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Submissions

The European Journal of Legal Studies invites submissions of General Articles and New Voices Articles on a rolling basis in the fields of comparative law, European law, international law, and legal theory. Journal is committed to the promotion of linguistic diversity and accepts submissions in any language, subject to the competence of the editorial board. The EJLS is committed to double-blind peer review. We therefore ask authors to ensure that their submissions include an anonymised version, together with a title page in a separate file containing identifying information. We invite authors to consult our Style Guide and Author Guidelines, which are available at https://ejls.eui.eu/contributeto-ejls.

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Book Reviews

TOP THREE ELEMENTS OF SUCCESSFUL PEER REVIEW

Michael Widdowson[*] and Dimitris Panousos[†]

One of the EJLS's main selling points is its double-blind peer review and its commitment to detailed feedback.[1] This process enables the minimisation of any reviewer bias and is particularly advantageous in assisting early career scholars in improving their work.[2] As a journal, the EJLS prides itself in giving early career scholars the opportunity to peer review articles. Among other things, training is provided by the EJLS to ensure that new reviewers are given the necessary tools to start reviewing articles. However, these training sessions are only conducted once, shortly after a peer reviewer starts their position at the EJLS. One of the main issues with this is the fact that after the training session, there is no written guide to recap what was delivered in the training session. Further down the line, the peer reviewer may gradually forget bits of information from the session. To resolve this issue, we have decided to dedicate this editorial to our peer reviewers and create a concise crash course guide on the top three elements of successful peer review. This Editorial can be used as a guide by all peer reviews from inside and outside the EJLS to understand the key tips to conducting a successful peer review.

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[1] For more information on feedback at the EJLS, see: Michael Widdowson, 'The "Gift" of Feedback' (2024) 16 EJLS 1-8.

[2] Research has shown that double-blind peer review further reduces discrimination by removing any gender, race or other biases that a reviewer may hold; see Blanca Rodríguez-Bravo and others, 'Peer Review: The Experience and Views of Early Career Researchers' (2017) 30 Learned Publishing 269; C Le Goues and others, 'Effectiveness of Anonymization in Double-Blind Review' (2018) 61 Communications of the ACM 30.

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I) THOROUGHNESS

The first important element to a successful peer review is a thorough review of the article. To ensure this, you must first check that the submission satisfies the journal's substantial requirements. These requirements are a list of best practices that journals ask authors to follow in their submissions. In the case of the EJLS they are listed on our website and state that the article must *inter alia*:[3]

1) contain and respond to a clearly written research question; and be
2) well written;
3) original;
4) within the word limit; and
5) properly referenced using OSOCLA.

Upon the first round of review, it is best to start by ensuring that the relevant substantial requirements are satisfied. If you believe that one or more of these elements is not satisfied, indicate this and explain what steps the author needs to take to correct these issues. It is also a great idea to have the relevant reference and style guide open on your computer so you can more easily check whether the author has properly cited their sources and formatted their work.[4] In the case of the EJLS, we have our own style guide that can

[3] Further information on these categories for authors and reviewers can be found on the EJLS website: EJLS, 'European Journal of Legal Studies: Submissions' <https://ejls.eui.eu/contribute-to-ejls/> accessed 28 February 2025; other journals usually have similar requirements posted on their individual websites for instance See: Trusts and Trustees 'Instructions to Authors' (*Oxford Academic*) <https://academic.oup.com/tandt/pages/general_instructions> accessed 6 March 2025 and *McGill Law Journal,* 'Submissions' (*McGill University*) <https://lawjournal.mcgill.ca/submissions/> accessed 6 March 2025.

[4] Alternative shorter guides like the OSCOLA Quick Reference Guide or the online OSCOLA Guide can be used as well, see Law Librarians, 'LibGuides: OSCOLA Referencing Guide (Online): Home' <https://libguides.swansea.ac.uk/Oscola/Home> accessed 28 February 2025.

be can be consulted by authors and peer reviewers and we ask authors to cite their references using OSCOLA refencing; however, many other journals have differing referencing and citation requirements. If an author has not respected the journal's formatting and reference style properly, note this down. This encourages the author to correct the formatting, referencing and style issues before the later stages of review. Next, use your expertise as a reviewer to do a substantive review of the article. Check the content and validity of the claims made in the article. If you think any content could be added, claims could be improved upon or expanded, use your knowledge of the topic to the fullest to let the author know where they could make improvements. Finally, once you have conducted these checks, it is completely up to you to decide whether or not to accept the article. If you feel that an article has too many substantial faults for publication, do not hesitate to reject it. This also holds for articles destined for a special issue or special section, which go through the same double-blind peer review process as regular articles.

If the article has been accepted in the first round and you receive it for a second-round review, check to make sure that the author has properly addressed your comments and suggestions. The author should have either implemented your suggested revisions or given you a reason why they have not chosen to do so. If the author has ignored your comments from the first round, it is best to reject the article. In many journals, the final decision of acceptance or rejection of an article is made by the Executive Editorial board. While it is rare for the Executive Editorial Board to reject an article that has been accepted in peer review, this can be done in exceptional circumstances due to *inter alia* non-compliance with originality or ethical requirements. In the case of the EJLS, the final decision lies with the Heads of Section. However, rejections can be exceptionally carried out later in the review process if serious ethical or originality issues are uncovered. To avoid late rejections from occurring, it is always best to carry out a thorough peer review to pick up these issues as soon as possible.

Thoroughness is the cornerstone of good peer review, as it ensures that issues with the article can be uncovered early before the later stages of the review

process. It also allows you to use your expertise to improve the author's article and future research output.

II) Communication

The second important element of good peer review is communication. Good communication should be exercised externally to the author and internally to the Executive Board. Communication is vital, as it avoids delays to articles in the peer review process. This allows journals to maintain speedy communication with authors and, in the case of the EJLS, permits us to maintain our reputation as a speedy publication.

First of all, it is important that when giving feedback on the article, you are polite and respectful to the author. Even if you really do not like an article or do not agree with an author's claims, these criticisms need to be delivered politically and to the author. For example, instead of saying that the article is 'total rubbish', be specific and explain what issues you have with the article in detail. Instead of questioning the author's expertise on the subject, criticise specific arguments in the article itself. It is important as reviewers that you are helping the author to improve their article and future academic output and are not personally attacking them. Personal attacks on the author are not only hurtful, they often result in authors delaying revisions or withdrawing potentially good articles.

Good communication should also be exercised with the journal's Executive Board. If you are assigned a piece to review by either an EJLS Head of Section or any other member of a journal's executive board, maintain rapid and good communication with them. If, for example, you have been assigned to review an article and you are unable to review it, please let your contact within the journal know as soon as you can. Please also ensure that, as reviewers, you try to stick to any reviewer deadlines you may have been given as much as you can. If, as a result of any personal circumstances or any other reason, you are unable to meet the reviewer deadline, please let your journal contact know, and an extension will likely be granted. At the EJLS, we understand exceptional circumstances delaying a review are unavoidable.

However, communication of these circumstances should be given to a journal's executive board so they can mitigate delay and inform the author.

III) EXPERTISE

The final element of peer review is an element which can be applied not just to reviewers but also to journals. As previously discussed, reviewers should use their expertise to improve submissions to conduct a thorough peer review. However, there is an additional responsibility on the part of the journal to ensure that their peer reviewer pool is sufficiently large enough to cope with the number of articles. Since the COVID-19 pandemic, many businesses have suffered from shortages of personnel. Academic journals have been no exception, where shortages of peer reviewers have led to overburdening existing reviewers with articles.[5] This further delays submissions and can make overworked volunteer reviewers feel unrecognised for their efforts.[6] This causes a vicious circle where peer reviewers who feel like their efforts are no longer recognised by the journal will either leave or quietly quit their positions. This, as a journal, caused us to lose vital expertise from our reviewer pool and forced us to overwork existing reviewers. With this issue affecting us and other journals we sought to find a solution. Instead of concentrating on the problem we foresaw an opportunity to expand ourselves as a journal and to make us more of an outward-looking publication. For the first time in the EJLS, we decided to expand our reviewer pool to include external candidates. This enabled us to have a greater number of reviewers available in our pool and, at the same

[5] Hugo Horta and Jisun Jung, 'The Crisis of Peer Review: Part of the Evolution of Science' (2024) 78 Higher Education Quarterly 12511; Colleen Flaherty, 'The Peer-Review Crisis' (*Inside Higher Ed*) <https://www.insidehighered.com/news/2022/06/13/peer-review-crisis-creates-problems-journals-and-scholars> accessed 28 February 2025.

[6] Mitchell Young, 'Competitive Funding, Citation Regimes, and the Diminishment of Breakthrough Research'. (2015) 69 Higher Education 421, 431.

time, made the EJLS less EUI-centric and more diverse.[7] This new direction of the EJLS we hope will improve the speed of our review process and further diversify our publication output.

IN THIS ISSUE

This issue features a diverse selection of contributions, reflecting the breadth of contemporary legal scholarship. Our *New Voices* article, by **Trygve Mathias Hellenes** and **Rens Stegink**, examines the direct effect of provisions within the Foreign Subsidies Regulation's prior control system in public procurement, highlighting tensions between centralised enforcement and the need for effective remedies.

The general articles engage with pressing legal and philosophical questions. **Anna Sležková** critically reinterprets the right to individual assessment in European criminal law, arguing that traditional understandings risk objectifying individuals rather than recognising their subjective rights. **Antoni Abat Ninet** explores the epistemological construction of the European Union's social contract, illustrating how its symbolic and ideological dimensions shape political legitimacy. **Aphrodite Papachristodoulou** interrogates the legal and ethical implications of AI-driven border control practices, advocating for a right to rescue at sea to counter the increasing use of technology in migration governance.

This issue closes out with two book reviews. **Bruna A. Gonçalves** examines Adriane Sanctis de Brito's historical study of the Anglo-Brazilian Treaty for

[7] The issues with EUI centrism and racial equality were discussed within another EJLS editorial; see Timothy Jacob-Owens, 'Witness in the Ivory Tower' (2021) 13 EJLS 1-13.

the suppression of the slave trade,[8] while **Alexander Schuster** reviews Paul Linden-Retek's exploration of postnational constitutionalism in Europe.[9]

Changing of the Guard

The academic year 2024/2025 marks a significant turning point for the EJLS, particularly in relation to its three boards: the Executive Board, the Advisory Board and the Editorial Board.

Within the Executive Board, we are pleased to welcome **Alexander Schuster** and **Julia Galera Oliva** as Heads of Sections for European Law and International Law respectively, alongside **Aikaterini Koinaki,** who has joined us as Executive Editor. This academic year has also seen a shift in the position of Managing Editor, with **Madalena Simões** and **Lukas Schaupp** now assuming this vital role. Finally, our former Head of Section for International Law, **Dimitris Panousos**, has now taken the helm as Editor-in-Chief.

These transitions have, of course, involved saying farewell to our previous Executive Board Members. We extend our heartfelt thanks to **Carolina Paulesu** (former Managing Editor), **Miguel Mota Delgado** (former Managing Editor), **Niels Hoek** (former Head of Section for European Law) and **Michael Widdowson** (former Editor-in-Chief) for their invaluable contributions during their time at the EJLS. We wish them all the very best in their future endeavours.

In addition to these changes, we also owe a big thank you to the remaining members of the Executive Board for their ongoing commitment to the journal: **Cielia Eckardt** (Executive Editor), **Sebastian von Massow**

[8] Adriane Sanctis de Brito, *Seeking Capture, Resisting Seizure: An International Legal History of the Anglo-Brazilian Treaty for the Suppression of the Slave Trade (1826-1845)*, Global Perspectives on Legal History vol 22 (Max Planck Institute for Legal History and Legal Theory 2023).

[9] Paul Linden-Retek, *Postnational Constitutionalism: Europe and the Time of Law* (OUP 2023).

(Executive Editor) and **Irina Muñoz Ibarra** (Head of Section for Legal Theory).

The start of this academic year has also seen a shift within the Advisory Board. We would like to express our deep gratitude to the former members of the Advisory Board for their insightful guidance and unwavering support over the years: **Sarah Nouwen**, **Martijn Hesselink**, **Deirdre Curtin** and **Urska Sadl**. At the same time, we are excited to welcome **Arnulf Becker Lorca**, **Gráinne De Búrca**, **Sergio Puig** and **Silvia Suteu** to the Advisory Board. We look forward to working closely with you in strengthening and advancing the EJLS.

Finally, in September 2024, the EJLS experienced an important expansion of its pool of peer reviewers. For the first time, our call for applications was extended to external applicants, resulting in the addition of 44 new reviewers to our journal. As outlined above, our peer reviewers bear a significant responsibility in ensuring the success and integrity of the journal. For that, we would like to thank all our peer reviewers (both newer and older ones) for their work and dedication.

EXAMINING DIRECT EFFECT OF THE FOREIGN SUBSIDIES REGULATION'S PRIOR CONTROL SYSTEM IN PUBLIC PROCUREMENT

Trygve Mathias Hellenes* & Rens Stegink †

The article scrutinises whether the provisions of the FSR's prior control system in public procurement cases, specifically Articles 29(3), 29(4), and 32(1), allow for direct effect. The analysis reveals that while Articles 29(3) and 32(1) meet the criteria for direct effect by being sufficiently clear, relevant and unconditional, Article 29(4) does not due to its conditional nature and the centralised enforcement structure of the FSR. The article further discusses the implications of the European Commission's exclusive competence in enforcing the FSR, contrasting it with the decentralised enforcement in State aid law. The authors conclude that despite the FSR's divergence from State aid law, the direct effect of Articles 29(3) and 32(1) is essential to maintaining the effectiveness of the notification obligation and the standstill provision. The tension between the centralised enforcement system of the FSR and ensuring that the FSR is interpreted in light of State aid is most clearly illustrated by the question of whether the remedy of reimbursement has direct effect within the FSR. The authors acknowledge that the wording of Article 7(4)(h) indicates that direct effect is precluded, but nevertheless argue that in light of the practical need for such a remedy, illustrated by accrued experience within State aid law, the remedy of reimbursement should also have direct effect.

Keywords: Foreign Subsides Regulation; public procurement; state aid; prior control system; notification obligation; standstill obligation; direct effect; comparative analysis; European Commission; national courts

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I. INTRODUCTION

By now, the enforcement practice of the European Commission (EC) under the Foreign Subsidies Regulation (FSR)[1] is starting to take shape.[2] The FSR is a new piece of EU legislation that bestows various investigative and redressive powers on the EC with the objective of preventing undertakings

[1] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330/1 (FSR).

[2] European Commission, 'Competition FSR brief' (February 2024), Issue 1. The brief provides a summary of the experience gained by the Commission during the first 100 days of the FSR.

active in the EU internal market from enjoying selective competitive advantages provided by third countries through foreign subsidies.[3]

The EC opened a number of in-depth investigations under the FSR following notifications in the context of public procurement procedures submitted by undertakings intending to participate in the procedures.[4] The legal basis for such notifications can be found in Article 29(1) FSR. That provision entails the obligation for undertakings participating in a public procurement procedure in the EU to notify the receipt of foreign financial contributions if certain quantitative thresholds are met.[5] When the EC decides to open a preliminary review or in-depth investigation into notified foreign financial contributions, the public procurement procedure at issue may still take place except for the eventual award of the contract.[6] Only after the EC has adopted a clearance decision, or when the mandatory time limits for adopting a decision have expired, may the award of the contract to the undertaking concerned proceed.[7] This way, the FSR ensures that no undertaking can benefit from foreign subsidies distorting the internal market by obtaining a public procurement contract during the time needed by the EC to conduct its review. Any economic operator that ignores or submits insufficient information in accordance with Article 29(1) FSR shall never be awarded the contract.[8]

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[3] Preamble of the FSR, recital 6. For an overview of the contents of the FSR, see Konstantina Sideri, 'Regulating Foreign Subsidies: Legal Implications Under EU Competition Law' (2023) 44 *European Competition Law Review* 2 81-86.

[4] eg European Commission, 'Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector', available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1803> accessed 30 September 2024.

[5] Article 28(1) FSR. There is also an obligation to notify concentrations under the FSR, see Article 22 FSR. That notification obligation falls outside the scope of this article.

[6] Article 32(1) FSR.

[7] Article 32(2) FSR.

[8] Article 29(3)-(4) FSR.

Such a prior control system is not unique to the FSR but can also be identified in State aid law. Particularly, according to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), a Member State intending to implement State aid must notify the EC in sufficient time of such a plan. The last sentence of the same provision also holds that the Member State shall not put its proposed aid measure into effect before the EC has adopted a final decision on the compatibility of the aid. This obligation is referred to as the 'standstill obligation'.[9] The European Court of Justice (ECJ) has consistently held that Article 108(3) TFEU is directly effective.[10] Similar to the FSR system, the State aid regime ensures that undertakings cannot benefit from State aid measures during the EC investigation, nor when they fail to meet the notification obligation.

The legislature has recognised the similarities between the FSR and State aid law by stating that the Regulation 'should be applied and interpreted in light of [...] State aid [...]', implying possible room for direct effect of the FSR's prior control system based on contextual reasoning.[11] However, the legislature also held that the EC is 'the sole authority competent to apply this Regulation', suggesting there is no room for private enforcement.[12] This would cause a discrepancy between State aid law and the FSR, which would be contrary to the will of the legislature.

So far, the literature on the FSR has mainly sought to examine key substantive concepts,[13] as well as potential conflict between the FSR and

[9] 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 [2016] OJ C262/01, para 2.

[10] This caselaw will be discussed in Section III.

[11] Preamble of the FSR, recital 9.

[12] Preamble of the FSR, recital 8.

[13] eg Morris Schonberg, 'The Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions' (2022) 2 EStAL 143-152; Lena Hornkohl, 'Protecting the Internal Market From Subsidisation With the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?', (2023) 14 JECLAP 3

WTO law.[14] Yet, the issue of direct effect of the FSR's prior control system is merely touched upon and remains ambiguous: commentators have so far either concluded briefly that the prior control system of the FSR must have direct effect due to its similarities with State aid law,[15] or contended that the FSR only offers limited room for private enforcement.[16] To address this unclarity in the literature, this contribution asks whether the FSR's prior control system should have direct effect, considering its complementary function but also interpretational links with the prior control system under the State aid regime.[17] To this end, Section II first examines whether the provisions of the FSR's prior control system allow for direct effect, applying the ECJ's standard framework based on a textual and contextual approach. This way, it can be assessed whether the provisions themselves already facilitate direct effect and, if so, which remedies are at the national courts' disposal. Next, Section III examines whether or not direct effect should extend to the specific remedy of ordering reimbursement. Section IV concludes the article and summarises the findings, indicating that the FSR's centralised enforcement system is, to some extent, at odds with the legislature's intentions set out in the FSR's proposal and preamble.

137-151; Xueji Su, 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?', (2023) 50 LIEI 1 67-92.

[14] Malte Frank, 'The EU's New Foreign Subsidy Regulation on Collision Course with the WTO' (2023) 60 Common Market Law Review 4.

[15] Wolters Kluwer, 'White Paper: How will the new EU Foreign Subsidies Regulation work?', available at <https://know.wolterskluwerlr.com/LP=3089?> accessed 15 September 2024.

[16] Lena Hornkohl, 'The role of third parties in the enforcement of the Foreign Subsidies Regulation: complaints, participation, judicial review and private enforcement' (2023) 8 Competition Law & Policy Debate 1 30-43.

[17] Preamble of the FSR, recitals 5-6.

II. Does the Prior Control System of the FSR Have Direct Effect?

1. Prior Control System

The provisions governing the prior control system are Article 29(3) and (4) and Article 32(1) FSR. Article 29(3) and (4) FSR ensure the effectiveness of the notification obligation in Article 29(1) FSR, as only tenders that have been submitted in accordance with Article 29(1) FSR get reviewed by the contracting entity. The standstill clause of Article 32(1) FSR ensures the same because it requires that the contract is not awarded whilst the EC examines the notification.[18]

To examine whether these provisions allow for direct effect, Sub-Section 2 will follow the criteria for direct effect as employed by the ECJ. That is, whether the regulation provision is sufficiently clear, relevant to the situation of the individual invoking it,[19] and unconditional, meaning that the provision does not necessitate 'the adoption of measures of application by the Member States' for their implementation.[20] However, a sole focus on the wording of the provisions is at odds with a teleological interpretation, which requires not only the assessment of the wording of the provision but also its context and purpose.[21] This method aims to uncover the legislative intention of the provision under review.[22] Examining the question of direct effect by assessing the context of the relevant provisions has also been expressly

[18] All other steps in public procurement may continue during the standstill obligation, see Ondrej Blažo, 'A New Regime on Protection of Public Procurement against Foreign Subsidies Distorting the Internal Market: Mighty Paladin or Giant on the Feet of Clay?' (2021) 21 International and Comparative Law Review 2 157.

[19] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn OUP 2020) 233-234.

[20] Case C-403/98 *Monte Arcosu* EU:C:2001:6, paras 26-28.

[21] Case C-306/16 *Maio Marques da Rosa* EU:C:2017:844, para 38.

[22] Rudolf Streinz, Interpretation and Development of EU Primary Law, in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2021) 255.

acknowledged by the ECJ.[23] Sub-Section 3 will, therefore, examine the context of the prior control system in the FSR and discuss if the context negates the possibility of direct effect.

2. *Viewed in Isolation: Does the FSR's Prior Control System Have Direct Effect?*

The starting point is Articles 29(3) and 32(1) FSR, as the assessment of direct effect is broadly similar for both provisions. Pursuant to Article 29(3) FSR, the contracting authority or entity 'shall' reject a tender if a notification or declaration within the meaning of Article 29(1) FSR is missing, thus imposing an unequivocal obligation which renders the provision unconditional. The same applies to Article 32(1) FSR, which provides for a clear standstill obligation by not allowing the award of the tender while the notified foreign financial contributions are being examined by the EC. These two provisions, therefore, seemingly meet the criteria for direct effect.

Shifting the focus to Article 29(4) FSR concerning incomplete declarations or notifications, it must be noted that this provision provides that the contracting authority may not examine the notified foreign financial contributions themselves, as it is up to the EC to assess whether the notification is incomplete. This gives the EC discretion when deciding whether more information is needed to fulfil the obligation to notify pursuant to Article 29(1) FSR, which in turn suggests that this part of the prior control system is not unconditional and thereby lacks direct effect.[24]

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[23] Case C-561/19 *Consorzio Italian Management e Catania Multiservizi* EU:C:2021:799, para 46.

[24] Discretion suggests a lack of direct effect, see case T-191/99 *Petrie* EU:T:2001:284, para 34; Case C-236/92 *Comitato di coordinamento per la difesa della Cava and Others v. Regione Lombardia and Others* EU:C:1994:60, para 9.

3. *Contextual Approach*

The question is whether the aforementioned assessment of direct effect based on the provisions' wordings should be altered given the legal context. In this regard, a distinct and key feature of the FSR is the role it assigns to the EC:

> to ensure a level playing field throughout the internal market and consistency in the application of this Regulation, *the [EC] is the sole authority competent to apply this Regulation*.[25]

By giving the EC exclusive competence to enforce the FSR, this wording of the Preamble suggests that national courts cannot apply the FSR, and thereby, direct effect is precluded. This creates an obvious tension with another statement in the Preamble that the FSR should also be interpreted in light of State aid law, which supports the direct effect of a decentralised prior control regime in light of the caselaw concerning Article 108(3) TFEU.[26]

As regards the FSR's prior control system, it raises the question of whether the role of the EC precludes the direct effect of Articles 29(3) and 32(1) FSR despite their wording.[27] Moreover, the EC's central role in the enforcement of the FSR supports the earlier finding that Article 29(4) is not suitable for direct effect.[28]

It is worth highlighting that the exclusive competence attributed to the EC was based on a deliberate choice of the legislature due to 'widespread stakeholder concern' over inconsistent application of the FSR if a decentralised approach was adopted.[29] This strongly indicates that the legislature intended to confer complete jurisdiction upon the EC, evidenced by the absence of any limitation on the competence granted. This is clearly

[25] Preamble of the FSR, recital 8 (emphasis added).

[26] ibid recital 9.

[27] Preamble of the FSR, recital 8.

[28] ibid.

[29] Commission, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(21)223 (5 May 2021) 10.

different to the State aid regime, where the TFEU does not state that the EC is the sole enforcer of the State aid rules, which in turn allows the ECJ to confer the power to national courts to interpret the notion of State aid, thereby allowing national courts to examine the question of illegal State aid and remedy the distortion it causes.[30]

Thus, from the outset, it seems that direct effect is precluded for Article 29(3) FSR. However, if a case concerns a lack of notification or declaration altogether, the national court will often not have to interpret and apply the notion of 'foreign financial contribution'. Instead, the national court would merely establish that a notification or declaration is missing from the request to participate or the tender and then apply Article 29(3) FSR. In such a case, the national court does not apply any procedural or substantive provision in the FSR except Article 29(3) FSR. The task attributed to the national court is, therefore, much more limited than in State aid law, where it must also interpret the notion of State aid. Following this view, there is no apparent conflict with the centralised enforcement in the FSR and direct effect. Therefore, the wording of Article 29(3) FSR supporting direct effect must be decisive.

Regarding Article 32(1) FSR, the standstill obligation may be seen as the key to rendering the notification obligation effective. It could occur that the in-built mechanism in Article 29 FSR fails when, for example, the contracting authority might be tempted to ignore its obligation under Article 29(3) FSR if the tender offer is (exceptionally) economically advantageous. Then, despite lacking information on potential foreign subsidisation, which could cause the offer to be so beneficial, the contracting authority would award the contract. To protect the effectiveness of the notification obligation, national courts would, in that case, have to be able to step in and apply Article 32(1) FSR, as the EC is unable to. After all, the EC, under the FSR, does not have a legal basis for rejecting tenderers from the tender

[30] Case C-39/94 *SFEI* EU:C:1996:285, para 49.

procedure.[31] This situation is similar to State aid law, where the effectiveness of the standstill provision could be jeopardised without direct effect as the EC does not have a legal basis for ordering reimbursement solely due to a violation of the notification obligation.[32] This suggests that the effectiveness of Article 32(1) FSR requires direct effect, in a way similar to the State aid regime.

In a public procurement context, this entails that an economic operator has been awarded the contract even though the obligation to notify in Article 29 FSR was violated or while the EC was performing its review. Public procurement law, then, offers the possibility of damages as a remedy.[33] As with Article 29(3) FSR, direct effect would not entail that the national court would have to apply the FSR in conflict with the role attributed to the EC. The national court would only rely on Article 32(1) FSR to confirm that the claimant would have received the contract if the successful tender was barred from receiving the contract following Article 31(2) FSR. Other legal issues concerning the question of compensation would thus fall entirely outside the scope of the FSR, as it does not regulate such matters.[34]

Last, is the question of direct effect when dealing with a possible incomplete notification or declaration. If the notification does not hold all required contents according to the EC, Article 29(4) FSR prescribes that the EC shall communicate its findings to the contracting authority or entity and request the economic operator at issue to complete its notification. If the economic

[31] As mentioned in Section I, only the contracting authority possesses that power.

[32] Case C-142/87 *Belgium v. Commission ("Tubemeuse")* EU:C:1990:125, para 20. See also Section III.

[33] European Parliament and Council Directive (EU) 2007/66 amending Council Directives 89/665 EEC and 92/13 EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31, Article 2(1)(c).

[34] Directive 2007/66 only states that it must be possible to claim damages. The conditions for such a claim are governed by relevant national law, see Case C-166/14 *MedEval* EU:C:2015:779, para 37.

operator still fails to do so, the EC shall adopt a decision declaring the tender irregular and requesting the contracting authority or entity to adopt a decision rejecting such an irregular tender. Consequently, declaring a tender irregular pursuant to the procedure enshrined in Article 29(4) FSR would typically involve a disagreement on the completeness of the submitted notification.

Pursuant to Article 29(1) FSR, economic operators are required to notify the receipt of foreign financial contributions, provided that the quantitative thresholds are met. Given the notion of 'foreign financial contribution', it must be proven whether the received financial state support amounts to financial contributions having their origin in a third country, as defined in Article 3(1) FSR. If Article 29(4) FSR would have direct effect, the national court requested to enforce that provision would be required to interpret the notion of 'foreign financial contribution' in case of a disagreement on whether the received financial state support meets that qualification. Given the FSR's centralised enforcement, such a competency for national courts would be inconsistent with the role attributed to the EC.

Unlike the reasoning above with regard to Article 29(3) and 32(1) FSR, interpreting the notion of 'foreign financial contribution' would severely infringe on the EC's discretion as the sole authority competent to apply the FSR.[35] Admittedly, the definition of 'financial contribution', as further substantiated in Article 3(2) FSR, closely resembles the similar definition employed in State aid law.[36] However, the opposite is true as regards the required establishment of the origin of a financial contribution in a third country. As stated in Article 3(2) FSR, a financial contribution can be provided by a third country either directly or indirectly. The problematic condition is the requirement of attributability of actions of public or private

[35] Preamble of the FSR, recital 8.

[36] See eg, Wessel Geursen, 'What Constitutes a 'Subsidy' Under the Foreign Subsidy Regulation? Substantive Convergence with State Aid Rules and Procedural Divergence' (2024) 1 MP 6 31-32.

bodies when a financial contribution is provided indirectly by a third country. Attributability of the actions of a public entity is to be assessed taking into account 'elements such as' the characteristics of the entity and the legal and economic environment prevailing in the State in which the entity operates, including the government's role in the economy. Attributability of the actions of a private entity is to be assessed taking into account 'all relevant circumstances'. The employment of the wording 'elements such as' and 'all relevant circumstances' evidently keeps the establishment of a third country origin very broad while providing little guidance, which offers considerable room for interpretation for national courts. This could lead to divergence, which is problematic in light of the EC's broad and, more importantly, exclusive mandate to apply the FSR. This could potentially result in inconsistent application of the FSR, which was exactly the widespread stakeholder concern expressed during the legislative process that led to the EC being attributed the sole authority to apply the FSR.[37]

III. Is the Remedy of Ordering Reimbursement under the FSR Directly Effective?

The preceding section shows that the remedies of claiming damages and having competitors dismissed from the tender process due to a lack of notification have direct effect despite the central enforcement structure of the FSR. It is, however, much more unclear if the direct effect of the prior notification scheme of the FSR extends to a right for a private party to argue before a national court that the unlawful foreign subsidies should be reimbursed. This is because reimbursement of foreign subsidies is a remedy directed to the EC within the FSR, as we will see below. This section starts by exploring the legal basis for reimbursement under the FSR, highlighting the tension between the enforcement system of the FSR and the desire to interpret the FSR in light of State aid law. Next, it is argued that the remedy

[37] See Commission Proposal (n 2) 10.

of reimbursement should have direct effect based on the purpose behind direct effect in State aid and how direct effect in State aid law has worked in practice.

1. Legal Basis for Ordering Reimbursement of Unlawful Foreign Subsidies

The legal basis for requiring the reimbursement of foreign subsidies is Article 7(4)(h) FSR. The provision is directed to the EC, which 'may' impose such redressive measures. Since the power enshrined in that provision is explicitly conferred upon the EC and allows for discretion, this suggests that national courts are precluded from relying on it; especially as the national court would then apply the FSR in conflict with the centralised system envisaged in the preamble of the FSR. Furthermore, Article 7 FSR is contingent on the fact that the foreign subsidies actually distort the internal market. These subsidies are not generally prohibited; the EC must perform a balancing test pursuant to Article 6 FSR before imposing any redressive measure. This highlights the conditional nature of Article 7 FSR. All of the above suggests that Article 7(4)(h) FSR fails to meet the criteria for direct effect: instead, it would jeopardise the centralised enforcement structure of the FSR.

However, as noted in Section I, the legislature envisaged that the FSR should be interpreted in light of State aid law. By concluding that reimbursement cannot be ordered by a national court, a vital discrepancy between the FSR and State aid emerges. This flows from the fact that within State aid law, the national court is required to draw all 'appropriate conclusions' from the breach of the obligation to notify.[38] Given this obligation of national courts, they have *inter alia* been granted the power of ordering the reimbursement of illegal State aid.

[38] Case C-284/12 *Deutsche Lufthansa* EU:C:2013:755, para 29.

2. *Purpose of Direct Effect in State Aid Law vis-à-vis the FSR*

National courts tasked with preserving the rights of individuals possess far-reaching powers to order reimbursement and/or award damages, because the EC lacks sufficiently effective means to protect individuals against unlawfully provided aid. Indeed, the ECJ held that the EC cannot adopt a final decision ordering the recovery (read: reimbursement) of the unlawfully implemented aid solely to remedy a violation of the standstill obligation.[39] The EC only has the power to issue an interim decision suspending the implementation of unlawful aid awaiting its compatibility assessment; for example, when aid has been granted or altered without notification or implemented without the necessary clearance.[40] If the Member State fails to comply with that decision, the EC is empowered to immediately decide whether the aid is compatible with the internal market and, if appropriate, to call for recovery of the amount of aid which has already been paid.[41] This means, however, that in any case, the EC must perform a compatibility assessment in order to be empowered to recover unlawful aid, irrespective of compliance with the standstill obligation.[42]

The problem is that the compatibility assessment by the EC takes a lot of time, and the power of the EC to recover unlawful aid provisionally is subject to strict conditions.[43] Yet, it is also necessary that conservatory measures are taken against Member States' practices that could render the prior control system nugatory.[44] If Member States decide to violate the standstill obligation by unlawfully implementing aid, this could have immediate distortive effects on the internal market, as the recipient

[39] Case C-142/87 *Belgium v. Commission ("Tubemeuse")* EU:C:1990:125, para 20.

[40] ibid paras 15-16. See also Article 13 Council Regulation (EU) 2015/1589.

[41] ibid para 18. See also Article 14 Council Regulation (EU) 2015/1589.

[42] See also Case C-354/90 *FNCE* EU:C:1991:440, para 14; Case C-1/09 *CELF* EU:C:2010:136, para 38.

[43] See Article 13(2) Council Regulation (EU) 2015/1589.

[44] Case C-301/87 *France v. Commission ("Boussac")* EU:C:1990:67, para 18.

undertaking would immediately have additional economic advantages at its disposal. To effectively address such a situation, swift and immediate legal redress before the national courts is necessary given that the EC is unable to act effectively. As a logical consequence, the national courts possess the far-reaching power to order the reimbursement of unlawful State aid. On this basis, one may readily conclude that the direct effect of Article 108(3) TFEU is not only justified based on its wording but also in light of the required effectiveness of the prior control system laid down in that provision.

Returning to Article 7(4)(h) FSR, this entails that although the provision could be regarded as conditional upon the EC, this need not be decisive for the question of direct effect. Moreover, the underlying reason for giving national courts the remedy of ordering the reimbursement of unlawful State aid also applies in the context of the FSR, as any assessment of the potential distortion of the internal market caused by the foreign subsidy could take a long time.

Limiting the direct effect of the prior notification scheme in the FSR could, therefore, significantly weaken the effective enforcement of the FSR's prior control system, similar to what has been seen in State aid law. These negative consequences will now be illustrated by how direct effect has worked in practice in State aid law.

3. State Aid Practice and Implications for the FSR's Direct Effect

The EC periodically reviews how the State aid rules are enforced before national courts of Member States. The most recent study shows that the number of private enforcement cases has increased.[45] In those cases, the EC reports a clear prevalence of claims requesting the recovery of aid.[46] This is

[45] Commission, 'Study on the enforcement rules and decisions of State aid by national courts', 2019, available at <https://op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1> accessed 29 September 2024, 63.

[46] ibid, 80, 89.

because empirical evidence shows that it is even more challenging to institute a successful claim for either damages or interim measures. Firstly, the EC establishes that reimbursement is more often rewarded than damages.[47] Caselaw indicates that damages claims are more liable to be quashed in court, as claimants often fail to meet the high burden of proof for the quantification of damages and the causal link between the incompatible aid and the loss of market shares or profits.[48] This isillustrated by the *Corsica Ferries* case, where a company sued for damages due to a loss of market share because a competitor – as established by the EC – unlawfully received State aid. Whilst the Bastia Administrative Court (court of first instance) awarded damages, the Marseille Administrative Court (court of appeal) partially annulled that decision for failure to estimate the damages despite an EC decision unequivocally establishing the provision of unlawful aid to the competitor.[49] This confirms the aforementioned high burden of proof for a causal link between the incompatible aid and the alleged damages.[50] Secondly, there are only a few cases where interim measures were imposed by national courts in summary proceedings. Establishing the cumulative elements of the complex notion of 'State aid' on the merits is already challenging, so that it becomes 'an almost insurmountable obstacle in summary proceedings'.[51] Furthermore, when considering the request for interim measures in summary proceedings, the national court must balance the interests of the requesting undertaking *vis-à-vis* the public interest. The EC reasons that the provision of state support is 'almost by definition linked to a public interest, which systematically trumps the interest of a single undertaking'.[52]

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[47] ibid, 80.

[48] ibid, 80–81, 88, 90.

[49] ibid, 81; Marseille Administrative Court of Appeal, 12/2/2018 (an appeal to ruling 1500375 of the Bastia Administrative Tribunal).

[50] ibid, 81.

[51] ibid 80.

[52] ibid 80.

The EC's examination of the empirical evidence thus shows that the effective enforcement of the prior control system in State aid law predominantly depends on the possibility of national courts to order reimbursement. Arguably, it would be insufficient if national courts could only award damages. However, as shown in Section II, under the centralised enforcement of the FSR regime, that is exactly the case. Only the EC could order reimbursement, which – judging by the empirical evidence – could result in less effective enforcement. The State aid practice, therefore, constitutes another indication that direct effect under the FSR should be extended to cover the power to order reimbursement.

It is acknowledged that arguing for direct effect of the power to order reimbursement is an uphill battle against the letter of the law pursuant to Article 7(4)(h) FSR. Nevertheless, the preceding discussion has illustrated that the direct effect of the FSR's prior control system would become illusory if seeking reimbursement is ruled out, which cannot be the desired outcome of the legislature.

IV. Conclusion

Where existing literature seemingly took an 'either/or' approach toward the direct effect of the FSR's prior control system, this article proposes that the matter is more nuanced and requires careful balancing of the intentions set out by the legislature in the preamble to the FSR. The analysis shows that the FSR diverges from EU State aid law on the role of national courts. Under the FSR, the EC is the sole enforcer of the Regulation, while EU State aid law has adopted a decentralised system of enforcement. Despite this key difference, this article concludes that Article 29(3) and Article 32(1) FSR have direct effect, as they do not require national courts to apply the FSR substantively. Following this reasoning, Article 29(4) FSR cannot be directly effective, not only because of its conditionality but also because direct effect would hinder the centralised enforcement of the FSR. The issue of whether the remedy of reimbursement has direct effect highlights the conflict

between the envisaged centralised enforcement of the FSR and ensuring equal remedies between State aid law and the FSR.

The context of the FSR thus creates a more complicated legal situation, as the legislature wants the FSR to be at once similar and different to State aid law while requiring careful attention to the different roles national courts play within EU State aid law and the FSR. In this article, it is nevertheless argued that the effectiveness of the FSR should take precedence over the wording of Article 7(4)(h) FSR and, therefore, give national courts the possibility to order reimbursement. Otherwise, the experience accrued within State aid law shows that the prior control system would be unacceptably weakened.

MAKING ASSESSMENT TRULY INDIVIDUAL: THE IMPORTANCE OF THE PHILOSOPHICAL CONCEPT OF OBJECTIFICATION OF MAN FOR THE INTERPRETATION OF THE RIGHT OF CHILDREN IN CONFLICT WITH THE LAW TO INDIVIDUAL ASSESSMENT

Anna Sležková*

The right to individual assessment of children in conflict with the law is an integral part of European criminal law. However, understanding this right remains largely intuitive. This leads us, in keeping with the historical roots of the practice of individual assessment, to equate it with variously focused professional diagnostics such as psychiatric, psychological, or pedagogical diagnostic tools or social work assessment frameworks not based on a dialogue with the assessed persons. Drawing on the concept of 'objectification of man', this article submits that the traditional understanding of individual assessment contradicts both the attribute of the individual and the nature of a subjective right. The concept of objectification of man is chosen because it may be – at least in some constitutional traditions, such as Germany and Czechia – directly linked to human dignity as a constitutional value. This article, nevertheless, relies on the philosophical concept of objectification as it appears in the work of Adorno, Hejdánek, and Marcel. Unlike the constitutional concept, the philosophical one does not foreground the aspect of instrumentalisation, but that of abstraction and subsumption. The article argues that the philosophical concept of objectification of man allows us to formulate a strong link to anti-discrimination concepts of international human rights law, and, thus, enables us to reconceptualise the right to individual assessment primarily as a right to social availability and dialogue.

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Keywords: individual assessment, objectification of man, social disciplining, Adorno, Hejdánek, Marcel

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INTRODUCTION: THE UNINTELLIGIBLE NATURE OF INDIVIDUAL ASSESSMENT AS A SUBJECTIVE RIGHT

The right to individual assessment is integral to the European criminal law directives. In EU law, it is recognised in a threefold manner:

- as the right of victims of crime relevant in the context of the adoption of specific measures of the victim's protection from secondary or

repeated victimisation, intimidation, or retaliation;[1]

- in the context of specific measures of assistance in the access to their rights for child victims of sexual abuse, sexual exploitation, and child pornography;[2] and
- as the right of children suspects and accused in criminal proceedings.[3]

The purpose of individual assessment seems intuitive – it should help authorities enforcing criminal law better grasp the person's uniqueness and find appropriate ways to meet the person's needs. However, this presumption is problematised by the historical roots of individual assessment as a tool of welfare policies which can be difficult to reconcile with the idea of subjective rights.[4]

In this paper, I focus on the context of children in conflict with the law and unfold the problem of the current practice of individual assessment as a problem of objectification. The reason I rely on the concept of objectification is twofold. First, since its birth to the present day, individual assessment has been developed as a practice that promises to provide criminal justice authorities with an objective image of the person's needs. Objectification is thematised in philosophy as a counterpart to objectivity and enables us to unfold the practice of individual assessment not as a tool of objectivity but on the contrary of (shared) subjectivism. Second, the concept

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1 Directive (EU) 2012/29 of 19 April 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L115/1, Article 22.

2 Directive (EU) 2011/93 of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L335/1, Article 19 (3).

3 Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ L132/1, Article 7.

4 Jenneke Christiaens, 'A History of Belgium's Child Protection Act of 1912: The Redefinition of the Juvenile Offender and His Punishment' (1999) 7(1) European Journal of Crime, Criminal Law and Criminal Justice 8–9.

of objectification enables us to link the problem of individual assessment to the constitutional value of human dignity. Some constitutional traditions, including Germany and the Czech Republic,[5] understand human dignity as a prohibition to treat man as a mere object. Nevertheless, contrary to the traditional constitutional understanding of the objectification of man, emphasising its instrumentalising dimension, I rely on the philosophical one. The concept of objectification as understood in philosophy gives us, contrary to the constitutional understanding, a framework to problematise the expectation of objective knowledge of the person's needs with which individual assessment is traditionally associated. Further, it helps reconsider the practice of individual assessment to get closer to the specific circumstances of the case.[6]

I argue that for a philosophical understanding, the primary and decisive characteristic of the objectification of man does not lie in instrumentalisation but in abstraction and subsumption. It is not primarily an issue of ethics but epistemology, forcing us not to ask how to behave towards the other but, instead, if we can know the other through his subsumption under an abstract concept and whether any information so derived can be passed off as positive truth about the other's personality and life. Thus, in law, the objectification of man in its philosophical understanding manifests itself on the side of what we conceive as fact and is closely linked to the penetration of the positivist sciences of man such as psychiatry, psychology, criminology or pedagogics in their positivist orientations into the law. Nevertheless, as I explain in the paper the cognition thus acquired is far from being a reality. What appears

[5] This is the object formula of human dignity. Concerning the object formula in the German tradition see, for instance, Erin Daly, *Dignity Rights. Courts, Constitutions, and the Worth of the Human Person* (updated edn, University of Pennsylvania Press 2021) 5, 45–46. For the Czech tradition, see, for instance, Jiří Baroš in Eliška Wagnerová and others, *Listina základních práv a svobod. Komentář* (2nd edn, Wolters Kluwer 2023) 15.

[6] Zdeněk Kühn in Zdeněk Kühn and others, *Listina základních práv a svobod. Velký komentář* (Leges 2022) 270–71.

to us as cognition are, above all, historically and socially conditioned ideas that we have embodied in abstract concepts and attribute them to specific objects of our cognition. Therefore, although objectification of man in its philosophical understanding is not primarily an issue of ethics, uncovering the consequences of objectifying cognition inevitably raises ethical questions, especially when the cognition is ascribed normative consequences.

This, nevertheless, happens whenever the individual assessment is used to inform a legal coercive intervention against an individual, in other words, an intervention adopted against the person's will or wishes such as a child's placement in a social care, educational or health care institution, albeit taken for their protection instead of punishment. In such a case, individual assessment cannot avoid recognising the individual by subsuming them under abstract concepts such as different kinds of needs on the one side or of social dangerousness on the other side. As I demonstrate below, the philosophical understanding of objectification reveals abstract concepts as places of sedimentation of ideologies, which, moreover, often carry social inequality. Thus, instead of capturing the person's uniqueness, individual assessment frameworks relying on abstract concepts spread social prejudices and stigma, enlarge the field for social disciplining and control, and enhance systemic discriminatory schemes. These implications may be, however, hardly compatible with the concept of a subjective right.

Thus, I ask the following research questions: 1) How does the concept of objectification of man as understood in philosophy help problematise the current practice of individual assessment of children in conflict with the law? and 2) How can the philosophical understanding of objectification of man contribute to the reconceptualisation of individual assessment so that it corresponds to the nature of a subjective right?

To date, the existing scholarship has not addressed the complexity of the problem of cognition through abstraction and subsumption in individual assessment, ie, the problem of using positivist diagnostic tools, be they

psychiatric, psychological, pedagogical diagnostics or social work assessment frameworks based on subsumption of particulars under abstract concepts. Legal critiques focusing on individual assessment of children in conflict with the law as a right do not go so far as to dismiss the concept of individual assessment as an expert tool for collecting information about a child. They usually highlight the need for a participatory nature of the practice. Unfortunately, they do not identify it with the requirement of dialogue which is more radical than participation.[7]

More fruitful critiques may be found in other disciplines, mainly sociology, criminology, social work, and history, especially in their critical orientations. However, current scholarship within these disciplines has not focused on the right to individual assessment as enshrined in the Directive (EU) 2016/800, but focuses either on specific tools like actuarial methods[8] and the risk/needs

[7] Agné Limanté, Rūta Vaičiūnienė and Jolanta Apolevič, 'Legal Aid and Individual Assessment of Children in Conflict with the Law: Building the Basis for Effective Participation' (2021) 19(1) International Journal of Environmental Research and Public Health <www.mdpi.com/1660-4601/19/1/17> accessed 10 April 2024; see also the outcomes of the FOCUS project (2020–2021): Maria Cidonelli, 'A Gateway to Child-centered Justice: FOCUS presents innovative tools to implement individual assessment' (*childhub.org*) <https://childhub.org/en/child-protection-news/gateway-child-centered-justice-focus-presents-innovative-tools-implement-individual-assessment> accessed 10 April 2024.

[8] By actuarial methods I mean the application of statistically based methods that serve to calculate the prediction of the likelihood of future risks for or from the assessed individual. These methods are based on statistically pre-defined indicators which can be labelled as 'risks', 'needs', or otherwise. Indicators are applied to specific situations and used to assign a classification to that situation in terms of the type and level of risk it poses. Not rarely they are associated with the expectation of objectivity. – See, for instance, Natasha S. Mendoza and others, 'Risk assessement with actuarial and clinical methods: Measurement and evidence-based practice' (2016) 61 Child Abuse & Neglect 2. For the critiques of actuarial methods of risk assessment see, for instance, Ian Paylor, 'Youth Justice in England and Wales: A Risky Business' (2011) 50(4) Journal of Offender Rehabilitation 221; Chelsea Barabas and others,

factors[9] they rely on,[10] or on the role of experts in the context of individuals' personalities, backgrounds, and circumstances in the delivery of criminal

'Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment' (2018) 81 Proceedings of Machine Learning Research <https://proceedings.mlr.press/v81/barabas18a/barabas18a.pdf> accessed 10 April 2024.

9 'Risk' and 'needs' are statistically defined criteria that serve the purposes of predictability of human behaviour (risks) and determination of appropriate intervention (needs). 'Risk factors' is an older concept that displays static characteristics of a person, such as age or history of criminal behaviour, to predict future behaviour. Their application leads to the incapacitation of the person and openly repressive interventions. 'Needs factors' is a more recent concept that aims to bring dynamism to the risk assessment frameworks. Needs factors are conceived as dynamic risk factors, ie, risks that may be eliminated through appropriate intervention. Thus, while risk factors are intended to inform us about the risk that can be expected from a person in the future, needs factors are designed to serve as a basis for determining how to intervene against that person to reduce the likelihood of their future risky behaviour. Most recent developments in risk assessment tools have added the dimension of 'responsivity' to the risk-needs framework. Responsivity factors should place the intervention in a broader context of the assessed person to increase its effectiveness. They include aspects that are not directly connected with the unlawful act but rather with the assessed person like their intelligence, self-esteem, reading ability, motivation to change, emotional maturity, etc. Barabas and others describe risk-needs-responsivity (RNR) assessment frameworks and the fourth and last generation of risk assessment tools which is still the most used in practice. See Barabas and others (n 8) 3, 5. See also Robert Hoge, 'Advances in the assessment and treatment of juvenile offenders' (2009) 17 *Kriminologija & Socijalna Integracija 52–3.*

10 Stephen Case, 'Young People "At Risk" of What? Challenging Risk-focused Early Intervention as Crime Prevention' (2006) 6(3) Youth Justice 171; Gwen van Eijk, 'Inclusion and Exclusion Through Risk-based Justice: Analysing Combinations of Risk Assessment from Pretrial Detention to Release' (2020) 60(4) The British Journal of Criminology 1080.

justice or the exercise of public power in general.[11]

These works differ in the radicality of the critiques they offer. Some authors argue for the need for a paradigmatic change in the concept of risk-needs factors either in terms of greater space for the perspectives of the concerned persons[12] or their share of resources[13] but do not fully overcome the risk-based paradigm as such. Others formulate a powerful position against individual assessments conceived as risk-needs-based managerial methods[14] or persuasively unfold the problems that the engagement of experts within public power brings for social equality and the rule of law.[15]

Yet, human rights critique positioning the problem of individual assessment of children in conflict with the law within the framework of constitutional values and offering a radical reconceptualisation of individual assessment as a subjective right is missing. This paper aims to fill this gap.

In this paper, I turn to several authors of different philosophical orientations. As a point of departure, I chose Theodor W. Adorno and his work on dialectical thinking. Adorno tried to formulate his theory as a 'methodology' and thus kept it as free as possible from ideological backgrounds.[16] This is especially important for children because it neutralises the different and often

[11] Nikolas Rose, 'Expertise and the Government of Conduct' (1994) 14 Studies in Law, Politics and Society 359; Shoshana Pollack, 'Anti-oppresive Social Work Practice with Women in Prison: Discursive Reconstructions and Alternative Practices' (2004) 34(5) The British Journal of Social Work 693; Kelly Hannah-Moffat, 'Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics' (2010) 22(2) Current Issues in Criminal Justice 193.

[12] Case (n 10).

[13] van Eijk (n 10).

[14] Pollack (n 11); Hannah-Moffat (n 11).

[15] Rose (n 11).

[16] The brackets are used because he himself stresses that 'any form of dialectical reflection which is purely methodological – ie, is externally foisted upon things – already violates the character of dialectic. Theodor W. Adorno, *An Introduction to Dialectics (1958)* (Christoph Zierman ed, Nicholas Walker tr, Polity Press 2017) 54.

conflicting perceptions of their maturity or immaturity, dependence or independence, abilities and incompetencies, and development needs. Further, Adorno's negative dialectics can help us unfold structural biases in the practice of individual assessment conceived as abstraction and subsumption.[17]

Nevertheless, I argue that the understanding of objectification as a problem of cognition through abstraction and subsumption is common for philosophers of different backgrounds. To demonstrate this, I support Adorno's ideas by references to two other thinkers who strongly thematised objectification in their works, namely Czech philosopher Ladislav Hejdánek, and French philosopher Gabriel Marcel. Hejdánek's thematisation of objectification and non-objecthood seems inspiring because he lived and worked in Czechoslovakia during the Cold War and had only limited access to the contemporary thinking of Western thinkers.[18] Nevertheless, he comes to the same conclusions as Adorno on the essential points. Marcel's concepts of availability [*disponibilité*] and unavailability [*non-disponibilité*] then appropriately complement Adorno's thoughts, especially concerning the reconceptualisation of the right to individual assessment. [19]

To respect Adorno's work not only as a point of reference but also as a 'methodology', I think in constellations, bringing different concepts from

[17] Adorno speaks about 'sediments of the history of mankind'. ibid 54.

[18] Ladislav Hejdánek, *Nepředmětnost v myšlení a ve skutečnosti* (Oikoymenh 1997) 194.

[19] For the concepts of availability [*disponibilité*] and unavailability [*non-disponibilité*] see Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (2nd edn, Éditions Nauwelaerts, 1967) 83–84. It is worth noting that Adorno was a critic of existentialism to which Marcel is often classified. However, his critique, which is based primarily on scepticism of finding solutions at the level of the individual, is not, in my opinion, incompatible with the concepts of availability and unavailability, especially when applied to society, which is what I am trying to do in this paper. For Adorno's critique of existentialism, see Theodor W. Adorno, *Negative Dialectics* (first published in German in 1966, EB Ashton tr, The Continuum International Publishing Group 2007) 49–51.

various fields together and observing them in their mutual configurations.[20] I will thus focus not only on the philosophical understanding of the objectification of man but also include the historical roots of the individual assessment and historical and sociologic critiques of individual assessment tools. I will also identify common points of the philosophical concept of objectification with human rights standards, specifically with disability rights. The reason why I choose disability rights is twofold. First, disability rights are formulated in contrast to treating the person with a disability as an object.[21] Second, the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD, 2006) is the most recent status-based anti-discrimination convention, including anti-discrimination concepts that have not yet been explicitly articulated concerning other groups such as children. I argue that the philosophical concept of objectification can illuminate the universal validity of these concepts.

To think in constellations, I need to be as specific as possible. In Adorno's words, I need to 'think in fragments'. Thus, I focus only on individual

[20] Constellations of concepts should be, in Adorno's view, an effective response to objectifying – conceptual thinking. It refers to putting different concepts centred on an object side by side and looking at them in their configurations, not in their predefined relationships based on mathematical-logical laws. In other words, it makes us observe and not analyse through induction and deduction, abstraction, and subsumption, and thus get new insides and perspectives. Adorno emphasises that thinking in constellations enables us to see 'from without what the concept has cut away within: the "more" which the concept is equally desirous and incapable of being.' – ibid 162. It occurs that, if we want to think in constellations, we need a specific subject-matter we focus on – a fragment.

[21] The Department of Economic and Social Affairs of the UN defines the aim of the CRPD as changing the view of persons with disabilities from objects of charity, medical treatment, and social protection to subjects of rights. – United Nations, Department of Economic and Social Affairs, 'Convention on the Rights of Persons with Disabilities (CRPD)' (*un.org*) <www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-Disabilities.html> accessed 15 July 2024.

assessment as a child's right in conflict with the law. The reason is twofold. First, individual assessment of children suspects or accused historically precedes that of victims, although the latter took, firstly, the form of a right enshrined in European law.[22] Thus, the context of child justice system enables us to shed light on the ideology that accompanied the birth of assessment practices.

Second, the situations when the individual assessment provides information for the adoption of coercive intervention are more common in the child justice system, where the individual assessment traditionally informs the measures imposed on the child regardless of their will. Nevertheless, the context of children in conflict with the law may serve as an example for one of many relevant contexts in which individual assessment is being used. The arguments presented may be equally applied to the situation of victims of crime or in any other context where the individual assessment is not carried out as a dialogical relationship and serves to adopt coercive interventions against the concerned persons.[23]

Finally, when I use examples from a particular legal system, I turn to the Czech (Czechoslovak) one, as I am most familiar with its history and current application. Moreover, as mentioned above, Czech constitutional law, following the German doctrine, subscribes to the concept of human dignity as the prohibition of objectification of man.

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[22] Right of victims to individual assessment to identify specific protection needs in Article 22 of the Directive (EU) 2012/29 of 19 April 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L115/1. The right of children in conflict with the law to individual assessment was enshrined on the European law level 4 years later in Article 7 of the Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ L132/1.

[23] That may be the case of persons with disabilities if they are assessed as being incapable to perform their procedural rights as participants to the proceedings.

I. Liberal and Positivist Origins of Individual Assessment and Their Persistence in Human Rights Law

The ideological origins of individual assessment in the context of criminal justice date back to the nineteenth century and are inherently linked to traditional liberalism and individualism. In his text dedicated to the problem of expertise and government of conduct, Rose describes the era of traditional liberalism through the phenomena of the proliferation of expertise and experts in the exercise of public power.[24] This led to depolitisation of certain social issues, and welfarism.[25] He considers that the idea of exemption of certain social spheres like the market, the public sphere, and the individual from the legitimate scope of political power paradoxically led to interventions to ensure their self-organising capacities.[26] Rose further explains that traditional liberal government relied on 'a certain conception of the nature of human beings and the natural forces shaping moral conduct'.[27] That opened the door to the assertion of cause-and-effect rationality, based on mathematical-logical patterns of reasoning, ie, to positivism and positivistic sciences. Rose calls this development '[t]he invention of the calculable individual, with the birth of techniques of individualization and classification'.[28]

The idea of the 'calculable' individual was also appealing to the public power, to which it served as the ideological basis for the legal recognition of formative interventions against individuals to change them according to the presumed natural moral norms. Laws are no longer formulated according to an abstract theory of justice but according to 'the positive truths of expertise'.[29] They accept this expertise as the point of departure for

[24] Rose (n 11).
[25] ibid 360–81.
[26] ibid 364.
[27] ibid 370.
[28] ibid 379.
[29] ibid 377.

regulation, which undermines the principle of legality and the primacy of law.[30] Further, the idea of causality in human behaviour also enabled the enlargement of the legitimate exercise of power against individuals to prevent their misconduct.[31]

The cause-and-effect rationality and the belief that the public power equipped with modern and still developing positivist sciences can shape people through its intervention stood at the birth of separate criminal justice systems for children. Christiaens explains this development through the notion of 'welfare sanction', which she defines, relying on Garland, as '[a] sanction which takes as its object not a citizen but a client, activated not by guilt but by abnormality, establishing a relation which is not punitive but normalizing'.[32] Thus, with welfare sanctions, the normality and not the legality, the normalisation and not the punishment came to the fore in the exercise of public power against an individual. Christiaens further highlights this finding when she links the emergence of welfare sanctions to social defence doctrine and emphasises that this doctrine was in no way a judicial theory but a social project aiming to establish a system of social control to preserve the fundamental values of the liberal society.[33]

This 'pedagogization of penal practices' could not be done without a diagnostic of the abnormalities of the individual to be suppressed by the

[30] Foucault notes in his writings the paradoxical situation that at practically the same moment that Beccaria's legalistic doctrine succeeds in establishing itself in criminal law, it is undermined by the intersection of positivist sciences of man and the concept of the 'dangerous individual'. See, for instance, Michel Foucault, 'Truth and Juridical Forms' in James D Faubion (ed), *Michel Foucault. Power. Essential Works 1954–84* (Robert Hurley and others trs, 3rd edn, Penguin Random House UK 2020) 56, 85; Michel Foucault, 'About the Concept of the "Dangerous Individual" ' in ibid 199.

[31] Rose (n 11) 377–378.

[32] David Garland, 'The Birth of the Welfare Sanction' (1981) 8(1) British Journal of Law and Society 29, 40 cited in Christiaens (n 4) 5, footnote n 2.

[33] Christiaens (n 4) 13.

coercive intervention.[34] This is where the practice of individual assessment of the child was born. Christiaens confirms the key role of positivist sciences in this regard.[35] Similarly, Blanchard puts the emergence of assessing practices in the context of the trust in science, which will be able to fully identify the causes of a child's misbehaviour and thus enable treatment in terms of their resocialisation. She describes that the personality of the offender became central to the decision-making of judicial authorities who relied on social inquiry and medical or psychological-medical examination that became regular parts of criminal files.[36]

The Czechoslovak experience confirms these findings. The individual assessment as a legally relevant practice was already contained in the first special act regulating juvenile delinquency in 1931.[37] It was expected to cover the child's individual, family, and economic circumstances. The explanatory note to the Act revealed the diagnostic and positivist understanding of individual assessment. It defined its aim as giving a timely and thorough image of the personality of the juvenile to identify the most effective measure for their moral development. It also expressed uncritical trust in the development of the 'knowledge of the science and on the new educational methods' and referred to the pedopsychological and psychopathological department of the Pedagogical Institution of the Capital City of Prague as an example of promising practice.[38]

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[34] ibid 8.

[35] ibid 15, 20.

[36] Véronique Blanchard, "Sous toutes les coutures". Déviance juvénile féminine et observations de specialistes (tribunal pour enfants de la Seine, années 1950)' in Ludivine Bantigny and Jean-Claude Vimont (eds), *Sous l'oeil de l'expert. Les dossiers judiciaires de personnalité* (Publications des universités de Rouen et du Havre 2010) 69.

[37] Act No. 48/1931 Coll., on criminal justice over juveniles.

[38] Explanatory memorandum to the Czechoslovak Act No. 48/1931 Coll., on criminal justice over juveniles – Parliamentary Print No. 539 of the electoral term 1929–1935

The works dedicated to different assessment tools used in the current criminal justice practice across North America and Western Europe document that these diagnostic origins are not only present but are still dominating. They take the form of different risk-needs-responsivity assessment tools.[39] On the one hand, works focusing on these tools are not necessarily critical. For instance, Hoge openly speaks about the aim of individual assessment as to identify 'specific behaviour and attitudinal deficits in the youth'.[40] He further puts this practice in the context of evidence-based programming, the application of cognitive-behavioural techniques, and the classification of youth in types without calling anything of these into question.[41]

On the other hand, the critical works formulate strong arguments against this traditional conception of individual assessment. They highlight that it entrusts the dominant role to statistics and describe the consequences of inferring positive truths about specific cases from statistical evidence. The common denominators of those critiques are reduction of reality and loss of context, tendencies to classify, categorise and measure the reality, and confusion of causes with coincidences.[42] Not all these critiques reject the idea of individual assessment tools and their use in the criminal justice system. They, however, always propose at least radical reconceptualisation of these tools.[43]

(*Digital library of the Chamber of Deputy*) <www.psp.cz/eknih/1929ns/ps/tisky/t0539_06.htm> accessed 10 April 2024.

[39] See above n 9.

[40] Robert Hoge (n 9) 89–90.

[41] ibid 89–90.

[42] Christiaens (n 4) 9; Paylor (n 8) 226; Hannah-Moffat (n 11) 200–201, 204; Barabas and others (n 8) 6–8.

[43] For instance, Paylor emphasises in his critique that actuarial risk assessment methods should be replaced by an approach based on a relationship between the social worker and the child and their family, building on the child's and family's strengths and

Nevertheless, neither international human rights law, nor European criminal law seems to reflect those criticisms appropriately. Although the Directive 2016/800 moves the individual assessment somewhat toward a rights-based approach, it lacks explicit guarantees that would prevent understanding the right to individual assessment as a 'right' of the individual to have their personality and life assessed by experts, whether or not the individual agrees with their conclusions. The analysis by the European Union Agency for Fundamental Rights (FRA) proves that such understanding is common within the Member States where it is understood either as a social inquiry carried out by a social worker, a psychological or psychiatric assessment, or a combination of both. The analysis further reveals that individual assessment is still used especially as a basis for the adoption of different measures toward the child, not necessarily with the child's consent.[44]

In the Council of Europe and UN documents, individual assessment is thematised most often as an integral part of multidisciplinarity.[45] It is thus

working with them 'by way of "planning a web of support".' – Paylor (n 8) 230. Barabas and others propose to rely on statistical methods, namely casual interference, when determining the effectiveness of interventions in the criminal justice system. They 'argue that risk assessments should be conceived of as a diagnostic tool that can be used to understand the underlying social, economic and psychological drivers of crime.' – Barabas and others (n 8) 11. Below, I also refer to van Eijk's proposal to reconceptualise individual assessment as a distributive process with the aim not to subject the assessed person to legal coercion but to reinforce their access to resources. – van Eijk (n 10) 1082.

[44] FRA, *Children as suspects or accused persons in criminal proceedings. Procedural safeguards* (2022) 77–83 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-children-procedural-safeguards_en.pdf> accessed 10 April 2024.

[45] See especially the Guidelines on Child Friendly Justice adopted on 17 November 2010, Chapter IV, Section A. – General elements of child-friendly justice, Point 5. – Multidisciplinary Approach, para 17. Concerning the UN documents, see CRC Committee, *General comment No. 24 on children's rights in the child justice system* (CRC/C/GC/24, *un.org* 2019) paras 11 and 109 < https://digitallibrary.un.org/record/3899429?ln=en&v=pdf > accessed 10 April 2024.

inevitably linked to the role of experts.[46] These documents, unfortunately, do not simultaneously address the problematic aspects of the expertisation of public power either in the form of reduction of the rule of law or in more paradigmatical dimensions in the form of individualising and psychologising criminal behaviour and social problems in general.[47] These processes are, however, linked to any positivist-oriented diagnostics focused on the man.[48]

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[46] The link between multidisciplinarity and experts is evident, for example, in the Council of Europe's Guidelines on Child-Friendly Justice, which describe multidisciplinarity as the involvement of professionals of different backgrounds in the child's case. Their role is defined as to help the decision-making authorities 'to obtain a comprehensive understanding of the child an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.' – the Guidelines on Child Friendly Justice adopted on 17 November 2010, Chapter IV, Section A. – General elements of child-friendly justice, Point 5. – Multidisciplinary Approach, para 16.

[47] Rose (n 11) 366, 375–76.

[48] This claim can be well demonstrated by the way Garland describes the roots of classical criminology. Garland points out that classical criminology was based on a conception of criminality as a purely individual matter, as a matter of individual pathology. This led to the criminal system becoming concerned not only with the offence but with the person of the offender, and at the same time, it also created a demand for the insights of non-legal disciplines that could detect the pathological determinant in the individual. Psychiatry was dominant among these disciplines in the beginning, and the assessment of a person took the form of a medical-psychological examination. Garland himself places this approach within the framework of scientism and positivism. – David Garland, *Punishment and Welfare: A History of Penal Strategies* (Kindle edn, Quid pro Books 2018) ch 3. In his lectures on the introduction to dialectics, Adorno traces the positivist approach to man against the background of the relation between the particular and the universal, pointing out that in the positivist approach the particular is seen as 'an abbreviated expression of characteristic features'. – Adorno, *An Introduction to Dialectics* (n 16) 168. Adorno goes on to point out that behind the ideas of these characteristics there is always a theory, a theoretical context, which 'could develop, for example, a social-psychological model for individuals who respond in precisely this way rather than

The UN Committee on the Rights of the Child (CRC Committee) does not preclude individual assessment from serving as a basis for coercive intervention against a child.[49] It thus fails to constitute an effective safeguard against such individualisation because the coercive intervention may be justified by risks that lie in the systemic failures which the child is exposed to such as poverty or social exclusion. The coercive intervention then transfers responsibility to the child because it is the child who must bear the adverse legal consequences of failures of the society and social systems. The requirement for participation of the child, even if formulated as a guiding principle, cannot remedy this impact of individual assessment.[50] Against this backdrop, the philosophical understanding of objectification of man may help us explain why.

We cannot conclude that European or international human rights law completely fails to reflect the problematic aspects described in the

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that because they exhibit a rather specific if nonetheless complex kind of character structure.' – ibid 204. However, without the existence of such a model, diagnostics of a person is not possible. Thus, both authors point to the connection between the idea of observable determinants of a person's personality and causalities derived from these determinants and positivism. A similar idea can also be found in Pollack, who, though not directly referring to positivism, comments on 'cognitive-behavioural programming' by which she means those programmes that disregard the broader social context of the offending behaviour, but are based on the idea that this behaviour is a consequence of the 'criminal mind'. – Pollack (n 11) 695. In light of Garland's characterisation of classical criminology, these programmes can also be characterised as positivist, since they are based on the notion of man as a creature with recognisable characteristics that can be framed within the laws that govern human behaviour. Pollack, however, explicitly links cognitive-behavioural programmes to 'decontextualization of offenders from their social environment (…), thereby individualizing and psychologizing criminal behaviour.' – ibid 695.

[49] CRC Committee, *General comment No. 24 on children's rights in the child justice system* (CRC/C/GC/24, *un.org* 2019) para 11 < https://digitallibrary.un.org/record/3899429?ln=en&v=pdf > accessed 10 April 2024.

[50] Limanté, Vaičiūnienė and Apolevič (n 7) 12, 15.

interconnection between positivist diagnostics and the coercive application of public power towards individuals. Still, such reflection is available outside the scope of children's rights. Not surprisingly, it is the field of disability rights that formulates legal paradigms and categories that delegitimise those practices under the concept of the medical or individual model of disability that they replace with the social or human rights model.[51] I argue that objectification of man as understood in philosophy, thanks to its link to the supreme constitutional values of human dignity and equality, may show the universal validity of those legal concepts and formulate a general rejection of any coercive practices based on positivist diagnostic methods/assessments.

II. Objectification of Man as Socially Conditioned Incapacitation Under the Guise of Objective Truths

The philosophical concept of objectification uncovers the thought patterns on which individual assessment is based, if conceived as expert diagnostics of the person. At the same time, it allows us to go deeper than other reflections in critiquing this practice. Indeed, it reveals that assessment frameworks informing coercive interventions against an individual are shaped by social predictions rather than the uniqueness of the person and by notions of normality rather than plurality. Ultimately, it shows that these assessment frameworks do not bring to the law the objectivity in whose

[51] Academic literature distinguishes between social and human rights models of disability arguing that the former is descriptive and the latter prescriptive. Also, the UN Committee on the rights of persons with disabilities (CRPD Committee) does not include in its General Comment on equality and non-discrimination the term 'social model' and instead defines the human rights model as the counterpart of the individual (medical) one. Nevertheless, I do not find it necessary, for the purpose of this paper, to keep this distinction. Thus, I use the term 'social model of disability' as a broad concept to cover both the social and human rights models. Anna Lawson and Angharad E. Beckett, 'The social and human rights models of disability: towards a complementarity thesis' (2020) 25(2) The International Journal of Human Rights 348.

name they are developed but, instead, subjectivism, albeit a shared one. In other words, it demonstrates that these frameworks operate as hidden normalising tools reinforcing social hierarchies and structural inequalities and obscuring value judgments as 'objective truths'.

1. Philosophical concept of objectification: unfolding positive truths as subjective concepts

As mentioned in the introduction, philosophy, contrary to constitutional law, thematises objectification primarily as an issue of epistemology and not ethics. Objectifying cognition is a classificatory cognition governed by Cartesian rationalism and the methods of traditional logic (subsumption, abstraction, deduction, induction).[52] This way of cognition usually promises

[52] In his lectures on the introduction to dialectics, Adorno formulates his conception of dialectics against the background of a critique of the four rules of the method of knowledge formulated by Descartes, which 'have undoubtedly underpinned scientific thought to this very day.' Adorno, *An Introduction to Dialectics* (n 16) 128. Adorno elaborates mainly on the first three rules: 1) 'to accept nothing as true which I did not clearly recognize to be so' – ibid 130; 2) 'divide up each of the difficulties which I examine into as many parts as possible, and as seemed requisite in order that it might be resolved in the best manner possible' – ibid 136; and 3) 'to carry out on my reflections in due order, commencing with objects that were the most simple and easy to understand, in order to rise little by little, or by degrees, to knowledge of the most complex, assuming an order, even if a fictious one, among those which do not follow natural sequence relatively to one another.' – ibid 147. For Adorno, the first rule strictly separates truth and time, leads to the idea that the object to be known is statically given, and finally results in classificatory concepts because it is built on the presumption that each object can be clearly distinguished from the other. – ibid 102, 130–135. The second rule consists of analysing everything into its elements which, in the end, leads to reduction of the object into constituent elements – ibid 136–138. The third rule is linked to the idea of existence of a certain predetermined order, a rational ordering principle. – ibid, 147–149. For Adorno, cognition according to Descartes' rules is thus cognition that is essentialist, classificatory, that reduces complexity and is based on the idea of a pre-given order,

to bring objective knowledge but, as Marcel points out, the only objective fact about this way of cognition is its subjectivity.[53] In other words, philosophy unfolds objectifying cognition as subjectivism and idealism[54] and having the same roots as traditional metaphysics.[55]

Adorno finds that cognition through classification. Subsumption of particularities under abstract concepts, inevitably depends on the idea of the matter as a givenness, a thing with its affirmative substance, a thing in itself.[56] It is exactly the idea of affirmative substantiality that represents the metaphysical element in objectifying cognition.[57] Such an idea requires permanence, stability, and staticity.[58] It denies the context, which must be, on the contrary, dynamic.[59] Similarly, Hejdánek, who links objectification to the Greek tradition of thinking, observes that the ancient Greeks tried to displace the aspect of time, saw truth in immutability, and even, in ongoing changes, tried to reveal their immutable regularities.[60]

Adorno emphasises that the human consciousness and not the matter itself may serve as the guarantor of a solid identity. Identity, logical non contradictoriness, or the stable and permanent affirmative substance of things are not givens, but ideas – products of the subject, through which the

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which Descartes himself admitted could only be a thought construct, but which subsequent thinkers have already treated as a given. – ibid 134–35, 138, 147.

[53] Marcel emphasises that the only certainty that Descartes has been able to offer us is the unquestionability of the epistemological subject as the body of objective knowledge, that is, as the guardian of the category of validity. Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (n 19) 54.

[54] Adorno, *Negative Dialectics* (n 19) 145–47.

[55] Adorno, *An Introduction to Dialectics* (n 16) 107; Ladislav Hejdánek (n 18) 30, 178–79.

[56] Adorno, *Negative Dialectics* (n 19) 147–48.

[57] Hejdánek (n 18) 25, 178; Adorno, *An Introduction to Dialectics* (n 16) 159.

[58] Adorno, *Negative Dialectics* (n 19) 154.

[59] Adorno, *An Introduction to Dialectics* (n 16) 9.

[60] Hejdánek (n 18) 181.

subject tries to dominate what it observes and describes, that is, the object. Unfortunately, these concepts know the object only through representation, through something that the object is not.[61] Similarly, Marcel conceives abstraction, that is, in Adorno's words, 'the product of the subject', as fiction.[62]

It is worth noting that this alienating motif of abstraction has also been stressed in more targeted critiques of the practice of individual assessment. For example, Bessant, in her critical appraisal of the sociology of risk applied to young people at risk of homelessness, points out that the method of epidemiological research[63] can only 'show certain average values or deviations from the norm'.[64] Referring to Gould, she emphasises that any central tendency is always an abstraction.[65] It cannot be assumed that what can be said about an entire group is true for every single member of that group.[66]

For Adorno, the subsumption of the matter under a concept is the compulsion of the rules of logic, ie, of the subject, because it inevitably leads to the reduction of the object, the denial of its complexity, and its fragmentation.[67] Adorno speaks about the 'delusion of the natural context'

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[61] Adorno, *Negative Dialectics* (n 19) 148–49.

[62] Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (n 19) 50

[63] By epidemiological research she means a statistically based method in which a characteristic of a person or their environment is associated with health-related or social-related conditions based on epidemiological evidence. Judith Bessant, 'From sociology of deviance to sociology of risk. Youth homelessness and the problem of empiricism' (2001) 29 Journal of Criminal Justice 36.

[64] ibid 36.

[65] Stephen Jay Gould, *Life's Grandeur. The Spread of Excellence from Plato to Darwin* (Jonathan Cape 1996) 48–49 cited in Judith Bessant (n 63) 36.

[66] Bessant (n 63) 36.

[67] For reduction of the object see Adorno, *Negative Dialectics* (n 21) 192–93. For the denial of the object's complexity and the fragmentation of the object see ibid 176; Adorno, *An Introduction to Dialectics* (n 16) 101.

by which he means that logic rules dominate the context and thus lose it.[68] Fragments determined by logical–organisational thinking, even if put together, will never be able to capture the context again because they are the result of ideology hidden in the concepts applied on the one side and of reduction on the other side. They thus always lose a certain aspect of reality.[69] Objectifying cognition can then unfold as stabilising the dynamic and ever-changing reality through grasping it by pre-defined abstract concepts – forms – and decontextualising, formalising and fragmenting it.[70] As such it, unfortunately, loses contact with reality and replaces it with subjective ideas.

This is also the case of positivist sciences which present themselves as capable of bringing objective knowledge, positive truths, since their method is also based on the rules of traditional logic. The philosophical concept of objectification thus enables us to thematise knowledge obtained through positivist sciences as subjective, idealistic, and socially conditioned.[71]

The social conditioning nature of positivist knowledge is a strong motif especially in Adorno's critical work. For Adorno, there is no such thing as the pure individual. The individual consciousness and individual experience

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[68] Adorno, *Negative Dialectics* (n 19) 141.

[69] Hejdánek points out that what can be obtained by combining knowledge of specialised science is at most a pluriverse and not a universe. – Hejdánek (n 18) 18.

[70] Adorno formulates the idea of the rule of the concept, which is that the concept always tends to be constant as opposed to the matter – reality it is supposed to embody, which results in its blindness to matter – reality. – Adorno, *Negative Dialectics* (n 19) 137. He further points out that the concept 'hypostatizes its own form against the content', ie, abstract concept replaces reality. For Adorno, this makes the concept an embodiment of the identity principle. – ibid 154. Adorno also emphasises that of the features of what he calls "the hitherto dominant philosophy of modern age" which can be identified with objectifying thinking and tradition is the exclusion of traditional moments of thought, including the dehistoricisation of its content. – ibid 53. The motifs of decontextualisation, formalisation and fragmentation of reality as a result of objectifying thinking and cognition resonate strongly in Hejdánek's work – Hejdánek (n 18) 12, 25–26.

[71] Adorno, *An Introduction to Dialectics* (n 16) 119, 122; Hejdánek (n 18) 35, 179.

are, at least to a certain extent, determined by society.[72] Adorno also stresses that society must not be conceived as a monolithic organism; it is rather a system than an organism, and thus, what conditions the subject and its thinking are primarily social antagonisms.[73]

If we accept that the established content of a concept is not an embodiment of reality, but a subjective idea of reality, then we must also ask who the subject is that formulates this idea. The motif of social antagonisms then leads us to the idea that there is a clash of different social groups in society whose ability to influence the content of the concept may not be equal. The abstract concept can thus become an important tool for maintaining the privileged position of certain social groups vis-à-vis others, and thus an important tool for maintaining social inequalities that result from the division of labour and, therefore, inequalities in power.[74] However, the problem is that the ideas covered by concepts are not communicated as political decisions but as objective, 'natural', inevitable truths with predictive force. This naturalistic approach makes it very difficult for the persons and groups concerned to break out of their designated position within society, as their inequality is communicated as something naturally given. As a result, there is not even a social need to deal with the conditions generating inequality. A good example to demonstrate this consequence of an objectifying approach to the human being is the medical approach to disability, which I discuss in more detail below.

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[72] Adorno, *Negative Dialectics* (n 19) 181.

[73] Adorno, *An Introduction to Dialectics* (n 16) 147.

[74] Garland describes the roots of modern welfare criminal practices on the grounds of four programmes, namely criminology, social work, social security, and eugenics. He links these programmes to the promotion of the professional middle classes. He thus points out that the expertisation of criminal practices also entailed the dominance of the middle class and its values, and conversely, expert disciplines and their frameworks entailed social biases in favour of the middle class. David Garland, *Punishment and Welfare: A History of Penal Strategies* (Kindle edn, Quid pro Books 2018) ch 5.

The authoritative application of these abstract concepts against individuals can be thus thematised not as an objective cognition but primarily as a disguised social discipline of one social group by another, which only deepens the inequalities that gave rise to the concept. This observation is also close to Foucault's concept of the war of races and state racism, which he describes against the background of disciplinary power and biopolitics as its instruments.[75]

Historical analyses of the first individual assessment frameworks confirm these theoretical positions. They reveal significant social antagonisms

[75] It is worth noting that Foucault formulates the concept of 'state racism' without an exclusive link to the traditional understanding of race. For Foucault, racism is 'a way separating out the groups that exist within a population […] a way of establishing a biological type caesura within a population that appears to be a biological domain.' – Michel Foucault, *"Society must be defended". Lectures at the Collège de France 1975–76* (Mauro Bertani and Alessandro Fontana eds, David Macey tr, Picador, 1997) 255. Foucault places his concept of racism in direct relation to biopolitics, which suggests that the reference to the biological domain should be read here in its historical context. Indeed, as Foucault notes, medicine played a central role in the early days of the biopolitical approach of the state to the individual, or more precisely, the population and 'becomes a political intervention-technique with specific power-effects […]'. – ibid 252. However, it is clear from Foucault's lecture that he sees racism very broadly in terms of any approach to a person that views the person's behaviour through the lens of naturalism and natural laws. Racism is thus the differentiation of groups based on the idea of their natural essence and the establishment of natural hierarchies between them. Foucault himself also mentions, in relation to racism, nineteenth-century society's understanding of 'criminality, the phenomena of madness and mental illness, the history of society with their different classes, and so on.' – ibid 257. The fact that Foucault's conception of racism transcends traditional notions of race is illustrated by his own criticism of socialist states with respect to which he explicitly mentions the term of 'social racism' and adds that 'we find that racism–not a truly ethnic racism, but racism of evolutionist kind, biological racism–is fully operational in the way socialist States (of the Soviet Union type) deal with the mentally ill, criminals, political adversaries, and so on.' – ibid 261–2.

directed against those who, to return to the way Rose describes the era of liberalism (see above section I), did not display sufficient self-management skills necessary for its smooth functioning. These individual assessments were informed by bourgeois morals, and their primary aim was to discipline the marginalised social groups, especially the poor and ethnic minorities.[76]

Similarly, Young describes the dynamics of late modernity as a process of essentialisation consisting of 'casting the other as the opposite of ourselves – as a fixed demon involving all vices which are the inverse of our virtues'.[77] He directly links the process aiming to create a secure identity to the emergence of social exclusion.[78]

The philosophical concept of objectification thus enables us to thematise individual assessment based on abstraction and subsumption as a tool of social normalisation and disciplining which results in the social exclusion of those who, for different reasons, cannot or do not want to keep up with social expectations in the liberal society.[79]

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[76] Ludivine Bantigny, 'Ordre social, ordre moral. A priori et partis pris des enquêtes sociales dans la France des années 1950' in Ludivine Bantigny and Jean-Claude Vimont (n 36) 86; David Niget, 'De l'impossible violence aux troubles du comportement. L'observation medico-pédagogique des jeunes délinquantes dans la Belgique des années 1950' in ibid 107.

[77] Jock Young, 'Crime and the Dialectics of Inclusion/Exclusion: Some Comments on Yar and Penna' (2004) 44 The British Journal of Criminology 552.

[78] ibid 550, 552–53.

[79] The normalising impact of objectifying cognition is also stressed in the works of Hejdánek and Marcel. Hejdánek observes that causal rationality opens the way 'to a truly "scientific" management of society and of individual human life' – Hejdánek (n 18) 25. Marcel links the phenomenon of objectification to 'the increased socialisation of human life'. – Gabriel Marcel, *Le mystère de l'être,* Volume I (Association Présence de Gabriel Marcel, 1997) 36 cited in Peluška Bendlová (ed), *Tři programové texty existenciální filosofie Gabriela Marcela* (Filosofia 2022) 47. My translation.

Garland discovers the same rationality beyond 'welfare sanctions', namely, legal coercive measures applied against the individual not for the purpose of their punishment but with the aim to correct their abnormalities.[80] Indeed, welfare sanctions are intrinsically linked to assessment tools conceived as diagnostics of the person because what is important for the imposition of these sanctions is not the unlawful act but the perpetrator's personality.[81] Thus, the philosophical concept of objectification allows us to unfold welfare sanctions as socially conditioned decisions to exclude members of ostracised social groups. In other words, it reveals that even though welfare sanctions are justified by expert knowledge and seem to be inevitable consequences of the 'objective truths' about the person their nature remains first and foremost political.

2. Social model of disability as an example of non-objectifying approach and its applicability to other objectified groups

The philosophical concept of objectification thus allows us to formulate a strong position for the primacy of law over 'objective truths' about human 'nature'. Garland notes that welfare sanctions were not justified by legal philosophy but by positive knowledge.[82] In other words, they represented spaces where the legal considerations had to take a back seat and capitulate to these positive truths. However, the philosophical concept of

[80] Garland (n 32). For the definition of welfare sanctions see ibid 40. Typical examples of welfare sanctions are the placement of a child in various types of institutions other than prison (educational, social care, or health care), where the stay is not thematised as punishment but as protection, either of the child or of society.

[81] Foucault notes that modern criminal law has become interested in the offender not only as the author of the act but also as a potentially dangerous individual. This brings to the fore the question of who the offender is 'by nature, according to his constitution, character traits, or his pathological variables.' Foucault, 'About the Concept of the "Dangerous Individual"' (n 30) 199.

[82] Garland (n 32) 38.

objectification shows these spaces primarily as legal questions of equality and human freedom.[83]

From the philosophical perspective, human dignity, understood as a prohibition of objectification of man, would not need to rely on the hard-to-define concept of instrumentalisation, of treating a person as a mere means.[84] It would protect persons from such forms of instrumentalisation that treat man as a member of the human species whose dangerousness or needs are diagnosable by experts. In other words, it would delegitimise those coercive measures based on perceived 'natural' characteristics or needs of the person and thus presented as inevitable expert responses to the person's situation.

I argue that this is what the child rights-based approach seeks to express and what is even more consistently captured in the field of disability rights under the social model of disability.[85] The social model of disability conceives of

[83] It is not without interest that Hejdánek directly places the problem of objectifying cognition/thinking in the context of freedom. According to him, freedom in objectifying thinking takes the form of an 'understood necessity'. In this way, he refers to the conception of man as a species that is governed by 'natural' laws, and which therefore manifests itself purely causally and is knowable by the scientific method. Hejdánek (n 18) 25.

[84] Michal Rosen, *Dignity: its History and Meaning* (Harvard University Press 2018) 80–90; Christoph Möllers, 'Democracy and Human Dignity: Limits of a Moralized Conceptions of Rights in German Constitutional Law' (2009) 42 Israel Law Review 424—25.

[85] The UN CRC Committee defined the child rights-based approach in its General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence. The Committee stressed that ensuring '[r]espect for dignity, life, survival, wellbeing, health, development, participation and non-discrimination of the child as a rights-bearing person […] is best realized by respecting, protecting and fulfilling all the rights in the Convention (and its Optional Protocols).' The Committee thus put the rights perspective at the forefront. – UN Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of*

disability primarily as a social problem. It emphasises that equality is a social issue and not a natural consequence of personal functional disadvantage. Thus, the problem of marginalisation and lower opportunities for people with impairments or perceived as with impairments is primarily the problem of social structures and schemes applied to those people.[86]

The social model of disability has been formulated as the counterpart of the traditional approach to persons with disabilities, also characterised as the individual or medical model of disability. The individual model of disability, as its name suggests, addresses the problems associated with disability as a matter of a particular person's incapacity caused by their actual or perceived impairment. A naturalistic perspective thus comes to the fore in justifying the person's lower opportunities and marginalisation.[87] It seems fully understandable that this model provides a fertile ground for expert assessments of persons, hence its alternative designation as a medical model.

The individual (medical) model establishes a significant asymmetry in power between experts on the one side and persons with actual or perceived impairments on the other side. This places the latter in a situation of dependency on the expert views, including in their access to human rights. On the contrary, the social model of disability takes the idea of equality in human rights and freedoms as its starting point.

Therefore, it should not be surprising that the CRPD delegitimises a number of traditional practices of incapacitation, exclusion, or even isolation adopted with expert justification under the guise of their objective necessity due to

violence (CRC/C/GC/13, un.org, 2011) para 59 <https://digitallibrary.un.org/record/711722?ln=en&v=pdf> accessed 10 July 2024.

[86] Lawson and Beckett (n 51) 348–49.

[87] ibid 349. See also UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination* (CRPD/C/GC/6, un.org, 2018) para 8 <https://digitallibrary.un.org/record/1626976?v=pdf> accessed 12 April 2024.

the person's health condition.[88] It refuses to accept the antagonistic attitudes and disadvantaging structures for persons with disabilities as unchangeable natural givens and to place all their negative consequences upon the individual. In other words, it refuses the objectification of persons with disabilities.[89]

The philosophical concept of objectification of man can help us understand the universality of the social model of disability, the legal categories it entails and their possible application to other social groups facing structural inequality due to their supposed natural incapacity. Children are definitely such a group.[90] This does not suggest that we should thematise childhood as

[88] These practices are, nevertheless, commonly used in national jurisdictions and include restrictions of legal capacity, forced institutionalisations, involuntary hospitalisation and treatment, segregation in education, etc. The Czech Republic, for instance, still considers all these practices legitimate and makes them part of the national legal order.

[89] The CRPD, for example, rejects the restriction of the person's legal capacity [Article 12(2)], or deprivation of liberty on the grounds of disability [Article 14(1)]. Instead, it enshrines the right of persons with disabilities to supported decision-making [Article 12(3)] and independent living (Article 19). See, especially, UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal recognition before the law* (CRPD/C/GC/1, un.org, 2014) <https://digitallibrary.un.org/record/812024?ln=en> accessed 1 March 2025; UN Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities* (A/72/55, Annex, un.org, 2016) <https://digitallibrary.un.org/record/1298412?ln=en&v=pdf> accessed 1 March 2025; UN Committee on the Rights of Persons with Disabilities, *General Comment No. 5 on living independently and being included in the community* (CRPD/C/GC/5, un.org, 2017) <https://digitallibrary.un.org/record/1311739?ln=en&v=pdf> accessed 1 March 2025.

[90] The motif of children's physical and mental immaturity appears in the Preamble to the Declaration of the Rights of the Child (1959) and, by reference, in the Preamble to the Convention on the Rights of the Child (1989). The fact that children can be considered as persons facing structural inequalities can best be demonstrated by the

a disability. It rather suggests that the philosophical concept of objectification can help us discover the same naturalistic rationality beyond coercive measures applied to children to 'protect' their alleged needs determined by an individual assessment framework based on abstraction and subsumption. Thus, the philosophical concept of objectification enables us to reveal that these practices may not be appropriate responses to the child's situation,

lower degree to which they can make autonomous decisions about their lives and the higher degree to which they must tolerate decisions made about them by adults, which find their legal expression, *inter alia*, in the concept of the best interests of the child. It is not without interest that, for example, the CRPD Committee has taken exception to the application of this concept to people with disabilities other than children, precisely because it undermines the equality of people with disabilities and their right to legal capacity. – UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal recognition before the law* (CRPD/C/GC/1, un.org, 2014), para 21 <https://digitallibrary.un.org/record/812024?ln=en> accessed 1 March 2025. This is not to say that the application of the concept of the best interests of the child, especially when interpreted in accordance with the general comments of the UN CRC Committee, is illegitimate. I am merely pointing out that this concept mirrors higher dependence of children on the views and decision-making of adults, which, in case of adults, including adults with lower cognitive abilities, is considered a violation of the equality principle. It is my premise that a broad definition of ableism used, for instance, by Wolbring, which shows that ableism and albeistic attitudes towards human beings may not only be related to a person's physical, mental, intellectual or sensory impairments, but to any socially applied notion of inferior abilities, is inspiring for understanding the position children receive in society. For Wolbring ableism is to value certain abilities and discriminating those who lack them as 'less able'. Wolbring points out that '[a]bleism is an umbrella ism for other isms such as racism, sexism, casteism, ageism, speciesism, anti-environmentalism, gross domestic product (GDP)-ism and consumerism.' It is also important that Wolbring notes what the philosophical concept of objectification tries to capture, that is, that ableism raises the possibility of classifying people, and therefore of social hierarchy and exclusion. – Gregor Wolbring, 'The Politics of Ableism' (2008) 51 Development 252–53.

despite the claims of experts. It further opens the way to uncover social biases the alleged needs may harbour, as in the case of persons with disabilities.

The philosophical concept of objectification can reveal that these practices and the assessment tools they rely on are not based on objective truths but are social decisions to resolve difficult social situations at the expense of the individual – by subjecting them to coercion and exclusion. In this context, it seems important to mention the experience of the Czech (Czechoslovak) child justice system where the birth of welfare sanctions and the practice of individual assessment understood as expert diagnostics can be directly linked to the social fight against unpleasant phenomena accompanying extreme poverty as beggary and vagrancy.[91] Those phenomena were thematised not as a failure of social structures and social solidarity but as 'moral disorders' of children requiring individual intervention.[92] The child thus had to bear the negative consequences of the social failure in the form of their incapacitation and exclusion.

The fact that more than a century has passed since the paradigm was established, and that in the interim, there have been significant shifts in the level of terms used ('needs' instead of 'disorders' and 'abnormalities') and in human rights standards, does not mean that the paradigm has been overcome. After all, many risks and needs factors constantly used do not deny conditioning by the person's material situation and social opportunities. Van Eijk, for example, points this out explicitly when emphasising that 'most [assessment] tools have in common that they conceptualize social marginality as criminogenic and that they include direct and/or indirect measures of socio-economic status through items such as educational achievement, income, employment status, housing and,

[91] Anna Sležková, 'Právněhistorický význam trestní politiky státu v oblasti chudoby pro zrod moderního systému veřejnoprávní ochrany dětí' (2022) 161(3) Právník 241.
[92] ibid.

sometimes, neighbourhood characteristics (poverty and crime) and leisure activities'.[93]

The former UN Special Rapporteur on the right to health, Dainius Pūras, notes that even what is considered a 'mental disorder' can be produced by the social conditions of poverty and social injustice and warns against 'psychologisation' or 'psychiatrisation' of poverty under the direction of psychological or psychiatric experts.[94] However, this occurs with the use of assessment frameworks based on abstraction and subsumption to inform coercive interventions against an individual. In the case of children, we could also speak of 'pedagogisation' of social conditions.

These ideas bring us back to the aforementioned thinkers who are thematising non-objecthood and objectification. I would like to refer here to Marcel and his concept of availability [*disponibilité*] that could also be described as engagement. Marcel notes that the objectifying treatment of man happens in a situation of unavailability in which one of the persons chooses only a part of the total sum of the resources they can dispose of 'for the benefit' of the other.[95] I argue that the concept of unavailability can be applied not only to the relationship between individuals but also between society and individuals.

Individual assessment based on abstraction and subsumption can be then revealed as a tool that serves to reinforce and, at the same time, obscure this inequality in the distribution of social resources. This reinforced and obscured inequality can only be overcome if we reject the practice of coercive measures imposed on individuals on an expert ground. The CRPD, based on the social model of disability, can provide inspiration in the form

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[93] van Eijk (n 10) 1082.

[94] UN Special Rapporteur on the right to health, Dainius Pūras, *Mental Health and Human Rights: Setting a Rights-based global agenda* (A/HRC/44/48, un.org, 2020) para 23 <https://digitallibrary.un.org/record/3862194?ln=en&v=pdf> accessed 10 July 2024.

[95] Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (n 19) 83–84.

of anti-discrimination concepts that transfer the coercive effect of the law from the individual to the environment.

Human dignity, conceptualised as the prohibition of objectification of man, can then serve as a legal category enabling the application of these concepts outside the field of disability rights, including the system of child justice in general and the right of children in conflict with the law to individual assessment in particular.

III. RETHINKING THE RIGHT TO INDIVIDUAL ASSESSMENT

The philosophical concept of objectification reveals the practice of individual assessment of children in conflict with the law as it has developed historically and is still applied today. Objectification is applied as the subjection of the assessed person to dominant social demands and discourses, ie, as a practice of social normalisation. Instead of capturing the context, it eliminates it as it confuses the uniqueness of the person's personality and situation with social preunderstandings embodied in the abstract concepts of 'risks' or 'needs' and denies the broader – systemic – dimension of the case. This allows it to obscure that a person's unlawful act is not only an individual matter but also a matter of the structural conditions to which the person is exposed, including inequality in the distribution of social resources. In the individual coercive measure that is taken based on such an assessment, the failures of social structures, in Marcel's words, their unavailability, are thus inevitably attributed to the responsibility of the individual. In addition to the factual constraints the person already faces, they must endure the legal ones.

The paradox of labelling such a practice as a subjective right seems obvious. However, it would not be appropriate to reject individual assessments altogether. It is impossible to deny that there were and still are intrinsically humanistic motivations behind this practice. Instead, what is needed is to radically rethink individual assessment as a subjective right in a way that creates a real space for the context, that is, the particular circumstances of the case revealing the uniqueness of the person concerned and their situation on

the one side and the broad systemic context of the person's life on the other side. I argue that we may achieve this radicality if we combine the philosophical concept of non-objecthood and the anti-discriminatory concepts of the CRPD.

1. The difficult task of breaking the hierarchy of the subject in law

In the philosophical concept of objectification, the radical turn consists in the reflection of the thought on itself, uncovering the mechanisms of its operation, the assumptions on which it is based, and the origins of these assumptions. This motif appears in the works of all three aforementioned philosophers, namely Adorno, Hejdánek, and Marcel.

Adorno conceives of his negative dialectics as a critical reflection that juxtaposes thought/concept (subject) and thing/context (object), revealing their inadequacy.[96] This contradiction makes it impossible to reconcile one with the other entirely. The aim is to abolish the dominance of the subject, that is, to defend the object against identifications and thus preserve its non-identity.[97] Non-identity here means the awareness that the object is still different from the concept applied to it and that its reality is never fully captured.

To do this, the subject needs to emancipate itself, that is, to 'resist the average value of such objectivity [note: *the consensus omnium*] and to free itself as a subject'.[98] In other words, the subject must resign to the pre-understandings – social prejudices – embodied in the concepts and in the notion of pre-defined relations between the concepts.

Adorno emphasises that objectivity depends on this emancipation since '[t]he superiority of objectification in the subjects not only keeps them from becoming subjects; it equally prevents a cognition of objectivity. […] It is

[96] Adorno, *Negative Dialectics* (n 19) 153.

[97] ibid 181.

[98] ibid 171.

now subjectivity rather than objectivity that is indirect, and this sort of mediation is more in need of analysis than the traditional one.'[99]

Adorno does not propose to abandon conceptual thinking altogether, but rather, following Hegel, he speaks of the need to conceive of the concept as moving, that is, as enabling a response to the revealed non-identity of the object to which it refers.[100] However, Adorno does not share Hegel's idea of an absolute spirit that ultimately frames and thus closes the space for reflection.[101] Adorno is concerned with preserving openness by establishing a situation in which the subject does not completely subjugate reality, which is related to recognising that the object is external to the subject. He is convinced that this openness takes the form of an unenclosed process and points out that this process, and not its outcome, can be associated with the category of truth.[102] In other words, he resigns to gain solid positive truths.

It may seem that there are only two ways to create this openness to the non-identity of man in individual assessment. First, the law can completely omit the modern question of who the human being is and what their circumstances are.[103] Nevertheless, that would return us to pre-modern society and its rationality, where criminal law would take no more account than a person's unlawful act and the punitive sanction. Such policy could ultimately result in the same social oppression and reinforced marginalisation of certain groups in a vulnerable situation as the current practice of individual assessment informing coercive interventions against individuals. It is important to realise that there is no 'natural state' in society, ie, a state devoid of structural determinants. Thus, to omit the question of the circumstances to which man is subjected is, in effect, merely to reaffirm the status quo.

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[99] ibid 171.

[100] Adorno, *An Introduction to Dialectics* (n 16) 9–12.

[101] ibid 84–85.

[102] ibid 22–23.

[103] Michel Foucault, 'Truth and Juridical Forms' in James D Faubion (ed, n 30) 70–71.

Second, the legislator can seek other ways than coercive interventions. It can use individual assessment to create opportunities for the assessed person instead of imposing obligations on them. It is my premise that Adorno would prefer this second path since it is the only way to overcome or at least mitigate the dominance of the subject – of social antagonisms.

This approach is very much in line with some of the proposals already formulated to reconceptualise risk assessment in criminal justice. For example, van Eijk proposes reconceptualising risk-based practices as distributive processes. She suggests that the assessed risks would not increase the severity of the sentence but instead prioritise that person in accessing what van Eijk refers to as 'valuable resources' such as treatment, education, rehabilitation, etc.[104]

Adorno's philosophy, however, allows us to criticise this proposal as incomplete. Even concepts such as treatment, education, rehabilitation, resources, or opportunities can easily become abstract categories and thus establish a hierarchy between the assessing subject and the assessed object, as well as a space for social disciplining. Indeed, the historical experience of the welfare model of child justice is a case in point.[105] The person concerned does not care whether the sign on the building reads prison, sanatorium or educational institution since they is under the legal obligation to stay there.[106] Similarly, Bessant openly classifies many of the objectives associated

[104]van Eijk (n 10) 1088.

[105]Welfare model sought to replace punitive interventions with welfare ones. It did not want to punish the child but to protect them, treat them and re-educate them. Unfortunately, it did not abandon coercion as a fundamental principle of the approach to the child. See, for instance, Susan Young, Ben Greer, and Richard Church, 'Juvenile delinquency, welfare justice and therapeutic interventions: a global perspective' (2017) 41(1) BJPsych Bulletin 21–23. For a particular historical experience of the transition of the punitive approach to children to a protective one see, for instance, Christiaens (n 4).

[106]This idea was expressed for instance in the United States Supreme Court's landmark decision in In re Gault (1967), in which the Supreme Court pointed out that the

with welfare sanctions like 'treatment, rehabilitation, reform and integration' as disciplinary notions.[107]

Indeed, Adorno's philosophy also shows that dignified treatment does not necessarily depend on labelling a person as a subject and that the labelling of an object does not necessarily lead to their dehumanisation. It only methodologically describes the person's position in a situation. It is far more important not to objectify a person; not to leave the person at the mercy of the supremacy of the assessing subject and to derive truth about them through subsumption. However, the mere designation of opportunity may not guarantee this.

2. Individual assessment as a right to social availability and dialogue

To avoid the dominance of the subject it is necessary to avoid creating new notions and concepts with static and pre-determined contents that are merely applied to a person through logical rules, including subsumption. We thus need to go deeper and reflect on how to keep the concepts 'moving' and open. We need to ask the question how to ensure that the content of concepts we use is able to reflect the uniqueness of a particular person's situation, including systemic failures the person faces in their life. Here, Adorno's ideas can be appropriately complemented by Hejdánek and Marcel. Like Adorno, they, too, thematise reflection as a situation in which

welfarist approach leads to a reduction in traditional legal safeguards. On the welfarist measure of forcibly placing a boy in an Industrial School, the Supreme Court stated that ' […] however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.' In re Gault, 387 US 1, 27 (1967).

[107] Bessant (n 63) 39. It is worth noting that Bessant puts this reference in the context of interventions in which the child has only a passive position, as they are 'the target' of those interventions. Thus, we can assume that the designation of these objectives as disciplinary notions is not intended to undermine treatment, rehabilitation, reform and integration programmes if provided with the child's free and informed consent.

the thought reflects on itself and starts thinking about its preconceptions, prejudices and automatisms it relies on.

Marcel speaks of secondary reflection, and like Adorno, he associates it with a form of emancipation of the subject.[108] He describes this as an effort to communicate with oneself.[109] He, too, connects this path with the shedding of thought's automatisms. This can be understood as a reference to an internal dialogue in which the acting subject questions itself and its understanding of the world. In doing so, they open up more and more space for the perspective of the other and for the possibility of encountering the other. The result of secondary reflection is thus what Marcel calls the availability [*disponibilité*] of the subject, that is, the ability to be wholly and fully with a person when the person needs it.[110]

Similar motifs can be found in Hejdánek, who conceives of reflection directed towards the non-object as an action in which the subject reflects on itself. He stresses that a critical moment of this reflection is the detachment of the subject from itself, thereby bringing the subject into a situation of openness in which it 'ceases to be an obstacle to itself'.[111] In this context, Hejdánek, too, speaks of the subject making itself available in this reflection and thus being 'ready to put itself aside, to cease to assert only itself and to accept a mission that is not any of its "natural" equipment.'[112]

It is appropriate to apply the requirement of self-reflection on the subject to individuals and society. Society, too, can be available [*disponible*] to the other – the individual. This would be a form of 'social availability', which may be

[108]Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (n 19) 59.

[109]Gabriel Marcel, *Mon propos fondamental* quoted from the Czech translation Gabriel Marcel, 'Můj základní záměr' (Peluška Bendlová tr) in Bendlová (ed), *Tři programové texty existenciální filosofie Gabriela Marcela* (n 79) 167.

[110]Gabriel Marcel, *Positions et approaches concrètes du mystère ontologique* (n 19) 83.

[111]Hejdánek (n 18) 106–107. My translation.

[112]Hejdánek (n 18) 107. My translation.

understood as the capacity of social systems to reflect on themselves and thus be *with* the other and not just *over* or *for* the other.[113]

This moment also resonates in the field of children's rights. It can be seen as a central feature distinguishing a rights-based approach (the preposition 'with') from a repressive approach (the preposition 'over') or a welfare approach (the preposition 'for').[114] However, it is even more strongly anchored in disability rights – the CRPD and its central anti-discrimination concepts. From the CRPD perspective, social availability could be linked to the idea of accessibility guaranteed at the general level in the form of accessibility of attitudes (Article 8) and environment, information, and communication (Article 9) and at the individual level in the form of the right to receive reasonable or procedural accommodations [Article 5(3) and Article 13 (1)]. It could also be linked to addressing 'historic and/or thematic/systemic exclusion from the benefits of exercising rights' by preferential treatment of the persons concerned in the form of specific measures.[115]

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[113]It is not without interest that this conception corresponds to the view of the role of human rights in Luhmann's systems theory: Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 Journal of Law and Society 270.

[114]The CRC Committee defined these three model approaches to children in its General Comment No. 21 on children in street situations. There, it linked the repressive and the welfare approaches with abstract ideas of adults about what children need (punishment, rescue). Concerning the rights-based approach, it emphasised that 'the process of realizing children's rights is as important as the end result': CRC Committee, *General Comment No. 21 on children in street situations* (CRC/C/GC/21, un.org 2017), paras 5, 10 <https://digitallibrary.un.org/record/1304490?ln=en&v=pdf> accessed 12 April 2024. The demand for the process and its quality thus becomes the fundamental protection against the domination of abstract ideas which means that the process must be free from such domination. It is, therefore, a requirement of concreteness, individuality, and context. I argue it is not inaccurate to see it as a requirement for a relationship.

[115]ibid para 25c.

The perspective of social availability leads to a fundamental turn in the view of the problem and its solution. There would be a move away from placing the problem in the individual, as in traditional liberalism, to a broader social context. The social context must be conceptualised as broadly as possible and not narrowly. By too narrow approach to the social context, I mean an approach that considers only the child's family and its situation as the social context and does not take into account the perspective of potential systemic failures.[116] This narrow approach to assessment of the child's needs does not break the principle of placing the problem in the individual; it only expands the number of individuals who will be held responsible for the child's unlawful act and, thus, disciplined.[117] Therefore, it still does not address the failure of the social structures. Social availability would place the accessibility of social structures at the centre of the assessment. It forces us to focus, instead of 'abnormalities' of the individual and their family, on whether society is giving all the resources it can for the benefit of the assessed person.

It might seem that this focus of assessment is no longer compatible with the adjective 'individual', but the opposite is true. The individual remains at the centre here since, if we are to avoid the hierarchy of the subject and open the possibility for self-reflection on social structures, it is from the individual's point of view and with their voice that the availability must be seen. Indeed, only the individual whose situation the assessment concerns can constitute an element of non-identity in the whole process, disrupting

[116]This is, for instance, the prevailing approach in Czech criminological discourse, including surveys among criminal justice professionals. See, for example, Kazimír Večerka, Jana Hulmáková, Markéta Štěchová, 'Juveniles in the Process of Faulty Socialisation. Summary' (Institute of Criminology and Social Prevention 2019) <www.iksp.cz/storage/169/summary_-Juveniles-in-the-Process-of-Faulty-Socialisation.pdf> accessed 3 March 2025.

[117]I refer to situations when parents and family circumstances are identified as the root cause of the child's unlawful behaviour, as a result of which legal intervention is also directed against them, eg, by placing the child outside the family in a re-education facility. I do not claim, therefore, that parents are necessarily held criminally responsible for the child's unlawful act.

the otherwise naturally totalising social-systemic tendencies. Marcel and Hejdánek link combating pre-understandings, automatisms, and prejudices to a relationship, that is, a situation in which these crutches of knowledge are replaced by a living communication with the other.[118]

This formulates the requirement for dialogue as the central 'method' of individual assessment.[119] The importance of dialogue is also underlined by the CRPD, which is generally very strongly opposed to abstraction-representation and is based on the rule 'nothing about us without us'.[120] Dialogue is, after all, the key moment in determining the form of reasonable or procedural accommodations.[121]

Dialogue cannot be identified with 'mere' participation as it is traditionally conceived.[122] The principle of dialogue makes it impossible for the person's voice to be ultimately overridden by an appeal to an abstract category. Dialogue is, therefore, the only way to break the closure of the system caused by the exclusive concentration on non-contradictoriness, which also exists

[118]Hejdánek (n 18) 126; Marcel, 'Existence et objectivité' (1925) 32(2) Revue de Métaphysique et de Morale 58–63.

[119]I use the brackets here because as in the case of dialectic it is not a 'method' in the technical sense. Any technicisation would go against the requirement and deprive the situation of its dialogical character.

[120]UN Committee on the Rights of Persons with Disabilities, *General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention* (CRPD/C/GC/7, un.org 2018) para 4 <https://digitallibrary.un.org/record/3899396?ln=en&v=pdf> accessed 12 April 2024.

[121]UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination* (CRPD/C/GC/6, un.org, 2018) paras 24b and 26a <https://digitallibrary.un.org/record/1626976?v=pdf> accessed 12 April 2024.

[122]I mean above all that the dialogue is not exhausted by merely ascertaining the view of the person on the matter that concerns them, with the understanding that this view may subsequently be overcome by the decision-maker to refer to other needs of the person. Dialogue refers to a partnership search for solutions and thus requires constant and respectful contact and an open discussion with the person concerned.

in law where the internal non-contradictoriness and mutually consistent legal order must be ever-present because they belong among the basic principles of the rule of law.

The philosophical way out from the objectifying approach to man thus allows us to reconceptualise the right to individual assessment through social availability and dialogue, where social availability would constitute the assessment framework and dialogue the method.

The CRPD anti-discrimination concepts of accessibility, reasonable accommodations, procedural accommodations, and specific measures can mainly play two roles. First, they can help us realise all the dimensions that social availability can have and thus define new criteria on which assessment tools should focus. These new tools will not, however, result in the application of the societal views on the individual but rather of those of the individual on the society.

Second, the CRPD anti-discrimination concepts can help us determine the legitimate limit of social availability in a particular case. This is possible thanks to the concept of reasonable accommodation and its interconnection with the concept of accessibility; in other words, the interconnection of accessibility at the individual and system level.[123] Ensuring accessibility remains the unconditional duty, but it is a duty of progressive realisation.[124] Nevertheless, the CRPD Committee emphasises that, in the meantime, access for a particular individual should be provided through reasonable accommodation.[125] Additionally, the duty to provide reasonable accommodation is not absolute.

The decision for the adoption of reasonable accommodation has always two steps. First, it must be determined what accommodation is reasonable for a particular person. This determination should consider only the 'relevance,

[123] ibid para 24.

[124] ibid para 41a.

[125] ibid para 42.

appropriateness and effectiveness' for the person and should take place in a dialogue with them.[126] Second, it should be assessed whether the accommodation does not constitute disproportionate or undue burden, that is, excessive or unjustifiable burden for the accommodating party.[127] The criterion of disproportionate or undue burden is an effective safeguard that the needs of the person as perceived by themselves will not be met to a degree that could create new social injustice.

However, we cannot overlook that this criterion brings back the hierarchical superiority of the assessing subject into individual assessment. This only confirms that in the legal system, the hierarchy of the subject can never be completely avoided. However, the disproportionate or undue burden must not be justified by abstract concepts about a man and by the rules of mathematical-logical rationality governing them.

3. The possibilities of applying social availability and dialogue in the child justice system

It thus remains to focus on the concrete implications of linking philosophical concepts of objectification and anti-discrimination concepts for the child justice system. Criminal justice systems have only limited means of responding to the systemic deficiencies identified through the perspective of social availability and the 'method' of dialogue. It is a branch of law that is oriented towards individual responsibility and coercive interventions. Furthermore, alongside the suspect or accused, there will typically be a victim with the same right to social availability and dialogue.

Nevertheless, the new concept of individual assessment can still be important for the functioning of the child justice system in a threefold manner. It influences:

1) the sanctions that can be imposed on the child;

[126] ibid para 25a.

[127] ibid para 25b.

2) procedural accommodations for the child; and

3) the role of the child in the individual assessment process.

The first of the mentioned impacts is the most radical, yet inevitable conclusion. The problem of individual assessment based on abstraction and subsumption is the problem of welfare sanctions or the welfare aspects of traditional punitive sanctions. As described above, both incorporate the same objectifying rationality, and individual assessment conceived as diagnostics is part of the welfare approach to children in conflict with the law. Thus, the rejection of the practice of individual assessment as abstraction and subsumption must also mean the rejection of welfare sanctions.

From the CRPD perspective, this may not seem so radical. The CRPD is built on the rejection of coercive interventions against people with disabilities which are incompatible with the social model of disability. The CRPD Committee rightly notes that these interventions reduce above all, under the guise of their medical or other necessity, legal safeguards for the person concerned.[128]

This is also true for children, as the Czech experience proves. In the Czech Republic, children in conflict with the law may be deprived of their liberty not only in prison but also in closed re-educational facilities under the measure of 'protective upbringing'. Since 'protective upbringing' is not formally conceived as a punitive sanction but as a 'protective' one, its ordering is not tied to strict legal conditions. Nor is it required that a crime of a certain gravity has been committed. The inappropriateness of the child's upbringing environment is the only thing that matters.[129] Children in

[128] Concerning the context of deprivation of liberty, see UN Committee on the Rights of Persons with Disabilities, *The Guidelines on the right to liberty and security of persons with disabilities* (Annex to A/72/55, un.org, 2016) paras 13–16 <https://digitallibrary.un.org/record/1298412?ln=en&v=pdf> accessed 10 July 2024.

[129] The only exception involves children below the age of criminal responsibility if they have been found responsible of an unlawful act punishable, if committed by an

conflict with the law are further often referred in the name of their 'needs' to family proceedings in which they are ordered to be placed in a completely identical closed institution as in the case of protective upbringing, this time based on a family law intervention – referred to as 'institutional upbringing'. Individual assessment in criminal proceedings serves as a basis for such a referral.[130] Of course, the procedural safeguards in family law proceedings are not as strict as in criminal proceedings. Children are not, for instance, obligatorily represented by a lawyer but only by a state child protection agency acting as their guardian *ad litem*.[131]

The reconceptualised individual assessment should protect the child from these coercive interventions, which reduce the level of their legal protection in the first place. At the same time, it does not exclude the issues currently addressed by these measures from the scope of the child justice system. Quite the contrary, social availability can be conceived broadly to capture the context of a child's life as much as possible. What changes, above all, is the position of the child. The child is given power over the determination of

adult, by an exceptional punishment. However, 'protective upbringing' may also be imposed in other situations, even on children below the age of criminal responsibility, if their family circumstances are determined inappropriate. Act No. 218/2003 Coll. on responsibility of children for unlawful acts and juvenile justice, section 93(2).

[130]International Commission of Jurists – European Institutions and Forum for Human Rights, 'Recommendations on the Main Principles Governing the Individual Assessment of Children in Conflict with the Law' (*International Commission of Jurists,* December 2021) 38 <https://icj2.wpenginepowered.com/wp-content/uploads/2021/12/ENGL-Recommendations-Individual-assessment.pdf> accessed 11 July 2024.

[131]Forum for Human Rights and International Commission of Jurists – European Institutions, 'Submission to the UN Committee on Economic, Social and Cultural Rights in advance of the Examination of Czechia's Third Periodic Report' (*UN Treaty Body Database*, 13 January 2022) paras 23–27 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FCSS%2FCZE%2F47490&Lang=en> accessed 14 July 2024.

their needs and the way their needs should be responded to. Thus, the child does not have to fear having to endure an intervention that the child considers harmful.

Individual assessment in its reconceptualised form will also play an important role when deciding on traditional punitive sanctions like imprisonment because it helps us gain a more comprehensive view of responsibility for the unlawful act. Although it does not aim at denying the individual responsibility of the child, it opens space for reflection on the responsibility of social structures. Furthermore, it unfolds risk factors traditionally used to allege the dangerousness of the child and, thus, justify tougher punishment as social constructs. Therefore, the reconceptualised individual assessment may give us only reasons to moderate or suspend the punitive sanction, not to tighten it.

The second area may not seem so radical, but the impacts of reconceptualised individual assessment may be even more tangible here than in the first one. It is the area of procedural accommodations for the child in the criminal proceedings. This dimension of individual assessment remains rather neglected in the practice of Member States, contrary to the use of individual assessment for sentencing.[132] Nevertheless, Directive 2016/800 envisages it as a relevant area where individual assessment should play an important role.[133]

Procedural accommodations ensure that the proceedings are not purely formal but accessible and understandable for the person. In other words, the person must have a real and not merely formal opportunity to exercise their procedural rights. They include various measures concerning, for instance, adaptation of language or assistance of a closed person in the proceedings. Importantly, procedural accommodations, as opposed to reasonable accommodation, are not subject to the limit of disproportionate or undue

[132]FRA (n 44) 77–83.

[133]Recital, para 35, and Article 7 (4a) and (4c).

burden.[134] This reflects the importance of the right to a fair trial, which cannot be restricted because of societal limits.

Finally, the reconceptualised individual assessment should bring about a radical change in the role the child plays in the assessment process. Both the framework of social availability and the 'method' of dialogue require that the child is treated as a partner. Again, this is more than mere participation because participation can still be applied in hierarchical relationships, while partnership requires equality. Thus, in individual assessment, the child should not only be treated as a mere source of information[135] embedded then in an assessment framework, but the whole process should take the form of lively communication with the child in which the child's perspective is being respected.

CONCLUSION

The philosophical grasp of objectification as abstraction and subsumption allows us to reveal that cognition based on this mathematical-logical rationality does not bring the expected objectivity but social normalisation. The practice of individual assessment that has been developed historically as a -more or less- codified expert diagnostics of the assessed person, delivering positive truths about their personality and circumstances, inevitably emerges as part of this normalisation. This is all the truer if individual assessment based on abstraction and subsumption is used as the basis for taking coercive measures against a person.

At the same time, the philosophical concept of objectification allows us to bring a broader perspective of social inequality and disadvantageous social

[134]UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on equality and non-discrimination* (CRPD/C/GC/6, un.org, 2018) para 25d <https://digitallibrary.un.org/record/1626976?v=pdf> accessed 12 April 2024.

[135]It is interesting that this motif also appears in Marcel, directly in connection with human dignity. – Gabriel Marcel, *La dignité humaine et ses assises existentielle* (Aubier Montaigne 1964) 60–61.

structures into criminal justice decision-making and thus break this normalising cycle. The philosophical thematisation of non-objectivity shifts the locus of the problem that requires intervention from the individual to their environment in the broadest sense. At the same time, it emancipates the individual in the sense that it gives them space to thematise the problem, to present their perspective with the guarantee that it will not simply be dismissed as irrelevant due to an abstract – social concept.

There is an obvious proximity to modern human rights concepts, which the CRPD brings even more consistently than the UN CRC (1989). The CRPD's core anti-discrimination categories may thus provide a platform for translating the philosophical concept of the non-objecthood of man into the scope of the law. Further, this proximity then makes it possible to argue in favour of the universal validity of these concepts, even outside the field of disability rights, for all people who may be vulnerable to expertly substantiated coercion, including children.

This argumentation can be further supported by linking these anti-discrimination categories with human dignity, conceived as the prohibition of objectification of man, in which, however, the aspect of subsuming the personality and circumstances of the man under abstract categories (risks, needs, etc.) and not the aspect of instrumentalization, ie, being treated merely as means to an end, would come to the fore.

The criminal justice system will always have a limited capacity to redress existing structural inequalities and injustices because the prevailing subject-matter of criminal proceedings remains the issue of individual responsibility. Nevertheless, the role of individual assessment in its reconceptualised form through the philosophical concept of objectification and CRPD anti-discrimination concepts remains crucial. It can uncover the social inequalities sedimented in the concepts and forms we apply through law and thus contribute to ensuring that inequalities are not further entrenched through criminal law, be it in the form of welfare sanctions, reasons for tougher punitive sanctions, or the inaccessibility of criminal procedure. This,

too, can be an opportunity for the suspect or the accused, fully in line with the principles of social availability and dialogue.

Moreover, it allows the child to experience being treated as a partner, with respect and not having their needs or experiences alienated. This can be an important formative moment especially for children facing social marginalisation and exclusion. Indeed, these children may have never experienced similar treatment by social institutions before.

AN EU SOCIAL CONTRACT OF THE TWENTY-FIRST CENTURY

Antoni Abat Ninet*

If you ask ChatGPT what the European Union social contract is, the answer is a very long, not very concise, and exclusively normative answer, no mention to symbology or imaginary is done. The artificial intelligence responds to the answer as probably most citizens and many academics would. However, this article argues that the social contract, as an epistemological construction, transcends this exclusively normative perspective; moreover, it carries a symbolic and ideological weight that explains its use and abuse to gain an extra dose of legitimacy, obedience, or to reinforce specific political or dogmatic postulates.

My argument will be as follows. In the first section, I will review the epistemological construction of social contracts and its constitutive elements. Starting with a historical perspective, I draw from this analysis to suggest a notion of the pact of association updated to our time. The exposition of these theories, from the embryonic understanding of social contracts to current theories, highlight concrete elements that I believe are still constitutive social contract theories and may help envision a democratically participated and decided social contract.

Then, I will turn to the case of the European Union by examining the pre-normative debates and narratives from its origins to present times, remarking solidarity and fear as leitmotifs of the progressive process of union between previously contentious states. Finally, I end by analysing the need to consider our reality and the way we communicate and decide in the Artificial Intelligence era to frame the new social contract theories.

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I. RETHINKING SOCIAL CONTRACTS

It is neither easy nor straightforward to define the concept of the social contract because its epistemological construction has been evolving and mutating, much like the constitutive political concepts, principles, and values that shape it. The social contract is a metaphorical pact of political association, at least in its origins (Grotius, Hobbes, Rousseau, Pufendorf or Locke), which establishes or renews a political organisation. This figurative

agreement includes distinctive elements of political association from other social or political groups, and it may embody its own purposes, aspirations, constitutional identity, and morality. In this pact, contracting parties typically enter into association, rather than aggregation, to willingly and autonomously cede a portion of their sovereignty to ensure their security, achieve peace, and promote well-being.

It is also acknowledged by literature that the terms of the contract must safeguard the most fundamental interests of the contracting parties, leaving the associates in a better position in terms of security and freedom than if they were outside the contract. Historically, it has been believed by the authors of the so-called Golden Age, such as Hobbes, Rousseau, and Locke, that the greater homogeneity and material equality among the contracting parties, the greater the guarantees of success and stability the pact of association will have. The parties consent tacitly or explicitly to the terms of the contract despite the contract itself or its contractual nature not being explicitly mentioned.

It is obvious that these terms of the definition of the social contract strongly resonate with the treaties, objectives, and functioning of the European Union (EU). Since its origins, although these values have varied, it can be stated that the EU construction can be analysed through the prism of the social contract theory. The EU can be understood as a social contract of social contracts. This means that its member states—each functioning as a social contract in their own right—come together to form a new, overarching social contract. By joining the EU, these member states, as contractual participants, have voluntarily ceded portions of their sovereignty. This collective agreement is primarily aimed at achieving shared goals such as peace, security, and well-being This paper analyses different instruments, debates, decisions, and norms of the EU that can be considered part of the social contract. It also advocates for an explicit, rather than metaphorical, social contract for the EU, where the inhabitants of the Union have the opportunity to participate, deliberate, and express

themselves, unless they choose not to do so or they aim to violate the founding values and principles of the Union or the European Union Charter of Fundamental Rights (CFR). It is argued that twenty-first-century social contracts are living and dynamic documents that are democratically deliberated upon, participated in, and decided. This living nature captures the Hobbesian sense of the social contract as a transitional process, not a fixed premise, a never-ending device to settle and improve our political form of association.[1]

With these characteristics, the EU will be better positioned to create a more inclusive, democratic, and sustainable new express social contract. This paper eschews the idea that social contracts are 'rigid' and 'exhaustive' and advocates moving beyond the social contract's intellectual and metaphorical nature, its euphemistic symbolism, and the implied tacit consent. I propose a participatory, deliberative, and democratic decided social contract, emphasising the importance of the latter term 'to decide' (*theory of dezisionismus)* by the parties. I acknowledge that this ambitious epistemological construction challenges some of the structural elements of traditional social contract theory. However, it seems the better approach for updating the theory to the twenty-first-century political reality and the era of information, artificial intelligence, and Homo Digitalis, where more people than ever demand participation in decision-making political processes.

This paper will focus on the analysis of a social contract for the EU, a metaphor of the social contract which has been continuously referenced by EU institutions and policymakers.[2] Today, such references are increasingly

[1] Peter J. McCormick, *Social Contract and Political Obligation* (Routledge 1987).

[2] Calls for renewal of the social contract have emerged as responses to multiple crises. Already in 2013, Benoît Coeuré, as a member of the Executive Board of the European Central Bank, pointed out the need to reform the social contract to respond properly to the economic crises that Europe was facing at that time. In the

evident even beyond the context of the EU. A very recent instance of reference to this social contract is one made by Javier Milei, the Argentinian President, in his presidential discourse, asserting a statement by Alberto Benegas Lynch:

> Liberalism is the unrestricted respect for the life project of others, based on the principle of non-aggression, in defence of the right to life, liberty, and property, whose fundamental institutions are private property, markets free of state intervention, free competition, division of labour, and social cooperation'.

According to the President, the new social contract chosen by the Argentinians is summarised in this sentence.[3] I welcome this concretisation of the elements of the social contract, serving as a new pact of association, which is one of the requirements of the epistemological construction this paper advocates for. At first glance, President Milei's explicit mention of a new social contract aims to reaffirm the new political scenario and guiding values opened in Argentina after the results of the last presidential elections.

The question that we can pose, not only to President Milei but to all these political actors, is why, like a sort of Nietzschean 'eternal return,' the reference to the social contract appears and disappears from the political agendas of diverse political entities and actors. The answer depends mostly on the context and period in which the instrumentalisation of the phenomenon arises. As Lloyd and Shreedhar remark: 'The method of justifying political pinciples, arrangements by appeal to the that would be

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same vein, Vice-President of the European Commission Frans Timmermans first, (in 2019) and Prime Minister of Portugal, António Costa, later, during his speech at the opening session of the Porto Social Summit 2021, insisted on renewing the European social contract by committing to developing innovative and inclusive responses at their own level.

[3] See 'Discurso histórico del Presidente Milei en su asunción inaugural- 10/12/23' (Youtube 10 December 2023) minutes 26:26. <www.youtube.com/watch?v=a17GYC99r5g> accessed 11 December 2013.

made among suitably situated rational, free, and equal persons'.[4] Additionally, it can also be noted that the calls for a new or a renewed social contract stem from the consideration that the social contract or the expectations placed upon it have failed. Even though, in most cases, the contractarians were not conscious of their association in a social contract, only after a failure the mention of the contract appeared. In considering the renewal of references, it must also be noted that there has been a geographical and material (sectorial) spread of the social contract theory. The social contract is no longer as it was conceptualised in the seventeenth century, an element of European ideology and related solely to European cultural elements, nor is it restricted to the bargaining of security, peace, well-being (and private property in Hobbes and Locke) for a portion of individual sovereignty.[5]

Very recently, the metaphor has been used to justify the obedience to the sovereign but has also been used in a multitude of different ways. For example, social contract theory has been used:

1. To reinforce a concrete political narrative (such as the renewal of the EU social contract to stress solidarity or India's right to education);
2. To reinforce political legitimacy (such as the agreement between China's urban population and the Communist Party, offering well-being for support to the Chinese Communist Party regime);
3. To envision new political goals;
4. To strengthen communitarian philosophy, how the social contract theory might be understood differently from a non-Western

[4] Sharon A. Lloyd and Susanne Sreedhar, 'Hobbes's Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2022) <https://plato.stanford.edu/entries/hobbes-moral> accessed 15 January 2024.

[5] David Gauthier, 'The Social Contract as Ideology' (1977) 6 (2) Philosophy & Public Affairs 130.

perspective if values salient in African communitarian philosophy are properly understood.

5. To guide citizens in coping with technological, environment and gender relations (in India) or to embrace the values of liberalism (in Argentina).[6]

Alongside this geographical spread of the theory, there has also been a material or sectional dispersion. Proposals for gender/sexual social contract, racial contracts, digital social contract, environmental social contracts, a social contract addressing pandemics contractual initiatives to combat populism, and others have been conceptualised.[7]

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[6] See Minouche Shafik, 'Why India Needs a New Social Contract' (*Hindustan Times*, 19 September 2019) <www.hindustantimes.com/analysis/why-india-needs-a-new-social-contract/story-DiAttglA4Zy0T2OyWqImDM.html> accessed 11 January 2024; Selina Ho, *Thirsty Cities: Social Contracts and Public Goods Provision in China and India* (Cambridge University Press 2019) ch. 4, 60-118; Caroline Dyer and others, 'Connecting Families with Schools: The Bureaucratised Relations of "Accountability" in Indian Elementary Schooling' (2022) 43 (8) Third World Quarterly 1875; Chemhuru Munamato, 'Gleaning the Social Contract Theory from African Communitarian Philosophy' (2017) 36 (4) South African Journal of Philosophy 505.

[7] Carole Pateman, *The Sexual Contract* (Stanford University Press 1998); Julia Simon-Ingram, 'Expanding the Social Contract: Rousseau, Gender and the Problem of Judgment' (1991) 43 (2) Comparative Literature 134; Susan Moller Okin, 'Feminism, the Individual, and Contract Theory' (1990) 100 (3) Ethics 658; Charles W. Mills, *The Racial Contract* (Cornell University Press 2014); Livia Levine, 'Digital Trust and Cooperation with an Integrative Digital Social Contract' in Kirsten Martin, Katie Shilton and Jeffrey Smith (eds) *Business and the Ethical Implications of Technology* (Springer 2022); Bruno Deffains, 'Rethinking the Social Contract in the Digital Age' in Jean Mercier Ythier (ed) *Economic Reason and Political Reason: Deliberation and the Construction of Public Space in the Society of Communication* (ISTE 2022); Tony Pereira, 'The Transition to a Sustainable Society: A New Social Contract' (2012) 14 Environment, Development and Sustainability 273; Jane

It is fair to question whether this dissemination of the social contract theory has de-naturalised the theory or if the theory has simply mutated and evolved to encompass new and diverse realities. As with other key political concepts, I believe that geographical expansion does not inherently impose acculturation or de-naturalisation of the social contract theory. On the contrary, it allows for more reflection and virtuality, pushing for a less euphemistic and abstract phenomenon towards a more realistic and pragmatic application. In this sense, the same question can be posed to the main thesis of this paper: is it a form of theoretical denaturalisation to advocate for an express contract? Or, conversely, is it a necessary consequence of our time? I argue that the demands of democracy, coupled with the opportunities provided by a well-regulated technology, open new avenues for direct action of the people. Therefore, in twenty-first century, a social contract, which has always been considered a metaphorical phenomenon approved through tacit consent, needs to be more concrete, allowing individuals to participate as active contractors.

In the next section, I will review the epistemological construction of the social contract and its constitutive elements from a historical perspective to the present day. The methodology involves highlighting concrete aspects that are relevant and applicable to our current conceptualisation of social

Lubchenco and Chris Rapley, 'Our Moment of Truth: The Social Contract Realized?' (2020) 15 (11) Environmental Research Letters 110201; United Nations Research Institute for Social Development, 'A New Eco-Social Contract' (2021) 11 <https://sdgs.un.org/sites/default/files/2021-07/UNRISD%20-%20A%20New%20Eco-Social%20Contract.pdf> accessed 27 July 2024; Domonkos Sik, 'Towards a Post-Pandemic Social Contract' (2023) 174 (1) Thesis Eleven 62; Antón Costas, 'Un nuevo contrato social postpandémico. El papel de la Economia social' (2020) 100 CIRIEC-Espana Revista de Economia Publica, Social y Cooperativa 11; Katrina Perehudoff and others, 'A Global Social Contract to Ensure Access to Essential Medicines and Health Technologies' (2022) 7 (11) BMJ Glob Health e010057; Daphne Halikiopoulou and Sofia Vasilopoulou, 'Breaching the Social Contract: Crises of Democratic Representation and Patterns of Extreme Right Party Support' (2018) 53 (1) Government and Opposition 26.

contracts and, more specifically, to my theoretical experimental proposal for the EU.

II. Heading The Evolution of the Conceptualisation of the Social Contract

1. *The embryonic form*

Since its origins, political entities in all their varied forms have required the submission of individuals to political authority. From the earliest political constructions and the beginnings of political consciousness, humankind theorised about the submission of both citizens and non-citizens to the polis, its laws, and its authority. In the quest for legitimacy, the theory of the social contract flourished, even before the so-called Golden Era of social contract theories.[8] Some elements of the social contract theory, such as agreement, tacit consent, and the source of legal and political rights and obligations, were also identified throughout history.[9]

Indeed, we can question whether this historical reference departs from a sort of anachronistic apriorism, given that the expression 'social contract' appeared in the works of Grotius and Rousseau. Alternatively, we may consider whether the concept of the 'social contract' or its linguistic codification cannot be detached, or at least its signified (what the sign represents or refers to), from previous theories. With this non-trivial reservation in mind, it is common in academia to recognize in the illustrious

[8] The Golden era is normally considered from 1650 to 1800 which covers the 'big four' contract theorists: Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant. See Woojin Lim, "The Racial Contract": Interview with Philosopher Charles W. Mills, *Harvard Political Review* (Boston, 29 October 2020) <https://harvardpolitics.com/interview-with-charles-w-mills/> accessed 5 April 2024; See also Peter J. McCormick, *Social Contract and Political Obligation. A Critique and Reappraisal* (Routledge 2019).

[9] See David Hume, *Essays, Moral, Political, and Literary of Civil Liberty* (Liberty Found Books 1985).

elenctic Socratic dialogue, *Crito* by Plato, and in Socrates' acceptance of the death penalty, an antecedent or embryonic form of the social contract. This interpretation stems from the idea that Socrates' decision to abide by Athenian laws, despite their unjust application in his case, reflects a tacit agreement between the individual and the state. Thus, his actions are often viewed as an early philosophical foundation for the concept of the social contract.[10]

Other ancient contractual elements can be traced in Epicurus' content, suggesting that justice arises from a common (social) agreement not to harm each other, where relationships are not intended to cause suffering or harm at specific places or times. This approach contrasts the notion of justice originating from prudence or wisdom, as proposed by Plato and Aristotle.[11] Additionally, Aristotle's work references Lycophron the Sophist, who held that law is merely a 'contract,' serving as a guarantee for the mutual respect of rights, rather than being capable of making citizens good and just.[12] Elements of the social contract theory can also be observed in the Middle Ages as detailed in the next section.

2. The social contract as politico-theological concept

As Andrew Arato suggests, some of our significant political concepts are secularised theological ones,[13] and the social contract theory may possibly be one of these major religious-political concepts. In Christendom, the idea of

[10] David G. Ritchie, 'Contributions to the History of the Social Contract Theory' (1981) 6 (4) Political Science Quarterly 656; Joshua Cohen, Rousseau: *A free Community of Equals* (Oxford University Press 2010); François Foronda, *Avant le Contrat Social, Le contrat politique dans l'Occident médiéval, XIII^{e}-XV^{e} siècle* (Éditions de la Sorbonne 2011).

[11] Epicurus, Diogenes Laertius, and Robert Drew Hicks, *Principal Doctrines: 350 BC*, (Infomotions, Inc. 2001) para 33.

[12] Ritchie, 'History of the Social Contract Theory' (n 10) 656.

[13] Andrew Arato, *Post-Sovereign Constitution Making, Learning and Legitimacy* (Oxford University Press 2016) 269.

contract theory between government and people gained prominence in the popular consciousness of ecclesiastical writers, politicians, and ordinary individuals, intellectually grounded in the Bible and in the work of Aristotle.[14] In fact, the Latin word 'testament' (meaning testimony) in reference to the two divisions of the Bible, was a loan-translation of the Greek '*Diatheke*,' which meant both 'covenant' and 'will,' and of the Hebrew '*berîth*,' signifying the covenant that God entered into first with Abraham, then with the people of Israel.[15]

The Old Testament establishes a theological basis for contractual theory in multiple versicles. For instance, the book of Genesis mentions in 9:9 ' I now establish my covenant with you and with your descendants after you'; in 9:12 ' And God said, "This is the sign of the covenant I am making between me and you and every living creature with you, a covenant for all generations to come"'; and in 9:15 'I will remember my covenant between me and you and all living creatures of every kind. Never again will the waters become a flood to destroy all life'. Additionally, the Book of Samuel mentions in 5.3 that 'When all the elders of Israel had come to King David at Hebron, the king made a covenant with them at Hebron before the LORD, and they anointed David king over Israel'. As Ritchies remarks, 'furthermore, in the Middle Ages, men were more prone than at any other time to think in terms of the Roman conception of quasi-contract'.[16]

The pact as a form of collective action arose in the twelfth century with the proliferation of sworn societies and corporations of all kinds based on

[14] Ibid 659.

[15] See 'Testament (n.)' (*Online Etymology Dictionary*) <https://www.etymonline.com/en/word/testament> accessed 20 September 2023; 'Old Testament' (Catholic Online) <https://www.catholic.org/bible/old_testament.php> accessed 6 January 2023.

[16] Ritchie (n 16), 659.

principles of mutual contractual obligations.[17] The formula according to which the nobles of the Catalan-Aragon Crown are said to have elected their king in the twelfth century — 'We who are as good as you choose you for our king and lord, provided that you observe our laws and privileges'[18] — and the Magna Carta, Charter of the English Liberties granted by King John in 1215, are good examples of explicit political agreements between the sovereign and the nobles that emerged from practices consolidating the power of feudal rulers in the Middle Ages. Scholastic authors also addressed various aspects of the social contract, though medieval authors often limited the contract to sovereigns without considering the relationship of subjection.[19]

Given the evolutionary nature of the theory of the social contract and its capacity for development (*Entwicklungsfähigkeit*), and assuming that the Old Testament and the works of Aristotle were determinant in the reception and development of the social contract theory in the Middle Ages by Christendom, it is conceivable that some important elements of this theory can also be found in Islam and medieval Judaism. This assumption is grounded in the fact that the Old Testament is also a holy book for these other two Abrahamic religions, and in the significant influence that the works of Aristotle have had on prominent thinkers of both creeds. Therefore, some elements of the works of Al-Farabi, Ibn Khaldun, Mosheh ben Najmán, and Moses Ben Maimonides related to the elements of the

[17] Alain Boreau, 'Essor et Limites Théologiques du Contrat Politique' in François Foronda (ed), *Avant le Contrat Social, Le Contrat Politique dans l'Occident Médiéval, XIII^e^-XV^e^ siècle* (Éditions de la Sorbonne 2011). 243

[18] Montserrat Bajet Royo, *El Jurament i el Seu Significat Jurídic al Principat Segons el Dret General de Catalunya (segles XIII-XVIII): Edició de la 'Forma i Pràctica de Celebrar els Juraments i les Eleccions a la Ciutat de Barcelona en el Segle XV'* (Universitat Pompeu Fabra 2009).

[19] Boreau, 'Essor et Limites Théologiques du Contrat Politique' (n 17) 243.

social contract need to be at least acknowledged in this evolutionary theory.[20]

It is hard to deny the fact that social contract theory was conditioned by this theological substrate, at least during this period of its conceptual evolution. Interestingly, the theological approach to the social contract at this time was not related to citizens or citizenship, unlike Ancient Athens and Rome or later during the so-called Golden Era of the American and French revolutions. Instead, the 'contractors' were the believers: Jews, Christians, or Muslims (members of the Ummah), who, with some differences, only needed to believe in the 'right' God and obey the religious commandments.[21]

3. The Golden Era

It is widely accepted that the golden era of the social contract theory occurred during the seventeenth and eighteenth centuries. During this period, the formulation of the social contract consisted of the analogy used by contractual philosophers such as Grotius, Hobbes, Pufendorf, Locke, Rousseau, Hume, and Kant to explain the relationship between individuals in a 'state of nature,' 'natural law,' and the State, Commonwealth, or league of States, aimed at protecting rights of individuals such as life (Hobbes), liberty (Rousseau), and private property (Locke). It is not feasible to delve deeply into all the contributions that these authors made to the theory of the social contract.

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[20] See Luis Xavier López Farjeat, 'Al-Fārābī and the Relation Between Politics and Religion in Light of His Summary on Plato's Laws' (2016) 18 (36) *Signos Filosóficos*, 38. See also David Novak, *The Jewish Social Contract. An Essay in Political Theology* (Princeton University Press 2005); Abu Naser Al-Fārābī, *On the Perfect State* (Richard Walzer tr, Clarendon Press 1985); Ibn Khaldun, *The Muqaddimah* (Princeton 2015); Moses Maimonides, *The Guide of the Perplexed* (Chicago University Press 1963).

[21] See Antoni Abat Ninet, 'A Secular God and a Creed', in *The Religion of the Constitution,* (Edward Elgar Forthcoming 2026) <academia.edu/106131408/CHAPTER_I_A_SECULAR_GOD_AND_A_CREED_I_THE_RELIGION_OF_THE_CONSTITUTION>.

I believe, it is valuable to highlight specific elements of the works of Hobbes and Rousseau, the main social contract theorists, that contribute to the understanding of the theory of the social contract even today and since the emergence of new contractarian proposals, such as those of Rawls and Nozick, in the twentieth century, which have improved, responded to, and updated social contract elements to fit the realities of the twentieth century. The idea is to reflect on the lasting influences of the works of these authors and to filter our understanding of the EU social contract through the 'original' definition of the phenomenon.

A. Hobbes

Hobbes' contributions to the social contract, which endure to this day, can be categorised into at least four main areas: a) the condition of human nature, which links the topic with the ancient relationship between physis and nomos; b) the rationale of 'the state of war' and the rational exit; c) the covenant of union and subjection and d) the principle of authorisation and representation and the consequences of the covenant, the possible rupture, limits and the right of resistance. Hobbes remarked as 'the final cause of the Common-wealth as the preservation (security) of men, who, despite their natural inclination towards liberty and dominance over others, accept, throughout a covenant, the introduction of restraints upon themselves'.[22] Men then will observe the original contract and the laws of nature, more concretely, the contract as the second law of nature. The purpose and rationale of government lie in its capacity, through the exclusive possession of legitimate coercive authority, to deter individuals from reverting to the natural condition of mankind.[23]

The contact creating the Common-wealth is unique in that it simultaneously creates the conditions which make obligations and contracts meaningful, it is self-justifying and, more importantly, self-enforceable.

[22] Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, Penguin 1950) pt 2 ch 17.

[23] McCormick (n 2) 15.

Additionally, it is significant that the contract is not between the sovereign and the people but between each individual and every other individual that shall authorise all the actions and judgements of a Man or Assembly of Men.[24] McCormick points out that neither the original assembly nor the original contract ever actually took place,[25] and the vast majority of the specialised Hobbesian doctrine considers that the agreement is hypothetic, meaning that the contract is not so in a normative sense.[26] However, constituent assemblies and constitutions (among other legal founding documents) can be considered as original assemblies and original social contracts. Let us consider, for instance, the foundation of new states, where the political entities are created ex-novo by a constituent assembly that approves a constitution. In cases such as that of Mustafa Kemal Ataturk in the founding of the Republic of Türkiye, of Mohandas Gandhi in the Republic of India, or Nelson Mandela in the Republic of South Africa, the analogy of Hobbes in relation to one man can be dissected.

The sovereign is not a party to the contract but only a recipient of powers under the contract.[27] The obedience to the sovereign commands comes from the contractual obligation, and to avoid the natural condition of mankind, the *Bellum omnes contra omnes.* Hobbes considers 'the Covenant to generate the Common-wealth and the "sword" to enforce it as necessary evils. Thus, men cannot observe justice and the other laws of nature without a common power to keep them all in awe'.[28] Hobbes follows, stating that '[w]e might as well suppose all Mankind to do the same; and then there neither would be

[24] Hobbes, *Leviathan* (n 25) 133.

[25] McCormick (n 2)15.

[26] Hobbes, *Leviathan* (n 25). Macpherson's reference to the pact is always conditional or hypothetical, as if the pact was celebrated.

[27] Ibid 21.

[28] Ibid.

no need to be any Civil Government, or Common wealth at all; because there would be Peace without subjection'.[29]

In Chapter XVIII of the Leviathan, Hobbes remarks twelve consequences derived from the institution of the Common-wealth by the social contract. I believe that some of the elements listed are still valid today and can provide some perspective on the nature of the EU's political pact. However, others are less considerable due to the specific circumstances of Hobbes' times and the absolutist nature of the seventeenth-century Leviathan. On the consequences of the social contract that may help us to characterise the EU social contract and sovereignty, Hobbes pointed out that it is from the Common-wealth that all the rights and faculties are derived by the consent of the People assembled.[30] In this sense, the adhesion, alienation or association is a voluntary act of the subject,[31] as it happened in the Economic European Community (EEC) and is still occurring in the EU. The establishment of the EU derives from the agreement of the member states and, therefore, the consent of the Peoples of Europe assembled in their respective national assemblies.[32] And the process of accession of a new Member State (MS) into the EU implies a unanimous decision by the EU Council on a framework for negotiating with the candidate.

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[29] Hobbes, *Leviathan* (n 25) 129.

[30] Ibid 133. Note that Hampton interprets that the Social Contract does not sovereignty. See David Gauthier, 'Hobbes's Social Contract' in Susan Dimock, Claire Finkelstein, and Christopher W. Morris (eds), *Hobbes and Political Contractarianism: Selected Writings* (Oxford University Press 2022).

[31] The inclusion of the subject into the institution is conceptualised as an act of adhesion, alienation or association by it, depending on whether we focus on: Hobbes, *The elements of Law Natural and Politic*, (Ferdinand Tönnies ed, Frank Cass & CO. LTD. 1969) and Hobbes, *De Cive: The Latin Version,* (Howard Warrender ed, Oxford University Press 1983) or the *Leviathan* (n 25). See also Quentin Skinner, 'Hobbes on Representation' (2005) 13 (2) European Journal of Philosophy 155.

[32] See 'Consolidated version of the Treaty on European Union PREAMBLE' [2016] OJ C202/15.

The first consequence remarked by Hobbes implies that the Covenant does not contradict previous agreements to which the subjects are still obliged.[33] This consequence may be well represented by the principle of primacy of EU law (precedence and supremacy), which dictates that where a conflict between an aspect of EU law and an aspect of law in an EU MS (national law) arises, EU law will prevail in the fields that the MS has ceded its sovereignty.[34] EU primacy (at least as the European Court of Justice sees) means that EU law always prevails over national law (regardless of the question of sovereignty).[35] Controversy over the relationship between EU law and national law remains alive.[36] However, the paramount decision of the Portuguese Constitutional Court, Ruling 422/2020 on the hierarchy between national and non-national sources may establish a momentum in this regard when stating in Ground 2.8 that:

> under Article 8 (4) of the Constitution of the Republic of Portugal, the Constitutional Court may only consider and refuse to apply a rule of the European Union Law if it is incompatible with a fundamental principle of a democratic state based on the rule of law that, in the context of the

[33] Hobbes, *Leviathan* (n 25) 133.

[34] The primacy of EU law has developed over time by means of the case law (jurisprudence) of the Court of Justice of the European Union. It is not enshrined in the EU treaties, although there is a brief declaration annexed to the Treaty of Lisbon in regard to it. See 'Consolidated version of the Treaty on the Functioning of the European Union - DECLARATIONS annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES - 17. Declaration concerning primacy' [2008] OJ series C115/344; See also 'Primacy of EU law (precedence, supremacy)' *EUR-Lex* <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html> accessed 11 September 2024.

[35] Roman Kwiecien, 'The Primacy of European Lawn over National Law under the Constitutional Treaty' (2005) 6 (11) German Law Journal 1479.

[36] Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) 3 (2-3) International Journal of Constitutional Law 473.

> European Union Law (including, therefore, the CJEU case law), does not have a parameter materially equivalent to that recognised in the Constitution since such a principle necessarily applies to the agreement on the […] On the other hand, whenever the assessment of a rule of law of European Union law, has a parameter materially equivalent to the one recognised in the Portuguese Constitution, functionally guaranteed by the CJEU (in accordance with the legal means provided in European Union Law), the Constitutional Court should not assess the compatibility of the rule with the Constitution.[37]

Another example is that, when a candidate state is negotiating its accession to the EU, it needs to respect and promote the democratic values of the EU and meet the 'Copenhagen Criteria', which include the EU acquis criteria.[38] Accordingly:

> Candidate (applicant) countries are required to accept the acquis before they can join the EU. Derogations (exceptions) from the acquis are granted only in exceptional circumstances and are limited in scope. The acquis must be incorporated by candidate countries into their national legal order by the date of their accession to the EU, and they are obliged to apply it from the date.[39]

The third consequence is that no subject can justly protest against the establishment of a sovereign declared by the majority.[40] This restraint of the right to protest is grounded in the fact that when the subject voluntarily

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[37] Constitutional Court of Portugal, Ruling no.422/2020, Case no. 558/2017, of 15 July 2020.

[38] On the conditions for membership (Copenhagen Criteria) European Council in Copenhagen 21 and 22 June 1993, 'Conclusions of the Presidency' Doc/93/3 <ec.europa.eu/commission/presscorner/detail/en/doc_93_3> accessed 19 December 2024; Madrid European Council 15 and 16 December 1995, 'Presidency Conclusions' (Bulletin of the European Union 1995) <www.europarl.europa.eu/summits/mad1_en.htm> accessed 5 March 2025

[39] See 'Acquis', <eur.lex.europa.eu/EN/legal-content/glossary/acquis.html> accessed 19 December 2024.

[40] Hobbes, *Leviathan* (n 25) 135.

joined the assembly, he clearly expressed his intention and implicitly agreed to abide by the decisions of the majority. Therefore, if he rejects or protests any of their rulings, he acts against his covenant and unjustly so.[41] The spirit of loyalty to the covenant implied by this consequence should guide decision-making within the Council, especially when such decisions require the unanimity of its members.

As a matter of example, when Hungary is abusing the unanimity vote in the Council to pressure the EU (blocking the 50 billion euros) is breaching the Hobbesian third consequence of the institution of the Covenant.[42] In this sense, as Pettit remarks, ' the subjects of a Common-wealth, whatever its origin and whatever its constitution, are not deprived of their freedom as non-obstruction just by their subjection; the laws may punish transgressions, but they do not prevent them'.[43] But such subjects are deprived of their freedom as non-obligation in the domain over which the will of the sovereign expresses itself in laws, or at least this is so when 'refusal to obey frustrates the end for which the sovereignty was ordained' and so long as the sovereign is not 'disabled to provide for their safety'.[44] Hobbes remarked that, one way in which refusal to obey will not frustrate the ends of sovereignty is when I struggle for my life or the lives of my friends against a sovereign who would have us killed.[45] This, however, is not the case of Hungarian

[41] Ibid.

[42] 'Parliament insists that the EU must freeze funding to Hungary' (News, European Parliament 2022) <https://www.europarl.europa.eu/news/en/press-room/20221118IPR55719/parliament-insists-that-the-eu-must-freeze-funding-to-hungary> accessed 19 December 2024.

[43] Philip Pettit, 'Liberty and Leviathan' (2005) 4 (1) Politics, Philosophy & Economics 131.

[44] Ibid 144.

[45] Ibid.

abuse of unanimity despite the claim of Orban's government on threats to constitutional identity and values.[46]

Hobbes' Leviathan Consequences seven and eight on the right of making rules and the right of all judicial authority, through which the subject can understand what rightfully belongs to them,[47] could well guide the distribution of competences of the Union nowadays and demand an express legal accommodation of the principle of primacy of EU law, as mentioned before with the example of the ruling decision of the Portuguese Constitutional Court.

Hobbes' theory also enables us to analyse the role that the MS has in the EU and abroad as an analogy to his analysis of the persistence of the state of nature in the relationship between the states. Hobbes's understanding of sovereignty is another crucial point. He conceived sovereignty as political philosophers did in the seventeenth century (Grotius, Spinoza, Leibniz, Locke) when the concept of the modern state rose. Today, sovereignty is parcelled into competencies. When the EU has competence over a matter, it essentially holds sovereignty or power in that area. To regain the power over this competence, the subject (MS) will have to amend the Treaties, that is, the legal accommodation of the pact of association.

The work of Hobbes has been used to criticise the hybrid nature of the EU and its lack of a common power. Due to this absence, MS keep alive the state of nature and continue to 'make war', whereas a foreign military invasion/aggression (understood in the sense of the twenty-first century reality) always threatens their potentiality of peace. However, the fact is that the EU has been implementing coercive measures (from article 7 of the TEU to the freeze funding to MS) with more or less success that seems to envision the foundation of a well-structured sovereign power. Self-preservation,

[46] Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law' (2018) 43 (1) *Review of Central and East European Law* 23.

[47] Hobbes, *Leviathan* (n 25).

well-being and peace were basic ends in Hobbes and, as demonstrated, have been the main goals and funding principles of the EEC and the EU.

The debate on the need to create an EU army referred to as 'the Sword,' is essential to the institution in Hobbes' view. Similarly, the EU's migration policies can also be discussed in terms of the necessary conditions for a well-configured commonwealth, or res-publica, rather than a civitas, even though Hobbes uses the term '*civitas'* in the Latin version of the Leviathan. The EU can be conceptualised as a union of member states, like a commonwealth, as long as there exists a *summa potentia* -a supreme power- and an EU potential communis that binds everyone. This includes common power and European civil law.

B. Rousseau

To confront the social contract of the EU with the modern roots of the theory, Rousseau's work is useful and necessary, as it provides tangible elements and insights to conceptualise and envision the theory within the framework of the Union. Some aspects of Rousseau's theory coincide with those remarked by Hobbes, such as the goal of self-preservation and personal security, the hypothetical nature of the contract, the inalienability and indivisibility of sovereignty, and the aim of justifying obligations and the terms of association.[48]

For Rousseau, the social contract aims at the foundation of a just society (*une juste société*), a political body. The pact is organised around the law as an expression of the general will, which needs to be distinguished from the will of all (*volonté de tous*), which is merely the sum of subjective individual (passionate) wills. The social contract then, through the law, imposes reason and restraint on passions.[49] The sovereign is the people, an original

[48] Jean Jacques Rousseau, *Du Contrat Social* (Pierre Burgelin ed, first published 1762, Flammarion Edition 1966) p I ch 6 and p 2 ch 1 and 2.

[49] Pierre Burgelin, 'Introduction' in Jean-Jacques Rousseau, *Du Contrat Social* (n 48) 20.

innovation. In ancient social contract theories (such as the Hobbesian), individuals in the state of nature were conceived as sovereign only to abdicate their freedom into the hands of the sovereign.

Rousseau aptly noted that:

> The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.[50]

As with Hobbes' position, if there is a breach of the pact, the subjects regain their natural freedom. Rousseau summarises all the contractual clauses as 'These articles of association, rightly understood, are reducible to a single one, namely the total alienation by each associate of himself and all his rights to the whole community.'.[51]

Once again, as with the theory of Hobbes, my understanding of the possibility of parcelling sovereignty, which may be considered problematic by many contractualist and realist authors, places the prism of EU distribution of competences and sovereignty at a different level. However, for the sake of this analysis, we may ask whether, in the competences where sovereignty or entitlement lies with the EU, the MS have effectively entered into a contract of alienation, and whether this aligns with the spirit of the agreement. Interestingly, and also related to the evolving nature of the EU construction, Rousseau states that each person, through the fundamental pact, has only alienated from his power, his freedom, and his property, the part which pertains to the community.[52]

In this vein, Joshua Cohen states that:

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[50] Rousseau, *Du Contract Social* (n 49) 51.

[51] Ibid.

[52] Henri Rodet, *Le Contrat Social et les idées politiques de J.-J. Rousseau* (Arthur Rousseau 1909) 200.

> Rousseau's solution to the fundamental problem is his ideal of a free community of equals: free, because it ensures the full political autonomy of each member; a community, because it is organised around a shared understanding of and supreme allegiance to the common good; and a community of equals-a democratic society-because the content of that understanding reflects the good of each member.[53]

This definition fits perfectly well with the EU as a political project, where MS, while maintaining their own identities, values, and casuistry, freely agree to live together as equals, establishing treaties and legislation guided by a conception of the common good (founding values and principles of the EU) through social cooperation, and in our case scenario, solidarity. Cohen follows:

> Rousseau's ideal of a free community of equals is free because it ensures the full political autonomy of each member; it is a community because it is organized around a shared understanding of a supreme allegiance to the common good; and it is a community of equals—a democratic society—because the content of that understanding reflects the good of each member.[54]

Again, the parallelism with the EU is obvious, where legitimate authority is compatible with the sovereignty and freedom of the MS.

Rousseau then distinguishes between the social pact that brings the political body into existence and justifies the terms of association and the legislation that will give movement to it.[55] Despite Rousseau considering sovereignty as indivisible and inalienable, this partial alienation of the political subject may bear some resemblance. A question that also arises is: when the political association is formed, is it the community that decides which matters are of interest to it? This query delves into the heart of democratic governance,

[53] Cohen (n 10) 10.

[54] Ibid 16.

[55] Rousseau, *Du Contract Social* (n 48) 73. See also Cohen (n 10) 24.

where the allocation of power and determination of communal interests is a crucial aspect of collective decision-making.

III. The EU Social Contract – Pre-normative, Normative and Imaginary Compounds

The proposed classification comprises of two primary sections: the pre-normative and normative. In the normative section, the codification of the EEC and later the EU in treaties serves as the determining element, while in the pre-normative section, the normative perspective is not the dominant factor. As I will discuss in detail later, the dogmatic element of the EU social contract constitutes the fundamental structure, indicating that attachment and respect by the parties exist in pre-contractual conditions. By applying the pre-normative concept (envisioned by the pioneers) and the normative concept (legally incorporated into the treaties and legislation) to the EU social pact, the objective is to underscore that the desires and aspirations were not only rationalised but also tailored to align with the primary objectives of the Union.

1. Pre-normative sense

Following this delineation, I believe that the declarations, negotiations, and visions of Churchill, Adenauer, Schuman, Monet, and others from 1946 to July 23rd, 1952 (the date of the signing of the Paris Treaty establishing the European Coal and Steel Community (ECSC) and creating a common market for coal and steel, as the first founding treaty of the European Community), can be regarded as part of the original 'pact of association' which was subsequently codified in the Treaty and reiterated whenever the Treaty was amended.

It is challenging to confine the scope of this non-codified original social pact, but it would encompass elements ranging from the speech delivered at the University of Zurich on September 19th, 1946, advocating for the Union of States of Europe (or any similar appellation), to the establishment of a

Council of Europe and the Franco-German partnership, culminating in the Schuman Declaration of May 9th, 1950. This declaration proposed the formation of a ECSC with the aim of fostering peace and solidarity between France and Germany, notwithstanding their historical enmity.[56]

The Schuman Declaration, influenced by Jean Monet, stands as a cornerstone of European integration, a pivotal political proclamation underscoring the imperative of solidarity for self-preservation, peace attainment, and the mitigation of post-World War II Europeans' apprehension of a new conflict. From a normative viewpoint, the principle of solidarity was enshrined in the Preamble of the 1951 treaty establishing the ECSC, laying the groundwork for subsequent European treaties. The Preamble of the Treaty of Maastricht (1992) functioned as a symbolic 'birth certificate,' furnishing a constitutional framework and a sense of collective identity for the European project, cementing the notion of solidarity as a guiding principle for the Union's future endeavours.[57]

The reference to solidarity in the preamble of the Treaty reflects the historical backdrop and sets the stage for the progressive political integration envisioned by the EU. The preamble of the Maastricht Treaty not only encompasses an essential interpretive principle but also issues a declarative statement on its purpose, elucidating principles of positive law. The Treaty of Lisbon fortifies the concept of solidarity, with Article 2 of the TEU enshrining solidarity among the common values of the MS that must prevail. Its inclusion in this article carries significant political and legal ramifications,

[56] European Commission: Directorate-General for Communication, The Schuman Declaration of 9 May 1950 (Publications Office 2015) <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en> accessed 11 September 2024.

[57] Antoni Abat i Ninet and Acar Kutay, 'Europe's Lack of Solidarity in its Response to the Humanitarian Crisis. Jeopardizing the European Union's Constitutional Imaginary' (2020) 61 Revista Catalana de Dret Públic 99.

as a breach of the value of solidarity can trigger the application of measures outlined in Article 7 of the TEU.[58]

This special protection is designed to lend tangible applicability and a deterrent quality to the value, preventing it from remaining merely aspirational. Solidarity has now become a fundamental legal principle within the Union.[59] This emphasis on solidarity particularly reinforces, from an originalist standpoint, the recent calls for the renewal of the EU social contract, as mentioned earlier in this article. In other words, using the EU social contract to uphold private property as a foundational value of the Union, to advocate for ordoliberal or neoliberal values as emblematic of the EU, or to champion policies endorsed by xenophobic and Eurosceptic actors, would breach the founding values and diverge from the original conception of the EU social contract. Such actions would necessitate the formulation of a new social contract, implying a different political organisation.

2. Normative

The codification, mandated by the prevailing political-legal logic of our era, spans from the initial pact of agreement and its primary objectives within the ECSC of 1951 to Article 2 of the TEU and the codification of the CFR. Like any process of legal adaptation, it entails the legitimisation of law as a source of obligation and self-imposition. Moreover, it underscores the significance of the principle of the rule of law, which obliges every individual, institution, or public office to subject their actions to the dictates of law; thus, establishing the supremacy of law as an expression of the general will.

The indispensable process of legal rationalisation within treaties implies that certain elements of the social contract may not be explicitly delineated in legal norms unless we acknowledge that the EU social contract does not

[58] Ibid.

[59] Ibid.

surpass the contents of the Treaties. Conversely, the process of codification, as a rationalisation process, elucidates the *raison d'être* of the EU. The EU social contractors, as rational beings comprehending the foundational values and principles of the EU and the CFR, are now directly interlinked as members of the political organisation.

The meta-legal and ethical principles, alongside the founding values of the EU and the CFR, constitute an integral aspect of the EU social contract, encapsulating its essence and rationale and embodying the dogmatic facet of EU material constitutionalism. These founding values and principles remain immutable even as new contractors join the political organisation. This constitutive identity of the EU predates democratic deliberation and decision-making undertaken within the social contract. In essence, participation in discussions necessitates alignment with these meta-ethical values, which underpin the political organisation. Otherwise, participation is precluded. Following Rousseau, legislation serves to animate the body formed within the social pact, where 'public enlightenment' culminates in the fusion of understanding and will within the social body.[60]

Regarding aspects of the EU social contract currently under scrutiny, dissemination of the aforementioned theory can provide a comprehensive understanding of the framework and the various topics encompassed by the social contract (including urban and rural development, technological advancements, gender equality, environmental protection, and digitalisation), as well as the imperative to prioritise specific founding values or principles. For instance, the EU's adherence to the founding value of the rule of law or its emphasis on the principle of solidarity may be underscored. Additionally, the EU social contract encompasses issues such as the European Green Deal and its implementation, security concerns, migration policies, climate change mitigation, digital transformation, healthcare matters, the

[60] Rousseau, *Du Contrat Social* (n 48) 77.

role of religion in the public sphere, the potential establishment of an EU army, and others.

It is worth noting that these lists of elements may not necessarily align with those of the Member States' social contracts. Despite the EU social contract being considered a social contract among social contracts, with the EU possessing its own legal and political personality, it is not inherently required to correspond to the elements of the Member States' social contracts. A potential convergence of social contract elements, such as specific Christian founding values (encountered in Hungary, Poland, or Romania), can coexist with those of the EU, as long as they do not directly contradict the Union's founding values and principles. However, the converse is not necessarily true. Therefore, the evolution of the EU did not transpire spontaneously, and these states willingly acceded to membership.[61]

3. Symbology and imaginary

A second cornerstone of the EU social contract lies in its role within European political symbology and constitutional imaginaries, as Blokker aptly advocated, enabling citizens to play a crucial role in reinventing the EU and shaping our political project.[62] Thus, an inclusive and democratically participated social contract can serve as a tool to address

> A significant dimension of the EU's "falling short" […] due to a lack of imagination and a persistence of political elites and institutions in outdated modes of operation, largely grounded in a technocratic pursuit of "scientific rationalisation," which subordinates politics to expertise.[63]

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[61] See *Buhuceanu and Others v. Romania* App No 20081/19 (ECtHR, 25 September 2023); Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* ECLI:EU:C:2021:1008.

[62] Paul Blokker (ed), *Imagining Europe: Transnational Contestation and Civic Populism* (Palgrave Macmillan 2021).

[63] Blokker (n 62) 1, citing Jürgen Habermas, *Toward a rational society: Student protest, science and politics* (Heinemann Educational 1971).

The renewal of the pact of association may contribute to reversing myopic approaches to European politics by promoting individuals' engagement in the European project.[64]

Certainly, the proposal of this paper can be situated within the creative theories of social democratic imaginaries that have emerged in recent years.[65] As Neumann remarks:

> the appeal to EU social imaginaries encompasses inquiries not only into horizons of cultural meaning that fundamentally shape the EU but also into their further articulation as instituted (and instituting) cultural projects of power and social action.[66]

From the perspective of the EU social imaginary, the social contract is both creative and social. While the normative aspect of the social contract mainly represents the rational dimension of the phenomenon, the imaginary, as an element of the human condition, represents the institution of the EU, configuring key institutions of our society as a mixture of social imaginary significations.[67]

This reference to the EU social contract, embedded in the creation of a common symbology and imaginary, will play, in Gauthier's terminology, a key role in ideological terms.[68] For him, ideology is part of the deep structure of self-consciousness, understood as the capacity of human beings to conceive themselves in relation to other humans, human structures, and

[64] Blokker, *Imagining Europe* (n 62) 6.

[65] Suzi Adams and others 'Social Imaginaries in Debate' (2015) 1 (1) Social Imaginaries 15

[66] Sabine Neumann, 'Spatializing "Divine Newcomers" in Athens' in Thomas Galoppin, Elodie Guillon et al (eds), *Naming and Mapping the Gods in the Ancient Mediterranean* (De Gruyter 2022) 826.

[67] Suzi Adams and others, 'Social Imaginaries in Debate' (n 65) 21, citing Cornelius Castoriadis, *The Imaginary Institution of Society* (MIT Press 1987) 359.

[68] Gauthier, 'The Social Contract as Ideology' (n 5) 132.

institutions.[69] In this sense, the EU social contract may reinforce the existence of this common structure. The ideology encompasses everyone so that, as more people attain self-awareness, they do so in terms provided by the deep structure of our thought - in terms of social contract and contractarianism.[70]

However, the use of the term ideology, understood in post-Marxist terms, has also been conceived and related to as 'means of domination'. As Komárek remarks on such interpretation, ideology is primarily an instrument of domination. It 'reifies' human experience, making the products of human activity (such as markets or a particular distribution of rights, especially property) appear as natural and fixed.[71]

Therefore, an alternative narrative and conceptualisation have been used to refer, from a less dominative sense to symbology and political imaginary. As Přibáň remarks, 'institutions, like human beings or concepts, have a social existence; they are created, used, expanded, criticised, blended, abandoned, and replaced by other concepts with new semantics and persuasive force'.[72] He continues, noting that 'the imaginaries of statehood, nationhood, European polity, and transnational societal integration are not products of theoretical speculations and political programs'.[73]

This a-legal perspective transcends the normative sense accommodated by the dogmatic part of the treaties and its deontology. This does not mean that there is no legal reference or consequence of the symbology attached to the

[69] Ibid 131.

[70] Ibid 163.

[71] Jan Komárek, *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 3. See also Zoran Oklopcic, *Beyond the People: Social Imaginary and Constituent Imagination* (Oxford University Press 2018).

[72] Jiří Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium, and Communitas' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 21.

[73] Ibid 21.

EU social contract call. On the contrary, the plea to reinvigorate the pact of association can also be understood as a further step towards a kind of constitutionalism that has emerged in the past decades in the EU, reaffirming its utopian character.[74]

Komárek aptly states:

> Constitutional imaginaries are understood as sets of ideas and beliefs that help to motivate and justify the practice of government and collective self-rule. They are as important as institutions and officeholders. They provide political action with an overarching sense and purpose recognized as legitimate by those governed.[75]

Consequently, the EU social contract may play an important role in strengthening, from a symbolic perspective, the narratives and purposes of the EU imaginaries and European institution-building.[76] This is especially true, if we understand political imaginary, as Přibáň remarks, as 'the symbolic capacity to present the pluralistic construction of social reality as one commonly shared and meaningfully constituted polity'.[77]

As an example, we can consider whether EU's response to the brutal military aggression of Russia toward Ukraine can be traced as a central semiotic image of the EU social contract and founding values. Thus, the Russian intervention has been fuelled by Kyiv's aim to join the EU and openly and publicly commit to adhering to the EU founding values and principles. Russian aggression toward Ukraine is a direct challenge to the EU social contract and to a candidate country, a potential contractor that freely and

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[74] Jan Komárek,'European Constitutional Imaginaries: Utopias, Ideologies, and the Other' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 1.

[75] Ibid 1.

[76] See András Jakab, *European Constitutional Language* (Oxford University Press 2016) 63.

[77] Přibáň, 'European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium, and Communitas' (n 72) 1-10.

peacefully wants to adhere to the political organisation. Additionally, it is also an attack on the EU socio-political and constitutional imaginary, as it directly assaults our social imaginary significations.

IV. A Twenty-First Century-Social Contract

From a more theoretical perspective and tracing the historical development related to social contract theory, my current understanding of contractual theory necessarily encompasses the works of John Rawls, one of its foremost modern exponents. Rawls revitalised the idea of social contract theory after a period when it fell out of favour with political philosophers.[78] Additionally, the work of Jürgen Habermas is crucial in understanding how individuals may deliberate, communicate, and decide in the public sphere, thus shaping the social contract.[79]

Justification is not simply about providing evidence or deducing conclusions on political legitimacy or morality from established premises. Instead, the contractual model elucidates the rationale that connects our perspective as individuals with specific interests and objectives to our perspective as members of society.[80] In our case, the perspective, interests, and objectives of EU inhabitants (not necessarily tied to the citizenship of a MS) are aligned with our perspectives as members of the Union. In his *Theory of Justice*, Rawls posits that we can view a political system as a mechanism that makes social decisions when it is informed by the viewpoints of representatives and electors.[81] The understanding of a democratically deliberated social contract nourishes this conception of the political system.

Following the methodology outlined in this paper, we can assert that the proposal for an explicitly democratically deliberated and decided EU social

[78]John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999).

[79]Jürgen Habermas, *Theorie des kommunikativen Handelns* (Surkhamp 1997) vol 2.

[80] Ibid.

[81] Ibid 228.

contract also reflects certain Rawlsian characteristics. Rawls argues that the selection of the two principles - the first principle concerning fundamental liberties, and the second principle, which encompasses access to leadership positions and responsibility and wealth and income distribution - arises through a contract.[82] Similar to Rawls, I believe that some of the founding values of the EU are highly abstract and intended to serve as final public criteria for the basic structure, ensuring justice and reasonableness for free and equal persons.

In this sense, as Nussbaum remarks, Rawls assumes that the principle of justice applying to each society has already been fixed.[83] She states that the 'basic structure' of a society is defined as 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.[84]

This Rawlsian conception of the pre-contractarian "natural law" tradition perfectly encapsulates the epistemological framework proposed in this paper for a contemporary EU social contract. In essence, the 'natural law' and fundamental rights and duties are represented by Article 2 of the TEU and the CFR, serving as the prerequisites for engaging in dialogue and decision-making regarding the EU social contract. Following Rawls, these are the principles of justice that are deemed justified because they were established through consensus in an original position of equality, or, if not initially perceived, they become evident through philosophical reflection.[85] These principles of justice are largely embraced by the EU, upheld by institutions, and adjudicated by judges, ensuring regular adherence and appropriate interpretation by authorities.[86]

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[82] John Rawls, *The Theory of Justice* (n 78).

[83] Martha C. Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' (2004) 32 (1) Oxford Development Studies.

[84] Nussbaum (n 84) 5, citing John Rawls, *The Theory of Justice* (n 78) 32.

[85] John Rawls, *Political Liberalism* (Columbia University Press 1993) 39.

[86] Ibid 79.

In this context, EU contractors find themselves in a sort of Rawlsian original position where everyone favours the same founding values and principles, along with the CFR. In Rawls's terms: 'the agreement in the original position is unanimous, yet everyone is situated so that all are willing to adopt the same principles'.[87] Certainly, the EU aligns with that of a well-ordered political association, relatively homogeneous in its basic moral beliefs, and characterised by broad agreement on what constitutes well-being. This mirrors Rawls's concept of a united society and its political conception of justice, which serves as a model in his *Theory of Justice*. However, such a society would only be stable if everyone continued to adhere to the two principles based on an overarching moral theory that incorporates them as integral components. Yet, according to Rawls, uniform acceptance of a moral theory is implausible.[88]

Similarly, with the EU, evidence indicates that it is not entirely unified in its political conception of justice, leading to varying interpretations of the founding values and principles outlined in Article 2 of the TEU and even the CFR, as exemplified by Hungary, Poland, and Romania, as mentioned above. In response to this criticism, Rawls's concept of an overlapping consensus emerges as the most viable basis for EU political and social unity, ultimately fostering full acceptance and understanding of the essence of EU material constitutionalism.[89] I firmly believe that conflicting yet reasonable comprehensive interpretations and doctrines of the EU's founding values and principles, compatible with the full rationality of human beings as far as can be determined through a political conception of justice, can establish and maintain unity and stability amidst reasonable pluralism.[90]

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[87] John Rawls, 'Reply to Alexander and Musgrave' (1974) 88 Quarterly Journal of Economics 633.

[88] Rex Martin, 'Overlapping Consensus' in Jon Mandle J and David A. Reidy (eds) *The Cambridge Rawls Lexicon* (Cambridge University Press 2015) 588.

[89] John Rawls, *Political Liberalism* (n 87).

[90] Ibid 133-135.

In the envisioned application of the idea of overlapping consensus to our case scenario, the consensus and the reasonable doctrines endorse the dogmatic part of EU material constitutionalism, each from its own point of view. Again, in applying Rawls, the political principles underlying the basic structure differ from those governing personal and familial relationships, which are characterized by affection, unlike the nature of the political.[91] These central points of well-ordered societies may help to frame the scope of the EU democratic deliberated and participated social contract.

Another important consideration when applying Rawlsian work to the proposal of this paper is the division between domestic and international Rawlsian principles of the social contract.[92] The proposal of a democratic EU social contract calls for the involvement of individuals, EU, and MS institutions. This plural call has implications when applying Rawlsian theory. However, the dichotomy exposed by Nussbaum somewhat fades because the relationship between MS in the EU cannot be qualified as international, and even less so in the sense that Rawls defined in his work, despite states representing the interests of the peoples within them.[93] Rawls believes that the consensus on the principles of justice can also be achieved through philosophical argumentation, deliberation, and rationality and at this point, the famous debate between Rawls and Habermas comes into focus.[94] Despite this paper not delving into the debate among individuals within the framework of the new EU social contract, it is necessary to make some references in order to envision democratic participation and deliberation within the social contract framework.

The central premises of Habermas's theory of law and democracy, which may be analogically applied to social contract participation, are the principle

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[91] Ibid 137.

[92] Nussbaum, 'Beyond the Social Contract: Capabilities and Global Justice' (n 84).

[93] See John Rawls, *The Law of Peoples* (Harvard University Press, 2001).

[94] See James Gordon Finlayson, *The Habermas-Rawls Debate* (Columbia University Press 2019).

of discourse and the principle of democracy.[95] The first of the principles implies that norms will be legitimate when free and equal citizens deliberate and make decisions in such a way that all can agree to them without coercion or distorted beliefs.[96] According to this principle, the validity of a decision is related to a 'rational consensus', in a sense that norms are valid only if those affected can agree to them as participants in a rational consensus.[97] For Habermas, the introduction of this principle presupposes that practical questions can be impartially and rationally decided.[98]

The legitimacy of the law, therefore, will ultimately be based on a communicative mechanism.[99] Another principle that Habermas introduces in his normative theory in '*Faktizität und Geltung*' is the principle of democracy, which consists of uniting the wills of citizens in acceptance of a legal norm that will be applied on their behalf.[100] As Habermas states, the main idea is that the principle of democracy arises from the connection of the principle of discourse with legal content, understanding this fusion as a logical genesis of rights, which must continue their gradual reconstruction.[101] Habermas defines the purpose of the principle of democracy as establishing a legitimate procedure to produce laws. Legitimate validity for legal norms can only be claimed based on a legally

[95] Antoni Abat Ninet and Josep Monserrat Molas, 'Habermas and Ackerman: A Synthesis Applied to the Legitimation and Codification of Legal Norms' (2009) 22(4) Ratio Juris 513.

[96] Ibid.

[97] Abat & Kutay (2009) citing Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998) 138.

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid 514.

articulated discourse to which all members of the juridical community affected by the norm give their consent.[102]

The principle of democracy presupposes the possibility of deciding rationally on practical questions and of engaging in all kinds of possible discourses from which laws derive their legitimacy. Consequently, our understanding of the EU social contract is intimately related and will give shape to this claim.

In '*Faktizität und Geltung*', Habermas does not renounce the universal values contained in human rights.[103] Therefore, we could say that his intention was to exclude morality from the theory, but he finds that he cannot do so entirely because he recognises the need for the role that morality plays in the foundation of universal rights. This contradiction affects universal rights—hierarchically, the most important rights of all, which are the focus of his work.[104] The proposal presented in this article considers that the dependence on and maintenance of morality, referred to by Habermas, is represented by Article 2 of the TEU and the CFR as the basic structure of the contract and the framework for democratic action.

V. Conclusion

Contemplating the context and reality in which we live, the EU, like any political organisation, needs to reduce the risk of political instability by implementing safeguards and measures to protect its contract of social association. Aligned with the founding values and principles of the EU and the increasingly democratic mandate in its functioning (as seen in the European Green Deal), this paper argues that the only way to address the exposure the EU social contract faces is by strengthening the principles of solidarity, democracy, and the rule of law.

[102]Abat and Monserrat (n 95) 513, citing Habermas, *Between Facts and Norms* (n 98) 175.

[103]Ibid.

[104]Ibid.

An original interpretation of the EU social contract lies in the leitmotifs that led to the creation of the EEC fear and solidarity as the way to respond to it. It is my premise that an institutionally and individually participated EU social contract will strengthen a new version of the agreement of association by promoting social dialogue, civic engagement, and EU integration. If, in its origins, the solution to fear and angst about a new conflict was solidarity, today's existential and political crises affecting the EU need to be addressed from the basic structure of the EU and democratic participation. In this sense, the social contract theory evolves from the legally and politically indeterminate and dispersed notion towards a more tangible, express, and solemn social contract, enabling individual deliberation and participation to collaborate in this task. If the EU social contract is democratically participated in, it will offer more possibilities to pave the way for a 'stronger together Europe', as highlighted by the President of the Commission, Ursula Von der Leyen.[105]

An institutionally and individually participated EU social contract will strengthen the agreement of association by promoting social dialogue, civic engagement, and EU integration. First, it overcomes the consent-based policing model by placing individuals at the centre of the social contract agenda. Although individuals can be bound by their consent, this consent must be real (explicit) and not fictional. Second, a tangible contract introduces a real contractual form governed by the principle of autonomy of the will. This principle means that the contract can be made on any non-prohibited matter, respecting the founding values and principles of the EU and the CFR. Then, the contract is perfected by express consent. Third, an open and transparent democratic participation and deliberation process on the express social contract increases the levels of inclusivity, sustainability,

[105]'2021 State of the Union Address by President von der Leyen' (*European Commission,* 15 September 2021) <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701> accessed 13 June 2024.

transparency, and accountability, fostering a more inclusive community. This approach opens new avenues for developing the societal aspect of the contract, also promoting an open society. Fourth, it allows to cultivate participatory forms that politically engage individuals in the social contract drafting, thus displacing political populism and other disruptive elements from the contract by 'popularising' the social contract as an institution through its content, development, and remarking Dworkin's well-known objection that an imaginary agreement cannot bind any actual person.[106]

The EU social contract is a unique opportunity to activate and enhance citizens' deliberation and participation in Europe, build a twenty-first century EU imaginary, and, following the wording of the preamble of the CFR, place the individual at the heart of the activities of the EU.

[106]Ronald Dworkin, 'The Original Position' in Norman Daniels (ed), *Reading Rawls*, (Blackwell 1975) 16.

EUPHEMISMS OF SUCCESS: AI TECHNOLOGY IN EUROPEAN BORDER MANAGEMENT AND THE RIGHTS OF MIGRANTS AT SEA

Aphrodite Papachristodoulou*

Border control practices are best characterised by the 'risk logic', which primarily deals with the anticipation and active prevention of undesirable events rather than with the presence of existential threats. Consequently, migrants are treated with a demarcated sense of otherness, whereby international waters serve as a metaphorical 'moat' to keep the unwanted out by intercepting boats or abstaining from international obligations of rescue. This paper seeks to unpack such legal and factual complexities by analysing contemporary manifestations of extraterritorial State power and remote control over migrants at sea, which compound ethical and legal concerns around rights abuses. In doing so, the analysis builds upon the human rights implications and the role that AI technology could play amid the adoption of the EU AI Act and the European Pact on Migration and Asylum. In this context, the article advocates that the current (ab)uses of technology give rise to a right to be rescued at sea, capable of minimising border deaths and refoulement practices.

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Keywords: remote control; surveillance; technologies; borders; externalisation; right to be rescued at sea.

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I. INTRODUCTION

Since the onset of the Arab Spring, there has been evinced a shift in migration control strategies within the European Union (EU, the Union) towards pre-emptive politics and border fortification, facilitated by the use of state-of-the-art technologies. These practices *qua* mechanisms of migration management,[1] have substantially redefined the dynamics of human mobility and border governance. Particularly notable is a disincentivised attitude to conducting rescues, evidenced by a changing stance among European States and the EU as an institution following the aftermath of the perceived 'migration' crisis in 2015, where over one million people arrived in Europe seeking protection and resettlement. However, scholarship in this field unequivocally confirms that cross-border human mobility (migration) aiming to enter and remain in nations of the global

[1] Niamh Kinchin and Davoud Mougouei, 'What Can Artificial Intelligence Do for Refugee Status Determination? A Proposal for Removing Subjective Fear' (2022) 34 International Journal of Refugee Law 373.

North will persist, not only due to ongoing wars but also as a consequence of environmental factors such as climate change, environmental degradation and natural disasters.[2]

Contemporary migration in the form of irregular movement by sea has received global attention in the last decades, not only for the economic, political and social issues it raises but also for raising the spectre of threats to life and the person, and thus of effective human rights protection of migrants. The perils of the sea for individuals that choose to set sail upon it in unseaworthy boats, such as adverse weather conditions and hypothermia, is quite clear. However, these dangers are particularly pronounced for those trafficked or smuggled across the sea.[3]

The customary duty to rescue persons in distress is a legally binding obligation, deriving also from the international law of the sea framework,[4] and is applicable regardless of a person's nationality, status or activities performed at sea. Against this background, the negation or shift away from obligations of search and rescue (SAR) when life is in peril towards a technological border control practice that uses the sea as a 'moat' to fortify

[2] Matthew Scott, 'Adapting to Climate-Related Human Mobility into Europe: Between the Protection Agenda and the Deterrence Paradigm, or Beyond?' (2023) 25 (1) European Journal of Migration Law 56.

[3] For an analysis on the vulnerabilities of trafficked persons who are victims of egregious abuse, but in the absence of access to legal protection and securing migration status, they also become irregular migrants, see, Siobhán Mullally, 'Migration, Gender, and the Limits of Rights' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 145-6.

[4] Article 98 (1) (a) of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS). The Convention has been ratified by EU law with Council Decision 98/392, which means that the EU is bound by all the rights and obligations provided under UNCLOS.

borders[5] has made the humanitarian plight of migrants far worse. Coastal state authorities, operating through their maritime Rescue Coordination Centres (RCCs), systematically rely on information gathered from aerial assets, such as drones, to pinpoint the location of migrant boats. They then share this information with third-country authorities to facilitate intervention (or, interception), thereby avoiding rescue obligations and, ultimately, deflecting boats from reaching their own territory.[6] As a result, we are witnessing an expansion of State sovereign power and a looser interpretation of existing obligations, both of which are enabled and carried out through technological tools for the management of external borders.

To date, technologies, including Artificial Intelligence (AI) systems, that have been piloted and deployed at external borders have been used with minimal public scrutiny and control.[7] On 13 March 2024, the European Parliament adopted the EU AI Act (the Act), which is considered to be 'the world's first comprehensive horizontal legal framework for AI', laying down rules on AI and paving the way for the Act to become law.[8] The Act attempts

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5 Davis Scott FitzGerald, 'Remote Control of Migration: Theorizing Territoriality, Shared Coercion, and Deterrence' (2020) 46(1) Journal of Ethnic and Migration Studies 12.

6 Maritime surveillance activities under Frontex mainly see the participation of coastguards and law enforcement actors which are governed by EU Regulation 1896/2019; Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26(1) European Journal of Migration Law 123.

7 Ludivine Sarah Steward, 'The Regulation of AI-based Migration Technologies under the Draft EU AI Act: (Still) Operating in Shadows?' (2023) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648504> accessed 1 May 2024.

8 Horizontal legislation means that it applies to all AI systems that are placed on the European market or used in the Union under its scope. Exceptions do apply however. See, in particular, Article 2 of the EU AI Act. See also, Kirk J. Nahra, et al 'The European Parliament Adopts the AI Act' (Wilmerhale Privacy and Cybersecurity Law, 14 March 2024) <www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20240314-the-european-parliament-adopts-the-ai-act> accessed 30 April 2024.

to deal with high-risk human rights implications of technologies, including the ones deployed at and beyond the border, which fall under the 'high-risk' category. In conjunction with the adoption of the EU Pact on Migration and Asylum,[9] which, as it will become apparent below, is prominently focused on deterrence, my analysis foresees an expected amplification of sea border surveillance (and violence) as part of the broader border control practices to prevent migrant crossings into and within the EU, widening the gap in human rights protection at sea.

To address the lack of connection between AI technologies, obligations of rescue at sea and human rights, the Article provides a normative argument in revisiting the existing framework of human rights and adjusting international human rights law to accommodate the evolving technological landscape.[10] Conversely, my contention is that the increasing (ab)use of AI technologies in the field of migration policies and border management lends support to the argument for recognising a right to be rescued at sea, as these practices raise critical legal and ethical questions about the protection of fundamental rights, especially with regards to the loss of life at sea. The analysis is considered of significant societal relevance, as it aspires to inform further law, policy and jurisprudence in the field.

The first section of the Article examines through doctrinal research the role of border technologies in the securitisation paradigm[11] to shed light on the

[9] Pact on Migration and Asylum <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 2 May 2024.

[10] Yuval Shany, 'The Case for a New Right to a Human Decision Under International Human Rights Law' (2023) <https://ssrn.com/abstract=4592244>, 2 accessed 2 May 2024. See, eg, Karen Yeung, 'A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework', COE Doc. DGI(2019)05 71-74.

[11] For a thorough analysis of the securitisation paradigm of SAR activities see, Daniel Ghezelbash, Violeta Morno-Lax, Natalie Klein and Brian Opeskin, 'Securtization of

importance the EU places on the use of modern technology, including surveillance, in its migration policies and border control management. By first documenting the situation on the ground based on the latest available information, Section II takes a critical stance to unpack doctrinal questions by scrutinising both the EU's AI Act and the EU Pact on Migration and Asylum in light of the human rights implications posed to migrants who attempt to cross the borders via sea routes. In turn, to tackle the increasing disconnect in the literature concerning AI technologies, responsibilities of SAR, and human rights obligations, I contend in Section III that such risk-based measures and policies reinforce the case for recognising a right to be rescued at sea that will become even more pertinent as climate change and natural disasters exacerbate, contributing to elevated levels of displacement. This Article takes into account legal and policy developments on European border management that had taken place until 1 July 2024 unless stated otherwise.

II. A Risk-Based Approach to Migration Control

The application of 'risk logic' has been deeply entrenched in European border and migration management. What is more, it is intricately intertwined with security considerations aimed at controlling an increasingly 'mobile' border and deterring mobility.[12] This section explores

Search and Rescue at Sea: The response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67(2) International & Comparative Law Quarterly 330-332.

[12] 'Mobile' border is used herein to refer to the dynamic nature of how borders are managed or perceived, especially in relation to migration, security measures, and the movement of people. In this context, 'mobile' is not referring to physical borders shifting, but rather to the way borders are handled—such as migration policies that make crossing them easier or harder, or new technologies that change the way borders are monitored. See also, Vladislava Stoyanova, 'Complementary Pathways in Murky Legal Waters: A Lost Cause or a Light in the End of the Tunnel?' (2023) 25(2) European Journal of Migration Law 135.

the phenomenon of irregular migration by sea, focusing on contemporary State practices in the Mediterranean Sea region and the EU's efforts to protect its external borders. It highlights the increasing reliance on security-based responses and surveillance technologies aimed at securing borders, which often have negative ramifications for migrants' rights – and lives.

As part of the EU border regime, the principal aim of the Schengen Borders Code (SBC) is 'to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally'.[13] At the same time, under Article 4, it provides that activities must fully comply with the requirements of the Refugee Convention and the obligations related to access to international protection, particularly the principle of *non-refoulement*.[14] Accordingly, when exercising border control, States must comply with both international and EU law.[15]

The term 'border surveillance' under the SBC denotes the monitoring of the borders between border crossing points in order to prevent persons from circumventing border checks.[16] Surveillance is thus said to be adapted to existing or foreseen risks and threats so that 'unauthorized border crossings are always at risk of being detected'.[17] For example, the deployment of surveillance technology is a rapidly emerging trend and is critical to EU border agencies, such as those of the EU's Border and Coast Guard Agency (Frontex), in their pre-frontier detection practice. The agency, through the European Border Surveillance System (EUROSUR) established in 2013, uses big data technologies (including satellite imagery and ship recording

[13] Article 13 (1) Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code or SBC).

[14] Article 4 SBC.

[15] See, inter alia, *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008); *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 41.

[16] Article 2 (12) SBC.

[17] Article 13 (3) SBC.

services) to 'predict control and monitor traffic across European Union borders' and ultimately to block migrants' passage.[18] Frontex also deploys law enforcement officers to assist national coastguards in 'managing' the EU's external borders with surveillance through planes and helicopters. To this effect, optical and thermal cameras, sea-, air-, and land-borne radars, vessel tracking technologies and satellites form a vast and complex remote sensing apparatus.

From a legal perspective, borders play a key constitutional role as they are central to State territorial sovereignty, delimitating spaces, objects and populations whereby the State (its confined territory and population) is made.[19] In this way, States can exercise control over who is allowed to enter, transit, and remain in their territory, while international refugee law and international human rights law raise prominent exceptions to sovereignty.[20] It is, therefore, indubitable that the phenomenon of irregular migration by sea is fundamentally considered a challenge to State sovereignty. Policies that focus on tackling migration are not new and have always played a key role in 'protecting' a State's sovereign claims to control their borders as well as monitor admittees.

Following, contemporary border practices, policies and bilateral (formal and informal) agreements with third countries continue to proliferate in the

[18] Regulation (EU) 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (EUROSUR) L 295/11, 6 November 2013.

[19] Violeta Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control' (2024) Queen Mary Law Research Paper No. 421/2024 <https://ssrn.com/abstract=4710194> 5, accessed 30 April 2024.

[20] See discussion by Jesper Lindholm, 'Remote Migration Control at Sea: Jurisdiction Relating to Joint or Proxy Interception in Foreign Waters or Foreign Search and Rescue Regions' in Kristina Siig, Birgit Feldtmann and Fenella M.W. Billing (eds), *The United Nations Convention of the Law of the Sea: A System of Regulation* (Routledge: Taylor & Francis Group 2024) 152.

Mediterranean, often with little regard for underlying realities – especially in the absence of effective legal means of entry in the EU. Mediterranean frontline States such as Italy, Malta, Spain, Greece, and Cyprus, heavily impacted by migratory flows due to their geographical proximity to North African and Middle Eastern countries such as Tunisia, Algeria, Libya, Egypt, Lebanon and Turkey, have strengthened border control measures and adopted migration policies aimed at externalising European borders.[21] For instance, Italy (together with the EU) has heavily funded the development and strengthening of the Tunisian (and Libyan) coastguard over time. This support recently led to the establishment of Tunisia's national Search and Rescue Region (SRR) under its legal responsibility, which could result in the 'rescue and interception' of migrants to Tunisia, leaving them trapped in a human rights limbo and subject to dire living consequences.[22] These practices have infamously stretched the concept of State sovereignty even beyond the territorial limits of a State to countries of origin and transit, hence creating a 'foreign border', which will keep migrants as far as possible from European shores.[23]

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[21] Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) Human Rights Law Review 574.

[22] Under international maritime law, States have the primary responsibility for coordinating rescues within their SRRs; See, the Tunisian Decree No.°2024-181 of April 5, 2024, organizing maritime search and rescue; AlarmPhone, 'Interrupted Sea' <https://alarmphone.org/wp-content/uploads/2024/06/Interrupted-sea-EN.pdf> accessed 20 June 2024; See also analysis by Mariagiulia Giuffré, Chiara Denaro, Fatma Raach, 'On "Safety" and EU Externalization of Borders: Questioning the Role of Tunisia as a "safe Country of Origin" and a "Safe Third Country"' (2022) 24 European Journal of Migration Law 570-599.

[23] Maarten den Heijer, Europe and Extraterritorial Asylum (Hart Publishing 2012) 5; UNHCR, 'Operational Data Portal, Refugee Situations, Mediterranean Situation' <https://data.unhcr.org/en/situations/mediterranean> accessed 30 April 2024.

It follows that externalisation,[24] along with securitisation (often used interchangeably or tied together)[25] are key themes underlying the Union's migration policies, which arguably aim at curbing migratory flows and sidestepping obligations including those arising from international refugee law,[26] human rights law and international law of the sea.[27] Nonetheless, the number of people dying at sea reveals that border control measures have a negative impact on the human rights and lives of those migrants who attempt to cross the Mediterranean. Specifically, in 2023 alone, the mortality rates (the risk of dying at sea) doubled in the Mediterranean Sea when compared to 2015, making the relative surge in deaths particularly unsettling, given the five-fold decrease in the number of migrant sea crossings in that period (341,010 compared to 1,007,492).[28]

[24] Externalisation usually takes the form of parlance that frames migration as an existential threat. It has been described as an 'umbrella concept' that refers to 'the process of shifting functions that are normally undertaken by a state within its own territory so that they take place, in part or in whole, outside its territory'. As defined by David Cantor, Nikolas Feith Tan, Mariana Gkliati et al, 'Externalisation, access to territorial asylum, and international law' (2022) 34(1) International Journal of Refugee Law 120. See also, Barry Buzan, Ole Waever and Jaap de Wilde, *A New Framework for Analysis* (Lynne Rienner Publishers 1998) 26.

[25] Securitisation may occur both in political discourse and policy practice and refers to security practices.

[26] Convention Relating to the Status of Refugees, 189 UNTS 137 and Protocol Relating to the Status of Refugee, 606 UNTS 267 (1951 Refugee Convention).

[27] Xanthopoulou (n 6) 109; See also the Refugee Law Initiative Declaration on Externalisation and Asylum adopted on 29 June 2022, which sets out key international considerations on externalisation.

[28] Data was collected from the IOM's Missing Migrant Project, which is considered to collect the most comprehensive figures on the region. It was then analysed to get the mortality rates by comparing the number of attempted crossings yearly with the actual number of dead/missing. See IOM's Missing Migrant Project, <www.missingmigrants.iom.int/region/mediterranean> accessed 20 February 2025.

The stark contrast between the increased risk of dying at sea relative to the lower number of people trying to make such crossing as a result of the Union's policies is, at the very least, paradoxical, as one might legitimately expect to see that fewer people making such crossings will result in fewer fatalities. Additionally, given that this area has become heavily surveilled, one would anticipate that the increased situational awareness would result in a more robust SAR response by providing early warnings of distress. As a result, this data reveals that the maritime SAR framework suffers from non-compliance and ineffectiveness, widening the gap between border technologies and international commitments. Consequently, the duty to render assistance at sea and its correlative right to be rescued remain tragically empty rhetoric, as the purported pretext of using sea border surveillance to enhance the service of SAR appears only as a *façade* commitment, devoid of meaningful action and raising seminal questions of legality.

One of the possible explanations for the increase in mortality rates, as highlighted in a joint report by Human Rights Watch and Border Forensics, is the growing use of military drones by Frontex and the EU in the Mediterranean. These drones increasingly pose a 'threat to migrants and refugees'. The report further states that 'Frontex's rhetoric around saving lives remains tragically empty as long as the border agency doesn't use the technology and information at its disposal to ensure that people are rescued promptly and can disembark at safe ports'.[29] Consequently, the increasing reliance on aerial and maritime means of control by Member States (MS) operating under Frontex jointly with the Libyan Coast Guard and Navy (LCGN) indicates a progressive abstention from SAR activities and a

[29] Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya: Aerial Surveillance Is Enabling Interceptions Return of Migrants to Harm' (Human Rights Watch, 12 December 2023) <www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya> accessed 15 June 2024.

growing disconnect between border technologies, rescue obligations and human rights pertinent in this context.

Such practices further lead to an intensification of remote interceptions and returns. Whilst in 2012 it became clear that the classical direct 'push-backs' of migrant vessels,[30] even when interdicted on the high seas, represent a fundamental violation of the principle of *non-refoulement*, this did not stop States from avoiding the transparency of physical control and finding alternative avenues (through the use of technology) with the same end result. Particularly, the European Court of Human Rights (ECtHR, the Court, or the Strasbourg Court) in *Hirsi Jamaa and Others v Italy*, condemned Italy for exposing migrants to the risk of being subjected to ill-treatment in Libya and notably observed that 'Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya'.[31] Ergo, it reasoned that States 'cannot circumvent refugee law and human rights requirements by declaring border control measures [...] to be rescue measures'.[32] The judgment seems *prima vista* not to afford any future manoeuvring of migration policies to stem migration flows by way of cooperation agreements, which produce effects outside a State's territory and result in human rights violations. Nonetheless, even when courts denounce

[30] Push-back practices include the forced return of migrants, including applicants for international protection, to the country from where they attempted to cross or have crossed an international border without allowing them to apply for asylum or submit an appeal which may lead to a violation of the principle of *non-refoulement.* See, European Commission, Migration and Home Affairs, 'Glossary' <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/push-back_en#:~:text=Various%20measures%20taken%20by%20states,or%20denied%20of%20any%20individual> accessed 25 August 2024.

[31] *Hirsi and Others v Italy* (*Hirsi*) App No 27765/09 (ECtHR, 23 February 2012) 129.

[32] Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21(2) International Journal of Refugee Law 291.

such policies, they may inadvertently encourage further externalisation by keeping migrants outside a State's prima facie control.[33]

Buttressing the above entanglement of the securitisation paradigm, the most profound example is the re-activation of the Memorandum of Understanding (MoU) between Italy-Libya agreed in February 2017, which acts as a continuation of what was already the case ten years ago.[34] This time, the agreement goes a step further, as Italy is no longer at the forefront of migrant interceptions and push-backs since the LCGN has undertaken those tasks. More simply, it allows for the detection of migrants before they come close to European States' territories in order to alert the LCGN (coastal partner States) to intercept or 'rescue' migrants and, ultimately, block exits from Libya. In parallel, the EU provides additional support to Libya in the form of training and the provision of naval assets to its coast guard as part of *Operation EUNAVFOR MED Irini*.[35] In this way, the erection of invisible pre-frontier obstacles plays a proactive role not only in preventing and

[33] David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019) 256.

[34] 'Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic' (2017) (English version) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 2 May 2024; See also, the latest agreement drawn between Italy-Albania, Law no. 14 of 21 February 2024, 'Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, fatto a Roma il 6 novembre 2023, nonché norme di coordinamento con l'ordinamento interno' OJ General Series no. 44 of 22-02-2024.

[35] Tineke Strik and Erik Marquardt, 'EU support to the Libyan Coast Guard in the light of the UN conclusions and recent incidents' (29 March 2023) <www.europarl.europa.eu/doceo/document/P-9-2023-001069_EN.html#def2> accessed 28 April 2024.

impeding migrant arrivals but also in the engagement of the law of the sea and human rights obligations.[36]

Over the course of time, the analysis of available data has demonstrated a significant correlation between the asset flights and the number of interceptions performed by the LCGN.[37] For instance, in 2023 alone, the LCGN intercepted over 17,000 migrants at sea, whilst that year marked the highest death toll recorded since 2018, with more than 2,526 documented deaths in the Central Mediterranean.[38] Simply put, without the information from EU aircraft, the LCGN would not have had the technical and operational means to intercept as many boats as it does. I call this contemporary practice '*neo* push-backs',[39] allowing for remote control

[36] Bolstering the externalisation of the migration management saga, the EU announced in2 May 2024 yet another deal with a third country, that dangerously replicates already established agreements with Tunisia and Egypt. This time, the Union will provide Lebanon with €1 billion in aid to prevent migrants from reaching Cyprus by boats, in an attempt to close another migratory route, thereby putting individuals seeking international protection at high risk of *refoulement* and destitution. See, European Commission, 'President von der Leyen reaffirms EU's strong support for Lebanon and its people and announces a €1 billion package of EU funding' (2 May 2024) <https://ec.europa.eu/commission/presscorner/detail/en./ip_24_2384> accessed 2 May 2024. See also Moreno-Lax (n 19).

[37] Judith Sunderland and Lorenzo Pezzani 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse' (Human Rights Watch, 8 December 2022) <www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse> accessed 2 May 2024.

[38] Statistics from the International Organization for Migration (IOM), 'Missing Migrants Project Global Data Overview, January 2022-December 2022' (21 June 2023) <https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/MMP%20global%20data%20briefing%202022.pdf> accessed 1 May 2024.

[39] The use of the term 'neo' is meant to reflect the new/contemporary type of push-backs that are facilitated by the use of border technologies.

techniques to be extended beyond the physical frontiers of States and exercised the moment an individual attempts to leave their country.

An analogy can be drawn with the Case C-808/18 *Commission v Hungary* of the Court of Justice of the EU (CJEU), where the court ruled against State efforts to exclude access to the law regarding the use of transit zones by Hungary.[40] Characteristically, the Court, in its reasoning, emphasised Hungary's systemic practice of limiting access to the transit zones, making it almost impossible for third-country nationals arriving from Serbia to access the asylum procedures there.[41] In a similar manner, Frontex's and States' extraterritorial practices can lead to the pull-back of navies and push-back of migrants,[42] which has the same result as the Hungarian legislation.[43]

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[40] ECLI:EU:C:2020:1029 para 127.

[41] Not least to mention that Frontex has been scrutinised in recent years by a number of EU bodies and institutions and has faced legal action against its practices and claims of overstepping the limits of its powers; Xanthopoulou (n 6) 124.

[42] Aphrodite Papachristodoulou and Richard Collins, 'Pulling Back Navies and Pushing Back Migrants: Questioning the EU's Legal Responsibility in the Mediterranean Sea' (2018) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 01/2020, 13-15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548637> accessed 1 May 2024.

[43] See European Ombudsman, 'Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ)' <www.ombudsman.europa.eu/en/decision/en/182665> accessed 25 February 2025. ; European Court of Auditors, 'Special Report: Frontex's support to external border management: not sufficiently effective to date' (European Court of Auditors, 2021), <www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf> accessed 20 June 2023; Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya: Aerial Surveillance Is Enabling Interceptions Return of Migrants to Harm' (Human Rights Watch, 12 December 2023) <www.hrw.org/news/2022/12/12/eu-frontex-complicit-abuse-libya> accessed 20 December 2024. The following case is

These policies and agreements result in the *neo* push-back of individuals and the denial of effective access to asylum procedures, posing an even greater danger to the life of individuals whilst interfering with one's right to be rescued at sea.

It is evident that the overall stance on migration has fuelled the adoption of a risk-based approach at external borders,[44] whereby the deployment of technologies aims 'to remove obstacles to the functioning of the internal market or to fight terrorism or other forms of organised cross-border crime'.[45] There lies an inherent paradox that is blurring the lines between human mobility and cross-border movement, on the one hand, and crime and terrorism threats, on the other hand. This connection is problematical as it seemingly equates migrants, especially asylum-seekers, with criminals, reinforcing exclusionary surveillance and control mechanisms akin to the 'ban-opticon'.[46].This process, otherwise known as 'othering' of non-

a deportation case but still valuable in showing how the Agency is being challenge for legality of its actions. Case T-600/21 *WS and Others v Frontex* ECLI:EU:T:2023:492; Front-LEX, 'For the First Time, a "Pushback" Victim Sues Frontex for Half a Million Euro' <www.front-lex.eu/alaa-hamoudi> accessed 20 December 2024. See also Moreno-Lax (n 21) 9; UN Human Rights Council 'Report of the Independent Fact-Finding Mission on Libya' (27 March 2023) UN Doc A/HRC/52/83 para 4 <https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc5283-advance-edited-version-enar> accessed 20 May 2024.

[44] A risk-based approach in this context is defined in the EUROSUR Regulation and concerns improving the situational awareness and reaction capability at the external borders of the MS of the Union for the purpose of 'detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protecting and saving the lives of migrants'. EUROSUR, para 1.

[45] Jorrit J. Rijpma, 'Brave New Borders: The EU's Use of New Technologies for the Management of Migration and Asylum' in Marise Cremona (ed), *New Technologies and EU Law* (Oxford University Press 2017) 209.

[46] On exclusionary surveillance and control mechanisms see Didier Bigo's 'ban-opticon' apparatus. Didier Bigo, 'Detention of Foreigners, States of Exception, and

nationals or non-citizens of the EU, fosters detrimental attitudes and allows for stricter security and externalisation measures to address a perceived 'threat', undermining international obligations of rescue and providing humanitarian assistance.[47]

III. MOBILITY IN 'CRISIS'

Apropos of the above, coupled with the fast-growing trend of incorporating technologies, including AI, as mechanisms of maritime migration control, the EU has sought to address the gap between the use of AI technologies and the protection of fundamental rights, through regulatory initiatives like the AI Act and the EU Pact on Migration and Asylum, both adopted in 2024.[48] The AI Act aims to promote trustworthy AI, while the EU Pact on Migration and Asylum aims to create a 'more unified approach to managing migration flows' in and across Europe.[49] Questions, however, remain regarding whether these new regulations will adequately ensure that the deployment of AI systems in border management is in line with existing

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the Social Practices of Control of the Banopticon' in Rajaram and Grundy-Warr (ed), *Borderscapes Hidden Geographies and Politics at Territory's Edge* (1st edn, University of Minnesota Press 2007) 23.

47 On the migration-security nexus see also Bruno Olivier Martins and Maria Gabrielsen Jumbert, 'EU Border Technologies and The Co-Production of Security "Problems" and "Solutions"' (2020) 48(6) Journal of Ethnic and Migration Studies 4. See also, Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) 27 Alternatives 67. Bigo has also extensively discussed the securitization of cross-border mobility.

48 European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), para 1 of the Preamble, <www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf> accessed 2 May 2024.

49 ibid.

principles and fundamental rights whilst contributing to ensuring accountability through regulation.

1. The EU AI Act

Manifestly, technologies of control,[50] including AI, are a key component in supporting the complex migration-border nexus apparatus of the EU and its MS in so far as they have been deployed and piloted with limited public scrutiny. Against this background, the EU AI Act seeks to provide safeguards for the deployment of 'high-risk' AI systems and provides a separate legal framework that aims to regulate the use of technology in migration, asylum and border control management. This means that, if an AI system falls under the 'high-risk' category, it will still be permitted to be used but subject to a high level of mandatory requirements before it can be placed on the EU market. To this end, the Act further imposes specific obligations on various stakeholders involved in the development of AI systems, including public and private actors, such as private companies that provide the AI system (the 'system provider'), public authorities using these systems (the 'deployer'), distributors, and importers of AI systems.[51] In this connection, defining 'AI' in legal terms has proven to be a difficult task for EU lawmakers and has

[50] Philippe Bonditti, Didier Bigo and Frédéric Gros, *Foucault and the Modern International Silences and Legacies for the Study of World Politics* (1st edn, Palgrave Macmillan 2017) 290. The editors discuss 'technologies of control' by drawing on Foucault's concepts. They highlight surveillance, profiling, and data-driven governance to shape migration policies and security measures. Bigo's concept of the 'ban-opticon' highlights how authorities use predictive techniques to regulate mobility, reinforcing exclusionary practices under the justification of security and public order.

[51] For the definition of these terms, see Article 3 of the Act. See also Article 6 of the Act which prescribes the classification rules for high-risk AI systems, and, for the purposes of my analysis, para 2 is relevant as it refers to AI systems mentioned in Annex III.

been a focal issue during the negotiations. In the final draft, an AI system is defined as

> a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[52]

When considering the technologies that have been deployed in the Mediterranean region to manage migration flows, the EU AI Act becomes acutely relevant. In particular, Article 7 of Annex III is dedicated to migration and applies inter alia to

> AI systems intended to be used by or on behalf of competent public authorities or by Union institutions, bodies, offices or agencies to assess a risk, including a security risk, a risk of irregular migration, or a health risk, posed by a natural person who intends to enter or has entered into the territory of a Member State.[53]

In addition, it includes AI systems used in the context of 'migration, asylum or border control management, for the purpose of detecting, recognising or identifying natural persons, with the exception of the verification of travel documents'.[54] Therefore, surveillance mechanisms used at sea, land or in the air fall in the 'high-risk' category of AI systems that 'detect' natural persons within the meaning of the Regulation (eg, autonomous systems like drones with integrated AI-enabled object recognition, classification and tracking capabilities that are used to perform functions such as border surveillance).

Alarmingly, the Act provides a carve-out for law enforcement, migration, asylum and border control authorities to use high-risk systems, as it exempts them from the requirement to register information about the system onto a publicly accessible database, which would have increased public

[52] Article 3 (1) of the Act.

[53] Article 7 (b) of Annex III of the Act.

[54] ibid Article 7 (d).

transparency and oversight. Both providers and deployers of high-risk systems in these areas will be requested to register only a limited amount of information and only in a non-publicly accessible section of the database.[55] Consequently, it takes away the exercise of public scrutiny in these high-stake areas, which are prone to fundamental rights violations, as these systems will be exempted from transparency and oversight safeguards for law enforcement authorities, rendering it impossible for external actors to know where and how AI systems are deployed as well as appreciate the underlying risks and long-term effects of their use.

Worth noting is that the Act grants certain authorities protecting fundamental rights with certain rights, such as the possibility to request access to documentation, which could contribute to enhancing accountability.[56] In addition, Article 86 of the Act provides the possibility for the right to explanation for any affected person subject to a decision made by the deployer based on the output from a high-risk AI system. Still, in practice, this right might be unattainable for migrants who have suffered rights violations or lost their lives.

At the outset, the legislation appears to suffer from several shortcomings, which might exacerbate border violence and, at the same time, allow States to negate responsibilities for any infringements so far as the deployment and use of AI systems, including surveillance technology, is concerned in sea border operations. In particular, one of the most serious shortcomings of the legislation is that it provides a blanket exemption based on national security

[55] Article 49 (4) of the Act. See also Ella Jakubowska, et al 'EU's AI Act fails to set gold standard for human rights' (3 April 2024) <www.amnesty.eu/wp-content/uploads/2024/04/EUs-AI-Act-fails-to-set-gold-standard-for-human-rights.pdf> accessed 1 May 2024.

[55] Article 49 1(c) of the Act.

[56] Article 77 paras (1) and (3) of the Act. See also Ludivine Sarah Stewart, 'The regulation of AI-based migration technologies under the EU AI Act: (Still) operating in the shadows?' (2024) 30 European Law Journal 133.

grounds that will allow European States to exempt themselves from the rules for any activity that is deemed to fall under the armpit of 'national security'.[57] The concern relates to the 'national security' ground being applied to migration, policing, and security to create an intended eclipse of legal liability, impacting the rights of migrants at sea.[58] This is warranted by the fact that 'national security' remains the sole responsibility of Member States in accordance with Article 4(2) of the Treaty on European Union (TEU), operational needs of national security activities and specific national rules applicable to those activities. This justification, in reality, is frequently misused for the purposes of carrying out disproportionate policing (at a distance) and border management activities.[59] To all expectations, the Act

[57] Preamble para (24) of the Act. The justification for 'military and defence purposes' is governed by Article 4(2) TEU, as well as the specificities of the Member States and the common Union defence policy, which is outlined in Chapter 2 of Title V of the Treaty on European Union and is subject to public international law. This is considered a more appropriate legal framework for regulating AI systems used in lethal force and other military and defence activities.

[58] An increasing number of studies is raising concerns about the potential abuse of these systems, which could jeopardize the protection of fundamental rights of migrants subjected to these technologies, including their rights to access justice, seek asylum and to be free from discrimination. See, eg, Madeleine Forster, 'Refugee Protection in the Artificial Intelligence Era: A Test Case for Rights' (Royal Institute of International Affairs 2022) <https://chathamhouse.soutron.net/Portal/Public/en-GB/RecordView/Index/191194> accessed 25 February 2025; Niovi Vavoula, 'Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism' (2021) 23(4) European Journal of Migration and Law 467.

[59] See, for example, Clemends Binder, 'How the EU politicises research and development in border security' (2022) <www.kcl.ac.uk/how-the-eu-politicises-research-and-development-in-border-security> accessed 14 June 2024. The understanding related to the 'policing at a distance' theory developed by Bigo and Guild. See, Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa

sets a dangerous precedent for the use of AI systems, including surveillance to detect persons, further widening the gap between AI regulation, fundamental rights safeguards, and search and rescue obligations for persons detected in distress at sea.

All of this shows that, if these tools are used without safeguards, the facilitation of illegal border interdictions and loss of life will, arguably, persist. Notwithstanding, the legislation does make reference to the need not to circumvent international obligations arising under the UN Convention relating to the Status of Refugees,[60] '[n]or should they be used to in any way infringe on the principle of non-refoulement or to deny safe and effective legal avenues into the territory of the Union, including the right to international protection'.[61] It remains to be seen how it will affect migrants' rights and if it will minimise the practical challenges faced by frontline States in the Mediterranean.

2. The EU Pact on Migration and Asylum

Another recent development in this arena is the adoption of the EU Pact on Migration and Asylum (EU Pact, or Pact) on 14 May 2024 by the Council of the EU. The Pact is legislative package aiming to reform the Common European Asylum System.[62] One of the key elements addressed in the Pact is a fairer sharing responsibility system in order to avoid having frontline EU

Policies' in Didier Bigo and Elspeth Guild, *Controlling Frontiers* (1st edn, Routledge 2005).

60 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by the Protocol of 31 January 1967.

61 Preamble para 60 of the Act.

62 Council of the EU, 'Press Release 396/24: The Council adopts the EU's pact on migration and asylum' (14 May 2024) <www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/pdf/> accessed 2 March 2025. The Pact is expected to come into effect in 2026, as Member States have two years to implement the laws.

States impacted heavily by migratory pressures, which is further elucidated by the Asylum and Migration Management Regulation (AMMR).[63] However, as other scholars have argued, the Pact seems to be an attempt to normalise further human rights violations that are taking place not only within Europe but also in the countries of origin and transit, where the EU has drawn policies of border externalisation as shadowed in the previous section.[64]

Among the goals of the proposed Pact is the prevention of irregular departures through 'mutually beneficial partnerships with those [third] countries […] and be based on human rights, rule of law and the respect of the Union's common values'.[65] Despite being couched in the language of fundamental rights, it is evident that the AMMR prioritises the long-established practice of containment that seeks to fight against irregular migration at *all* costs, preventing movement further into the EU, whilst strengthening cooperation with third countries.[66] Yet again, with the unfolding climate crisis affecting many regions in North Africa and the Middle East and intersecting with other political and economic crises,[67] the

[63] See Articles 3-4, 2020/0279 (COD) 26 April 2024; Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 (AMMR).

[64] See, for instance, Niamh Keady-Tabbal and Eoghan O Cennabháin, 'Detention, Deportation & Drowning: Ireland's Embrace of Fortress Europe' (Rebel News, 26 June 2024) <www.rebelnews.ie/2024/06/26/detention-deportation-and-drowning-irelands-embrace-of-fortress-europe/> accessed 10 September 2024.

[65] Article 5 of AMMR, 2024.

[66] For a thorough analysis of the Pact, see, Jean-Pierre Cassarino and Luisa Marin, 'The Pact on Migration and Asylum: Turning the European territory into a non-territory?' (2022) 24 European Journal of Migration Law 1-26.

[67] See, for instance, Human Rights Committee 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016' Un Doc CCPR/C/127/D/2728/2016 (commonly known as the case of *Ioane Teitiota v New Zealand*).

situation and commitment to safeguarding migrants' rights appears even more dire.

Worth noting is that this practice ostensibly challenges and results in a clear denial of the right to leave and to seek asylum, rights which are enshrined in EU law as much as international law.[68] More prudently, Papastavridis has advocated that based on the Human Rights Committee (HRC or the Committee) General Comment No. 27 on the right to freedom of movement arising from Article 12 of the International Covenant on Civil and Political Rights (ICCPR or the Covenant),[69] violations of the right to leave can be committed not only by the departing country but also by the potential countries of destination.[70] Although the precise extent of the right to leave remains a matter of controversy, and, indeed, proportionate limitations on the right seem to be permissible, it appears equally clear that an absolute blanket policy of containment, such as that practised by Libya and other States (with EU support), does arguably eschew the right entirely.[71] Apropos the above, the manner in which the Union and its MS have progressively shaped their borders not only manifests an almost complete disengagement from rescues in the Mediterranean but also

[68] For discussion see, Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 203-246.

[69] International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 UNTS 171.

[70] Efthymios Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 Nordic Journal of International Law 109; Human Rights Committee 'General Comment No. 27: Freedom of Movement (Article 12)' UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para 10.

[71] See on this connection and interrelation, Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss, (ed), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming).

highlights the delegation of SAR activities and border management to volatile third countries, where human rights are susceptible to abuse.

A further concern relates to the reinforcement and expansion of surveillance technology over migrants in the EU border regime in what seemingly appears to be another attempt to compound border security.[72] Amid repeated criticisms, the Pact:

> will normalise the arbitrary use of immigration detention, including for children and families, increase racial profiling, use 'crisis' procedures to enable pushbacks, and return individuals to so-called 'safe third countries' where they are at risk of violence, torture, and arbitrary imprisonment.[73]

Detention, in particular, is featured in various instruments of the EU Pact, including Articles 44 and 45 of the AMMR, Article 8 (7) of the Screening Regulation, Article 8 of the Reception Conditions Directive and Article 5 of the Return Border Procedure Regulation. At the same time, maritime SAR aspects are addressed in several instruments, reflecting the significance of managing migration flows at sea. In this regard, the Crisis and Force Majeure Regulation (Chapter IV) regulates what will happen in 'exceptional

[72] See Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council (EURODAC).

[73] 'Over 50 NGOs Pen Eleventh-Hour Open Letter to EU on Human Rights Risks in Migration Pact' (18 December 2023) <https://picum.org/blog/open-letter-eu-human-rights-risks-migration-pact/> accessed 1 May 2024. See also, UNHCR, 'Child Immigration Detention Must Be Prohibited Following Adoption of EU Migration and Asylum Pact, UN Experts Say' (2 May 2024) <www.ohchr.org/en/press-releases/2024/05/child-immigration-detention-must-be-prohibited-following-adoption-eu> accessed 2 May 2024.

situations of mass influx of third-country nationals or stateless persons',[74] the definition of the term 'mass influx' is absent, leaving ample discretion for manoeuvring by States. It can be contended that this regulation seems to be an 'exodus' for governments to manage anticipated climate-induced mass migration,[75] worsening the 'border industrial complex' and shrinking human rights protection whilst leading to a fragmented application of the responsibility sharing system.[76] In this way, the Pact is perceived to strengthen the prioritisation of fighting irregular migration flows instead of providing the well-anticipated specifications on SAR responsibilities, including in situations of distress, which could have enhanced the safety of life at sea and minimised abandonment practices that lead to death by drowning.

Moreso, the Pact will allow the mere existence of 'a risk of crisis' to justify derogation from ordinary EU rules that may lead to a fragmented application of the responsibility-sharing mechanism set up under the Pact.[77] Particularly,

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[74] Article 1 (2) of the Crisis Regulation.

[75] Emilio Antonios Hugues, 'Waiting for Godot No More: The Climate Crisis and the New European Asylum Pact' (Oxford Human Rights Hub, 18 April 2024) <https://ohrh.law.ox.ac.uk/waiting-for-godot-no-more-the-climate-crisis-and-the-new-european-asylum-pact/> accessed 24 May 2024.

[76] United Nations General Assembly, 'Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' UN Doc A/75/590 (10 November 2020) <https://digitallibrary.un.org/record/3893019?ln=en> accessed 25 May 2024. See also Vicky Kapogianni and Noemi Magugliani, 'When Aerial Surveillance Becomes the Sine Qua Non for Interceptions at Sea: Mapping the EU and its Member States' Complicity in Border Violence' (2023) European Yearbook of Human Rights 2023, 498; Patricia Vella de Fremeaux and Felicity G. Attard, 'Navigating the Human Rights Trajectory of the EU Migration and Asylum Pact in Search and Rescue Operations (Part Two)' (opiniojuris, 17 September 2024) <https://opiniojuris.org/2024/09/17/navigating-the-human-rights-trajectory-of-the-eu-migration-and-asylum-pact-in-search-and-rescue-operations-part-two/> accessed 21 February 2025.

[77] Fremeaux and Attard (n 76).

according to its own meaning, crisis evokes the formulation of extreme measures to combat an 'alarming' phenomenon. Conceptualising these movements in this fashion allows not only the regularisation of emergencies and a perpetual state of crisis to endure but also the normalisation of stricter measures that neglect the risk of being harmed by rising global temperatures and the lived experiences of migrants in the name of exceptional policies to protect State borders from perceived security threats. In essence, however, the current 'crisis' is far from exceptional; the problem is not the plight of migrants attempting to reach Europe but the way their predicament has been negatively perceived. In this manner, the Pact will arguably allow European States to linger on a regime of emergency to ascertain dominance over vulnerable individuals, victims of trafficking and persons with disabilities, while more people will be forced to leave their homes in the near future.

In this connection, even though 'climate refugees' are not covered by the 1951 Refugee Convention and climate is not currently a recognised reason for seeking asylum, the protection of human life at sea and, thus, of having a robust SAR system will become paramount. As the Institute for Economics and Peace has predicted (in the worst-case scenario), 1.2 billion people could be displaced by 2050 due to climate change, environmental degradation and natural disasters.[78] Insofar as the Pact is concerned, it fails to address this growing concern, despite the fact that other initiatives like the 2018 Global Compact for Safe, Orderly and Regular Migration do cite climate as a potential reason for migration. Still, the current framework of migration management will arguably aggravate the vulnerabilities of climate migrants,[79] as it falls short of providing equal legal protections to

[78] Institute for Economics & Peace, 'Over One Billion People at Threat of Being Displaced by 2050 Due to Environmental Change, Conflict and Civil Unrest' <www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf> accessed 25 May 2024.

[79] Christine Savino, 'The Increased Imperative for International Law Protections Regarding Climate Induced Migration' (20 July 2022)

conventionally defined refugees. Therefore, the Union's risk-based approach at external borders, together with the Pact's focus on deterrence through the use of technology and enhanced surveillance, could inadvertently impact climate refugees from arriving at borders and hinder their ability to seek protection in the absence of legal avenues for crossing borders.

IV. A Sea Under Surveillance

The EU's overall legal initiatives and practices aimed at addressing irregular migration by sea have led to the adoption of dehumanising policies, which have deflected the attention from the protection of persons to the securitisation of borders through advanced maritime surveillance strategies designed to detect these phenomena. Despite the substantial funding lines dedicated to 'manage' migration flows, the persistent scale of recurrent shipwrecks and drownings[80] has rendered the obligation of rescue a game of roulette for authorities at the expense of migrant lives. Given the poignant flaws of the legal system governing migration control, the time is ripe to explore alternative avenues that can minimise the vacuum in human rights protection at sea and address systemic violations against migrants. From an international law standpoint, the location of a vessel is of utmost importance as it serves as a critical factor in establishing the relevant rights and obligations of the concerned State(s) and individuals.[81] This section addresses

<https://ohrh.law.ox.ac.uk/the-increased-imperative-for-international-law-protections-regarding-climate-induced-migration/> accessed 27 May 2024.

[80] See Aphrodite Papachristodoulou, 'Shipwreck after Shipwreck: Frontex Emergency Signals and the Integration of AI Systems' (Verfassungsblog, 11 March 2014) <https://verfassungsblog.de/shipwreck-after-shipwreck/> accessed 1 May 2024.

[81] In the context of my analysis, the exercise of border controls happens within 'international waters' that do not fall under the sovereignty of any State. Otherwise known as 'the high seas', the international waters is the area beyond the 200 nautical miles from a State's coastal baseline but from just outside the 12 nautical miles territorial sea, where most maritime incidents occur.

this issue by providing a normative argument that structures a right to be rescued at sea within the existing right to life provided under international human rights law, which is a necessary response to the risks that AI technology presents in migration control.

As already touched upon, the increase in the mortality rates in the Mediterranean has been accompanied by a growing utilisation of technological resources in migration policies dedicated to enforcement operations, although scholarship tracking this relationship remains scarce. Such measures, like the EU's *Operation Irini* and Frontex's use of aircraft and drones,[82] to a certain foreseeable extent negatively affect the safety of migrants' lives who are trying to cross borders, as they prioritise detection and the strengthening of third countries' border control capabilities to intercept migrant boats. For example, statistical analysis carried out by Border Forensics supports the conclusion that the EU's overall approach to migration is designed not to rescue individuals in distress but to prevent them from reaching the territorial shores of European countries.[83] This was illustrated by analysing the number of interceptions with Frontex's aerial assets hours of flight, pointing to the conclusion that on days when the assets fly more hours over its dedicated area of operation, the LCGN tends to intercept more boats. The same study showed that the deployment of aerial assets by Frontex has not had any meaningful impact on reducing the death rate.

Whilst the EU and its MS have tried to address the specificities of the SAR practice through a number of regulations and practices, including enhancing information exchange, cooperation and coordination among MS and other relevant actors, this Article has found that the blocking of access to safe border crossings and the deflection away from a State's own territory aggravates border violence and is counterproductive in reducing the mortality rates at sea. This is so as efforts to halt irregular migration flows

[82] Strik and Marquardt (n 35).

[83] Sunderland and Pezzani (n 37).

from one route will likely push migrants into undertaking even more perilous journeys in the Mediterranean.

Needless to mention that there is a clear absence of State-led SAR operations aimed at tackling the loss of life at sea, as well as overt hostility towards NGOs who proactively undertake rescues in an effort to fill the legal vacuum of protection.[84] In particular, the Italian government seeking to be at the forefront of regulating migration movements, has waged a war against NGOs since 2017. For example, on 4 June 2023, the NGO Sea Eye 4 was detained in the Italian port of Ortona after rescuing 32 people on the ground that it had carried out a second rescue before disembarking the first response rescuees, which Italy claims to be in breach of the dubious Italian decree passed on 2 January 2023.[85] In particular, the decree precludes NGO vessels from carrying out more than one rescue at a time, resulting in a sharp reduction in rescue capacities in the Central Mediterranean vis-à-vis contradicting the international SAR framework, which requires that shipmasters provide immediate assistance to persons in distress at sea.[86]

It is important to apprehend the unqualified application of the duty to render assistance to those in distress. Migrants, would-be asylum seekers and even human smugglers often travel together by the same means but for different

[84] See, eg, Matilde Rocca, 'Rights at Sea: State Interference with Activists' Search and Rescue Operations' (2024) 26(1) European Journal of Migration Law 82; Paolo Cuttitta, 'Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part I)' (BorderCriminologies, 18 April 2018) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-migrants> accessed 20 July 2024.

[85] Decree Law No. 1/2023, amended by Law No. 15 of 24 February 2023.

[86] Freija Jeppesen, 'New decree obstructs lifesaving rescue efforts at sea and will cause more deaths' (Médecins Sans Frontières, 5 January 2023) <https://reliefweb.int/report/italy/new-decree-obstructs-lifesaving-rescue-efforts-sea-and-will-cause-more-deaths> accessed 20 July 2024.

reasons, and are therefore mixed in the same boat.[87] It is irrelevant for this purpose when a person is found at sea whether or not she is entitled to seek protection status upon arrival in Europe or elsewhere.[88] Notwithstanding the non-discriminatory nature of the duty, there has been a mounting number of alleged fundamental rights violations reported in connection with sea border surveillance activities.[89] Still, where a positive identification of a situation of distress is made with the use of 'reliable advance technology (satellite surveillance, over-the-horizon radar, unmanned aerial vehicles)',[90] it will suffice to trigger the duty to render assistance to persons in distress. Such technologies possess the capability to alert authorities to emergency situations by generating knowledge and enhanced ongoing situational awareness.

Herein lies the crux of the complexities surrounding rescues, which is the interpretation of the concept of 'distress', the linchpin triggering the duty to render assistance. Until and unless a bona fide distress situation is identified, State authorities can easily renounce their international obligations of rescue by resorting to justifications of uncertainty surrounding evidence of

[87] This phenomenon is widely referred to as mixed migration by sea – a hallmark of today's maritime movements. See, eg, Efthymios Papastavridis 'The 'Left-to-Die Boat' incident of March 2011: Questions of International Responsibility arising from the Failure to Save Refugees at Sea' (2013) Refugee Law Initiative Working Paper No. 10 <http://sas-space.sas.ac.uk/4957/1/RLI_Working_Paper_No.10.pdf> accessed 15 March 2020.

[88] Article 14 of the Universal Declaration of Human Rights as well as Article 18 of the EU Charter both provide for the right to seek and enjoy asylum.

[89] See eg, Fundamental Rights Agency, Migration: Fundamental Rights Issues at Land Borders' (8 December 2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-land-borders-report_en.pdf> accessed 2 April 2024.

[90] Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention under the Law of the Sea Paradigm' (2020) 21 German Law Journal 433.

emergency provided by aerial assets in the form, inter alia, of thermal imaging.

The interpretative controversy around the various (mis)constructions of the concept of distress, along with evidence acquired from technologies, is further demonstrated, for example, in the Pylos tragedy outside Greece that resulted in the death of more than 600 people. In this incident, the Greek authorities initially disputed whether the vessel was in distress in their SAR region, despite receiving tantamount information from Frontex's aerial sightings that supported this conclusion.[91] While it may be difficult to sustain the legal argument that maritime and aerial surveillance produces human rights violations in this context, the position that technology facilitates such violations is more tenable. As a result, it can be observed that the SAR framework is increasingly susceptible to mismanagement and non-compliance by States.

The aforementioned contemporary manifestations of State power exercised through remote control practices at sea, including abandonment at sea and/or omissions in rescue activities, privatised push-backs,[92] and *refoulement* activities, ostensibly undermine the human rights of migrants. Remarkably, Hélène Tigroudja, in her individual opinion in the *A.S. and others v Italy*, admitted that the Human Rights Committee's majority views in the case were an attempt to address 'maritime legal black holes' which give substance to an emerging 'right to be rescued at sea'.[93] Manifestly, such explicit

[91] See Aphrodite Papachristodoulou, 'Halfway Through 2023: A Year of Unparalleled, Avoidable Migrant Tragedies at Sea' (EJIL:Talk!, 21 June 2023) <www.ejiltalk.org/halfway-through-2023-a-year-of-unparalleled-avoidable-migrant-tragedies-at-sea/> accessed 1 May 2024.

[92] Global Legal Action Network, 'Privatised Migrant Abuse by Italy and Libya' <www.glanlaw.org/nivincase> accessed 1 May 2024.

[93] Human Rights Committee 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3042/2017' (27 January 2021) UN Doc CCPR/C/130/D/3042/2017 23 (commonly known as the case of *A.S., D.I., O.I. and G.D. v Italy*).

reference is a first step toward the formal recognition of the existence of a right to be rescued at sea in international law. In the *A.S.* case, the Committee highlighted that failure to respond to distress situations in a due diligent manner amounts to an exercise of human rights jurisdiction by the State and, thus, found a violation of the right to life under the Covenant. In light of the above, judicial authorities should always be guided by normative considerations and push beyond the traditional approach in order to extend necessary human rights protections to situations that are difficult to govern.

Looking at the law of the sea framework, individuals that are affected by State activities taking place in the maritime space are duty-recipients (of the duty to rescue) but are not perceived as right-holders. This is so as the UNCLOS does not grant, explicitly at least, individual rights that can be claimed or 'received'. Hence, it is posited that the law of the sea offers the means which make it possible to realise the ends of international human rights law and, in this case, the protection of human life at sea. Relatedly, the ECtHR increasingly takes into account the legal contours of the law of the sea when deciding upon cases relating to maritime migration that have human rights ramifications.[94] Undoubtedly, the purpose of international human rights regimes' architecture is to provide a bulwark, safeguarding the individual against human rights abuses.

By formally recognising a right to be rescued at sea as part of lex lata, judicial institutions will be in a position to explore the content and scope of such a right by delineating the substantive protections that will flow from it, including extraterritorial human rights obligations to take strong pre-emptive and precautionary measures when subjecting individuals to remote sensing and control. Even though States are entitled to control their borders, they are also under a duty to appreciate when human lives and human rights will be exposed to danger and, accordingly, adopt preventive measures that, in a reasonable manner, aim to avoid risks from materialising. It is telling that a recent judgment of the Strasbourg Court in this domain reiterated the

[94] Eg, *Hirsi* case (n 31); *Safi and Others v Greece* App no 5418/15 (ECtHR, 7 July 2022).

obligations of States to respect the lives of migrants at sea in the context of maritime operations when it found Greece to be in violation of a Syrian refugee's right to life when its coastguard shot at a vessel carrying migrants.[95] It can be, in turn, argued that the right to be rescued at sea is activated at the same moment as the duty of the State to provide SAR services is and, thus, positive obligations to protect human life at sea arise. On this account, unduly delaying or negligently handling a rescue operation, handing it knowingly to an incompetent authority to execute, or not responding to digital information indicating a distress situation at sea will arguably amount to an exercise of jurisdiction as the State will be acting in the knowledge that the life of individuals is at risk.

As I have argued elsewhere,[96] the adoption of a '*pro-homine*' reading of the duty to render assistance, which prioritises the human person, endows a correlative 'right to be rescued at sea' to individuals. Along these lines, apart from the mismanagement of the duty to rescue, there lies another justification for the recognition of this right, and that is as a response to the challenges brought about by the (ab)uses of AI systems in migration control, including surveillance technology that leads to an increasing number of maritime interceptions. Instead, aerial surveillance conducted by Frontex should be used in the pro-active service of rescue, and unless requested for other emergencies, its aircraft and drones should remain on-site when they detect boats to monitor the situation and document rescue or interception activities.[97] Hence, the recognition of the right to be rescued at sea will advance the cause of the safety of life at sea and will promote the rule of law by strengthening State accountability in complying with international obligations when using technologies at external borders in the context of maritime operations. This understanding stems from the inherent and

[95] *Alkhatib and Others v. Greece* App no 3566/16 (ECtHR, 16 January 2024).

[96] Aphrodite Papachristodoulou, 'The Recognition of a Right to be Rescued at Sea in International Law' (2022) 35 (2) Leiden Journal of International Law 304.

[97] Sunderland and Pezzani (n 37).

tantamount value of life, justifying the imposition of obligations to safeguard life in danger of being lost at sea.

Considering the foregoing, it is posited that the right to be rescued at sea also serves as a bulwark against *refoulement* practices and an attempt to fill the vacuum of human rights protection at sea created by migration policies. This is so as the obligations stemming from UNCLOS to provide SAR service and to deliver rescued persons to a 'place of safety' should be exercised in line with obligations from international refugee law, that is, protection against maltreatment, including return to a country where their life would not be at stake.[98] As such, the prohibition of *refoulement* under international refugee law ties into the disembarkation of persons to a 'place of safety' for a rescue operation to be considered successfully completed.[99]

As a corollary to this, States should be required to consider the right to be rescued at sea when designing policies and rely on technologies of surveillance to tackle migrant flows, and accordingly, incorporate into their border practices an effort to minimise lethal side-effects (including foreseeable deaths of individuals and *refoulement* practices). By recognising and upholding this right, international law imposes an obligation on States to adopt pro-active measures – beyond merely responding to emergencies – that actively safeguard life at sea. In particular, this could include the allocation of resources for pro-active monitoring and the development of multi-authority cooperative frameworks to ensure effective collaboration between (capable) emergency response units and operational efficiency. The necessity of technological innovation to navigate evolving challenges is thus crucial for enhancing the effectiveness of joint operations at sea and, ultimately, for saving lives at sea.

[98] Kees Wouters and Maarten Den Heijer, 'The *Marine I* Case: A Comment' (2009) 22(1) International Journal of Refugee Law 6.

[99] See also, Martin Ratkovich, 'International Law and the Rescue of Refugees at Sea' (PhD thesis, Sweden: Stockholm University 2019) 260-5.

V. CONCLUSION

This Article has sought to highlight the Union's risk-based approach adopted as to the movement of people, and the myriad ways a State can exercise effective remote control over migrants, including policy and operational arrangements, as well as outsourcing border controls through the creation of a technological infrastructure of surveillance -that has created a vacuum in human rights protection at sea-. The analysis prompted the conclusion that the EU's external border policy seeks to strengthen the border control capabilities of third countries and, in this way, divert attention from the real and intricate challenges of migration, creating gaps in refugee and human rights protection.[100]

Mindful of evolving migration and technological challenges, the analysis advocated for the recognition of the right to be rescued at sea to address the continuous mismanagement of the duty of States to render assistance, which has led to an immeasurable loss of life and push-backs. As such, the progressive abstention or negation from SAR activities, together with the burgeoning reasons to migrate, has brought to the fore the need to recognise a right to be rescued at sea. As push-factors to migration continue to diversify, externalisation measures have ever more become the linchpin of the European response to managing human mobility, reflecting the Union's concerted efforts to distance people seeking protection. For one, the EU AI Act appears to offer a carte blanche for governments to continue preventing migrants and asylum seekers from accessing European States whilst allowing invasive technology to be used in unparalleled ways. The interaction between AI systems, human rights law, refugee law, and law of the sea obligations will become more evident in the future as States continue to

[100]Commission Communication, 'The Global Approach to Migration and Mobility' COM (2011) 743 final, 15l. See also, Lilie Chouliaraki and Myria Georgiou, 'Migration – the crisis imaginary' (London School of Economics, 14 July 2023) <https://blogs.lse.ac.uk/europpblog/2023/07/14/migration-the-crisis-imaginary/> accessed 24 May 2024.

outsource important facets of their migration and border policy while their power exponentially expands and extends horizontally and vertically, over the airspace above and in the depths of the seas below.

ADRIANE SANCTIS DE BRITO, *SEEKING CAPTURE, RESISTING SEIZURE: AN INTERNATIONAL LEGAL HISTORY OF THE ANGLO-BRAZILIAN TREATY FOR THE SUPPRESSION OF THE SLAVE TRADE (1826-1845)*

Bruna A. Gonçalves [*]

In *Seeking Capture, Resisting Seizure,* Adriane Sanctis de Brito proposes a reinterpretation of the history of the abolition of the transatlantic slave trade. Instead of framing the British abolition strategy as a humanitarian deed, as done by many in the past, she investigates diplomatic documents to find the political interests of Britain in promoting the measure. The same lens is used to explain why Brazil was so resistant to abolition. The diplomatic exchanges between the empire and the recently independent state figure as her research object. De Brito's central contribution is situating the dialogue in colonial power dynamics. By doing so, she challenges the saviour/savage dichotomy – the colonial difference paradigm – embodied in the dominant scholarship. In this brief review, I provide an overview of the book's structure and main arguments: that the history of abolition is not as clear-cut as Western and mainstream legal historians make it seem and that international law was used as a strategic tool by formerly colonised states assert and maintain their independence. I particularly focus on the second argument's place in the broader contention between different critical approaches to law over law's emancipatory potential. Despite what ends up being a superficial engagement with these theories, I argue the book is a great addition to the legal history scholarship. De Brito inspects British diplomatic strategy with

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unprecedented rigour and challenges legal historians to finally take Western domination interests seriously and leave their colonial tendencies behind.

The book is organised into five chapters. Chapters 1 and 2 describe the broad picture of the British policy of seizing, searching and capturing ships engaged in the international slave trade. The first chapter traces the strategy to the Napoleonic Wars' Prize Law regime. Prize Law invested in the British navy the power to apprehend and seize enemy vessels *and* neutral vessels caught in contraband. With the Wars' end, however, the British Parliament understood that the state lacked the authority to interfere with foreign vessels. This is where de Brito temporally locates the object of her research. Upon forbidding the slave trade in 1807, Britain attempted to expand the Prize regime in scope and duration to convince (or coerce) other states to comply with the abolition. Unable to impose the prohibition internationally or exercise jurisdiction over foreign vessels, Britain was forced to lobby and resort to bilateral diplomacy. In Chapter 2, de Brito dissects the matters under negotiation: seize, search, and capture rights. The rights were assembled under the umbrella of the right to visit. Their amalgamation is the first point of contention de Brito investigates. By comparing the 1817 Anglo-Portuguese Treaty and the 1845 Anglo-French Treaty, she argues that treaty parties contextually determined what the right to visit entailed. While some states interpreted the right to visit as encompassing search, that is, a thorough investigation of the ship's structure and content to determine its potential engagement in the slave trade, others limited apprehension and prosecution to flagrant cases. Those states who refused a broader interpretation shared a concern with freedom of navigation and the independence of nations, central to the reciprocity exercised among the Global North at the time. Yet in practice, de Brito argues, the limits were not as clean-cut as on paper, and interpretation was thus largely left to the discretion of navy officers and commissioners. That is to say, the limitations imposed were not always respected.

Chapters 3, 4 and 5 narrow the scope to the right to visit in the 1826 Anglo-Brazilian Treaty. Only then does the book's main argument unfold amidst the dense, descriptive efforts. Chapter 3 offers a genealogical investigation of the treaty's origins. De Brito recalls that Brazil inherited the 1817 Anglo-Portuguese treaty upon independence. However, there were doubts from both sides over how Brazil's lack of consent affected the treaty's validity and contestability. This is Chapter 3's initial concern. The chapter then moves into the 1826 Anglo-Brazilian Treaty, which cleared the previous doubts but brought with it new interpretative disputes. De Brito provides an overview of the matters of contention over this new instrument: its limitations, the jurisdiction to deal with Portuguese vessels, the necessary conditions for legal search and capture, and the composition of the mixed commissions established to adjudicate the legality of visits. She concludes that Britain and its officers ignored agreed terms and acted on their own devices, unilaterally interpreting the treaty. This, she emphasises, was enabled by a lack of checks and balances in mixed commissions as they were composed almost exclusively of British officers and did not allow appeal to their decisions. Brazilian representatives opposed the practice on the grounds of legal equality among independent States (though they admitted Britain was superior in other aspects, such as 'knowledge, industry, naval power, wealth, etc.').[1] They believed law and legal practice were neutral and external to political power and that legal equality was the core of independence in a colonial world. The diametrical opposition of states is further explored in Chapters 4 and 5, where the actual enforcement of the Anglo-Brazilian Treaty of 1826 is analysed. Chapter 4 approaches the subject through the lens of disagreements over how to apply the particular right to visit of the Anglo-Brazilian Treaty. Chapter 5 addresses the final moments of the treaty: what it meant for Britain that Brazil opted out of the mixed commission and reclaimed its sovereignty after enacting the abolition of the slave trade.

[1] Adriane Sanctis de Brito, *Seeking Capture, Resisting Seizure: An International Legal History of the Anglo-Brazilian Treaty for the Suppression of the Slave Trade (1826-1845)*, vol 22 (Max Planck Institute for Legal History and Legal Theory 2023) 91.

All in all, de Brito expands the narrated history of abolition to encompass British interests. She locates them in the power dispute between states at the point in time when Latin American colonies reached independence and entered the European international legal system as legal subjects; when colonial modes of production began to incorporate what would become market capitalism relations. It is clear she disagrees with the argument that Brazil resisted Britain's abolitionist lobby out of immorality, as narrated by Britain and reproduced by mainstream scholars.[2] De Brito emphasises that Brazil used the political relevance of abolition to negotiate its interest in being recognised as an independent state and resist the threat that British power represented to it. Similar resistance was common at the time. Other European states read Prize Law and its peacetime continuation as a British attempt to act as an international governor, violating the sovereignty

[2] The Brazilian immorality counters the 'British morality' story, which has long predominated in British collective (and academic) memory. This story is founded upon Thomas Clarkson's 1808 book *The History of the Rise, Progress and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament*, and was later reproduced by theorists from Adam Smith to Thomas Hutcheson. The theory defends abolition was an altruistic act, more than the fulfilment of the state's economic and political interests. Nevertheless, as mentioned by de Brito, this is founded upon the colonial myth of the white saviour and its moral superiority, a fact the scholarship often neglects. Contemporary examples of its reproduction include, e.g. Thomas L. Haskell, 'Capitalism and the Origins of the Humanitarian Sensibility, Part 2' (1985) 90(3) The American Historical Review 547; Mishka Lysack, 'The Abolition of Slavery Movement as a Moral Movement: Ethical Resources, Spiritual Roots, and Strategies for Social Change' (2012) 31(1-2) Journal of Religion & Spirituality in Social Work: Social Thought 150–71; Edith F. Hurwitz, *Politics and the Public Conscience: Slave Emancipation and the Abolitionst Movement in Britain*, 1st ed. (Routledge, 2021); Adam Hochschild, *Bury the Chains: The British Struggle to Abolish Slavery* (Oxford: Pan Books, 2006); On the exact same topic as de Brito, Matthew Mason, 'Keeping up Appearances: The International Politics of Slave Trade Abolition in the Nineteenth-Century Atlantic World' (2009) 66(4) The William and Mary Quarterly 809–32.

principle governing relations among *them*. Brazil only added to this argument a trade element: their own interest in independence.

As mentioned above, though de Brito does not explicitly enter the question of structural change, her argument on Brazil instrumentalising the law has subtle indications of her interest in this debate. That is, whether the law can serve as a tool for resisting oppression and not only *institutional* domination in the colonial context. If interpreted that way, her argument is read as the law being deployed by Brazil in resisting governmental control by Britain but also colonisation in a more broadly defined political sense (the colonised vs. the coloniser). Her position in this discussion can be implied from her affirmation that '[t]hrough their battles of legal interpretation, we may start to make sense of the role of the legal technique as a *power* mobiliser' (my emphasis).[3]

Three main positions may be identified in this debate: law has the potential to promote social change,[4] law has limited but important potential for change,[5] and law cannot bring structural change, even if it may be tactically

[3] Sanctis de Brito (n 2) 5.

[4] Most notably, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1st ed. (Cambridge University Press, 2006), 544ff.; David Kennedy, 'Law and the Political Economy of the World' (2013) 26(1) Leiden Journal of International Law 7–48; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 317–20.

[5] Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017), 517ff.; Susan Marks, 'International Judicial Activism and the Commodity-Form Theory of International Law' (2007) 18(1) European Journal of International Law 199–211.

deployed for individual cases within the collective struggle.[6] The justificative of each side is provided based on what they understand as the relation between social power, ideology and institutions. I could not possibly expand on what this means here, but that is also unnecessary – it suffices to locate de Brito. Her position is revealed when she argues that power is external to international law and only serves as a 'background against which most argumentative disputes under the bilateral treaty played out'.[7] The argument is also complemented by the affirmation that international law is a 'two-way street' despite its European foundation, legacy, and institutional constraints, which were particularly evident in the nineteenth century.[8] In sum, de Brito abides by the argument that the law's indeterminacy and social constructiveness open space for its instrumentalisation by oppressed groups and subsequent social change without further consideration of how existing political conditions hinder that possibility. The choice shows disbelief in a deep structure embedding the norms and institutional frameworks.

I mean to notice that despite the indicated interest in that debate, de Brito fails to explain her position in more detail and engages with the other possible interpretations of how (if) the law may be used to defy power. How, at the same time, does the colonial power dynamic exist, and is the institutional sphere exempt from it – or at least, can it be detached from it and serve the colonised? Her silence undermines her argument in a way that the transposition of the colonial difference paradigm to international law is flattened.

[6] China Miéville, *Between Equal Rights:A Marxist Theory of International Law* (Brill 2005); For a more nuanced view, Robert Knox, 'Strategy and Tactics' (2012) 21 The Finnish Yearbook of International Law 193.

[7] Sanctis de Brito (n 2) 147.

[8] ibid 86.

Furthermore, if she truly means to imply that Brazil attempted to subvert its position in the colonial power dynamics, she missed an important substantive dimension of the discussion: how Brazil was still ruled by the coloniser after its independence. State interests and class interests are then treated as evident synonyms, as they indeed were in many of the colonies obtaining independence through popular revolution in the twentieth century, such as Algeria, Indonesia, Burkina Faso, or Guinea Bissau (the latter also colonised by Portugal), or even the earlier Haitian revolution. That pattern is seen in much of the anglophone literature, which forgets pre-eighteenth-century colonialism. However, applying this logic specifically to Brazil raises many questions.

Brazil's independence did not result from a popular revolution, though revolts and resistance movements were frequent and powerful. Independence was declared to fulfil the interests of the Portuguese elites and their descendants, who settled in Brazil after escaping from Napoleon in 1808. After his family returned to Portugal in 1821, Dom Pedro I, nominated the governor of Brazil, then part of the United Kingdom of Portugal, Algarve and Brazil, joined forces with the elite to promote independence and became the first Emperor of Brazil.[9] His goal was not cutting ties with Portugal but maintaining the relative independence of his government, which Lisbon increasingly tried to reduce.[10] The country inherited the Portuguese colonial endeavours and system, continuing (if not intensifying) the ruthless and violent enslavement of displaced Africans and the social and institutional conditions of a colonial regime (e.g. racialised wealth

[9] Lúcia Bastos Pereira das Neves, 'A Vida Política' in Alberto da Costa e Silva (ed), *Crise Colonial e Independência: 1808-1830* (Fundacion Mapfre e Editora Objetiva 2011) 95ff.

[10] ibid.

concentration, dehumanisation, commodification of people of colour, land grabbing, and so on).[11]

Saying that *Brazil*, as a unit, was resisting colonisation would come across as homogenising the Third World. In a way, the problem of not exploring further the debate on law and power, which takes away some of the clarity of the book's message, also saves her from undoubtedly making that mistake. Third World countries' political interests and governmental representation do not necessarily reflect their subalternity. After all, white supremacy and Eurocentrism also permeate internal social relations.[12] Brazil is perhaps one of the strongest examples of this: its elites had the conviction that Brazil was a part of Europe in the tropics.[13] It is not coincidental that the country was the last in the world to abolish enslavement and the main destination of trafficked and enslaved Africans even after independence. This has put it at the centre of the historiographical discussion over abolition as the pariah of a morality struggle led by Britain. In sum, the reader is left wondering whether international law is an open-ended tool that can, indeed, satisfy emancipatory interests or if it is a tool for conflicting powers to pursue their institutional interests without breaking with colonial logic.

On a more positive note, de Brito's analysis of Britain's colonial interests, more than Brazil's interests as 'the colonised,' is left intact. De Brito responds to Jenny Martinez's argument that Prize courts were some proto-type

[11] Alberto da Costa e Silva, 'As Marcas Do Período' in Alberto da Costa e Silva (ed), *Crise Colonial e Independência: 1808-1830* (Fundacion Mapfre e Editora Objetiva 2011) 32.

[12] See, in that regard, Pablo Gonzalez Casanova, 'Internal Colonialism and National Development' (1965) 1 Studies in Comparative International Development 27.

[13] Lília Schwarcz, 'Cultura' in Alberto da Costa e Silva (ed), *Crise Colonial e Independência: 1808-1830* (Fundacion Mapfre e Editora Objetiva 2011) 244ff.

human rights courts.[14] She argues that the dominant view of the British strategy as humanitarian is colonial in itself and reproduces the white saviour narrative. Then, she proves that the humanity of enslaved people was not the British priority by showing how trafficked persons continued to be treated as property in the system: illegal seizure entitled the ship's owner to compensation for extra costs and 'cargo' who perished, and restitution of individuals who managed to survive despite the inhumane conditions – not to mention that the enslaved people were not subjects in the proceedings but objects. Moreover, Britain had particular interests in the labour of former enslaved individuals who obtained freedom. The state implemented in its plantations a new system of servitude that would remain in force in its colonies for over a hundred years.[15] Though different from chattel slavery, it followed its morality and many of its practices. If we are to see British abolitionism as one of the origins of humanitarianism, the history recounted by de Brito confirms that humanitarianism follows an exclusionary and colonial logic.[16] However, it should be noted that de Brito does not go as far as to make this argument.

Despite its shortcomings, the book remains relevant as a detailed alternative narrative to the mainstream literature on Prize Law. De Brito debunks Britain's moralism and takes its imperialist interests seriously. Britain acted as the global leader, using unilateral measures to reinforce its power over other nations and maintain its position as the main colonial empire. Brazil, governed by European royalty, tried to affirm its position as part of the European group of 'civilised' States, which depended on reassuring its sovereignty. Whether that should be framed as resistance to or alliance with

[14] Jenny Martinez, 'Human Rights and History' (2013) 126 Harvard Law Review 221.

[15] Sanctis de Brito (n 2) 156–159.

[16] In that regard, see Alan Lester and Fae Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines across the Nineteenth-Century British Empire* (Cambridge University Press 2014); Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 London Review of International Law 81.

white supremacy and Eurocentrism is a matter of divergence between the author and me. It nevertheless remains that each state had its own battle to fight and used the horrific enslavement regime as the platform for achieving it, disputing how and to what extent it could be contained. The book is centred on this clash of interests and how the parties played their cards to achieve their political aims.

PAUL LINDEN-RETEK, *POSTNATIONAL CONSTITUTIONALISM: EUROPE AND THE TIME OF LAW*

Alexander Schuster *

Paul Linden-Retek's *Postnational Constitutionalism: Europe and the Time of Law* tells the story of why the European project is far from being guided by a postnational vision, what the EU lacks to truly overcome the Westphalian nation-state, and how the current structures stand in the way of a project built on solidarity. Linden-Retek reminds the reader about flaws in the present EU legal system, why EU law currently cannot create a European project that is fully committed to solidarity for all, and that many European policymakers' decisions have had detrimental effects on many people outside the EU. The endless stream of dying migrants in the Mediterranean is only one story of many that is told here. Yet, Linden-Retek also conveys a message of hope. He sparks something like excitement – excitement for the future in times that are distressing and excitement that there is still much to do, change, and achieve with the European project. He makes us believe that we can be optimistic and should be committed to pushing for a European project that acknowledges and accepts its past so we can be responsible for the future.

The central lens of *Postnational Constitutionalism* is, simply put, time: positioning EU law in the bigger picture that considers its history by 'affirming the temporal character of a European political project'.[1] To establish a genuinely emancipatory European Union that overcomes national sovereignty, the European project needs to become aware of its

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[1] Paul Linden-Retek, *Postnational Constitutionalism European and the Time of Law* (Oxford Studies in European Law, OUP 2023) 29.

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communities around it by linking the European past with the present to the future.

According to Linden-Retek, the current design of EU law overall stands in the way of achieving a truly postnational European project guided by an emancipatory, solidaristic spirit. The main reason for this is the process of 'reification'. Linden-Retek describes this process as something in which consciousness is lost by reducing time only to the present. By reducing time to the present, reification ignores the past and future; thus, there is no account or cognition of previous encounters with human beings and no thought for empathy. Instead, reification solidifies the view of 'others' as objects or things: 'When neither we nor the world are understood to be the products of relationships that are dynamic, changing, and responsive to one another, […] we lack a story through which to make sense of the meaning of our action in and upon the world.'[2] On the contrary, the story currently being told by the European Court of Justice (CJEU) often stands for the assertion of national popular sovereignty and the exclusion of non-nationals of an EU Member State.[3] At times, however, it appears slightly unclear who the subject of Linden-Retek's critique is – the EU as a whole, its lawmakers, its judges, its Member State governments or EU lawyers in the broadest sense.

Linden-Retek's solution to overcome this lack of empathy and ignorance towards others is what he calls 'anti-reification': connecting the present with the past and to the future. 'Memory, recollection, and the reconstruction of history' are the essential parts of this process.[4] This means that the process of reification needs to entail 'concreteness (the rejection of abstraction); contingency (the rejection of present social structure and the reconstruction

[2] ibid 77.

[3] Linden Retek refers to, for instance, asylum seekers making a claim at the EU's borders.

[4] ibid.

of orderings and histories); utopia (the hope of finding order again)'.[5] According to Linden-Retek, this process serves as postnationalism's central task for the constitutional order: to acknowledge the loss of the past and turn this into responsibility for the future. Concretely, Linden-Retek suggests that the current 'fragments' of EU law can be overcome if the law creates a narrative. For instance, instead of blindly applying the proportionality test to attempt an objectively balanced outcome, the CJEU should also consider the personal and historical situation as well as future implications for the subject of the case at hand. Anti-reification would mean that judiciaries must reflect on broader political and societal constellations and, thus, attune to socio-historic relationships: 'Part of the judicial role under constrained judicial review, then, is to anticipate how various public and societal actors might articulate their own constitutional interpretations, given their place in the constellations of political and social power.'[6]

I could not agree more with Linden-Retek and his fundamental critique in the book that, as EU law currently stands, it is often disconnected from the world ('the others') and everyday society. Too frequently, EU law subordinates the everyday life of ordinary EU citizens to the idea of integrating the EU's Member States through legal rules. It is important to note that those rules often follow the original idea of economic integration through the internal market. To be clear: I believe EU law has achieved significant societal improvements. I could provide several examples of cases in which the CJEU stood up as the defender of fundamental rights, championed the fight for equality between women and men in Europe, or protected the rights of the queer community. Yet, as Linden-Retek rightly points out (and others, such as De Witte or Azoulai),[7] EU law does not seem

[5] ibid 78.

[6] Ibid 187.

[7] See, for instance, Loïc Azoulai, 'The Law of European Society' (2022) 59 CLMR 203; Floris De Witte, 'Here be Dragons: Legal geography and EU law' (2002) 1 European Law Open 1 113; Loïc Azoulai, 'Reconnecting EU Legal Studies to European

to be prepared to respond to a range of conflicts of our time and does not seem to be prepared to step outside the box to see 'the others' with more compassion and empathy. Particularly in times of crisis, starting with the Global Financial Crisis in 2007, where the status quo for many people on the European continent was turned upside down, EU law, so the critique, often seems inadequately prepared to find solutions to the conflicts of our time.

This is why Linden-Retek's book touches upon essential and fundamental aspects of where the EU integration project should go. Suppose the EU, often portrayed as the stronghold of democracy and human rights, aspires to be what it is portrayed. In that case, EU law needs to be inclusive, empathetic, and emancipatory. Linden-Retek shows us that the way the EU legal framework is currently designed does not necessarily encompass these values and often reveals a discrepancy between what politicians in Europe claim the EU to be and what it does in practice. He particularly focuses on the treatment of refugees, the rule of law crisis and the EU's approach to fundamental rights. By doing so, Linden-Retek opens doors for discussion and breathes fresh air into the mind of EU academia to debate and rethink how the EU, or more broadly, the European integration project, should work and what it aspires to be. He emphasises the need 'for a more open and democratically contested form of postnational constitutionalism and a more inclusive, just, and hospitable European'.[8]

Opening this discussion should also mean starting an even broader debate in EU academia. Before we start creating different kinds of utopias, we genuinely need to ask what the most helpful way to create an empathetic, emancipatory, and inclusive European project is. In times in which many realities on the European continent have drastically changed over the past years, where decisions require urgency and policymakers need to make

Societies' (*Verfassungsblog*, 19 March 2024) <https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/> accessed 7 August 2024.

[8] Paul Craig and Gráinne de Búrca, *Editors' Preface*, in Linden-Retek (n 1).

fundamental decisions, should we not also look at how EU law can be improved, how we can critically assess the legal framework, and how we can further develop and explore EU law's theoretical fundamentals? Everyone in EU academia and policymaking should ask themselves: how can we, especially the EU academic bubble so often disconnected from society, reconnect with European society and EU law on a larger scale? In other words, as Chamon put it, how can we 'address the deficit between our work and European societies' in the best way?[9] If academia continues to create complex intellectual ideas, I fear that the goal that Linden-Retek wants to achieve in the first place will become a distant illusion. Rather than feeding into the complex and often overly intellectual system of EU law academia, which tends to be excessively complex and inaccessible to a broader audience, maybe simplicity and concreteness could serve as a starting point instead.

Connected to the previous point, one aspect of the book is not entirely clear after reading it. I wondered whether the author has a problem with how the EU legal system currently operates or how the law generally works. In other words, is the fundamental critique of *Postnational Constitutionalism* a critique of the law in general or the way EU law is specifically designed? After all, as Chamon rightly put it, 'the unique element of EU law lies in the EU component, not in the law component'.[10] Linden-Retek describes aspects of reification that stand in the way of a postnational constitutional order, such as the configuration of citizens as a bearer of rights instead of a member of a political community 'in which judgments are made, and obligations are carried',[11] the reproduction of the current 'system' by prioritising the

[9] Merijn Chamon (*Linkedin*, 25 March 2024) <https://www.linkedin.com/posts/merijn-chamon-7b121620_to-make-these-schemes-and-techniques-sensitive-activity-7177944806487134208SvMc/?utm_source=share&utm_medium=member_desktop> accessed 9 August 2024.

[10] ibid.

[11] Linden-Retek (n 1), 135.

present,[12] or the assertion of national popular sovereignty.[13] While the fourth chapter provides a conclusive overview of why these aspects hinder the development of a postnational order, it is unclear why they are unique to the EU legal framework. What differentiates the EU component of a legal system that stands in the way of a postnational order from many other legal systems worldwide is left somewhat in the dark. At times, it appears that the EU legal framework is rather used as an example of many legal systems with the goal of establishing a general critique of many legal systems.

Moreover, one aspect that requires more reflection on a broader level is the potential to misuse this utopian project Linden-Retek depicts. His account of the postnational EU builds on the premise that we start telling a story, built on a narrative that considers the continent's own past. While he refers to the story as the sequence of events that happen, the narrative is about *how* the story is told. According to him, to create a project that transcends the model of sovereign nation-states built on sovereignty, the EU should not respond to events in an isolated manner. Instead, we all need to develop a narrative of Europe's past to place events in a broader picture.

Indeed, I agree with the author that the EU and the European project, in a broader sense, have not sufficiently attempted to reflect on its history to draw any conclusions from it. Nonetheless, if I think about Linden-Retek's idea to create a narrative grounded in Europe's history and to become conscious of time, I wonder whether there are already some of those narratives being built and being told – however, certainly not in the way in which the author intends them to function. I wonder why this narrative, this story that is supposed to be told, necessarily has to be 'good', or in other words, something that is morally and ethically worth aspiring to? We might also wonder why this narrative should only be used for the achievement of a

[12] ibid 126.

[13] ibid 120.

postnational European project? Finally, who would have some 'authority' to say what history is and what the narrative is that Linden-Retek describes?

For this reason, I wonder if this narrative, which is grounded in history and should help us overcome the sovereign nation-state, can be used to achieve precisely the opposite – the decoupling from the European project entrenched in a nationalistic, populist agenda. For instance, if Victor Orban builds an entire narrative around an election campaign based on racism, xenophobia, hatred against Europe and antisemitism, grounded in Hungary's past as a white, Christian stronghold, has he not built a narrative, a story to build his vision of the EU?

I will conclude that Paul Linden-Retek's book on a postnational vision of the EU could not be a timelier fit. For some time now, scholars have critically observed 'integration through law' as the dominant conception in EU law.[14] Common critique includes that EU law in its current form has a 'reality deficit' and operates far away from everyday citizens. One could say that EU law has experienced its own 'critical legal theory' moment. *Postnational Constitutionalism* is a valuable addition to this overall debate and connects current societal debates with how (EU) law works. The book is an essential read for academics interested in rethinking EU law and questioning the current state of EU integration. As suggested, the book could also be interesting to read as a general critique of the law. Either way, Linden-Retek's book should serve the academic bubble as a thought-provoking base for further literature and debate.

[14] See, for instance, n 6.