetful that the state with the authority to legislate, and other legal institutions, was already present in the transition from feudalism to capitalism".<sup>50</sup>

Still, Tzouvala dismisses Pashukanis' account of the legal form a bit too abruptly. Despite the many imperfections in Pashukanian thought, his central insight that law and capitalism are structurally connected provides a useful lens through which one can also map the uneven and fragmented development of international law – a proposition that animates the book at hand. Moreover, his account of the legal form as encapsulating the idea of formal legal equality helps to explain why law, or for that matter international law, assumes a privileged form of regulation. This perhaps does not amount to 'thingifying' either international law or capitalism, as Tzouvala suggests.<sup>51</sup> To the contrary, as Knox points out, Pashukanis offers a 'good explanation for the haphazard and uneven development of international law'.<sup>52</sup> In this regard, even though Pashukanis does not feature prominently in Tzouvala's work, many of the claims that she makes in the book, especially with regard to the expansion and development of the capitalist mode of production, can be explained through his conception of the legal form.

That aside, Tzouvala's revisiting of Marx's conception of primitive accumulation allows us to recognize "civilization" as the fundamental link between international law, colonialism and capitalist expansion. Marxist scholarship that aims to extrapolate on the continuing legacies of imperialism needs to account for the variegated but equally violent patterns of primitive accumulation that transpire in several parts of the world. Many of the current

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<sup>49</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 25.

<sup>50</sup> Chimni, *International Law and World Order* (n 24) 467.

<sup>51</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 41.

<sup>52</sup> Robert Knox, 'Imperialism, Commodification and Emancipation in International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/>> accessed 24 April 2021.

discourses on neo-colonialism or global imperialism, for instance, could benefit greatly from the historical and analytical perspective that accounts of primitive accumulation bring to the debate.

Although Tzouvala does not take a global class approach to the "standard of civilization", her historical materialist approach to the concept opens up that opportunity. One could shift the lens slightly to take into account the historical and international dimension of the division of labour that "civilization" brings about and, by doing so, expose the historical role of international law in the co-constitution of exploitation and domination.<sup>53</sup> Such an approach would further allow a tracing of the development and history of "civilization" from the perspective of a continuing class struggle. In other words, *CaC* opens up a number of different avenues through which a Marxist analysis can be brought to bear on international law and its argumentative patterns.

### 3. *Pushing Against TWAIL and Yet Still Grounding Gender, Race and Sexuality*

The historical-material lens adopted in Tzouvala's book throws up a challenge but also an opportunity for other critical approaches, most notably TWAIL. Despite sharing a broadly similar agenda of resisting varied forms of exploitation and domination, TWAIL and Marxist scholars have different starting points and very different frames for analysing international law's complicity with imperialism. TWAIL's conception of both international law's history and its present dynamics is rooted in the idea of imperialism of "culture", where "civilization" is primarily viewed as a "bearer of cultural differentiation and antagonism".<sup>54</sup> This has been expressed most persuasively in Anghie's 'dynamic of difference': 'to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as "universal" and civilized and the other as "particular" and uncivilized'.<sup>55</sup> Crucially tied to this cultural differentiation is the idea of international law as fundamentally

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<sup>53</sup> For a class approach, see Akbar Rasulov, 'The Nameless Rapture of the Struggle: Towards a Marxist Class-Theoretic Approach to International Law' (2010) 19 *Finnish Yearbook of International Law* 243; Chimni, 'Prolegomena' (n 18).

<sup>54</sup> Ntina Tzouvala, 'Civilization' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

<sup>55</sup> Anghie, *Imperialism* (n 7) 4.

ordered around a racial hierarchy of domination by Western communities over non-Western ones. Race and culture have therefore informed the bulk of the scholarly tradition within TWAIL and the post-colonial space.<sup>56</sup>

Marxist scholars, on the other hand, have described the role of international law as primarily that of mediating the process of capitalist expansion. Accounts of race and racialization do not feature prominently. Even Chimni, who identifies himself with both the TWAIL and Marxist traditions, has assigned primacy to the 'logic of capital', as opposed to territory or culture, in determining international law.<sup>57</sup> As Knox points out, within the Marxist discourse, race and racism 'tend to be understood as counterposed to processes of capitalist accumulation'.<sup>58</sup> This has created a widening gap between TWAIL and Marxist scholars who have, unwittingly perhaps, looked past each other, dampening some of the radical potential that a combined focus could bring.

The distinctiveness of *CaC* and Tzouvala's work more broadly lies in the fact that, while she is firmly rooted within the Marxist tradition, issues of race, racialization and gender are equally important to her thinking. Her study on the standard of civilization interrogates these relationships by locating them within the context of a historically specific form. She relates European international law to the 'rise and global (but unequal) spread of capitalism' as a way to capture the historical specificity of this particular form as privileged regulation. Drawing from Third World Marxist scholars, especially Samir Amin, Tzouvala argues imperial domination and culturally superior modes of differentiation have not been specific to Europe alone. On the contrary, such

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<sup>56</sup> See Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 195. Yet, it is also true that TWAIL's engagement with questions of race can do much more. See James Thuo Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other' (2020) 67 *UCLA Law Review* (forthcoming); Tzouvala, Review Essay (n 5).

<sup>57</sup> Chimni, *International law and World Order* (n 24).

<sup>58</sup> Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 *London Review of International Law* 81, 100.

modes of exclusion have been a mainstay of many civilizations around the world.

What is noteworthy about "civilization" as a specifically European project, then, is not so much that it has sought to universalize the cultural specificities of Europe and exclude those communities that did not conform to it. Instead, as she notes elsewhere, it is that it 'assisted in the construction of a new, global hegemony: that of European capital' and the specificities of that particular mode of production.<sup>59</sup> By drawing our attention to the dynamics of capitalist exchange and production, Tzouvala pushes TWAIL scholarship to confront, if not fully embrace, the Marxist critique. In this, she joins a range of other critical international lawyers who have pushed against what they perceive as overly "naturalistic" and "idealistic" accounts of international law and imperialism in TWAIL scholarship. Haskell, for instance, decries TWAIL for falling into the same Eurocentric trap that it seeks to challenge and argues for a radically materialist account of the law and its relationship to capitalist production.<sup>60</sup> Knox, on the other hand, reframes Anghie's thesis towards a 'materialist' 'dynamic of difference', centring the role of capital accumulation within it.<sup>61</sup> Rose Parfitt similarly argues that Anghie underestimates the extent to which 'sovereignty' came to be 'economized' by international law, such that the legal subjectivity of the non-Western world was made wholly contingent upon its capacity and willingness to transform itself in the image of a capitalist state.<sup>62</sup>

Tzouvala, however, does not stop at that. Her narrative evinces deep reflection on how race, gender and sexuality provide the necessary justifications for the continued presence of the concept of "civilization" in international law. She examines these categories as argumentative tropes that are used by international lawyers to constantly infantilize, racialize and feminize non-Western communities – thus rationalizing the unequal

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<sup>59</sup> Ntina Tzouvala, 'The Specter of Eurocentrism in International Legal History' (2021) 31 *Yale Journal of Law and the Humanities* 413, 432.

<sup>60</sup> John Haskell 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 *Canadian Journal of Law and Jurisprudence* 383.

<sup>61</sup> Knox, 'Valuing Race?' (n 58).

<sup>62</sup> Parfitt (n 40).

distribution of rights and obligations. In other words, these racialized tropes lay the groundwork for capitalist expansion while simultaneously deferring the prospect of equal inclusion of those communities into the family of civilized nations.

The intervention and occupation in Iraq that Tzouvala painstakingly documents in chapter five illustrates precisely how the constructed image of Iraq and its people as 'malicious' 'passive' 'excessively violent' and 'deceptive' provided the rationale for the continued presence of the Coalition Provisional Authority and the radical neoliberal reforms that followed. With the backing of UN Security Council resolution 1483, Iraq and its institutions were entirely remodelled along the lines of a capitalist market economy, with property rights, investment protection and central bank independence squarely entrenched. Both the World Bank and International Monetary Fund were brought in to add a layer of legitimacy, neutrality and expertise to what was undoubtedly a political undertaking. Meanwhile, a limited and weak model of democracy was foisted on Iraq as the only reasonable form of political association, given that Iraqi people had no conception of what real freedom entailed. Thus, even though the language of civilization was not explicitly invoked, Iraqi society came to be viewed as utterly incompetent, weak and prone to savagery and thus incapable to decide the terms of their own future.

What the intervention in Iraq and Tzouvala's subsequent discussion of the 'unable and unwilling' doctrine tells us is that the contradictions of capitalism take shape by legitimizing themselves through the simultaneous processes of racialization and other forms of stratification. This goes a long way towards shedding light on some of the disciplinary blind spots that hamper TWAIL and Marxist scholarship and even promises a radical engagement between the two. Although Tzouvala pursues a narrower objective in viewing race and racialization as argumentative tropes and not as "material relationships", her book opens up the space needed to fully explore the co-constitutive nature of race, gender and sexuality in the expansion of capitalist relations and the particular role that international law plays in that process.

#### IV. THE CONTRADICTIONS OF CIVILIZATION AND THE EMANCIPATORY ROLE OF INTERNATIONAL LAW

The South West Africa saga that Tzouvala brilliantly documents in her fourth chapter brings out the inherent limitations of using "civilization" to further progressive goals. Despite launching a radical challenge to the system of discrimination and racism of the apartheid regime, Third World lawyers ultimately failed to mobilize the language of "civilization" to question the roots of racialized capitalism in South Africa. Trapped within the contradictions of "civilization", Ethiopia and Liberia realized that the challenge to racialized capitalism would come at the cost of acknowledging that black Namibians were not civilized enough to govern on their own. In other words, the two poles of "civilization", improvement and biology, were a zero-sum game. Instead, in their submissions, the applicants before the court restricted themselves to the more mundane claim that the system of racial discrimination in South Africa prevented the liberation of certain individuals and was thus contrary to international law. This however, meant that the structural coupling between racialization and capital in South Africa was never really questioned.<sup>63</sup>

What the South West Africa saga illustrates is that "civilization" as a concept of international law, though indeterminate and inherently unstable, does not offer an unlimited scope for argumentation, even when used by the most progressive of lawyers. Instead, "civilization", like many other argumentative concepts, operates within the constraints and contradictions of the very process of capitalist expansion, preventing, in some sense, the possibility of challenging "imperialism and capitalism at their core".<sup>64</sup> Moreover, even when "civilization" allows for a muted and highly abstracted possibility of challenge, it comes with the price of legitimizing and sustaining the very system of law that facilitated exploitation in the first place. Even if Tzouvala does not wish to put it in these terms, this is undoubtedly where the nature and constraints of 'legal form' manifest themselves most prominently. It is in this limited sense that indeterminacy can be both 'restraining and enabling'

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<sup>63</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 149-167.

<sup>64</sup> *Ibid* 41.

at the same time.<sup>65</sup> What implications does this have for international lawyers who wish to commit to the project of emancipation?

First of all, it cannot mean that progressively minded lawyers cease using the instrument of international law because, more often than not, that is not possible. Here, I agree with Chimni that international law can and has been used to further the cause of marginalized communities and subaltern groups, even if those attempts came with substantial riders.<sup>66</sup> In fact, once it becomes clear that resisting the structures of capitalist social relations is at best achievable only in the long term – if at all – the case for using international law in an instrumental, tactical way ought to become more pronounced, strengthened and even intensified.<sup>67</sup> Moreover, social movements that do not directly attempt to use legal institutions for their progressive goals and are thus less constrained by the legal form are also instrumental to this process of resistance.

It is also essential that we uncover and criticize the theoretical (super)structures that constrain both our legal discourse and our collective imagination. *CaC* does exactly that. It reminds us that, although "civilization" does not conform to a precise definition and is inherently unstable, it is not devoid of a structuring logic. On the contrary, "civilization" demonstrates the structural logic of capitalism and points to the mediating role international law plays in the expansion of the capitalist mode of production, incorporating into its fold the "uncivilized" world. Ultimately, the most important take-away from *CaC* is perhaps that the task of radical critique, whether through scholarship or through practise, must continue, even with the awareness that such critique is unlikely to lead to any wholesale transformation.

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<sup>65</sup> Ibid 40.

<sup>66</sup> BS Chimni, 'Concluding Response from Professor Chimni: International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/concluding-response-from-professor-chimni-international-law-and-world-order/>> accessed 24 April 2021.

<sup>67</sup> Robert Knox, 'Strategy and Tactics' in Jan Klabbers (ed), *Finnish Yearbook of International Law*, vol 21 (2010) 193.



# THE STANDARD OF CIVILISATION IN INTERNATIONAL LAW

Julie Wetterslev\* 

## I. INTRODUCTION

The cover of Ntina Tzouvala's new book depicts a Goddess floating ethereally in her white dress over a landscape of colonial settlement.<sup>1</sup> On the ground below her, we see prairie wagons and cowboy settlers moving through yellow fields, probably in North America, probably in the 18<sup>th</sup> or 19<sup>th</sup> century. As I pick up the book, I imagine this floating figure to be Justitia, the Goddess of Justice. The look on her face is mild and benevolent. When I search a bit on the internet, I learn that, in fact, the heavenly lady on the cover is an allegorical representation of Manifest Destiny, the idea that settlers in the United States were leading civilisation westwards. She is shown bringing light and progress from East to West, stringing telegraph wire and holding a book, highlighting different stages of economic activity and evolving forms of transportation.<sup>2</sup> The metaphor seems clear from the outset: International law has always accompanied settler colonialism and capitalist expansion.

Tzouvala does not claim that her book presents a total theory of international law, nor that the law she depicts is universal.<sup>3</sup> Her history is focused on the trope of 'civilisation', which runs through the discipline of international law as an argumentative praxis, forever oscillating between the logics of 'biology' and 'improvement'. Through a range of concrete historical and textual examples from different geographical and transnational settings (including the Mandate System of the United Nations, the South African presence in Namibia during apartheid and recent invasions of Syria and Iraq) we learn how the standard of civilisation was coined and employed in international legal argumentation. In this review, I complement her narrative with a few

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<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

<sup>2</sup> The painting on the cover of the book is called 'American Progress' and was painted by Prussian-born American painter John Gast in 1872.

<sup>3</sup> See Tzouvala (n 1) 17.

thoughts about how the logics of biology and improvement can be traced back to the colonial and Christian origins of international law.

The analysis yielded by Tzouvala's sophisticated methodology resonates with my own work on the titling of lands as indigenous territories in North Eastern Nicaragua, which provides a contemporary example of how international law has failed to prevent capitalist expansion, settler colonialism and indigenous dispossession. The claim for indigenous communal property holding is grounded in international law and has increasingly been formulated in the language of human rights and cultural survival. Nonetheless, through conversations with indigenous leaders, academics and lawyers in Nicaragua, I have come to understand that many different and evolving meanings have been ascribed to the indigenous title as a legal form. I therefore find Tzouvala's methodological insights valuable for understanding the creation of arguments relating to indigenous title and self-determination (not to be confused with real and undisputed sovereignty). The indeterminate and sometimes contradictory logics of civilisation have formed part of the process of titling lands as indigenous territories, a process profoundly entangled both with international law since the conquest of the Americas and with state-building in the post-colonial moment. In other words, Tzouvala's research method and propositions can inspire new understandings of the continuous and current displacement and dispossession of indigenous peoples from their ancestral lands.

## II. LAW AS CAPITALISM'S SCRIPTURE

Although Tzouvala has taken on an ambitious task in writing international law's history anew, she manages to accomplish this without resorting to oversimplifications. In a careful analysis of texts ranging from treaties and court rulings to textbooks and memorials, she shows that the model of the capitalist state that has been promoted through the international legal 'logic of improvement' (or progress) has never been static. 'Civilisation' is forever transformable and flexible but remains in place to discipline and exclude those societies deemed 'non-Western' and peripheral by the very same elusive standard. Tzouvala acknowledges that not all legal systems are necessarily textual, but her aim is not to engage with those legal systems (i.e. indigenous systems of law). Rather, she aims to subject the hegemonic and

influential project of international law (so-called 'Western' international law) to critical scrutiny.

Through an elegant review of relevant literature, Tzouvala places the textuality of this (Western) international law within capitalist structures of accumulation and imperialist expansion. Importantly, she emphasises the Marxist claim that the capitalist mode of production is a historically specific mode and not a given one, underlining also that this is what offers a prospect of possibly overcoming it. Primitive accumulation and structural exploitation of labour power emerged through processes of violent displacement and dispossession of peasants, and through bureaucratic and legal techniques of individualisation that severed individuals both from their means of production and from their ties to family, land and community. From the beginning, the state and the law were thus integral to the process of creating and recreating the capitalist relations of production.

Simultaneously, the author draws on the constructive critique of Marxism from indigenous scholars, who have underscored that the violent processes of dispossession that underlie primitive accumulation are not only a thing of the pre-capitalist historical past. As pointed out by scholars such as Glen Coulthard,<sup>4</sup> as well as by current indigenous activists worldwide, violence is a continuous condition for indigenous peoples all over the world, as they are often subjected to brute force when they resist the logics of a life structured around profit and instead emphasise notions of care and interconnection between humans and non-human beings. Also, Tzouvala rightly points out that indigenous scholars have accentuated how the control over land as such, and not necessarily the goal of control over wage labour, has been a driving force in the processes of capitalist expansion.<sup>5</sup> As Patrick Wolfe emphasised, invasion is a structure, not an event.<sup>6</sup>

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<sup>4</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014).

<sup>5</sup> For more on this topic see e.g. Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education & Society* 40.

<sup>6</sup> Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387.

Tzouvala does not claim to explain the entirety of the relationship between international law and capitalism through this book. Rather, she examines the relationship between one type of argumentative praxis and the specific and contradictory model of production that capitalism is. She suggests that it is the global spread and reproduction of this contradictory model of production, which carries both universalising and stratifying tendencies, that allows for the persistence, persuasiveness and even invisibility of the 'standard of civilisation' as a consistent argumentative pattern in international law. The capitalist mode of production, as well as the political, economic, and institutional structures that uphold it, is what allows the argumentative pattern to reproduce and reshape itself. The methodological finesse here is to approach 'civilisation' as an argumentative structure (rather than as a legal term to be defined or interpreted).

Tzouvala recalls Althusser's notion of *interpellation*<sup>7</sup> as central in the production of legal subjects.<sup>8</sup> By reference to famous nineteenth century international lawyers, she shows how only those political communities that were interpellated as modern, bureaucratic and juridically separate from both society and economy were deemed to be fully civilised subjects (a.k.a. states) capable of self-government and mutual recognition in international law. While there was a sense of possibility for non-Western communities to attain social transformation and become 'civilised', the logic of biology meant that these communities would need the guidance and stewardship of Western international lawyers to progress from backwardness and moral inferiority. While white majority societies were considered civilised by default, racialised people were under constant scrutiny and had to prove their civilised status to the guardianship of white statesmen and lawyers to be 'upgraded'. In this logic of biology, 'race as such was treated as an unchangeable historical and natural reality',<sup>9</sup> and the imposition of a wide range of juridical practices of domination and disciplining were justified.

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<sup>7</sup> Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)' in *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001).

<sup>8</sup> See Tzouvala (n 1) 11-13.

<sup>9</sup> Ibid 68.

This textual and critical approach is also relevant for understanding both past and contemporary processes of legal argumentation to name and define (or interpellate) the *indigenous*, and the ways in which such argumentation has contributed to creating and changing material conditions. Indigeneity has been held out as a badge of honour and a mark of the resistant unity of the marginalised. It can be understood as a political identity mobilised against processes of colonial domination and capitalist expansion. Yet, as pointed out by other scholars, indigeneity is, at best, a contentious and indeterminate term that groups together a wide range of peoples with dissimilar origins, cultural traits, languages, and forms of organisation, which is why some peoples grouped under this designation prefer to be called by the name of their nation instead.<sup>10</sup> In addition, the category has colonial roots, and can be prone to lend itself to a romanticised, culturalist and idealised vision of the noble savages, who are also often considered to be ungovernable and lawless. Indigeneity is always juxtaposed against something else, and perhaps indigeneity's *other* would be, precisely, civilisation.

### III. CHRISTIANITY: A MISSING LINK?

Tzouvala argues that the oscillation between the 'logic of biology' and the 'logic of improvement' in the standard of civilisation has been notable in international legal argumentation since the nineteenth century. During the nineteenth century, she holds, there was a global intensification of the trends toward the legalisation of social affairs, the adoption of legal systems centred around notions of individualism, private property and judicial independence, and the bureaucratisation and territorialisation of state power. At the same time, the 'logic of biology' constantly denied non-Western political communities the possibility of reaching 'civilisation', perpetually confining them into a lesser position within the architecture of international law. In this register, legal, economic, or cultural differences were attributed to unchangeable characteristics and the gap between the West and 'the rest' was made impossible to bridge.

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<sup>10</sup> See e.g. Pablo Mamani Ramírez, *Geopolíticas Indígenas* (CADES, Centro Andino de Estudios Estratégicos 2005); Silvia Rivera Cusicanqui, *Ch'ixinakax Utxiwa: A Reflection on the Practices and Discourses of Decolonization* (2012) III South Atlantic Quarterly 95.

Tzouvala links the oscillation between the two 'logics' of the standard of civilisation to nineteenth century international law's sense of Western imperialism as a force there is no point in resisting, leaving non-Western communities with no options but to assimilate or perish. In doing so, she demonstrates how the argumentative indeterminacy of 'civilisation' maps onto the contradictions of imperialism as a specifically capitalist phenomenon of unequal and combined development that tends to generate both homogenisation and unevenness on a global scale. Overall, I find this historical excavation of 'civilisation' as a trope that runs through international law most thought-provoking and skilfully done.

While I share many of the author's intuitions and appreciate her project to reconcile Marxist and deconstructive approaches to construct a materialist history of international law, I am less convinced that the logics of biology and improvement became apparent or dominant in this discipline only in the nineteenth century. Tzouvala explains taking the nineteenth century as a starting point by referring to the weakening of the authority of the Christian churches, the stabilisation of Western nation-states and the expansion of the state system in that century as determining bases of a system of modern international law. Yet, even if just in a footnote, she also acknowledges that not everyone is convinced that international law ever transitioned to secularism. Furthermore, she writes, with a reference to Brenna Bhandar, that the 'equation between civilisation, whiteness and productive economic activity, the taming of nature, and adventurous curiosity was at the core of juridical justifications of settler colonialism'.<sup>11</sup> Such logics, though shifting, indeterminate, flexible and forever evolving, might be grounded in a Christian project of hegemony.

A range of theorists and historians have, in fact, shown that notions of (Christian) civilisation versus (Indian) barbarism, savagery and infidelity were a crucial feature of the conquest and colonisation of the Americas and of the legal regimes that developed in this process.<sup>12</sup> As such, oppositional logics and

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<sup>11</sup> Tzouvala (n 1) 70, citing Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018).

<sup>12</sup> See e.g. Nicole D Legnani, *The Business of Conquest: Empire, Love, and Law in the Atlantic World* (University of Notre Dame Press 2020); Robert A Williams, *The*

ideas of progress, backwardness and potential for development were inherent to the very construction of both Europe and the Americas (and all other regions) as continental entities.<sup>13</sup> This indicates that the logics of civilisation were at play already at the foundation of international law as a discipline in the sixteenth century – as can be seen, for example, in texts written by Francisco de Vitoria, Hugo Grotius and Bartolomé de las Casas – regardless of whether the term 'civilisation' appears as such in these writings.<sup>14</sup>

Tzouvala suggests a need to re-work Anthony Anghie's claim that, in international law, 'the civilising mission was animated by [...] the question of cultural difference'.<sup>15</sup> She rather wants to place the inclusion-exclusion dynamics of international law in a historically specific and evolving relationship that is both discursive and determined by the dominant and ever-expanding capitalist mode of production. However, while of course it is true that many legal systems across time and space have performed some function of 'othering', and that ideas of civilisational superiority have not been unique to the West, the book might be at risk of missing an important point about the relationship between *coloniality* and international law that decolonial scholars have struggled to emphasise.

Anthony Anghie's main claim about the colonial origins of international law were based on a reading of Francisco de Vitoria, the Roman Catholic theologian, whose sixteenth century writings dealt precisely with the issue of how to construct a universal law in the face of cultural and 'civilisational'

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*American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press 1990).

<sup>13</sup> See e.g. Enrique D Dussel, *1492: El Encubrimiento Del Otro: Hacia El Origen Del 'Mito de La Modernidad': Conferencias de Frankfurt, Octubre de 1992* (Ediciones Antropos 1992); Edmundo O'Gorman, *La Invención de América: Investigación acerca de la Estructura Histórica del Nuevo Mundo y del Sentido de su Devenir* (2nd edn, Fondo de Cultura Económica 1996).

<sup>14</sup> On this, see e.g. Helen M. Kinsella 'Civilization and Empire - Francisco de Vitoria and Hugo Grotius' in *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011).

<sup>15</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) 3.

difference.<sup>16</sup> Vitoria has often been called 'the father of international law'<sup>17</sup> because of his ponderings about the legal status and possible sovereignty of 'the Indian nations'. It was the question of the legal status of the Indian that drove Vitoria to develop his jurisprudence and to conclude, in a preliminary sense, that the Indians could not be deprived of their lands merely by virtue of their status as unbelievers or heretics. Unlike earlier writers, Vitoria would suggest that the Indians were not merely barbarians, heretics or animals. Rather, he argued that their institutions showed that they were human and in possession of reason, which made them able to participate in a *jus gentium* – supposedly as equals.

In fact, however, this *jus gentium* and this so-called 'universal' jurisdiction would be a jurisdiction based on Spanish and Christian values. The Indians could be excused in a sense for not having had the opportunity to know about God and Christendom before their encounter with the Spaniards, but they were not to interfere with or disapprove of missionary activities. In other words, Vitoria (and other early 'international' legal theorists) perceived there was room for *improvement*, in the sense that Indians could be Christianised. Moreover, in their framing, there was no legal basis for the Indians to resist this civilising mission; thus, Vitoria's *jus gentium* essentially legitimised Spanish incursion, looting and conquest of indigenous territories, especially if the people living there resisted Christianisation in any way.<sup>18</sup> To my mind, a greater sensitivity to those colonial origins of international law and to the linkage between Christianity and 'civilisation' does not contradict anything that Tzouvala has to say about later developments in the supposedly secular and 'universal' system. Rather, it would qualify and strengthen the argument about civilisation as an argumentative pattern that oscillates between disciplining the state along the lines of capitalist modernity and confining some communities to a lower legal status due to their purportedly inherent inferiority.

Tzouvala also draws on Samir Amin's notion of Eurocentrism to explain the development of the standard of civilisation in a way that aims to critique a

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<sup>16</sup> See *ibid* 13-31.

<sup>17</sup> See e.g. Charles H McKenna, *Francisco de Vitoria: Father of International Law* (1932) 21 *Studies: An Irish Quarterly Review* 635.

<sup>18</sup> *Ibid*.

'culturalist mystification' of the transition to capitalism in the West.<sup>19</sup> This makes sense, but perhaps it would be worthwhile to dwell more on the development of this concept by Latin American theorists and philosophers such as Anibal Quijano, Walter Mignolo, Maria Lugones and Enrique Dussel.<sup>20</sup> In their notion of Eurocentrism, the conquest of the Americas is also the defining and central basis without which the confluence of racialisation and capitalist expansion cannot be understood. Importantly, Quijano argued that while many cultures have perceived themselves as superior to others, Western 'European' culture is the only one that has succeeded in establishing a hegemonic worldwide perception of its superiority through the classification of all populations on a global axis of race, founded on the relations of domination and expansion of a capitalist mode of production that the conquest of the Americas inaugurated and imposed.<sup>21</sup> While Amin seemingly saw no connection between the Castilian purge of the Moors from the Iberian Peninsula in 1492 and the project of conquest in the Americas which began the very same year, a range of (especially Latin American) theorists have advanced such notions. Scholars such as Sylvia Wynter and Kelvin Santiago-Valles have underlined the importance of looking more in depth into how the proto-racist and proto-national discourse that the Christian Spanish elites brought with them overseas was transformed by the genocidal events in the Americas and, upon returning to Europe, contributed to the rise of such tendencies there and, hence, to the configuration of the hegemonic global power relations that are still with us today.<sup>22</sup>

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<sup>19</sup> Tzouvala (n 1) 29–30, citing Samir Amin, *Eurocentrism* (2nd edn, Monthly Review Press 2009).

<sup>20</sup> See e.g. Enrique D. Dussel, Javier Krauel and Virginia C. Tuma, 'Europe, Modernity, and Eurocentrism' (2000) 1 *Nepantla: Views from South* 465; Anibal Quijano and Michael Ennis, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 *Nepantla: Views from South* 533; Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2011); Maria Lugones 'The Coloniality of Gender' in Wendy Harcourt (ed), *The Palgrave Handbook of Gender and Development* (Palgrave Macmillan 2016).

<sup>21</sup> Quijano and Ennis (n 20).

<sup>22</sup> Sylvia Wynter, 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation--An Argument' (2003)

Julia Suárez-Krabbe has argued that the configuration of the 'human' in the image of the White Christian European Man was a result of a confluence of several processes of extermination in the fifteenth and sixteenth century. First, the witch-hunt targeted women who were not (proper) Christians and who practised alternative knowledges and spiritualities. Second, the final conquest of Al-Andalus by Spanish monarchs put an end to the co-existence of different spiritualities under one political authority through the expulsion of the Jews and the Muslims. Third, the process of indigenisation in the context of the conquest of the Americas enforced already burgeoning practices of feminisation and racialisation of those whose epistemologies and very existence resisted categorisation within the strict dualisms of mind/body and human/nature, paving the way for a logic that devalued nature and yielded ideas of purity of blood. This should be seen in combination with a fourth event: the aggressive persecution and genocidal practices against the Roma people unleashed after the Catholic Church released its first 'anti-Gypsy law' in 1499 – a legal document that required the Roma to become sedentary and economically productive, predominantly through agriculture. Finally, the enslavement and genocide perpetrated against native populations in the Americas and the establishment of the transatlantic slave trade naturalised the colonial criteria of inferiority, linking racism with capitalism. In other words, racism became the foundation for the logic of capital and the exploitation of labour. Years later, this reasoning also underlined the rationale behind the elites' decision to abolish slavery.<sup>23</sup>

Following the total extermination of various indigenous populations in the Caribbean, the Spanish clergy assembled at Valladolid between 1550 and 1551 for a lengthy and explicit discussion about whether the Indians were to be considered human or not. As Suarez-Krabbe and others have shown, this debate cemented the inferiority of those categorised as indigenous peoples, even if their humanity was eventually (at least theoretically) acknowledged. This acknowledgement was the position advocated by Bartolomé de las Casas

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3(3) CR: The New Centennial Review 257; Kelvin Santiago-Valles, "'Race,' Labor, 'Women's Proper Place', and the Birth of Nations: Notes on Historicizing the Coloniality of Power' (2003) 3(3) CR: The New Centennial Review 47.

<sup>23</sup> Julia Suárez-Krabbe, *Race, Rights, and Rebels: Alternatives to Human Rights and Development from the Global South* (Rowman & Littlefield International 2016) 50-79.

(possibly the first human rights defender in history), but it came at the cost of regarding the Indians as a form of minor children in need of protection and stewardship.<sup>24</sup>

Although the line from the Catholic discussions in the conquest of the Americas to 19<sup>th</sup> century legal debates is not entirely straight, it would be problematic to disregard the possible discursive continuities and to reject the possibility that the development of industrial capitalism in the 19<sup>th</sup> century might have merely strengthened or recalibrated pre-existing argumentative patterns already present in feudal colonial contexts. There is a connection, the way I see it, between the role that early international legal theorists assigned to priests and missionaries (such as themselves) and the role that colonial administrators and international lawyers would later assume – for example through the Mandate System – to oversee and evaluate the transformation of societies and populations perceived as backwards. Vitoria's recognition of the possibility of Indian sovereignty and self-determination, on the one hand, and his assertion of the possibility of conducting a 'just war' against non-conforming barbarians and savages in the name of Christianisation, on the other hand, also reappears in a slightly altered form in later justifications for invasions of countries like Iraq, Libya, and Syria. Thus, while I wholeheartedly agree that race and gender as relations are contingent and changeable products of complicated historical processes – or in Tzouvala words 'complex articulations of material relations of oppression and exploitation'<sup>25</sup> – I also believe that underestimating the role of European conquest, colonisation and plundering of the Americas in the configuration of those processes would be a mistake.

#### IV. A SENSE OF CONTINUOUS IMPROVEMENT AND PROGRESS

Even if Tzouvala does not trace her ideas back to the earliest theological foundations of international law, there is still great value in her examination of the argumentative development of the standard of civilisation from an overtly racist and moralistic reasoning into softer forms of power and governmentality during the 20<sup>th</sup> century and beyond. In particular, she

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<sup>24</sup> Ibid.

<sup>25</sup> Tzouvala (n 1) 202–03.

convincingly demonstrates how the standard of civilisation was transformed and made invisible through a recourse to technocratic 'scientific' methods and a focus on administration and governance shaped by the gathering of information, statistics and 'verification of facts on the ground'.<sup>26</sup> Her historical account also makes visible how legal reform under extra-territoriality in the late nineteenth and early twentieth centuries helped strengthen a state monopoly over legality and individualise social bodies through an emphasis on individual rights. In this process, guarantees for property rights and commercial activities were considered essential for achieving 'justice' and a territory's capacity for self-government was linked to its ability to be integrated smoothly in the political, economic, commercial and other conditions of 'the modern world'.

As Tzouvala points out, when so-called peripheral and semi-peripheral societies have tried to achieve inclusion in the status of civilised nations, one of the main criteria they have had to live up to has been to adopt the institutions of capitalist modernity. This process has been intrinsically linked to the assimilation of indigenous peoples and other non-dominant groups, as well as the erosion of alternative life worlds and forms of organisation. Thus, there is a need to understand that inclusion into the dominant and globally expanding model of capitalist modernity comes with strings attached.

In this sense, Tzouvala's tracing of the standard of civilisation in international law is helpful in relation to my own research, which deals with the titling of lands as indigenous communal property in Nicaragua. This process has in many ways been driven by and entangled with developments in international law. In line with what Tzouvala describes through examples from elsewhere in the world, in Nicaragua the state building project that accelerated from the late nineteenth century onwards was also moved forward by an almost frenetic technocratic effort to map, collect detailed information about and expand authority over those areas formerly controlled and ruled by indigenous or tribal groups and their authorities.

As Tzouvala explains, once modern authoritarian states were crafted to ensure territorial control, their authority expanded over regions and peoples who previously had important levels of autonomy and locally organised lives.

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<sup>26</sup> Ibid 46-54.

The expansion of modern state power in the name of 'civilisation' has not only threatened minorities but is the very process that gave meaning to the category 'minority' in the first place. Meanwhile, a political concern and mobilisation for subjugated groups were translated into international law, albeit in ways that did not always contribute to resolving tensions and indeed sometimes enabled imperial powers to intervene more-or-less directly in the affairs of newly formed independent states.

In Nicaragua, those areas (and those population groups that were categorised as minorities) were found on the country's Atlantic (Caribbean) Coast, which had never been colonised by the Spanish. While, on Nicaragua's Pacific Coast, indigenous land titles had already been introduced in Spanish colonial times to 'protect' but also to racially segregate indigenous persons, on the Atlantic Coast, the indigenous title only appeared as a legal construct as the British were withdrawing from the area and aimed to maintain strong relations with their tribal partners in commerce – as well as some form of presence and control. As such, the very first indigenous titles on the Atlantic Coast were a direct outcome of the treaties that the British concluded with the recently independent Nicaraguan state. These treaties also foreclosed the possibility for Moskitia (as the Coast was known then) to become a fully independent country and state.<sup>27</sup>

Another point brought forward by Tzouvala is that, while, from the beginning of the nineteenth century, non-Western states had to conform to certain welfarist imperatives to be considered 'civilised', most international lawyers still refrained from any overt criticism of the capitalist system as a whole. Rather, they mostly focused on taming the more extreme forms of capitalist exploitation in order to prevent anti-capitalist revolutions. As Tzouvala shows in the book through the example of Namibia, 'civilisation' has been employed legally to maintain the economic status quo in recently decolonised countries, locking in a highly unequal and racialised distribution of property and wealth. Overall, Tzouvala concludes that the efforts of some post-colonial states and lawyers to go against the grain and deploy the notion

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<sup>27</sup> See e.g. Carlos María Vilas, *State, Class, and Ethnicity in Nicaragua: Capitalist Modernization and Revolutionary Change on the Atlantic Coast* (Lynne Rienner 1989); Rafat Ghotme, 'El Protectorado Británico en la Costa Mosquitia, 1837-1849' (2012) 7(2) *Revista de Relaciones Internacionales, Estrategia y Seguridad* 21.

of 'civilisation' subversively was not a successful way to promote a radical critique of capitalism. Arguing that colonial and mandate systems were in fact violating the 'sacred trust of civilisation' enmeshed peripheral and semi-peripheral international lawyers in the very same 'logic of improvement' that they should rather have rejected, as this strategy did not prevent the enforcement of neoliberal policies and modes of governing from taking hold in recently decolonised states.

Tzouvala's insightful and detailed analysis of the transformation of occupied Iraq is another case in point, as it shows how comprehensive neoliberal reform was deemed essential for the rehabilitation of the country from a 'rogue state' to a 'normal' sovereign with equal rights and duties. Not only did the Coalition Provisional Authority in Iraq equate 'improvement' with the neoliberal model of capitalist accumulation – it also deprived Iraqi citizens of free information about the process and of possibilities to participate democratically in decision-making. Tzouvala shows how numerous core public services such as education, health, water and sanitation were outsourced in Iraq – often to private U.S. companies – while the public sector was limited, ideas of central planning were denounced, free-market reforms were implemented and an independent central bank was established. Meanwhile, through a racist and infantilising discourse, Iraqi state functionaries and local communities were considered either too weak, too violent, too lazy, too immature, too inefficient, or too malevolent – in short, either unwilling or unable – to be given much responsibility or control in the process.

Through such thoroughly argued and thickly descriptive examples, Tzouvala's book presents us with overwhelming evidence that civilisation as an argumentative praxis has swung like a pendulum between two poles. On the one hand, the distribution of equal duties and rights among nations is deemed possible and achievable, albeit conditional on the adoption of capitalist reforms. On the other hand, through a logic of biology and immutable difference, this possibility is endlessly postponed or negated for certain 'peripheral' or marginalised societies (mainly those previously colonised). She further asserts that this instability in the use of 'civilisation' in international law has been fatal for revolutionary projects, a conclusion I agree with based on my own research. In the Nicaraguan case, the discourse

of progress and civilisation has also severely hampered the possibility of a revolutionary process that could truly escape the logics of capitalist expansion, racialised subjugation and environmental and cultural destruction.<sup>28</sup>

Although the revolutionary peasant leader Augusto C. Sandino, who fought U.S. intervention in Nicaragua in the 1920s, allied and cooperated with indigenous groups along the River Coco in his anti-imperialist guerrilla warfare, in the contradictory realm of historical realities, his writings reveal a liberalist and civilisational stance towards the Eastern regions, whose inhabitants he considered primitive and whose lands he considered underdeveloped and 'empty'.<sup>29</sup> In other words, the indigenous and tribal groups were deemed not to be sufficiently civilised, sedentary and productive.

As the socialist Sandinista revolution swept through Nicaragua in the 1970s and 80s, tensions rose between the cadres, on the one hand, who were mainly from the Pacific side of the country and set on promoting a peasants and workers revolution, and those indigenous (especially Miskitu) communities, on the other hand, who were intent instead on preserving their own communal and ancestral land management systems and felt suspicious towards the 'Spanish invaders' (as they called their compatriots from the Pacific Coast). The imperial forces jumped fast to exploit the cultural misunderstandings, the long-standing 'Anglo-affinities'<sup>30</sup> of the Miskitu and

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<sup>28</sup> See e.g., *Nicaragua's Failed Revolution – Indigenous Struggle for Saneamiento* (The Oakland Institute 2020) <<https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/nicaraguas-failed-revolution.pdf>> accessed 21 May 2021, a report which details the process of deforestation and colonisation of indigenous territories due to the endorsement of extractive industries.

<sup>29</sup> This analysis of Sandino's writings and stance can be found in Byron Piñeda *Shipwrecked Identities – Navigating Race on Nicaragua's Mosquito Coast* (Rutgers University Press 2006), especially 95-105.

<sup>30</sup> This term, coined by anthropologist Charles Hale during the war in the 1980s, refers to the fact that the Miskitu had extensive relations with the British and later with North Americans due to their involvement on the Atlantic Coast as traders, investors and missionaries. Charles R Hale, *Resistance and Contradiction: Miskitu Indians and the Nicaraguan State, 1894-1987* (Stanford University Press 1996).

the conflicts regarding the land, with Ronald Reagan famously pronouncing '*I am a Miskito Indian*'<sup>31</sup> and U.S. financial and military support flowing in to aid the armed indigenous uprising against the Sandinista government and army.<sup>32</sup>

From 1984, peace talks enhanced the pressure for indigenous autonomy and self-determination in the Caribbean regions and clauses to fulfil such deep-rooted wishes were inserted into both a new Constitution and an Autonomy Statute in 1987. After the war, when the destroyed country was again bombarded with anti-socialist propaganda and campaign support for liberal politicians, Nicaragua entered a 17-year period of profound liberalisation and free-market reforms. In this context, the indigenous land title won new acclaim and was endorsed by actors such as the Organisation of American States and the World Bank, who also promoted the formalisation of private land tenure throughout the region. The indigenous title was supposed to be different from private property titles; collective and expressive of ancestral connections and understandings of the land. Nonetheless, the mercantilist vision of land seems to have proliferated since the communal titling process, indicating that this process has not in fact significantly strengthened territorial control and self-determination.

## V. CIVILISATION AS DISPOSSESSION AND MARGINALISATION

As Tzouvala herself writes, her account of civilisation 'raises doubts about the rationalising force of liberal capitalism that gradually does away with supposedly archaic forms of hierarchy and oppression, such as racism or the patriarchy.'<sup>33</sup> Indeed, as she exposes so clearly, 'civilisation is far from being a

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<sup>31</sup> In 1985, in a speech in Bitburg, West Germany, Ronald Reagan announced: 'I am a Laotian, a Cambodian, a Cuban, and a Miskito Indian in Nicaragua. I, too, am a potential victim of totalitarianism'. Associated Press, 'Transcript of Reagan's Speech at Air Base after his Visit to the Cemetery' *The New York Times* (New York, 6 May 1985) <<https://www.nytimes.com/1985/05/06/world/transcript-of-reagan-s-speech-at-air-base-after-his-visit-to-the-cemetery.html>> accessed 12 May 2021.

<sup>32</sup> See e.g. Thomas W. Walker (ed), *Reagan Versus The Sandinistas: The Undeclared War On Nicaragua* (Routledge 2019).

<sup>33</sup> Tzouvala (n 1) 86 (emphasis omitted).

relic of international law's imperial past';<sup>34</sup> rather, it is a persistent and profoundly oppressive pattern of argumentation in international legal disputes and debates. Tzouvala therefore warns those critical of the underlying doctrine to counter civilisation arguments from within their logic. This warning rings true when I consider the conflicts over land ownership in the Northern Caribbean region in Nicaragua. Thinking of law in the way Tzouvala does – not as a sum of rules, but as a particular type of specialised language that is essentially indeterminate (but always historically situated) – helps to make sense of the wildly different and contradictory meanings that have been ascribed to indigenous property title in this region.

Indigenous leaders, scholars and lawyers often refer to the creation of indigenous territories as a historical revindication of rights, as justice materialised or as a means of preserving cultural and 'ancestral' traditions and ways of life, and a common law doctrine has evolved in response to this.<sup>35</sup> While on the one hand this appears meaningful in terms of acknowledging and recognising a history that has often been ignored and discarded, and in terms of securing the possibility of a diversity of lifeworlds and languages to persist, the approach can also invoke a biological or ethno-nationalist logic that likens kinship and descentance to culture and promotes a kind of segregated development.<sup>36</sup> Others, such as Brenna Bhandar and Kirsten Anker, have therefore pinpointed that the property title and its implication of ownership or transferability of land for investment, production or mercantile purposes was not an indigenous invention and that the notion of territoriality and delimitation contained in the indigenous title carries a racist undercurrent of containing indigenous identity within specific areas – without building on actual indigenous and pre-colonial conceptualisations of land.<sup>37</sup> As Robert Nichols has explored, a curious juxtaposition of claims thus emerges in relation to indigenous land rights, namely, 'that the earth is not to

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<sup>34</sup> Ibid 209.

<sup>35</sup> See e.g. Jérémie Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' (2007) 56 *The International and Comparative Law Quarterly* 583.

<sup>36</sup> See Nandita Sharma and Cynthia Wright, 'Decolonizing Resistance, Challenging Colonial States' (2008) 35(3) *Social Justice* 120.

<sup>37</sup> Bhandar (n 11), 68-74; Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Routledge 2017).

be thought of as property at all, and that it has been stolen from its rightful owners'.<sup>38</sup> Nichols argues – convincingly, I find – that the titling of land as indigenous territories promoted through international law combines two distinct processes. It converts non-proprietary social relations into proprietary ones (a sort of 'propertisation') while at the same time systematically transferring control and title of this newly formed property.<sup>39</sup>

Many of the Nicaraguan leaders and lawyers I have interviewed clearly invoke the need for 'improvement' to become fully 'civilised', speaking of the indigenous property title, newly achieved through international law, as a basis for material and economic development that could allow poor communities to finally prosper *if they could just learn* to manage the territory together in more productive, efficient, and modern ways. Some invoke the need for civilisation in entirely different terms, stating that the indigenous communal property title has been an obstacle to rational economic development (which, implicitly, would require individual ownership and property rights). Some talk about communal title as the basis for a political organisation that is independent of the state and the articulation and titling of indigenous territories as an important step towards autonomy and self-determination – or as the nearest thing to independence for the Caribbean Coast. Others describe the title as proof of recognition of the existence and rights of indigenous peoples within the Nicaraguan nation-state and as a vehicle for enhanced cooperation and coordination with state institutions; certainly the state has both strengthened its knowledge and control over the territories through the process of mapping, demarcation, and interchange with the so-called 'indigenous territorial governments'. Finally, in the context of advancing agricultural expansion, cattle-driven colonisation, extensive illegal land deals throughout the territories and the lack of state response to violations of the communal property rights, some have started to describe the communal property title as nothing more than 'a piece of wet paper'.<sup>40</sup>

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<sup>38</sup> Robert Nichols, *Theft Is Property! Dispossession & Critical Theory* (Duke University Press 2020) 8.

<sup>39</sup> Ibid.

<sup>40</sup> All of these differing evaluations and appreciations of the 'meaning' and 'significance' of indigenous property title were expressed in interviews I conducted with indigenous leaders, lawyers and activists on Nicaragua's Caribbean Coast between 2017 and 2020.

Having been *interpellated* through international law, not just as indigenous collectives, but as *property owners*, has certainly brought change – but perhaps mainly in the shape of conflict and division – to these communities.

What is clear is that the indeterminacy of the law and its meaning has all but sapped the indigenous title of whatever revolutionary potential it could have held. This has only been enhanced by the fact that mainly educated individuals who work in NGOs and universities have been engaged and employed in the legal constructions and disputes regarding title, while ordinary community members are not always able to grasp nor speak the specialised language of international law and indigenous human rights.

Today, the leaders of indigenous communities on Nicaragua's Caribbean Coast are enmeshed in paperwork to create territorial governance plans or even constitutions for their territories, while to a large extent they lack the authoritative force to protect their boundaries against incoming settlers from other regions of the country and the economic force to stand up against mining and forestry companies. Proactive indigenous lawyers present complaints and denunciations of the violations of indigenous communal property rights but are also wary of calling upon themselves a militarisation of the territories to keep unwelcome newcomers out. In the process of demarcation and titling, the communities have been taught by international human rights lawyers that they are autonomous, original and self-contained while, of course, in reality they form an integrative part of a much bigger whole – namely, an unequal and discriminatory globalised economy in which imperial forces have always held their country in a tight clamp. International law has yet to fulfil its many promises to those communities, but they keep hoping, often invoking the idea that *if only* they could become more structured, get ordered and well-organised and be less corrupt and more law-abiding – *if only* they themselves and their state and regional institutions could be *more civilised* – then all would work out for the better.



# VICTORIAN ANTICS: THE PERSISTENCE OF THE "LAW AS CRAFT" MINDSET IN THE CRITICAL LEGAL IMAGINATION

Daniel R. Quiroga-Villamarín \* 

## I. INTRODUCTION

At the risk of circularity, I would like to begin my review of Ntina Tzouvala's innovative monograph *Capitalism as Civilisation (CaC)* with a reference to one of her own book reviews.<sup>1</sup> Or, perhaps more precisely, to the reaction a commentator had on Twitter to her review of the edited volume *World Trade and Investment Reimagined*.<sup>2</sup> Our Twitter user (who will remain anonymous), used Tzouvala's book review to put forward an argument on why mainstream international legal scholarship (MILS) should engage with what he<sup>3</sup> saw as Tzouvala's exemplary summary of the core of a 'critical legal studies' (CLS) approach to international economic law. Even if we suspend for a second the problematic issue of MILS claiming the prerogative to engage with CLS-related work (a privilege rarely granted to us on the 'socio-critical spectrum'),<sup>4</sup> I argue there is one further problem with this tweet: it assumes one can label

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<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020).

<sup>2</sup> Ntina Tzouvala, 'World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization' (2020) 31 *European Journal of International Law* 1166.

<sup>3</sup> Our Twitter user was obviously a "he". I share Tzouvala's brave use of non-gendered pronouns in specific situations to highlight the many ways in which our field's hierarchies are experienced in both scholarship and practice. See Tzouvala, *Capitalism as Civilisation* (n 1) 39, note 108. On a different note, I use MILS in the same way as BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017) 12.

<sup>4</sup> To paraphrase Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 14. This point was aptly noted by Dimitri Van Den Meerssche and Marina Veličković on Twitter.

Tzouvala's work as part and parcel of a garden-variety CLS. This is surprising, not only because CLS and its international law cousin, the 'New Approaches to International Law' movement (NAIL), have been pronounced dead by their own founders for quite some time now,<sup>5</sup> but also because Tzouvala's work is one of the many efforts undertaken by emerging scholars to *go beyond* the limitations of the CLS project, while also building on its legacy and struggles.

In what follows, I will read *CaC* precisely as an intervention in an intergenerational debate regarding the 'tragic inheritance' of contemporary critical scholarship from the CLS tradition (broadly understood).<sup>6</sup> Indeed, my argument is that *CaC*'s potentials and limitations can be seen more clearly in the context of the emergence of a 'new wave of Marxist legal-theoretical enterprises' that builds on, but at the same time firmly departs from, the settled core of CLS-related insights that most mainstream commentators identify with critical legal theory or history today.<sup>7</sup> My account, of course, will be partial and limited. I will not offer the reader a broad context of what I understand to be the dynastics of critique in western legal academia(s).<sup>8</sup> I will not even refer too much to the perhaps more relevant tradition of British critical legal thinking that has such a strong influence in Australia,<sup>9</sup> but limit

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<sup>5</sup> Much has – and can – be written about the histories of the CLS and NAIL projects. For a general introduction, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 135-182.

<sup>6</sup> Which, I argue, is a productive way of reading the monograph, considering that Tzouvala only a couple of years ago had urged for a debate of this sort. See Ntina Tzouvala, 'New Approaches to International Law: The History of a Project' (2016) 27 *European Journal of International Law* 215, 233. On the notion of tragic inheritance, see Adil Khan, *Inheriting Persona: Narrating the Conduct of Third World International Lawyers* (PhD Thesis 1137, IHEID, 2016) cited in Bianchi (n 5) 210.

<sup>7</sup> Akbar Rasulov, 'CLS and Marxism: A History of an Affair' (2014) 5 *Transnational Legal Theory* 622-622; Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31 *Yale Journal of Law & the Humanities* 389.

<sup>8</sup> Stuart Elden, 'From Dynastics to Genealogy' (*Critical Legal Thinking*, 13 January 2021) <<https://criticallegalthinking.com/2021/01/13/from-dynastics-to-genealogy/>> accessed 27 April 2021.

<sup>9</sup> Costas Douzinas, 'The Responsibilities of the Critic: Law, Politics, and the Critical Legal Conference' in Emilios A Christodoulidis, Ruth Dukes and Marco

myself to the United Statesean 'Boston body',<sup>10</sup> and Martti Koskenniemi's 'Helsinki school',<sup>11</sup> partly because Tzouvala frames her argument in a close conversation with these traditions and the work of Anne Orford.<sup>12</sup> If one takes the material-institutional approach to legal theory, which Tzouvala and other new wave Marxists have pushed for, then the fact that Koskenniemi wrote a blurb for the book – and served as an examiner for Tzouvala's PhD dissertation – is not of minor importance.<sup>13</sup>

Bearing this in mind, I review the book's main contributions insofar as it follows Haskell's invitation to seize 'the hubris to venture hegemonic explanatory frameworks' from a Marxist perspective (section II).<sup>14</sup> Indeed, Tzouvala concludes her book by calling for a totalizing theory of international law, rightly pointing out that this is perhaps 'one of the biggest challenges for materialist legal theory' in our times.<sup>15</sup> As Susan Marks noted, for quite some time the Marxist aspiration of 'totality' has been dismissed as the return of 'grand narratives' (at its best) or the handmaiden of totalitarianism (at its worst).<sup>16</sup> Undaunted by this stale cold-war cliché, Tzouvala pushes forward. This return of theory is particularly exciting given our field's profound distrust of general theoretical frameworks, a trait shared by most MILS scholars, as well as socio-critical scholars.<sup>17</sup> Just like

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Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019).

<sup>10</sup> Illan Rua Wall, 'The Mytho-Poetics of Critical Legal (Secret) Society' (*Critical Legal Thinking*, 2 May 2019) <<http://criticallegalthinking.com/2019/05/02/the-mytho-poetics-of-critical-legal-secret-society/>> accessed 27 April 2021.

<sup>11</sup> Bianchi (n 5) 163-182.

<sup>12</sup> See n 23.

<sup>13</sup> Tzouvala, 'New Approaches to International Law' (n 6) 228. See also John Haskell, 'From Apology to Utopia's Conditions of Possibility' (2016) 29 *Leiden Journal of International Law* 667.

<sup>14</sup> Haskell (n 13) 676.

<sup>15</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 219-220.

<sup>16</sup> Susan Marks (ed), 'Introduction', *International Law on the Left* (Cambridge University Press 2008) 1-29, 14.

<sup>17</sup> Akbar Rasulov, 'On Theory-Bashing: Why It Happens and What It (Probably) Says About Us' (*EJIL: Talk!*, 17 March 2017) <<https://www.ejiltalk.org/on-theory-bashing-why-it-happens-and-what-it-probably-says-about-us/>> accessed 27 April 2021.

Koskenniemi's *From Apology to Utopia*, it seems to me that Tzouvala's monograph will provide a long-lasting contribution to the *theory* of international law.<sup>18</sup>

However, I also argue that – in my own modest opinion as a fellow comrade, member of the Third World Approaches to International Law (TWAAIL) movement, and Marxist legal historian – the book's contributions to *history* are perhaps less salient (section III).<sup>19</sup> I suggest that perhaps one of the reasons for this is that while Tzouvala boldly departs from the insights most CLS/NAILers hold when it comes to legal theory, her approach to the constitution of the international legal 'archive'<sup>20</sup> remains profoundly indebted to our discipline's 'Victorian antics':<sup>21</sup> a vision of international law as first and foremost an arcane ritual, ontologically – if not eschatologically –

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<sup>18</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press 2005). In this review, I do not wish to engage in an in-depth discussion of whether *From Apology to Utopia* (FATU) represents a 'theory' or not. An interesting discussion on this issue can be found in the (all-male) symposium on FATU in the special issue of (2016) 29(3) *Leiden Journal of International Law* or in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

<sup>19</sup> On the tense relationship between theory and history in the incipient field of the 'theory and history of international law', see Janne E Nijman, *Seeking Change by Doing History* (University of Amsterdam - Inaugural Lecture 591 2017). This review, sadly, does not offer me enough space to offer a discussion of how 'theory' and 'history' are not necessarily opposing poles in the Marxist tradition. I do share, however, the Foucauldian and Nietzschean preoccupation for the reduction of history into 'a handmaiden to philosophy'. See Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press 1980) 156.

<sup>20</sup> On the problematization of what constitutes the 'archives' or the 'fields' of our discipline, see Madelaine Chiam and others, 'History, Anthropology and the Archive of International Law' (2017) 5 *London Review of International Law* 3. See also Rose Parfitt, 'The Spectre of Sources' (2014) 25 *European Journal of International Law* 297.

<sup>21</sup> Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 23.

distinct from other fields of social knowledge and practice.<sup>22</sup> Despite their profound differences, this disciplinarian tendency can also be found in Orford's work, which is another important intellectual and institutional-material influence on the monograph at hand.<sup>23</sup> To be clear, in my argument I do not wish to diminish the important contribution that Tzouvala, Koskenniemi, Orford, or any other previous generations of critical scholars have made to opening up space for contemporary heterodox scholarship. My own life experience as a young researcher in Bogotá and Geneva painfully corroborates Samuel Moyn's assertion that

[m]any nonmainstream scholars owe the space they inhabit in the academy to critical legal studies, particularly those outside the United States, because in that country at least the earlier impact of legal realism had already caused a profound and unprecedented break with traditional doctrinalism and formalism that still has no parallel elsewhere.<sup>24</sup>

My comradely critique, I hope, can shed some light on how I envision what a more decisive Marxist break with the CLS-tradition could look like. This is not to say it is the only way a Marxist or materialist perspective could look like. As Tzouvala herself recognizes, there is much to be celebrated in the

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<sup>22</sup> Rasulov has, aptly in my view, called this Koskenniemi's 'anti-anti-disciplinarian theoretical agenda'. Akbar Rasulov, 'From Apology to Utopia and the Inner Life of International Law' (2016) 29 *Leiden Journal of International Law* 641, 642. See also Sahib Singh, 'Koskenniemi's Images of the International Lawyer' (2016) 29 *Leiden Journal of International Law* 699, 721.

<sup>23</sup> Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan, Emanuelle Tourme-Jouannet and Héléne Ruiz (eds), *International Law and New Approaches to the Third World: Between Repetition and Renewal* (Société de législation comparée 2013); Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166; Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017). I have elaborated on this more deeply elsewhere, see Daniel Ricardo Quiroga-Villamarín, 'Beyond Texts? Towards a Material Turn in the Theory and History of International Law' [2020] *Journal of the History of International Law* 1. Advance copy online, <<https://doi.org/10.1163/15718050-12340172>>.

<sup>24</sup> Samuel Moyn, 'Legal Theory among the Ruins' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) 99.

constructive and productive discussion amongst Marxist fellow travellers. Indeed, after years of marginalization, it seems the field of international law has served as the stage for the revitalization of new (and old) Marxist traditions, that range from Tzouvala's concern with primitive accumulation and the contradictions of capitalism's uneven expansion, to the Benjaminian histories of international legal reproduction, Pashukanian analyses of the legal form, Chimni's Integrated Marxist Approach, Marks' twin histories of capitalism and human rights, Benton's plea for a 'Marxist-influenced socio-legal history' and my own modest proposal for a non-textual legal history.<sup>25</sup> With the rise of this plurality of innovative approaches, it seems that even the most mainstream Twitter users will also come to see that CLS 'remains the historical chapter of a theory to surpass and therefore to remember'.<sup>26</sup> Let us turn now to Tzouvala's bold attempt to surpass CLS.

## II. LAW AS CAPITALISM: A THEORY OF THE CONSTRAINTS AND RESOURCES OF LEGAL ARGUMENTATION IN TIMES OF CAPITALIST ACCUMULATION

Tzouvala's monograph is, first and foremost, a powerful and compelling invitation to reread a series of classical legal materials. Drawing from Althusser's work on symptomatic reading,<sup>27</sup> she proposes what she calls a 'productive rather than revelatory understanding of/for international law'.<sup>28</sup> In this vein, rather than merely uncovering something that might be hidden in a text, her argument is that all lawyers, whether critical or mainstream, approach a certain legal text under the spell of a *problematic* that makes some aspects of the text 'hyper-visible and others invisible'.<sup>29</sup> This enables her to provide

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<sup>25</sup> For general (but perhaps already dated) overviews, see Bianchi (n 5) 72-90; Robert Knox, 'Marxist Approaches to International Law' (*Online Oxford Bibliography* 2018) <<http://oxfordbibliographiesonline.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml>> accessed 23 March 2021. It is exciting to see how much the field has grown in the last couple of years.

<sup>26</sup> Moyn (n 24) 99.

<sup>27</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 7ff. See also Haskell (n 13) 667.

<sup>28</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 10.

<sup>29</sup> *Ibid* 10.

a reading of international legal materials that does not purport to recover a pre-existing meaning from the surface of the text [... but one which recovers] not only what is said but also what remains unsaid, not because of an oversight but as a logical consequence of the *problematic* of the text.<sup>30</sup>

This problematic, she aptly points out, frames the way in which particular visions of the correct (re)distribution of rights, privileges, duties, and liabilities between polities can be raised.<sup>31</sup> In this vein, she suggests that instead of seeing 'civilization' as a 'monistic [yet ambiguous] carrier of meaning' one could interrogate it as the crystallization of a particular argumentative pattern.<sup>32</sup>

What follows is the innovative move of the monograph. Boldly, Tzouvala suggests that this deconstructive approach is not necessarily in contradiction with a Marxist perspective, proposing a way to reconcile the 'postmodern' sensibility on the instability of discourse and a materialist interest in the structures of global legal domination.<sup>33</sup> I will not explain this point at length, especially as another contributor of the symposium has found this attempt of synthesis particularly productive.<sup>34</sup> Needless to say, I myself found this suggestion powerful, as it also resonated with my own attempt to reconcile Foucauldian and Marxist approaches in legal history.<sup>35</sup> For the purposes of this review, what is important to note is that while CLS/NAILers tend to argue that international law's indeterminacy remains always 'under-determined'<sup>36</sup> and other Marxists tend to discard indeterminacy in the name of 'the standpoint of the oppressed',<sup>37</sup> Tzouvala wants to insist on the importance of a deconstructive Marxism that pays attention to the way seemingly indeterminate arguments are 'overdetermined' by the structures of

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<sup>30</sup> Ibid 13.

<sup>31</sup> Ibid 15.

<sup>32</sup> Ibid 15 and 14, respectively.

<sup>33</sup> Ibid 35ff.

<sup>34</sup> See Kanad Bagchi, 'Materialism, Culture and the Standard of Civilization' (2021) 13(1) *European Journal of Legal Studies* 61.

<sup>35</sup> Quiroga-Villamarín, 'Beyond Texts?' (n 23).

<sup>36</sup> See, for instance, Martti Koskeniemi, *The Politics of International Law* (Bloomsbury Publishing 2011) 259.

<sup>37</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 38 (discussing Chimni and Parfitt's work).

capitalism.<sup>38</sup> In other words, she argues that the Derridean deconstructive project could be enriched by – and is not antithetical to – an analysis of 'the political, economic, and institutional structures that make possible the continuing presence, persuasiveness, and even invisibility of this contradictory, unstable, and overall unpleasant argumentative pattern'.<sup>39</sup>

For this reason, she suggests that we cannot simply conclude that civilization is an indeterminate or ambiguous concept and call it a day. But rather, that the specific conditions in which the contradictory patterns of argumentation that one can group under the rubric of civilization must be understood 'as the historically contingent way in which the contradictions of capitalism as a global system of production and exchange are inscribed into international legal argumentation'.<sup>40</sup> She does not suggest that one should understand the relationship between *law and capitalism*, but rather invites us to see *law as capitalism* – a move that I find both powerful and problematic, as I discuss further below.<sup>41</sup>

Tzouvala's understanding of capitalism focuses mostly on the limitless, uneven, and contradictory expansion of a specific mode of production around the world.<sup>42</sup> Offering a general overview of Karl Marx's *Capital*, she highlights the importance of primitive accumulation and includes important discussions of eurocentrism, settler colonialism, and the centrality of gendered and racialized metaphors in this process of endless expansion. Personally, I would have enjoyed a more profound discussion of the different approaches that have emerged (in both the Marxist and non-Marxist camps) on the histories of capitalism in the last decades.<sup>43</sup> While I am sympathetic to what Duncan Kennedy once called 'a Marxist-theft-of wood-anticipates-

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<sup>38</sup> While Tzouvala does not use overdetermination as such, I felt this was only a natural extension of her previous Althusserian commitments. On this concept, see Louis Althusser, *For Marx* (Verso 2005) 87-128.

<sup>39</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 40.

<sup>40</sup> *Ibid* 40.

<sup>41</sup> Catherine Fisk and Robert Gordon, 'Foreword: 'Law As...': Theory and Method in Legal History' (2011) 1 U.C. Irvine Law Review 519. See also Tzouvala, *Capitalism as Civilisation* (n 1) 42.

<sup>42</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 19ff.

<sup>43</sup> See generally, 'Interchange: The History of Capitalism' (2014) 101 *Journal of American History* 503.

everything-that-the-modern-leftist-can-think-of-and-it-is-really-the-working-class-that-counts speech',<sup>44</sup> I do think that there is much to gain from the small window that has opened to talk about the plural histories of capitalism in a more ecumenical and interdisciplinary fashion.<sup>45</sup>

In sum, Tzouvala puts forward a theorization of international law 'as a specialised language articulated by a particular class of intellectuals, lawyers, within specific institutional structures' in which civilization is but one of the many patterns of argumentation that provide resources and constraints for these professionals in contexts of capitalist expansion.<sup>46</sup> This enables her to go beyond the limitations of the Pashukanian notion of the 'legal form', while at the same time providing a theoretical framework that is relevant for both practitioners and socio-critical theorists seeking to understand the 'range of contingently articulated answers, which, however always remain within a particular framework – the oscillation between "'improvement"' and "'biology"''.<sup>47</sup> As one of the contributors to this symposium shows, this theoretical framework could be used productively to understand land disputes and cases of accumulation by dispossession in, and beyond, our times.<sup>48</sup>

### III. CAPITALISM AS LAW: A CRITIQUE OF CAC'S LIMITED ARCHIVE AND DISCIPLINARIAN BOUNDARIES

In the next chapters (two to five), Tzouvala aims to apply this 'meta-theory' of the 'structured indeterminacy of "civilization"' to a series of specific historical episodes,<sup>49</sup> with the intention of adding a 'layer of concreteness and

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<sup>44</sup> Tor Krever, Carl Lisberger and Max Utzschneider, 'Law on the Left: A Conversation with Duncan Kennedy' (2015) 10 *Unbound: Harvard Journal of the Legal Left* 1, 23.

<sup>45</sup> Marc Flandreau, 'Border Crossing' (2019) 1 *Capitalism: A Journal of History and Economics* 1. To be sure, Tzouvala does cite Beckert in note 84 at 31, but only as a 'subsequent research' that merely expands the work done by Afro-Unitestatesean Marxists.

<sup>46</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 41.

<sup>47</sup> *Ibid* 42.

<sup>48</sup> See Julie Wetterslev, 'The Standard of Civilization in International Law' (2021) 13(1) *European Journal of Legal Studies* 81.

<sup>49</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 214-5.

historical specificity' to the previous critical research on the theory and history of international law.<sup>50</sup> While I thought that the monograph offered a refreshing new Marxist perspective with regards to *legal theory*, I found it to be wanting with regards to *legal history*.

I was somewhat surprised to see that Tzouvala's radical theoretical critique of Koskenniemi (and what she calls the standard left legal reaction) was not accompanied by an equally radical departure from the archives, objectives, and methods of the dominant CLS/NAIL approaches to the (intellectual) history of international law.<sup>51</sup> Of course, I am not arguing that Tzouvala's history of a 'structured pattern of argumentative practice' can be reduced to the Skinnerian intellectual biographies that have long ruled the scene in our discipline. But, at the same time, I was struck by how 'domesticated' Tzouvala's choice of case studies and materials is. While I enjoyed chapters two to five, I struggled to find what her monograph was bringing to the fore other than a (masterful) *rereading* of a series of classical legal documents and the abundant body of secondary literature that has already been written about these episodes. Tzouvala might justly retort that she never intended to 'uncover' anything that was hidden, but rather to symptomatically make the animating problematic of civilization explicit in these scenarios. However, seeing that so much has been written about these events already, is it really necessary to pursue such a sophisticated theoretical project to show that a racialised and gendered dichotomy of civilization was latent in the times of Lorimer & co,<sup>52</sup> the League of Nations mandates,<sup>53</sup> the South West Africa judicial drama,<sup>54</sup> and the post-cold war muscular humanitarianisms?<sup>55</sup> While

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<sup>50</sup> Ibid 168.

<sup>51</sup> This is as much a *mea culpa* as a critique, as I have also undertaken this sort of work in the past. See Daniel Ricardo Quiroga-Villamarín, "'An Atmosphere of Genuine Solidarity and Brotherhood': Hernán Santa-Cruz and a Forgotten Latin American Contribution to Social Rights' (2019) 21 *Journal of the History of International Law* 71.

<sup>52</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 44-87. With Lorimer & co, I am referring to the (in)famous "men of 1873". See Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 *European Journal of International Law* 415, 426.

<sup>53</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 88-128.

<sup>54</sup> Ibid 129-166.

<sup>55</sup> Ibid 167-211.

I suspect that mainstream readers (like our anonymous Twitter user) will enjoy rereading familiar cases from a radical perspective, as a reader already familiar with some of the work of Tzouvala's secondary sources, I was left feeling that the monograph's powerful theoretical innovations were not aligned with its rather uncontroversial historiographical conclusions.

One issue that animates my critique is the pressing and difficult question of what to expect from legal history when there are competing approaches coming from both lawyers and historians (categories which are themselves problematic as they presume a disciplinarian consensus which is by and large absent).<sup>56</sup> While I have often felt frustration<sup>57</sup> with the 'archive fever' of some of my colleagues trained in history,<sup>57</sup> I do think there is some sense in the expectation that historical research (including legal history) should try to bring a new archive of primary sources to the fore.<sup>58</sup> Elsewhere, Tzouvala dismisses Pedersen's critique of Anghie's work (which raises precisely this point) because she argues it was unfair to judge a book based on its 'out-of-date' sources instead of its argument.<sup>59</sup> But the issue Pedersen wanted to raise (or that at least I highlight) is not related only to the 'novelty' of secondary literature, but to the need for a more robust use of primary materials.<sup>60</sup> This is not to say that Tzouvala relies exclusively on secondary sources: chapter 3 in particular draws on some colonial documents and the minutes of the Mandate system.<sup>61</sup> But, for those already familiar with the plethora of work

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<sup>56</sup> Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law* 7, 32. See also Nijman (n 19).

<sup>57</sup> Jacques Derrida, 'Archive Fever: A Freudian Impression' (1995) 25 *Diacritics* 9.

<sup>58</sup> Marc Bloch, *The Historian's Craft* (Peter Putnam ed, Reprint, Manchester University Press 2002) 40ff.

<sup>59</sup> Ntina Tzouvala, 'The Specter of Eurocentrism in International Legal History' (2021) 31 *Yale Journal of Law & the Humanities* 413, 414 note 4.

<sup>60</sup> Susan Pedersen, 'Back to the League of Nations' (2007) 112 *The American Historical Review* 1091, 1104.

<sup>61</sup> Without, at any rate, going too much farther than Pedersen or the already existing histories of the League of Nations. See Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2017).

that Benton labels the interdisciplinary approach to global legal politics, it is difficult to pinpoint the novelty of Tzouvala's 'history of international law'.<sup>62</sup>

I suggest that Tzouvala's provocative framing of *law as capitalism* might have a problematic unintended consequence – it pushes us to see *capitalism as law*. Indeed, Tzouvala's concern for the patterns of legal argument might have led her to sideline the many primary sources that could reveal the contradictions of capitalism that do not fit neatly into the traditional registers of legal arguments.<sup>63</sup> Just like Koskenniemi, she seems to focus excessively on the 'use of materials from international courts and doctrinal debates',<sup>64</sup> something that Haskell has criticized as an overreliance on the 'linguistic' determinants of legal struggles.<sup>65</sup> This is perhaps why Koskenniemi notes (correctly) in his blurb that the book is 'above all, legal'.<sup>66</sup> Just like Orford, Tzouvala tends to diminish the contributions of historians and other disciplines due to their extra-disciplinary understanding of the law (whatever that means).<sup>67</sup> Elsewhere I have written more extensively on what I think are the flaws of this narrow disciplinary understanding of legal history, despite my profound admiration of Koskenniemi's and Orford's work.<sup>68</sup> What matters for the present discussion is that, in my view, the monograph's narrow

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<sup>62</sup> Benton (n 56) 32.

<sup>63</sup> In my own work, for instance, I have tried to 'read' shipping containers into the history of transnational governance, even if they bear little to no resemblance to what is understood as 'legal' under the terms of the (in)famous art 38 (of the Statute of the International Court of Justice) and its spectre of sources. See Daniel R Quiroga-Villamarín, 'Normalising Global Commerce: Containerisation, Materiality, and Transnational Regulation (1956–68)' (2020) 8(3) *London Review of International Law* 457.

<sup>64</sup> Martti Koskenniemi, 'What Is Critical Research in International Law? Celebrating Structuralism' (2016) 29 *Leiden Journal of International Law* 727, 728.

<sup>65</sup> Haskell (n 13) 668.

<sup>66</sup> Tzouvala, *Capitalism as Civilisation* (n 1) back-cover blurb.

<sup>67</sup> Alexandra Kemmerer, "'We Do Not Need to Always Look to Westphalia . . ." A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17 *Journal of the History of International Law* 1, 3 on Mazower's *No Enchanted Palace*. Compare with Tzouvala, *Capitalism as Civilisation* (n 1) 105 on Pedersen's aforementioned *The Guardians* (n 61): '[d]espite law occupying a minor position in Pedersen's analysis...' – perhaps this speaks well of Pedersen's book?

<sup>68</sup> Quiroga-Villamarín, 'Beyond Texts?' (n 23).

understanding of 'international law' as 'a specialized language articulated by a particular class of intellectuals, lawyers, within specific institutional structures'<sup>69</sup> restricts the potential archives of global legal politics to a rather tired and overstudied set of classical legal materials. Tzouvala's (again, masterful) discussion of the *Palmas* arbitration is perhaps a good example of this.<sup>70</sup> Her analysis may push mainstream international lawyers to confront the colonial implications of this (in)famous case, and I will certainly use the monograph to do so in my teaching. But those of us who were already painfully aware of *Palmas*' imperial history were left wanting more than a historiographical review of secondary materials.

Like Orford (and Koskenniemi, to a degree), Tzouvala makes a daring attempt to 'occupy' the space of law for the legal left.<sup>71</sup> There is nothing wrong with that, of course. But, in my own perspective, the new wave of Marxist legal history could do more to engage with the (seemingly) 'non-legal' or with 'non-linguistic materials' that constitute the vast archive(s) of global governance. Tzouvala might reply, invoking Orford's authority, that my argument 'involves a rejection of the jurisprudential method as a whole and a refusal to engage with the ways legal scholars and institutions make meaning move over space and time'.<sup>72</sup> She would be right. As a legal historian, I am not interested in what the mainstream (or surprisingly, some leading critical figures) consider *the* jurisprudential method. What is more, if our primary sources are telling us that 'legal battles ... have often masked the nature of the power struggles' of the histories we are interested in tracing,<sup>73</sup> then it only follows that there might be other promising 'meanings' and 'institutions' to interrogate than the limited repertoire of what (some) think lawyers 'do'.

It would be unfair to impose my own intellectual project (of a non-textual legal history) on Tzouvala, so I will conclude by suggesting a way in which her Derridean fidelity to text could be combined with a more profound

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<sup>69</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 41.

<sup>70</sup> Ibid 193ff.

<sup>71</sup> Kemmerer (n 67) 13. Koskenniemi reluctantly notes that the legal left can easily fall prey to the legal center in this maneuver.

<sup>72</sup> Tzouvala, 'The Specter of Eurocentrism in International Legal History' (n 58) 430 note 65.

<sup>73</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 129.

engagement of what I have called (following Foucault) a 'materialism of the incorporeal'.<sup>74</sup> As I noted recently, in a review of Whitehall's fascinating *Three Wartime Textbooks* piece,<sup>75</sup> for all our talk about international law as an argumentative pattern or language, we know very little about the material 'conditions of possibility' of many classic legal interventions.<sup>76</sup> A productive road for future work that follows Tzouvala's synthesis of Derrida and Marxism could be the examination of the material-institutional structures that determine publishing in international law from a historical perspective. For instance, some colleagues in Colombia (drawing and contributing from the ever-growing literature on the materiality of the production of knowledge<sup>77</sup>) recently wrote an edited volume on three mid-19<sup>th</sup> century Colombian administrative law textbooks.<sup>78</sup> What was exciting about their intervention was that they not only interrogated the history of legal discourse or the patterns of argumentation contained in the books, but also their material politics: cost and accessibility, size, publishing house, institutional connections, etc. This allowed them to highlight patterns of consumption, distribution, and production which went beyond a traditional 'intellectual history' or CLS account of the globalization of legal thought. Liendo-Tagle, in this vein, also recently recompiled a robust study of the market for legal journals since the 19<sup>th</sup> century in the Spanish legal academia.<sup>79</sup> This is a promising direction which a political economy of the 'print capitalism' of the patterns of legal discourse could take in the near future.<sup>80</sup>

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<sup>74</sup> Quiroga-Villamarín, 'Beyond Texts?' (n 23) section 3 (page 17 in the advance copy).

<sup>75</sup> Deborah Whitehall, 'Three Wartime Textbooks of International Law' (2020) 22 *Journal of the History of International Law* 385. This was in the context of an ESIL international legal history virtual meeting on 18 December 2020.

<sup>76</sup> Haskell (n 13) 674.

<sup>77</sup> Filipe Carreira da Silva and Mónica Brito Vieira, *The Politics of the Book: A Study on the Materiality of Ideas* (The Pennsylvania State University Press 2019).

<sup>78</sup> Antonio Barreto Rozo, Miguel Alejandro Malagón Pinzón and Ana María Otero Cleves, *Tratados y Manuales Jurídicos Del Período Radical: Análisis de La Segunda Mitad Del Siglo XIX Colombiano* (Universidad de los Andes 2015).

<sup>79</sup> Fernando Liendo Tagle, *Prensa Jurídica Española: Avance de un Repertorio (1834-1936)* (Universidad Carlos III 2020).

<sup>80</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (revised edn, Verso 2016).

#### IV. CONCLUDING REMARKS

In sum, I argue that this monograph signals an important breakthrough in the development of a contemporary wave of (not only post- but also anti-CLS) Marxist legal thinking in international legal academia. At the same time, the book stands at a threshold of a transition, still showing a lot of fidelity to a 'Helsinki' or 'Melbourne' disciplinarian imagination that, in my own view, has reached its limits when it comes to international legal history.<sup>81</sup> This is not to diminish its importance - I owe much to Koskeniemi, Orford, Tzouvala, and other leading critical scholars and mentors who have fought tooth and nail to open a space for critique in international law's rather reactionary landscape. But, at the same time, it would be a shame if new(er) generations of legal scholars did not take stock of the achievements of those who came before us to push against the boundaries of critique - only to be, then, outflanked by the next generation of 'young turks'.<sup>82</sup>

This comment on mentoring and generational engagement leads me to a final (but not less important) remark. I was surprised to see the relative lack of engagement with Liliana Obregón's work in Tzouvala's monograph. Of course, I am biased, given my standpoint as a Feminist Latin American TWAILer who was a student of Obregón and has learned much from her work on the relevance of civilization for international law. For that reason, I was somewhat taken aback to see that a monograph that dealt precisely with Obregón's most important area of work only cited her three times, and in a rather superficial manner. In fact, Tzouvala clarifies that one of Obregón's articles is but a mere 'analysis of the historical specificities of nineteenth-century engagements with international law in Latin America'.<sup>83</sup> Given that Tzouvala cites the 2012 *Oxford Handbook of the History of International Law* (to, correctly I think, point out its lack of engagement with political economy), one is left wondering why she did not refer to Obregón's ground-breaking chapter in that volume, 'The Civilized and the Uncivilized', which deals *precisely* with the main theme of the monograph.<sup>84</sup> Indeed, an absent notion

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<sup>81</sup> Nijman (n 19); Benton (n 56).

<sup>82</sup> While problematic, I see some sense in Duncan Kennedy's use of this term.

<sup>83</sup> Tzouvala, *Capitalism as Civilisation* (n 1) 52 note 29.

<sup>84</sup> Liliana Obregón, 'The Civilized and the Uncivilized' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford

(that could have intersected neatly with Tzouvala's logics of improvement and biology) was 'creolization' – a term that has been used to think beyond the 'historical specificities' of Latin America to serve as a pillar for postcolonial critique and heterodox approaches to the history of nationalism.<sup>85</sup>

My reproach might sound petty, but my experience in Geneva has taught me the importance of highlighting (especially to Europeans) the relevance of work produced by the TWAIL tradition. I remember doing the same at least once to highlight Tzouvala's work in the *Genevoise* classrooms of international humanitarian law, in which her work (or that of other TWAILers) is rarely discussed. By the same token, I felt it was important to conclude my review by signalling my suspicion that, by writing a monograph on civilization without acknowledging the crucial work of a previous female TWAIL scholar, Tzouvala might be reproducing (unwillingly, no doubt) the same imperial dynamics she aims to critique. I do not claim any higher ground – I am sure I have willingly or unwillingly also reproduced many Eurocentric practices and knowledges in my own work. Koskenniemi, Obregón, or Tzouvala would be the first ones to admit that Eurocentrism is not something we can easily detach ourselves from.<sup>86</sup> I make this (self-)critique because I believe that mainstream, socio-critical, and TWAILer scholars alike could benefit from more awareness of the distributional and material-institutional consequences of our citational practices.<sup>87</sup>

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University Press 2012) 917-939. Needless to say, this is not her only piece on this matter.

<sup>85</sup> Anderson (n 80); Encarnación Gutiérrez Rodríguez and Shirley Anne Tate (eds), *Creolizing Europe: Legacies and Transformations* (Liverpool University Press 2015).

<sup>86</sup> Liliana Obregón, 'Martti Koskenniemi's Critique of Eurocentrism in International Law' in Wouter Werner, Marieke De Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 360-392.

<sup>87</sup> See Rohini Sen, 'Reading and Readings of *Capitalism as Civilisation*' (2021) 13(1) *European Journal of Legal Studies* 117.

## READING AND READINGS OF *CAPITALISM AS CIVILISATION*

Rohini Sen\* 

### I. INTRODUCTION

Ntina Tzouvala's monograph, *Capitalism as Civilisation – A History of International Law*, is, among many things, an elegant, profound and discursive account of *reading* and readings. Through *reading* as a methodological approach and processual mode, Tzouvala engages symptomatically and materially with international legal texts and terrain. And her *readings* of international law, located in a reconciliation of Marxism and deconstruction,<sup>1</sup> vitalise civilisation as a conceptual category in new and enduring ways. By embedding the dynamic of difference<sup>2</sup> in the ever-expanding logic of capital and capitalist production, she brings to the fore the very contradictions that make the 'standard of civilisation' categorically tenable and conceptually imperishable. Oscillating between the two oppositional points of the 'logic of biology' and the 'logic of improvement',<sup>3</sup> the 'standard of civilisation' is a shapeshifting, moving target placed onto dynamic iterations of the capitalist state at every stage. And it is precisely this indeterminacy that allows a wide

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<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020) 35.

<sup>2</sup> Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

<sup>3</sup> Tzouvala (n 1) 5.

(but not unlimited) range of political actors<sup>4</sup> to articulate their agenda in its terms – leading to both homogenisation and polarisation.<sup>5</sup>

A book review is traditionally understood as a form of evaluation in which the reader is expected to provide an analytical account of their reception of or engagement with the author's work. I, however, will depart from this tradition by performing a *reading* of her readings and read productively with (and against)<sup>6</sup> her. This departure is strategic<sup>7</sup> in that I hope to subversively use the textual format of a book review to move towards a transubstantiation of the terms and forms of normative scholarly engagement.<sup>8</sup> So instead of doing what a review *ought* to do, I will engage with Tzouvala's work to expand the scope of what a review *could also* do – read each other in a way where contradictions are very much a part of our work and where reconciling the seemingly irreducible differences becomes plausible and probable.<sup>9</sup> I also hope to reclaim the discursive and political potential of narrative through *this*

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<sup>4</sup> As a host of CLS scholars point out, there is a consistent articulation of these categories of actors, even though it appears as if disparate communities can join their ranks. Tzouvala (n 1); Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019); Susan Marks, *A False Tree of Liberty: Human Rights in Radical Thought* (Oxford University Press 2019).

<sup>5</sup> Tzouvala (n 1) 40.

<sup>6</sup> This is a logical extension of what Tzouvala refers to in her acknowledgments (Tzouvala (n 1) vi), and also in keeping with Anne Orford's technique in Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) ch 2.

<sup>7</sup> I use this term as understood by Rob Knox, 'Strategy and Tactics' (2012) 21 *The Finnish Yearbook of International Law* 193.

<sup>8</sup> Even within the communities of Critical Legal Studies and Critical Approaches to International Law, the forms appear to be inadvertently reproducing the hegemony. Another reviewer of this symposium, Daniel R. Quiroga-Villamarín, points to this in his work about how we unwillingly reproduce imperial dynamics and Eurocentric practices in our own work.

<sup>9</sup> My approach here takes from both Claire Hemmings' analysis of the teleology of feminist accounts in Claire Hemmings, 'Telling Feminist Stories' (2005) 6(2) *Feminist Theory* 115 and Tzouvala's own efforts to prepare a methodological toolkit using the otherwise irreconcilable methods/theories of deconstruction and Marxism.

processual account of history<sup>10</sup> where the dialogical relationship of structure and indeterminacy are very much a part of the Critical Legal Studies (CLS) analytical terrain.

This process of reading is also located in three specific contexts, two of which are articulated by Tzouvala as undergirding her own work as well. The first is the figure of the lawyer as an intellectual of global capitalism,<sup>11</sup> contextually embedded within the textual (and extra-textual) contradictions themselves. As a critical international lawyer, my *reading* of Tzouvala and her readings cannot transcend the complicity and contamination of this all-pervasive neoliberal system. The second is the debate surrounding what constitutes a disciplinary turn (to political economy)<sup>12</sup>, the formulations of a discipline, its others<sup>13</sup> and its methods<sup>14</sup>. Perhaps our disciplinary boundaries and contestations are more porous than we let ourselves believe,<sup>15</sup> and different ways of reading law may be a close encounter in how we think within (and of) another discipline.

For instance, international law's turn to historiography may seem unexpectedly similar to a post-colonial moment in sociology and/or a queer reading of international relations, emphasizing the close, circuitous relationship between disciplines, critique and mainstream.<sup>16</sup> And this, along with our frequent epistemological impasse of 'where do we go from here' (within our so-called theoretical homes) may have an impact on our self-

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<sup>10</sup> Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Mass Beacon Press 1995).

<sup>11</sup> Tzouvala, (n 1) 216.

<sup>12</sup> John Haskell and Akbar Rasulov, 'International Law and the Turn to Political Economy' (2018) 31 *Leiden Journal of International Law* 243.

<sup>13</sup> Tzouvala (n 1) 40; Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 *Leiden Journal of International Law* 799.

<sup>14</sup> Hemmings (n 9) 130.

<sup>15</sup> I arrive at this proposition through my reading of Haskell and Rasulov and, following a conversation with Tzouvala and Haskell at the Asser Workshop: International Law and Political Economy, 20 January 2021.

<sup>16</sup> What we think is critique or oppositional may sometimes be the borders of the mainstream/discipline itself, notes Margaret Davies in Margaret Davies, 'Ethics and Methodology in Legal Theory a (Personal) Research Anti-Manifesto' (2002) 6 *Law Text Culture* 7.

identification as theoretically-methodologically critical. Thus, while I agree with Daniel R. Quiroga-Villamarín<sup>17</sup> that this monograph is a masterful *rereading* of classical legal documents and secondary literature about these episodes,<sup>18</sup> how they are received cannot be accounted for by anybody's disciplinary, theoretical or methodological scaffoldings. Simply, any reading is entirely a question of a *reading* in context. The third context is the affective premise of Tzouvala's book, where we are called to praxis by the unprecedented urgency of our times<sup>19</sup> and it is with this tone that I mostly do my reading – as if everything were at stake.

In the following sections, I offer three accounts of reading as a praxis, leaving room for the readers (Tzouvala's as well as mine) to contemplate their own reading processes. In Part II, I engage with the various reading forms and methods Tzouvala applies to read international law within a Marxist-deconstructionist framework and against the grain. How *she* reads is central to this segment. Part III, then, looks at how this reading emerges as interpretations and analysis of international law in and through specific events and outcomes. In other words, this part examines her *readings* as a record of *what* she reads and the results they produce. In part IV, I present my own reading of her work and what it leads me to question and contemplate: an imagination of reading as within and beyond textual sources.

## II. THE VARIOUS ACCOUNTS OF *READING* AND (TZOUVALA'S) *READING*

The first chapter is a heuristic and framework through which Tzouvala offers various accounts of *reading* traditions she leans into to perform her readings of international law. She adopts a Marxist-Deconstructionist toolkit to deconstruct 'empiricist or metaphysical oppositions between discourse and some "brute" reality beyond it'.<sup>20</sup> She demonstrates that contrary to its unitary appearance, civilisation is a binary between the logic of biology and

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<sup>17</sup> See Daniel R. Quiroga-Villamarín, 'Victorian Antics: The Persistence of the "Law as Craft" Mindset in the Critical Legal Imagination' (2021) 13(1) European Journal of Legal Studies 101.

<sup>18</sup> Ibid.

<sup>19</sup> Tzouvala (n 1) chapter 6.

<sup>20</sup> Terry Eagleton, 'Marxism, Structuralism and Post-Structuralism' (1984) 13(1) Economy and Society 103; Tzouvala (n 1) 39.

the logic of improvement, represented by fundamentally different visions on how rights and duties are to be distributed amongst the international legal community – carrying the self and other within itself. To ground this in materiality, in the subsequent chapters, she looks at political, economic and institutional structures that make the continuing presence, persuasiveness and even invisibility of this contradictory, unstable and unpleasant argumentative pattern possible.<sup>21</sup> Through this, she seems to address Matsuda's and the overarching Marxist concerns on post-structuralism's obsession with the textual without progressive politics or a material component.<sup>22</sup> And, in centering the oppositional tension between the standard of civilisation and its inclusive potential to bring within its fold some of those who are seemingly extrinsic to it because of the logic of biology, she addresses yet another paradox. The progressionist mirage of this tension renders Third World Approaches to International Law's<sup>23</sup> (non-materialist wing) voluntaristic approaches to international law, explicable.

Tzouvala performs other significant functions through her Marxist-Deconstructionist toolkit as well. First, in integrating these two methods, she executes a reading that is strikingly similar to Hemmings' historiography of feminist readings,<sup>24</sup> in that both of them (inadvertently) interrogate the teleology of the stories about these methods and disciplines themselves. For Hemmings the outcome is imagining the feminist past differently - as a series of contestations at every assigned decade instead of distinct feminist epochs (essentialized 70s and post structuralist 90s, for instance). This re-imagining leads us to confront that what we *think* we know of the iconic figures of these disciplinary turns (Spivak, Butler, Irigaray and others), and how the histories of them and their work are restricted and possibly (mis)constructed. Similarly, Tzouvala, *in* and *through* her reading, makes contingent what are presumed to be (incompatible) deconstructionist and Marxist readings of texts. In addition, through these heuristics, she draws our attention to *her*

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<sup>21</sup> Tzouvala (n 1) 40.

<sup>22</sup> Mari Matsuda, 'Beyond, and not Beyond, Black and White: Deconstruction Has a Politics' in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press 2002); Tzouvala, (n 1) 36.

<sup>23</sup> Hereinafter referred to as TWAIL.

<sup>24</sup> Hemmings (n 9).

reading and makes us acutely aware of *our* reading of her work as part of the process. While she limits her work solely to the Western, textual, argumentative account of law,<sup>25</sup> it is precisely here that the non-textual emerges as the unrealisable 'other' in her text. While pointing out the many widely practiced misreadings of international law<sup>26</sup> both as an *ad hoc* technique and/or juridical bad form, she advances a theory of reading to account for her performance of productive reading of and for international law through its texts.

Two of the reading methodologies she draws from are Anne Orford's productive misreading<sup>27</sup> and Bennet Capers's 'read back' and 'read black'<sup>28</sup>. Both these methods are a guide to reading legal texts against the grain and to reading international law in a way that avoids the deployment of 'the axiomatics of imperialism for crucial textual functions'.<sup>29</sup> Orford's productive misreading (against ahistorical and non-contextual reading) is a tribute to feminist and post-colonial literary theory,<sup>30</sup> where she reads to challenge the genre and/or make it produce a different meaning from the one intended by the authors.<sup>31</sup> Thereby, she reads international law in a way it was never 'meant' to be read. In doing this, she calls to attention the history- (and meaning-) making potential of reading, where how we read or misread is governed by the same 'standards of civilisation': a spectrum where knowledge is hegemonic and those who are consistently at the dominant end of these civilization turns are the ones who decide how things are meant to be read.<sup>32</sup>

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<sup>25</sup> Tzouvala (n 1) 19.

<sup>26</sup> Tzouvala (n 1) 8.

<sup>27</sup> Orford (n 6).

<sup>28</sup> Bennet Capers, 'Reading Back, Reading Black' (2006) 35(1) Hofstra Law Review 9.

<sup>29</sup> Orford, (n 6) 39, Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999) 89.

<sup>30</sup> Tzouvala (n 1) 9; Orford (n 6).

<sup>31</sup> Orford (n 6); Terry Threadgold, 'Book Review: Law and Literature: Revised and Enlarged Edition by Richard Posner' (1999) 23 Melbourne University Law Review 830, 838.

<sup>32</sup> Here, 'standard of civilisation' stands for both a) a Eurocentric reading of international law and b) the Eurocentric hegemonic reproduction of determining figureheads in disciplines and genres as instances of 'who to read' and 'how to

Capers' excavating and revelatory reading, meanwhile, brings to the fore that which is ignored by the mainstream reading but is already present in the text. Tzouvala performs her own reading of international law, modulating Orford and Capers by problematising the discipline's 'given'. However, in this instance, by focusing on the contradictions of 'civilisation' as an imperative, she goes a step further and critiques the 'given' of CLS as well.

The central influence on Tzouvala's reading is that of Althusser and his 'hermeneutic' praxis/methodology of 'symptomatic reading'.<sup>33</sup> She uses his method to perform her reading of international legal texts. Symptomatic reading is a productive reading practice that does not treat the text as a finished object,<sup>34</sup> with meaning residing on its surface. It looks for presences and absences (that are not deliberate omissions), where the absences represent that which is unthinkable and impossible to account for without highlighting the inherent contradictions in the text, discipline, or concept. However, by identifying the text as an unfinished object, symptomatic reading alludes to symptomatic meanings that are not waiting to be unearthed but are intangible and far from self-evident. This indicates that this form of reading, when applied to legal texts in particular, performs a specific interpretative function – something Tzouvala says she departs from in this text. If symptomatic reading is inherently interpretative, then one might ask if the validity of her problematic as well as of her reading is as implicated in the context she is trying to transcend – the violence of the legal interpretative process<sup>35</sup>. The caveat that her reading is an unfinished, transitional engagement<sup>36</sup> subject to further reading may be partially a

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read'. Much like civilisation's contradictions, critical scholars are equally guilty of this practice.

<sup>33</sup> Louis Althusser and Étienne Balibar, *Reading Capital* (Librairie François Maspero 1968).

<sup>34</sup> Althusser identifies two reading strategies in Marx's work. His earlier reading, up until the 1844 Manuscripts, is textual. But in *Capital*, when engaging with the works of Adam Smith and others, he moves to a reading that locates what can and cannot be thought within a particular disciplinary framing.

<sup>35</sup> Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

<sup>36</sup> Tzouvala (n 1) 14.

displacement of the interpretative function of symptomatic reading onto reading practices external to herself.

To unpack this dialogical association of critical reading<sup>37</sup> -interpretation, Althusser's reading must be revisited through Lacan and subsequently, Žižek. Where the three converge is in agreeing that a text is structured by what it cannot accommodate (a second text) and therefore, necessarily represses. What is repressed is internal to the text and its revelation will threaten to undermine the text itself. This repressed unthinkable, then, leaves traces or symptoms on its surface. However, Lacan and subsequently Žižek, depart from Althusser in what they consider to be repressed. Althusser understands these symptoms as a cipher that *can* be decoded – full (interpretive) meaning can be achieved in the process. Whereas for Lacan<sup>38</sup> and Žižek, the symptom is always somewhat inaccessible, and therefore un-substitutable and uninterpretable. The impossibility of knowing *is* the condition of knowing itself. Moreover, Žižek's response to the repressed symptom departs significantly from Althusser by necessitating the examination of the role of fantasy in ideology.<sup>39</sup> These expositions problematise Althusser's concept of symptomatic reading as one with its interpretive potentials oscillating between the real and the fantastical. Thus, if there is the slightest chance of loosely conceiving interpretation as an act of erasure through excavation,<sup>40</sup> then it may be useful to understand ourselves relationally to the text as objects we approach,<sup>41</sup> possibly extinguish and recreate. The question I ask then (of Tzouvala) is this - if interpretation can explain away the symptom (in Althusserian reading), then is it really just an act of reading?

My purpose behind the question is neither a dissention with Tzouvala, nor a concern per se – I see this dialogical critical reading-interpretative praxis as one of the contradictions that are inherent to the idea of critical scholarly

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<sup>37</sup> Symptomatic reading is understood as a form of critical reading.

<sup>38</sup> Jacques Lacan, *The Ethics of Psychoanalysis 1959-60: The Seminar of Jacques Lacan*, (Jacques-Alain Miller ed, Routledge 1992).

<sup>39</sup> Slavoj Žižek, *The Sublime Object of Ideology* (Verso Books 1989).

<sup>40</sup> Susan Sontag, *Against Interpretation, and Other Essays* (Farrar, Straus & Giroux 1966).

<sup>41</sup> Both Tzouvala in relation to the texts she critically reads-interprets and us in relation to her text.

projects. Thus, in locating my reading in Žižek's invocation of fantasy, I reconcile Tzouvala's symptomatic reading with her claims of not engaging in interpretation within the oppositional scope of critique itself. Critique as or in critical legal scholarship serves the unique function of oscillating between the extraordinary and the mundane. If the latter allows us to observe doctrines and nuances in close proximity, the former encourages us to transcend immediate reality and imagine beyond our theoretical, methodological or disciplinary homes. Critique, then, is a site of imagination<sup>42</sup> through interpretation, located in certain reading practices where our desire for full meaning, as opposed to the actual possibility of full meaning, rests in the contradictions of this meaning-making process. To that end, I find Tzouvala's reading of Victor Kattan's<sup>43</sup> account as speculative,<sup>44</sup> interesting. Kattan brings to life an intellectual biography of Zafrullah Khan through historiography and archival engagement. Much of the work in his narrative of the South West African saga, located in a climate of institutional judicial imperialism, lies in excavating the textual interstice. This process demands interpretation and an imagination of history, not unlike Tzouvala's own reading of the events she investigates. As a reader, I wonder about their differential mode of approach to reading, beyond a simple methodological difference in their historiographic processes.

The final form, performed in conjuncture with symptomatic reading is reading law in a manner that does not reflect its presumed 'disciplinary' constraints. Tzouvala departs from doctrinal analysis and what she terms a 'legal argument properly so called' within the confines of a courtroom, that is 'a structured dialogue which assigns a burden of proof in relation to facts, and in relation to norms a burden of persuasion: states must persuade judges of the worth of their argument'.<sup>45</sup> Identifying this as rooted in deep-seated

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<sup>42</sup> I am mindful of the theoretical limits and remits of critique, but I impose no such bounds on imagination - academic or otherwise.

<sup>43</sup> Victor Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases' (2015) 5(2) *Asian Journal of International Law* 310.

<sup>44</sup> Tzouvala (n 1) 139.

<sup>45</sup> Iain Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism' (1991) 61(1) *British Yearbook of International Law* 339; Tzouvala (n 1) 169.

state-centrism, she rightly notes that any reflection of law outside the courtroom or a lawyer's office should not respond to this interpellation which leads us to adopt this particular form of argumentation as the only one possible (rendering all others unthinkable). Those reading or arguing<sup>46</sup> within the two dimensions of international law offered by Koskenniemi – law-as-fact and law-as-idea<sup>47</sup> – are unable to escape the exhaustive and mutually exclusive nature of their performance without ever problematising the terms of the discourse itself.<sup>48</sup>

The interpretative controversies produced by these two seemingly distinct forms is constantly iterated in *how* international lawyers argue and *what* they argue about, making this 'familiar practice strange'<sup>49</sup> in non-courtroom sites of engagement. Orford gives us an illustration of this range of practice in her reading of arguments against humanitarian intervention where they are arranged across two strands. The first is a close doctrinal reading that questions the legality of the texts permitting or prohibiting intervention as an exception to the use of force. The second is grounded in the implications of extra-legal realities for such doctrines, which allow for external intervention in weaker states. Neither of these strands, however, engages with the root causes that underpin the making of such doctrines<sup>50</sup>, indicating that it is outside the remit of what is understood to be reading of or for international law and international lawyering. It is precisely this framing that Tzouvala reads out of and against. By pointing out the epistemological

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<sup>46</sup> I am using reading and arguing interchangeably here to indicate that only when we read law in a particular form do we locate ourselves in a corresponding argumentative format.

<sup>47</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006).

<sup>48</sup> Instead, they problematise the terms of the debate where applicable law and its contingent realities are the only investigative terrains.

<sup>49</sup> Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) *Journal of International Law and International Relations* 1; Tzouvala (n 1) 170.

<sup>50</sup> Susan Marks performs a similar analysis of root causes in her discourse on human rights as obfuscating them in Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) *The Modern Law Review* 57.

affinity of the two forms of international law offered by Koskenniemi,<sup>51</sup> she gives us a glimpse of law's 'second text' as reading narratives, imaginaries, and material practices to help us better understand legal argumentation's continued paradoxes. In this case, they are the paradoxes and contradictions of civilisation as a continuous, adaptable standard, producing and reproducing itself relationally to the capitalist state, where state is both an allusion to statehood and the form that capital takes at a given moment.<sup>52</sup>

### III. TZOUVALA'S READINGS OF INTERNATIONAL LAW AND THE LEGAL TERRAIN

#### *I. Symptomatic Readings*

Tzouvala's symptomatic reading is masterful, sophisticated, rich, and, in the words of Natsu Taylor Saito, 'legally accessible'<sup>53</sup>. That she manages to advance such elegant analysis in such lucid form is no mean feat and, in Althusserian terms, she textually generates the repressed symptoms to academic legal writing - the forbidden, accessible version of such texts! Having taken that very indulgent interpretative liberty with symptomatic reading, I will try to unpack the way Tzouvala's *reading* transforms into specific readings of international law (and its outcomes) in the given contexts. To do this, I go back to Hemmings' formulation once again. Hemmings' own symptomatic reading<sup>54</sup> of feminist texts lead her to note that

in order for poststructuralism to emerge both as beyond particularized difference and as inclusive of those differences, this narrative actively

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<sup>51</sup> Chapter 5 of this book is a good account of how these forms play out in the occupation of Iraq.

<sup>52</sup> This is my reading of Tzouvala and even if this is not the meaning she intended, I subject this to the same paradigm of reading beyond her own reading that she alludes to in Tzouvala (n 1) 14.

<sup>53</sup> Tzouvala (n 1) back cover review.

<sup>54</sup> Even though she does not call it this or identifies with it as such, I am using the term in a manner where I locate her reading in the same register of analytical lattice as Tzouvala's.

requires the misrepresentation of interventions within feminism as decade-specific.<sup>55</sup>

For Tzouvala, then, there are three layers of this symptomatic. First, for capital to reproduce and expand in diverse and (sometimes) contradictory conditions, it is necessary for international law to emerge as desirable. Second, for international law to sustain itself as plausible and reformative, it is necessary for the standard of civilisation to be flexible. And finally, for the standard of civilisation to be sustainable, it is imperative for it to move within the oppositional poles (logic of improvement and logic of biology), and to make this contradiction invisible and unthinkable.

Having established this as her analytical core, Tzouvala performs a range of incisive readings to capture this moving target. Within the contradictory logic of capital, she allows for many possible readings, including that of interpellation, in the ideological internalisation of the state. For instance, in early post-war international law, only those political communities that were juridically separate from society and economy were deemed to be civilised.<sup>56</sup> This contained within itself the profound contradiction of the imagination of the state (public) as much less arbitrary than the market (private) and yet somehow, the market was thought of as always self-regulating and fair. Similarly, legal equality was premised on immutable (but not substantively so) differences (race, gender, class) that law disregarded. However, these differences were also embedded in capitalist reproduction through law, and thereby in law itself.<sup>57</sup> In legal texts, this tension arose through dialectic engagement of interpretative adaptations both by the 'civilised' and the 'not there yet'. For example, the battle for extraterritoriality in *SS Lotus*<sup>58</sup> was in fact an intricate, paradoxical process where the conditions for the demise of a rule that was unfavourable to the 'not civilised' lay in the adaptation/appropriation of the rule by those it was looking to disenfranchise in the first place. So, in using extraterritoriality against France (and against its colonial dimensions premised on the logic of biology), Turkey set in motion

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<sup>55</sup> Claire Hemmings' symptomatic reading of feminist texts and citation patterns in Hemmings (n 9) 12.

<sup>56</sup> Tzouvala (n 1) 62.

<sup>57</sup> Tzouvala (n 1) 67.

<sup>58</sup> *Case of the SS "Lotus" (France v. Turkey)* PCIJ Rep Series A No 10.

a process where the rule is abandoned and forced to relocate itself in newer, more subtle iterations of the biology-improvement axes.<sup>59</sup> A similar reading could be performed of slavery, where the legal validity of the conditions of slavery were rendered redundant once the differential response to slavery in America as opposed to its practices in Africa allowed for an interrogation of the conditions of slavery itself.<sup>60</sup>

If the readings speak to capital, and therefore to international law's contradiction by design, then unpacking this oscillatory premise reveals their oppressive underpinning in each stage. For instance, the UNGA resolution 65(I)(1946) concerning the Future Status of South West Africa rejected the results of the referendum supporting its annexation in consideration of the fact that the inhabitants of South West Africa have not reached a 'stage of political development' that enables them to express a considered opinion that the Assembly could recognise. Thus, regardless of the conscious intent of the drafters of this text – the presumption that black Namibians were unable to govern themselves (logic of biology) not only formed the premise of the UN's opposition to South Africa, but also of South Africa's disavowal of the UN. In a way, this extreme racism was the most faithful application of the principles that formed the core of the Mandate System and even the Charter itself.<sup>61</sup> And the participation of non-Western lawyers in this discussion simply changed the balance (and valence) of the two interwoven poles of 'civilisation' rather than doing away with the concept itself.<sup>62</sup> The only time (in Tzouvala's reading of these specific texts) a legal argument came close to interrogating the terms of the debate was when Ethiopia and Liberia, in their first presentation before the International Court of Justice (ICJ), read civilisation against the grain. In identifying the 'intersection between racialisation, labour exploitation and land dispossession in the practice of apartheid and as against the "sacred trust of civilisation"',<sup>63</sup> the argument problematised the artificial boundaries of the context. And in reading them

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<sup>59</sup> Tzouvala (n 1) 77.

<sup>60</sup> I am performing a conjoint reading of chapters 2, 3 and 4 here.

<sup>61</sup> Tzouvala (n 1) 142.

<sup>62</sup> Tzouvala (n 1) 148 and chapter 2.

<sup>63</sup> Ibid.

thus, Tzouvala once again confirms the significance of reading law outside the 'prescriptive' forms and legal terrain.

Ethiopia and Liberia's subsequent turn in argument to human rights and non-discrimination, then, is a far more significant event than the ICJ's change of heart, Tzouvala notes. It is an adaptation to the civilisational standard in a way that is frequently mischaracterised as international law's reformative potential. But more importantly, it is also an account of how an uncontested adoption of (Western) law as a textual discipline limits the scope for transcending its oppressive contexts. Here, I am reminded of Parfitt's use of the 'Shadow Box' as a methodology to unpack Ethiopia's hybrid and sophisticated presentation before the League of Nations – deploying part sameness and part otherness to resist being conformed and homogenised.<sup>64</sup> Much like the formulation of 'sacred trust of civilisation', Ethiopia claimed proximity to the 'true international law' through the cultural foundations that the 'great powers' dismiss as barbaric. Parfitt, whom Tzouvala cites liberally and engages with closely, also deploys a unique reading form like Tzouvala's own (Parfitt calls it the Shadow Box) where the *reading* of the reader in context is transmuted into the viewer's (also in context) gaze. But unlike the generic assertion that all critical reading (if there is such a thing) is done in - and in acknowledgement of - context, what Parfitt and Tzouvala are doing appears to be reconciling oppositions in their *reading* and readings. A form of Marxism + (another oppositional/post-structural form), deployed as a processual-methodological task of reading (doing international law) that focuses on looking for patterns rather than engaging with terms that are (mistakenly) perceived to be wholly pre-determined or wholly contingent. And, as Tzouvala clarifies, the outcomes which are sometimes quite favourable to the 'not civilised' are not the sites of this investigation, because while they can be explained by this inherent contradiction, they cannot be predicted.

## 2. *Deconstruction with(in) the Marxist Tradition*

I had the opportunity to ask Tzouvala about her methodological toolkit and why she chose this reading apparatus in the first place. Marxism, she stated,

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<sup>64</sup> Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019).

offers the best analysis of capitalism both as a totality and a contradiction of totality. Marxism also helps us to think of law as something dangerous in the process of this analysis. Deconstruction, similarly, addresses two important things. It serves as a mirror, showing how critical international law imitates liberalism, and also helps one think of law as powerless. Tzouvala uses these approaches skilfully to decentre liberalisation as the site of critique. In her readings, she demonstrates how the term is misunderstood and how capitalism has not always been liberal. Because of the inherent potential of these forms to contain multiplicity and contradiction, their application need not be limited to political economy alone, as she demonstrates. With these techniques, she seems to successfully relocate herself (and her theory) between forms of writing that privilege 'real political action' and those that are alleged to be 'a kind of intellectual game'.<sup>65</sup>

But the most striking aspect of this reading apparatus is her deconstruction and, movement of the terms - 'structure' and 'indeterminacy'.<sup>66</sup> Each of these words have multiple meanings and, therefore, multiple readings in her text. Tzouvala uses structuralism in one instance to denote structural Marxism,<sup>67</sup> and in another instance to denote structural indeterminacy<sup>68</sup>. Structural Marxism, she argues, is too rigid and textual, formulating law as a determinate process. Structural indeterminacy is located in the so-called 'indeterminacy thesis', articulated most famously in the international law context by Martti Koskenniemi<sup>69</sup> and David Kennedy,<sup>70</sup> where both of them argue that international law is always trapped in an oscillation between 'concrete' and 'normative' forms of justification, which either tend towards 'apologism' or 'utopianism' respectively. With international law, therefore, there is no coherent justification for addressing a problem because things could 'always

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<sup>65</sup> Terry Threadgold, 'Introduction' in Terry Threadgold and Anne Cranny-Francis (eds), *Feminine–Masculine and Representation* (Routledge 1990) 11, 13.

<sup>66</sup> I owe this formulation to Kanad Bagchi, who read Tzouvala's use of the word structure to offer different meanings and context. Following his reading, I located several meanings and usages of 'indeterminacy' as well in her text.

<sup>67</sup> Tzouvala (n 1) 5.

<sup>68</sup> Tzouvala (n 1) 6,7.

<sup>69</sup> Koskenniemi (n 47).

<sup>70</sup> David W Kennedy, 'Theses About International Law Discourse' (1980) 23 *German Yearbook of International Law* 353.

have gone – and will go – the other way'.<sup>71</sup> Now, it is precisely this indeterminacy that subjects the rigid structural Marxist accounts to critique, by pointing to law's fluctuations and movement. Tzouvala then brings in historical materialism and the structural scaffolding of Marxism to resurrect the critique to Koskenniemi and Kennedy that has been offered in the past by Chimni, Orford, Parfitt, and many others.<sup>72</sup> By reading history and context out of law, the thesis fails to engage with why law is indeterminate in the first place. But by re-locating this indeterminacy in historical materialism, she illustrates that perceiving it as indeterminate is not the problem but rather that the problem emerges from the conclusions we draw from it being indeterminate.

Aside from these express denotations, structure and indeterminacy appear in her readings in less manifest ways. The pursuit of a coherent explanatory theory of international law is grounded in a notion of structure. The requirement to produce a coherent theory, or the outcome of this theory may both be and produce an image of international law (and its social realities) that is indeterminate.<sup>73</sup> Similarly, the structured indeterminacy of 'civilisation' points to a certain sense of (indeterminate) argumentative freedom while also a form of (structural) entrapment within the contradictions themselves. And finally, identifying these structures of constraint opens up indeterminate methods, apparatuses and approaches to engage with them and/or escape them.

#### IV. MY *READING* OF TZOUVALA (AND HER READINGS)

##### *1. Reading 'Critically'*

Aside from being an enthralled reader, I also read Tzouvala as a (self-identifying) CLS scholar and feminist, moving between disciplines and

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<sup>71</sup> Koskenniemi (n 47); Parfitt (n 64).

<sup>72</sup> BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017); Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Alexis Galán, and Marieke de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2015); Parfitt (n 64).

<sup>73</sup> Tzouvala (n 1) 214.

traditions and implicating myself in a collective (and individual) context. And here, my observations are primarily of two kinds – textual and regarding that which her text renders unthinkable and yet, plausible. Textually, it is interesting to see the circle of scholars she re-reads and resurrects through her citation praxis. While she does limit herself to a textual analysis, even within the textual, the scholars she re-reads (as against productive misreading) are familiar and frequently cited (in CLS circles). Their unquestionable relevance and brilliant contribution to CLS scholarship notwithstanding, it leaves one feeling a little uneasy about "who" else could have been a part of this conversation (and discursive frame) if we did not limit ourselves to a certain format of scholarly texts. This observation is also made by Daniel R. Quiroga-Villamarín,<sup>74</sup> but we differ in our construction of absences and their significance. While Daniel points to identifiable and notable exclusions within the scholarly discipline, mine pertains to a form of exclusion that this normative academic form and citation pattern produces.<sup>75</sup>

The choice to engage with textual, while clearly tactical<sup>76</sup> in that the current formulation of law *is* textual and hegemonic,<sup>77</sup> has consequences. It overlooks how non-textual *academic* modes of intervention, namely classroom spaces, institutions, and critical pedagogy could also perform a productive reading or viewing of international law texts against the mainstream.<sup>78</sup> The approach of reading becomes a hermeneutic. In choosing reading, we invariably seem to limit ourselves to texts and textual sources. At the same time, reading can also be understood as an act of scrutiny and perusal that goes beyond the text. By closely navigating 'who and what we see' when we bring international law into pedagogic sight and classroom spaces, we allow ourselves space to read beyond its designatively limited context. The distinction I make between textual and non-textual takes from Tzouvala's own rich analysis of what lies

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<sup>74</sup> See Quiroga-Villamarín (n 17).

<sup>75</sup> I am equally guilty of it and consider myself complicit in this process.

<sup>76</sup> Once again, I refer to Knox' formulation of these terms in Knox (n 7).

<sup>77</sup> Tzouvala (n 2) 18,19.

<sup>78</sup> Here, I go back to Spivak's foreword to Mahasweta Devis' *Dopdi* and the relationship between the first world and third world scholars and subjects in Gayatri Spivak, Foreword to "Draupadi" by Mahasweta Devi (1981) 8 *Critical Inquiry* 381.

in the non-textual legal realm<sup>79</sup>. We should acknowledge law as performative and versatile, both within and beyond the text.

Another risk of eliminating the non-textual is that the absences in textual or citation patterns allow a certain kind of reductive generalising to persist, where all those 'trained in the same epistemological grammar' (Western liberal academic training) are only speaking among themselves. Perhaps it is here that engaging with the *academic/pedagogic* 'other' becomes incumbent. In this, I speak of not the mainstream international lawyer, but Sumana Roy's 'Provincial Reader' (and possibly scholar) who, as Roy describes, is always arriving after the party is over in a sense of belatedness that is 'dated'.<sup>80</sup> However, what makes these 'dated' interventions or formulations rich is the 'unpredictability of these anachronistic "discoveries" — the randomness and haphazardness involved in mapping connections among thoughts and ideas, in a way that hasn't yet been professionalized'.<sup>81</sup> Someone once told me that in a theory that is Foucault-centric, you can arrive at the same answer without Foucault – it simply takes longer to get there. And it is precisely this longer road or ideating haphazardness that we should engage with to enrich our reading of international law (or any discipline for that matter). But these readers, scholars and ideas lie very clearly outside of our existing citation ecosystems.

The obvious implications of such absences aside, there is a certain form of dissent that emerges from Tzouvala's praxis: An intent to break away from an overpowering and dominating mode of re-interpretation, where the former 'meaning' and 'purpose' must necessarily be obscured or completely obliterated.<sup>82</sup> I then read Tzouvala against *this* genealogy and into Marks' false contingency – where a consciousness of who is reading makes the

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<sup>79</sup> Tzouvala (n 1) 19.

<sup>80</sup> Sumana Roy, 'The Provincial Reader' *Los Angeles Review of Books (LARB)* (19 April 2020) <<https://lareviewofbooks.org/article/the-provincial-reader/>> accessed 6 April 2021.

<sup>81</sup> *Ibid.*

<sup>82</sup> Friedrich Wilhelm Nietzsche, *On the Genealogy of Morality* (Cambridge University Press 1994) 52.

patterning of privilege obvious and therefore, avoidable.<sup>83</sup> So, while Tzouvala creates an unintended absence in her citation cycle, in her reading, she wonderfully resurrects and problematises (through reinterpretation) those she cites in the first place. In doing this, she avoids posing them grammatically as well as temporally distinct from that history which they have seemingly allowed<sup>84</sup> us to surpass. This she does by reminding us that all international lawyers (including critical legal scholars) are 'subjected to the contradictions upon entering the realm of civilisation in its own terms', no matter how self-reflexive, critically aware and responsible.<sup>85</sup>

## 2. Reading Reparatively

Most importantly, my reading of Tzouvala is reparative,<sup>86</sup> in the sense that I am happy to learn from her, walk with her, and freely immerse myself in the text. To that end, my earlier symptomatic reading is simply offered as a comradely reflection. While I suspect Tzouvala's own reading of international law (against the grain) is suspicious, and rightfully so, in *our* collective (and individual) endeavours of thinking, arguing and acting, suspicion is not called for, at least not in my reading of this text. For me, then, the most profound thing about this book, aside from its brilliant interrogation of 'civilisation', is the political economy in and of reading it generates.<sup>87</sup> Tzouvala's reading is non-linear, and she consistently harmonizes different strands of thinking as bringing in different approaches to a common

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<sup>83</sup> Susan Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1, 14, quoting Terry Eagleton, *The English Novel* (Blackwell, 2005) 311.

<sup>84</sup> This charge is directed particularly at the interventions that are made by/attribution to key figures in critical scholarship as distinct from the context within which they operate. Particularly when we announce the 'death' of an old way of thinking through these processes.

<sup>85</sup> Tzouvala (n 1) 216.

<sup>86</sup> Eve Kosofsky Sedgwick, 'Paranoid Reading and Reparative Reading; or, You're So Paranoid, You Probably Think This Introduction is About You' in Eve Kosofsky Sedgwick (ed), *Novel Gazing: Queer Readings in Fiction* (Duke University Press 1997).

<sup>87</sup> I borrow and reframe this usage from Maria do mar Pereira, who discusses the interconnectedness of our theoretical and methodological premise as a political economy in her course entitled 'Producing Feminist Research'.

problem and leaving room for more.<sup>88</sup> Much like her readings of 'civilisation', throughout her *reading* she demonstrates that what is typically perceived as oppositional can be seen as comparable and even reconciliatory. And it is not necessary to present a text or the intent behind it as free from contradictions and coherent.<sup>89</sup>

Reading and writing critically about international law is about much more than an engaged community of recruited readers and it is precisely because of this, I believe, that Tzouvala places demands on them (us): as a form of respect. The stakes, for me, are located in the feeling that simmers just beneath all possible readings of her text – all of us, the 'civilised', 'not civilised' and the 'nearly there' are moving within these contradictory poles of 'civilisation' on *its* terms. And while most of us are in varying, hierarchical degrees of awareness, even those framing the terms of the debate do not fully control this expansion process and its consequences. The symptom to Tzouvala's text, then, is the 'traumatic kernel, which resists symbolization, totalization, symbolic integration'<sup>90</sup> - a feeling of dread where an escape from capitalism 'feels' improbable. And therefore, in keeping with the logic of contradiction, my reading of her is reparative and with admiration. I read her in the hope of using her analysis as a way to engage with mainstream<sup>91</sup> international law, to comprehend the analytic she and other Marxist scholars offer to TWAIL, to dwell upon the absences in her text, and most importantly, to join her in contemplation in imagining an end to capitalism.

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<sup>88</sup> She offers this caveat multiple times and earmarks this in her introduction and conclusion.

<sup>89</sup> This is my reading of what Tzouvala's writing can lead us to and not a claim she makes in her text.

<sup>90</sup> Žižek (n 39).

<sup>91</sup> Our relationship with the purported mainstream is far more complex than it seems, but that is not within the scope of this review.

## CAPITALISM AS CIVILISATION, OR HOW TO RESPOND TO YOUR BOOK REVIEWS WHEN THE AUTHOR IS DEAD

Ntina Tzouvala\* 

When, early in *Capitalism as Civilisation: A History of International Law*, I positioned this book as yet another instance of productive (mis)reading,<sup>1</sup> I rendered some argumentative moves unavailable to me. Whatever I say about the engaging and thoughtful reviews by Kanad Bagchi, Daniel R. Quiroga-Villamarín, Rohini Sen, and Julie Wetterslev,<sup>2</sup> then, cannot come from a position of presumed authority (pun intended) or control over the text. Tempting as it might be, I cannot now proclaim that this is or is not what the book 'really' says. After all, one of the principal interventions of this book has been to decentre the lawyerly subject, to push back against the idea that anyone can ever be the full author and master of international law.<sup>3</sup> Rather, I have opted to take this as an opportunity not so much to respond to or to defend anything, but rather to create a new text out of the silences, omissions and slippages of the book that is under review here. In so doing, I am not claiming that my remarks had always been part of the book or even that they are in perfect harmony with that is already there. Rather, in keeping with an understanding of scholarship as structured dialogue, I will put forward three main propositions: first, I will argue that looking at conventional materials in unconventional ways is not only intellectually and politically defensible, but

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<sup>1</sup> Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020) 43.

<sup>2</sup> Kanad Bagchi, 'Materialism, Culture and the Standard of Civilization' (2021) 13(1) *European Journal of Legal Studies* 61; Julie Wetterslev, 'The Standard of Civilization in International Law' (2021) 13(1) *European Journal of Legal Studies* 81; Daniel R. Quiroga-Villamarín, 'Victorian Antics: The Persistence of the "Law as Craft" Mindset in the Critical Legal Imagination' (2021) 13(1) *European Journal of Legal Studies* 101; Rohini Sen, 'Reading and Readings of Capitalism as Civilisation' (2021) 13(1) *European Journal of Legal Studies* 117.

<sup>3</sup> Tzouvala (n 1) 216-17.

cannot but be at the centre of critical inquiry into law as both a critical and a legal business. Secondly, I will explain why I consider the conceptualisation of international law as a product of the 19<sup>th</sup> century to be persuasive on both disciplinary and historical materialist grounds and the implications of this periodisation. Finally, I will elaborate on my own understanding of historical materialism, its implications for law, and under what conditions it can encounter deconstruction productively.

However, before I proceed with any of this, I need to diverge: structured dialogues need not, and should not, produce consensus, but – if done properly – they tell us something valuable about ourselves and our work and in so doing, they transform both.<sup>4</sup> It is, then, a happy and strange confirmation of the death of the author that the best summary of this book's arguments has not been produced by me, but by Rohini Sen. Allow me to reproduce her writing at some length:

First, for capital to reproduce and expand in diverse and (sometimes) contradictory conditions, it is necessary for international law to emerge as desirable. Second, for international law to sustain itself as plausible and reformative, it is necessary for the standard of civilisation to be flexible. And finally, for the standard of civilisation to be sustainable, it is imperative for it to move within the oppositional poles (logic of improvement and logic of biology), and to make this contradiction invisible and unthinkable.<sup>5</sup>

Similarly, I am grateful to Kanad Bagchi for putting into words my less-than-conscious tendency to 'fuse different strands of critique' and seeing my efforts in 'disentangling deconstructionist and Marxist critiques' as one of the major contributions of this book.<sup>6</sup> Wetterslev, in turn, offered to me the

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<sup>4</sup> This constitution of the lawyerly subject by an infinite number of texts is yet another reason why its reification is both intellectually hopeless and politically suspect: 'Later on, out in the hall, in informal conversation, the legal thinker will, of course, readily admit that he is just as much a fit subject for sociological, economic, psychoanalytic explanations as the next guy. But when he is doing law, when he is in role, the rhetorical form of his statements will effectively deny all these twentieth-century knowledges in favor of eighteenth-century Lockean fantasies'. Pierre Schlag, 'Le Hors De Texte, C'est Moi - The Politics and the Domestication of Deconstruction' (1990) 11 *Cardozo Law Review* 1631, 1638-9.

<sup>5</sup> Sen (n 2) 128.

<sup>6</sup> Bagchi (n 2) 62, 66.

gift of her own research and, by implication, of generalisation: by discussing how 'civilisational' arguments have been deployed against the Mayangna and Miskitu people in Nicaragua, Wetterslev confirmed my intuition that civilisation's reach goes far beyond the episodic treatment that it received in my book.<sup>7</sup> At the level of politics, this is undeniably terrible news. However, acknowledging the pervasiveness of the problem can become the first step toward confronting it. Finally, Quiroga-Villamarín pushed me in valuable ways to think about and clarify not only what is critique to me, but also who is the critical subject in international law. I am grateful to all four for the care with which they treated this text.

## I. ON THE IMPORTANCE OF BEING CONVENTIONAL: CRITIQUE IN THE TIME OF INNOVATION

In contrast to the spectacular opening of the *Communist Manifesto*,<sup>8</sup> Volume I of *Capital* begins with an astoundingly trite observation:

The wealth of societies in which the capitalist mode of production prevails appears as an 'immense collection of commodities'; the individual commodity appears as its elementary form. Our investigation therefore begins with the analysis of the commodity.<sup>9</sup>

Marx is essentially saying that we are surrounded by stuff that costs money, and that the unremarkable nature of this observation is precisely what warrants a closer look. Enacting a similar sensibility, Gayatri Chakravorty Spivak and Edward E. Said articulated the provocative claim that Western literary works that are both canonical and canonically understood as being unrelated to imperialism, could, in fact, be read as being structured by the

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<sup>7</sup> See Wetterslev (n 2).

<sup>8</sup> 'A spectre is haunting Europe – the spectre of communism. All the powers of old Europe have entered into a holy alliance to exorcise this spectre: Pope and Tsar, Metternich and Guizot, French Radicals and German police-spies'. Karl Marx and Friedrich Engels, with an introduction by David Harvey, *The Manifesto of the Communist Party* (first published 1848, Pluto Press 2008) 31.

<sup>9</sup> Karl Marx with an introduction by Ernest Mandel, *Capital: A Critique of Political Economy Vol. 1* (first published 1867, Penguin Books 1990) 123.

imperial encounter.<sup>10</sup> Once you start thinking of *Jane Eyre* as a parable about imperialist feminism sacrificing the 'other' woman at the altar of the white woman's individuation, you simply cannot go back.<sup>11</sup> Or – to bring the conversation closer to the legal realm – think of Desmond Manderson's deconstructive reading of the Hart-Fuller debate.<sup>12</sup> What if – asks Manderson – this exchange that is central to any self-respecting legal theory course in the Anglophone world, does not represent two opposing and mutually exclusive positions? What if Fuller's naturalistic account is, in fact, surprisingly positivist and it is the Hartian view that fails to account for law as a sociological fact?<sup>13</sup> Critique is the exercise of rendering the familiar strange, and engaging with the international legal canon appears inescapable,<sup>14</sup> because the canon is both familiar and powerful. To put it differently, if one is engaged with critique not due to an aesthetic preference for being avant-garde,<sup>15</sup> but because one suspects that the world is in bad shape and really-existing international law plays some part in the violence, exploitation, and environmental collapse that is unfolding around us, then it becomes impossible not to engage with the conventional sites and materials of the discipline.

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<sup>10</sup> Gayatri Chakravorty Spivak, 'Three Women's Texts and a Critique of Imperialism' (1985) 12(1) *Critical Inquiry* 235; Edward E Said, *Culture and Imperialism* (Vintage Arrow 1994).

<sup>11</sup> 'When Jean Rhys, born on the Caribbean island of Dominica, read *Jane Eyre* as a child, she was moved by Bertha Mason: "I thought I'd try to write her a life". *Wide Sargasso Sea*, the slim novel published in 1965, at the end of Rhys' long career, is that "life". I have suggested that Bertha's function in *Jane Eyre* is to render indeterminate the boundary between human and animal and thereby to weaken her entitlement under the spirit if not the letter of the Law'. Spivak (n 10).

<sup>12</sup> Desmond Manderson, 'Two Turns of the Screw' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010).

<sup>13</sup> 'Hart's positivism fails to establish the "reality" of law which is its sole goal, while Fuller's morality constantly falls back on positivism to establish the ethics of law which is its sole goal'. Ibid 200.

<sup>14</sup> See Sujith Xavier and Ntina Tzouvala, 'Series Introduction – Teaching International Law: Between Critique and the Canon' *TWAIL Review* (12 March 2021) <<https://twailr.com/series-introduction-teaching-international-law-between-critique-and-the-canon/>> accessed 13 May 2021.

<sup>15</sup> If this is the reason you are doing it, I am not necessarily judging you, but you can stop reading now. There is not much in this piece that will be of interest to you.

In this respect, my response to Rohini Sen's concern that I do not engage with 'non-textual academic modes of intervention ... [that] perform a productive reading or viewing of international law texts against the mainstream'<sup>16</sup> would be twofold. My first reaction to this concern is that these forms of practice – albeit pivotal for the transmission of international law from generation to generation – would require robust socio-legal methods in order to be studied with some degree of integrity. International lawyers – with the possible exception of US-based ones – are generally not trained in these methods and they tend not to employ them consistently in their work. Instead of resorting to claims that these practices 'matter' – a statement vague enough to be true, but not in a way that actually clarifies much in most instances – or to pronouncements about whether these practices succeed (or not!) in remaking international law, I opted for focusing on those materials that can be meaningfully interrogated through the theories and methods available to me and to most international lawyers.

Secondly, a history of the 'standard of civilisation' inevitably focuses on the canonical texts of international law for the simple reason that this is where 'civilisation' was constructed. 'Civilisation' has been a hegemonic mode of arguing that has been used to authorise exploitation, dispossession and violence. If this is true, then being excluded from the disciplinary history of 'civilisation' might as well be testament to the fact that one has not been complicit in these processes of juridified injustice. 'Civilisation' has been a tale of capitalist power and hegemony, and those excluded from both have not been its authors. Mine is not a history of international law that tries to re-authorise the discipline by enlarging the pool of its participants and constituency. After all, while the International Court of Justice (ICJ) was adjudicating the 'sacred trust of civilisation' in South West Africa, the national liberation movement of the South-West Africa People's Organization (SWAPO) was adamant that the right of Namibians to govern themselves was in no sense dependent on the international legal right to self-determination.<sup>17</sup> Counter-hegemonic practices have often entailed a refusal

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<sup>16</sup> Sen (n 2) 133.

<sup>17</sup> See Tzouvala (n 1) 129.

to engage with international law or even an open hostility to it.<sup>18</sup> These acts of refusal and dissent need not be subsumed to a history of 'civilisation'.

Similar questions of archive and materials emerge out of Quiroga-Villamarín's review. His concern about my archive is that it is both too traditional and not traditional enough. In this telling, focusing on texts and textuality is an unnecessary concession to 'the mainstream', while at the same time historiographical novelty hinges on unearthing some new materials that will, presumably, reveal a new event, person or, well, text that will change our perception of international law due to its sheer novelty. This critique hinges on three assumptions: first, the idea that 'the mainstream' actually centres law's textuality; secondly, the idea that 'the material' allows us to transcend this textuality; and finally, that the aim of legal history as a critical enterprise is revelation. I am doubtful that any of these assumptions stand up to scrutiny. Formalist legal work does not centre textuality.<sup>19</sup> The idea that legal texts (judgments, treaties, textbooks, etc) are reflective of a transcendental essence, be it legal rules or legal principles, that exists somewhere else and needs to be worked out by either removing or filling in the impurities, inconsistencies, and gaps of the texts is the essence of legal formalism as theory and practice. This formalist posturing does a lot of things, but one thing it does not do is to treat seriously the textuality of law as anything other than an embarrassing inconvenience.

I will return to the question of materiality and textuality in the third section of this essay, but for now it suffices to say the following: if a jurisprudential critique does not centre on conventional legal texts, it remains an open question whether it is actually a jurisprudential critique and not something else, be it economic history, theory and history of technology and science, etc. This can be read as an act of gate-keeping, which would not be incorrect, but with one significant qualification: gates have two sides. Here, I am not so

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<sup>18</sup> See Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of Imperialism and International Law' in Kathryn Greenman and others (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021).

<sup>19</sup> I will assume for a moment that 'the mainstream' in 2021 international law means 'legal formalism at the service of a centrist liberal sensibility'. This is, however, my working definition, not Quiroga-Villamarín's, who appears to be using the term somewhat loosely.

much interested in protecting law from other disciplines or considerations, but rather in protecting everyone else from law and – more importantly – from lawyers.<sup>20</sup> Many of the structures that sustain global capitalism and imperialism simply have nothing to do with international law, and thinking otherwise is probably closer to 'the mainstream' than we care to acknowledge. Finally, if history is to perform a critical function in international law (and this is not a given),<sup>21</sup> it can absolutely do so by articulating new claims about how exactly is it that law moves through time and space without unearthing new facts or undiscovered treaties (even though this can be a worthwhile pursuit too).<sup>22</sup> What made *Imperialism, Sovereignty and the Making of International Law* a path-breaking book was not that before 2005, lawyers were not aware of Vitoria, the League of Nations or the 'war on terror' (they were well aware of all three), but rather that Anghie showed that these disparate moments could, in fact, be arranged as part of one story, that of imperialism as *the* structuring force of international law as a whole.<sup>23</sup>

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<sup>20</sup> Rasulov has offered one theory about the origins of this expansionist trend in international legal scholarship: 'Feeling bad about disciplinary renewals, however, is no more a central part of what makes someone a good international lawyer than feeling good about them ought to be a central part of what makes someone a good international law student. Think again: there are too few real jobs in the field, even today. The house of international law is overcrowded. Unless the old guard with their old ways and habits are completely squeezed out, the new guard will have no room to take as their own. What better way to go about securing a job, then, than with a disciplinary renewal?' Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19(3) *Leiden Journal of International Law* 799, 802.

<sup>21</sup> On the domestication of history, see Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon, Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

<sup>22</sup> One way of conceptualising this exercise is as 'critical redescription': Anne Orford, 'In Praise of Description' (2012) 25(3) *Leiden Journal of International Law* 609.

<sup>23</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

## II. ON PERIODISATION AND ITS CONSEQUENCES: CHRISTIANITY AND INTERNATIONAL LAW

Wetterslev's work on the Americas makes her alert to the question of Christianity as part of international law and of the civilising mission in a way that challenges my own.<sup>24</sup> In raising this point, her review incidentally raises broader questions of periodisation in the history of international law. Even though I do agree with her point that Christianity has operated both as part of the 'logic of biology' and as part of the 'logic of improvement' (and that my book did overlook this),<sup>25</sup> I am not convinced that this necessitates or even allows us to situate Catholic scholars such as Vitoria within the same historical trajectory as late 19<sup>th</sup>-century international legal scholars. In other words, even though my concerns about Koskenniemi's *The Gentle Civilizer of Nations* as international legal history are extensive, I agree with his proposition that international law as we know it is fundamentally a creature of the 19<sup>th</sup> century.<sup>26</sup>

My argument to that effect is threefold. My first point actually hinges on Christianity, or rather on its fragmentation. It is, indeed, hard to imagine that a Catholic theologian was part of the same lineage as Pasquale Fiore, when the latter wrote the following:

This was the sanguinary period of the religious wars. The horrible war of the Albigenses, the Crusades, the relentless struggles against the Protestants were directly due to the doctrine of the Papacy. A reaction, however, was not long in coming. As struggle began for the separation of the public law of the State from the public law of the Church, for the vindication of the essential attribute of human personality, the right to freedom of conscience, and for the freedom and equality of the three churches, Catholic, Lutheran and Calvinist. The Reformation finally triumphed and the victories it had gained were recognized in the treaty of Westphalia, which consecrated a principle of community among peoples professing different religious beliefs.<sup>27</sup>

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<sup>24</sup> See Wetterslev (n 2).

<sup>25</sup> See Wetterslev (n 2).

<sup>26</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International law 1870-1960* (Cambridge University Press 2001) 28-35.

<sup>27</sup> Pasquale Fiore, *International Law Codified and its Legal Sanction, or the Legal Organisation of the Society of States* (Baker 1918) 4.

Or that Vitoria inhabited the same intellectual universe as Bluntschli, who described the anti-liberal *Syllabus of Errors* of 1864 as a 'manifesto of war by ecclesiastic Absolutism over the modern world and its culture'<sup>28</sup> or, in other words, against civilisation. Even though Islam was overwhelmingly positioned by late 19<sup>th</sup>-century international lawyers as the greatest threat against civilisation, Catholicism followed closely after. Indeed, the rejection of non-Western societies from the realm of civilisation often did not hinge on their perceived strangeness, but rather on their perceived familiarity. The 'Orient' represented in the minds of many international lawyers the type of religious fanaticism and bigotry liberal Protestants had fought against at home only recently, and they were not about to allow it to come back through the window. And this is before we even try to account for Orthodox Christianity, represented by Russia and the always 'unruly' Balkans. Even though being Orthodox was certainly an advantage in comparison to the Muslim Ottoman Empire, close proximity to Islam was (and is) thought to have contaminated the Christian creed.<sup>29</sup> To return to Wetterslev's pre-occupation with Latin America, neither 19<sup>th</sup>-century international lawyers nor contemporary civilisational 'warriors' have considered that the continent's overwhelming embrace of Christianity (and especially Catholicism) resolve the question of its 'civilisational status'.<sup>30</sup>

This is, in my view, a story of discontinuity in more than one way. If writing about international law in the register of Marxist critiques of capitalism, another line of discontinuity worth taking seriously is that between mercantile and industrial capitalism. The transition between the two was

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<sup>28</sup> Quoted in Koskenniemi (n 26) 65.

<sup>29</sup> Huntington infamously categorised the Orthodox civilisation as distinct from the Western one: 'As the ideological division of Europe has disappeared, the cultural division of Europe between Western Christianity, on the one hand, and Orthodox Christianity and Islam, on the other, has reemerged' Samuel P Huntington, 'The Clash Of Civilisations?' (1993) 72(3) *Foreign Affairs* 22, 29-30.

<sup>30</sup> 'Historically, although this may be changing, Latin America has been only Catholic. Latin American civilization incorporates indigenous cultures, which did not exist in Europe, [and] were effectively wiped out in North America ... Latin America could be considered either a sub-civilization within Western civilization or a separate civilization closely affiliated with the West and divided as to whether it belongs in the West'. Samuel P Huntington, *The Clash of Civilizations and the Remaking of the World Order* (Simon and Schuster 1996) 46.

neither linear nor inevitable. It is worth recalling that during the 17<sup>th</sup> and 18<sup>th</sup> centuries, the joint transition to capitalism and to modern statehood stalled or was even reversed in large parts of Europe, especially Eastern Europe.<sup>31</sup> Jurisprudentially, this transition from mercantile to industrial capitalism was encapsulated in lawyerly concerns shifting away from a focus on trade and navigation to an emphasis on much more comprehensive demands for social transformation along the lines of capitalist modernity. Additionally, the legal tools through which these demands were articulated changed considerably. Even though the entanglement between state and capital persisted (and actually deepened), notions of corporate sovereignty and jurisdiction that were commonplace in the era of mercantile capitalism became increasingly unacceptable and eventually unthinkable in international law.<sup>32</sup> Instead, as Doreen Lustig has shown recently, the private corporation retained its power by jettisoning its international legal status and becoming sublimated under the state.<sup>33</sup> Similarly, pronouncements of universal reason as legally consequential – a defining feature of Vitoria's jurisprudence<sup>34</sup> – were strange to 19<sup>th</sup> and early 20<sup>th</sup> century international lawyers, whose work was much more ethnologically or, later, sociologically inflected. Even late 20<sup>th</sup>-century invocations of humanity as an organising principle of international law have

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<sup>31</sup> Charles S Maier, *Leviathan 2.0: Inventing Modern Statehood* (Harvard University Press 2014).

<sup>32</sup> On corporate jurisdiction in the early modern era, see Kate Miles, 'Uneven Empires: Extraterritoriality and the Early Trading Companies' in Daniel S. Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019). On the unsettled competition between state and company in 18<sup>th</sup>-century international law, see Sundhya Pahuja, 'Public Debt, the Peace of Utrecht and the Rivalry between Company and State' in Alfred HA Soons (ed), *The 1713 Peace of Utrecht and Its Enduring Effects* (Brill 2019).

<sup>33</sup> Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (Oxford University Press 2020).

<sup>34</sup> 'The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. [...] Further, they make no error in matters which are self-evident to others; this is witness to their use of reason'. Francisco de Vitoria, 'The First Relectio of the Reverend Father, Brother Franciscus de Vitoria on the Indians Lately Discovered' in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (The Lawbook Exchange 2000) xiii.

surprisingly state-centric legal implications, as they have been used to authorise the armed force of certain states against others or to propose limits on the veto powers of the P5.<sup>35</sup> As Susan Marks has observed, contemporary critics of state-centrism do not have much to offer other than an expanded sovereignty for certain (Western) states:

What begins as a discussion about the abuse of human rights turns into a discussion about which sovereignty to prefer: the sovereign right of Iraq to determine its affairs freely within its own boundaries, or the sovereign right of the United States and its allies to protect their citizens from criminal conspiracies hatched abroad? At a more straightforward level, the championing of humanity against state-centrism becomes a justification for the supreme expression of sovereign power, the use of military force.<sup>36</sup>

All in all, the argumentative structures, institutions and constraints contemporary international lawyers work with and against are fundamentally dissimilar from those of 16<sup>th</sup>-century jurists and theologians.

None of this is to say that Wetterslev's basic concern is unfounded. She has certainly convinced me that a more careful examination of religion as both a marker of 'improvement' and/or 'biology' would enable us to grasp something valuable about their intersections. This is an especially urgent task in the era of rising Islamophobia, as anti-Islamic animus, radicalising discourses and practices, and a capitalist ethos converge from the US-led 'war on terror' to Hindu-nationalist India to Xinjiang.<sup>37</sup> However, I am inclined to say that figuring out the links between religion and civilisation does not compel us to rearrange the periodisation of the book under review in ways that undermine the historical specificity of 'civilisation' and overemphasise continuity over rupture.

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<sup>35</sup> Amongst many: Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European Journal of International Law* 513.

<sup>36</sup> Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 *Leiden Journal of International Law* 339, 344-5.

<sup>37</sup> Cyra A Choudhury and Khaled A Beydoun (eds), *Islamophobia and the Law* (Cambridge University Press 2020).

### III. ON TEXTS AND MATERIAL STRUCTURES, OR ON HOW TO BE A MARXIST IN LAW

Kanad Bagchi's review raises two issues, which, albeit distinct, have their origins in some core politico-intellectual anxieties of mine. Bagchi rightly observes that in distancing myself from Pashukanis and in gesturing toward deconstruction and Derrida, I actually engage with neither at great length.<sup>38</sup> In regards to the former, Bagchi observes that my analysis could have benefited from greater engagement with the Soviet jurist, since we both posit the co-constitutive nature of international law and capitalism. This is obviously correct, but it somewhat understates Pashukanis' distinct contribution to legal theory. Indeed, all sorts of legal theorists to the left of centre, be it legal realists, critical legal theorists of the 1970s and 1980s, and contemporary law and political economy scholars, would be at home with the pronouncement that law and capitalism are co-constitutive. Pashukanis' argument, instead, was much more specific and aligned with an understanding of Marxist critiques of capitalism as a critique of social forms. In his *General Theory of Law and Marxism*, the Soviet jurist proposed that there was a fundamental homology between the legal form understood as entailing free and equal subjects and of the commodity form, namely the tendency of capitalist formations to present social relationships between humans as relationships between stuff. In his own words:

The legal relationship between subjects is only the other side of the relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.<sup>39</sup>

From this premise, Pashukanis drew a number of conclusions. The most important conclusion for him personally (because it got him killed) was that the persistence of the legal form constituted evidence of the persistence of capitalist relations of production and exchange. One can imagine why this was not warmly received in the Soviet Union of the 1930s. It is somewhat

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<sup>38</sup> See Bagchi (n 2).

<sup>39</sup> Evgeny Pashukanis, 'The General Theory of Law and Marxism' in Piers Beirne and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press 1980) 62.

more surprising that when contemporary inheritors of the Pashukanian tradition equate the continuing existence of international law with the continuing violence of capitalism,<sup>40</sup> they are accused of legal nihilism.<sup>41</sup>

This takes me to my own dilemmas when engaging with Pashukanis. As I explain in the conclusion of the book,<sup>42</sup> I remain agnostic about the possibility of a Marxist legal critique that focuses on *the* legal form. Instead, my analysis focused specifically on what I have come to see as one argumentative pattern amongst many in international law. My reasons for doing so are partly jurisprudential and partly Marxian. First, the legal form as encapsulation of free and equal subjects has more to do with the self-perception of liberal legal systems, than with the realities of capitalist international law. Even nominal commitment to sovereign equality has been surprisingly recent in the discipline, and remains accompanied by openly uneven distribution of rights, duties, immunities, liabilities, etc. In other words, if we are to focus on how the law actually operates, as opposed to the tales some legal systems tell about themselves, it is almost impossible to hold

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<sup>40</sup> It was the least controversial proposition in China Miéville's work that caused sustained controversy: 'The attempt to replace war and inequality with law is not merely utopian – it is precisely self-defeating. A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*'. China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 319. For a careful explanation and extension of what legal form critiques of international law do and do not entail, see Robert Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 *Leiden Journal of International Law* 413; Robert Knox, 'Imperialism, Commodification and Emancipation in International Law and World Order' (EJIL:Talk!, 29 December 2017) <<https://www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/>> accessed 13 May 2021.

<sup>41</sup> Writing about Miéville, BS Chimni remarked that: 'Equally the idea of international rule of law should be valued. In short, legal nihilism is the luxury of armchair academics. It cannot inform social and political movements in the real world'. BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press 2017) 477; See also: Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45(2) *Verfassung und Recht in Übersee: Law and Politics in Africa, Asia and Latin America* 195, 203-4.

<sup>42</sup> Tzouvala (n 1) 220.

on to the idea of the free and equal subject as the cornerstone of international law. Secondly, the fact that the Marxist critique of the capitalist mode of production is a critique of social forms does not necessarily mean that the Marxist critique of law in particular needs to be a critique of forms as well.<sup>43</sup> Perhaps law fits within the social totality of capitalism in ways that are reflective of the contradictions of really-existing capitalisms and not of the deeper logic of the capitalist mode of production. Perhaps the opposite is true. My relative non-engagement with Pashukanis was due to this uncertainty.

Bagchi also rightly observes another silence in the text, this time surrounding deconstruction. It is undeniably true that I opted for 'doing' deconstruction, instead of explaining it. For saying that 'it is worth revisiting these arguments as arguments and not as shadows of legal rules that exist independently of them'<sup>44</sup> is an accessible way of saying that 'there is nothing outside the text'.<sup>45</sup> Often the target of scorn by Marxists, liberals, and conservatives alike, this Derridean aphorism is both much more modest and much more ambitious than its critics allow for. Derrida was well aware of the existence of buses, bombs and starving bodies as existing outside book pages and he reminded his audience of them in the midst of neoliberal triumphalism in the 1990s. It is difficult to see how the author of the following was indifferent or unaware of material realities of dispossession, exploitation, and domination:

The aggravation of the foreign debt and other connected mechanisms are starving or driving to despair a large portion of humanity. They tend thus to exclude it simultaneously from the very market that this logic nevertheless seeks to extend. This type of contradiction works through many geopolitical fluctuations even when they appear to be dictated by the discourse of democratization or human rights.<sup>46</sup>

To say that 'there is nothing outside the text' is not to negate the existence of the world beyond a piece of paper, but rather to posit that the meaning of the

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<sup>43</sup> Contra: Rob Hunter, 'Critical Legal Studies and Marx's Critique: A Reappraisal' (2021) 31(2) *Yale Journal of Law and the Humanities* 389.

<sup>44</sup> Tzouvala (n 1) 190.

<sup>45</sup> Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press 1998) 21.

<sup>46</sup> Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (Routledge 1994) 103.

text does not correspond or depend on anything outside said text or, in other words, that

there is no pure transmission, uncorrupted by a secondary medium, that makes us one with our listeners or readers. To engage in deconstruction is to show, through close reading, how even the advocates of a metaphysics of presence end up acknowledging the inescapability of writing and all that it represents.<sup>47</sup>

As implied above, the implications of this thesis for formalist legal work are explosive. Suddenly, academic writings and, much more consequentially, judgments or memos cannot be assessed against some legal rules or principles that inhabit some transcendental sphere waiting to be discovered. Deconstruction invites us to treat legal texts as significant and signifying in their own right, and not as reflective of some external and eternal truth. In so doing, it undermines metaphysical thinking in relation to law. Indeed, a shared suspicion toward metaphysics is an undeniable point of convergence between Marxism and deconstruction.<sup>48</sup>

One could retort that one does not need deconstruction to move beyond metaphysical thinking in law. American legal realists crafted a wide range of arguments and tools in that direction.<sup>49</sup> Deconstruction's anti-metaphysical impulse, however, can bring into sharp focus one particular characteristic of Western international law: its reliance on symmetrical, binary oppositions (civilised/uncivilised), which upon examination turn out to be neither symmetrical (the uncivilised is conceptually subordinated to the civilised) nor exactly oppositions, since the hegemonic term (civilised) depends for its meaning on its nominal opposite (uncivilised). Nonetheless, as Kosofsky Sedgwick has noted, this conceptual incoherence is neither inefficacious or

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<sup>47</sup> Shuja Haider, 'Postmodernism Did Not Take Place: On Jordan Peterson's 12 Rules for Life' *Viewpoint Magazine* (23 January 2018) <<https://viewpointmag.com/2018/01/23/postmodernism-not-take-place-jordan-petersons-12-rules-life/>> accessed 13 May 2021.

<sup>48</sup> On this point, see Michael Ryan, *Marxism and Deconstruction: A Critical Articulation* (John Hopkins University Press 2019) 29-32.

<sup>49</sup> See notably: Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470; Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *Columbia Law Review* 809.

innocuous nor will it go away if it is named as such.<sup>50</sup> A quintessentially deconstructionist text such as the *Epistemology of the Closet* was also adamant that

rather than embrace an idealist faith in the necessarily, immanently self-corrosive efficacy of the contradictions inherent to these definitional binarisms ... contests for discursive power can be specified as competitions for the material or rhetorical leverage required to set the terms of and to profit in some way from, the operations of such an incoherence of definition.<sup>51</sup>

In my mind, this realisation opens the door for a tactical embrace of deconstruction by Marxists in international law. Because most of the incoherent definitions in international law tend to work for the reproduction of global capitalism, deconstructing them can be a politically useful move. If anything, Marxists are uniquely placed to perform the second part of the quote above, since we can offer the most persuasive theories about who benefits from these incoherent definitions and, therefore, even make sense of their surprising (for idealist international lawyers) endurance. In this respect, I have to disagree with Bagchi that the synthesis of Marxism and deconstruction is too sudden. To me, it seems long overdue.

#### IV. CONCLUSION

Both certain versions of Marxism and of deconstruction are at home with the idea that the subject is neither self-evident nor constructed through identity, but through relation and difference. My experience of engaging with these four thoughtful reflections has had me thinking about the forms of subjectivity that emerge out of critical work in the space of international law. One alternative is offered by Quiroga-Villamarín when he writes the following: 'for those already familiar with the plethora of work that Benton labels the interdisciplinary approach to global legal politics, it is difficult to pinpoint the novelty of Tzouvala's "history of international law"'.<sup>52</sup> Another is put forward by Sen when she asserts that: 'To that end, I find Tzouvala's

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<sup>50</sup> Eve Kosovsky Sedgwick, *Epistemology of the Closet* (University of California Press 2008) 10.

<sup>51</sup> *Ibid* 11.

<sup>52</sup> Quiroga-Villamarín (n 2) 111-112.

reading of Victor Kattan's account as speculative, interesting ... As a reader, I wonder about their differential mode of approach to reading, beyond a simple methodological difference in their historiographic processes'.<sup>53</sup> I intentionally picked two excerpts that are critical of the book under review to illustrate that they nevertheless hinge on entirely different critical legal subjectivities: the former is the critic as the 'subject who knows' and demands to be impressed by new information. In this telling, the critic differs from the 'mainstream' on account of the former's superior knowledge and understanding. This subject also appears in Quiroga-Villamarín's passing remark that he is 'not interested in what the mainstream (or surprisingly, some leading critical figures) consider *the* jurisprudential method'.<sup>54</sup> In stark opposition to this subjectivity, the critic that Sen portrays is one structured around curiosity and doubt. Her difference from the 'mainstream' is not its lack and her completeness, but rather her suspicion that lack is at the centre of everyone's subjectivity. The book under review tried to decentre the lawyerly subject by ignoring it, but if I was to say anything about it, then I would have to pick things up where Sen left them.

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<sup>53</sup> Sen (n 2) 125.

<sup>54</sup> Quiroga-Villamarín (n 2) 113.



## GENERAL ARTICLES

### PURE THEORY'S DECONSTRUCTION

Kristina Čufar\* 

*In this article, I engage with the deconstructive strategy at play in Hans Kelsen's highly influential Pure Theory of Law to highlight both its iconoclasm and its limitations. Pure theory is a critical undertaking, reflecting a commitment to confronting the ideological aspects of law and legal theory. Nevertheless, pure theory's critical edge remains mostly overlooked both in mainstream interpretations as well as in critical legal thought. To offer an alternative reading, I first flesh out pure theory's radical and efficient critique of the political prejudice ingrained in traditional legal theory by utilizing Derrida's framework of deconstruction. Secondly, I turn Kelsen's deconstructive tools against pure theory itself. Kelsen's insistence on the separation of law and violence results in an effective declaration of the superiority of the normative over the factual, constructing a self-deconstructive hierarchy. Rather than a defeat, this is an ironic affirmation of Kelsen's critical stance that refuses to validate any ideology.*

**Keywords:** Pure Theory of Law, Hans Kelsen, epistemology, deconstruction, Jacques Derrida

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## I. INTRODUCTION

In this article, I trace the deconstructive strategy at play in Hans Kelsen's Pure Theory of Law ('pure theory') in order to highlight both its iconoclasm and its limitations. This tracing is twofold: first, I draw inspiration from Jacques Derrida to flesh out the deconstructive strategy at play in pure theory's challenging of the political prejudices ingrained in legal theory. Second, I draw on Derrida's legal theory to highlight the self-deconstructive aspects of pure theory's onto-epistemology and its conceptualization of the relationship between law and violence. My reading strongly affirms pure theory as a critical and relevant approach to legal theorizing and proposes that Kelsen's inability to effectively disentangle law and violence is not a failure, but an ironic confirmation of his nonconforming philosophical outlook.

In the first part of the article, I set the stage for a deconstructive reading of pure theory by outlining Kelsen's motivations in constructing his theory and briefly summarizing pure theory's principal claims. Dealing with pure theory requires a recognition that its reception that regularly focuses on Kelsen's reconstruction of the legal system and side-lines his critical ambitions. Pure theory is often perceived as an ode to political and even economic liberalism. The political thrust of pure theory cannot be denied, but this thrust consists less in a praise of a certain mode of organizing a political and legal system and more in a lucid scepticism that favours suspicion over any ideal. Pure theory's critical tendencies nevertheless find some recognition in the literature. I engage with some readings of Kelsen's theoretical apparatus as radically critical and propose to take this line of interpretation even further.

In the second part of the article, I focus on Kelsen's epistemological program and its neo-Kantian presuppositions through the prism of his desire to construct a theory that would transcend its human creator and offer a perfectly objective description of law as an object of cognition. Pure theory's deconstructive strategy is rooted in Kelsen's ambition to erect a normative legal science that would lay bare both law and its theory and expose each as products of politics. Kelsen was on a mission to expose the prejudice and ideology at the heart of supposedly neutral concepts such as subjective right and objective law. Pure theory's deconstruction of this pairing is considered through Derrida's elaboration of the strategy.

Deconstruction, a double reading, always implies self-deconstruction. Hence, the third part of the article focuses on the impurities that Kelsen failed to exorcise from his theory. By concentrating on pure theory's prioritization of the normative vis-à-vis the factual, I argue that Kelsen's theory falls on its own sword. This argument departs from Kelsen's characterization of law as a coercive order and ventures to the very question of the foundations of legal validity. Pure theory's notorious *Grundnorm* (basic norm), presupposing an absent authorization of the original law-founding act, stands out not as the (theoretical) origin but as the whole becoming of legality.

The unauthorized act of power enshrining the initial norm of a legal order cannot be seen as an inconvenient origin of an otherwise disciplined organization; the *Grundnorm's* presupposition haunts the entire legal order – every legal norm echoes its essential question. To assert that law cannot be fully distinguished from the power and violence that both give birth to it and sustain it is not to assert that legal validity does not exist and that we ought to dismiss legal theory altogether. This claim rather celebrates Kelsen's critical spirit and pays tribute to his warning that law is a pernicious outcome of political struggles.

## II. PURE SCIENCE

### *I. Kelsen's Pure Theory of Law*

Pure Theory of Law is a product of thinking about the possibility of thinking about and cognizing law, an undertaking that occupies Kelsen just as much –

if not more – as thinking about and cognizing law itself. He acknowledges the chaotic state of the object of cognition and then rationalizes this chaos out of existence in order to arrive at a logical and coherent exposition of law's supposed essential traits.<sup>1</sup> The result of this undertaking – pure theory – is above all an epistemological project that presents itself as doubly pure: unadulterated by value judgments and by factual reality.<sup>2</sup>

While pure theory is widely perceived as Kelsen's theory, it is important to bear in mind that Kelsen was, at least during his European years, developing pure theory within a circle of like-minded individuals. Pure theory is thus a product of a collective effort and vivid debates; it is not just Kelsen's personal project.<sup>3</sup> Nevertheless, he was the undisputed trailblazer of the approach and its fiercest proponent. Doubtlessly, Kelsen gradually introduced changes and contradictions into the fibre of pure theory's system.<sup>4</sup> But as Alf Ross predicted in his 1936 review of the first edition of *Pure Theory of Law*:

Hopefully we can still expect many more works from Kelsen's productive hand, but in all probability nothing essentially new. This is because Kelsen's work is so distinctively *System*.<sup>5</sup>

This prediction turned out to be rather accurate and an investigation of Kelsen's critical stance demands a holistic approach to his theory. Accordingly, I understand pure theory as Kelsen's entire body of work on legal science/theory. I comprehend pure theory as a coherent whole, mixing

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<sup>1</sup> Hans Kelsen, *General Theory of Law and State* (Russell and Russell 1961) 437–439.

<sup>2</sup> Joseph Raz, 'The Purity of the Pure Theory' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 238. According to Comanducci, pure theory is (at least) triply pure – he adds the purity of the object, as the third purity. See Paolo Comanducci, 'Kelsen vs. Searle: A Tale of Two Constructivists' (2000) 4 *Associations* 33.

<sup>3</sup> Pure theory, as Kelsen never denied, is a product of stimulating discussions of the Vienna Circle at the turn of last century. For more on this, see Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368.

<sup>4</sup> For more on the issue of periodizing Kelsen's legal theory, see e.g. Stanley L Paulson, 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 *Oxford Journal of Legal Studies* 153.

<sup>5</sup> Alf Ross, 'The 25th Anniversary of the Pure Theory of Law' (2011) 31 *Oxford Journal of Legal Studies* 243, 244 (emphasis in original).

assertions made by Kelsen at various stages of his career as if they all belonged to an overarching narrative.

Pure theory is an investigation into the cognitive possibility of the normative realm of the Ought (i.e. norm, value, validity, immaterial existence, cognition, coherence, structure, reason, meaning, etc.), the category that allows Kelsen to avoid the great beyond of natural law metaphysics while retaining a strong emphasis on the non-factual nature of legal phenomena, which he seeks to explore scientifically. The normative realm is constructed by a legal thinker (of any kind, that is, whether a theorist, a practitioner, a layperson) on the basis of the factual realm of the Is (i.e. fact, matter, efficacy, power, volition, violence, force, chaos, action, will, nature, etc.).<sup>6</sup> In pure theory, law is both a fact (Is) and a meaning (Ought); yet without *meaning*, it would just be a fact – sheer power. Kelsen's plan, accordingly, is to emancipate the meaning qua norm; to establish it independently of the fact that 'carries it' in order to articulate law's essence.<sup>7</sup>

The onto-epistemological dualism of the Is and the Ought might not be pure theory's most appreciated aspect, as this dualism and the methodological postulates that come with it seem strange and perplexing to many readers.<sup>8</sup> Kelsen's reconstruction of a modern legal order as a hierarchical structure, on the other hand, seems to have captured the hearts and minds of generations. In his effort to logically organize normative material, Kelsen eagerly adopted the *Stufenbau* doctrine, focusing on the hierarchical structure of a legal system as a system of creation, to illustrate law's validity and dynamic, norm-

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<sup>6</sup> See e.g. Hans Kelsen, 'On the Pure Theory of Law' (1966) 1 *Israel Law Review* 1; Hans Kelsen, 'What Is a Legal Act?' (1984) 29 *American Journal of Jurisprudence* 212.

<sup>7</sup> Hans Kelsen, "'Foreword" to the Second Printing of Main Problems in the Theory of Public Law' in Paulson and Paulson (n 2) 19.

<sup>8</sup> To cite a famous example, HLA Hart nearly fell off his chair when Kelsen attempted to explain his onto-epistemology, which Hart did not seem to ever fully grasp. See HLA Hart, 'Kelsen Visited' in *Essays in Jurisprudence and Philosophy* (Clarendon 1983) 286-308. Of course, there are also authors who cherish the Is-Ought dualism as prerequisite for Kelsen's sharp critique and reconstruction of legal theory. See e.g. Jörg Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers, Or: What Use Is Kelsenian Theory' (2006) 12 *International Legal Theory* 5.

generating quality.<sup>9</sup> Since norms do not exist as facts or things, validity represents their specific mode of existence. According to pure theory, a legal system is a system of norms and each norm derives its validity from a higher norm.<sup>10</sup> Such tracing of legal validity eventually leads to the problem of infinite regress, as we climb the chain of norms all the way to the original norm that cannot be grounded in another.<sup>11</sup> No formal authorization of this founding moment can be found, as it concerns an act of power that posited the historically first constitution.

The question of foundations and its implications for a deconstructive reading of pure theory is discussed in more detail later on; for now suffice it to say that, since Kelsen's philosophical system intentionally excludes all non-legal material, the only remaining possibility is to ground law on law by presupposing the *Grundnorm* – the symbolic 'transformation of power into law'.<sup>12</sup> Unsurprisingly, the *Grundnorm* has proven a source of academic controversy ever since it emerged from Kelsen's writings; legal theorists have variously reproved it as 'a conceptual ragbag',<sup>13</sup> 'bizarre logic reasoning',<sup>14</sup> 'something comic',<sup>15</sup> 'so pathetically wrong that no further comment is

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<sup>9</sup> Kelsen adopted the *Stufenbau* doctrine from Adolf Merkl. See Andras Jakab, 'Problems of the *Stufenbaulehre*: Kelsen's Failure to Derive the Validity of a Norm from Another Norm' (2007) 20 *The Canadian Journal of Law and Jurisprudence* 35, 35–36.

<sup>10</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the *Reine Rechtslehre* or *Pure Theory of Law** (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1996) 55–57.

<sup>11</sup> *Ibid* 56–58.

<sup>12</sup> Kelsen, *General Theory of Law and State* (n 1) 437.

<sup>13</sup> Hamish Ross, 'Hans Kelsen and the Utopia of Theoretical Purism' (2001) 12 *King's Law Journal* 174, 193.

<sup>14</sup> Neil Duxbury, 'The Basic Norm: An Unsolved Murder Mystery' (2007) LSE Law, Society and Economy Working Papers 17/2007 <<https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS17-2007Duxbury.pdf>> accessed 15 January 2021.

<sup>15</sup> HLA Hart, *The Concept of Law* (Clarendon Press 1994) 236.

needed',<sup>16</sup> 'either unintelligible or unacceptable',<sup>17</sup> and 'fraught with danger',<sup>18</sup> to quote just a few examples.

Another controversial trait of pure theory is its monism. According to pure theory, national and international legal systems form one single system – a (conceptual) unity that cannot be examined separately. Kelsen explains that the unity of national and international law may be achieved by assuming that one is superior to the other, as long as a single *Grundnorm* validates and unites the entire system. It does not matter whether international law prevails over national or vice versa; either assumption is an ideologically constructed fallacy and is equally expedient from the perspective of pure theory.<sup>19</sup> Kelsen's monism reflects a belief in the unity of law, which in turn reflects a belief in the unity of the object of cognition.<sup>20</sup>

Pure theory, its aspirations to universality notwithstanding, is tailored to the systematic nature of the modern continental-style state law and the emerging consolidation of international law.<sup>21</sup> Pure theory addresses something concrete, despite the high level of abstraction it entails.<sup>22</sup> Much of the recent critique focuses on pure theory's state-centric approach, which no longer fits

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<sup>16</sup> Ronald Moore, 'Kelsen's Puzzling Descriptive Ought' (1972) 20 *UCLA Law Review* 1269, 1280, quoting Gustav Bergmann and Lewis Zerby, 'The Formalism in Kelsen's Pure Theory of Law' (1945) 55 *Ethics* 116.

<sup>17</sup> Graham Hughes, 'Validity and the Basic Norm' (1971) 59 *California Law Review* 695, 703.

<sup>18</sup> *Ibid.*

<sup>19</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange 1989) 344–347.

<sup>20</sup> In Kelsen's words: 'To know an object and to recognize it as a unity means the same thing'. Kelsen, *General Theory of Law and State* (n 1) 410.

<sup>21</sup> For an in depth and contextualized analysis of Kelsen's engagement with international law, consult e.g. Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010).

<sup>22</sup> Consider the following: 'Positive law is always the law of a definite community: the law of the United States, the law of France, Mexican law, international law. [...] The subject matter of a general theory of law is the legal norms, their elements, their interrelation, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders'. Kelsen, *General Theory of Law and State* (n 1) xiii.

the reality of the transformed postmodern 'lawscapes'.<sup>23</sup> Then, of course, there are also those who do not see the supposed conflict between pure theory and postmodern legal realities.<sup>24</sup> Pure theory may strike one as a relic of the past that still haunts our understanding of legal phenomena with its systematization and thus limits our imaginations in reconstructing (transformed) legal realities. Despite the controversy over the ongoing pertinence of pure theory, there is little resistance to the idea that Kelsen described brilliantly the prevailing legal order of his time.

The idea that pure theory got something very important very right is especially evident in the continental European tradition, where lawyers are trained to understand law along more-or-less Kelsenian lines. The question is: Why does pure theory's systemization fit our perceptions of law so neatly? Is it because pure theory captures the modern legal system so masterfully or because we, albeit unwillingly and unconsciously, observe the world through its lens? To borrow from one of Kelsen's philosophical idols, Friedrich Nietzsche,<sup>25</sup> is it possible that '[t]he world seems logical to us because we have made it logical'?<sup>26</sup> To deal with this question successfully, it is important to acknowledge that it was Kelsen's radical epistemological program, with all its strangeness, that made his celebrated vision of a modern legal system possible. Any critique or defence of pure theory must affirm this entanglement. Before delving fully into Kelsen's onto-epistemological system, it is instructive to observe how pure theory resonates in recent debates.

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<sup>23</sup> See e.g. Kaarlo Tuori, 'Whose Voluntas, What Ratio? Law in the State Tradition' (2018) 16 *International Journal of Constitutional Law* 1164.

<sup>24</sup> See e.g. Jörg Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Jörg Kammerhofer (ed), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014).

<sup>25</sup> Kelsen has his own reading of Nietzsche's thought. It is clear that he adores Nietzsche's vigour and recognizes him as a kindred spirit: 'Nietzsche, this sceptic and relativist, this heir of Enlightenment'. Hans Kelsen, *Secular Religion: A Polemic against the Misinterpretation of Modern Social Philosophy, Science and Politics as 'New Religions'* (Springer 2012) 225.

<sup>26</sup> Friedrich Wilhelm Nietzsche, *The Will to Power* (first published 1901, Vintage Books 1968) book 3 verse 521, 283.

The debate on pure theory is an enormous and heterogeneous field; it seems as though pure theory communicates everything and nothing, amounting to a riddle that can only be read by being read-into. While it would be impossible to engage with all the interpretations, appropriations, attacks, rejections, and reconstructions that pure theory has undergone since its inception in the early 20<sup>th</sup> century, a handful of examples will provide a point of departure for my reading, which explores pure theory's critical edge.

## *2. Pure Theory, Iconoclasm, and Radical Critique*

Pure theory as a quintessentially positivist legal theory does not seek, or so Kelsen claims, to prescribe how law ought to be. Polishing the bare bones of the quasi-universal legal structure, pure theory often reminds us of its moral relativism. Nevertheless, many readers remain unconvinced. Those who rebel against the rigid norms of positivist approaches to law all too often overlook the critical attitude of pure theory's apparent cynicism. Such critics tend to project political programs onto pure theory's empty structures. The list includes everything from fascism to democratic liberalism, from Bolshevism or even anarchism to capitalistic statism, from Catholic scholasticism or Protestantism to atheism. As Kelsen asserted in 1934:

In a word, the Pure Theory of Law has been suspected of every single political persuasion there is. Nothing could attest better to its purity.<sup>27</sup>

Interpretations of pure theory as a celebration of political liberalism are especially prominent, even though Kelsen denied such political contamination of this theory: 'It is clear to everybody who has read my works [...] that my theory of law from the beginning [...] has nothing to do with my political attitude as a liberal democrat'.<sup>28</sup> Regardless, inscribing pure theory with a (neo)liberal political program is a widespread and popular practice. I limit myself to two recent examples. Lars Vinx's reading of pure theory as the utopia of legality expresses enthusiasm about Kelsen's political philosophy and its commitment to liberal democracy, yet Vinx is underwhelmed when it comes to pure theory's lack of substantial moral commitment and is on a

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<sup>27</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 3.

<sup>28</sup> Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17 *Stanford Law Review* 1128, 1135.

mission to salvage pure theory from the 'grips of a crude ethical relativism'.<sup>29</sup> As he demonstrates, pure theory can easily be transformed into natural law by substituting Kelsen's analytical *Grundnorm* with 'some substantive moral principle'.<sup>30</sup> This rewriting of pure theory is based on the assumption that pure theory is a rule of law theory, committed to the defence of liberal constitutional democracy and individual freedom. Kelsen might disagree:

[T]he rule of law principle does not guarantee the freedom of the individual but only the possibility of the individual to foresee, to a certain extent, the activity of the law-applying, that is, the administrative and judicial, organs, and hence to adapt his behavior to these activities.<sup>31</sup>

Another example of engagement with pure theory's liberal leanings is Mónica García-Salmones Rovira's interpretation of Kelsen as a neoliberal. She criticises Kelsen's vision of law as serving business interests instead of the interests of universal justice and equates his moral relativism with nihilism.<sup>32</sup> Yet Kelsen himself never equated political liberalism with the postulates of the free market:

The life-principle of every democracy is therefore – not, indeed, as has sometimes been supposed, the economic freedom of liberalism, for there can just as well be a socialist democracy as a liberal one – but rather spiritual freedom, freedom to express opinions, freedom of belief and conscience, the principle of toleration, and more especially, the freedom of science, in conjunction with the belief in its possible objectivity.<sup>33</sup>

Kelsen's sharp and critical attitude is often perceived as disturbing and in need of revision, but what is disturbing to some is the prerequisite of critique to others. Alexander Somek celebrates pure theory's destructive and deconstructive ethos as a much-needed alternative to the currently more

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<sup>29</sup> Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007).

<sup>30</sup> Ibid 58.

<sup>31</sup> Hans Kelsen, 'Foundations of Democracy' (1955) 66 *Ethics* 1, 77–78.

<sup>32</sup> Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press 2014) 120–156.

<sup>33</sup> Hans Kelsen, 'State-Form and World-Outlook' in Ota Weinberger (ed), *Essays in Legal and Moral Philosophy* (Reidel 1973) 101–102.

prominent Hartian version of legal positivism.<sup>34</sup> Unlike commentators who perceive pure theory as *démodé* in the context of postmodern post-national lawscapes, he embraces one of the most criticized aspects of pure theory, its monism, arguing that pluralism itself may be perceived as but a closeted form of monism.<sup>35</sup> Somek understands Kelsen's monism as disenchanting and capable of transcending the state-centred apprehension of law that haunts much of pluralist and dualist legal theorizing. Furthermore, he recognizes the monist-dynamic understanding of law – seeing law as a unity in constant becoming, i.e. constant transformation – as attractive to those sceptical of universal morality and the related idea that the validity of a legal norm depends on its moral content.<sup>36</sup>

Jörg Kammerhofer also values Kelsen's radical positivism. Understanding pure theory as a critical and deconstructive effort, he strongly endorses its continued salience for (international) legal scholarship.<sup>37</sup> Without denying the transformations of lawscapes taking place, he affirms pure theory as a useful and productive toolbox for a present-day legal scholar. He accepts that certain modifications to Kelsen's original wording are in order if pure theory is to remain relevant to legal research, yet pure theory's core strikes him as relevant as ever. He aims to dispel the stigma attached to Kelsen's name by faithfully following pure theory's radical epistemological program, taking into account the historical context in which it was developed.<sup>38</sup> In the

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<sup>34</sup> Alexander Somek, 'Legality and Irony' (2016) 7 *Jurisprudence* 431; Alexander Somek, 'The Spirit of Legal Positivism' (2010) University of Iowa Legal Studies Research Paper No. 10-21 <<https://papers.ssrn.com/abstract=1621823>> accessed 2 May 2017.

<sup>35</sup> Alexander Somek, 'Monism: A Tale of the Undead' (2010) University of Iowa Legal Studies Research Paper No. 10-22 <<http://papers.ssrn.com/abstract=1606909>> accessed 23 April 2016.

<sup>36</sup> Alexander Somek, 'Stateless Law: Kelsen's Conception and Its Limits' (2006) 26 *Oxford Journal of Legal Studies* 753, 767.

<sup>37</sup> Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' (n 24); Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers' (n 8).

<sup>38</sup> Jörg Kammerhofer, 'Hans Kelsen's Place in International Legal Theory' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 143-167.

process, he fleshes out one of the key strengths of pure theory: its ability to unmask the political prejudices underlying much of legal theory to this day.<sup>39</sup>

Christoph Kletzer also shows great appreciation for pure theory and attempts to demonstrate the lucidity and elegance of Kelsen's neo-Kantian theory.<sup>40</sup> He understands that pure theory's objective is epistemological and shows great sympathy for the fundamental question of legal theory as articulated by Kelsen: How is legal science possible? Another aspect of pure theory that Kletzer finds deserving of attention is its conception of law and violence, law and force. Kelsen keeps referring to law as a coercive system, understanding the term coercive in its broadest sense.<sup>41</sup> It is important to note that for Kelsen law (the normative) is not identical with force or violence (the factual); law is rather an organization of force. Kletzer embraces this idea and uses it to challenge the common obsession in Anglo-Saxon analytical jurisprudence with demonstrating that there is no direct link between law and force, largely in an effort to avoid appearing Austinian.<sup>42</sup>

Kletzer agrees with Kelsen that law is not force but an organization of force. Indeed, Kelsen was focused on understanding the possibility of cognizing the ways in which force is organized and employed. This is a critical undertaking,

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<sup>39</sup> Kammerhofer adopts a Kelsenian stance in interpreting the political ideology of constitutionalism as present-day natural law theory posing as legal positivism. See *ibid* 151.

<sup>40</sup> See generally Christoph Kletzer, *The Idea of a Pure Theory of Law: An Interpretation and Defence* (Bloomsbury 2018).

<sup>41</sup> More specifically, Kelsen refers to law as a 'specific social technique of a coercive order'. The question of coercion and material force is addressed further on in more detail. For now, see Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 *University of Chicago Law Review* 75.

<sup>42</sup> John Austin's legal theory is infamous for defining law as a sovereign's command backed by a threat of sanction. For some discussion of Austin's theory and its general rejection by the positivists – most notably Hart – see e.g. Frederick F Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23 *Ratio Juris* 1; Hart, *The Concept of Law* (n 15) 18–25. Kelsen describes pure theory as close to Austin's analytical jurisprudence, but also as more nuanced and consistent. He is bothered by the conflation of fact and meaning and of coercion and sanction in Austin's command theory. For Kelsen's full engagement with Austin, see Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44, 54–70.

rejecting moralistic fantasies in which law is too virtuous to need to rely on the threat of violence or force.<sup>43</sup> It is indeed not popular to be too vocal about one's perception of law as coercive, since such an assertion supposedly blocks us from realizing law's true essence, potential, and reach.<sup>44</sup> While it is true that Kelsen does not shy away from the coercive nature of law, modern positivism – pure theory included – is nevertheless an attempt to divorce law's essence from coercion, force, power, and violence.

Kelsen never loses sight of the fact that law is born out of force, that law's founding moment boils down to an unauthorized act of law creation that can only be remedied by a recourse to fiction. Simultaneously, however, Kelsen's epistemological dualism of the Is and the Ought implies a hierarchy in which law, an organization of force, is superior to mere force. While Kelsen puts his finger on an important and highly disturbing aspect of legal phenomena, he still perceives law as a possible tool for reducing and taming the violence inherent to human sociability. He understands that law may organize violence in the most disquieting ways<sup>45</sup> and yet he believes that legal order also holds potential for something greater. Pure theory's conception of law and violence is thus both deconstructive and self-deconstructing, as I examine more closely later on.

The problematic notion of the separation of law and violence or law and power is a popular motive for critical legal scholars. If much positivist theory attempts to relativize law's dependence on violence, critical scholarship has focused a lot of attention on this very issue. Even though Kelsen's radical positivism inspires a critical outlook, pure theory usually receives but a brief

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<sup>43</sup> Kletzer (n 40) 21-25.

<sup>44</sup> For discussions of the role of coercion in (positivist) legal theory and the strong tendency of legal theory to justify force/violence of/in law, see e.g. Frederick F Schauer, *The Force of Law* (Harvard University Press 2015); Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms'. (2008) 42 *University of Richmond Law Review* 1195.

<sup>45</sup> Consider Kelsen's following statement: 'The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinion, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of those states'. Kelsen, *Pure Theory of Law* (n 19) 40.

mention as a traditional theoretical foe in critical writings. The reasons for this are, again, rooted in Kelsen's rigid epistemology. Panu Minkkinen's close critical engagement with pure theory's onto-epistemological implications stresses the importance of active engagement with the tradition of legal positivism as a necessary step in overcoming the restraints imposed on legal philosophy.<sup>46</sup> Minkkinen places Kelsen at the heart of 'thinking without desire' – the tradition of the detached study of law that rejects justice equated with truth as an unattainable ideal and focuses instead on the mundane aspects of law as it is – that is, on (truth as) correctness. Minkkinen's exploration of continental legal philosophy reveals that, despite Kelsen's intentions, desire cannot be disentangled from cognition. Kelsen's desire to divorce scientific research from any personal inclinations is in stark contrast with the explicitly political critique of legalities performed by critical legal thinkers. Indeed, Kelsen's epistemological norms are highly restrictive, yet his own critique is far from disinterested, as it will emerge more clearly from the following section.

### III. PURE ICONOCLASM

#### *1. Norms of Thinking: Pure Theory's Prescriptive Dimension*

To avoid falling prey to any political ideology, Kelsen takes refuge in the ideal of scientific objectivity. Scientific objectivity – not merely an ideal but a self-imposed norm – is Kelsen's core value and it demands discipline and detachment: this is the prescriptive dimension of pure theory. Pure theory's contribution to legal studies is not so much the information pure theory transmits about the structure of a modern legal system. Instead, what is crucial is what pure theory transmits in terms of norms of thinking, instructions on purification, and disconnect with the world 'as it appears to us'.<sup>47</sup> Pure theory seeks to establish a legal-philosophical method capable of achieving certainty and objectivity, mirroring the illusive ideal of modern

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<sup>46</sup> Panu Minkkinen, *Thinking without Desire: A First Philosophy of Law* (Hart 1999) 1-50, 183-187.

<sup>47</sup> Kelsen, *General Theory of Law and State* (n 1) 434.

natural science.<sup>48</sup> This epistemology, Kelsen hopes, has the potential to become *the* legal science.

Paradoxically enough, considering that pure theory presupposes the highest (humanly obtainable) level of objectivity and self-annihilation of the legal thinker, it is Kelsen's embodied and embedded experience that offers an insight into his iconoclastic ambitions.<sup>49</sup> The ideals chased by Kelsen are unattainable and yet this fact does not invalidate his intellectual project. If anything, Kelsen's failure to achieve full objectivity demonstrates the deconstructive play blurring the line between the subjective and the objective. Having witnessed two World Wars, the dissolution of great empires, the rise of Nazi fascism, and the reconstitution of the global politico-legal landscape, Kelsen was well aware of the enormous challenges facing humanity. State theory, natural law, religion, and the nationalisms of his time are the targets of his scientific rage, as they represent attempts to disempower and subjugate human beings.<sup>50</sup> Pure theory, with its deconstructive strategy, aims to expose the instabilities inherent in these very narratives. Kelsen is convinced that it is the lack of scientific rigor that has led legal theory to become nothing but an apologetic discourse of the ruling ideology.<sup>51</sup> The rigid and ascetic epistemological norms put forward by pure theory, on the other hand, hold the promise of exposing rather than masking political interests in the corpus of law and its theory; the critical scientific-philosophic approach and its strict norms of thinking are the only means of escaping the swamps of dualisms, fictions, and personifications – that is, from metaphysical representations (or so Kelsen believes).

For Kelsen, 'ideological', 'metaphysical', and 'ontological' are synonyms. From its inception, one of pure theory's main objectives was to challenge the traditional legal theorizing and to construct a dynamic theory of law capable of perceiving law as an ever-changing and hence always changeable

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<sup>48</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 4.

<sup>49</sup> While rejecting the strict distinction between norm and fact proposed by modern legal positivism, Douzinas and Gearey acknowledge Kelsen's theory as a response to the spectacular failure of the Weimar Republic and an attempt to counter Nazi irrationalism. See Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005) 157.

<sup>50</sup> Hans Kelsen, 'God and the State' in Weinberger (n 33).

<sup>51</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 2.

phenomenon. This motivated Kelsen to deconstruct the pairings of being and becoming, subjective right and objective law, and private and public law, as well as to reject the differentiation between natural and juridical persons.<sup>52</sup> Kelsen's aim is not to invent a new political system, but to criticize the existing one in hope of its transformation. Pure theory's sharp description will not appeal to the law-creating authorities, he warns, nor will it provide a blueprint for the forces aiming to erect a new legal order in place of the old.<sup>53</sup> While Kelsen had his own vision of a desirable legal order, he was keenly aware that the inevitable transformations of law may take myriad shapes and that their legality will not depend on their (endlessly relative and contingent) moral adequacy.

The era in which Kelsen rose to prominence was profoundly characterized by the incredible progress of the natural sciences and their ability to produce ultimate, reliable, and verifiable truths/results.<sup>54</sup> Empiricism was thriving, and the entire history of metaphysics seemed but a dead end. This was also obvious in legal theory. Kelsen's normativist project may be seen as a direct response to the fact-centred legal positivism of the 19<sup>th</sup> century, in both its expressions: historicism and naturalism. Such positivisms took empiricism as their guiding norm and thus obliterated the Ought as belonging to the unscientific realm of metaphysical investigation.<sup>55</sup> Kelsen's question '(how) is science of law as a normative phenomenon possible?' echoes one of the basic questions of neo-Kantianism, which in its essence is a theory of knowledge.

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<sup>52</sup> Kelsen, "'Foreword" to the Second Printing of Main Problems in the Theory of Public Law' (n 7).

<sup>53</sup> Ibid 106–107.

<sup>54</sup> For more on the development and status of the natural sciences and their relationship with/influence on philosophy in this era, see Cathryn Carson, 'Method, Moment, and Crisis in Weimar Science' in Peter Eli Gordon and John P McCormick (eds), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013).

<sup>55</sup> Agostino Carrino, 'Between Weber and Kelsen: The Rebirth of Philosophy of Law in German-Speaking Countries and Conceptions of the World' in Ian Bryan, Peter Langford and John McGarry (eds), *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber* (Routledge 2015) 23–24.

## 2. Kelsen's (Neo)Kant(ianism)

In pursuit of his goals, Kelsen finds a 'frenemy' in Kant who, to Kelsen's satisfaction, addresses the question of the possibility of the cognition of facts without recourse to metaphysics. Kelsen aims to address the same question in the normative sphere.<sup>56</sup> From the time he joined the ranks of academic lawyers, Kelsen was convinced that legal scientific philosophy lagged behind other fields and was clearly frustrated by this. The entire struggle for legal positivist methodology, in Kelsen's eyes, resulted time and again in a reiteration of metaphysics. Kelsen believed that pure theory represented a revolution:

Pure Theory of Law was the first to try to develop Kant's philosophy into a theory of positive law [...], it marks in a certain sense a step beyond Kant, whose own legal theory rejected the transcendental method. [...] The Pure Theory of Law first made the Kantian philosophy really fruitful for the law by developing it further rather than clinging to the letter of Kant's own legal philosophy.<sup>57</sup>

To construct an objective theory of law, Kelsen rejected Kant's practical reason and natural law, perceiving them as rooted in Christianity and thus in the dreaded metaphysical duplication, that is, the doubling of the object of cognition rooted in superstitious metaphysical beliefs about heaven and earth and the like. This leads Kelsen to the following conclusion about Kant:

The struggle which this philosophical genius, supported by science, waged against metaphysics, which earned him the title of the 'all-destroyer', was not actually pushed by him to the ultimate conclusion. In character, he was probably no real fighter but rather disposed to compromise conflicts.<sup>58</sup>

Kelsen, in contrast, saw himself as a true fighter, a fearless demystifier. While Kant understood legal validity as absolute, Kelsen's pure theory understands

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<sup>56</sup> 'Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms?"' Kelsen, *Pure Theory of Law* (n 19) 202.

<sup>57</sup> Hans Kelsen, 'The Pure Theory of Law, "Labandism", and Neo-Kantianism. A Letter to Renato Treves' in Paulson and Paulson (n 2) 172.

<sup>58</sup> Kelsen, *General Theory of Law and State* (n 1) 444.

it as relative. It is not easy to be a positivist, Kelsen speculated – the desire to uncover the 'absolute foundation' is too forceful. Hence legal positivism had never yet appeared in the entirety of history.<sup>59</sup> Pure theory was about to change this, Kelsen hoped, and thus change the trajectory of history itself. He self-identified as the all-destroyer of legal metaphysics (which he imagined to be identical with natural law). In other words, he understood himself as the Kant-becoming-Nietzsche of jurisprudence.

Simultaneous rehabilitation and transformation of Kant's original critique, as well as the employment of the transcendental method, conceptualism, idealist epistemology, and the rejection of Kant's 'thing-in-itself', are the traits of the neo-Kantian movement.<sup>60</sup> The neo-Kantians preceding Kelsen intended to save philosophy as a transcendental critique of knowledge and thus preserve room for reasonable speculation. At the centre of their interest is the question of the object of study and the methodology creating this object; in other words, an attempt to solve the crisis of philosophy with epistemology. Kelsen himself was convinced that knowledge consists in the formal construction of the object of study according to the rigorous principles governing concept-formation. Human reason, in the (neo)Kantian imaginary, creates the life-world without being shaped by it.

Nevertheless, Kelsen's (neo)Kantianism remains debatable. For example, some authors believe that he stopped being a (neo)Kantian after he moved to

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<sup>59</sup> Ibid 445.

<sup>60</sup> Neo-Kantianism as an intellectual movement encompasses a multiplicity of irreconcilable views and approaches that nevertheless share a common thread. Kelsen's approach is the closest to the neo-Kantian philosophy of value that replaces the ontological existence of values (Is) with their axiological validity (Ought), thus supposedly enabling an investigation into transcendental values (formal validity) as the unconditional standards of transcendent values (what 'ought to be', legitimacy). The philosophy of value is associated with Heinrich Rickert. For more on affinities between Rickert's philosophical system and Kelsen's approach, see Christian Krijnen, 'The Juridico-Political in South-West Neo-Kantianism: Methodological Reflections on Its Construction' in Ian Bryan, Peter Langford and John McGarry (eds), *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber* (Routledge 2015).

the United States<sup>61</sup> because the second (and more popular) edition of Pure Theory, which Kelsen wrote for the Anglo-Saxon public in his American years, differs somewhat from the first edition in both its style and its content.<sup>62</sup> Some read Kelsen's fascination with Hume's philosophy as a rejection of Kant. Yet Kelsen saw Hume as one of Kant's influences and, thus, not incompatible with Kant's theory of cognition.<sup>63</sup> Essentially, pure theory still remained as it was; or, as Kelsen himself stated in 1965: 'Its very essence is and always has been that it is *Erkenntnis*-jurisprudence in the true sense of this term'.<sup>64</sup> I am not convinced by the theory that Kelsen somehow dramatically transformed from a (neo)Kantian into an analytical legal philosopher, especially considering the intimate connection between Anglo-Saxon analytical philosophy and (neo)Kantianism.<sup>65</sup>

### 3. Pure Theory and Deconstruction

This section deals with deconstruction, drawing connections between pure theory and Derrida's quasi-transcendental critique of the metaphysics of presence. Derrida's work, too, is indebted to Kant's critical project and is generally considered as an important milestone in post-Kantian philosophy. The reading of Kelsen's deconstruction through Derrida allows us to move away from the rigidity of traditional neo-Kantian method and shift the focus towards the rebellious spirit animating Kelsen's purist enterprise.

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<sup>61</sup> For a glimpse into this debate, see Stanley L. Paulson, 'Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory' (1999) 19 *Oxford Journal of Legal Studies* 351. Regarding the debate on Kelsen's (neo)Kantianism, see e.g. Alida Wilson, 'Is Kelsen Really a Kantian?' in Richard Tur and William L Twining (eds), *Essays on Kelsen* (Clarendon Press 1986); Hillel Steiner, 'Kant's Kelsenianism' in Tur and Twining (n 61); Stefan Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?' in Paulson and Paulson (n 2); Geert Edel, 'The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen' in Paulson and Paulson (n 2); García-Salmones Rovira (n 32) 126–129.

<sup>62</sup> Most notable is Kelsen's switch to will doctrine, see: Kelsen, 'Professor Stone and the Pure Theory of Law' (n 28) 1138.

<sup>63</sup> Kelsen, *Secular Religion* (n 25) 129–136.

<sup>64</sup> Kelsen, 'Professor Stone and the Pure Theory of Law' (n 28) 1135.

<sup>65</sup> See e.g. Hans-Johann Glock, 'The Development of Analytic Philosophy: Wittgenstein and After' in Dermot Moran (ed), *The Routledge Companion to Twentieth-Century Philosophy* (Routledge 2008).

Revisiting Kelsen's rebellious ambitions is instructive for two reasons. Firstly, it allows for a reconsideration of Kelsen's place in jurisprudence and permits a reading of pure theory as a multidimensional complexity rather than writing it off as a nemesis of critical legal thought. While pure theory's rigidity and essentialism certainly invite criticism, pure theory nevertheless exposes many of law's theoretical vulnerabilities and points towards the endless possibility of legal reform. Secondly, while the prejudices inscribed in both legal texts and legal rationality uncovered by Kelsen's anti-ideological methodology might be old news, they still deserve further criticism as the narratives attacked by Kelsen largely remain naturalized and normalized.

Undoubtedly, a lot has changed in the world (of law) since Kelsen's death, yet his theory still resonates strongly. Despite global transformations and shifts in the distribution of power, the old models of private property remain unchanged and corporate interests are intimately intertwined with populists railing against globalization. But what has pure theory to do with any of this? Pure theory – notwithstanding interpretations that would place it at the heart of (economic) liberalism – ruthlessly exposes capitalism as an ideology amongst other ideologies and traces the naturalizations of its principles in legal theory. Pure theory's laying bare of the capitalist prioritization of private property, which calls attention to the contingency of the capitalist system and the possibility of its transformation, thus remains extremely instructive in the current atmosphere. Therefore, it is prudent to pay more attention to pure theory's decentring of property rights, a seldom-discussed aspect of Kelsen's theory that does not fit in with the familiar story of pure theory as the guardian of the status quo.

The public-private divide and the conception of private property as central, along with the ideal of an autonomous individual subject qua owner, have been meticulously dissected in the past decades.<sup>66</sup> Nevertheless, Kelsen's deconstruction reminds us of the responsibility of legal theorists to remain alert and capable of questioning the presuppositions of their own beliefs and ideals. It also reminds us that the biggest challenges of our age, distinctive and

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<sup>66</sup> Indeed, this is one of the central arguments of critical legal thought. See e.g. Susan B Boyd, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press 1997); Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000).

unique as they might seem, are not all that different from those of a century ago. As discussed, Kelsen harbours deep suspicion towards metaphysical dualisms and is a masterful deconstructor of received narratives. To stress the subversive power underlining Kelsen's arguments, it is fruitful to relate his legal theory to Derrida's framework of deconstruction. It is important to underline that pure theory is itself deconstructable and vulnerable to its own critical approach: the play of deconstruction that happens *in* and *to* pure theory. The double genitive, adored by Derrida, is at play here.

The double genitive is a recurring theme in Derrida's writings and a helpful introduction to his deconstruction. Deconstruction is a form of radical philosophical critique originating in literary theory but extending to an array of pressing philosophical and political issues. Deconstruction, as Derrida presents it, is all about complexification and openness. It is not a method; rather it is a process, a strategy.<sup>67</sup> Derrida's double genitive is an expression of the ambiguity that haunts our language, as the title of his book *Spectres of Marx* suggests. Loaded with two meanings, this title takes advantage of the subjective and the objective use of the genitive, invoking both the ghosts of Marx haunting us and the ghosts haunting Marx and his works.<sup>68</sup> Derrida's deconstructive strategy calls attention to the hierarchical relationships defining seemingly neutral dualisms (speech-writing, mind-body, male-female, presence-absence, and so on) and invites what has been silenced and excluded in the construction of such hierarchies back into play.<sup>69</sup> Derrida puts forward a fierce critique of western metaphysics but also quickly recognizes his project as its part rather than its end. There is no text that

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<sup>67</sup> In Derrida's words: '[D]econstruction, that strategy without which the possibility of a critique could exist only in fragmentary, empiricist surges that amount in effect to a non-equivocal confirmation of metaphysics'. Jacques Derrida, *Dissemination* (Athlone 1981) 7.

<sup>68</sup> Pierre Macherey and Ted Stolze, 'Marx Dematerialized, or the Spirit of Derrida' (1995) 8 *Rethinking Marxism* 18, 18–19.

<sup>69</sup> See e.g. Jacques Derrida, 'Differance' in *Speech and Phenomena, and Other Essays on Husserl's Theory of Signs* (David B Allison tr, Northwestern University Press 1973); Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, corrected ed, Johns Hopkins University Press 1998) 3–93.

could not be deconstructed, even 'deconstruction always in a certain way falls prey to its own work', as he puts it.<sup>70</sup>

How can we connect Kelsen with Derrida, whose post-structuralist approach is often seen as the enemy of the certainty and truth celebrated and pursued by Kelsen's positivist vision? Of course, Kelsen's and Derrida's respective approaches are far from identical. Unlike Derrida, Kelsen embraces neo-Kantianism, its epistemological binaries, and its norms of thinking. In this sense, his understanding of critique is in stark contrast with Derridean deconstruction. Nevertheless, Derrida's deconstruction of law has been designated as the 'most sustained critique of metaphysics since logical positivism'.<sup>71</sup> Moreover, Derrida's engagement with law is deeply marked by Kelsenianism, the prevailing (if indirect and insidious) stance among jurists in Derrida's French cultural context.<sup>72</sup> Just like French jurists who operate in the shadow of pure theory without explicitly declaring themselves Kelsenians, Derrida does not mention pure theory either as an inspiration or as a theoretical foe. Critical legal thinkers, often adopting Derrida as an ally, rarely mention Kelsen's pure theory as anything but an example of the traditional legal thinking that must be overcome. Yet there is a very interesting intersection between the two approaches. To flesh this out, let us take a closer look at Kelsen's deconstruction of the pairing of objective law and subjective right.

#### *4. Metaphysics of Property: Pure Theory's Deconstruction*

Kelsen, disturbed by the dualism of objective law and subjective right, concentrated on the fetishization of subjective right in legal theory. As he points out, subjective right stands, first and foremost, for private property:

The ideological function is easy to see in this utterly self-contradictory characterization of the concepts of subjective right and legal subject. The notion to be maintained is that the subjective right, which really means private property, is a category transcending the objective law, it is an

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<sup>70</sup> Derrida, *Of Grammatology* (n 69) 24.

<sup>71</sup> Merold Westphal, *Overcoming Onto-Theology: Toward a Postmodern Christian Faith* (Fordham University Press 2001) 219.

<sup>72</sup> For more on this, see Pierre Legrand, 'Introduction (Of Derrida's Law)' in Pierre Legrand (ed), *Derrida and Law* (Routledge 2017).

institution putting unavoidable constraints on the shaping of the content of the legal system.<sup>73</sup>

Such fetishization represents subjective right as the predecessor of any objective legal system: 'In line with its original function, the dualism of objective law and subjective right expresses the idea that the latter precedes the former logically as well as temporally'.<sup>74</sup> Kelsen argues that the ideological prioritization of subjective right reflects an understanding of ownership as freedom and results in a conspicuous silence regarding the concept of legal obligation. He observes that proponents of this view go so far as to juxtapose rights against law, overlooking that rights *are* law and that no right can exist without a reciprocal obligation. The notion of legal obligation is thus effectively silenced by the 'ideology of liberty' masquerading as legal theory.<sup>75</sup> Kelsen traces this mystification back to natural law and its ideal of natural rights, which supposedly exist in and of themselves without, and prior to, any human intervention.<sup>76</sup>

Kelsen overturns the binary in question and proclaims the superiority of the element previously perceived as inferior: There can be no subjective right without objective law; or, rights are law. The purpose of declaring that rights are, first and foremost, law is to work through the hierarchy on its own terms, using its inherent presuppositions against it. Kelsen's aim is not to celebrate the unjustly overlooked and shamed concept of legal obligation as somehow superior, but to reveal the fragility of the dualism. Thus, subjective rights are exposed as just one possible way of constituting and enforcing – that is, shaping – law, and not as some originary essence preceding law's manifestation:

In any case, private property is historically not the only principle on which a legal order can be based. To declare private property as a natural right because the only one that corresponds to nature is an attempt to absolutize a special principle, which historically at a certain time only and under certain political and economic conditions has become positive law.<sup>77</sup>

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<sup>73</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 40–41.

<sup>74</sup> *Ibid* 38.

<sup>75</sup> *Ibid* 38–40.

<sup>76</sup> Kelsen, *Pure Theory of Law* (n 19) 125–130.

<sup>77</sup> Kelsen, *General Theory of Law and State* (n 1) 11.

As Kelsen recognizes, subjective rights are systematically favoured in legal theory and objective law is consequentially perceived as a system that emerges to protect and enforce, but also to limit, these rights. In other words, law is perceived as inflicting violence upon rights. This perception leads to the celebration of (property) rights and the sphere of so-called private law as the realm of freedom, while legal obligations and so-called public law are condemned as the realm of subjection:

What we call private law, seen from the standpoint of its function—*qua* part of the legal system—in the fabric of the law as a whole, is simply a particular form of law, the form corresponding to the capitalistic economic system of production and distribution; its function, then, is the eminently political function of exercising power.<sup>78</sup>

The strategic reversal of the dualism challenges this view with the proclamation that all law is primarily obligation – that all law is public law. Through this reversal, Kelsen exposes the intimate relationship between (human) rights and the principle of sovereignty, a suspicion that continues to occupy critical theorists to this day.<sup>79</sup>

Kelsen's deconstruction of the dualism of subjective right and objective law vindicates deconstruction as a deeply affirmative and political enterprise. Far from a nihilist and malicious attack on sacred values, deconstruction fleshes out what has been suppressed and silenced in the constitution of what passes as natural, normal, meaningful, and true. It exposes an ever-elusive origin. Indeed, it exposes the very impossibility of an origin – of an absolute point of departure. Deconstruction, as employed by Kelsen and famously elaborated by Derrida some decades later, operates as 'a double gesture, a double science, a double writing'.<sup>80</sup> The silenced element in the hierarchy is strategically positioned as the 'origin' to reveal the undecidability of the binary at issue – the impossibility of its resolution.

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<sup>78</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 96 (emphasis in original).

<sup>79</sup> See e.g. Jessica Whyte, 'Human Rights: Confronting Governments?: Michel Foucault and the Right to Intervene' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Routledge 2012).

<sup>80</sup> Jacques Derrida, 'Signature Event Context', in *Limited Inc* (Northwestern University Press 1988) 21.

To illustrate the striking similarity between Kelsen's and Derrida's deconstructive strategies let us take a look at Derrida's deconstruction of the speech-writing binary.<sup>81</sup> Derrida argues that writing is perceived as violence against the spoken language – as logically and temporarily subsequent to it. Speech, in turn, is perceived as the original manifestation of language, possessing its full meaning. Derrida questions this framework by placing writing in the privileged position, declaring all language to be writing. He does so not to glorify writing, but to expose the instability of the hierarchical pairing. This move highlights the metaphysical and political prejudices, as well as the violence, that sustains hierarchical binaries that couple a privileged with a devaluated element.

Both examples – Kelsen's and Derrida's – follow the dynamics of deconstruction. Deconstruction addresses a binary and exposes this binary as representing a hierarchy: an interplay between a privileged element (subjective right, spoken language) and an element which is silenced and devaluated (obligation/law, writing). We can observe how Derrida subverts the prevailing narrative by declaring that all language is writing; Kelsen by proclaiming that all rights amount to obligations. These moves should not be read superficially as mere reversals of the hierarchies in question. These moves aim to *work through* the hierarchies and oppositions, using their language and inherent presuppositions against them. Deconstruction does not aim to overturn, erase, or neutralize a binary; deconstruction is about illuminating the binaries and the power relations embedded in these seemingly neutral oppositions. The first step of reversal – proclaiming that the traditionally inferior element is actually superior – is taken only to enable the second step, where the system in which the binary emerged is displaced. In Kelsen's case, this system is legal theory; in Derrida's, linguistics.

Simultaneously, deconstructive reading of binaries allows us to pay attention to the ironic play taking place in pure theory itself: in his quest to purify legal theory of the dualisms he perceives as ideological, Kelsen produces an array of epistemological dualisms.<sup>82</sup> Believing that ontology and epistemology

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<sup>81</sup> Derrida, *Of Grammatology* (n 69) 27-37.

<sup>82</sup> 'Yes, this philosophy, too, is dualistic; only it is no longer metaphysical, but an epistemological, critical dualism on which it rests'. Kelsen, *General Theory of Law and State* (n 1) 435.

represent two distinct spheres of cognition, the former belonging to metaphysics and the latter to science, Kelsen constructs a dualist onto-epistemology of the factual and the normative. Neatly separating law (the normative) from power (the factual), pure theory encourages a theoretical framework that privileges law above power, force, violence, and politics. As in all dialectical pairings, law needs (to tame and control) its factual other:

Force and law do not exclude each other. Law is an organization of force.<sup>83</sup>

Pure theory is all about proclaiming clear boundaries between its privileged object of cognition and the messy realm of material existence it brackets out of legal research. Pure theory is constructed upon a hierarchical binary, a vertical relationship of the preferred and the frowned-upon, announcing its own self-deconstructibility. This feature of Kelsen's intellectual undertaking exposes a crack in pure theory without challenging its theoretical merit; as we are about to see, the fact that pure theory is deconstructible is by no means a fatal flaw.

#### IV. PURE UNDECIDABILITY

##### *1. Law-Preserving Violence*

Derrida's deconstructive reading of the entanglement of law, justice, and force/violence can be instructive in fleshing out the fault lines lurking under pure theory's smooth depiction of law as an object of cognition divorced from its material manifestations. The undecidability in Kelsen's theory is not a proof that pure theory is invalid. Nor is it an invitation to infuse pure theory with moralizations and ideologies. The impossibility of divorcing the normative from the factual that emerges from the deconstructive reading of pure theory merely illustrates the impossibility of declaring any ideology as meritorious or worthy of praise. Ironically, Kelsen's failure to achieve closure by establishing a clear division between law and violence – the undecidability haunting pure theory – is a confirmation of his sceptical critical outlook that deserves greater recognition.

As discussed, Kelsen does not shy away from the fact that violence and force play an integral part in the functioning of a legal system. He describes law as

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<sup>83</sup> Hans Kelsen, *Peace through Law* (Garland Pub 1973) 7.

a specific social technique organized as a coercive order and concludes that no legal state can ever be considered peaceful.<sup>84</sup> In pure theory, objective legal validity is conditioned by the efficacy of the legal system.<sup>85</sup> This formula exposes pure theory's recognition that the factual material life of law is crucial for law's existence, yet simultaneously subordinate to the immaterial quality of legal validity perceived as law's true essence. In other words, efficacy of a legal system is a condition – but never the determining factor – of legal validity.

Kelsen sees the difference between sanction and delict as a difference of authorization, a difference of meaning.<sup>86</sup> Questioning this difference, in his eyes, is tantamount to anarchism, which equates law with brute force.<sup>87</sup> Kelsen holds it to be crucial that the actual behaviour establishing an efficacious order corresponds with applicable legal norms only to a certain degree.<sup>88</sup> A legal norm that goes unbroken is as superfluous and oxymoronic as a legal norm that no one obeys: Law comes into existence precisely when the factual deviates from the normative.

A dialogue with Derrida's seminal essay *Force of Law* can expose the cracks in the distinction between law and violence, which Kelsen sees as not only possible, but indeed necessary for a coherent concept of law.<sup>89</sup> Derrida is fascinated with the verb 'to enforce' (law), which explicitly indicates the coupling of law and force/violence.<sup>90</sup> Kelsen's purist project, on the other

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<sup>84</sup> Kelsen, 'The Law as a Specific Social Technique' (n 41) 78–82.

<sup>85</sup> Hans Kelsen, 'A "Realistic" Theory of Law and the Pure Theory of Law: Remarks on Alf Ross's On Law and Justice' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart 2013) 205.

<sup>86</sup> Kelsen, *General Theory of Law and State* (n 1) 21.

<sup>87</sup> Consider Kelsen's thoughts on anarchism: 'Anarchism tends to establish the social order solely upon voluntary obedience of the individuals. It rejects the technique of a coercive order and hence rejects the law as a form of organization'. Ibid.

<sup>88</sup> Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 59.

<sup>89</sup> Kelsen, *General Theory of Law and State* (n 1) 23.

<sup>90</sup> Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority" (Deconstruction and the Possibility of Justice)' (1990) 11 *Cardozo Law Review* 920.

hand, aims to present law as organizing and giving meaning to, but never as equivalent to, violence and force.

When discussing coercion and law-enforcement, it is worth stressing that neither Derrida nor Kelsen propose that *all* legal norms assume the prohibitive structure of delict and sanction. What is at stake here is law's interpersonal nature. As Derrida puts it, the applicability of law, its enforceability, is not a secondary, exterior, and inferior supplement to law. It is not a mere condition operating in the shadows of law's validity. On the contrary, force and enforcement are essential not only to the concept of law, but even to the understanding of justice as law championed by enthusiasts of due process of law, who presuppose the generality and universality of legal norms as the prerequisite of justice.<sup>91</sup>

## 2. *Law-Founding Violence*

The difficulties rooted within the desire to disentangle the normative from the factual are closely related to the question of law's foundations – to Kelsen's enigmatic presupposition of the *Grundnorm*. To assess the role of force in law's becoming it is instructive to consider the mystical founding moment: The creation of the historically first constitution, the original legal norm. Derrida intends to problematize the (absent) foundations of law, morality, and politics, which for him (if not for Kelsen) appear hopelessly entangled. Derrida urges the reader not to misunderstand this move: 'This questioning of foundations is neither foundationalist nor anti-foundationalist'.<sup>92</sup>

Questioning the foundations of law in a deconstructive fashion means critically engaging with the idea of a legitimate fiction – a fiction necessary to establish the truth of justice – instead of merely positing such a fiction and considering the matter settled.<sup>93</sup> While Kelsen is a champion of purity and a prophet of the clear distinction between the normative and the factual, he could hardly be reproved for overlooking the fictitious nature of law's foundations. It is no coincidence that his *Grundnorm* is empty – a mere

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<sup>91</sup> Ibid 949.

<sup>92</sup> Ibid 931.

<sup>93</sup> Ibid 939.

authorization of an act of force rather than a substantive imperative. Further, while he presupposed the *Grundnorm* in an effort to build a definitive theoretical structure capable of ordering legal thought for generations, Kelsen himself never ceased to return to this question, reconsidering the issue and updating it with more-or-less subtle transformations in hopes of guaranteeing the stability of his intellectual venture as a whole.<sup>94</sup>

A good place to begin a deconstruction of Kelsen's presupposition is the idea that the founding moment of law is precisely that: a moment – a singular isolatable point in time. Kelsen proposes that the *Grundnorm*, the original authorization, only changes with the advent of a successful revolution.<sup>95</sup> On pure theory's account, legal orders – like legal norms – form a clear chain of succession from one revolution to the next, from one *Grundnorm* to another. Kelsen believes that the fact that the *Grundnorm* can change, in contrast to the immutable natural law, makes it a dynamic concept. He clearly recognizes the non-law embedded in the *Grundnorm*, but reads it as exceptional; he understands the making of the first constitution as the only unauthorized (or, more precisely, fictionally authorized) legal act. The creation of the first constitution – an arbitrary and violent act that can only be justified *post factum* and with recourse to a fiction – is not merely a moment in the history of a legal system. As Derrida puts it:

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<sup>94</sup> The *Grundnorm's* journey in Kelsen's thought is full of twists and turns. Kelsen initially equated the *Grundnorm* with the positive constitution before later declaring it to be pure theory's hypothetical foundation, a transcendental-logical presupposition, and then finally a fiction. For more see Kelsen, "'Foreword' to the Second Printing of Main Problems in the Theory of Public Law' (n 7) 13; Kelsen, *Introduction to the Problems of Legal Theory* (n 10) 58–61; Kelsen, *Pure Theory of Law* (n 19) 193–221; Hans Kelsen, 'The Function of a Constitution' in Tur and Twining (n 61).

<sup>95</sup> The key condition of a successful revolution is that the new 'reality' conforms to the new 'ought' – that the new legal system appears valid on the condition of it being efficacious. The radical break of a revolution in pure theory first transpires on the normative level. Its success depends on the conformation of the 'real reality' to the 'legal reality'. See e.g. Kelsen, *Pure Theory of Law* (n 19) 208–211.

This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence.*<sup>96</sup>

The presupposition of the *Grundnorm* thus cannot be understood as an isolated instance referring to the original legal act and the original legal norm. The *Grundnorm* should rather be read as a process – as a dynamic becoming: not a constitution, but a permanent re-constituting. To support this proposal with Derridean terminology, each presupposition of the *Grundnorm* is marked by iterability; the *Grundnorm* represents the foundational promise that is never (and could never be) kept but is (and must be) continuously repeated.<sup>97</sup> This iterability – the constant re-grounding and re-presupposing of the *Grundnorm* – perpetually inscribes it with variation and perpetually inscribes law-preserving with law-founding violence.

The aspiration to isolate unauthorized violence as a unique law-founding moment runs through the entire project of pure theory of law, with its fragile dualisms. Pure theory's realm of the factual already includes legal meanings – it is precisely the quest of legal cognition to purify these meanings and separate them from the factual. Kelsen's legal science is all about formalizing and systemizing recovered legal meanings, creating the normative realm in the process. Kelsen assumes the factual realm as given and independent of cognition, while he readily submits that a legal norm as an object of legal science is created by the thinking subject. This exclusion of the factual as the boring, immutable, and passive is constitutive rather than descriptive. It creates factuality as necessary evil and elevates meaning as its opposite – that is, as transformative and creative, since factuality only makes sense when the normative realm is presupposed.

The deconstructive strategy allows us to invert the opposites of the normative and the factual and of law and violence and declare that the factual is embodied in concepts like power, force, and violence as legality itself. However, such a conception would obviously result in a distorted image. Thus, deconstruction is more productively employed to demonstrate that there is no clear hierarchy between the assumed realms. Albeit potentially disturbing for the ontological presuppositions of pure theory, a

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<sup>96</sup> Derrida, 'Force of Law' (n 90) 991 (emphasis in original).

<sup>97</sup> Ibid 997.

deconstructive reading of law's contamination by force does not destroy law by reducing it to sheer power and domination. It merely exposes an undecidability: the hopeless entanglement of law and violence that serves as a reminder that law remains pernicious even in the realm of theory.

While such a reading contradicts the core postulates of pure theory, it also highlights one of Kelsen's most piercing arguments: Law possesses no inherent righteousness and may sanction the use of violence in morally repugnant ways without losing its validity. This argument urges legal thinkers to remain vigilant and critical, wary of endorsing any ideology and even warier of excluding as non-legal those normative orders they perceive as unjust.<sup>98</sup>

## V. CONCLUSION

The main goal of this article was to highlight the critical and iconoclastic tendencies of Kelsen's pure theory of law, which has been watered down through decades of interpretation as a (neo)liberal, state-centred theory in service of the status quo. Building on Kelsen's motivations in conceiving his theory, as well as some of the less discussed aspects of pure theory that clearly expose its critical edge, I offer an interpretation that celebrates Kelsen's vision of legal theory as a highly vigilant discipline that does not succumb to the fantasies of an ideal legal order aligned with elusive conceptions of justice.

Kelsen developed a radical and lucid reconsideration of the neutralized and naturalized ideas about law and embraces the unpleasant dimensions of legality. Although his moral relativism is often criticized, it allows for a sincere evaluation of the disturbing practices that take place within legal orders. The debate that marked Kelsen's times was the intellectual quarrel over whether the Nazi fascist legal order ever possessed legal validity. Kelsen was always firm on the opinion that law may have any content whatsoever, no matter how immoral it may be. While disturbing, this position encourages not only critique, but also vigilance; the absence of the presuppositions that

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<sup>98</sup> After the atrocities of the Second World War, some legal theorists declared the National Socialist legal order as non-legal – as never possessing legal validity. In contrast, positivist thinkers like Kelsen hold that recognizing such an order as legal means being a critical observer of legality. For the non-law argument, see e.g. Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

legality is synonymous with morality and goodness renders the observer sceptical and suspicious. In our own times, when the optimistic idea of the 'end of history' is rapidly dissolving, Kelsen's lesson remains valuable.<sup>99</sup>

Indeed, pure theory cannot be taken at face value and its deconstructible moments hold lessons of their own. Kelsen insists that the normative and the factual must be conceived as a hierarchy privileging the normative. Such a hierarchy of law and violence (or law and power) is problematic because it reflects a desire to celebrate law as morally superior to the power and violence that engender it. Yet law is always pregnant with violence; force remains a crucial part of any legal system, not merely an external condition of its functioning. Here we meet the limits of Kelsen's critique, which poses as disinterested and wholly objective when it is, in fact, laden with aspirations and desires. Kelsen's hope that scientific objectivity would become the guiding norm of a united global society have not materialized. Therefore, any critical confrontation with geopolitical power struggles demands a recognition that the normative and the factual are entangled, since the line between law and power remains as murky as ever.

Questioning the prioritization of the normative vis-à-vis the factual does not result, as Kelsen would have it, in a complete dismissal of the concept of legal validity. Questioning Kelsen's onto-epistemological binaries is in line with pure theory's rejection of any and all complacency and wishful thinking. Pure theory urges us to take law as it is, without embellishments that would substantially justify or embellish it, and this demand will continue to resonate even when legal realities transform beyond what we could imagine at the present time. Rejecting the possibility of purity, either factual or ideological, and distancing oneself from Kelsen's norms of cognition thus ironically celebrates his dissenting attitude and rigor as crucial inspirations for the future of legal theory.

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<sup>99</sup> 'The end of history' is an allusion to Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

YOU CANNOT EAT CRITIQUE:  
ON UNCRITICAL CRITICAL (LEGAL) THEORY AND  
THE POVERTY OF BULLSHIT

Matthew Evans\* † 

*This article reflects upon critical theory, focusing especially on critical legal theory, particularly in relation to human rights. Positing that much critical theory is in fact uncritical, the article argues that critical theory is frequently deployed in such a way as to contradict its supposed purposes of challenging the prevailing order, orthodoxy and injustice, and guiding radical change. It is argued that in deploying critical (legal) theory there is a danger of producing bullshit, which scholars should be mindful of and should seek to avoid. Finally, the article suggests moving towards postdisciplinarity and to greater integration of critique with theory and practice as possible resolutions to the dilemmas and contradictions exposed by drawing attention to bullshit and uncritical critical (legal) theory.*

**Keywords:** critical theory, bullshit, human rights, critical legal theory, postdisciplinarity, Foucault, uncritical critics

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† This article is inspired in part by a number of conversations with colleagues over several years. In this regard, particular thanks must go to Marie Hutton, Tanya Palmer, Nuno Ferreira and Pádraig McAuliffe. An earlier version of the paper was presented at the Sussex Centre for Human Rights Research Work in Progress Seminar (University of Sussex, Brighton, 9 October 2019), where useful comments were received – thanks must go to the organisers and participants, especially Stephanie Berry, Charlotte Skeet, Lindsay Stirton and Lara Montesinos Coleman. Further thanks must go to the anonymous reviewers and to Tarik Kochi.

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## I. INTRODUCTION

Theory, it is said, is 'always *for* someone and *for* some purpose'.<sup>1</sup> This invites the questions of *who* and *what* it is for. This article considers these questions, focusing on critical theory – particularly critical *legal* theory – and its deployment by scholars. Robert Cox contrasts 'critical' and 'problem-solving' theories.<sup>2</sup> Critical theories are those which do not 'take institutions and social and power relations for granted'.<sup>3</sup> Moreover, '[c]ritical theory allows for a normative choice in favour of a social and political order different from the prevailing order', a 'principle objective' being to 'clarify [the] range of possible alternatives'.<sup>4</sup> This is more or less congruent with the formulation proposed by the *Critical Legal Thinking* blog: critique is 'minimally' understood 'as the challenging of orthodoxy, ideology and systemic injustice' and is 'the companion and guide of radical change'.<sup>5</sup> However, some – perhaps even *much* – of what is put forward as critical (legal) theory does not do what these formulations suggest it should. Indeed, '[c]ritique has not been critical enough in spite of all its sore-scratching'.<sup>6</sup>

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<sup>1</sup> Robert W Cox, 'Social forces, States and World Orders: Beyond International Relations Theory' (1981) 10 *Millennium: Journal of International Studies* 126, 128.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid* 129.

<sup>4</sup> *Ibid* 130.

<sup>5</sup> Critical Legal Thinking, 'Submissions' (Critical Legal Thinking) <<http://criticallegalthinking.com/Submissions/>> accessed 12 June 2019; see also David Jabbari, 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12 *Oxford Journal of Legal Studies* 507, 507.

<sup>6</sup> Bruno Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern' (2004) 30 *Critical Inquiry* 225, 232.

Though it has been over four decades since the publication of EP Thompson's *The Poverty of Theory*,<sup>7</sup> and over three since the first appearance of *On Bullshit* by Harry Frankfurt,<sup>8</sup> both remain useful in thinking through the issues covered here. 'Bullshit', in Frankfurt's sense, is a form of dishonesty short of lying, where claims are deployed without regard for whether they are true or false.<sup>9</sup> It includes that which 'lack[s] evidence' or is 'obscure, ambiguous, unnecessarily wordy or disorderly'.<sup>10</sup> It is put forward 'to suit [the bullshitter's] purpose',<sup>11</sup> rather than to further other goals, such as clarification or truth-seeking. Neil Stammers's notion of 'uncritical critics' of human rights (as compared to both 'critical' and 'uncritical proponents') is also useful for the purposes of this article, as is Dustin Sharp's recent work reflecting on bringing together critical theory and 'critically motivated problem-solving theory' in transitional justice.<sup>12</sup> Indeed, there is an emphasis on critical theory and human rights throughout. These lenses of analysis are applied in the discussion which follows, arguing that too much of what passes for critical theory is both bullshit and deeply uncritical.

This article is deliberately provocative. It is somewhat polemical – it is in part 'a critical polemic against polemical critics'.<sup>13</sup> The intention is to disrupt, to stimulate thought and – perhaps – action. Analysis, theorisation, and critique are things which are *done* purposively. They can, then, be done differently. Moreover, criticality does not inhere in an author. The same person (even the same piece) might produce both critical and uncritical critique. It is not

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<sup>7</sup> EP Thompson, *The Poverty of Theory and Other Essays* (Merlin 1978).

<sup>8</sup> Harry G Frankfurt, 'On Bullshit' (1986) 6 *Raritan Quarterly Review* 81; Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005).

<sup>9</sup> Frankfurt, *On Bullshit* (n 8).

<sup>10</sup> Petter A Naessan, Book review of *On Bullshit* by Harry Frankfurt (2005) 53 *Philosophy Now* <[https://philosophynow.org/issues/53/On\\_Bullshit\\_by\\_Harry\\_Frankfurt](https://philosophynow.org/issues/53/On_Bullshit_by_Harry_Frankfurt)> accessed 24 July 2019.

<sup>11</sup> Frankfurt, *On Bullshit* (n 8) 56.

<sup>12</sup> Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 8; Neil Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (2015) 75 *Revue interdisciplinaire d'études juridiques* 67; Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13 *International Journal of Transitional Justice* 570.

<sup>13</sup> Anthony J Langlois, 'Human Rights in Crisis? A Critical Polemic Against Polemical Critics' (2012) 11 *Journal of Human Rights* 558.

suggested that all critical theory suffers from the problems identified here, or that these issues apply equally and in the same way to all critical theory or its application. Critical theory is far from homogenous.<sup>14</sup>

The intention here is therefore not to provide an overview of or response to the entire oeuvre of critical (legal) theory – this would be far outside the scope of an article such as this. Moreover, the works discussed in this piece are not chosen with a view to them being representative of critical (legal) theory as a whole. Rather, the article focuses on some particular tendencies evident in some, but not all, critical (legal) theory. The works of critical theory discussed here are chosen as illustrative examples which highlight potentially uncritical tendencies and – especially – dilemmas and implications which emerge from them. The empirical examples of activism and practice are likewise not representative of all possible applications of the issues discussed in the article. They are instead used to illustrate and illuminate some of the practical implications of the more theoretical discussion in the article.

The following analysis is interpretative and exploratory. Furthermore, the provocation – or invitation – of this article is as much self-reflexive and self-directed as it is outward-facing. It is not written from a position outside of the phenomena it discusses. Following John Holloway, it is an attempt, no doubt flawed and partial, to think and act 'in, against, and beyond'<sup>15</sup> critical (legal) theory. In doing so the article also seeks to move beyond disciplinary perspectives. It is not concerned *only* with critical legal theory. Thinking across and beyond disciplines is necessary to make the arguments put forward here, which draw on multiple areas outside law and legal theory, as well as interdisciplinarity, transdisciplinarity and postdisciplinarity.<sup>16</sup> This focus is

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<sup>14</sup> Ben Golder, 'Beyond Redemption? Problematizing the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2 *London Review of International Law* 77.

<sup>15</sup> John Holloway, *In, Against, and Beyond Capitalism: The San Francisco Lectures* (PM Press 2016).

<sup>16</sup> Raymond C Miller, 'Interdisciplinarity: Its Meaning and Consequences' *Oxford Research Encyclopedia of International Studies* (20 November 2017). DOI: 10.1093/acrefore/9780190846626.013.92; Andrew Sayer, 'Long Live Postdisciplinary Studies! Sociology and the Curse of Disciplinary Parochialism/Imperialism'. Paper presented to the British Sociological Association Conference, Glasgow, April 1999, published by the Department of

in part motivated by the experience of having studied and taught multiple disciplines and of being, by a quirk of circumstance, based in a law school without having trained as a practising or academic lawyer.

The article argues that too often in critical theory orthodoxies are reinforced rather than challenged, the possibilities for radical change are obscured and the prevailing order reinforced. Too much critical theory is, in a sense, uncritical. In the sections that follow, each of these interrelated trends are explored. In the final substantive section, some possible approaches to resolving the dilemmas and contradictions the article sets out are offered, before conclusions are put forward. These relate to the possibility of moving beyond disciplinary divides – towards postdisciplinarity – in order to make use of the most appropriate intellectual tools and avoid disciplinary parochialism and imperialism. In this way, the article points towards the possibility of integrating critique with theory and practice in order to avoid utopianism and better identify where and how change might be achieved.<sup>17</sup>

## II. REINFORCING ORTHODOXIES

For all that critical (legal) theory affects towards challenging orthodoxies, it nevertheless contains orthodoxies and (small-c) conservative tendencies.<sup>18</sup> A

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Sociology, Lancaster University. <<https://www.lancaster.ac.uk/fass/resources/sociology-online-papers/papers/sayer-long-live-postdisciplinary-studies.pdf>> accessed 22 May 2019; Andrew Sayer, 'For Postdisciplinary Studies: Sociology and the Curse of Disciplinary Parochialism/Imperialism' in John Eldridge, John MacInnes, Sue Scott, Chris Warhurst and Anne Witz (eds) *For Sociology: Legacies and Prospects* (Sociologypress 2000); Justin Rosenberg, 'International Relations — The "Higher Bullshit": A Reply to the Globalization Theory Debate' (2007) 44 *International Politics* 450.

<sup>17</sup> See Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Sharp (n 12); Ron Dudai, 'The Study of Human Rights Practice: State of the Art' (2019) 11 *Journal of Human Rights Practice* 273.

<sup>18</sup> Matt McManus, 'On Critical Legal Studies and the Limits of Critique' (Merion West, 29 September 2018) <<https://merionwest.com/2018/09/29/on-critical-legal-studies-and-the-limits-of-critique/>> accessed 3 July 2019; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 247; Costas Douzinas, Peter Goodrich and Yifat Hachamovitch, 'Introduction: Politics, Ethics and the Legality of the Contingent' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity*

small number of theorists and approaches have become canonised and, at times, placed almost beyond reproach.<sup>19</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, for instance, argue that they do not 'identify, categorise and worship a [critical (legal) theory] canon'.<sup>20</sup> Nevertheless, in their words, 'it should come as no surprise' that a group of particularly influential theorists are easily identifiable.<sup>21</sup> Michel Foucault is chief among these.<sup>22</sup> To be blunt, Foucault is overrated.<sup>23</sup> This does not mean that nothing about his body of work is ever useful – frequently it is – but the degree of attention paid to Foucault is massively disproportionate to his actual contributions.<sup>24</sup> As Lara Montesinos Coleman notes, regardless of his contributions, 'Foucault's critical ethos can be neither starting point nor end of engagement with

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*and Critical Legal Studies: The Legality of the Contingent* (Routledge, 1994) 13-14; Jasmine Chorley, Rob Hunter, Dimitrios Kivotidis, Eva Nanopoulos, Paul O'Connell and Umut Özsu, 'About' (Legal Form: A Forum for Marxist Analysis of Law, October 2017) <<https://legalform.blog/About/>> accessed 29 August 2019.

<sup>19</sup> Dylan Riley, 'Bourdieu's Class Theory: The Academic as Revolutionary' (2017) 1 Catalyst 107; Daniel Zamora, 'Can We Criticize Foucault?' *Jacobin* (10 December 2014) <<https://www.jacobinmag.com/2014/12/foucault-interview/>> accessed 17 June 2019; Daniel Zamora, 'Introduction: Foucault, the Left, and the 1980s'. In Michael C Behrent and Daniel Zamora (eds), *Foucault and Neoliberalism*, Ebook Edition (Polity Press 2016); Chorley and others (n 18).

<sup>20</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, 'Introduction: Law, Politics and the Political' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) 7.

<sup>21</sup> Ibid 4; also Douzinas and Gearey (n 18) 242.

<sup>22</sup> See also Zamora, 'Can We Criticize Foucault?' (n 19); Zamora, 'Introduction' (n 19); Riley (n 19) 107.

<sup>23</sup> Karlene Faith, Book Review of *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* edited by Caroline Ramazanoğlu (1995) 23 *Crime, Law and Social Change* 257. Susan Bordo, 'Feminism, Foucault and the Politics of the Body' in Caroline Ramazanoğlu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism* (Routledge, 1993); Michael C Behrent, 'Conclusion: The Strange Failure (and Peculiar Success) of Foucault's Project' in Michael C Behrent and Daniel Zamora (eds), *Foucault and Neoliberalism* (Polity Press 2016).

<sup>24</sup> Faith (n 23) 257-258. Of course, this article further contributes to this attention.

actually existing struggles'.<sup>25</sup> Moreover, whilst 'not all academics who love Foucault are neoliberals[,] the neoliberal academy, thought of as a "diffuse network of power relations", certainly loves Foucault'.<sup>26</sup> Indeed, a 'Foucault industrial complex' has developed in and around academia.<sup>27</sup> One possible reason for this is the degree to which it is possible for scholars deploying Foucault to say whatever they please and see themselves reflected back in Foucault, who was notoriously reluctant to give unambiguous, authoritative interpretations of his own work.<sup>28</sup> Indeed, he said 'I prefer not to identify myself, and I'm amused by the diversity of the ways I've been judged and classified'.<sup>29</sup>

Some might view multiple – and potentially contradictory – possible interpretations as a strength. Foucault himself seemed to. Noting that he has

been situated in most of the squares on the political checkerboard, one after another and sometimes simultaneously: as anarchist, leftist, ostentatious or disguised Marxist, nihilist, explicit or secret anti-Marxist, technocrat in the service of Gaullism, new liberal and so on[,]

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<sup>25</sup> Lara Montesinos Coleman, 'Ethnography, Commitment, and Critique: Departing from Activist Scholarship' (2015) 9 *International Political Sociology* 263, 263.

<sup>26</sup> *Progressive Geographies*, Comment on 'Foucault and Neoliberalism – A few Thoughts in Response to the Zamora Piece in Jacobin' by Stuart Elden, posted by the user wobblywheel at 8:55pm (Progressive Geographies, 31 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-72160>> accessed 17 June 2019.

<sup>27</sup> This term comes from comments made by Paul McGuinness on 3 October 2018 at the Critical Theory Reading Group, Sussex Law School, University of Sussex, Brighton.

<sup>28</sup> Zamora, 'Introduction' (n 19).

<sup>29</sup> Michel Foucault, 'Polemics, Politics and Problematizations: An Interview Conducted by Paul Rabinow in May 1984' <<https://foucault.info/documents/foucault.interview/>> accessed 22 July 2019.

Foucault posited that

[n]one of these descriptions is important by itself; taken together, on the other hand, they mean something. And I must admit that I rather like what they mean.<sup>30</sup>

This diversity of possible interpretations is, however, also a weakness.<sup>31</sup> There is a danger that Foucauldian critique could mean almost anything, and thus that it could be reduced to the bullshit Frankfurt wrote against.<sup>32</sup>

As noted above, utterances which 'lack evidence' or which 'are obscure, ambiguous, unnecessarily wordy or disorderly' could be bullshit.<sup>33</sup> The bullshitter has no regard for whether their claims are true or false.<sup>34</sup> Rather, they are concerned with 'trying to get away with something'<sup>35</sup> – picking out or making up claims 'to suit [the bullshitter's] purpose', whatever that may be at the time.<sup>36</sup> It is entirely possible for Foucauldian critique to contain bullshit, particularly if it claims to be more authentic, or more authoritative, than alternative interpretations.<sup>37</sup> This does not mean that Foucault was a bullshitter, but Foucauldian bullshit is not difficult to produce. Bruno Latour makes a somewhat similar – but more general – point, arguing that 'critique [...] has become such a potent euphoric drug' because, as a critic:

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<sup>30</sup> Ibid.

<sup>31</sup> Zamora, 'Introduction' (n 19). See also, more generally, Steven Knapp and Walter Benn Michaels, 'Against Theory' in Vincent B Leitch, William E Cain, Laurie Finke, Barbara Johnson, John McGowan and Jeffrey J Williams (eds), *The Norton Anthology of Theory and Criticism* (WW Norton 2001).

<sup>32</sup> Frankfurt, *On Bullshit* (n 8).

<sup>33</sup> Naessan (n 10).

<sup>34</sup> Frankfurt, *On Bullshit* (n 8).

<sup>35</sup> Ibid 23.

<sup>36</sup> Ibid 56. There may be circumstances where such bullshitting is expected or necessary (perhaps even desirable). One such instance might be in the roles of lawyers in adversarial systems, with each side required to pick out and interpret evidence in order to put forward the best position for their clients, rather than to provide the fullest or most accurate account of events (thanks must go to Lindsay Stirton for raising this point). A key claim of this article, however, is that bullshit is unnecessary, undesirable and ought to be avoided in critical theorising.

<sup>37</sup> See Behrent (n 23).

[y]ou are always right! When naïve believers are clinging forcefully to their objects, claiming that they are made to do things because of their gods, their poetry, their cherished objects, you can turn all of those attachments into so many fetishes and humiliate all the believers by showing that it is nothing but their own projection, that you, yes you alone, can see. But as soon as naïve believers are thus inflated by some belief in their own importance, in their own projective capacity, you strike them by a second uppercut and humiliate them again, this time by showing that, whatever they think, their behavior is entirely determined by the action of powerful causalities coming from objective reality they don't see, but that you, yes you, the never sleeping critic, alone can see.<sup>38</sup>

The canonisation of certain critical theorists – particularly Foucault – is further evident in the fact that *Jacobin* headlined a piece 'Can We Criticize Foucault?'.<sup>39</sup> Foucault scholars were quick to maintain that Foucault can be and has been criticised.<sup>40</sup> Nevertheless, there is a danger here. In Michael Behrent's words, this

consists in turning Foucault into [a] fantasy philosopher, the thinker [readers] want him to be – an unrelenting critic of Marxism who somehow remained a kind of socialist; a Nietzschean who embraced solid progressive principles. This is just wishful thinking.<sup>41</sup>

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<sup>38</sup> Latour (n 6) 238-239. Latour's work can itself be criticised along similar lines, including that it offers 'incoherence disguised as [complexity]' (perhaps comprising bullshit in Frankfurt's terms) and (contrary to the supposed ends of critical theory) that it 'conceals an agenda that is not only uncritical but deeply politically conservative'. Indeed, RH Lossin suggests that '[i]f neoliberalism were a Platonic Republic, Bruno Latour would likely be its philosopher-king'. See Rebecca H Lossin, 'Neoliberalism for Polite Company: Bruno Latour's Pseudo-Materialist Coup' *Salvage* (1 June 2020) <<https://salvage.zone/articles/neoliberalism-for-polite-company-bruno-latours-pseudo-materialist-coup/>> accessed 3 June 2020.

<sup>39</sup> Zamora, 'Can We Criticize Foucault?' (n 19).

<sup>40</sup> Stuart Elden, 'Foucault and Neoliberalism – A Few Thoughts in Response to the Zamora Piece in Jacobin' (*Progressive Geographies*, 17 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/>> accessed 17 June 2019.

<sup>41</sup> Michael Behrent, Comment on 'Foucault and Neoliberalism – a few thoughts in response to the Zamora piece in Jacobin' by Stuart Elden, posted at 5:50am

Similar criticisms have been raised over the popularity of other theorists. Dylan Riley focuses on Pierre Bourdieu, 'whose enormous contemporary influence is only comparable to that previously enjoyed by Sartre or Foucault'.<sup>42</sup> Riley argues that in US academia the popularity of Bourdieu's critical theory 'is due neither to its explanatory power nor to its ability to generate new problems and questions'.<sup>43</sup> Rather, Bourdieu 'resonates with the lived experience of elite academics, offers a form of ersatz radicalism focused on self-transformation, and provides the sociologist' – or, indeed, other disciplinary scholar – 'with a sense of having an elevated social role'.<sup>44</sup>

Thompson, arguing against Louis Althusser, posits that such critical theory allows scholars 'to perform *imaginary* revolutionary psycho-dramas [...] while in fact falling back upon a very old tradition of bourgeois elitism for which Althusserian theory is exactly tailored'.<sup>45</sup> Phil Burton-Cartledge is more charitable to Althusser than Thompson, but the danger of Althusserian bullshit is also evident in his reading. Burton-Cartledge notes, for instance, that Althusser's *For Marx* 'ruthlessly attacks woolly thinking while, ironically, exhibiting some itself'.<sup>46</sup>

In these scenarios, critical theory seems to be more for reassuring academics of their own importance and for maintaining their status and position in society, rather than for challenging orthodoxy.<sup>47</sup> Indeed, in canonising particular approaches, new orthodoxies can be created.<sup>48</sup> Furthermore, as

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(Progressive Geographies, 21 December 2014) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-69426>> accessed 17 June 2019; see also Behrent (n 23).

<sup>42</sup> Riley (n 19) 107.

<sup>43</sup> Riley (n 19) 136.

<sup>44</sup> Ibid. Lossins (n 38), similarly, argues that Latour's 'academic popularity is both understandable and disturbing' given he 'has, over several decades, elaborated a grand system of thought that is seductively materialist in appearance, and deeply reactionary in substance'.

<sup>45</sup> Thompson (n 7) 3.

<sup>46</sup> Phil Burton-Cartledge, 'Five Books on Marx and Marxism' (All That Is Solid..., 6 May 2013) <<http://averypublicsociologist.blogspot.com/2013/05/five-books-on-marx-and-marxism.html>> accessed 14 August 2019.

<sup>47</sup> See Riley (n 19); Latour (n 6) 239; Sharp (n 12); Lossins (n 38).

<sup>48</sup> Dudai (n 17); Chorley and others (n 18).

discussed further below in relation to critical theory reinforcing the prevailing order, maintaining distinct divides between disciplines reinforces orthodoxies within academia. Critical legal theory's place within law as a discipline, for example, reinforces the idea that the study of law ought to be treated as distinct from (and in some approaches, more important than) the study of other phenomena.<sup>49</sup>

### III. OBSCURING POSSIBILITIES FOR RADICAL CHANGE

There is often a theory-practice divide.<sup>50</sup> Whilst some insist critique *is* practice or theory *is* practice,<sup>51</sup> this is only true to an extent.<sup>52</sup> Radical change rarely emanates from professionalised intellectual spaces. Social movements, of course, have their own organic intellectuals.<sup>53</sup> Much of the time, however, for the organic intellectuals of social movements engaged in on-the-ground struggle it is difficult to see what it matters what Foucault said to Sartre on a wet Wednesday in 1979.<sup>54</sup> Indeed, what was said might not even have been very interesting to those concerned with the political debates in which they

<sup>49</sup> Miller (n 16). Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Dudai (n 17).

<sup>50</sup> Thompson (n 7) 3; Dudai (n 17).

<sup>51</sup> Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Donald F Bouchard and Sherry Simon trs, Cornell University Press 1977) 208; Larry Shiner, 'Reading Foucault: Anti-Method and the Genealogy of Power-Knowledge' (1982) 21 *History and Theory* 382, 383.

<sup>52</sup> Faith (n 23); Conor Gearty, 'Human Rights Research Beyond the Traditional Paradigm: Afterword' in Damian Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law: Beyond the traditional paradigm* (Routledge 2019).

<sup>53</sup> David Forgacs (ed), *The Gramsci Reader: Selected Writings 1916–1935* (New York University Press 2000) 300–311; also Corinne Lennox and Yeşim Yaprak Yıldız, 'Activist Scholarship in Human Rights' (2020) 24 *International Journal of Human Rights* 4; Coleman (n 25).

<sup>54</sup> Arthur Scargill, former president of the National Union of Mineworkers, dismissed critics associated with small Marxist groupings with the derisive question 'What does it matter what Trotsky said to Lenin on a wet Wednesday in 1917?'. See Simon Harvey, 'Arthur Scargill and the End of a Fantasy' (Miner's Advice) <[https://www.minersadvice.co.uk/yourview21\\_scargill\\_fantasy.htm](https://www.minersadvice.co.uk/yourview21_scargill_fantasy.htm)> accessed 17 June 2019; for Scargill using a similar turn of phrase see Arthur Scargill, 'The New Unionism' (1975) 92 *New Left Review* 3, 12.

were intervening.<sup>55</sup> It might, in fact, have been bullshit. Edward Said, for example, was disappointed with both Sartre and Foucault's (lack of) intellectual and political engagement on Palestine.<sup>56</sup>

Likewise, Riley explains Bourdieu's popularity as, in part, 'growing out of the separation of intellectuals from mass political movements'.<sup>57</sup> Thompson makes a similar criticism of Althusserian theorists who 'would *like* to be "revolutionaries"' but are

the products of a particular 'conjuncture' which has broken the circuits between intellectuality and practical experience (both in real political movements, and in the actual segregation imposed by contemporary institutional structures).<sup>58</sup>

Indeed, '[w]hen academics cannot talk to anyone except one another, and even then with difficulty, there can be no political weight to their theorizing'.<sup>59</sup> When this occurs, critical theory is neither companion nor guide to radical change.<sup>60</sup>

Furthermore, as Conor Gearty notes, critical legal theorising may be of limited practical use to those who are, for example, attempting to persuade actually existing courts to protect a vulnerable or targeted group.<sup>61</sup> What those engaged in the realities of practice – influenced and compromised by manifestations of power and politics – can meaningfully take from the (possible) insights of critique is an open question which ought to be engaged with.<sup>62</sup> Responding to Martti Koskenniemi's critical theoretical approach to

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<sup>55</sup> Langlois (n 13); Coleman (n 25).

<sup>56</sup> Edward Said, 'Diary: An Encounter with J-P Sartre' (2000) 22 *London Review of Books* 42.

<sup>57</sup> Dylan Riley, 'Science and Politics: A Response to Burawoy, Heilbron, and Steinmetz' (2018) 2 *Catalyst* 88, 116.

<sup>58</sup> Thompson (n 7) 3.

<sup>59</sup> Faith (n 23) 267; also Richard Michael Fischl, 'The Question That Killed Critical Legal Studies' (1992) 17 *Law and Social Inquiry* 779, 804-805; Langlois (n 13).

<sup>60</sup> *Critical Legal Thinking* (n 5).

<sup>61</sup> Gearty (n 52). See also Isobel Roele, 'Policing Critique' (2018) 81 *Modern Law Review* 701, 711.

<sup>62</sup> Dudai (n 17); Lennox and Yıldız (n 53); Coleman (n 25); Lara Montesinos Coleman, 'Struggles, Over Rights: Humanism, Ethical Dispossession and Resistance' (2015) 36 *Third World Quarterly* 1060.

international law, and his preferred form of critical international law professional, Isobel Roele, for instance, ponders '[w]ho is this individual who exercises professional judgment in a way that resists power and is driven by emotional instinct?'. She argues that 'Koskenniemi swathes [the ideal critical professional] in so many gauzy layers of misdirection that they escape our intellectual grasp'.<sup>63</sup> Koskenniemi argues that

critical law is perhaps not reducible to abstract discourses, methods or 'principles' but identified by a gut feeling about the way the injustice of the world is a *product* of its ruling symbolic order and therefore cannot be treated through it.<sup>64</sup>

However, Roele responds that 'Koskenniemi gestures his intentions and avoids packaging this idea in easily abstractable language. His ideas are revealed obscurely – carefully coded messages to like-minded lawyers'.<sup>65</sup> In this approach, there is a danger of Koskenniemi's ideas taking the form of bullshit. According to Roele, Koskenniemi

not even naming his politically-engaged, emotionally-aware moral agent of an international lawyer undermines the critically transformative power of the idea. This anonymous aspiration is hope incognito, a figure that will only be recognised by those already in-the-know.<sup>66</sup>

One does not have to be in the business of writing 'recipes [...] for the cook-shops of the future'<sup>67</sup> to be troubled by demobilising and demotivating implications of some critical legal theory. This is particularly the case in the strand of critical legal theory which tends towards 'trashing' – including of arguably (or, at least, potentially) progressive tendencies such as human rights – to the exclusion of 'putting forward constructive moral arguments'.<sup>68</sup> Some

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<sup>63</sup> Roele (n 61) 712.

<sup>64</sup> Martti Koskenniemi, 'Epilogue: To Enable and Enchant – on the Power of Law' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 411

<sup>65</sup> Roele (n 61) 712.

<sup>66</sup> Ibid.

<sup>67</sup> Karl Marx, *Capital: A Critique of Political Economy, Volume I* (Ben Fowkes tr, Penguin 1976) 99.

<sup>68</sup> McManus (n 18); also Sharp (n 12); Fischl (n 59); on the potentially progressive character of human rights see Langlois (n 13); Dudai (n 17); Malcolm Langford,

of these critiques (whether framed as 'trashing' or not) are *uncritical* in that they are empirically questionable, constructing then defeating straw-men. For example, the critiques raised by David Kennedy in the influential piece 'The International Human Rights Movement: Part of the Problem?' are by his own admission 'assertions, worries, polemical charges' and 'none of them has been proven'.<sup>69</sup>

Raising, thinking through and responding to these kinds of concerns can be a useful exercise. More critical advocacy might emerge from the invitation to human rights advocates to consider questions like Kennedy's. For example, asking whether alternative – possibly more effective – vocabularies are crowded out by human rights framing, thinking through what is obscured or lost in focusing too much on the law and legal methods of advocacy, or problematising the – overly rigid – categories, roles and binary distinctions (victim/perpetrator, rights-holder/duty-bearer, refugee/citizen, and so on) which mainstream human rights advocacy can rely upon. However, as Kennedy himself notes, raising a concern does not prove its veracity, nor does it necessarily undermine the soundness of possible responses. Likewise, the raising of such concerns does not in itself help in the identification or pursuit of opportunities for radical change.

For Stammers, 'uncritical critics take evidence of the abuse of institutionalised human rights as conclusive proof that human rights can only ever serve the interests of power'.<sup>70</sup> At its most egregious, this kind of uncritical critique – being 'gloriously unencumbered by any perceived need

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'Critiques of Human Rights' (2018) 14 *Annual Review of Law and Social Science* 69; Lennox and Yildiz (n 53); Coleman (n 62); Mark Heywood, 'South Africa's Journey from Socialism to Human Rights: The True Confessions of an Errant Socialist' (2019) 11 *Journal of Human Rights Practice* 305.

<sup>69</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 101. For a direct response to Kennedy's arguments see Hilary Charlesworth, 'Author! Author!: A Response to David Kennedy' (2002) 15 *Harvard Human Rights Journal* 127. For further discussion of this in relation to human rights see Paul Gready, 'The Politics of Human Rights' (2003) 24 *Third World Quarterly* 745; Stammers, *Human Rights and Social Movements* (n 12); Langlois (n 13); Dudai (n 17).

<sup>70</sup> Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12) 76.

for supporting evidence'<sup>71</sup> – is bullshit. This is not to deny that 'norms – including human rights norms – are open-ended, amenable to contrasting interpretations and to the support of contradictory agendas' including both institutionalisation in the interests of power, and, more progressively, mobilisation as 'struggle concepts' in challenges to power posited by social movements.<sup>72</sup> Similar lessons can be taken from Samuel Moyn's position that human rights are neither a panacea nor inherently neoliberal or anti-egalitarian.<sup>73</sup> Indeed, using Stammers's terms, both the uncritical advocates and uncritical critics (who might claim human rights norms as monolithically positive or negative) ought to be opposed.<sup>74</sup>

Costas Douzinas has argued that '[m]ost critics of rights belong today to the political left'.<sup>75</sup> Even if this was true at the time of his writing, which is doubtful,<sup>76</sup> it is difficult to make the case that this remains so, at least in the Global North.<sup>77</sup> It is more plausible that most *academic* critics of rights come from the political or, at least, academic left.<sup>78</sup> One might also posit a difference between (academic) *critics* of rights and (political) *opponents* of

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<sup>71</sup> Gready (n 69) 747.

<sup>72</sup> On contrasting interpretations and contradictory agendas of human rights, see Koskeniemi (n 64) 400; on human rights as social movement struggle concepts, see Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12); Stammers, *Human Rights and Social Movements* (n 12) 3.

<sup>73</sup> See Samuel Moyn, 'Human Rights Are Not Enough' *The Nation* (9 April 2018) 20–22.

<sup>74</sup> See Stammers, *Human Rights and Social Movements* (n 12).

<sup>75</sup> Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000) 148.

<sup>76</sup> See, for example, Charlesworth (n 69).

<sup>77</sup> See, for example, Bethany Rodgers, 'Human Rights in the UK Media: Representation and Reality, 19 September 2014' (2015) 8 *Networking Knowledge*; Andrew Clapham, 'Where to Now? How Can We Challenge Human Rights Disenchantment?'. Keynote address presented at the conference 'Challenging Human Rights Disenchantment 50 years on from the ICCPR and ICESCR', Sussex Centre for Human Rights Research, University of Sussex, Brighton, 27 January 2017; Langford (n 68); Lennox and Yıldız (n 53); Heywood (n 68).

<sup>78</sup> On critical and uncritical critics and proponents of human rights see Stammers, *Human Rights and Social Movements* (n 12); also Langford (n 68).

rights,<sup>79</sup> in which case Douzinas's claim might better fit the evidence. Douzinas does not, however, explore such a distinction.<sup>80</sup>

One might reasonably agree with Foucault that everything – including human rights – is not *bad* but *dangerous*, but so what?<sup>81</sup> What does this tell anyone about understanding and responding to the world, including, for example, how they might attempt to address injustice? For example, the Foucauldian notion of dangerousness can be applied reflectively by both activists and scholars. Inviting them to consider the worst possible outcomes of their (dangerous) actions might lead to urging caution over naïve optimism. Causing harm – even endangering lives – through taking or supporting unduly confident and hopeful actions might then be avoided. However, part of the problem of this kind of critique is the idea that, in applying Foucauldian dangerousness, activists or scholars could be certain that they are taking the best action. There is the risk of a question-begging circularity in such an approach. Any bad outcome can be put down to a lack of caution or a failure to engage with dangerousness in what *must* therefore have been naïvely hopeful (perhaps insufficiently Foucauldian) approaches. On the other hand, any success can be marshalled as evidence that this *must* have been the best action, applying the correct degree of caution and awareness of dangerousness.

Similarly, applying a Foucauldian lens of analysis to human rights, Pheng Cheah makes a series of elisions, each of which might be questioned. Cheah argues that the realisation of economic, social and cultural rights 'became inseparable from policies of human development'. Moreover, '[h]uman development is the humanization of economic development', therefore

the humanity that is produced can also be deployed by states in their strategies for increasing their resources, thereby compromising and marring the human face of development.

Cheah posits that

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<sup>79</sup> See Lennox and Yıldız (n 53); Coleman (n 62).

<sup>80</sup> Douzinas (n 75). See also Langlois (n 13) for discussion of Douzinas's positions.

<sup>81</sup> Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress'. In Paul Rabinow (ed), *The Foucault Reader* (Pantheon Books 1984) 343.

[t]he problem of implementing second- and third-generation human rights would need to be reconsidered from the ground up [...] in terms of the very structure of biopolitical rights [and] in terms of the inscription of these rights in a biopolitical field that is always shifting.<sup>82</sup>

However, what this would actually entail or how it might be done remains unclear.

The view from the critical (legal) theoretical high ground may be clear, but what of stepping into the 'swamp' of practice?<sup>83</sup> Pointing out the muddiness of the swamp does not in itself assist those who must traverse it to navigate a passable route. To paraphrase a question posed by an attendee at the 2015 Critical Legal Conference (CLC) during an informal conversation: *Foucauldian critique is all well and good, but what are you going to do about these refugees?* It is true that you cannot eat rights<sup>84</sup> – but then, you cannot eat critique either.

At its worst, critical legal theory leads to a kind of nihilism,<sup>85</sup> or 'fatalistic despair'.<sup>86</sup> Things are bad (or dangerous), attempts to improve them are also bad (or dangerous) – as they are complicit in keeping things bad or making them differently bad (or dangerous) – so there is no point pursuing change.<sup>87</sup> Foucault claimed his position led 'not to apathy but to a hyper- and pessimistic activism'.<sup>88</sup> However, according to Karlene Faith, it is also the case that '[r]eading history through Foucault, the ultimate horror is that,

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<sup>82</sup> See Pheng Cheah, 'Second-Generation Rights as Biopolitical Rights'. In Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 231-232.

<sup>83</sup> Donald A Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books 1983) 42; also Gearty (n 52); Roele (n 61); Stammers, *Human Rights and Social Movements* (n 12); Sharp (n 12); Fischl (n 59); Langlois (n 13); Coleman (n 25); Coleman (n 62); Heywood (n 68).

<sup>84</sup> Choolwe Muzyamba, Elena Broaddus and Catherine Campbell, "'You Cannot Eat Rights": A Qualitative Study of Views by Zambian HIV-vulnerable Women, Youth and MSM on Human Rights as Public Health Tools' (2015) 15 *BMC International Health and Human Rights* ar26. DOI: 10.1186/s12914-015-0067-6.

<sup>85</sup> Jabbari (n 5) 507-508.

<sup>86</sup> Roele (n 61) 704.

<sup>87</sup> Roele (n 61) 719, 721; Langlois (n 13) 560; Jabbari (n 5); also Sharp (n 12); Dudai (n 17).

<sup>88</sup> Foucault (n 81) 343.

because power comes from everywhere, no one can be held responsible for power abuses'.<sup>89</sup> Indeed, Foucault's actions reflect this fatalism: despite 'continu[ing] to sign petitions throughout th[e] period' after 'his "two years" service' of more directly engaged activism in the 1970s,<sup>90</sup> Foucault argued that 'signing nothing or signing everything, either way, it amounts to the same'.<sup>91</sup>

Of course, 'knowing that something is broken is not the same thing as knowing how to fix it'.<sup>92</sup> Importantly, however, 'while it can deliver important insights, "relentless critique" alone will often prove insufficient to create a bridge between understanding and actual change in the world'.<sup>93</sup> Anthony J Langlois raises a similar issue:

some of those on the contemporary critical left [...] appear at times to leave the crushed of the world behind as they apparently conclude that the aporias of human rights (and political action more generally) preclude the possibility of (legitimately) doing anything for and/or with those in need.<sup>94</sup>

Langlois suggests that '[t]his discourse may leave one in raptures about such prospective revelations as a "new cosmopolitanism to come" [drawing on Douzinas]', though 'it will not, however, facilitate cosmopolitan justice for those who seek it *today*'.<sup>95</sup>

This is worth considering in relation to concrete instances of, and critical responses to, human rights advocacy. For instance, regarding responses to the (deeply flawed) *Kony 2012* video and advocacy campaign, Lars Waldorf notes that '[t]here's no question that *Kony 2012* smacks of missionary zeal and traffics in some tired tropes about Africa' but suggests that in responding to the campaign (and criticism of it) 'we should be less worried about the white man's burden and more worried about his indifference'.<sup>96</sup> He argues, citing

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<sup>89</sup> Faith (n 23) 264.

<sup>90</sup> Stuart Elden, *Foucault: The Birth of Power* (Polity Press 2017) 188.

<sup>91</sup> Cited in *ibid* 188.

<sup>92</sup> Sharp (n 12) 575.

<sup>93</sup> *Ibid*; see also Langlois (n 13); Coleman (n 25).

<sup>94</sup> Langlois (n 13) 560.

<sup>95</sup> *Ibid* (emphasis in original).

<sup>96</sup> Lars Waldorf, 'White Noise: Hearing the Disaster' (2012) 4 *Journal of Human Rights Practice* 469, 469. Flaws of *Kony 2012* have also been highlighted and

Irene Bruna Seu,<sup>97</sup> that many criticisms of *Kony 2012* utilise the same 'repertoires of denial' which 'enable [audiences] to morally justify their passivity' in response to Amnesty International's human rights appeals.<sup>98</sup> These are 'the medium is the message', which 'focuses on the attributed manipulative function of the appeal', 'shoot the messenger', which 'attacks the sender of the appeal', and 'babies and bathwater', which 'questions in various ways the validity of the action recommended in the appeal'.<sup>99</sup>

Waldorf argues that this 'risks reinforcing the public's sceptical consumerism towards human rights appeals as well as their moral apathy towards distant suffering'.<sup>100</sup> The same risks, and some of the same 'repertoires of denial' – especially 'babies and bathwater' – are evident in uncritical criticism of human rights more broadly,<sup>101</sup> as well as of other (no doubt highly imperfect)

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criticised by a number of other commentators, including Mahmood Mamdani. He argues that there is a risk that the video and campaign's 'well-intentioned but unsuspecting' audience 'will be responsible for magnifying the very crisis to which they claim to be the solution' due to the campaign's focus on a military rather than political response to Joseph Kony and the Lord's Resistance Army (LRA). Whilst atrocities allegedly committed by the Ugandan army in the name of 'counterinsurgency' are deprioritised, simultaneously, 'the LRA is given as the reason why there must be a constant military mobilization, at first in northern Uganda, and [then] in the entire region' and 'why the US must sen[d] soldiers and weaponry, including drones, to the region'. Mahmood Mamdani, 'The Downside of the Kony 2012 Video: What Jason did not tell Gavin and his army of invisible children' (Pambazuka News, 15 March 2012) <<http://www.pambazuka.net/en/category.php/features/80787>> accessed 16 September 2015. For further discussion see, for example, Sam Gregory, 'Kony 2012 Through a Prism of Video Advocacy Practices and Trends' (2012) 4 *Journal of Human Rights Practice* 463; David Hickman, 'Jason and the Internauts' (2012) 4 *Journal of Human Rights Practice* 475; Mark A Drumbl, 'Child Soldiers and Clicktivism: Justice, Myths, and Prevention' (2012) 4 *Journal of Human Rights Practice* 481.

<sup>97</sup> Irene Bruna Seu, "'Doing Denial": Audience Reaction to Human Rights Appeals' (2010) 21 *Discourse & Society* 438.

<sup>98</sup> Waldorf (n 96) 472.

<sup>99</sup> Seu (n 97) 443.

<sup>100</sup> Waldorf (n 96) 472.

<sup>101</sup> See *Ibid*; Seu (n 97); Stammers, *Human Rights and Social Movements* (n 12); Stammers, 'Human Rights and Social Movements: Theoretical Perspectives' (n 12); Gready (n 69); Langlois (n 13); Clapham (n 77); Dudai (n 17); Coleman (n 62).

mobilisations, such as Extinction Rebellion.<sup>102</sup> The possibility of change, radical or otherwise, is therefore obscured, or reduced, as attempts to pursue it – flawed though they may be – are dismissed outright, along with the overarching causes they promote.<sup>103</sup>

In these cases, the critical (legal) theorist occupies a position curiously reflecting the comic strip character Mister Gotcha, declaring 'I am very intelligent' whilst chastising those seeking to 'improve society somewhat' for nevertheless – supposedly hypocritically – 'participat[ing] in society'.<sup>104</sup> Whilst the comic satirises right-wing talking points, there is a real risk that critical (legal) theory – typically seen as a project of the academic, if not political, left<sup>105</sup> – absorbs these and reproduces them in barely-altered form. Whilst perhaps not advancing the view that the prevailing order need not be changed, such critical (legal) theory nevertheless undermines attempts to achieve change by suggesting they are hopelessly naïve, or necessarily complicit in maintaining the systems to which they are opposed.<sup>106</sup> This kind of critique invites responses similar in sentiment to those expressed by Ian MacKaye of the hardcore punk band Minor Threat in the song 'In My Eyes': 'You tell me that I make no difference / Well at least I'm fucking trying / What the fuck have you done?'.<sup>107</sup> The demand is not civil, to be sure, but it bears consideration:<sup>108</sup> if the goal of critical (legal) theory *is* radical change, what does it *actually do* to further this? Is it even trying?

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<sup>102</sup> Richard Seymour, 'Life or Death' (18 April 2019) <<https://www.patreon.com/posts/life-or-death-26191840>> accessed 19 December 2019.

<sup>103</sup> See Dudai (n 17).

<sup>104</sup> Matt Bors, 'Mister Gotcha' *The Nib* (13 September 2016) <<https://thenib.com/mister-gotcha>> accessed 2 August 2019.

<sup>105</sup> Costas Douzinas, 'Adikia: Critical legal theory and the future of Europe'. Plenary address presented at the conference 'Critical Legal Conference 2015: Law, Space and the Political', University of Wrocław, Wrocław, 3 September 2015; Fischl (n 59); Jabbari (n 5).

<sup>106</sup> Latour (n 6); Jabbari (n 5); Langlois (n 13); Sharp (n 12); Dudai (n 17).

<sup>107</sup> Minor Threat, 'In My Eyes', *In My Eyes EP* (Dischord Records 1981).

<sup>108</sup> On civility, see John Reynolds, 'Disrupting civility: amateur intellectuals, international lawyers and TWAIL as praxis' (2016) 37 *Third World Quarterly* 2098; Richard Seymour, 'Take your bourgeois civility and have a nice day' (27 February 2019) <<https://www.patreon.com/posts/take-your-and-24997555>> accessed 15 March 2019; Vann R Newkirk II, 'Protest Isn't Civil' *The Atlantic* (28

None of this is to suggest that good intentions are enough. Nor that trying to achieve positive change provides immunisation against, or absolution for, actually doing harm. Trying is, however, necessary for the pursuit of radical change, even if it is very far from sufficient. This is where questions emerge for producers and users of critical (legal) theory. Consistently, a question for those seeking radical change is how to pursue it – through what actions or politics? If critical theory lives up to its claims it ought to provide some guidance in this regard. This came to the forefront in recently attending a critical theory reading group, held in a law school, discussing Stuart Elden's *Foucault: The Birth of Power*.<sup>109</sup> Participants frequently raised questions about what a Foucauldian politics, or Foucauldian activism, would actually be and what it might mean. Answers were not clear or consistent. Moreover, such a politics, if it can be discerned, need not be good, progressive or effective.<sup>110</sup>

These questions, as well as those drawn from Cox highlighted above,<sup>111</sup> pose problems for critical legal theory, especially that which builds upon Foucault: who and what is this for, and what are the implications of its application? In answering these, too often critical legal theory falls short, the apparent – or, at least, plausible – implication being that radical change is not possible. Jessica Whyte, for instance, attempts to unpick the meaning and implications of Foucault's – on the face of it potentially contradictory – positions on human rights. In doing so, rather than providing clarity over whether and how change might be pursued with and through Foucauldian thought, Whyte offers more limited conclusions: that 'Foucault's willingness to look for the domination masked by discourses of right and warning that we should beware of introducing a new hegemonic thought under the guise of human rights seem more important than ever'.<sup>112</sup>

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June 2018) <<https://www.theatlantic.com/ideas/archive/2018/06/the-civility-instinct/563978/>> accessed 15 March 2019.

<sup>109</sup> Elden (n 90).

<sup>110</sup> Said (n 56); Zamora, 'Can We Criticize Foucault?' (n 19).

<sup>111</sup> Cox (n 1).

<sup>112</sup> Jessica Whyte, 'Human rights: confronting governments? Michel Foucault and the right to intervene' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) 31. More broadly, see Roele (n 61); Jabbari (n 5); Dudai (n 17).

In contrast to uncritical critics,<sup>113</sup> Ron Dudai advocates a 'human rights practice perspective' as 'adopt[ing] a more complex position than either a triumphalist account or dead-end criticism'.<sup>114</sup> Richard Seymour, meanwhile, concludes that it is possible to be critical of movements such as Extinction Rebellion, due to them being 'hippy-moralists who appear to have a simpleminded and depoliticised conception of "power" and "the system"' whilst, nevertheless, extending 'full solidarity to the hippy-moralists'.<sup>115</sup> Mark Heywood, somewhat similarly, argues that in responding to the global political conjuncture (including inequality, violence, reactionary populism and looming environmental catastrophe), 'what is needed is not point-scoring but ideas' – including, but not limited to, those emerging from the human rights movements cast aside by 'the prevailing rights-sceptics' of (uncritical) critical scholarship.<sup>116</sup>

In thinking beyond both uncritical advocacy and uncritical criticism of human rights, it is also worth considering the existing and potential roles of translation and vernacularisation in the ways human rights are locally understood and applied.<sup>117</sup> Consideration should also be given to the scope for, and limitations of, activists' and affected communities' tactical use of the law – including legal human rights mechanisms – as well as to alternative tactics and alternative frameworks of understanding (although such alternatives are not always framed as based on critical legal theory).<sup>118</sup>

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<sup>113</sup> See Stammers, *Human Rights and Social Movements* (n 12).

<sup>114</sup> Dudai (n 17) 283-284.

<sup>115</sup> Seymour (n 102).

<sup>116</sup> Heywood (n 68) 317. Malcolm Langford similarly argues that 'a human rights project' is a necessary but 'not a sufficient condition for social transformation' – see Langford (n 68) 83.

<sup>117</sup> See, for example, Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38; Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9 *Global Networks* 441; Kristi H Kenyon, 'Localizing the Global/Globalizing the Local: Reconciling Botho and Human Rights in Botswana'. In Joel R Pruce (ed), *The Social Practice of Human Rights* (Palgrave Macmillan 2015).

<sup>118</sup> See Kate Tissington, "'Tacticians in the Struggle for Change"? Exploring the Dynamics between Legal Organisations and Social Movements Engaged in Rights-Based Struggles in South Africa'. In Marcelle C Dawson and Luke Sinwell

Uncritical critique on the other hand, lacking nuanced engagement with actually existing conditions and attempts to change them, too often obscures or denies the possibility for radical change. This, in turn, can serve to reinforce the prevailing order.

#### IV. REINFORCING THE PREVAILING ORDER

The prevailing order does not only comprise economic and social structures, states and governments. It is also reflected in and reinforced by institutions such as the university, and behaviours within them.<sup>119</sup> The disciplining of the university is part of this.<sup>120</sup> Just as 'juridification as an imperial process of colonising other disciplinary structures and spheres with specifically legal modes of thought has been widely noted in legal and political theory',<sup>121</sup> so too is critical legal theory – like other (sub)fields – vulnerable to the effects of

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(eds), *Contesting Transformation: Popular Resistance in Twenty-First-Century South Africa* (Pluto Press 2012); Julia Suárez-Krabbe, *Race, Rights and Rebels: Alternatives to Human Rights and Development from the Global South* (Rowman & Littlefield International 2016). See also Moyn (n 73).

<sup>119</sup> Elsa Noterman and Andre Pusey, 'Inside, Outside, and on the Edge of the Academy: Experiments in Radical Pedagogies' in Robert H Haworth (ed), *Anarchist Pedagogies: Collective Actions, Theories, and Critical Reflections on Education* (PM Press 2012); Andre Pusey, 'Towards a University of the Common: Reimagining the University in Order to Abolish It with the Really Open University' (2017) 3 *Open Library of Humanities* 1; John Morrissey, 'Regimes of Performance: Practices of the Normalised Self in the Neoliberal University' (2015) 36 *British Journal of Sociology of Education* 614; Maja Davidovic, 'Why Gender and Diversity in the Classroom is Essential: A Research Student Perspective' (Durham University School of Government and International Affairs, 27 August 2019) <<https://www.dur.ac.uk/sgia/research/projects/genderanddiversity/raexperience/>> accessed 29 August 2019; see also Matthew Evans, 'Navigating the Neoliberal University: Reflecting on Teaching Practice as a Teacher-Researcher-Trade Unionist' (2020) 41 *British Journal of Sociology of Education* 574. Also Suárez-Krabbe (n 118).

<sup>120</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Bob Jessop and Ngai-Ling Sum, 'Pre-disciplinary and Post-disciplinary Perspectives' (2001) 6 *New Political Economy* 89.

<sup>121</sup> Stone, Wall and Douzinas (n 20) 2.

disciplinary parochialism and imperialism.<sup>122</sup> For instance, one of the major contributions of Douzinas – an academic rockstar among the British (or at any rate predominantly UK-based) tradition of critical legal theory – has been to posit and apply a difference between 'politics' and 'the political'.<sup>123</sup> The former represents the formal sphere of government and administration, whereas the latter refers to the actual workings – and contestation – of power, ideology and material interests.<sup>124</sup> This can be a useful heuristic. It is not, however, especially profound.

Furthermore, in putting forward a narrow view of 'politics' in order to contrast this with 'the political' some of the problems of disciplinary imperialism are evident. For instance, few within the discipline of politics,<sup>125</sup> are likely to agree with a narrow definition of 'the politics of "political science"' as a 'conflation of political discourse with the routine political debates of the day, and around the machinations of parties, ministers and lobbyists', which turns 'social and economic conflict into a matter of accountancy, and ideology into calculated party manifestos'.<sup>126</sup> Even though such an approach to 'political science' does exist, it is not necessarily

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<sup>122</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>123</sup> Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Routledge-Cavendish 2007) 102-103. Douzinas is (co-)author and (co-)editor of several major books in critical legal studies, and is an editor of *Law and Critique* ('the prime international critical legal theory journal'). See Law and Critique, 'Description' <<https://link.springer.com/journal/10978>> accessed 25 July 2019; Law and Critique, 'Editorial Board' <<https://www.springer.com/philosophy/philosophy+of+law/journal/10978?detailsPage=editorialBoard>> accessed 25 July 2019. On the British critical legal tradition, see Douzinas and Gearey (n 18) 239-247.

<sup>124</sup> Douzinas (n 123) 102-103; Stone, Wall and Douzinas (n 20) 3-4.

<sup>125</sup> See, for example, Adrian Leftwich (ed), *What is Politics? The Activity and its Study*, Revised Edition (Polity Press 2004).

<sup>126</sup> Stone, Wall and Douzinas (n 20) 3. Koskenniemi, similarly, summarises his 'critique of the political science enterprise' with a broad anecdote of 'countless PhD students' who 'complain about their being instructed to write on such abstractions as "liberalism", "realism", "constructivism" etc.' (alongside some more substantial evidence of the dominance of positivist approaches in international relations scholarship in the US academy). Koskenniemi (n 64) 399-400, 411.

dominant, nor is it taken for granted by those disciplined as political scientists.<sup>127</sup>

Several scholars used by critical legal theorists to build this argument could just as easily be categorised as part of the discipline of politics (at least in the subdiscipline of political theory) as they could within law or legal theory.<sup>128</sup> Something of a false dichotomy between disciplines appears to be evident.<sup>129</sup> Nor, one might suspect, is it especially likely that scholars acquainted with disciplinary work in areas such as politics or sociology would be bowled over by the revelation that power operates in and through institutions and processes (such as law) – and their study – which are presented as neutral or value-free.<sup>130</sup> As an example of this position in critical legal theory, consider that the editors of a major collection note that 'if there is an overarching argument to the book, it is an argument for the renewal of our understanding of legality's complicity with politics and power'.<sup>131</sup> That legality is complicit with politics and power is not a revelation. Having established this, the question then is how an understanding of this, its implications, and responses to it might be furthered – and what this might mean. If, like Koskenniemi, one identifies 'a gut feeling about the way the injustice of the world is a *product*

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<sup>127</sup> Leftwich (n 125); on disciplining of scholars see Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16). In Leftwich's volume, Leftwich (n 125), for example, a – potentially somewhat similar – distinction is made between 'the use of the word "politics", with a lowercase "p", refer[ing] to the actual activity out there in the world' and 'the word "Politics" (or Political Science), with an upper-case "P", refer[ing] to the academic discipline, that is to the study of political life'. See Adrian Leftwich, 'Preface'. In Adrian Leftwich (ed), *What is Politics? The Activity and its Study*, Revised Edition (Polity Press 2004) viii.

<sup>128</sup> Douzinas (n 123) 102-105; Stone, Wall and Douzinas (n 20) 3-4.

<sup>129</sup> On this trend in general see Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>130</sup> Howard S Becker, 'Whose Side Are We On?' (1967) 14 *Social Problems* 239; Alvin W Gouldner, 'Anti-Minotaur: The Myth of a Value-Free Sociology' (1962) 9 *Social Problems* 199; Cox (n 1); also Fischl (n 59) 802; Dudai (n 17).

<sup>131</sup> Matthew Stone, Illan rua Wall and Costas Douzinas, 'Preface' in Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012) ix. Likewise, see Koskenniemi's position that 'it seems necessary to me to re-describe professionalism and the various expert languages as *already political*'. Koskenniemi (n 64) 404.

of its ruling symbolic order and therefore cannot be treated through it', what then is to be done about it?<sup>132</sup>

Who and what is (critical legal) theory for in these instances? Partly it appears to be trying to show that critical legal theory as a subdiscipline is able to solve problems caused by law as a discipline (by criticising the idea that law is neutral in relation to politics and power), and by extension, to solve problems which might otherwise be approached from the perspective of other disciplines such as politics or sociology.<sup>133</sup> Disciplinary divides in academia, and the influence this has outside academia, form part of the prevailing order.<sup>134</sup> Critical legal theory does not often challenge this disciplinary order and can in fact reinforce it. Indeed, Douzinas and Adam Gearey argue that a key contribution of the 'Brit Crit' movement (which they largely treat as synonymous with the CLC) is to 'have reintroduced legal scholarship *where it always belonged*, at the heart of the academy'<sup>135</sup> – so 'disciplinary imperialism', one might argue.<sup>136</sup> David Jabbari, by contrast, reflecting the other side of the same coin, suggests that '[a]nalyzing the impact of legal norms on other social systems is arguably the role of the sociologist'<sup>137</sup> rather than the legal scholar – so 'disciplinary parochialism', then.<sup>138</sup>

Who these instances of critical legal theorising are for, on the face of it, largely seems to be other legal scholars (and, possibly, practitioners). There is something to be said for this. Legal education and scholarship often focus upon a narrow set of methodologies and attendant theoretical assumptions, which it is valuable to interrogate and expand.<sup>139</sup> Moreover, '[s]tudents of

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<sup>132</sup> Koskenniemi (n 64) 411; also Roele (n 61); more broadly, see, for example, Dudai (n 17).

<sup>133</sup> See, for example, Jabbari (n 5).

<sup>134</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Stammers, *Human Rights and Social Movements* (n 12).

<sup>135</sup> Douzinas and Gearey (n 18) 240, emphasis added; see also Douzinas (n 75) vii.

<sup>136</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>137</sup> Jabbari (n 5) 538.

<sup>138</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16).

<sup>139</sup> Bal Sokhi-Bulley, 'Alternative Methodologies: Learning Critique as a Skill' (2013) 3 *Law and Method* 6; McManus (n 18).

critical theorists often go on to become practitioners, constituting an important vector of influence' on '[e]volutions in practice'.<sup>140</sup> However, encouraging law students, legal scholars and lawyers to think outside the dominant paradigms of their field<sup>141</sup> is a far cry from 'challenging [...] systemic injustice' as 'the companion and guide of radical change'.<sup>142</sup>

Indeed, these issues are worth considering in relation to Douzinas having latterly been a member of Greece's Hellenic parliament, elected for Syriza – something of a collision between legal critique, 'politics' and 'the political' perhaps.<sup>143</sup> There are plainly contradictions in Syriza as a self-declared anti-austerity party of the left implementing deep cuts, privatisations and austerity measures.<sup>144</sup> Syriza left government having failed to achieve radical change or challenge systemic injustice (some might argue they did not even try to achieve this) and having reinforced the prevailing neoliberal order, including the domination of Greece by the interests of the European Commission-European Central Bank-International Monetary Fund 'troika'.<sup>145</sup> Critical theorists' participation in government was clearly not enough to successfully 'challeng[e] [...] orthodoxy, ideology and systemic injustice' or provide 'the companion and guide of radical change'.<sup>146</sup>

Douzinas, of course, cannot be singled out as to blame for Syriza's failings. Nevertheless, the special appeal of various strands of critical theory to academics,<sup>147</sup> and the emphasis placed by Douzinas and others on placing

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<sup>140</sup> Sharp (n 12) 575.

<sup>141</sup> Sokhi-Bulley (n 139).

<sup>142</sup> Critical Legal Thinking (n 5); see also Roele (n 61).

<sup>143</sup> Douzinas reflects on this experience as an 'accidental politician' in a recent book, Costas Douzinas, *Syriza in Power: Reflections of an Accidental Politician* (Polity Press 2017).

<sup>144</sup> See Richard Seymour, 'Syriza: the denouement' (7 July 2019) <<https://www.patreon.com/posts/syriza-28201028>> accessed 26 July 2019; David Adler, 'The three mistakes behind Syriza's demise in Greece' *The Guardian* (8 July 2019) <[https://www.theguardian.com/commentisfree/2019/jul/08/syriza-demise-greece-alexis-tsipras?CMP=share\\_btn\\_tw](https://www.theguardian.com/commentisfree/2019/jul/08/syriza-demise-greece-alexis-tsipras?CMP=share_btn_tw)> accessed 26 July 2019; also Robert Knox, 'Against Law-sterity' *Salvage* (13 December 2018) <<https://salvage.zone/in-print/against-law-sterity/>> accessed 12 June 2020.

<sup>145</sup> Seymour (n 144); Adler (n 144).

<sup>146</sup> Critical Legal Thinking (n 5).

<sup>147</sup> Riley (n 19); Thompson (n 7).

legal critique 'at the heart of the academy' comes to mind.<sup>148</sup> Outside the academy, does such theory do what it claims? Perhaps not, at least in this case.<sup>149</sup>

Critical theory can also be deeply exclusionary.<sup>150</sup> Critical legal theory – much like other (sub)fields<sup>151</sup> – is dominated by a relatively small group of people (in large part, but not exclusively, made up of white men). Like other (sub)fields – and subcultures and political movements – critical legal theory includes some by excluding others.<sup>152</sup> Critique 'polices' and critical legal theorists engage in policing through both prescription and prohibition.<sup>153</sup> Knowledge of – and, at worst, conformity with – a particular canon of authors and approaches can be used as a gatekeeping device, so that in-groups and out-groups are demarcated by their familiarity with critical theory's terms of art and neologisms.<sup>154</sup> For example, an interlocutor responding to Elden's position on criticism of Foucault (and whether or not Foucault was sympathetic to neoliberalism),<sup>155</sup> raised the potential for critical theory to be dominated by small, exclusive, groups of 'experts'. They wondered, for instance,

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<sup>148</sup> Douzinas and Gearey (n 18) 240; Douzinas (n 75) vii.

<sup>149</sup> See also Langlois (n 13) for a discussion of Douzinas's theoretical positions in relation to an actually existing politics of austerity. More broadly, this is worth considering in light of austerity as 'a deeply juridical phenomenon', framed – including in Greece – as a (fixed) legal rather than 'political' (and therefore contestable) issue; see Knox (n 144).

<sup>150</sup> Caroline Ramazanoğlu, 'Introduction' in Caroline Ramazanoğlu (ed), *Up against Foucault: Explorations of Some Tensions between Foucault and Feminism*, 1-25 (Routledge 1993) 1; Bordo (n 23) 179.

<sup>151</sup> See, for example, Davidovic (n 119).

<sup>152</sup> See Phil Burton-Cartledge, 'Stanning for Corbyn, and Other Twitter Tribes' (All That Is Solid..., 5 August 2019) <<http://averypublicsociologist.blogspot.com/2019/08/stanning-for-corbyn-and-other-twitter.html>> accessed 8 August 2019; Roele (n 61) 705-706; John Henry Schlegel, 'CLS Wasn't Killed by a Question' (2007) 58 *Alabama Law Review* 967, 975.

<sup>153</sup> Roele (n 61) 705-706.

<sup>154</sup> Douzinas and Gearey (n 18) 247; Schlegel (n 152); Bordo (n 23) 179; also Thompson (n 7); Latour (n 6).

<sup>155</sup> Elden (n 40).

must we all become historians of French labor politics in the 1960s and 70s in order to understand Foucault? Must the tens of thousands of Anglo/American scholars in the humanities and social sciences who regularly cite Foucault become experts in post-war French political history in order to proceed with citing him?<sup>156</sup>

Furthermore, having participated in the CLC, experience suggests that despite its professed egalitarian, anarchist, horizontal organisational structure, the conference may be as pervaded by cliques and unequal (including gendered and heterosexist) power dynamics as other clubs and organisations, including those professing an egalitarian ethos.<sup>157</sup> This is not to say that critical (legal) theorists are necessarily unaware of these tensions and contradictions, though some may well be.<sup>158</sup> Nor is it to suggest that critical legal theory is worse than more mainstream currents in terms of reinforcing the prevailing order. Indeed, some other currents reinforce the prevailing order on purpose.<sup>159</sup> However, it is all the more necessary to respond to these tendencies given the overt purposes of critical theory.

There is something to be said for considering critical (legal) theory in light of Alexis Papadopolis's critique of certain manifestations of antifascism as 'group identity' – 'not what you do, but what you *are*'.<sup>160</sup> Papadopolis focuses on particular antifascist responses to regular mobilisations by the far-right Proud Boys in Portland, Oregon, USA – a city where 'probably more than

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<sup>156</sup> Progressive Geographies, Comment on 'Foucault and Neoliberalism – A Few Thoughts in Response to the Zamora Piece in Jacobin' by Stuart Elden, posted by the user wobblywheel at 6:01pm (Progressive Geographies, 4 January 2015) <<https://progressivegeographies.com/2014/12/17/foucault-and-neoliberalism-a-few-thoughts-in-response-to-the-zamora-piece-in-jacobin/#comment-73036>> accessed 17 June 2019.

<sup>157</sup> See, for example, Lara Montesinos Coleman and Serena A Bassi, 'Deconstructing Militant Manhood: Masculinities in the Disciplining of (Anti-)Globalization Politics' (2011) 13 *International Feminist Journal of Politics* 204; Ramazanoğlu (n 149) 1; also Davidovic (n 119); on the CLC, see Douzinas and Gearey (n 18) 239–247.

<sup>158</sup> Douzinas and Gearey (n 18) 247; Douzinas, Goodrich and Hachamovitch (n 18) 13–14; also Fischl (n 59); Schlegel (n 152).

<sup>159</sup> For discussion of this see, for example, Fischl (n 59).

<sup>160</sup> Alexis Papadopolis, 'Masochistic Milkshake Martyrs' *Damage* (28 October 2019) <<https://damagemag.com/2019/10/28/masochistic-milkshake-martyrs/>> accessed 6 November 2019. Alexis Papadopolis is presumably a pseudonym.

anywhere else in the country, any street activity by polo-shirted chauvinists is guaranteed to be met with an energetic and hostile response'.<sup>161</sup> Papadopolis argues that a mutual (sodomasochistic) relationship is formed between fascism and antifascism of this sort. Each needs the other so that group identity can be defined and maintained in opposition to – but also, in a sense, in complicity with – the other:

If antifascism is a group identity, then who wants to actually get rid of the fascists that buttress it? If antifascism is pleasure, then why submit it to the political needs of the situation? The sadist doesn't want to transform society; she wants perpetual motion: the fist colliding with Richard Spencer's face, repeating in time with the music, on an eternal loop.<sup>162</sup>

Something similar might be said of uncritical critical theorists. Such critics need the mainstream, the conservative, liberal and neoliberal to continue to exist so that group identity can be maintained as *being* critics – or even being 'crits'<sup>163</sup> – not *doing* criticism.

Papadopolis notes, echoing some of the criticism of critical legal theory outlined above – the sort rejected by Fischl<sup>164</sup> – that

[i]t's been well-argued that the left needs to get out of the habit of simply opposing the evils of the world – of merely defining itself as anti-racist, anti-capitalist, antifascist, etc – and start putting forward a positively articulated vision of what we *support*.<sup>165</sup>

However, the kind of relationship Papadopolis describes 'isn't even oppositionalism; at its worst, it's a kind of complicity'.<sup>166</sup> Papadopolis argues that '[i]f you do genuinely oppose something, first of all you have to refuse to adopt the role it prescribes for you'.<sup>167</sup> What might this mean in practice? For the antifascists Papadopolis discusses, the answer may be relatively straightforward (even if summed up in the format of a joke): 'A masochist

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<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Fischl (n 59). Douzinas and Gearey (n 18).

<sup>164</sup> Fischl (n 59).

<sup>165</sup> Papadopolis (n 160).

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

says, hit me. A sadist answers, no'.<sup>168</sup> For critical theorists, and those deploying critical theory, consideration must be given to what role they have been prescribed and how it might be refused. Lest it be forgotten, (critical legal) theorists and users of theory in the academy 'are involved in the reproduction of capital, regardless of the content of their lectures' – or publications.<sup>169</sup> This leads to the question of what they *can* do to refuse their prescribed roles or otherwise avoid the pitfalls these present.

## V. WHAT IS TO BE DONE?

How can bullshit be avoided and uncritical critique made to be critical? Can the pitfall of 'critique of critique' (of critique of critique) *ad infinitum* be avoided?<sup>170</sup> There are no easy answers – that is rather the point. Nevertheless, some possibilities are set out here. One possibility is abandoning – or at least weakening attachments to – divisions in scholarly disciplines.<sup>171</sup> This is set out next. After this, the related possibility of weakening divides between theory and practice is put forward,<sup>172</sup> followed by closing remarks on the key themes and implications of the article.

A move towards postdisciplinarity could militate against the problems of uncritical critical theory. If the study and theorisation of phenomena such as law and politics are not considered to be fundamentally separate activities

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<sup>168</sup> Ibid. This is not to suggest that fascism ought never to be physically confronted but rather to emphasise the need for reflection upon all tactics and strategies, and their effects. Such reflection must be on practices rather than on identities – it is the focus on identity, rather than on action and effect, which results in perverse complicity between antifascism (as identity) and fascism in the instances discussed by Papadopolis. See Stanislav Vysotsky, 'The Influence of Threat on Tactical Choices of Militant Anti-fascist Activists' (2013) 5 *Interface* 263; M Testa, "'A Good Deal of Disorder" or The Anarchists & Anti-Fascism In The UK' (2017) 25 *Anarchist Studies* 9; Charlotte Nichols, 'No Quarter for Fascists' *Tribune* (2 January 2020) <<https://tribunemag.co.uk/2020/01/no-quarter-for-fascists>> accessed 6 January 2020.

<sup>169</sup> Noterman and Pusey (n 119) 178; Evans (n 119); see also Suárez-Krabbe (n 118).

<sup>170</sup> Douzinas (n 105); Dudai (n 17).

<sup>171</sup> Miller (n 16); Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Rosenberg (n 16).

<sup>172</sup> See, for example, Sharp (n 12); Dudai (n 17).

then the importation of banalities packaged as insight from one discipline to another becomes less likely.<sup>173</sup> Concurrently – and intertwined with this – genuine insights of critical critique become more likely. Thinking beyond established disciplines encourages the development and use of tools appropriate to addressing matters of interest rather than the application of disciplinary tools to a narrower set of appropriate – or, worse, inappropriate – questions.<sup>174</sup> In practice, '[t]his would mean pursuing ideas without regard for the established borders of disciplines' and 'moving away from the idea that studies ought to have a home discipline in law or another discipline (even if the boundaries of this home are permeated by interdisciplinarity)'.<sup>175</sup> Indeed,

one way in which postdisciplinarity can add value is by bringing greater coherence to areas of study precisely because conforming to disciplinary boundaries (even if they are stretched by interdisciplinarity) leads to the arbitrary division of phenomena into component elements which are then approached from particular disciplinary perspectives rather than holistically.<sup>176</sup>

This expands the toolbox available to scholars and can thus contribute to 'clarify[ing the] range of possible alternatives' to the prevailing social and political order, in line with Cox's notion of critical theory's 'principle objective'.<sup>177</sup> This also, at least potentially, has the effect of rupturing the implicit hierarchies inherent in the placement of each discipline's critical

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<sup>173</sup> Fischl (n 59) 802; Darren J. O'Byrne, 'Marxism and Human Rights: New Thoughts on an Old Debate' (2019) 23 *International Journal of Human Rights* 638.

<sup>174</sup> Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Rosenberg (n 16).

<sup>175</sup> Matthew Evans, 'Interdisciplinarity and Punishment in the Academy: Reflecting upon Researching and Teaching Human Rights in University Settings'. Paper presented at the conference 'Re-visioning International Studies: Innovation and Progress', The International Studies Association's 60<sup>th</sup> Annual Convention, Sheraton Centre Toronto, Toronto, 27-30 March 2019, 11.

<sup>176</sup> Evans (n 175) 11; see also Sayer, 'Long Live Postdisciplinary Studies!' (n 16); Sayer, 'For Postdisciplinary Studies' (n 16); Miller (n 16); Rosenberg (n 16).

<sup>177</sup> Cox (n 1) 130.

theorists in a privileged position, uniquely able to see through the naïveté of the non-critical 'great unwashed'.<sup>178</sup>

Another, related, possibility is weakening the divide between theory and practice, not simply by asserting that they are the same thing, but by consistently engaging in the dialectical interrogation of each by the other.<sup>179</sup> The questions drawn from Cox form part of this: who and what is any given instance of theorisation for?<sup>180</sup> What does it mean for practice? Likewise, who and what is any given instance of practice for? What does it mean for theory? Practice here can be understood broadly, encompassing, for example, the professional activities of lawyers and scholars, as well as institutional and non-institutional forms of political activism.<sup>181</sup>

If critical theory is to be 'the companion and guide of radical change'<sup>182</sup> then it must '*clarify* [the] range of *possible* alternatives'.<sup>183</sup> The point is not only to understand the world, but also to change it.<sup>184</sup> Therefore, utopianism will not do:

if critical theory is to constrain its potential utopianism, as Cox argues it must, then an analysis of tactical and strategic policy questions associated with 'real world' implementation – and at higher level of detail than is typical of most critical studies literature – is required.<sup>185</sup>

Utopianism should not, however, be confused with radicalism.<sup>186</sup> If radical change is to actually occur with critical theory as its 'companion and guide',<sup>187</sup>

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<sup>178</sup> Latour (n 6) 239; see also Sharp (n 12), especially his summary of Frankfurt School critical theory at 575.

<sup>179</sup> Sharp (n 12); Dudai (n 17); Lennox and Yıldız (n 53); Coleman (n 25); Coleman (n 62).

<sup>180</sup> Cox (n 1).

<sup>181</sup> Dudai (n 17).

<sup>182</sup> Critical Legal Thinking (n 5).

<sup>183</sup> Cox (n 1) 130, emphasis added.

<sup>184</sup> Karl Marx, 'Theses On Feuerbach'. In Karl Marx and Frederick Engels, *Selected Works (in three volumes)* (vol 1, Progress Publishers 1969) 15.

<sup>185</sup> Sharp (n 12) 584.

<sup>186</sup> Frederick Engels, 'Socialism: Utopian and Scientific'. In Karl Marx and Frederick Engels, *Selected Works (in three volumes)* (vol 3, Progress Publishers 1970); see also Dudai (n 17).

<sup>187</sup> Critical Legal Thinking (n 5).

then those whose critique exposes the contradictions and the utopianism of, for example, mainstream and liberal approaches to law ought not to 'offer a utopian fantasy of [their] own'.<sup>188</sup> Utopias offer little in the way of guidance. However, 'relentless critique',<sup>189</sup> pointedly refusing to answer the 'what would you put in its place?' question,<sup>190</sup> also offers little guidance.<sup>191</sup> Some critical (legal) theorists might suggest that this is beside the point – that their aim is *not* to provide a guide for change.<sup>192</sup> Very well – this is perhaps where thinking 'against' and 'beyond' critical legal theory comes to the forefront rather than solely thinking 'in' it,<sup>193</sup> though plainly some critical legal theorists *do* intend their work to guide radical change.<sup>194</sup> One might draw a comparison with Papadopolis's challenge to Portland's antifascists to refuse to adopt the role prescribed for them by conditions to which they claim to be opposed.<sup>195</sup> Whether in, against, or beyond critical legal theory, for those who are committed to pursuing radical change, there is an imperative to think through how this might be achieved. Likewise, there is an imperative to think through how they might actually refuse complicity with the conditions they oppose.

Dustin Sharp's development of a Coxian approach to critical theory could be useful here.<sup>196</sup> Sharp suggests that problem-solving – status quo-accepting – and critical – status quo-disrupting – theories should not be treated as a simple binary.<sup>197</sup> Rather, the degree to which the status quo is reinforced or disrupted exists on a spectrum or 'continuum of critique'.<sup>198</sup> Sharp advocates 'integrated critique', bringing critical theory together 'in sustained and close

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<sup>188</sup> Fischl (n 59) 819.

<sup>189</sup> Sharp (n 12) 575.

<sup>190</sup> Fischl (n 59).

<sup>191</sup> Dudai (n 17); Langlois (n 13).

<sup>192</sup> See, for example, Fischl (n 59).

<sup>193</sup> See Holloway (n 15).

<sup>194</sup> Critical Legal Thinking (n 5). Jabbari (n 5).

<sup>195</sup> Though, Papadopolis notes, '[a]lready, this seems to be too much of a challenge: many self-described antifascists are deeply resistant to the idea. We're having fun here, and who are you to interfere with our fun?'. Papadopolis (n 160).

<sup>196</sup> Sharp (n 12); Cox (n 1).

<sup>197</sup> Sharp (n 12) 582-583.

<sup>198</sup> Ibid.

conversation' with 'critically motivated problem-solving theory'.<sup>199</sup> In Sharp's conception 'critically motivated problem-solving' differs from Cox's problem-solving theory<sup>200</sup> because it makes no claims to value neutrality.<sup>201</sup> Moreover, 'unlike most critical theory', it 'is keyed to understanding "the how" of bringing about the potential alternative orders for which critical theory has provided a very rough sketch. In other words, it sweats some of the small stuff that critical theory famously ignores'.<sup>202</sup> Sharp's 'critically motivated problem-solving theory' then 'corkscrews around the continuum of critique [...] helping to push things in one direction or another' – towards status quo-acceptance or disruption.<sup>203</sup> This kind of approach might be most obviously useful in areas such as human rights and transitional justice (Sharp's field), where 'the transmission of ideas from the academy to practice may be especially significant given the frequent migration of "pracademics" between the two worlds'.<sup>204</sup> It could, however, be applied more broadly in an attempt to resolve the kinds of tensions this article has identified.

## VI. CONCLUSION

A fundamental theme of the discussion in this article is that critical theorists and those making use of critical theory should consistently interrogate what it is they are doing and why they are doing it, as well as what the effects of what they are doing are. They should look at themselves in the mirror – but more than that, they should ensure that they have stepped out of the distorting hall of mirrors which is made up of both mainstream approaches and uncritical critique.<sup>205</sup> Having done this, they should ask themselves what they are doing, why they are doing it, who they are doing it for and what the implications are. These questions ought to haunt the producers and users of critical (legal) theory, and should return again and again to interrogate critical inquiry. If, on reflection, there are no clear answers to these questions – or if

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<sup>199</sup> Ibid 584.

<sup>200</sup> Cox (n 1).

<sup>201</sup> Sharp (n 12) 584.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid 575; see also Dudai (n 17).

<sup>205</sup> Stammers, *Human Rights and Social Movements* (n 12).

the answers are bullshit<sup>206</sup> – then an opportunity presents itself to think and act differently: to engage in more critical critique, or to move away from, or perhaps beyond, critical theory altogether. This, then, is the self-directed and outward-facing challenge laid down by the article, and the goal set by it.

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<sup>206</sup> Frankfurt, *On Bullshit* (n 8).

**LEAVING THE DICE FOR PLAY:  
A CRITIQUE OF THE APPLICATION OF THE LAW AND ECONOMICS LENS  
TO INTERNATIONAL HUMANITARIAN LAW**

Tetyana (Tanya) Krupiy\*

*International humanitarian law remains under-theorised. Eric Posner pioneered the use of law and economics methodology to provide an alternative explanation of international humanitarian law. The present article examines how the use of the cognitive framework underpinning the law and economics (L&E) lens in international humanitarian law (IHL) transforms this legal regime. First of all, the article argues that, although the law and economics methodology accounts for the fact that self-interest is one of the motivating factors behind state action, it does not accommodate the constructivist dimension of international humanitarian law. Furthermore, while the Chicago School has descriptive capacity for the principle of military necessity, it offers a limited analytic framework for understanding the principle of humanity, both of which are equally important when understanding the foundational basis of IHL. Secondly, the article argues that L&E changes how states interpret the purpose of international humanitarian law, the structure of this legal regime and how individuals apply the legal norms on the battlefield. In other words, it alters the balance between military and humanitarian considerations within IHL norms. The rules of targeting will serve as a case study to illustrate some of the problems associated with the application of the L&E lens to IHL, especially how such rules in fact place limitations on the planning and conduct of military operations.*

**Keywords:** international humanitarian law, law and economics, rules of targeting

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## I. INTRODUCTION

According to Frédéric Mégret, international humanitarian law (IHL) is an 'anti-theoretical, at times even anti-intellectual discipline'.<sup>1</sup> Specifically:

[T]he dominant understanding of international humanitarian law sees it as above all a pragmatic endeavour, one relatively unperturbed by foundational questions. As such, humanitarianism as an ideology is one that has traditionally foregrounded action, pragmatism, and empathy over ideas, abstraction, and theory.<sup>2</sup>

<sup>1</sup> Frédéric Mégret, 'Theorising the Laws of War' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 763.

<sup>2</sup> Ibid.

There is limited literature theorising the nature of IHL.<sup>3</sup> Recently scholars have begun to apply feminist, third world approaches to international law, economic analysis of law<sup>4</sup> and other methodologies to theorise IHL.<sup>5</sup> Their aim is to bring new perspectives to this area of law.<sup>6</sup> Thomas Forster believes that the employment of diverse methodologies allows one to attain a more nuanced understanding of the role of IHL.<sup>7</sup> Such scholarship 'challenges well-established narratives held dear by sceptics and proponents alike'.<sup>8</sup> A good example of this is Eric Posner, who applied the law and economics methodology (L&E) to challenge the traditional understanding of IHL as advancing humanitarian values.<sup>9</sup>

This paper scrutinises whether the L&E methodology has descriptive capacity for IHL and may be employed to better understand where the balance between competing values lies within IHL norms. It contributes to existing literature by demonstrating that the application of economic reasoning has limited explanatory value for IHL.<sup>10</sup> The article concentrates on approaches within L&E that are not normatively oriented in that they do not provide for the possibility of non-economic considerations trumping economic considerations on policy grounds.<sup>11</sup> For this reason, the article makes the Virginia and the Chicago Schools the focal points of analysis. Since the Yale School permits non-economic values to override economic

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<sup>3</sup> Ibid.

<sup>4</sup> Thomas Forster, 'International Humanitarian Law's Old Questions and New Perspectives: on What Law Has Got to Do with Armed Conflict' (2016) 98(3) *International Review of the Red Cross* 995, 997.

<sup>5</sup> Ibid 1008.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid 997.

<sup>8</sup> Ibid.

<sup>9</sup> Eric Posner, 'A Theory of the Laws of War' (2002) *John M Olin Law & Economics Working Paper* 160 1, 5.

<sup>10</sup> Ibid 12-13; Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) 191; Annemarie Balvert, 'Their Own Best Vindication: an Economic Analysis of International Humanitarian Law in the 19th Century' (Master of Laws thesis, Tilburg University 2018) 44.

<sup>11</sup> Francesco Parisi, 'Positive, Normative and Functional Schools in Law and Economics' (2004) 18 *European Journal of Law and Economics* 259, 264-65.

considerations,<sup>12</sup> its consideration is beyond the scope of this article. The article discusses how the use of L&E methodology transforms IHL.

The application of L&E excises the psychological, communal and normative dimensions of IHL. Furthermore, its methodology modifies how states would come to understand the purpose and the structure of IHL and revises the cognitive architecture of this area of law. L&E alters how decision-makers balance military and humanitarian considerations and therefore how they apply IHL norms. The rules of targeting will be used as a case study for contextualising the discussion. These rules are designed to enable the parties to a conflict to comply with an obligation to take constant care to spare the civilians from the effects of the conduct of military operations.<sup>13</sup>

The academic significance of the paper is that it demonstrates that the methodological choices scholars make when theorising IHL can have a profound impact on the regime itself. Scholars can facilitate the ability of states to make informed decisions regarding how to develop IHL. They can inform states about how the application of different methodologies bears on the substance of legal norms and the structure of IHL.

This article adopts the following structure. Section II explains the traditional understanding of IHL and its cognitive structure. It demonstrates what roles the principle of military necessity and the principle of humanity have within IHL, and argues that they provide a roadmap for the IHL's cognitive framework and for commanders applying IHL norms. This information serves as a foundation for contrasting how the traditional understanding of IHL differs from an analysis of IHL through the lens of L&E.

Section III introduces the methodology of L&E and illustrates how scholars have applied this methodology to explain IHL. It delineates why the article engages with the Chicago School and the Virginia School but not with the Yale School of L&E. Section IV investigates some of the dimensions which the use of L&E excises from IHL. The shortcoming of the L&E methodology is that it does not account for the collective, psychological and symbolic dimensions of IHL. Instead, it will be argued that the constructivist methodology is a closer match for describing IHL, as L&E does not

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<sup>12</sup> Ibid 264.

<sup>13</sup> UNGA, Res 2675 (1970), UN Doc A/RES/2675 para 3.

accommodate the constructivist dimension of IHL due to its individualistic orientation.

Section V shows that the Chicago School has descriptive capacity for the principle of military necessity but not for the principle of humanity. As such, it has limited explanatory capacity for how IHL balances military and humanitarian values. The rules of targeting here serve as a case study. Section VI synthesises the analysis regarding the manner in which the use of L&E transforms the structure and application of IHL norms. The conclusion discusses how the analysis of IHL through the lens of L&E modifies the underpinnings of this legal regime and the application of IHL norms.

## II. THE TRADITIONAL UNDERSTANDING OF IHL'S PURPOSE

In order to enter into the discussion on how the application of the L&E lens to analyse IHL transforms this legal regime it is first necessary to survey the traditional understanding of IHL. In particular, it is necessary to understand the cognitive background and principles that underpin IHL norms and how they relate to one another. The principles of military necessity and humanity, defined in the Preamble to the Saint Petersburg Declaration Renouncing the Use in War of Certain Explosive Projectiles 1868 (Saint Petersburg Declaration),<sup>14</sup> constitute the legal and moral foundation of IHL norms.<sup>15</sup> The two principles determine how individuals apply IHL norms on the battlefield.<sup>16</sup>

The Preamble envisages the purpose of IHL in the following manner: 'that the progress of civilization should have the effect of alleviating as much as possible the calamities of war'.<sup>17</sup> In associating the progress of humankind with alleviating human suffering in war, the Preamble to the Saint Petersburg

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<sup>14</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868, entered into force 11 December 1868) 1 AJIL 95 (Saint Petersburg Declaration) preamble.

<sup>15</sup> Viola Vincze, 'Taming the Untameable: the Role of Military Necessity in Constraining Violence' (2016) 2016(2) ELTE Law Journal 93, 96.

<sup>16</sup> Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 795, 796.

<sup>17</sup> Ibid.

Declaration places humanity at the heart of the social development of societies worldwide.

First of all, the principle of humanity prohibits 'the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes'.<sup>18</sup> Secondly, the principle of military necessity qualifies the principle of humanity by permitting a belligerent 'subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money'.<sup>19</sup> These two principles co-exist in a relationship of 'delicate balance'.<sup>20</sup> They embody universal values.<sup>21</sup> The Preamble to the Saint Petersburg Declaration delineates the relationship between the principles and defines the purpose of IHL.<sup>22</sup>

According to Yishai Beer, at the time of its formulation states saw the purpose of the principle of military necessity as constraining the use of military force.<sup>23</sup> At present, however, it may be argued that the principle 'primarily pays lip service to the constraining function it was designed to fulfil, justifying, in fact, almost any belligerent activity'.<sup>24</sup> This is the standpoint of Michael Schmitt, who argues that the principle of military necessity does not place actual limitations on the conduct of military operations.<sup>25</sup> Rather, it allows the armed forces to refer to military considerations when applying IHL norms.<sup>26</sup>

Yet, as Beer argues, despite the change in interpretation, the need to constrain the employment of force, from both a military and ethical

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<sup>18</sup> United Kingdom Ministry of Defence, *United Kingdom Joint Service Manual of the Law of Armed Conflict* (Oxford University Press 2004) para 2.2.1.

<sup>19</sup> *Judgment of the Nuremberg International Military Tribunal USA v List (The Hostages Case)* (1948) 15 ILR 632.

<sup>20</sup> *Ibid.*

<sup>21</sup> Vincze (n 15) 96.

<sup>22</sup> *Ibid.*

<sup>23</sup> Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalising the Concept of Military Necessity' (2015) 26 *European Journal of International Law* 801, 807.

<sup>24</sup> *Ibid* 807.

<sup>25</sup> Schmitt (n 16) 799.

<sup>26</sup> *Ibid.*

perspective, remains.<sup>27</sup> Because resources are scarce, military professionalism requires the armed forces to apply force in a measured manner.<sup>28</sup> He consequently advocates that the original restraining role of the principle of military necessity should be strengthened by introducing professional military standards.<sup>29</sup> Beer thus diverges from Schmitt in that he advocates for the armed forces to adopt supplementary standards so as to reinvigorate the original function of the principle of military necessity to limit how much force the armed forces may employ.<sup>30</sup>

The position adopted here is that Beer's interpretation of the principle of military necessity is preferable to that of Schmitt's. The principle stipulates that the amount of force the armed forces use should be consistent with how much force IHL authorises the armed forces to employ.<sup>31</sup> Had the principle of military necessity only addressed military considerations associated with winning the battle, the reference to the restrictions IHL places on the conduct of hostilities would have been redundant. Support for this argument may be found in state practice. France, for example, interprets the principle of military necessity as authorising only those measures which are 'indispensable' to the accomplishment of the mission.<sup>32</sup>

The principles of humanity and military necessity are complementary.<sup>33</sup> The Preamble to the Saint Petersburg Declaration summarises the relationship between the two principles<sup>34</sup> by stating that 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy' and 'to disable the greatest possible number of men

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid 805.

<sup>29</sup> Ibid 809.

<sup>30</sup> Beer (n 23) 809.

<sup>31</sup> *The Hostages Case* (n 19).

<sup>32</sup> General of the Armed Forces of France, *Summary Note on the Laws Applicable During Armed Conflict* 432/DEF/EMA/OL.2/NP (Chief of the Armed Forces 1992) para 2.4.

<sup>33</sup> United States Department of the Navy, *Law of Naval Warfare NWIP 10-2* (United States Department of the Navy 1955) 2-8; Schmitt (n 16) 798.

<sup>34</sup> APV Rogers, 'The Principle of Proportionality' in Howard Hensel (ed), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict* (Ashgate Publishing 2008) 195-96.

[soldiers]'.<sup>35</sup> This goal 'would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men [soldiers], or render their death inevitable'.<sup>36</sup> This is reflected in the viewpoints of Indonesia and New Zealand, both of which stipulate that, when applied in combination, the principles of humanity and military necessity prohibit 'activities which produce suffering out of all proportion to the military advantage to be gained'.<sup>37</sup>

Despite such commitments, it is hard to determine where exactly the balance between the requirements of humanitarianism and military necessity in IHL lies.<sup>38</sup> Due to the absence of such guidelines, it is not only the case that military personnel with different doctrinal backgrounds may disagree on how to balance the competing principles in 'close cases'.<sup>39</sup> It also means that scholars have applied various methodologies to theorise IHL, including L&E. The outstanding question of this paper is whether the use of the L&E lens enables scholars to accurately describe IHL and to offer guidance on where the balance between the principles of humanity and military necessity may be found.

### III. AN INTRODUCTION TO LAW AND ECONOMICS

The scholarly use of L&E methodology to analyse the conduct of states in the international arena is a relatively recent phenomenon.<sup>40</sup> To understand the

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<sup>35</sup> Saint Petersburg Declaration (n 14) preamble.

<sup>36</sup> Ibid.

<sup>37</sup> New Zealand Defence Force, *Interim Law of Armed Conflict Manual DM 112* (Directorate of Legal Services 1991) para 207; The Commander of the Regional Military Command of Irian Jaya and Maluku, Directive Concerning Human Rights (Indonesian Armed Forces 1995) paras 7(d) and 7(e).

<sup>38</sup> International Committee of the Red Cross, *Report on the Practice of Russian Federation* (International Committee of the Red Cross 1997), ch 1.5.

<sup>39</sup> International Criminal Tribunal for the Former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (2000) 94 ILM 1257 para 50.

<sup>40</sup> William Aceves, 'The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice' (1996) 17 University of Pennsylvania Journal of International Economic Law 995, 998-99.

novelty of this approach it is therefore necessary to have a grounding in a L&E methodology, showing how scholars have applied this methodology to the context of IHL. L&E methodology is characterised by the fact that it applies concepts and methods from the field of economics to evaluate whether they have explanatory value for legal norms and legal systems.<sup>41</sup> One of the goals of economics is to maximise wealth.<sup>42</sup> The present article focuses on examining whether L&E methodology has explanatory value for IHL. It scrutinises how the reference to the market in establishing what value to place on military advantage and harm to civilians modifies the structure of IHL.

L&E encompasses three distinct methodological approaches which share a common foundation.<sup>43</sup> The Chicago School, the Yale School and the Virginia School are the three main approaches for analysing institutions and behaviour through an economic lens.<sup>44</sup> The three schools share a common purpose and use economic theory as an analytic technique.<sup>45</sup> They view individuals as autonomous rational actors who seek to fulfil their preferences.<sup>46</sup> As such, individuals are separate from the community they live in.<sup>47</sup> However, each school of L&E has a distinct methodological approach for analysing the law and evaluating social preferences.<sup>48</sup>

The present article will refer to the Chicago School and to the Virginia School but not to the Yale School when discussing whether L&E can explain IHL. The Yale School is not part of the discussion because it incorporates both economic and non-economic concepts in its analytical framework<sup>49</sup>, and acknowledges that economic language and concepts are distinct from

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<sup>41</sup> Parisi (n 11) 259.

<sup>42</sup> Keith Hylton, 'Law and Economics Versus Economic Analysis of Law' (2018) Boston University School of Law Law and Economics Research Paper Series 17-40 1, 3.

<sup>43</sup> Parisi (n 11) 263-64.

<sup>44</sup> *Ibid* 264-65.

<sup>45</sup> *Ibid* 263.

<sup>46</sup> James Buchanan, 'The Domain of Constitutional Economics' (1990) 1 *Constitutional Political Economy* 1, 13-14.

<sup>47</sup> *Ibid* 13.

<sup>48</sup> Parisi (n 11) 263-264.

<sup>49</sup> Guido Calabresi, 'An Exchange: About Law and Economics: a Letter to Ronald Dworkin' (1980) 8 *Hofstra Law Review* 553, 558.

other normative concepts.<sup>50</sup> Importantly, it places economic goals below higher-order goals, such as justice.<sup>51</sup> Since the Yale School allows normative values to trump economic goals,<sup>52</sup> it is unsuitable for analysing whether economic reasoning has descriptive capacity for IHL. It will therefore not be considered directly in what follows. However, the article will analyse briefly why economic theories which incorporate non-economic reasoning lack descriptive capacity for IHL.

The main focus of this article will thus be on the Chicago School and the Virginia School of L&E. First of all, the Chicago School is relevant because a close analysis of the first scholarly work to theorise IHL through the lens of L&E shows that it draws extensively on the Chicago School as an analytic framework.<sup>53</sup> Secondly, the 'public choice theory' of the Virginia School will be examined, in order to determine the explanatory power of L&E to IHL.

Eric Posner was the first scholar to employ L&E to provide an alternative explanation of IHL, and his scholarship epitomises the application of the Chicago School to understand IHL.<sup>54</sup> He rejects the conventional explanation of IHL as serving humanitarian values<sup>55</sup> and argues that states are self-interested entities.<sup>56</sup> They are preoccupied with how many resources to invest in production of goods for domestic consumption and how many resources to spend on military capability.<sup>57</sup>

States maximise the joint value of making investments in the production of goods and military capabilities under two conditions.<sup>58</sup> First of all, states need to place limitations on how much they invest in strengthening military capability.<sup>59</sup> They thus conclude agreements to limit specific arms to achieve

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Eric Posner, 'A Theory of the Laws of War' (n 9) 1 and 12-13.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 5.

<sup>56</sup> Ibid 3.

<sup>57</sup> Ibid 6.

<sup>58</sup> Ibid 8.

<sup>59</sup> Ibid.

this objective.<sup>60</sup> Secondly, as armed conflict is unattractive to states because it destroys cities and factories<sup>61</sup>, they need to reduce the 'efficiency of military technology'.<sup>62</sup> To achieve this, they adopt IHL norms to limit their investment in military conflict.<sup>63</sup> Such limitations on hostile conduct allow states to increase production by reducing the number of involved civilians and demobilised soldiers.<sup>64</sup> As a result, states preserve greater levels of production of goods and increase the levels of consumption among the civilian population.<sup>65</sup> The reduction of deaths among civilians increases productive capital because civilians who are uninjured are able to produce goods for society to consume.<sup>66</sup>

Eric Posner drew on the Chicago School in order to construct an analysis of state behaviour. In particular, he was influenced by Richard Posner,<sup>67</sup> who developed the 'principle of wealth maximisation' to describe how a decision-maker guided by economic goals would formulate legal rules.<sup>68</sup> The principle of wealth maximisation states that such legal rules maximise society's 'wealth'<sup>69</sup> in the form of 'the total value of all "economic" and "non-economic" goods and services' circulating in society.<sup>70</sup> They achieve this by allocating a resource to the person who is willing to pay a higher price.<sup>71</sup> In order to claim a right to a resource an individual should produce those goods

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid 13.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 3.

<sup>64</sup> Ibid 12.

<sup>65</sup> Ibid 20.

<sup>66</sup> Ibid 12.

<sup>67</sup> Parisi (n 11) 264.

<sup>68</sup> Richard Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *Journal of Legal Studies* 103, 120; Richard Posner 'A Reply to Some Recent Criticisms of the Efficiency Theory of Common Law' (1981) 9 *Hofstra Law Review* 775, 775.

<sup>69</sup> Richard Posner, 'The Value of Wealth: a Comment on Dworkin and Kronman' (1980) 9 *Journal of Legal Studies* 243, 243.

<sup>70</sup> Richard Posner, 'Wealth Maximisation and Tort Law: a Philosophical Inquiry' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 99.

<sup>71</sup> Posner, 'The Value of Wealth' (n 69) 243.

for which other individuals are prepared to pay more than had the producer used the resources to produce an alternative good or service.<sup>72</sup>

Eric Posner's conception of states choosing how to maximise the joint value from investing resources into competing activities in the production of military and non-military goods<sup>73</sup> maps onto the principle of wealth maximisation developed by Richard Posner. His work can be interpreted as explaining IHL in terms of maximising the wealth of states. More recently Alan Sykes and Annemarie Balvert have written in support of Eric Posner's conception of L&E as explaining IHL.<sup>74</sup> Their analysis is based on the Chicago School. Since the explanation of IHL as reducing the efficiency of military technology<sup>75</sup> rather than as pursuing humanitarian goals<sup>76</sup> challenges the traditional conception of IHL, it is necessary to investigate whether a L&E approach to analysis changes its object of study.

In addition to the principle of wealth maximisation developed by the Chicago School, the 'public choice theory' of the Virginia School<sup>77</sup> is suitable for analysing whether L&E explains IHL. The Virginia School focuses on understanding collective action in the realm of politics, in terms of how citizens develop rules to limit the authority of the state.<sup>78</sup> What distinguishes the Virginia School from other schools of L&E is that it focuses on how individuals make choices relating to the establishment of a constitution to govern society's affairs rather than on how individuals can allocate scarce resources among competing goals.<sup>79</sup> What unifies the Virginia School with other L&E schools is that it uses exchange to understand human

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<sup>72</sup> Ronald Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1, 4-5.

<sup>73</sup> Eric Posner, 'A Theory of the Laws of War' (n 9) 8.

<sup>74</sup> Posner and Sykes (n 10) 191; Balvert (n 10) 44.

<sup>75</sup> Eric Posner, 'A Theory of the Laws of War' (n 9) 8.

<sup>76</sup> *Ibid* 5.

<sup>77</sup> Parisi (n 11) 265.

<sup>78</sup> James Buchanan, 'Public Choice: Politics without Romance' (2003) 19 *Policy* 13, 15.

<sup>79</sup> Buchanan, 'The Domain of' (n 46) 5-6.

interaction.<sup>80</sup> Moreover, individuals choose rules among alternative sets of rules<sup>81</sup> with a view to maximising their preferences.<sup>82</sup>

The scholarship of Jeffrey Dunoff and Joel Trachtman is an example of scholars using the type of reasoning present in the Virginia School to describe the process through which states formulate treaty norms in public international law.<sup>83</sup> They describe treaty-making in terms of states entering into a transaction to trade 'components of political power'.<sup>84</sup> This transaction resembles a market transaction<sup>85</sup> and enables states to maximise their preferences,<sup>86</sup> although they may forgo something in reaching an agreement, the agreement confers a benefit on them.<sup>87</sup> The authors analyse how states establish common rules to govern their collective affairs and limit their own authority through a process of exchange. This claim will be critically analysed at a later stage.

The Virginia School thus stipulates that individuals may decide to allow collective values and interests to influence them.<sup>88</sup> In contrast, the Chicago School treats the maximisation of wealth as enabling individuals to achieve other goods, such as happiness and freedom.<sup>89</sup> Since IHL claims to embody universal values<sup>90</sup> and is a product of the states' collective action, the question remains whether the Virginia School has descriptive value for how states formulated IHL.

Although there exist some important distinctions between the Chicago and Virginia Schools, for the purposes of the present argument they will be referred to interchangeably as representatives for the L&E methodology, unless otherwise stated. Importantly, both approaches accept the

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<sup>80</sup> Ibid 8.

<sup>81</sup> Ibid 9.

<sup>82</sup> Ibid 11.

<sup>83</sup> Jeffrey Trachtman and Joel Dunoff, 'Economic Analysis of International Law' (1999) 24 *Yale Journal of International Law* 1, 6.

<sup>84</sup> Ibid 13-14.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 14.

<sup>88</sup> Ibid 7.

<sup>89</sup> Posner, 'The Value of Wealth' (n 69) 244.

<sup>90</sup> Saint Petersburg Declaration (n 14) preamble.

fundamental assumption that social interaction between individuals and states should be understood through the lens of economic exchange. An awareness of L&E methodology now makes it possible to trace what dimensions of IHL become excised when one theorises it through the lens of L&E.

#### IV. PROBLEMATISING THE USE OF THE ECONOMIC COGNITIVE FRAMEWORK IN IHL

Law and economics can be characterised as a cognitive framework for understanding the world as well as for structuring relationships. However, as Dan Danielsen explains, the L&E understanding is in fact built on particular assumptions, expectations and values.<sup>91</sup> Many of these become problematic when applied to the context of IHL.

##### *1. The Role of the International Community*

First of all, the individualist methodology of L&E<sup>92</sup> is insufficient to account for how IHL conceptualises the relationship between states. All L&E schools assume that individuals are autonomous rational actors who seek to fulfil their preferences.<sup>93</sup> The public choice theory acknowledges that collective interests may shape how individuals make choices.<sup>94</sup> However, it treats the cumulative choices of individuals, rather than the community as a whole, as a unit of analysis.<sup>95</sup> This has led Andreas Paulus to criticise L&E for not accounting for the fact that international law operates as a normative force in shaping the formation of states' interests.<sup>96</sup>

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<sup>91</sup> Dan Danielsen, 'International Law and Economics: Letting Go of the "Normal" in Pursuit of an Ever-Elusive Real' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 458 and 462.

<sup>92</sup> Buchanan, 'The Domain of' (n 46) 13-14.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* 16-17.

<sup>95</sup> *Ibid* 7.

<sup>96</sup> Andreas Paulus, 'Potential and Limits of the Economic Analysis of International Law: a View From Public International Law' (2009) 165 *Journal of Institutional and Theoretical Economics* 170, 173.

The individualistic lens of L&E for analysing state conduct is inconsistent with the important role references to the international community and shared values play in IHL. The fact that the Virginia School provides that actors may choose to be influenced by collective values<sup>97</sup> does not mitigate this concern. IHL appeals to universally shared values<sup>98</sup> as part of its claim to legitimacy. The Martens Clause states that if IHL is silent on a matter then individuals have protection under the principles of international law which 'result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.<sup>99</sup>

The references in the Martens Clause to the laws of humanity and the requirements of 'public conscience'<sup>100</sup> appeal to the core ethical values that states and individuals worldwide share. The Preamble to the Saint Petersburg Declaration similarly links the goal of 'alleviating as much as possible the calamities of war' to the shared goal of achieving the progress of civilisations.<sup>101</sup> While the meaning of the term civilisation has evolved,<sup>102</sup> at its core this term refers to the development of human societies culturally, morally and in other ways.<sup>103</sup> By conceiving of states as atomistic actors rather than as actors who are part of an international community, the Virginia and the Chicago Schools rule out some of the functions of IHL.

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<sup>97</sup> Buchanan, 'The Domain of' (n 46).

<sup>98</sup> Mégret (n 1) 765.

<sup>99</sup> The Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land 1899 (adopted 29 July 1899, entered into force 9 April 1900) 32 Stat 1803 (The Hague Convention II 1899) preamble; *In re Krupp and others* (1948) 15 Annual Digest and Reports of Public International Law Cases 620.

<sup>100</sup> *Ibid.*

<sup>101</sup> Saint Petersburg Declaration (n 14) preamble.

<sup>102</sup> Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 917-42.

<sup>103</sup> Yukichi Fukuzawa, *An Outline of a Theory of Civilization* (David Dilworth and G Cameron Hurst III tr, Columbia University Press 1875) 45; Cristian Violatti, 'Civilization', *Ancient History Encyclopedia* (2014) <[www.ancient.eu/civilization](http://www.ancient.eu/civilization)> accessed 19 February 2019.

## 2. IHL's Symbolic and Communicative Value

One of the functions L&E exises are the symbolic and communicative dimensions of IHL. The references states make to commonly shared values in IHL instruments should be understood as having a symbolic function. When one changes the symbolic function of IHL, one also changes the cognitive framework underpinning this legal regime. The fact that states concluded a legal regime of IHL notwithstanding the plurality of variations within local cultures corroborates the fact that IHL symbolises the values states share as members of an international community.

René Provost explains the central function symbolism has in IHL.<sup>104</sup> To develop this argument he examines the motivations of states surrounding the choice of symbols to designate medical units.<sup>105</sup> For instance, Turkish forces used the red crescent to identify medical relief teams in 1876 because they found the use of the red cross offensive.<sup>106</sup> The fact that the Turkish forces contested the type of the symbol to be employed to designate protected objects but not the substance of IHL norms<sup>107</sup> supports the assertion that IHL embodies the values states hold as members of an international community. In particular, Turkey became party to IHL treaties<sup>108</sup> notwithstanding the fact that the Quran contains restrictions on the conduct of hostilities.<sup>109</sup> Furthermore, states adopted the Third Additional Protocol to the 1949 Geneva Conventions to designate the red crystal as a symbol<sup>110</sup>

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<sup>104</sup> René Provost, 'The International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law' (2007) 40(2) *Israel Law Review* 614, 621.

<sup>105</sup> *Ibid* 615.

<sup>106</sup> John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross* (Westview Press 1996) 138.

<sup>107</sup> Provost (n 104) 617-18.

<sup>108</sup> *Ibid* 617.

<sup>109</sup> Hadīths numbers 17932, 17933, 17934, 17935, 17936 and 17937, quoted in Ahmad ibn al-Husayn ibn Alī ibn Mūsā al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, vol 9 (Maktabah Dār al-Bāz 1994) 90; AM Al-Dawoody, 'War in Islamic Law: Justifications and Regulations' (PhD Thesis, University of Birmingham 2009) 201-12.

<sup>110</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III) 2005

with a view to communicating the universal nature of IHL. As Provost explains, '[t]he crystal was selected for its lack of cultural baggage in any culture'.<sup>111</sup> Since states concluded a separate treaty to stipulate the use of a neutral emblem, they recognised that the symbolism of universality is an important dimension of IHL which has a communicative function.

The symbolism of IHL is found in its animating spirit, cognitive framework and in how it navigates diversity. Robert Cover's work shows that the language states selected for formulating IHL norms is closely connected to and illuminates the cognitive framework underpinning IHL. Cover describes the law as being more than a collection of rules.<sup>112</sup> Instead, it employs particular narratives when constructing legal rules in order to implement a particular normative vision of the world.<sup>113</sup> Margaret Radin similarly views the law as serving a 'powerful conceptual – rhetorical – discursive force'<sup>114</sup> which influences how we understand the world.<sup>115</sup>

The language states chose when formulating IHL norms reflects how IHL conceives of the world, what set of values it communicates, what type of ideology it advances and how it envisages the relationship between states. Going beyond the legal context Valentin Voloshinov examines the manner in which the choice of language determines what values and ideology come to shape social life.<sup>116</sup> This has its roots in the nature of human relations; language, culture and the construction of meaning are at the centre of what it means to be human.<sup>117</sup> Groups need a distinctive collective identity and a shared understanding of the world in order to carry out coordinated

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(adopted 8 December 2005, entered into force 14 January 2007) (2006) 45 ILM 555 art 2(2).

<sup>111</sup> Provost (n 104) 620.

<sup>112</sup> Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 4-5.

<sup>113</sup> *Ibid* 5.

<sup>114</sup> Margaret Jane Radin, 'Compensation and Commensurability' (1993) 43 *Duke Law Journal* 56, 83.

<sup>115</sup> *Ibid*.

<sup>116</sup> Valentin Voloshinov, *Marxism and the Philosophy of Language* (Ladislav Matejka and Irwin Robert Titunik tr, Harvard University Press 1973) 98.

<sup>117</sup> Neil Fligstein and Doug McAdam, *A Theory of Fields* (Oxford University Press 2012) 35.

activities.<sup>118</sup> The coordinated activity enables the group to solve problems and to structure social life.<sup>119</sup>

As such, the words the states use for framing IHL norms should be viewed as having significance as they disseminate a particular set of values and propagate an ideology. They enable states to maintain a social order through the creation of an international community and the norms come to shape what array of choices states regard as being available to them. This account of IHL is consonant with a constructivist approach. Constructivists view states as generating shared understandings and knowledge through interactions.<sup>120</sup> The social norms which emerge shape how states regard themselves, their interests and other actors.<sup>121</sup>

A potential critique of the argument that one of the functions of IHL is to create a collective identity and values to enable states to carry out coordinated activities is that states act in self interest. On this reasoning, IHL treaties lay down the foundation, but states give effect to cultural variation and their separate interests by offering alternative interpretations of the relevant IHL provisions.<sup>122</sup> These rival interpretations are expressions of states struggling with each other for power.<sup>123</sup> As David Kennedy points out, law is 'a more subtle and dispersed practice' through which people continuously compete with one another for the pre-eminence of certain actions over others.<sup>124</sup>

This critique has merit in part. Even though self-interest is one of the guiding motivations of states, in the context of IHL this element is in constant dialogue and tension with IHL's constructivist dimension. The fact that IHL norms are premised on the balancing of the principles of military necessity

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<sup>118</sup> Ibid 37-38.

<sup>119</sup> Ibid 44.

<sup>120</sup> Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: an Interactional Account* (Cambridge University Press 2010) 12.

<sup>121</sup> Ibid.

<sup>122</sup> Provost (n 104) 641.

<sup>123</sup> Brunnée and Toope (n 120) 23.

<sup>124</sup> David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 182.

and humanity illustrates the fact that states continuously negotiate the competing imperatives of self-interest and collective values. Even though scholars make attempts to interpret IHL in a manner which elevates pragmatism, such approaches lack support within the legal doctrine. To illustrate, Iddo Porat and Ziv Bohrer maintain that states are permitted to place greater weight on the life of their own civilians than on the lives of enemy civilians.<sup>125</sup> However, since customary international law requires equal treatment of individuals<sup>126</sup> the creation of a hierarchy between individuals based on their nationality is inconsistent with IHL.

The deficiency of L&E is that it accounts only for the role of self-interest in guiding state conduct. By doing so it disregards the vital role played by the international community in shaping and maintaining shared values, values in light of which state practice must ultimately be understood. The Virginia School does not go far enough to accommodate this aspect. While it does allow states to choose to be influenced by the particular values of the collective<sup>127</sup> it assumes that actors 'make rational choices in accordance with individually autonomous value scales'.<sup>128</sup> The rejection by the Virginia School of the position that there are overarching values guiding individual conduct<sup>129</sup> does not account for the constructivist dimension of IHL. States deliberately referred to commonly shared values when drafting IHL treaties. These shared values provide guidance to states regarding what choices are available to them when they apply and develop IHL norms. It is therefore not the case that states "cherry pick" what values of the international community to be guided by when developing IHL norms, both through state practice and through concluding new treaties.

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<sup>125</sup> Iddo Porat and Ziv Bohrer, 'Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians' (2015) 97 *The George Washington International Law Review* 99, 153.

<sup>126</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949 (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV 1949) art 3; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge University Press 2005) 308-09.

<sup>127</sup> Buchanan, 'The Domain of' (n 46) 7.

<sup>128</sup> *Ibid* 15.

<sup>129</sup> *Ibid* 14.

### 3. *The Role of IHL in Preserving the Social Fabric Within Societies*

Eric Posner's use of L&E to interpret IHL as enabling states to preserve productive capacity,<sup>130</sup> as well as to optimally allocate the resources between economic and military production,<sup>131</sup> has limited explanatory value for IHL. Although states may have considered how to best preserve their productivity when formulating IHL, it does not follow from this that states use economic considerations as a primary motivation for adopting limitations on the conduct of hostilities. States call on shared ethical values in the Martens Clause and the Saint Petersburg Declaration as a means to construct a fabric which holds the international community together and prescribes how interactions take place. The maintenance of the fabric of society has a particular significance in times of armed conflict because the conflict represents a different space for societies to occupy in comparison with peacetime.

The following example illustrates the significance of shared values in enabling IHL to fulfil its function. Martin Daughtry uses the term 'thanatosonics'<sup>132</sup> to describe the experience of individuals during an armed conflict.<sup>133</sup> Because individuals want to survive, their perception narrows during an armed conflict.<sup>134</sup> The sounds of explosion inflict psychological damage and limit how individuals perceive the world.<sup>135</sup> Scientific studies demonstrate that the experience of catastrophic, violent and traumatic events raises the likelihood of individuals developing psychiatric illnesses.<sup>136</sup> The stress and the altered perception creates a possibility that individuals may put self-preservation above the welfare of other individuals.

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<sup>130</sup> Eric Posner, 'A Theory of the Laws of War' (n 9) 12-13 and 20.

<sup>131</sup> Ibid 8.

<sup>132</sup> Thanatos is the personification of death in Greek. The term thanatosonics alludes to the sound causing death. Matt Stefon, 'Thanatos', *Encyclopaedia Britannica* (2019) <[www.britannica.com/topic/Nyx](http://www.britannica.com/topic/Nyx)> accessed 20 October 2019.

<sup>133</sup> Martin Daughtry, 'Thanatosonics: Ontologies of Acoustic Violence' (2014) 32(2) *Social Text* 119 25, 39.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid 40-41.

<sup>136</sup> George Bonanno and others, 'Weighing the Costs of Disaster: Consequences, Risks and Resilience in Individuals Families and Communities' (2010) 11(1) *Psychological Science in the Public Interest* 1, 1.

The language of universally shared 'public conscience'<sup>137</sup> has communicative power for preventing citizens from sinking to a state of otherness. In the state of otherness violence becomes a yardstick for determining who is entitled to personal integrity, rights and entitlements to resources. Since economics is designed to facilitate the ability of individuals to fulfil their preferences,<sup>138</sup> it lacks the vocabulary for justifying why individuals should forgo their preferences to benefit others even when there is no immediate benefit for doing so.

Since the Chicago School<sup>139</sup> and the Virginia School<sup>140</sup> view human interactions as an exchange, they do not explain the content of some IHL norms. An example is an obligation on soldiers to expose themselves to danger in order to distinguish between civilians and combatants.<sup>141</sup> In contrast, the reference to universal values<sup>142</sup> provides a means for IHL to justify why individuals should elevate higher-order values above their immediate self-interest. L&E does not account for the fact that IHL enables states to maintain the social fabric within their societies and to fulfil the inherent psychological need of human beings for meaning. The conception of shared identity and values shaping what array of conduct actors view as available to them is absent from L&E.

#### *4. IHL Limits the Use of Economic Reasoning*

A possible counterargument to L&E having incomplete explanatory capacity for IHL is that IHL rhetoric diverges from states' motivations. For instance, states refer to the progress of civilisations in the Preamble to the Saint Petersburg Declaration as a justification for alleviating suffering in armed conflict.<sup>143</sup> During the nineteenth century Western states waged wars in

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<sup>137</sup> The Hague Convention II 1899 (n 99) preamble.

<sup>138</sup> John Sloman, *Economics* (6th edn, Prentice Hall 2006) 4.

<sup>139</sup> Richard Posner, 'Wealth Maximisation Revisited' (1985) 2 *Notre Dame Journal of Law Ethics and Public Policy* 85, 92.

<sup>140</sup> Buchanan, 'The Domain of' (n 46) 8.

<sup>141</sup> United Kingdom Ministry of Defence (n 18) 82, fn 202.

<sup>142</sup> Mégret (n 1) 765.

<sup>143</sup> Saint Petersburg Declaration (n 14) preamble.

order to make profits and to consolidate their power.<sup>144</sup> They invoked the term "civilisation" to justify launching the wars as part of the rhetoric of spreading culture, knowledge and progress.<sup>145</sup>

The scholarship of Chris af Jochnick and Roger Normand provides further evidence for divergence between what states say and the motivations behind their actions. They maintain that states interpret IHL norms limiting the conduct of hostilities in a manner that elevates military imperatives above humanitarian considerations.<sup>146</sup> In other words, states use IHL as a tool to legitimise violence rather than to humanise armed conflict.<sup>147</sup> According to the two authors:

War has long been limited largely by factors independent of the law. For complex military, political, and economic reasons, belligerents tend to use the minimal force necessary to achieve their political objectives. Force beyond that point - gratuitous violence - wastes resources, provokes retaliation, invites moral condemnation and impedes post-war relations with the enemy nation.<sup>148</sup>

The discrepancy between what states say and do points to the undesirability of attempting to reduce IHL to simple accounts. Contrary to Hersch Lauterpacht, IHL is not 'almost entirely humanitarian'.<sup>149</sup> Neither is it a tool for legitimising violence. Rather, IHL specifies how states should mediate self-interest and the constructivist dimension of IHL.

Although states do apply economic thinking when formulating policy and although policy has influence on how the armed forces apply IHL, IHL limits the place economic reasoning has within its norms. The field of 'strategic

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<sup>144</sup> Ellen Sebring 'Civilization & Barbarism: "The White Man's Burden" (1898–1902) Cartoon Commentary' (*Centre for Research on Globalisation*, 9 July 2015) <[www.globalresearch.ca/civilization-barbarism-the-white-mans-burden-1898-1902/5461424](http://www.globalresearch.ca/civilization-barbarism-the-white-mans-burden-1898-1902/5461424)> accessed 14 February 2019.

<sup>145</sup> Ibid.

<sup>146</sup> Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: a Critical History of the Laws of War' (1994) 35(1) *Harvard International Law Journal* 49, 50.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid 53.

<sup>149</sup> Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *British Yearbook of International Law* 360, 363–64.

studies<sup>150</sup> is dedicated to studying how states can use military power to achieve policy objectives.<sup>151</sup> It stipulates that states should aim to achieve their goals 'within a reasonable timeframe' and 'at a reasonable cost'.<sup>152</sup> These goals reflect economic reasoning. This is because they are premised on finding an optimum balance between the inputs and the outputs in the form of military gain. The content of the overarching strategy influences how commanders formulate military strategy and carry out military operations.<sup>153</sup> However, although states may apply economic thinking when they formulate policy and policy has influence on how the armed forces apply IHL, IHL limits the place that economic reasoning has within its norms. IHL does not address explicitly the strategic level of war.<sup>154</sup> Because IHL provides the parameters for the potential interpretation of its norms, it delineates whether and to what extent economic reasoning and strategic goals may influence how parties to the conflict apply IHL norms.

Whether states formulate the overarching strategy with a view to widening or reducing the scope of protection conferred on individuals enjoying immunity from attack depends on the context. For example, Martin Shaw proffers that Western states manage the political risks of losing domestic and international support for a military campaign when issuing guidance to commanders regarding how to carry out military operations.<sup>155</sup> States manage the political risk by reducing soldier casualties, civilian casualties<sup>156</sup> and by influencing the way in which the media portrays the military campaign.<sup>157</sup>

This strategic consideration led to the United States requiring its armed forces to assume greater risk during counterinsurgency operations than in

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<sup>150</sup> David Lonsdale, 'Strategy' in David Jordan and others (eds), *Understanding Modern Warfare* (Cambridge University Press 2008) 17-18.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid 19.

<sup>153</sup> Yishai Beer, 'Military Strategy: the Blind Spot of International Humanitarian Law' (2017) 8 *Harvard National Security Journal* 333, 373.

<sup>154</sup> Ibid 358.

<sup>155</sup> Martin Shaw, *The New Western Way of War: Risk-Transfer and its Crisis in Iraq* (Polity Press 2005) 98.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid 92-93.

other types of contexts.<sup>158</sup> This is an example of policy considerations resulting in commanders interpreting IHL norms more generously and in taking more measures to reduce harm to civilians than is legally required. In comparison, when the United States dropped the atomic bombs on Hiroshima and Nagasaki during World War II it referred to the strategic level of war to justify the destruction of the two cities.<sup>159</sup> The United States maintained that many more civilians would have died had they deployed ground troops.<sup>160</sup>

In the case of *Shimoda and others v the State* the Tokyo District Court rejected the argument that states could engage in 'total war' because technology did not allow them to distinguish between civilians and military objectives.<sup>161</sup> A concept of 'total war' would allow the state to treat every Japanese as a combatant, thereby permitting the targeting of the entire population.<sup>162</sup> The court found that the American armed forces failed to distinguish between civilian objects and military objectives in dropping atomic bombs on Hiroshima and Nagasaki.<sup>163</sup> This case illustrates that there are limits to how broadly states may interpret IHL in order to legitimise violence and to advance policy goals.

In these examples the states in question are clearly attempting to balance the requirements of the principle of military necessity with that required by the principle of humanity. The work of Eric Posner has limited value for a better understanding of IHL as a whole because it only provides a deeper understanding of the former.

Economic reasoning and the focus of strategic studies on achieving policy goals through military means do indeed have descriptive value for the principle of military necessity. Posner views states as making a decision on

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<sup>158</sup> United States Army, *The US Army Marine Corps Counterinsurgency Field Manual* (Marine Corps Warfighting Publication No 3-33.5, University of Chicago Press 2007) paras 7.5-7.6.

<sup>159</sup> William Fenrick, 'The Rule of Proportionality and Protocol in Conventional Warfare' (1982) 98 *Military Law Review* 91, 121-22.

<sup>160</sup> Basel Liddell Hart, *History of the Second World War* (London Cassell 1970) 692.

<sup>161</sup> *Shimoda and others v the State* (1964) 32 *ILR* 626.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

how to allocate resources between competing uses,<sup>164</sup> several examples of which may be mentioned. Decision-makers refer to military science and to the principle of military necessity when deciding how to allocate resources; states refer to strategic studies to enable them to achieve policy goals 'within a reasonable timeframe' and 'at a reasonable cost'.<sup>165</sup> The principle of military necessity is concerned with the allocation of military resources to enable the commander to achieve the goal of winning the military operation; it thus permits the commander to disable the greatest number of soldiers using the smallest amount of resources and time.<sup>166</sup>

This task of winning the military operation with a minimum expenditure of resources<sup>167</sup> arguably parallels the discourse of strategy of achieving the desired goal 'at a reasonable cost'.<sup>168</sup> This interpretation of the principle of military necessity thus have parallels with economic reasoning. Economics is concerned with how to allocate resources in such a way as to fulfil the preferences of society.<sup>169</sup> It prescribes that resources should be allocated in a manner that results in the highest possible value of output, or alternatively when 'a given output is produced using the lowest possible value of inputs'.<sup>170</sup> The economic goal of extracting the maximum benefit from limited resources is present in strategic studies and the principle of military necessity.

However, the existence of this parallel does not lead to a conclusion that L&E explains IHL. The reference to how states can achieve the greatest military advantage with the minimum expenditure of time and resources omits the fact that the principle of military necessity is qualified by a reference to the requirement to comply with IHL. Since IHL norms reflect a balance between the principles of military necessity and humanity,<sup>171</sup> it would need to be shown that L&E explains how IHL balances competing values. What is more, the fact that L&E does not account for the constructivist dimension of IHL and excises the psychological dimension from this legal regime points to the

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<sup>164</sup> Eric Posner 'A Theory of the Laws of War' (n 9) 12.

<sup>165</sup> Lonsdale (n 150) 19.

<sup>166</sup> *The Hostages Case* (n 19).

<sup>167</sup> *Ibid.*

<sup>168</sup> Lonsdale (n 150) 19.

<sup>169</sup> Sloman (n 138) 4.

<sup>170</sup> *Ibid.*

<sup>171</sup> Schmitt (n 16) 796.

need to examine whether L&E has descriptive value in the context of IHL. The next section will use the rules of targeting as a case study to evaluate whether L&E explains the structure of IHL norms and the manner in which commanders balance competing values.

## V. A CASE STUDY OF LAW AND ECONOMICS IN IHL

The use of the Chicago School provides a more fruitful avenue of inquiry than the Virginia School for analysing whether the L&E has descriptive capacity for the structure of IHL. This stems from the fact that the Virginia School focuses on the process through which actors arrive at rules placing restrictions on their interactions through an exchange in order to derive a net benefit.<sup>172</sup> In contrast, the Chicago School focuses on how norms premised on the economic rationale are structured. Since there is state practice raising the question of whether the structure of the rules of targeting can be explained by reference to the Chicago School, these rules are used as a case study. The principle of distinction, the rule of target verification and the principle of the least feasible damage are considered. Since the latter two norms require commanders to balance military and humanitarian considerations when applying the rules<sup>173</sup> they are the subject of greater attention.

### 1. *An Introduction to the Rules of Targeting*

The rules of targeting are underpinned by three primary norms. First of all, the rule of target verification requires commanders to do everything 'feasible' to verify that the prospective target is a combatant, an individual who takes a direct part in hostilities or a military objective.<sup>174</sup> The rule imposes an obligation on the attacker to gather intelligence and to take appropriate

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<sup>172</sup> Buchanan, 'The Domain of' (n 46) 4.

<sup>173</sup> Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level* (National Defence Headquarters, 1999), 4-2 and 4-3, paras 17-18.

<sup>174</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API 1977) art 57(2)(a)(i).

measures to verify the nature of the target.<sup>175</sup> IHL further imposes an obligation to take precautionary measures on individuals who plan or decide on an attack,<sup>176</sup> as those individuals occupy a position in the military hierarchy. To illustrate, Switzerland maintains that individuals in command of a battalion or a group are best positioned to consider what precautionary measures are feasible.<sup>177</sup>

Secondly, commanders apply the rule of target verification against the background of the obligation of the armed forces to observe the principle of distinction. The principle of distinction imposes an obligation on combatants to distinguish at all times between civilians and civilian objects on the one hand, and between combatants and military objectives on the other.<sup>178</sup>

Thirdly, the 'principle of the least feasible damage'<sup>179</sup> obliges commanders to 'take all feasible precautions in the choice of means and methods of attack with a view to avoid, or minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects'.<sup>180</sup> The term 'feasible' has identical meaning in the context of the rule of target verification and the principle of the least feasible damage.<sup>181</sup> It refers to measures which it is 'practicable or practically possible' to take in the circumstances.<sup>182</sup> The commander needs to balance both humanitarian and military considerations in assessing what measures are feasible to take.<sup>183</sup> The focus is on how a 'reasonable' person

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<sup>175</sup> United Kingdom Ministry of Defence (n 18) para 13.32.

<sup>176</sup> API 1977 (n 174) art 57(2).

<sup>177</sup> Switzerland, Declaration Made Upon Signature of AP I 1977, 12 December 1977, para 1, reprinted in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 2 (Cambridge University Press 2005) 358.

<sup>178</sup> API 1977 (n 174) art 48.

<sup>179</sup> Yves Sandoz, 'Commentary' in Andrew Wall (ed), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, vol 78 (Naval War College 2002) 278.

<sup>180</sup> API 1977 (n 174) art 57(2)(a)(ii).

<sup>181</sup> France, Reservations and Declarations Made Upon Ratification of AP I 1977, 11 April 2001, para 3, reprinted in Henckaerts and Doswald-Beck vol 2 (n 177) 357.

<sup>182</sup> See the statements the United Kingdom, Germany and Canada made upon ratifying API 1977, reprinted in Henckaerts and Doswald-Beck vol 2 (n 177) 357-358.

<sup>183</sup> *Ibid.*

would have deliberated in evaluating the adequacy of precautionary measures.<sup>184</sup> In practice, commanders 'have some range of discretion to determine which available resources shall be used and how they shall be used'.<sup>185</sup> The issue of how commanders resolve the tension between the principles of military necessity and humanity in determining what degree of precautionary measures to take as part of applying the rules of targeting remains unresolved in existing literature.<sup>186</sup>

A recent study of state practice distilled how commanders balance military advantage and harm to civilians when applying the rules of targeting on the battlefield.<sup>187</sup> The study concluded that commanders employ alternative means of warfare whenever the degree of military advantage they forgo in using the alternative option is of the same or lower magnitude than the anticipated magnitude of harm to civilians.<sup>188</sup> The study conceives of commanders as applying subjective valuation and rules of thumb to place value on military advantage and harm to civilians.<sup>189</sup> For instance, commanders designate the likelihood of the attack inflicting harm on civilians as small, medium or high<sup>190</sup> rather than in terms of strict quantitative probability values.

## *2. How Far Economic Reasoning can be Taken*

It is possible to use the Chicago School to interpret the rule of target verification and the principle of the least feasible damage as requiring commanders to take an efficient level of precautionary measures. However, this is contingent on one making an important assumption about valuation. The assumption is that commanders use the market to elicit information

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<sup>184</sup> Office of the Judge Advocate General (n 173), 4.3-4.4 paras 25-27.

<sup>185</sup> International Criminal Tribunal for the Former Yugoslavia (n 39) para 29.

<sup>186</sup> Marco Sassòli and Lindsay Cameron, 'The Protection of Civilian Objects - Current State of the Law and Issues *de Lege Ferenda*' in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International Publishing 2006) 70.

<sup>187</sup> Tetyana Krupiy, *A Toolbox for the Application of the Rules of Targeting* (Cambridge Scholars Publishing 2016).

<sup>188</sup> *Ibid* 338.

<sup>189</sup> *Ibid* 286 and 292-93.

<sup>190</sup> *Ibid* 292-93.

about what value states place on the avoidance of harm to civilians vis-a-vis military advantage.

Richard Posner proffers that L&E explains in what circumstances American judges rule that an individual owes a duty of care to take measures to prevent injuring another person.<sup>191</sup> The legal doctrine in American tort law encapsulating this reasoning is called the 'Learned Hand formula'.<sup>192</sup> The formula states that there is a duty on individuals to spend resources on taking precautions to prevent harming someone whenever the cost of taking such precautions is less than the gravity of damage which is likely to occur on average if precautions are not taken.<sup>193</sup> The average damage that will occur is calculated by multiplying the gravity of the injury by the likelihood of such an injury occurring.<sup>194</sup>

The rule of target verification and the principle of the least feasible damage can be interpreted as requiring commanders to take the same level of precautionary measures as the Learned Hand formula provided one makes an assumption. The assumption is that IHL is indifferent to how commanders determine what value to place on harm to civilians and military advantage. As such, the formula can be said to capture the practice of states; a commander will use an alternative means of warfare if the cost in terms of military advantage of substituting a means or method of warfare is either less than or the same as the magnitude of harm to civilians which is avoided as a result of making the substitute in question.<sup>195</sup>

The scholarship of Sigmund Horvitz and Robert Nehs provides indirect evidence that there may be a parallel between the degree of precautionary measures the Learned Hand formula requires and that required by the rule of target verification and the principle of the least feasible damage. The authors argue that the formulation of the principle of the least feasible damage should be based on economic analysis of the law in order to increase compliance with

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<sup>191</sup> Posner, 'Utilitarianism, Economics and Legal Theory' (n 68) 120.

<sup>192</sup> Ibid.

<sup>193</sup> *United States v Carroll Towing Co* 159 F2d 169 [173] (United States Circuit Court of Appeals Second Circuit 1947).

<sup>194</sup> Ibid.

<sup>195</sup> Krupiy (n 187) 338.

the law.<sup>196</sup> A party should substitute their means of warfare for their alternative whenever the chance of civilian harm being avoided is greater than the cost of making the substitution in question.<sup>197</sup> In other words, the degree of precautionary measures advised by Horvitz and Nehs is a simplified restatement of the Learned Hand formula.

Further indirect evidence for this argument is found in the scholarship of Annemarie Balvert. Balvert argues that IHL follows a cost-benefit analysis and is efficient from the standpoint of the Kaldor-Hicks criterion of efficiency.<sup>198</sup> According to this criterion, a change from state A to state B should be made if those who benefit from the change could hypothetically compensate those who are made worse off by the change.<sup>199</sup> Such transactions are efficient because the value of total goods in society is increased whenever the benefits of a change from state A to state B exceed the costs of the change in question.<sup>200</sup>

The Learned Hand formula is founded on the economic concept known as 'diminishing marginal utility'.<sup>201</sup> In the field of economics the concept of diminishing marginal utility refers to the fact that as individuals consume more of a unit of production, they derive less satisfaction from each additional unit of consumption and greater satisfaction from consuming a unit of another good.<sup>202</sup> To illustrate, the armed forces derive less military advantage from deploying an additional tank as they deploy more tanks. They gain more military advantage from employing other units of materiel, such as artillery and aircraft in the place of a tank. An economist would thus say that

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<sup>196</sup> Sigmund Horvitz and Robert Nehs, 'Proportionality and International Humanitarian Law: an Economic Analysis' (2011) 23(2) *Global Change, Peace & Security* 195, 205.

<sup>197</sup> *Ibid* 199.

<sup>198</sup> Balvert (n 10) 44.

<sup>199</sup> *Ibid*.

<sup>200</sup> Richard Nobles, 'Economic Analysis of Law' in David Schiff and others (eds), *Jurisprudence & Legal Theory: Commentary and Materials* (Oxford University Press 2002) 860.

<sup>201</sup> Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn, Pearson 2012) 214-15.

<sup>202</sup> David Besanko and Ronald Braeutigam, *Microeconomics* (2nd edn, John Wiley & Sons 2005) 72-75.

the manner in which the Learned Hand formula assigns rights is efficient from the point of economic theory.<sup>203</sup> Since the formula allows individuals to inflict injury on others whenever the value they place on the activity exceeds the cost of payable compensation, the operation of this legal rule produces efficient outcomes.<sup>204</sup>

One of the few sources which can be construed as instructing the commanders to use the reasoning inherent in the economic concept of diminishing marginal utility is the United States Naval Doctrine Publication 6. According to this military manual, the value of gathering additional information decreases as commanders gather more intelligence.<sup>205</sup> Specifically:

Knowledge is a function of information so, as the quantity of information increases, the effectiveness of the decision also should increase. At some point in the process, however, when basic knowledge has been gained and the quest for information focuses more on filling in details, we reach a point of diminishing returns. At this point, the potential value of the decision does not increase in proportion to the information gained or the time and effort expended to obtain it [...] Beyond this point, additional information may have the opposite effect - it may only serve to cloud the situation, impede understanding, and cause the commander to take more time to reach the same decision he could have reached with less information. Therefore, it is not the quantity of information that matters; it is the right information made available to the commander at the right time.<sup>206</sup>

The view that commanders derive utility from gathering information but that there comes a point at which the value of each additional unit of information declines reflects the essence behind the concept of diminishing marginal utility in economics.

There is insufficient evidence to conclude that commanders relying on the rules of targeting apply the economic logic of diminishing marginal utility when determining how to allocate limited resources between competing tasks. The instruction to commanders to employ diminishing marginal utility

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<sup>203</sup> Posner, 'The Value of Wealth' (n 69) 244.

<sup>204</sup> Richard Posner, 'Wealth Maximisation and Tort Law' (n 70) 104.

<sup>205</sup> United States Department of the Navy, *Naval Doctrine Publication 6 Naval Command and Control* (Headquarters United States Marine Corps 1995) 24.

<sup>206</sup> *Ibid.*

reasoning in the United States Naval Doctrine Publication 6<sup>207</sup> reflects policy rather than customary international law. The military manual discusses decision-making theory in the context of planning a military operation rather than in the context of compliance with IHL.<sup>208</sup> Even if it were to be the case that this military manual referred to the gathering of intelligence in the context of complying with the rule of target verification, this evidence would be inconclusive. This is because, although the United States treats its military manuals as providing 'important indications of state behaviour and *opinio juris*', it cautions that the conduct of the armed forces on the battlefield has greater evidentiary weight<sup>209</sup> as military manuals primarily incorporate policy considerations.<sup>210</sup> There is also little indication in the conduct and statements of other states that commanders use economic reasoning when applying the rules of targeting.

Further support for the argument that the concept of diminishing marginal utility has limited application in IHL can be found in the obligation to comply with the principle of distinction. The state practice of the Philippines reflects the fact that states require the armed forces to achieve a high degree of certainty that the target is a military objective. The Philippines interprets the principle of distinction as obliging the armed forces to have 'reasonable certainty' that the proposed target is a legitimate target.<sup>211</sup> Thus, it requires the armed forces to gather sufficient information to ascertain that the proposed target is a military objective irrespective of the degree of effort involved in attaining each successive degree of certitude. In contrast, the concept of diminishing marginal utility entails balancing the benefit of having more information against the cost of obtaining such information.

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<sup>207</sup> Ibid 23-4.

<sup>208</sup> Ibid 24.

<sup>209</sup> United States Department of State, 'United States Initial Reactions to ICRC Study on Customary International Law' (*United States Department of State*, 3 November 2006) <<https://2001-2009.state.gov/s/l/rls/82630.htm>> accessed 1 February 2019.

<sup>210</sup> Nobuo Hayashi (ed), *National Military Manuals on the Law of Armed Conflict* (2nd edn, Torkel Opsahl Academic EPublisher and Peace Research Institute 2010) 8-9.

<sup>211</sup> The Philippines, *AFP Standing Rules of Engagement* (Armed Forces of the Philippines 2005) para 8(5).

The likely reason why the United States treats the concept of diminishing marginal utility as having applicability to military planning<sup>212</sup> stems from the common-sense logic inherent in this concept. The more intelligence commanders gather, the greater their knowledge about the location of the adversary and the civilians. There may come a point at which commanders have a sufficient degree of certainty about the nature of the proposed target and choose to divert reconnaissance resources to other missions. Another reason for the relevance of the concept of diminishing marginal utility stems from the fact that economics prescribes how scarce resources can be allocated between socially competing needs.<sup>213</sup> Commanders operate under constraints of both time<sup>214</sup> and resources.<sup>215</sup>

The United States in all likelihood treats the concept of diminishing marginal utility as being relevant to military planning because this concept reflects the military wisdom commanders accumulated over the years which are encapsulated in the principles of war.<sup>216</sup> A commander considers the principles of war when devising tactics for a military operation with a view to increasing the unit's chances of winning.<sup>217</sup> The principle of the economy of effort urges commanders to allocate resources to tasks which enable the armed forces to achieve 'decisive strength' and to reserve fewer resources to tasks which have less bearing on the achievement of the military success.<sup>218</sup> The principle of the economy of effort and the principle of diminishing marginal utility are thus complementary. While the former encourages commanders to allocate reconnaissance resources based on the importance of each mission, the latter tells the commander at what point to divert

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<sup>212</sup> United States Department of the Navy (n 205) 24.

<sup>213</sup> Neva Goodwin and others, *Microeconomics in Context* (Houghton Mifflin Company 2005) 2-3.

<sup>214</sup> Laurie Blank, 'Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law' (2011) Emory University School of Law Public Law & Legal Theory Research Paper Series 12-186 1, 12-13.

<sup>215</sup> Milan Vego, *Joint Operational Warfare: Theory and Practice*. (2nd edn, United States Naval War College 2009) IX-48.

<sup>216</sup> Air Marshal David Evans, *War: a Matter of Principles* (Macmillan Press 1997) 1.

<sup>217</sup> *Ibid* 2.

<sup>218</sup> *Ibid* 80-81.

resources from one mission to another. IHL intervenes to limit the extent to which commanders can spread resources among competing military missions by requiring them to take constant care to spare the civilian population in the course of conducting military operations. The rule of target verification and the principle of the least feasible damage guide commanders in how to comply with this obligation.<sup>219</sup>

Eric Posner's work<sup>220</sup> demonstrates that an economist would find it significant that the rule of target verification and the principle of the least feasible damage require commanders to allocate the same resource between two competing uses, namely the achievement of military advantage and the reduction of harm to civilians. The concept of diminishing marginal utility explains why it is desirable to allocate resources to multiple uses. The allocation of resources to multiple competing uses maximises the value one can derive from the activities.<sup>221</sup>

An economist would describe the rules of targeting which require the attacker to take the same degree of precautionary measures as in the Learned Hand formula as maximising the sum of military gains and the reduction of harm to civilians. Economists view the use of the cost-benefit approach to decision-making which treats each unit of expenditure as having a diminished marginal utility as maximising the net benefit.<sup>222</sup> They regard the cost-benefit assessment<sup>223</sup> 'as an abstract model of how an idealised rational individual would choose among competing alternatives'.<sup>224</sup>

The economic rhetoric that the rules of targeting enable the armed forces to conduct military operations in such a way as to maximise their chances of

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<sup>219</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 680, para 2191.

<sup>220</sup> Eric Posner, 'A Theory of the Laws of War' (n 9) 6, 8.

<sup>221</sup> Posner, 'Utilitarianism, Economics and Legal Theory' (n 68) 125; Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5(1) *Philosophy and Public Affairs* 3, 11.

<sup>222</sup> Michael Common and Sigrid Stagl, *Ecological Economics: an Introduction* (Cambridge University Press 2005) 315.

<sup>223</sup> Ben Bernanke and Robert Frank, *Principles of Economics* (4th edn, McGraw Hill/Irwin 2009) 12.

<sup>224</sup> *Ibid* 7.

winning while minimising harm to civilians to the greatest extent possible does not, on the face of it, conflict with the traditional understanding of the purpose of IHL. IHL requires the armed forces to reduce 'as much as possible the calamities of war'.<sup>225</sup> The reference in the principle of military necessity to the use of any amount of force necessary to win the military engagement with the least possible expenditure of resources subject to the restrictions placed by IHL<sup>226</sup> alludes to the maximisation of military advantage under a condition of constraint. The next section considers whether L&E can explain the structure and application of IHL norms given the manner in which it approaches valuation.

### *3. Where the Economic Analysis of Law Breaks Down*

Economics use the heuristic device of the market to elicit preferences.<sup>227</sup> However, this distorts how IHL conceives of human life and how commanders apply the rules of targeting on the battlefield. In economics the value of a human life is linked to market transactions, namely to the earning capacity of individuals as well as to how much goods and services they produce.<sup>228</sup> Richard Posner defines the value of human life by reference to the market by focusing on how much money individuals ask to be paid on the employment market for being exposed to particular danger.<sup>229</sup> This value is then divided by the amount corresponding to the likelihood that an individual would die in the course of carrying out the employment activity.<sup>230</sup> However, Posner does not address a crucial issue in his analysis. It follows from the principle of wealth maximisation that how much the employer can offer to pay for the assumption of risk hinges on the revenue the employer is able to generate from selling the goods and services in question. The

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<sup>225</sup> Saint Petersburg Declaration (n 14) preamble.

<sup>226</sup> *The Hostages Case* (n 19).

<sup>227</sup> Sloman (n 138) 316-317.

<sup>228</sup> *Ibid* 317.

<sup>229</sup> Richard Posner, *Economic Analysis of Law* (7th edn, Aspen Publishers 2007) 197-98.

<sup>230</sup> *Ibid* 197.

statistical life approach in L&E to the valuation of life is to determine how much individuals are willing to pay to avoid exposure to a particular hazard.<sup>231</sup>

If we apply such reasoning to the context of war, the lives of individuals who have an illness or are elderly have lower value than the life of healthy individuals when economics serves as an analytical framework.<sup>232</sup> This fact stems from their reduced capacity to produce goods and services.<sup>233</sup> Additionally, the employment of an economic approach to valuation would result in greater value being attached to the life of children. As children have a longer life expectancy than adults, they can produce goods and services over a longer time period.

This approach to valuation is inconsistent with IHL. IHL treats human life as having intrinsic value. It places equal value on all life<sup>234</sup> by holding that individuals enjoy immunity from attack when they do not,<sup>235</sup> or no longer,<sup>236</sup> take direct part in hostilities. Further evidence for this position can be found in Article 3 of the Geneva Conventions of 1949.<sup>237</sup> This customary international law norm<sup>238</sup> enshrines 'fundamental general principles of humanitarian law'<sup>239</sup> and requires equal treatment of all individuals.<sup>240</sup> Age and physical condition are examples of the prohibited grounds of discrimination.<sup>241</sup>

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<sup>231</sup> W Kip Viscusi, 'The Value of Life in Legal Contexts: Survey and Critique' (2000) 2(1) *American Law and Economics Review* 195, 196-97.

<sup>232</sup> Sloman (n 138) 317.

<sup>233</sup> *Ibid.*

<sup>234</sup> Françoise Krill, 'The Elderly in Situations of Armed Conflict' (*ICRC*, 22 May 2011) <[www.icrc.org/en/doc/resources/documents/misc/57jqx9.htm](http://www.icrc.org/en/doc/resources/documents/misc/57jqx9.htm)> accessed 3 May 2019.

<sup>235</sup> API 1977 (n 174) art 48.

<sup>236</sup> *Ibid* art 41(1).

<sup>237</sup> Geneva Convention IV 1949 (n 126) art 3.

<sup>238</sup> Henckaerts and Doswald-Beck vol 1 (n 126) 308-09.

<sup>239</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 [218].

<sup>240</sup> Geneva Convention IV 1949 (n 126) art 3.

<sup>241</sup> Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (adopted on 16 March

Since both the Chicago<sup>242</sup> and Virginia Schools<sup>243</sup> focus on exchange to elicit preferences the use of this methodology is not conducive to fostering compliance with an IHL requirement of equal treatment. Economists rely on the hypothetical market as a tool for establishing preferences because individual perceptions are subjective and because it is difficult to compare the interpersonal preferences of individuals.<sup>244</sup> In practice, how much individuals can offer to pay for their life or for a reduction of exposure to a hazard is contingent on their earnings. Since individuals receive different pay for different kinds of work, the amount of money individuals can offer to pay will vary. Similarly, individuals who have fewer assets will be more willing to be employed in hazardous occupations compared to their more affluent peers. The employment of L&E logic results in the creation of a hierarchical order in which the value of the civilian lives varies depending on their income and possessions.

The assumption relied on by the Chicago School that the market is a suitable vehicle for eliciting individual preferences<sup>245</sup> is meaningless in the context of IHL. In an armed conflict the ability of individuals to act on their desires is contingent on staying alive. In contrast with peacetime, civilians would place an unlimited value on their lives in a time of war because they lack the training to protect themselves from the incidental effects of military operations. Some individuals agree to be compensated for engaging in employment which exposes them to limited risk.<sup>246</sup> Since the employer takes measures to reduce hazards, for example through the adoption of safety measures, this further reduces the risks and renders them more controllable.

The Chicago School is incapable of accounting for how commanders apply the rules of targeting on the battlefield. They require that the military

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1998), Part III art 2(10), reprinted in Henckaerts and Doswald-Beck vol 2 (n 177) 2028.

<sup>242</sup> Posner, 'Wealth Maximisation and Tort Law' (n 70) 99.

<sup>243</sup> Buchanan, 'Public Choice' (n 78) 9.

<sup>244</sup> Richard Zerbo Jr, *Economic Efficiency in Law and Economics* (Edward Elgar Publishing 2001) 4.

<sup>245</sup> Posner, 'Wealth Maximisation and Tort Law' (n 70) 99.

<sup>246</sup> Carsten Gerner-Beuerle 'Calabresi, Posner, and Some Common Areas of Confusion: the Value of Life in Law and Economics' (2009) 1, 5 <<http://ssrn.com/abstract=1345583>> accessed 15 March 2019.

advantage and harm to civilians be converted to a common metric prior to being compared. This assumption diverges from IHL which treats harm to civilians and military advantage as being incommensurable.<sup>247</sup> Incommensurability relates to an inability to trade off competing interests in a meaningful way.<sup>248</sup> There is no metric which one can use to compare military advantage in relation to humanitarian values.<sup>249</sup> Kenneth Anderson and Matthew Waxman analogise civilian harm and military advantages to apples and oranges.<sup>250</sup> IHL raises the paradox of how commanders balance military advantage and harm to civilians without being able to measure or quantify the magnitude of either. According to the Israeli Rules of Warfare, 'there is no set formula according to which it is possible to weigh civilian damage against the expected military benefits from the offensive; but it is a question of degree'.<sup>251</sup> While reasonable commanders may disagree over the valuation of human life as a result of cross-cultural variation, it is expected that reasonable commanders will arrive at a similar assessment.<sup>252</sup>

One approach to answering the question of how commanders both attach value to incommensurable variables and weigh them is to view value as relative. According to Albert Einstein, an 'absolute' frame of reference does not exist.<sup>253</sup> When one measures anything, one measures one entity in relation to something else.<sup>254</sup> This reasoning suggests that the magnitude of harm to civilians can only be understood by reference to military advantage

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<sup>247</sup> Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3d edn, Cambridge University Press 2016) 158.

<sup>248</sup> Trachtman and Dunoff (n 83) 48.

<sup>249</sup> Dinstein (n 247) 158; Michael Schmitt, 'War, Technology and International Humanitarian Law' (2005) 4 Occasional Paper Series 1, 51.

<sup>250</sup> Kenneth Anderson and Matthew Waxman, 'Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can' (2013) Jean Perkins Task Force on National Security and Law 2013-II 1, 12 <[http://media.hoover.org/sites/default/files/documents/Anderson-Waxman\\_LawAndEthics\\_r2\\_FINAL.pdf](http://media.hoover.org/sites/default/files/documents/Anderson-Waxman_LawAndEthics_r2_FINAL.pdf)> accessed 3 May 2019.

<sup>251</sup> Israel Defense Forces, *Rules of Warfare on the Battlefield* (2nd edn, IDF School of Military Law 2006) 27.

<sup>252</sup> International Criminal Tribunal for the Former Yugoslavia (n 39) para 50.

<sup>253</sup> Albert Einstein, *The Meaning of Relativity* (Springer Science and Business Media 1922) 103.

<sup>254</sup> *Ibid* 88.

and vice versa. Circumstances determine what degree of harm to civilians corresponds to the military value of a means of warfare, such as a tank. This is because humanitarian and military considerations dictate what degree of military advantage it is feasible for a commander to forgo in adopting an alternative means or method of warfare.<sup>255</sup> The degree of military advantage the preservation of a tank offers is contingent on the total pool of military resources the armed forces have and on how easily the armed forces are able to replace the damaged units.

The extent of harm to civilians which corresponds to the military advantage of a tank moreover reflects a consideration that human beings are irreplaceable. Hence, the military advantage of a tank equates to a certain degree of harm which the armed forces will inflict on the civilians due to protecting the tank. Commanders use thresholds embodying subjective valuation, ranging from low to high, rather than numerical values to estimate anticipated military gains and harm to civilians.<sup>256</sup> This reasoning relating to valuation is congruent with, for example, Israel's state practice. Israel treats the weighing of military advantage against the harm to civilians as being a matter of degree.<sup>257</sup> This corresponds to the assertion that one can measure one entity in relation to another but not in relation to itself.<sup>258</sup>

## VI. THE USE OF ECONOMIC REASONING TRANSFORMS IHL

In addition to lacking sufficient explanatory power, the introduction of economic concepts, such as productive value, to explain IHL has the potential to reshape this legal regime. The use of a theoretical framework based on economics which allows for subjective valuation does not address the concerns.

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<sup>255</sup> Belgium, Interpretative Declarations Made Upon Ratification of AP I 1977, 20 May 1986, para 3, reprinted in Henckaerts and Doswald-Beck vol 2 (n 177) 357.

<sup>256</sup> Laurent Gisel, International Expert Meeting 22-23 June 2016: the Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law (ICRC 2016) 65.

<sup>257</sup> Israel Defense Forces, Rules of Warfare on the Battlefield (n 251) 27.

<sup>258</sup> Einstein (n 253) 88.

*1. Economics Modifies the Goals and Structure of IHL*

Margaret Radin posits that the language individuals employ to discuss value<sup>259</sup> and rights shapes their understanding of the world as well as the purpose of legal regulation.<sup>260</sup> The use of economic language leads to a commodification of that which has a moral dimension.<sup>261</sup> Economics 'reduces to the language of market value something that is appropriately conceptualised in some other language of value'.<sup>262</sup> Individuals thus come to view aspects of their personhood as a commodity, namely a set of scarce goods which are high in demand.<sup>263</sup>

The use of economic reasoning to explain IHL transforms IHL. By shifting how states conceive of value, L&E sets a different agenda for the goals to be pursued by IHL. The latter becomes a regime which aims to maximise a state's wealth through increasing the circulation of goods in the market. L&E reasoning modifies the structure of IHL and how decision-makers apply IHL norms. Furthermore, it erases the dimensions of value which are not linked to wealth production and thereby commodifies civilian objects.

Such commodification is inconsistent both with the Preamble to the Saint Petersburg Declaration and with how IHL in general, and the principle of humanity in particular, envisages protected persons and objects. For instance, the use of L&E leads to the value of cultural property hingeing on how much revenue a state earns from tourist visits. L&E ignores the fact that states formulated IHL in a manner which recognises that cultural property has psychological value and evokes 'deep-rooted spiritual attachment'.<sup>264</sup> The Preamble to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 states that cultural property makes an

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<sup>259</sup> Radin, 'Compensation and Commensurability' (n 114) 83.

<sup>260</sup> Margaret Jane Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1849, 1884-85.

<sup>261</sup> *Ibid* 1861-62; Margaret Jane Radin, 'Justice and the Market Domain' in John Chapman and Ronald Pennock (eds), *Markets and Justice* (New York University Press 1989) 167.

<sup>262</sup> Radin, 'Compensation and Commensurability' (n 114) 59.

<sup>263</sup> Radin, 'Market-Inalienability' (n 260) 1884.

<sup>264</sup> Dinstein (n 247) 203.

important contribution to the cultural heritage worldwide.<sup>265</sup> The fact that the Convention recognises that cultural property has psychological value to people worldwide evidences that the principle of humanity requires valuation by reference to psychological, rather than merely economic, value.

When commanders refer to the market as a means to elicit what value to place on avoidance of harm to civilians and military advantage, they may balance the competing values of military necessity and humanity differently. For instance, commanders may conclude that it is not feasible to take precautionary measures to minimise damaging a civilian object housing elderly individuals. They are likely to reach a different conclusion under a traditional analysis which makes no reference to the productive capacity of the civilians. The application of the central elements of the 'principle of wealth maximisation', such as a focus on individual preferences, the use of the market to elicit preferences and the allocation of resources to efficient uses, therefore changes the structure of IHL and how the latter understands the relationships between individuals and states. Because valuation is central to the principles of military necessity and humanity, when one changes the process of valuation one transforms how decision-makers understand and balance these principles. Thus, the descriptive value of L&E methodology for explaining IHL is questionable because it is inconsistent with how IHL envisages harm to civilians.

## *2. The Inadequacy of Economic Theoretical Frameworks which Permit Subjective Valuation*

The use of valuation by reference to the subjective values of individuals does not redress the problematic nature of using L&E to explain and theorise IHL. The following example illustrates that economic theoretical frameworks which allow for the incorporation of non-economic reasoning do not address the weakness of methodologies based on L&E.

Richard Zerbe is an economist who advocates the use of the cost-benefit analysis as a guide for decision-making in a manner which accounts for the

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<sup>265</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 preamble.

values the economic analysis traditionally excludes.<sup>266</sup> He argues that when assessing the costs and benefits associated with a change a decision-maker should consider 1) the subjective psychological values that those affected by the decision would place on the respective gains and losses, 2) the ethical principles society shares which bear on the proposed change and 3) 'regard for others'.<sup>267</sup> Zerbe defines 'regard for others' as 'the concern of some for what they regard as fair outcomes for others, whether or not the regarding parties are themselves directly affected'.<sup>268</sup> It is irrelevant what motivates individuals to care about those the decision affects.<sup>269</sup>

Zerbe argues that when a decision-maker applies the cost-benefit analysis to determine whether to embark on a course of action, and when the decision-maker uses psychological valuation for assessing costs and benefits, the resulting decision will lead to the attainment of the highest social gain.<sup>270</sup> The decision will be ethical in the sense of fairly distributing benefits and burdens.<sup>271</sup> Zerbe views his theory as enabling the decision-makers to achieve a different type of efficiency, one that is 'ethically satisfying'.<sup>272</sup>

Arguably Zerbe's goal of maximising the net social gain resembles, but is not equivalent to, utilitarianism. Utilitarianism views morality in terms of advancing the greatest good for the greatest number of people and avoiding pain,<sup>273</sup> where pleasure and pain are to be measured both quantitatively and qualitatively.<sup>274</sup> Zerbe's approach is distinct from utilitarianism in one aspect: individuals who are made worse off by the decision receive compensation.<sup>275</sup>

Under Zerbe's decision-making framework, the rules of targeting – which have the form of the Learned Hand formula and which allow for subjective valuation – enable states to attain the highest social gain. Zerbe's definition

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<sup>266</sup> Zerbe (n 244) 16.

<sup>267</sup> Ibid 50.

<sup>268</sup> Ibid 26.

<sup>269</sup> Ibid 189.

<sup>270</sup> Ibid 28.

<sup>271</sup> Ibid 30.

<sup>272</sup> Ibid 1.

<sup>273</sup> John Stuart Mill, *Utilitarianism* (Andrews United Kingdom 2011) 16-17.

<sup>274</sup> Ibid.

<sup>275</sup> Zerbe (n 244) 29.

of social gain is wide enough to encompass any societal preferences. These include the ability to shape the state's system of governance, preservation of national identity and safeguarding the lives of civilians. An uncritical engagement with Zerbe's theory would designate the rule of target verification and the principle of the least feasible damage as resembling utilitarianism.

However, the interpretation of the rule of target verification and the principle of the least feasible damage as achieving the maximisation of the social gain does not adequately explain IHL. Zerbe's framework suggests that there is a threshold at which the conversion of military resources into military gains at the expense of causing death and destruction produces the highest social gain. This approach ignores the fact that IHL rules are normative in character. Jean Pictet argues that the humanitarian principles within IHL norms reflect ethical and philosophical tenets that all cultures share.<sup>276</sup> Michael Bothe prefers the viewpoint that IHL is multicultural because states have different cultural identities.<sup>277</sup> There is cross-country variation in what restraints communities observe in times of armed conflict at different points in time worldwide.<sup>278</sup> However, Bothe acknowledges that the world's religions share a core list of proscribed conduct and that the protections extend to individuals who do not practise that particular religion.<sup>279</sup>

An appropriate interpretation of IHL norms requires a grasp of the ethical foundation behind the norms and how they have been evolving. According to Dale Stephens, IHL norms have a settled core of meaning and evaluative standards which leave a degree of discretion to the decision-maker.<sup>280</sup> While the ethical values underlying IHL norms of minimising suffering, injury and

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<sup>276</sup> Henri Dunant Institute, *International Dimensions of Humanitarian Law* (Martinus Nijhoff Publishers 1988) 3-4.

<sup>277</sup> Michael Bothe, 'Multiculturalism and the Development of International Humanitarian Law' in Jacques-Yvan Morin and Sienho Yee (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Martinus Nijhoff Publishers 2009) 620.

<sup>278</sup> *Ibid* 621.

<sup>279</sup> *Ibid* 622.

<sup>280</sup> Dale Stephens, 'Counterinsurgency and Stability Operations: a New Approach to Legal Interpretation' in Raul Pedrozo (ed), *The War in Iraq: A Legal Analysis*, vol 86 (Naval War College 2010) 298.

destruction remain constant, states enlarge the scope of protections over time. Theodor Meron has analysed how the ambit of protections IHL confers has been expanding.<sup>281</sup> To illustrate, prior to and during World War II customary international law permitted bombardment of military objectives even if it caused 'wholesale destruction of property and civilian life'.<sup>282</sup> In contrast, current customary international law prohibits attacks

which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>283</sup>

Noam Neuman proffers that the moral tenets underpinning the principle of proportionality should be referred to in order to aid the process of legal interpretation because these tenets influenced how states formulated IHL.<sup>284</sup>

The interpretation of the rules of targeting as yielding a social gain imbues them with a type of logic underlying utilitarian ethics, yet utilitarian ethics is a poor descriptor of the deeper ethical foundations of IHL. The statement that damage to a day-care centre, the collateral killing of ten children, the expenditure of a bomb and the destruction of eighteen units of enemy materiel maximises either the social gain or utility is inconsistent with how IHL conceives of military operations. IHL treats the process of balancing incidental killing of civilians and military advantage as an agonising and morally value-laden decision rather than as a decision which produces net social gain or utility. This is supported by how states evaluate the conduct of their armed forces. To illustrate, Israel described the armed forces as facing

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<sup>281</sup> Theodor Meron, 'The Humanisation of Humanitarian Law' (2000) 94(2) *The American Journal of International Law* 239, 239.

<sup>282</sup> Morton Royse, 'La Protection des Populations Civiles Contre les Bombardements' (International Committee of the Red Cross conference, Geneva, 1930) 41.

<sup>283</sup> Doswald-Beck vol 1 (n 126) 46.

<sup>284</sup> Noam Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality' (2004) 7 *Yearbook of International Humanitarian Law* 79, 100-01.

'complex operational, moral and legal challenges' when responding to rocket attacks from Hamas.<sup>285</sup>

Utilitarian reasoning misrepresents the nature of military and humanitarian considerations. Radin explains that the utilitarian claim that the sum of two values can be maximised makes two assumptions.<sup>286</sup> The first is that a value can be reduced to something.<sup>287</sup> The second is that values can be put in order from the most to the least valuable.<sup>288</sup> This is not possible with incommensurable values.<sup>289</sup> When one ranks values one renders them reductionist, thus commodifying them.<sup>290</sup> Similarly, by using a process of translation to convert harm to civilians and military advantage to a concrete entity one modifies the two variables into commodities.

This commodification occurs because the military gains and harm to civilians become commensurable and this again distorts the nature of the two variables in IHL. The act of commensurability eliminates a core aspect of the rules of targeting, namely a process of reflection on why human life and national security have value as well as how each should be evaluated. The contemplation on the value of human life is moral-laden and agonising and the different emotions individuals experience when reflecting on the value of human life and national security shed light on the nature of each variable. For example, loss of a human life is related to feelings of grief. Failing to successfully conduct a military operation may evoke feelings of fear and anxiety associated with losing the capacity for self-governance.

Rather than being additive, in IHL military advantage and harm to civilians are different entities which are in a position of mutual relation. Military advantage can be weighed in relation to harm to civilians but cannot be converted to the same unit of analysis using psychological valuation. The use

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<sup>285</sup> Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects* (Israel Ministry of Foreign Affairs 2009) 98 para 261.

<sup>286</sup> Radin, 'Compensation and Commensurability' (n 114) 64.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid* 67.

of a L&E methodology is problematic in IHL because it mischaracterises harm to civilians and military advantage as commensurable.

## VII. CONCLUSION

The Virginia and the Chicago Schools provide limited descriptive capacity in the context of IHL. The Virginia School accounts for the fact that self-interest is one of the motivating factors behind states' conduct. However, it does not capture the constructivist dimension of IHL. L&E reasoning in general and the Virginia School in particular divest IHL of its symbolic, psychological and collective dimensions. It changes the cognitive architecture of IHL and the role this regime plays in sustaining the fabric of societies during armed conflict.

The use of the Chicago School to understand IHL changes how states understand the purpose of IHL. It reframes the purpose of IHL by reference to the maximisation of wealth and by reference to the maximisation of the circulation of goods in societies. It modifies IHL's underlying structure and the application of its norms. The Chicago School has descriptive capacity for the principle of military necessity but not for the principle of humanity. Since the use of economic reasoning leads to the commodification of that which is the subject of valuation, economic reasoning is inconsistent with how the principle of humanity envisages protected persons and objects. The reference to the market to elicit preferences and to allocate rights changes how IHL mediates the tension between the principle of military necessity and the principle of humanity. The humanitarian facet of IHL becomes weakened when one expresses military advantage and harm to civilians using quantitative values.

Overall, the discussion demonstrates that the use of L&E renders IHL a type of humanitarian economics. The sociologist Ulrich Beck argues that when one uses quantifiable values, such as mortality rates, in the place of ethics to reason about the acceptability of inflicting harm one engages in a type of 'ethics without morality'.<sup>291</sup> Beck uses the term 'mathematical ethics' to

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<sup>291</sup> Ulrich Beck, 'From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment' (1992) 9 *Theory Culture & Society* 97, 99.

denote how, with the advent of technology, society relies on the measurement of risks for making decisions.<sup>292</sup> The analysis illustrates that the employment of L&E to explain IHL inserts a type of mathematical ethics<sup>293</sup> into IHL. The Chicago School displaces the process of thinking about humanitarian values from a standpoint of ethics with a vantage point of wealth production. In doing so it removes moral dimensions from the deliberation process of commanders. The traditional conception of IHL as offering a framework for reasoning through difficult decisions with an ethical dimension in the context of an armed conflict better captures IHL than the methodology offered by L&E.

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.



# THE AUTONOMY OF EU LAW: A HARTIAN VIEW

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*This article aims to reconstruct and theorise the autonomy of the European Union (EU) legal system by drawing on Hartian legal theory. It comprises four claims. First, the European Court of Justice's (ECJ) 'foundational case law' on autonomy – and direct effect and supremacy as its corollaries – is conceptualised as a second-order thesis about the genus to which EU law belongs (the 'autonomy thesis'). Second, the ECJ's reliance on the full effectiveness of EU law as a justification for the autonomy thesis alludes to the deep connection between legality and effectiveness, but this connection cannot rationally explain the normativity of the autonomy thesis as an internal statement of law. Third, in order to provide such an explanation, the autonomy thesis is reconceptualised as an 'internal recognitional statement' by which the ECJ asserts a normative formulation of an autonomous EU rule of recognition. Fourth, within this Hartian analysis of the EU legal system, the doctrines of direct effect and supremacy lack self-standing analytical value. This article finishes with some very preliminary observations on a well-known objection against the autonomy of EU law based on the attitudes and perspectivism of national courts.*

**Keywords:** EU law, autonomy, *effet utile*, HLA Hart, legal philosophy, transnational legal theory

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## I. INTRODUCTION

Since the early 1960s, the European Court of Justice (ECJ)<sup>1</sup> has claimed that the EU Treaties constitute an autonomous legal system<sup>2</sup> whose justiciable norms are directly effective and have primacy – or supremacy<sup>3</sup> – over conflicting national law.<sup>4</sup> National administrative and judicial institutions are obligated to apply these norms.<sup>5</sup> The constitutionalisation of the EU Treaties, most notably associated with *van Gend & Loos* and *Costa v ENEL*,<sup>6</sup> has been abundantly analysed from the perspective of legal hermeneutics,<sup>7</sup>

<sup>1</sup> Since the Treaty of Lisbon, the official name of the European Court of Justice is 'Court of Justice of the European Union', which comprises both the General Court and the Court of Justice (informally still known as the 'European Court of Justice'). For considerations of simplicity and consistency, in this article I use the historic term 'European Court of Justice' (ECJ) throughout. By 'European Court of Justice' I refer to the highest judicial institution of the European Union. This article does not contain references to judgments of the General Court or the former Court of First Instance.

<sup>2</sup> Recently, *Opinion 2/13* EU:C:2014:2454, paras 166–170; *Opinion 1/17* EU:C:2019:341, paras 109–111.

<sup>3</sup> I consider the terms 'primacy' and 'supremacy' as synonymous for the reasons set out in section V.2. below.

<sup>4</sup> On direct effect, see recently e.g. Case C-573/17 *Poptawski* EU:C:2019:530. On primacy, see recently e.g. Case C-399/11 *Melloni* EU:C:2013:107.

<sup>5</sup> E.g. Case C-348/15 *Stadt Wiener Neustadt* EU:C:2016:882.

<sup>6</sup> Case 26/62 *van Gend & Loos* EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66.

<sup>7</sup> E.g. Hans Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxemburg on 27–28 September 1976*, 29–35; Pierre Pescatore, 'Van Gend en Loos', 3 February 1963 – A

transformative constitutionalism,<sup>8</sup> in a recent 'historical turn' in EU legal studies,<sup>9</sup> and in historical studies.<sup>10</sup>

Nevertheless, the foundations of EU law as a transnational system of legal norms remain elusive. It is unclear to what extent the ECJ's claims regarding EU law's autonomy, and direct effect and supremacy as its corollaries, are theoretically explicable. Philosophers and theorists of law, however, generally have had little interest in the EU legal system.<sup>11</sup> As a result, the fact that the EU's founding Treaty was signed over sixty years ago notwithstanding, there is no robust explanation of the ECJ's claims regarding the autonomy of the EU legal system.

The aim of this article is to offer an explanation of the ECJ's foundational case law on the autonomy of EU law, as well as the relevance of effectiveness

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View from Within' in Miguel Poiars Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart 2010) 6; JHH Weiler, 'Rewriting *Van Gend en Loos*: Towards a Normative Theory of ECJ Hermeneutics' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Kluwer 2003).

<sup>8</sup> JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

<sup>9</sup> See e.g. the special issues (2012) 21 *Contemporary European History*; and (2013) 28 *American University International Law Review*; and Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017).

<sup>10</sup> See e.g., Morten Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend & Loos* Judgment' (2014) 12 *International Journal of Constitutional Law* 136; Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend & Loos* and the Making of EU Polity' (2010) 16 *European Law Journal* 1.

<sup>11</sup> For notable exceptions, see Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993) (which provides a theory of the ECJ's legal reasoning based on institutional positivism); George Letsas, 'Harmonic Law' (offering a Dworkinian critique of EU constitutional pluralism) and Julie Dickson, 'Towards a Theory of European Union Legal Systems' (theorising the relationship between EU and national law from a legal systems perspective) both in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press 2012); Neil MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) (analysing transnational legality from an institutional positivist theory); M.L. Jones, 'The Legal Nature of the European Community: A Jurisprudential Analysis using HLA Hart's Model of Law and a Legal System' (1984) 17 *Cornell International Law Journal* 1 (offering an early and somewhat coarse-ground analysis of the EU legal system based on Hart's legal theory).

in this respect, which tries to remain faithful to EU law's self-understanding and describes it in its own terms.<sup>12</sup> In order to do so, the central question of this article is whether we can conceptualise this foundational case law in the vocabulary of HLA Hart's seminal theory of law and recent elaborations thereupon. The choice for Hartian legal theory – rather than, say, Kelsen's or Dworkin's – is in part purpose-driven, as I believe it can accurately account for the existence and structure of the EU legal system.<sup>13</sup> However, arguably this choice is also warranted on other grounds. In contemporary legal philosophy, Hart's work remains profoundly influential and many philosophers consider it unrivalled in its account of the circumstances under which communities are governed by a legal system.<sup>14</sup> Secondly, Hart explicitly centred his theory of law on the idea of separate legal systems – as opposed to Kelsen's monistic theory of law, among others – which makes his work at least *prima facie* suitable for the analysis of the ECJ's construction of EU law as a legal system *separate* from national legal systems.<sup>15</sup>

As I hope to show, Hartian legal theory, and analytical jurisprudence in general, is of much added value to EU constitutionalism, which tends not to make use of the insights of analytical jurisprudence – a socially obligatory reference to *The Concept of Law* aside. Alas, Hart's work is known as much by

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<sup>12</sup> Theoretical accounts of EU law usually apply extra-legal vocabularies, mainly those from political science. This is exemplified by characterisations of EU law that rely on concepts such as federalism, supranationalism and intergovernmentalism, multi-level governance, etc. This article tries to avoid such 'foreign' vocabulary. I could also say that I am trying to offer a purely legal theory of EU law, but that would be misleading because I am relying mainly on Hartian and post-Hartian legal theory, which rejects Kelsen's metaphysical and methodological commitments to a pure theory of law.

<sup>13</sup> I alluded to this point in Justin Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 *Oxford Journal of Legal Studies* 328.

<sup>14</sup> This is not to deny or belittle important criticisms of Hart's work by positivists (e.g. Joseph Raz, John Gardner, and Scott Shapiro), anti-positivists (e.g. Ronald Dworkin and Robert Alexy) and natural lawyers (e.g. John Finnis). The phrasing 'the circumstances [...] legal system' is to indicate that I understand Hart's theory of the characteristics of the legal system as an explanation *from the external point of view*, and in that respect its key tenets are still widely accepted.

<sup>15</sup> Case 13/61 *Bosch and van Rijn* EU:C:1962:11.

rumour as by reading', as Leslie Green observes in his introduction.<sup>16</sup> This is not to pretend that my choice for Hart's legal theory as such is original. While most accounts on the supposed autonomy of EU law at most only allude to Hart's work without deeper engagement,<sup>17</sup> Barber and Letsas's analyses of European constitutional pluralism brilliantly draw on Hartian and post-Hartian theory of the legal system and the notion of the rule of recognition.<sup>18</sup> More generally, the relationship between national and EU law has also attracted the interest of legal philosophers including MacCormick,<sup>19</sup> Eleftheriadis,<sup>20</sup> and Dickson.<sup>21</sup> However, what has been missing from the literature is a Hartian account of the autonomy of EU law from the latter's own self-understanding, as reflected in the ECJ's foundational case law on autonomy, direct effect, and supremacy.<sup>22</sup> This, then, is the purpose of this article.

The remainder of this article is structured as follows. Section II will set the scene by questioning the 'common story' of *van Gend & Loos* and the founding of the EU legal system as an exercise in teleological interpretation. Following Alexander Somek's claim that in constitutionalising the EU Treaties, 'the Court inferred the legal form of Community law from its content',<sup>23</sup> I will argue that the legal form that the EU Treaties have been understood to

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<sup>16</sup> HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) xv.

<sup>17</sup> E.g. Teodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389, 398.

<sup>18</sup> NW Barber, 'Legal Pluralism and the European Union' (2006) 12 *European Law Journal* 306; Letsas (n 11).

<sup>19</sup> Neil MacCormick, 'The *Maastricht*-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259; MacCormick (n 11).

<sup>20</sup> E.g. Pavlos Eleftheriadis, 'Aspects of European Constitutionalism' (1996) 21 *European Law Review* 32; and 'Pluralism and Integrity' (2010) 23 *Ratio Juris* 365.

<sup>21</sup> Dickson (n 11)

<sup>22</sup> Thus, I take the ECJ's case law to 'speak on behalf of the law', as it were. Obviously, one may distinguish between 'the law' and 'what courts say is the law'. While the anthropomorphisation of 'the law', and the role of courts therein, is worth a discussion of its own, I leave that point aside here.

<sup>23</sup> Alexander Somek, 'Is Legality a Principle of EU Law?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 67.

possess since *van Gend & Loos* is that of an autonomous legal system. I describe this argument as the 'autonomy thesis'. This autonomy thesis is the central object of analysis in the subsequent sections.

Section III explores the relationship between the autonomy thesis and what the ECJ considers its central rationale, the principle of effectiveness. Effectiveness is a necessary condition of legality, but it cannot be the *reason for* legality, nor can it account for the fact that the ECJ expresses the autonomy thesis as a normative statement. To understand the foundational case law, we need an 'internal point of view', in Hart's words.

Section IV proceeds accordingly by conceiving *van Gend & Loos* and *Costa v ENEL* as *internal* formulations of an EU rule of recognition, and uses the development of general principles of EU law as an example of how the ECJ has tried to 'pitch' the EU legal system towards national courts.

Rephrasing the autonomy thesis in Hartian vocabulary invites a conceptualisation of the two other doctrines central to the ECJ's foundational case law: direct effect and supremacy. Section V reconfigures the salience of direct effect and supremacy as elements of the 'union of primary and secondary rules' that Hart deemed central to the concept of a legal system. This section ends with some very preliminary observations on scepticism about the autonomy of EU law, which is based on the perspectivism of national (constitutional) courts, and aims to presage further, jurisprudentially informed, research to this end. Section VI concludes.

## II. FROM TELEOLOGICAL INTERPRETATION TO THE AUTONOMY THESIS

It seems almost commonplace to perceive the Court's foundational case law as an example of teleological interpretation.<sup>24</sup> *Van Gend & Loos* remains the paradigmatic case, as the Court here infers autonomy and direct effect from the spirit and general scheme of the Treaty. This kind of purposive interpretation of the Treaties and secondary legislation has been both hailed as a noble dream, 'well developed [...] and presented to individuals and their

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<sup>24</sup> See e.g., Bengoetxea (n 11) 250–258; Mitchel Lasser, *Judicial Deliberations* (Oxford University Press 2004) 207; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the European Union* (Hart 2013) 207–212.

judges with such elegance and persuasive power',<sup>25</sup> and despised as a nightmare,<sup>26</sup> or a juridical *coup d'état*.<sup>27</sup> Many authors understand the Court's case law as an example of what has come to be known as 'meta-teleological interpretation'. First introduced by Lasser,<sup>28</sup> and subsequently used by Poiars Maduro and Conway,<sup>29</sup> the concept of 'meta-teleological interpretation' refers to the interpretation of individual legal norms in light of the purposes of the legal system as a whole.<sup>30</sup> Even if 'meta-teleological' interpretation statistically does not play a major role in the Court's jurisprudence,<sup>31</sup> it has had considerable influence in the Court's landmark judgments.<sup>32</sup>

However, in a recent contribution, Alexander Somek claimed not only that the reasoning in *van Gend & Loos* is illegitimate, but also that it cannot even count as teleological interpretation in the first place. What is important in this regard is that the revolutionary impact of *van Gend & Loos* was not that article 12 of the Treaty establishing the European Economic Community (EEC) had direct effect, as Weiler and de Witte had indeed already demonstrated.<sup>33</sup> The key contribution of *van Gend & Loos* is that the question of whether EU norms have direct effect must solely be answered by EU law

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<sup>25</sup> Pescatore (n 7).

<sup>26</sup> For the classical critique, see Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986).

<sup>27</sup> Alec Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority' (2007) 8 *German Law Journal* 915.

<sup>28</sup> Lasser (n 24) 206–215, 359.

<sup>29</sup> Miguel Poiars Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) *European Journal of Legal Studies* 1; Gerard Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice' (2008) 14 *European Law Journal* 787.

<sup>30</sup> Lasser (n 24) 208; Poiars Maduro (n 29) 12–14.

<sup>31</sup> Sibylle Seyr, *Der effet utile in der Rechtsprechung des EuGH* (Duncker & Humblot 2008) 270, notes that out of 455 judgments containing *effet utile* - or purpose-based interpretation, more than 63% pertain to the effectiveness of the individual legal norm, rather than that of the EU legal system as a whole.

<sup>32</sup> See e.g. Urška Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law' (2015) 8 *European Journal of Legal Studies* 18.

<sup>33</sup> The result might well have been the same under public international law: Weiler (n 7).

itself: *autonomy*, not direct effect as such.<sup>34</sup> By declaring the irrelevance of the monistic and dualistic systems of incorporation in national constitutional law, the Court emancipated EU law from public international law. The latter lacks a doctrine of 'internal primacy' to this day.<sup>35</sup> Further, in contrast to public international law – under which the Treaty of Rome would be part of the general system of international law – *van Gend & Loos* and *Costa v ENEL* purported to create an EU legal system that governs its own jurisdiction. The Court thus expressly dissociated the EU legal system from public international law.<sup>36</sup> Somek takes these well-known facts to their logical implication: the 'myth of teleological interpretation' disguises the fact that 'the Court inferred the legal form of Community law from its content'.<sup>37</sup> As I understand his argument, 'legal form' refers to the form of an autonomous legal system, which operates normatively separately from national legal systems and international law.

Somek is right to conclude that teleological interpretation is an unconvincing explanation of the Court's foundational case law. Teleological interpretation is a method of interpretation locating the *content* of individual legal norms – or perhaps sets of legal norms – in their purpose. Meta-teleological interpretation shifts focus to the purpose of the entire legal system, but it is still concerned with the process of discovering the content of some norm or set of norms.

In stark contrast, the autonomous nature of the EU legal system as inferred from the Treaty's substance in *van Gend & Loos*, is not an interpretation of any legal norm in particular. It is rather a second-order interpretation of the *genus*

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<sup>34</sup> Somek (n 23) 67; Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2012).

<sup>35</sup> Bruno de Witte, 'The Continuous Significance of *Van Gend en Loos*' in Miguel Poiares Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law* (Hart 2010). See further e.g. Thomas Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' in (1992) 235 *Collected Courses of the Hague Academy of International Law* 303.

<sup>36</sup> This is why I consider conceptions of EU law as part of some general system of international law unpersuasive. Cf. e.g. Derrick Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147.

<sup>37</sup> Somek (n 23) 67.

to which the Treaty belongs: not a treaty in public international law, but an autonomous legal system.<sup>38</sup> Rather than interpreting any EU norm, the Court appears to take an outsider's perspective by observing the form of the Treaty of Rome. This difference between interpreting the Treaty's form and interpreting the Treaty's legal norms is visible in the structure of *van Gend & Loos* itself: only after introducing the doctrine of direct effect as a corollary of autonomy does the Court discuss whether article 12 EEC possesses direct effect, and to that end it introduces the criteria of sufficient clarity and unconditionality. Both direct effect and supremacy are not – and could not possibly be – inferred from any legal norm.<sup>39</sup>

I will refer to the ECJ's conception of the EU Treaties – introduced in *van Gend & Loos* and *Costa v ENEL* and maintained up to *Opinions 2/13* and *1/17* – as the 'autonomy thesis'. The autonomy thesis comprises two elements. The first element, already mentioned, is that EU law is a self-referential legal system that cannot be known from an external Archimedean vantage point.<sup>40</sup> In Hartian parlance, EU law has its own rule of recognition.<sup>41</sup>

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<sup>38</sup> By 'second-order interpretation' I mean an interpretation of the form of the activity in which interpretation of first-order norms takes place. Second-order interpretation is accordingly distinct from 'meta-teleological interpretation', which is a specific method of interpreting first-order norms. To provide an analogy: interpreting first-order norms of etiquette should be distinguished from interpreting the 'activity' of etiquette as such, e.g. by asking how etiquette is different from other normative systems, whether etiquette is conventional, etc.

<sup>39</sup> This makes it somewhat odd that some scholars have expressed surprise that the doctrines of autonomy and supremacy cannot be found in the Treaty. See recently e.g. Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press 2018) 115–131. Even if this were the case, this begs the question why this supremacy rule, as a rule of the Treaty, would have supremacy over the manner in which national constitutional law regulates the incorporation of public international law. No first-order supremacy rule in the EU Treaties could of itself generate the supremacy (or, *mutatis mutandis*, autonomy) of the EU legal system.

<sup>40</sup> See Gunther Teubner, "'And God Laughed...": Indeterminacy, Self-Reference, and Paradox in Law' in Christian Joerges and David Trubek (eds), *Critical Legal Thought* (Nomos 1989).

<sup>41</sup> See Lindeboom (n 13); Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford*

The second element of the autonomy thesis pertains to the nature of the rule of recognition. According to Hart, a rule of recognition is practiced by a subset of the members of the community he calls 'legal officials'.<sup>42</sup> Contrary to public international law, the autonomy thesis entails that national administrative and judicial authorities become legal officials of the EU legal system. The EU legal system speaks directly to national authorities by obligating them to apply EU law.<sup>43</sup> From the perspective of Hartian legal theory, the relationship between *system* and *official* is a more fundamental cornerstone of the legal system than the one between *system* and *individual*, which has been the focus of most scholarship on the constitutionalisation of the EU Treaties.<sup>44</sup>

This second element of the autonomy thesis may generate puzzlement as it applies to national legal officials notwithstanding their constitutional and institutional entrenchment in their domestic legal systems. However, similar puzzlement about the Hartian concept of legal official transcends the specific case of EU law's autonomy thesis. For Hart, legal officials create a legal system by committing to its rule of recognition. Responding to the apparent circularity and indeterminacy of this reasoning,<sup>45</sup> the genealogy of

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*Principles of European Union Law. Volume 1: The European Union Legal Order* (Oxford University Press 2018).

<sup>42</sup> Hart (n 16) 90–99.

<sup>43</sup> As to national courts, see e.g. Case 106/77 *Simmenthal* EU:C:1978:49; Case C-213/89 *Factortame* EU:C:1990:257; and Case C-416/10 *Križan* EU:C:2012:218. As to national administrative authorities, see e.g. Case 103/88 *Fratelli Costanzo* EU:C:1989:256.

<sup>44</sup> Cf. e.g. JHH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 *International Journal of Constitutional Law* 94. Hart's discussion about the necessary and sufficient conditions for the existence of legal systems requires, on part of the broader community of individuals, only general obedience for any motive whatever. Only the subset of 'legal officials' needs to *practice* the rule of recognition, which they do by accepting it as 'common public standards of official behaviour' (Hart (n 16) 116).

<sup>45</sup> As to circularity, legal officials such as courts derive their identity as officials from the law. At the same time, they are said to constitute the legal system. As to indeterminacy, Hart's theory does not make clear *which* subset of a community's members are supposed to count as *legal* officials as opposed to officials of any other normative system. This relates also to the over-inclusiveness of Hart's

legal systems presumes that some powerful subset of the members of a community – call them 'proto-officials' – may start regarding themselves as being bound by some set of rules, perhaps even mistakenly or accidentally, and in doing so begin constituting a legal system.<sup>46</sup> Thus the proto-officials of system A can transform into genuine officials of system A, and officials of system A can transform into the proto, then actual officials of system B.

Thus, as applied to EU law, circularity and indeterminacy do not pose any *theoretical* problems because the ECJ never communicated with a random subset of the members of the population.<sup>47</sup> The role of national courts as *legal* officials of their national legal systems makes them sufficiently determinable as a *sociological* category of proto-officials of the EU legal system.<sup>48</sup> The autonomy thesis is anti-institutional in purporting to transform the identity of national courts, while recognising their current institutional position; an exercise in symbolic power *par excellence*, to use Bourdieu's terminology.<sup>49</sup>

To sum up, the Court's foundational case law on the autonomy, direct effect and supremacy is inaptly described as a teleological interpretation of the legal norms of the EU Treaties. Instead, the autonomy thesis is a thesis about the form that the EU Treaties have created. It states that EU law is identified by its own rule of recognition, and that all Member State authorities are legal officials of the EU legal system.<sup>50</sup>

The remainder of this article will try to flesh out the logic of the autonomy thesis. If the autonomy thesis is not an interpretive statement about the

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theory of legal system: Keith Culver and Michael Giudice, *Legality's Borders* (Oxford University Press 2010) 10–21.

<sup>46</sup> Hart (n 16) 111–123; John Gardner and Timothy Macklem, 'Review of Scott J. Shapiro, *Legality*' [2011] Notre Dame Philosophical Reviews <<https://ndpr.nd.edu/news/legality/>> accessed 18 August 2020. For alternative, though related, solutions to the circularity paradox, see Culver and Giudice (n 45) 10–14.

<sup>47</sup> Art 267 TFEU refers to 'any court or tribunal of a Member State'.

<sup>48</sup> Koen Lenaerts speaks in this regard of 'national judges as the *arm* of EU law (or, put more simply, as "European judges")': Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 *Yearbook of European Law* 1, 4 (emphasis in original).

<sup>49</sup> Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 839.

<sup>50</sup> See further Section IV below.

normative substance of EU norms, what kind of statement is it? Can it be explained at all, or should we simply take the Court's case law for granted, whether or not we believe in its legitimacy? In the next section, I will start by looking at the Court's effectiveness argument, which takes centre stage in the autonomy thesis: that the effectiveness of EU law can only be guaranteed if EU law governs its own application, and is directly applied by Member State authorities.

### III. FROM EFFECTIVENESS TO THE INTERNAL POINT OF VIEW

From *van Gend & Loos* to *Opinion 2/13*, the ECJ has largely justified the autonomy thesis by reference to the need to ensure the effectiveness of the EU Treaties.<sup>51</sup> But while effectiveness is an empirical measurement, court decisions are interpretations of norms and are therefore normative themselves. The logic of the ECJ's foundational case law must therefore account for both its normative character *and* the central role of effectiveness. In order to flesh out this dynamic, we need a small detour towards the relationship between effectiveness and legal validity, before returning to autonomy in section IV.

It is widely established in legal theory that some degree of effectiveness is a necessary condition for the validity of law. No 'legal system purport' is valid law if it is not effectively upheld.<sup>52</sup> The precise relationship between effectiveness and legal validity has been extensively analysed in the work of

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<sup>51</sup> Case 26/62 *van Gend & Loos* EU:C:1963:1: 'the vigilance of individuals [...] amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 [...]'; *Opinion 2/13* EU:C:2014:2454, paras 188–189, 197.

<sup>52</sup> Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945) 119; Hart (n 16) 116–117; Joseph Raz, *The Concept of a Legal System*, (2nd edn, Clarendon Press 1980) 202–207; Ralf Dreier, 'Der Begriff des Rechts' (1986) 39 *Neue Juristische Wochenschrift* 890, 896; Robert Alexy, *Begriff und Geltung des Rechts* (Karl Alber 1992) 201. Even Dworkin's anti-positivist conception of law as integrity is grounded in the imperative of interpreting the posited legal materials as much as possible as part of one coherent political morality. As Dworkin puts it, legal claims should have 'institutional support' (Ronald Dworkin, 'The Model of Rules I' reprinted in *Taking Rights Seriously* (Harvard University Press 1978)) and social facts exercise a 'gravitational force' on legal content (Ronald Dworkin, 'Hard Cases' reprinted in *ibid*).

Hans Kelsen, on which Hart appears to rely heavily (but mostly silently). For Kelsen, validity can be equated to existence: to say that a legal norm is valid is tantamount to saying that it exists, and vice versa.<sup>53</sup> Given that validity is the only quality that legal norms possess, the effectiveness of legal norms must be an extra-legal quality. Statements about the effectiveness of legal norms thus pertain to people's actual observance of the legal norms.<sup>54</sup>

For Kelsen, the link between effectiveness and validity is established through the presupposition of the *Grundnorm*. This presupposition must be conditional upon the overall effectiveness of the legal system; in other words, a legal system that is by and large effective is a condition for presupposing the *Grundnorm*, which validates all other legal norms.<sup>55</sup> However, in order to maintain his epistemic and metaphysical distinction between the factual ('*Sein*') and the normative ('*Sollen*'), Kelsen repeatedly stresses that effectiveness is only a *negative condition* for validity:

The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms.<sup>56</sup>

Even individual legal norms can lose their legal validity, notwithstanding the legal system's overall efficacy, if they remain permanently inefficacious. While the validity of newly enacted legal norms is provided by a higher-order

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<sup>53</sup> Hans Kelsen, *The Pure Theory of Law* (Max Knight tr, University of California Press 1967) 10; Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 146.

<sup>54</sup> Kelsen (n 52) 39–40.

<sup>55</sup> Ibid 41–42, 119.

<sup>56</sup> Ibid 119. A terminological note: In *Reine Rechtslehre*, Kelsen mainly used the word 'Wirksamkeit' in this context, which is usually translated as 'efficacy' rather than 'effectiveness' in part because Kelsen also employs the term 'Effektivität' in a seemingly different manner. I use 'effectiveness' and 'efficacy' interchangeably here because my point is precisely that what Kelsen calls 'Wirksamkeit' and 'efficacy' (as does Hart, see III.2. below) is relevant to the role of what in EU law is usually called '(full) effectiveness' or '*effet utile*'.

norm – making them valid *before* there are first observed or applied – '[a] legal norm is no longer seen as valid if it remains permanently inefficacious'.<sup>57</sup>

Building on Kelsen's framework, Joseph Raz elaborated that effectiveness in the sense of obedience to the laws is hardly a measurable criterion for the existence of a legal system. After all, '[h]ow should cases of disobedience be counted? [...] How many opportunities not to murder does one have during a year? And how many opportunities not to steal?'.<sup>58</sup> Raz proposes instead to focus on the recognition of legal norms by law-applying institutions.<sup>59</sup> He claims that such recognition is a necessary condition of their existence by way of counterfactual: the question is whether the courts would apply a norm if they were presented with an appropriate case for applying it.<sup>60</sup> Very similarly, Eugenio Bulygin conceives of effectiveness as a situation in which, provided that the necessary conditions for applying a norm obtain, courts will apply the norm. The effectiveness of legal norms thus correlates with their invocability before courts.<sup>61</sup>

#### 1. *The Role of Direct Effect and Invocability in the ECJ Case Law*

Raz's and Bulygin's formulation of the effectiveness–validity nexus already gives us a hint of the relevance of the Court's case law on the direct effect of EU law. Direct effect is the key mechanism for the EU legal system to guarantee its enforceability. In the words of Pescatore,

[a]ny legal rule is devised so as to operate effectively (we are accustomed, in French, to speak here about *effet utile*). If it is not operative, it is not a rule of law [...] In other words, practical operation for all concerned, which is

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<sup>57</sup> Hans Kelsen, 'Validity and Efficacy of the Law' (Bonnie Litschewski Paulson and Stanley Paulson trs), in Eugenio Bulygin, *Essays in Legal Philosophy* (Carlos Bernal and others eds, Oxford University Press 2015) 67.

<sup>58</sup> Raz (n 52) 203.

<sup>59</sup> Ibid 191–201.

<sup>60</sup> Raz (n 53) 87–88.

<sup>61</sup> Eugenio Bulygin, 'The Concept of Efficacy' (Bonnie Litschewski Paulson and Stanley Paulson trs), in Eugenio Bulygin, *Essays in Legal Philosophy* (Carlos Bernal and others eds, Oxford University Press 2015) 48–51.

nothing else than 'direct effect', must be considered as being the normal condition of any rule of law.<sup>62</sup>

As I understand Pescatore's claim, direct effect is not really a substantive doctrine of EU law, but rather a doctrinal restatement of its practical operation. Obviously, enforcement need not necessarily be *within* the Member States, and invocability need not necessarily be before *national* courts. A legal order of international law might well be effective at an international level only. But scepticism of the effectiveness and accordingly the legality of international law continues to this day.<sup>63</sup> Thus, a charitable interpretation of Pescatore's observation is that the rules of the EU Treaties would not *really* be legal rules if they were not directly enforced in the domestic sphere.

The early development of the case law on the principle of effectiveness in the context of 'procedural autonomy' served a similar function to direct effect.<sup>64</sup> According to the doctrine of procedural autonomy, pending the harmonisation of procedural rules at EU level, it is for the national legal orders to lay down the rules on legal procedures and remedies to which substantive claims based on EU law before national courts are subject.<sup>65</sup> However, national procedural rules applying to claims based on EU law may not make the exercise of EU law rights 'virtually impossible' or 'impossible in practice', a principle which national courts are obligated to protect.<sup>66</sup> This

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<sup>62</sup> Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *European Law Review* 155 (1983), reprinted in (2015) 40 *European Law Review* 135 (subsequent citations refer to the 2015 reprinted version for convenience).

<sup>63</sup> E.g. Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005).

<sup>64</sup> In later years, the principle of effectiveness has accumulated more positive, hermeneutic content, which translates into more stringent requirements for national procedural law. For an overview of this development, Norbert Reich, 'The Principle of Effectiveness and EU Private Law' in Ulf Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Intersentia 2013).

<sup>65</sup> See generally, Michael Dougan, 'The Vicissitudes of Life at the Coalface' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011).

<sup>66</sup> Case 33/76 *Rewe-Zentralfinanz* EU:C:1976:188, para 5; Case 45/76 *Comet* EU:C:1976:191, para 16.

principle of effectiveness adds to the principle that national procedural rules may not discriminate between actions based on EU law and similar actions based on national law (the principle of equivalence or non-discrimination).<sup>67</sup>

Neither the doctrine of procedural autonomy, nor its limit in the principle of effectiveness, are found in the EU Treaties. These are not interpretations of first-order legal norms of EU law.<sup>68</sup> The doctrine procedural autonomy rather *guarantees* that EU law norms can be enforced before national courts, as does direct effect itself. The principle of effectiveness in the case law on procedural autonomy gives normative expression to the factual observation that legal norms which cannot be invoked before courts, or which are not applied by courts when they are invoked, are insufficiently effective to retain their legal validity.

However, this legal-theoretical appraisal of effectiveness remains incapable of describing the normative logic of the autonomy thesis. In other words, we require an understanding of *van Gend & Loos*'s normative point of view which takes sufficient account of the factual salience of effectiveness, without *reducing* the judgment to a factual statement about effectiveness. Avoiding such reductionism is crucial not only because court judgments *necessarily* are normative statements about what the law requires, but also because if *van Gend & Loos* were a descriptive, factual statement, it would obviously be wrong: the doctrines of autonomy and direct effect did not 'exist' before the ECJ proclaimed them. The vantage point of Hart's legal theory helps to grasp the normative logic of *van Gend & Loos*.

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<sup>67</sup> Case 33/76 *Rewe-Zentralfinanz* EU:C:1976:188, para 5; Case 45/76 *Comet* EU:C:1976:191, para 13.

<sup>68</sup> This may also be different for the more stringent interpretation of the principle of effectiveness established in later case law (see Reich (n 64)), which relies heavily on art 47 CFR. My analysis is confined to the foundational principles of procedural autonomy, which form the basis of the interaction between EU substantive law and national procedural law. Arguably, the principle of equivalence or non-discrimination *as such* could be seen as a cornerstone of the first-order substance of EU law, although the Treaties do not specifically apply it to national procedural rules.

## 2. *The Internal Point of View*

Central to Hart's theory of law is the distinction between the internal and the external point of view, and the corresponding distinction between internal statements and external statements. An internal statement is a statement of some legal norm or its interpretation given by someone who is committed to the rule of recognition.<sup>69</sup> Internal statements are therefore legal statements by those who are actively engaged in the legal system. External statements are statements by someone who merely observes the legal system and is not himself active within it. According to Hart, an external statement describes the fact that some people accept a given rule of recognition.<sup>70</sup> Put differently, internal statements, or statements from the *internal point of view*, are statements *of law*. External statements, or statements from the *external point of view*, are statements *about law*.<sup>71</sup>

Whether a legal system is effective is a question from the external point of view. For Hart, making internal statements about a legal system presupposes the general efficacy of that legal system:

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy.<sup>72</sup>

Elsewhere, Hart refers to the 'context of general efficacy' as the 'normal context' of making internal normative statements about what the law is.<sup>73</sup> This 'normal context' seems remarkably similar to Pescatore's observations that 'practical operation for all concerned [...] must be considered as being the normal condition of any rule of law', 'any legal rule must be at first sight

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<sup>69</sup> Hart (n 16) 102–103.

<sup>70</sup> Ibid 103.

<sup>71</sup> For this formulation, see Kevin Toh, 'An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445, 451–452.

<sup>72</sup> Hart (n 16) 104 (emphasis in original).

<sup>73</sup> HLA Hart, 'Scandinavian Realism' in *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 168.

presumed to be operative in view of its object and purpose', and that "'direct effect" is nothing but the ordinary state of the law'.<sup>74</sup>

As a participant in the EU legal system, the ECJ necessarily adopts an internal point of view. In making statements on 'direct effect' and the necessity of facilitating the 'enforceability' of EU norms, however, the ECJ seems to make explicit the necessary preconditions for EU legality. This would amount to making an external statement about the existence of the EU legal system *from within the system*: i.e. an external statement disguised as an internal, normative statement. Admittedly, the ECJ locates part of its hermeneutics in the principle of loyalty in article 4(3) TEU.<sup>75</sup> No individual norm, however, can serve as a basis for an external statement regarding the effectiveness of either that norm itself or its legal system. As the *validity* of the norm depends on its effectiveness, the norm can never be a reason for its own effectiveness. Pescatore is obviously right to argue that any legal norm in some way aspires towards achieving its aim in reality. However, this argument is unable to bootstrap an internal, normative statement from an external statement on efficacy.

Accordingly, to make sense of the doctrine of direct effect, and the autonomy thesis more generally, as normative statements, we need an understanding of the autonomy thesis as an *internal* statement. The next section will try to provide such an understanding by conceiving the autonomy thesis as a so-called *internal recognitional statement*, i.e. a normative expression of the rule of recognition of the EU legal system.

#### IV. HOW TO RECOGNISE 'A NEW LEGAL ORDER'

This section will provide an explanation of the foundational case law using two central features of Hart's theory of law. The first was introduced in the previous section: the distinction between the internal and the external point of view. The second is Hart's theory of the legal system. For Hart, a central characteristic of a legal system is that it unites a system of primary and secondary rules identified by a certain law-identifying rule, which Hart calls

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<sup>74</sup> Pescatore (n 62) 135, 153.

<sup>75</sup> See also *ibid* 140, 152.

the rule of recognition.<sup>76</sup> As no legal system exists without a rule of recognition, which guarantees the former's normative autonomy, there must be an EU rule of recognition to protect the autonomy thesis. This section aims to show how the ECJ's foundational case law can be understood as providing a *normative* expression of the rule of recognition.

### *1. Van Gend & Loos as an Internal Recognition Statement*

If Hart's example of the UK legal system's rule of recognition ('Everything enacted by the Queen in Parliament is law')<sup>77</sup> is applied by analogy to the EU legal system at the time of *van Gend & Loos*, we would get something along the lines of:

All norms of the Treaty of Rome and all norms of secondary legislation enacted in accordance with the Treaty of Rome are valid norms of the EEC legal system (hereinafter: 'RR EEC').

This formulation is quite similar to the ECJ's claims in *van Gend & Loos* and *Costa v ENEL*: 'the Community constitutes a new legal order of international law',<sup>78</sup> 'the EEC Treaty has created its own legal system',<sup>79</sup> and, in particular, 'the law stemming from the Treaty [is] an independent source of law'.<sup>80</sup> What these claims have in common with RR EEC is a seemingly external viewpoint towards the EU Treaties.

At multiple occasions, Hart indeed suggested that the rule of recognition cannot be expressed from the internal point of view, but can only be observed empirically and expressed as an external statement.<sup>81</sup> Since the rule of

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<sup>76</sup> Hart (n 16) 99, 116. I use the term 'central characteristic' as opposed to 'essential' or 'necessary characteristics' because it is doubtful whether Hart regarded the union of primary and secondary rules as 'essential to' or 'necessary for' the concept 'law'. See e.g. Frederick Schauer, 'Hart's Anti-Essentialism' in Andrea Dolcetti, Luis Duarte d'Almeida and James Edwards (eds), *Reading HLA Hart's The Concept of Law* (Hart 2013).

<sup>77</sup> Hart (n 16) 102.

<sup>78</sup> Case 26/62 *van Gend & Loos* EU:C:1963:1, 12.

<sup>79</sup> Case 6/64 *Costa v ENEL* EU:C:1964:66, 593.

<sup>80</sup> Case 6/64 *Costa v ENEL* EU:C:1964:66, 594.

<sup>81</sup> E.g.: 'The question of whether a rule of recognition exists *and what its content is*, i.e. what the criteria of validity in any given legal system are, is regarded

recognition *identifies* the law, internal statements of law are rather *entailed* by the rule of recognition.

Notwithstanding the seemingly external viewpoint expressed by the ECJ in the abovementioned claims, the ECJ's foundational case law does not merely *describe* some rule of recognition, but takes an explicitly normative approach towards it. Given that the Treaty of Rome has created its own legal system, individuals are *allowed* to invoke its norms before national courts independently of national law, and national courts are *required* to apply directly effective norms. The autonomy thesis thus seems to be a normative expression of the rule of recognition.

Whether Hart actually believed that internal, normative statements about the rule of recognition are impossible is unclear. At other times, Hart clearly stated that '[i]n the day-to-day life of a legal system its rule of recognition is very seldom *expressly* formulated as a rule' and '[f]or the most part the rule of recognition is not stated'.<sup>82</sup> Focusing on these later statements, Kevin Toh has argued recently that Hart's theory is better understood as allowing for the possibility of what he calls 'internal recognitional statements'.<sup>83</sup> Internal recognitional statements are formulations of a component of the rule of recognition from an internal point of view. The infrequency with which explicit internal recognitional statements are actually encountered could thus be conceived as a pragmatic phenomenon rather than a conceptual impossibility.<sup>84</sup> Usually, participants in a legal system will only *implicitly* express the content of the rule of recognition by applying some first-order norm(s). Moreover, it certainly is not impossible that courts, in exceptional situations, express the content of the rule of recognition explicitly. In *Miller*, for example, the UK Supreme Court observed that EU law 'derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law'.<sup>85</sup> The

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throughout this book as an empirical, though complex, question of fact' (emphasis added), Hart (n 16) 292.

<sup>82</sup> Hart (n 16) 101.

<sup>83</sup> Toh (n 71) 485.

<sup>84</sup> For another hypothesis about Hart's ambiguous stance towards internal statements of the rule of recognition: Kevin Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689, 699–700.

<sup>85</sup> *Miller v Secretary of State* [2017] UKSC 5, para 225.

rule of recognition can therefore be regarded as having both an external and an internal formulation.

At the time of *van Gend & Loos*, we can conceive of the EU legal system's rule of recognition as having the content 'RR EEC'. Today, the rule of recognition might look something like this:

All norms of the Treaty on European Union, the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union, and all norms of secondary legislation enacted in accordance with the Treaties and the Charter are valid norms of the EU legal system.

In his discussion on the formulation of the rule of recognition and Hart's distinction between external and internal statements, Toh expresses the logic of the rule of recognition in both an external and an internal statement.<sup>86</sup> From an external point of view, a rule of recognition then reads as:

We [or: they] actually treat R as the ultimate criterion of legal validity in this legal system.<sup>87</sup>

As an *internal* statement, the rule of recognition would read:

We ought to treat R as the ultimate criterion of legal validity in this legal system!; or

Let us treat R as the ultimate criterion of legal validity in this legal system.<sup>88</sup>

The ECJ's statements in *van Gend & Loos* and *Costa v ENEL* on the existence of an autonomous EU legal system can similarly be conceptualised as the following internal recognitional statement:

'RR EEC' ought to be treated as the ultimate criteria of legal validity of the EU legal system; or

Let us treat 'RR EEC' as the ultimate criteria of legal validity of the EU legal system.

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<sup>86</sup> Toh (n 71) 491.

<sup>87</sup> Ibid. In this regard, by 'R' Toh means any particular (candidate) rule of recognition.

<sup>88</sup> Ibid.

This conceptualisation of the ECJ's foundational case law not only accounts for the *normative* formulation of a rule of recognition of an autonomous legal system, but also for the ECJ's attitude towards national courts. Internal (recognitional) statements provide reasons for a certain group of people (for Hart, primarily courts). In other words, internal statements imply a 'reflective critical attitude' on the part of those who follow them, who consider them as a normative standard both for themselves and for others.<sup>89</sup> In stating that the EU Treaties constitute an autonomous legal system which can be invoked directly before national courts, the ECJ not only accepts this rule of recognition for itself, but also claims that national courts are bound by it. More explicitly than in *Costa v ENEL*, the Court emphasised the duty-imposing aspect of 'RR EEC' towards national courts in *Simmenthal*:

It follows from the foregoing that every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.<sup>90</sup>

In Toh's formulation of internal recognitional statements, *Simmenthal* would translate into:

National courts ought to treat 'RR EEC' as the ultimate criteria of legal validity of the EU legal system.

Conceptualising the logic of *van Gend & Loos* and *Costa v ENEL* as an internal recognitional statement leads to the following interim conclusions. First, the establishment of an autonomous EU legal system takes the form of an internal recognitional statement identifying the Treaty of Rome as an independent source of law, which is reason-giving for its legal officials. Second, this statement claims not only to impose normative duties on the ECJ, but also on the national courts. The national courts are thereby considered 'legal officials' of the EU legal system. Finally, the former conclusions entail that we are able to measure the effectiveness of the EU

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<sup>89</sup> Hart (n 16) 57: the internal point of view towards rules 'is manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others'.

<sup>90</sup> Case 106/77 *Simmenthal* EU:C:1978:49, para 21.

legal system within the Member States. The degree to which EU law is judicially invocable and enforceable before national courts becomes dispositive of whether the EU legal system exists.

## 2. *Pitching the Rule of Recognition: The Case of General Principles of EU Law*

While internal statements of law *presuppose* the external statement that the legal system is generally efficacious,<sup>91</sup> this does not mean that no internal statement can be made which does not yet fully conform to the behaviour of other legal officials. Concluding otherwise would deny the possibility of judicial legal change. Outside their 'normal context', internal statements can also be made to *change* the content of the rule of recognition:

It will *usually* be pointless to assess the validity of a rule [...] by reference to rules of recognition [...] which are not accepted by others in fact, or are not likely to be observed in the future.<sup>92</sup>

As Toh puts it, by making a pitch to his interlocutors, a legal official proposing a rule of recognition, or a part of one,

would have to be quite mindful of the existing practices among his fellow community members [...] He would have to tailor his pitches in light of his fellow members' normative opinions and practices if his internal legal statements were to be successful in obtaining the appropriate uptake on their parts.<sup>93</sup>

The partial or total success of the ECJ's autonomy thesis and the doctrines of supremacy and direct effect have been abundantly discussed from the perspective of historical studies and judicial politics.<sup>94</sup> The motivational

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<sup>91</sup> Hart (n 16) 104 (emphasis in original).

<sup>92</sup> Hart (n 73) 168 (emphasis in original).

<sup>93</sup> Toh (n 71) 499.

<sup>94</sup> For historical perspectives, see e.g. Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001); Bill Davies, *Resisting the ECJ: Germany's Confrontation with European Law, 1949–1979* (Oxford University Press 2012). For judicial politics perspectives, see e.g. Anne-Marie Burley and Walter Mattli, 'Europe Before the Court' (1993) 47 *International Organization* 41; Karen Alter, 'The European Court's Political Power' (1996) 19 *West European Politics* 452; Tommaso Pavone and R. Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) 25 *European Law Journal* 352.

reasons for recognising a source of law and the protected reasons this generates are beyond the scope of this article. Instead, I will try to connect the question of why national authorities would heed the ECJ's pitch for a new rule of recognition to the abovementioned conceptualisation of the autonomy thesis as an internal recognitional statement. As this internal recognitional statement is *normative*, its normative weight may be salient for the degree of compliance by national authorities.<sup>95</sup> The development of unwritten general principles of EU law in the ECJ's case law offers a remarkable illustration of how the ECJ aims to adjust the content of EU law's rule of recognition by tailoring its pitches in light of national courts' (likely) normative opinions and practices.<sup>96</sup>

Recognition of certain general principles of law, even where they are not expressly mentioned in the Treaty, may simply reflect the phenomenology of adjudication: in recognising that what they do is interpret the law, judges may commit themselves to recognising particular principles which they also deem central to 'law'.<sup>97</sup> An early example is the case *Fédération Charbonnière de Belgique*, where the ECJ recognised as unwritten principles of EU law the prohibition of misuse of powers and the principle of proportionality.<sup>98</sup> In his Opinion, AG Lagrange adumbrates both the manner in which the ECJ would later construct the EU legal system and the manner in which the content of

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<sup>95</sup> I do not want to suggest that the normative weight of the autonomy thesis *is* the reason for national authorities to apply EU law. My claim is merely that it *could* be a reason for national authorities to apply EU law. The actual reasons national authorities have for complying with EU law, or even national law, might be very different and diverge widely among judges.

<sup>96</sup> There are numerous other examples of how the ECJ's case law could be seen as a pitch towards the national courts for recognising the EU rule of recognition, in particular in areas where the Court balances considerations of effectiveness against the legitimate purposes of national procedural rules. For reasons of space, this section will only discuss general principles.

<sup>97</sup> See Ronald Dworkin's 'The Model of Rules II' and 'Hard Cases', both reprinted in *Taking Rights Seriously* (Harvard University Press 1978). See also Paul Craig, 'General Principles of Law: Treaty, Historical and Normative Foundations' in Katja Ziegler, Päivi Neuvonen and Violeta Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar 2019).

<sup>98</sup> Case 8/55 *Fédération Charbonnière de Belgique* EU:C:1956:7.

the legal system is infused with concepts from national law. The Treaty of Rome is,

from a material point of view, the charter of the Community, since the rules of law which derive from it constitute *the internal law of that Community*. As regards the *sources* of that law, there is obviously nothing to prevent them being sought, where appropriate, in international law, but normally and in most cases they will be found rather in the internal law of the various Member States.<sup>99</sup>

Similarly, in *Algera* the Court was confronted with the question of the revocability of individual rights under the Treaty. As the Treaty did not contain any applicable rules in this regard, the Court observed that

unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries.<sup>100</sup>

While the inclusion of general principles in these cases may simply reflect deep conventions among ECJ judges about what 'law' is,<sup>101</sup> later case law on the status of fundamental rights as general principles of EU law seemed to involve a more strategic adaptation of the rule of recognition's content. Responding to the *Bundesverfassungsgericht's Solange I* judgment,<sup>102</sup> the ECJ maintained the normative supremacy of EU law over all conflicting national law in *Internationale Handelsgesellschaft*.<sup>103</sup> The proverbial carrot to this stick was the Court's observation that fundamental rights are an inherent part of the EU legal system. The influence of *Internationale Handelsgesellschaft*

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<sup>99</sup> Case 8/55 *Fédération Charbonnière de Belgique* EU:C:1956:6, Opinion of AG Lagrange, 277 (emphasis in original).

<sup>100</sup> Joined Cases 7/56, 3/57 to 7/57 *Algera* EU:C:1957:7, 55.

<sup>101</sup> On the 'deep conventions' of law, see Andrei Marmor, 'Deep Conventions' (2007) 74 *Philosophy and Phenomenological Research* 586. Deep conventions constitute what counts as a certain social practice. As applied to law, deep conventions are both logically and culturally prior to the rule of recognition, as they determine 'what law in our culture is'. See Andrei Marmor, 'How Law Is Like Chess' in *Law in the Age of Pluralism* (Oxford University Press 2007) 172–181, esp 177.

<sup>102</sup> BVerfGE 37, 271, BvL 52/71 (*Solange I*).

<sup>103</sup> Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

(hereinafter: *IHG*), and previously *Stauder*,<sup>104</sup> on the content of the EU rule of recognition can be roughly formulated as follows:

**RR EEC before *IHG*:** 'All norms of the Treaty of Rome and all norms of secondary legislation enacted in accordance with the Treaty of Rome are valid norms of the EEC legal system'.

**RR EEC after *IHG*:** 'All norms of the Treaty of Rome, unwritten general principles of law including fundamental rights, and all norms of secondary legislation enacted in accordance with the Treaty of Rome, general principles of law and fundamental rights, are valid norms of the EEC legal system'.

It is not difficult to see how this change in the EU rule of recognition strengthens the ECJ's pitch towards national courts:<sup>105</sup>

*IHG*: 'We ought to treat 'RR EEC after *IHG*' as the rule of recognition (don't worry, it guarantees fundamental rights protection)'.

Talk of the 'common constitutional traditions of the Member States', created by the ECJ but now also part of the Treaties,<sup>106</sup> signals interaction between the legal system of the Member States and the EU legal order. However, the need for the EU legal system to incorporate fundamental cornerstones of the national legal systems is mostly pragmatic and serves as a credible pitch of the EU's internal recognitional statement.

## V. THE AUTONOMY THESIS AND THE DOCTRINES OF DIRECT EFFECT AND SUPREMACY

If *van Gend & Loos* and *Costa v ENEL* express the autonomy thesis as an internal recognitional statement, this raises the question what role the doctrines of the direct effect and of supremacy of EU law play within the Hartian framework. This section will respectively translate the two doctrines into a rather crude but consequential rule of adjudication (direct effect), and

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<sup>104</sup> Case 29/69 *Stauder* EU:C:1969:57, para 7.

<sup>105</sup> But see Bill Davies, '*Internationale Handelsgesellschaft* and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017).

<sup>106</sup> E.g. art 6(3) TEU, and arts 67 and 82 TFEU.

a corollary of the normativity of EU law, which lacks self-standing analytical value (supremacy).

*1. A Master Secondary Rule: The Doctrine of Direct Effect*

The existence of an autonomous rule of recognition is constitutive of the existence of an autonomous system of norms. The role of other secondary rules – rules of change and rules of adjudication – then becomes to elaborate further the system's institutional systematicity. Rules of change abound in EU law, as evinced from the numerous legal bases in the Treaties prescribing the creation of EU secondary legislation,<sup>107</sup> and the procedures for amendment of the Treaty,<sup>108</sup> accession to the EU,<sup>109</sup> and exit from the EU.<sup>110</sup> Rules of adjudication are more elusive. While the adjudicatory competences of the ECJ itself are clearly enumerated in the Treaties,<sup>111</sup> the same is not true for national courts. The latter's competences draw largely from national law. Direct effect of EU law, however, plays a crucial role here.

Direct effect has had several meanings in the ECJ's case law and legal scholarship. It has been referred to as the principle which essentially brings EU norms into the national legal orders.<sup>112</sup> The autonomy thesis leaves no room for an incorporation mechanism of that sort. If the EU legal system is an *autonomous* legal system, national courts (and other national (administrative) authorities) must be members of the EU legal system, i.e. they must 'count as' EU courts when they apply EU law.<sup>113</sup>

A more important and consequential dimension of direct effect is the invocability of sufficiently precise and unconditional EU norms before national courts. The right to invoke EU norms is essentially a rule of adjudication, which grants national courts the competence to apply norms of

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<sup>107</sup> E.g. art 114 TFEU.

<sup>108</sup> Art 48 TEU.

<sup>109</sup> Art 49 TEU.

<sup>110</sup> Art 50 TEU.

<sup>111</sup> Art 19 TEU; arts 251–281 TFEU.

<sup>112</sup> E.g. Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 *Common Market Law Review* 931, 942–943.

<sup>113</sup> E.g. Case 106/77 *Simmenthal* EU:C:1978:49. See also Lenaerts (n 48) 4.

EU law. In more recent cases, the ECJ explicated this rule of adjudication by characterising direct effect as an obligation on national courts and national administrative authorities to apply the EU norms invoked before them.<sup>114</sup> The rule of adjudication seems almost a corollary of the *internal* formulation of the rule of recognition. By identifying a source of law that national courts *qua* EU officials ought to apply, one cannot at the same time deny those courts the *competence* to apply that source of law. In this sense, direct effect *qua* rule of adjudication is a more specific expression of the internal formulation of the rule of recognition. In *van Gend & Loos*, only after proclaiming the autonomy of EU law does the Court move on to the practical implication of this autonomy thesis, i.e. the doctrine of direct effect. In one masterful stroke, direct effect grants all national courts the competence to apply EU law norms.<sup>115</sup>

This competence is, of course, limited by national procedural rules.<sup>116</sup> Procedural law is also part of the set of rules of adjudication.<sup>117</sup> Whether EU norms can be invoked before national courts, and whether national courts are allowed or obligated to apply them, flows from a complex interaction between EU and national law. However, the ability to invoke EU law norms and the obligation on national courts to apply them subsequently is always

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<sup>114</sup> E.g. Case 103/88 *Fratelli Costanzo* EU:C:1989:256, para 31; Case C-201/02 *Wells* EU:C:2004:12, paras 64–65. See further Sacha Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047.

<sup>115</sup> In this sense, direct effect is indeed the 'normal state of the law' and its relevance as a separate doctrine is limited. On broader questions on the limits to invocability of EU law see Koen Lenaerts and Tim Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law* (Oxford University Press 2008); and Lorenzo Squintani and Justin Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction between Direct Obligations and Mere Adverse Repercussions' (2019) 38 *Yearbook of European Law* 18.

<sup>116</sup> On the role of national procedural rules from the perspective of EU law, see section III.1. above.

<sup>117</sup> Hart (n 16) 97: 'Besides identifying the individuals who are to adjudicate, [rules of adjudication] will also define the procedure to be followed'.

the *default position*.<sup>118</sup> Furthermore, from the perspective of EU law, arguably these national rules serve as ancillary EU law. In Kakouris's words:

Thus, because recourse to national procedural law has been in order to fill a gap in Community law, this law is subordinated to Community law and must, where necessary, be altered in order to fulfil its ancillary function [to ensure the effective application of substantive Community law].<sup>119</sup>

Hence, national procedural rules are *woven into* the default position enshrined in the doctrine of direct effect. In other words, EU law uses national procedural law to pursue the effective enforcement of EU substantive law. In doing so, these national rules are dissociated from their national legal system and become part of EU law.<sup>120</sup> Such would, at least, be the viewpoint of the EU legal system if it had to justify the logic of what is going on – and of course if it could speak.<sup>121</sup>

Kakouris emphasises in this regard that national courts, when applying EU law, 'belong *from the functional point of view* to the Community legal order'.<sup>122</sup> The functional perspective will not suffice, however, as regards the status of national procedural rules. National procedural rules cannot be an ancillary part of the EU legal system only because national courts *qua* EU courts happen to apply them: they must be validated themselves in some way by the EU legal system.<sup>123</sup> It appears, however, that from the perspective of EU law, all national procedural rules which do not violate the principles of equivalence and effectiveness are validated *as EU law norms* by the doctrine of direct effect and the principle of sincere cooperation in article 4(3) TEU

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<sup>118</sup> For a clear illustration, Case C-453/99 *Courage v Crehan* EU:C:2001:465, paras 24–31.

<sup>119</sup> CN Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 *Common Market Law Review* 1389, 1396.

<sup>120</sup> *Ibid* 1404: 'in the absence of Community procedural law, the national courts apply the national rules of procedural law, *which thus become ancillary Community law*' (emphasis added).

<sup>121</sup> See n 22. On the law as a 'subject', see Alexander Somek, *The Legal Relation* (Cambridge University Press 2017) 87–92.

<sup>122</sup> Kakouris (n 119) 1393–1394.

<sup>123</sup> I owe this point to Boško Tripković.

*qua* rule of adjudication. This rule of adjudication could logically be rephrased along these lines:

National courts ought to apply justiciable norms of EU law, within the constraints of the procedural rules as laid down in applicable national procedural law insofar as the latter comply with the principles of equivalence and effectiveness.

Consequently, the validation of national procedural rules *as EU norms* could be grounded in EU law, giving them binding effect within the EU legal system. The process of giving binding effect to *extra-legal* norms is indeed pervasive in legal systems.<sup>124</sup>

## 2. *Taking Norms Seriously: The Doctrine of Supremacy*

The supremacy of EU law is usually portrayed as a 'principle' or a '(conflict) rule', which belongs to the positive norms of EU law. Some authors distinguish between 'primacy' and 'supremacy'.<sup>125</sup> According to Avbelj, for instance, primacy is 'a trans-systemic principle, which regulates the relationship between the autonomous legal orders', while supremacy is rather 'the feature of supreme legal acts in the legal orders of the Member States and of the EU; [...] an intra-systemic feature'.<sup>126</sup> Schütze seems to have something slightly different in mind when he refers to supremacy as 'the superior hierarchical status of the Community legal *order* over the national legal

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<sup>124</sup> See Joseph Raz, *Practical Reason and Norms* (Clarendon Press 1975) 151–154; and as applied to EU law, Lindeboom (n 13) 346–348, referring to other examples including art 6(3) TEU and art 52(3) CFR. Something similar happens in EU internal market law when a national measure derogates from a fundamental freedom. This measure is then considered to 'implement EU law' in the sense of art 51(1) CFR. Thus, from the perspective of EU law, such a national measure becomes in a way part of the EU legal system. See Koen Lenaerts and José Gutiérrez-Fons, 'The EU Internal Market and the EU Charter: Exploring the "Derogation Situation"' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019).

<sup>125</sup> See Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 *European Law Journal* 744, with further references.

<sup>126</sup> *Ibid* 750.

*orders*'.<sup>127</sup> Others have noted that EU law only claims primacy rather than supremacy, because it does not invalidate conflicting national law.<sup>128</sup>

The autonomy thesis makes this distinction redundant and translates supremacy into a truism of the legal system.<sup>129</sup> Primacy as a trans-systemic principle, on the other hand, presupposes normative interaction between legal orders as a whole. But the autonomous nature of legal systems makes discussing the normative superiority of legal orders *legally irrelevant*.<sup>130</sup> After all, any meaningful legal relationship between legal systems – manifested by some conflict rule, regardless of how it is called – immediately subsumes those supposedly autonomous legal systems to an overarching legal system which is supreme. In absence of a way for legal systems to legally relate to each other, the only legal hierarchy left is *within* each system, again obfuscating any distinction between primacy and supremacy. To put this in Hartian terminology, questions of legal hierarchy and legal-normative conflict between legal systems are irrelevant because legal systems exist as such only by virtue of a certain rule of recognition. This is precisely what autonomy is all about.

At a practical level, the application of legal norms by legal officials depends on whether these officials are committed to (some part of) the rule of recognition identifying these norms as legally valid. Any application of an EU norm is an implicit commitment to at least the relevant part of an internal recognitional statement. When legal officials recognise more than one legal

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<sup>127</sup> Robert Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023, 1033 (emphasis in original).

<sup>128</sup> Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90* EU:C:1998:498, para 21; Monica Claes, 'The Primacy of EU Law in European and National Law' in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 182.

<sup>129</sup> Lindeboom (n 13).

<sup>130</sup> See also MacCormick (n 19). Admittedly, the result is a cynical conception of legal normativity: Gunther Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law & Society Review* 763, 782–784.

system, the resolution of any conflict between them is simply a choice between the concurrent rules of recognition in individual cases.<sup>131</sup>

Since the supremacy claim only applies *within* the system, it would be mistaken to conceive of the autonomy thesis as 'EU-centred monism'.<sup>132</sup> The ECJ has never claimed that national legal systems are *subsumed* under the EU legal system. Such a view would presumably also imply that national laws conflicting with EU law are *invalid* in virtue of EU law, or at least *could* be declared invalid on the basis of EU law, positions both of which the ECJ – notwithstanding obscure allusions in *Costa v ENEL* – has not further pursued.<sup>133</sup> By contrast, the autonomy thesis is not troubled by the fact that EU law does not claim to entail the invalidation of conflicting national law. As the EU legal system has no hierarchical connection with national legal systems, it is nonsensical to speak of invalidation in this context.

The doctrine of supremacy, then, is merely a doctrinal conceptualisation of EU law's claim to be robustly normative,<sup>134</sup> and to provide reasons for action which also exclude reasons for acting otherwise – for instance, national laws allowing something which EU law prohibits – from the balance of reasons.<sup>135</sup> This may well be part of our concept of law, which seems infused with the notion of supremacy over concurrent normative systems, possibly rooted in

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<sup>131</sup> See also Gareth Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism' in Jan Komárek and Matej Avbelj (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Barber (n 18).

<sup>132</sup> Cf. Eleftheriadis, 'Pluralism and Integrity' (n 20).

<sup>133</sup> Case 6/64 *Costa v ENEL* EU:C:1964:66, 592–593, referring to the context of (now) art 258 TFEU; Joined Cases C-10/97 to C-22/97 *IN.CO.GE.'90* EU:C:1998:498, para 21.

<sup>134</sup> Robust normativity indicates that the respective norms give *genuine* rather than formal reasons for action: they prescribe what we really ought to do. The normativity of a game is usually taken to be an example of formal normativity. According to many legal philosophers, all legal systems claim to be robustly normative. Whether law is as robustly normative as it claims is contested. Compare e.g. David Enoch, 'Is General Jurisprudence Interesting?', with George Letsas, 'How to Argue for Law's Full-Blooded Normativity', both in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity* (Oxford University Press 2019).

<sup>135</sup> I.e. 'protected reasons', as Raz calls them in Raz (n 53) 17ff.

our association between law and the sovereign state.<sup>136</sup> *Costa v ENEL* appears to point to the conceptual connection between law and supremacy:<sup>137</sup>

[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, *without being deprived of its character as Community law*.<sup>138</sup>

### 3. Some Preliminary Remarks About Perspectivism and National Courts

The previous discussion on the (ir)relevance of direct effect and supremacy as self-standing doctrines of law links to the longstanding discussion on the competing supremacy claims by national and EU legal systems and their respective apex courts. According to a common and well-known objection against the ECJ's foundational case law, national legal officials only apply EU law because their respective national legal systems obligate them to do so.<sup>139</sup> Indeed, having established a rational *explanation* of the ECJ's foundational case law does not obviate the question of whether the behaviour, attitudes and perspectivism of national courts – in particular national constitutional courts<sup>140</sup> – threatens the theoretical and empirical correctness of the autonomy thesis.

<sup>136</sup> Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press 2001) 39–42.

<sup>137</sup> Elsewhere I have argued that the conceptual connection between law and supremacy in *Costa v ENEL* can also be understood as reflecting a 'Hamiltonian' conception of supremacy, following Alexander Hamilton's conception of the US federal order in *The Federalist* No 27 and No 33. See Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) 21 *German Law Journal* 1032.

<sup>138</sup> Case 6/64 *Costa v ENEL* EU:C:1964:66, 594 (emphasis added).

<sup>139</sup> E.g. Michael Giudice, 'Conceptual Analysis, Legal Pluralism, and EU Law' (2015) 6 *Transnational Legal Theory* 586.

<sup>140</sup> For well-known examples, see e.g. BVerfGE 123, 267, 2 BvE 2/08 (2009); Czech Constitutional Court, Case Pl ÚS 50/04 (2006); Conseil d'état, Case No. 226514 (2001); Italian Constitutional Court, Case No 183/1973 (1973); and Polish Constitutional Court, Decision K 18/04 (2005). See, most recently, BVerfG, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvro85915 (2020) on the ECB's

However, a legal-theoretical analysis of the salience of the psychological attitudes of national judges, and their reasons for and acts of applying EU law, entails deeply contested questions of analytical jurisprudence. For one, Toh claims that what judges *believe* to be their rule of recognition is categorically distinct from what *is* the rule of recognition.<sup>141</sup> The correctness of any claim of the latter kind would require normative reasoning, to the extent that there might be a rule that is the real rule of recognition of that community 'despite the lack of common recognition or acceptance of it, by the community's members or officials, as the community's rule of recognition'.<sup>142</sup> Along these lines, it might be that national (constitutional) courts which do not treat the EU rule of recognition as the rule of recognition might simply be mistaken.<sup>143</sup> Put differently, whether or not EU law *is* an autonomous legal system, such does not depend on the fact that some, many, or all national courts *treat* the binding force of EU law as being rooted in their own constitutions.<sup>144</sup>

Even if one considers the 'mainstream' position in Anglo-American legal positivism, according to which the existence and content of law is ultimately

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Public Sector Asset Purchase Programme (PSPP) and the ECJ's judgment in Case C-493/17 *Weiss* EU:C:2018:1000.

<sup>141</sup> Toh (n 71); Kevin Toh, 'Legal Philosophy à la carte' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity* (Oxford University Press 2019) 235–238.

<sup>142</sup> Toh (n 141) 237. This conclusion appears at odds with the Hartian project, but instead is based on Dworkinian conceptions of legality. However, Toh argues that Hart endorsed the so-called 'social fact' thesis *only* in relation to the external point of view. I find this a plausible reading of Hart's theory of law.

<sup>143</sup> Such a theory of the existence and content of the (real) rule of recognition, whether based on Hartian or Dworkinian grounds, would of course have to include some criteria to identify the rule of recognition *other than the beliefs or behaviour of judges as matters of social fact*. Toh suggests applying the method of reflective equilibrium by 'arguing for particular rules as making up [a community's] rule of recognition by showing that these rules do a better job of meshing with considered legal judgments than any alternative candidates for components of the rule of recognition' (Toh (n 141) 237).

<sup>144</sup> I am thankful to Kevin Toh for raising this point, although I put it in slightly different terms.

a matter of social fact only,<sup>145</sup> and disputes about the rule of recognition can be solved by a head-count among the relevant category of legal officials,<sup>146</sup> the salience of national (constitutional) courts' opinions is obscure. Hart emphasised, for instance, that the internal point of view is not about the 'feeling', 'emotion' or 'special psychological experience' of officials.<sup>147</sup> Making an internal statement of law is an 'act of recognition': in *expressing* the content of the rule, that rule is recognised as a standard for behaviour and a reason for criticising departure from that standard.<sup>148</sup> Outside incidental instances of reference to ultimate standards of legality – which are usually confined to the jurisprudence of national constitutional courts – most applications of EU law by national courts leave open the ultimate criteria of validity.<sup>149</sup> It might be that the prevalence of national courts' applications of EU law – even in the absence of a sufficiently prevalent moral endorsement on their part of some autonomous EU rule of recognition – suffices to corroborate the correctness of the autonomy thesis.<sup>150</sup>

As I mentioned above, a full analysis of the salience of the perspectivism of national courts cannot be discussed here, and consequently I shall have to defer such analysis to another occasion. Whether national courts can be mistaken about their own identity as legal officials is only one of many complex questions remaining. However, these and other questions do require, for a start, a rational and theoretically sustainable explanation of the ECJ's autonomy thesis. By employing Hartian legal theory and the post-

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<sup>145</sup> See e.g. Raz (n 53) 47–48; Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165; Scott Shapiro, *Legality* (Harvard University Press 2011) 44, 200–201.

<sup>146</sup> Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 *University of Chicago Law Review* 1215, 1222.

<sup>147</sup> Hart (n 73) 166.

<sup>148</sup> *Ibid* 165–166.

<sup>149</sup> It is recalled that in any legal system '[f]or the most part the rule of recognition is not stated' (Hart (n 16) 101).

<sup>150</sup> Raz famously pointed out the importance in legal discourse of 'detached legal statements', i.e. statements of law which do not express endorsement of the law, but merely prescribe the content of the law from a 'detached' point of view. Legal officials can state what the law requires, just as a Catholic, who happens to be an expert in Rabbinical law, can state what the latter requires of an orthodox but relatively ill-informed Jew who asks for advice (Raz (n 53) 156–157).

Hartian notion of 'internal recognitional statements', this article has aimed to provide such an explanation.

## VI. CONCLUSION

Among the numerous normative systems upheld, communities are governed by legal systems when a certain subset of their members recognise a normative system comprising both primary and secondary norms, which is united by a law-identifying 'rule of recognition'. This Hartian theory of law elucidates the question what it means to say that EU law is an autonomous legal system. From a Hartian perspective, legal systems are autonomous in the sense that they have their own rules of recognition.<sup>151</sup> It is clear that such a rule of recognition can be formulated for the EU legal system. More importantly, what I have tried to show is that the ECJ's foundational case law on autonomy, direct effect and supremacy can be conceptualised as internal statements referencing this rule of recognition. We should therefore be comfortable in recognising the EU legal system's autonomy, even if we do not normatively endorse it,<sup>152</sup> or if we consider the ECJ's hermeneutics illegitimate.<sup>153</sup>

The autonomy of EU law is intrinsically connected to its effectiveness: there would be no EU legal system if no one applied it. It is absolutely crucial, however, that effectiveness cannot be the reason for autonomy, just as it cannot be the reason for legal validity. Rather, as I have tried to show, the ECJ's reliance on effectiveness to justify the autonomy of EU law indicates that internal statements of law presuppose a general context of effective enforcement, or at least the prediction that this effectiveness will materialise.

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<sup>151</sup> Recent debate on 'inclusive' and 'exclusive' variants of Hartian legal positivism centres on the autonomy of the *content* of legal systems and the rule of recognition. I leave this debate aside because it presupposes that at least there *are* rules of recognition and that they are autonomous in the sense that they alone – rather than any other written or unwritten rules – indicate the criteria of legality.

<sup>152</sup> Alexander Somek, 'Inexplicable Law: Legality's Adventure in Europe' in Nico Stehr and Bernd Weiler (eds), *Who Owns Knowledge?: Knowledge and the Law* (Routledge 2017).

<sup>153</sup> Somek (n 23); Stone Sweet (n 27).

Thus, the Court's proclamation of the autonomy thesis amounts to the creation of an internal point of view for itself, which goes hand-in-hand with its invitation to the national courts to join. Once we recognise the autonomy thesis as an *internal recognitional statement* which purports to achieve national courts' uptake by way of a 'normative pitch', we can ditch confused talk about the 'incorporation' of EU law into national legal systems and quasi-Kelsenian conundrums of normative hierarchy between legal systems. Were the EU legal system able to read Hart's *The Concept of Law*, it would likely recognise itself.



# HOW TO COPE WITH HARMFUL TAX COMPETITION IN THE EU LEGAL ORDER: GOING BEYOND THE ELUSIVE QUEST FOR A DEFINITION AND THE MISPLACED RELIANCE ON STATE AID LAW

Gabriella Perotto\* 

*The European Union relies on two legal instruments for limiting harmful tax competition: the Code of Conduct for Business Taxation and state aid law. This article analyses their role in the fight against harmful tax competition, assessing their suitability and effectiveness, and proposes an alternative approach to tackle this issue. In particular, in light of the impossibility of effectively defining harmful tax measures, the article calls for abandoning the traditional approach, shifting the focus from control over the measures adopted by Member States to the limitation of incentives that encourage undertakings to use aggressive tax planning and profit-shifting strategies. The introduction of a Common Consolidated Corporate Tax Base could be a suitable instrument for that purpose. The current crisis, triggered by the COVID-19 pandemic, is presented as an example that highlights the drawbacks of relying on state aid law for limiting the implementation of harmful tax measures.*

**Keywords:** tax competition, harmful tax measures, state aid law, COVID-19 crisis, temporary framework, CCCTB

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## I. INTRODUCTION

Tax competition refers to jurisdictions competing with one another, usually to attract foreign investment and capital.<sup>1</sup> In particular, it consists in national authorities reducing taxes with the main aim of attracting the most mobile tax bases.<sup>2</sup> Scholars do not have a uniform position on the economic assessment of the effects of tax competition. While some consider it a good way to limit 'the governments' biases towards increasing their budgets beyond efficient levels',<sup>3</sup> according to others, the resulting 'tax dumping' can seriously impair governments' capacity to maintain an efficient economic system.<sup>4</sup> Tax competition, which can be observed both at global and regional level, is fostered by the high mobility of capital stemming from increasingly

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<sup>1</sup> Christian Keuschnigg, Simon Loretz and Hannes Winner, 'Tax Competition and Tax Coordination in the European Union: a Survey' (2014) Working Papers in Economics and Finance (University of Salzburg, Department of Social Sciences and Economics) 4/2014 <www.econstor.eu> accessed 19 January 2021, where the authors underline that the notion of tax competition was 'originally based on the analysis of optimal tax assignment in federal states as developed by Oates [Wallace E. Oates, *Fiscal Federalism* (Harcourt Brace Jovanovich 1972)] and the subsequent research on fiscal federalism, showing that tax rates on mobile factors might end up at inefficiently low levels. Subsequent theoretical developments extend this approach to competition between independent jurisdictions, with widely varying policy implications depending on the particular assumptions made. ... this notion of intercountry competition ... [defines] tax competition in a broad sense and along the lines of Devereux and Loretz [Michael P. Devereux and Simon Loretz, 'What Do We Know about Corporate Tax Competition?' (2013) 66 *National Tax Journal* 745] as "... the uncooperative setting of taxes where a country is constrained by the tax setting behaviour of other countries"'.

<sup>2</sup> Pietro Boria, *Diritto Tributario Europeo* (Giuffrè Editore 2010) 239-240.

<sup>3</sup> Alexander Haupt and Wolfgang Peters, 'Restricting Preferential Tax Regimes to Avoid Harmful Tax Competition' (2005) 35 *Regional Science and Urban Economics* 493, 494; cf Keuschnigg, Loretz and Winner (n 1) 10.

<sup>4</sup> *Ibid*; Richard Teather, 'Harmful Tax Competition?' (2002) 22 *Economic Affairs* 58; Adina Violeta Trandafir, 'Tax Competition – Beneficial or Harmful? How Various Tax Measures Affect the Allocation of Resources?' (2010) 15 *Studies and Scientific Researches Economic Edition* 173.

high levels of economic integration.<sup>5</sup> States are forced to take into account factors that can influence the choice of location of undertakings, with tax policies playing a key role in this respect. The European Union's (EU) internal market provides an interesting context within which to analyse the functioning of tax competition, as it is a legal environment where interjurisdictional competition is stimulated and facilitated by the four freedoms.<sup>6</sup>

In recent years, harmful tax competition and aggressive tax planning have become key issues in the European legal and political debate. Fair taxation is central for the EU since it leads to sustainable revenues, a competitive business environment, and a stable economy based on growth, jobs, and investment.<sup>7</sup> The coronavirus crisis has returned the matter to centre stage, since the relaxation of state aid rules, combined with fiscal asymmetries among Member States and very limited control powers over tax competition at the European level, can lead to competitive distortions within the internal market. In ordinary times, the application of strict state aid rules also has the *de facto* aim of limiting competitive practices among Member States. Therefore, the relaxation of control over them could ease the implementation of harmful tax measures. Moreover, the attention paid to fair taxation will be increasingly important in the years ahead since it will allow a swift and sustainable recovery from the fallout of the COVID-19 crisis, as stressed in the Commission Communication 'Europe's Moment: Repair and Prepare for the Next Generation'.<sup>8</sup> The current situation highlights that the fight against harmful tax competition is one of the most important challenges that the EU will have to face to prove its standing as a political actor and not just as a mere economic union.

Against this backdrop and in light of the current context, characterised by the loosening of state aid rules for the COVID-19 crisis, this article casts a critical eye on the recourse to state aid law as an instrument for tackling

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<sup>5</sup> Haupt and Peters (n 3) 493-494.

<sup>6</sup> Keuschnigg, Loretz and Winner (n 1) 3.

<sup>7</sup> Commission, 'Communication on Tax Good Governance in the EU and Beyond' (Communication) COM (2020) 313 final, 1.

<sup>8</sup> Commission, 'Europe's Moment: Repair and Prepare for the Next Generation' (Communication) COM (2020) 456 final.

harmful competition. The position supported builds on the findings of some recent scholarly work that has questioned the effectiveness of a wide use of state aid law against harmful tax competition and the risk of 'tax harmonization through the backdoor',<sup>9</sup> also taking into consideration the current regulatory framework prompted by the coronavirus outbreak. Departing from these premises, the article contends that the problem could be tackled better through tax harmonisation,<sup>10</sup> and more specifically through the belated introduction of a Common Consolidated Corporate Tax Base. From a methodological point of view, this article analyses the current European regulatory framework concerning harmful tax competition, discusses its flaws, also in light of the COVID-19 pandemic, and proposes a preventive approach towards this issue. In particular, it critically engages with the main instruments adopted by the EU concerning tax competition (section II), focusing on the analysis of the issues related to the application of the Code of Conduct for Business Taxation (section III) and state aid law (section IV). Specific attention is paid to the effects of the Temporary Framework for state aid measures – a soft law instrument adopted by the Commission to allow national support to the economy in the context of the coronavirus outbreak – in relation to the implementation of harmful tax measures (section V).<sup>11</sup> Based on this analysis, the article identifies a number of policy solutions (section VI), while the final section draws some conclusions (section VII).

A key contention of the article is that state aid rules are ill-suited as an instrument to deal with harmful tax measures. The discussion will focus on the aim pursued by this set of rules, paying specific attention to the measures targeted and the sanctions provided in case of implementation of unlawful

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<sup>9</sup> Dimitrios A. Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15(3) *European State Aid Law Quarterly* 428, 436. The expression has been recently proposed again in Cees Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In Search of Rationality' (2019) 28(1) *EC Tax Review* 6.

<sup>10</sup> Sandra Marco Colino, 'The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance' (2020) 44 *Fordham International Law Journal* (forthcoming).

<sup>11</sup> Commission, 'Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 1863 final and subsequent amendments.

state aid, on the broadening of the scope of application of article 107(1) of the Treaty on the Functioning of the European Union (TFEU) and related problems concerning the respect of national powers in tax matters. The current crisis exacerbates such drawbacks and reveals the urgent need for a comprehensive and effective approach towards harmful tax competition. The article will underline that looking for a clearer definition of what constitutes a harmful tax measure is not a viable approach since it would undermine national discretionary tax power, a very sensitive domain for Member States. Therefore, there is a need for a change of perspective, shifting the focus from control over the measures adopted by Member States to the limitation of the incentives that encourage undertakings to plan aggressive tax strategies and profit-shifting practices. In particular, the implementation of a Common Consolidated Corporate Tax Base or, at least, an increase in tax coordination between Member States, would be an important step forward in the fight against harmful tax competition.

## II. TAX COMPETITION BETWEEN MEMBER STATES

In the early years of the European integration process, tax competition was considered a controversial but unavoidable consequence of the development of the internal market.<sup>12</sup> The rationale behind the creation of 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' was the enhancement of cross-border movement.<sup>13</sup> The use of fiscal policies as a tool to attract businesses did not seem to conflict with this objective, particularly in light of Member States' retained power in this domain. In fact, direct taxation is a field that is not even mentioned in the Treaties because, first of all, it has always been considered fundamental to pursue domestic social and economic objectives and, secondly, in the early stages of the European integration process, harmonisation in this sector was not perceived as an indispensable tool to build the internal market.<sup>14</sup> On the

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<sup>12</sup> Pieter Van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' (2019) 4(1) *European Papers* 225, 226.

<sup>13</sup> Article 26(2) TFEU. *Ibid* 231-232.

<sup>14</sup> Lukasz Adamczyk and Alicja Majdanska, 'The Sources of EU Law Relevant for Direct Taxation' in Michael Lang, Pasquale Pistone, Josef Schuch and Claus

other hand, the attention paid to indirect tax harmonisation reflects the free-trade area origins of the EU, with the more complex issue of direct taxation and its distortive effects becoming salient only at a later stage.<sup>15</sup> As integration increased, the line between EU and Member States' powers in the field of taxation became more blurred.<sup>16</sup> Some voices are currently calling for a more efficient and democratic decision-making process in EU tax policy matters and proposing, in particular, to adapt the decision-making process by abandoning the unanimity requirement that is hindering progress in this field.<sup>17</sup> However, at the moment, this matter is still subject to procedures guided by intergovernmental logics and European action is limited and mainly confined to indirect taxation.

Awareness of the potential harmfulness of unsupervised tax competition in Europe began in the mid-1990s,<sup>18</sup> with concerns being raised not just over the consequences of tax dumping but also about other aspects such as tax evasion, tax avoidance and aggressive tax planning.<sup>19</sup> Nevertheless, European

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Staringer (eds), *Introduction to European Tax law: Direct Taxation* (5<sup>th</sup> edn, Spiramus 2019) 9.

<sup>15</sup> Ben J. M. Terra and Peter J. Wattel, *European Tax Law* (6<sup>th</sup> edn, Wolters Kluwer Law & Business 2012) 13.

<sup>16</sup> Lena Boucon, 'EU Law and Retained Powers of Member States' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 171.

<sup>17</sup> Commission, 'Towards a More Efficient and Democratic Decision Making in EU Tax Policy' (Communication) COM (2019) 8 final.

<sup>18</sup> For a thorough analysis of the development of the approach taken by the EU towards harmful tax competition by the use of State aid policy, see Edoardo Traversa and Pierre M. Sabbadini, 'State-Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax policy in Disguise?' in Werner Haslehner, Georg Kofler and Alexander Rust (eds), *EU Tax Law and policy in the 21<sup>st</sup> Century* (Kluwer Law International 2017) 107-134.

<sup>19</sup> Aggressive tax planning strategies are intended to minimise effective taxation of the business income and they often entail the use of different methods such as borderline interpretations of the applicable provisions and the exploitation of loopholes in national tax law or deriving from the lack of coordination between different jurisdictions. For an extensive analysis of the notions of tax evasion, tax avoidance and tax planning, see Paulus Merks, 'Tax Evasion, Tax Avoidance and Tax Planning' (2006) 34(5) *Intertax* 272. Moreover, specifically on the issue of

institutions have never openly condemned tax competition in itself, believing that it can also have positive effects (like greater transparency among Member States and some convergence of their tax regimes), with intervention being limited to tackling measures falling within the narrower notion of harmful tax competition.<sup>20</sup> Tax competition is not problematic *per se*, but in a single market where the Treaty freedoms increase the mobility of profits and investment there need to be common rules on the extent to which Member States can use their tax regimes and policies to attract businesses and profits.<sup>21</sup> In any case, Member States' exercise of powers must comply with EU law such as state aid rules, as will be discussed extensively in the following sections. Striking a balance between the conservation of a fair and competitive environment in the internal market and the respect of national discretionary power in tax matters is one of the most controversial and important challenges for the EU.

The debate on this topic was triggered by the so-called Monti Package,<sup>22</sup> encouraged by a previous Commission proposal for creating a comprehensive European tax strategy,<sup>23</sup> which acknowledged the existence of harmful tax competition within the EU. In these documents, the Commission showed how tax competition can be harmful for the internal market in terms of significant losses of tax revenues and of an increasing tax burden on labour compared with more mobile tax bases.<sup>24</sup> In fact, as integration increased, the liberalisation of goods, services, and capital markets translated into an increase in tax competition that has been working as a driving force in the direction of lower taxes on capital.<sup>25</sup> Because of this, the Commission drew

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aggressive tax planning in the EU, see Franklin Cachia, 'Aggressive Tax Planning: An Analysis from an EU Perspective' (2017) 26(5) EC Tax Review 257.

<sup>20</sup> Van Cleynebreugel (n 12) 235.

<sup>21</sup> Communication on Tax Good Governance (n 7) 3.

<sup>22</sup> Commission, 'Toward Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union' (Communication) COM (1997) 495.

<sup>23</sup> Commission, 'Taxation in the European Union – Discussion Paper for the Informal Meeting of ECOFIN Ministers' SEC (1996) 487 final.

<sup>24</sup> Toward Tax Coordination in the European Union (n 22) 2.

<sup>25</sup> Commission, 'The Contribution of Public Finances to Growth and Employment: Improving Quality and Sustainability' (Communication) COM (2000) 846 final, 30.

up its proposal for a package to tackle harmful tax competition in the EU,<sup>26</sup> which was subsequently adopted in a resolution issued by the ECOFIN Council and included in the conclusions of the ECOFIN Council meeting concerning taxation policy.<sup>27</sup> The package consists of a Code of Conduct for Business Taxation (Code of Conduct) and measures to eliminate distortions in the taxation of capital income and to phase out withholding taxes on cross-border payments of interest and royalties between companies.

The Code of Conduct covers 'those measures which affect, or may affect, in a significant way the location of business activity in the Community' and specifies that 'tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful'.<sup>28</sup> If a measure is considered potentially harmful, it can be submitted to a review process to identify the presence of features that qualify a measure as harmful in terms of tax competition. The Code of Conduct specifies that, when assessing the harmfulness of tax measures, some of the aspects that should be taken into account are:

1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or
4. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or

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<sup>26</sup> Commission 'A Package to Tackle Harmful Tax Competition in the European Union' (Communication) COM (1997) 564 final.

<sup>27</sup> Council, 'Conclusions of the Ecofin Council Meeting on 1 December 1997 Concerning taxation policy' [1998] OJ C2/1.

<sup>28</sup> Ibid, Annex 1, 'Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council of 1 December 1997 on a code of conduct for business taxation', lett A and B.

5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.<sup>29</sup>

The Code also provides for a standstill and a rollback clause in which the Member States commit themselves not to introduce or maintain harmful tax measures.<sup>30</sup> It is important to underline that the Code of Conduct is a soft law instrument, and that its functioning is based on peer review. In fact, the resolution issued by the ECOFIN Council also provided for the establishment of a group within the Council called – after the name of its chairman – the Primarolo Group, which was tasked with assessing the tax measures that may fall within the scope of the Code and to oversee the provision of information on those measures.<sup>31</sup>

The Code of Conduct makes explicit reference to state aid law,<sup>32</sup> noting that some of the tax measures covered by the Code of Conduct may fall within the scope of article 107 TFEU. In fact, a tax measure can be considered both harmful according to the Code of Conduct and state aid under article 107(1) TFEU. However, since the qualification of a measure as harmful or as state aid does not depend on the fulfilment of the same set of conditions, it is possible that a measure falls in just one of the two categories. Usually, the decisive feature that qualifies a measure as state aid is selectivity, while harmful tax measures can have general application. This distinction is very important because the consequence is the applicability of a binding and consolidated set of rules, namely state aid law, instead of having to rely on the Code of Conduct, a soft law instrument.

The discussion concerning tax competition in the EU revolves around two main issues: respect for Member States' discretionary power in tax matters and the possibility and effectiveness of using state aid law to limit the implementation of harmful tax measures in the internal market. Both of these issues touch on various matters that are closely intertwined, such as the difficulty of drawing a clear line between the powers conferred upon the EU and those retained by Member States in tax matters, as well as the definition

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<sup>29</sup> Ibid, lett B.

<sup>30</sup> Ibid, lett C and D.

<sup>31</sup> Ibid, lett H.

<sup>32</sup> Ibid, lett J.

of harmful tax measure and the differences between the latter and the notion of state aid.

### III. THE CODE OF CONDUCT AND THE DEFINITION OF HARMFUL TAX MEASURE

The Code of Conduct is still in force and the Primarolo Group regularly meets to select and review tax measures for assessment and transmits reports to the Council. However, the effectiveness of this instrument is doubtful for at least two reasons. Firstly, the review process conducted under the Code is weak because of its political and non-binding nature. Secondly, the definition of harmful tax measure is controversial, and the Code does not provide detailed conditions that would allow an easier and more transparent assessment. In that regard, the Code needs to be updated because 'the nature and form of tax competition have changed substantially over the past two decades and the Code has not evolved to meet the new challenges'.<sup>33</sup>

On 15 July 2020, the Commission proposed the Package for Fair and Simple Taxation, including the 'Communication on Tax Good Governance in the EU and Beyond', which has the purpose of reforming and modernising the Code of Conduct.<sup>34</sup> In the Communication, the Commission lists the main factors that intensified the pressure on states to use taxation to compete for foreign investments, namely digitalisation, the growing role of multinationals in the world economy, the increased importance of intangible assets, and the reduction of barriers for business.<sup>35</sup> To substantially enhance the effectiveness of the Code of Conduct, the Commission proposes to reform the scope and criteria provided therein and to improve its governance. Concerning the first aspect, the Commission considers that the scope of the Code should be widened

to cover further types of regimes and general aspects of the national corporate tax systems as well as relevant taxes other than corporate tax

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<sup>33</sup> Communication on Tax Good Governance (n 7) 3.

<sup>34</sup> Ibid. For further information on the proposal, see Commission, 'Package for Fair and Simple Taxation' <[https://ec.europa.eu/taxation\\_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation\\_en](https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/package-fair-and-simple-taxation_en)> accessed 19 January 2021.

<sup>35</sup> Communication on Tax Good Governance (n 7) 3.

[since] under the current scope of the Code, there are too many types of harmful regimes that can escape assessment.<sup>36</sup>

Regarding the governance improvement, the Commission envisages more transparency, the introduction of qualified majority voting in the Primarolo Group, and effective consequences for Member States that do not comply with the Group's decisions on time. If the modernisation process is successfully completed, it will certainly be an improvement for the effectiveness of tax competition regulation.

Broadening the scope of application of the Code of Conduct is an important step towards more effective action against harmful tax competition. However, this would require a clearer definition of what constitutes a harmful tax measure, which, quite regrettably, the modernisation process has so far carefully avoided. As noted in the previous section, the current version of the Code only provides a non-exhaustive list of requirements for the qualification of a measure as harmful. The definition of such measures has been kept vague because a stronger one might be seen as an attempt to shift the allocation of powers between the EU and Member States in the field of direct taxation. In fact, the notion of harmful tax measure is a litmus test for the willingness of Member States to grant more power to the EU in the taxation field. The introduction of a binding set of rules providing a clear definition of the requirements necessary to qualify a measure as harmful and a related sanction for their implementation is unlikely at the moment. Member States are not inclined to cede their power concerning taxation, including the possibility of using fiscal measures to attract foreign investments, and would perceive a binding regime as a threat towards their discretionary power. This conclusion is unavoidable considering how sensitive this domain is for Member States and the different perspectives they have on this issue. In that regard, it is sufficient to consider that what qualifies as a harmful tax measure for one Member State is an opportunity for another.<sup>37</sup>

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<sup>36</sup> Ibid 4.

<sup>37</sup> Paraphrasing the expression used by Catherine Barnard for describing another tricky notion, namely social dumping: 'What is social dumping to the losers (richer Northern European States) is economic opportunity to the winners (poorer Eastern European States)'. See Catherine Barnard, 'Fifty Years of

However, the suggestion of a hypothetical definition of harmful tax measure isolated from the current European context also does not seem possible, or at least not relevant. The attempt to distinguish harmful measures from lawful ones entails an assessment concerning the aim of the measure at stake that is extremely difficult to translate into a black-letter rule. Even assuming that it would be possible, the search for a clear definition would be a pointless endeavour comparable to a doctor who desperately tries to cure the symptoms without analysing and dealing with the root causes of the disease. In this case, the symptoms are aggressive tax planning and profit shifting practices implemented by undertakings that take advantage of the favourable tax measures adopted by Member States. The causes are the incentives that undertakings and Member States have to engage in these types of practices, namely the reduction of their tax burden for undertakings and the attraction of capital and investment for the state. Paradoxically, an issue caused by the level of integration of the internal market can be tackled effectively only through further integration. As will be contended in section VI, further harmonisation in the field of corporate taxation could actually limit the implementation of harmful tax practices. Trying to tackle tax competition following an approach based on the definition of what constitutes a harmful tax measure seems to be a difficult effort that cannot lead to a satisfying result and that, ultimately, is not useful for combating harmful tax competition.

#### IV. THE ROLE OF STATE AID LAW IN THE FIGHT AGAINST HARMFUL TAX COMPETITION

The reference made in the Code of Conduct to the possible overlap between the definition of harmful tax measure and the notion of unlawful state aid<sup>38</sup> prompted the Commission to draw up guidelines on the application of state

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Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 311.

<sup>38</sup> Council, 'Conclusions of the Ecofin Council Meeting on 1 December 1997 Concerning taxation policy' Annex 1, 'Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council of 1 December 1997 on a code of conduct for business taxation', [1998] OJ C2/1 lett J.

aid rules to measures relating to direct business taxation.<sup>39</sup> The resulting notice clarified how state aid rules had to be applied in the tax field and was followed by a report concerning its implementation.<sup>40</sup> It is important to underline that, as noted therein, 'the Commission has adopted a number of decisions in which it found that measures classed as harmless under the code of conduct constituted aid' and that, '[c]onversely, it would be quite possible for a measure classed as harmful in the light of the code of conduct not to be caught by the concept of state aid'.<sup>41</sup> Moreover, the report underlines that 'the code of conduct is designed *inter alia* to prevent the tax bases of some Member States being eroded to the benefit of others, while the purpose of State aid control is to prevent situations where competition and trade between firms are affected'<sup>42</sup> and that 'state aid monitoring applies only to specific measures and thus cannot eliminate distortions of competition that might result from general rules ... therefore [it] cannot replace efforts by the Member States to coordinate their tax policies with a view to abolishing harmful tax measures'.<sup>43</sup> However, the massive use of state aid control against tax ruling practices enacted by Member States in the following years suggests a change of stance by the Commission.

The Commission decisions on tax rulings are particularly interesting from the point of view of the interplay between state aid law and tax competition. These are administrative decisions that have the purpose of establishing how domestic tax provisions will be applied to a specific case. The use of these instruments is desirable in terms of legal certainty. Particularly in relation to advance pricing agreements (specific types of administrative decisions concerning the determination of transfer pricing for transactions between integrated companies), they can enhance transparency and predictability, and prevent double taxation. However, tax rulings can become unlawful state aid whenever the decision is based on non-objective or bespoke criteria or if

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<sup>39</sup> Commission, 'Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation', [1998] OJ C384/3.

<sup>40</sup> Commission, 'Report on the Implementation of the Commission Notice on the Application of the State Aid rule to Measures Relating to Direct Business Taxation', (Communication) COM (2004) 434.

<sup>41</sup> *Ibid* 66.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

they do not reliably reflect what would result from the ordinary application of the tax regime, consequently lowering the addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation.<sup>44</sup> Therefore, since 2013, the Commission has been investigating tax ruling practices of Member States in order to fight so-called BEPS (base erosion and profit shifting) practices, in line with the Organisation for Economic Co-operation and Development's (OECD) BEPS Action Plan.<sup>45</sup> Thus far, the Commission decision-making practice on these issues has led to seven recovery decisions concerning Luxembourg,<sup>46</sup> Ireland,<sup>47</sup> Belgium,<sup>48</sup> the Netherlands,<sup>49</sup> and the UK<sup>50</sup> while four other formal investigations

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<sup>44</sup> Commission, 'Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (Communication) COM (2016) 2946, para 170.

<sup>45</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013).

<sup>46</sup> *State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE* Commission Decision 2019/421 [2019] OJ L78/1; *State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon*, Commission Decision 2018/859 [2018] OJ L153/1; *State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat* Commission Decision 2016/2326 [2016] OJ L351/1.

<sup>47</sup> *State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple* Commission Decision 2017/1283 [2017] OJ L187/1.

<sup>48</sup> *The excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium* Commission Decision 2016/1699 [2016] OJ L260/61.

<sup>49</sup> *State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks* Commission Decision 2017/502 [2017] OJ L83/38.

<sup>50</sup> *State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption* Commission Decision 2019/1352 [2019] OJ L/216/1. It should be noted that in this case, the decision is only partially negative.

involving the Netherlands,<sup>51</sup> Luxembourg<sup>52</sup> and Belgium<sup>53</sup> are still pending. In each of its final decisions, the Commission ordered the recovery of the aid disputed arguing that those measures amounted to incompatible state aid since all criteria provided by article 107(1) TFEU were met. The decisions are currently under scrutiny by the Court of Justice, after challenges were lodged by the Member States and taxpayers involved.<sup>54</sup> While scholars have pointed out possible problems in relation to the stretching of these requirements – especially the selectivity of the measure – to make them fit for the particular type of measure at stake,<sup>55</sup> tax rulings also involve competitive fairness concerns. In particular, by offering extremely low levels of taxation, certain Member States are able to attract the relocation of multinational companies. Nonetheless, as Nicolaides rightly stresses,

the Commission may be correct that multinational companies pay too little tax in relation to their ability to pay ... [and it] may be both morally wrong

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<sup>51</sup> Commission, 'State Aid SA.46470 (2017/C) (ex 2017/NN) – Possible State aid in favour of Inter IKEA' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2018] OJ C121/30 and Commission, 'State aid SA.51284 (2018/NN) – Possible State aid in favour of Nike.' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2019] OJ C226/31.

<sup>52</sup> Commission, 'State aid SA.50400 (2019/C) (ex 2019/NN-2) – Possible State aid in favour of Huhtamäki' (Invitation to submit comments pursuant to Article 108(2) TFEU) [2019] OJ C161/3.

<sup>53</sup> Commission, 'Decision to open in-depth investigations into individual "excess profit" tax rulings granted by Belgium to 39 multinational companies' 16 September 2019, not yet published.

<sup>54</sup> For a list of cases related to tax ruling decisions, see Commission, 'Tax Rulings' <[https://ec.europa.eu/competition/state\\_aid/tax\\_rulings/index\\_en.html](https://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html)> accessed 19 January 2021.

<sup>55</sup> *Ex multis*: Liza Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019); Adrien Giraud and Sylvain Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter' (2017) 16(2) *European State Aid Law Quarterly* 233; Amedeo Arena, 'State Aids and Tax Rulings: an Assessment of the Commission's Recent Decisional Practice' (2017) 1(1) *Market and Competition Law Review* 49; Theodoros Iliopoulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity' (2017) 16(2) *European State Aid Law Quarterly* 263; Thomas Jaeger, 'Tax Concessions for Multinational: In or Out of the Reach of State Aid Law?' (2017) 8(4) *Journal of European Competition Law & Practice*, 221; Dimitrios A. Kyriazis (n 9).

and harmful to the European economy ... [but] not all social and economic problems can be solved by mobilising the EU's State aid rules.<sup>56</sup>

Indeed, the application of state aid rules to a wide range of national measures and the use of this control to limit the implementation of harmful tax measures raises several doubts. In particular, it is uncertain to what extent the stretching of the definition of state aid is limited by the respect for the retained power in tax matters. The effectiveness of this method for tackling harmful tax measures is also questionable. The *leitmotif* of the overall discussion concerning the relation between state aid law and tax competition is how to strike a balance between the respect for national discretionary power in tax matters and the protection of fair competition in the EU between undertaking and Member States. Therefore, it is interesting to consider how state aid law is applied to measures that fall within the scope of application of the Code of Conduct in order to check if this set of rules is suitable or not to tackle harmful tax competition.

The main issue is the purpose of the targeted measure. State aid rules look at measures of a single Member State, assessing whether they can distort competition and affect trade in the internal market by conferring a selective advantage to certain undertakings. Conversely, tax competition and the related profit-shifting practises implemented by undertakings are characterised by a strong cross-border dynamic that state aid law is not designed to catch. Therefore, because of its nature, state aid law is not fit to control and sanction the exploitation of tax loopholes created by national measures.<sup>57</sup> Moreover, the sanction – namely, the recovery of the aid – is ineffective considering the fact that harmful tax measures, by attracting investment from certain undertakings engaged in profit-shifting practices, are ultimately intended to confer an advantage on the Member State itself. It is clear that, in this case, it is a win-win situation for the state implementing these measures. State aid law is not suitable for limiting this type of harmful practice since the recovery of the aid is aimed at restoring fair competition at

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<sup>56</sup> Phedon Nicolaidis, 'Can Selectivity Result from the Application of Non-Selective Rules? The Case of Engie' (2019) 18(1) *European State Aid Law Quarterly* 15, 28.

<sup>57</sup> Emily Forrester, 'Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) 27(1) *EC Tax Review* 19, 31.

the downstream level (competition between undertakings) and not to have an impact of the upstream level (competition between Member States).<sup>58</sup>

This explains the difficulties in tailoring the definition of state aid to the purpose of combating harmful tax competition. In fact, the requirements provided by article 107(1) TFEU are intended to identify measures that are potentially dangerous for downstream competition. They can also happen to affect upstream competition, but this is a secondary effect. The attempt to extend the notion of state aid to also capture harmful tax measures that traditionally did not fall into the scope of application of article 107(1) TFEU is therefore problematic in several ways.

The most relevant consequence of this evolution is the extension of the notion of selectivity. This trend can be identified in relation to the controversial application of state aid rules to tax rulings, but also with reference to the definition of fiscal aid in general. In fact, over the years, the decision-making practice of the Commission and the case law of the Court of Justice contributed to the development and to the extension of the notion of selectivity that has a decisive role in determining the scope of application of article 107(1) TFEU with regard to tax measures.<sup>59</sup> Selectivity is often the

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<sup>58</sup> The terminology used for distinguishing competition between undertakings and Member States (downstream and upstream competition) is borrowed from Alfonso Lamadrid de Pablo and José Luis Buendía, 'State Aid Asymmetries and the Covid-19 Outbreak- An Update and an Offer' (Chilling Competition, 19 May 2020) <[www.chillingcompetition.com](http://www.chillingcompetition.com)> accessed 19 January 2021.

<sup>59</sup> See, in particular, Case C-88/03 *Portuguese Republic v Commission of the European Communities* ECLI:EU:C:2006:511; Joined Cases C-428/06 to C434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others* ECLI:EU:C:2008:488; Case C-487/06 P *British Aggregates Association v Commission of the European Communities and United Kingdom* ECLI:EU:C:2008:757; Case C-279/08 P *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:551; Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* ECLI:EU:C:2009:709; Joined cases C-78/08 to C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl, Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze and Ministero delle Finanze v Michele Franchetto* ECLI:EU:C:2011:550; Joined cases C-106/09 P and C107/09 P *European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2011:732; Case C-20/15 P *European*

crucial element in the assessment of tax measures and usually the most controversial. In this respect, in a recent editorial written by Andreas Bartosch, fiscal aids are defined as 'the intellectually most challenging aspect which the application of the Treaty's rules on this pillar of EU competition law has to offer' and the criterion of material selectivity is compared to a jellyfish, meaning that 'in the very moment you have reached a level of sufficient confidence to finally grasp it, it slips out of your hands again'.<sup>60</sup> The distinction between general measures and selective measures determines the actual allocation of power,<sup>61</sup> and the broadening of the concept of selectivity has important effects in terms of power conferred to the Commission, which has a fundamental role in the assessment procedure of potential unlawful state aid. Therefore, the extension of the notion of selectivity (and state aid) means broadening the controlling power of the Commission over national choices in tax matters. As contended by the US Treasury in relation to the *Apple* case, there is a risk that the Commission will become a 'supra-national tax authority'.<sup>62</sup> Therefore, the central issue concerns once again the respect of national prerogatives. It has to be borne in mind that the Treaties do not confer upon the EU direct taxation competences and Member States retain the power to shape their own tax system,<sup>63</sup> including the issuing of tax rulings, on the condition that fiscal measures comply with EU law.<sup>64</sup>

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*Commission v World Duty Free Group SA and Others* ECLI:EU:C:2016:981. For a comprehensive overview of the consolidated position of the Commission concerning the notion of State aid, see 'Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union' (n 44).

<sup>60</sup> Andreas Bartosch, 'The Apple Ruling or the Destruction of the Ring to Bind Them All' (2020) 19(3) *Editor's Note in European State Aid Law Quarterly* 249.

<sup>61</sup> Cees Peters (n 9) 10.

<sup>62</sup> U.S Department of the Treasury, 'The European Commission's Recent State Aid Investigation of Transfer Pricing Rulings' White Paper of 24 August 2016, 9 <[www.treasury.gov](http://www.treasury.gov)> accessed 19 January 2021.

<sup>63</sup> Concerning the allocation of powers in the EU and the retained power of Member States, see Lena Boucon (n 16); In general, in relation to the notion of tax power, tax *compétence* and tax sovereignty, see Andréas Kallergis, *La Compétence Fiscale* (Nouvelle bibliothèque de thèses, Dalloz 2018).

<sup>64</sup> Ben J. M. Terra and Peter J. Wattel (n 15) 36. In particular, concerning the compliance of national fiscal measures and state aid law, see: Cases C-182/03 and

## V. STEPPING UP TAX COMPETITION IN A TIME OF CRISIS: THE STATE AID TEMPORARY FRAMEWORK AND THE CORONAVIRUS OUTBREAK

It is dramatically evident that the COVID-19 outbreak is a full-blown crisis: beyond public health issues and social disruption, it is having a – presumably long-term – severe impact on the economy, acknowledged also by the Commission, which has been extremely swift and responsive. In terms of state aid, on 19 March 2020 the Commission issued a Temporary Framework,<sup>65</sup> the scope of which was subsequently broadened by a series of amendments.<sup>66</sup> Among the many consequences of the pandemic, loss of revenues and lack of liquidity for undertakings are some of the most immediate. According to the Commission, these conditions can be

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C-217/03 *Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities*, ECLI:EU:C:2006:416, para 81; Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA*, ECLI:EU:C:2012:184, para 25.

<sup>65</sup> Commission, 'Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 1863 final. It was anticipated by the Commission, 'Response to the COVID-19 Outbreak' (Communication) COM (2020) 112 final, which outlines the Commission's immediate response to mitigate the economic impact of COVID-19, including its commitment in making sure that 'State aid is effective in reaching those companies in need and that harmful subsidy races are avoided, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the EU' (see p. 9).

<sup>66</sup> Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 2215 final; Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 3156 final; Commission, 'Third Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 4509 final; Commission, '4th Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak and Amendment to the Annex to the Communication from the Commission to the Member States on the Application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to Short-term Export-credit Insurance' (Communication) COM (2020) 7127 final.

considered an unforeseeable exceptional circumstance that not even sound undertakings could be prepared for.<sup>67</sup>

For the purposes of this article, the present crisis is the perfect example to show the limitations and risks inherent in the approach adopted by the EU in recent years towards the control of harmful tax competition. As pointed out in the previous section, relying on a set of rules intended for other aims and trying to adjust the definition of state aid in order to tackle harmful tax measures is neither adequate nor effective. The Temporary Framework offers a further argument in favour of the unsuitability of this approach. In this case, a loosening of the rules is perfectly in line with the rationale of state aid law. However, as previously contended, state aid control is not only intended to maintain a level playing field between undertakings, but also has a very important *de facto* role in limiting the implementation of harmful tax measures since the Code of Conduct is not effective. Therefore, there are reasons to fear that the loosening of state aid rules will entail the risk of increased implementation of harmful tax measures due to the greater flexibility for Member States in designing the aids and quicker checks by the Commission in order to allow for swift adoption. In the light of the lack of coordination in the tax domain, this crisis might even facilitate the implementation of such measures by deep-pocketed Member States.

There are several tools in the state aid framework allowing Member States to intervene and mitigate the negative effects of this crisis. Firstly, as in normal times, governments may adopt general measures falling outside the scope of state aid law provided that they are not selective regarding 'wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions, or financial support directly to consumers for cancelled services or tickets not reimbursed by the concerned operators'.<sup>68</sup> Moreover, Member States may implement measures falling within the scope of application of Block Exemption Regulations,<sup>69</sup> or measures that are under

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<sup>67</sup> Temporary Framework as amended on the 13<sup>th</sup> of October 2020, para 8.

<sup>68</sup> *Ibid*, para 12.

<sup>69</sup> Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1. The regulation covers several categories and types of aid measures (such as regional aids, aids to small and

the ceilings envisaged by the *de minimis* Regulation<sup>70</sup> without involving the Commission.<sup>71</sup> In order to meet acute liquidity needs and support undertakings in distress, governments may even adopt measures covered by article 107(3)(c) TFEU and the related rescue and restructuring state aid guidelines,<sup>72</sup> after duly notifying the Commission of the measures taken.<sup>73</sup>

Secondly, article 107(2)(b) TFEU provides that 'aids to make good the damage caused by natural disasters or exceptional occurrences' are presumed compatible with the internal market. This is a mandatory exception and the measures falling within its scope of application are always exempted from the general prohibition envisaged in article 107(1) TFEU. In particular, aid measures have to be notified pursuant to article 108(3) TFEU, but the Commission merely checks whether the conditions are fulfilled and, therefore, does not have discretion in the assessment of the compatibility of the aid.<sup>74</sup> Since, for the purposes of article 107(2)(b) TFEU, the Commission considers that the current crisis can be qualified as an 'exceptional

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medium-sized enterprises and aids for research, development and innovation) exempted from the notification obligation as long as all the criteria provided are fulfilled. Moreover, see also Commission Regulation (EU) 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ L 193/1; Commission Regulation (EU) 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ L 369/37.

<sup>70</sup> Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1. The *de minimis* Regulation covers small state aid amounts (200.000 euros for each undertaking over a 3-year period) that are exempted from state aid control as they are deemed to have no impact on competition and trade in the internal market.

<sup>71</sup> Temporary Framework as amended on the 13<sup>th</sup> of October 2020, para 13.

<sup>72</sup> Commission, 'Guidelines on State Aid for Rescuing and Restructuring Non-financial Undertakings in Difficulty' (Communication) [2014] OJ C 249/1.

<sup>73</sup> Temporary Framework as amended on the 13<sup>th</sup> of October 2020, para 14.

<sup>74</sup> Kelyn Bacon, *European Union Law of State Aid* (Oxford University Press 2013) 95.

occurrence',<sup>75</sup> Member States may compensate undertakings that suffered a damage directly caused by the COVID-19 outbreak.<sup>76</sup> However, being an automatic exception, eligibility conditions are rather narrow: the damage has to be a direct consequence of the 'exceptional occurrence' (requiring a causal link between the damage suffered by an undertaking and the COVID-19 outbreak), it has to be well-proven, and overcompensation is forbidden.<sup>77</sup>

Thirdly, pursuant to Article 107(3)(b) TFEU, aids granted by Member States can be declared compatible with the internal market when intended to remedy serious disruption to the national economy. On this ground, the Commission adopted the Temporary Framework, a soft law instrument that identifies a set of temporary measures deemed compatible with article 107(3)(b) TFEU so as to ensure a quick and more flexible approval procedure once it has been notified of a state aid measure.<sup>78</sup> It includes measures intended to tackle the difficulties suffered by undertakings, accelerate COVID-19 research and the development of relevant products.<sup>79</sup> Therefore,

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<sup>75</sup> SA.56685 (2020/N) *State aid notification on compensation scheme cancellation of events related to COVID-19 (Denmark)* Commission Decision not to raise objections [2020] C125/1.

<sup>76</sup> Temporary Framework as amended on the 13<sup>th</sup> of October 2020, para 15. Moreover, the Commission specifies that the principle "one time last time" (see section 3.6.1. of the Rescue and Restructuring Guidelines) does not cover aids compatible under article 107 (2) (b).

<sup>77</sup> Jacques Derenne's speech during the webinar '#3 State aid in the COVID-19 contest' organized by Concurrences on the 14<sup>th</sup> of April 2020 in the context of the 'Concurrences Quarantine Webinar Series', transcript available at 'Webinar #3 State Aid in the Covid-19 Context (Concurrences) <[www.concurrences.com](http://www.concurrences.com)> accessed 19 January 2021. See, in general, Kelyn Bacon (n 74) 98.

<sup>78</sup> For an overview of the contents of the newly adopted Temporary Framework, see: José Luis Buendía and Angela Dovalo, 'State Aid Versus COVID-19. The Commission Adopts a Temporary Framework', (2020) 1 *European State Aid Law Quarterly* 3; Michel Debroux, 'State aid & COVID-19: A swift response to a massive challenge' (2020) *e-Competitions Special Issue State aid & Covid-19 Concurrences* <[www.concurrences.com](http://www.concurrences.com)> accessed 19 January 2021; Andrea Biondi, 'State Aid in the Time of COVID-19' (EU Law Live, 25 March 2020) <[www.eulawlive.com](http://www.eulawlive.com)> accessed 19 January 2021.

<sup>79</sup> The Commission lists a very broad range of measures deemed compatible: direct grants, repayable advances or tax advantages, guarantees on loans, subsidised interest rate for loans, guarantees and loans channelled through credit

the Temporary Framework does not introduce new grounds for assessing state aid compatibility, but it confirms the possibility to resort to article 107(3)(b) TFEU by specifically identifying the compatibility conditions to be applied by the Commission and complied with by the Member States, which will also have to demonstrate the necessity, proportionality and appropriateness of the measures to remedy the disturbance in the economy.<sup>80</sup> The Temporary Framework does not prevent Member States from using alternative approaches; therefore, notifications for both general and individual aid schemes are possible.<sup>81</sup> It is applicable until 30 June 2021, except for the section that aims to enable recapitalisation support, which will

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institutions or other financial institutions and short-term export credit insurance. The amendment of 3 April 2020 extended the original five types of aid within the Temporary Framework to include aids for COVID-19 relevant research and development, investment aids for testing and upscaling infrastructure, investment aids for the production of COVID-19 relevant products, aids in form of deferrals of tax and/or of social security contributions, and aids in form of wage subsidies for employees to avoid lay-offs during the pandemic. On 8 May 2020, a second amendment was adopted which identifies additional state aid measures deemed compatible with the internal market. It sets out the criteria based on which Member States may provide public support in the form of equity, hybrid capital instruments, and subordinated debt to undertakings facing financial difficulties due to the COVID-19 outbreak. In particular, the Commission considered that recapitalisation must only be considered if no other appropriate measures can be found and, since such measures can be highly distortive for competition between undertakings, they must be subjected to stringent conditions as regards the state entry, remuneration and exit from the undertaking concerned and the governance. On 29 June 2020, the Commission adopted a third amendment to further extend the scope of the Temporary framework. It has been expanded to allow the grant of more support to micro, small and start-up companies and incentivise private investments. A fourth amendment was adopted on 13 October 2020. It prolonged and extended the scope of the Temporary Framework. In particular, it introduced new measures to support uncovered fixed costs of companies, adapted the conditions for recapitalisation measures and extended the temporary removal of all countries from the list of "marketable risk" countries under the short-term export-credit insurance communication.

<sup>80</sup> Temporary Framework as amended on the 29th of June 2020, para 19.

<sup>81</sup> *Ibid*, para 16.

be applied until 30 September 2021.<sup>82</sup> The provision of an extended deadline for the types of aid introduced by the second amendment of the Temporary Framework is due to the nature of such measures, which require a longer term to be implemented and effective. As expected, Member States are relying heavily on the Framework and the Commission is rapidly granting its approval to their measures.<sup>83</sup>

The Temporary Framework explicitly confirms the complementary function of state aid control stating that 'EU State aid control ensures that the EU internal market is not fragmented and that the level playing field stays intact. ... It also avoids harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union'.<sup>84</sup> Although it refers in general terms to interjurisdictional competition, this statement is also applicable to the specific domain of tax competition, where state aid control can be used to avoid a race to the bottom. Moreover, the last amendment to the Temporary Framework introduced paragraph 16ter, providing that aids granted under this regime cannot 'be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid', since 'such condition would appear to be harmful to the internal market'.<sup>85</sup> It also specifies that this rule is applicable 'irrespective of the number of job losses actually occurred in the initial establishment of the beneficiary in the EEA'.<sup>86</sup> The statements are clear and straightforward and the insertion of an explicit prohibition to condition the grant of the aid to the relocation of the beneficiary is obviously an important limit to the introduction of harmful tax measures. However, it only captures measures that are explicitly conditioned on the relocation while subtler incentives could evade control.

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<sup>82</sup> Ibid, para 93.

<sup>83</sup> For an updated list of the measures approved under Article 107(2)b TFEU, Article 107(3)b TFEU and under the Temporary State Aid Framework, see Commission, 'State Aid Rules and Coronavirus' <[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html)> accessed 19 January 2021.

<sup>84</sup> Temporary Framework as amended on 13 October 2020, para 10.

<sup>85</sup> Ibid, para 16ter.

<sup>86</sup> Ibid.

Even if the pandemic has spread across the whole EU, the crisis will not affect each country and sector in the same way.<sup>87</sup> This is due not only to the fact that some Member States have been less affected by the virus, but also – and, to some extent, more importantly – to the different spending power of each of them.<sup>88</sup> Such asymmetry results in varying levels of firepower: wealthier governments will be able to support their domestic economy much better.<sup>89</sup> In the long run, this could lead to distortive effects on the competition among undertakings – since the beneficiaries of these measures will be in a much better position than their competitors based in other Member States – and on the stepping up of harmful tax competition, because such measures can have the ultimate result (or aim) of attracting foreign capital and investments, thus exacerbating the crisis in severely affected Member States with a limited budget.

Serious disruption to competition in the internal market may come from increasing state aid intervention possibilities for Member States.<sup>90</sup> In fact, as

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<sup>87</sup> See Luca Calzolari, 'L'influenza del COVID-19 sulla politica di concorrenza: difese immunitarie o anche altro?' (SIDIBlog - Forum COVID-19, 6 April 2020) <[www.sidiblog.org](http://www.sidiblog.org)> accessed 19 January 2021; François-Charles Laprèvote and Georges Siotis' speech during the webinar '#3 State aid in the COVID-19 contest' organized by Concurrences on the 14th of April 2020 in the context of the 'Concurrences Quarantine Webinar Series', transcript available at 'Webinar #3 State Aid in the Covid-19 Context (Concurrences)' <[www.concurrences.com](http://www.concurrences.com)> accessed 19 January 2021.

<sup>88</sup> Speech by President von der Leyen at the European Parliament Plenary on the new MFF, own resources and the Recovery Plan, Brussels, 5 May 2020. In particular, she remarked that 'the virus is the same in every Member State, but the capacity to respond and absorb the shock is very different' and 'that each Member State has a different fiscal space - so the use of state aid is very different'. Consequently, she considered that it is already possible to observe 'an unlevelling of the playing field in our Single Market'. See also 'Europe's moment: Repair and Prepare for the Next Generation' (n 8) 2, where it is stated that 'while the virus is the same in all Member States, the impact and the potential for recovery looks very different'.

<sup>89</sup> José Luis Buendía Sierra, 'State Aid in Time of Cholera' (2020) 19(1) *Editor's Note in European State Aid Law Quarterly*, 2.

<sup>90</sup> Alfonso Lamadrid de Pablo and José Luis Buendía, 'A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund', *Chillin' Competition*, 31 March 2020, accessed 11 November 2020, where the authors acknowledge the

pointed out by President von der Leyen, it is already possible to observe 'an unlevelling of the playing field in our Single Market'.<sup>91</sup> For example, Germany notified state aid measures amounting to more than a half of the total value of approved aids while other Member States such as France or Italy notified aids amounting to about one fifth of that value.<sup>92</sup> This situation certainly calls for a deeper intervention at European level and the position of the Commission is clearly stated in the communication concerning the second amendment to the Temporary Framework, which recalls the necessity of 'additional EU level support and funds ... to make sure that this global symmetric crisis does not transform into an asymmetric shock to the detriment of Member States with less possibility to support their economy and EU's competitiveness as a whole'.<sup>93</sup>

The Recovery Plan, which is based on the new instrument *Next Generation EU*, and which was proposed by the Commission and agreed upon by

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unbalanced asymmetries among Member States and propose the amendment of the Temporary Framework in order to make the compatibility of State aid conditional on the provision of compensation for the competitive distortions that they create. Moreover, see also Lena Hornkohl and Jens van't Klooster, 'With Exclusive Competence Comes Great Responsibility: How the Commission's Covid-19 State Aid rules Increase Regional Inequalities within the EU' (VerfBlog, 29 April 2020) <[www.verfassungsblog.de](http://www.verfassungsblog.de)> accessed 19 January 2021.

<sup>91</sup> Speech by President von der Leyen at the European Parliament Plenary on the new MFF, own resources and the Recovery Plan, Brussels, 13 May 2020.

<sup>92</sup> See Sam Fleming, Jim Brunsten and Michael Peel, 'Crisis in Europe: von der Leyen's audacious bid for new powers' *Financial Times* (18 May 2020) <[www.ft.com](http://www.ft.com)> accessed 19 January 2021. The chart shows that at the beginning of May the total value of approved aids amounted to almost 2 trillion of euros. Moreover, for more detailed data concerning the value of each aid measure approved classified on the ground of the notifying country, see Commission, 'State Aid Cases' <[https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases\\_en](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases_en)> accessed 19 January 2021.

<sup>93</sup> Commission, 'Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' (Communication) COM (2020) 3156 final, para 8.

European leaders on 21 July 2020,<sup>94</sup> seems to go in that direction, admitting the existence of asymmetries and aiming at the restoration of a *level playing field* (for example through the new Solvency Support Instrument), besides the reinforcement of the long-term budget of the EU. Moreover, the discussion of own resources becomes central: the ceiling will be temporarily increased by 0.6 percentage points and the necessity of introducing new types of own resources is acknowledged.<sup>95</sup> The implementation of the instruments proposed by the Commission, which aim to compensate for the asymmetries among Member States, could actually reduce the distortive effects triggered by the loosening of state aid control. However, the fight against harmful tax competition should not be left to measures dictated by contingency, and state aid rules have proven not to be suitable for this purpose.

In a time of crisis like the one currently being experienced in Europe, greater and well-regulated public intervention in markets can be beneficial.<sup>96</sup> It also seems unavoidable when considering that, due to the limited size of the EU budget, the main fiscal response to the coronavirus will mainly come from Member States' national budgets, as the Commission admitted in its Communication concerning the coordinated economic response to the COVID-19 outbreak.<sup>97</sup> In this context, the loosening of state aid rules in the light of the current crisis and the resulting sudden reduction in control over harmful tax measures highlight the drawbacks of relying primarily on state aid law to exert control over tax competition.

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<sup>94</sup> European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' EUCO 10/20.

<sup>95</sup> Ibid, para A29 and 145-150.

<sup>96</sup> In general, scholars agree on the necessity to react promptly to the crisis by allowing a conditioned and transparent but broader and more flexible intervention of Member States. For a partly divergent opinion based on the proposal of adopting a more prescriptive approach towards State aid and a more permissive policy towards mergers, see Jorge Padilla and Nicolas Petit, 'Competition policy and the Covid-19 opportunity', (2020) 2 *Concurrences*.

<sup>97</sup> Commission, 'Response to the COVID-19 Outbreak' (Communication) COM (2020) 112 final, 9.

## VI. PREVENTION IS BETTER THAN CURE: THE CCCTB

The current crisis underlines once more the need for adequate instruments to tackle harmful tax competition. The tax ruling saga cannot be considered over yet, but a preliminary conclusion can be drawn from it: state aid rules are proving to be ineffective in tackling harmful tax measures. State aid control cannot replace the need for more coordination among Member States' tax policies to reduce or even eliminate harmful tax competition. Although the similarity between measures causing harmful tax competition and measures falling within the scope of application of state aid rules is clear, the two notions do not perfectly coincide and measures distorting competition among Member States do not necessarily amount to state aid.<sup>98</sup> In spite of its flaws, the consolidated set of rules governing European state aid law at the moment is still an important tool for the limitation of harmful tax competition in the Single Market. However, it should be considered a mere stopgap while trying to find a more comprehensive approach.

In light of the impossibility of defining an effective definition of harmful tax measure, the present article proposes a change of approach in the way the EU tackles harmful tax competition. Action at the European level should not be targeted towards the control over the measures adopted by Member States, because such an approach cannot be successful. Instead, it should focus on limiting the incentives that encourage undertakings to carry out harmful practices such as profit shifting and aggressive tax planning. In fact, the strategies put in place by undertakings and tax measures implemented by Member States are two sides of the same coin, which form the complex phenomenon of harmful tax competition.

As already mentioned, tax competition between Member States is the normal consequence of a system characterised by a lack of uniformity in this domain. Therefore, the introduction of binding legal instruments intended to increase tax coordination would be the best option. In particular, the implementation of a Common Consolidated Corporate Tax Base (CCCTB) could be a good way to tackle harmful tax competition by discouraging

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<sup>98</sup> Commission, 'Report on the Implementation of the Commission Notice on the Application of the State Aid rule to Measures Relating to Direct Business Taxation', COM (2004) 434, para 64-67.

activities such as aggressive tax planning. The introduction of a CCCTB entails the calculation of the aggregate net income for an entire corporate group, followed by the apportionment of that income to each location where the group conducts business using a specific formula.<sup>99</sup> Article 116 TFEU, which applies when 'a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and [...] the resultant distortion needs to be eliminated',<sup>100</sup> could be considered a legal basis for the adoption of a CCCTB. An extensive interpretation of this article, including general but serious tax disparities in its scope of application, could be a good ground for pursuing the implementation of this project by overcoming the unanimity requirement.<sup>101</sup>

President von der Leyen expressly envisaged a new CCCTB in her political programme,<sup>102</sup> and the European Parliament has also expressed its support.<sup>103</sup> The Recovery Plan proposal drafted by France and Germany<sup>104</sup> included an explicit reference to the necessity of introducing a CCCTB, as part of a more general aim of improving the framework for fair taxation in the EU. The Commission acknowledged this proposal and, in its own Recovery Plan, stated that it will propose a set of new European own resources, including one based on the Emissions Trading Scheme, a Carbon Border Adjustment Mechanism, an own resource based on the operation of large companies, and a new digital tax, building on the work done by the OECD.<sup>105</sup> It is very

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<sup>99</sup> Juho Mäki-Lohiluoma, 'The CCCTB Initiative as a Possible Solution to the Conflict Between the Internal Market and National Tax Autonomy' (2019) 1 *Helsinki Law Review* 150, 154.

<sup>100</sup> Article 116 TFEU.

<sup>101</sup> Joachim Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' (2020) 29(2) *Editorial in EC Tax Review* 58, 61.

<sup>102</sup> Ursula von der Leyen, 'A Union that Strives for More: My Agenda for Europe' *Political Guidelines for the Next European Commission 2019-2024*, July 2019.

<sup>103</sup> European Parliament, 'Resolution on the new multiannual financial framework, own resources and recovery plan' 2020/2631(RSP), para 9.

<sup>104</sup> Available at: German Federal Government (Bundesregierung), 'A French-German Initiative for the European Recovery from the Coronavirus Crisis' <[www.bundesregierung.de](http://www.bundesregierung.de)> accessed 19 January 2021.

<sup>105</sup> 'Europe's Moment: Repair and Prepare for the Next Generation' (n 8) 4.

unfortunate that the European Council conclusions dodged this issue,<sup>106</sup> even though one can argue that this was just an act of political realism in light of the staunch opposition of some Member States that seem to see any action in this field as an attempt to curb their competitiveness.

## VII. CONCLUSION

The global crisis caused by the COVID-19 outbreak is a turning point in many respects. From the perspective of tax competition between Member States, it raises the question whether we are going towards an increase of harmful tax competition or a more coordinated tax system. The disruption caused by sudden, great shocks like the one we are currently experiencing should be used as a chance to foster further integration and to improve fiscal coordination, paving the way to fiscal harmonisation, at least in the field of corporate taxation.

Various initiatives taken at European level during the last years have contributed to creating a fairer tax environment. There are attempts of coordination in this domain (such as the Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation),<sup>107</sup> but there are still important challenges that the EU has to face, and the regulation of tax competition needs to keep pace. The analysis conducted in this article shows the weaknesses of the current system to tackle harmful tax competition. As extensively discussed, relying on state aid law in order to avoid the implementation of harmful tax measures is not effective. The development of the notion of fiscal aids enabled some limitation of harmful tax competition, since measures falling within the scope of both the Code of Conduct and article 107(1) TFEU can be assessed by the Commission and

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<sup>106</sup> 'European Council conclusions (17, 18, 19, 20 and 21 July 2020' (n 94).

<sup>107</sup> Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1; Council Directive (EU) 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1. See Pasquale Pistone and Rita Szudoczky, 'Coordination of Tax Laws and Tax Policies in the EU' in Michael Lang, Pasquale Pistone, Josef Schuch and Claus Staringer (eds), *Introduction to European Tax Law: Direct Taxation* (5th edn, Spiramus 2019).

qualified as incompatible state aids. However, this approach has several drawbacks and, since some measures do not qualify as state aid, they are subject to soft law only.

The current crisis exacerbates and renders more evident the issue highlighted above for at least two reasons. Firstly, the only binding set of rules applicable to harmful tax measures, namely state aid law, has been temporary loosened. Notwithstanding that a specific provision prohibits making the granting of aid conditional on relocation has been introduced, a more lenient control by the Commission can leave the door open to the implementation of distortive measures, even if not explicitly subject to a relocation condition. Resorting to state aid to support the economy and relieve the impact of such an unprecedented crisis is inevitable, at least as a first reaction. However, it is necessary to remember the rationale behind European state aid regulation: 'in the short term, we will need to prevent the ship from sinking, but we will need to remain vigilant to fix other distortions, or leaks, once the storm has settled'.<sup>108</sup> Secondly, the COVID-19 outbreak led to new asymmetries between Member States and intensified existing ones. The loosening of state aid control can be an incentive for deep-pocketed Member States to implement harmful tax measures, though the asymmetries existing between Member States are acknowledged and somewhat balanced by the Recovery Plan, an ambitious instrument that responds to the need for more solidarity in facing such an emergency.

Considering the context described, the risks concerning harmful tax competition resulting from the loosening of state aid rules are certainly mitigated. However, this crisis shows the importance of a better integrated Europe. The introduction of a Common Consolidated Corporate Tax Base would be an important step forward. As contended above, this would have important repercussions on tax competition, since undertakings will be less incentivised to plan profit shifting strategies. The fact that the European Council Conclusions do not mention this instrument does not mean that it is a project left aside.<sup>109</sup> However, it would have been a good sign to see the Common Consolidated Corporate Tax Base included, since this is one of the main steps that the EU could take to seriously address the issue of harmful

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<sup>108</sup> José Luis Buendía Sierra (n 89) 2.

<sup>109</sup> 'European Council Conclusions (17, 18, 19, 20 and 21 July 2020)' (n 94).

tax competition between Member States. In the long run, greater coordination in fiscal policies will be fundamental for limiting harmful tax competition within the EU.

# THE OPTIONAL MEASURES OF DEPOSIT GUARANTEE SCHEMES: TOWARDS A NEW BANK CRISIS MANAGEMENT PARADIGM?

Marco Bodellini\*

*The role of deposit guarantee schemes is pivotal in banking crises. This role, however, should not be limited to only performing the so-called pay-box function. While this is deposit guarantee schemes' core function, and, as such, needs to be included in the safety net 'armoury' of every jurisdiction, optional interventions, both preventive measures and measures in the context of liquidation, can turn out to be more effective, from a system-wide perspective, to maintain financial stability and to reduce the destruction of value potentially resulting from an atomistic liquidation. Accordingly, the implementation of these measures by deposit guarantee schemes should not be hindered, but rather facilitated by the legal framework. Each European Union Member State should be encouraged (indeed required) to transpose in its domestic regime the provisions of the Deposit Guarantee Schemes Directive which deal with deposit guarantee schemes' alternative measures, thereby paving the way for a new bank crisis management paradigm. Nonetheless, a number of legal obstacles arising from the application of state aid rules and from the extension of the depositor preference rule in the liquidation process to deposit guarantee schemes, combined with a narrow reading of the least cost principle, need to be removed in order for deposit guarantee schemes to be able to successfully carry out optional interventions.*

**Keywords:** deposit guarantee schemes, bank crisis management, resolution, liquidation, DGSD, BRRD

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## I. INTRODUCTION

Deposit guarantee schemes (DGSs) are an important component of the banking system safety net. Their core function is to protect depositors in the event of their bank becoming 'failing or likely to fail' (FOLF) and being liquidated. In such a scenario, by paying out covered depositors, they contribute to maintaining the stability of the banking system, thereby avoiding that the insolvency of one bank can be transmitted to other institutions, which could give rise to widespread failures that can lead to a systemic crisis.<sup>1</sup> This typically happens when banks' debt-holders suddenly request their banks to convert their debt instruments into cash to such an extent that the latter become unable to do so due to the so-called maturity mismatch, that is an important feature of commercial banking. Commercial banks mainly take deposits from the public and make loans. Deposits are, as a consequence, the most common form of financing for commercial banking institutions. The main characteristic of deposits is that they are withdrawable on demand, which makes them short-term liabilities. Typically, banks hold only a fractional amount of the overall value of the

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<sup>1</sup> See Giuseppe Boccuzzi, *Towards a New Framework for Banking Crisis Management. The International Debate and the Italian Model* (Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia 2011) 220.

deposits they take and use the remaining part to make loans. The reason for this is that using deposits to extend loans, by charging higher interests on their borrowers, is their way to make profits. However, the issue in doing so is that whereas deposits are short-term liabilities, loans usually have longer maturity. This creates the abovementioned maturity mismatch. In good times, such a business model works out efficiently. In bad times, however, this is not necessarily the case, since the fractional reserves, the fraction of deposits that the bank has not used to make loans and has invested in liquid – and therefore typically less profitable – assets, might not be enough to meet depositors' withdrawals. This situation in turn might deteriorate very quickly, leading to a phenomenon called bank run. Bank runs constitute a negative externality (i.e. a source of market failure) to the extent that, as they evolve, even solvent banks can face a heavy liquidity strain, which in turn may cause their insolvency.<sup>2</sup>

Against this background, capital is the first line of defence and thus is meant to tackle such a risk thereby protecting the bank. In fact, a bank that is well capitalised is able to absorb the losses resulting from fire sales of illiquid assets, which are executed to meet depositors' withdrawals. By contrast, when a bank is undercapitalised, it is more vulnerable to maturity mismatch. This is because share capital can absorb losses much more effectively than any other instrument. In other words, significant losses can cause a bank run, but if the bank in question holds a proportionally significant amount of capital, it can absorb the losses. If losses are expected to be effectively absorbed by capital, depositors should be less inclined to run on their bank to withdraw deposits. Therefore, given the importance of deposits to the public and the role of banks in maintaining financial stability, banking institutions are subject to minimum capital requirements.<sup>3</sup> Accordingly, capital requirements are a preventive measure, which does not increase moral hazard. But when capital is not enough to absorb losses and a crisis materialises, DGSs are meant to step in and play a pivotal role. In such a

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<sup>2</sup> See Charles W. Calomiris and Gary Gorton, 'The Origin of Banking Panic Models: Facts and Bank Regulation' in Robert Glenn Hubbard (ed), *Financial Markets and Financial Crises* (University of Chicago Press 1991) 109.

<sup>3</sup> See Marco Bodellini, 'The Long "Journey" of Banks from Basel I to Basel IV: Has the Banking System Become More Sound and Resilient than it Used to Be?' (2019) 20 ERA Forum 84.

context, DGSs' primary function is to serve as a pay-box for covered depositors, guaranteeing in this way the default-free character of deposits even in the event of a failure.<sup>4</sup> The importance of this function rests on the assumption that covered depositors should have access to safe and secure instruments allowing them to make payments and to save.<sup>5</sup> These instruments are bank deposits. However, due to the fact that banks, like any other firm, may be exposed to losses and potentially to insolvency, specific legislation on DGSs aims to render bank deposits a safe way to store money for payments and savings.

DGSs usually come into play when a FOLF bank is placed under liquidation,<sup>6</sup> and accordingly its banking authorisation is withdrawn. In such a scenario, DGSs are requested to perform the pay-box function. Accordingly, they assume an explicit obligation since, upon the authorisation withdrawal, they are required to compensate covered depositors, within a pre-specified and reasonably short period of time. Interestingly, the guarantee that DGSs provide is non-discretionary as depositors have in principle a direct claim for compensation against them, regardless of the conditions underlying the bank failure. Still, the level of protection offered is typically limited and the rationale for this limitation is that in this way moral hazard as well as the opportunity cost of building up a deposit guarantee fund that is not invested or used in another way can be mitigated. Furthermore, their way of working complies with the new approach of avoiding the use of taxpayers' money in the context of bank crises since they are funded exclusively by *ex ante* or *ex*

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<sup>4</sup> See Christos Gortsos, 'The role of deposit guarantee schemes (DGSs) in resolution financing' (2019) European Banking Institute Working Paper Series no. 37, 6 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3361750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361750)> accessed 30 August 2020.

<sup>5</sup> See Christos Gortsos, 'Deposit Guarantee Schemes: General Aspects and Recent Institutional and Regulatory Developments at International and EU Level' (2016), Working Paper, 4 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2758635](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758635)> accessed 30 August 2020.

<sup>6</sup> The terms liquidation and winding up are used interchangeably throughout the paper.

*post* contributions provided by the participating banks, without any support from the government and/or the central bank.<sup>7</sup>

Thus, DGSs certainly play a pivotal function in keeping financial stability in that they are an *ex-ante* form of protection for depositors, who have the guarantee to get their covered deposits back. Their very presence, among the safety-net providers, is in and of itself instrumental to keep depositors' confidence in the system and thereby maintain financial stability. In other words, the credibility that the DGS pay-box function confers to the banking system, by increasing trust and consequently reducing the risk of bank runs, is of paramount importance.<sup>8</sup> On these grounds, banks are requested to become members of a DGS.<sup>9</sup>

The pay-box function is clearly fundamental to prevent, or at least to mitigate, the impact of banking crises and, as such, needs to be included in the bank crisis management legal framework. Nevertheless, the so-called optional functions (i.e. the implementation of alternative measures aimed at preventing a bank's failure and the provision of financial means in the context of liquidation aimed at preserving access of depositors to covered deposits), that DGSs can be empowered to perform pursuant to article 11, paragraphs 3 and 6 of the European Union (EU) Deposit Guarantee Schemes Directive (DGSD),<sup>10</sup> might end up being even more effective, from a system-wide

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<sup>7</sup> See Rita Carisano, *Deposit Insurance: Theory, Policy and Evidence* (Dartmouth Publishing 1992) 22-29.

<sup>8</sup> See David Llewellyn, 'The Economic Rationale for Financial Regulation' (1999) Financial Services Authority (FSA) Occasional Paper Series no. 1, 5 <[https://www.fep.up.pt/disciplinas/pgaf924/PGAF/Texto\\_2\\_David\\_Llewellyn.pdf](https://www.fep.up.pt/disciplinas/pgaf924/PGAF/Texto_2_David_Llewellyn.pdf)> accessed 30 August 2020.

<sup>9</sup> See Stefan Ingves, 'Remarks Given at IADI Conference on Designing an Optimal Deposit Insurance System' (2017) Keynote Address at IADI Conference, Basel 2 June 2017, 1 <<https://www.bis.org/speeches/sp170602.pdf>> accessed 30 August 2020.

<sup>10</sup> The paper will refer to the two DGSs measures regulated under article 11 paragraphs 3 and 6 of the DGSD as optional or alternative measure(s), optional or alternative intervention(s) or optional or alternative function(s), interchangeably.

perspective, to maintain financial stability and to reduce the destruction of value potentially resulting from an atomistic (or piecemeal) liquidation.<sup>11</sup>

In this regard, the possibility for a DGS to intervene at the first signs of a crisis can be particularly effective in preventing the latter from escalating. In fact, many banking crises, still at an early stage, can be more efficiently solved thanks to the willingness of DGSs to financially help restructure the institutions concerned, avoiding in this way their failure. Likewise, the ability of DGSs to provide financial support in the context of a bank's liquidation might turn out to be particularly important for the latter to be orderly and effective.

Against this background, this paper, applying a qualitative research methodology, but also relying on empirical data resulting from surveys, examines whether there are valid reasons supporting the argument that DGSs' optional functions might prove more effective, from a system-wide perspective, in maintaining financial stability and in reducing the destruction of value than the pay-box function. To do so, this paper analyses the EU legislation, focusing on the four functions that DGSs (can) perform pursuant to the DGSD. Thus, the pay-box function is analysed and discussed *vis-à-vis* the adoption of alternative measures aimed at preventing a bank's failure and the provision of financial means within a liquidation procedure aimed at preserving access of depositors to covered deposits. In this context, the arguments in favour and against the effectiveness of the latter functions are examined also by looking at their implementation in some EU Member States as well as referring to the interesting empirical results of two surveys recently conducted by the European Forum of Deposit Insurers (EFDI) and the European Banking Authority (EBA). Accordingly, a view supporting the relevance of alternative measures is taken and, on these grounds, the legal obstacles in place at the EU level, (i.e. state aid rules and depositor preference rule combined with a narrow reading of the least cost principle),<sup>12</sup> currently hindering the DGSs' ability to perform such functions, are explored. In this regard, the opposite positions of the European Commission and of the

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<sup>11</sup> The terms atomistic liquidation and piecemeal liquidation are used interchangeably throughout the paper.

<sup>12</sup> The expressions 'least cost principle' and 'least cost criterion' are used interchangeably throughout the paper.

General Court of the European Union concerning the state aid framework are taken into account by analysing the *Tercas* case. The application of the least cost principle in light of the new rules extending the depositor preference to DGSs in the liquidation process is discussed as well. Against this backdrop, some reform proposals (namely a revision of the Commission's 2013 Banking Communication as well as of the depositor preference rule and the least cost criterion) aimed at removing the obstacles currently in place are advanced with a view to enabling DGSs to implement such functions when this is considered to be a more effective solution to the benefit of the whole system, thereby paving the way for a new bank crisis management paradigm. Such a new bank crisis management paradigm is, in fact, the result of empowering DGSs both to intervene in the face of the first symptoms of a crisis thereby preventing it from escalating and getting out of control and to provide financial support in the context of a liquidation ensuring, in this way, that the latter is orderly and effective.

Tackling all these issues, this paper aims at contributing to the debate on the role of DGSs in banking crises supporting the view that they should play a pivotal function since their enhanced involvement can turn out to be instrumental from a system-wide perspective to keep financial stability and to reduce the destruction of value often resulting from an atomistic liquidation of the assets. The paper is divided into 7 sections as follows. After this introduction, section 2 focuses on the EU legislation and on the functions that DGSs can accordingly perform. Sections 3 and 4 discuss the potential effectiveness of DGSs' alternative measures aimed at preventing a bank's failure and the potential effectiveness of DGSs' alternative measures in the context of liquidation, respectively. Section 5 looks at the way in which DGSs' optional measures have been implemented over time in some EU Member States. Section 6 analyses the legal obstacles refraining DGSs from implementing optional interventions in banking crises, distinguishing between state aid rules and the depositor preference rule and, accordingly, advances some legislative proposals with a view to removing them. Section 7 concludes.

## II. THE EUROPEAN UNION LEGISLATION AND THE FUNCTIONS OF DEPOSIT GUARANTEE SCHEMES

Directive 94/19/EC introduced the first set of rules dealing with DGSs and it is, therefore, a milestone in the legislation on deposit insurance in the EU.<sup>13</sup> It regulated DGSs' operation on the basis of minimum harmonisation criteria and the principle of mutual recognition. Most notably, it made membership of a DGS mandatory for every bank. In fact, the participation in a DGS was (and still is) a prerequisite for obtaining a banking license. The rationale for the introduction of specific binding rules on DGS membership obviously was (and still is) closely connected to the important function that such schemes are meant to perform, along with the other safety net players, in ensuring confidence in the banking system.

Nonetheless, the global financial crisis of 2007-2009 prompted a lively debate on the need to strengthen and review the structure, financial resources as well as the functions of DGSs. The discussion focused in particular on the role of deposit insurance in the financial safety net. In 2008, accordingly, the European Commission formulated a proposal to promote convergence among Member States' DGSs, which eventually led to the adoption of Directive 2009/14/EC. This Directive represented the first step towards a structural reform of the deposit insurance system. It amended some shortcomings of the previous Directive with a view to achieving greater consistency between European DGSs.

Additionally, at the international level, the International Association of Deposit Insurers (IADI) made remarkable efforts to advance innovative solutions in response to the global financial crisis. In 2010, IADI published the first version (later revised in 2014) of its *Core Principles for Effective Deposit Insurance Systems*, which are the internationally recognised standards governing the operations of DGSs and reflect the need for effective deposit insurance in preserving financial stability.<sup>14</sup>

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<sup>13</sup> See Giuseppe Boccuzzi, *The European Banking Union: Supervision and Resolution*, (Palgrave Macmillan 2016) 132.

<sup>14</sup> See International Association of Deposit Insurers, 'Core Principles for Effective Deposit Insurance Systems' (2014) <<https://www.iadi.org/en/assets/File/Core%20Principles/cprevised2014nov.pdf>> accessed 30 August 2020.

In 2010 the European Commission proposed a recast of the Directive of 2009<sup>15</sup> and, on 12 June 2014, the new DGSD<sup>16</sup> was adopted as part of the new European regulatory and supervisory architecture. The DGSD keeps the legal foundations of the previous Directive in place, and the 100,000 Euro coverage level, already provided for by the Directive of 2009, has been confirmed.<sup>17</sup> The paying-out period, by contrast, has been reduced to seven working days, although Member States have been given the possibility to phase-in this provision over a transitional period of ten years.<sup>18</sup>

The reliability of a DGS results from its funding capability, therefore it needs to be able to rely on adequate financial resources for its interventions. The DGSD introduced a more structured funding system, trying to fix the shortcomings of the previous Directive which had let Member States decide whether their DGSs were to be financed *ex-ante* or *ex-post*.<sup>19</sup> The new provisions on funding create a model based on both *ex-ante* and *ex-post* contributions, through a four-step approach.<sup>20</sup> The first step consists of a solid *ex-ante* fund, set up through the banks' ordinary contributions.<sup>21</sup> The target level of the *ex-ante* fund is at least 0.8% of covered deposits and such a target level is to be reached by 3 July 2024; 30% of the *ex-ante* fund, in turn, can be made up of payment commitments, which have to be fully

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<sup>15</sup> On the need to further amend the legislation in place back then see Rym Ayadi and Rosa Lastra, 'Proposals for Reforming Deposit Guarantee Schemes in Europe' (2010) 11 *Journal of Banking Regulation* 219.

<sup>16</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173/149 (hereafter DGSD).

<sup>17</sup> Article 6 of DGSD.

<sup>18</sup> Article 8 of DGSD.

<sup>19</sup> See Giuseppe Boccuzzi and Riccardo De Lisa, *The Changing Face of Deposit Insurance in Europe: from the DGSD to the EDIS Proposal*, in Giampio Bracchi, Umberto Filotto and Donato Masciandaro (eds), *The Italian banks: which will be the "new normal"?* (Edibank 2016) 6.

<sup>20</sup> Article 10 of DGSD.

<sup>21</sup> On this, see European Banking Authority, 'Guidelines on Methods for Calculating Contributions to Deposit Guarantee Schemes (DGSs)' (2015) <<https://eba.europa.eu/sites/default/documents/files/documents/10180/1089322/f336fb5-7264-4381-9eee-cb2144b489e9/EBA-GL-2015-10%20GL%200n%20methods%20for%20calculating%20contributions%20to%20DGS.pdf>> accessed 30 August 2020.

collateralized.<sup>22</sup> In addition to the *ex-ante* fund, the Directive also introduced extraordinary *ex post* contributions, which banks are required to provide in the event of a pay-out and when the available financial resources are not sufficient to reimburse depositors. These contributions shall not exceed 0.5% of covered deposits per year.<sup>23</sup> The third form of financing is the alternative funding arrangements. These arrangements are meant to enable DGSs to get short-term funding from the markets, should they need it. Eventually, if all these resources prove insufficient, DGSs may also rely on a mutual voluntary borrowing facility. Accordingly, it is stated that DGSs can borrow funds from other EU DGSs under certain conditions and up to 0.5% of their covered deposits.

In relation to their operation, the DGSD confers upon DGSs four functions. Two of these functions are mandatory, whereas the remaining two are optional as Member States can decide whether they want their DGSs to also perform them in addition to the mandatory ones.<sup>24</sup> These functions are: 1) the pay-box function, to be performed in the context of liquidation, which is mandatory; 2) resolution financing, which is mandatory as well; 3) the implementation of alternative measures aimed at preventing a bank's failure, which is optional; and 4) the provision of financial means in the context of liquidation aimed at preserving access of depositors to covered deposits, which is optional as well.

The pay-box function is exercised in the context of a winding up and aims to protect the covered depositors of a failing bank. It is considered the core function of DGSs.<sup>25</sup> After paying out the covered deposits, the DGS is then entitled to subrogate to the covered depositors' rights in the assets' liquidation process, benefiting now from the same preference given to covered depositors by article 108 of the Bank Recovery and Resolution Directive (BRRD).<sup>26</sup> The granting to DGSs of the same superpriority given

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<sup>22</sup> Article 10, paragraphs 2 and 3 of DGSD.

<sup>23</sup> Article 10, paragraph 8 of DGSD.

<sup>24</sup> Article 11 of DGSD.

<sup>25</sup> Pursuant to article 11 paragraph 1 of the DGSD, the financial means of a DGS shall be primarily used in order to repay depositors pursuant to this Directive.

<sup>26</sup> Pursuant to article 108 paragraph 1 of the BRRD, 'Member States shall ensure that in their national laws governing normal insolvency proceedings: (a) the

to covered depositors in the liquidation ranking makes it more likely for them to recover a substantial part (or possibly all) of the amount used to reimburse the depositors. Nevertheless, this could, in turn, affect the DGS's ability to perform the other functions as further discussed in section VI.2.

The DGS is also meant to finance the resolution of a bank that is FOLF. Such a function is to be carried out according to the conditions laid out in article 109 of the BRRD and makes DGSs act as loss absorbers to the benefit of covered depositors.<sup>27</sup> Thus, the DGS will contribute to the resolution financing to the extent that it would have suffered a loss by reimbursing covered depositors in the hypothetical event of such bank being submitted to ordinary insolvency proceedings. Accordingly, should bail-in be applied, the DGS would be required to provide the bank under resolution with resources equivalent to the amount by which covered deposits would have been written down in the hypothetical scenario of them being bailed-in (so-called virtual bail-in). Similarly, should the other resolution tools be implemented, the DGS would be requested to contribute an amount equivalent to the losses that such covered depositors would have suffered. Yet, performing this function is now made more unlikely due to the introduction of depositor preference pursuant to article 108 of the BRRD, determining that the DGS should make a contribution only when all the

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following have the same priority ranking which is higher than the ranking provided for the claims of ordinary unsecured creditors: (i) that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU; (ii) deposits that would be eligible deposits from natural persons and micro, small and medium-sized enterprises were they not made through branches located outside the Union of institutions established within the Union; (b) the following have the same priority ranking which is higher than the ranking provided for under point (a): (i) covered deposits; (ii) deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency'.

<sup>27</sup> Pursuant to article 11 paragraph 2 of the DGSD the financial means of a DGS shall be used in order to finance the resolution of credit institutions in accordance with Article 109 of the BRRD. The resolution authority shall determine, after consulting the DGS, the amount by which the DGS is liable.

other liabilities ranked below covered deposits are not enough to absorb the incurred losses.<sup>28</sup>

Beside these two mandatory functions, Member States can decide, pursuant to article 11, paragraph 3 of the DGSD, to also permit their DGSs to intervene at an early stage to prevent a bank's crisis by providing different forms of support.<sup>29</sup> Nevertheless, such interventions need to meet some criteria in order to be carried out.<sup>30</sup> The most relevant condition is that these measures must comply with the 'least cost principle', under which they cannot end up being more costly for the DGS than the amount it would have paid to reimburse covered depositors had the bank undergone a piecemeal liquidation.<sup>31</sup> The second optional function that a DGS can perform according to article 11, paragraph 6 of the DGSD is the provision of financial support in the context of a winding up.<sup>32</sup> Such an intervention is to be carried

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<sup>28</sup> See Simon Gleeson and Randall Guynn, *Bank Resolution and Crisis Management. Law and Practice* (Oxford University Press 2016) 173.

<sup>29</sup> The paper will refer to the measures regulated under article 11 paragraph 3 of the DGSD as preventive function(s), preventive measure(s), or preventive intervention(s) interchangeably.

<sup>30</sup> Pursuant to article 11 paragraph 3 of the DGSD, the following conditions need to be met: '(a) the resolution authority has not taken any resolution action under article 32 of BRRD; (b) the DGS has appropriate systems and procedures in place for selecting and implementing alternative measures and monitoring affiliated risks; (c) the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS; (d) the use of alternative measures by the DGS is linked to conditions imposed on the credit institution that is being supported, involving at least more stringent risk monitoring and greater verification rights for the DGS; (e) the use of alternative measures by the DGS is linked to commitments by the credit institution being supported with a view to securing access to covered deposits; (f) the ability of the affiliated credit institutions to pay the extraordinary contributions in accordance with paragraph 5 of this Article is confirmed in the assessment of the competent authority'.

<sup>31</sup> These measures are contemplated also by principle 15 of the IADI Principles for Effective Deposit Insurance Systems, stating that '[t]he deposit insurer should be part of a framework within the financial system safety net that provides for the early detection and timely intervention and resolution of troubled banks'; see International Association of Deposit Insurers (n 14) 21.

<sup>32</sup> The paper will refer to the measures regulated under article 11 paragraph 6 of the DGSD as alternative function(s) in the context of liquidation, alternative

out with the objective of preserving access of depositors to their covered deposits.<sup>33</sup> Nevertheless, even these interventions, like the preventive interventions, must comply with the 'least cost principle'.<sup>34</sup>

The following part of this paper will focus on these two optional functions, starting with a discussion of the arguments supporting that their implementation might prove more efficient than depositors' pay-out, from a system-wide perspective, in maintaining financial stability and in reducing the destruction of value potentially resulting from an atomistic liquidation. The paper will refer to the two DGSs measures regulated under article 11, paragraphs 3 and 6 of the DGSD as optional or alternative measure(s), optional or alternative intervention(s) or optional or alternative function(s), interchangeably.

### **III. THE POTENTIAL EFFECTIVENESS OF ALTERNATIVE MEASURES AIMED AT PREVENTING A BANK'S FAILURE**

The intervention of a DGS at the first symptoms of a bank's crisis can be particularly effective in preventing the latter from escalating and getting out of control. In fact, many banking crises, still at an early stage, can be more efficiently solved thanks to the ability of DGSs to help restructure the institutions concerned. Such a preventive intervention, in addition, can be

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measure(s) in the context of liquidation or alternative intervention(s) in the context of liquidation, interchangeably.

<sup>33</sup> Pursuant to article 11 paragraph 6 of the DGSD, Member States may decide that the available financial means may also be used to finance measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned.

<sup>34</sup> These measures are contemplated also by principle 16 of the IADI Principles for Effective Deposit Insurance Systems, stating that '...In addition, the deposit insurer or other relevant financial system safety-net participant should have the authority to establish a flexible mechanism to help preserve critical banking functions by facilitating the acquisition by an appropriate body of the assets and the assumption of the liabilities of a failed bank (e.g. providing depositors with continuous access to their funds and maintaining clearing and settlement activities)'; see International Association of Deposit Insurers (n 14) 22.

seen as beneficial for the whole system that otherwise could be negatively affected both in reputational and economic terms. Indeed, in the context of bank crises, there is always a special public interest to safeguard depositors and, linked to it, to protect the stability of the system. In some cases, this goal can be more successfully achieved through preventive action.

Of course, DGSs are expected to conduct a cost-benefit analysis before performing preventive interventions. The benchmark to consider in conducting such an assessment is the hypothetical cost that they should pay to reimburse covered depositors in the event that the bank in crisis ended up being liquidated without the deposits being transferred to another bank. If such assessment shows that the cost of depositors' pay-out is higher than the cost of restructuring, then the preventive intervention should take place. Obviously, the cost of depositors pay-out is to be calculated also in light of the amount that the DGS expects to recover from the insolvency proceeding after subrogating to the depositors' rights, although, from this perspective, the extension of depositors super priority to DGSs represents a possible obstacle, as discussed in section VI.2.

Yet, experience has shown that preventive measures are generally less costly than the reimbursement of depositors.<sup>35</sup> Nevertheless, there might also be cases where a bank collects only a limited amount of covered deposits, but at the same time performs crucial functions for its group. The failure of such a bank could have terrible effects on the other group members and possibly on financial stability. In such a case, however, the cost of preventive measures might exceed the cost of pay-out of covered depositors, thereby preventing their application.<sup>36</sup>

On these grounds, DGSs can be seen as reactive system-wide tools, funded directly by banks, to be employed at the early stages of a crisis, on the assumption that it is in the interest of the whole banking system to prevent (or at least mitigate) its negative effects. Accordingly, their task should be to

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<sup>35</sup> See European Forum of Deposit Insurers, 'EFDI State of Play and Non-Binding Guidance Paper. Guarantee Schemes' Alternative Measures to Pay-out for Effective Banking Crisis Solution' (2019) 29.

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

play a central role in preventing banking crises by disbursing, at an early stage, the resources provided by other banks.

#### IV. THE POTENTIAL EFFECTIVENESS OF ALTERNATIVE MEASURES IN THE CONTEXT OF LIQUIDATION

The ability of DGSs to provide financial support in the context of a bank's winding up is particularly important for the latter to be orderly, as requested by the BRRD, and effective. According to article 32(b) of the BRRD, indeed, Member States shall ensure that a FOLF institution in relation to which the resolution authority considers that all the conditions for resolution are met, except for the resolution action being in the public interest,<sup>37</sup> shall be wound up in an orderly manner in accordance with the applicable national law.<sup>38</sup>

The final objectives of the winding up procedure are the liquidation of the assets and the payment of creditors, which are to be carried out by the liquidators. This means that the creditors' interest to be repaid should drive the action of both the authorities and the liquidators. Nevertheless, a number of other extremely relevant interests should be taken into due consideration in running the procedure in order for it to be orderly and effective. Chief among them are the stability of the system, the confidence of depositors and investors and the safeguarding of the going concern value of the FOLF bank.

To this end, normal corporate insolvency proceedings, (typically run by law courts), which apply to non-financial firms, are often not considered adequate for banks.<sup>39</sup> This results from the fact that these proceedings are

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<sup>37</sup> On public interest, see Marco Bodellini, 'Impediments to Resolvability: Critical Issues and Challenges Ahead' (2019) 5 *Open Review of Management, Banking and Finance* 52.

<sup>38</sup> Article 32(b) has been introduced within the BRRD by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019, amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC, OJ L 150/296 (so-called BRRD 2).

<sup>39</sup> See Thomas F. Huertas, 'The Case for Bail-ins' in Andreas Dombret and Patrick S. Kenadjian (eds), *The Bank Recovery and Resolution Directive. Europe's Solution for 'Too Big to Fail'?* (De Gruyter 2013) 167-168; Randall Guynn, 'Are Bailouts Inevitable?' (2012) 29 *Yale Journal on Regulation* 121, 137-140; Wolf-Georg Ringe,

usually lengthy and slow and primarily aimed at (simply) liquidating the assets. The proceeds arising from the sale of the assets are then used to pay (typically, only some of) the creditors.<sup>40</sup> As a consequence, the continuation of the FOLF bank's activities would not be guaranteed, possibly provoking destruction of value.<sup>41</sup> The interruption of the activities in turn can have a potential destabilising impact on the bank's counterparties and, more broadly, on the banking and financial system as well as, sometimes, on its geographical area of operation.

Accordingly, even though the final objective of the winding up procedure is the assets' liquidation and the payment of the bank's creditors, still atomistic liquidation is seldom considered an effective and efficient crisis management procedure for FOLF banks, mostly because it does not ensure the continuation of critical functions, thereby potentially affecting the bank's counterparties. This in turn might end up destroying the going concern value of the good parts of the bank in crisis and therefore can be detrimental for both the bank's creditors and the system as a whole.

To avoid these negative outcomes, the liquidation procedure should then take forms resembling – to a certain extent – the resolution procedure. This can be achieved through the use of legal instruments similar to the resolution tools now regulated by the BRRD. Thus, the main tool to use in the winding up procedure with a view to continuing (at least some of) the FOLF bank's critical functions would be an instrument similar to the sale of business tool, which I define as 'sale of business-like tool'.<sup>42</sup> The latter would allow to

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'Bail-in between Liquidity and Solvency', (2006) University of Oxford Legal Research Paper Series No. 33/2006, 6 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2782457](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782457)> accessed 30 August 2020.

<sup>40</sup> Marco Bodellini, 'Greek and Italian "Lessons" on Bank Restructuring: Is Precautionary Recapitalization the Way Forward?' (2017) 19 Cambridge Yearbook of European Legal Studies 145.

<sup>41</sup> See Rosa Lastra, Costanza Russo and Marco Bodellini, 'Stock Take of the SRB's Activities over the Past Years: What to Improve and Focus on?' (2019) Study Requested by the ECOM Committee of the European Parliament, 11 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634392/IPOL\\_STU\(2019\)634392\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634392/IPOL_STU(2019)634392_EN.pdf)> accessed 30 August 2020.

<sup>42</sup> Pursuant to article 2, paragraph 1, number 58 of the BRRD, the sale of business tool is 'the mechanism for effecting a transfer by a resolution authority of shares

transfer both assets and liabilities of the bank under liquidation to another bank at market prices (which are expected to be higher than liquidation prices), thereby allowing for the continuation of (at least some of) the activities of the FOLF bank through the purchasing institution and safeguarding in this way the going concern value of the FOLF entity.

In this way, the winding up could become a means to allow for the continuation of (some of) the failing bank's activities through a different bank, thereby merging together the dissolving function of the liquidation procedure with the business continuity character of the sale of business tool. The outcomes which could be achieved through the application of the 'sale of business-like tool' in a winding up procedure would be the following: 1) deposits could be moved to the purchasing bank and depositors, therefore, would be fully protected, thereby avoiding runs on other banks and possibly systemic risk; 2) borrowers would keep on accessing financial means provided by the purchasing bank, avoiding to negatively affect the real economy; 3) assets and liabilities (or at least some of them) would be transferred to the purchasing bank, thereby allowing for the continuation of the business activity and maintaining the going concern value.

Yet, even if liquidators manage to find another institution willing to purchase all (or a part of) the assets and liabilities of the bank under liquidation, the value of the liabilities to transfer to the purchasing bank would still, fairly obviously, exceed the value of the assets. In such a scenario, DGSs can play a pivotal role to successfully help run the liquidation procedure. Indeed, they might provide funds to be used to compensate the purchasing bank for taking on such a negative balance between assets and liabilities. Nonetheless, such an intervention is to take place only if the amount of resources to provide is estimated to be lesser than the amount that the DGS should pay to covered depositors in the event of an atomistic liquidation without the transfer of

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or other instruments of ownership issued by an institution under resolution, or assets, rights or liabilities, of an institution under resolution to a purchaser that is not a bridge institution ...'. According to article 38 paragraph 1 of the BRRD, 'Member States shall ensure that resolution authorities have the power to transfer to a purchaser that is not a bridge institution ... (b) all or any assets, rights or liabilities of an institution under resolution'.

deposits to another bank. In this regard, EFDI has taken the view that the least cost evaluation should

consider a comprehensive range of elements, including the direct (financial, operational, etc.) and indirect costs (missing return on liquidity, increasing cost of funding, etc.) of pay-out, adequate haircuts on the expected recovery side, and also contagion and reputation risks which may lead to further reimbursements; on the other side, the costs of 'interventions in liquidation' for the DGS, entailing refundable or recoverable disbursements and guarantees, are proposed to be calculated to the extent of expected losses estimated at the date of the intervention.<sup>43</sup>

Against this background, the application of the 'sale of business-like tool' during the winding up procedure can be seen as an alternative to the bank's atomistic liquidation. The choice between these two alternatives (i.e. atomistic liquidation *vis-à-vis* application of the 'sale of business-like tool') should be based on a comparative assessment. Accordingly, the authorities should run a counterfactual scenario on the basis of which the liquidation strategy is to be informed.

In developing this counterfactual scenario, it should be assumed that in the event of a piecemeal liquidation: 1) the assets will be sold at discounted prices over a relatively long period of time; 2) the bank's activities will be immediately interrupted; 3) the pledged performing assets will be seized and enforced by the secured creditors; 4) the DGS will have to step in to protect covered depositors; 5) the contractual relationships will be immediately terminated with liquidators calling back all the loans and credit lines previously extended to the bank's borrowers.

In practical terms, this would cause enterprises and households to be obliged to pay back their loans to the liquidators overnight. This, in turn, could create a domino effect triggering a significant number of failures affecting many more counterparties. Uninsured depositors and unsecured creditors would have to wait for the winding up procedure timeframe to try and get (likely, only a part of) their money back. The DGS should immediately reimburse the covered depositors and after that it could exercise the subrogation right to the depositors' rights in the liquidation procedure. Nevertheless, due to the limited amount of immediately available resources, in some cases, the DGS

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<sup>43</sup> See European Forum of Deposit Insurers (n 35) 6.

will likely have to ask its member banks for extra contributions. Also, the guarantees released by guarantors, if any, would be immediately enforced. As a consequence, the guarantors would have to pay immediately the guarantee-holders before being able to exercise the ensuing subrogation right in the liquidation procedure.

For all these reasons the application of the 'sale of business-like tool' is often to be considered more efficient than a piecemeal liquidation, since it is able to allow, on the one hand, for the continuation of the bank's most critical functions and, on the other hand, for the protection of the FOLF bank's going concern value. Consequently, the atomistic liquidation with the DGS reimbursement of covered depositors should be activated only in cases in which the sudden interruption of the bank's activities and the destruction of the going concern value are not considered able to negatively affect the system. Still, for the 'sale of business-like tool' to be successfully employed in the context of a bank's liquidation, the DGS needs to be involved in order to finance the transaction(s).

## V. THE IMPLEMENTATION OF DEPOSIT GUARANTEE SCHEMES' OPTIONAL MEASURES IN EUROPEAN UNION MEMBER STATES

The implementation of DGSs' optional measures has been common practice in several EU Member States, thereby showing that there is consensus (at least in some countries) on their effectiveness. According to a survey recently conducted by EFDI on its members, 14 DGSs (of which 8 are private and 6 public) are empowered to implement preventive measures pursuant to article 11, paragraph 3 of the DGSD.<sup>44</sup> The EBA recently conducted a similar survey according to which 'fourteen respondents from fourteen Member States reported that the use of measures under Article 11(3) was allowed in their jurisdiction'.<sup>45</sup> With regard to the measures under article 11, paragraph 6 of

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<sup>44</sup> Ibid 15, pointing out that within the European Union such interventions can be performed in Austria, Croatia, Denmark, France, Germany, Ireland, Italy, Malta and Spain.

<sup>45</sup> See European Banking Authority, 'Opinion of the European Banking Authority on Deposit Guarantee Scheme Funding and Uses of Deposit Guarantee Scheme Funds' (2020), 76, EBA/OP/2020/02 <[https://eba.europa.eu/sites/default/documents/files/document\\_library/Publications/Opinions/2020/EBA%20Opin](https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2020/EBA%20Opin)

DGSD, the EFDI survey pointed out that 17 DGSs (of which 6 are private and 11 public), according to their statute, can carry out alternative interventions in the context of liquidation as well.<sup>46</sup> Both preventive measures and optional measures in the context of liquidation have been frequently employed by several DGSs in some EU Member States and, over time, have proven to be effective.<sup>47</sup>

According to the EFDI's survey, the most common preventive measures adopted by DGSs pursuant to article 11, paragraph 3 of the DGSD were: 1) guarantees provided by the DGS on equity instruments issued for the purpose of bank recovery; 2) subscription by the DGS of equity instruments issued for the purpose of bank recovery; 3) acquisition by the DGS of non-performing loans of the distressed bank; 4) direct financing by the DGS; 5) guarantees provided by the DGS on loans granted by third parties; 6) guarantees provided by the DGS in the context of asset protection schemes; 7) interest rate allowance (e.g. on loans received by the distressed bank); 8) other forms of contribution (e.g. consultancy costs and management tutoring cost, reduction by incentives to retirements, personnel training, IT upgrade costs).<sup>48</sup>

Likewise, the most common alternative measures in the context of liquidation adopted by DGSs pursuant to article 11, paragraph 6 of the DGSD were: 1) full transfer of assets, liabilities and other contracts of the bank under liquidation to another bank; 2) partial transfer of assets and liabilities; 3) imbalance and liquidation costs to be covered; 4) guarantees provided by the

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ion%20on%20DGS%20of%20funding%20and%20uses%20of%20DGS%20of%20funds.pdf  
> accessed 30 August 2020.

<sup>46</sup> See European Forum of Deposit Insurers (n 35) 15, pointing out that within the European Union such interventions can be performed in Austria, Croatia, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovenia and United Kingdom (which at that time was still an EU Member State).

<sup>47</sup> Ibid 16-19, pointing out that before the approval of the DGSD in 2014, 14 DGSs had implemented preventive measures. 8 of these DGSs were private and 6 were public schemes; similarly 7 DGSs had implemented alternative measures in the context of liquidation as well. 3 of these DGSs were private and 4 were public schemes.

<sup>48</sup> Ibid 18.

DGS on equity instruments issued by the purchasing bank; 5) subscription by the DGS of equity instruments issued by the purchasing bank; 6) acquisition by the DGS of non-performing loans of the bank under liquidation; 7) guarantees provided by the DGS on assets transferred to the purchasing bank; 8) allowances to the acquiring bank.<sup>49</sup>

Italy, for example, has for a long time had in place rules allowing its domestic DGSs to perform both optional functions.<sup>50</sup> Interestingly, these optional measures were carried out much more often than the mandatory pay-box function because they were considered more effective than the latter.<sup>51</sup> In practice, instead of paying out the amount of covered deposits in the event of a piecemeal liquidation, the Italian DGSs used: 1) to finance in several ways their member in trouble, typically in the context of early intervention measures, to prevent the situation from escalating and becoming an irreversible crisis, typically a) by financing the acquisition of the troubled bank by another bank; b) by recapitalising it; c) by providing guarantees; d) by purchasing shares; e) by taking on the mismatch between liabilities and assets to be transferred; and 2) to provide different forms of financial support in the context of liquidation with the goal of preserving access of depositors to their covered deposits, typically a) by financing the acquisition of the troubled bank by another bank or b) by taking on the mismatch between liabilities and assets to be transferred. The Italian DGSs informed their decisions through a preventive assessment of both the potential success of the intervention and

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<sup>49</sup> Ibid 21.

<sup>50</sup> See Giuseppe Boccuzzi (n 1) 234.

<sup>51</sup> Similarly, see Augustin Carstens, 'Deposit Insurance and Financial Stability: Old and New Challenges' (2018) Keynote Address at the 17th IADI Annual General Meeting and Annual Conference on Deposit Insurance and Financial Stability: Recent Financial Topics, Basel 18 October 2018, 3 <<https://www.bis.org/speeches/sp181024a.pdf>> accessed 30 August 2020, arguing that the deposit insurer may require a wider range of instruments, beyond conventional liquidation actions which are 'needed to protect deposits as well as to manage and sell the bank's assets in a way that minimises the cost to the deposit insurance funds and maximises value for creditors'; for an overview of liquidation cases with DGS pay-outs across the EU, see Dalvinder Singh, *European Cross-Border Banking and Banking Supervision* (Oxford University Press 2020), appendix 6, table 6.2.

its cost *vis-à-vis* the amount they should have paid to covered depositors had the bank been submitted to a piecemeal liquidation ('least cost principle').

From 1988 to 2018, the main Italian DGS (*Fondo Interbancario di Tutela dei Depositi*) intervened twelve times: in eight cases, the intervention was conducted to allow for the transfer of assets and liabilities to another bank in the context of a liquidation, thereby avoiding an inefficient piecemeal liquidation. In two cases, the intervention supported banks at the early stage of a crisis and only in two cases the DGS simply reimbursed covered depositors in the context of a piecemeal liquidation.<sup>52</sup> In the last two years the Italian DGS intervened two more times by subscribing to very large increases of capital to the benefit of *Cassa di Risparmio di Genova* and *Banca Popolare di Bari*, both placed under temporary administration.<sup>53</sup> In line with such an approach, between 1997 and 2015 the mutual bank's DGS (*Fondo di Garanzia dei Depositanti del Credito Cooperativo*) intervened eighty times and

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<sup>52</sup> See Fondo Interbancario di Tutela dei Depositi, 'FIDT's Interventions, Interventions Report' (2020) <[https://www.fitd.it/Cosa\\_Facciamo/Interventi](https://www.fitd.it/Cosa_Facciamo/Interventi)> accessed 30 August 2020, according to which the total amount disbursed over time by the Italian DGS was EUR 1,249.30 million, of which only EUR 77.3 million for depositors pay-out.

<sup>53</sup> See *Ilsole24ore*, 'Carige, Firmato l'Accordo per la Soluzione Privata di Salvataggio', *Ilsole24.com* (10 August 2019) <<https://www.ilsole24ore.com/art/carige-firmato-l-accordo-la-soluzione-privata-salvataggio-ACbF7Be>> accessed 30 August 2020; Giuseppe Fonte, 'Italy in Talks with EU over Popolare Bari Rescue', *Reuters* (9 January 2020) <<https://www.reuters.com/article/us-italy-banks-popolare-di-bari-idUSKBN1Z813J>> accessed 30 August 2020; see also Francesco Capriglione, 'Banking Crises and Systemic Crises. The Italian Case' (2019) 8 *Law and Economics Yearly Review passim*; Cristina Dias, Jérôme Deslandes and Marcel Magnus, 'Recent Measures for Banca Carige from a BRRD and State Aid Perspective' (2019) European Parliament Briefing, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/624413/IPOL\\_BRI\(2019\)624413\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/624413/IPOL_BRI(2019)624413_EN.pdf)> accessed 30 August 2020, underlining that the funds provided by the Italian DGS in the recapitalization of Carige amounted to EUR 238.8 million in addition to another EUR 313.2 million previously provided by its voluntary arm. The funds provided by the Italian DGS in the recapitalization of Banca Popolare di Bari amounted to EUR 310 million with the DGS commitment to further inject EUR 390 million, if needed.

only in one case it reimbursed covered depositors within an atomistic liquidation procedure.<sup>54</sup>

That is why the role of DGSs should not be limited to just performing the pay-box function and the implementation of the optional functions should, therefore, not be hindered, but rather facilitated. In this vein, each Member State should be encouraged (indeed required) to transpose into its domestic framework the provisions under article 11, paragraphs 3 and 6 of the DGSD in order for DGSs to be empowered to carry out such functions at the early intervention stage as well as at the liquidation stage, thereby paving the way for a new bank crisis management paradigm.

## VI. THE LEGAL OBSTACLES TO DEPOSIT GUARANTEE SCHEMES OPTIONAL INTERVENTIONS IN BANKING CRISES AND SOME PROPOSALS TO REMOVE THEM

Despite the benefits of having DGSs that are empowered to perform optional functions, there are a number of legal constraints at the EU level affecting their capability to implement such measures. A combination of different rules with a different rationale can, indeed, make DGSs' optional interventions very difficult to be put in place. These provisions are: 1) state aid rules, particularly the 2013 European Commission Banking Communication, paragraph 63; 2) depositor preference pursuant to article 108 of the BRRD, which applies also to DGSs when subrogating to depositors' rights in insolvency proceedings, combined with a narrow reading of the 'least cost principle'.

### *1. The Obstacles Resulting from the State Aid Framework*

The first issue arises from paragraph 63 of the 2013 European Commission Banking Communication, which states that when a DGS provides funds with a view to helping restructure a bank in crisis, for the intervention to comply

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<sup>54</sup> See Francesco Baldi, Marcello Bredice and Roberto Di Salvo, 'Bank-Crisis Management Practises in Italy (1978-2015). Perspectives on the Italian Cooperative Credit Network' (2015) 2 *The Journal of European Economic History* 144-145, recalling that the total amount disbursed over time by the Italian Mutual Banks' DGS was EUR 1,363 million.

with the state aid rules, regardless of the private nature of the resources, such resources must not be under the state's control and the decision to intervene must not be imputable to the state.<sup>55</sup> When this is not the case, the intervention will be considered a provision of state aid measures and will need to be authorised by the Commission.<sup>56</sup> In order to be authorised by the Commission, burden sharing measures typically have to be implemented as well. This, in turn, can create further issues since the DGS as such does not have any power to apply the burden-sharing mechanism.<sup>57</sup> Additionally, there are cases where the application of burden sharing measures might end up being counterproductive since they could give rise to knock-on effects.<sup>58</sup>

This provision is particularly critical also in light of the fact that a bank receiving assistance, which is qualified as extraordinary public financial support, would be consequently considered as FOLF under article 32 of the BRRD. As a consequence, the determination of the bank being FOLF would compromise the DGS's attempt to avoid its failure through the preventive intervention.<sup>59</sup> Against this background, the EBA has stated that 'there may be merit in clarifying in the EU framework that the use of DGS funds for

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<sup>55</sup> 2013 European Commission Banking Communication, paragraph 63 reads as follows: 'Interventions by deposit guarantee funds to reimburse depositors in accordance with Member States' obligations under Directive 94/19/EC on deposit-guarantee schemes [...] do not constitute State aid [...] However, the use of those or similar funds to assist in the restructuring of credit institutions may constitute State aid. Whilst the funds in question may derive from the private sector, they may constitute aid to the extent that they come within the control of the State and the decision as to the funds' application is imputable to the State ... The Commission will assess the compatibility of State aid in the form of such interventions under this Communication'.

<sup>56</sup> Interestingly, pursuant to the 2013 Banking Communication, paragraph 63, on the contrary, performing the pay-box function does not qualify as a provision of state aid measures.

<sup>57</sup> See European Forum of Deposit Insurers (n 35) 5.

<sup>58</sup> This is why paragraph 45 of the 2013 Banking Communication empowers the Commission to exclude the application of the burden sharing mechanism when this would endanger financial stability or lead to disproportionate results.

<sup>59</sup> See Concetta Brescia Morra 'The New European Union Framework for Banking Crisis Management: Rules versus Discretion' (2019) 3 European Company and Financial Law Review 365.

failure prevention would not in itself trigger the determination that the institution was failing or likely to fail'.<sup>60</sup>

The European Commission had the opportunity to apply the 2013 Banking Communication rules on DGSs in the *Tercas* case in which it took the view that the measures implemented by the Italian DGS to rescue that institution qualified as a state aid pursuant to article 107 of the Treaty on the Functioning of the European Union (TFEU). This interpretation was eventually confirmed on 23 December 2015 on the basis of: 1) the alleged public nature of the resources owned by the scheme; 2) the public mandate exercised by the Italian DGS in the operation; and 3) the role played by the Bank of Italy in the approval of the intervention.<sup>61</sup>

Nevertheless, Italy, *Banca Popolare di Bari* and the Italian DGS, with the intervention of Bank of Italy, challenged the European Commission's decision, bringing a legal claim before the General Court of the European Union for its annulment. The claim was based on the alleged infringement of article 107 TFEU for erroneous reconstruction of the facts concerning: 1) the public nature of the resources; 2) the imputability to the State of the contested measures; 3) the granting of a selective advantage and 4) the assessment of the compatibility of the alleged state aid with the internal market.<sup>62</sup>

On 19 March 2019, the General Court of the European Union issued the judgment in Joined Cases T-98/16, T-196/16 and T-198/16 and annulled the

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<sup>60</sup> See European Banking Authority (n 45) 80, also suggesting that '[t]he wording of Article 11 of the DGSD should be clarified to ensure that measures mentioned in Article 11(3) are referred to as "preventive measures" and those in Article 11(6) are referred to as "alternative measures", because currently the measure under Article 11(3) is referred to as an "alternative measure", which could create confusion about the purpose of such measures'.

<sup>61</sup> European Commission, 'Decision on the State Aid' SA.39451 (2015/C) (ex 2015/NN) implemented by Italy for Banca Tercas, Brussels, C (2015) 9526, 23 December 2015.

<sup>62</sup> See Andrea Vignini, 'State Aid and Deposit Guarantee Schemes. The CJEU Decision on Tercas and the Role of DGSs in Banking Crises' in *The Role of the CJEU in Shaping the Banking Union: Notes on Tercas (T-98/16) and Fininvest* (Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia 2019) 21.

Commission's decision.<sup>63</sup> The Court argued that the Italian DGS was not carrying out any public mandate, since these optional measures, which are never mandatory, were adopted by the DGS only in order to avoid the more costly financial consequences of reimbursing covered depositors.<sup>64</sup> This would have occurred in the event of a piecemeal liquidation. This argument was further supported by the fact that the DGS intervened on the premise that its measures were compliant with the least cost principle.<sup>65</sup>

The Court highlighted that the Italian DGS is a private consortium of banks, which acts on behalf and in the interest of its members (i.e. the Italian banks) and its bodies are composed of the banks' representatives who are appointed by the DGS's members themselves.<sup>66</sup> Similarly, the Court rejected the argument that the Bank of Italy could exercise control over the DGS activities by attending its meetings through one of its officials as an observer with no voting rights.<sup>67</sup>

The Court also reached the conclusion that the DGS's intervention was the result of the free will of its members, autonomously deciding: 1) to make the DGS carry out those preventive measures and 2) to finance the support granted to *Tercas*, pursuing their own private interest of avoiding the more expensive reimbursement of covered depositors, which would have been carried out in the event of a piecemeal liquidation.<sup>68</sup> In the Court's view, the Commission failed to prove sufficiently that the resources were under the control and at disposal of the Italian public authorities.<sup>69</sup> All these elements and considerations, accordingly, drove the Court to annul the Commission's decision on the grounds that the intervention concerned did not violate the state aid framework. Nonetheless, the European Commission appealed

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<sup>63</sup> Joined Cases T-98/16, T-196/16 and T-198/16 *Italian Republic and Others v European Commission* EU: T:2019:167.

<sup>64</sup> *Ibid* paragraph 97.

<sup>65</sup> *Ibid* paragraph 104.

<sup>66</sup> *Ibid* paragraph 113.

<sup>67</sup> *Ibid* paragraph 121.

<sup>68</sup> *Ibid* paragraph 159.

<sup>69</sup> *Ibid* paragraph 161.

against the judgment of the General Court before the Court of Justice and the case is still pending.<sup>70</sup>

The decision of the General Court shed some light on the interplay between state aid rules and DGSs' optional interventions, thereby opening up the possibility of putting these DGSs alternative interventions in place where the conditions highlighted in the judgement are met. However, DGSs with a decision-making process based on the involvement of public authorities might be barred from implementing those measures since they could be qualified as state aid. This interpretation could be grounded on the assumption of their decisions being considered imputable to their state and their resources being regarded as under their state's control.<sup>71</sup> But if this will be the case, such a reading of the Banking Communication rules, in turn, could affect the level playing field between DGSs (and, as a consequence, between their domestic banking systems) established in different Member States on the basis of their governance arrangements, threatening in this way competition in the EU single market. Indeed, in this case the intervention of a public DGS would be qualified as state aid and therefore it could be implemented only after being authorised by the European Commission. The latter is empowered to authorise similar interventions when burden-sharing measures involving shareholders and subordinated creditors are put in place as well. The application of burden-sharing measures, however, might be sometimes detrimental, thus in such cases it should not take place.<sup>72</sup> Additionally, the application of the burden sharing mechanism to equity

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<sup>70</sup> Case C-425/19 P <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=216205&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8873673>> accessed 23 February 2021; the appeal states: 'The Commission considers that the judgment under appeal is based on incorrect legal considerations and distortion of the facts, which irremediably invalidate its findings and the operative part of the judgment'.

<sup>71</sup> The European Forum of Deposit Insurers, for example, distinguishes among its members between publicly managed DGSs and privately managed DGSs on the basis of a self-assessment that the members conducted by focusing on corporate status (in the national jurisdiction) and/or corporate governance mechanism (appointment of directors, decision-making powers); see European Forum of Deposit Insurers (n 35) 15.

<sup>72</sup> See Marco Bodellini, 'To Bail-In, or to Bail-Out, That Is the Question' (2018) 19 *European Business Organization Law Review* 377.

instruments and subordinated debt instruments falls outside the DGS mandate and therefore requires a specific decision of the resolution authorities. In this regard, it has been observed that the inability of DGSs to implement burden-sharing measures 'reflects an asymmetry with the resolution authorities' powers', thereby creating coordination issues.<sup>73</sup>

The *Tercas* case is rather informative in this regard, since it clearly shows how the European Commission reads and interprets its 2013 Banking Communication rules. The European Commission decided that a private law consortium that is privately funded and managed, like the Italian DGS, granted state aid measures to *Tercas* because its intervention was influenced and directed by the Italian public authorities (mostly the Bank of Italy). This reading of the facts has been criticised<sup>74</sup> and eventually the Commission's decision was overruled by the General Court of the European Union.<sup>75</sup> The decision of the General Court is therefore very relevant. Nonetheless, in order to clarify the regime in place, avoid legal uncertainties, and remove the risk that optional measures can be implemented only by some EU DGSs, it seems that a review of the 2013 Banking Communication rules on DGS's optional measures and state aid provision would be needed.<sup>76</sup>

The need for a review of the Banking Communication is based on a number of considerations. From a systematic perspective, it is worth noting that the main goal of the post-global financial crisis bank crisis management regime

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<sup>73</sup> See European Forum of Deposit Insurers (n 35), 5, pointing out that since article 11 paragraph 3 of the DGSD provides that since 'the DGS shall consult the resolution authority and the competent authority on the measures and the conditions imposed on the credit institution, it might be appropriate to provide for an explicit pro-active role in this regard in favour of the DGS when packaging the entire intervention, also in order to clarify the roles and responsibilities of each player involved'.

<sup>74</sup> See Salvatore Maccarone, 'La Sentenza del Tribunale Europeo sul Caso *Tercas*' (2019) 3 *Bancaria* 20.

<sup>75</sup> Joined Cases T-98/16, T-196/16 and T-198/16 *Italian Republic and Others v European Commission* EU: T:2019:167.

<sup>76</sup> Accordingly, see European Banking Authority (n 45), 81, stating that '[s]ubject to the outcome of the Commission's appeal in the *Tercas* case, the EBA invites the Commission to consider if there is a need to amend the Banking Communication and the potentially different consequences for DGSs depending on their legal status and/or governance structure'.

is, according to the Financial Stability Board 'Key Attributes of Effective Resolution Regimes for Financial Institutions', to handle a bank's crisis without using public money while simultaneously avoiding the creation of financial instability.<sup>77</sup> This in itself is a very difficult goal to achieve.<sup>78</sup> But if this is the objective, then it should be seen as conceptually incoherent to render the use of private resources, like the ones of DGSs, more complicated. This holds true even when a public authority, such as the banking supervisor or the ministry of finance, considers it appropriate to exercise a form of moral suasion on the banking industry participants to orchestrate, coordinate, and implement an effective solution in the interest of the system as a whole based on the intervention of the DGS. Such a position rests on the consideration that the use of private resources by definition should not be qualified as state aid provision. Even more so, in a context where resources are by nature finite and where public intervention is discouraged, any possible privately funded solution should be facilitated. Accordingly, the International Monetary Fund (IMF), in its 2018 Financial Sector Assessment Program (FSAP) for the Euro Area, has pointed out that 'deposit and asset transfers funded by DISs could likewise be granted a presumption of compliance when provided on a least cost basis according to agreed open procedures and subject to European-level oversight, thus minimizing competition concerns'.<sup>79</sup>

Such a revision of the 2013 Banking Communication rules, based on the arguments advanced by the General Court of Justice in the *Tercas* case, should

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<sup>77</sup> Financial Stability Board, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (2014) <[https://www.fsb.org/wp-content/uploads/r\\_141015.pdf](https://www.fsb.org/wp-content/uploads/r_141015.pdf)> accessed 30 August 2020, 1, stating that the implementation of the Key Attributes 'should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions'.

<sup>78</sup> See Biljana Biljanovska, 'Aligning Market Discipline and Financial Stability: A More Gradual Shift from Contingent Convertible Capital to Bail-in Measures' (2016) 17 *European Business Organisation Law Review* 105-106, arguing that 'market discipline and financial stability cannot be achieved simultaneously'.

<sup>79</sup> See International Monetary Fund, 'Euro Area Policies, Financial System Stability Assessment', (2018) IMF Country Report no. 18/226, 28 <<https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-System-Stability-Assessment-46100>> accessed 30 August 2020; similarly see European Forum of Deposit Insurers (n 35) 25.

determine that the optional functions implemented by those DGSs that comply with the least cost principle do not qualify as state aid measures, regardless of their governance arrangements and decision-making process.<sup>80</sup> In this way, the risk of different treatments depending on the legal structure of the DGS would be removed and it would also be possible to resolve the friction between article 11 of the DGSD, the Banking 2013 Communication rules and article 32 of the BRRD, stating that the provision of extraordinary public financial support would make the bank FOLF. Indeed, if such measures no longer qualify as a state aid provision, their implementation will not cause the recipient bank to be considered FOLF and therefore the DGSs intervention, as regulated under article 11 of the DGSD, could take place. Also, such a review would permit a deviation from the mandatory implementation of burden-sharing measures, which, as discussed, in some cases might be counterproductive.

*2. The Obstacles Resulting from the Granting to Deposit Guarantee Schemes of a Super Priority in the Bank's Liquidation and the Narrow Reading of the 'Least Cost Principle'*

The second issue arises from the introduction of the depositor preference rule in the BRRD. This super priority, indeed, also applies to DGSs subrogating to depositors' rights in the insolvency proceedings. Such a rule, coupled with a narrow reading of the 'least cost principle', could end up making every DGS optional intervention very difficult, if not impossible. The granting of this super priority to DGSs impacts the optional interventions in that they are allowed only to the extent that the DGS does not end up spending more money than the amount it would have had to pay in order to reimburse covered depositors in the context of a piecemeal liquidation according to the 'least cost principle'. The critical aspect is that, due to the super priority, it is unlikely that the DGS will be called on to bear losses at all.

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<sup>80</sup> Accordingly, see European Banking Authority (n 45) 81, stating that 'Subject to the outcome of the Commission's appeal in the *Tercas* case, the EBA invites the Commission to consider if there is a need to amend the Banking Communication and the potentially different consequences for DGSs depending on their legal status and/or governance structure'.

This could occur only when losses are so significant that all the other liabilities ranked below deposits are not enough to absorb them.

It is true that when only focusing on a single crisis, the DGS might seem better off as it will recover all (or a relevant part of) the resources provided to reimburse the affected covered depositors, due to the extension of the depositor preference. Nonetheless, this is not necessarily the best possible outcome for the system,<sup>81</sup> which would be the overall cheapest and safest solution, also taking into account the interests of taxpayers.<sup>82</sup> Yet, due to the depositor preference extended to DGSs, it will be almost impossible for them to provide any form of assistance aimed at preventing the bank's failure as well as to finance measures in the context of liquidation, in contrast with the US framework.<sup>83</sup> As a result, typically only a piecemeal liquidation can take place, which will cause the destruction of much more value, negatively affecting both the other unsecured creditors and potentially the banking system as whole. Indeed, a disorderly liquidation can trigger a crisis of confidence, entailing massive shifts of deposits across institutions, and in particularly serious situations even deposit runs. Should the crisis spread to other banks as well, then the costs for the DGS of reimbursing covered depositors could become much higher than originally foreseen.<sup>84</sup> Even more interestingly, piecemeal liquidation often would be neither beneficial for the system nor in the interest of the DGS itself. This is because the interest of the banking system and the interest of the DGS are typically aligned. Since the interest of the DGS is the interest of its members, which are the banks

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<sup>81</sup> See Alessandra De Aldisio and others, 'Towards a Framework for Orderly Liquidation of Banks in the EU' (*Notes on Financial Stability and Supervision of Banca d'Italia* 2019) 6, who use an example to demonstrate that even when an optional measure implemented by the DGS ends up being more expensive for it than depositors pay-out, such a strategy is typically more effective from a system-wide perspective.

<sup>82</sup> See European Forum of Deposit Insurers (n 35) 25.

<sup>83</sup> See Fernando Restoy, 'How to Improve Crisis Management in the Banking Union: a European FDIC?' (2019) CIRSIF Annual International Conference on 'Financial Supervision and Financial Stability 10 Years after the Crisis: Achievements and Next Steps', Lisbon 4 July 2019, 4, <<https://www.bis.org/speeches/sp190715.pdf>> accessed 30 August 2020.

<sup>84</sup> See De Aldisio and others (n 81) 9.

composing the banking system, the interest of the DGS is the interest of the banking system at large.

Moving from this assumption, the 'least cost principle' should be rethought in light of the overarching interest of the system and without just considering the cost paid by the DGS in performing optional measures in the crisis concerned.<sup>85</sup> Therefore, the amount to be paid should be compared to the sum of direct and indirect costs for the banking system – and potentially for the real economy – arising from an atomistic liquidation.<sup>86</sup> In other words, disregarding the 'indirect costs' for the system would lead to a partial result which is not able to point out the best possible solution.

This reading of the rules, in turn, is in line with the rationale behind the DGSD, which clearly provides the possibility for DGSs to intervene by carrying out optional measures.<sup>87</sup> It would be irrational to provide such a possibility and then to introduce other rules in different legislative acts substantially hindering the performance of such measures. Furthermore, this is the very essence of the Financial Stability Board's 'Key Attributes of Effective Resolution Regimes' that require authorities to resolve FOLF banks without using public money, while avoiding the creation of negative systemic effects.<sup>88</sup> Given that the resources of a DGS are those provided by

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<sup>85</sup> On this see European Banking Authority (n 45) 81, stating that 'There is a need to provide more clarity on how to assess that: the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS (as per Article 11(3)); the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned' (as per Article 11(6)). There is also a need for more clarity on what kind of costs should be taken into account in the abovementioned assessments (only direct or also indirect costs – and what costs constitute indirect costs), particularly because the current lack of clarity poses the risk that different authorities will take different approaches to the least cost assessment; such clarifications should be made in a legal product that provides sufficient legal certainty for DGSs'.

<sup>86</sup> See European Forum of Deposit Insurers (n 35) 6.

<sup>87</sup> According to recital 16 of the DGSD 'It should also be possible, where permitted under national law, for a DGS to go beyond a pure reimbursement function and to use the available financial means in order to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts ...'.

<sup>88</sup> See Financial Stability Board (n 77) 1.

the banks, their use in handling crises should be facilitated on the grounds that otherwise the whole system, and thereby the public, could be negatively affected.

Accordingly, the scope of the least cost principle should be enlarged in order to enable the performance of system-wide driven solutions based on the DGSs' optional interventions, since, as it is, the legislative framework makes a strategy that is often not efficient (i.e. a piecemeal liquidation with the DGS's reimbursement of covered depositors), the only practically possible one. For this proposal to properly work without creating legal uncertainties, article 11, paragraph 3 and article 11, paragraph 6 of the DGSD should be amended by clearly spelling out how such a revised principle should be applied in practice, namely by stating which (direct and indirect) costs should be taken into account and compared with the amount of depositor pay-out.

The counterargument to this line of reasoning could be that a system-wide interpretation of the least cost principle would be either arbitrary and inaccurate or practically impossible. Nevertheless, in this regard it has been stated that even though the calculation of indirect costs would not be easy, still according to previous experiences these costs can be material. Therefore, a methodology to calculate them could be developed.<sup>89</sup>

In any case, if such a different and broader application of the 'least cost principle', aimed at taking into account the overarching interest of the system, was to be considered as practically impossible, then a more radical solution would be the abolition *sic et simpliciter* of the extension to the DGSs of the super priority in the exercise of their subrogation rights within the insolvency proceedings.<sup>90</sup> In substantive terms, the result would be the same, as DGSs would be allowed to also perform the optional measures under article 11, paragraphs 3 and 6 of the DGSD. Given that the interests of the

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<sup>89</sup> In this regard, De Aldisio and others (n 81) 9, argue that 'even if it is more difficult to quantify these costs than it is to quantify direct costs, experience shows that they can indeed be material, as the history of crises is full of contagion episodes. It would not be overly difficult to identify a methodology to estimate these additional costs'.

<sup>90</sup> Ibid 8, arguing that 'to broaden the number of cases in which the DGS may carry out alternative interventions, the super-priority rule could be eliminated for subrogated DGSs (it could still be applied to insured depositors)'.

system and the interests of DGSs are equivalent, the latter should not raise any opposition to such a legislative amendment, which, in turn, would align the EU regime with the US one.<sup>91</sup>

## VII. CONCLUDING REMARKS

DGSs are a fundamental component of the banking system safety-net. They play a pivotal role in maintaining financial stability since they are an *ex-ante* form of protection for depositors, who, due to them, have the guarantee to get their covered deposits back in any case. Accordingly, their presence is in itself instrumental to keep depositors' confidence in the system and, consequently, to maintain its stability. Their essential purpose is the performance of the pay-box function that, as such, needs to be included in the bank crisis management legal framework. Yet, the optional functions (i.e. the implementation of alternative measures aimed at preventing a bank's failure and the provision of financial means in the context of liquidation aimed at preserving access of depositors to covered deposits) might be even more effective, from a system-wide perspective, in maintaining financial stability and reducing the destruction of value potentially resulting from a piecemeal liquidation procedure, than the pay-box function.

In this regard, the possibility for a DGS to intervene in the face of the first symptoms of a crisis can turn out to be particularly effective to avoid that the latter further escalates by getting out of control. In fact, many banking crises, still at an early stage, can be more efficiently handled through a DGS intervention aimed at helping the restructuring of the institutions concerned. Likewise, the ability of DGSs to provide financial assistance in the context of a bank's liquidation might render this process orderly and effective. That is why the role of DGSs should not be limited to just performing the pay-box function. In this regard, moving from the analysis of the effectiveness of the optional functions in some Member States and relying on empirical data resulting from surveys conducted by EFDI and EBA, this paper has advanced the argument that the implementation of the optional functions should not be hindered, but rather facilitated. In this vein, each EU Member State should be encouraged (indeed required) to transpose

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<sup>91</sup> See Restoy (n 83) 4.

in its domestic framework the provisions under article 11, paragraphs 3 and 6 of DGSD regulating the DGSs optional measures in order for them to be empowered to carry out such functions at the early intervention stage as well as at the liquidation stage.<sup>92</sup>

Still, since currently the implementation of both these functions in the Member States is hindered by a number of legislative obstacles, this paper, after analysing the legal regime in place, has advanced some reform proposals aimed at removing them. Accordingly, with regard to the state aid framework, this paper has argued in favour of a revision of the 2013 Banking Communication rules aimed at ensuring that the optional functions implemented by those DGSs that comply with the least cost principle do not qualify as state aid measures, regardless of their governance arrangements and decision-making process. In this way, the risk of different treatments depending on the legal structure of the DGS would be removed and it would also be possible to resolve the friction between article 11 of the DGSD, the 2013 Banking Communication rules and article 32 of the BRRD, stating that the provision of extraordinary public financial support would make the bank FOLF. Indeed, if such measures no longer qualify as a state aid provision, their implementation will not cause the recipient bank to be considered FOLF and therefore the DGSs intervention, as regulated under article 11 of the DGSD, could successfully take place. Such a review would also permit a deviation from the mandatory implementation of burden sharing measures, which in some cases might be counterproductive.

In relation to the extension of depositor preference to DGSs and the least cost principle, by contrast, this paper has supported a rethinking of the principle, bearing in mind the overarching interest of the system and without just considering the cost paid by the DGS in performing optional measures in the crisis concerned. To do so, the amount to be paid to reimburse covered depositors should be compared to the sum of direct and indirect costs for the banking system – and potentially for the real economy – arising from an atomistic liquidation. Such an approach would enable an implementation of

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<sup>92</sup> See European Forum of Deposit Insurers (n 35) 24, arguing that some EU Member States did not transpose into their domestic legal systems the provisions of Article 11 paragraph 6 of the DGSD due 'to the rigidity of the existing court-based insolvency proceedings'.

the most effective solutions from a system-wide perspective in terms of both keeping financial stability and reducing the destruction of value potentially arising from atomistic liquidation procedures, thereby leading to the adoption of a new bank crisis management paradigm. Such a new bank crisis management paradigm would be the result of empowering DGSs both to intervene in the face of the first symptoms of a crisis, thereby preventing it from escalating, and to provide financial support in the context of a liquidation ensuring, in this way, that it is orderly and effective. This, in turn, could also pave the way for the establishment of a European Deposit Insurance Scheme (EDIS), with a centralised decision-making at European level and funding sources mutualised within the Banking Union.<sup>93</sup>

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<sup>93</sup> On the European Deposit Insurance Scheme, see Dirk Schoenmaker, 'Building a Stable European Deposit Insurance Scheme' (2018) 4 *Journal of Financial Regulation* 314.

## BOOK REVIEWS

ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* (OXFORD UNIVERSITY PRESS 2020)

Maria Patrin\* 

### I. INTRODUCTION

Some years ago, when I was working in Brussels as a consultant on European affairs, I used to travel regularly to Japan to update Japanese manufacturers on the latest developments in European Union (EU) legislation. At the time I did not suspect that, in so doing, I was contributing to what Anu Bradford in her latest book calls the "Brussels Effect". The Brussels Effect refers to the phenomenon whereby, under specific conditions, the EU influences and shapes the global regulatory environment by unilaterally adopting stringent regulatory standards for its own internal market. In order to gain and maintain access to the large European consumer market, most multinational companies are pushed to comply with EU standards and often expand such compliance across their world-wide production. Thus, in many fields, the EU has established itself as a global regulatory hegemon. The EU determines the amount of chemicals present in toys made in China, the notices about cookies that we receive while surfing on the web, the safety devices installed in cars produced in Japan and whether or not two US companies can merge. In my own experience, our Japanese clients used information on EU rules and laws to adapt their future production to EU environmental and safety standards, internalising EU regulatory preferences in their own production planning.

Anu Bradford's *The Brussels Effect: How the European Union Rules the World* is a well-structured book with a convincing narrative. It builds upon a 2012 article by the same author that introduced the concept of the Brussels Effect

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and identified its main traits.<sup>1</sup> The 2020 book further develops the theoretical and practical aspects of this phenomenon, showing how and why the EU has become a global regulatory hegemon. By positing the Brussels Effect, the author proposes a new reading of the role that Europe plays in the world, reframing a debate that is too often dominated either by a dismissive stance about Europe's inexorably declining power or by a normative over-reliance on the benefits and virtues of the EU's model.<sup>2</sup> In the first part of this review, I will summarise the main arguments presented in the book. In the second part, I will engage in some critical reflections prompted by these arguments.

## II. UNDERSTANDING THE BRUSSELS EFFECT

Bradford positions her work at the crossroads between the internal perspective of European studies and the wider domain of international relations, drawing liberally from law, political science and economics. The breadth of her book reflects a sense of dual belonging that she acknowledges in her preface: 'As a result of my personal and professional journey from Europe to the United States, today I have the benefit of observing the EU at the same time as an insider and as an outsider'.<sup>3</sup> This privileged perspective makes Bradford a natural contributor to the strand of legal and political science literature that looks at the kind of external power the EU exercises, the external impact of EU rules and norms and why third countries align their domestic law systems to EU law.

It is well established that the EU exports its norms and standards via unilateral, bilateral and multilateral channels, including neighbourhood

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<sup>1</sup> Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

<sup>2</sup> See respectively Douglas Webber, 'Declining Power Europe: The Evolution of the European Union's World Power in the Early 21st Century' (2016) 1 *European Review of International Studies* 31; Ian Manners, 'The European Union's Normative Power in Global Politics' in Hubert Zimmermann and Andreas Dür (eds), *Key Controversies in European Integration* (Palgrave Macmillan 2012).

<sup>3</sup> Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) x.

policy and partnerships, free trade agreements and international treaties.<sup>4</sup> How and why the EU does this has been the object of a burgeoning literature. The capacity of the EU to extend internal EU rules and policies beyond borders has been captured among others by Lavanex and Schimmelfennig's concept of 'external governance'<sup>5</sup> and by Zeitlin's 'extended experimentalist governance'.<sup>6</sup> It has been addressed by Manner's idea of the EU's "normative power", according to which the EU exports norms in the name of universal principles.<sup>7</sup> In the field of law, Scott has looked at the 'extraterritoriality and territorial extension of EU law', which arises when EU legislation requires third country law or conduct to be in accordance with EU law.<sup>8</sup> Most of these accounts are centred on the EU's active efforts to shape the international regulatory environment. Bradford's Brussels Effect introduces a new perspective to this debate by focusing on market dynamics and multinational economic actors and shifting the analysis away from a Europe-centred approach. In other words, it is through the effects of the market and the choices of international economic players that Europe takes centre-stage and a system of global EU influence emerges.

The book is structured around three levels of analysis: a theoretical introduction of the Brussels effect; an empirical illustration through targeted case-studies; and a normative assessment of the regulatory power exerted by Europe through the Brussels Effect. This structure may at times appear slightly repetitive, but it allows the main argument of the book to come across clearly and embeds it in a consistent line of reasoning.

The theoretical part of the work lays out the conditions under which the Brussels Effect takes place and shows how the EU has come to play the role of global regulatory hegemon. To start with, Bradford distinguishes between

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<sup>4</sup> See e.g. Gerda Falkner and Patrick Müller (eds), *EU Policies in a Global Perspective: Shaping or Taking Global Regimes?* (Routledge 2014).

<sup>5</sup> Sandra Lavanex and Frank Schimmelfennig, 'EU Rules beyond EU Borders: Theorising External Governance in EU Politics', (2009) 16 *Journal of European Public Policy* 791.

<sup>6</sup> Jonathan Zeitlin (ed), *Extending Experimentalist Governance: The European Union and Transnational Regulation* (Oxford University Press 2015), *iff*.

<sup>7</sup> Manners (n 2).

<sup>8</sup> Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

two interconnected forms of the Brussels Effect. The *de facto* Brussels Effect takes place when, to gain access to the internal market, multinational companies adopt EU standards and subsequently extend them to their global production. This is a consequence of market forces: Companies trading internationally tend naturally to comply with the most stringent standards so as to avoid customizing their production in different markets. The *de jure* Brussels Effect occurs when foreign governments adopt EU-like regulation, often as a consequence of pressures by those same multinationals that, once adjusted to EU rules, advocate for the same level of regulation in their domestic markets. Thus, the *de jure* Brussels Effect is largely a consequence of the *de facto* Brussels effect, which therefore commands the primary focus of the book.

Bradford acknowledges that the Brussels Effect does not take place in all EU regulatory domains. She also argues that, while today – and most likely for years to come – the EU is in a unique position to fulfil the role of global regulator, the Brussels Effect is not *per se* specific to Europe and could apply to any other jurisdiction in the presence of specific market and regulatory features. Bradford cites five main criteria, to be exact. First, a global regulator must command a *large market* in order to incentivize foreign companies to adapt to its stringent rules. Second and third, its institutions must possess sufficient *regulatory capacity* and willingness to adopt *stringent regulatory standards*. Fourth, its regulations must target *inelastic markets*, such as consumer markets, so that companies cannot simply flee the jurisdiction to circumvent regulation. Finally, the products and production it targets must be *non-divisible* such that companies are forced to extend compliance measures across their entire global operations and not simply customize their products in different markets.

The case-studies of Part II focus on market competition, the digital economy, consumer safety and the environment. They test how the above-mentioned elements come together to determine the Brussels Effect in practice, both *de facto* and *de jure*. Bradford shows that the last criterion of non-divisibility often explains the circumstances under which the Brussels Effect takes place. In areas such as competition policy, data protection and chemical safety, the Brussels effect is often pervasive. When it comes to food safety, however, diverging consumer preferences often make products

divisible and companies thus prefer to customize their production to different markets instead of pinning it to the most stringent standard. Nevertheless, the Brussels Effect remains strong in the domain of GMO regulation.

The last part of the book is devoted to a normative assessment of whether the Brussels effect is beneficial and whether it will prove lasting. The author develops a generally positive assessment of the Brussels Effect. She acknowledges the redistributive costs for societies of the regulatory race to the top. However, she argues that the Brussels Effect amounts neither to a form of regulatory protectionism nor to regulatory imperialism. There is no coercion involved. The phenomenon is steered by the self-interest of multinational companies and there is little that foreign governments can do to prevent it. Independent of any cost-benefit analysis, the Brussels Effect is a necessary consequence of global market dynamics and it will not fade away easily. Certainly, the Brussels Effect faces challenges from external developments (such as the rise of China, the decline of international cooperation and the crisis of globalisation) and, even moreso, from within the EU: Brexit will reduce the EU market size by 15%, making the internal market less appealing to foreign companies, while widespread anti-EU sentiment and populism risk eroding the EU powers and deadlocking decision-making processes. Bradford's conclusions are however optimistic. Neither China (despite its growing markets) nor any other country currently meets the criteria needed to threaten the EU's regulatory dominance. Internally, anti-EU sentiment generally targets politically salient topics, which do not tend to implicate the technical regulatory areas in which the Brussels Effect usually takes place. As for Brexit, Bradford convincingly predicts that the UK will not get rid of EU regulation after its exit. The EU will remain the UK's number one export market and the UK will need to seek regulatory alignment to maintain access to that market. If anything, the UK will continue to be bound by EU rules without being able to influence them in their adoption phase.

### III. REFLECTING UPON THE BRUSSELS EFFECT

Overall, Bradford's *The Brussels Effect* presents an unconventional but solid theory about the EU's external power, which it supports with a broad range

of empirical data. Bradford moves fluidly between theory and praxis to show the different aspects of the phenomenon but is also very careful in circumscribing the limits of her theory. In my view, the single greatest contribution of the book lies in the simplicity of its argument, which is nonetheless compelling. The author succeeds in explaining how the Brussels Effect shapes a comprehensive system of global influence dominated by the EU. Through the *de facto* and *de jure* Brussels Effect, the EU's unilateral and multilateral action come together in a puzzle where all pieces easily fit with each other.

Perhaps the work's main weakness is that this core argument was already well developed in Bradford's 2012 article. In this respect, the book adds little to the basic theory of the Brussels Effect. It does, however, provide new empirical support and an assessment of current and future developments. Considering the magnitude and speed of political and social change, an update to the 2012 article was needed and the book is anything but irrelevant. It shows that the Brussels Effect is resilient to the many crises that the EU has been facing. It even argues that those crises can nurture and reinforce the Brussels Effect. In this way, the Brussels Effect emerges as a historical path-dependent model that can also adapt to face future challenges. This appears to me as a crucial point for a theory which, published in 2020, will certainly have to account for the COVID-19 crisis. Will the pandemic result in isolation and the demise of multilateralism (as countries erect new barriers and compete for vaccines and health devices) or will it strengthen cooperation and trade (since the challenge is, by its very nature, a global one that cannot be stopped at a nation's borders)? In terms of regulation, the pandemic will perhaps show the importance of high regulatory standards on health promotion. Yet its economic consequences may well amplify calls for reducing administrative burdens and pursuing a "better" regulation agenda (that is, one favouring a less regulated economic environment).

In the last part of this review I would like to focus on three main considerations. Rather than a criticism, they are reflections inspired by the book. They concern: the role of civil society and corporate interests in European governance; the role of law inside and outside the EU; and the impact of the Brussels Effect on the EU's accountability and democratic legitimacy.

Bradford rightly includes corporate interests and civil society in her analysis. She suggests that, although foreign companies invest heavily in EU advocacy, they are rarely successful as the EU ultimately persists in issuing stringent regulations despite corporate opposition. She further argues that civil society groups are more influential in Brussels than in the US and that, as a result, EU regulation strikes a fairer balance between the various interests at stake.<sup>9</sup> Although I agree that interest representation in Brussels is very much embedded in the decision-making process, I think that Bradford may be too lenient with the Brussels lobbying environment. The European Commission draws extensively on expertise from business and NGOs alike, but activists cannot compete with the resources that big firms invest in EU advocacy. Though perhaps at a lower degree, lobbying goes on behind closed doors in Brussels just as it does in the US and businesses wield formidable power, especially because of the internal market focus of much EU regulation. For instance, trade associations have been instrumental in lowering EU ambitions on many environmental issues, such as the reduction of CO<sub>2</sub> emission standards (ambitions which are admittedly higher than in most other countries, including the US).<sup>10</sup> Considering this, could the Brussels Effect lead to strengthened lobbying in Brussels and thus to lower regulatory standards being adopted in the EU? In other words, could increased corporate lobbying erode the Brussels Effect from within?

On the opposite side, civil society has not remained silent. An uprise of citizens' engagement has grown in parallel with – or despite – corporate lobbying and has increasingly assumed an international character. In this regard, I wonder how recent grassroots civil society movements such as "Fridays for Future" can act as multipliers of the Brussels Effect. Originating in Europe, such movements have engaged in a fight that has expanded beyond borders, forging preferences for high global environmental and safety standards. They have grown increasingly influential and now represent an innovative instrument for regulatory convergence. It would be interesting to

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<sup>9</sup> Bradford, *The Brussels Effect* (n 3) 251

<sup>10</sup> The automotive industry, for instance, is renowned for its lobbying efforts. See Sigrun M Wagner, 'Environmental Policies and Lobbying by Automotive Makers in Europe' in Luciano Ciravegna (ed), *Sustaining Industrial Competitiveness after the Crisis* (Palgrave Macmillan 2012).

examine how such movements interact with the Brussels Effect. Can a sort of "civil society Brussels Effect" be envisaged?

The book also invites an overall reflection on the role of law in the EU and beyond. Law has undoubtedly constituted a significant source of power for the EU and a driver of integration.<sup>11</sup> Cremona and Scott have highlighted that the EU's external power is itself rooted in the law: 'As an international legal actor, law is at the foundation of the EU's external power; it may have profound effects on the laws and governance arrangements of other countries, upon global governance arrangements and international and transnational norms'.<sup>12</sup> Significantly, they acknowledge the Brussels Effect as part of the global reach of EU law. Indeed, the Brussels Effect enables the transformative potential of legal rules to operate at a global scale. Eventually, the Brussels Effect results not only in global regulatory convergence, but also in the globalisation of a system essentially based on legal rules, whereby the importance of law in governing market relations and trade is globalised as well. Yet market players, rather than institutions and courts, are the main drivers of this phenomenon.

At the same time, however, the Brussels Effect, through the globalisation of EU law, strengthens the impression of a legal, regulatory Europe, whose main power is essentially built upon the functioning of the internal market. The normative dimension of EU external influence is treated as a secondary – at best supporting – element in achieving internal market objectives. Yet, is it enough for the EU to be a mere regulator? Should the EU not be more than its market and its rules? These questions lead me to my third and final point.

Ultimately the image that comes out of Bradford's book is one of a technocratic Europe that advances its power and influence at the global level through law and regulation. The author does not seem to worry about this. On the contrary, she sees technocracy as a positive instrument that protects the Brussels Effect from the threats of national populisms: 'The technocratic nature of EU rule-making may further contribute to the resilience of the

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<sup>11</sup> Joseph H Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

<sup>12</sup> Marise Cremona and Joanne Scott, 'Introduction: EU Law Beyond EU Borders' in Marise Cremona and Joanne Scott (ed), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 1.

Brussels Effect'.<sup>13</sup> However, in my opinion, endorsing a technocratic Europe risks further undermining the democratic legitimacy of EU politics and policies. This is not only problematic for EU internal decision-making, but it also eventually affects the global regulatory environment, as the EU democratic deficit is shifted to the international level through the Brussels Effect. Indeed the author admits that the Brussels Effect can undermine the democratic accountability of foreign citizens: '[...]the idea that unelected European civil servants have the ability to block global transactions by US companies can be disconcerting to those involved', as 'American citizens cannot hold European politicians accountable for decisions they disagree with'.<sup>14</sup> Since, even in Brussels, accountability of decision-makers is a contested issue, the Brussels Effect can act as a multiplier of democratic shortcomings. Ultimately, it enhances the need to ensure sound democratic processes in the EU, especially at a time of resurgent political contestation and appeals to national sovereignty.

#### IV. CONCLUSION

In conclusion, Anu Bradford's *The Brussels Effect* is an enlightening read for both the academic community and the wider public, including policy-makers and public affairs professionals. The book offers a simple answer to the everlasting question: what does Europe do for you? It develops a convincing narrative about why EU regulation matters and how, in practice, it affects everyday lives not only of Europeans, but indeed of most of the people in the world. According to this narrative, EU actions and preferences ultimately shape the global business environment. Significantly, these preferences do not reflect only the choices of EU institutions, but also those of EU consumers, who assume an active role in setting global norms and standards.

In this way, the book challenges the conventional narrative of Europe's declining power, the extent of its multilateral action and the usual understanding of its normative power. As the author suggests, the EU is not merely a benevolent global power exporting values via multilateral and bilateral agreements. It is also – and mainly – an economic actor with a large

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<sup>13</sup> Bradford, *The Brussels Effect* (n 3) 285

<sup>14</sup> Ibid 250.

internal market and vested interests in the globalisation of its own unilateral regulatory standards. It is a place where consumers' preferences converge and constitute global power. A new storyline could thus emerge – one which empowers European citizens, or rather EU consumers, to contribute to fair global regulation and trade.

ROGER HALSON AND DAVID CAMPBELL (EDS), *RESEARCH HANDBOOK  
ON REMEDIES IN PRIVATE LAW* (EDWARD ELGAR 2019)

Grigoris Bacharis\* 

## I. INTRODUCTION

Is 'remedies' even a subject? This is the intriguing question Steve Hedley asks in Chapter 1 of the new *Research Handbook on Remedies in Private Law*, edited by Roger Halson and David Campbell.<sup>1</sup> What is the added value of investigating remedies by themselves, seeing how intimately connected they are with substantive law and how dependent they seem on questions of procedure? After all, even the definition of remedies (to say nothing of their classification) is a permanent subject of controversy.<sup>2</sup> The *Handbook* helps explain exactly why remedial law is a worthy subject matter of its own. The editors have assembled an impressive array of contributions on the various aspects of remedial law in common law jurisdictions and beyond.

As the editors themselves state in the foreword, innovation in the law of remedies has been widespread over the last 25 years, with the law being in a state of flux.<sup>3</sup> Of course, remedies, often in conjunction with rights, have been the subject of many treatises and articles over the years.<sup>4</sup> However, Halson

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<sup>1</sup> Steve Hedley, 'Is "Remedies" a Subject?' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar 2019).

<sup>2</sup> Ibid 3.

<sup>3</sup> See for example Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press 2005) 2. See also SM Waddams, 'Remedies as a Legal Subject', (1983) 3 Oxford Journal of Legal Studies 113.

<sup>4</sup> See the references in the footnote above but also the previous work by the editors in Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (Cambridge University Press 2005). See also Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford Hart 2005); Charles EF Rickett (ed), *Justifying Private Law Remedies* (Oxford Hart 2008); Andrew Burrows, *Remedies for Torts and Breach of Contract and Equitable Wrongs* (Oxford University Press 2019).

and Campbell argue that recent changes in remedial law actually reflect the encroachment of social justice or welfarist considerations upon the traditional realm of private law. Private law increasingly outright mandates specific outcomes instead of just providing a framework for the development of private relations. This is an interesting, if controversial, position to adopt and indeed many of the contributions included in the volume could be said to reflect the rising tension between the private sphere and the public good. The *Handbook* helps make sense of these conflicts, investigating to what extent private law can retain its integrity in the face of present challenges.

These trends and tensions have sparked renewed interest in remedies at the European level,<sup>5</sup> which has peaked in conjunction with European Union (EU) harmonization efforts. The June 2020 agreement for a new collective redress mechanism, aiming at rendering consumer damages effective,<sup>6</sup> joins the IP Enforcement Directive of April 2004 as a recent example of 'remedies thought' in EU law.<sup>7</sup> Against this backdrop, the *Handbook's* intimate look into the distinct character of remedial law should be of interest to any private law scholar reading this journal.

## II. STRUCTURE AND COMMENTS

The volume contains diverse contributions touching on issues of contract, equity, restitution and tort law. It consists of 27 separate chapters grouped under five headings. The first part is of a general nature, beginning with a contribution by Steve Hedley discussing remedies as a subject matter and the merit of doing so. This is followed by a historical overview of contract (Stephen Waddams) and then tort law (Paul Mitchell) remedies, as well as

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<sup>5</sup> See for example the newly published volume by Franz Hofmann and Franziska Kurz (eds), *Law of Remedies: A European Perspective* (Intersentia 2019).

<sup>6</sup> See European Commission, 'Commission Welcomes Confirmation of Provisional Agreement to Strengthen Collective Redress in the EU' <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_20\\_1227](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1227)> accessed 8 July 2020.

<sup>7</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.

two chapters on how remedial rules operate in practice in the civil justice system (Annette Morris) and in commercial transactions (Catherine Mitchell). Part II is titled 'the Protected Interest' and focuses not only on reliance damages (David McLauchlan) and the performance interest (David Winterton), but also restitution (Peter Jaffrey) and equitable remedies for breach of trust (Duncan Sheehan). Part III groups together several chapters relating to termination for fundamental breach (Qiao Liu), non-pecuniary loss (Roger Halson), the literal enforcement of obligations (Andrew Tettenborn), common mistake and frustration (Catherine MacMillan) and market damages in sales of goods (David Campbell). It also contains a critical analysis of the UK Consumer Rights Act of 2015<sup>8</sup> (James Devenney), a chapter on injunctions through the lens of nuisance (Robert Palmer and Ben Pontin) and an overview of gains-based damages (Katy Barnett). Part IV provides an interesting look into other common law jurisdictions such as Australia (Sirko Harder), New Zealand (Rick Bigwood) and Canada (Jeff Berryman), along with an enlightening overview of the solutions adopted by the mixed Scots law (Laura Macgregor). It also contains two chapters that will no doubt be very useful for European and comparative private lawyers, namely on harmonisation instruments at the European (Mel Kenny) and international (Ewan McKendrick, Qiao Liu and Xiang Ren) levels. Finally, Part V serves as a summary of the main themes of the book and is of a general theoretical nature. There, one can find a notable contribution on tort law and the tort system (Alan Beever), which is followed by an analysis of the structure of remedial law (Stephen A. Smith). This part ends with a complementary two-chapter discussion of default rules in contract remedies (Jonathan Morgan and William Whitford).

A common theme that emerges from many contributions is the complex relation between the law of remedies and the theories of justice that may or may not underlie it. In the first chapter, Steve Hedley opines persuasively that focusing on remedies reveals issues that would be invisible otherwise, invoking the value judgments that judicial decisions as to remedies frequently involve.<sup>9</sup> It is important for scholars to consider just how flexible remedies should be and whether the common law fails to enforce its own morality by

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<sup>8</sup> Consumer Rights Act 2015 (UK), ch 15.

<sup>9</sup> Hedley (n 1) 2.

requiring that mere damages be paid for breach of contract instead of specific performance. After all, remedies are crucial for potential litigants and the interest of the parties in the litigation process (or lack thereof) often revolves around what remedies might be available. Therefore, both substantive law *and its remedies* must be fair, as only remedies can satisfy the 'users' of private law. However, this is often ignored.

Hedley's observations are nicely complemented by Stephen Waddams' and Paul Mitchell's overviews of the history of remedies in contract and tort that follow. The chapters show the influence of history and legal categories as obstacles to reform. Waddams analyses the primacy of monetary remedies and observes that this primacy is qualified; in practice, the preference is not as strong as is sometimes suggested, as illustrated by exceptions in disputes over land sale contracts and other types of cases. Results in civilian and common law are often quite similar in practice even if the conceptual starting point is different.<sup>10</sup> However, the distinction between categories matters in other areas: Breaches of contracts are not treated the same way as torts. Mitchell, in turn, analysing the history of tort remedies in England and Wales, emphasises the influences not just of legal categories but also of historical origins and of a 'rationalistic commitment to compensation' on the law of tort remedies.<sup>11</sup> These three constraining forces create a kind of path dependency in the evolution of law and often work as an impediment to reform. Ultimately, it is often the participants in the legal system and their values and assumptions—principally informed by the aforementioned factors—that shape how a given area of substantive law operates in practice. Mitchell's tripartite classification of constraining forces is doubtless a very interesting explanatory framework that helps illuminate the process of legal development.

The subsequent chapter by Catherine Mitchell offers another instance where practical reality "clashes" with the law in the books, pointing to the limitations of theoretical accounts and empirical investigations on contract

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<sup>10</sup> Stephen Waddams, 'The Modern History of Remedies for Breach of Contract' in Halson and Campbell (n 1) 17, 18.

<sup>11</sup> See Paul Mitchell, 'The Modern History of Tort Remedies in England and Wales' in Halson and Campbell (n 1) 33, 45.

law remedies.<sup>12</sup> There are some instances where remedies broadly track commercial expectation and others where they deviate from them and we lack the empirical evidence necessary to understand when parties contract out of remedial rules. While, in certain transactions, breach may constitute a 'wrong', in others it may be a legitimate response to difficulties. Thus, usage of the word 'wrong' is not always supported by the reality of commercial contracting.

Chapter 24 serves as a great addition to the above. Alan Beever draws a useful dichotomy between tort law and the tort system and highlights the implications of this separation. One should always keep in mind that tort law is the law, whereas the tort system is the institution created by a particular application of the law. The need to distinguish the study of the tort system from that of tort law does not mean that each study will *always* yield insights relevant to the other.<sup>13</sup> The current institutional structure of the personal injury system may not be up to the task of enacting the substantive law and thus may not be relevant to the task of constructing an ideal system. Beever persuasively criticizes the prevalent policy based approach to tort and the uncritical adoption of law and economics thought. He points out that positive law is by no means a perfect instantiation of corrective justice but actually suffers from being detached from it, which is often overlooked when discussing tort remedies. Therefore, 'fit' is not necessarily the correct benchmark. The failure of the tort and contract systems to achieve corrective justice (or whatever other standard we choose to implement) due to how remedies are granted in practice should not lead us to hasty conclusions on how we should shape remedial laws, as this may generate a kind of feedback loop that causes us to favour the existing system.

In sum, law in practice and the law on the books can diverge significantly. However, institutional arrangements tend to influence the law and shape the appropriate remedial response and no theory of substantive law would be complete without being aware of how to deal with this divergence. Insurance settlements, social welfare, complex commercial customs and contractual

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<sup>12</sup> Catherine Mitchell 'Remedies and Reality in the Law of Contract', in Halson and Campbell (n 1) 68, 84.

<sup>13</sup> Alan Beever, 'Tort Law and the Tort System: From Vindictiveness to Vindication' in Halson and Campbell (n 1) 439.

terms influence remedial law; all are important factors in the reality of how we perceive both our tort system and tort law. A closer look into remedies helps illustrate the fault lines.

A parallel thread that emerges is the relation of remedial law to social and distributive justice. Indeed, everywhere in the book conflicts can be found that relate directly to the distributive aspects of the various remedies. Those social justice aspects are prominent, for example, in the sixteenth chapter, which discusses English law and injunctions through the lens of nuisance. Lord Denning's famous aphorism that the injunction would make the village 'much the poorer' takes a central role here.<sup>14</sup> Palmer and Pontin first explain how injunctions have been historically used to coerce powerful economic forces even going back to medieval times. Thus, compared to damages injunctions are inherently risky for courts who 'cannot afford to get it wrong'.<sup>15</sup> Older precedents such as *Coventry v Lawrence*<sup>16</sup> and *Miller v Jackson*<sup>17</sup> but also new cases like the 'Chelsea stadium dispute'<sup>18</sup> show that injunctions involve delicate weighing of conflicting interests. Of course, a central problem is the extent of discretion that should be granted to the courts. By granting injunctions instead of damages in certain disputes courts implement certain value judgments. For instance, the presumption in favour of granting an injunction in nuisance cases demonstrates how courts still think of property as more than a mere commodity. Damages often cannot compensate for the loss of enjoyment of one's home, which is something that does not have a monetary 'price'. This shows how closely linked the choice of remedies is to fundamental questions of justice.

Other chapters of the volume are more technical or doctrinal in nature but no less interesting, as they show how remedial law is still in flux. A good example is Chapter 7 on restitution. Peter Jaffrey makes clear that the development of the law of restitution on the basis of unjust enrichment obscures the differences between different types of remedies. This chapter

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<sup>14</sup> *Miller v Jackson* [1997] QB 966, 976.

<sup>15</sup> Robert Palmer and Ben Pontin, 'Injunctions Through the Lens of Nuisance' in Halson and Campbell (n 1) 294.

<sup>16</sup> *Coventry v Lawrence* [2012] EWCA Civ 26.

<sup>17</sup> *Miller v Jackson* (n 14).

<sup>18</sup> Palmer and Pontin (n 15) 308.

amply demonstrates that remedies and substantive law exist in an uneasy relationship.<sup>19</sup> For instance, restitution is often construed as a remedy and unjust enrichment as the associated cause of action. Jaffrey disagrees, instead distinguishing between the different types of restitution claims. By accepting a general cause of action, in this case unjust enrichment, we unavoidably cause a certain path dependence in the incremental change of case law. Ultimately, taxonomy and legal categories matter in remedies. Hence, we should not be hasty to group together disparate claims and assume that a common cause of action exists. Jaffrey makes a persuasive case that a tendency to create legal categories can often obscure rather than clarify the law. For a civilian lawyer it is not difficult to envisage a general cause of action based on unjust enrichment; however, the same does not necessarily need to be true in common law.

In the face of prevailing uncertainty, there is space for devising innovative approaches. In Chapter 12, volume editor Roger Halson attempts to create a unified framework for damages for non-pecuniary loss in both contract and tort. This is remarkable given the significant differences that exist even among different torts. The author criticizes various grounds offered as a rationale for justifying restrictions on recovery of damages for non-pecuniary loss in contract, such as the inability to quantify such losses or reticence to punish defendants.<sup>20</sup> Halson argues that contract should be brought closer to tort in that respect and that generalist limits to recovery such as remoteness, mitigation and contributory negligence are sufficient in both areas.<sup>21</sup>

Lastly, the comparative law aspects of this book are fascinating and offer something that has been missing from previous treatises on remedies. The discussion of remedial rules in Scots Law deserves particular attention, as this system unites different types of remedies deriving from both civil and common law, which co-exist in a complicated relationship with each other. In particular, the unique ways in which Scots law deals with the issues of

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<sup>19</sup> Peter Jaffrey, 'Restitution', in Halson and Campbell (n 1) 110.

<sup>20</sup> Roger Halson, 'The Recovery of Damages for Non-Pecuniary Loss in Contract and Tort: A Unified Approach' in Halson and Campbell (n 1) 199.

<sup>21</sup> On non-pecuniary loss in different civil law systems, cf Katarzyna Kryla-Cudna, 'Breach of Contract and Damages for Non-Pecuniary Loss' (2018) 26 *European Review of Private Law* 515, 516.

retention and 'specific implement' should be of interest to every comparative lawyer.<sup>22</sup> Furthermore, Berryman's discussion of Canadian law shows that domestic conditions like the absence of sophisticated supply chains or the abundance of real property exert strong influence on the shaping of remedies, once again illustrating the influence of institutional arrangements on remedial law stressed earlier in this review.<sup>23</sup> Such factors can explain divergence in rules concerning, for instance, punitive damages and the availability of specific performance.<sup>24</sup> Thus, although common law jurisdictions do influence each other, it is remarkable how the incremental evolution of the case law can also lead to different results.

Patterns of harmonization and fragmentation are also apparent on the international and European level. A comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts, on the one hand, with the Principles of European Contract Law and the Draft Common Frame of Reference, on the other, is illuminating. For instance, the fact that specific performance is enshrined as the principal remedy in the CISG does not necessarily guarantee its widespread use across disputes. Contracting parties may simply ignore this provision and request payment of damages; domestic courts and arbitrators may interpret it through the lens of their own national law. This is yet another example of how law operates in practice under real life constraints. That is, commercial transactions and the domestic understanding of remedies exert a strong pull that leads the law in practice to diverge from the law on the books. Nonetheless, according to chapter authors Ewan McKendrick, Qiao Liu and Xiang Ren, a consensus seems to be gradually emerging as to when the remedy should and should not be available.<sup>25</sup>

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<sup>22</sup> Laura Macgregor, 'Remedies for Breach of Contract in Scots Law' in Halson and Campbell (n 1) 336.

<sup>23</sup> Jeff Berryman, 'Canadian Perspectives on Contract Remedies' in Halson and Campbell (n 1) 371.

<sup>24</sup> In Scots Law, evidence of uniqueness is required for specific performance under *Semelbago v Paramadevan* (1996) 2 SCR 415.

<sup>25</sup> Ewan McKendrick, Qiao Liu and Xiang Ren, 'Remedies in International Instruments' in Halson and Campbell (n 1) 409.

### III. CONCLUSION

There is much more to this book. One also can find highly interesting chapters on remedies in trusts, remedial discretion, defaults, and different types of damages. Any reader of this work with even a passing interest in common law, comparative law or legal theory stands to gain much, even if some additions could be desirable. For instance, the extensive coverage of remedial law in common law jurisdictions could be complemented, possibly in subsequent editions, by a chapter on the civil law perception of remedies, which could indeed help better illuminate the common law approach. In addition, some contributions seem to focus less on remedial law in the strict sense and more on substantive law. That is not necessarily a criticism, though, given how intimately the areas are intertwined. Lastly, the volume would benefit from a chapter or two focusing on the economic analysis of specific remedies, given the rich work on the subject.<sup>26</sup> The same could be said about empirical research on remedies.

In conclusion, the book clearly proves that remedies is, in fact, its own subject. Researching remedies helps scholars come to terms with the increasing complexity of the law and find common threads. For one, it leads to a better conceptualization of theoretical problems, such as the relation between the law and the systems that enforce it.<sup>27</sup> Furthermore, it reveals interesting discrepancies across the various common law jurisdictions, which can be explained as points of principle, products of domestic conditions, or both. While these sorts of issues require scholars to keep an eye on the actual practice of the law, practical realities need not be decisive in shaping the law itself. In any case, it is obvious that there is a pressing need for research on the topic, as wrong turns can happen and remedial law remains the object of intense disputes implicating fundamental questions of justice and socio-

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<sup>26</sup> Of course, many contributions do cover aspects of legal economic thought but a self-standing chapter would still be of value. See for example Stephen A Smith, 'The Structure of Remedial Law' in Halson and Campbell (n 1) 458; Jonathan Morgan, 'Contract Remedies as Default Rules' in Halson and Campbell (n 1) 476.

<sup>27</sup> Duncan Sheehan and TT Arvind 'Private Law Theory and Taxonomy: Reframing the Debate' (2015) 35 *Legal Studies* 480.

political structures.<sup>28</sup> The *Handbook* is not merely a comprehensive reference work, but also includes a number of innovative contributions to existing scholarship. Overall, the editors and contributors to this volume have succeeded in providing an in-depth review of the law of remedies that can both open up new debates and rejuvenate old ones.

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<sup>28</sup> See for example Palmer and Pontin (n 15); Annette Morris, 'Personal Injury Compensation and Civil Justice Paradigms' in Halson and Campbell (n 1) 47.