

EDITORIAL

Oliver Garner 1

NEW VOICES

Anogika Souresh
Jurisdictional Immunities of the State: Why the ICJ
Got It Wrong 15

Guglielmo Feis
Ought Implies Can: Counter-Examples and Intentions 37

Marta Cantero Gamito
Regulation.com. Self-Regulation and Contract Governance
in the Platform Economy: A Research Agenda 53

GENERAL ARTICLES

Sara De Vido
The Ratification of the Council of Europe Istanbul
Convention by the EU: A Step Forward in the Protection
of Women from Violence in the European Legal System 69

Eduardo Gill-Pedro
Freedom to Conduct Business in EU Law: Freedom from
Interference or Freedom from Domination? 103

Gaetano Lapenta
Vers un marché unique numérique:
Géoblocage et portabilité transfrontière des services
de contenu en ligne dans l'UE 135

Moshe Bar Niv & Ran Lachman
Judges' Perspective on the Level of Punishment 171

Virgílio Afonso da Silva
Do We Deliberate? If So, How? 209

BOOK REVIEWS

Anastasia Poulou
Floris de Witte, Justice in the EU. The Emergence
of Transnational Solidarity 241

Martijn Van Den Brink
Päivi Johanna Neuvonen, Equal Citizenship and Its Limits
in EU Law: We the Burden? 251

Alessandro Petti
Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds),
What Form of Government for the European Union and for
the Eurozone? 259

Editorial Board

Editor-in-Chief

Managing Editors

Executive Editor

Heads of Section

Elias Deutscher

Birte Böök, Raphaële Xenidis

Kasper Drajewski, Rūta Liepina

Martijn Van Den Brink (European Law)

Federica Coppola (Comparative Law)

Fabrizio Esposito (Legal Theory)

Stavros Pantazopoulos (International Law)

Senior Editors

Lucila Almeida, Birte Böök, Martijn Van Den Brink, Federica Coppola, François Delerue, Elias Deutscher, Leticia Diez Sanchez, Fabrizio Esposito, Maria Haag, Rūta Liepina, Stavros Makris, Afroditi Marketou, Thibault Martinelli, Sergii Masol, Dimitri Van Den Meersche, Margherita Melillo, Emma Nyhan, Irene Otero Fernandez, Argyri Panezi, Stavros Pantazopoulos, Chloé Papazian, Luigi Pedreschi, Vincent Réveillère, Theodosia Stavroulaki, Marita Szreder, Mikhel Timmerman, Dienneke De Vos, Raphaële Xenidis, Jan Zglinski

Junior Editors

Marcin Barański, Filipe Brito Bastos, Zeynep Timocin Cantekin, Kayahan Cantekin, Janneke Van Casteren, Oliver Garner, Tarik Gherbaoui, Aishani Gupta, Galyna Kostiukevych, Anna Krisztián, Rebecca Mignot-Mahdavi, Promitheas Peridis, Christy Petit, Ricardo Rodrigues de Oliveira, Alexandre Ruiz Feases, Viorica Vita

External Reviewers

Ieva Bloma, Stephen Coutts, Giuliana Giuliani, Nicholas Lee, Carl Lewis, Vesco Paskalev, Vegard Tørstad

Departmental Advisory Board

Deidre Curtin, Claire Kilpatrick, Dennis Patterson, Martin Scheinin

Website

www.ejls.eu

Submissions

The European Journal of Legal Studies invites submissions from professors, practitioners, and students. In particular, we welcome articles demonstrating a comparative, contextual and interdisciplinary approach to legal scholarship.

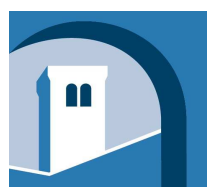
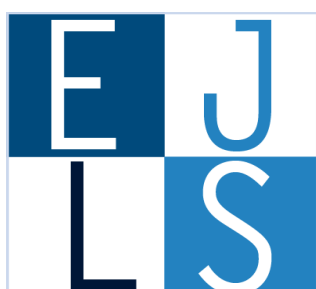
Articles should be submitted in electronic format to Submissions.EJLS@EUI.eu.

If electronic submission is not practicable, please send a hard copy to:

Editor-in-Chief
European Journal of Legal Studies
Villa Salviati, Via Bolognese 156
50139 Firenze, Italy

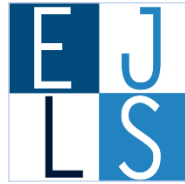
Footnotes should conform to The Oxford Standard for Citation of Legal Authorities, available for downloading from www.law.ox.ac.uk/publications/oscola.php.

The name of the author and contact details should appear only on a separate cover sheet to facilitate objective, anonymous evaluation. The Journal is committed to multilingualism and accepts submissions in any European language within the competence of the Board.



European
University
Institute

DEPARTMENT
OF LAW



European Journal of Legal Studies
Vol. 9 No. 2 (Spring 2017)

TABLE OF CONTENTS

EDITORIAL

Oliver Garner 1

NEW VOICES

Anogika Souresh
Jurisdictional Immunities of the State: Why the ICJ
Got It Wrong 15

Guglielmo Feis
Ought Implies Can: Counter-Examples and Intentions 37

Marta Cantero Gamito
Regulation.Com. Self-Regulation and Contract Governance
in the Platform Economy: A Research Agenda 53

GENERAL ARTICLES

Sara De Vido
The Ratification of the Council of Europe Istanbul
Convention by the EU: A Step Forward in the Protection
of Women from Violence in the European Legal System 69

Eduardo Gill-Pedro
Freedom to Conduct Business in EU Law: Freedom from
Interference or Freedom from Domination? 103

Gaetano Lapenta
Vers un marché unique numérique:
Géoblocage et portabilité transfrontière des services
de contenu en ligne dans l'UE 135

Moshe Bar Niv & Ran Lachman
Judges' Perspective on the Level of Punishment 171

Virgílio Afonso da Silva
Do We Deliberate? If So, How? 209

BOOK REVIEWS

Anastasia Poulou
Floris de Witte, Justice in the EU. The Emergence
of Transnational Solidarity 241

Martijn Van Den Brink
Päivi Johanna Neuvonen, Equal Citizenship and Its Limits
in EU Law: We the Burden? 251

Alessandro Petti
Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds),
What Form of Government for the European Union and for
the Eurozone? 259

EDITORIAL

Amid the political turmoil following the United Kingdom's popular vote on 'Brexit', the United Kingdom Supreme Court has recently handed down its highly-anticipated ruling in Miller. This judgment conveys remarkable insights about the United Kingdom Supreme Court's perception of the relationship between the national and European legal orders. We invited Oliver Garner, a Ph.D. researcher at the Law Department of the European University Institute working on the legal ramifications of 'Brexit' and an editor of our journal, to write an editorial on the implications of this ruling. Oliver puts the ruling in a broader perspective, comparing it to two other recent national court decisions: Dansk Industri from the Danish Supreme Court and Taricco from the Italian Constitutional Court.

EJLS Board

THE BORDERS OF EUROPEAN INTEGRATION ON TRIAL IN THE MEMBER STATES: *DANSK INDUSTRI*, *MILLER*, AND *TARICCO*

Oliver Garner*

I. Introduction

On 6th December 2016, the Danish Supreme Court delivered its judgment in the *Dansk Industri* case.¹ Just over six weeks later, on the 24th January 2017, the United Kingdom Supreme Court delivered its highly-anticipated judgment on the UK Government's appeal in the *Miller* litigation.² Two days later, the Italian Constitutional Court issued a second preliminary reference to the Court of Justice of the European Union in the ongoing *Taricco* saga.³ These

* Ph.D. Researcher at the European University Institute, Florence. Editor at the European Journal of Legal Studies and the European Law Blog. Email: oliver.garner@eui.eu. I thank Hans Lindahl, Urška Šadl, Birte Böök, Elias Deutscher, and Raphaële Xenidis for comments on an earlier draft of this piece.

¹ Case no.15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.*

² *R(on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

³ Italian Constitutional Court n.24/2017.

three judgments have arisen in divergent factual contexts within three Member States that stand at diverse points of relation to the ongoing project of European integration. However, despite these differences, I will argue that the three judgments converge on the point of constitutional principle which they address: situating the exact borders between the constitutional orders of the Member States, and the Union's own 'autonomous'⁴ constitutional order. Consequently, through a novel application of the theoretical framework of Hans Lindahl,⁵ this editorial will seek to explain the manner in which these decisions have sought to square the circle between the primacy of European Union law and the borders and identity of the national constitutional order.⁶ Ironically, it will be concluded that the court of the Member State which finds itself facing the exit door of the Union, the United Kingdom, has established its national constitutional boundaries in a manner which is most conducive to the coherence of the European Union's legal order.

II. The Facts and the Question at Stake

The facts of the Danish case 'appear trivial'⁷ at first glance as they concern a singular employment related pecuniary claim rather than an issue affecting society at large. The deceased claimant fell within the scope of the conditions

⁴ Case Opinion 2/13 ECLI:EU:C:2014:2454.

⁵ Hans Lindahl, *The Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013).

⁶ The researchers at the European University Institute have recently had the opportunity to connect the dots between the three judgments and their wider context. Sessions on 'Challenging Primacy' and 'Brexit: EU and national constitutional law' as part of the 'Current Issues in EU Law' seminar have addressed the *Dansk Industri* and *Miller* judgments respectively, the Constitutionalism and Politics Working Group recently welcomed Federico Fabbrini and Oreste Pollicino for their presentation 'Constitutional Identity in Italy: European Integration as the Fulfillment of the Constitution' which covered the *Tarrico* case, and finally, on the theoretical level, the EUI has recently welcomed Hans Lindahl to present his work-in-progress as part of the innovative 'Stealth Legal Order' seminar series.

⁷ Mikael Rask Madsen, Henrik Palmer Olsen and Urska Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', (23 January 2017) iCourts Working Paper Series No. 85, 4.

under Paragraph 2a(1) of the Danish Law on salaried employers for entitlement to a severance allowance following his job dismissal. However, under Paragraph 2a(3) of the Law, his concurrent entitlement to an old-age pension invalidated his severance entitlement despite his continuing in employment. Consequently, on referral of the case via preliminary reference, the Court of Justice of the European Union ('CJEU' or the 'Court of Justice') held that withholding this severance payment violated the unwritten general principle of EU law prohibiting discrimination on the basis of age.⁸ Thus, the case came back before the Danish Supreme Court to apply this interpretation of EU law in its final decision on the merits.

The facts of the United Kingdom *Miller* case, by stark contrast, could not be further from being politically trivial. They concerned the seismic political upheaval of the Member State's withdrawal from the European Union. Specifically, the claimant had filed an application for judicial review to clarify the exact means by which the United Kingdom executive could fulfil the domestic 'constitutional requirements' outlined in Article 50(1) Treaty on European Union ('TEU') for providing notification of a decision to withdraw. The United Kingdom government argued that it was entitled to exercise the executive prerogative power without parliamentary oversight to give notification. They argued that this was because the United Kingdom's membership of the EU, or of any other treaty regime, concerned the realm of relations between sovereign states governed by international law. By contrast, the claimant argued that the specific nature of EU law, which provides substantive rights to individuals in the national sphere, means that it constitutes a form of domestic law. The argument followed that the government was prevented from exercising the prerogative to trigger Article 50 because to do so would be changing the law of the land without the consent of Parliament. This would violate constitutional principles established since the 18th century. Following a decision for the claimants in the Divisional Court, the appeal came before the Supreme Court under an unprecedented amount of public interest both within the United Kingdom and in the rest of Europe.

Falling somewhere in the middle of these two extremes on the scale of political and societal salience, the facts of the *Taricco* litigation concern the

⁸ Case C-441/14 *Dansk Industri v Rasmussen* ECLI:EU:C:2016:278, para.27.

limitation periods within which an individual may be prosecuted for VAT fraud under Italian law. The referring Italian court considered that the brevity of these periods may have breached the obligation under EU law to take measures to counteract illegal activities affecting the financial interests of the European Union.⁹ Upon preliminary reference, the CJEU held that national limitation provisions that may exempt perpetrators of fraud from punishment are incompatible with the Court's interpretation of the obligations under Article 325 Treaty on the Functioning of the European Union ('TFEU').¹⁰ In so doing, the Luxembourg court also held that its prescription for national courts to refrain from applying such limitation provisions would not amount to a breach of legality under Article 49 of the Charter of Fundamental Rights of the European Union.¹¹ Thus, the case had to be determined nationally. However, due to the fact that the Italian Constitutional Court's interpretation of the principle of legality as indeed applicable to procedural issues stands in direct conflict with the CJEU's interpretation, both the Court of Appeal of Milan and the Italian Supreme Court made references to the Constitutional Court to determine whether disapplication would violate the national constitution. The Constitutional Court has subsequently taken the unusual step of referring the case back to the Court of Justice once more.

The facts of these cases have arisen in Member States with differing relationships to the project of European integration. To apply an analogy deriving from one of Florence's most famous sons,¹² the United Kingdom currently finds itself within the *Purgatorio* between a popular vote in a national referendum to withdraw from the Union and the formal notification under Article 50 TEU to commence the withdrawal proceedings. After either the negotiation of a withdrawal treaty or two years, failing a vote by the European Council for extension of the negotiation period, the Member State will take the final descent into the *Inferno* of its relationship with the

⁹ <https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/29/cooperation-means-request-clarification-better-revisitation-italian-constitutional-court-request-preliminary-ruling-taricco-case/> (last accessed 20 March 2017).

¹⁰ Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555, para.52.

¹¹ *ibid* para.55.

¹² Dante Alighieri, Robin Kilpatrick (trs), *The Divine Comedy: Inferno, Purgatorio, Paradiso* (Penguin Classics, 2013).

European Union. The United Kingdom has often found itself accompanied by the Kingdom of Denmark in its position as an awkward partner in the European project. After their respective accessions in 1973, both Member States have secured numerous opt-outs from the *acquis communautaire* at treaty amendments. This has been accompanied by rejections of further integration into the European constitutional order by the Danish population in 1992¹³ and 2015.¹⁴ This hesitance of the Danish executive and people towards further EU integration, but without taking the ultimate step towards withdrawal, means that Denmark may also be regarded as situated in the *Purgatorio* between full European integration and fragmentation. To complete the Divine Comedy allusion, the Republic of Italy may be perceived to flourish in *Paradiso* in its relations with Europe. One of the 'Original Six' signatories of the Treaty of Rome establishing the European Economic Community in 1957, Italy's engagement with the European Union constitutional order is argued to be so essential that integration has been described as 'fulfilment of the national constitution'.¹⁵

The *Dansk Industri*, *Miller*, and *Taricco* judgments have arisen from different factual contexts. However, at the abstract level, all three judgments concern the fundamental question of the interaction between separate yet intertwined constitutional orders. Therefore, a move to the theory of how legal orders define their boundaries can provide the framework with which it is possible to explain exactly how the three national courts confronted the claims of the European constitutional order.

III. Borders, Limits, and Fault-Lines: The Legal Theory of Hans Lindahl

In his 2013 monograph, Hans Lindahl provides a three-way distinction between 'boundaries', 'limits', and 'fault-lines' in legal ordering.¹⁶ The first concept refers to how law orders behaviour within a normative community

¹³ 50.7% of the population voted to reject the Maastricht Treaty on 2 June 1992.

¹⁴ 53.11% of the population voted to reject a flexible opt-out on Area of Freedom, Security, and Justice matters whereby the Danish government could choose whether to opt-in on a case-by-case basis on 3 December 2015.

¹⁵ Federico Fabbrini and Oreste Pollicino, 'Constitutional Identity in Italy: European integration as the fulfilment of the Constitution' EUI Law Department Working Paper, 2017/06.

¹⁶ Lindahl (n 5), 174.

by setting its spatial, temporal, material, and subjective boundaries. The author goes on to outline that such ordering cannot create the unity of a legal *order* unless this order is necessarily limited. Thus, boundaries manifest themselves as 'limits' when they are called upon to exclude certain phenomena as either 'legal' or 'illegal'. Crucially, however, Lindahl challenges the dichotomy between legal and illegal by introducing a third category – 'a-legality'. Such a-legal phenomena question how a legal order sets the boundaries that give shape to the distinction between legality and illegality.¹⁷ A-legality has both 'weak' and 'strong dimensions'. Phenomena of the former character emerge from the domain of the unordered, yet in principle are *orderable* by the legal collective.¹⁸ By contrast, the latter dimension concerns a normative challenge that a legal collective cannot accommodate either as legal or as illegal by reformulating its limits.¹⁹ Therefore, to return to the constitutive function of borders, Lindahl argues that in its strong dimension, a-legality no longer summons a collective to shift the limit between legal (dis)order and the unordered, but instead lays bare a 'fault-line' between what a collective can order – the orderable – and what it cannot order – the unorderedable.²⁰ Following the lead of Kaarlo Tuori's insightful application of Lindahl's theory to conflicts between national and EU law in general,²¹ I will seek to use the framework to explain the specific cases arising from Denmark, the United Kingdom, and Italy.

IV. Explaining the Borders Confrontation between the National and European Order

Viewed through Lindahl's conceptual lens, the key question underlying all three cases is: *Where* are the borders of jurisdiction between the Member State constitutional orders and the European Union constitutional order, and *how* are they determined? The three national courts provided divergent answers to these questions. The Danish Supreme Court refused to follow the CJEU's preliminary ruling and disapply the provision of national law when

¹⁷ *ibid* 158.

¹⁸ *ibid* 164.

¹⁹ *ibid* 165.

²⁰ *ibid* 175.

²¹ Kaarlo Tuori, 'Crossing the limits but stuck behind the fault lines?' (2016) 1 *Transnational Legal Theory*, 133-153.

deciding the merits of the case. Therefore, it can be argued that the Danish Supreme Court in *Dansk Industri* regarded the clash between the applicable EU law and the national legislation as the *strong* form of a-legality, which thus means that the claims of EU law were 'unorderable'. The Danish court concludes that the Law on Accession, through which EU law is made enforceable within the Danish constitutional order, 'does not provide the legal basis to allow the unwritten principle prohibiting discrimination on the grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition.'²² The Danish court further reiterates that it would be 'acting outside the scope of its powers as a judicial authority if it were to disapply the provision in this situation'.²³ Consequently, to co-opt the famous phrase²⁴ applied to the German Constitutional Court, the Danish court has not only barked, but has bitten. It has found in *Dansk Industri* that it would be acting *ultra vires* if it were to disapply the national law provisions. Therefore, it has established the fault-line of the national constitutional order beyond which the European legal order cannot pass. Tuori has outlined his perception that 'the principles of primacy, unity and efficacy form part of the constitutional identity of EU law'.²⁵ Consequently, the decision by a national court to refuse to accept the primacy of a norm of EU law when in conflict with a national provision can also be argued to trespass beyond the concurrent fault-lines of the EU constitutional order.

In contrast to *Dansk Industri*, the United Kingdom Supreme Court in *Miller* was not confronted with the claim that any *singular* norm of the European Union legal order was incompatible with a norm of the national legal order. Instead, in deciding the question at hand, it saw fit to outline the holistic status of the entire *source* of EU law within the United Kingdom's constitutional order. Nevertheless, the manner in which the majority judgment drew the boundaries between the national and European orders provides an indication of how the UK court would have dealt with an individual conflict of norms in a different manner to the Danish court. In

²² *Dansk Industri* (n 1); see Madsen et al. (n 7), 8.

²³ *ibid.*

²⁴ See, *inter alia*, Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7 ELJ 95.

²⁵ Tuori (n 21), 152.

developing its own version of the 'Solange' doctrine,²⁶ the court set a *procedural* limit to the relationship between the European and national constitutional orders, in contrast to the *substantive* limits arguably created by both the German and Danish courts. Whereas the latter courts have held that EU law may be held to be *ultra vires* if it intrudes upon the substance of fundamental rights protection in national constitutional law, the United Kingdom approach outlines that EU law could only be inapplicable in the national constitutional order if the constitutional procedure by which it is authorised were to be amended.

The UK Supreme Court details that the effect of the European Communities Act 1972 is that 'EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes'.²⁷ However, this recognition of the primacy of EU law is not unconditional; instead, the court outlines that 'consistently with the principle of Parliamentary Sovereignty, this unprecedented state of affairs will only last *so long as* Parliament wishes: the 1972 Act can be repealed like any other statute'.²⁸ Therefore, the Supreme Court has drawn the 'limits' of the United Kingdom's accommodation of the European Union along procedural lines: The condition of the European Communities Act remaining in force means that *all* norms of EU law will have primacy over conflicting national norms. At the same time, however, the court does not recognise the final *supremacy* of the source of EU law precisely because its effect is predicated on the enabling national law. As the majority judgment outlines: '[T]he content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law. However, the *constitutional process* by which the law of the United Kingdom is made is exclusively a question of *domestic law*'.²⁹

Applying the first-limb of this statement, the argument can be made that if the United Kingdom Supreme Court had been confronted with the *Dansk*

²⁶ See <https://ukconstitutionallaw.org/2017/01/31/oliver-garner-conditional-primacy-of-eu-law-the-united-kingdom-supreme-courts-own-solange-so-long-as-doctrine/> (last accessed 20 March 2017);

²⁷ *Miller* (n 2), para. 60.

²⁸ *ibid* (emphasis added).

²⁹ *ibid* para. 62 (emphasis added).

Industri conflict of norms, it would have held that the status of the EU law norm would require the national court to disapply the conflicting national law, as this conflict is 'exclusively a question of EU law'. Furthermore, this conclusion would not be affected by the nature of the norm as an 'unwritten principle' that is a 'judicial creation'. Further along in the judgment, the United Kingdom Supreme Court recognises the obligation of UK courts to comply with the Court of Justice of the European Union's interpretation of EU law.³⁰ Consequently, in contrast to the Danish Supreme Court, the UK Supreme Court may be held to have situated the 'fault-line' of the United Kingdom constitutional order not in any substantive border that EU law norms are not authorised to cross, but instead in the *procedural* feature that the source of law's effect remains predicated on the enabling domestic law. 'So long as the 1972 Act remains in force, its effect is to constitute EU law an *independent* and *overriding* source of domestic law'.³¹ The judgment in *Miller* also illuminates the question of *who* should answer the question of setting fault-lines. By recognising that the ultimate validity of EU law depends on the repeal of the enabling statute, it can be argued that the court defers the ultimate question of the fault-lines of the constitutional order to the legislature and the political process.

Although the German Constitutional Court's 'Solange' judgments are the most famous examples of the boundary establishing role of Member State courts, it was in fact the Italian Constitutional Court which first established its own progenitor – the doctrine of 'counter-limits' (*contro limiti*).³² In the same judgment³³ in which Article 11 of the Constitution was identified as Italy's own 'conduit pipe'³⁴ by which EU law norms are made nationally enforceable, the Constitutional Court held that 'this mechanism would operate only if one crucial condition is met: that EU law complies with the protection of fundamental rights'.³⁵ Thus, like the German and Danish courts and unlike the United Kingdom court, the Italian constitutional order sets substantive limits to the status of EU law. Despite the establishment of such

³⁰ *ibid* para. 64.

³¹ *ibid* para. 65 (emphasis added).

³² See discussion in Fabbrini and Pollicino (n 15).

³³ Italian Constitutional Court n.14/1964.

³⁴ *Miller* (n 2), para. 65.

³⁵ Fabbrini and Pollicino (n 15), 8.

limits, the Italian Constitutional Court has never even barked, let alone bitten. Fabbrini and Pollicino outline that the court 'never invoked such limits in practice: on the contrary [the Constitutional Court] developed a constructive dialogue with the ECJ, aimed at emphasizing the common constitutional tradition of Europe more than the specific identity of Italy'.³⁶ The evocative claims that European integration functions as fulfilment of the Italian constitution can also be regarded through Lindahl's insights concerning the 'normative point',³⁷ which provides orientation for the ordering of limits. The claimed receptiveness to the integration of Italian constitutional identity may suggest that the normative point of the legal order is not *threatened* by the presence of norms deriving from the European legal order but is instead *reinforced* by it.

This dialogical approach can help to explain why in *Taricco* the Italian Constitutional Court has not conclusively settled the drawing of the boundaries of the national constitutional order for itself but has instead referred back to the European court in this endeavour. Tuori's comments on how conflicts may be resolved within Lindahl's conceptual framework are appropriate. He details that acceptance may be possible if one of the parties to the conflict does not regard the conflict in terms of an irresolvable fault-line and thus is willing to shift its limits.³⁸ Thus, the Italian Constitutional Court has not crossed the same Rubicon as the Danish Supreme Court by firmly establishing its fault-lines through a refusal to disapply national law. However, its request for 'revisitation'³⁹ by the Court of Justice can be interpreted as a request for the Luxembourg court to 'back down' by adjusting its own limits in a 'last attempt to avoid a constitutional collision between the two legal orders'.⁴⁰ The fact that following the preliminary ruling the case will again come back to the national legal order for decision means that the Italian court will then have the final word on the extent to which it

³⁶ *ibid* 2.

³⁷ Such a normative point of a collective concerns 'that which our action *ought* to be about', Lindahl (n 5), 90.

³⁸ Tuori (n 21), 151.

³⁹ <http://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/> (last accessed 20 March 2017).

⁴⁰ *ibid*.

will compromise in the drawing of its limits in light of the European court's own boundary setting.

V. Conclusion: The Broader Picture

One may well argue that broader contextual factors removed from legal doctrine have played a key role in the different decisions delivered in *Dansk Industri*, *Miller*, and *Taricco*. Regarding the first judgment, Madsen, Olsen, and Šadl ruminate on the possible explanatory causation of changes in the composition of the bench in Copenhagen.⁴¹ On *Miller*, one may ponder whether the United Kingdom's current precarious position on the steps to the exit door of the European Union informed the boldness with which the Supreme Court detailed the conditional primacy of EU law. Following withdrawal, the Court will no longer be confronted with the form of conflicts that have arisen in Denmark and Italy; instead its dicta will become a footnote in the history of the United Kingdom's doomed European Union membership.⁴² Finally, in the Italian context, the receptiveness towards the European Union in the rhetoric of the Presidents of the Republic⁴³ may have created a pressure upon the Court not to give bite to its counter-limits doctrine. This is reinforced by the holistic approach of regarding the President of the Republic and the Constitutional Court as both fulfilling key roles as guardians of the Italian constitution.⁴⁴

However, I would argue that the value of applying conceptual frameworks such as Hans Lindahl's to legal phenomena such as the decisions in these cases is that it may equip legal scholars with the tools to provide prior *doctrinal* explanations for different approaches. This may allow at least an attempt to

⁴¹ Madsen et al. (n 7).

⁴² See discussion in <http://europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/> (last accessed 20 March 2017).

⁴³ For example, former President Ciampi's rhetoric that the EU has been 'from its origins a polity; a land of rights; a constitutional reality which does not contrast with our beloved national Constitutions, but rather connects them and complements them. It is a polity which does not turn down the identity of our nation States but rather strengthens them.' (translation from Fabbrini and Pollicino (n 15), 6.)

⁴⁴ See discussion in Fabbrini and Pollicino (n 15).

give a 'pure'⁴⁵ legal account before moving, through a contextual approach, to the no less important extra-legal factors which influence judicial decisions. Thus, it may be concluded that in these particular cases the distinction in the *manner* in which the respective national courts demarcate their boundaries – substantive in Denmark and Italy, procedural in the United Kingdom – has informed the different approaches of these courts towards the relationship between the national constitutional order and the European constitutional order. Ironically, this means that the judiciary of the Member State in which the polity has voted to withdraw from European integration have settled the boundaries of the national legal order in a manner that is the most accommodating towards, and respectful of, the coherence and integrity of the European constitutional order. Indeed, to revisit and reshuffle the analogy with Dante's Divine Comedy, the UK Supreme Court's approach may be regarded as *Paradiso* for the primacy claims of the EU legal order, the Danish Supreme Court's establishment of a strong fault-line can be seen as *Inferno*, whereas the Italian Constitutional Court's double-referral suggests that the resolution of the case resides in *Purgatorio*. Although *Miller* may be the twilight of the UK Supreme Court's engagement with the European Union legal order, its salience may live on beyond the borders of the United Kingdom through providing inspiration to the other Member State courts when confronted with the issues of borders, limits, and fault-lines.

⁴⁵ Hans Kelsen, Max Knight (trs), *Pure Theory of Law* (University of California Press, 1967).

IN THIS ISSUE

As always, in this issue the reader will find a rich assortment of articles covering a broad range of interesting and salient topics which offer plenty of food for thought.

This time, our New Voices section, which provides young academics the possibility to critically reflect on recent legal developments and to challenge well-established claims, features three fascinating essays. The first New Voices essay, by *Anogika Souresh*, revisits the International Court of Justice's (ICJ) ruling in the *Jurisdictional Immunities of the State* case. It critically engages with the reasoning of the ICJ which granted Germany State immunity in civil proceedings before Italian courts in relation to war crimes committed during the Second World War in Italy. In the second New Voices article, *Guglielmo Feis* embarks on a theoretical discussion of the 'Ought-Implies-Can' thesis that traditionally shapes our perception of normativity and legality. *Marta Cantero Gamito*, in turn, directs our attention to the increasing role of online platforms as regulators and discusses how they produce a new form of spontaneous self-regulation based on reputation and trust as alternative to existing State-regulation.

In the first of our general articles, *Sara De Vido* eloquently supports the ratification by the European Union of the Council of Europe Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence and explores the potential impact of this ratification on EU policies and on women's individual rights.

In his article, *Eduardo Gill-Pedro* investigates the conceptual foundations of the fundamental right to freedom to conduct business in EU Law. He suggests that the Court of Justice of the European Union's (CJEU) case law used to be informed by a republican understanding of the freedom to conduct business as 'freedom from domination'. In its recent and highly controversial ruling in *Alemo-Herron*, the CJEU, however, abandoned this republican conception and endorsed an understanding of freedom to conduct business as 'freedom from interference'.

Gaetano Lapenta's contribution analyses the European Commission's recent legislative proposal aiming at ensuring the cross-border portability of online

content services and prohibiting geo-blocking as a corner-stone of the European Union's Digital Single Market Strategy. His article not only reflects the political and legal salience of the digital economy, but, as it is written in French, also underlines the EJLS's commitment to language diversity.

The promotion of innovative and cutting-edge legal research is a central goal of our journal, as reflected in our recent call for submissions in the field of Empirical Legal Studies. After the successful launch of this initiative in our last issue, we are very glad to publish two new articles using social science methodology. Based on a survey of Israeli judges over three decades, the first article, by *Moshe Bar Niv* and *Ran Lachman*, empirically examines the perception of the adequate level of punishment in the Israeli legal system. The second article, by *Virgílio Afonso da Silva*, relies on a survey of former and current Brazilian Supreme Court Justices to find out how judges perceive the functioning and performance of judicial reasoning and deliberation processes.

Last but not least, our book review section awaits the reader with reviews of three recent publications covering highly controversial questions of EU law. *Anastasia Poulou* discusses Floris de Witte's monograph *Justice in the EU. The Emergence of Transnational Solidarity*. The issue of transnational justice and solidarity is also at the centre of Päivi Johanna Neuvonen's recent book *Equal Citizenship and Its Limits in EU Law: We the burden*, discussed by *Martijn Van Den Brink*. In turn, *Alessandro Petti*, reflects on how the edited volume *What Form of Government for the European Union and for the Eurozone?* by Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds.) addresses the fundamental issues of democracy and legitimacy within the EU in light of the recent changes in the Euro zone governance and the introduction of the *Spitzenkandidaten* procedure.

EJLS Board

NEW VOICES

JURISDICTIONAL IMMUNITIES OF THE STATE: WHY THE ICJ GOT IT WRONG

Anogika Souresh*

This article explores the decision in Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) regarding the relationship between State immunities and jus cogens norms. It focuses on three assertions in the case, regarding the criminal/civil distinction, the procedural/substantive distinction and the pronouncement that the gravity of the crime is irrelevant when assessing the claim for State immunity. The article picks apart the three assertions in turn, which leads to the conclusion that the analysis by the International Court of Justice (ICJ) was flawed. Ultimately, it is argued that Germany ought not to have been afforded State immunity for violations of jus cogens norms.

Keywords: ICJ, immunity, jus cogens, State immunity, peremptory norms

TABLE OF CONTENTS

I. INTRODUCTION	16
II. THE JUDGMENT IN <i>JURISDICTIONAL IMMUNITIES</i>	16
III. REVISITING THE RELATIONSHIP BETWEEN STATE IMMUNITIES AND <i>JUS COGENS NORMS</i> IN THE <i>JURISDICTIONAL IMMUNITIES</i> JUDGMENT	19
1. <i>The Criminal/Civil Distinction</i>	20
2. <i>The Procedural/Substantive Law Distinction</i>	24
IV. THE GRAVITY OF VIOLATIONS	32
V. CONCLUSION	35

* Durham University (LLB)

I. INTRODUCTION

The International Court of Justice's (hereinafter 'ICJ' or 'the Court') ruling in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*¹ was the result of a series of Italian national judgments denying immunity to Germany for acts committed during the Second World War.² While reaching a conventional decision, there was no assessment of the relationship between *jus cogens* and State immunities. This essay will take apart the assertions made in the judgment, and analyse the relationship between State immunities and *jus cogens* norms, as well as the consequences flowing from this relationship.

The dissenting opinion of Judge Trindade acknowledged the growing importance and 'primacy of *jus cogens*'.³ This essay will use the ideas and questions raised in this dissent, and answer and clarify them using international law developments. While Trindade's dissent rests on the need for access to justice, this essay, however, will engage in a more doctrinal analysis.

This essay will firstly outline the decision of the Court in *Jurisdictional Immunities*, and the main reasoning for the application of the conservative relationship. Subsequently, it will refute three contentions of the judges, namely the criminal/civil distinction, the procedural/substantive distinction, and the assertion that the gravity of the crime has no impact on immunities. It is proposed that had the judges engaged in a critical analysis of the relationship between *jus cogens* norms and State immunities, in the light of developments in international law, Germany ought not to have been afforded immunity.

II. THE JUDGMENT IN *JURISDICTIONAL IMMUNITIES*

The facts of the case are as follows: in September 1943, Italy declared war on Germany, following Mussolini's removal from power. Between October 1943

¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99.

² Most notably, *Ferrini v Germany* [2004] 128 ILR 658.

³ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 (Dissenting Opinion of Judge Trindade) para 6.

and the end of the Second World War, German forces engaged in massacres of civilians in Italian territory and in the deportation of civilians who were subjected to forced labour. Additionally, German forces imprisoned several hundred thousand members of the Italian armed forces and denied them the status of prisoner of war.⁴ They were instead deported to 'German-occupied territories for use as forced labour'.⁵

In 1998, Ferrini, an Italian national deported to Germany in 1944, instituted proceedings before Italian courts against the Federal Republic of Germany for his detention and forced labour. The case reached the Italian Court of Cassation, which 'held that Italian courts had jurisdiction over the claims for compensation brought against Germany by [...] Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime'.⁶

Following *Ferrini*, similar claims were filed against Germany. Germany subsequently requested the ICJ's intervention, claiming that Italy had violated its right to State immunities by allowing civil claims to be brought in Italian national courts.⁷ Italy maintained that it had jurisdiction with regard to Germany's crimes under international law.

The ICJ rejected Italy's arguments on multiple grounds. This essay will focus on the arguments regarding the relationship between *jus cogens* norms and State immunities. It will engage in a doctrinal analysis of three assertions of the judges, highlight the weaknesses of these assertions, and suggest an alternative interpretation of the relationship between *jus cogens* norms and State immunities.

First, the ICJ distinguished between civil and criminal proceedings. While cases in national legal proceedings have found immunity to be non-applicable, these 'concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages'.⁸ The ICJ also

⁴ *Jurisdictional Immunities* (n 1) para 21.

⁵ *ibid.*

⁶ *ibid* para 27.

⁷ *ibid* para 37.

⁸ *ibid* para 87.

referred to Lord Bingham's clarification of the UK's earlier case law, in *Jones v. Saudi Arabia*,⁹ which stated that the 'distinction between criminal and civil proceedings [was] "fundamental to [the] decision" [in *Pinochet*]' to not grant immunity to the former Head of State of Chile.¹⁰ Whilst *Pinochet* was a criminal proceeding, *Jurisdictional Immunities* was a civil proceeding, and the ICJ deemed this to differentiate the two and confer a stronger claim of State immunity on Germany.

It is proposed that cases concerning the immunity of a former Head of State can inform the development of State immunity. The 'legal existence of a State manifests itself only in the acts of individuals': thus, the actions of a Head of State are also, often, the actions of a State.¹¹ These are two 'expression[s] of a single principle' of sovereignty, and, for that reason, this essay will use cases concerning the functional immunity of a former Head of State to explore the legal development of the law of immunities, which includes State immunity.¹²

Secondly, the ICJ noted:

Since *jus cogens* rules always prevail over any inconsistent rule of international law [...] and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.¹³

However, *jus cogens* rules do not prevail in *Jurisdictional Immunities*. The Court formulated a requirement for a 'conflict of laws' between *jus cogens* and State immunity, and concluded that the two rules never clash in such a way that one has to give way to another.¹⁴ In the Court's words, '[t]he rules of State immunity are procedural in character and are confined to determining

⁹ *Jones v Saudi Arabia* [2006] UKHL 26 para 32.

¹⁰ *Jurisdictional Immunities* (n 1) para 87.

¹¹ Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 CLR 530, 540.

¹² Pasquale De Sena and Francesca De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 EJIL 89, 110; Jerrold Mallory, 'Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings' (1986) 86 CLR 169, 170; Andrea Bianchi, '*Ferrini v. Federal Republic of Germany*' (2005) 99 AJIL 242, 247.

¹³ *Jurisdictional Immunities* (n 1) para 92.

¹⁴ *ibid* para 93.

whether or not the courts of one State may exercise jurisdiction in respect of another State'.¹⁵ Nonetheless, it is proposed that the judgment was flawed in assuming that there is no conflict of laws, instead 'present[ing] the decision as the automatic consequence of a rigid *a priori* substance/procedure distinction, rather than the outcome of weighing competing values'.¹⁶ This makes the reasoning behind the decision unconvincing, insofar as the judges failed to analyse the issues.

Finally, the ICJ pronounced that entitlement to immunity is not dependent on the gravity of a situation:

Customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.¹⁷

Thus, the ICJ decided the *jus cogens* nature of the rule violated had no bearing on Germany's entitlement to immunity. However, this goes against the case law of other courts which did not grant immunity due to the gravity of the violation.¹⁸ Moreover, it disregards the nature of *jus cogens* itself, and is dissonant with the Court's claim that '*jus cogens* rules always prevail over any inconsistent rule of international law'.¹⁹

III. REVISITING THE RELATIONSHIP BETWEEN STATE IMMUNITIES AND *JUS COGENS* NORMS IN THE *JURISDICTIONAL IMMUNITIES* JUDGMENT

This section will evaluate the decision in *Jurisdictional Immunities* and contend that *jus cogens* norms ought to have superseded immunities. Three pronouncements by the majority in *Jurisdictional Immunities* will be explored.

¹⁵ *ibid.*

¹⁶ Kimberley Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of *Germany v Italy*' (2012) 1 CJICL 153, 163.

¹⁷ *Jurisdictional Immunities* (n 1) para 84.

¹⁸ *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 277, 308; *Ferrini* (n 2); *Prefecture of Voiotia v Federal Republic of Germany* (2000) 129 ILR 513 (though the Special Supreme Court of Greece, in *Margellos v Federal Republic of Germany* (2002), later noted that in the current state of international law, Germany had immunity and could not be sued).

¹⁹ *Jurisdictional Immunities* (n 1) para 92.

First, it will be argued that the distinction between criminal and civil proceedings is arbitrary when considering *jus cogens* violations.²⁰ Secondly, the distinction between procedural and substantive law will be explored, and shown to also be arbitrary.²¹ Thirdly, this section will seek to refute the assertion that immunity is not dependent on the gravity of the violation.²²

1. *The Criminal/Civil Distinction*

In *Jurisdictional Immunities*, the Court differentiated between criminal and civil proceedings. It stated that the earlier decisions concerning immunities for grave violations of international law, such as *Pinochet*, were not relevant, as these concerned criminal jurisdiction, not a civil claim for damages.²³ It reasserted that the distinction between criminal and civil proceedings was fundamental to the *Pinochet* decision.²⁴ However, it will be demonstrated that the distinction is arbitrary and the nature of the proceedings has no effect when deciding on *jus cogens* violations.

Jurisdictional Immunities relied on the pronouncement in *Jones v. Saudi Arabia*, in which Lord Bingham stated that the distinction between criminal and civil proceedings was 'fundamental' to the decision in *Pinochet*.²⁵ However, no real justification is provided for this assertion. On the contrary:

While the distinctions between civil and criminal proceedings should certainly not be ignored, they should not necessarily erase the fundamental message of *Pinochet*: some acts are not part of the official behavior that immunity is intended to protect.²⁶

It will, first, be argued that criminal and civil proceedings are not antithetical, but complementary concepts. Secondly, the ICJ ignored previous State practice, in which States accepted civil proceedings for *jus cogens* violations. Finally, it is proposed that the distinction is arbitrary. Thus, in contrast to the

²⁰ *Jurisdictional Immunities* (n 1) para 87.

²¹ *ibid* para 93.

²² *ibid* para 84.

²³ *ibid* para 87.

²⁴ *ibid*.

²⁵ *ibid*; *Jones* (n 9) para 32.

²⁶ Stacy Humes-Schulz, 'Limiting Sovereign Immunity in the Age of Human Rights' (2008) 21 Harv.Hum.Rts.J. 105, 118.

assertion of the judges in *Jurisdictional Immunities*, the criminal/civil distinction does not affect the relationship between immunities and *jus cogens* norms.

A. Complementarity

Humes-Schulz, in her discussion of criminal and civil liability, notes that the 'two forms of liability work together and reinforce each other frequently'.²⁷ Thus, criminal and civil proceedings are not irreconcilable. Criminal and civil liability are complementary to each other: while criminal liability provides a mechanism by which to punish wrongdoers, civil liability shifts the focus to the victim and provides reparations in order to counterbalance the wrongful act.²⁸ Thus, Humes-Schulz views criminal sanctions as the result of a violation of an obligation to the State, and civil sanctions as the result of a violation of an obligation to the victim.

Building on this framework, criminal and civil proceedings can be seen as two parts of a whole. When a crime has been committed, both the community and the individual are harmed. Thus, while criminal liability redresses the harm to the community, civil liability redresses the harm to the individual. In this way, the wrongdoing has, as far as possible, been wholly redressed. Therefore, it is proposed that criminal and civil proceedings are not disparate, but complementary to each other. Thus, it is difficult to see, firstly, why the decision in *Pinochet* allegedly depended on this distinction and, secondly, why the nature of the proceedings should affect the relationship between *jus cogens* norms and immunities.

B. State Practice

Moreover, the ICJ in *Jurisdictional Immunities* failed to note that civil jurisdiction had been exercised for serious international crimes. For example, the United States has, for many years, exercised universal jurisdiction in civil proceedings for serious violations of international law, and this has not been challenged by other States.²⁹ Further, the Committee against Torture has

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*; Lori Fisler Damrosch, 'Enforcing International Law through Non-Forcible Measures' (1997) 269 *Collected Courses of The Hague Academy of International Law*

concluded that there is a need for civil redress, even when there is the obstacle of State immunity.³⁰ Finally, there is case law, especially from Canada, USA, Italy and Greece, to show State practice for courts allowing civil proceedings against a State.³¹

The ICJ relied on UK case law, which has mainly concerned criminal proceedings, yet disregarded civil proceedings concerning violations of peremptory norms in other jurisdictions. Thus, the contention in *Jurisdictional Immunities* that an assessment of immunities in relation to *jus cogens* violations can only occur in criminal proceedings is not unequivocally shared by current State practice.

C. Arbitrary Distinction

Looking at the nature of *jus cogens* norms, the minority in *Al-Adsani* observed that:

The distinction [...] between civil and criminal proceedings [...] is not consonant with the very essence of [...] *jus cogens* rules. It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule.³²

Jus cogens norms are, by their very nature, hierarchically higher than other rules of international law and thus supersede the latter. The minority noted that immunities are a hierarchically lower rule, as they can be waived, contracted out of, or renounced.³³ Therefore, the distinction between

9, 161-167; Elina Steinerte and Rebecca Wallace, 'Case Report: *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*' (2006) 100 AJIL 901, 905; John Murphy, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) 12 Harv. Hum. Rts. J 1, 32.

³⁰ Committee against Torture 'Conclusions and Recommendations of the Committee Against Torture: Canada' (7 May-1 June 2012) UN Doc. CAT/C/CAN/CO/6, Art 15.

³¹ Damrosch (n 29) 168; Steinerte (n 29) 905-906; Sevrine Knuchel, 'State Immunity and the Promise of *Jus Cogens*' (2011) 9 Northwestern Journal of International Human Rights 149, 155; *Siderman de Blake v. Argentina* (1992) 965 F. 2d 699; *Ferrini* (n 2); *Prefecture of Voiotia* (n 18).

³² *Al-Adsani v United Kingdom* App No 35763/97 (ECHR, 21 November 2001) (Joint Dissenting Opinion) 31.

³³ *ibid* 30.

criminal and civil proceedings is arbitrary in this context as peremptory norms would supersede immunities regardless of whether the proceedings were of a criminal or civil nature.

Although the nature of criminal and civil proceedings is indeed different, this fact does not affect the legal responsibility or the relationship between *jus cogens* and immunities. The decision in *Jurisdictional Immunities* treated this distinction as completely altering the claim for immunities. However, as Judge Loucaides stated in his dissenting opinion in *Al-Adsani*:

The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever.³⁴

Judge Loucaides' dissenting opinion in *Al-Adsani* convincingly argued that the distinction between criminal and civil proceedings, in a case concerning the determination of immunity for *jus cogens* violations, is arbitrary. The dissent noted that once a violation of a *jus cogens* rule is established, no 'immunity can be invoked in respect of any judicial proceedings whose object is the attribution of legal responsibility'.³⁵ Thus, it is irrelevant whether this responsibility is decided in a criminal or civil context. This is a factor regarding the nature of legal proceedings which the majorities in *Al-Adsani* and *Jurisdictional Immunities* did not consider. Therefore, it does not matter whether the proceeding is of a civil or criminal nature. The rules relating to *jus cogens* apply regardless of the nature of the claim, and, for this reason, the distinction made by the judges in *Jurisdictional Immunities* is arbitrary.

As a final note, Cassese argued that civil jurisdiction is less intrusive than criminal jurisdiction.³⁶ For example, when it is exercised over a State official, there is no possibility of imprisonment and consequent disruption to the State. Thus, it is questionable why *Jurisdictional Immunities* expressly forbade

³⁴ *Al-Adsani v United Kingdom* App No 35763/97 (ECHR, 21 November 2001) (Dissenting Opinion of Judge Loucaides) 34.

³⁵ *ibid.*

³⁶ Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 EJIL 853, 859.

civil jurisdiction whilst not disputing the criminal jurisdiction exercised in *Pinochet*.

Summarily, there does not seem to be a need or a justification for the distinction in *Jurisdictional Immunities* between criminal and civil proceedings. Nor did the majority in this case provide a convincing reason as to why immunities can cease for *jus cogens* violations only in criminal proceedings. This decision disregarded the nature of *jus cogens* and also hyperbolised the distinction between criminal and civil proceedings. This section has shown, through an assessment of the aims of civil and criminal proceedings, State practice, and the nature of *jus cogens* norms, that the decision in *Jurisdictional Immunities* is unconvincing in its differentiation of civil and criminal proceedings, and that the above differentiation should have no effect on the relationship between *jus cogens* norms and State immunities.

2. *The Procedural/Substantive Law Distinction*

In *Jurisdictional Immunities*, the ICJ stated that although the rule of immunity must give way to the hierarchically higher rule of *jus cogens*, this may only happen if there is a conflict of laws.³⁷ However, the judges deemed the 'rules of State immunity [to be] procedural in character and [...] confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State'.³⁸ *Jus cogens* rules, on the other hand, are substantive in nature.³⁹ Thus, it was argued that the rule of immunity and the rule of *jus cogens* never clashed, as they are different in character and the 'two sets of rules address different matters'.⁴⁰

This section will firstly argue that the distinction between procedural and substantive law is arbitrary when addressing *jus cogens* violations. In the alternative, it will contend that, even if accepting the distinction between procedural and substantive law, the judgment was flawed in assuming that *jus cogens* could only be substantive law, and immunities a matter of procedural law. It will be argued that there is indeed a conflict of laws. This, in turn, leads

³⁷ *Jurisdictional Immunities* (n 1) paras 92-93.

³⁸ *ibid* para 93.

³⁹ *ibid* para 95.

⁴⁰ *ibid* para 93.

to *jus cogens* norms superseding the law of State immunity when such conflict occurs.

A. Arbitrary Distinction

First, the nature of *jus cogens* rules means that they supersede any other legal norm.⁴¹ Thus, it is irrelevant whether that norm is a procedural or substantive rule. When any other legal rule comes into contact with a *jus cogens* rule, it must give way. This was the view of the minority in *Al-Adsani*, who stated that 'the procedural bar of State immunity is automatically lifted, [...] as they conflict with a hierarchically higher rule, [so] do not produce any legal effect'.⁴²

Furthermore, Judge Trindade, in his dissenting opinion in *Jurisdictional Immunities*, criticised the majority for failing to provide reasoning for the alleged distinction between procedural and substantive law.⁴³ This 'formalistic' lack of conflict between State immunities and *jus cogens* norms seems to be an arbitrary, constructed distinction in order to avoid the contentious question of whether *jus cogens* norms can now deprive sovereign States of immunity.⁴⁴

Charles Chamberlayne, in his book *A Treatise on the Modern Law of Evidence*, argued that the 'distinction between procedural and substantive law is artificial'.⁴⁵ For example, in *Pinochet*, substance and procedure were linked, as 'the substantive prohibition on torture entailed procedural consequences,

⁴¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 64.

⁴² *Al-Adsani*, Joint Dissenting Opinion (n 32) 30.

⁴³ Trindade (n 3) para 298.

⁴⁴ *ibid* para 315; This has been described as a 'conflict avoidance technique' Philippa Webb, 'Human Rights and the Immunities of State Officials' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 147.

⁴⁵ Charles Chamberlayne, *A Treatise on the Modern Law of Evidence* (Sweet & Maxwell Limited 1911) 217; Friedrich Karl von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (T.&T. Clark 1869) 102; Walter Wheeler Cook, '"Substance" and "Procedure" in the Conflict of Laws' (1933) 42 YLJ 333, 355.

including an exception to State immunity'.⁴⁶ A further example is the exhaustion of local remedies, which has been interpreted as both a procedural and substantive rule.⁴⁷ This shows that there is overlap between substance and procedure, rather than a stark distinction. However, this was not acknowledged by the majority in *Jurisdictional Immunities*.

B. Conflict of Laws

In any case, even if there is a distinction between procedural and substantive law, the Court's judgment in *Jurisdictional Immunities* is premised on the assumption that conflict cannot exist between the rules of State immunity and *jus cogens*. First, the assertion that the procedural rule of immunities and the substantive law of *jus cogens* never clash is dismantled by the decision in *Pinochet*, in which there was a clash, as *jus cogens* superseded the claim for immunities. Secondly, the ruling in *Jurisdictional Immunities* failed to consider that *jus cogens* rules are not merely substantive, but can also have procedural elements; and immunities are not merely procedural rules, but can be construed as substantive.

A procedural rule will first be defined. Through this definition, it will be argued that immunities are not necessarily rules of procedure, but can also be of substantive nature. Secondly, it will be argued that *jus cogens* norms are not merely substantive rules, but can have procedural elements. Finally, the right to access of justice, an overarching theme in Judge Trindade's dissent, will be examined.

a. What Is a Procedural Rule?

Procedural rules have tended to relate to the jurisdiction of a court, and the admissibility of the case.⁴⁸ Issues of admissibility and jurisdiction are dealt with at the beginning of a case, before the substantive merits stage.⁴⁹ Whereas jurisdiction concerns whether the Court has the legal power to

⁴⁶ Trapp (n 16) 161.

⁴⁷ James Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 BYBIL 452, 453.

⁴⁸ Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (2011) 82 BYBIL 1, 73.

⁴⁹ John Graham Merrills, *International Dispute Settlement* (CUP 2011) 119.

adjudicate, Yuval Shany defined admissibility as concerning whether the court should exercise its legal power to adjudicate.⁵⁰

In *Jurisdictional Immunities*, it was held that the 'rules of State immunity are procedural in character and [...] confined to determining whether [...] the courts of one State may exercise jurisdiction in respect of another'.⁵¹ However, it is contended that, in relation to *jus cogens* violations, the courts of one State may exercise jurisdiction over another State. Due to the *erga omnes* nature of *jus cogens* norms, all States have universal jurisdiction⁵² when they are breached.⁵³ For the purposes of this argument, jurisdiction will be limited to adjudicative jurisdiction, which is the power to subject a person or a State to judicial process.⁵⁴

As States have universal jurisdiction to adjudicate on *jus cogens* violations, the requirement of possessing the legal power to adjudicate is fulfilled. Further, under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), States have an obligation to recognise as unlawful a breach of a peremptory norm.⁵⁵ The wording of Article 41 ARSIWA is reiterated by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁵⁶ This implies a positive obligation

⁵⁰ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 84; S.Gozie Ogbodo, 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18 Ann.Surv.Int'l & Comp.L. 93, 97.

⁵¹ *Jurisdictional Immunities* (n 1) 93.

⁵² As of September 2012, 147 out of 193 States have implemented national legislation providing universal jurisdiction for war crimes, crimes against humanity, genocide or torture (Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (Amnesty International Publications 2012) 2). This portrays the extent to which universal jurisdiction, for these crimes, is accepted by the international community.

⁵³ Mary Robinson, *The Princeton Principles on Universal Jurisdiction* (Princeton University 2001); Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre' (2008) 39 Colum.Hum.Rts.L.Rev. 471, 477.

⁵⁴ Anthony Colangelo, 'Jurisdiction, Immunity, Legality, and *Jus Cogens*' (2013) 14 CJIL 53, 55.

⁵⁵ UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 (ARSIWA), Art 41(2).

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 159-160.

to recognise as unlawful a breach of a peremptory norm, thus suggesting that courts ought to exercise their legal power to deem it unlawful: hence, the admissibility criterion, under Shany's definition, is also fulfilled.⁵⁷ Therefore, the procedural requirements are satisfied. This shows that immunities are not a procedural bar to adjudication.

Instead, Anthony Colangelo, in his work 'Jurisdiction, Immunity, Legality, and *Jus Cogens*', argued that 'immunity is a substantive defense from liability, not a jurisdictional defense about the appropriate forum'.⁵⁸ Immunities operate to afford protection regardless of the substantive merits of the case – if a *jus cogens* violation is found, immunities serve to provide a substantive defense from liability.

For example, in *Arrest Warrant*, the ICJ stated that 'immunity from jurisdiction [...] does not mean [...] impunity in respect of any crimes [...] committed'.⁵⁹ If immunity was a procedural defence, the case would not proceed, and there would be no determination of legal responsibility, which in turn would lead to impunity. However, if immunity were a substantive defense from liability, the merits could first be examined. In order to ensure that immunity does not mean impunity, immunity must necessarily be a substantive defence from liability. Though the ICJ was not referring to an exercise of jurisdiction over another State, but cited other methods through which an individual could be prosecuted, such as by the court of their nationality or through a waiver of immunity. Judge Van den Wyngaert, in her dissent, noted that, in practice, 'immunity leads to *de facto* impunity'.⁶⁰ Thus, it is necessary that foreign courts exercise their universal jurisdiction, and possible to do so as immunity is necessarily a substantive, rather than procedural, defence.

⁵⁷ Shany (n 50) 84.

⁵⁸ Colangelo (n 54) 57.

⁵⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 para 60.

⁶⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 3 (Dissenting Opinion of Judge Van den Wyngaert) para 34.

Hence, it is questionable whether immunities are procedural in nature. If they are, indeed, a substantive defence, then there would be a 'conflict of laws' with the substantive rule of *jus cogens*.

b. Are Jus Cogens Norms Purely Substantive?

In *Jurisdictional Immunities*, *jus cogens* norms were deemed to be substantive rules which 'determine[d] whether [certain] conduct is lawful or unlawful'.⁶¹ However, it will be argued that *jus cogens* norms are not solely substantive rules. Firstly, their purpose is to 'impact on the legal consequences of [a peremptory] breach'.⁶² Therefore, it does not make sense to define them as purely substantive, as they impact any legal breach. Secondly, it will be argued that *jus cogens* norms are not purely substantive as they have procedural elements.

Bartsch and Elberling propose a convincing argument that 'every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement'.⁶³ They argue that because all *jus cogens* norms are *erga omnes*, they must presuppose a superior means of enforcement.⁶⁴ It could also be argued, building on this argument, that the application of *jus cogens* necessitates a procedural rule of judicial enforcement. If there were no means of enforcement, peremptory norms, whilst being a higher source of international law, would also be impotent.

However, *jus cogens* norms are enforced. In *Jurisdictional Immunities*, it was noted that '*jus cogens* rules always prevail over any inconsistent rule of international law'.⁶⁵ Hence, the hierarchical superiority of *jus cogens* norms would, theoretically, ensure enforceability over other rules of international law. Thus, it seems logical to conclude that 'every *jus cogens* rule *ipso facto*

⁶¹ *Jurisdictional Immunities* (n 1) 58.

⁶² Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 EJIL 955, 969.

⁶³ Kerstin Bartsch and Björn Elberling, '*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision' (2003) 4 GLJ 477, 486.

⁶⁴ *ibid* 487.

⁶⁵ *Jurisdictional Immunities* (n 1) para 92.

contains a procedural element' of enforcement.⁶⁶ This means that there is a conflict of laws between the procedural enforcement of *jus cogens* and the procedural rule of immunities. When such conflict occurs, the rule relating to *jus cogens* would supersede the rule of immunities.

The procedural/substantive distinction is advocated by Stefan Talmon in his exploration of *jus cogens* after *Jurisdictional Immunities*. Talmon defined procedural rules as: 'rules governing the judicial and non-judicial interpretation, implementation, and enforcement of substantive rules'.⁶⁷ This definition of a 'procedural rule', which Talmon used to justify the decision of the Court, instead serves to reinforce the argument that *jus cogens* rules have a procedural, as well as substantive, element. The substantive rule of *jus cogens* requires interpretation, implementation, and enforcement. Thus, at these three stages, *jus cogens* is a procedural rule. Therefore, at the interpretation, implementation, and enforcement stage of a *jus cogens* rule, there is a conflict of laws.

Alternatively, the determination of a rule as *jus cogens* is procedural, as courts must determine the rule violated and whether the violation provides jurisdiction. In *Questions Relating to the Obligation to Prosecute or Extradite*, the ICJ stated that 'the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture, [a *jus cogens* norm,] is a necessary condition' to enable proceedings to be brought.⁶⁸ In order for universal jurisdiction to be established, a serious crime under international law, such as a *jus cogens* violation, must be committed.⁶⁹ Therefore, the procedural process of assessing jurisdiction necessitates the inspection of the violated rule.

It has been shown that the distinction between procedural and substantive rules does not apply when *jus cogens* norms are involved, firstly due to the nature of *jus cogens*, and secondly because *jus cogens* norms are not purely substantive rules; they have procedural elements which the Court failed to

⁶⁶ Bartsch (n 63) 488.

⁶⁷ Stefan Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 LJIL 979, 982.

⁶⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 paras 74, 99.

⁶⁹ Princeton Principles (n 53) Art 2.

consider. It is this lack of analysis into the nature of *jus cogens* which makes the decision regarding the procedural/substantive distinction unconvincing.

C. Access to Justice

The argument concerning access to justice, in relation to the procedural/substantive divide, will briefly be explored. Judge Trindade's overarching concern in his dissent is the need for access to justice. He criticised the 'deconstruction' of *jus cogens* as a substantive rule, to the detriment of the victims.⁷⁰ It will now be examined whether access to justice does have any impact on the procedural/substantive distinction.

Judge Cassese deemed the right of access to justice to be a *jus cogens* norm.⁷¹ The right of access to justice concerns whether a Court should exercise its legal power to grant victims the possibility of legal redress, and thus is a matter of admissibility. Therefore, it is procedural in nature.

Using Cassese's reasoning, if access to justice were *jus cogens*, this would mean that there would be a conflict of laws with the procedural *jus cogens* rule and the allegedly procedural determination of State immunity. However, it is doubtful whether the right of access to justice is a *jus cogens* rule. Though Cassese referred to judicial decisions, it was conceded that 'there are few judicial pronouncements' elevating the right of access to justice to the rank of *jus cogens*.⁷² In fact, these pronouncements are mainly found in separate opinions, as opposed to judgments, of the Inter-American Court of Human

⁷⁰ Trindade (n 3) paras 296-297.

⁷¹ *In the Matter of El Sayed* (Order Assigning Matter to Pre-Trial Judge) STL CH/PRES/2010/01 (15 April 2010) para 29.

⁷² *ibid*; *Goiburú v Paraguay* (Judgment) Inter-American Court of Human Rights Series C No 153 (22 September 2006) para 131; *Pueblo Bello Massacre v Colombia* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 63-65; *Baldeon-Garcia v Peru* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 147 (6 April 2006) paras 9-10; *Dismissed Congressional Employees v Peru* (Separate Opinion of Judge Trindade) Inter-American Court of Human Rights Series C No 158 (24 November 2006) paras 4-7.

Rights.⁷³ On the other hand, the prohibition of torture, genocide, and war crimes is, firstly, found in judgments of both national and international courts and, secondly, codified in widely ratified treaties.⁷⁴ The right to access to justice is not. Therefore, there is insufficient support for the claim that the right of access to justice is a *jus cogens* norm. Thus, it has little impact on the procedure/substance distinction.

IV. THE GRAVITY OF VIOLATIONS

In *Jurisdictional Immunities*, the ICJ deemed there to be 'serious violations of the law of armed conflict' which amounted to *jus cogens* violations.⁷⁵ Nonetheless, the Court ruled that a State's entitlement to immunity does not depend on the gravity or peremptory nature of the crime committed.⁷⁶ This will be examined in the light of the growing prevalence of international human rights law and international criminal law, and the nature of *jus cogens* norms in themselves.

Jus cogens norms must be looked at in the wider context of international law.⁷⁷ International criminal law, in particular, has allowed for individuals, including high ranking officials, to be punished for the 'most serious crimes' in international law.

It would be paradoxical to allow the individuals who are [...] the most responsible for the crimes [...] to invoke the sovereignty of the State and to

⁷³ Rosa Freedman and Nicolas Lemay-Hebert, 'Towards an alternative interpretation of UN immunity: A human rights-based approach to the *Haiti Cholera Case*' (2015) 19 QIL 5, 16.

⁷⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁷⁵ *Jurisdictional Immunities* (n 1) para 81.

⁷⁶ *ibid* para 84.

⁷⁷ Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491, 494.

hide behind the immunity that is conferred on them by virtue of their positions.⁷⁸

This portrays a doctrinal and moral shift away from absolute immunity, with more of a focus being placed on the gravity of the crime committed and accountability for these crimes.⁷⁹ This is a relatively new approach in international law, brought about by international human rights and international criminal law developments. It is submitted, from a rereading of functionalism, that this approach takes into consideration the necessary functions required to perform a State's obligations, and recognises that *jus cogens* violations are not a necessary function.

Judge Trindade placed *jus cogens* norms in the 'framework' of human rights and international criminal law developments.⁸⁰ This is important, because it is something the majority failed to do. Yet, it is only by placing *jus cogens* norms in their legal context that the extent of their application can be deduced. There has been a doctrinal shift in international law, and Heads of State and officials have increasingly been denied immunities for international crimes.⁸¹ From this, it is evident that *Jurisdictional Immunities* ought to have responded to these legal developments.

Furthermore, the nature of peremptory norms must be considered. The gravity of the crime must be looked at in order to determine whether there has indeed been a *jus cogens* violation. Torture, genocide and war crimes have all been deemed *jus cogens* violations by international courts: these crimes are,

⁷⁸ Trindade (n 3) para 56; 'Report of the International Law Commission on the Work of Its 48th Session (6 May-26 July 1996)' (1996) II UNYBILC I, 26-27.

⁷⁹ Daniel Singerman, 'It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity' (2007) 21 EILR 413, 430; Ingrid Wuerth, '*Pinochet's* Legacy Reassessed' (2012) 106 AJIL 731, 742.

⁸⁰ Trindade (n 3) para 61.

⁸¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279, Art 7; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by SC Resolution 827) Art 7(2); Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by SC Resolution 955 Art 6(2); ICC (n 73) Art 27; *Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147.

by their nature, grave and serious violations which 'shock the conscience of mankind'.⁸² It is thus argued that the majority's claim in *Jurisdictional Immunities*, namely that immunity is not dependent on the gravity or peremptory nature of the crime committed, is specious.⁸³

In *Jurisdictional Immunities*, the ICJ simultaneously decided that there was a *jus cogens* violation and that the gravity of the violation did not matter. These two assertions do not concur. A *jus cogens* violation is, by its very nature, a grave violation of international law. Its status as a *jus cogens* violation means that it is hierarchically higher than the rule of immunity and thus the 'jurisdictional bar is lifted by the very interaction of the international rules involved'.⁸⁴ Therefore, the nature of *jus cogens* means that the gravity of the violation is indeed relevant in determining a State's entitlement to immunity. The judgment in *Jurisdictional Immunities* did not address this, and thus did not explore the nature of *jus cogens* norms. Had the majority done so, it is proposed that the Court ought to have held that immunities were lifted as a result of a *jus cogens* violation.

Finally, it is important to note that State immunities are an exception to the rule of adjudicatory jurisdiction. Thus, they are not a rule but an exception to a rule. As Rosalyn Higgins noted in her work 'Certain Unresolved Aspects of the Law of State Immunity', 'it is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction'.⁸⁵ In *Jurisdictional Immunities*, State immunities ultimately trump *jus cogens* norms. They have somehow been elevated into a status above non-derogable norms, but this does not concur with their actual status in international law. It is, instead, claimed that the relationship between *jus cogens* norms and State immunities ought to have been interpreted in such a way so that Germany would not have been afforded immunity for war crimes.

⁸² *ibid* 288; *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17 (10 December 1998); Genocide Convention (n 74); *Jurisdictional Immunities* (n 1).

⁸³ *Jurisdictional Immunities* (n 1) para 84.

⁸⁴ *Al-Adsani*, Joint Dissenting Opinion (n 32) 31.

⁸⁵ Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) 29 NILR 265, 271.

V. CONCLUSION

This essay has explored the decision in *Jurisdictional Immunities*, regarding the relationship between State immunities and *jus cogens* norms, in light of developments in international law. The judgment itself has been placed in context, as the result of a series of Italian judgments prosecuting Germany for crimes committed during World War II. It is these crimes that the ICJ regarded as *jus cogens* violations.

The Court relied on three assertions in granting State immunity for the *jus cogens* violation: (i) the distinction between criminal and civil proceedings is fundamental; (ii) the distinction between procedural and substantive law meant that there was no conflict of laws so immunities still applied; and (iii) the gravity of the violation is irrelevant to the assessment of immunities. These assertions have been looked at in turn, and shown to involve a lack of analysis as well as a prevalence of arbitrary distinctions. While Trindade's dissent focused on the need for access to justice and the importance of human rights, this essay has explored the Court's decision through a doctrinal analysis.

It is submitted that *Jurisdictional Immunities* required greater analysis of the nature of *jus cogens* in relation to State immunities. Had the majority properly analysed the nature of *jus cogens* norms and State immunities, no immunities for *jus cogens* violations ought to have been afforded.

OUGHT IMPLIES CAN: COUNTER-EXAMPLES AND INTENTIONS

Guglielmo Feis*

The paper tackles Ought Implies Can (OIC) from a slightly different angle compared to the one that is often adopted in the contemporary OIC sub-debates. I am mainly concerned with the thought according to which, even if the action we ought to do is impossible, it is still possible to intend to do it. This possibility of intending is used as a strategy to rescue OIC from possible counter-examples. I explore two different ways to rescue the principle: (i) OIC rescue by implicating intending in action and (ii) OIC rescue by separation, and show they both face problems.

Keywords: Ought Implies Can, intentions, impossible obligations

TABLE OF CONTENTS

I. INTRODUCTION	37
II. HISTORICAL PRELIMINARIES: OIC CONTEXT	39
III. CONCEPTUAL PRELIMINARIES: OIC FORMALIZATION AND COUNTER-EXAMPLES	43
IV. AGAINST OIC RESCUERS BY IMPLICATION-INTENDING-IN-ACTION	45
V. AGAINST OIC RESCUERS BY SEPARATION	49
VI. DOES INTENDING THE IMPOSSIBLE OFFER A LAST CHANCE TO RESCUE OIC?	50
VII. CONCLUSION	51

I. INTRODUCTION

This paper deals with supposed counter-examples to the Ought Implies Can (OIC) thesis (in the literature they are the addicted example, 'role-oughts' and, in general, 'ought but cannot' cases)¹ and challenges two possible replies

* Postdoctoral researcher at the State University of Milan.

¹ The most impressive collection of OIC counter-examples (as well as of many original replies) is Peter B M. Vranas, 'I Ought, Therefore I Can' (2007) 136 Philosophical Studies 167. On the addicted case see Vranas at 183-185 and fn 18 for a bibliography on

to them, i.e. to ways to defend. A possible defense is arguing that it is possible to intend the thing that one ought to do, even in cases in which doing it might be really hard or even impossible. I call this move the Ought Implies Can Rescue (OIC-R).²

Such a rescue may happen in two different ways, either (1) rescuing by implicating-intending-in-action or (2) rescuing by separation. The first OIC rescuer – the rescuer by implicating-intending-in-action – states that the possibility to intend the action *requires* (and this implies) *the possibility to somehow do the action*. The second OIC rescuer – the rescuer by separation – states that *the mere possibility to intend the action is enough to save OIC*.

If we want to stick to one of the first inquiries on OIC, that by Georg Henrik von Wright, we delve into the OIC research in which 'one may discuss whether the idea, when understood in a certain way, *is true* or not'.³

the addicted and OIC. On ought but cannot see Wayne Martin, 'Ought but Cannot' (2009) 109 *Proceedings of the Aristotelian Society* 103; Christopher Jay, 'Impossible Obligations are not Necessarily Deliberatively Pointless' (2013) 113 *Proceedings of the Aristotelian Society* 381; Alex King, 'Things we Ought, but Can't' (2014) 27 *Ratio* 316 and, for another opposition to OIC, see Peter Graham, 'Ought' and Ability' (2011) 120 *The Philosophical Review* 337. For empirical data on OIC see Moti Mizrahi, 'Ought, Can and Presupposition: An Experimental Study' (2015) 5 *Methode* 232.

² This kind of intuitive strategy was firstly indicated to me by Wojciech Żelaniec whom I thank. According to Georg Henrik von Wright, *Norm and Action* (Clarendon Press 1963), 111 the 'can' is the can of ability, not of the success of each individual case. A more complex account that can be seen as a refinement of this idea is provided by Vranas (n 1); Jonny Anomaly, 'Internal reasons and the ought-implies-can principle' (2008) 39 *Philosophical Forum* 469; Clayton Littlejohn, 'Ought', 'Can', and Practical Reasons' (2009) 46 *American Philosophical Quarterly* 363 and Ralph Wedgwood, 'Rational 'Ought' Implies 'Can' (2013) 23 *Philosophical Issue* 70 evaluate the possibilities in terms of having reasons rather than a factual ability to perform the action. My argument against this rescue is probably not enough to be an argument against these defenses of OIC in terms of reasons. Nonetheless, I think this argument is useful to set the stage for such an argumentation.

³ Georg Henrik von Wright (n 2), sect. 2, 108. In his later researches von Wright (Id.), *An Essay in Deontic Logic and the General Theory of Action*. North Holland Publishing Company, 1968; Id. "Norms, truth and logic." In Id. *Practical Reason*. Blackwell, 1983, 130–209) develops at least three different positions about OIC. On this, see Guglielmo Feis, "'Ought Implies Can" in von Wrightian Deontic Logic' (m.s.).

I first offer a brief sketch on the vast usages and debates on OIC (section 2). The reader acquainted with OIC eager to know my argument may skip this paragraph and go to section 3, in which I lay down the structure of the counter-examples to OIC and what is at stake in this paper. Then, in the next two sections, I object to both these rescue moves: section 4 deals with rescuer by implicating-intending-in-action, section 5 deals with rescuer by separation. In section 6, I show that the thesis emerging from these attacks to OIC rescuers – intending to do A does not imply the possibility to do A – is compatible with another OIC related thesis, namely the thesis from the philosophy of action, according to which you can intend to do the impossible.⁴ In the last section (section 7), I draw some conclusions.

II. HISTORICAL PRELIMINARIES: OIC CONTEXT

The leading idea behind Ought Implies Can (OIC) is one according to which what we can do, what we can realize, what is (physically and logically) possible and what is feasible are all relevant in assessing what we ought to do. The idea is better cashed out moving from the direct OIC formula to its contraposition, i.e. as no Ought Implies no Can (**Cont OIC**).

(**Cont OIC**) is probably the way in which the OIC thesis is most often discussed and intuitively grasped. If we recall the old Latin *brocarda* in the Justinian Digest '*impossibilium nulla obligatio*' it is quite easy to find an ancestor of OIC.

This old Roman origin and the fact that the thesis is often associated with the name of Kant, made it the case that OIC gain traction in the beginning of the 20th century as the 'Kantian principle' or 'Kantian Maxim' or even 'Kantian Axiom'. As soon as deontic logic evolved, OIC was used as an axiom to ensure the logic has no contradiction. In the debate on moral dilemmas, OIC was used once more to ensure there was no moral dilemma.

Almost everything related to OIC is nowadays being placed under renewed critical scrutiny. All its components are questionable: which sort of ought,

⁴ An interesting debate on this issue is Gideon Yaffe, *Attempts* (OUP 2010), 51-64 critique of Michael Bratman, 'Two Faces of Intentions' (1984) 93 *The Philosophical Review* 375 argument for the thesis that it is possible to try without intending. See also Kirk Ludwig, 'Impossible Doings' (1992) 65 *Philosophical Studies* 257.

duty, obligation or normative requirement is expressed by 'Ought'? What is the relationship expressed by 'Implies'? Is it some logical relationship or a pragmatic and conversational one? Why not opt for a conceptual one? And, most delicate of all, what is the relevant 'Can' we have to measure and evaluate?

Not only do we have the issue of constructing a suitable OIC by way of picking up the correct elements for its three components, but the OIC ancestors are, in themselves, controversial. The OIC wording is not present in the Kantian corpus and having our contemporary OIC proposal fit into the old Roman adage is complicated. Further, it is controversial to state the relationships between OIC and the so-called Hume's Law. OIC is assumed to be a bridge-principle between Is and Ought when it is formulated contrapositionally as (**Cont OIC**): in fact, here, we are using what we can(not) do (i.e. Is) to say that an Ought should cease to be in force. Is that compatible with the gap between Is and Ought (assuming there is such a gap)?

Another highly debated issue connects OIC to free will, via the discussion of the principle of alternate possibilities that has been criticized by Frankfurt. As the debates in logics and moral dilemmas evolved, we developed frameworks that are able to tolerate or accept conflicts. Hence, OIC became more a choice than a necessity. Another issue is that of doxastic voluntarism, i.e. the thesis according to which we have control over our beliefs, and this connects to epistemology, as far as the issue of infinite regress in justifications is concerned. Referencing all these debates is complicated and may well need a review article.⁵

⁵ The Digest reference is Celso's formulation of *impossibilium nulla obligatio*, included in the Justinian Roman Digest (50:17:185) as *impossibilium nulla obligatio est* (this time with the m and not with the n as in Celso's formulation). See also Bloomfield, 'Two Dogmas of Metaethics' (2007) 132 Philosophical Studies 439, Martin (fn. 1), Charles R. Pigden, 'Ought-Implies-Can: Erasmus, Luther and R.M. Hare' (1990) 29 Sophia 2 for references to the discussion in Augustine, Luther, Erasmus. On OIC as a way to cut down norms see R.M. Hare, *Freedom and Reason*, (Clarendon Press, 1963), 59. One of the earliest and most important linkages between Kant and OIC is found in George E. Moore, 'The Nature of Moral Philosophy'. In *Philosophical Papers* (Routledge & Kegan Paul, 1922), 317. As soon as 1946 this Kantian OIC is depicted as a legendary quotation, see David Baumgardner, 'Legendary Quotations and Lack of References' (1946) *Journal of the*

History of Ideas. For some examples of this 'Kantian glorification of OIC' as something that need not be questioned, here are some labels that attests such a glorification 'Kantian principle': David W. Ross, *The Right, and the Good* (Claredon Press 1930), 5; Arthur Prior, *Time and Modality* (Claredon 1957) 142; David Widerker, 'Frankfurt on "Ought Implies Can" and Alternative Possibilities' (1991) 51 *Analysis* 222, 223. 'Kantian "ought implies can" principle': Fred Feldman, *Doing the Best We Can. An Essay in Informal Deontic Logic* (Reidel 1986), 189. 'Kant's principle': Dale Jacquette 'Moral Dilemmas, Disjunctive Obligations, and Kant's Principle that "Ought" Implies "Can"' (1991) 88 *Synthese* 43, 43. 'The Kantian principle that "ought implies can"': Dirk Baltzly, 'Moral Dilemmas are not a Local Issue' (2000) 75 *Philosophy* 245, 245. 'Kantian injunction': Alex Blum, 'The Kantian versus Frankfurt' (2000) 60 *Analysis* 287, 287. 'Kantian doctrine': Fred Feldman, *Doing the Best that We Can. An Essay in Informal Deontic Logic* (Reidel, 1986), 221. 'Kantian dogma': Bloomfield, (above), 439.

On Kantian roots of the principle see at least Robert Stern, 'Does Ought Imply Can? And Did Kant Think It Does?' (2004) 16 *Utilitas* 42.

For OIC in the literature on moral dilemmas, see at least Bernard Williams, 'Ethical consistency' (1965) 39 *Proceedings of the Aristotelian Society, Supplementary Volumes* 103; Bastian Cornelius van Fraassen, 'Values and the Heart's Command' (1973) 70 *Journal of Philosophy* 5; Ruth Barcan Marcus, 'Moral Dilemmas and Consistency' (1980) 77 *Journal of Philosophy* 121; Terrence McConnell, 'Moral dilemmas', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2014).

For the dispute on 'Implies' in OIC see at least Walter Sinnott-Armstrong, 'Ought' conversationally implies 'can' (1984) 43 *Philosophical Review* 249; Bart Streumer, 'Does "Ought" Conversationally Implicate "Can"?' (2003) 11 *European Journal of Philosophy* 219.

On the OIC and Hume's Law see D.C. Collingridge, 'Ought-Implies-Can and Hume's Law' (1977) 52 *Philosophy* 348; Bloomfield (above).

On OIC as an axiom in deontic logic, see Examples of OIC as an axiom are found in Edward J. Lemmon, 'Deontic Logic and the Logic of Imperatives' (1965) 8 *Logique et Analyse* 39 and Norman O. Dahl, '"Ought" Implies "Can" and Deontic Logic' (1974) 4 *Philosophia* 485; Jacquette (above).

On OIC and PAP see Widerker (above) and Blum (above), Gideon Yaffe, '"Ought" implies "can" and the principle of alternate possibilities' (1999), 59 *Analysis* 218; David Copp, '"Ought" Implies "can" and the derivation of the principle of alternate possibility' (2008) 68 *Analysis* 67; Guglielmo Feis, 'The OIC/PAP Dispute: Two Ways of Interpreting 'Ought' Implies 'Can' in Sofia Bonicalzi, Leonardo Caffo, Mattia Sorgon (Eds.) *Naturalism and Constructivism in Metaethics* (Cambridge Scholars, 2014).

On doxastic voluntarism and its role in epistemic justification see at least, Feldman (above); William Alston, 'The Deontological Conception of Epistemic Justification'

This quick overview was necessary to provide some broader context of the philosophical significance and the main problems of OIC. In the legal domain, OIC is probably less criticized and analyzed than it is in the philosophical literature. For example, in his 2007 contribution Ferrajoli is almost ready to swear on OIC, without taking into account any of the criticism that has been raised against OIC, and Guastini is similarly inclined.⁶ In a recent paper Stef Feyen used OIC as a bridge principle to persuade legal dogmatics to include more empirical knowledge and data in their analysis.⁷

This paper does not engage directly with some of the issues of the vast and diverse OIC sub-literatures. I investigate some of the reasons we may have to support OIC when we are faced with some putative OIC-counter-examples (see section 3 for how these counter-examples work). There are at least two possible defenses for OIC: (i) rescue by implicating-intending-in-action (section 4) and (ii) rescue by separation (section 5). I explore and criticize these.

Emphasizing the connection between OIC and intentions points out a further connection between OIC and the legal domain, given the importance of intentions in the evaluating agency.

Before moving on, I think it is worth disclosing my overall attitude towards OIC. I believe OIC involves a plurality of theses within it. This is evidenced by any recent paper on OIC in which more than one OIC formulation is proposed and discussed. What comes out of this recognition of a plurality of

(1988) 2 Philosophical Perspectives 257, and Scott F. Aikin, 'Who is afraid of epistemology's regress problem?' (2005) 126 Philosophical Studies 191.

On von Wright see (n 3). For recent counter-examples to OIC and defences see fn. 1.

⁶ Luigi Ferrajoli, *Principia Juris* (Laterza 2007), 253. Riccardo Guastini, *La sintassi del diritto* (Giappichelli 2011), 42 fn. 4.

⁷ Stef Feyen, 'Ought Implies Can and dogmatic enquiry: Some reflections on the methodology of legal scholarship?' (2015) 46 *Rechtstheorie* 425. Feyen provides examples at p. 433 fn. 19 to 22 and pp. 434-435. In general, he offers an overview of OIC issues with a closer application to the law in the first two sections of the paper (pp. 425-439). For a proposal that is more focused on theoretical problems of OIC but deploys some applications as far as pragmatic and interpretations are concerned, see Guglielmo Feis & Chris Fox, 'Ought Implies Can' and the Law' (forth.) *Inquiry*.

OIC theses is that *it is difficult to establish the existence of a non-controversial OIC simpliciter* which is able to cover all the different fields and aspects of it.

III. CONCEPTUAL PRELIMINARIES: OIC FORMALIZATION AND COUNTER-EXAMPLES

Consider the Ought Implies Can thesis:

$$(\text{OIC}): OA \rightarrow \Diamond A.^8$$

For a counter-example to OIC, we need a situation in which:

$$(\text{OIC counter}): OA \wedge \neg \Diamond A,$$

i.e. a situation in which there is an obligation to do A and A is not possible/feasible.

Now, several examples have been provided in the literature for (OIC counter) cases.⁹ I do not want to discuss whether the supposed OIC counter-examples are *real* counter-examples or not. For the purpose of this paper, I will simply take these counter-examples from the literature as something that whoever wants to defend OIC has to deal with.

A possible reply to the OIC counter-examples could be the following one: despite A being impossible, it is still possible to intend to do A, to have reasons to do A or to have some possible and feasible compensatory obligation(s) to compensate our not doing A.¹⁰

⁸ This is the most used way to write down OIC and expresses the fact that we are mixing two different kinds of modalities. It is quite uncontroversial that OA stands for a deontic modality, whereas it is more controversial how to interpret the diamond (\Diamond) of alethic modal logic (physical possibility, material possibility, ...).

⁹ Again, see Vranas (n 1), 173-196, Martin (n. 1) and Graham (n 1) for new challenges.

¹⁰ I shall not deal with the last option. A compensatory obligation to do B if you cannot do A recognizes that A is impossible. The fact that OIC holds for B does not cancel that it did not work for A. For a use of compensatory obligation see von Wright (n 2), 115 when he discusses being punished for the disobedience of an impossible order. Rem Blanchard Edwards, *Freedom, Obligation and Responsibility* (Springer 1969), 110-111 discusses compensatory obligations linking them to ability.

I call this move the *OIC rescue through intending* thesis, that can be spelt out as follows:

(OIC rescue): $OA \rightarrow \Diamond(\text{Int } A)$ or, with reasons, $OA \rightarrow \Diamond(\text{Reasons to } A)$.¹¹

In order to move from **(OIC rescue)** to **(OIC)**, we would need a thesis that says that the possibility of intending A somehow requires, states or implies that A is possible. The thesis that we need is the following; let's call it intending-in-action thesis:

(IIA): $\Diamond(\text{Int } A) \rightarrow \Diamond A$.

(IIA) states that the possibility of intending A implies that it is possible for us to do A.

Nonetheless, even in cases of a failure of the preceding **(IIA)** thesis, a different kind of OIC rescuers may claim that OIC still holds, even in cases of OIC counter-examples. Their reason would be that the 'true' OIC is not the one hinging on the possibility of A (i.e. **(OIC):** $OA \rightarrow \Diamond A$) but, rather, on the possibility of intending A (i.e. **(rev OIC):** $OA \rightarrow \Diamond(\text{Int } A)$). This second group of rescuers does not need an additional thesis such as **(IIA)**, but has the burden to prove that what we have in mind when we discuss Ought Implies Can is not the **(OIC)** formulated above, but a *revisionary intention based OIC*:

(rev OIC): $OA \rightarrow \Diamond(\text{Int } A)$.

Despite **(rev OIC)** and **(OIC rescue)** being the same formal thesis, their status and function in the OIC debate is different. **(OIC rescue)** is a functional thesis to defend **(OIC)** that requires a further argument for **(IIA)** to establish some relevant connection between **(OIC rescue)** and **(OIC)**. **(Rev OIC)**, instead, is a revisionary thesis. It says that the real **(OIC)** is in fact **(rev OIC)** and assumes no commitment to **(IIA)**.

In the following two sections, I deal with both these parties. I call the first group of OIC rescuers the rescuers by *implicating-intending-in-action*: they hold that **(IIA)** is true and rescue OIC relying on this thesis. The second

¹¹ In this paper, I shall analyze only the formulation with intentions. For some examples of a reason-based debate see Ulrike Heuer, 'Reasons and impossibility' (2010) 147 *Philosophical Studies* 235 and Bart Streumer, 'Reasons, impossibility and efficient steps: reply to Heuer' (2010) 151 *Philosophical Studies* 79. See also (n 2).

group is the one of OIC rescuers by *separation*: they claim that OIC is not the usual thesis we have in mind but rather something different, i.e. OIC ranges on intentions. Thus, they separate the two OICs, the usual one on the possibility to A, and their new and true one on the possibility of intending to A, and go to defend the second one, without specifying any relationship between the two OICs thesis – i.e. (rev OIC) and (OIC).

IV. AGAINST OIC RESCUERS BY IMPLICATION-INTENDING-IN-ACTION

OIC rescuer by implicating-intending-in-action states that the possibility to intend the action requires (and this implies) the possibility to somehow *do* the action. Given a counter-example to OIC, they will separate the components of action and try to go 'one level down': if *doing A* is impossible, they say, we go back and evaluate whether *intending to do A* is possible or not.¹²

The specific move of this rescue is: (i) go down a level – i.e. shifting from doing to intending; (ii) then, in order to save OIC, we need to go up again to the standard OIC level where we show that, despite A being impossible *prima facie* we have to reconsider its (im)possibility, because we have seen, at a lower level, that it was possible to intend to do A.¹³

Now, in order for this down-up move to work (down from doing to intending, then up again to doing),¹⁴ what the rescuers need is a thesis that states the connection between the down and up, namely between intending and doing. Let us call this *intending-in-action*:

¹² In that way, they can expand on the von Wrightian idea of 'can' being that of ability. Moving to the level of intentions opens up more conceptual possibilities. It is in fact possible to claim that we can also intend what we have no ability (yet) to do. For example: I can intend to speak Japanese when I have no ability to do it now. That intention actually leads me to start learning Japanese. I am not saying that that option fits easily the rescuer's bill, but nonetheless it is an option.

¹³ Vranas (n 1) holds that OIC is true if we construct it as a link of conceptual necessity between an obligation understood as a reason for action and 'can' as the sum of opportunity and ability; also von Wright (n 2) reads can as 'ability' and not as success.

¹⁴ Given that we have the accordion effect in the philosophy of action (see Joel Feinberg, 'Action and Responsibility' in Max Black (ed.) *Philosophy in America* (Cornell University Press, 1965)), we can call this "the OIC elevator".

(IIA): $\Diamond(\text{Int } A) \rightarrow \Diamond A$.

The possibility of intending A implies that it is possible for us to do A. This amounts to saying that we can always do what we intend.

The (IIA) thesis seems to express a definition of 'intending' that may be justified upon particular rationality constraints (if you value consistency you would like to avoid the chance for an agent to intend something he cannot do), but in this context this seems unjustified.¹⁵ Here, we are dealing with ways in which OIC can be rescued from its counter-examples by way of using the concept of intention and, in particular, by way of providing a better understanding of the concept of action involved in the discussion of OIC counter-examples.¹⁶

Thus, it seems possible to provide counter-examples to (IIA), i.e. cases in which it is possible to intend A but it is not possible to do it. Consider for example the case of Ponce de León, who intends to chase the source of eternal youth (and not only does he intend to do so, but he also *starts* a quest to find it), which is however not possible for him to do, because it does not exist.¹⁷ Consider another example of failure of (IIA),¹⁸ such as the statement 'I intend to square the circle, but I cannot do it' (because it's impossible).¹⁹

¹⁵ One of the first accounts in the philosophy of action that valued consistency and coherence as requirements is Bratman (n 4).

¹⁶ As a whole, the rescuers' researches are valuable because they help us to better understand what's inside the 'can' of OIC.

¹⁷ A similar example is 'kidnapping Santa Claus' as Santa, does not exist as the source of the eternal youth in the other example.

¹⁸ I think it is worth to investigate the different kinds of situations that may cause (IIA) to fail, nonetheless this research – that might be generalized into a research project on OIC starting from its (supposed) failures – is not part of the present work.

¹⁹ This example might appear trivial but cognitively it is not. Innovation and discoveries are often due to people that want to go against the limits of what is considered impossible. Think about any Apple commercial or Google anecdotes. A more philosophical insight on this is provided by David Lewis, *Counterfactuals* (Blackwell 1973), 91: 'We will certainly construct ersatz worlds that disobey currently accepted physical laws; for instance, ersatz worlds where mass-energy is not conserved. Still, we cannot be sure of getting all possible worlds, since we cannot be sure that we have constructed our ersatz worlds at a high enough level of generality. If we knew only the physics of 1871, we would fail to cover some of the possibilities that we recognize

I think that this counter-example holds for both faces of intentions outlined by Michael Bratman in his 'Two Faces of Intentions'.²⁰ If we consider intention as intentional action, then intentional acting to (try to) square the circle will not make it possible to square the circle. On the other hand, if we consider intentions as plans, we are free to intend and make plans about squaring the circle and also embed it into bigger plans such as 'once we square the circle, we will be able to craft the philosophical stone'. Nonetheless, not even this ability will grant that our intention will become feasible.²¹

today. Perhaps we fail today to cover possibilities that will be recognized in 2071. Our modal opinions do change, and physicists do a lot to change them. But this is not to say that we can argue from the contingent results of empirical investigation to conclusions about what possibilities there are. It is only to say that when we find it hard to locate our actual world among the possibilities that we recognize, we may reasonably be stimulated to reconsider our modal opinions. We may try to think of credible possibilities hitherto overlooked, and we may consider whether we are still as sure as we were about those of our modal opinions that have turned out to be restrictive. It is this reconsideration of modal opinions that may influence our construction of ersatz worlds, not the results of empirical investigation itself. We are concerned not with physics proper, but with the preliminary metaphysics done by physicists.'

²⁰ Bratman (n 4).

²¹ A way to obtain this could be to load the concept of intention, plan, intentional action and so on with strong consistency requirements. Nonetheless, the point of the debate here is that of testing counter-examples to OIC – that is already assumed as a coherence principle, cf. Dahl (n 5) and Jacquette (n 5) for its role in deontic logic or in the moral philosophy issues of moral dilemmas. If we really want to do a fair test, I think we do not have to set the terms of debate using intention, plan, etc. in a way that is OIC-dependent (i.e. with strong consistency requirements). In the OIC debate there is this tendency to make it the case that possible strong counter-examples against OIC are not even worth to enter into the philosophical arena. Consider what Vranas (n 1), 184 says on a more extreme version of the addicted example I may call the 'conceptual addicted', i.e. the mere conceptual possibility that there may be an addicted who is necessarily addicted and cannot refrain from her addiction in every possible situation. According to Vranas' reply, even admitting such a case for the sake of the argument, then the zombie addicted will have no obligation. Such a move seems quite a sort of *petitio principii* to me. Given that he wants to defend OIC he has to say that the conceptual addicted has no obligation because he cannot resist her addiction. With such a preliminary setting, it will turn out that the strongest OIC counter-example that the opponent of OIC may produce is not

An objection to be anticipated is the one that appeals to consistency in order to disqualify from the start proposed examples as cases we should consider in a debate on OIC. I think consistency is somehow overrated and excessively desired and struggled, especially in philosophy of action.²² Basically, we cannot get rid of the phenomenon of inconsistency when taking into account real-life agency. It is easier to model behavior with classical logic that adopts ideal rationality constraints and fears impossibility as its worst enemy, but a perfectly working model based on oversimplified assumptions will not work, no matter how formally beautiful it is (ask classical economists after a subprime crises).²³ Nonetheless, I think that, especially when dealing with agency, we need adaptive theories that will probably need a more complex technical machinery (which should look inelegant from point of view of the classical rationality constraints) but, somehow, will manage to do the work.²⁴

recognized as threatening by Vranas because he has disqualified it from the beginning.

²² See Bratman (n 4), 381 in which consistency matters a lot and has a key role in his argument: 'The argument for strong consistency provides the basis for my argument against the Simple View'. Now we live in 'days of rampant pluralism' not only in ontology, but also in logic. We have many more logical tools and options (e.g. defeasible logics, conflict tolerant (deontic) logics, relevance logics, paraconsistent logics, dialetheistic logics) to deal with incoherence, inconsistency, irrationality and conflicts. Further, experimental economics and experimental game theory helped us to realize that we do not always act rationally or follow standard game-theoretic strategies.

²³ A similar point consisting in a general warning on using models that are formally simple and elegant but, once tested on real cases, fail to grasp the complexities we are interested in can be found in Gideon Yaffe, 'Reply to Jan Broersen, Thomas Nadelhoffer and Steven Sverdlik' (2012) 3 *Jurisprudence* 483 in replying to Jan Broersen, 'Three Points of Disagreement with Gideon Yaffe on Attempts' (2012) 3 *Jurisprudence* 467 comment of Yaffe (n 4).

²⁴ Formal theories allow for the use of more than one model at time that take into account different features (that may clash with one another). We have dynamics and non-monotonic logics as well as defeasible logics: given that even formal theories are no longer afraid to go deep down into inconsistencies and incoherence, why should philosophies willing to explain and understand what goes on when we act do so?

V. AGAINST OIC RESCUERS BY SEPARATION

OIC rescuers by separation claim that in case you ought to do A and A is impossible, it is possible to show that you can intend to A (even if doing A will still be impossible). For them, that allows the rescue of OIC.

I think that OIC rescuers by separation commit a fallacy of relevance: OIC and their (**rev OIC**) are too far apart. Even if the case they are making for (**rev OIC**) were successful, it would not be relevant for the main topic of that discussion, i.e. the rescue of OIC. As long as (**rev OIC**) is not related to the starting OIC, such a rescue is just a straw man. In order for it not to be a straw man, two options are available to the OIC rescuers by separation:

1. They can show that there is a link between (**rev OIC**) and OIC, proving that the separation is just a *prima facie* separation;
2. They can claim that, despite there being a real gap between OIC and (**rev OIC**), what we mean by (OIC) is truly (**rev OIC**).

Option (1) amounts to prove that (IIA) holds, that is to say that there is a connection between (**rev OIC**) and (OIC) due to the fact that intentions lead to acting. The problem, here, is that (IIA) is exactly the thesis endorsed by the first kind of OIC rescuers, a thesis that I argued against in the previous section (section 4).

Option (2) requires an extremely detailed work of reconstruction and redefinition of all the uses and different claims involving OIC leading to a revisionary prescriptive proposal that can roughly be asserted as 'all we used to think about OIC was wrong, the **True OIC** is (**rev OIC**) and has to do with intentions'. I think that all the comparative and reconstructive work that needs to be done before stating the revisionary prescriptive proposal would be really useful. Nonetheless, I am afraid that this proposal will fail because of its self-ascription to be the only right one. Further, given my OIC attitude, I think that it is difficult to reduce all the issues of OIC as an axiom of deontic logic, as a Kantian principle or as the Latin old but gold set of brocarda *impossibilium nulla obligatio* and *ad impossibilia nemo tenetur* to a single **True OIC** as we have seen above in section 2.

VI. DOES INTENDING THE IMPOSSIBLE OFFER A LAST CHANCE TO RESCUE OIC?

One last chance to rescue OIC could be the rather theatrical move to endorse the thesis that it is possible to intend the impossible:

$$(I\emptyset): \Diamond \text{Int } \emptyset$$

(I use the empty set symbol – \emptyset – to represent something impossible).

This thesis, strictly speaking, is not much appreciated by OIC supporters, because it admits impossible actions – i.e. something they are opposed to – as something we need to discuss when intending is concerned. (Intending is often used with reference to things one ought to do, so accepting $(I\emptyset)$ is the first step to admit that there are impossible actions that are nonetheless obligatory, *contra* OIC).

Nonetheless, swallowing this harsh bite may help in rescuing OIC. The argument would run as follows: if you can intend to do the impossible, then OIC counter-examples ($OA \wedge \neg \Diamond A$ or $OA \wedge \emptyset A$) get neutralized because, despite A's being impossible ($\neg \Diamond A$), you can still intend it ($\Diamond \text{Int } \emptyset A$) and thus (OIC) is saved. Accepting $(I\emptyset)$ will allow both kinds of rescuers to include into their rescuing examples of what might be considered the hardest cases for them, i.e. cases in which *we are intending the impossible*.²⁵

My reply is the following: what I showed before for intending in general (section 4) also holds true for intending the impossible. Intending the impossible does not imply doing the impossible, which, in turn, does not imply *succeeding in doing the impossible*. What happens, in the case of rescuers by intending-in-action, is that intending the impossible leads you to try to do the impossible, *that is, a kind of doing that does not succeed*. This doing an attempt (try) that fails *is* something possible. In particular, given that you are trying to do the impossible, your trying to do it will *necessarily fail* because you cannot succeed in doing the impossible.

On the other rescuers hand, allowing intending the impossible should make it easier for the rescuers by separation to resist the OIC counter-examples.

²⁵ At first glance, these cases could be conceived as a sort of 'double' OIC counter-examples: intending A is impossible and thus is doing A.

Nonetheless, as previously shown (section 5), the game they have to win is on the metalevel, where they have to prove the relevance of the link between (OIC) and (rev OIC) in rescue, or justify the revision in favor, of (rev OIC).

VII. CONCLUSION

In the paper, I clarified what is at stake in bringing intentions into play when we are discussing OIC counter-examples and trying to defeat them. I identified two ways of using intentions to argue for OIC (rescue by intending-in-action and rescue by separation) and tried to develop arguments against both.

Making these rescue moves explicit and challenging them, allows us to progress in the OIC debate. We have a chance to focus on intentions and we can investigate OIC in relationship to attempts and impossible doings which are important topics for legal theory.

I later showed how the appealing thesis (at least for those who wish to unravel the OIC aura) that you can intend to do the impossible is not incompatible with the arguments laid down before.

REGULATION.COM. SELF-REGULATION AND CONTRACT GOVERNANCE IN THE PLATFORM ECONOMY: A RESEARCH AGENDA

Marta Cantero Gamito*

This essay looks at the role of online platforms as rule-makers. The disruption of the Platform Economy has come hand in hand with a broader transformation: the emergence of a post-regulatory society, which feels more and more comfortable with transacting outside conventional legal and regulatory frameworks. This has raised the question as to how to regulate these platforms, if at all. This short piece focuses on how platform businesses are developing their own governance frameworks based on self-regulation, trust, and reputation, which create incentives for online traders to comply with the platforms' terms and conditions. Due to reputational enforcement and network effects, platforms act as powerful gatekeepers of online markets, displaying features of governance through contract. By recommending the use of contract governance as an analytical framework, this essay proposes a research agenda to examine the extent to which these emerging governance frameworks act as a competing alternative to existing forms of State-provided market regulation.

Keywords: Platform Economy, Sharing Economy, self-regulation, contract governance, reputational enforcement

TABLE OF CONTENTS

I. INTRODUCTION	54
II. DISRUPTING THE LAW	55
III. REGULATORY OPT-OUT: TRUST AND REPUTATION AS AN ALTERNATIVE TO STATUTORY RULES	60
IV. REPUTATIONAL ENFORCEMENT BASED ON DISPUTE RESOLUTION AND CONTRACT GOVERNANCE	63
V. CONCLUDING REMARKS.....	66

* Postdoctoral Researcher University of Helsinki, and Research Associate FiDiPro project on *The External Dimension of European Private Law*.

I. INTRODUCTION

Globalisation and digitisation have brought about the emergence of new technological, economic and social paradigms. Technological developments have prompted not only a socioeconomic revolution, they are also transforming the legal landscape, the existing legal categories, and even the current understanding of law. This essay focuses on one of the most central issues of the Digital Economy: the role of online platforms as rule-makers.

The existing regulatory regimes struggle in responding to the challenges posed by online platforms. In the meantime, these platforms continue their development and are offering their own normative solutions. This has led to the (spontaneous) emergence of norms generated by the platforms themselves and, to a lesser extent, by their users' community. Platforms' governance frameworks are largely based on reputational mechanisms and trust. Self-regulation is a common feature of platform businesses. However, this essay puts the spotlight on the role of reputational mechanisms (feedback and ratings) as a source of normativity. The main hypothesis is that by providing feedback and rating the services they have used or the products that they have bought, platforms' businesses and users are 'spontaneously' generating new rules. This is particularly true in those cases where users' ratings are used as a benchmark when resolving a private dispute under a dispute settlement procedure embedded in the platform itself. Hence, the reputational system stands as a novel form of dealing with, and regulating, market failures and problems of asymmetric information outside any official law-making procedure. Such developments defy conventional regulatory theories and increase the appeal of digital platforms as an object of legal and interdisciplinary research.

To date, the role and relevance of consumer feedback as a parameter for dispute resolution and its potential as one of the sources of the law of the platform remain, with some exceptions, a largely unexplored terrain, lacking distinctive and compelling research. In Europe, legal scholarship has mainly focused on policy responses. The dominant approach is that this new paradigm for private transactions calls for a reform of EU consumer and contract law to be capable of accommodating new triangular relationships on which platform transactions are based, in order to safeguard consumers' interests and to extend the liability to the platform's intermediary. Some

'cautious' approaches have proposed the use of non-legal categories and self-regulation, but only in combination with regulation. However, these approaches are based on an insufficient understanding of the impact of users' ratings and their potential to develop into generally applicable rules.

Rather than providing a complete picture, this essay serves as a provocation as well as a research agenda into the enquiry of whether this phenomenon is a consequence of the emergence of a post-regulatory society that is calling for a different kind of 'law'. The essay critically enquires if and how online platforms are creating a new non-legal form of (transnational) regulation and the extent to which it is functioning as a viable and competing alternative to existing State market regulation. In so doing, the paper focuses on the different implications of the self-regulation of digital platforms. The paper initially outlines how online platforms, using new forms of self-regulation, based on spontaneously emerged norms and practices, are providing a regulatory alternative to conventional regulation. It also illustrates how platform businesses are built on structures heavily relying on trust and reputation. Finally, the paper also discusses the role and weight of reputational enforcement in dispute-solving. In that way, it offers a new analytical framework for the legal analysis of the Platform Economy based on contract governance. The piece concludes by addressing the necessity to look into the institutional choices that have favoured the emergence and successful development of online platform businesses.

II. DISRUPTING THE LAW

The Platform Economy is characterised by the existence of a structure, the platform, which enables transactions by connecting two contracting parties, be it for the purchase of a good or the provision of a service. Accordingly, the platform serves as a meeting point that relies on external action to generate a product or service that it is complementary to the platform itself. Online platforms such as Airbnb, Uber or Amazon enlarge consumers' choice by matching sellers and buyers, service providers and service users, credit seekers and investors, landlords and tenants, and the list goes on. The main feature of these platforms is the presence of network effects; the higher the number of users, the more appealing the platform becomes. Nowadays,

online platforms, from many perspectives, resemble nation-states.¹ Data shows that the combined value of the companies representing the Platform Economy is more than \$4.3 trillion and that these companies employ directly 1.3 million people.² Facebook manages 1.5 billion users, a 'population' bigger than most countries. Alibaba's transactions amounted to \$248 billion last year.³ Through their terms and conditions, which platforms' users – usually hastily – accept, these online platforms become the regulators of significant segments of the world's population and the economy.

From a legal perspective, the Platform Economy is reshaping the way in which transactions have been understood so far, and therefore, its regulation poses a difficult challenge for lawmakers.⁴ Some of these regulatory challenges include most notably the distinction between peer and trader and how this entails different externalities related to jurisdiction problems, tax avoidance, labour law and consumer law infringements, as well as how services and goods traded through online platforms may represent a risk of non-compliance with health and safety standards. Aware of the dimensions and particularities of this industry, governments (national, regional and local) are extemporaneously creating and enforcing rules and regulations applicable to platform businesses and their participants. However, the existing legal regimes are still unable to provide one-stop regulatory solutions to these phenomena, and that is giving rise to the fragmentation of the regulatory digital space. Governments are aware of fragmentation in the regulation of the Platform Economy and, therefore, are trying to provide comprehensive regulatory frameworks. Yet, the approaches differ significantly. While some governments are relying on traditional regulatory approaches setting up the rules for the emerging industry, other, more liberal, approaches are

¹ S. P. Choudary, M. W. Van Alstyne, and G. G. Parker, *Platform Revolution: How Networked Markets Are Transforming the Economy-and how to make them work for you* (WW Norton & Company 2016).

² The Center for Global Enterprise, 'Global Platform Survey', 2015.

³ The Wall Street Journal, 'What is Alibaba?' WSJ Project <http://projects.wsj.com/alibaba/> accessed on 19 January 2017. Data from 2016.

⁴ W. J. Maxwell and P. Thierry, 'Regulating Digital Platforms in Europe—A White Paper' <https://ssrn.com/abstract=2584873> accessed 10 February 2017. See also V. Hatzopoulos and S. Roma, 'Caring for Sharing? The Collaborative Economy under EU Law', (2017) 54(1) CML Rev 81.

advocating the self-regulation of the sector as a mechanism to attract and to facilitate the proliferation of innovative businesses. A protectionist approach, favoured by some, is to restrict or even to ban certain new services. Two prominent examples are the prohibition of renting entire apartments through Airbnb in Berlin or the banning of Uber services in Spain.

Within the different regulatory solutions, one alternative, the 'analogue' solution, would be to extend the regulatory scope of existing rules and regulations to include the new transactions and players (e.g. extending existing consumer protection rules, devised for the offline world, to peer-to-peer transactions). National judges are already facing these scope problems.⁵ This analogue approach would entail the creation of sector-specific rules that take into account the particular features of contractual transactions in the Platform Economy and to set out a dedicated regulatory regime from the outset.⁶ Some countries are already preparing dedicated rules, such as the Italian proposal on the Sharing Economy.⁷ In addition to this, there are also local and regional regulatory initiatives.⁸ However, the inability of domestic initiatives to provide solutions to a borderless phenomenon requires transnational action.

⁵ See Cases C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* ECLI:EU:C:2016:612; C-434/15 *Asociación Profesional Elite Taxi*, nyr; C-526/15 *Uber Belgium BVBA v Taxi Radio Bruxellois NV* ECLI:EU:C:2016:830; and Case C-320/16 *Criminal proceedings against Uber France SAS*, nyr.

⁶ Research group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5(4) *Journal of European Consumer and Market Law* 164.

⁷ Proposta di legge 'Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione', 27 January 2016 <http://www.camera.it/leg17/126?tab=2&leg=17&idDocumento=3564&sede=&tip o=> accessed 7 March 2017.

⁸ Examples can be found in: Amsterdam's Action Plan for the Sharing Economy (*Actieplan Deeleconomie*) <http://www.sharenl.nl/nieuws/2016/03/09/actieplan-deeleconomie> accessed 6 March 2017, and the current process by the Catalan Government to review sector-specific legislation to adapt it to the sharing economy and the new sharing economy business models http://premsa.gencat.cat/pres_fs/vp/AppJava/notapremsavw/291907/ca/govern-revisara-normativa-sectorial-actualitzar-regular-leconomia-collaborativa.do accessed 6 March 2017.

In the EU, since the initial call for more intrusive regulation⁹ characterised by the investigation of Amazon's e-book businesses, Google's advertising practices, and Facebook's privacy, the EU's regulatory approach has changed dramatically. For the time being, the European Union is embracing a more flexible and market-based regulatory approach. The European Commission, as part of the Digital Agenda for Europe, has published a Communication on Online Platforms and the Digital Single Market.¹⁰ The Commission suggests the creation of a regulatory model to accommodate the characteristics of the Platform Economy, in particular when it comes to the provision of services by persons who do not fall under the scope of the existing EU consumer protection legislation – online platforms are multisided markets.¹¹ Moreover, the Commission's proposal: 1) does not propose a new general law on online platforms; 2) advances the partial deregulation of traditional communication services by establishing a level playing field for comparable digital services; and 3) and relies on self-regulation. Other regions across the world have not yet delivered any comprehensive regulatory solution.¹²

Legal scholars are also aware of the challenges posed by digital technologies as to how to effectively regulate them.¹³ The Platform Economy calls for a

⁹ Günther Oettinger's (European Commissioner for Digital Economy and Society) Speech at Hannover Messe: 'Europe's Future is Digital', April 2015 https://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-hannover-messe-europes-future-digital_en.

¹⁰ European Commission, 'A European Agenda for the Collaborative Economy' <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF>, 4: '(...) a more flexible regulation of services markets would lead to higher productivity and could ease the market entry of new players, reduce the price for services, and ensure wider choices for consumers'.

¹¹ European Commission, 'Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (2016) 288 final <https://ec.europa.eu/digital-singlemarket/en/news/communication-online-platforms-and-digitalsingle-market-opportunities-and-challenges-europe> accessed on 20 November 2016.

¹² See GSMA Mobile Economy Report (2016) <http://www.gsma.com/mobileeconomy>.

¹³ A. Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish 2006); C. Reed, *Making Laws for Cyberspace* (OUP 2012); R. Brownsword and K. Yeung (eds), *Rights, Regulation, and the Technological Revolution* (OUP 2008); R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century*

new generation of regulation (Regulation 2.0) based on information transparency and data-driven accountability.¹⁴ Against this background, while some claim that the Platform Economy requires a dedicated regulatory framework,¹⁵ some others advocate for the advantages of self-regulation as a tool to attract innovative – and profitable – new businesses.¹⁶ Lastly, a third alternative proposes the creation of a dedicated regulatory framework defining the 'essential requirements'¹⁷ in combination with the creation of a harmonised standard establishing the technical and legal details.¹⁸

In the meantime, the existing legal concepts and categories devised for the analogue world are struggling to fit the brave new digital world of online platforms. In view of this, self-regulation and reputational mechanisms stand as suitable mechanisms for regulating the new types of transactions facilitated by online platforms. The main argument is the emergence of a new governance framework, which here is referred to as the *spontaneous self-regulation of digital platforms*.¹⁹ This framework emerges bottom-up; from users' rating to standards of quality.

(CUP 2012); R. Brownsword, E. Scotford, and K. Yeung (eds), *Oxford Handbook on Law, Regulation and Technology* (OUP 2016); A. De Franceschi, *European Contract Law and the Digital Single Market* (Intersentia 2016); R. Schulze and D. Staudenmayer (eds), *Digital Revolution: Challenges for Contract Law in Practice* (Nomos 2016).

¹⁴ N. Grossman, 'Regulation the Internet Way: a data-first model for establishing trust, safety and security. Regulatory Reform for the 21st Century City Project' <http://datasmart.ash.harvard.edu/news/article/white-paper-regulation-the-internet-way-660> accessed 10 December 2016.

¹⁵ See (n 6), and O. Lobel, 'The Law of the Platform' (2016) 16 *Minnesota Law Review* 212.

¹⁶ C. Koopman, M. Mitchell and A. Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' (2015) 8(2) *The Journal of Business, Entrepreneurship & the Law*; M. Cohen and A. Sundararajan, 'Self Regulation and innovation in the Peer-to-Peer Sharing Economy' (2015) 82 *U. Chi. L. Rev. Dialogue* 116.

¹⁷ Research group on the Law of Digital Services, see (n 6).

¹⁸ C. Busch, 'Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy', in De Franceschi (n 13).

¹⁹ Based on the concept of 'spontaneous governance' in O. Williamson, 'Economic Institutions: Spontaneous and Intentional Governance' (1991) 7 *Journal of Law, Economics, & Organization* 159.

III. REGULATORY OPT-OUT: TRUST AND REPUTATION AS AN ALTERNATIVE TO STATUTORY RULES

The disruption of the Platform Economy facilitated by technological progress has come hand in hand with a societal transformation.²⁰ In legal terms, one may even dare to speak about the emergence of a post-regulatory society. Participants in the Platform Economy feel more and more comfortable with transacting outside conventional legal and regulatory frameworks. Platform users find confidence not in the applicable rules, but mostly in the reputation of the other contracting party. In fact, platform businesses, in particular those belonging to the Sharing Economy, are largely designed around trust regimes and reputational ordering.

A trust regime provides a scheme in which the enforcement of the contract is based on a secured credible commitment, as understood by North.²¹ Under such a regime, enforcement relies on a system of reputational feedback that builds on ratings and reputational quality, and where traders long to be esteemed.²² Such a system of quality compliance is largely generated spontaneously by users' feedback, giving rise to standards of quality. It is, therefore, a process of peer review that ensures the compliance with minimum quality requirements. Under this system, standards would act as 'private judges', as understood by Williamson.²³ They will make the reputation system 'more effective as a mean of promoting trade (...). [T]he system is designed to promote private resolution of disputes and otherwise to transmit *just enough* information to the right people in the right

²⁰ P. Mason, *Postcapitalism: A Guide to Our Future* (Macmillan 2016); C. Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* (Hachette Books 2006) and *The Longer Long Tail* (Random House Business 2009).

²¹ D. C. North, 'Institutions and Credible Commitment' *Journal of Institutional and Theoretical Economics* (JITE)/*Zeitschrift für die gesamte Staatswissenschaft*, (1993) II.

²² See in this point Ch. III of Section ('Of the effects of prosperity and adversity upon the judgment of mankind...') within Part I ('On the prosperity of action') in A. Smith, *The Theory of Moral Sentiments*. (first published 1759, Penguin 2010).

²³ See (n 19).

circumstances to enable the reputation mechanism to function effectively for enforcement'.²⁴

This is an illustration of the opportunistic conditions favoured by the network effects inherent to the Platform Economy. In terms of game theory, reputational mechanisms together with the role of platform businesses as gatekeepers of large markets would explain the collective behavioural patterns observed among platform users. A cooperative behaviour will be preferred over non-cooperation, provided that cooperation preserves market access conditions whereas non-cooperation excludes them.²⁵ Against this background, platform businesses are currently leading a (spontaneous) process of regulatory innovation in response to the ongoing economic, technological and societal transformations. These regulatory and institutional innovations represent a market response to the demands for regulation of the society in the Digital Age, which conventional forms of regulation and enforcement (judicial and extrajudicial) cannot easily replicate.

Using services provided in the context of the Sharing Economy means opting-out from regulation.²⁶ This leads to a process of de-regulation and, ultimately, to re-regulation, based on self-regulation. Such process entails far-reaching implications for conventional regulatory theory. Thus, it is therefore necessary to rethink the nature and the role of these emerging 'post regulatory' norms and processes.

Opting-out from regulation, i.e. the adoption of a self-regulatory approach based on community-created rules and practices, has already proved to be a successful strategy for certain sectors.²⁷ Nevertheless, some scholars are

²⁴ P. R. Milgrom and D. C. North, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs' *Economics & Politics* (1990) 2(1) 1.

²⁵ G.-P. Callies and M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance' *Ratio Juris* (2009) 2(2) 260.

²⁶ Cf. L. Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *The Journal of Legal Studies* 115, 57.

²⁷ *ibid*, see also L. Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions' (2001) U Chicago Law & Economics, Olin Working Paper No. 133.

reluctant to the use of reputation mechanisms as a *total replacement* of regulation.²⁸ Against this background, international standardisation stands as an alternative regulatory back-up solution devised for problems of institutional design; e.g. reputation mechanisms can be vulnerable to bias and abuse. The creation of international standards establishing procedural guarantees stands as a solution to design problems posed by reputational frameworks. In the field of online reputation, the International Standards Organization (ISO) has already initiated the works on standardisation of online reputation. The aim of the standard is to standardise methods, tools, processes, measures and best practices related to the online reputation of organisations or individuals providing services or products, derived from user-generated content (ISO/TC 290 – Online reputation).²⁹

In terms of transnational governance, the new technological environment has changed the rules of the game and it is giving rise to new modes of power, governance and ownership.³⁰ Participation is now networked and peer driven.³¹ This has entailed a transformation in transnational governance, where standardisation is placed at the 'core of the emerging Transnational New Governance system'.³² The self-regulatory practices of standards, codes of conducts or best practices function as drivers of decentralisation of regulation.³³ In the case of the Platform Economy, where the markets are instead being de-regulated,³⁴ this paper adds that the development of digital

²⁸ Busch (n 18).

²⁹ The creation of this global standard is based on the model developed by the French Association for Standardisation, AFNOR, in 2013. AFNOR, French Standard NF Z 74-501 – *Avis en ligne de consommateurs – Principes et exigences portant sur les processus de collecte, modération et restitution des avis en ligne de consommateurs* (19 July 2013).

³⁰ M. Naím, *The End of Power: from boardrooms to battlefields and churches to states, why being in charge isn't what it used to be* (Basic Books 2014).

³¹ J. Heimans and H. Timms, 'Understanding "New Power"' (2016) 92(12) Harvard Business Review 15.

³² K. W. Abbott and D. Snidal, 'International Regulation Without International Government: Improving IO Performance Through Orchestration', (2010) 5(3) The Review of International Organizations 315,44.

³³ J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54(1) Current legal problems 103.

³⁴ B. Edelman and D. Geradin, 'Spontaneous Deregulation' (2016) 94(4) Harvard Business Review 80.

platforms constitutes a process of decentralisation not only of regulation, but also of de-regulation. Therefore, this spontaneous self-regulation serves as a proxy for new forms of transnational governance.³⁵ Preliminary research conducted so far, suggests that spontaneous self-regulatory solutions based on the 'network communitarianism governance' model³⁶ are responses to the challenges of regulatory legitimacy, effectiveness and connection.³⁷ However, it remains to be seen to what extent platforms exert control over the flow of information within the platform to assess whether they are effectively channelling 'collective action' and setting new quality standards based on users' expectations, paying attention to the deficiencies encountered by Sunstein in his *Republic.com*.³⁸

IV. REPUTATIONAL ENFORCEMENT BASED ON DISPUTE RESOLUTION AND CONTRACT GOVERNANCE

Law enforcement is experiencing a process of transformation,³⁹ which is challenging the understanding not only of 'justice' but also the concept 'law' itself. This narrative is amplified with the introduction of digital technologies in conflict management. In order to overcome the legitimacy and procedural challenges posed by Online Dispute Resolution (ODR) mechanisms, at least in Europe, these procedures have been equipped with a combination of *ex-ante* (certification) and *ex-post* (monitoring) procedural guarantees.⁴⁰ Much

³⁵ N. Elkin-Koren and E. Haber, 'Governance by Proxy' (2016) 82(1) Brooklyn Law Review 105.

³⁶ A. Murray, 'Nodes and Gravity in Virtual Space' (2011) 5(2) Legisprudence 195.

³⁷ As identified in Brownsword (n 13).

³⁸ C. R. Sunstein, *Republic.com* (Princeton University Press 2001), and *Republic.com 2.0* (Princeton University Press 2009).

³⁹ H.-W. Micklitz and A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart Publishing 2016). See also Micklitz 'The Transformation of Enforcement in European Private Law: Preliminary Considerations', (2015) 23(4) European Review of Private Law 491.

⁴⁰ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes [2013] OJ L 165/1 and Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ 165/63.

has been written about how an effectively designed ODR mechanism contributes to placing trust in the market.⁴¹

Here, attention is paid to the potential of online platforms which offer embedded mechanisms for dispute resolution, for the development of a new mechanism of law enforcement. The primary aim of these platforms is not to offer a successful ODR model, but rather to provide a venue for dispute resolution as an organic complement to the transactions taking place via the platform. These 'integrated' venues for dispute resolution stand as a mechanism of enforcement separated not only from judicial enforcement but also from more generic manifestations of extrajudicial settlement. In this regard, where accessibility, speed, affordability and the existence of attractive remedies⁴² is a strong asset in the platforms' dispute resolution mechanism, platforms can effectively compete against the State-provided enforcement structure. In view of that, it is perhaps of major significance to ask why, while 40% EU traders do not even know about the existence of Alternative Dispute Resolution mechanisms,⁴³ eBay handles 60 million cases per year.⁴⁴ Probably the answer to this pressing question lies in the institutional (and contractual) design of the embedded dispute resolution mechanisms. Moreover, the lack of effective incentives for traders to engage in ODR procedures like the EU ODR Platform⁴⁵ has resulted in the automatic closing of 55% of the total submitted complaints because traders have not responded. Against this background, an enquiry is to be made

⁴¹ E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons 2001); P. Cortés, *Online Dispute Resolution for Consumers in the European Union* (Taylor & Francis, 2011); J. Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009); G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004), to mention a few.

⁴² Callies and Renner (n 25).

⁴³ European Commission, 'Settling consumer disputes online' Factsheet, January 2016.

⁴⁴ UK Civil Justice Council, 'Online Dispute Resolution for Law Value Civil Claims' (Online Dispute Resolution Advisory Group) 2015 <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> accessed 10 December 2016.

⁴⁵ EU Online Dispute Resolution Platform <https://webgate.ec.europa.eu/odr/main/?event=main.home.show> accessed 10 December 2016.

concerning the extent to which online platforms might be contributing to bridging this 'ODR trust gap'.

The incorporation of dispute resolution within the intermediary platform may create a *de facto* monopoly over enforcement. On the one hand, especially when it comes to small claims, chargeback mechanisms may serve as an effective remedy without having to rely on the support of state courts or private authorities.⁴⁶

On the other hand, by making participation in dispute resolution part of their terms and conditions, online platforms are offering effective incentives for traders to engage in the resolution of disputes. In so doing, the platform is acting as a *gatekeeper* of the market, provided that the trader wishes to remain trading via the platform as well as to improve, or at least to maintain, its reputational record. Thus, by providing a 'designed for trust' environment, online platforms are putting in place a mechanism of enforcement by exclusion. A non-collaborative behaviour in the event of a dispute may entail the exclusion of the platform by the removal of the listing or the cancellation of the registration; a consequence that may be exponentially amplified as a result of network effects. Moreover, some online platforms also display features of a governance by self-commitment and unilateral standard-setting, which set out the conditions for market access.⁴⁷

In this way, digital platforms can be seen as an illustration of cooperative regulation based on self-organisation and self-commitment, whereas the contract design of digital platforms offers a paradigmatic example of one of the manifestations of contract governance; governance through contract.⁴⁸

⁴⁶ P. Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2016) 36(3) *Oxford Journal of Legal Studies* 595.

⁴⁷ By way of example, Airbnb has included a Non-discrimination policy: <https://es.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect>, Responsible hosting guidance: <https://es.airbnb.com/help/article/1397/responsible-hosting>, Hosting standards: <https://es.airbnb.com/help/topic/206/hosting-standards> and a Code of conduct: <https://openair.byairbnb.com/conduct.html>.

⁴⁸ F. Möslin and K. Riesenhuber, 'Contract Governance – A draft research agenda' (2009) 5(3) *European Review of Contract Law* 248, 89. S. Grundmann, F. Möslin and

In view of this, contract governance offers a precise conceptual and analytical framework for developing the ideas associated with the emergence of platform businesses as rules-givers.

Three important questions should be asked in relation to the role of platform businesses in dispute resolution: 1) whether platforms' innovations offer a more efficient venue – involving advantages in terms of speed and cost – to solving small disputes; 2) whether such advantages could be simulated by judicial redress and public forms of Alternative and Online Dispute Resolution (ADR, ODR) or other forms of adjudication; and ultimately 3) whether the advantages accompanying these embedded venues for dispute resolution are amounting to the displacement of enforcement from courts and administrative structures (hierarchies) to platforms (markets) against possible drawbacks or risks in terms of material justice.

V. CONCLUDING REMARKS

This paper is concerned with the role of online platforms as a manifestation of decentralised regulatory innovation through private legal ordering by means of private contract and private dispute settlement. In particular, it puts the spotlight on the actual potential of reputational systems as a non-legal source of normativity and capable of shaping (bottom-up) a regulatory regime outside established and conventional legal sources. Under these reputational regimes, ratings become a new benchmark for quality and can be used as parameters for dispute resolution, effectively replacing legal categories of rules and enforcement. This raises the question as to whether Regulation.com provides the enabling conditions for the development of an alternative normative order to State-provided norms.

Regulation.com thus poses questions ranging from issues of institutional design and the role of reputational enforcement to the understanding of law and regulation. Given the size and social relevance of the Platform Economy, there is a clear demand for a multidisciplinary and transnational research agenda. The current state urges academics to reflect on how online platforms,

K. Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP 2015).

and especially those platforms belonging to the Sharing Economy, are not only disrupting the economy but its underlying structure.

Further research is needed in order to examine the advantages and disadvantages of these emerging governance regimes vis-à-vis conventional forms of regulation. Attention is to be paid to the extent to which contract governance lays the foundation for these developments to take place, and how a contract governance framework based on reputational mechanisms and platforms' enforcement capabilities ultimately may serve as a proxy for transnational (and spontaneous) governance. Normatively, this provoking argument would challenge the application of analogue solutions to the digital realm by casting doubts on the creation and application of a formal regulatory framework as the most appropriate response to a trillion-dollar industry that has largely developed outside existing legislation.

GENERAL ARTICLES

THE RATIFICATION OF THE COUNCIL OF EUROPE ISTANBUL CONVENTION BY THE EU: A STEP FORWARD IN THE PROTECTION OF WOMEN FROM VIOLENCE IN THE EUROPEAN LEGAL SYSTEM

Sara De Vido^{*}

The article explores the reasons why the EU should ratify the Council of Europe Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011, and the consequences the ratification may entail. In the first part, I will make a few remarks on the main provisions of the Convention, which must be considered as the most advanced system of protection of women from violence at the international level in force for the time being, and I will comment on the current status of EU gender equality policies. In the second part, starting from the European Commission roadmap regarding the EU accession to the Convention (October 2015), and the proposal for a Council decision on the signing of the Convention (March 2016), I will analyse the legal bases for the ratification of the Convention by the EU, and the possible impact this treaty may have on EU policies. I argue first that the legal basis of the decision of the Council concluding the agreement cannot be limited to Articles 82 to 84 of the Treaty of the Functioning of the EU (TFEU), but should be extended to – at least – Articles 19 and 168 TFEU. I will then explore the impact of the Convention on future policies of the EU, also providing a comparison with the Convention on the Rights of Persons with Disabilities, which constitutes the first international treaty on human rights ratified by the European Union. Secondly, I will contend that one of the provisions of the Convention, namely Article 30(2), which requires States to compensate victims of violence who have sustained 'serious injury or impairment of health', has direct effect.

^{*} Assistant Professor of International Law and vice-director of Centre for Human Rights at Ca' Foscari University of Venice, Italy, affiliate to the Manchester International Law Centre, UK, co-founder of the Women in International Law Network. The author wishes to thank the two anonymous referees for their insightful comments on an earlier draft of the article. All remaining errors are mine. The article was completed in November 2016.

Keywords: violence against women, Istanbul Convention, ratification, EU, health

TABLE OF CONTENTS

I. INTRODUCTION	70
II. THE COUNCIL OF EUROPE ISTANBUL CONVENTION: AN OVERVIEW	72
1. <i>The International Legal Background</i>	74
2. <i>The Definitions of Violence against Women and of Domestic Violence in the Istanbul Convention</i>	75
3. <i>States' Obligations under the Convention</i>	77
4. <i>Compliance Mechanism under the Convention</i>	78
III. THE ACTION UNDERTAKEN BY THE EU TO COMBAT VIOLENCE AGAINST WOMEN	79
IV. THE RATIFICATION OF THE COUNCIL OF EUROPE ISTANBUL CONVENTION BY THE EU	82
1. <i>Legal Basis: Going beyond the EU Commission Proposal</i>	83
2. <i>Effects on EU Policies</i>	86
3. <i>The Direct Effect of Article 30(2) of the Council of Europe Istanbul Convention and its Consequences</i>	95
V. CONCLUSION	101

I. INTRODUCTION

The Council of Europe Convention on Combating Violence against Women and Domestic Violence was adopted in 2011 in Istanbul (hereinafter 'Council of Europe Istanbul Convention'), and constitutes a landmark step in providing a unique and advanced legal framework, binding for the ratifying States, aimed at the protection of women and girls from gender-based violence, and any individual from domestic violence.¹ The phenomenon of

¹ See Ronagh JA McQuigg, 'What Potential does the Council of Europe Convention on Violence against Women hold as regards Domestic Violence?' (2012) 16 The International Journal of Human Rights 947; Adriana Di Stefano, 'Violenza contro le donne e violenza domestica nella nuova convenzione del Consiglio d'Europa' [2012] Diritti Umani Diritto Internazionale 169; Sara De Vido, 'States' Due Diligence

gender-based violence is widespread in every country of the world. In the European Union (EU), according to a report prepared by the European Agency for Fundamental Rights, 33% of women have experienced physical and/or sexual violence since the age of 15, which corresponds to 62 million women.² The data is only partially reliable; the reality is that the situation is even worse. In fact, most cases of violence, committed behind domestic walls, go unreported.³

Entered into force on 1 August 2014, the Convention has been ratified – at the time of writing – by 22 States of the overall 47 of the Council of Europe.⁴ The Convention is open to international organizations, such as the EU, and non-member States of the Council of Europe alike, hence having a universal aspiration. The European Commission published in October 2015 a 'roadmap' on the (possible) EU accession to the Council of Europe Istanbul Convention, and, on the occasion of the International Day for the Elimination of Violence against Women, confirmed that the document was the 'first, concrete step' towards ratification.⁵ In March 2016, the Commission presented the proposal for a Council Decision on the signing of the Convention.⁶

Obligations to Protect Women from Violence: A European Perspective in Light of the 2010 CoE Istanbul Convention' in Wolfgang Benedek et al (eds), *European Yearbook on Human Rights* (Intersentia, 2014) 365.

² FRA, Violence against Women: an EU-wide survey http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf accessed on 20 June 2016.

³ Enrique Gracia, 'Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition' (2004) 58, *J Epidemiol Community Health* 536, 536.

⁴ Albania, Andorra, Austria, Belgium, Bosnia Herzegovina, Denmark, Finland, France, Italy, Malta, Monaco, Montenegro, The Netherlands, Poland, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Sweden, Turkey.

⁵ EU Commission, Roadmap A (possible) EU accession to the CoE Convention on preventing and combating violence against women and domestic violence, October 2015, 2015/JUST/010 and EU Commission, Factsheet Q&A International Day for the Elimination of Violence against Women (24 November 2015) http://europa.eu/rapid/press-release_MEMO-15-6150_en.htm accessed 20 June 2016.

⁶ European Commission, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and

This article will argue that the EU should ratify the Convention, as envisaged by the Commission in the roadmap and in the proposal, as an instrument to reinforce the measures existing at EU level to combat violence against women. I will contend that, although the EU has been particularly active in the adoption of measures aimed at reaching gender equality and protecting female victims of violence, it lacks a comprehensive framework, which could be provided by the Council of Europe legal instrument.

In the first part of the article, I will briefly present the main characteristics of the Istanbul Convention (II), before illustrating the situation with regard to gender equality at EU level (III). In the second part, I will analyse the articles of the EU founding treaties which might constitute the legal basis for the ratification of the Convention: starting from the proposal of the Commission, I will argue that the legal basis of the decision of the Council concluding the agreement should not be limited to Articles 82 to 84 of the Treaty of the Functioning of the EU (TFEU), but should be extended to Articles 19 and 168 TFEU (IV.A). I will then explore the impact of the Convention on future policies of the EU (IV.B). Finally, I will contend that one of the provisions of the Convention, namely Article 30(2), which requires States to compensate victims of violence who have sustained 'serious injury or impairment of health', has direct effect; therefore, in the hypothesis of ratification by the EU, it might be invoked by women before national judges, even though the EU Member State of the *forum* has not ratified the Convention (IV.C).

II. THE COUNCIL OF EUROPE ISTANBUL CONVENTION: AN OVERVIEW

The Istanbul Convention is the outcome of a long process that has raised increasing awareness of the problem of violence against women in Europe,⁷ and, more generally, at the international level. Even when committed by private parties, within domestic walls, instances of violence against women

combating violence against women and domestic violence, Brussels (4 March 2016) COM (2016) 111 final 2016/0063.

⁷ See, for example, Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence, adopted by the Committee of Ministers on 30 April 2002 at the 794th meeting of the Ministers' Deputies.

constitute a violation of human rights, and States bear due diligence obligations in effectively preventing and combating these crimes.⁸ The private-public distinction,⁹ which previously prevented States from interfering in the individual sphere, has been disrupted thanks to the provisions included in international legal instruments, the work of international and regional tribunals, and feminist theories.¹⁰ Under international law, States must intervene in order to punish the perpetrators of crimes against women, and adopt adequate preventive and protective measures in favour of female victims of abuse.¹¹

⁸ Due diligence obligations are 'best efforts' obligations mainly aimed at preventing, investigating, punishing and providing remedies to the violation of human rights (cfr. Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8). In particular, States must prevent, investigate and punish violations of human rights committed by private persons or entities, which are not State organs. Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras* [1988] IACHR Series C No. 4, para. 188, which addressed for the first time the issue of State responsibility for acts committed by non-State actors.

⁹ Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387, 389. See also, in general: Hilary Charlesworth, Christine Chinkin and Susan Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 615; Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Rebecca Cook (ed.) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 85; Karen Engle, 'International Human Rights and Feminism: When Discourses Meet' (1991-92) 13 *Michigan Journal of International Law* 17; Donna Sullivan, 'The Public/Private Distinction in International Human Rights Law' in Julie Peters and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 126.

¹⁰ See for example the works by Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006); Karen Engle, 'After the Collapse of the Private/Public Distinction: Strategizing Women's Rights' in Dorinda G. Dallmeyer (ed.) *Reconceiving Reality: Women and International Law* (American Society of International Law 1993) 143; Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2012).

¹¹ Ronagh J.A. McQuigg, 'Domestic Violence and the Inter-American Commission on Human Rights: Jessica Lenahan (Gonzales) v. United States' (2012) 12 *Human Rights Law Review* 122, 131; and Jennifer Koshan, 'State Responsibility for Protection

1. The International Legal Background

At the international level, as it is well-known, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not contain any reference to violence against women or domestic violence. However, the Committee established by the Convention defined in its General Recommendation 19 issued in 1992 gender-based violence as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.¹² Hence, violence against women can be considered among the acts prohibited by the international legal instrument, since violence interferes with the enjoyment of rights and freedoms by women on a basis of equality with men. In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women, and in 1994 a Special Rapporteur on violence against women, its causes, and consequences was appointed by the then UN Commission on Human Rights in order to monitor the respect of women's human rights by States.¹³

It is worth mentioning that more than twenty years after the CEDAW Committee General Comment, the issue of violence against women is still regarded as a high priority in the political agenda of international and regional organizations. Hence, for example, the United Nations Security Council in its recent Resolution 2242 (2015) stressed the impact of new forms of violence on women and girls, in particular the negative effects of climate change, of international terrorism, and of the global nature of health pandemics, and urged Member States 'to ensure increased representation of women at all decision-making levels in national, regional and international institutions', in particular in sectors pertaining to peace and security.¹⁴ Furthermore, the Agenda 2030 on sustainable development has included among its goals (namely goal no. 5) the achievement of gender equality and the empowerment of all women and girls. This goal can be attained by different means, including

against Domestic Violence: The Inter-American Commission on Human Rights Decision in *Lenahan (González)* and its Application in *Canada*' (2012) 30 *Windsor Yearbook of Access to Justice* 39, 51.

¹² Cedaw Committee General Recommendation n 19 (11th session 1992) para 7.

¹³ United Nations Commission on Human Rights Resolution 1994/45 of 4 March 1994.

¹⁴ UN SC Resolution 2242 (2015) para 1.

by eliminating 'all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other type of exploitation'.¹⁵

Nonetheless, while the interest of the international community has increasingly acknowledged the gravity of the offence, in part as a result of the path paved by feminist scholars and activists, the pace of such gains has not been matched by a reduction in violence.

2. The Definitions of Violence against Women and of Domestic Violence in the Istanbul Convention

The achievement of the Council of Europe Istanbul Convention must be welcomed as a positive outcome, which fills a normative gap existing in Europe. It is not the purpose here to analyse the Convention article by article; the explanatory notes by the Council of Europe are sufficiently clear to understand the scope and the main provisions of the treaty.¹⁶ A few remarks are however necessary in order to appraise the reasons why the EU should ratify the Convention.

It is noteworthy that the preamble to the Convention emphasises the fact that violence against women is a manifestation of 'historically unequal power relations between women and men', which have led to 'domination over, and discrimination against, women by men', and that it acknowledges the 'structural' nature of violence which means that it is rooted in society and as such must be eradicated.

The Istanbul Convention clearly differentiates between violence against women and domestic violence which might affect women but also children, men, and elderly people. Violence against women is defined as 'a violation of human rights and a form of discrimination against women', which include 'all acts of gender-based violence that result in, or are likely to result in, physical,

¹⁵ Draft resolution referred to the United Nations summit for the adoption of the post-2015 development agenda by the General Assembly at its sixty-ninth session, Transforming our World: the 2030 Agenda for Sustainable Development, 18 September 2015.

¹⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11 May 2011.

sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Article 3.a). The definition of domestic violence does not solely refer to acts committed against women, rather to any kind of physical, sexual, psychological or economic violence 'that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim' (Article 3.b). According to some commentators, the neutral formulation of the latter definition disregards the gender aspect of domestic violence, and it is more the outcome of a political compromise rather than of a clear understanding of the social problem.¹⁷

The Convention is, nonetheless, innovative, since it acknowledges that domestic violence is *one* of the forms of violence against women. If we imagine the two forms of violence in an Euler circle, we see that domestic violence is not a proper subset of violence against women, but the two sets overlap, since there are cases of domestic violence where the victim is not a woman. Given the data at the international level, however, it is clear that the intersection among the two sets is predominant. Legally speaking, the Convention does not overlook the fact that women are the majority but not the only victims of violence within domestic walls. Furthermore, States have legal obligations with regard to women (Article 2, para 1), whereas they are 'encouraged' to apply the Convention to 'all victims of domestic violence' (Article 2, para 2). The distinction among the two forms of violence could be useful in order to elaborate the definitions to be introduced in future legal instruments of the EU. The EU could decide, for example, to adopt a directive on domestic violence – as I will discuss further – which encompasses all hypotheses of violence, including against elderly people, men, and children.

¹⁷ Christine Chinkin and Kevät Nousiainen, *Legal Implications of EU Accession to the Istanbul Convention*, Luxembourg, 2016, p. 43. http://ec.europa.eu/justice/gender-equality/files/your_rights/istanbul_convention_report_final.pdf accessed 20 June 2016: 'violence against women is a human rights concern precisely because of the structural discrimination against, and subordination of, women that is both its cause and consequence. Domestic violence against men indubitably occurs but its incidence is not grounded in such structural discrimination'.

3. States' Obligations under the Convention

With regard to States' obligations deriving from treaty provisions, the Convention requires State parties to criminalise several conducts which amount to violence against women and domestic violence, whether these conducts have not yet been included in their respective criminal codes. The conducts encompass forced marriage, female genital mutilation, forced abortion, stalking, sexual harassment, physical and psychological violence and sexual violence. The Convention also requires State parties to ensure that in criminal proceedings regarding the acts of violence covered by the Convention, 'culture, custom, religion, tradition or so-called "honour" are not regarded as justifications of such acts' (Article 42, para 1).¹⁸

The Convention then obliges State parties to take the necessary legislative or other measures to ensure that the offences established in the Convention are punishable by effective, proportionate and dissuasive sanctions (Article 45), taking into account their seriousness and aggravating circumstances, such as the fact that the acts are committed in the presence of a child (Article 46). As for preventive and protective measures, States must promote 'changes in the social and cultural patterns of behavior of women and men with a view to eradicating customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men' (Article 12),¹⁹ and provide support services for victims of violence, including legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment (Article 20), specialist support services (Article 22), shelters (Article 23), and telephone helplines (Article 24). In order to implement the obligations set out the Convention, States must

¹⁸ For a more detailed analysis of the Istanbul Convention, let us refer to Sara De Vido, *Donne, Violenza e Diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011* (Mimesis 2016). The Convention, for example, does not address prostitution as a form of violence; secondly, it does not take into account new forms of violence such as the ones committed in the cyber world.

¹⁹ On the concrete actions to be undertaken in order to implement this article, see Marianne Hester, Sarah-Jane Lilley, 'Preventing Violence against Women: Article 12 of the Istanbul Convention' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e1fo> accessed 20 June 2016.

allocate 'appropriate measures and human resources', thus creating a precise legal obligation in terms of public expenditure.

In the analysis of States' obligations, it is useful to also mention Article 30(2) according to which:

Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming redress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

States may append reservation on this provision, and some State parties actually did upon ratification.²⁰

4. Compliance Mechanism under the Convention

The effectiveness of a treaty heavily depends on the existence of mechanisms whose purpose is to assess States' compliance with its mandatory obligations. For the assessment of compliance with treaty obligations, the Convention has established an independent expert body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), and a Committee of the parties, which is a political body. The group of experts will draw up and publish evaluation reports on the measures taken by parties in order to implement the Convention. Furthermore, GREVIO may initiate a special inquiry procedure in order to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention. After the adoption by the Committee of Ministers of the rules of the election procedure of the GREVIO members, in November 2014,²¹ the first ten members of the group were elected by the Committee of the Parties at its first meeting on 4 May 2015.²² GREVIO held its first meeting in September 2015 in Strasbourg. Its

²⁰ Andorra, Cyprus, Malta, Monaco, Poland, Romania, Serbia, Slovenia.

²¹ Resolution CM/Res (2014)43 on rules of the election procedure of the members of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). The Committee of the Ministers is composed of the Ministers of all 47 States Members of the Council of Europe.

²² The Committee of the Parties refers to the representatives of the State parties to the Istanbul Convention.

impact on national – and (potentially) European – legislation and policies cannot be assessed yet, but generally treaty bodies, despite producing only non-binding acts and recommendations, have proved to be effective mechanisms in order to guarantee respect for treaty obligations.²³

III. THE ACTION UNDERTAKEN BY THE EU TO COMBAT VIOLENCE AGAINST WOMEN

The protection of women from gender-based violence is neither enshrined in the EU treaties nor in the Charter of Fundamental Rights, a fact that has not prevented the EU from taking action to counteract the offences related to violence against women. The action of the EU has been mainly devoted to the achievement of gender equality, which also encompasses initiatives with regard to the eradication of violence against women.²⁴ I argue that this fragmented action with regard to the protection of women from violence is not enough to effectively counteract gender-based crimes and, as will be demonstrated in this and the subsequent section, that the ratification of the Istanbul Convention could provide a comprehensive legal framework for EU acts, both binding and non-binding, in that sector.

In the Treaty on the European Union (TEU), as amended by the Treaty of Lisbon, the focus is on the issue of 'equality between women and men', which constitutes at the same time a value (Article 2) and an objective (Article 3) of the EU.²⁵ In the Treaty on the Functioning of the European Union, among the provisions 'having general applications', Article 8 provides that 'in all its activities, the Union shall aim to eliminate inequalities, and to promote

²³ With regard to UN human rights treaty bodies, see Nigel S Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 621.

²⁴ See Tamara Herve, 'Thirty Years of EU Sex Equality Law: Leading Backwards, Looking Forwards' (2005) 12 *Maastricht Journal of European and Comparative Law* 307, 307 ff.; Sevil Sümer, *European Gender Regimes and Policies* (Ashgate 2009) 67.

²⁵ See Karl-Peter Sommermann, 'Article 3' in Herman-Joseph Blanke, Stelio Mangiameli (eds) *The Treaty on the European Union. A Commentary* (Springer 2013) 159. See also the preamble as amended by the Treaty of Lisbon: Member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.

equality, between men and women', whereas Article 19 TFEU enables legislation to combat 'all forms of discrimination, including on the basis of sex'. The well-known principle of equal pay between male and female workers (Article 157 TFEU, former Article 119 ECC and Article 141 EC) dates back to the very foundation of the then European Economic Community, and has been extensively interpreted by the Court of Justice of the European Union (CJEU).²⁶ Although initially conceived to pursue economic interests,²⁷ the principle of equality has been later interpreted by the Court of Justice as a 'general principle of EU law'.²⁸

The only reference to violence against women in the EU Treaties can be found in Declaration 19 to the Final Act of the 2007, referring to Article 8 TFEU, which provides that among the efforts to 'eliminate inequalities between women and men', the Union will aim to combat all kinds of domestic violence in its different policies.²⁹

As far as secondary legislation is concerned, several acts have been adopted over the years with regard the trafficking of human beings, in particular women and children,³⁰ and the victims of crime, including Regulation (EU) 606/2013 on the mutual recognition of protection measures in civil matters which will play a pivotal role in the recognition of restriction orders; and Directive 2012/29/EU, establishing minimum standards on the rights,

²⁶ For more, see: Susanne Burri and Sacha Prechal, *EU Gender Equality Law Update 2013* (European Commission 2014) 5. However, the norms related to parental rights have changed slowly. Clare McGlynn, 'Work, Family, and Parenthood: The European Union Agenda' in Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work and Family* (Oxford University Press 2005) 217; Kevät Nousiainen, 'Double Subsidiarity, Double Trouble? Allocating care responsibilities in the EU through social dialogue' in Anne Kovalainen, Marja Keränen, Hanne Marlene Dahl (eds.), *Europeanisation of Care and Gender: Global complexities* (Palgrave 2011) 21.

²⁷ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press 2010) 537.

²⁸ See, for example, Cases 117/76 and 16/77 *Ruckdeschel* ECLI:EU:C:1977:160, para. 7.

²⁹ Declaration on Article 8 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

³⁰ Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

support and protection of victims of crime (hereinafter 'Victims' Rights Directive').³¹ The EU addressed the offence of sexual harassment committed in the workplace in Council Directive 2000/78/EC, established a general framework for equal treatment in employment and occupation in Directive 2002/73/EC, and created Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation to address harassment, including sexual harassment.³²

Moving from legal instruments to policies and non-binding acts, it should be acknowledged that the EU has been prolific in the adoption of measures to address different aspects of gender inequality. The European Parliament has been active in addressing violence against women and domestic violence since as early as 1979, when it voted in favour of establishing the *ad hoc* Committee on women's rights.³³ Nowadays, the EU Parliament Committee on Women's Rights and Gender Equality continues its activity, dealing with several issues, including the eradication of violence against women.³⁴ Furthermore, in 2006, the EU established the European Institute for Gender Equality (EIGE) in Regulation (EC) No 1922/2006, which has recently

³¹ Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters [2013] OJ L 181/4. See also Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57; Directive 2011/99/EU on the European protection order [2011] OJ L 338/2.

³² Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2000] OJ L 269/15; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23. See also the European Added Value Assessment Combatting violence against women, 'An assessment accompanying the European Parliament's Legislative Own-Initiative Report (Rapporteur Antonia Parvanova, MEP)' (2013) 15 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-/eav_violence-against-women-en.pdf accessed 20 June 2016.

³³ It should be noted that Simone Veil was at that time the president of the European Parliament and the first woman to be elected for this position.

³⁴ Elimination of violence against women in the EU, procedure ongoing 2015/2855(RSP).

launched the Gender Equality Index 2015.³⁵ The European Commission, along with the support given to numerous awareness-raising campaigns in EU countries, adopted the Women's Charter in 2010,³⁶ and in June 2015 promoted a 'Forum on the Future of Gender Equality in the European Union'.³⁷

With specific regard to one form of violence against women – female genital mutilation – all EU institutions have clearly taken a position to prohibit this practice.³⁸

IV. THE RATIFICATION OF THE COUNCIL OF EUROPE ISTANBUL CONVENTION BY THE EU

In this section I will discuss the process of ratification by the EU of the Istanbul Convention, analysing first the legal basis of the – probably forthcoming – decision on ratification, and secondly, the impact of the Council of Europe legal instrument on EU policies. With regard to the latter,

³⁵ The progress in gender equality are still not sufficient. See <http://eige.europa.eu/news-and-events/news/eige-launches-gender-equality-index-2015-marginal-improvements-gender-equality> accessed 20 June 2016.

³⁶ Communication from the Commission, A Strengthened Commitment to Equality between Women and Men – A Women's Charter: Declaration by the European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women COM(2010) 78 final.

³⁷ See the Report of 10 June 2015 http://ec.europa.eu/justice/events/future-of-gender-equality-2015/files/report_forum_gender_equality_en.pdf accessed 20 June 2016.

³⁸ See, for example, European Parliament Resolution on Ending Female Genital Mutilation (2012/2684(RSP)); EU Commission, Communication to the European Parliament and the Council Towards the elimination of female genital mutilation COM(2013) 833 final; European Parliament Resolution on the Commission Communication entitled 'Towards the elimination of female genital mutilation' (2014/2511(RSP)); Council of the EU Justice and Home Affairs Conclusions on preventing and combating all forms of violence against women and girls, including female genital mutilation, 5 June 2014.

I will argue that one of the provisions of the Convention, namely Article 30(2), could be considered as having direct effect.

1. Legal Basis: Going beyond the EU Commission Proposal

Concerning the legal basis, in this sub-section I will first discuss whether the EU has competence to ratify a convention on violence against women, and on which grounds. I will then briefly illustrate the proposal of the European Commission included in the roadmap,³⁹ and finally suggest that the EU should also consider other articles of the TFEU as legal basis.

With regard to international treaties on human rights, despite its longstanding action in the protection of human rights, the EU has been reluctant in ratifying conventions in this field; for the time being, it has only ratified the UN Convention on the Rights of Persons with Disabilities.⁴⁰

The EU may conclude an international agreement where the conclusion of a treaty is necessary, 'within the framework of the Union's policies', to achieve one of the objectives referred to in the Treaties, 'or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope' (Article 216(1) TFEU). The central question is consequently the following: may the EU ratify a convention regarding the prevention and suppression of violence against women and domestic violence? Or, in other terms, does the EU have competence in this field?

I argue in this article that the answer is positive, as clearly anticipated by a commentator,⁴¹ and as confirmed by the roadmap and the proposal presented by the European Commission. First of all, the Council of Europe Istanbul Convention expressly paves the way for the EU accession, according to Article 75. The Convention is open for signature and ratification both by members and non-members of the Council of Europe, including the European Union. Secondly, shifting to the EU legal system, the EU has

³⁹ Roadmap (n 5).

⁴⁰ Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, ratified by the EU on 23 December 2010.

⁴¹ Steve Peers, 'Should the EU Ratify the Istanbul Convention on Violence against Women' (23 April 2014) <http://eulawanalysis.blogspot.co.uk/2014/04/should-eu-ratify-istanbul-convention-on.html> accessed 20 June 2016.

competence to ratify the Convention since violence is a form of gender-based discrimination, and gender equality constitutes one of the objectives enshrined in the founding Treaties. As acknowledged by the Commission, 'violence against women is a violation of their human rights and an extreme form of discrimination, entrenched in gender inequalities and contributing to maintaining and reinforcing them'.⁴²

According to the Commission, the legal bases which are of relevance with regard to the ratification of the Istanbul Convention are several;⁴³ nonetheless, since the 'predominant purpose' of the legal instrument consists of the prevention of violent crimes against women and the protection of victims, the Commission has decided to only consider Article 82(2) TFEU, providing for minimum rules to facilitate mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters; and Article 84 TFEU, envisaging measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.⁴⁴

However, I propose that the European Commission should also consider, in addition to the ones listed in the proposal, other Articles of the EU Treaties as legal basis, in order to further emphasise the importance of the EU action in combating violence against women. First, given the fact that violence against women is a form of discrimination on the basis of sex – or, better, on

⁴² Proposal for a Council Decision (n 6) 2.

⁴³ Article 16 TFEU (data protection), Article 19(1) TFEU (sex discrimination), Article 23 TFEU (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 TFEU (free movement of citizens, free movement of workers and freedom of establishment), Article 78 TFEU (asylum and subsidiary and temporary protection), Article 79 TFEU (immigration), Article 81 TFEU (judicial cooperation in civil matters), Article 82 TFEU (judicial cooperation in criminal matters), Article 83 TFEU (definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 TFEU (non-harmonising measures for crime prevention), and Article 157 TFEU (equal opportunities and equal treatment of men and women in areas of employment and occupation). Proposal for a Council Decision (n 6) 9.

⁴⁴ Proposal for a Council Decision (n 6) 9.

the basis of gender – the Commission should have used Article 19 TFEU as legal basis.⁴⁵

Secondly, the institution should have considered Article 168(1) TFEU, according to which Union action, in complementing national policies, 'shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health'.

Concerning the principle of non-discrimination, it should be acknowledged that adopting this legal basis has a precedent. The Council Decision of 26 November 2009 regarding the conclusion by the then European Community of the UN Convention on the Rights of Persons with Disabilities referred to Article 13 of the then Treaty of the European Communities (prohibition of discrimination, now Article 19 TFEU).⁴⁶ Therefore, this legal basis is pertinent to the ratification of the Istanbul Convention as well.

Focusing on Article 168 TFEU, violence against women, since it clearly causes severe bodily and mental injuries to women, is a 'public health' issue.⁴⁷ Despite the lack of an express reference to the right to health in the Council of Europe Convention, a reference to health policies is enshrined in the conventional text, namely Article 30. The individual right to health is increasingly becoming a national public health issue, and, in considering the international community as a network of actors, I agree with the World

⁴⁵ Article 19 TFEU (former Article 13 TEC) confers power to the Council and the European Parliament to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Discrimination on the ground of sexual orientation was introduced in the Charter of Fundamental Rights of the European Union, at its Article 21.

⁴⁶ Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities 2010/48 [2010] OJ L 23/35.

⁴⁷ World Health Organisation, 'Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence' (2013) 4 http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf accessed 20 June 2016.

Health Organisation that combating violence against women is becoming a global public issue that implies national and international efforts alike.⁴⁸

To envisage a more articulated legal basis – Articles 82 and 84 TFEU, but also 19 and 168 TFEU – for the future decision on ratification is more than a matter of mere formality, rather it would allow a stronger action in combating and preventing violence against women. This action would be characterized by both binding (directives) and non-binding (guidelines, best practices) acts.

2. Effects on EU Policies

Having in mind the legal bases that I discussed in the previous sub-section, I will now consider the impact of the Convention on EU policies. I will first discuss the possible adoption of EU directives related to specific crimes of violence against women. I will then propose that, in line with the action undertaken after the entry into force for the EU of the Convention on the Rights of Persons with Disabilities, the European Commission adopts a Strategy on violence against women as a form of discrimination on the basis of gender. Finally, I will argue that, despite having a flexible competence on issues of public health, the European Union could promote recommendations in order to provide guidelines to EU Member States in the adoption of preventive measures aimed at complying with the Convention. In that respect, I will contend that Article 168 TFEU could not be considered the legal basis for a directive regarding measures of harmonization, but rather for best practices aimed at directing States in the adoption of health policies against violence.

A. The Adoption of New EU Directives to Protect Women from Violence

As acknowledged by the European Parliament in its 2016 study on the issue of violence against women, EU policy concerning this sensitive issue is predominantly based on soft law acts, such as Council conclusions, resolutions of the Parliament, and Commission strategies.⁴⁹ The directives that I mentioned previously, such as the Victims' Rights Directive, 'have a

⁴⁸ WHO (n 47) 35.

⁴⁹ European Parliament, 'The Issue of Violence against Women in the European Union' (Brussels 2016) 41 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556931/IPOL_STU\(2016\)556931_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556931/IPOL_STU(2016)556931_EN.pdf) accessed 20 June 2016.

broader scope than just violence against women and therefore only make reference to this topic'; in other words, 'they are not specific enough'.⁵⁰ It is hence necessary to assess whether the adoption of directives by the European Parliament and the Council addressing specific instances of violence against women is possible, and desirable.

According to a study commissioned by the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the General Secretariat of the European Parliament, there is EU legal competence to adopt directives on some forms of violence against women.⁵¹ The study, which is also mentioned by the European Parliament in the aforementioned document, refers to four directives: on rape, on female genital mutilation, on domestic violence, and, as an alternative, a more general directive on violence against women.

With regard to the first directive proposed, the directive as legal instrument is considered to be useful in order to identify 'the minimum standard of the definition rape for purposes of effective judicial cooperation when there is a cross-border issue in bringing an alleged offender to justice'.⁵² The same can be argued with regard to female genital mutilation, an offence which is usually characterised by a transnational dimension.⁵³ The legal basis can be found in Articles 82 and 83 TFEU. Article 82 would allow the mutual recognition of judgments and judicial decisions related to convictions for rape and female genital mutilation practices. Furthermore, rape and female genital mutilation amount to 'sexual exploitation of women and children' (Article 83(1) TFEU) against which the European Parliament and the Council may 'establish

⁵⁰ European Parliament (n 49).

⁵¹ Sylvia Walby and Philippa Olive, European Added Value of a Directive on combatting violence against women, (Brussels, 2013) II-62 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/femm/dv/eav_violence-against-women-/eav_violence-against-women-en.pdf accessed 20 June 2016.

⁵² Walby and Olive (n 51).

⁵³ In the sense that families often return to their country of origin for the only purpose to force their daughters undergo female genital mutilation. See Sara De Vido 'Culturally Motivated Crimes in a Multicultural Europe. The case of Criminalization of FGM in the 2011 CoE Istanbul Convention' in Marilena Vecco and Lauso Zagato (eds.), *Citizens of Europe. Culture e diritti* (Ca' Foscari 2015) 93.

minimum rules concerning the definition of criminal offences and sanctions', in all cases where the offence presents a transnational dimension. The Council also has competence, according to Article 83(1) and acting unanimously provided that the European Parliament gives its approval, to adopt a decision identifying other areas of crime that meet the criteria specified in the same paragraph. Rape and female genital mutilation could be included in the list if the Council and the European Parliament agree so. I would add that the reference to Article 19 TFEU would be of utmost importance in order to stress the fact that these offences are gender-related.

As far as domestic violence is concerned, the reasoning is more complex, since domestic violence cannot be trivialized as merely 'sexual exploitation', in light of Article 83 TFEU; instead, sexual exploitation is *one* of the elements of domestic violence, which is also characterized by threats, economic violence, and psychological pressure. The study commissioned by the European Added Value Unit⁵⁴ identifies the legal basis of a future directive in Article 82(2) TFEU, concerning the adoption of directives aimed to establish minimum rules on the 'mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', in one of the following instances: 'a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision'.⁵⁵ Despite referring to the study, the European Parliament more cautiously relies on Article 84 TFEU, which excludes harmonisation of the criminal law of Member States but would constitute the legal basis to adopt measures aimed to 'pressure Member States to take action on national level to prevent domestic violence'.⁵⁶ The European legislative institutions will also have to decide whether to consider domestic violence as an offence only against women or also against children, men, elderly people, and members of the LGBTI community; the Istanbul Convention creates an

⁵⁴ The European Added Value Unit is part of the Directorate for Impact Assessment and European Added Value, which in turns is a depending entity of the Directorate-General for Parliamentary Research within the Secretariat of the European Parliament.

⁵⁵ Walby and Olive (n 51) 64.

⁵⁶ European Parliament (n 49) 43.

obligation on States with regard to domestic violence against women, but only encourages the parties to apply its provisions to all victims of domestic violence (Article 2(2) of the Istanbul Convention).

Furthermore, the study commissioned by the EU Added Value Unit suggests, as an alternative, the adoption of a general directive on violence against women, whose legal bases are Article 84 TFEU, which, as I said, excludes harmonisation, and Article 82 TFEU, concerning the adoption of directives aimed to establish minimum rules on the 'mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension' (Article 82(2)). A directive on violence against women could well include a minimum standard for the definitions of the different forms of violence.⁵⁷ This interesting proposal presents some elements of risks and one major obstacle. As for the former, first, a general directive on violence against women might be 'too general', hence unable to adequately address the phenomenon of violence against women; secondly, it can result in a mere 'copy and paste' of provisions of the Convention. The obstacle consists of the element of transnationality: despite the fact that the victim or the perpetrator of the offence may reasonably move from one EU Member State to the other, the directive will exclude purely internal situations, which, however, might represent the majority of cases of, for example, domestic violence. Nonetheless, Articles 82 and 84, possibly in conjunction with Article 19 TFEU to emphasize that violence against women is a form of discrimination on the basis of gender, are the most appropriate legal bases.

In sum, the adoption of binding instruments related to violence against women is of extreme importance. Nonetheless, one can reasonably argue that the implementation of the Istanbul Convention by the European Union, once completed the process of ratification, will consist of both binding and non-binding acts, and will pave the way for actions in less explored sectors, such as the protection of women's health.

⁵⁷ Walby and Olive (n 51) 65.

B. Learning the Lesson from the Process of Ratification of the UN Convention on the Rights of Persons with Disabilities

The ratification of the Istanbul Convention could depend on the adoption of a code of conduct, to be adopted before the deposition of the instrument of formal confirmation on behalf of the European Union, with the purpose to set internal arrangements for the implementation of the treaty provisions and to regulate the representation of the EU's position at the meetings of the GREVIO, the monitoring mechanism established by the Convention. In that respect, the Convention could learn the lesson from the ratification of the Convention on the Rights of Persons with Disabilities. According to the Council Decision 2010/48/EC concerning the conclusion of the Convention, in the matters falling within the shared competences of the then Community (now EU) and the Member States, 'the Commission and the Member States shall determine in advance the appropriate arrangements for representation of the Community's position at meetings of the bodies created by the UN Convention'.⁵⁸ The Decision envisaged that the Code of Conduct should have been prepared before the deposition of the instrument of formal confirmation on behalf of the Community.

The Code of Conduct was adopted the following year and it regulates the 'division of tasks' between the European Union and its Member States.⁵⁹ The principle of sincere cooperation inspires the text. Hence, for example, with regard to matters falling within shared competence and on matters falling within supporting competences, the EU and its Member States 'will aim at elaborating common positions', in particular as concerns legislative acts provided in the Declaration annexed to the Decision 2010/48/EC or new acts or policy measures aimed at, among other purposes, combating discrimination on the ground of disability, and ensure equal pay for male and female workers.⁶⁰ The Code of Conduct also coordinates the positions of the Union and its Member States before the Committee on the Rights of Persons

⁵⁸ Council Decision 2010/48/EC (n 46) Art. 4 para 2.

⁵⁹ Code of Conduct of 15 October 2010 between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities [2010] C 340/11.

⁶⁰ Code of Conduct (n 59) para 5.

with Disabilities at UN level. A Council Working Group was established to fulfil this function.⁶¹ With regard to the monitoring mechanism created by the Convention, 'reports of the Union and its Member States will cover their respective competences [...] and shall be complementary'.⁶²

A similar code of conduct could be envisaged for the ratification of the Istanbul Convention to coordinate the actions of the EU and its Member States.

Furthermore, given the fact that violence against women is a form of discrimination on the basis of gender, the Commission could prepare a strategy as it did for the Convention on the Rights of Persons with Disabilities.⁶³ The Strategy 2010-2020 identified the 'actions at EU level to supplement national ones', and determined 'the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection'.⁶⁴ The Strategy on violence against women could discuss the measures aimed at eradicating discrimination, for example by establishing a 'femicide watch' as suggested by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Dubravka Šimonović, in 2015.⁶⁵ This instrument would be in compliance with States' obligations deriving from the Convention, and, at the same time, it would follow the recommendation by the Special Rapporteur. She concretely proposed a collection of data on the number of femicides or cases of gender-related killings of women, disaggregated by age and ethnicity of victims, and the sex of the perpetrators, and indicating the relationship between the perpetrator and the victim or victims, which should be published every year, on 25 November.

⁶¹ Code of Conduct (n 59) para 6.

⁶² Code of Conduct (n 59) para 12.

⁶³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe COM/2010/0636 final.

⁶⁴ Communication (n 63) para 2.

⁶⁵ Report of the Special Rapporteur on violence against women, its causes and consequences Dubravka Šimonović A/HRC/32/42 (2016) para 45.

C. A Possible EU Action in the Field of Women's Health

I have anticipated that the health sector should constitute one of the prominent fields of intervention. In the following pages, I will argue that Article 168 TFEU can constitute the legal basis for the adoption of best practices in combating violence against women. I will also show that, despite being desirable, a directive harmonising measures on women's health as public health concern is not conceivable, though Article 114 TFEU offers some room for manoeuvre.

With regard to the first aspect, best practices can be adopted under EU law. It is worth clarifying that, although the health sector is still a matter which pertains to Member States' sovereignty,⁶⁶ the EU has some margin of action. The European Commission has already funded the Rights, Equality and Citizenship programme based on Article 168 TFEU, just to mention an illustrative example.⁶⁷ Furthermore, in its resolution of 10 March 2015 on progress on equality between women and men in the European Union in 2013, the European Parliament posited that 'sexual and reproductive rights are fundamental human rights and should be taken into account in the EU action programme in the field of health'.⁶⁸

Despite acknowledging that the implementation of health policies is a competence of the EU Member States, the European Parliament recommended that all Member States strengthen their free public services to support all women victims of violence, and encouraged the adoption of best practices among Member States.⁶⁹ Best practices on the establishment at national level of shelters for victims, the training of professionals, the promotion of educational programmes and awareness campaigns, just to make few examples, can be easily adopted by the European Commission upon recommendation, for example, of the Women's Rights and Gender

⁶⁶ On health as having a transversal nature, cutting across different areas of EU law, see Tamara Hervey, 'EU Health Law' in Catherine Barnard and Steve Peers (eds.), *European Union Law* (Oxford University Press 2014) 622.

⁶⁷ See also the reference to the 'improvement of health and lives of victims' in the roadmap: Roadmap (n 5) 4.

⁶⁸ European Parliament resolution on progress on equality between women and men in the European Union in 2013 (2014/2217(INI)).

⁶⁹ European Parliament resolution (n 68) paras 33 and 46.

Equality Committee of the European Parliament. Nevertheless, I am referring here to non-binding instruments, which might hinder the correct implementation of the Council of Europe Istanbul Convention.

Turning to the second aspect, I am arguing that harmonising measures on health policies are inconceivable under Article 168 TFEU, but not excluded with regard to cross-border healthcare under the combined legal basis of Articles 168 and 114 TFEU. A directive regarding health policies in the prevention and protection of women victims of violence would surely constitute a very useful instrument in this field. However, the question is whether or not we can find in the founding treaties the correct legal basis. By only applying Article 168 TFEU, even if combined with the flexibility clause enshrined in Article 352 TFEU, the answer will be negative. First, Article 168(5) TFEU excludes 'any harmonisation of the laws and regulations of the Member States'. As acknowledged by the Court in the *Tobacco Advertising Directive* judgment, although the then Article 129(4) TEC (now Article 168 TFEU) did not imply that 'harmonising measures adopted on the basis of other provisions of the treaty [could] not have any impact on the protection of human health', other Articles of the Treaty could not be used 'as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty'.⁷⁰ In the case at issue, the European Court of Justice annulled the 1998 Tobacco Advertising Directive on the grounds that 'the directive was a disguised health measure rather than an internal market provision'.⁷¹ The subsequent cases confirmed that European

⁷⁰ Case C-376/98 *Germany v Council* ECLI:EU:C:2000:544, paras 78-79. See on the judgment, Robert Schütze, 'EU Competences. Existence and Exercise' in Anthony Arnall and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 82; Hervey (n 66) 646; Tamara Hervey and Jean V McHale, *Health Law and the European Union* (Cambridge University Press 2004) 96. The case originated as an application lodged by the Republic of Germany for the annulment of Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1998] OJ L 213/9. The pleas alleged that the legal basis – then Article 95 TEC, now 114 TFEU – was incorrect. The Directive was eventually annulled by the Court. See also Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:2006:772, para 95.

⁷¹ Fernanda Nicola and Fabio Marchetti, 'Constitutionalizing Tobacco: The Ambivalence of European Federalism' (2005) 46 *Harvard International Law Journal*

Union has competence to harmonise divergent national laws which may adversely affect the internal market, but it is precluded from adopting 'measures that have the effect of harmonising excluding areas beyond what is necessary to eliminate distortions of competitions'.⁷²

Secondly, one cannot refer to Article 352 TFEU, which provides that the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, can adopt the appropriate measures to attain one of the objectives set out in the Treaties, where the Treaty has not provided the necessary powers. Although the then Article 308 TEC (now 352 TFEU) constituted the legal basis of the 2004 Directive relating to compensation of crime victims,⁷³ after the entry into force of the Treaty of Lisbon its application has become impossible in the field of public health. Article 352(3) TFEU is extremely clear in that respect: 'Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation'.⁷⁴

With regard to some aspects related to the protection of female victims of violence, it is possible to invoke the combined legal basis of Article 114 and Article 168 TFEU. As it is known, according Article 114 TFEU the European Parliament and the Council can adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health is to be guaranteed

507, 517; Geraint G. Howells, 'Federalism in USA and EC - The Scope of Harmonised Legislative Activity Compared' (2002) 5 *European Review of Private Law* 601, 604–05; Stephen Weatherill, 'The Commission's Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis' (2002) 13 *European Business Law Review* 497, 503–05.

⁷² Lorna Woods and Philippa Watson, *EU Law* (Oxford University Press 2009) 353. See also Case C-491/01 *R v Secretary of State for Health, ex parte British American Tobacco and others* ECLI:EU:C:2002:741, paras 95–96: in that case the conditions under Art. 95 TEC (now Art. 114 TFEU) were met.

⁷³ Council Directive 2004/80 relating to compensation to crime victims [2004] L 261/15.

⁷⁴ Its application in the field of public health was theorised, before Lisbon, by Hervey and McHale (n 70) 88.

taking account in particular of any new development based on scientific facts. As antecedent, it is worth mentioning here the EU Directive on the application of patients' right in cross-border healthcare, which was precisely adopted having regard to both Article 114 and Article 168 TFEU.⁷⁵ Concerning women's health, a new directive, or an amendment to the Directive on patients' right already in force, could provide the possibility for women to receive cross-border healthcare which can better respond to the physical and psychological consequences of violence. The effects of violence, in particular sexual violence, are severe, such as anxiety, mental distress, hopelessness, suicidability, and require attentive medical support to allow the female victim to recover.⁷⁶ Hence a directive or an amendment to the already existing directive could be a useful instrument in order to implement the provisions of the Istanbul Convention.⁷⁷

The reference to Article 168 TFEU in the (possible) future Council Decision concluding the agreement for the accession of the EU to the Council of Europe Istanbul Convention appears of extreme importance, since it would stress the relevance of such policies for the EU and for its Member States, and the fact that violence against women *is* a public health issue.

3. The Direct Effect of Article 30(2) of the Council of Europe Istanbul Convention and its Consequences

In this sub-section, I will argue that Article 30(2) of the Istanbul Convention has direct effect, and it creates a right for the female victim of gender-based violence to receive compensation for severe impairment of her health. As an alternative, even denying direct effect to the provision of the Convention, an obligation for States to compensate victims of violence does exist under EU law, which, as we will see, precisely obliges States to create an *ad hoc*

⁷⁵ Directive 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45.

⁷⁶ John Briere and Carol E Jordan, 'Violence against women: Outcome complexity and implications for assessment and treatment' (2004) 19 *Journal of Interpersonal Violence* 1252, 1253.

⁷⁷ I am referring to Articles 20, 22 and 25 of the Istanbul Convention on the provision of services to female victims of violence.

mechanism of compensation. I will eventually assess the impact of the Istanbul Convention in that respect.

Let us start from the issue of direct effect. Once in force in the EU, an international agreement is binding both 'upon the institutions of the Union and its Member States' (Article 216(2) TFEU). Even without ratifying a treaty, EU Member States are bound by international treaties concluded by the EU, but 'on the basis of EU law, rather than on the basis of international law'.⁷⁸ Indeed treaty provisions, the CJEU posited, form 'an integral part of the EU legal system'.⁷⁹ In other words, States cannot 'ignore' international agreements concluded by the EU, although this does not automatically mean that all their provisions have direct effect.⁸⁰

Nonetheless, as pointed out by former judge of the then European Community Court of Justice, Pierre Pescatore, 'though the Court has showed that it is willing to recognise the direct effect of certain provisions of international agreements, its attitude in this respect is much more reserved than in the field of Community law'.⁸¹

The 'attitude' of the Court demonstrates that the topic is of 'intensively political nature', and that the notion of direct effect, 'in any given case, is contested, and is bound to be contested'.⁸² This article neither purports to illustrate or revisit the 'doctrine' of direct effect, which has been subject to deep doctrinal scrutiny,⁸³ nor to re-analyse all the relevant judgments by the

⁷⁸ Bart Von Vooren and Ramses A. Wessel, *EU External Relations Law* (Cambridge University Press 2014) 42.

⁷⁹ Case 181/73 *Haegeman v Belgium* ECLI:EU:C:1974:41, paras 2-6. See Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 325.

⁸⁰ Von Vooren and Wessel (n 78) 42.

⁸¹ Pierre Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (2015) 40 *European Law Review* 135, 149.

⁸² Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect' (2001) 21 *Yearbook of European Union Law* 263, 264.

⁸³ See, *inter alia*, the contribution in the special section dedicated to *Van Gend en Loos*: A Joint Symposium with the International Journal of Constitutional Law (I•CON) (2014) 25 *European Journal of International Law* 94. All manuals dedicated a part to the direct effect of EU law. See, e.g., Chalmers (n 27) 284; Woods and Watson (n 72) 100; Hervey (n 66) 143; in Italian, see the outstanding works by Giuseppe Tesaro, *Diritto dell'Unione europea* (Cedam 2012); Roberto Adam and Antonio Tizzano, *Manuale di*

Court of Justice on the direct effect of international treaties.⁸⁴ The purpose is rather to analyse whether or not a specific provision of the Council of Europe Istanbul Convention has direct effect. The reasoning of the Court has never been very clear in that respect, denying the direct application of the provisions of both the WTO Treaty and of the Aarhus Convention, and confirming the direct effect of provisions in some other agreements.⁸⁵ Hence, we can only speculate, having in mind the legal reasoning of the Court, about the possible outcome of a case filed before it with regard to the implementation of the Council of Europe Istanbul Convention. This hypothesis is based on the fact that the EU will ratify the Convention.

The CJEU affirmed that a provision enshrined in an international treaty must be regarded as being directly applicable when, 'regard being had to its wording and to the purpose and nature of the agreement', it contains a 'clear and precise' obligation which, in other words, is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁸⁶ Accordingly, two elements are necessary in order to assess the direct effect of

diritto dell'Unione europea (Giappichelli 2014); in French, Jean-Paul Jacqué, *Droit institutionnel de l'Union européenne* (Dalloz 2012).

⁸⁴ See, *inter alia*, Von Vooren and Wessel (n 78) 228; Eeckhout (n 79) 327; Mario Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) 94.

⁸⁵ Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 *European Journal of International Law* 151, 153; Woods and Watson (n 72) 119; Pieter Jan Kuijper et al (eds), *The Law of EU External Relations* (Oxford University Press 2013) 929. The ECJ confirmed the direct effect of a bilateral trade agreement in Case 104/81 *Hauptzollamt Mainz v Kupferberg* ECLI:EU:C:1982:362, para 7; and of a partnership and cooperation agreement with Russia in Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* ECLI:EU:C:2005:213, para 29. The Court denied direct effect to Article 9 of the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ECLI:EU:C:2011:125, para 52; of the WTO agreement since the judgment Joined cases 21/72 and 24/72, *International Fruit Company and Others v Produktschap voor Groenten en Fruit* ECLI:EU:C:1972:115, para 27; of the Montego Bay Convention for the Law of the Sea in Case C-308/06 *Intertanko and Others v Secretary of State for Transport* ECLI:EU:C:2008:312, para 64.

⁸⁶ Case C-240/09 *Lesoochranárske zoskupenie VLK* (n 85) para 44.

a treaty provision: the wording of the provision on the one hand, and the purpose and the nature of the agreement, on the other hand.⁸⁷

With regard to the specific case of the Council of Europe Istanbul Convention, the majority of its provisions contain States' due diligence obligations; in other words, obligations of means rather than of results. However, Article 30(2) of the Convention which, requires States to compensate victims of violence who have sustained 'serious injury or impairment of health' to the extent that 'the damage is not covered by other sources, such as the perpetrator, insurance or State-funded health and social provisions', seems to have a different nature. Although the provision does not explicitly confer rights to individuals,⁸⁸ one may argue that it contains a 'clear and precise obligation capable of directly regulating the legal position of individuals'.⁸⁹ As a consequence, a woman victim of violence can invoke the individual right to compensation before a national court, even though the State of the *forum* (Member State of the European Union) has not ratified the Convention.⁹⁰ In other words, in light of the Convention, a judge should decide that a woman is entitled to a reparation which must be provided by the State in the case in which the perpetrator is not able to provide it.

A major objection can be raised in that respect: the norm does not have direct effect since it is always necessary that the State adopts a mechanism of

⁸⁷ Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 *European Journal of International Law* 129, 140.

⁸⁸ Martines (n 87) 138.

⁸⁹ Case C-240/09 *Lesoochránárske zoskupenie VLK* (n 85) para 45. See also, with regard to Art 30, Roberto Senigaglia, 'La Convenzione di Istanbul contro la violenza nei confronti delle donne e domestica tra ordini di protezione e responsabilità civile endofamiliare' [2015] *Rivista di diritto privato* 135.

⁹⁰ *Mutatis mutandis*, the International Court of Justice derived the right of the individual to 'consular assistance' from States' obligations under Article 36(1)(b) of the Vienna Convention on Consular Relations. See *Germany v United States* [2001] ICJ Reports 466, para 77 (*LaGrand* case). In the case at issue, two German brothers were executed by the State of Arizona despite numerous pleas arguing that US officials had violated their right to consular access. According to the Court, Article 36(1)(b), obliges the receiving State to inform the consular post of the sending State of the individual detention 'without delay'; the clarity of the provision leaves no doubt on the fact that the article creates 'individual rights'. See also *Mexico v United States* [2004] ICJ Reports 12 (*Avena and other Mexican nationals* case), paras 130-131.

compensation. Therefore, I now move to the second aspect of the argument. Even though it might be controversial whether or not Article 30(2) has direct effect, it should be acknowledged that States are obliged under EU law, in particular under Council Directive 2004/80⁹¹, to establish a compensation scheme for victims of violent intentional crime committed in their respective territories, provided that it refers to cross-border situations (Article 12). According to a report issued by the European Commission in 2009, 25 EU Member States have put in place such scheme.⁹² Therefore, a mechanism to compensate women victims of violence should be active in the majority of EU Member States and the application of Article 30(2) of the Council of Europe Istanbul Convention would not be prevented.

The Directive 2004/80 is however only applicable with regard to violent intentional crime committed in a Member State other than the Member State where the applicant for compensation is habitually resident (Article 1). It therefore appears useless in hypothesis of, for example, domestic violence which occurs at national level. This limitation clearly emerged in the order of the Court of Justice of the European Union adopted on 30 January 2014, *Paola C. v. Presidenza del Consiglio dei Ministri*.⁹³ In that case, the claimant tried to have compensation from the Italian State for being victim of sexual violence, since the perpetrator could not afford the compensation. However, the Court posited that the directive did not apply to purely domestic cases, but only to transnational ones. A commentator has considered the judgment as a form of 'reverse discrimination' against rape victims.⁹⁴ The entry into force of the Convention could determine an evolution in the interpretation of the Directive 2004/80. The CJEU posited that 'the primacy of

⁹¹ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L261/15.

⁹² Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 20 April 2009 on the application of Council Directive 2004/80/EC relating to compensation to crime victims COM(2009) 170 Final.

⁹³ Order of the Court, Case C-122/13 *Paola C. v. Presidenza del Consiglio dei Ministri* ECLI:EU:C:2014:59, paras 17-18.

⁹⁴ Steve Peers, 'Reverse Discrimination against Rape Victims: A Disappointing Ruling of the CJEU' (24 March 2014) <http://eulawanalysis.blogspot.co.uk/2014/03/compensation-for-crime-victims.html> accessed 20 June 2016.

international agreements concluded by the Community over provisions of secondary Community legislation meant that such provisions had to be interpreted, as far as possible, in a manner consistent with those agreements'.⁹⁵ Accordingly, in cases of violence against women or domestic violence, the directive should be interpreted in such a way as to guarantee a system of adequate compensation to the victims, notwithstanding the fact that the offence occurred within the territory of the State where the applicant for compensation was habitually resident.⁹⁶

In other words, even in the case in which the Court of Justice affirms that the provisions of the Istanbul Convention are not directly applicable, the latter would have an 'indirect effect',⁹⁷ namely the obligation for national judges to interpret EU law in a manner that is consistent with the agreement.⁹⁸ Hence, for example, as pointed out by an author, 'EU law must be interpreted to mean victims receive a residence permit based on their personal situation, if the authorities consider it necessary (Article 59(3) of the Convention)'.⁹⁹

Furthermore, the European Commission could start an infringement procedure against the Member States which did not correctly apply the provisions of the Convention as transposed into EU law, in relation to all instances within the exclusive competence of the European Union or for which the European Union has exercised its competence by means of the adoption of a directive.

⁹⁵ Case C-61/94 *Commission v Germany* ECLI:EU:C:1996:313, para 52.

⁹⁶ The Advocate General Yves Bot has come to the same conclusion, though, even without relying on the Istanbul Convention. See his conclusions in Case C-601/14, *European Commission v Italy* ECLI:EU:C:2016:249, para 80. The Advocate General considers a mechanism to compensate victims of violent offences within the territory of a Member State as a prerequisite for the application of such a system according to the directive.

⁹⁷ The CJEU denied the direct effect of the provisions of the UN Convention on the Rights of Persons with Disabilities in Case C 363/12 *Z v. A Government department and The Board of Management of a Community School*, para 90.

⁹⁸ Steve Peers, 'Violence against women: what will be the impact of the EU signing the Istanbul Convention?' (4 March 2016) <http://eulawanalysis.blogspot.it/2016/03/violence-against-women-what-will-be.html> accessed on 20 June 2016. See also Case C-61/94 *Commission v Germany* (n 95), para 52.

⁹⁹ Peers (n 98).

V. CONCLUSION

Given the analysis above, the EU should achieve the ratification of the Council of Europe Istanbul Convention – a process that has already started – in order to provide a more coherent legal framework with regard to the actions to counter violence against women at EU level. The European institutions have already adopted measures aimed at combating violence against women, but by virtue of the Istanbul Convention they could provide States guidelines on the best measures to adopt in order to implement the Convention itself. Furthermore, the Commission could propose to the European Parliament and the Council some directives whose purpose would be to harmonise at EU level measures of prevention and protection of victims of domestic violence, and women victims of all forms of violence. The EU action would be monitored by the mechanism of compliance established by the Convention (GREVIO), which can address the points of strengths and weaknesses of the measures adopted.

The positive impact of the Istanbul Convention is not limited to EU policies and legislation. I have argued in this article that one of the provisions of the Convention has direct effect in the EU Member States' legal systems; hence it directly governs the legal position of the individuals. Accordingly, a woman victim of violence who has suffered serious impairment of health can ask the national judge for a compensation directly from the State, if this compensation cannot be provided by the perpetrator of the violence. Nonetheless, even assuming that Article 30(2) would not have direct effect, if the Istanbul Convention were in force in the EU, secondary legislation – the directive regarding compensation for victims of violence, for example – can be interpreted in a manner consistent with the Convention. By virtue of consistent interpretation, the directive could indeed provide wider protection than the one expressly enshrined in its provisions. To achieve this scope, I have suggested that the EU should not append reservation to Article 30(2) of the Convention – a reservation that I deem to be contrary to the spirit of the EU, and its practice undertaken so far.

It might be counter-argued that a decision by the Council, requiring EU Member States to ratify the Convention, would be enough without raising questions of EU competence. However, I agree with a commentator stressing the fact that ratification could 'address the argument that the EU

has double standards as regards human rights, insisting that Member States, would-be Member States and associated countries should uphold human rights standards that the EU does not apply itself.¹⁰⁰

Another objection could be related to the worrying data regarding violence against women: the number of women victims of violence has not diminished notwithstanding the increasing number of acts addressing the issue adopted at international and national level. However, even though law is not enough to determine a cultural change, which is fundamental to eradicate the 'structural' violence against women, I am convinced that it is a necessary instrument to – at least – reflect on and promote this change.

¹⁰⁰ Peers (n 98).

FREEDOM TO CONDUCT BUSINESS IN EU LAW: FREEDOM FROM INTERFERENCE OR FREEDOM FROM DOMINATION?

Eduardo Gill-Pedro*

What understanding of freedom does the EU freedom to conduct business protect? This article distinguishes between two understandings of freedom – freedom as non-interference and freedom as non-domination, and argues that both the text of Article 16 of the Charter and the pre-Charter case law suggest an understanding of freedom as non-domination. However, in recent case law, the Court appears to have move towards an understanding of freedom as non-interference. This article highlights the implications of such a move for national democracies.

Keywords: Charter of Fundamental Rights of the EU, right to conduct business, freedom, republican theory, *Alemo-Herron*

TABLE OF CONTENTS

I. INTRODUCTION	104
II. FREEDOM AS NON-INTERFERENCE OR AS NON-DOMINATION?.....	105
1. <i>Loss of Freedom without Interference</i>	106
2. <i>Interference without Loss of Freedom</i>	108
3. <i>The Value of Civic Freedom</i>	110
III. THE EU RIGHT TO CONDUCT BUSINESS AS A REPUBLICAN FREEDOM....	112
1. <i>The CJEU's Case Law</i>	114
2. <i>Freedom from National Regulation</i>	119
IV. TRANSFORMING THE RIGHT TO CONDUCT BUSINESS.....	122
1. <i>Alemo-Herron</i>	123
2. <i>Prohibiting That Which Is Allowed by National Law</i>	126
3. <i>Prohibiting That Which Is Allowed by EU Law</i>	127
4. <i>The Transformation of the Right to Conduct Business</i>	128

* Post Doctoral Researcher, Faculty of Law, Lund University

V. THE IMPLICATIONS OF PROTECTING FREEDOM AS NON-INTERFERENCE.....	129
VI. CONCLUSION	134

I. INTRODUCTION

The freedom of individuals and enterprises to engage in economic activity, to enjoy freedom of contract and to compete freely in the market is protected as an EU fundamental right, under Article 16 of the Charter of Fundamental Rights of the EU, which states that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.

The inclusion of the freedom to conduct business as a fundamental right guaranteed by the Charter, entails its recognition not only as a legal right, but as a legal right which reflects a moral concern.¹

This article will investigate what that moral concern might be. What morally relevant interest is the EU seeking to protect when recognising the freedom to conduct business as a fundamental legal right? The obvious answer, I suggest, is freedom – the freedom of those who may wish to conduct business. However, freedom is an ambiguous and controversial moral concept. In this article, I will begin in Section II by contrasting two understandings of the concept of freedom: freedom as non-interference and freedom as non-domination. I will then argue in Section III that the text of Article 16, and the caselaw of the CJEU, until recently, can be seen as compatible with an

¹ As Besson puts it 'legal human rights are fundamental and general moral interests recognised by the law as sufficiently important to generate moral duties'. Similarly, Habermas stipulates that 'human rights circumscribe precisely that part (and only that part) of morality which can be translated into the medium of coercive law'. So there is an irreducible connection between human rights as moral concerns and human rights as legal norms. As Forst emphasises, 'human rights have a moral life, expressing urgent human concerns and claims that must not be violated or ignored [...and] they also have a legal life' (S. Besson, 'Human rights and democracy in a global context: decoupling and recoupling' (2011) 4 *Ethics & Global Politics* 19, 25; J. Habermas, 'The concept of human dignity and the realistic Utopia of human rights' (2010) 41 *Metaphilosophy* 464, 470 and R. Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) *Ethics*, 711).

understanding of freedom as non-domination. However, in Section IV, I will show how the case of *Alemo-Herron* and associated developments, appear to indicate an interpretation of the right to conduct business as protecting freedom understood as non-interference.

These developments, while appearing to uphold freedom, if we conceive of freedom as non-interference, may also be seen as diminishing freedom, if we conceive of freedom as non-domination. I will conclude by arguing that these developments can be seen as depriving the national polity of the freedom to regulate their collective life together by democratic means, and of the possibility for the national polity to protect the freedom of its members from being dominated by others.

II. FREEDOM AS NON-INTERFERENCE OR AS NON-DOMINATION?

There is an understanding of freedom, which can be termed 'freedom as non-interference', which has been a very influential in Western political thought. It has been most elegantly articulated by Isaiah Berlin.² For Berlin, social and political freedom entails 'the absence of obstacles to choices and activities' which may be open to a person.³ A person is free, in regard to any salient area of activity, when she or he has a number of options open to her or him, and that person's freedom is diminished whenever other persons interfere with her or his possibility to choose one of those options. The mere fact that the person does not have the opportunity or capacity to do something does not

² See in particular I. Berlin 'Two Concepts of Liberty' in I. Berlin, and H. Hardy, (eds), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002).

³ *ibid* 32. In the original essay Berlin stated that freedom entails non-interference with an individual's ability to choose according to her or his desires (*ibid* 128). However, Berlin later recognised that this was an error – a person is deprived of freedom not only when she is precluded from choosing something that she actually desires, but also when the number of options open to her are reduced. As Berlin acknowledges, 'if freedom is simply not to be prevented by other persons from doing whatever one wishes, then one way of attaining such freedom is by extinguishing one's wishes' (I Berlin 'Introduction' in I. Berlin, and H. Hardy (eds), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002), 31).

diminish her or his freedom.⁴ According to Berlin it is only 'if I am prevented *by others* from doing what I could otherwise do, I am to that degree unfree'.⁵

This is not the only possible understanding of freedom.⁶ Phillip Pettit has criticized it as inadequate on two grounds. First, because it fails to acknowledge that there can be a diminution of freedom even in the absence of interference, and second, because it fails to recognize that not all interferences with an individual's ability to choose entails a diminution of freedom.⁷ I will elaborate this criticism and present Pettit's own understanding of freedom.

1. Loss of Freedom without Interference

Freedom as non-interference is a product of the choices open to an individual. Berlin uses the metaphor of open doors – an individual is free to the extent that there are a number of possible doors that are open to her or him, and to the extent that those doors are free from obstacles. So on this view, if person B is able to choose between option x, y and z in respect of some important aspect of her life,⁸ then B is free to that extent. Her freedom is reduced when someone interferes with her ability to choose one or more of

⁴ It is only 'the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes' which makes me unfree (ibid 176).

⁵ ibid 169 (emphasis added).

⁶ In fact, Berlin presents, as the title of the essay suggests, two concepts of 'liberty': negative liberty, which he conceives as non-interference, and 'positive liberty' which he equates with the possibility of self-realisation of the individual's true self. Berlin emphasises that this concept of 'liberty' negates the possibility of individual freedom and is irreconcilable with a notion of freedom as non-interference. So for Berlin, only negative liberty can be called 'freedom'. I do not take issue with Berlin in his claim that 'positive liberty' cannot be equated with freedom. I will however argue that Berlin presents a false dichotomy, because 'negative liberty' can itself be conceived as 'freedom as non-interference' and 'freedom as non-domination'.

⁷ The seminal work is Pettit *Republicanism: A theory of freedom and government* (OUP 1999). See also Pettit 'Republican Freedom: Three axioms, four theorems' in C. Laborde and J. Maynor (eds.) *Republicanism and Political Theory* (Blackwell 2008).

⁸ Freedom is thus a function of my ability to choose in respect of matters that 'are important in my plan of life, given my character and circumstances' (Berlin (n 2), 177)

those options, by preventing, or making more difficult for her to choose that option or options.

Pettit argues that this fails to account for the possibility that freedom can also be reduced in situations where there is no interference with the actual choices which are available to a person. He therefore proposes a different conception of freedom, which builds on the republican tradition of political thought,⁹ and which he terms 'freedom as non-domination'. Under this conception, freedom is diminished not only by actual interference, but also by domination. Domination entails the possibility of one person (or group, or institution) exercising control over the choices of another – when one person has 'alien control'¹⁰ over another. So freedom is not only compromised when person A interferes with the choices open to person B, but also when person A is able to control the choices which B makes, even if no actual interference occurs.¹¹

According to the concept of freedom as non-interference, the existence of such relationships of dominance has no impact on freedom if those who are in a position to exercise 'alien control' refrain from interfering with the choices open to those whom they dominate. So according to Berlin 'liberty is not incompatible with some kinds of autocracy' and 'it is perfectly possible that a liberal minded despot will allow his subjects a large measure of [...] freedom'.¹² By contrast, where freedom is conceived as non-domination, it is

⁹ It should be noted that Pettit himself does not claim that the conception of freedom as non-domination is his own original idea, but is his articulation of 'an ideal which has deep roots in the history of thought' and reflects a tradition that goes back to 'at least to the Roman republican way of thinking about freedom, and survived though the Renaissance and the English republic [...] to become a centerpiece of political thought in the 18th century' (Pettit 'The Instability of Freedom as Noninterference: The Case of Isaiah Berlin' (2011) 121 *Ethics* 693, 708).

¹⁰ According to Pettit, 'alien control' arises where A has desires over how B chooses, A acts on those desires, A's action or presence makes a desired difference to how B chooses. So there is an element of intentionality to alien control, on the part of A – A has to want B to choose in a particular way (Pettit *Republicanism*, 22 ff and Pettit 'Three Axioms', 102 (both n 7)).

¹¹ Pettit suggests that alien control may be exercised through invigilation – A is able to invigilate the choices which B makes (Pettit 'Three Axioms' (n 7)).

¹² Berlin (n 2), 176.

wholly incompatible with subjugation to a despot, because while such a despot 'might allow his subjects free choice', she or he will nonetheless always be in a position to exercise invigilation and control over how those subjects choose. Domination is thus a function of unequal power between such persons or groups.¹³

So, as Pettit argues, a conception of freedom as non-interference is incomplete. It fails to account for those circumstances where the freedom of persons is diminished not by any interference in the choices that they make, but by the existence of relations of domination – relations where one person, or group, is able to exercise oversight and control over the choices made by other persons.¹⁴ In freedom as non-domination, therefore, the focus shifts from the extent to which a person's choices are restricted to the extent to which a person is subject to the control of other persons in the making of choices – in other words, the focus shifts from the freedom of choices and the notion of a free person as one who has free choices, to the freedom of person and the notion of a free choice as one which is made by a free person.¹⁵

2. *Interference without Loss of Freedom*

The incompleteness of the conception of freedom as non-interference is double-edged. Not only does this conception miss those situations where there is loss of freedom without interference, but it assumes that all interferences with the ability of individuals to choose amount to a restriction of that individual's freedom. However, if we conceive of freedom as non-domination we can see that there can be interferences in the choices of

¹³ C. Laborde 'Republicanism in M. Freeden and M. Stears (eds) *Oxford Handbook of Political Ideologies* (OUP 2013).

¹⁴ Pettit points out that Berlin's conception of freedom would count as free a person (B), who is subject to the control of another (A), in respect of the choice between X and Y, where B is able to ingratiate himself to A so that A will not interfere with B's choice. In this scenario, it appears that the freedom of B to choose between X and Y has not been interfered with, because B was able to persuade A (who could have interfered) not to interfere. But as Pettit points out 'you cannot make yourself free [where freedom is understood as non-domination] by cozying up to the powerful and keeping them sweet' (Pettit (n 9), 705).

¹⁵ Pettit 'Free Persons and Free Choices' (2007) 28 *History of Political Thought* 709.

individuals which do not entail a loss of freedom, because they do not entail a domination of one person by another.

The mechanism which allows for such interference without domination is democratic control. Where a law is enacted in a manner which allows those subject to the law to exercise control over it¹⁶ and where laws 'are forced to track the perceived interests of those on whom they are imposed'¹⁷ then those subject to the law are not subject to domination by any one person or group – they are not subject to arbitrary rule by another.¹⁸

The person subject to that law may find that the choices open to her have been diminished. We can use as an example a law that prohibits driving over 50 km/h in a built-up area, which clearly interferes with the choice of a driver to drive over that speed. But if that law was enacted through a process in which that person had some measure of control, then, under the concept of freedom as non-domination, her freedom was not diminished by that restriction of her choices. The freedom of the driver to *choose* to drive fast is

¹⁶ What kind of control would suffice is a matter which goes beyond the scope of this paper, and thus one in which I will not go to in detail, but, following Pettit, it would need to more than mere causal effect, but it would not need to be intentional direction. (Pettit, 'Three Conceptions of Democratic Control' (2008) 15 *Constellations*, 46).

¹⁷ Pettit, 'Republican Freedom and Contestatory Democratization' in I. Shapiro and C. Hacker-Cardón (eds) (CUP 1999), 170.

¹⁸ Of course, it will never be possible to demonstrate that any particular law is truly non-arbitrary, and adequately tracks the interests of those over whom it claims authority. Pettit emphasises that the most important element of democratic control is the ability of those who are subject to the law to contest that law (Pettit, (fn 17)). This echoes the theory of democracy of Claude Lefort, who argues that democracy 'invites us to replace the notion of a legitimate law with the notion of a debate about what is legitimate and what is illegitimate, a debate which is necessarily without any guarantor and without any end' (C. Lefort 'The Question of Democracy' in *Democracy and Political Theory* (Transl. D. Macey) (Polity 1998), 39). For Lefort therefore 'it is the very fact that every single individual over whom that authority is claimed has the right to reject that claim, and denounce it as hollow and wrong, which gives any claim of authority democratic legitimacy.' (C. Lefort 'Human Rights and the Welfare State' in *Democracy and Political Theory*, (Transl. D. Macey) (Polity 1998), 41).

taken away,¹⁹ and this is not remedied by arguing that she should not have chosen to drive fast. But she is not deprived of freedom, understood as non-domination, because it is not any one person imposing their choices on her, but it is a rule which results from a process over which the driver herself had a measure of control. What prevents the restriction on the driver's freedom of choice from being dominating is not that it was 'correct' but that it was imposed by a process over which the driver had control, so it was not the imposition of an alien will on her.

3. *The Value of Civic Freedom*

Where we conceive of freedom of as non-domination, we can see that it is possible for law to restrict choices without thereby diminishing freedom. But its effect goes further. The introduction of laws which restrict the freedom of choice of persons can have the effect of protecting others from domination. If freedom is diminished by the presence of relations of domination, where one individual or group has the power to exercise 'alien control' over others, then it is possible for the introduction of a law which restricts the freedom of choice of those who may have such dominance increases the freedom of all those who may otherwise be subject to that domination.

So setting aside such laws in order to allow individuals to choose that which those laws prohibit does not necessarily result in an increase in freedom. First, as set out above, such laws will not be a restriction on the freedom of its

¹⁹ And here it may be helpful to distinguish again 'freedom as non-domination' from Berlin's conception of positive liberty, discussed in footnote 6 above. Under the conception of positive liberty, the argument would be that the driver's liberty had not been diminished because her liberty as a rational individual would not be increased by giving way to irrational desire of driving fast: If A was truly free she would see that she should not desire to drive fast, and so would exercise self-mastery over her desires. As Berlin points out, such an understanding of liberty is incompatible with individual freedom and carries with it totalizing forces ('it is the argument of every dictator, inquisitor and bully'). But that is not what is meant by freedom as non-domination. The freedom of the driver to choose to drive fast is taken away, and this is not remedied by arguing that she *should not* have chosen to drive fast.

addressees, if they are non-dominating.²⁰ And, second, those laws may in themselves be protective of freedom.

If individual members of the community are able to arbitrarily disregard the rules by which that community regulates its life together, and thereby exercise domination over other members of the community, then no member of that community is able to consider her or himself as a free person.²¹ As Pettit puts it:

Freedom involves emancipation from [...] subordination, liberation from [...] dependency. It requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another.²²

Under the republican conception of freedom advanced by Pettit, rules which the political community agree on, through a process over which members of that community have some control, do not deprive individuals of freedom, even when they restrict the choices available to them. On the contrary, such rules are necessary to protect freedom, because they can restrict the possibility that some members of that community will dominate others.²³

²⁰ This is not to say that laws promulgated by the state cannot themselves be a source of domination. As Pettit puts it 'The republican state must not only seek to combat the effects of *dominium* in giving rise to domination, it must also guard against the domination that can be associated with the *imperium* of government' (Pettit *Republicanism* (n 7) 173). And the state, by being inescapable, and by being able to exercise violent coercion to ensure compliance with its rules, is itself 'a serious threat to people's enjoyment of [freedom as non-domination]' (Pettit (n 7), 155). So the thesis advanced here is not that state rules are per-se non-dominant. However, republican political theory presupposes that some degree of non-domination is possible through the institution of democratic processes, by which those whose freedom of choice is limited by common rules are able to exercise a measure of control over those rules.

²¹ It is possible that persons who exercise domination over others may consider themselves free. But if there are no institutional protections against domination, then such persons are not necessarily free from domination, because there may be others who will, in other circumstances, have the upper hand and thereby dominate them. If there are no protections against arbitrary power, then what may appear as freedom is wholly contingent, and the dominator may find himself the dominated.

²² Pettit *Republicanism* (n 7) 5.

²³ And this is an indication that understanding freedom as non-domination also entails the protection of basic rights. To be able to live as a free person, in a society where

Further, under this conception of freedom, a person is free to the extent that she or he lives in a community in which she or he is able to exercise control over the rules which coerce her or him, so setting aside those rules will diminish the freedom of all the persons living in that community.

III. THE EU RIGHT TO CONDUCT BUSINESS AS A REPUBLICAN FREEDOM

Article 16 of the Charter states that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.²⁴ I argue that, by tying the freedom to conduct business to 'Union law and national laws and practices', the EU is recognizing the freedom to conduct business as non-domination, rather than as non-interference. This means that, under Article 16, persons do not have a general right to be free from interference in their choices when conducting their business. They have a right to conduct their business to the extent that the law allows them. This may seem a tautology: 'I am allowed by law to do that which the law allows me to do'. But it is not a tautology, because the fact that the Charter recognizes that I have the freedom to conduct business in accordance with the law means that I have a *legally enforceable* right to do so, and I am therefore

one is not subjected to domination by others, entails the institutionalization of a set of basic rights which will protect the person *both* from *dominium*, that is by being subject to alien control by other persons, *and* from *imperium*, that is, to being subject to arbitrary rule by the state (see Pettit 'The Basic Liberties' in M. Kramer et al (eds) *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (OUP, 2008). But such basic liberties, being themselves legal rights, must themselves be the outcome of democratic processes (see J. Waldron 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18. It should be noted that there are important differences between republican theorists on the extent to which basic rights should be entrenched in a constitution and enforced by courts. For an overview of the debate between different approaches in the republican 'camp' see T. Hickey 'The Republican Virtues of the "New Commonwealth Model of Constitutionalism"' (2016) 14 Icon 494.

²⁴ The Explanations to the Charter indicate that this entails the recognition of the freedom to exercise an economic or commercial activity, freedom of contract and free competition. (Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02). Article 6(1) TEU states that these explanations are to be given due regard to in interpreting and applying the Charter.

entitled to challenge before a court²⁵ any measure which precludes me from doing that which the law allows me to do.²⁶

This understanding of freedom to conduct business is perfectly consonant with freedom as non-domination. If the political community (the EU or the member states) has regulated a particular area of economic activity, then this will not restrict the freedom of the economic actors engaged in that activity, even if it may interfere with some of the choices that would otherwise be open to them.²⁷

By contrast, if the economic activity is allowed by the relevant laws, then any restriction on that activity will amount to alien control. So if the EU or the member states, or any other body, seeks to prevent a person from conducting their business, where that person's conduct is in accordance with Union law and national laws and practices, then that could amount to alien control over that person.

²⁵ Either the CJEU or in the national courts, depending on the measure that causes the interference.

²⁶ Article 16 thus allows individuals to challenge before a court any arbitrary interference with their freedom to conduct business. Such an arbitrary interference may of course be challengeable on other grounds, such as ultra vires or abuse of power, but Article 16 makes sure that a ground for challenge will exist. As the Court held in *Kadi* 'the Community judicature must [...] ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights' (Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and another v Council* ECLI:EU:C:2008:461, para. 326). It should be noted that this obligation extends to national measures implementing EU law, as set out in Article 51 of the Charter.

²⁷ This presupposes that the law in question is made through a process over which those affected have some control over. I will not address whether in reality this is the case, but if a person considers that a law is made in a way which does not take her or his interest into account, then that itself will be the ground for challenging that law, not the interference with freedom. However, this takes us into questions relating to a theory of democracy which are outside the scope of this article. (for a theory of democratic contestation that would be compatible with freedom as non-domination see J. Hart Ely *Democracy and Distrust* (Harvard U.P.; 1980). For an application in the European context, see E. Gill-Pedro *EU Fundamental Rights and National Democracies: Contradictory or Complementary* (Doctoral Dissertation, Lund, 2016).

1. *The CJEU's Case Law*

The case law of the CJEU is particularly relevant in the context of this right, because in the Explanations to the Charter relating to Article 16, it is stated that 'this right is based on the case law of the CJEU'.²⁸ The Explanations provide examples of cases where this right was recognised, and in order to understand how this right is conceived within the EU legal order, we need to look at that caselaw. I will seek to show that this case law is, until quite recently, consonant with an understanding of freedom as non-domination.

The first case mentioned in the Explanations is *Nold*.²⁹ This case concerned EU measures which sought to rationalize coal production and distribution, and therefore imposed conditions which meant that the applicant, a company engaged in the selling and distribution of coal, but who did not meet those conditions, could not act as a direct wholesaler of coal. The applicant challenged the EU measures before the CJEU, on the grounds *inter alia* that it breached its fundamental right to the free pursuit of its business activities,³⁰ because the measures 'have the effect, by depriving it of direct supplies, of jeopardising both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence'.³¹

The CJEU did not accept the applicant's arguments. Instead it stated:

²⁸ This right is absent from the European Convention on Human Rights (ECHR) and from other Council of Europe instruments, such as the European Social Charter. It is also absent from other major international human rights instruments, such as the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights, the UN Covenant on Social, Economic and Cultural Rights.

²⁹ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission*, ECLI:EU:C:1974:51, 491.

³⁰ The only explicit provision cited by the applicant in this context was 'the right of property ownership, the protection of which is ensured in particular by Article 14 of the 'Grundgesetz' of the Federal Republic of Germany and the Constitution of the Land of Hesse'. (ibid Submissions and Arguments of the Parties, Section III.B.4.). In addition, the applicant claimed that 'These rights are also recognized by the Constitutions of other Member States of the Community, by international Conventions' (ibid, Conclusions of the Parties, Section IV). No citations to such provisions in other Constitutions or Conventions appears to have been provided.

³¹ ibid para. 12 of the Grounds.

If rights of ownership are protected by the constitutional laws of all the Member States and *if* similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.³²

So the CJEU states that, if such a right were to be protected, it would not be absolute but could be limited. However, the CJEU does not then consider whether the measure could be justified as a limitation on the applicant's rights. Instead, in a final twist, it turns at last to the question of whether the measure fell within the scope of fundamental rights. It states:

As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.³³

So in the end the CJEU concludes this measure, in restricting the economic opportunities of undertakings participating in the internal market, do not fall within the scope of a putative 'right to conduct a business', if such a right were to be guaranteed.

This rejection of the claim that the freedom to conduct business extends to measures that limit the 'commercial interests of opportunities' – measures which interfere with the freedom of choice of economic operators – indicates that the CJEU did not approach the freedom to conduct business as freedom as non-interference. Because under such a conception of freedom, the Commission's decision³⁴ had clearly interfered with the choices open to the applicant.

Nold is presented as a 'founding stone' in the emergence of the right to conduct business as an EU fundamental right. The Explanations state that 'Article 16 is based on CJEU case law which has recognised freedom to

³² *ibid* para. 14 (emphasis is mine).

³³ *ibid* para. 14.

³⁴ The Commission's Decision introduced new terms of business which the Commission knew meant that a number of coal dealers would lose their entitlement to buy directly from the producer – the Decision interfered with the freedom of those dealers to choose to buy directly from the producer.

exercise an economic or commercial activity' and cites *Nold*.³⁵ This case is presented as 'a source for later case law'³⁶ and indeed is cited extensively by the CJEU. Dean Spielmann, former judge of the CJEU and writing as part of an EU Network of Experts, explicitly acknowledges the right to conduct business as founded on the CJEU's case law:

La liberté d'entreprise n'est pas prévue dans les autres conventions internationales. Elle n'est pas reconnue dans la Convention européenne des droits de l'homme [...] [Elle] se fonde sur la jurisprudence de la Cour de justice.³⁷

So when seeking to understand the meaning and scope of the EU fundamental right to conduct business, this case is of central importance. And if we consider *Nold*, and all the case law which followed it, alongside all the cases concerning the right to conduct business decided by the CJEU prior to the Charter coming into force, I identify three characteristics. First, all

³⁵ Together with *Spa Eridania*. But in that case, again the CJEU does not 'recognise' a right to conduct business, but merely observes that 'an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time', and that therefore a national decree which altered the applicant's quota allocation (implementing a EU Regulation) did not breach the applicant's fundamental rights. As in *Nold*, the CJEU merely repeats someone else's claim that this right exist, without taking a view on whether it does so: 'That guarantee *is said to extend* to the rights of undertakings [...]' (Case 230/78 *SpA Eridania-Zuccherifici nazionali and another v Minister of Agriculture and Forestry and another*, ECLI:EU:C:1979:216, paras 22 and 20 respectively, emphasis is mine).

³⁶ J. Cunha Rodrigues, 'Internationale Handelsgesellschaft and Nold' in Maduro M and Azoulai L (eds), *The Past and Future of EU Law* (Hart 2010), 93. Oliver states that CJEU ruled in *Nold* that the right to conduct business was recognised as an EU fundamental right, and subsequent cases confirmed this ruling (Oliver, 'What purpose does Article 16 of the Charter serve?' in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013), 283).

³⁷ D. Spielmann *Liberté d'entreprise* in EU Network of Experts on Fundamental Rights (eds) *Commentary on the Charter of Fundamental Rights of the EU* (EC Commission, June 2016), at: http://ec.europa.eu/justice/fundamentalrights/files/networkcommentaryfinal_en.pdf, accessed at 21 September 2016.

these cases entail challenges brought against EU measures. Persons³⁸ who considered that their freedom of economic action was constrained by EU measures challenged those measures, either directly in the CJEU,³⁹ or indirectly through the national courts and by way of preliminary reference.⁴⁰

Second, in all these cases in which individuals sought to rely on their right to conduct business in order to challenge EU measures, the Court has rejected their challenge.⁴¹

Third, the approach of the Court appears to follow the same pattern in every case – the Court will adopt a very deferential attitude to the EU institution that adopted the measure.⁴² The focus is on the EU measure and on the objectives which that measure is intended to achieve, rather than on the interference with the choices open to the persons claiming that their right

³⁸ Mostly legal persons. In some cases the proceedings were brought by member states though the rights claimed to be infringed were those of persons (e.g. Case C-240/97 *Spain v Commission*, ECLI:EU:C:1999:479 and Joined Cases C-184/02 and C-223/02 *Spain and Finland v European Parliament and Council*, ECLI:EU:C:2004:497), and some cases entail natural persons (e.g. Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290).

³⁹ As in *Nold* (n 29).

⁴⁰ As in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

⁴¹ This point is made by both Oliver and Usai, who both conduct an overview of the relevant caselaw (Oliver (n 36); A. Usai 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order' (2013) 14 *German Law Journal*, 1867). Weatherill also states that 'Article 16 of the Charter does not disallow a broad range of interventions by public authorities which limit the exercise of economic activities, provided only that the public interest behind the intervention is adequately demonstrated' (S. Weatherill 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10 *European Review of Contract Law* 167, 178).

⁴² In his very critical overview of the caselaw, Carsten Herresthal observes that 'the [Court] grants the EU [...] a very wide range of discretion in choosing measures of intervention' (C. Herresthal 'Constitutionalisation of Freedom of Contract Law' in K. Ziegler, and Huber *Current Problems in the Protection of Human Rights* (Hart 2013), 112).

had been interfered.⁴³ So while the Court stated, in *Spain v Commission*⁴⁴ that 'the freedom [to conduct business]⁴⁵ cannot, therefore, be limited in the absence of Community rules imposing specific restrictions in that regard' whenever the Community rules impose specific restrictions on that choices open to particular economic actors, the Court will not set aside those in order to protect the freedom of choice of those actors. As Groussot et al. put it, the Court:

Confine[s] itself to examining whether [the EU measure] contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion⁴⁶

This is consonant with the text of Article 16 – the right to conduct business, *in accordance with Union law*, is guaranteed. This was expressly affirmed by the Court in *Sky Österreich*, a case that was decided after the Charter had come into force, and where the Court (sitting as a Grand Chamber) reviewed its own case law and stated that:

On the basis of that case-law and in the light of the wording of Article 16 of the Charter, [...] the freedom to conduct a business may be subject to a broad

⁴³ The case of *Hauer* (n 38) is particularly striking in that respect. The applicant was the owner of a plot of land, and she wished to plant vines on that land in order to produce and sell wine. However, an EU Regulation prohibited all new planting of vines for wine producing in her area, so she was absolutely precluded from engaging in the occupation of wine producer. The Court held that this prohibition did not necessary engage Ms Hauer's right to conduct business - and in any event was justified and necessary ('the restriction on the free pursuit of the occupation of wine grower, *assuming it exists*, is justified').

⁴⁴ *Spain v. Commission* (n 38) para. 99.

⁴⁵ This case concerned the freedom of contract of one of the parties. Freedom of contract is recognized as one aspect of the freedom to conduct business under Article 16 of the Charter, according to the Explanations to the Charter (together with the freedom of economic activity and the right to free competition.

⁴⁶ X. Groussot, G.T. Pétursson and J Pierce 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (2014) Lund University Legal Research Paper 01/2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181, accessed 21 September 2016, 11.

range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.⁴⁷

I suggest that the case law of the court regarding the right to conduct business can be interpreted as holding that, in situations where the Union rules permit a particular activity, the person has a right to conduct it. But if Union rules do restrict that activity, there is no right to conduct it. It is also consonant with an understanding of freedom as non-domination. The freedom of economic operators means that they have a right to do that which the law allows them, and not to be subject to arbitrary, dominant, impositions on their action. But the freedom of economic operators does not mean that they have a right to do what they choose to do. Their freedom of choice is protected only to the extent that they may choose that which the law allows them to choose.

2. *Freedom from National Regulation*

As set out above, in the case law prior to the Charter coming into force, the freedom to conduct business had only been invoked in order to challenge (unsuccessfully) EU law measures. Groussot et al. speculate that this 'weak' right might be transformed by a 'strong' court. They note that the inclusion of this right in the Charter imbues this right with a 'constitutional flavour'⁴⁸ emboldening the CJEU to allow this right to be invoked by individuals challenging national measures within the scope of EU law.

In *Scarlet Extended*⁴⁹ the Court did just that. In this case, a management company, representing copyright holders (SABAM), brought proceedings in a national court against an internet service provider (Scarlet Extended) because clients of Scarlet were accessing the internet to download works from SABAM's catalogue without paying. In the national proceedings, SABAM applied for an injunction requiring that Scarlet install filters in its servers in order to monitor and block any users which were unlawfully sharing works in SABAM's catalogue. Directive 2000/31/EC⁵⁰ prohibits national

⁴⁷ Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 46.

⁴⁸ Groussot et al (n 46) 4.

⁴⁹ Case C-70/10 *Scarlet Extended SA v SABAM*, ECLI:EU:C:2011:771.

⁵⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

authorities from imposing a general obligation on an ISP to monitor and record the information it transmits on its network, so the national court submitted a reference asking whether granting that injunction would contravene that prohibition, read in light of Articles 8 (right to respect for private life) and 10 (freedom of expression) ECHR.⁵¹

The Court found that granting the injunction would not be compatible with EU law. But in its reasoning, the Court did not focus on the Directive, nor to the right of free expression and the right to privacy. Instead it rephrased the question, to refer not to 'article 8 and 10 ECHR' but to 'applicable fundamental rights'. It then rephrased the Grand Chamber judgement of *Promusicae*, which had stated that '*the right to respect for private life* on the one hand and the rights to protection of property and to an effective remedy on the other' need to be balanced,⁵² by holding that this meant that 'the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of *other fundamental rights*'.⁵³ It then concluded that it followed from *Promusicae* that, in circumstances such as in the main proceedings, the national court must:

strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter⁵⁴

The application of Article 16 in respect of national measures, and in proceedings between private persons, was a significant extension of the scope of Article 16. As Everson and Gonçalves suggest, this case:

commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/01.

⁵¹ Respectively, the right to respect for private life and the right to free expression.

⁵² Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España*, ECLI:EU:C:2008:54, para. 65 (emphasis added)

⁵³ *ibid* (emphasis added).

⁵⁴ *Scarlet Extended* (n 49) para. 46.

both *de facto* and *de jure* elevates the principle of the freedom to conduct business to a private obligation – or 'quasi-subjective' right – that must be enforced by national law between private individuals.⁵⁵

But when it comes to the substance of Article 16, the Court follows the pre-Charter approach. Article 16 only protects the freedom to conduct business to the extent to which such freedom is allowed by EU and national law. The injunction which SABAM applied for was not allowed by the Directive,⁵⁶ and it would contravene the rights of free expression and of privacy of the internet users.⁵⁷ Which means that the injunction would prohibit Scarlet Extended from doing something which, under the Directive (interpreted in light of the rights of free expression and privacy) Scarlet Extended had a right to do. As I have sought to demonstrate, in the review of the case law set out above, the right to conduct business protects the freedom of individuals to do that which the law allows them to do. Therefore, an injunction which prevented Scarlet Extended from conducting their business in a manner which was allowed by law would constitute an arbitrary interference with the company's 'right to conduct business in accordance with EU law and national law and practice'.⁵⁸

Scarlet Extended, while a significant case⁵⁹ in that it extended the application of Article 16 to national measures, can thus be understood as a continuation

⁵⁵ M. Everson and R. C. Gonçalves, 'Art 16 - Freedom to Conduct Business' in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014), 451.

⁵⁶ The granting of the injunction would clearly be a 'general obligation' prohibited by the Directive. See Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA v SABAM*, ECLI:EU:C:2011:255, para. 66.

⁵⁷ AG Cruz Villalón pointed to the very far reaching consequences of the national proceedings 'The outcome of the main action is undeniably intended to be extended and generalised not only to all ISPs but also and more widely to other important internet participants, not only in the Member State from which the questions have been referred for a preliminary ruling, but also to all Member States, and even beyond.' (para 61). Further, in the earlier case of *Promusicae*, cited by the CJEU in *Scarlet Extended*, the Grand Chamber had already emphasised the importance of the right to respect for private life in the context of internet service providers.

⁵⁸ Article 16 of the Charter of Fundamental Rights of the EU.

⁵⁹ This case was followed shortly after by Case C-360/10 *SABAM v Netlog NV*, ECLI:EU:C:2012:85, with very similar facts, where the court applied the reasoning of

of the pre-Charter approach, where the right to conduct business protects freedom as non-domination, rather than freedom as non-interference.

IV. TRANSFORMING THE RIGHT TO CONDUCT BUSINESS

Shortly before the Charter came into force, Andrea Usai proposed⁶⁰ that Article 16 should be used to 'push the throttle in favour of an even more developed economic union' by allowing the right to conduct business to be used as a 'safeguard against barriers that the member states may want to put up in the internal market'⁶¹ even in purely internal situations.⁶² Usai thus presents the normative value of the right to conduct business as flowing from the way it preserves and promotes the possibility for individuals to be able to be free from constraints – constraints in the way they conduct their business or on the way they structure their contractual relationships.

Under this understanding, freedom from regulation is presented as a value in itself. In other words, the ability of individuals to determine their actions and structure their relationships independently from public intervention,⁶³ and to insulate those persons from regulation or coercion is presented as normatively valuable in itself.⁶⁴

Of course, this freedom is not presented as absolute, and interferences with the economic freedom of individuals by both EU and by the member states are permissible.⁶⁵ But any such interference, either by the EU or by the

Scarlet almost verbatim (compare *Scarlet Extended*, paras 41 – 49 with *Netlog* paras 39–47).

⁶⁰ Usai (n 41), 1871.

⁶¹ *ibid* 1881.

⁶² *ibid* 1883.

⁶³ D. Leczykiewicz and S. Weatherill 'Introduction' in D. Leczykiewicz and S. Weatherill (eds) *The Involvement of EU Law in Private Law Relationships* (Hart 2013), 3.

⁶⁴ D. Leczykiewicz 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013), 172.

⁶⁵ Oliver suggests that the role of Article 16 should be reserved for 'extreme cases, its primary function being to act as a counterweight to other fundamental rights' and to

member states when acting in the scope of EU law, must be justified and proportionate, in light of an objective which is recognized as legitimate under EU law. The key point is that private autonomy, presented as the freedom of economic actors to determine their actions without interference from the state,⁶⁶ is something which *should* in principle be preserved, with any regulatory interference on that freedom presented as something that requires justification.

I argue that this understanding of the right to conduct business does not reflect the text of the Article 16 of the Charter and of the Explanations to the Charter. Nor does it reflect the case law of the Court. This understanding of the right to conduct business reflects a conception of freedom as non-interference, rather than freedom as non-domination. It presupposes that individuals are free to the extent that their ability to choose between different options that could be open to them is not interfered with, and they are made less free whenever some choices are closed to them.

In *Alemo-Herron*, it appears that the Court departed from its traditional understanding of the right to conduct business and adopted an approach which seems more in line with the approach set out in the preceding paragraph – an approach which seems to reflect an understanding of freedom as non-interference.

1. *Alemo-Herron*

The claimants in *Alemo-Herron*⁶⁷ were former employees of the leisure department of a local authority (Lewisham Borough Council). The Council's leisure activities were sold to one private company and subsequently to the defendants (Parkwood Leisure, another private company). Under the domestic legislation, the contract of employment between the employees

serve as a reminder to the EU and the member states that they 'must have regard to [to the freedom to conduct business] in all their actions' ((Oliver (n 36) 299).

⁶⁶ Or even from interference by other private actors – Leczykiewicz considers that a restriction of private autonomy can occur in horizontal situations, where private actors interfere with the private autonomy of other private actors (Leczykiewicz (n 64)).

⁶⁷ Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

and the Council had been transferred to the new employers, who assumed the 'rights, powers, duties and liabilities' under that contract. This contract included a provision to the effect that the terms of the employment would be in accordance with terms negotiated by the National Joint Council for Local Government Services (NJC). Parkwood did not participate in the NCJ, and could not do so as it was not a local authority.

After the transfer, the NJC negotiated a new agreement, the terms of which, under domestic law, would become binding on Parkwood. However, Parkwood informed its employees that it would not be abiding by that new agreement. Alemo-Herron and the other employees brought proceedings in the Employment Tribunal.

The domestic legislation⁶⁸ implemented the Acquired Rights Directive.⁶⁹ This Directive stipulates that 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement' until the termination of that agreement.⁷⁰ The CJEU had already held⁷¹ that this provision should not be interpreted as *requiring* that the employer be bound not just by the agreements in force at the time of the transfer, but also by agreements concluded after that date (so called 'dynamic' clauses).⁷²

But the Directive stated expressly that it was without prejudice the right of Member States to apply or introduce laws more favourable to employees. This is what the domestic legislation did – it allowed 'dynamic' clauses to be incorporated into contracts of employment, which meant that, on transfer,

⁶⁸ The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE Regulations).

⁶⁹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/0016 (the Acquired Rights Directive).

⁷⁰ Acquired Rights Directive, Article 3(3).

⁷¹ Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*, ECLI:EU:C:2006:168.

⁷² Article 3(1) of the Directive must be interpreted *as not precluding*, [...] that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business. (*Werhof*, para 37, emphasis is mine).

the new employer would be bound not only by the terms of collective agreements at the time of the transfer, but also to subsequent collective agreements.⁷³ The question which the national court⁷⁴ referred to the CJEU then was whether national courts were free to apply those more favourable provisions of the national implementing legislation.⁷⁵ The national court expressly stated that there was no contention that such national legislation breached the rights of the employer to freedom of association, as protected by Article 11 ECHR.

The CJEU pointed out that the 'dynamic clause', was 'liable to limit considerably the room for manoeuvre necessary for a private transferee' to make adjustments to the conditions of employment to reflect 'the inevitable difference in working conditions that exist between [the public sector and the private sector]'.⁷⁶ It would also require the employer to be bound by a contractual process to which it was not a party, where it could:

neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.⁷⁷

Therefore, the CJEU concluded that the requiring the employer to be bound by the 'dynamic clause' would be 'liable to adversely affect the very essence of its freedom to conduct a business'.⁷⁸

⁷³ *Alemo-Herron* (n 67), para 8.

⁷⁴ The matter was referred from the Supreme Court of the United Kingdom.

⁷⁵ The CJEU had held in *Hernandez* that the grant of more extensive protection than provided for in a Directive was a matter that fell outside the scope of EU law (Case C-198/13 *Víctor Hernández and Others v Reino de España and Others*, ECLI:EU:C:2014:2055).

⁷⁶ *Alemo-Herron* (n 67), para 28.

⁷⁷ *ibid* para 34.

⁷⁸ *ibid* para 35.

This judgment received extensive criticism, in particular for its treatment of the Acquired Rights Directive⁷⁹ and for its treatment of the CJEU's own case law,⁸⁰ and for the intrusion into the autonomy of labour law.⁸¹

I will not address those aspects specifically, but will instead make two distinct but related arguments. First, in *Alemo-Herron*, the CJEU interpreted the right to conduct business so as to prohibit a member state from doing something which, but for that right, would be lawful under both national law and EU law. Second, the approach of the CJEU to freedom to conduct business entails an understanding of freedom as non-interference.

2. *Prohibiting That Which Is Allowed by National Law*

The referring court in *Alemo Herron* had itself indicated that the right to freedom of association, as protected by the ECHR, was not in issue.⁸² Further, the referring court, the UK's Supreme Court, had clearly stated that the domestic law was 'entirely consistent with the common law principle of freedom of contract'⁸³ and:

There can be no objection in principle to parties including a term in their contract that the employee's pay is to be determined from time to time by a third party such as the NJC of which the employer is not a member or on which it is not represented.⁸⁴

⁷⁹ J. Prassl 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42 *Industrial Law Journal* 434 (esp. 439 – 440).

⁸⁰ Weatherill (n 41); X. Groussot and G. T. Petursson, 'The Emergence of a New Constitutional Framework' in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a binding instrument* (Hart 2015), 142–143.

⁸¹ Prassl (n 79), Syrpis and T. Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A. Bogg and others (eds) *The Autonomy of Labour Law* (Hart 2015).

⁸² *Alemo-Herron* (n 67), para 19.

⁸³ *Parkwood Leisure Ltd v Alemo-Herron and others* [2011] UKSC 26, para 9 (*per* Lord Hope).

⁸⁴ *ibid.*

And as the Advocate General pointed out, the parties in the proceedings had indicated to the CJEU that the UK system of collective bargaining is characterised by its flexibility, and UK labour law:

does not appear to preclude Parkwood and the employees of the transferred undertaking sitting down to negotiate and agreeing to dispense with, amend or preserve the clause.

So according to the referring court, the national legislation did not violate national principles of private law, nor was it in any other way invalid as national legislation. Therefore Parkwood Leisure, according to national law, did not have the right not to abide by the collective agreement.

3. *Prohibiting That Which Is Allowed by EU Law*

As indicated above, the Directive, read in isolation, did not prohibit member states from granting more extensive protection to employee's right following transfer than stipulated in the Directive. Further, in its Preamble the Directive states that its objectives are a) reducing differences between member states in respect of employee protection following transfer and b) ensure that the rights of employees are protected in the event of transfer.

So on the face of it, the national legislation did not contravene the Directive, nor could it be considered to undermine the expressly stated objectives of the Directive. This is in contrast to situations such as *Laval*⁸⁵ In that case, the Swedish law granted the workers more extensive protection than required under the Posted Workers Directive⁸⁶, but in so doing it restricted the freedom to provide services of Laval.⁸⁷ This Directive is expressly stated to be a measure intended to further the integration of the single market, and any national measure which restricts one of the fundamental freedoms will inevitably contradict the objectives of the Directive.⁸⁸ *Alemo-Herron* entails an extension of the scope of application of the Charter also in comparison to

⁸⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others*, ECLI:EU:C:2007:809.

⁸⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

⁸⁷ *Laval* (n 85) para. 99.

⁸⁸ Posted Workers Directive (n 86), Recitals 1 and 2.

Scarlet Extended and *Netlog*.⁸⁹ In those cases the national measure contravened an express provision of the Directive, and undermined an express objective of the Directive. They therefore fell clearly within the scope of EU law.

4. *The Transformation of the Right to Conduct Business*

So why should the CJEU have the power to review national measures implementing a Directive which provide more extensive protection and which do not otherwise obstruct the achievement of the objectives of that Directive? As Bartl and Leone emphasise, whilst this would appear to represent an extension of the scope of the CJEU's power of review member state measures, neither the judgment nor the AG's Opinion indicate the reason for such an extension of the CJEU's power.⁹⁰

But the CJEU does state that the objective of the Directive is not merely to protect the rights of employees, in the event of a transfer, but 'seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other'.⁹¹ The relevant interest of the transferee is the interest in having 'room for manoeuvre in order to make necessary adjustments and changes to the contractual relationship with its employees. In other words, the relevant interest that needs to be balanced against the employees' interests is the freedom of contract of the employer.

I argue that, in presenting Article 16 as protecting the 'room for manoeuvre' of Parkwood, the CJEU interpreted the right to conduct business as

⁸⁹ Discussed above (n 57).

⁹⁰ M. Bartl and C. Leone 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11 *European Constitutional Law Review* 140.

⁹¹ *Alemo-Herron* (n 67), para. 25. This 'teleological twist' has been criticized on several grounds. Prassl points out that it appears to go against the text of the Directive – according to Prassl the Directive was never designed internally to balance the interests of the employer and employee, but was intended to protect employees in light of structural changes in the employment market - changes brought about in part through the processes of European market integration (Prassl (n 79)). Weatherill claims that this interpretation misses the 'thematic rationale' of protecting the weaker parties in contractual relationships which is prevalent in much of EU secondary law, in fields such as employment rights and consumer protection (Weatherill (n 41)).

protecting freedom as non-interference, rather than freedom as non-domination. On the later interpretation, Parkwood would have no right *not* to comply with the contractual clause to which it had signed up. Its right to conduct business was limited to the freedom to conduct business 'in accordance with EU law, and with national laws and practices'.

However, by re-interpreting Article 16 as protecting the right of Parkwood to that which national law expressly precluded it from doing, the CJEU transformed the freedom to conduct business. It transformed from the freedom to do that which the law allows, to the right to challenge the law where such law interferes with the freedom of choice of the undertaking.

V. THE IMPLICATIONS OF PROTECTING FREEDOM AS NON-INTERFERENCE

Stephen Weatherill suggested that *Alemo-Herron* was a decision so 'downright odd' that it deserves to be 'consigned to the bottom of an icy lake' and forgotten about. It is, as I have argued above, and as Weatherill so lucidly demonstrates, a decision that is clearly out of line with the previous jurisprudence of the Court. It has also not been followed in subsequent rulings.⁹² It may therefore appear wiser, for those troubled by its implications, to leave it to fall into obscurity at the bottom of that lake.

However, the aim of this article is not solely a critique of the specific decision in *Alemo-Herron*. Rather, this article seeks to problematize the particular conception of freedom which is presupposed by *Alemo-Herron*, and which has been advanced not just in that decision, but also in discussions concerning the meaning of Article 16. In particular, the Fundamental Rights Agency of the EU has produced a report on the freedom to conduct business that ties Article 16 to the need to 'reshape Europe's approach to free enterprise' 'by creating a business-friendly environment at the national level' and by

⁹² At the time of writing, the judgment had not been cited by the CJEU in connection with the interpretation of Article 16 (in Case C-328/13 *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*, ECLI:EU:C:2014:2197) the CJEU cited the case in connection with the Transfer of Undertakings Directive, and in Case C-456/13 *T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission*, ECLI:EU:C:2015:284, in connection with the interpretation of Article 47 of the Charter).

'spurring the economy by simplifying for entrepreneurship and business to operate'.⁹³ On a similar vein, Usai proposes that a greater recognition of the right to conduct business would lead to more economic freedom and therefore to greater welfare – it would push the throttle in favour of an even more developed economic union, and Leczykiewicz suggests that the right to conduct business 'offers private parties more concrete and entrenched mechanisms of resisting regulatory effects of national and EU law'. Advocate General Trstenjak, in her Opinion in the *Fra.Bo* even implied that a private entity could rely on Article 16 to challenge (otherwise lawful) measures aimed at ensuring free movement.⁹⁴

Additionally, the language of the CJEU in *obiter dicta* in recent cases seems to echo an understanding of the freedom to conduct business as freedom from interference. In *UPC Telekabel Wien* the CJEU stated that '[t]he freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it'.⁹⁵ This idea of the right to conduct business as entailing a freedom from regulatory burdens, as freedom from interference, seems therefore to have some traction in the discussions concerning Article 16. It appears both logical and appealing – who can object to the right of individuals to make their own choices in life.

But if we recall the republican critique of freedom as non-interference outlined above, we realise that freedom does not consist of not having one's choices interfered with, it consists of not being in a position where others have control over us when we make choices. So if we take the case of *Alemo-*

⁹³ FRA 'Freedom to Conduct Business – Exploring the dimensions of a Fundamental Right (EU Commission, Report, 2015), at <http://fra.europa.eu/en/publication/2015/freedom-conduct-business-exploring-dimensions-fundamental-right> accessed 21 September 2016.

⁹⁴ Opinion of AG Trstenjak in Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches*, ECLI:EU:C:2012:176, para 56.

⁹⁵ Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and another*, ECLI:EU:C:2014:192, para 49. But the CJEU held that any right of the company to conduct its business was not affected by the injunction at issue. This phrasing was repeated recently in Case C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen*, ECLI:EU:C:2016:498, para 27, but the CJEU held that the EU measure did not breach the applicant's freedom to conduct business.

Herron, we can see that what is at stake is not just the freedom of the employer and of the employees to choose the terms of their contract of employment, but the fact that in a scenario where employers and employees have such freedom of choice, the employer might well be in a dominant position, and so be able to exercise alien control over the employees.⁹⁶ In other words, those employees will only be seen as free if we conceive of freedom as non-interference. If we conceive of freedom as non-domination, then where the employer is in a dominant position, the freedom of choice for the employees may be seen as no freedom at all. Indeed, as Weatherill and other commentators point out,⁹⁷ a range of EU legislation, not only in labour law, but also in consumer law and anti-discrimination law, can be understood as an attempt to protect the weaker party in situations where untrammelled freedom of choice would leave that weaker party vulnerable. The Acquired Rights Directive itself appeared (before its reinterpretation by the Court in *Alemo-Herron*) to be a measure intended to protect employees who found themselves in a particularly vulnerable situation following the take-over of their employer by another company.

But my argument does not stop there. As set out above, the republican critique of freedom as non-interference is double edged. Not only does it fail to account for loss of freedom in situations of non-interference, but also fails to account for interference which does not entail loss of freedom. Considering again *Alemo-Herron*, it may appear that the domestic legislation restricts the employer's freedom, by interfering with their freedom to choose the terms of their contract with their employees. But that legislation, assuming that it was the outcome of a reasonably democratic process over which both employees and employers had some measure of control,⁹⁸ did not restrict the employer's freedom as it was not a result of alien control.

⁹⁶ For an exploration of the freedom of association of trade unions from a perspective of republican political theory, see A. Bogg and C Estlund 'Freedom of Association and the Right to Contest' in A. Bogg *et al* (eds.) *The Autonomy of Labour Law* (Oxford: Hart, 2015).

⁹⁷ Weatherill (n 41), 174; Bartl and Leone (n 90), 144, Prassl (n 79), 439).

⁹⁸ Although the TUPE Regulations are a Statutory Instrument, rather than an Act of Parliament, they are made by the Secretary of State under powers delegated by an Act of Parliament, and subject to parliamentary scrutiny (as well as judicial review on, *inter alia*, *ultra vires* grounds). Further, as the Explanatory Memorandum to the

However, in requiring the national court to set aside the domestic legislation in order to extend the freedom of choice of the employers, the Court effectively diminished the public autonomy of the UK, and in so doing, diminished the freedom of persons in the UK. As I set out above, if individual members of the community are able to arbitrarily disregard the rules by which that community regulate their life together, and thereby exercise domination over other members of the community, then no member of that community is able to consider her or himself as a free person.

The objection might be made that the rules were not set aside arbitrarily. EU law claims primacy over national law, and requiring the UK to set aside its laws where they conflict with EU law is merely an expression of that. But, under a republican conception of freedom, we can see the obligations which member states take under the Treaties, such as the obligation to allow free movement in the internal market, as being obligations that are undertaken by the political community as a whole, and over which that community has some control. Similarly, the demand that member states implement the obligations imposed by EU Secondary Law are not arbitrary if we assume⁹⁹ that the legislative processes of the EU are ones over which those affected are able to exercise some measure of control.¹⁰⁰

By contrast, the Court in *Alemo-Herron* determined that the national legislation should be set aside because it was wrong – because it was 'liable to adversely affect the very essence of [the employer's] freedom to conduct a business'.¹⁰¹ This assumes that there is an objective 'essence' to economic

Regulations state, these Regulations were years in the making, in a process in which a broad range of both employer and employee organizations were consulted (Explanatory Memorandum to TUPE Regulations 2006 (2006/246), paragraph 7.1, available at <http://www.legislation.gov.uk/ukxi/2006/246/memorandum/contents>, accessed 21 September 2016).

⁹⁹ As Pettit points out, the republican ideal of freedom as non-domination assumes that those subject to the law have some measure of control over that law, even if this is only to a limited extent (Pettit (n 7), 139).

¹⁰⁰ This of course is a matter in respect of which there is significant disagreement. But I suggest that the wide margin of discretion which the Court affords the EU legislature stems (at least in part) from the recognition of the greater democratic legitimacy of the EU legislature vis à vis the Court.

¹⁰¹ *Alemo-Herron* (n 67), para 35.

freedom, and that it is possible for the Court to identify it. But what the 'essence' of any right to conduct business might be, if such an essence exists at all, is a question of considerable disagreement. This disagreement is reflected both in the litigation that took place at national level,¹⁰² and in proposals for legislative reform,¹⁰³ which preceded the Court of Justice's judgment.¹⁰⁴ By constitutionalizing the right of participants in the market to be free of regulatory interference, except to the extent that this can be justified,¹⁰⁵ the CJEU is making a particular determination of the relationship between the market and the state, and the role of the state in regulating the market.¹⁰⁶ By making that determination in a way which fails to acknowledge the disagreements that surround it, and the resulting need for political

¹⁰² For an overview of that litigation, see, e.g. C. Wynn-Evans, 'TUPE, Collective Agreements and the Static–Dynamic Debate: *Alemo-Herron and Others v Parkwood Leisure Ltd* [2010] IRLR 298, CA (2010) 39 Industrial Law Journal 275

¹⁰³ The 2006 Regulations were introduced by the Labour government, and were criticized by the conservative opposition. When the Coalition government came to power they proposed reform of the 2006 Regulations (see iCroner 'Amendments to the TUPE Regulations 2006' 31 January 2014, at: <https://app.croner.co.uk/feature-articles/reform-tupe-regulations?product=29#WKID-201401071444350299-25691899>, accessed on 21 September 2016).

¹⁰⁴ Not to mention the barrage of criticism that the judgment received after it was handed down. And it should be remembered that the Advocate General, in his interpretation of the right to conduct business, did not consider that the UK legislation breached the essence of that right (Opinion of AG Cruz Villalon in Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* ECLI:EU:C:2013:82).

¹⁰⁵ For a criticism of EU political choices which favour distributive justice and collective welfare over personal freedom and market economy, see Herresthal (n 42), 114. This leads Herresthal to call for stronger EU mechanisms against the undue restriction of the later (102) and specifically to propose that the CJEU 'make an effort to provide for substantiation of freedom of contract' and to refer less to the ECtHR caselaw and more to the Charter (116).

¹⁰⁶ Póitares Maduro highlights the choice entailed in different concepts of the European economic constitution, by reference to the Treaty provisions on free movement of goods. One concept sees this freedom as aimed at preventing protectionism and barriers to trade *between* member states, and the other concept sees this freedom as an 'economic due process' clause that would allow the CJEU to review any kind of intervention in the market (M. Póitares Maduro *We the Court: the European Court of Justice and the European economic constitution* (Hart, 1998), 60).

mechanisms to resolve them, the Court risks becoming itself a source of domination.¹⁰⁷

VI. CONCLUSION

I have argued that 'freedom' need not only be conceived as non-interference, but can also be conceived as non-domination. I suggested that there are very good reasons why a right to conduct business should be understood - as the text of Article 16, and the pre-Charter case law of the Court, would suggest - as freedom from domination. What the right to conduct business protects is the freedom to conduct business in accordance with EU law and national laws and practices, and not the freedom not be interfered with in the conduct business.

But in *Alemo-Herron* the Court appears to have departed from this understanding of Article 16. By protecting the right of Parkwood Ltd not to be interfered with by the (otherwise valid) national Regulation the Court reinterpreted Article 16 as protecting freedom *from* national law and practices.

I argued that there are grave implications in such a reinterpretation. If we understand freedom as non-domination, such reinterpretation will result in the loss of freedom of those who become subject to domination by others, and the loss of freedom of the political community to determine its common life together.

¹⁰⁷ Richard Bellamy argues that any attempt to delineate matters which are to be insulated from politics, and a failure to acknowledge disagreement in respect of those matters can itself be a source of domination and arbitrary rule (R. Bellamy *Political Constitutionalism* (CUP 2007), 147 ff.).

VERS UN MARCHÉ UNIQUE NUMÉRIQUE:
GEOBLOCAGE ET PORTABILITÉ TRANSFRONTIÈRE DES SERVICES DE
CONTENU EN LIGNE DANS L'UNION EUROPÉENNE

Gaetano Lapenta^{*}

Le blocage géographique constitue une barrière aux antipodes d'un marché numérique sans frontières. Cet article vise tout d'abord à vérifier si de tels obstacles, motivés principalement par le morcellement du cadre juridique européen actuel, peuvent être justifiés.

L'analyse de la directive services montre qu'il n'est pas possible de qualifier le traitement différencié résultant du géoblocage en tant que discrimination interdite. C'est pourquoi, dans sa stratégie pour la création d'un marché unique numérique, le premier pas de la Commission a été la proposition de règlement visant à assurer la portabilité des services de contenu en ligne. Cependant, cet article met en évidence le manque de précision concernant les définitions de 'présence temporaire' ainsi que d'État membre de résidence', ce qui pourrait rendre le futur règlement concrètement inapplicable.

Geo-blocking constitutes a practice which is contrary to the idea of a digital single market without borders. The purpose of this article is to assess whether such barriers may be justified given the fragmentation of the current European legal framework.

The analysis of the Services Directive demonstrates it is not possible to qualify the differentiated treatment resulting from geo-blocking as an unlawful discrimination. Therefore, in its Digital Single Market Strategy, the Commission's first step was to propose a regulation aimed at ensuring the portability of online content services. However, this article highlights the lack of clarity in regards to the definition of 'temporary presence' and 'Member State of residence', which can result in the concrete inapplicability of said future regulation.

Keywords: géoblocage, discrimination en ligne, marché unique numérique, directive services, portabilité des services de contenu en ligne

^{*} Associate - Shearman & Sterling (Bruxelles), LL.M (Collège d'Europe, Bruges), email: gaetano.lapenta@gmail.com.

TABLE DES MATIÈRES

I. INTRODUCTION	136
II. LE GEOBLOCAGE COMME OBSTACLE AU MARCHÉ UNIQUE NUMÉRIQUE	141
1. <i>Introduction au phénomène du géoblocage</i>	141
2. <i>Les techniques de géoblocage</i>	141
3. <i>Les raisons avancées par les opérateurs afin de justifier les mesures de géoblocage</i>	143
III. LA COMPATIBILITÉ DU GEOBLOCAGE AVEC LE CADRE LÉGISLATIF ACTUEL	155
1. <i>L'Article 20(2) de la Directive Services: Limite à la liberté de discriminer entre des prestataires ?</i>	156
2. <i>Le champ d'application de l'article 20(2) de la Directive Services</i>	157
3. <i>La notion de 'conditions générales d'accès à un service mises à la disposition du public' et les raisons d'un traitement différencié</i>	159
IV. LA PORTABILITÉ TRANSFRONTIÈRE DES SERVICES DE CONTENU EN LIGNE : LE PREMIER PAS VERS UN MARCHÉ UNIQUE NUMÉRIQUE	161
1. <i>À quels services s'appliquerait ce règlement ?</i>	162
2. <i>Comment fonctionnerait le règlement en pratique ?</i>	163
3. <i>Quand s'appliquerait le règlement ?</i>	165
V. CONCLUSIONS	168

I. INTRODUCTION

La création d'un marché commun est à l'origine de la construction européenne. Dans l'idée de Jean Monnet et Robert Schuman, à travers la mise en commun d'intérêts et la réalisation d'une solidarité de fait, le marché aurait amené à une 'union sans cesse plus étroite entre les peuples de l'Europe'.¹ Toutefois, il ne s'agit pas d'un concept statique, dont la réalisation peut être atteinte une fois pour toutes. Au contraire, c'est un processus qui se réalise

¹ Préambule au Traité sur l'Union européenne (ci-après 'TUE') Version consolidée du Traité sur l'Union Européenne [2012] JO C 362/1.

sur le long terme, une 'réalité dynamique, car il faudra constamment adapter le marché aux mutations rapides de l'économie'.² À l'origine de la construction européenne, les obstacles étaient constitués principalement par des mesures protectionnistes adoptées par les États membres afin d'isoler les opérateurs économiques nationaux de la concurrence internationale. La technologie a provoqué une révolution du marché et changé la nature des obstacles. Elle a, en effet, modifié le système de production et de distribution et réduit les distances entre les hommes.³ Le défi actuel est donc la création d'un marché numérique où les contenus peuvent librement circuler en ligne, sans qu'il y ait de frontières.

L'Union Européenne (ci-après 'UE') a accepté de relever ce défi. En mai 2015, la Commission européenne (ci-après 'la Commission') a lancé une stratégie pour le marché unique numérique,⁴ en en faisant d'ailleurs une priorité du mandat Juncker. Si l'on regarde l'objectif ultime, ce plan d'action rappelle la stratégie originaire de création d'un marché intérieur, tout en étant adapté à la période actuelle et aux récents développements technologiques. Au lieu d'éliminer des barrières douanières érigées par les États membres, il s'agit de supprimer les obstacles numériques qui empêchent la libre circulation des contenus en ligne, la finalité étant de passer de 28 marchés nationaux à un seul. Cela passe tout d'abord par l'amélioration de l'accès aux biens et services numériques. Ensuite, la Commission vise à créer 'un environnement propice au développement des réseaux et services numériques' ainsi qu'à maximiser le potentiel de croissance inhérent à l'économie numérique.⁵

Les statistiques démontrent bien qu'il s'agit d'un marché en pleine expansion. Concernant les contenus audiovisuels et musicaux en ligne, qui feront l'objet de la présente étude, les données montrent une croissance continue depuis le début des années 2000. Les achats de produits audiovisuels en ligne ont

² A. Mattera, *Notre européanité: une histoire millénaire, de l'épopée de Marathon à la réunification des peuples de l'Ancien continent* (LGDJ 2014) 354.

³ *ibid* 359.

⁴ Commission européenne, 'Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, Stratégie pour un marché unique numérique en Europe' COM(2015) 192 final.

⁵ *ibid*.

augmenté du 46% entre 2004 et 2012.⁶ Pour ce qui est du secteur de la musique, si les achats en ligne représentaient en 2008 10% des achats totaux, en 2012 le marché numérique avait atteint les 29% de tout le marché.⁷ Les consommateurs se sont très vite adaptés à ce développement technologique. Ainsi en 2015, 58% des européens avaient déjà fait un achat en ligne au cours de la dernière année.⁸ Pour sa part, la Commission estime que 'ce marché pourrait générer 415 milliards d'euros par an pour notre économie et créer des centaines de milliers de nouveaux emplois'.⁹

Toutefois, afin de pouvoir développer ce marché et atteindre la plénitude de son potentiel économique, il faudrait supprimer tous les obstacles à la libre circulation. Parmi ceux-ci, le blocage géographique (ci-après 'géoblocage') constitue une barrière aux antipodes d'un marché numérique sans frontières. Dans sa stratégie pour la réalisation du marché unique numérique, la Commission a déclaré vouloir supprimer toute forme de géoblocage non justifiée, puisque ces mesures créent de la frustration pour les consommateurs et une fragmentation du marché.¹⁰ Pour donner un exemple, actuellement il arrive très souvent qu'un consommateur italien ne puisse pas accéder à la version italienne d'un site internet pour télécharger de la musique lorsqu'il se trouve en France. Il pourra accéder seulement à la version française du site, s'il en existe une, avec très probablement un contenu et des prix différents. De la même manière, si ce même consommateur a conclu un abonnement dans son pays de résidence avec un prestataire offrant du contenu audiovisuel en ligne, il ne pourra pas utiliser ce service lorsqu'il se trouve, même temporairement, dans un autre État membre de l'Union, bien

⁶ U. Stenzel, M.H. Sanches Lima et J.J. Downes, 'Study on the Digital Content Products in the EU' (2012) Framework contract: evaluation impact assessment and related services; Lot. 2: Consumer's Policy, Technical report, Brussels.

⁷ G. Langus, D. Neven et S. Poukens, 'Economic Analysis of the Territoriality of the Making Available Right in the EU' (2014) Study prepared for DG Markt, 30.

⁸ Eurostat http://ec.europa.eu/eurostat/data/database?node_code=isoc_bdek_smi consulté le 22 avril 2016.

⁹ Commission européenne http://ec.europa.eu/priorities/digital-single-market_fr consulté le 22 avril 2016.

¹⁰ Commission européenne, Stratégie pour un marché unique numérique en Europe COM(2015) 192 final 6 (n 4).

qu'il ait payé pour ce service. En résulte, dès lors, une fragmentation du marché européen suivant les frontières nationales.

Malgré l'importance de ce thème, la doctrine juridique ne s'est pas préoccupée du phénomène d'un point de vue scientifique. En effet, les seules analyses existantes sur le géoblocage se concentrent sur l'aspect de la territorialité du droit d'auteur,¹¹ mais, comme nous verrons ensuite, ces dispositions ne sont pas les seules à constituer des barrières à la libre circulation en ligne. Par ailleurs, après la présentation de la 'Stratégie sur le marché unique numérique' en mai 2015,¹² la Commission a reçu de nombreuses interventions de la part des parties prenantes qui seraient touchées par les dispositions envisagées mais ces intervenants s'arrêtent souvent sur des positions de principe dictées par leurs intérêts particuliers.¹³ L'étude apparaît complexe car des considérations juridiques et économiques se mêlent et une approche interdisciplinaire est nécessaire.

Cependant, l'objectif de traiter la question du géoblocage dans ses différents aspects généraux ne nous permet pas de consacrer une attention spéciale au droit d'auteur, dont un projet de réforme est en cours de discussion au sein de la Commission,¹⁴ car une analyse axée sur le droit d'auteur nécessiterait une approche tout à fait spécifique. De plus, la présente étude se concentrera sur la libre circulation en ligne des contenus audiovisuels et musicaux et, par conséquent, nous n'aborderons pas les propositions relatives à l'achat en ligne de marchandises tangibles parce que cela pose des problèmes différents à certains égards.

Dans la première section, nous analyserons le phénomène du géoblocage en tant que barrière à la création d'un marché unique numérique permettant de

¹¹ G. Mazziotti, 'Is geo-blocking a real cause for concern in Europe?' (2016) 38 EIPR 365.

¹² Stratégie pour un marché unique numérique en Europe COM(2015) 192 final 6 (n 4).

¹³ Les interventions des parties prenantes dans la consultation publique effectuée par la Commission sont disponibles sur le site: <https://ec.europa.eu/digital-single-market/en/news/geo-blocking-public-consultation-contributions-received-stakeholders> (consulté le 22 avril 2016).

¹⁴ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a modern, more European copyright framework' COM(2015) 626 final.

diviser le marché européen selon les frontières nationales, ainsi que les techniques utilisées par les prestataires en ligne dans ce but. Nous identifierons les raisons juridiques, culturelles et économiques invoquées par ces prestataires afin de justifier une pratique se traduisant, finalement, dans un traitement différencié des consommateurs en fonction de leur localisation. Cette analyse vise à vérifier si des mesures de géoblocage dans le marché numérique européen peuvent être justifiées.

Dans la deuxième partie, nous essayerons de répondre à la question de savoir si les mesures de géoblocage pourraient être interdites à la lumière du cadre législatif actuel. Cette question apparaît importante car le législateur se voit souvent accusé de 'surproduction' de règles¹⁵ et, partant, l'objectif de cette section sera de savoir si les dispositions déjà existantes dans l'ordre juridique européen pourraient contribuer à la création d'un marché unique numérique à travers une meilleure mise en œuvre ou si, comme affirmé par la Commission, il faudrait intervenir avec de nouvelles mesures législatives afin d'assurer la libre circulation des contenus numériques en ligne. En particulier, l'article 20(2) de la directive 2006/123/CE¹⁶ (ci-après 'directive services') prévoit une obligation de non-discrimination, mais il faudra vérifier l'étendue de potentielles justifications à un traitement différencié dans le but d'estimer quel est l'impact réel de cette disposition sur le marché.

Enfin, dans la dernière section, nous analyserons la première proposition législative présentée par la Commission dans le cadre de sa stratégie sur le marché unique numérique, à savoir la proposition visant à assurer la portabilité transfrontière des services de contenus en ligne dans le marché intérieur. La formulation ambiguë de cette proposition pourrait affecter la réalisation de l'objectif fixé qui est de garantir la possibilité pour les abonnés à un service de contenu en ligne d'en bénéficier lorsqu'ils sont *présents temporairement* dans un État différent de celui où ils résident *habituellement*.

¹⁵ F. Modugno, A. Celotto, M. Ruotolo, 'Considerazioni sulla crisi della legge' dans F. Modugno, *Appunti per una teoria generale del diritto. La teoria del diritto oggettivo* (Giappichelli 2000) 351.

¹⁶ Directive 2006/123/CE du Parlement européen et du Conseil relative aux services dans le marché intérieur [2006] JO L376/60.

II. LE GEOBLOCAGE COMME OBSTACLE AU MARCHÉ UNIQUE NUMÉRIQUE

1. Introduction au phénomène du géoblocage

Lorsque nous parlons de blocage géographique, nous nous référons à une 'mesure technologique empêchant les consommateurs d'accéder à un site internet ou d'acheter du contenu en ligne sur la base de la localisation de leur point d'accès'.¹⁷ Le géoblocage limite le commerce transfrontalier ainsi que la portabilité des services en ligne que le consommateur avait souscrits auparavant. Il s'agit d'ailleurs d'une pratique très répandue. Il ressort, en effet, d'une récente enquête conduite par la Commission dans le domaine du commerce électronique¹⁸ que 68% des prestataires de services en ligne interrogés utilisent des mesures de géoblocage, la plupart ayant recours à une vérification de l'adresse IP afin de déterminer la localisation de l'utilisateur. De plus, 72% d'entre eux ont déclaré que la portabilité de leurs contenus en ligne est limitée.¹⁹ Il existe pourtant une demande croissante d'accès transfrontalier à des sites internet, expliquant d'ailleurs la forte augmentation du chiffre d'affaires des prestataires de services de Réseau Virtuel Privé ('RVP').²⁰

2. Les techniques de géoblocage

Il y a principalement trois mécanismes auxquels les consommateurs font face lorsqu'ils essayent d'avoir accès à un site internet d'un pays différent de celui où ils se trouvent.

Tout d'abord, les consommateurs peuvent se voir opposer un refus de vente lorsqu'ils veulent acheter du contenu numérique. Dans ce cas, le prestataire

¹⁷ F. Simonelli, 'Geo-blocking: Unjustified barrier to the Digital Single Market or legitimate commercial practice? The case of copyrighted audiovisual content' (2015) Actes du CEPS (Centre for European Policy Studies) Digital Forum.

¹⁸ Commission, 'Geo-blocking practices in e-commerce: issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition' SWD (2016) 70 final.

¹⁹ *ibid.*

²⁰ Un Réseau Virtuel Privé (RVP, en anglais VPN), permet aux usagers de contourner les restrictions géographiques, en établissant une connexion internet directement dans des pays où le contenu est disponible.

requiert différents éléments, à savoir une adresse de résidence dans un certain pays, une carte bancaire nationale au moment du paiement ou une connexion établie dans un certain État. 65% des entreprises offrant du contenu numérique en ligne utilisent des mesures visant à bloquer tout court l'accès d'un consommateur localisé dans un autre État membre.²¹ La plupart d'entre elles ont recours à l'adresse IP afin de vérifier la localisation, alors que seulement 2% prennent en compte la nationalité du consommateur. Cette approche peut s'expliquer par le fait qu'une discrimination sur la base de la nationalité ne serait en aucun cas une restriction justifiable. D'autres prestataires en ligne ont recours à des mesures moins restrictives. C'est le cas de ceux qui utilisent le '*re-routing*', qui consiste à rediriger le consommateur vers le site national où les produits sont adaptés aux consommateurs nationaux en raison de la langue, la culture ou d'autres spécificités. Finalement, lorsque le consommateur avait l'intention d'acheter un produit déterminé qui n'est pas disponible sur la version du site qui lui est accessible, cette restriction peut également se traduire dans un refus de vente. Dans la plupart des cas, l'objectif de cette technique est d'offrir aux cyberconsommateurs (i.e. les consommateurs achetant des produits sur internet) des prix ou contenus différents ou tout simplement des produits de qualité différente en fonction de leur localisation. Cela nous amène à la dernière forme de restriction en ligne qui se manifeste dans l'application de termes et conditions différentes. Dans ce cas, même si le contenu est disponible dans tous les États membres de l'Union, les consommateurs se verront offrir des contrats d'achat différents sur la base de leur situation géographique.

Une fois les techniques employées par les prestataires en ligne afin de mettre en œuvre un blocage géographique identifiées, une question surgit spontanément : quelles sont les raisons qui amènent les opérateurs en ligne à utiliser de telles mesures ? Seulement après avoir répondu à cette question, il sera possible de vérifier si les motivations identifiées peuvent constituer une justification acceptable à la lumière du droit de l'Union.

²¹ SWD (2016) 70 final 48 (n 18).

3. Les raisons avancées par les opérateurs afin de justifier les mesures de géoblocage

Toutes les entités impliquées dans le marché numérique semblent s'arrêter sur des positions de principe lorsqu'il s'agit d'expliquer les raisons en faveur ou contre l'utilisation des techniques de géoblocage. Les consommateurs militent pour une interdiction absolue de toute forme de restriction qui discrimine sur la base du point d'accès.²² C'est sans surprise, en revanche, que les prestataires de services en ligne soulignent que leurs restrictions sont pleinement conformes au droit de l'Union.²³

Dans ce paragraphe nous essayerons d'identifier les raisons qui pourraient justifier ou non des pratiques restrictives. Nous répartirons ces raisons en trois catégories: raisons juridiques, culturelles et économiques. Cette classification permet également d'identifier les obstacles qui peuvent être surmontés à travers une intervention législative et ceux qui, en revanche, dépendent de facteurs autres que législatifs.²⁴

A. Raisons juridiques

La plupart des prestataires de services en ligne justifient leurs restrictions sur la base du morcellement du cadre juridique européen car l'existence de différentes obligations dans les différents États membres entraînerait des coûts parfois très importants. Toutes ces raisons seront dès lors abordées dans l'analyse qui suit. Dans une première partie, nous analyserons la raison principale avancée par les prestataires de contenu en ligne, à savoir le droit d'auteur et le principe de territorialité qui lui est inhérent. Dans un deuxième

²² 'EU unveils Digital Single Market: Consumers must be central' (2015) Communiqué de presse de l'organisation Bureau européen des Unions de Consommateurs ('BEUC') http://www.beuc.eu/publications/beuc-pr-2015-006_digital_single_market.pdf consulté le 22 avril 2016.

²³ 'Digitaleurope's response to the public consultation on geoblocking and other geographical restrictions when shopping and accessing information across the European Union' (2015) < http://ec.europa.eu/information_society/newsroom/image/document/2016-5/digital_europe_13459.pdf consulté le 22 avril 2016.

²⁴ Pour une classification différente, nous renvoyons à l'analyse d'impact initiale de la Commission, 'Proposals to address unjustified geo-blocking and other discrimination based on consumers' place of residence or nationality' (2015) http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf consulté le 22 avril 2016.

temps, nous examinerons les autres raisons juridiques que nous avons identifiées en tant que barrières contraires à un marché unique numérique.

a. Le droit d'auteur et le principe de territorialité

La raison principale poussant les prestataires à restreindre l'accès à leurs sites internet est constituée par le droit d'auteur protégeant les œuvres musicales et audiovisuelles en ligne. La protection de ces droits est garantie au niveau national. Ainsi, les titulaires des droits ou leurs gestionnaires octroient des licences dont la validité est limitée au territoire d'un certain État membre et le prestataire d'un service en ligne qui veut distribuer un contenu audiovisuel ou musical au niveau européen doit obtenir une licence d'exploitation dans chaque État membre où il veut offrir son service. Cependant, il est possible que le titulaire du droit d'auteur ait déjà octroyé une licence sur base exclusive pour chaque État. Partant, un deuxième prestataire voulant se voir octroyer une licence pour cet État ne pourra pas l'obtenir puisque le droit d'exploitation de ce répertoire a déjà été octroyé à une autre entité et il sera, par conséquent, dans l'impossibilité de distribuer le contenu dans ce pays. Notons que, même en l'absence de concessions exclusives, l'existence de différents gestionnaires des droits dans chaque pays entraîne des coûts de transaction parfois importants, puisqu'il devient nécessaire de négocier les licences pays par pays. De plus, ce morcellement peut entraîner l'existence de prix différents pour le même répertoire dans chaque pays et le prestataire pourrait estimer que la demande potentielle sur ce marché n'est pas suffisante pour couvrir le coût du droit d'exploitation.

Par conséquent, les coûts de transaction découlant de la nécessité de négocier une licence pays par pays, l'existence de droits octroyés sur base exclusive ainsi que l'absence d'une demande potentielle suffisante à couvrir les coûts supportés pourraient amener le prestataire en ligne à limiter son offre à un seul pays ou à un certain nombre de pays seulement. Afin de donner suite à cette décision, le prestataire en ligne aura recours à des mesures de géoblocage empêchant l'accès depuis les pays où il ne détient pas de licence et ainsi ne pas enfreindre les droits d'exploitation octroyés à d'autres prestataires dans ces États.

Au niveau juridique, la territorialité de la protection du droit d'auteur pour les œuvres artistiques est prévue par l'article 5(2) de la Convention de Berne,²⁵ lequel dispose que 'l'étendue de la protection ainsi que les moyens de recours garantis à l'auteur pour sauvegarder ses droits se règlent exclusivement d'après la législation du pays où la protection est réclamée'. La Cour de Justice de l'Union européenne reconnaissant le principe de territorialité a aussi affirmé dans son arrêt *Lagardère* que les dispositions de l'Union ne visaient pas 'à remettre en cause [...] le principe de territorialité de ces droits, reconnu par le droit international et admis également par le traité CE'²⁶ et que 'ces droits ont donc un caractère territorial et le droit interne ne peut, par ailleurs, sanctionner que des actes accomplis sur le territoire national'.²⁷ Cela veut dire que la protection du droit d'auteur a un caractère national puisque ce droit est issu de la législation des États et, par conséquent, sa protection est limitée au territoire de l'État pour lequel la licence a été octroyée.

Quelles sont les conséquences du principe de territorialité? Tout d'abord, l'octroi d'une licence dans un pays ne permet pas *normalement* d'offrir dans d'autres États un service ayant pour objet des œuvres protégées par le droit d'auteur. Il apparaît, dès lors, que les mesures de géoblocage, empêchant l'accès à un site depuis un État membre où le prestataire n'a pas (encore) obtenu une licence, sont nécessaires pour mettre en œuvre les normes sur le droit d'auteur. Si ces mesures étaient purement et simplement interdites, l'accès au contenu à l'origine de tout État membre, peu importe la localisation de l'utilisateur, entraînerait un contournement du principe de territorialité.

En vertu du principe de territorialité du droit d'auteur, chaque détenteur au niveau national peut s'opposer à toute importation qui pourrait léser son droit exclusif dans le pays. Cela montre bien comment la territorialité du droit d'auteur peut constituer un obstacle au développement d'un marché unique numérique pour les produits audiovisuels et musicaux en Europe.

²⁵ Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886, complétée à Paris le 4 mai 1896, révisée à Berlin le 13 novembre 1908, complétée à Berne le 20 mars 1914 et révisée à Rome le 2 juin 1928, à Bruxelles le 26 juin 1948, à Stockholm le 14 juillet 1967 et à Paris le 24 juillet 1971 et modifiée le 28 septembre 1979.

²⁶ Affaire C-192/04 *Lagardère* ECLI:EU:C:2005:475, point 46.

²⁷ *ibid.*

Par ailleurs, l'existence d'une tension entre propriété intellectuelle et liberté de circulation est reconnue dans les Traités de l'UE mêmes. Se rendant compte que les droits de propriété intellectuelle, tels que reconnus au niveau national, pouvaient entraîner une fragmentation du marché intérieur, les rédacteurs des traités ont prévu la possibilité d'opposer la 'protection de la propriété industrielle et commerciale' en tant que justification d'une entrave à la libre circulation des marchandises, à condition qu'elle ne constitue 'ni un moyen de discrimination arbitraire ni une restriction déguisée dans le commerce entre les États membres'.²⁸

Cependant, cette entrave a aussi des limites. La limite la plus importante qui contrebalance le caractère restrictif du droit d'auteur est représentée par le *principe d'épuisement* des droits, reconnu pour la première fois par la Cour de Justice dans l'arrêt *Deutsche Grammophon*.²⁹ Sur la base de cette jurisprudence, à partir du moment où un produit a été mis sur le marché dans un autre État membre pour la première fois avec le consentement du titulaire, celui-ci ne peut plus en empêcher la circulation et, partant, il ne peut pas s'opposer aux importations parallèles de ce produit.³⁰

La fonction de ce principe est d'encourager les importations parallèles pour renforcer la concurrence et limiter les obstacles et le morcellement créés par le droit d'auteur. Toutefois, il s'applique seulement aux produits tangibles et donc, pour ce qui nous intéresse, aux œuvres audiovisuelles et musicales incorporées dans un support matériel.³¹ Cette limitation du principe est prévue par la directive sur le droit d'auteur dans la société de l'information, dont le considérant 29 explicite que 'la question de l'épuisement du droit ne se pose pas dans le cas des services, en particulier lorsqu'il s'agit de services en ligne'.³² De plus, l'article 3(3) de la même directive dispose que les droits exclusifs de l'auteur d'autoriser ou d'interdire toute communication au public

²⁸ Article 36 Version consolidée du Traité sur le fonctionnement de l'Union européenne (TFUE), [2012] JO C 326/47.

²⁹ Affaire 78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59, point 11.

³⁰ S. Jacquier, W. Maxwell et X. Buffet Delmas, 'Industrie de contenu: quel avenir pour les licences territoriales?' [2009] 47 RLDI 65.

³¹ Mazziotti (n 11) 4.

³² Directive 2001/29/CE du Parlement européen et du Conseil du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information [2001] JO L167/10.

de ses œuvres 'ne sont pas épuisés par un acte de communication au public, ou de mise à la disposition du public', en particulier lorsque cet auteur, personnellement ou par le biais d'intermédiaires, rend ses œuvres disponibles en ligne. Le résultat de ces normes est que le principe d'épuisement ne s'applique pas à la distribution en ligne, exception faite pour la dérogation reconnue dans l'arrêt *UsedSoft*,³³ où la Cour a décidé d'appliquer le principe d'épuisement aux programmes d'ordinateur. Mise à part cette exception, l'inapplicabilité du principe d'épuisement confirme le caractère territorial de la distribution en ligne de contenus couverts par le droit d'auteur.³⁴

Afin d'aboutir à la réalisation d'un marché unique numérique, il faudrait faciliter l'octroi de licences multi-territoriales de manière à promouvoir une offre pan-européenne ainsi que l'intégration numérique au sein de l'Union. Est-ce envisageable dans le marché audiovisuel et musical ? Pour répondre à cette question, il faudra considérer les deux marchés séparément.

Dans le marché de contenus audiovisuels en ligne, les titulaires du droit d'auteur gèrent directement leurs droits, sans en confier la gestion à des sociétés nationales de gestion collective, comme dans le cas des œuvres musicales. Les producteurs de ces contenus, partant, octroient directement les licences d'exploitation à ceux qui les requièrent et donc ils seraient déjà en mesure de déterminer l'extension territoriale de leurs licences.³⁵ Ils pourraient, dès lors, décider d'octroyer des licences pan-européennes voire mondiales, sans créer une fragmentation du marché suivant les frontières nationales. Ce faisant, le distributeur en ligne de ces contenus ne devrait plus avoir recours à des mesures de géoblocage de son site parce qu'une offre pan-européenne par le même distributeur n'enfreindrait pas les droits exclusifs d'autres concessionnaires nationaux. Toutefois, ce n'est pas ce qui arrive aujourd'hui car les titulaires du droit d'auteur concernant des productions audiovisuelles n'octroient pas de licences multi-territoriales en considérant qu'elles ne seraient pas rentables. Au contraire, ils préfèrent octroyer des licences différentes pour chaque État membre de l'Union ou, tout au plus, pour chaque région linguistique.

³³ Affaire C-128/11 *UsedSoft* ECLI:EU:C:2012:407.

³⁴ G. Mazziotti, 'Copyright in the EU Digital Single Market' (2013) CEPS Task Force Reports, 66.

³⁵ *ibid* 11.

Les producteurs adaptent leurs contenus aux spécificités de chaque groupe de consommateurs, en présumant vraisemblablement que la demande est homogène à l'intérieur de tout État. Dans l'enquête conduite par la Commission et publiée en mars 2016,³⁶ il apparaît que dans 66% des accords conclus entre titulaires du droit d'auteur et prestataires de services en ligne, c'étaient les titulaires eux-mêmes qui imposaient de géo-bloquer l'accès au contenu depuis d'autres États membres. Par conséquent, le morcellement du marché numérique européen dans le secteur de l'audiovisuel est déterminé principalement par des choix autonomes des titulaires mêmes du droit d'auteur qui, sur la base d'une décision commerciale, estiment plus rentable l'octroi de licences sur base nationale afin de mieux viser les demandes spécifiques des consommateurs.

Dans le secteur des contenus musicaux, les prémisses sont différentes, mais le résultat est le même. Les titulaires du droit d'auteur sur les œuvres confient normalement la gestion de leurs droits à des sociétés de gestion collective avec une dimension nationale. Elles ont la mission de créer des répertoires, octroyer des licences sur ces droits et, ensuite, collecter, gérer et redistribuer les revenus.³⁷ Pour qu'un prestataire puisse offrir un service en ligne dans tous les pays de l'Union, il devra obtenir une licence d'exploitation auprès de chaque société nationale mais certaines d'entre elles ont conclu des accords bilatéraux permettant d'obtenir des licences multi-territoriales, ce qui tempère légèrement le caractère territorial inhérent à ce système. Cependant, dans beaucoup de cas, ils sont encore obligés de négocier avec plusieurs sociétés de gestion collective et pour cette raison le législateur de l'Union est intervenu afin d'encourager et faciliter l'octroi de licences multi-territoriales dans le secteur de la musique.

En effet, la directive 2014/26/UE prévoit qu'une société de gestion collective nationale peut octroyer une licence pour l'exploitation de son répertoire d'œuvres musicales dans plusieurs États membres.³⁸ Après la mise en œuvre

³⁶ SWD (2016) 70 final 55 (n 18).

³⁷ 'Pourquoi le numérique a-t-il encore des frontières en Europe ?' (2015) Étude réalisée par le Centre Européen des Consommateurs France, 11.

³⁸ Directive 2014/26/UE du Parlement européen et du Conseil du 26 février 2014 concernant la gestion collective du droit d'auteur et des droits voisins et l'octroi de

de cette directive, qui aurait dû être transposée avant le 10 avril 2016, il ne devrait plus y avoir d'obstacles *juridiques* liés au droit d'auteur pour obtenir une licence pan-européenne et ainsi offrir un produit musical en ligne dans tous les États de l'Union. La directive vise à faciliter le développement d'une offre pan-européenne de contenus musicaux, non fragmentée selon les frontières nationales. En second lieu, l'élimination du caractère territorial absolu et l'octroi de licences multi-territoriales entraîneraient aussi la réduction des coûts de transaction, puisqu'il ne faudrait plus identifier les titulaires ou gestionnaires des droits pays par pays et négocier un accord avec chacun d'entre eux.³⁹ Par conséquent, l'atténuation du caractère territorial du droit d'auteur devrait créer un environnement juridique approprié pour qu'un marché unique numérique des contenus musicaux se développe. Cependant, à propos du secteur musical, se présentent les mêmes considérations exposées par rapport aux contenus audiovisuels. Si les prestataires en ligne ne demandent pas de licences multi-territoriales, c'est parce qu'il n'y a pas de demande transfrontalière suffisante des mêmes contenus et une telle prestation n'apparaît pas rentable. Par conséquent, le marché numérique demeurera fragmenté suivant les frontières nationales.

b. D'autres raisons juridiques

Le droit d'auteur avec son caractère territorial n'est pas la seule raison poussant les prestataires à appliquer des mesures de géoblocage. D'autres raisons existent, liées à la fragmentation du cadre juridique européen dans de différents domaines.

Premièrement, l'existence d'une législation différente concernant le droit des contrats et le droit des consommateurs dans chaque État constitue une raison importante.⁴⁰ Ces législations, même harmonisées, imposent encore différentes obligations d'information aux consommateurs, en matière d'assistance après-vente et de garantie sur le produit ou service. Cela va de soi

licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur, [2014] JO L84/72.

³⁹ Langus, Neven et Poukens (n 7) 88.

⁴⁰ H. Schulte-Nölke, F. Zoll, E. Macierzyńska-Franaszczyk, S. Stefan, S. Charlton, 'Discrimination of Consumers in the Digital Single Market' (2013) Étude commissionnée par la Commission du marché intérieur et de la protection des consommateurs du Parlement Européen, 47.

que les coûts découlant de l'obligation de se conformer à ces normes augmentent proportionnellement au nombre de pays où le contenu en ligne est offert. En effet, le prestataire doit se renseigner sur les lois applicables dans chaque pays et se conformer à chacune de celles-ci. Plus il y a de différences par rapport au pays d'origine où le prestataire est établi, plus il devra supporter de coûts de conformité lorsqu'il décide d'opérer sur plusieurs marchés. Toutefois, dans l'enquête de la Commission de mars 2016,⁴¹ 81.7% des intervenants ont indiqué que le coût d'obtenir des informations et de se conformer au droit des consommateurs dans plusieurs États membres était la raison la moins importante parmi celles qui les poussaient à géobloquer l'accès à leur site.

Une deuxième justification au géoblocage réside dans l'existence de différents taux pour la Taxe sur la Valeur Ajoutée (ci-après 'TVA') dans les États membres. À partir du 1^{er} janvier 2015, la TVA doit être payée en appliquant le taux prévu dans l'État du bénéficiaire du service en ligne.⁴² Si ce taux est plus élevé dans certains États, le prix du service pour le consommateur devrait par conséquent être différent et pour cette raison les prestataires de services en ligne estiment qu'une différenciation des prix et conditions en ligne selon les pays serait justifiée.

Enfin, les prestataires craignent souvent qu'une prestation de services en ligne puisse les obliger à se confronter avec une juridiction étrangère saisie par le consommateur en cas de litige. En effet, lorsqu'un litige survient entre prestataire et professionnel, l'article 15(1)(c) du règlement 44/2001 dispose que le consommateur peut saisir la Cour de son domicile.⁴³ Cela obligerait le prestataire à faire face à une juridiction qu'il ne connaît pas, dont les normes procédurales ainsi que les coûts pourraient être significativement différents. Cependant, il y a deux aspects à souligner.⁴⁴ Tout d'abord, le risque de devoir faire face à une juridiction étrangère n'est pas limité aux services en ligne,

⁴¹ SWD (2016) 70 final 64 (n 18).

⁴² Directive 2008/8/CE du Conseil du 12 février 2008 modifiant la directive 2006/112/CE en ce qui concerne le lieu des prestations de services [2008] JO L44/11, Article 5.

⁴³ Règlement (CE) 44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale [2001] JO L12.

⁴⁴ Schulte-Nölke, Zoll, Macierzyńska-Franaszczyk, Stefan, Charlton (n 40) 54.

mais il est inhérent au concept même de marché unique, peu importe qu'il s'agisse de l'univers physique ou numérique. En second lieu, le législateur européen a facilité la résolution des litiges entre consommateurs et professionnels grâce à l'introduction du règlement en ligne des litiges à travers une plateforme accessible depuis le 15 février 2016 et ne concernant que les plaintes causées par un achat en ligne.⁴⁵ Cela devrait contribuer à supprimer certains obstacles au marché intérieur ainsi qu'à éliminer une potentielle justification pour le géoblocage des sites internet.⁴⁶

Cette analyse des raisons juridiques constituant un obstacle à la création d'un marché unique numérique a démontré que les explications données par les prestataires de services en ligne sont nombreuses et se fondent sur le morcellement du cadre juridique européen, entraînant des choix commerciaux conséquents.

Nous estimons que le but de créer un marché unique numérique ne devrait pas entraîner la substitution du législateur dans les choix légitimes des prestataires de services en ligne. L'intervention du législateur européen visant, par exemple, à faciliter l'octroi de licences multi-territoriales est bienvenue, surtout dans le but de créer un marché unique numérique, mais il ne devrait pas y avoir, à notre avis, une obligation absolue d'offrir des produits ou services dans tous les États membres car cela devrait rester un choix commercial autonome des prestataires. Par ailleurs, une obligation d'offre pan-européenne aurait comme conséquence qu'un prestataire qui ne connaît pas le marché étranger devrait faire face à une série de risques et incertitudes économiques et juridiques nouvelles.⁴⁷

Cependant, le législateur de l'Union, au lieu de simplement interdire toute mesure de géoblocage, a adopté à raison une approche prudente et pragmatique. À travers une constante harmonisation des normes

⁴⁵ Le site pour le règlement en ligne des litiges est accessible à l'adresse : <https://webgate.ec.europa.eu/odr/main/?event=main.home.show&lng=FR> (consulté le 22 avril 2016). Ce site a été créé en réponse à une législation spécifique de l'UE: Règlement (UE) 524/2013 du Parlement européen et du Conseil du 21 mai 2013 relatif au règlement en ligne des litiges de consommation et modifiant le règlement (CE) n° 2006/2004 et la directive 2009/22/CE [2013] JO L165/1.

⁴⁶ Schulte-Nölke, Zoll, Macierzyńska-Franaszczyk, Stefan, Charlton (n 40) 55.

⁴⁷ *ibid* 7.

européennes, il vise à créer les conditions pour qu'une offre pan-européenne de contenus audiovisuels et musicaux en ligne se développe comme un résultat 'naturel' du marché.

Les raisons juridiques ne sont pas les seules à justifier un comportement 'discriminatoire' en ligne fondé sur la localisation du point d'accès. Aux raisons juridiques il faut tout d'abord ajouter celles que nous avons qualifiées de 'culturelles'. Il est évident que ces obstacles ne pourront pas être surmontés sur le court terme à travers une intervention législative.

B. Raisons culturelles

La diversité culturelle et linguistique de l'Union constitue sans doute une richesse, et l'Union est juridiquement tenue de respecter cette diversité, comme prévu notamment à l'article 3(3) du Traité sur l'Union européenne (ci-après 'TUE'). Cependant, cette richesse peut aussi entraîner une fragmentation du marché audiovisuel et musical en ligne, puisqu'elle détermine une différenciation des préférences, vraisemblablement suivant les frontières nationales. Pour cette raison, les entreprises offrant des contenus en ligne ont souvent recours à des mesures de géoblocage, surtout sous forme de '*re-routing*', afin de mieux cibler les préférences des consommateurs. Au lieu d'offrir le même contenu pour tous les consommateurs européens, ces prestataires créent des sites différenciés, où les contenus sont adaptés aux goûts nationaux. Le résultat est un morcellement du marché numérique et une fragmentation des sites internet fondée sur la localisation du consommateur.

D'après les prestataires en ligne, une différenciation des sites est nécessaire car les producteurs se voient obligés d'adapter les contenus sur la base des langues, à travers le doublage ou le sous-titrage des produits audiovisuels. Ils estiment que dans l'UE la demande de contenus audiovisuels en langue étrangère est réduite et celle-ci n'arriverait pas à couvrir les coûts déterminés par une offre transfrontalière. De plus, les consommateurs montrent souvent une préférence pour les produits nationaux.

Cependant, cela n'est pas tout à fait vrai car la demande transfrontalière de produits d'autres pays augmente de plus en plus. Un facteur déterminant réside dans l'augmentation de la mobilité européenne. Aujourd'hui, un nombre croissant de citoyens européens habitent dans un pays dont ils ne

sont pas ressortissants. À cela il faut ajouter la présence en Europe de quatre millions de personnes considérées comme appartenant à des minorités linguistiques et de 3.7 millions de voyageurs transfrontaliers.⁴⁸ De plus, le nombre de citoyens pouvant s'exprimer dans une langue étrangère s'accroît progressivement et aujourd'hui a atteint 228 millions, selon de récentes études.⁴⁹ Ces chiffres montrent qu'il existe en Europe une forte demande transfrontalière, actuelle et potentielle, de contenus en provenance d'autres États membres. Cependant, les prestataires en ligne n'ont pas encore complètement saisi cette opportunité, dans la mesure où 38% de ceux dont les services sont accessibles à l'étranger déclarent offrir des contenus différenciés selon les pays.⁵⁰ Ainsi, ces opérateurs continuent à limiter l'offre aux produits nationaux ou culturellement voisins, en créant des sites internet accessibles dans un seul État ou avec des contenus adaptés seulement aux spécificités nationales.

C. Raisons économiques

La dernière catégorie de raisons pouvant expliquer l'adoption de mesures de géoblocage regroupe les facteurs économiques pris en compte par les prestataires en ligne au moment des choix commerciaux. Lorsqu'un prestataire doit fixer le prix et conditions d'un service en ligne, il doit tenir compte de la situation de marché ainsi que de la concurrence présente et future et du consentement à payer des consommateurs.⁵¹ Dans ce paragraphe nous analyserons premièrement l'impact du pouvoir d'achat dans chaque État membre sur la décision de discrimination des prix pour ensuite analyser d'autres raisons économiques justifiant cette discrimination.

⁴⁸ 'The economic potential of cross-border pay-to-view and listen audiovisual media services' (2012) Rapport rédigé par *Plum Consulting* pour la Commission européenne, 86.

⁴⁹ *ibid.*

⁵⁰ SWD (2016) 70 final 65 (n 18).

⁵¹ Commission européenne, 'Study on business practices applying different conditions of access based on the nationality or the place of residence of service recipients – Implementation of Directive 2006/123/EC on Services in the Internal Market' (2009) Rapport final, 62-8.

a. Discrimination des prix selon le pouvoir d'achat des consommateurs

Le consentement à payer des consommateurs varie selon leur pouvoir d'achat et il est très différent selon le pays. Pour donner un exemple, un consommateur cypriste dépense 8€ par an dans le marché de contenus audiovisuels, alors qu'un consommateur danois arrive à dépenser 450€ durant la même période.⁵² Si le consentement à payer varie, il est évident que les prestataires adapteront leurs prix en conséquence afin de maximiser leurs profits. Si les techniques de géoblocage étaient interdites, les prestataires seraient obligés d'offrir les mêmes prix et conditions à tous les consommateurs sur un site à dimension européenne, sans possibilité de discrimination. Cette convergence des prix entraînerait un désavantage pour les consommateurs avec un pouvoir d'achat inférieur ainsi que l'impossibilité pour les prestataires en ligne de maximiser leurs profits sur chaque marché, déterminant ainsi une réduction du bien-être de certains consommateurs.⁵³

En revanche, la possibilité de discriminer les prix sur la base du pouvoir d'achat relatif permet d'ouvrir de nouveaux marchés qui n'auraient pas été ouverts sans différenciation, puisqu'il n'y aurait pas eu de demande sur ces marchés si le prix avait été fixé au même niveau que dans les États avec un plus haut consentement à payer.

Cependant, les consommateurs des pays avec les prix les plus élevés financent indirectement l'offre de produits dans ceux qui bénéficient de prix plus bas et cela peut créer de la frustration parmi ceux qui se voient obligés de payer un prix plus élevé pour le même produit. Cette frustration peut encourager la piraterie en ligne ainsi que l'utilisation de RVP,⁵⁴ ce qui, dans un cercle vicieux, impliquerait l'impossibilité de continuer à pratiquer des prix

⁵² A. Enders, 'The value of territorial licensing to the EU' (2013), https://www.letsgoconnected.eu/fileadmin/Studies/Alice_Enders_The_value_of_territorial_licensing_-_FINAL_11_OCT_2013.pdf consulté le 22 avril 2016.

⁵³ J.V. Kennedy, 'Why Geoblocking Can Increase Consumer Welfare and Improve Income Equality' (2014) Information Technology and Innovation Foundation <http://www2.itif.org/2014-geoblocking-increase-consumer-welfare.pdf> consulté le 22 avril 2016.

⁵⁴ SWD (2016) 70 final 65 (n 18).

diversifiés.⁵⁵ Toutefois, une analyse économique empirique serait nécessaire avant de tirer des conclusions sur ce point.

b. D'autres raisons économiques

À part le besoin d'adapter les prix au pouvoir d'achat des consommateurs dans chaque État membre, les prestataires en ligne justifient le recours aux techniques de géoblocage aussi à la lumière d'autres raisons économiques. Tout d'abord, l'existence de mesures de géoblocage rend possible une concurrence significative sur le marché d'un certain État, qui n'est pas présente ailleurs en revanche. Cela se justifie par l'existence d'opérateurs actifs seulement sur le marché en ligne d'un certain pays. Un nouveau prestataire qui décide d'entrer sur ce marché devra adapter ses prix aux pressions concurrentielles présentes dans ce pays, l'obligeant à fixer des prix plus hauts ou plus bas par rapport à ceux d'autres marchés. De plus, les dimensions et la structure d'entreprise d'un prestataire peuvent ne pas être suffisantes pour entrer sur un marché étranger et cela justifierait aussi le choix d'opérer seulement au niveau national. Enfin, les coûts nécessaires pour entrer sur un nouveau marché, découlant surtout d'un besoin de publicité, peuvent être disproportionnés compte tenu des opportunités de profits.

Une fois toutes les raisons qui pourraient potentiellement justifier l'adoption de mesures de géoblocage identifiées, il convient de vérifier comment ces obstacles sont traités à la lumière du cadre législatif actuel. Cela apparaît important surtout en considération de l'intention déclarée par la Commission de présenter de nouvelles propositions législatives. De telles initiatives seraient justifiées seulement lorsque les normes déjà existantes ne permettent pas d'interdire de tels obstacles en vue de créer un marché unique numérique paneuropéen. Cet aspect fera l'objet du prochain paragraphe.

III. LA COMPATIBILITE DU GEOBLOCAGE AVEC LE CADRE LEGISLATIF ACTUEL

Les mesures de géoblocage pourraient être qualifiées *prima facie* en tant que discriminations des consommateurs en raison de leur résidence. En effet, le fait que le consommateur soit *lato sensu* résident dans un certain pays est le

⁵⁵ Langus, Neven et Poukens (n 7) 113.

seul critère à partir duquel l'accès aux contenus numériques mis à disposition par un prestataire établi dans un autre État membre est bloqué.

Avant de procéder à l'analyse des nouvelles propositions législatives présentées par la Commission dans sa stratégie pour le marché unique numérique,⁵⁶ il convient de vérifier si cet objectif ne pouvait pas être atteint sur la base de l'actuel cadre législatif. Plus spécifiquement, il faut regarder si un traitement différencié impliqué par le géoblocage pourrait être interdit en faisant appel aux dispositions législatives existantes et à leur meilleure mise en œuvre ou s'il serait nécessaire de prendre l'initiative d'une nouvelle législation, comme fait par la Commission. L'analyse de la nécessité d'intervenir à travers de nouvelles propositions législatives apparaît davantage importante car le législateur se voit souvent adresser des reproches de 'surproduction' de règles.⁵⁷

Dans le cadre législatif actuel, l'article 20(2) de la directive services semble *prima facie* approprié pour répondre au problème de la différence de traitement en raison de la nationalité ou résidence dans le marché unique numérique.⁵⁸ Cette disposition interdit les conditions générales d'accès à un service mises à la disposition du public par le prestataire lorsqu'elles discriminent en raison de la nationalité ou du lieu de résidence du destinataire.

1. L'Article 20(2) de la Directive Services: Limite à la liberté de discriminer entre des prestataires ?

Une disposition qui, à première vue, pourrait contribuer à la construction d'un marché unique numérique et répondre au géoblocage est l'article 20(2) de la directive services.⁵⁹ Cette directive a pour objectif de faciliter la libre circulation des services dans le marché européen. Il est clair que ce ne sont pas uniquement les États membres qui posent des obstacles à la libre circulation, les prestataires peuvent aussi choisir d'avoir recours à une forme

⁵⁶ COM(2015) 192 final.

⁵⁷ F. Modugno et al. (n 14) 351.

⁵⁸ Directive 2006/123/CE du Parlement européen et du Conseil du 12 décembre 2006, relative aux services dans le marché intérieur [2006] JO L376/36.

⁵⁹ *ibid.*

de discrimination en raison de la résidence et ainsi créer des frontières artificielles dans le marché.

L'article 20(2) paraît répondre à ce problème en interdisant 'les conditions générales d'accès à un service qui sont mises à la disposition du public par le prestataire' lorsqu'elles contiennent 'des conditions discriminatoires en raison de la nationalité ou du lieu de résidence du destinataire'. Toutefois, cela n'empêche pas de 'prévoir des différences dans les conditions d'accès lorsque ces conditions sont directement justifiées par des critères objectifs'. Cet article met en balance deux éléments : d'un côté, l'objectif de réaliser un marché unique où il n'y a pas de discriminations dans les conditions appliquées aux consommateurs ; de l'autre, la liberté des prestataires de déterminer l'étendue du marché dans lequel ils veulent offrir leurs services ainsi que les prix pratiqués sur chaque marché, à condition qu'il y ait une justification à toute éventuelle limitation.⁶⁰

Cependant, trois aspects critiques doivent être abordés. Tout d'abord, il faut vérifier si cette directive est applicable aux contenus audiovisuels et musicaux en ligne et, dans ce but, clarifier la notion de service adoptée par la directive. En effet, le considérant 9 spécifie que la directive s'applique 'exclusivement aux exigences qui affectent l'accès à une activité de service ou l'exercice d'une telle activité'. Le deuxième aspect qu'il faut aborder concerne la notion de 'conditions générales d'accès à un service, qui sont mises à la disposition du public par le prestataire'. Cette disposition ne définit pas la qualification de ces clauses, qui sont négociées individuellement avec le consommateur, se limitant à interdire les conditions générales d'accès discriminatoires. Enfin, il faut analyser quelles sont les justifications fondées sur des critères objectifs qui entraîneraient la légalité des discriminations.

2. Le champ d'application de l'article 20(2) de la Directive Services

Pour ce qui concerne le premier aspect, dans le but de fixer la notion de service, l'article 4(1) de la directive renvoie à l'article 57 du Traité sur le fonctionnement de l'Union européenne (ci-après 'TFUE') qui définit les

⁶⁰ Competition and Markets Authority, 'CMA response to the European Commission on geo-blocking and other geographically based restrictions' (2015) http://ec.europa.eu/information_society/newsroom/image/document/2016-5/competition_and_markets_authority_uk_13450.pdf consulté le 22 avril 2016.

services comme étant des 'prestations fournies normalement contre rémunération, dans la mesure où elles ne sont pas régies par les dispositions relatives à la libre circulation des marchandises, des capitaux et des personnes'. D'après la Commission, cette notion inclut aussi les téléchargements en ligne de fichiers musicaux⁶¹. Pourtant une telle inclusion se fonde sur une définition de marchandise comme 'produit tangible' qui n'est pas unanimement acceptée. Il est clair que si nous acceptons cette définition de marchandise, tout contenu numérique, étant intangible, sera considéré comme un service et, par conséquent, la directive pourra s'appliquer. Mais une marchandise doit-elle être par définition tangible ? À notre avis, il ne s'agit probablement pas d'une conclusion nécessaire, notamment si nous considérons que la conséquence serait d'appliquer deux disciplines différentes selon que le produit musical soit incorporé dans un support matériel ou distribué en ligne, puisque seulement dans ce dernier cas nous pourrions appliquer le régime relatif aux services. Il est vrai que ce n'est que dans le premier cas que le consommateur achète une marchandise *stricto sensu*, mais il est aussi évident que l'objet de son intérêt reste le contenu de ce support, à savoir le produit audiovisuel, et il n'y a pas de raisons contraignantes pour appliquer deux régimes différents. Nous proposons de considérer les contenus audiovisuels et musicaux *achetés* en ligne comme étant des marchandises pour les différencier de ceux qui sont diffusés en continu sur internet (*streaming*) qui seraient qualifiés de services. Cela nous semble l'interprétation la plus logique, mais elle limite l'application de la directive seulement à des contenus qui sont *diffusés* en ligne.

De plus, une limitation ultérieure du champ d'application découle de l'article 2 de la directive. Celui-ci exclut les services audiovisuels, de sorte que la directive services trouverait application seulement pour les contenus *musicaux diffusés* en ligne. Ce n'est pas une interprétation acceptée de façon unanime et d'ailleurs la doctrine souligne la difficulté de distinguer entre les contrats ayant pour objet des services et ceux qui concernent des marchandises, en estimant que le critère adopté dans la directive produit des

⁶¹ Commission, 'Document de travail des services de la Commission visant à l'établissement d'orientations sur l'application de l'article 20, paragraphe 2, de la directive 2006/123/CE relative aux services dans le marché intérieur ('la directive 'services')' SWD(2012) 146 draft 7.

difficultés pratiques.⁶² Cette incertitude sur le champ d'application exact de la directive est l'une des raisons pour lesquelles l'article 20(2) n'est pratiquement pas mis en œuvre.⁶³

3. La notion de 'conditions générales d'accès à un service mises à la disposition du public' et les raisons d'un traitement différencié

La deuxième question à analyser concerne la notion de 'conditions générales d'accès à un service mises à la disposition du public'. Selon la Commission, cette disposition se réfère à toute information mise à disposition du public à travers différents moyens, mais elle ne comprend pas les conditions négociées individuellement avec le consommateur, puisque dans ce cas il ne s'agirait pas de conditions mises à la disposition du public.⁶⁴ Par conséquent, ces clauses individualisées ne sont pas couvertes par l'article 20(2). Par conséquent, si le prestataire en ligne n'affiche pas ses conditions d'accès discriminatoires en public, il n'y a pas de violation de cette disposition. Souvent, dans le marché numérique le recours à des mesures de géoblocage n'est pas indiqué avant la fin de la transaction en ligne, lorsque le consommateur déclare sa résidence, c'est-à-dire lors de l'enregistrement ou lors sa localisation est relevée à travers son adresse IP. Dans ces cas, l'article 20(2) ne trouvera pas application.

Le dernier aspect méritant d'être abordé concerne les justifications que le prestataire pourrait donner pour motiver les discriminations pratiquées. Le législateur s'est rendu compte qu'une interdiction totale de tout traitement différencié dans le marché intérieur aurait été une intrusion excessive dans la liberté des prestataires. En effet, elle leur aurait imposé d'offrir leurs services dans toute l'Union dès qu'ils auraient entamé une activité dans un État membre, sans possibilité de différencier selon la résidence des consommateurs, donc, sans pouvoir déterminer l'étendue de leur marché.⁶⁵ Une telle obligation aurait pu entraîner des effets contraires au but de la directive, lequel est de déterminer une meilleure allocation des ressources et

⁶² Schulte-Nölke, Zoll, Macierzyńska-Franaszczyk, Stefan, Charlton (n 40) 43.

⁶³ 'Enhanced Consumer Protection – the Services Directive 2006/123/EC'
http://ec.europa.eu/consumers/ecc/docs/ecc-services_directive_en.pdf consulté le 18 avril 2016.

⁶⁴ SWD(2012) 146 draft 45 (n 61).

⁶⁵ Schulte-Nölke, Zoll, Macierzyńska-Franaszczyk, Stefan, Charlton (n 40) 39.

une plus grande croissance économique à travers la libre circulation. En effet, une interdiction de tout traitement différencié dans le marché intérieur aurait pu décourager les investisseurs puisqu'ils auraient dû faire des efforts au-delà de leurs capacités effectives. C'est pourquoi l'article 20(2) envisage 'la possibilité de prévoir des différences dans les conditions d'accès lorsque ces conditions sont directement justifiées par des critères objectifs' qui sont répertoriés de manière non exhaustive dans le considérant 95 du préambule, tels que les différentes conditions du marché, les 'risques supplémentaires liés à des réglementations différentes de celles de l'État membre d'établissement' ainsi que la non-détention des droits de propriété intellectuelle. Par conséquent, l'article 20(2) interdit seulement les discriminations arbitraires⁶⁶ et toute raison économique pourrait potentiellement justifier une différence de traitement pour autant qu'elle soit plausible.⁶⁷ Comme nous avons vu *supra*, les justifications possibles sont très nombreuses, ce qui rend cette disposition peu effective. L'article 20(2) est, en réalité, une disposition symbolique exprimant les valeurs du marché intérieur mais il n'entraîne pas de conséquences réelles car il se limite à promouvoir la transparence en obligeant les prestataires à expliquer les raisons d'un éventuel choix discriminatoire.⁶⁸

Cette analyse a démontré que, exception faite des services audiovisuels pour lesquels la directive services ne s'applique pas en raison d'une dérogation explicite prévue à l'article 2, l'application de l'article 20(2) aux contenus numériques n'est pas certaine car la notion de service n'est pas tout à fait claire. Pourtant, même si cette disposition s'appliquait aux contenus numériques, elle se limiterait à interdire les conditions générales d'accès discriminatoires, sans affecter les clauses négociées individuellement ayant le même effet. Enfin, même lorsqu'une discrimination est identifiée dans les conditions générales, il existe de nombreuses justifications à un tel traitement de sorte que cet article ne produit pas de conséquences concrètes. Il faut conclure que l'article 20(2) ne peut pas fonder juridiquement l'interdiction du géoblocage en vue de construire un marché unique numérique.

⁶⁶ *ibid* 46.

⁶⁷ *ibid* 47.

⁶⁸ *ibid* 48-9.

IV. LA PORTABILITE TRANSFRONTIERE DES SERVICES DE CONTENU EN LIGNE : LE PREMIER PAS VERS UN MARCHE UNIQUE NUMERIQUE

La Commission a lancé en mai 2015 une stratégie visant la création d'un marché unique numérique, dont l'objectif est d'améliorer l'accès aux biens et services en ligne ainsi que de créer un 'un environnement propice au développement des réseaux et services numériques' et ainsi maximiser le potentiel de croissance inhérent à l'économie numérique.⁶⁹ Pour ce qui concerne la présente étude, la Commission a déclaré vouloir supprimer toute forme injustifiée de géoblocage pour qu'il n'y ait plus de barrières artificielles érigées par les prestataires en ligne, dans le but de créer un véritable espace sans frontières comme prévu par l'article 26 TFUE.⁷⁰ En effet, les mesures de géoblocage identifiées *supra* affectent non seulement le *commerce* de services en ligne, mais aussi leur *portabilité* car, lorsque le consommateur a légalement accès dans son propre pays à certains contenus sur la base d'un abonnement à un service en diffusion en continu (*streaming*) et qu'il veut en profiter dans un autre État membre, il se verra refuser l'accès en raison de sa localisation. Tout cela résulte en un manque de portabilité transfrontière.

Cependant, il existe une demande potentielle de portabilité transfrontière et la Commission a estimé qu'aujourd'hui 29 millions d'européens voudraient avoir accès à leurs contenus en ligne depuis un Etat membre différent de celui où ils ont conclu leur contrat d'abonnement.⁷¹ Ils représentent 5.7% des consommateurs européens, mais ils devraient atteindre le taux de 14% en 2020, à savoir 72 millions de personnes.⁷²

Après avoir déclaré vouloir dépasser toute mesure de géoblocage dans le marché numérique, la Commission semble toutefois avoir eu peur de son propre courage et, au moment de présenter les propositions législatives envisagées dans sa stratégie, elle s'est limitée au problème du manque de portabilité transfrontière, en abandonnant pour l'instant l'idée d'une

⁶⁹ COM(2015) 192 final (n 4).

⁷⁰ *ibid.*

⁷¹ Commission européenne, 'Impact assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council to ensure the cross-border portability of online content services in the internal market"' SWD(2015) 270 final, 17.

⁷² *ibid.*

interdiction totale du géoblocage. L'adoption de cette approche graduelle est à approuver car, comme nous avons vu *supra*, les raisons pouvant justifier un traitement différencié sur le marché numérique selon la localisation du consommateur sont nombreuses et une simple interdiction aurait pu décourager les investissements et entraîner un effet contraire à l'objectif de croissance économique. C'est pourquoi la Commission s'est à raison limitée à présenter une proposition de règlement visant à garantir la portabilité transfrontière des services en ligne⁷³ en procédant sur la base de l'article 114 TFUE qui donne à l'Union le pouvoir d'adopter des mesures pour la mise en place et le fonctionnement du marché intérieur. L'objectif de la proposition est de 'garantir que les abonnés à des services de contenu en ligne dans l'Union fournis sur une base *portable* peuvent bénéficier de ces services lorsqu'ils sont *présents temporairement* dans un *autre État membre*'.⁷⁴ Cet objectif sera-t-il atteint à la lumière du libellé actuel de la proposition législative ? Nous estimons que certains amendements seront nécessaires pour que l'acte final soit effectivement applicable et puisse réellement garantir la portabilité transfrontière des services en ligne. Il faut tout d'abord analyser le contenu de cette proposition et les difficultés soulevées par sa formulation. Nous aborderons son champ d'application matériel et ensuite nous examinerons son fonctionnement et ses conditions d'application.

1. *À quels services s'appliquerait ce règlement ?*

L'article 1 de la proposition législative étudiée prévoit que le futur règlement s'applique aux 'services de contenu en ligne dans l'Union'. L'article 2(e) nous donne une définition spécifiant qu'il s'agit d'un service qu'un prestataire 'fournit légalement en ligne dans l'État membre de résidence, qui est portable, et qui constitue un service de médias audiovisuels au sens de la directive 2010/13/UE ou un service qui consiste essentiellement à donner accès à des œuvres, à d'autres objets protégés ou à des transmissions réalisées par des organismes de radiodiffusion'. En réalité, le manque de portabilité affecte seulement les services audiovisuels car dans le secteur de la musique les prestataires en ligne offrent déjà dans la plupart des cas la possibilité

⁷³ Commission européenne, 'Proposition de règlement du Parlement européen et du Conseil visant à assurer la portabilité transfrontière des services de contenu en ligne dans le marché intérieur' COM(2015) 627 final.

⁷⁴ *ibid* 8 (italique ajouté).

d'accéder aux contenus depuis un autre État membre.⁷⁵ Pourtant l'article 2 ne contient aucune limitation à cet égard. Le règlement s'appliquera à tous les services de contenu lorsqu'il s'agit d'un service offert contre rémunération ou d'un service offert gratuitement mais avec vérification de l'État membre de résidence.

Quelle est la raison d'être de ces conditions ? Le législateur ne voulait pas, en effet, obliger les prestataires offrant des services gratuits à se doter des moyens aptes à déterminer l'État de résidence habituelle du consommateur demandant l'accès à un contenu en ligne. Autrement cela aurait entraîné des coûts excessifs et un changement de leur mode d'action.⁷⁶ Pour cette raison, le règlement s'appliquera seulement lorsqu'il sera possible d'établir la résidence du consommateur soit, par exemple, sur la base de l'adresse de facturation (s'il y a eu paiement) soit en raison d'autres données auxquelles les prestataires ont déjà accès. Toutefois, il ne s'appliquera pas aux services offerts gratuitement sans vérifier l'État de résidence de l'abonné.⁷⁷ Concernant les moyens de vérification de l'État membre de résidence, le considérant 17 en donne une liste non exhaustive en se référant à l'existence d'un contrat de connexion internet, à l'adresse IP ou, de façon résiduelle, à tout autre moyen d'authentification. La définition de ces moyens est particulièrement importante car en dépend l'identification de l'État où le consommateur est temporairement présent et à partir duquel il peut accéder au contenu en ligne. Il serait opportun qu'à l'occasion des débats parlementaires une annexe soit ajoutée à ce règlement clarifiant les moyens de vérification de l'État membre de résidence.

2. Comment fonctionnerait le règlement en pratique ?

Comment est-il possible qu'un consommateur puisse accéder à des contenus protégés par le droit d'auteur et offerts par un prestataire dans un pays où ce dernier n'a pas de licence sans que cela entraîne une violation du droit d'exploitation attribué à autrui ? Il est possible, en effet, que le droit d'exploitation des mêmes contenus dans un autre pays ait été attribué à un sujet différent du prestataire de service en ligne avec lequel le consommateur

⁷⁵ SWD(2015) 270 final 10 (n 71).

⁷⁶ *ibid* 14.

⁷⁷ *ibid*.

a souscrit un abonnement et, pourtant, ce prestataire doit garantir, à la lumière de ce règlement, la portabilité des contenus dans d'autres États membres où le consommateur se trouve temporairement. Cela est possible parce que l'article 4 introduit une *fiction juridique* selon laquelle 'la fourniture d'un service de contenu en ligne, ainsi que l'accès à celui-ci [...] sont réputés avoir lieu uniquement dans l'État membre de résidence'. Grâce à cette fiction, le consommateur peut accéder en toute légalité aux contenus en ligne sur la base de l'abonnement conclu dans son propre pays et sans payer de redevance de droit d'auteur au distributeur exclusif dans l'État membre où il se trouve temporairement. Par ailleurs, le prestataire n'aura pas besoin de demander une autre licence dans le pays de destination du consommateur afin de garantir la portabilité de ses contenus en ligne, car il suffira d'avoir la licence d'exploitation des droits d'auteur dans le pays où réside habituellement le consommateur. Par conséquent, ce règlement étend automatiquement le champ de validité d'une licence d'exploitation territoriale à tous les États membres où les abonnés se trouveront temporairement.⁷⁸ Cela permet d'assurer le respect de l'obligation de garantir la portabilité sans devoir supporter les coûts supplémentaires entraînés par l'octroi d'une licence d'exploitation ultérieure. De plus, l'article 3 exclut que l'obligation de portabilité s'étende aux exigences de qualité car, si tel n'était pas le cas, les prestataires auraient dû procéder à des investissements ultérieurs dans les réseaux internet pour faire en sorte que, quel que soit le pays où se trouve le consommateur, la qualité du service en ligne soit la même que dans l'État de résidence. Enfin, l'article 5 dispose que toutes les clauses contractuelles, entre titulaires de droits d'auteur et prestataires en ligne ainsi qu'entre ces derniers et les consommateurs, contraires à l'obligation de portabilité seront *inapplicables*, même lorsqu'elles sont contenues dans des contrats conclus avant l'entrée en vigueur du règlement car celui-ci sera rétroactivement applicable.

⁷⁸ G. Mazziotti et F. Simonelli, 'Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?' (2016) CEPS Commentary <https://www.ceps.eu/publications/regulation-'cross-border-portability'-online-content-services-roaming-netflix-or-end> consulté le 12 avril 2016.

3. *Quand s'appliquerait le règlement ?*

Comme nous avons vu, l'article 1 prévoit que la portabilité doit être assurée lorsque l'abonné à un service en ligne est *présent temporairement* dans un autre État membre, à savoir dans un pays de l'Union où il ne réside pas habituellement. Cependant, un problème se pose par rapport à ces conditions d'application car le règlement ne prévoit pas de définitions satisfaisantes ni de 'présence temporaire' ni d'État membre de résidence'.

Concernant la notion d'État membre de résidence', l'absence de clarté pourrait entraîner un risque d'abus et une érosion du principe de territorialité du droit d'auteur. En effet, les européens qui ont une résidence secondaire ou un compte en banque dans un autre État membre, par exemple, pourraient profiter de cela pour souscrire un abonnement à un service en ligne qui n'est pas disponible dans leur pays et, ensuite, utiliser la portabilité pour avoir accès à ce service dans leur État de résidence habituelle.⁷⁹ Cela entraînerait tout d'abord un contournement du choix du prestataire en ligne de limiter l'étendue géographique de son service et, ensuite, une érosion importante du principe de territorialité du droit d'auteur car la portabilité ne serait pas limitée aux cas où le consommateur se trouve *effectivement* pour une période temporaire dans un État membre différent de celui où il réside habituellement. De plus, cette absence d'indication des critères pour définir quel est l'État de résidence habituelle rend ce règlement inapplicable. Il faudrait que la détermination de l'État de résidence soit automatique car il n'est pas envisageable d'obliger les prestataires de services de demander le certificat de résidence de tous leurs abonnés ni de leur imposer de conduire les mêmes investigations que les autorités fiscales, par exemple. L'objectif de ce règlement est de permettre la consommation des contenus en ligne lorsque le consommateur se trouve temporairement dans un autre pays de l'Union et le législateur ne peut pas imposer à la charge des prestataires des obligations disproportionnées par rapport à l'objectif poursuivi. Par conséquent, il serait opportun qu'à l'occasion des débats parlementaires une définition claire de l'État de résidence habituelle soit introduite dans le règlement.

Concernant le concept de 'présence temporaire', la proposition de règlement sous examen ne fixe pas une durée déterminée avec la conséquence que cette

⁷⁹ *ibid.*

période, pendant laquelle le consommateur peut accéder au service en ligne dans un pays différent de celui où il réside habituellement et où il a souscrit son abonnement, pourrait s'étendre sans limite. La Commission a motivé le choix de ne pas fixer de limites temporelles précises sur la base de trois arguments.⁸⁰ Premièrement, une limitation explicite empêcherait d'inclure des présences temporaires de durées différentes ; deuxièmement, le règlement inclut des contenus de types différents (audiovisuels, musicaux *et cetera*), donc il serait difficile de fixer une durée unique pendant laquelle le consommateur aurait le droit d'accéder au service en ligne ; enfin, la Commission affirme que, si la durée était définie, les prestataires seraient obligés de recourir à des moyens de contrôle intrusifs afin de déterminer précisément la période de présence du consommateur dans un autre État membre.

Cependant, les conséquences négatives d'un tel manque de précision apparaissent encore plus graves. Tout d'abord, il n'est pas clair qui doit définir cette durée et sur la base de quels critères. Ensuite, le règlement ne spécifie pas s'il faut considérer la durée totale de la présence du consommateur à l'étranger ou si le calcul recommencerait à chaque fois que le consommateur change de pays.⁸¹

Comme nous avons vu, cette absence de clarté peut entraîner un risque d'abus parce que le consommateur souscrivant un abonnement dans un pays pourrait ensuite avoir accès à ce service dans un autre État pour une durée *indéterminée*. Le risque d'une telle extension temporelle est d'entraîner une érosion complète du principe de territorialité car une licence octroyée dans un État permettrait de fournir des services dans un autre État sans limites temporelles.⁸² Le Parlement européen a affirmé que ce règlement ne doit pas remettre en cause le principe de territorialité du droit d'auteur puisque celui-ci garantit la diversité culturelle ainsi que le financement de l'industrie créative.⁸³ Pourtant, ce serait exactement ce qui pourrait arriver à la lumière de la formulation actuelle des dispositions.

⁸⁰ SWD (2015) 270 final (n 71) 25.

⁸¹ Mazziotti et Simonelli (n 78).

⁸² *ibid.*

⁸³ T. Madiega, 'Cross-border portability of online content services' (2016) European Parliamentary Research Service.

De plus, l'absence de clarté sur la durée de la présence temporaire irait à l'encontre du caractère obligatoire de ce règlement. En effet, la Commission a justifié le recours à cet instrument afin de garantir l'immédiateté d'application dans l'ensemble de l'Union au même temps mais si la durée devait être définie dans les contrats entre titulaires du droit d'auteur, prestataires et consommateurs, il faudrait attendre la conclusion de ces accords avant que la portabilité puisse être assurée.

Enfin, un dernier argument en faveur d'une définition claire de la présence temporaire mérite d'être mentionné. En effet, tout l'équilibre entre la portabilité des services en ligne et le respect du principe de territorialité repose sur l'étendue de la présence temporaire. Si cette durée se prolonge excessivement, le principe de territorialité du droit d'auteur serait *de facto* dépassé. En revanche, une durée trop courte ferait en sorte que ce règlement n'ait pas d'impact significatif et les consommateurs devraient continuer à faire face aux mesures de géoblocage de contenus légalement souscrits même à l'occasion d'un séjour relativement court dans un autre État de l'Union. Il s'agit d'un équilibre qui doit être fixé par le législateur et nous jugeons opportun que la présence temporaire soit *précisément* fixée. D'ailleurs, si l'objectif du Parlement est de sauvegarder le principe de territorialité, il est possible, à notre avis, qu'à l'occasion des débats, des amendements soient introduits afin de restreindre la durée de la présence temporaire pour que la dérogation au principe de territorialité ne soit pas excessive.⁸⁴ Cependant, il est aussi probable que le Parlement, au lieu de s'attarder sur une définition précise de la présence temporaire, choisisse de mieux clarifier les critères de rattachement de l'utilisateur à un certain pays. Cela permettrait de définir l'État membre de résidence où le consommateur peut souscrire un service portable en ligne, avec la conséquence que, dans tout autre État membre où il se trouvera, il pourra bénéficier de ce service pour une période limitée. Le choix (politique) entre une définition de la présence temporaire et une clarification des critères pour identifier l'État de résidence habituelle est remis au Parlement, mais il est évident, à notre avis, que des amendements sur un de ceux deux aspects sont nécessaires pour rendre effectivement applicable le futur règlement.

⁸⁴ Mazziotti et Simonelli (n 78).

V. CONCLUSIONS

La présente étude a montré comment la pratique du géoblocage détermine un morcellement du marché car elle divise l'espace numérique européen suivant les frontières nationales en empêchant la libre circulation transfrontière des contenus audiovisuels et musicaux en ligne et en bloquant la possibilité de profiter de ces contenus en raison de la localisation du point d'accès.

Sur la base de ces prémisses, la Commission a lancé en mai 2015 une stratégie pour un marché unique numérique dont un des objectifs est d'améliorer l'accès aux biens et services en ligne.⁸⁵ Elle a déclaré vouloir supprimer toute forme de géoblocage pour que les consommateurs ne doivent plus faire face à des mesures restrictives. Cependant, notre analyse a montré qu'il y a de nombreuses justifications au géoblocage. Certaines ont été probablement résolues grâce à l'intervention du législateur européen. Notamment, le caractère territorial absolu du droit d'auteur a été mitigé dans le secteur de la musique à travers la directive 2014/26/UE visant à faciliter l'octroi de licences multi-territoriales dans l'Union. De plus, un autre encouragement pour les offres transfrontalières découle de la possibilité de régler en ligne les litiges causés par un achat numérique afin d'éviter que les prestataires en ligne, lorsqu'ils offrent leurs services dans plusieurs États membres, doivent faire face à des juridictions étrangères dont les règles procédurales ainsi que les coûts peuvent être significativement différents. Cependant, d'autres raisons expliquant le géoblocage persistent car elles sont liées aux différences culturelles et économiques entre les États de l'Union. Cela justifierait encore un traitement différencié des consommateurs en raison de la localisation de leur point d'accès.

Jusqu'à présent la Commission a adopté une approche graduelle sur la question, visant l'harmonisation des règles, dans le but de réduire les entraves découlant du morcellement du cadre juridique européen. Cette approche doit être approuvée car il faut, à notre avis, que le développement d'une offre pan-européenne de contenus en ligne soit un résultat 'naturel' du marché et découle d'un choix autonome des prestataires. Plus spécifiquement, il faut que le législateur supporte et encourage ce développement, en supprimant les

⁸⁵ COM (2015) 192 final (n 4).

entraves, mais il ne faut pas imposer aux opérateurs en ligne une obligation absolue d'offrir des contenus à l'échelle européenne en interdisant simplement toute mesure de géoblocage. Une telle interdiction pourrait produire l'effet contraire et décourager les investissements au lieu d'entraîner une croissance économique. A partir du moment où il sera rentable de profiter de la libre circulation en ligne et de ne pas ériger de barrières entre les États, un marché unique numérique surgira spontanément, sans qu'il y ait besoin que le législateur européen impose une 'conscience privée européenne'⁸⁶ obligeant les opérateurs économiques à participer à la création du marché unique numérique.

Les premiers pas de la Commission dans le cadre de sa stratégie sur le marché unique numérique semblent aller dans cette direction. Sans doute une intervention du législateur était nécessaire car le cadre législatif actuel n'offrait pas de moyens aptes à contribuer à la création d'un marché unique numérique. Nous avons montré dans quelle mesure l'article 20(2) de la directive services n'était pas adéquat pour atteindre l'objectif d'un marché en ligne sans frontières.

Pour cette raison, la Commission a décidé d'intervenir avec des initiatives législatives. Cependant, au lieu d'avancer une proposition interdisant dans tous les cas que les prestataires en ligne puissent pratiquer des traitements différenciés en raison de l'État de résidence, la Commission a proposé un règlement visant à garantir la portabilité des services de contenus en ligne dans le marché intérieur comme première action. L'objectif louable est de faire en sorte qu'un consommateur ayant souscrit un abonnement à un service de contenu audiovisuel ou musical en ligne dans un État membre puisse accéder à ce service lorsqu'il se trouve temporairement dans un autre pays de l'Union sans faire face à des restrictions découlant du géoblocage.

Cependant, la proposition présente des lacunes car les concepts sur lesquels elle se base ne sont pas dûment définis. En particulier, nous estimons qu'une définition claire de 'présence temporaire' ainsi que d' 'État membre de résidence' est nécessaire pour que le futur règlement soit effectivement

⁸⁶ E. Dubout, 'Libertés de circulation et situations horizontales – la personne privée comme destinataire commun?' dans E. Dubout et A. Maitrot de la Motte (eds.), *L'unité des libertés de circulation : in varietate concordia ?* (Bruylant 2013) 108.

applicable et puisse atteindre l'objectif de garantir la portabilité des services en ligne dans l'UE. Ces clarifications sont tout à fait nécessaires si nous considérons que l'équilibre entre l'objectif de créer un marché unique numérique, d'un côté, et le respect du principe de territorialité du droit d'auteur, de l'autre, se fonde sur l'étendue du concept de 'présence temporaire'. Plus spécifiquement, une extension indéterminée de cette durée pourrait aller à l'encontre du principe de territorialité du droit d'auteur car le consommateur serait en mesure d'avoir accès pour une durée indéfinie à des contenus en ligne protégés par le droit d'auteur dans un pays où son prestataire ne dispose d'aucune licence d'exploitation. Par ailleurs, le Parlement a déclaré que ce règlement ne devra pas remettre en cause le principe de territorialité puisque celui-ci garantit la diversité culturelle ainsi que le financement de l'industrie créative et il est donc probable que des amendements seront introduits pour que ce principe soit sauvegardé. Pour l'instant, il faudra attendre les futurs développements en espérant que le législateur trouvera un équilibre garantissant une incitation de l'industrie créative de l'audiovisuel et de la musique ainsi que l'achèvement d'un marché unique numérique pour le bien-être des consommateurs européens.

JUDGES' PERSPECTIVE ON THE LEVEL OF PUNISHMENT

Moshe Bar Niv* & Ran Lachman^{†‡}

Whether or not courts impose an adequate level of punishment, is an important issue in terms of sustaining the social order, maintaining the judicial system's legitimacy, and designing anti-crime policies. To assess the level of sentencing the study surveyed longitudinally, the perspectives of Israeli judges on the issue over a period of three decades. The results show that, consistently, the judges assessed the level of punishment as quite lenient. The results also suggest that no corrective action was taken over the three decades to adjust for the lenient sentencing either by the court system or by the judges themselves, who have the discretion to impose more severe sentences. A regression analysis revealed that court instance and tenure as a judge were related to the judges' assessments of punishment. The practical and theoretical implications of all these results are discussed.

Keywords: level of punishment, judges, sentencing, court systems, tenure as judge, gender, homeostasis

TABLE OF CONTENTS

I. INTRODUCTION	172
II. PUBLIC PERCEPTIONS ON THE LEVEL OF PUNISHMENT.....	176
1. <i>Studies on Public Opinion</i>	177
2. <i>Criticism of Public Opinion Studies on Sentencing</i>	181
III. JUDGES' PERCEPTIONS – FINDINGS	186
1. <i>Judges' Assessment of the Prevalent Punishment Level</i>	187
2. <i>A Longitudinal Comparison</i>	188

* Radzyner Law School, The Interdisciplinary Center, Israel

† Prof. Emeritus, College of Management – Academic studies, Israel

‡ We thank the Research Unit at the School of Business, The College of Management (COMAS, Israel) for financing the data collection. The Research Unit at COMAS and the Interdisciplinary Center participated in supporting this study. We are also thankful to Joseph Ganel and Adi Har-Zion for their assistance. We also thank two EJLS anonymous reviewers for their helpful comments on an earlier version of this paper.

IV. JUDGES' BACKGROUND AND THE ASSESSMENT OF THE LEVEL OF PUNISHMENT	192
1. <i>Judges' Assessments of Punishment by their Court Instance</i>	193
2. <i>Judges' Assessments of Punishment Based on Tenure</i>	193
3. <i>Judges' Assessments of Punishment by Previous Employment</i>	195
4. <i>Judges' Assessments of Punishment by Gender</i>	196
5. <i>Multivariate Analyses</i>	197
V. CONCLUSION	199
APPENDIX	202
1. <i>The Research Method</i>	202
2. <i>Survey Procedure</i>	202
3. <i>The Respondents</i>	203
4. <i>Possible Response Biases</i>	204
5. <i>Measuring the Dependent Variable</i>	205

I. INTRODUCTION

Do courts impose an adequate level of punishment? This is a crucial question for sustaining and legitimizing the criminal system, as well as a central issue in designing anti-crime policies. But, how can the adequacy of the level of punishment be assessed? Unfortunately, there is no acceptable empirical yardstick for the assessment of the general level of sentencing. Most empirical analyses of levels of punishment are based upon surveying public opinion. However, this approach is inadequate and unreliable.¹ In the present paper, we examine the level of punishment from a different and unique point of view – that of the judges themselves. By introducing the judiciary's perspective and by empirically examining judges' assessments of the prevalent level of punishment, this paper contributes to the study and understanding of the level of punishment issued by the courts.

The overall severity level of judicial punishment is a very important issue. Punishment is probably one of the most severe governmental interventions in human fundamental rights. It entails a wide range of sanctions, including

¹ See discussion in section B.2. below.

deprivation of freedom by lengthy incarceration and, in extreme cases, even capital punishment. Thus, the adequacy of sentencing is of essential importance for sustaining the courts' societal legitimacy, for the welfare of society at large, and for the preservation of human rights. The proper sentencing level is also essential for the assessment of court effectiveness and is a key factor for upholding the public's trust in the court system. Therefore, there is a keen interest in studying the overall level of courts' punishment (severity or leniency).

Previous studies have shown that the general public perceives sentencing levels as too lenient. However, while the public's perception of punishment is crucial for the courts' social legitimacy, it does not substitute the professional perspective of the legal branch as adequate feedback on the level of punishment for the courts. Thus, by focusing on public opinion, most current research has failed to shed light on the perspective of those professionals that are actually involved in the criminal punishment process such as judges and lawyers. There are few empirical studies on the perception of the key players in the sentencing process: the judges.² Consequently, very little is known about how judges conceive and perceive the level of punishment that they themselves issue. Thus, exploring the judiciary's perceptions on the issue is of high importance, both from a theoretical and practical standpoint. This study is merely a step towards the exploration of this important issue, and it ought to be followed by further research.

This study examines and analyses the perceptions of presiding Israeli trial court judges regarding the level of punishment that is most prevalent in

² The few surveys examining judicial perceptions with regard to the level of sentencing are primarily 'experimental' in nature. Such an example is a sentencing experiment conducted in Dutch criminal courts, see, Jan W. De Keijser, Peter J. Van Koppen, and Henk Elffers, 'Bridging the gap between judges and the public? A multi-method study' [2007] *Journal of Experimental Criminology* 131-161. Similar experiments usually present the same scenario to a group of laypersons as well, and compare their resulting simulated sentences; see, Andre Kuhn, 'Public and judicial attitudes to punishment in Switzerland' in Julian V. Roberts (ed.), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Routledge 2002), 117. See also, Austin Williams, Thomas Williams 'A Survey of Judges' Responses to Simulated Legal Cases' [1977] 68 *Journal of Criminal Law and Criminology* 307.

Israel.³ The Israeli court system and, in particular, the criminal law are based on the common law system. The Israeli Penal Code and the specific offenses defined in it are based upon the English criminal law.⁴ Hence, the results of this study may help improve the understanding of the level of punishment in other common law jurisdictions as well.⁵

-
- ³ The Israeli judicial system has a three instance hierarchy – magistrate, district and supreme courts. The second instance (district court) serves as a trial court (first instance for matters that are beyond the jurisdiction boundaries of the first instance) and as a court of appeal, over the judgments of the first instance – the magistrate court.
- ⁴ The Criminal Code Ordinance 1936 was enacted during the British mandate and was adopted by Israel upon its independence in 1948. In 1977, the code was replaced by the Israeli Penal Law 5737 - 1977. The new law followed the pattern of the English-Mandatory Statute (in particular regarding the specific offenses). The Penal Law comprises two parts – general and a specific. The general part sets the basic principles of the criminal laws and provides the doctrines relating to criminal behavior. The specific part of the Penal Law details and defines the offenses ranging from infractions to the most serious crimes such as treason and murder. Following the common law pattern, offenses are divided into different categories as a function of the severity of the sanctions, and in particular, to the length of the maximum prison sentence per each crime. Hence, the Penal Code defines three categories of offenses: a) Infractions (petty crimes) – crimes that are subject to a maximum of three-month jail term. Jail terms from three months and up to three years are misdemeanors. Crimes that impose a prison sentence of more than three years or death penalty are defined as felonies. Generally, the Penal Law defines the elements of each particular offense: the criminal behavior (*actus reus*), and the required nature of intent (*mens rea*). The specific part also determines the particular sanctions regarding each offense. In addition to the Penal Law, other laws define numerous particular offenses such as the Securities Laws, Consumer Protection Laws, etc.
- ⁵ The Israeli court system is an adversary one and is based upon the common law courts' principles. See for example, 'As for other nations' practices, looking first to a handful of common law countries whose judicial systems most closely resemble our own, specifically the United Kingdom, Canada, and Israel Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?* [2009] 114 Penn. St. L. Rev. 49, 59; see also, 'United states and Israel share some features (they are both democracies with a common law tradition', Bruce Peabody, *The Politics of Judicial Independence: Courts, Politics, and the Public* (Johns Hopkins University Press 2011) 208-9. See also, 'courts based on the British derived common law adversarial system practiced in Israel', Angeline Lewis, *Judicial Reconstruction and the*

Typically, Israeli criminal laws prescribe a maximum penalty for defined offences (usually a maximum fine and/or maximum prison term). Only seldom does Israeli law impose mandatory⁶ or minimal⁷ jail penalties. Obviously, most crimes are not subject to the maximum penalty; this creates a legal vacuum that is being filled by judge-made law. Striving to facilitate achievement of the punitive goals, the Israeli Supreme Court has laid down very broad standards, requiring that punishment be based on the principles of 'deterrence, retribution, prevention, and rehabilitation'.⁸ These general principles confer upon the trial courts wide discretion, entailing very limited scope of appellate review.

Throughout the period covered by this study (1989-2010/11), criminal sentencing laws were stable. The general part of the Penal Law, however, was revised in 1995. The revision granted courts limited discretion (in exceptional cases) to alleviate mandatory life-sentence penalties. However, as there are only a handful of such mandatory sanctions, and since the certain offenses and sanctions in the specific part were generally left unchanged, the impact of the revision on the general sentencing policy was limited.⁹

Given the above, this study examines the following questions:

What are the trial judges' perspectives on and assessment of the severity level of current courts sentencing?

What are the judges' views of sentencing given a longitudinal perspective of almost three decades?

Do judges' assessments of punishment relate to their individual

Rule of Law (Brill 2012) 96; Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (CUP 2013) 18ff.

⁶ The Penal Code imposes mandatory life sentence in relation to murder crimes and genocide crimes.

⁷ The Penal Code mandates a minimum imprisonment for assaulting police officers or obstruction to police officers while they carry out their duties.

⁸ See, CA 3417/99 *Har-Shefi v. State of Israel*, section 9 of justice Tirkel's judgment, <http://versa.cardozo.yu.edu/opinions/har-shefi-v-state-israel>.

⁹ A year or so after our research was completed a substantive reform in sentencing policy has been passed by the Israeli legislature. A structured sentencing regime replaced the previous judicial wide-discretion policy, Penal Law (amendment no. 113), 2012, the amendment became effective as a law on 10.7.2013.

characteristics (such as court instance, tenure as judge, gender, etc.)?

The underlying proposition is that the presiding judges will perceive the punishment they issue as well as that of and their colleagues as adequate. The present study examines this proposition empirically.

The focus is on the judiciary as it plays a pivotal role in the sentencing process. Within statutory constraints, judges are the ones who decide on the actual penalties. Their role in the sentencing process requires the highest expertise and experience regarding sentencing policies and the prevalent levels of punishment. Judges have a comprehensive knowledge of penal law, procedure and sentencing principles, as well as familiarity with the particulars of the criminal cases. They are the ones who evaluate the facts, deliberate the legal issues, and take into account the special circumstances of the case in determining the appropriate punishment in each case. The judges' views on the level of punishment are therefore unique and of utmost importance and relevance.

II. PUBLIC PERCEPTIONS ON THE LEVEL OF PUNISHMENT

Basic constitutional and human rights principles, as well as considerations of public legitimacy of courts,¹⁰ require that the level of criminal sentencing be just and adequate. Overly harsh penalties infringe upon the offenders' rights, and those too lenient penalties impinge on victims' rights and the need to protect society from criminal activities. The task of the courts is to properly set punishments within the sentencing ranges prescribed by the law. In so doing, courts serve the social ends of maintaining an optimal level of deterrence,¹¹ as well as maximizing the welfare of society at large.

¹⁰ On the issues of level of sentencing and public confidence and trust in the judicial system, see: Julian V. Roberts, Mojca, M. Plesničar, 'Sentencing, Legitimacy, and Public Opinion' in Gorazd Meško and Justice Tankebe (eds.), *Trust and Legitimacy in Criminal Justice* 33-51 (Springer 2015), see also, Mike Hough, Ben Bradford, Jonathan Jackson, and Julian V. Roberts, *Attitudes to Sentencing and Trust in Justice* (2013).

¹¹ For a recent model of optimal deterrence, see Steven Shavell, 'A simple model of optimal deterrence and incapacitation', [2015] *International Review of Law and Economics* 13-19. See also, Nuno Garoupa, 'Economic Theory of Criminal Behavior' *Encyclopedia of Criminology and Criminal Justice* (Springer 2014) 1280-1286.

Studying the perceptions of various sections of society regarding the level of punishment has important social implications. For example, a prevalent conception among the public is that the level of punishment, regardless of its real effects, may affect the degree of legal compliance, and consequently, affect the crime rates in society. Thus, a public perception that sentencing has been overly lenient may contribute to a increase in crime and have negative consequences for social welfare.

1. Studies on Public Opinion

The most common approach for assessing the perception of the level of sentencing has been through surveying public opinion.¹² The most prevalent methods used to gauge the public's opinion on sentencing are public opinion polls, media polls, focus groups, etc.¹³ In the last decades, several public opinion surveys have been conducted assessing the prevalent levels of punishment in various countries.¹⁴ The findings suggest that, in many

¹² Another, more 'objective' method for evaluating the severity of sentencing is to compare actual sentences to various statistical parameters. For instance, to compare the average (or median) number of years of the actual sentencing to the 'average' range prescribed by law. The difference (if any) between them can suggest the severity or leniency of the actual punishment and gauge skewedness, proportions etc. See, for example: Oren Gazal-Ayal, Ruth Kannai, 'Determination of Starting Sentences in Israel-System and Application' [2010] Federal Sentencing Reporter 232-242. However, such calculations, in the context of the adequate level of sentencing, are usually meaningless, since they do not relate to accepted criteria of adequate punishment.

¹³ Arie Freiberg, Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Routledge 2014) 69-70.

¹⁴ See for example: Mike Hough, Ben Bradford, Jonathan Jackson, and Julian V. Roberts 'Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales' (LSE Report, 2013); Julian V. Roberts, 'Public Opinion and the Nature of Community Penalties: International Findings' In Julian V. Roberts and Mike Hough (eds.) *Changing Attitudes to Punishment* (Routledge 2002) 33; Austin Lovegrove, 'Sentencing and Public Opinion: An Empirical Study of Punitiveness and Lenience and its Implications for Penal Moderation' (2013) 46 Australian & New Zealand Journal of Criminology 200-220. Kimberly N. Varma, Voula Marinos. 'Three Decades of Public Attitudes Research on Crime and Punishment in Canada' (2013) 55 Canadian Journal of Criminology and Criminal Justice 549-562. Julian V. Roberts, Mike Hough. 'Exploring public attitudes to

countries, the public views the courts' sentencing as lenient or as highly lenient.¹⁵ Only a small proportion of respondents perceived punishments as severe. For example, Hough and Roberts reported that their survey of the British public regarding the level of punishment showed that about four-fifths of the public in the UK perceived the level of punishment as lenient.¹⁶ Half (51 percent) evaluated the level of punishment as much too lenient. Only a minority (19 percent) estimated the level of punishment as appropriate, and just 3 percent of them perceived it as too severe. In other words, the overwhelming majority of the public considered the punishment to be lenient. The British Annual Survey, which examined the attitudes of the public in relation to the level of sentencing, showed similar results (Table 1 below).

sentencing, factors in England and Wales' in Julian V Roberts (ed.), *Mitigation and Aggravation at Sentencing* (CUP 2011) 168; Mike Hough, Julian V. Roberts. 'Sentencing trends in Britain Public knowledge and public opinion' (1999) 1 *Punishment & Society* 11-26.

¹⁵ Ryan Kornhauser, 'Economic individualism and punitive attitudes: A cross-national analysis' (2015) 17 *Punishment & Society* 27-53; 'One of the leitmotifs of public attitudes to criminal justice is the desire for a harsher response to crime. Most people believe that the justice system is too lenient towards offenders. This perception goes back for many years.' Julian V. Roberts, Michael Hough, *Understanding Public attitude to Criminal Justice* (Open University Press 2005) 13; 'For decades the responses have been the same: most people believe that judges are too lenient towards offenders. This widespread dissatisfaction with the severity of sentencing is probably the most replicated finding in the field', *ibid*, 76.

¹⁶ Michael Hough, Julian Roberts, 'Attitudes to Punishment: Findings from the British Crime Survey' [1998] Home Office Research Study 179, 28, <http://www.icpr.org.uk/media/10372/Attitudes%20to%20punishment,%20hors179.pdf> accessed 15 September 2015.

This attitude remained stable for a long time, see, William Dawes, et. al, 'Attitudes to Guilty Plea Sentence Reductions' (Sentencing Council 2011) Ch. 2 https://docs.google.com/viewer?url=https%3A%2F%2Fwww.sentencingcouncil.org.uk%2Fwp-content%2Fuploads%2FAttitudes_to_Guilty_Plea_Sentence_Reductions_web1.pdf accessed 15 September 2015.

Table 1: Attitudes toward sentence severity (2008/09 to 2010/11)¹⁷

	2010/11	2009/10	2008/09
Much too tough	1%	1%	1%
A little too tough	2%	2%	2%
About right	24%	22%	21%
A little too lenient	36%	35%	35%
Much too lenient	38%	40%	41%
Un-weighted N (=100%)	5,596	5,389	5,572

It is also worthwhile to note that this perception of leniency is constant and consistent over three years. Hough and Roberts concluded:

This widespread dissatisfaction with the severity of sentencing is probably the most replicated finding in the field. It appears that whenever (and wherever) the public had been asked the question the majority responded in this way.¹⁸

Similar results of the perceived leniency have been also reported in other common-law countries as well as in some civil law countries,¹⁹ and even in the Nordic countries.²⁰ Typical results of surveys in those countries show that the punishment is perceived as lenient, with only a minority of respondents perceiving the level of punishment as appropriate, and significantly fewer

¹⁷ Michael Hough, Ben Bradford, Jonathan Jackson, Julian V. Roberts 'Attitudes to Sentencing and Trust in Justice' (2013).23, Table 3/6, <https://docs.google.com/viewer?url=http%3A%2F%2Fprints.bbk.ac.uk%2F5195%2F1%2F5195.pdf> accessed 15 September 2015; See also, Jane B. Sprott, Cheryl Marie Webster, and Anthony N. Doob. 'Punishment Severity and Confidence in the Criminal Justice System' (2013) 55 Canadian Journal of Criminology and Criminal Justice 279-292.

¹⁸ Julian V. Roberts, Michael Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press 2005) 76.

¹⁹ Helmut Kury, Joachim Obergfell-Fuchs, and Ulrich Smartt, 'The Evolution of Public Attitudes to Punishment in Western and Eastern Europe' in Julian V. Roberts, Michael Hough (eds), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (2005) 93-114.

²⁰ Balvig Flemming, Helgi Gunnlaugsson, Kristina Jerre, Henrik Tham, and Aarne Kinnunen, 'The Public Sense of Justice in Scandinavia: A Study of Attitudes towards Punishments' (2015) 12 European Journal of Criminology 342-361.

respondents seeing the punishment as severe. In the United States, for example, public opinion surveys indicate that the public wishes the courts would deal more severe punishment than is currently being imposed.²¹

Some studies have indicated that there is a gap between the public's perception of punishment leniency and its perception of a 'proper punishment'. In these studies, respondents were asked to suggest appropriate penalties to hypothetical cases (which were based on real cases already determined by the court). The respondents typically suggested a harsher punishment than that actually imposed by the court. Such results raise a question of the value of public opinion polls for determining the level of punishment.²²

Very few surveys were conducted in Israel on the perceived severity of sentencing. The surveys that have been undertaken indicate that the public's attitude is that punishment of offenders is too lenient. A recent poll, surveying a representative sample of the Jewish population in Israel, showed that the majority (70 percent) of the respondents thought that sentencing had been too lenient. Only 10 percent estimated punishment as too severe.²³ Another survey, which focused on offenses against children, also illustrated that the public regards sentencing for such offenses as being too lenient.²⁴

²¹ Francis T. Cullen, Bonnie S. Fisher and Brandon K. Applegate, 'Public Opinion about Punishment and Corrections' (2000) 58 *Crime and Justice* 1-79, 27: 'the public prefers or, at very least, accepts policies that get tough with the offenders'.

²² Jan W. De Keijser, Peter J. Van Koppen, and Henk Elffers, 'Bridging the Gap between Judges and the Public? A Multi-Method Study' (2007) 3 *Journal of Experimental Criminology* 131-161. See also, Martina Feilzer, 'Exploring Public Knowledge of Sentencing Practices' in Julian V. Roberts (ed.), *Exploring Sentencing Practice in England and Wales* (Palgrave Macmillan 2015) 61.

²³ <http://www.themarket.com/law/1.1707669> accessed 15 September 2015, in Hebrew

²⁴ Schmidt Hillel Benbenishty Rami, 'Public Attitudes toward Child Maltreatment in Israel' [2011] 33 *Children and Youth Services Review* 1181-1188. For the full report in Hebrew see: https://docs.google.com/viewer?url=http%3A%2F%2Fwww.haruv.org.il%2F_Uploads%2FdbbAttachedFiles%2Farticlesemail.pdf accessed 15 September 2015.

2. Criticism of Public Opinion Studies on Sentencing

Public opinion surveys have been criticized as an unreliable method of analysis of the level of punishment. While polls may reflect the perception of the public, critics of the approach claim that the general public is incapable of providing a proper assessment of the level of sentencing. They assert that given the complex nature of the sentencing processes, laypeople do not have the capability or skills to accurately grasp legal processes and, hence, cannot provide a proper assessment.²⁵ Several reasons for this have been noted:

A. Incomplete Information

The central criticisms of public opinion polls as providing poor reflection on punishment levels are twofold:

- 1) Legal knowledge – The public lacks the knowledge and (legal) understanding required for a relevant and educated assessment of the case;
- 2) Distorted knowledge – Incomplete information and at times misinformation is common among the public.

According to critics, public opinion surveys are not an appropriate proxy for gauging the severity of existing punishment as the public does not have the knowledge and legal understanding required for properly evaluating the level of punishment. Furthermore, the public does not have access to the particular details of the cases that are of the essence in determining the sentences.²⁶ Criticism of the use of public opinion surveys has intensified in the recent years making 'a very strong case against the validity of survey measurements of public opinion on criminal justice'.²⁷ The current view in criminology literature is that public opinion may be relied upon only when the public is provided with sufficient information and is reasonably able to

²⁵ See, Julian V. Roberts, Mojca M. Plesničar 'Sentencing, Legitimacy, and Public Opinion' [2015] *Trust and Legitimacy in Criminal Justice* 33, 43 and reference.

²⁶ See, Neil Hutton, 'Beyond Populist Punitiveness' (2005) 7 *Punishment and Society* 243.

²⁷ Jan W. de Keijser, Henk Elffers 'Cross-jurisdictional differences in punitive public attitudes?' (2009) 15 *European Journal on Criminal Policy and Research* 47-62, 49.

deliberate the questions.²⁸ But in most surveys, this is not the case. Hence, serious doubts have been raised about the validity of public opinion surveys as a dependable or even as a proper means for assessing the levels of punishment in a society. Yet, such polls remain the most common tool for assessing levels of punishment and they still have a significant impact on politician, administrators and others. This may affect future levels of punishment and establish an 'unjustified and unhealthy level of dominance in the contemporary political sphere'.²⁹

As for the problem of distorted and incomplete information, critics have argued that the opinions and perceptions of the public are derived from anecdotal, sporadic, partial, distorted, and/or erroneous information. Hence, the perspective of the public is inaccurate and biased. For the most part, the information available to the public tends to be derived from the mass media,³⁰ which typically focuses on the exceptional, unusual, otherwise sensational, or even inflammatory cases rather than the usual, ordinary court rulings. Consequently, people who are exposed to such media are more likely to consider punishments as too lenient and tend to advocate harsher punitive

²⁸ David A. Green, 'Public Opinion versus Public Judgment about Crime Correcting the 'Comedy of Errors'' (2006) 46 *British Journal of Criminology* 131-154. Julian V. Roberts, 'Community views of sentencing: Intuitive and principled responses to offending' in Michael Tonry (ed.), *Punishment Futures. Studies in Penal Theory and Philosophy* (OUP 2011) ; see also, Julian V. Roberts, 'Clarifying the Significance of Public Opinion for Sentencing Policy and Practice' in Ryberg, Jesper, and Julian V. Roberts (eds.) *Popular Punishment: On the Normative Significance of Public Opinion* (OUP 2014) 228. Jan W. de Keijser, 'Penal Theory and Popular opinion: The Deficiencies of Direct Engagement' in Ryberg, Jesper, and Julian V. Roberts (eds.), *Popular Punishment: on the normative significance of public opinion* (OUP 2014) 101, 104ff.

²⁹ Liz Turner, 'Penal Populism, Deliberative Methods, and the Production of 'Public Opinion' on Crime and Punishment' (2014) 23 *The Good Society* 87-102. See also, Matthew Smith, 'The Chicken or the Egg: What Shapes Public Opinion on Punishment?' [2013] *Chicago Policy Review* <http://chicagopolicyreview.org/2013/10/08/the-chicken-or-the-egg-what-shapes-public-opinion-on-punishment/> accessed March 11 2017. It argues that public opinion has caused stricter punishment.

³⁰ On the implication of the media upon respondents in public polls see, Julian V. Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (OUP 2002) ch. 5.

measures compared to people with less media exposure.³¹ Furthermore, less knowledgeable people rely more heavily on the media's interpretations as a source of information.³²

Several scholars have referred to this issue as the 'punitive gap' - the gap between the public's attitudes on sentencing and the actual sentencing.³³ This gap is attributed in part to the lack of accurate and valid information. In general, the public lacks knowledge and understanding of criminal law and sentencing policy.³⁴ Consequently, the public is incapable of analyzing what information is relevant and form an educated opinion. Various studies have shown that providing laypeople with relevant case information, even as trivial as the range of the statutory sentencing penalties or sentencing alternatives, have changed the respondents' perceptions on severity.³⁵ Furthermore, studies have shown that additional information affects respondents' views on punishment levels.³⁶ Such information make respondents more

³¹ Franklin D. Gilliam, Shanto Iyengar, 'Prime Suspects: The Influence of Local Television News on the Viewing Public' (2000) 44 Am. J. Pol. Sci. 560, 563-64.

³² Justin T Pickett, Christina Mancini, Daniel P. Mears, and Marc Gertz, 'Public (Mis) Understanding of Crime Policy the Effects of Criminal Justice Experience and Media Reliance' [2015] Criminal Justice Policy Review 500-522. Kenneth Dowler, 'Media Consumption and Public Attitudes toward Crime and Justice: The Relationship between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness' (2003) 10 J. Crim. Justice Popular Culture 109; see also Julian V. Roberts & Anthony N. Doob, 'News Media Influences on Public Views of Sentencing' (1990) 14 L. & Hum. Behav. 451, 456.

³³ Jan W. de Keijser, Henk Elffers, 'Cross-jurisdictional differences in punitive public attitudes?' (2009) 15 European Journal on Criminal Policy and Research 47-62, 48ff and references there.

³⁴ At an early stage of the empirical studies of the perceptions of punishment, scholars noticed that there was a substantial gap between the actual levels of punishment and the public's perception of the sentencing; See, Arnold M. Rose, Arthur E. Prell, 'Does the punishment fit the crime? A Study in Social Valuation' [1955] American Journal of Sociology 247-259, 248.

³⁵ Julian V. Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (2005) 29-31 and references to studies there.

³⁶ David Indermaur, Lynne Roberts, Caroline Spiranovic, Geraldine Mackenzie, and Karen Gelb, 'A matter of judgement: The effect of information and deliberation on public attitudes to punishment' (2012) 14 Punishment & Society 147-165.

knowledgeable and decrease the 'punitive-gap' in their perceptions of pensive-ness.³⁷

To recapitulate, assessments by the public of the level of punishment are, in fact, imprecise impressions based on partial, selective, and even inaccurate information. Some studies show that the public has no meaningful knowledge on the actual level of punishment.³⁸ Scholarly criticism has asserted that public opinions on this issue are unreliable and cannot reflect whether punishment is actually³⁹ too lenient or harsh.⁴⁰

B. The Complexity of Criminal Sentencing

Criminal sentencing is a process of balancing. On one hand, there are elements specific to each case and each offender and, on the other hand, there are public interest and the structure of the statutes. This creates inherent difficulties in having non-professionals assess the level of sentencing. The regular structure of criminal statutes prescribes the maximum and the minimum penalty, and sometimes prescribes no substantial punishment. Judges determine a particular punishment following judicial guidelines and personal discretion. These particular punishments result in a disparity among penalties imposed upon offenders for the breach of the same statutory

³⁷ Arie Freiberg, Karen Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* (Routledge 2014) 74-76 and references there.

³⁸ See for example, Michael Hough, Julian V. Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion' (1999) 1 *Punishment and Society* 11-26, 20. See also, Trevor Sanders, Julian V. Roberts, 'Public Attitudes Toward Conditional Sentencing: Results of a National Survey' (2000) 32 *Canadian Journal of Behavioral Science* 199-207.

³⁹ Jesper Ryberg, Julian V. Roberts, *Popular Punishment: On the Normative Significance of Public Opinion* (OUP 2014) 5.

⁴⁰ This, however, does not imply that public opinion surveys are irrelevant. Understanding public perception of punishment is of importance because it may actually influence the behavior of the stakeholders such as potential offenders, lawyers etc. Hence, notwithstanding the real level of punishment, a perception of harsher punishment may deter people from performing socially negative activities, while a public perception of leniency may fail in achieving sufficient deterrence and consequently result in higher rates of criminal activities. In addition, other ramifications may result from the public's perceptions of punishment such as people's attitudes to fairness and justice.

criminal rule. The inherent variability of punishments is often viewed by non-professionals as inconsistency. Non-professionals tend to view as lenient penalties that are inconsistent with the more severe ones in the range, and this reinforces their perceptions on severity of punishment. A layman's perception, therefore, is of questionable value in assessing overall levels of punishment. In contrast, professionally qualified evaluators, such as judges or lawyers, assess such diversity differently and make a much better (or, at least a less distorted) estimation of the appropriate level of punishment. As indicated earlier, there are very few empirical studies of views expressed by judges or representatives of the legal professions (such as lawyers). Consequently, the primary source of evaluation of the level of punishment is currently based upon the not very reliable grounds of opinion surveys of attitudes of the general public, or segments of it.

C. Limited Accessibility for Research

The focus on public opinion rather than on judges' perceptions may be a result of the practical and legal difficulties of conducting surveys among judges.⁴¹ This is particularly the case when the subject matter of the research may, directly or indirectly, be seen as a criticism of the judicial system. Furthermore, judges are frequently overloaded with work,⁴² and their predisposition to participate in independent academic studies is low. Therefore, it is not surprising to find only a handful of systematic empirical studies of the judges' views regarding punishment.⁴³

⁴¹ To run our surveys, we had to obtain permission from the Chief Justice of the Israeli Supreme Court, who is considered the head of the judicial system.

⁴² See for example, Shay Lavie, 'Appellate Courts and Caseload Pressure' (2016) 27 *Stan. L. & Policy Rev.* 57; Andrew Tickell, 'More 'efficient' justice at the European Court of Human Rights: but at whose expense?' [2015] *Public Law*, 206; Roger J. Miner, 'Dealing with the Appellate Caseload Crisis: The Report of the Federal Courts Study Committee Revisited' (2013) 57 *N.Y.L. Sch. L. Rev.* 517; Michael C. Gizzi, 'Examining the Crisis of Volume in the U.S. Courts of Appeals' (1993) 77 *Judicature* 96.

⁴³ Searching the legal data bases show that, indeed, a small number of surveys of judges' perceptions and attitudes were published, but none dealt with the subject of severity of the level of punishment.

III. JUDGES' PERCEPTIONS – FINDINGS

Our study examined the perceptions on punishment by presiding judges in Israel over a period of nearly 30 years.⁴⁴ Three consecutive surveys were conducted, 10 years apart, among all the first and second-instance judges presiding at the time of the surveys: in 1989, 1999 and 2010.⁴⁵ In the three surveys, the judges were asked to assess the severity level of the punishment prevalent at the time of each survey.⁴⁶ The very same question was used in all three surveys in order to allow a direct comparison. To avoid a self-serving response bias, the judges were not asked to assess their own sentencing but to assess the level of sentencing severity prevailing in Israel at the time.

The question the judges were asked in all three surveys was: '*Given your familiarity with the Israeli courts system, to what extent do the sentences imposed by the courts reflect a lenient approach?*'.⁴⁷ The response range to this question was: 1. *not lenient at all*; 2. *lenient to a small extent*; 3. *partly lenient*; 4. *considerably lenient*; 5. *lenient to a large extent*; 6. *very lenient*.⁴⁸

⁴⁴ Even though the data was collected in Israel, the results may have ramifications for a wider scope of common law judicial systems, of which the Israeli system is part.

⁴⁵ For a detailed description of the research methods and surveys conducted, see Appendix A.

⁴⁶ We acknowledge the possibility of a 'pro-system' bias in judges' assessments of punishment, as their responses may 'tarnish' the reputation of the judicial system and of their colleagues, and perhaps indirectly also implicate themselves. Therefore, the answers of the judges may be biased. If such bias exists, the result will be that the assessment of the punishment level would be that it is more 'appropriate' than it actually is. Consequently, the answers here are perhaps even more 'restrained' than the real opinion is.

⁴⁷ What is meant by 'lenient' was not pre-defined for the judges, but was left for the assessment of the responding judge. For a full discussion of this point, see Appendix A: Research Methods.

⁴⁸ An exploratory study conducted prior to the survey included the categories of '*adequate*' and '*too harsh*'. Yet it was found that no one chose these responses, and they remained 'empty categories'. Hence, they were omitted from the survey. For further details regarding the choice of this kind of response range, see Appendix A: Research Methods.

1. Judges' Assessment of the Prevalent Punishment Level

In the presentation of our results, we will first analyze the findings of the most current survey, conducted in 2010, and then compare them to those attained a decade and two decades earlier.

Our assertion was that since judges are the ones who issue the sentences and decide on the punishment they consider most appropriate, they would assess the level of punishment as fitting and appropriate and not as lenient. The findings did not support this assertion (See Chart 1 below). They showed that most judges did not consider the level of punishment to be appropriate. The majority of them (70 percent) considered punishment to reflect a lenient or at least partly lenient approach. Only very few judges (8 percent) considered the level of punishment to be not lenient at all.

Over a third of the judges (36 percent) thought that the punishments handed out were considerably to very lenient, of whom nine percent evaluated the punishments as lenient to a large and a very large extent. Another third (34 percent) said the existing punishment was partly lenient and 23 percent said it was lenient to a small extent (Chart 1 below).

In other words, even though the judges are the ones who issue the sentences and decide on the punishment, a large majority of them thought that the courts' sentences reflected some level of leniency. We find these results quite surprising. It is commonly assumed that judges are using their best judgment to decide and determine the punishment they think is the most appropriate one given the merits of the specific case. Yet, the results here suggested that the judges did not have confidence in the judgment of their colleagues; rather, they regarded the colleagues' sentencing as unfitting and lenient.

These results also raise an interesting issue: if most judges think that the overall level of punishment tends toward leniency, why do they not adjust it by issuing more adequate i.e., less lenient punishments? After all, it is up to them to decide and in their power to implement it.

Before we engage in finding possible interpretations for these results, it ought to be examined if the results obtained here are not an aberration. Perhaps the severity level of punishment found in 2010 reflected a temporary one-time deviation from the appropriate level. In other words, the level of punishment may follow a pattern of 'dynamic equilibrium'. Like any other 'open system',

the level of punishment is not unwavering or consistently stable, but it fluctuates or oscillates over time around a certain average level: i.e., governed by homeostasis.⁴⁹ In other words, when the level of punishment becomes more lenient than expected, judges may adjust by imposing more severe punishments to 'compensate' and correct for it. This 'correction' or adjustment may oscillate to a level of overly severe punishments, which in turn will lead to a further 'correction' toward higher leniency, to adjust accordingly, and so on. To wit, over time, the level of punishment may constantly fluctuate between too lenient or too severe, depicting a 'dynamic equilibrium' around the adequate punishment. Hence, it may well be that the judges' evaluation of the level of punishment in the 2010 survey was a 'snapshot' at a single point in time and not a dynamic picture of the levels of punishment that oscillate toward leniency as a reaction to a prior period when the perception of severity was much higher. To test this interpretation, a longitudinal perspective will be taken.

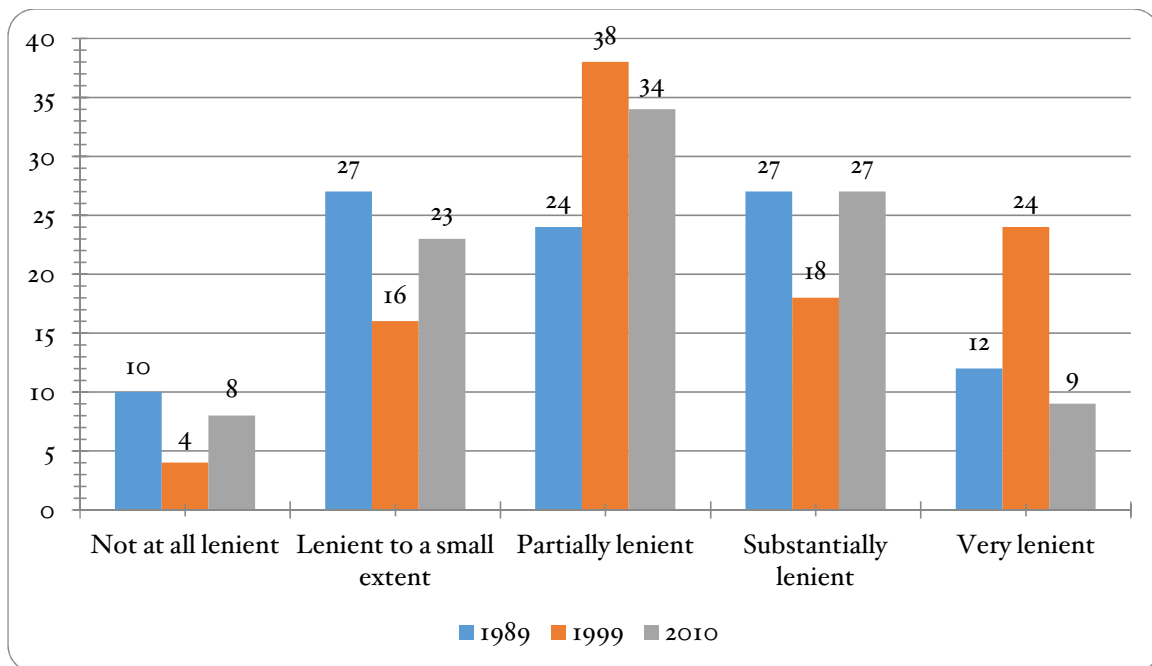
2. A Longitudinal Comparison

In order to test the above interpretation, we examined the perceived level of punishment over an extended time period. As noted above, judges' assessments of the level of punishment were measured not only in 2010, but also one decade earlier (1999) and two decades (1989) earlier. Given the conceptual framework of 'dynamic equilibrium' (or homeostasis), the perception of punishment as lenient may be a 'response' to a perceived severe level of punishment in the preceding decade (1999) and a 'correction' for it. If this is so, the level of punishment as perceived by judges in 1999 can be expected to be more severe, or in terms of our study, as 'not lenient at all'. The same pattern may be assumed for the judges' assessments given two decades earlier, in 1989.⁵⁰ The responses given at the three points in time are compared below (Chart 1).

⁴⁹ 'Homeostasis' is a mechanism inherent within open systems to assure that deviations beyond a given range from their desired course of affairs are self-corrected, thus assuring the systems' survival and sustainability.

⁵⁰ Obviously, there is the question of what is the proper time-cycle that captures the oscillation cycle. We refer to this issue later.

Chart 1: Judges' assessment of level of punishment over three decades (in %)



Looking at the data of the 1999 survey first, the results do not appear to support the 'self-correction' (homeostasis) assertion. In the 1999 survey, the assessments of punishment level, in general, were found to be no different than those in 2010 (Chart 1). The observed differences between them were not statistically significant, suggesting that the two distributions of responses of 2010 and of 1999 – are practically the same.⁵¹ To wit, the judges' perceptions of the punishment level in 1999 pointed towards leniency with the same strength as in 2010.

While these differences in distributions were not statistically different, in 1999, a somewhat larger majority of the judges (80 percent vs. 70 percent in 2010) said that the punishment prevalent at the time reflected leniency to at least some extent. More specifically, in 1999, a quarter (24 percent) of the judges said that the punishments were very lenient, as opposed to only 9 percent who suggested that in 2010.⁵² Similarly in 1999, 42 percent of the

⁵¹ $\chi^2 = 6.51$, d.f. = 8, ($p > 0.10$) n.s.

⁵² The value of statistical significance is affected by the number of observations at hand. Since the number of judges here is rather small this may affect the calculated significance of the differences. Perhaps with a larger N the differences could turn out to be significant. Hence, we decided to describe the differences.

judges assessed the punishment to be lenient 'to a large extent' or 'very lenient', whereas in 2010, 36 percent of the judges thought so. At the other end of the scale, in 1999 only 20 percent of the judges thought punishments were 'not at all lenient' or lenient 'to a small extent only', as opposed to 31 percent of the judges who felt this way in 2010.

These results suggest that the perceived leniency of punishment in 2010 was not a reaction to the perceived level of punishment during the preceding decade. The assertion, thus, that self-correction mechanisms are at work here (homeostasis) is not supported. However, since we have no precise knowledge of the timespan of the oscillating cycle (if one indeed exists), homeostasis cannot be ruled out entirely. It can still be argued that the correction or adjustment cycle takes less (or perhaps more) than a decade, or that we have 'missed' its picks with our surveys, and hence it was not captured by the surveys conducted 10 years apart. We have no data to clearly rule out such an argument.

It can, however, be assumed that adjustment periods, or oscillation cycles, from lenient to harsh punishment and back are not 'instantaneous' and may take several years to occur. Similarly, it may take judges several years of experiencing 'inappropriate' levels of punishment to react accordingly and adjust their own sentencing (if at all). Thus, we suggest that comparing the judges' responses at two points in time may miss or fail to reflect the 'full' cycle of oscillation from lenient punishment. Therefore, we added to the analysis the responses of the judges to this question collected in the 1989 survey. Now, the pattern of perceived level of punishment can be examined over three points in time.

The 1989 results remained basically the same – the distribution of responses was not statistically significant from those of two preceding surveys.⁵³ The majority of the judges in the 1989 survey thought that punishment was at least 'partly lenient', and a minority said it was only slightly lenient or not at all lenient (Chart 1). More specifically, in the 1989 survey, 63 percent of the judges believed that punishments were at least partly lenient, and among this number, 27 percent said the punishment was considerably lenient, and 12 percent felt it was lenient to a large extent or very lenient. Over a third

⁵³ $\chi^2 = 6.51$, d.f. = 8, $p > 0.10$; N.S.

assessed the punishment as lenient only to a small extent (27 percent) or not lenient at all (10 percent).

Thus, adding the data of 1989 to that of the other surveys shows that the distributions of judges' assessments over the three decades were not statistically different from each other. They all similarly suggested that punishment was persistently perceived not to be adequate but to be quite lenient. Also, these results did not support the assertion regarding homeostasis. There appears to be no self-correction (no homeostasis) mechanism, and the lenient approach in punishment prevailed over the rather long time period of three decades.

However, as suggested earlier, one can still not rule out the argument that the cycle of fluctuations, if they existed, did not fully correspond with our surveys. Since the timespan of such a proposed cycle is unknown, there is the possibility that it occurs within each decade and the three points of measurement here actually tapped it at the very same status: namely, a peak of leniency. While we think, it is rather unlikely that all three surveys happened to 'miss' the cycle, our data is not sufficient for ruling out such an event. From the statistical point of view, however, all three distributions, while not identical, were not significantly different.

The presentation of the responses in Chart 1, even though not statistically significant, can be interpreted as reflecting some level of oscillations of decreasing and increasing leniency over the three periods of time. For example, if one examines the responses judges gave in the 1989 survey, 37 percent of them said that punishment was not at all (or almost not) lenient; in 1999 their proportion was reduced to 20 percent, and in 2010, it increased again to 31 percent. Perhaps more pronounced were the differences in proportion of judges who felt the punishment was very lenient or lenient to a large extent: 12 percent in 1989 growing to 24 percent in 1999 and dropping back to 9 percent in 2010. In other words, several judges felt that the level of punishment was less lenient in 1989, became more lenient in 1999 and less lenient again in 2010. Thus, the mechanisms of homeostasis or self-adjustment arguable does exist, correcting the 1989 deviations towards somewhat higher leniency in the level of punishment in 1999, and oscillating it back towards the less lenient level in 2010. Yet, as these observed

differences in responses are not statistically significant⁵⁴ the assertion about a self-correcting mechanism that operates over time in punishments handed out is not supported here.

Given all of the above, we adopt the position that the judges' perception of the level of punishment did not significantly change over the three decades, and that they had been assessing it as lenient all along. We find this consistency in judges' perceptions over such an extended period quite surprising.

IV. JUDGES' BACKGROUND AND THE ASSESSMENT OF THE LEVEL OF PUNISHMENT

The analyses above indicate that the judges' assessments of the levels of punishment were not uniform and not all of them evaluated them in the same manner. Do these different views relate to some professional background factors such as their years of experience, the court they sit on, their employment prior to their appointment to the bench, or perhaps personal factors such as their gender?

Courts,⁵⁵ as well as scholars,⁵⁶ have recognized that a judge's background may affect their decisions. This is particularly true in cases where judges have a wide discretion in sentencing.⁵⁷ We examined some of these possible

⁵⁴ The commonly acceptable probability of error is 0.05% or less, and the probability of error found here is higher than that. Furthermore, when the population at hand is rather small (as the numbers of judges here), a less strict criterion of $p < 0.10\%$ may also be used, but the results reported above ($p > 0.10$) did not meet this lax criterion either.

⁵⁵ As Judge Richard A. Posner recognized: '[T]he exercise of discretion is shaped by a judge's values and intuitions, which in turn are shaped by the judge's background and experiences', *Tyson v. Trigg* 50 F.3d 436, 439 (7th Cir.1995).

⁵⁶ See for example, Paula M. Kautt, Cassia C. Spohn, 'Assessing Blameworthiness and Assigning Punishment', in Edward R. Maguire, David E. Duffee (eds), *Criminal Justice Theory: Explaining the Nature and Behavior of Criminal Justice* (Routledge 2015) 220-221.

⁵⁷ See for example, 'Although a sentencing judge is bound to make the findings and consider the relevant factors as required by the sentencing law, the manner in which a judge performs these duties may be guided by that judge's background, experiences, and moral values', *State v. Brown*, Court of Appeals of Ohio, 2004 WL 764589.

relationships by analyzing the data collected in the most recent survey of 2011, where the number of respondents was the greatest (86 judges).⁵⁸

1. Judges' Assessments of Punishment by their Court Instance

The assessment of the level of punishment may differ by court instance. The first instance (Court-of-Peace) in Israel generally adjudicates the crimes that entail imprisonment of up to a maximum of seven years, while the second instance (District Court) has jurisdiction on felonies that are subject to maximum imprisonment exceeding seven years. The gravity of the crimes adjudicated by each instance may reflect in a different perspective on punishment. Moreover, Israeli second instance courts have a twofold jurisdiction in criminal proceedings: they serve as trial courts within the scope of their vested jurisdiction and also as appellate courts that review first instance judgments. Hence, they have the formal authority and practical experience to evaluate the adequacy of the decisions and sentences of the lower instance courts. This special jurisdictional structure may affect the perception of the level of magistrate (First Instance) judges.

In order to examine such possible effect, the judges were divided as first and second instance, and the distributions of their assessments were compared. The results showed the distributions of responses of judges of the two instances were not different from each other or statistically significant.⁵⁹ Thus, no difference in perceptions of punishment severity exists between first and second instance judges.

2. Judges' Assessments of Punishment Based on Tenure

We further tested if the tenure of a judge could explain difference in perception of leniency. We expected that the more experienced the judge (as measured by years as a judge) the more he or she would assess punishments as lenient. Not only do years on the bench provide a wider perspective on punishment, longer experience allows for a different perspective on recidivism. To test this, years spent as a judge were correlated with the judges' assessment of level of punishment. The results show the two were correlated

⁵⁸ See Appendix A: Research methods, for details.

⁵⁹ Differences are not significant: $\chi^2=3.4$, d.f.=4; $p=0.46$, n.s.

($r_p = 0.25$) with each other.⁶⁰ The proposition is therefore supported: the more experience judges have, the more they tend to assess punishment as lenient. However, the correlation found here is not a strong one, suggesting that judges' experience is only weakly related to their assessments of punishment.

However, the correlation coefficient used here (Pearson's coefficient) taps linear relationships only. But, the relationships between years of tenure and assessment of punishment may be non-linear in nature. In fact, the Pearson coefficient indicates whether relationships between two variables were linear or not. Thus, if the relationships between years of experience and views on punishment are non-linear, the coefficient may be weak or indicate no relationship altogether. To examine if this is the case here, the relationship between punishment assessment and tenure were also examined using cross-tabulation of the two variables. In order to accomplish this, the variable of years of tenure as a judge was clustered into three categories⁶¹:

a. short experience (0-7 years); b. intermediate experience (8-14 years); c. long experience (over 14 years). The categories of 'very high' and 'high' extent of leniency assessment were also collapsed together.⁶² The distributions were then cross-tabulated (Table 2).

Table 2: Assessment of punishment by tenure as judges (in %)

Tenure over 14	Tenure 8-14	Tenure 0-7	Lenient
30.4	30	30.8	To a small extent
21.7	50	42.3	Partially
47.8	20	26.9	Substantially
(N=23) 100%	(N=20) 100%	(N=26) 100%	Total N=69

The results (Table 2) show that the relationships between tenure and assessment of leniency are, indeed, not quite linear. While there were

⁶⁰ Pearson correlation coefficient (r_p) was calculated here: $r_p = 0.25$, $p < 0.04$ (N=69).

⁶¹ Given the relatively small number of judges in the sample (see appendix A) length of tenure had to be collapsed into no more than three categories. To do that the tenure frequency distribution was divided into three almost equal categories with about a third of the respondents in each (26, 20, 23 respectively), yielding the above grouping.

⁶² These categories were collapsed together to avoid empty cells or cells with very small N in the cross-tabulation.

practically no differences in perceived leniency between judges of short and medium tenure, judges with long tenure perceived punishment as much more lenient.⁶³ Nearly a half (48 percent) of the more experienced judges (14 years and more) assessed punishment as at least substantially lenient; about a third (30 percent) perceived it as lenient to a small extent (none said it was not lenient at all). In contrast, the shorter tenured judges (0-7 and 8-13 years' tenure), 20 percent and 27 percent, respectively assessed punishment as substantially lenient and 42 percent and 50 percent assessed punishment as partially lenient. In addition, it is interesting to see that the assessments of punishment as not lenient (or to a small extent only) were unrelated to years of experience: slightly less than a third of the judges, regardless of experience, assessed punishment as not lenient (30, 30, and 31 percent). The distribution of responses in the other categories (partly, considerably, and very lenient) did vary by experience. Thus, the results suggested that experience as judge and punishment assessment, are related in a slightly non-linear relationship.⁶⁴

It can, therefore, be concluded that the hypothesis that tenure is related to punishment assessment of judges, is supported. The results suggest, however, that experience had a differential effect on judges' evaluations: it made no difference for judges who assessed punishment as not lenient, but many years of experience did make a difference for the perception of punishment as considerably or very lenient.

3. Judges' Assessments of Punishment by Previous Employment

It has been proposed that judges who prior to their nomination to the bench were employed in the Ministry of Justice (e.g., Public Prosecution Office) would assess the level of punishment as more lenient than judges who were previously employed in the private sector.⁶⁵ Of interest here were judges who,

⁶³ $\chi^2 = 14.9$, d.f.=8; Sig=0.06. N=69. The significance test here shows that the differences observed here are not statistically significant at the $p=0.05$ level. However, given the small numbers of judges, one can adopt here the less-conservative approach, where significance can be accepted at the $p<0.10$ level. Hence, we consider these differences as significant.

⁶⁴ This may explain the low correlation coefficient observed above.

⁶⁵ *Tyson v. Trigg*, 50 F.3d 436, 439 (7th. Cir.1995), Judge Posner, 'Former prosecutors may have a different bent from former defense lawyers, former lawyers for tort plaintiffs a different bent from former lawyers for insurance companies'.

before being nominated to the bench, served as defence lawyers as distinguished from those who served as prosecutors. The argument is that judges who served as prosecutors will tend to assess the level of punishment as more lenient than those who served as defence lawyers.

The best proxy we had for previous employment was previous employment in the private sector (e.g., private law firms) or previous employment in the government sector (e.g., Public Prosecution Office, Ministry of Justice). We adopted these two categories in order to test the relationship between previous employment and perceived punishment. The distributions of punishment assessments within each employment group were compared.⁶⁶

The results, however, did not support this proposition: no significant differences were found between the responses based on previous employment.⁶⁷

4. Judges' Assessments of Punishment by Gender

Does the perception of punishment relate to the gender of the judge? Previous research provided mixed results on this issue.⁶⁸ Some scholars viewed female judges as more 'liberal,' and as more lenient in punishment.⁶⁹ Given the ambiguous results of various studies, we examined in our data whether gender was related or not to the judges' perceptions of severity of punishment.⁷⁰ The results suggested that there were no statistically

⁶⁶ The original response range of six possible responses of this distribution had to be clustered into three main categories to avoid categories with very small numbers of responses or 'empty' ones. 'Partly' and 'considerable extent' were joined into 'partly' and 'a large' and 'very large extents' were joined into 'large extent'. However, there was no significant difference (χ^2 test) between these distributions when the full distribution was examined.

⁶⁷ $\chi^2 = 1.65$, d.f.=4, $p = 0.80$ n.s.; $N = 77$

⁶⁸ See for example, Shanna R. Van Slyke & William D. Bales, 'Gender Dynamics in the Sentencing of White-Collar Offenders' (2013) 26 *Criminal Justice Studies* 168-196; but, see to the contrary, Barbara Palmer, 'Women in the American Judiciary: Their Influence and Impact' (2001) 23 *Women & Politics* 89-99.

⁶⁹ Joanne Belknap, *The Invisible Woman: Gender, Crime, and Justice* (Cengage Learning 2014) 566.

⁷⁰ To examine it, judges were grouped by gender and the distributions of respondents' assessments of the level of punishment were compared.

significant differences between female and male judges in this matter.⁷¹ Both male and female judges similarly assessed the prevalent level of punishment severity.

5. *Multivariate Analyses*

So far, we have examined the relationships between judges' assessment of punishment and some background factors. However, in reality, the effect of each of the background factors on the judges' evaluations is not isolated from the possible effects of the others. To wit, when combined, the effect of each of these factors on the assessment may overlap or be different than their singular effect. Hence, the joint effect of these factors on the assessment and their relative weights ought to be analyzed as well. A multivariate analysis was, therefore, required. This was done by regressing the judges' assessments of punishment on the three major background factors.⁷²

The regression analysis suggested that the tenure as judge and the instance in which they presided were predictors of the variance in punishment assessments (Table 3). Gender was found to have no significant independent effect. These two variables accounted for nine percent of the adjusted variance in severity assessment, a rather low explained variance.

Table 3: Regression of judges' assessment of punishment on background factors

Collinearity Statistics		Sig	T	Standardized Coefficients	Unstandardized Coefficients		Model r ^a
VIF	Tolerance			Beta	Std. Error	B	
		.000	5.340		.465	2.486	(Constant) ^b
1.329	.752	.004	3.001	.40	.016	.049	Years as judge
1.034	.967	.532	.629	.074	.243	.153	Gender
1.293	.773	.032	2.198	.29	.263	.578	District Court

a) Dependent Variable: Sentences reflect a lenient approach

b) Predictors: (Constant), Gender, First/Second Instance, Tenure (Years) as judge
 $R^2 = 0.13$, Adj. $R^2 = 0.09$

⁷¹ $\chi^2 = 3.19$, d.f. = 4, $p = 0.53$, n.s.

⁷² Given the small number of judges, only three independent variables could be used in the analyses to attain valid results. Using more than three predictors here could have distorted the regression analysis.

ANOVA^a

Sig.	F	Mean Square	df	Sum of Squares	Model 1
.027	3.26	3.01	3	9.020	Regression
		.923	65	59.965	Residual
			68	68.986	Total

a) Dependent Variable: Sentences reflect a lenient approach

Two comments need to be made here. First, the rather small proportion of variance might be due to the small variance in the dependent variable. As can be seen in Chart 1, there was a small variance in the judges' responses to this question: 83 percent of the responses were concentrated in three of the six response categories. This small variance may be a reason for the small variance explained by the model analyzed here. The relatively small number of respondents may also be a contributing factor.

Second, there were some other variables not measured in our survey that might have had an impact on the way judges evaluate the severity of prevalent punishment. Therefore, the three variables in the model here cannot have been expected to account for the large portion of the variance. Future research ought to explore for other variables and examine the effect on judges' assessment the level of punishment.

Given the abovementioned limitations, rather than focusing on the total percentage of variance accounted for by the model, we suggest focusing on the relative weights or relative importance of the variables in the model (β weights)⁷³ in accounting for the variance in responses. From this perspective, the tenure as a judge ($\beta = 0.40$) appeared to be the main predictor related to punishment assessment, suggesting that the longer the years as a judge, the more lenient the assessment of punishment is. The second predictor was court instance ($\beta = 0.29$) in which the second instance judges saw the punishment as more lenient than the first instance ones. The third factor, gender, was not found here to have any net effect at all on the assessments.

⁷³ β is a standardized regression coefficient (i.e., coefficient expressed in standard score) that reflects the net weight of each variable (accounting for that of the others) in the regression formula.

V. CONCLUSION

The main finding of this study is that the judges viewed the general level of sentencing as consistently lenient. This is surprising since one would expect that judges, who are the ones making the penalty decision, would view the courts' punishment as appropriate, not as considerably lenient. Moreover, our findings showed that the judges' perception of the leniency of criminal punishment was not just an isolated phenomenon. It was a consistent assessment. Over three consecutive surveys, each taken a decade apart, the Israeli judges repeatedly indicated that they regard the courts' sentencing as lenient.

These findings suggest that the courts system has no effective regulatory or internal control mechanisms to adjust or 'correct' the level of sentencing. Adjustments or corrections were not found even when extended over a long period of time, a finding that is quite surprising. To wit, the courts' system lacked (or failed to effectively maintain) an inherent control mechanism (homeostasis). The absence of such mechanisms calls for the introduction of regulatory homeostatic 'safe-guards,' either internal or external. Without such regulatory mechanisms, the level of punishment issued by the courts may diverge from the 'appropriate' sentencing level.

Furthermore, the results suggested that the judges themselves did not take action to adjust the level of sentences they believed to be too lenient. They were the agents who determined the punishment and its level and had the discretion to change it. They could have served as an 'adjusting mechanism' by issuing sentences that were more in line with what they themselves consider 'appropriate' punishment. i.e., issue more severe sentences when they perceive the general level of punishment to be lenient. Similarly, they could have issued sentences that were more lenient when they perceived the level of punishment to be overly severe. However, the findings here indicated that this was not done. It appears as if the judges consistently acted contrary to their own judgment: lenient sentences were issued while simultaneously assessing the general level of punishment to be considerably lenient.

Why would judges be reluctant to adjust their sentencing level to what they think is right? One possible answer to this question may be found in Posner's question: 'What do judges maximize? (The same thing as everybody else

does)⁷⁴ i.e. their own interests. Indeed, in a previous study we conducted that considerations of personal reputation might affect judicial behaviour.⁷⁵ Given this, we propose that although judges have the formal and structural independence to issue the 'appropriate' punishments, a judge's personal consideration of his reputation may underlie his reluctance to take action toward correcting lenient punishment.

In Israel, as in many other Western democracies, judges are given discretion and independence to make judgments as they see fit (within the law), free of external pressures. They are legally and structurally insulated from extraneous considerations and influences and are bounded only by the letter of the law. It is the judges' duty to impose appropriate punishment. What could drive judges to impose lenient sentences? Judges, as does 'everybody else,' may have their own interests in mind. For example, they may have an aversion to being overruled and reversed. Such reversals may damage the reputation as a competent judge.⁷⁶ Lenient (but not too lenient) sentences appear to be the best strategy for judges to minimize reversals. In general, the probability of the defendants appealing a decision is substantially higher than that of an appeal by the prosecution (the State). A judge can quite easily decrease the probability of reversal by imposing lenient sentences (but not too lenient). The probability of appeal under such a leniency policy will be diminished because the defendant may be reluctant to appeal fearing a harsher sentence, and the prosecution (given the punishment is not too lenient) may be reluctant to allocate the time and resources involved in an appeal, once a guilty verdict has been attained. Consequently, the probability of reversals is minimized, and with it, the probability of damaging the judge's reputation.⁷⁷ Hence, an optimal strategy for a judge to avoid reversal is to

⁷⁴ Richard A. Posner, 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economic Review* 1-41.

⁷⁵ Moshe Bar Niv (Burnovski), Ran Lachman, 'Self-Interest in Judges' Time Allocation for Writing Judgments' SSRN: <http://ssrn.com/abstract=1641376>, or <http://dx.doi.org/10.2139/ssrn.1641376> accessed 16 July 2010.

⁷⁶ See, Christopher R. Drahozal, 'Judicial Incentives and the Appeals Process' (1998) 51 *Southern Methodist University Law Rev.* 469-503.

⁷⁷ Various studies claim that judges are influenced by the fear of reversal, see for example, Stephen J. Choi, Mitu Gulati, and Eric A. Posner, 'What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals' (2012)

impose lenient penalties. Since this was not the focus of our studies, we have no current data to test this proposition. Further research is required in order to find an answer to this puzzling issue.

The leniency of punishment, as reflected by the judges' assessments over decades, ought to be a source of concern for the system. Such a continuously lenient level of punishment is likely to have a considerable impact on the behaviour of the various stakeholders in the justice system. Potential offenders, as well as potential victims of crime, may react to it by developing socially undesirable patterns of behaviour. If left unobserved and uncorrected, such a trend may result with grave consequences such as erosion of the public trust in the judicial system. Such erosion might undermine the whole system of judgement's foundations and legitimization.

28 Journal of Law, Economics & Organization 518-549; David E Klein, Robert J. Hume, 'Fear of reversal as an explanation of lower court compliance' (2003) 37 Law & Society Review 579-581.

APPENDIX

1. The Research Method

This study was a longitudinal study that examined, over a period of almost three decades, the perceptions of Israeli courts judges regarding the severity of punishment issued by Israeli courts. The study was based on the analyses of data collected in three consecutive surveys, conducted a decade apart in 1989, 1999 and 2010, among the judges presiding in first and second instance courts in Israel. In each survey, self-administered mail-questionnaires were sent to all the presiding judges in the first and second instance courts (Supreme Court judges were not included).

The three surveys included questions on a variety of issues and opinions related to work of the judges and the functioning of the judicial system. These were outside the scope of the present study. In all three surveys, however, the very same question was asked regarding their assessment of the level of punishment. The identical question allowed comparison of the judges' responses across the time period of nearly three decades.

The self-administered questionnaires were anonymous and the confidentiality of respondents' answers was promised. Judges were asked to fill the questionnaire and mail it back to the researchers in a pre-addressed and stamped envelope.

2. Survey Procedure

Prior to conducting the surveys, exploratory studies were conducted to investigate the phenomena we intended to study and find out the judges' views on these issues. These studies included a literature review as well as a number of in-depth interviews with judges (mostly retired judges or judges who had voluntarily left the bench before retiring) to get their perspective on the issues at hand. Based on these interviews, a first draft of the survey questionnaire was constructed. The draft was pre-tested by several (ex-) judges and their comments on it were integrated into a final draft of the questionnaire. To allow for over time comparisons, the questionnaires of the three surveys were largely identical except for one part in them relating to issues that were topical at the time of the respective surveys.

To each of the judges who were included in the survey, a personally addressed envelope was sent containing the questionnaire, the approval by the Chief Justice of the Supreme Court to distribute the questionnaire, and a stamped envelope with a return address. Since the private addresses of judges in Israel are confidential, questionnaires were sent to the judges by mail to their courts. Since the questionnaires were anonymous and the envelopes were not marked and had no signs identifying the sender, it was impossible to know who sent back his or her questionnaire or what a given judge answered. Hence each time, two weeks after the survey was sent out, a reminder was sent to all judges, emphasizing that those who had responded should not respond again. 49, 65 and 86 judges (respective to the surveys) sent back completed and usable questionnaires (see below).

3. The Respondents

The study populations were all the judges in Israel who presided in first and second instance courts at the time of the respective survey (not including the Supreme Court, Labour Court, Juvenile Court, etc.). When the first and the second surveys were conducted (1989 and 1999) 320 judges in total served in the first and second instance courts in Israel. The total number of judges at the time the third survey was conducted (2010) had increased to 528 judges.⁷⁸ Our aim was to survey the entire population of judges, not just a sample of them. Thus, each of the three survey questionnaires was sent to all judges in Israel. However, as would be expected, not everyone responded to the questionnaire. Consequently, the resultant sample was obtained of those who were kind enough to respond and send the questionnaire back to us: 49 in 1989, 65 in 1999 and 86 in 2010.

As these respondents do not constitute probability samples, each was examined to see if they represented the judges' population at the time. The characteristics of the respondents in each sample were compared to the overall characteristics of the judges' population. In all three samples, no statistically significant differences were found. In other words, the samples appeared to represent the population of judges in Israel well. Further, we tested whether the samples obtained were compatible with each other. We

⁷⁸ The number of judicial positions has increased in response to a shortage of judges in Israel.

compared a few characteristics of the responding judges in the three samples. For example, the average tenure in the legal profession and years in office (as a judge), were found to be similar (no significant differences) in the three samples. In the 1989 sample, the average tenure of the judges in the profession was 22.5 years, while it was 26.4 years in the 2010 sample. The average number of years in office as a judge was 9.9 years in the 1989 sample, compared to an average of 9.6 years in the 1999 survey and 11.6 years in the 2010 survey. To wit, over time, the three samples of judges were not different from each other. It appears, therefore, that the three samples (a decade apart) were compatible with each other as well as representative of the judge population in Israel.

Although representative of their respective populations (which were small to begin with) the absolute numbers of respondents in the 1989, 1999, and 2010 samples were rather small (49, 65 and 86, respectively). Hence, it cannot be concluded with high confidence from the findings that such conclusions unequivocally apply to all judges. Nevertheless, since surveys in which the judges themselves answer the questionnaires concerning their work are extremely scarce, we found it important to present the findings and treat them as indicating general trends and suggestive of possible implications.

4. Possible Response Biases

The small number of respondents relative to the population size could raise concerns that a self-selection bias may exist: i.e., respondents decide whether or not to respond to the questionnaire based on their interest (or disinterest) in the study topic. Consequently, the sample might not be random but biased by the judges' views on the research topic.⁷⁹ However, such a bias is not very likely in these surveys: the questionnaires included a large number of topics about the legal profession (such as the very large increase in the number of lawyers in Israel between 199 and 2010, and its implications for the profession), judicial (judging processes, decision making, etc.), the functioning of the judicial system, and more. It is unlikely that judges would pick out one question (the evaluation of the severity of prevalent courts' punishment) to decide based on it whether to continue filling it out or not. Secondly, as indicated above, other characteristics of the judges in the

⁷⁹ Earl Babbie, *The Practice of Social Research* (Cengage Learning 2011).

samples (e.g., distribution to districts, gender, etc.) were similar to their distributions in the judges' populations as a whole in Israel. Thirdly, we have interviewed several judges about their willingness to respond to the questionnaire, and these interviews showed that lack of time and work-overload were the main reasons for not answering the detailed questionnaire. Given all this, we suggest that there was no significant self-selection bias on the samples.

5. Measuring the Dependent Variable

The dependent variable in our study was the judges' perception of the severity of the courts' punishment. This was measured by a question asking the judges (in all three surveys) to respond to the following statement: 'Given your familiarity with the Israeli court system, would you say the punishments issued in Israel generally reflect a lenient approach?' The response range was: 1. Not at all; 2. To a small extent only; 3. Partially so; 4. To a considerable extent; 5. To a large extent; 6. To a very large extent. A few points should be made regarding the question and the choice of response range.

In order to assess the judges' evaluation of punishment, a single, straightforward question was used. Given the application of a self-administered survey method, the questionnaire had to be as succinct as possible in order not to put-off the respondents. This is common practice in public opinion polls and attitude-surveys where no face-to-face interview is held.⁸⁰ This practice is even more pronounced when respondents are highly professional and very sensitive to time pressures, such as was our case with the judges. In the pre-tests we conducted, the question regarding leniency was tested, and the judges participating in the pre-test indicated that the question was quite clear.

A second point is the definition of 'lenient'. Since perceived 'leniency' is an individual evaluation ('in the eyes of the beholder', so to speak), it had to be left to the individual judge to decide what he/she considered to be lenient and to what extent. Defining it for the respondent would entail 'imposing' the researchers' definition on the respondents and, therefore, is seldom

⁸⁰ E.g., Frederick J Gravetter, Lori-Ann B. Forzano, *Research Methods for the Behavioral Sciences*, (Wadsworth Publishing 3rd edn, 2009).

recommended in cases like ours. Furthermore, by law, judges are given the discretion to determine what the adequate punishment is for a given case (except for the few offenses where a mandatory punishment is determined in the law). Judges are trusted to use their best judgment. Hence, it is up to them to determine what level of punishment is 'inadequate' and to what extent. Also, they are human, so they act according to their own perceptions and, therefore, it is important to assess these perceptions. Given these considerations, the question presented asked them to assess whether the extent the punishments issued in Israel generally reflect a lenient approach not according to a pre-determined 'objective yardstick' but given their familiarity with the Israeli court system.

The response range chosen appears to overemphasize the leniency of punishment, because it is not 'symmetrical' in the response options (i.e., not symmetrical between 'lenient to a very large extent' on the one end and 'severe to a very large extent' on the other). The response range in our study was not symmetrical as it offered several response options regarding leniency and only a single answer of 'not at all lenient', and had no reference to the possibility that the punishments were harsh. We chose to regard the anticipated distribution of answers to this question to be skewed to the side of leniency. In the literature review preceding the study, we had found that all the previous polls and studies found that only a small percentage of the public evaluated punishment as harsh; the vast majority of respondents indicated that the punishments were lenient.

Furthermore, in preliminary interviews we conducted with judges and lawyers, the interviewees overwhelmingly stated that the punishment was too lenient, with not even one suggesting that it was too severe. In addition, the preliminary results of the pre-test study showed that the respondents did not select the response of 'severe punishment'. Hence, this response alternative was omitted. Designing the frequently used 'symmetric' response range for this question would have distorted the skewed nature of the response distribution.⁸¹

Our preference was to create a scale more sensitive to tapping differences on the side of the more frequent response in order to better distinguish between

⁸¹ *ibid.*

various dimensions of leniency. A symmetric range or scale of, for example, five possible answers, ranging from: 1. very lenient to 5, very harsh, would have meant allocating two response options on the severe side of the range, two on the lenient side, and one middle or neutral option. In cases such as the present one, most responses would have been given on the too 'lenient' side of the scale with few if any responses on the two options allocated to the severe side of the scale. Two response options are not a sensitive enough scale to differentiate perceptions within the 'lenient' side. At the same time, the two 'harsh' punishment responses would have been left with almost no response. A concrete example of this situation can be seen in the findings of a study conducted in England, shown in Table 1 above. There, interviewees were presented a symmetrical response-scale ranging between strict and lenient punishment, and the results showed that in three consecutive surveys only three percent (combined) of the respondents responded to the two options of 'strict' and 'very strict' punishment. In contrast, three-quarters of responses were concentrated on the two 'lenient' options. Given such results, it is: a. not possible to get a fuller range of answers regarding the real perceptions; and b. hampers the ability to analyze and better understand the assessment of punishment by the public. Indeed, the actual distribution of responses found and reported here (for example, Chart 1) is concentrated on the 'lenient' side of the scale while there were very few that answers of 'not at all lenient.' Thus, it supports our preference of the asymmetric response range over the symmetric one.

DO WE DELIBERATE? IF SO, HOW?

Virgílio Afonso da Silva*

Academic studies usually present the points of view of their authors. In the specific field of deliberation in constitutional and supreme courts, although the dynamic, quality and results of the deliberations are analysed from various points of view, that perspective almost always comes from outside the court. What judges think of their deliberative performance or what they think of the deliberative model in the court to which they belong is rarely known. This article aims to address this issue by presenting the thoughts of justices on a certain supreme court regarding the deliberations in which they participate. Its goal is thus not to formulate general hypotheses about deliberation in constitutional and supreme courts or even specific hypotheses about a particular court. It presents some of the results of a broad study on the deliberative practices of the Brazilian Supreme Court. This research was based on interviews with the justices of the Court as well as other sources. These interviews sought to understand what the Supreme Court justices think—or at least what they say they think—about the deliberative process in which they participate, especially their views on how the

* Professor of Law, University of São Paulo. This article presents some of the results of a broad study about the deliberative practices of the Brazilian Supreme Court. This research was supported by a grant from the São Paulo Research Foundation - FAPESP (grant 2011/01066-0). An early draft of this article was presented at seminars of the research group *Constitution, Politics and Institutions*, at the Law School of the University of São Paulo, at the Getulio Vargas Foundation Law School in Rio de Janeiro (FGV Direito Rio) and at the Inter-Institutional Research Group of the Political Science and Public Law Departments of the University of São Paulo, the Getulio Vargas Foundation Law School in São Paulo (FGV Direito SP), and the UFABC. I would like to thank the organizers and participants of these three events for their valuable comments, especially Diego Werneck Arguelhes, Ivar A. Hartmann, Fernando Leal, Thomaz Pereira and Pedro Cantisano (Rio de Janeiro) and Rogério Arantes, Luciana Gross Cunha, Vanessa Elias de Oliveira and Conrado H. Mendes (São Paulo). I would also like to thank Guilherme Benages Alcantara and Tatiana Alvim for their hospitality in Brasília during my visits to the Brazilian Supreme Court. Finally, I also would like to thank all the justices that agreed to be interviewed for my project (see note 12).

deliberation and judgement sessions are organized, as well as on the value of consensus and collegiality.

Keywords: supreme courts, constitutional courts, deliberation, judicial behavior, judicial review

TABLE OF CONTENTS

I. INTRODUCTION	210
II. METHODOLOGY	213
III. THE VALUE OF DELIBERATION AND COLLEGIALITY	216
IV. THE JUDGEMENT SESSION AS A DELIBERATION SESSION.....	218
1. <i>Order of the Reading of the Opinions</i>	221
2. <i>The Order of Reading and the Weight of the Justices</i>	223
3. <i>How to Act When the Case Is Mathematically Resolved?</i>	226
4. <i>Interaction with Lawyers</i>	229
V. CONSENSUS SEEKING	231
VI. COLLEGIALITY	235
1. <i>Is There Collegiality on the Brazilian Supreme Court?</i>	235
2. <i>Collegiality and Opening to the Arguments of Others</i>	238
VII. CONCLUSION.....	239

I. INTRODUCTION

Academic studies generally present the perspectives of their authors regarding a given subject. In the specific field of deliberation in constitutional and supreme courts, although the dynamic, quality and results of the deliberations are analysed from various points of view, that perspective almost always comes from outside the court. Thus, it is interesting to explore judges' opinions of their deliberative performance or the deliberative model of the court to which they belong, as these opinions are seldom publicly known or taken into account.¹

¹ Of course, this does not mean that judges' perspectives are never taken into consideration in academic studies. There are enough studies, especially on judicial

This article aims to address this issue by presenting the thoughts of justices on a certain supreme court regarding the deliberations in which they participate. Therefore, it is not a study that defends a certain deliberative model nor is its goal to formulate general hypotheses about deliberation in constitutional and supreme courts or even specific hypotheses about a particular court. In a certain manner, this article aims to contrast some of the assumptions and hypotheses I formulated elsewhere about judicial deliberation in general, and about the deliberative practices of the Brazilian Supreme Court in particular, with the opinions of the judges of this court.² In that article, I pointed out countless deliberative shortcomings in the Brazilian Supreme Court and concluded that in fact, there is no deliberation among the judges on this court.

As will be shown throughout this text, in general, the Supreme Court judges disagree with this assessment. It is possible to argue that in fact, they are satisfied with the deliberative model adopted in this Court. This article presents some of the results of a broad study on the deliberative practices of the Brazilian Supreme Court. This research was based on interviews with the justices of the Court as well as other sources. Contrary to the objectives of similar studies conducted regarding other courts,³ the main goal of these interviews was not to reveal what takes place in the deliberation and judgement room because Brazilian Supreme Court sessions are public and their plenary sessions are broadcast live on television. Instead, the interviews sought to understand what the Supreme Court justices think — or at least

behaviour, that include interviews with judges as part of their dataset. However, they rarely involve interviews with supreme court or constitutional court judges and even more rarely within the specific field of judicial deliberation in such courts.

² Virgílio Afonso da Silva, 'Deciding Without Deliberating' (2013) 11 *International Journal of Constitutional Law* 557.

³ For example, the main objective of the interviews conducted by Kranenpohl with the justices of the German Constitutional Court was to better understand the dynamics of the deliberation sessions of this court, which are completely secret. See Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (VS Verlag für Sozialwissenschaften 2010).

what they say they think⁴ — about the deliberative process in which they participate.

To achieve this objective, this article is divided into five main sections. The first section presents the general objectives and methodology of the research.⁵ Section two briefly presents the core concept underlying the interviews: deliberation. The third section systematizes the justices' general opinions concerning the organization of the Brazilian Supreme Court's deliberation and judgement sessions. In this section, my more general hypothesis stating that the judgement session is not a deliberation session⁶ is questioned. Section four focuses on the value of consensus in the deliberative process. Finally, the fifth section presents the justices' thoughts on the importance of collegiality in the deliberative process and their opinions about its existence in the Brazilian Supreme Court. In the conclusion, in addition to systematizing the results of the case study, I also present an exercise called 'institutional creativity'. Conducted at the end of each of the interviews: each justice was asked to define what, in his opinion,⁷ would be the best deliberative model for the Supreme Court. To a certain extent, this institutional creativity exercise encapsulates the view that justices have of

⁴ It is certainly impossible to identify whether justices are offering their honest opinions or the answers that they deem most compatible with their position or public image. This article should be read with this limitation in mind. However, this is not a shortcoming; instead, it is part of a methodological option. The goal of this article is not to investigate, for example, whether there is actually a consensus-seeking tendency in the Court or how often justices change their opinions. In fact, to achieve these goals, quantitative research would have been the best method. However, if the goal is to uncover how the justices see themselves as deliberators, the best way to accomplish this is to interview them, even if there is a risk of insincere answers. To minimize that chance, the confidentiality of the answers was emphasized before each interview. For more details, see section I (Methodology).

⁵ The text in the first section, which summarizes the methodology and goals of the research on the deliberations of the Brazilian Supreme Court, is repeated in all the articles that present the results of this research.

⁶ See da Silva (n 2) 570.

⁷ The use of the pronouns 'he', 'his', and 'him' does not imply a gender-based option for the masculine over the feminine in this article. It simply results from the fact that none of the women who are or were justices in the Brazilian Supreme Court chose to participate in this research (see note 13).

their roles as deliberators within a collegial body such as the Brazilian Supreme Court.

II. METHODOLOGY

Since the deliberation and decision-making process adopted by the Brazilian Supreme Court has been the same for many decades, each new justice must follow the practices dictated by tradition and the Court's rules of procedure. However, that does not mean that all justices share the same view of their role on the Supreme Court as a collective institution. In other words, despite the fact that an increasing amount of information is accessible — from online databases, through TV Justiça (a TV channel operated by the judiciary that, among other things, broadcasts the plenary sessions of the Brazilian Supreme Court live), on YouTube or even on Twitter — we still cannot assess the role that the justices themselves want to play or what they think of the current decision-making process of the Court. It would not be sound to assume that all justices share the same views on the value of collegiality or dissenting opinions, the role of the justice rapporteur, or the effects of the extreme publicity surrounding the Court's deliberation and decision-making process. The interviews were intended to provide this input to better understand the Brazilian Supreme Court's deliberation practices from material hitherto unavailable.⁸

Between September 2011 and August 2013, seventeen justices (incumbent and retired) were interviewed. The interviews were structured (i.e., the same for all justices) and consisted of 36 questions, some with sub-questions, on the following subjects: the role of the justice rapporteur, concurrent and dissenting opinions, deliberation dynamics, deliberation and the legitimacy of judicial review, agenda setting and deliberation, methods of constitutional interpretation, the value of consensus, interruptions during the deliberation process,⁹ collegiality, publicity and TV broadcasting, deliberation and

⁸ After this research was concluded, the Getúlio Vargas Foundation Law School in Rio de Janeiro began a project called 'História Oral do Supremo Tribunal Federal' (Oral History of the Brazilian Supreme Court), which has interviewed several justices of the Brazilian Supreme Court. Although thematically wider in scope, these interviews also contain questions related to the deliberative process in the Court.

⁹ See note 47 below.

binding precedents, and deliberation and public opinion. Each interview lasted an average of 1 hour and 15 minutes. The longest interview took 2 hours and 45 minutes and the shortest, 45 minutes. The questions had not been revealed in advance and all interviews were conducted face-to-face. Each interview was recorded and subsequently transcribed.

To ensure confidentiality, the names of the justices were replaced by letters. Although there is no recognizable order to these letters, a clear division was made: letters A through I represent the justices who were incumbent at the time of the interview, and letters N through U represent those who were already retired at the time of the interview. In the text, I do not distinguish between incumbent justices and retired justices, except in those cases in which this distinction would be helpful to clarify contrasts between their views.

Despite their busy schedules, the justices were generally welcoming to the goals of the research. In many cases, they were willing to schedule more than one appointment to ensure that the interviews would be conducted at the ideal pace. Since only a few justices refused to be interviewed, it can be assumed that the results have a robust explanatory power regarding the deliberative practices of the Brazilian Supreme Court.¹⁰

This article — as well as others presenting the results of my research — does not have the typical structure of a law journal article.¹¹ As stated above, it does

¹⁰ Only four incumbent justices refused to be interviewed despite many attempts to gain their interest: Celso de Mello, Joaquim Barbosa, Cármen Lúcia Antunes Rocha and Rosa Weber. Since these two latter justices refused to talk and retired Justice Ellen Gracie Northfleet never answered several invitations sent to her, unfortunately, no women were interviewed for this research.

¹¹ Even articles that include interviews do not usually have the structure of this article. Again, Kranenpohl's research is an exception. In addition to the above mentioned book (Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (n 3)), see also Uwe Kranenpohl, 'Herr des Verfahrens oder nur Einer unter Acht? Der Einfluss des Berichterstatters in der Rechtsprechungspraxis des Bundesverfassungsgerichts' (2009) 30 *Zeitschrift für Rechtssoziologie* 135; Uwe Kranenpohl, 'Die gesellschaftlichen Legitimationsgrundlagen der Verfassungsrechtsprechung oder: Darum lieben die Deutschen Karlsruhe' (2009) 56 *Zeitschrift für Politik* 436; and Uwe Kranenpohl, 'Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts' (2009) 48 *Der Staat* 387.

not aim to defend a thesis on the Brazilian Supreme Court's deliberative process or to describe this process from a purely external perspective, much less to offer a comprehensive review of literature on the matter at hand. The goal is to deliver something that could be called an *internal description*. Just as the Supreme Court's decisions are the result of 11 different individual opinions that somehow have to fit into a final document, this internal description of the Supreme Court's deliberative practices also tries to compose a picture of that institutional practice from myriad individual points of view of its members. The only difference is that in this research, it is 17 justices that comprise this picture rather than 11.¹²

However, it is important to stress that although this article focuses mainly on presenting the opinions of the Brazilian Supreme Court justices on issues related to the deliberative practices of this Court, it is not merely a collage of points of view. On the one hand, because those points of view have been sorted out and systematized; on the other hand, because although I do not intend to take sides on the issues addressed, it was occasionally necessary to note some contradictions in the justices' statements or highlight some factual inconsistencies related to them.

A final clarification concerning the goals of the research and interviews is that their main topic was not the justices' attitudes on the tens of thousands of decisions made every year by the Court. Special focus was placed on the most important, politically and morally controversial decisions because many statements about, for example, the role of the justice rapporteur, the number of dissenting and concurring opinions, or the dynamics of the deliberation process only apply to those controversial cases.¹³

¹² The following incumbent (at the time of the interview) and retired justices were interviewed. Incumbents: Ayres Britto, César Peluso, Dias Toffoli, Enrique Lewandowski, Gilmar Mendes, Luiz Fux, Marco Aurélio Mello, Luís Roberto Barroso and Teori Zavascki. Retired: Carlos Velloso, Eros Grau, Francisco Rezek, Ilmar Galvão, Moreira Alves, Nelson Jobim, Sepúlveda Pertence and Sydney Sanches.

¹³ An example related to the role of the justice rapporteur may illustrate the importance of this clarification. While it is true that in the vast majority of decisions, the justices tend to vote along with the justice rapporteur without further inquiry, this is not the case in those more politically and morally controversial decisions, which are also the

In other words, a strictly quantitative study might show a different scenario than that which served as the backdrop for my research. However, I think that the choice to focus on a rather small set of decisions is justified. If one seeks to analyse the Brazilian Supreme Court as a constitutional court, then it does not make sense to take into account the deliberations of the justices when deciding the tens of thousands of interlocutory appeals they decide every year. What really matters here is the justices' attitudes in their decisions on those politically and morally charged cases that constitutional courts typically decide, such as those involving political reform, campaign financing, abortion, stem cell research, same-sex marriage, affirmative action, drugs, and so forth.¹⁴

III. THE VALUE OF DELIBERATION AND COLLEGIALLY

The interviews took at least one assumption for granted: the better the deliberative performance of a court exercising judicial review, the better the court itself is. The positive value of deliberation as such was therefore not in question. The theoretical framework that underpins this assumption has already been developed elsewhere and need not be fully analysed here.¹⁵

decisions that draw greater public attention outside the Court. The same applies to the practice of bringing lengthy written opinions to the plenary sessions and reading them; this usually happens only in those major decisions.

¹⁴ The definition of a controversial case is far from clear-cut. For example, it is not possible to state that all plenary decisions (as opposed to panel decisions) or all non-unanimous decisions are controversial. There are both panel decisions and unanimous decisions that may be considered controversial. Maybe the best example of the latter is the decision on same-sex civil unions, from 2011 (ADI 4277). Although it was a unanimous decision, its subject-matter is quite controversial. This is the reason why, instead of trying to provide a clear concept of a controversial decision, I decided to deliver many examples of recent decisions that should be, at least for the goals of this research, considered controversial. Not coincidentally, the unanimous decisions used as examples often have many concurring opinions.

¹⁵ For more details on these theoretical discussions, see da Silva (n 2). For other defences of judicial review grounded in the deliberative attributes of supreme or constitutional courts, see, for instance, John Rawls, *Political Liberalism* (Columbia University Press 1993) 231; Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press 2013); Ronald Dworkin, *Freedom's Law: The Moral Reading*

It may nevertheless be summed up as follows. Justices in supreme and constitutional courts are not directly elected. Therefore, the legitimacy of these courts in reviewing the legislation passed by democratically elected parliaments must have different foundations. The most frequently mentioned source of their legitimacy is surely the fact that they can protect the constitutional rights of minorities. However, there are other sources, and the quality of the deliberation is one of them. When courts do not deliberate (or when they deliberate poorly), they add nothing (or very little) to the work already done by the legislature. In other words, if court decisions consist of pure head counting, then Waldron is right to challenge their legitimacy.¹⁶ Thus, the assumption that courts are (or at least can be) institutions with a *distinct deliberative potential* is paramount to their legitimacy.

The assumption that deliberation is a central feature in the decision-making process of a supreme or constitutional court defined the organization of the interviews. The concept of deliberation underlying the questions is that of *internal* deliberation: 'the effort to use persuasion and reasoning to get the group to decide on some common course of action', which involves 'giving and listening to reasons from others inside the group'.¹⁷ Most questions were related to what I consider the 'conditions under which the full deliberative potential of an institution can be attained'.¹⁸ The most important of these is *collegiality*. The value of collegiality, however, was not taken for granted, at least not to the degree that the value of deliberation was. The justices could deny — and some of them indeed did — the positive value of collegiality. The concept of collegiality underlying the interviews implied qualities such as the disposition to work as a team, the willingness to listen to arguments advanced

of the American Constitution (Oxford University Press 1996) 1–38; Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press 2001).

¹⁶ See Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1391.

¹⁷ John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe' (2004) 82 Texas Law Review 1671, 1692. In opposition to the concept of internal deliberation, Ferejohn and Pasquino define *external* deliberation as 'the effort to use persuasion and reasoning to affect actions taken outside the group', which involves 'the group, or its members, giving and listening to reasons coming from outside the group'.

¹⁸ da Silva (n 2) 562–67.

by other justices (i.e., being open to being convinced by their good arguments), cooperativeness in the decision-making process, and mutual respect among judges.¹⁹ An entire section is also dedicated to a final feature of my concept of collegiality, namely, 'the disposition to speak, whenever possible, not as a sum of individuals but as an institution (consensus-seeking deliberation)'.²⁰

IV. THE JUDGEMENT SESSION AS A DELIBERATION SESSION

In the discussion regarding whether there is truly deliberation on the Brazilian Supreme Court, a preliminary question was whether the judgement session should be characterized as a deliberation session. This question addresses the more general thesis I advanced elsewhere, according to which the judgement session is *not* a deliberation session.²¹ The question posed to the justices was rather straightforward: 'Do you think that a judgement session in the Brazilian Supreme Court is also a deliberation session?' The concept of deliberation underlying the entire interview was expressed at the outset: 'During this interview, deliberation should be understood in its widest sense, as the exchange of arguments within a collegial institution with the goal of persuasion and decision making'.

Although the opinions of the justices have seldom been unanimous, those who said that the judgement session is not a deliberation session frequently clarified that this was the case only because of the workload and not necessarily due to the way the session was organized.²² More than a few justices mentioned Article 135 of the Court's rules of procedure, which defines the voting order in the Supreme Court. This article suggests that before presenting the position of each justice, there will be an oral debate:

¹⁹ *ibid* 562–63.

²⁰ *ibid* 563.

²¹ See *ibid* 570: 'the plenary session means 'opinion-reading session' rather than 'deliberation session'.'

²² Similarly, see Mathilde Cohen, 'Ex Ante versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort' (2014) 62 *Am J Comp L* 951, 999: 'the deliberative ideal lacks verisimilitude for certain courts by virtue of their skyrocketing dockets.'

Art. 135. *Once the oral debate is finished*, the Chief Justice will hear the reading of the written opinion of the rapporteur [...] and of the other justices, in reverse order of seniority.²³

This oral debate is regulated by Article 133 of the Court's rules of procedure:

Art. 133. Each justice may speak twice about the issue under discussion; he or she may also speak one additional time, if necessary, to explain a modification in his or her opinion. No one will speak without authorization from the Chief Justice, and no one will interrupt the justice who is speaking without asking him or her to briefly cede the floor and receiving that permission.

Clearly, these are not the characteristics of an open debate. Of course, in practice, on the few occasions during which there is an exchange of arguments before each justice's opinion is presented, this rigidity in the Court's rules of procedure is usually not followed. However, in the most important cases before the Brazilian Supreme Court, the practice has been to move directly to the reading of the written opinion of each justice without the preliminary oral debate mentioned in Article 133. Nevertheless, several justices still consider the judgement session to be a deliberation session as well. This appears so clear to some justices that they do not even bother to provide much justification.²⁴

Others justify this understanding through more arguments, as did Justice B:

I have the impression that it is a deliberation session. I think that a decision can be constructed that may not have even been in the written opinion of the justice rapporteur.

This outcome, mentioned by Justice B, corresponds substantially to one of the objectives that Fearon attributed to deliberation, which is the construction of a result that may not have been the initial idea of any participant in the debate.²⁵ Similarly, other justices also appear to believe that it is a deliberation session because although the opinions may be written

²³ Emphasis added. Art. 134, § 2 of the Court's rules of procedure also mentions oral debates.

²⁴ For example, Justice I ('I think so, it certainly is'), Justice Q ('I think so, I think so') and Justice O ('There is, there is [deliberation]').

²⁵ See James D Fearon, 'Deliberation as Discussion' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press 1998) 44.

before the session begins, there is an opportunity for change and adaptation, particularly when such change is possibly based on comments from other justices:

Yes [it is a deliberation session], because you start your reasoning from the beginning, you explain its path, and in the course of this presentation, you may be interrupted by a colleague who tries to establish different premises. I think that this is true deliberation despite the fact that you had your ideas previously organized in a written format.²⁶ It is a deliberation session in terms of the conclusion of the process. We meet together to discuss and exchange ideas, and we mutually complement each other [to] reach what we understand to be the best solution for each distinct case.²⁷

Even those who understand that the model does not encourage debate may argue that the judgement session is also a deliberation session:

I believe [that it is a deliberation session] in the sense of an exchange of ideas and an eventual readjustment of positions. Certainly yes, although the model does not particularly favour this.²⁸

In a similar sense, but with a bit more of a critical tone, Justice H argued:

It is a mixture of voting and debate. You are debating, and at the same time, you are also voting. This hampers deepening the discussion because if you could do it as the Court's rules of procedure dictate and simply participate in a debate, you [would think] 'I am going to participate in the debate like an intellectual sharpshooter and later I will reformulate my written opinion'. It would be better.

The most clearly contrary opinion arguing that the judgement session is not a deliberation session was that of Justice C:

I don't think so. It is a session for the presentation of points of view that are either already defined or that are reinforced during the discussion but are not brought about by it. The discussion itself is only an opportunity for the affirmation of points of view that are already in some way in the heads of the justices of the Supreme Court. The system does not frame this as a deliberative process, and it cannot be because to do so, it would have to be another environment, an environment for discussion, not one for defending points of view. What would work would be this: 'look, I am thinking of this,

²⁶ Justice G.

²⁷ Justice A.

²⁸ Justice E.

I am thinking out loud, but I want to listen, let's see, I am proposing this, what do you think? This or that could be considered...'. That is different, but the system does not foster it.²⁹

Finally, only one justice distinguished between the sessions of the panels and the plenary sessions in relation to the deliberative potential of both:

In the panel, [there is] greater [possibility for debate], perhaps because it does not have the solemnity of the plenary session. I think that the panel has a more deliberative profile. In most cases, the plenary session is nothing more than the presentation of stagnant, individual opinions.³⁰

1. *Order of the Reading of the Opinions*

The determination of who has the floor in a debate is rarely completely open. There must be some form of organization. As mentioned above, debate on the Brazilian Supreme Court is regulated by Articles 133 and 135 of the Court's rules of procedure. The former regulates the oral debate before the votes are taken; the latter defines how the voting is conducted. Since there are rarely oral debates before the voting, the only moment for deliberation is during the voting. The rules are quite rigid for this process: the Chief Justice will take the votes of the justice rapporteur and the other justices in the reverse order of seniority.

As mentioned, this speaking order, which is always the same, does not appear to encourage debate.³¹ Even if there are other courts — especially in common law countries — that also use the criterion of reverse order of seniority, there are some peculiarities in the Brazilian court that make this fixed order

²⁹ Justices R, P and S are also sceptical about the possibility of having deliberations in the judgement session. Justice R: 'It is rare, rare, it's rare [to have deliberation]'; Justice P: 'At times'; Justice S: 'It is more for [reaching] a decision than for deliberating'.

³⁰ Justice D. For a comparison of the level of cohesion in the panels and the plenary session, see Evan Rosevear, Ivar A. Hartmann, and Diego Werneck Arguelhes, 'Disagreement on the Brazilian Supreme Court: An Exploratory Analysis' (31 October 2015). Available at SSRN: <https://ssrn.com/abstract=2629329>, 18.

³¹ Similarly, see Mendes (n 16) 167: 'As the interaction becomes more rigid and codified (like the ritual in which the order of individual votes follow a criterion of seniority), deliberation naturally loses spontaneity. And although deliberation cannot be seen as mere 'spontaneous conversation', hard rules of interaction may turn it artificial'.

potentially more problematic. In the supreme courts of both the US and the UK, the reverse order of seniority is used in a preliminary meeting at which the justices give their views on the case being decided. After the preliminary meeting, the opinion of the Court and, if any, the concurring or dissenting opinions (in the US court) or the draft opinions of the individual justices (in the UK court) are shared with all the justices before the very final decision is taken.

Nevertheless, some justices have no problem with the fixed order of opinion reading. Some simply stated: 'I do not see this as relevant',³² or 'I think that this [...] is not essential'³³ without additional comment. Others argue that this rule is not important because it is not followed to the letter: 'This does not seem too important to me because it is not rigidly observed in reality'.³⁴ However, most of the justices believe that the rule is positive. There are a wide variety of reasons for this, some of which are conflicting. Some see the requirement that the newest members of the Court vote first as a form of protection. Within this form of protection, the idea of protecting justices from mutual influences appears.

I think this is good. I think it is good because each one has their own moment to speak. And to begin with the freshman is good because—I was once a freshman — the freshman enters the Court with great respect for the senior [members] and can have a tendency to vote along with them; therefore, he should be the first to vote.³⁵

I think it is interesting because it allows the youngest to bring new ideas. For example, if he were shy, he would not feel at ease to dissent after the opinions of the more senior members, so it has this positive aspect.³⁶

I have never considered this issue. However, there is a reason for it. [It is] always the newest member [who presents his opinion first] so that he is not influenced by the more senior members. I think that this is an intelligent rule, a golden rule.³⁷

³² Justice B.

³³ Justice T.

³⁴ Justice C.

³⁵ Justice O.

³⁶ Justice S.

³⁷ Justice I.

Other justices emphasize a positive effect on the more senior members rather than the newer ones:

At first, I thought this was horrible. Then, I realized that the political advantage of this is the following: if there is disagreement, it is the more senior members who decide; it is a form of permanence to have the final opinions come from the most senior members who are the last ones to vote.³⁸

In contrast, Justice G argued that it is good because the younger justices can bring new ideas to the decisions:

I confess that I never considered this. To begin with the newest [is] more thought-provoking; it brings new values, and the debate becomes richer.

Those who are opposed to the model usually suggest the rule adopted in other Brazilian courts in which the order of speaking varies according to who the rapporteur is:

I think it would be much more democratic if it varied according to the distribution of the case. It would be much more democratic and perhaps create greater security in voting by not always leaving the younger members to be cannon fodder.³⁹

Other courts follow the order of seniority after the rapporteur. It is the rapporteur and then goes by seniority. I think that this would be better because the criteria of the order would vary, but there would still be an order.⁴⁰

2. *The Order of Reading and the Weight of the Justices*

In the already mentioned article, I argued that a fixed order of reading the written opinions could lead to a difference in the weight of each justice, especially for the most senior justices⁴¹ because the case may already be mathematically decided by the time it reaches the most senior associate justice in the voting process. As discussed above, there are several courts that adopt the same order (inverse seniority). Once more, the contrast with the US and UK supreme courts may be illustrative. The inverse seniority criteria

³⁸ Justice R.

³⁹ Justice A.

⁴⁰ Justice D.

⁴¹ See da Silva (n 2) 570–72.

are used in these courts in preliminary (and secret) sessions.⁴² In the Brazilian Supreme Court, after the most senior associate justice and the Chief Justice cast their votes — i.e., share their opinions for the first time with all other justices — the judgement session is finished.⁴³

Nevertheless, the justices have a quite a different perspective. Although they are aware that the risk exists of the most senior associate justice becoming of little relevance, almost all of them point to the fact that it is not the procedural rule that is relevant in these situations but the personality of the justices, especially the more senior associate justices and particularly the most senior. Thus, if there is a risk that the opinion of the most senior associate justice becomes of little relevance, it would be due to his lack of initiative, not a procedural rule.

In the justices' responses, the most cited names were Justices Moreira Alves and Sepúlveda Pertence, as examples of the more active senior justices, who did not wait their turn to express their opinions — while the example of the most passive justice was always Justice Celso de Mello (the current most senior justice). In the following paragraphs, I transcribe these responses without additional commentary because they appear to me to be illustrative of the role that the personality of the most senior associate justice (or of the other rather senior justices) can have in the deliberation.

This will depend on the style of each justice. For example, Marco Aurélio Mello makes use of a provision of the Court's rules of procedure that Moreira Alves and Pertence often used: 'I am not voting before my colleagues, but, given the written opinion of the rapporteur, I would like to debate'. Moreira Alves did this constantly. Marco Aurélio Mello did it quite a bit, but less often, and Pertence also did it a lot, a bit less than Moreira Alves. In contrast,

⁴² This may explain why there is almost no study addressing the issue at stake here, namely, the difference in the weight of each justice in the deliberation process. Leflar, however, argued that even in the preliminary conference, the order should not be fixed. See Robert A Leflar, 'The multi-judge decisional process' (1983) 42 Maryland Law Review 722, 726: '[t]he order in which judges state their views on cases during a conference has bearing on a judge's opportunity to influence the decision'.

⁴³ Even though any justice is allowed to change his or her mind before the judgment session is concluded, i.e., even after the most senior Associate Justice read his opinion, this rarely — if ever — occurs.

Celso de Mello, who [currently] is the most senior associate justice, does it much less.⁴⁴

The Court's rules of procedure allow each justice to intervene in the discussion, so Marco Aurélio Mello uses this a lot; he immediately asks to speak. In contrast, Justice Celso de Mello is more reserved; he winds up giving a lecture at the end of the session. He is the last to vote and has very little influence. He makes a speech that he thinks is for history books.⁴⁵

Moreira Alves would not let the chance go by: when he was the senior associate justice and in certain cases realized that the Court was leaning against his position, he would ask to speak and even ask to interrupt the session in order to view the case files.⁴⁶ Not just anyone is able to fight in the plenary session because you will debate there with people with tremendous experience. At times I joked 'you have to hold the reins firmly or you may fall off the horse'.⁴⁷

He did not do this [speak before his turn]; Celso de Mello is much more evasive whenever possible.⁴⁸

Moreira Alves was like that; you began to vote and he would interrupt. He opened the debate at the beginning. Who had this personality? Moreira Alves, Pertence. Now, Celso de Mello does not. I think that he isn't even listening to what the others are saying.⁴⁹

Thus, because of this tendency to attribute the weight of each justice in the deliberation to personality issues rather than to procedural rules, there are few who believe that the voting order creates an imbalance in the debate. In addition to Justices A and D, who were mentioned in the previous section as

⁴⁴ Justice F.

⁴⁵ Justice I.

⁴⁶ The possibility of interrupting the judgement session and requesting to view the case files ('pedir vista') is established by the Brazilian Civil Procedure Code (Article 555, § 2): 'Every judge may interrupt a judgement session if he considers himself unable to reach a decision at the given moment'. These requests are sometimes also used to postpone the decision.

⁴⁷ Justice O.

⁴⁸ Justice Q.

⁴⁹ Justice R.

being opposed to the current fixed voting order, only retired Justice T mentioned some concern with a possible imbalance.⁵⁰

The fact that so many justices highlighted the personalities of their colleagues as pivotal, and provided clear examples thereof, should be taken into account. In light of this point, my original arguments, presented in the article mentioned above, should be refined to include the 'personality' variable. However, this does not mean that my arguments are rebutted.⁵¹ The fixed order still potentially decreases the influence of the most senior justices because they read their opinions last. The fact that some senior justices were and still are able to overcome the burden of 'jumping the queue' by expressing their points of view before their turn does not mean that the burden does not exist; it only means that the burden is not insurmountable. The case of Justice Celso de Mello, who has been the most senior associate justice on the Brazilian Supreme Court since 2007,⁵² clearly shows that not every senior associate justice is able or wants to be as active as they would need to be to have some degree of influence.

3. How to Act When the Case Is Mathematically Resolved?

Related to the previous issue, another question also arises addressing the strategy of how to proceed when a case is mathematically decided, i.e., when there are already six opinions in favour of a given position. In these moments, the influence of the justices who have still not voted is reduced given that it would be necessary for one of the justices who had already read their written opinion to change his or her position to alter the course of the judgement, which is not a simple task.

One of the interview questions was raised precisely to determine how the justices act or would act in a plenary session in a situation such as this, i.e., if he had still not read his opinion, which is contrary to the already consolidated

⁵⁰ Justice T: 'I think that a variation in the voting order would be very significant precisely for [avoiding differences in the weight of the vote between the justices who vote earlier and those who vote later]'.

⁵¹ I would like to thank Diego Werneck Arguelhes for pointing this out to me.

⁵² The justices mentioned above as having more active personalities, Moreira Alves and Sepúlveda Pertence, were the most senior associate justices from 1986 to 2003 and from 2003 to 2007, respectively.

majority. In this situation, the basic options would be (i) to simply read the written opinion as it was written, (ii) to reconsider the written opinion (during the plenary session or after requesting time view the case files) to try to counter the arguments of the majority, (iii) to try to join the majority but offer some different arguments that could perhaps be accepted; or (iv) to simply join the majority.

Most of the justices argued that their response would depend on the case being decided. Many of them said that all the strategies are possible: 'you could take any one of these four strategies, any one'.⁵³ Justices E and R had similar responses:

All the responses would be possible depending on the case, but I would say that if it is an issue that I consider to be important, and the Court is heading in a direction diametrically opposed to that which I believe correct, I would ask to be allowed to intervene before my turn and present my argument, even if only briefly. If I find that my argument would not be wholly accepted, I would try my second best option, which would be to try to neutralize the extreme that seemed to me to be unfavourable. And, in certain cases, if I believe the issue unimportant and the majority was already determined, I may just let it go.⁵⁴

There is no rule. For example, if I understand that the consequences of a given decision would be disastrous, I would ask for time to view the case files; if I think that the consequences of the decision would not be disastrous but nevertheless have a dissenting argument, I would maintain my position, but not read the written opinion to avoid disturbing the others. [I would say] 'I dissent in the terms of the written opinion, which I will file later...' since I knew that I would not change the opinions of the other justices. If I had a point of view that could be accepted by the majority, I would [present it].⁵⁵

⁵³ Justice H. This justice added a fifth strategy, which was analysed in the previous section: 'There is still a fifth [option]. You can say the following; 'look, the opinion of the rapporteur appears to me to be incorrect, and I would like to anticipate my opinion' to try to influence, in the best sense, the other justices who will vote afterwards. I will not let it reach me with the fact consummated; I will anticipate my dissent right away'.

⁵⁴ Justice E.

⁵⁵ Justice R.

Here the variable 'workload' was also mentioned as a factor that could influence the behaviour of the justices. In this sense, Justice Q stated:

The tendency is towards the latter [to simply join the majority]. In second place, the next to last [try to join the majority but offer some different arguments that could perhaps be accepted]. And this has a lot to do with the workload.

However, there are justices who emphasize that it is not possible to compromise, especially when handling the most important cases. For example, Justice B argued:

I never thought of joining the majority, no. If I had a differing position, I wouldn't do that. I think that I would have to maintain the dissenting position depending on the importance of the issue.

The position of Justice G is a bit more incisive, but takes a similar direction: 'No, I think that in the most polemical cases, I would offer my own contribution as I would have taken it to the judgement session'.

The position of Justice F was different from all the others. He stated that the justices simply cannot vote in another way that is not faithful to their conviction with the exception of the Chief Justice:

The ten associate justices of the Brazilian Supreme Court have the sole and exclusive commitment to vote along with their own conviction and must vote as such. The possibility of a Supreme Court justice voting against his conviction is exclusive to the Chief Justice. The associate justices on the Supreme Court do not have the right to do this and cannot do this without running the risk of subverting their consciences.

This point of view is especially opposed to that expressed by Justice E, who explicitly mentioned the possibility of voting according to a second preference to try to neutralize the extreme that would appear unfavourable. It seems that Justice F would understand this strategic behaviour as a 'subversion of the conscience' of the judge.

4. Interaction with Lawyers

In many constitutional and supreme courts, during the oral arguments justices may ask questions to the lawyers.⁵⁶ Although this moment precedes the deliberation itself,⁵⁷ it can have an important effect on the debate among the justices.

In the Brazilian Supreme Court, this practice does not exist. At most, the justices may ask questions to clarify a factual issue. When questioned about the importance of debate with lawyers, several justices emphasized the value of the oral arguments⁵⁸ and many stated that they favour the possibility of debating with the lawyers. Nevertheless, many justices pointed to a certain lack of experience among many of the attorneys who present oral arguments at the Supreme Court.

Among those favourable to greater interaction between justices and attorneys, some mentioned that it should not simply follow the current model. Some changes were suggested:

I think that this interaction should take place. And certain formalities that create a distance between the judge and the lawyer should be eliminated.⁵⁹

Maybe the most important change would be the realization of oral arguments (with or without debate) in a distinct (previous) session, as usually occurs in other constitutional courts and supreme courts:

I think that the oral argument as it is conducted in Brazil has limited value because it is a very unilateral process. The rapporteur generally already has his opinion written, which means that for him, the oral arguments rarely have any consequence. I would favour a model in which the oral debate were made in a session prior to the judgement session.⁶⁰

⁵⁶ 'Advocate', 'lawyer' and 'attorney' are terms used here in the broad sense to encompass all those who present oral arguments in the plenary session of the Supreme Court.

⁵⁷ See Mendes (n 15) 162.

⁵⁸ Justice F: 'My experience shows that the oral arguments can lead to a change in the outcome of the judgement'.

⁵⁹ Justice G.

⁶⁰ Justice E.

Although favouring a debate between justices and attorneys, Justice B mentions that with the Supreme Court's current workload, this interaction would not be possible or even productive:

An oral argument in the plenary session, for example, may have a very strong influence — not necessarily on the rapporteur, but on those who still have to vote — and in some cases certainly influence the opinions of the other justices. But the workload is a pivotal issue here. [A debate with the attorneys] would perhaps require having only that judgement [on that day].⁶¹ And the presentation of oral arguments could not be limited to fifteen minutes [as it is today]. The system would have to be completely remodelled.

Finally, although several justices might be favourable to having greater interaction with attorneys, they point to a certain lack of experience of those who make oral arguments in the Supreme Court, which can undermine the potential of this interaction:

On one occasion, I began to ask the attorney a few questions, but I forgot that he was quite young, and he became embarrassed, so a colleague nudged me — 'why are you causing trouble?' I apologized, [and said] 'No further questions'. So there is this issue as well. Since it is not usual [to ask questions], the attorney can understand that this is being done as a form of pressure.⁶²

Justices C and I were more explicit about the lack of experience of the attorneys:

What happens here in the Supreme Court? The person who comes to argue here at times is quite young and does not even fully understand the case, so it is impossible to engage in a dialogue. This can be detrimental. I think it is not very productive.⁶³

The attorneys are extremely unprepared! What is happening today? The person graduates, [...] takes the bar exam, and the next day is presenting oral arguments before the Supreme Court. One day, during a break in the session, a young man, who was young enough to be my son, and a young woman came to me. She sat here and he sat there. He [...] looked at me and asked: 'did you receive my brief?'. I looked at him and said: 'young man, look, according to the Court's rules of procedure, you should call me Your Honour, but you can

⁶¹ Unlike what occurs in many courts, in the Brazilian Supreme Court, many cases are often judged in a single day (or, to be more precise, in a single afternoon).

⁶² Justice O.

⁶³ Justice C.

call me Sir and start over'... [In other countries,] there is a long way before being admitted to the Supreme Court's bar. This rule would facilitate a better dialogue because it would be a dialogue among equals. But [here], you are clearly not dialoguing among equals.⁶⁴

V. CONSENSUS SEEKING

On the Brazilian Supreme Court, as on almost all similar courts around the world, the decisions are made by the majority. That is, six votes are enough for a case to be decided in a certain direction. Even so, there are studies that indicate that some courts make an effort to decide cases by broader majorities or even by consensus.⁶⁵

Questioned about a similar tendency on the Brazilian Supreme Court, only one of the incumbent justices and two of the retired justices were able to identify a consensus-seeking tendency. Justice G stated:

There is an effort in this direction because, one way or another, the justices, when they eventually meet outside the sessions, debate. During the interval of a session, they debate the issues. Thus today, there is an effort to reach an institutional decision.⁶⁶

No other justice expressed a similar perception.⁶⁷ In fact, some believed that this effort to reach a consensus should not even exist:

If I could give weight to a unanimous decision and to a majority decision, I would give a higher weight to a majority decision because it is the unequivocal understanding that the issue was discussed. In the plenary session, I very much resent the fact that at times, for one reason or another, an issue is decided without greater discussion.⁶⁸

Although they understand that this search for consensus should exist, others do not see an environment that is propitious to this on the Brazilian Supreme Court:

⁶⁴ Justice I.

⁶⁵ See Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (n 3) 181.

⁶⁶ Justice G.

⁶⁷ Justice B: 'No, I do not believe that this exists, I don't see it'; Justice D: 'No, it doesn't exist, it doesn't exist'.

⁶⁸ Justice A.

There is none. It's each one for himself and God for all. As soon as I entered in the Court, I asked, '[Justice] Jobim, listen, don't you discuss things here?'; [he answered] 'Ah, no, I tried to have discussions, but it didn't work'. [...] I think that [...] when you have a score higher than this minimum of six to five, the legitimacy of the decision is more robust. You will always have a justice like Marco Aurélio Mello, who will always dissent, but even this is good. [For example], the decision on same-sex civil union: I strongly insisted that we discuss this issue beforehand so that we could establish some premises and reject others to avoid each justice making his own speech. That is not good.⁶⁹

An attempt to explain the absence of a consensus-seeking orientation was given by Justice F, who attributed this role to the Chief Justice and to the rapporteur of each case. When the Chief Justice or the rapporteur do not take on consensus (or broad majorities) as a goal, it is very difficult for this to occur naturally. His explanation deserves a longer transcription:

This is the role of the Chief Justice; it is the role of the rapporteur, who has to take the initiative. The other associate justices here are quite passive. You can ask 'should it be like this?' My answer is no. And you ask, 'So, why is it like this? Is there an explanation?' There is. The number of cases that we have to decide is so cumbersome that we think, 'ah, I am not the rapporteur of the case, I am not the chief of the panel, I am not the Chief Justice, I vote how I want to vote; here is my vote, it's done. Why would I have to try to find a compromise solution?'. This is the role of the rapporteur, of the justice who first dissented, or of the Chief Justice.

Following this idea that it is up to the Chief Justice (or to the rapporteur) to try to foster consensus or broader majorities, Justice I mentioned that he acted this way when he was on the Electoral Court:

We have to sit down together, and it's easy: 'look, people, let's have coffee and do this and that; let's establish some shared premises and let's go into the session in agreement'. I have done this. One day I had a big problem [on the Electoral Court]. There was a delay, a justice was absent, and in the other room I had a good bottle of whiskey. I sent the waiter to bring some cheese and served a few glasses of whiskey to my colleagues and [said] 'take a look at this here' and we began to talk and we went to the session... An informal conversation can work miracles. There is no demerit in this at all. Because this is not academia, do you agree? We are one of the political branches,

⁶⁹ Justice I.

which must take decisions. And the more consistent, coherent, firm, and univocal the decisions, the better for the country, the better for the citizens.

However, the absence of a search for consensus does not appear to be peculiar to the most recent benches of the Court. The large majority of the retired justices stated that they also did not see a trend towards consensus.⁷⁰ In fact, in the case of retired justices, almost none appeared to see a problem in lacking a consensus-seeking orientation.⁷¹ To the contrary, it is identified as an attitude that demonstrates respect for individual positions:⁷²

No, no, this doesn't exist. On the Supreme Court, the individual's point of view is strongly respected.⁷³

Never, never. And in fact, there were many decisions made by tight majorities [...] this is inevitable, there is not a minimal chance on the Supreme Court, above all at a time like this, to achieve anything different, [such as] 'let's try to make a bit stronger majority'. This possibility does not exist.⁷⁴

No, no one was ever concerned with this. [Because a search for consensus] would imply coercing people to adopt a line of thinking when in reality, they are not prone to this.⁷⁵

These answers — especially the latter — seem to perfectly express the fear that consensus-oriented deliberation could suggest: 'that a justice is open to

⁷⁰ Only Justice R stated that 'There was [a tendency to seek consensus]. Then it disappeared. But at first, it was there, there was an effort. [...] When things got very complicated [...] one would ask to view the case file in order to try to reach consensus later. At times, the request to view the files was merely instrumental only to try later to discuss the issue over a coffee'.

⁷¹ With the exception of Justice T: 'I would even like if it were like that, but I knew it wouldn't be because unity never prevailed'.

⁷² The answers of the justices of the Brazilian Supreme Court in this regard are very similar to the most current justification of British judges for maintaining the *seriatim* system: (Andrew Le Sueur, 'A Report on Six Seminars About the UK Supreme Court' (2008) 1 Queen Mary University of London, School of Law Legal Studies Research Paper, 32).

⁷³ Justice O.

⁷⁴ Justice Q.

⁷⁵ Justice N.

compromise her own view of the underlying legal merits of an appeal in order to achieve some extraneous, distinctly non-legal or policy goal'.⁷⁶

However, some retired justices did mention that even without a general trend towards consensus-oriented interactions, the older benches of the Court sometimes identified cases that deserved special attention and that, if possible, should be decided by a broader majority or by consensus. In these situations, a 'session of the council' or even an 'administrative session', both held behind closed doors, could be used for a preliminary debate.⁷⁷

You had cases in which it was convenient for a decision to be taken by a truly substantial majority. These were cases for a session of the council. Precisely to know the different points of view, to not have a decision with too much dissent and to not have unnecessary debates during the session. The Supreme Court was very careful about this issue.⁷⁸

At the time when there were administrative sessions, these issues were discussed. 'Should this decision be unanimous?', 'Even if there are dissenting opinions, should it appear unanimous?'. And this was a political decision that was related to some high public interest of the country.⁷⁹

However, these 'sessions of the council' have been virtually discontinued. One of the justices explained the decline in the importance of the sessions of the council as follows:

It was pretty much dissolved as Justice Marco Aurélio Mello joined the Court. He was adamantly against this preliminary conversation. [...]

⁷⁶ Benjamin Alarie and Andrew Green, 'Should They All Just Get Along? - Judicial Ideology, Collegiality, and the Appointments to the Supreme Court of Canada' (2008) 58 *University of New Brunswick Law Journal* 73, 82.

⁷⁷ Article 151 of court's rules of procedure establishes that secret sessions might take place: (I) when one of the justices provides relevant reasons for it or (II) by request of the Chief Justice to discuss administrative matters. The first are sessions of the council and the latter are the so-called 'administrative sessions'. The sole paragraph of Article 152 explicitly provides that in the first case, the judgement session that follows the session of the council must be public.

⁷⁸ Justice O.

⁷⁹ Justice S.

Sometimes he didn't show up or showed up to protest, etc. Since then, the meetings have very rarely been held.⁸⁰

VI. COLLEGIALITY

The Brazilian Supreme Court is a collegial body. This does not mean that there is collegiality on the Court. The definition of collegiality that was presented for the justices was quite broad. It should be understood not in the sense that there necessarily be friendship or that dissent among the justices should be always avoided, but in the sense that there be a willingness to work as a team, to listen to the arguments of colleagues and to be open to them, and when possible, to try to speak as a group and not as an individual. Given this definition, the questions presented to the justices were clear and direct: Is there (or, in the cases of the retired justices, was there) collegiality on the Supreme Court?

1. Is There Collegiality on the Brazilian Supreme Court?

The division between incumbent and retired justices was probably the clearest in this area. Practically all the incumbent justices stated that the environment was not at all collegial, while almost all of the retired justices, especially those who left the Court long ago, said that it was. And more than one justice mentioned the expression supposedly coined by Justice Sepúlveda Pertence, who once asserted that the Brazilian Supreme Court is composed of 11 islands:

Collegiality is the ideal. It does not work like that, but it is the ideal. No, it does not exist here. There is even a saying that you can put in quotes: Sepúlveda Pertence said that the Supreme Court is constituted of 'eleven islands'! He always said this, and I think this is very true. After a few years, I said to him one day 'and they don't even form an archipelago'.⁸¹

⁸⁰ Justice P. The administrative sessions still take place several times a year. However, in these sessions, the justices do not discuss cases that are pending in the Court; they only address administrative matters. In some exceptional cases, the administrative sessions may still be used to define some procedural details of the decision-making process of pending cases, but never the merits of a case.

⁸¹ Justice C. On the 11 island metaphor, see, for instance, Guilherme Forma Klafke and Bruna Romano Pretzel, 'Processo Decisório no Supremo Tribunal Federal:

Look, it doesn't exist [collegiality]. There are eleven islands, and it absolutely does not exist. At times you may try to convince a certain group so that you have a pre-majority, so that your position will prevail. But collegiality does not exist on the Supreme Court. And it will take a long time to achieve it!⁸²

Among the incumbent justices, only Justice G adamantly declared that 'there is an environment of collegiality'. All the others clearly said there was not, or mentioned conditional factors, which were often not satisfied, for this collegial environment to be attained. Moreover, although many linked the lack of collegiality to the current deliberative model, the perception that there is no collegiality is not directly related to their opinion of about this model. In other words, even the justices who favour the current model, or are at least satisfied with it, still attribute the lack of collegiality to it, at least to some degree.

I think that [collegiality has] great importance, although at least in the more complex cases, it is usually absent.⁸³

I think there is no collegiality. I think that this sense of collegiality does not exist. I think that the system does not favour it and there is resistance to it by some.⁸⁴

This 'resistance by some', mentioned by Justice D, can be deliberate resistance, i.e., a justice who believes that being open to being convinced by others or to trying to speak as a group and not as an individual is harmful to the work of the Court. But it can also be the result of personal difficulty, at least in the view of Justice F:

It depends on each person's profile. We had here a fellow justice, and I admire him a lot, Eros Grau. [As] an only child, he had difficulty with this collegial body [...] I feel happy in the plenary session, I feel fortunate. I would be sad if I was alone. Thus, this is not only related to being a judge, but it also has to do with being human.

aprofundando o diagnóstico das onze ilhas' (2014) 1 *Revista de Estudos Empíricos em Direito*; Diana Kapiszewski, 'How Courts Work: Institutions, Culture, and the Brazilian *Supremo Tribunal Federal*' in Javier A Couso and others (eds), *Cultures of Legality* (Cambridge University Press 2010) 62.

⁸² Justice I.

⁸³ Justice E.

⁸⁴ Justice D.

As mentioned above, the view of some of the retired justices is quite different, especially those who left the Court long ago.

It did exist. It existed [a collegial environment]. [Justice] Brossard once wrote an article, and it was quite fortunate: he said that 'among the justices of the Supreme Court, there is a lot of cordiality, there is a lot of friendship, without any intimacy'. As an outside observer, I think that this has changed. I don't know if my observation is pertinent, but you see how the Barbosa Court was... This is one of the reasons that leads me to think that it's changed.⁸⁵

Not today. There is no doubt that there is none. Yes, there was more collegiality at that time.⁸⁶

When I entered the Court, there was an environment of collegiality. It was something curious because there were brutal debates, but they were debates about reasons, such as the debates between justices Néri da Silveira and Moreira Alves, Pertence and Velloso, and especially when Pertence and Moreira Alves got sharp. But no one left offended. In recent years, they began to strike at the person. That is not right. Instead of attacking the reasoning, one attacks the person. This began to create discord. And now there is hate there, and the environment is quite heavy. I was there recently, one speaks about another, complains, 'I was treated poorly, this way and that.'⁸⁷

Retired justices certainly do not always see their time on the Court positively in relation to collegiality. Some of them also mentioned the argument of the eleven islands:

Complete collegiality, no. I insist on the argument of the archipelago. Once in a while, let's say, some islands had a greater tendency to come together. But this was by chance.⁸⁸

⁸⁵ Justice O. The Barbosa Court [2012-2014] was marked by open conflicts and fights—sometimes very harsh and impolite—between the Chief Justice Joaquim Barbosa and some of the associate justices, and sometimes between Barbosa and attorneys. Since the plenary sessions of the Brazilian Supreme Court are broadcast live on TV, these fights could also be followed live on TV.

⁸⁶ Justice Q.

⁸⁷ Justice R.

⁸⁸ Justice P.

However, when faced with the question of whether there had been some change in the environment of collegiality from their time to the present, all the retired justices stated that they identified a clear change, which always tended towards less collegiality.⁸⁹

2. *Collegiality and Opening to the Arguments of Others*

Although nearly all the justices believe that there should be more collegiality on the Supreme Court, this opinion has not always been compatible with their own attitudes. As observed above, collegiality refers to the disposition to work as a team, to listen to the arguments of colleagues and be open to being convinced by them, and to try speaking as a group rather than as an individual whenever possible. Nevertheless, when asked about the frequency with which they were convinced by their colleagues, the responses indicated a lack of collegiality. There are those who said they *never* changed their position, those who asserted they had but not in important cases, and those who said that this happens frequently but were unable to give an example:

Look, if you asked me to name a case, I can't remember precisely. But I have many times, many times [been convinced by a colleague's argument].⁹⁰

Yes, although it was a small change.⁹¹

Sincerely, perhaps one time or another when there was a shift in the jurisprudence that I may not have known, but very rarely, very rarely.⁹² On the Supreme Court, never! On the truly polemical cases I have never voted without being sure which of the two points of view in confrontation was mine. So it was never necessary to change.⁹³

⁸⁹ For a different perception, see Kapiszewski (n 81) 63–65. It is important to bear in mind that the retired justices may unconsciously romanticize their time on the Court, especially those who left the Court long ago. Additionally, when someone is asked about his or her perception concerning events, persons and situations from the past, their memory is likely to be inaccurate or biased. For a good account of several cognitive biases (including confirmation bias, rewriting of memory and others), see Anthony G Greenwald, 'The totalitarian ego: Fabrication and revision of personal history.' (1980) 35 *American Psychologist* 603.

⁹⁰ Justice H.

⁹¹ Justice E.

⁹² Justice I.

⁹³ Justice Q.

There was no case [in which it was necessary to change my opinion].⁹⁴

Only one justice declared a willingness to vote in line with the reasoning of his colleagues when they were better than his, offering examples and justifications:

I had some cases, mainly in criminal issues. I was always more severe than my colleagues. But, at times, they advanced some arguments that I considered irrefutable. In such cases, I had no doubt. When I was not able to win over my conscience...⁹⁵

VII. CONCLUSION

As stated at the beginning of this article, the justices of the Brazilian Supreme Court are, to a large degree, satisfied with its deliberative practices. In an exercise conducted at the end of the interviews called 'institutional creativity' in which each justice could define what, in his opinion, would be the best deliberative model for the Supreme Court,⁹⁶ there were few variations in relation to the current model. In regard to deliberating in public, only 2 of the 17 justices were opposed to the practice. Some retired justices defended the so-called 'sessions of the council', which were sessions prior to the judgement session — without public — to discuss procedural issues. However, even these justices are not opposed to the public plenary session.

However, a very common practice, analysed throughout this article, appears to trigger a certain rejection among the justices: the custom of bringing written opinions, at times lengthy ones, to the deliberation and judgement sessions. Although virtually all justices follow this practice, which is not established by the Court's rules of procedure, all of them stated that if they could define the rules and practices of the Court on their own, they would prefer that only the justice rapporteur present his written opinion, which would be debated freely by the other justices.

⁹⁴ Justice U.

⁹⁵ Justice S.

⁹⁶ In the definition of this 'ideal model', the justices were not bound by any constitutional, legal or regimental actual provision. In other words, they were at liberty to create the model they desired.

These two positions — to favour deliberating in public and to oppose taking written opinions to the deliberation session — may be considered compatible. Nevertheless, the practice of taking written opinions to the session has been consolidated precisely as the publicity of the deliberations increased, that is, when the plenary session came to be broadcast live on TV. In other words, according to this view, the justices only take written opinions (and at times lengthy ones) to the plenary session *because* a large public is watching. However, the justices do not appear to have identified this pattern.

In any case, the division between retired and incumbent justices, which in part coincides with the division between justices with experience deliberating in front of the cameras (incumbent justices) and those without this experience (retired justices), appears to point to an important change associated with the deliberative practice in the Brazilian Supreme Court. Not only are the deliberations in the most polemical cases rather a sequential and very formal reading of opinions, very far from an open debate; collegiality, essential to sincere deliberation, also appears to have drastically decreased in recent years.

BOOK REVIEWS

FLORIS DE WITTE, JUSTICE IN THE EU. THE EMERGENCE OF TRANSNATIONAL SOLIDARITY (OUP 2015)

Anastasia Poulou*

In the famous words of Robert Schuman, Europe is not built at once or as a single whole, but on the basis of concrete achievements, creating first a solidarity of fact.¹ Even if in the original Treaties the word 'solidarity' only occurred as an echo of the Schuman declaration, in recent years it has made a number of appearances in key constitutional documents of the EU. Art. 2 of the Treaty of European Union (hereafter TEU) lists solidarity as one of the prevailing values of the EU and Art. 3 TEU illustrates that the Union shall promote solidarity in three different ways: as solidarity between generations, as solidarity among Member States, and as solidarity and mutual respect among peoples. Even the Charter of Fundamental Rights, the main human rights instrument of the EU, lists solidarity among its foundations and dedicates its Title IV to this principle.

EU law might not be agnostic to the concept of solidarity, nevertheless its practical implementation and Member States' motivations behind the concept still remain controversial. The academic debate on solidarity within the EU raises a number of salient questions. How is the notion of solidarity understood in the framework of the EU? What are the legal, political, economic, and moral limits of European solidarity? Floris de Witte's book 'Justice in the EU. The Emergence of Transnational Solidarity' tackles these difficult questions from an innovative perspective. Instead of focussing on solidarity between Member States, the book explores the way in which European integration and EU law reshape the relationship between citizens. By understanding justice as a relational commitment between citizens that

* Senior Research Fellow, Max Planck Institute for Social Law and Social Policy, Munich.

¹ *'L'Europe ne se fait pas d'un coup ni dans une construction d'ensemble, mais par des réalisations concrètes créant d'abord une solidarité de fait.'*

stand in a particular relationship to each other, de Witte interestingly introduces interpersonal claims of solidarity based on relational interactions as a useful method for capturing cosmopolitan dynamics within the structures of the nation state. This review analyses and critically assesses the main arguments put forward by de Witte, as they appear in the five chapters of the book.

The first Chapter of the book introduces ways of thinking about social justice beyond the nation state. De Witte understands social justice as the availability of welfare entitlements and choices enabling individuals to live a 'good life', meaning an autonomous and dignified life, in which each citizen can choose how to structure their priorities. This understanding of social justice presupposes significant and long-term processes of social and institutional structuring, such as an active civil society, public sphere, and avenues for participation and mediation of differentiated interests. Besides institutions, the pursuit of social justice needs moral sources captured under the term 'solidarity' in so far as they create a motive for individuals to share their resources with others in the same community. These preconditions for the achievement of social justice explain why the pursuit of justice has historically been tied to the spatial context of the nation state.

Nevertheless, de Witte notes that the globalization of economic processes and the integration through law in the EU progressively lift boundaries in economic and social terms and thus dislocate the question of social justice from the institutional structure of the nation state. The emergence of mobile actors, who dispose of the legal right and the economic capacity to exit a certain polity, significantly decreases the capacity of the nation state to lock in actors and to extract from them resources needed for redistributive programmes. This gradual dissolution of the social question away from the nation state has sparked diverse concerns and opinions among scholars. De Witte identifies four normative claims that animate the current academic debate about social justice. For adherents of the neo-liberal project, the dissolution of the social question is to be applauded, since it protects individual freedom against state intervention. Others, such as Polanyi and

Streeck,² see the separation between the social question and the transnational economy as problematic, because it deprives citizens of their political agency over the conditions of life, while cosmopolitans see it as a positive step towards a new, cosmopolitan type of society. Finally, scholars such as Habermas³ understand the inability of the nation state to engage with transnational dynamics as an opportunity to start building political structures beyond the nation state.

De Witte provides a very balanced presentation of the four normative claims, although he does not engage in a detailed discussion about the political background or implications of each claim presented. In this way, he misses the opportunity to underline how the political and ideological identity of a state influences the model of social policy it adopts. Moreover, de Witte's own views on the preferred justice paradigm remain deeply submerged, even if the reader might have suspicions about where his sympathies lie. The fact that he does not clearly articulate which of the four different paradigms he endorses, affects the coherence of the arguments presented in the book, since the types of EU solidarity presented in the following chapters are not (anymore) assessed under the lens of the normative claims introduced in the beginning of the book. This creates the misleading impression that there is no link between the justice paradigm adopted by the EU and the redistributive outcomes of the types of solidarity that the EU applies in practice.

In any case, as de Witte remarks, any modern conception of justice cannot function relying exclusively on processes within or beyond the nation state. But then the difficult question arises, how can we strengthen the nation state's capacity for redistribution, while promoting the capacity of actors to move between states and thereby overcome the moral arbitrariness of boundaries? De Witte's book focuses specifically on the conceptualisation of a new mode of social integration, which would serve to realise a type of social justice that reconciles this tension. He suggests the concept of reciprocity, understood in economic, social or political terms, as a starting point for

² See W. Streeck, 'Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy' [2011] 9 Socioeconomic Review 158; K. Polanyi, *The Great Transformation* (Beacon 2002).

³ See J. Habermas, *The Crisis of the European Union* (Polity 2012).

reintegrating cosmopolitan dynamics within the structure of the nation state in the pursuit of social justice. Unlike other authors, who understand reciprocity as obligations between states,⁴ de Witte articulates a concept of solidarity based on the associative and relational interactions between citizens. He very interestingly introduces interpersonal claims of solidarity based on relational dynamics as a useful method for the reconfiguration of justice on national level so as to take account of transnational relational commitments.

This is followed in Chapter 2 by an analysis of the interaction between national conceptions of justice, which are primarily expressed through institutions of the welfare state and the process of European integration. Even though the Union's legislative competences in the social area have gradually increased over time, social policy still remains the 'stepchild' of European integration. De Witte claims that the refusal of Member States to transfer welfare competences to the Union goes back to the absence on the European level of two essential institutional preconditions: a functioning system of representative democracy and the capacity to generate a feeling of solidarity between citizens. Quoting the Lisbon ruling of the German *Bundesverfassungsgericht*, de Witte convincingly argues that the redistribution of welfare is premised on the individual's right to political self-determination, namely the possibility to translate through the democratic process normative preferences into social policy decisions. The absence of such democratic structures in the EU is related to the absence of a type of solidarity that is strong enough to sustain redistributive policies.

Yet, as de Witte rightly notes, since the outbreak of the Eurozone crisis, the EU has strongly engaged in redistribution practices through the introduction of new instruments of economic governance. By way of the excessive deficit procedure, the macro-economic imbalance procedure, the European Semester and its country-specific recommendations, the Commission gained significant influence in domestic budgetary structures and national welfare policies, typically pleading for a scaling back of expenditure and welfare benefits. Even though accurately describing these developments, the book does not exhaustively discuss this shift in the EU's role in welfare policy, which challenges many of the assumptions of European constitutional law.

⁴ A. Sangiovanni, 'Solidarity in the European Union' [2013] 33 OJLS 220.

More specifically, in order to legitimize the redistributive convergence programmes that the Members of the Eurozone have to undergo, the EU resorts to executive power and expertise as sources of legitimacy. This transfer of power from representative to executive institutions might normatively be undesirable, but could in practice legitimize redistributive practices or sustain commitments to solidarity in the EU. In this regard, it would be interesting for the reader to know, if at this point of integration history, the EU's orientation towards another type of legitimacy, based on executive power and expertise, could indeed be a valid way for the creation of bonds of solidarity between the Member States.

Notwithstanding the fundamental limitations to the EU's capacity to contribute to the attainment of social justice, de Witte reminds us that the EU clearly possesses certain social policy competences and, as highlighted in the Lisbon ruling, it must even be social. Against this background, de Witte illustrates the ways in which the EU is better positioned than the Member States to tackle the deficiencies of a purely national understanding of justice and to accommodate the increasingly transboundary nature of migration flows, economic interactions, and legal integration. First, EU law extends the capacity of individual citizens to pursue their conception of 'the good life' beyond their own Member State through the right to free movement. Second, EU law protects the principle of equal citizenship by extending a right to non-discrimination on the basis of nationality to all EU citizens, who exercise their right to free movement. Third, the EU is sensitive to the ways in which its demands of justice affect domestic redistributive processes. As de Witte notes, the parasitical nature of the EU's claims of justice, meaning that the EU cannot sustain redistributive practices on its own, makes the actual availability of welfare structures in the nation state crucial. This analysis of de Witte is very illustrative, since it dissolves the apparent contradiction between the Member States' prerogative in the awarding of welfare benefits on the one hand, and the development of Europe's social dimension on the other. In other words, de Witte convincingly approaches the EU not as a source of a genuine and new transnational concept of justice, but rather as a remedy for a spatially limited, national understanding of justice, which cannot mitigate the externalities ensuing from the increased interdependence and the mobility of persons, capital, and labour.

Having presented the interconnected nature of national and supranational social justice, the book formulates a theory of transnational solidarity, which serves to integrate the Union's claims of freedom and equality beyond the state with the relational structures of justice on the national level. The norms of transnational solidarity that structure this type of reintegration are deeply engrained in EU law and, in particular, in its norms of free movement and non-discrimination law. The core part of the book is devoted to the analysis of three types of transnational solidarity that describe how associative connections between citizens across borders, which may take economic, social or political forms, are translated into specific rights and entitlements.

The first type of transnational solidarity, presented in Chapter 3, is market solidarity, which serves to integrate the associative connections that emerge through economic interactions on the internal market within the domestic structures of the welfare state. Market solidarity suggests that economic interaction alone constitutes a motive for sharing resources between citizens. De Witte sees the incorporation of market solidarity into EU law, in the first place, in terms of extending the personal scope of welfare benefits to include non-national EU citizens that work in a host state. The book interestingly points out that the reason for the demand of equal treatment is not so much the specific financial contribution of the migrant to the host state's finances, but rather the migrant's general engagement with the economic life of the host state. The second way, in which market solidarity is displayed, is by the construction of rights and obligations that the collectivities of 'labour' and 'capital' owe each other when acting transnationally. In this case, the EU hesitantly sets rules, which allow host Member States to insulate their own conceptions of fairness against the dynamics of the internal market. Nevertheless, in matters of minimum wage, posted workers, and the right to collective action, de Witte rightly notes that the CJEU liberated capital from national constraints imposed to protect labour. Given that in cases such as *Laval*,⁵ *Viking*,⁶ *Rüffert*,⁷ and *Commission v. Luxembourg*⁸ the Court imposed transnational limits on the national exercise of labour rights, it is

⁵ Case C-341/05 *Laval*, ECLI:EU:C:2007:809.

⁶ Case C-438/05 *Viking*, ECLI:EU:C:2007:772.

⁷ Case C-346/06 *Rüffert*, ECLI:EU:C:2008:189.

⁸ Case C-319/06 *Commission v Luxembourg*, ECLI:EU:C:2008:350.

questionable why de Witte chooses to include this dimension of EU law under the concept of transnational solidarity. If market solidarity aims to ensure that transnational economic interactions in the workplace conform to an idea of justice, it seems that this case law of the CJEU worryingly hollows and destabilizes the very function of transnational market solidarity. Instead of insulating the norms of market solidarity on the national level against the dynamics of the internal market, the CJEU introduces additional, transnational limits on the enjoyment of rights derived from market solidarity.

The book presents the area of healthcare as the third way in which market solidarity manifests itself in EU law. In this case, free movement law has been interpreted so as to allow patients to enforce the conditions of the healthcare contract that they have entered into in their Member State. In other words, whenever a state cannot provide a treatment, EU law grants patients the right to obtain it in another Member State with the retention of reimbursement schemes in the state of insurance. Even though this dimension of market solidarity seems at first glance to serve as a tool for patients to achieve transnational access to their healthcare rights, De Witte importantly clarifies that, according to empirical research, this exception to the principle of territoriality is used by Member States, such as Malta and Luxembourg, to make up for the lack of specialization or financial and technological resources to treat rare diseases. Although very revealing, the finding that Member States strategically use cross-border healthcare as a tool to meet their basic obligations for healthcare, seems to undermine the notion of transnational solidarity, since it serves foremost the interests of the incapable state rather than those of the patient in need of the most effective treatment.

Chapter 4 introduces the concept of communitarian solidarity as the second type of transnational solidarity that operates in the EU. Communitarian solidarity seeks to articulate the obligations of justice that follow from social interactions both on the European level and within the nation state, suggesting that co-presence of individuals alone constitutes a motive for sharing resources with fellow citizens. De Witte describes this type of solidarity as a procedural mechanism through which domestic citizenship is structurally opened up to include the associative social commitments that bind the migrant citizen to the host state polity. The illustratively presented

case law of the CJEU reveals that communitarian solidarity should not be understood as a substantive entitlement of mobile European citizens to all welfare benefits in the host state, but as a reflection of the social links between citizens. The exact nature, strength, and extent of such rights and entitlements depend primarily on the exact nature, strength, and extent of the migrant's social interactions in the host polity. In Chapter 4 the two outer edges of the obligation imposed on Member States under communitarian solidarity are discussed. The one extreme is formed by the recognition of a number of fundamental social rights, such as primary education, primary healthcare, and minimum subsistence benefits. Such rights, de Witte argues, can be accessed by every EU citizen, in whichever state the latter happens to reside. At the other extreme, the book discusses student benefits, which are linked to complex commitments that simultaneously reflect past, prospective, social, and economic commitments.

The description of communitarian solidarity as a spectrum with two outer edges is a very illustrative way to depict the different commitments of EU Member States to solidarity. Nevertheless, the inclusion of the right to minimum subsistence benefits under the social rights awarded to all EU citizens appears quite problematic. As de Witte notes as well, the question whether economically inactive migrants can claim minimum subsistence allowance in the host state is very contentious. In *Dano*,⁹ where the CJEU had the chance to elaborate whether communitarian solidarity demands that Member States take care of all lawfully resident EU citizens in need, the Court argued that economically inactive EU citizens derive a right to equal treatment, only as long as they meet the conditions for residence in the host state, which include the need to have sufficient resources for themselves and family members not to become a burden on the welfare system of the host state. Since the right to social assistance benefits of EU citizens is very often balanced against the need to protect the general stability and availability of welfare resources, one might doubt whether its inclusion among the unconditional social rights enjoyed by EU citizens is convincing. Instead of describing communitarian solidarity as an obligation with two outer edges, it would probably be more precise to depict it as a continuum between unconditional enjoyment of rights and enjoyment of rights only after the

⁹ Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

fulfilment of thick economic and social commitments. The different social rights falling under this category would then be positioned on this continuum, with the right to social assistance benefits falling in between the rights to primary healthcare and access to student benefits.

The third type of transnational solidarity within the EU presented in Chapter 5 is aspirational solidarity. It is the result of political interactions of EU citizens and imposes the negative obligation on Member States not to prevent their own nationals or migrant EU citizens from accessing the instruments that make up a 'good life', such as the labour market, public goods or welfare benefits. In this sense, aspirational solidarity suggests that being subject to EU law constitutes a motive for citizens to share resources. De Witte notes, however, that aspirational solidarity is the most divisive type of solidarity, as it has the potential to skew the redistributive preferences of Member States, to constrain many of the traditional instruments that Member States have used in order to manage their welfare models, and to pit the interests and aspirations of individual citizens against each other. Against this background, de Witte describes aspirational solidarity as a conditional and not absolute obligation, which is dependent on factual circumstances: when the aspirations of individual citizens risk undermining the redistributive commitments between all citizens, aspirational solidarity finds a limit.

De Witte describes employment market regulation as the first way in which EU law checks the coercive capacity of the state in limiting the individual's aspirations. According to the CJEU case law presented, the Court has interpreted the obligations of non-discrimination – in particular on the basis of age – as implying that Member States may only limit access to the labour market in order to protect associative commitments between citizens in that state. In other words, workers can only be forced off the labour market if the Member State can demonstrate that this contributes to the capacity of all citizens to live a 'good life'. Building on points raised in previous chapters, de Witte argues that aspirational solidarity also suggests that Member States may not limit the individual's aspirations by making access to welfare benefits conditional on continuous residence in the state. By presenting relevant case law, he convincingly explains that citizens may export welfare benefits and that Member States may only limit this right when allowing export would

destabilize internal redistributive commitments. The last instance of aspirational solidarity presented in this book concerns the obligation of host states to extend access to public goods, such as university and hospitals, to mobile EU citizens. Member States are in principle required to open up their universities or hospitals to migrant citizens, except if allowing access to migrants would undermine the associative commitments entered into by citizens in the host state.

In sum, the book analyses classic CJEU case law on issues of social policy under the innovative lens of transnational solidarity. Through this newly introduced concept, de Witte convincingly presents an original answer to the question whether the EU can contribute to the pursuit of justice and illustrates the various ways, in which EU law translates the associative commitments between citizens into norms of justice. More importantly, the book sketches the important role of both the Union legislator and the CJEU in the explicit and implicit articulation of the Union's commitment to justice. At the same time, an important contribution of the book is that it warns against the risk of EU law destabilizing rather than furthering the pursuit of justice in Europe. In this sense, de Witte sketches the different ways in which the EU institutions must be sensitive to the institutional and normative limits, which are inherent in EU law. In this way, the book admirably illuminates what it promised, namely, the added value of the EU law's focus on extricating the pursuit of justice from the nation state.

PÄIVI JOHANNA NEUVONEN, *EQUAL CITIZENSHIP AND ITS LIMITS IN EU LAW: WE THE BURDEN?* (HART PUBLISHING 2016)

Martijn Van Den Brink*

One of the most pressing issues concerning the free movement of EU citizens is from what moment in time mobile EU citizens are to be entitled to social benefits in the host Member State. This matter raises profound questions of justice, which have recently been attracting considerable attention. Like Floris de Witte's monograph *Justice in the EU*,¹ also Neuvonen's *Equal Citizenship and Its Limits in EU Law: We the Burden* focuses on the EU citizenship case law and does so through the discourse of justice. Both authors have their own take on these issues. While de Witte's perspective is more communitarian,² Neuvonen draws upon principles of egalitarian justice, offering a new and original perspective to the (case) law that governs the position of EU citizens who have moved to another Member State and claim benefits there. One of the novelty aspects of this book is the less doctrinal approach to the issue at stake. Looking at an array of non-legal disciplines, Neuvonen tries to explain why equality of treatment between EU citizens is important for the realisation of substantive justice within the EU. The book is to be commended for what it aims for. Yet, as I will explain, it suffers from several shortcomings and at times raises more questions than it answers. Before engaging in a critical discussion of the book, I will briefly set out the structure and main arguments of Neuvonen's analysis. The book is divided in two parts. The first offers an overview of the development of the non-discrimination principle and explains how this has created an equality problem: the equality principle remains premised upon individual

* Ph.D. candidate at the European University Institute, Florence, marinus.vandenbrink@eui.eu.

¹ See also: Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015). For a collection of essays on justice in the EU, see: Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

² De Witte (n 1) 11.

responsibility, namely the responsibility to be economically or socially active. The second part offers solutions to this problem.

The first part comprises three chapters. The first offers a historical overview of the development of the principle of non-discrimination on grounds of nationality to a principle of equal citizenship within the EU and explains how these developments have given rise to an equality problem. Is the equality principle an independent principle of EU citizenship or does it remain dependent on the exercise of free movement?³ The second chapter puts more substance to this critique and offers a detailed analysis of the right of the economically active and inactive EU citizens to equal treatment in the host Member State. This analysis, Neuvonen claims, demonstrates that the potential of EU citizenship has remained unfulfilled and that the equality problem remains: there is no adequate consideration of 'what differential treatment means for the equality of relationships between EU citizens'.⁴ The third chapter concludes the first part and offers a theoretical critique. It is suggested, in essence, that the EU's equality principle is still premised upon 'ideals of individual responsibility and agency'.⁵ This individualistic approach violates principles of egalitarian justice.

The second part builds upon the first and suggests a number of ways to create more just and equal relationships among EU citizens. The fourth chapter constructs EU citizenship as a source of subjectivity on the basis of feminist theory and, additionally, psycho-dynamic and phenomenological theories. According to Neuvonen, EU citizens' sense of subjectivity only emerges through social relations with other EU citizens. The last chapter explains what this ought to imply when applied in practice. Instead of an 'activity-based ideal of equality', 'more weight must be given to the impact which [legitimate differential treatment] may have on the equality of horizontal relationships between EU citizens'.⁶ Such an interpersonal perspective would pay more attention 'to how the refusal to grant equal treatment, may create an obstacle to the Union citizen's ability to integrate into the society of the

³ Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing 2016) 25.

⁴ *ibid* 87.

⁵ *ibid* 89.

⁶ *ibid* 176.

host Member State and to relate to the nationals of that state on an equal basis'.⁷

This brief overview does not do justice to the depth of Neuvonen's analysis, though the manifold theoretical perspectives introduced above will give the reader of this review an idea of the book's ambitions. As a result, the book offers an interesting and innovative perspective.

Having said that, the argument is not always convincing or clear. I will focus on four shortcomings here: (1) the project is methodologically not without problems; (2) the argument is not always consistent; (3) the argument remains obscure at times; (4) open ends remain. My first concern is about the project's methodology. I agree with Neuvonen that traditional positivist approaches, which offer an internal perspective but fail to take into account insights from other disciplines, are methodologically limited. The book therefore tries to complement a more traditional legal analysis with insights from non-legal disciplines.⁸ Such an external approach to the study of EU citizenship indeed is beneficial. Unfortunately, the interdisciplinary perspective is not pushed far enough and was introduced too late in the analysis.

The first part of the book remains largely uninformed by theory, while this should have been the point of departure. Only following an outline of the theoretical premises an examination about whether the law complies with them should have been carried out, ideally, adopting an interdisciplinary and deductive approach from the very beginning. Instead, the book reverses this order. The first chapter, for example, reads like a very traditional account on the nature of EU citizenship. The existence of 'reverse discrimination' is seemingly criticised and seen as a limitation imposed upon EU citizenship;⁹ EU citizenship's core rights are different from those of a traditional citizenship;¹⁰ and EU citizenship will remain largely meaningless if it is not developed into a 'genuinely equal status'.¹¹

⁷ *ibid* 178.

⁸ *ibid* 7–8.

⁹ *ibid* 27–30.

¹⁰ *ibid* 36.

¹¹ *ibid* 38.

Strikingly, these arguments are followed by the claim that 'the essence of the rights of EU citizenship depends on how we address the "still unanswered question of what Union citizenship actually is or ought to be"'.¹² Ideally, it should have first been explained what EU citizenship is indeed supposed to be, in view of the author, before an account of what is problematic about EU citizenship could be offered.

Notably, the claim that EU citizenship's core rights are different from traditional citizenship rights is profoundly disputable, and much depends on one's conceptualisation of EU citizenship. Some have suggested that EU citizenship is not unlike a 'federal citizenship', precisely because EU citizenship's core rights, the right to free movement and the right to non-discrimination, are like that of a federal citizenship.¹³ Therefore, EU citizenship appears much alike a traditional citizenship. Of course, one may think that EU citizenship should depend less on the right to free movement, or that this right's current interpretation raises problems of its own. Whether that is the case, however, depends upon one's conception of justice, which is precisely why theory should have been the book's point of departure. Currently, theory merely serves to reinforce the arguments in the first chapters and, as I will explain below, does not do so with sufficient clarity. Unfortunately, the arguments seem inconsistent at times. The problem that informs the study is defined differently throughout the book and I am uncertain also about the precise solutions Neuvonen has in mind.

At least three different problem definitions are given by the author. At the outset, it appears that the equality problem concerns the question of whether the non-discrimination principle is to be dependent on the free movement principles or should have an independent meaning.¹⁴ To me, it is hard to see how the principle of non-discrimination cannot, to a considerable extent, depend on the exercise of free movement by an EU citizen to another

¹² *ibid* 39. Neuvonen quotes Anne Pieter van der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship' (2011) 18 *Maastricht J. Eur. & Comp. L.* 62.

¹³ Christoph Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 *Revue Européenne de Droit Public* 61.

¹⁴ Neuvonen (n 3) 25.

Member State, and it is perhaps fortunate that the problem is redefined a little later. Subsequently, it is suggested that '[t]he core of the structural EU equality problem is that the residence-based scope of EU citizens' general right to equal treatment can easily lead to circularity in the application of the EU principle of equality'.¹⁵ This, I assume, also is not truly the equality problem Neuvonen wants to address in her book. Because if, as the author appears to argue, the circularity results from the ECJ's legal reasoning, all that would be required is for the Court to offer a more coherent and less circular argument. Only halfway through the book, after the principles of egalitarian justice have been discussed, does the problem that appears to truly animate the book truly emerge. This, in view of the author, is that 'the EU principle of equality suffers from a bias in favour of individual responsibility at the expense of just and equal relationships between EU citizens'.¹⁶ These different problem definitions could have been avoided had a solid theoretical base been introduced from the outset and had the problem the book seeks to address been presented against the backdrop of egalitarian principles of justice from the very beginning. This third, egalitarian justice-based, definition of the problem could then have been used from the start.

Unfortunately, also the solution proposed is not entirely clear. From the reconstruction of EU citizenship as subjectivity, it follows that we should pay more attention 'to how the refusal to grant equal treatment may create an obstacle to the Union citizen's ability to integrate into the society of the host Member State and to relate to the nationals of that state on an equal basis'.¹⁷ What remains unclear is what this ought to entail precisely. On the one hand, the suggestion is that limitations to the principle of equal treatment must be interpreted narrowly and that equality of outcomes is not necessarily the aim.¹⁸ On the other hand, the same page offers the suggestion that the current interpretation of Article 18 TFEU implies that *those who belong deserve to be treated equally*, whereas viewing EU citizens as full and equal subjects of EU law would suggest that *those who are treated equally (will) belong*.¹⁹

¹⁵ *ibid* 59.

¹⁶ *ibid* 112.

¹⁷ *ibid* 178.

¹⁸ *ibid*.

¹⁹ *ibid*.

But this statement is, or at least very much appears to be, about equalities of outcome. Neuvonen appears to suggest that only by being treated equally do EU citizens belong and become full and equal subjects of EU law. Since the latter appears to be what Neuvonen's preferred conception of justice requires, it is difficult to see how derogations from the principle of non-discrimination can remain tolerable. After all, for as long as equal treatment is not extended to all, certain categories of EU citizens will suffer in their social interactions with other EU citizens. This is exactly what Neuvonen is concerned with and what is required to give substance to EU citizens' subjectivity. My third concern with the book relates to its level of theoretical complexity and the fact that obscure concepts are not always explained with sufficient thoroughness. The theoretical part draws upon a wealth of theoretical insights. The ambition is not without potential pitfalls. Most EU lawyers will be unfamiliar with the theories used, including those of psychoanalysis or development psychology. A careful articulation of these disciplines' theoretical premises and insights is required, therefore, and so is a clear argument of how to best translate them into EU law. Unfortunately, the terminology used is often quite cryptic and is not always clarified by the author, making the argument difficult to follow at times. The book's second part is written densely and the language not always clear. For example, there are pages of nothing but expert quotes, yet forgetting to add an explanation for the benefit of an EU lawyer, illiterate in these areas, like the author of this review, of what is meant precisely.²⁰ How the study of EU citizenship can benefit from insights derived from these disciplines, therefore, is sometimes hard to grasp.

In addition to the disciplines mentioned this far, Neuvonen regularly makes minor detours to other theoretical fields to enrich the argument. Her exposé on feminist theory, for example, is complemented by insights from care ethics.²¹ Readers of this book can certainly expect an exciting rollercoaster ride through a variety of ideas. However, like many such rides, at times it may also evoke some feelings of dizziness. The book tries to do so much that it sometimes does too little. Due to the range of disciplines covered and the range of counter-arguments that need consideration, it sometimes seems like

²⁰ Page 153 provides a good example.

²¹ Neuvonen (n 3) 143–144.

there is insufficient space to reflect in depth upon all the literature being discussed.

Take as an example the democratic critique of justice arguments, which somewhat unexpectedly appears on pages 116 and 117. According to this critique, 'objectively defining universally valid principles of justice seems impossible,²² and individuals, who are living under different circumstances and having different talents and preferences, disagree about what it means for society to constitute justice. ²³ Therefore, it would be wrong to think that we can identify a correct conception of rights and justice and, therefore, also that judges are better situated to identify the correct or better view on the substantive results to be pursued by society. Theorists that have advanced this democratic critique tend to believe that disagreements about justice are, therefore, ideally to be resolved by our democratically elected institutions.

Considering that Neuvonen suggests that 'the theory of democratic equality (...) forms the basis of [her] critique of the EU principle of equality'²⁴ one would expect this democratic critique to be given full consideration. After all, would Neuvonen subscribe to the democratic critique, it should have great implications for her argument. Seemingly, she would have to acknowledge that her preferred conception of justice is ideally not imposed upon the EU by the ECJ, but to be adopted through more democratically legitimate procedures. Instead, she suggests that her solution to the equality problem 'must be constructed by EU law because [it] will not emerge otherwise'.²⁵ She does not specify in detail how this construction is to happen, but it appears that the Court should be made largely responsible for this.²⁶ Why precisely the democratic critique is irrelevant for the remainder of the book is never really clarified. The question that remains, therefore, is how her argument can be squared with her insistence on democratic equality. The argument seems vulnerable to critique pointing out that most legal scholars place great weight on promoting equality of concern and respect [yet] all too often ignore

²² Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) Chapter 8.

²³ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) Chapter 2.

²⁴ Neuvonen (n 3) 110.

²⁵ *ibid* 174.

²⁶ This is what page 177 appears to indicate.

[individual's] intrinsic, as opposed to merely instrumental, links with the ability to participate on an equal basis to others in decisions concerning the very foundations of their political and social life.²⁷

Neuvonen emphasizes the importance of equal social rights, but she also claims that democratic equality forms the basis of her argument. Unfortunately, she does not explain how democratic equality is best to be realised within the EU. Admittedly, this is a topic that warrants an entirely different study, but the tension in the book's argument is considerable. If democratic equality truly is at the heart of her argument, it is problematic whether the author's suggestion is, in fact, that the ECJ must realise equal treatment of social rights. Since Neuvonen demonstrates awareness of these counter-arguments, one would have expected a more persuasive rejection of them. Having said this, the book offers an interesting perspective. The ambitions and the methodological premises as formulated at the book's outset should serve as an example for others. The book demonstrates that there is value in new critical and constructive perspectives that challenge dominant narratives. New perspectives also bring about new challenges. The use of novel disciplines requires a careful exposition of those disciplines' concepts and terminology to make them accessible to EU lawyers and will require a careful application to avoid problems of consistency. Unfortunately, the book does not always successfully overcome these challenges. I am uncertain, therefore, how persuasive Neuvonen's account of justice is and what precisely is to change for EU citizenship to comply with her preferred conception of justice.

²⁷ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 152.

FEDERICO FABBRINI, ERNST HIRSCH BALLIN AND HAN SOMSEN (EDS)
 WHAT FORM OF GOVERNMENT FOR THE EUROPEAN UNION AND FOR
 THE EUROZONE? (HART PUBLISHING 2015)

Alessandro Petti*

The responses triggered by the euro crisis and the introduction of the *Spitzenkandidaten* procedure for selecting the President of the Commission have had significant implications for the constitutional construct and the political system of the EU. The volume edited by Fabbrini, Ballin and Somsen offers prime food for thought to reflect on fascinating issues ensuing from these recent developments. It constitutes a solid scholarly apparatus for understanding the status of the separation of powers within the EU and the Eurozone, the governance of the EU and the effectiveness and legitimacy of the EU institutional system. The focus is explicitly placed on the executive and the legislator. The editors move from the desire to mend the 'remarkable dis-engagement by legal scholars from the study of the form of the government of the EU'¹ and bring together contributions from EU lawyers, constitutional lawyers and political scientists from diverse academic cultures. A similarly interdisciplinary approach has featured in other perceptive and remarkably well-edited volumes on the fundamentals of the European project.² The originality of the book reviewed here rests on the combination of accurate insights on the EU constitutional dynamics with concrete reform proposals.

I will first discuss the chapters relating to the conception and functioning the EU institutional order, the 'New Intergovernmentalism' and the ensuing paradoxes of the EU constitutional order (Chs 2 and 14). Secondly, I will examine the contributions which address the governance of the Eurozone with a particular focus on the executive power (Chs 3 to 7 and 15). Thirdly, I will address the chapters tackling the pressing problem of democracy in the

* LLM European University Institute, alessandro.petti@eui.eu

¹ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds) *What Form of Government for the European Union and for the Eurozone?* (Hart 2015) 3.

² D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream* (CUP, 2016).

EU (Chs 8 to 10). Finally, I will review the contributions dealing with the trends towards the parliamentarisation of the European Commission (Chs 11 to 13).

The volume opens with a powerful foreword by Goulard who denounces that 'Europe' and 'Brussels' are increasingly perceived as the cause of all the woes of the Europeans. The contributions by Craig (Ch 2) and Puetter (Ch 14) offer a response to this widely shared belief suggesting a more balanced approach in assessing the shortcomings traditionally ascribed to the EU.

Craig provides acute observations on the EU's institutional structure and democratic deficit. He notices that, despite the recent attempts to reduce the divide between political power and the political responsibilities in the EU by linking the President of the European Commission (EC) to the dominant political forces in the European Parliament (EP), the underlying democratic fragilities of the EU constitutional construct remain in place. The radical changes in the EU's institutional design needed to alleviate the democratic malaise (such as a single elected President for the EU as a whole)³ were opposed by the Member States: from their perspective, an increased democratic legitimacy of the EU political order would come alongside a decrease in status of the national parliaments and executives that domestic leaders were reluctant to accept.⁴ Craig thus advocates for a broader conception of constitutional responsibility of the Member States which goes beyond mere legal accountability and has to be derived, *inter alia*, from the duty of sincere cooperation. Building on these premises, Craig scrutinizes the institutional design of the EMU and the measures adopted to counteract the euro crisis. He concludes that the reflections on how the financial crisis has affected the foundations of the EU, its legitimacy and its allocation of powers, should induce to 'think [...] about the constitutional responsibility of

³ Cf. the proposal of Fabbrini in fn 4 of this review.

⁴ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 21.

Member States⁵ [...], rather than working on the explicit or implicit assumption that the fault resides entirely with the EU'.⁶

Putter's chapter addresses a key institutional evolution of the EU, namely the emerging role of the European Council and its President. With rigorous, insightful and convincing arguments, the author qualifies the Maastricht Treaty as a turning point of the European integration entailing an integration paradox. Since Maastricht, Member State governments have displayed interests in pursuing further integration to tackle policy interdependencies while remaining unwilling to allocate additional competences at the EU level. The ensuing institutional change is an increased intergovernmental cooperation which operates at the level of the European Council and the Council producing a 'new Intergovernmentalism'. In this renewed intergovernmental cooperation, the President of the European Council acts as an institutional engineer rather than as a supranational policy entrepreneur. Puetter, therefore, questions the possibility envisaged by Fabbrini (Ch 16) to politicise the President's office through a EU wide electoral process.⁷ Puetter argues that the 'state of disequilibrium'⁸ emerging from the post-Maastricht integration paradox is not a transitory phenomenon which could be easily replaced by progressive communitarisation⁹ and hence supranationalisation.

The contributions by Craig and Puetter therefore emphasize the role of the Member States in shaping the EU constitutional construct giving a

⁵ The role played by the Member States in shaping EU constitutional architecture is also at the centre of the contribution of Sklias and Pantelis (Ch 4). The authors base their analysis on an erudite overview of EU integration theories and reach the conclusion that the original design of the EMU and the subsequent reforms to the euro governance have been characterized by an intergovernmental approach resulting from the convergence of interests of the most powerful member states, i.e. France and Germany.

⁶ *ibid* 36.

⁷ In his conclusive chapter, Fabbrini proposes a reform of the European Council consisting in the election of its President through a popular democratic process. This would endow the elected President with 'the necessary power and legitimacy to take authoritative decisions for the EU as a whole' *ibid* 304.

⁸ *ibid* 270.

⁹ *ibid* 269.

comprehensive explanation of the paradoxes and inconsistencies of the EU governance as it stands and as it will evolve in the future.

Several contributions to the volume address more specifically the governance of economic, monetary, and financial affairs in the Eurozone and in the EU with a focus on new institutional trends emerging in the exercise of the executive power. Callies (Ch 3) challenges the appropriateness of the current EU constitutional setting to tackle the multiple crises affecting the EU which stem from both technical and democratic deficits. The author praises the Community method as the expression of 'the dual legitimacy concept' based on the 'European principle of democracy' as expressed in Article 10(2) TEU which clarifies the channels of representation of the citizens and of Member State governments in the EU polity. He denounces that the 'pure intergovernmental form of coordination developed during the financial and debt crisis' resulted in the abandonment of the "Community method" characterizing European integration and the specific institutional balance set out in the European treaties'.¹⁰ Callies thus embraces a predominant thesis in the euro crisis literature, namely that the responses to the crisis have brought about a change in the EU constitutional balance towards a greater recourse to intergovernmental decision-making.¹¹

In the last sections of his chapter, Callies addresses the features that a viable Eurozone should have. The possibility of establishing an 'Euro-Parliament' composed of members of national parliaments is examined: this third chamber would complement the Council and the European Parliament. In the end of the contribution, the inevitability of Treaty reform is stressed. In case of absence of consensus, this reform could also take the shape of a 'Europe of two speeds' with the Treaty on Stability, Coordination and Governance in the EMU (TSCG) paving the way for structured patterns of differentiated integration. Callies' chapter intertwines perceptive and

¹⁰ *ibid* 40.

¹¹ See, *inter alia*, K Lenaerts, 'EMU and the European Union's Constitutional Framework'(2014) 39 ELR 753; E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', 50 CMLRev 683. This thesis has been challenged by de Witte: see B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', (2015) 11 EuConst 434.

exceptionally sound legal analysis with original reform proposals. It is in the former that the contribution certainly excels. As far as the latter are concerned, I harbour doubts on the benefits of establishing the 'Euro-Parliament'. If its members would consist of national parliamentarians to ensure that nationally sensitive policy fields (economic, fiscal, budgetary and social policy) remain in the hand of domestic politicians,¹² it is not clear why this additional chamber should be established at the European level in the first place. Moreover, the national parliaments are represented in the EU decision-making process through their governments sitting in the Council. As convincingly argued by Kelemen (Ch 11), national parliaments should rather engage in shaping EU policies in their national capitals exercising effective parliamentary control over their governments.

Several other contributions address new developments in the economic governance of the Eurozone. De Streel (Ch 5) advocates for a better distinction between technical assessments and discretionary choices in the European economic governance. He contends that the latter should be more clearly identifiable and better legitimised instead of remaining concealed behind the intricacies of the EU economic analysis. Beukers (Ch 6) provides a compelling explanation of the relationship between the ECB and the executive power in the EMU. He maintains that the unconventional exercise of the ECB's power and the role played by the ECB in the *Troika* 'justifies speaking of central bank intervention in the area of policy-making'.¹³ He also underlines that this development has not been accompanied by a reinforcement of the ECB's accountability structures. In chapter 7, Lo Schiavo elegantly describes the origins, the functioning and the governance structures of the Single Supervisory Mechanism (SSM). Building upon Schütze's findings on cooperative federalism in EU administrative law, he offers an original characterization of the relationship between the ECB and the National Competent Authorities. Lo Schiavo's contribution could have benefited from a more detailed inquiry into the sensitive issue of separation of the supervisory and monetary policy in the EMU governance framework. When addressing this issue, Lo Schiavo first challenges the effectiveness of the separation between monetary and supervisory functions in the current

¹² Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 55.

¹³ *ibid* 106.

institutional set-up. Then, he cautiously suggests that a 'relative separation'¹⁴ is in place, relying on the fact that the SSM Regulation provides for the separation of the meetings and the agendas of the Governing Council when exercising the two functions. The institutional practice will reveal whether this relative separation would be sufficient and appropriate.

Some of the most rewarding contributions to the volume focus on the functioning of the EU polity through the lenses of representation, participation and accountability. Relying upon Urbinati's theoretical framework, Piattoni (Ch 8) analyses the status of the EU representative democracy through the prism of three fundamental functions of representative assemblies, namely, 'voice', 'will' and 'control'. She unveils the 'peculiar' division of labour between representative assemblies, convincingly arguing that the 'wrong' questions are addressed in the 'wrong assemblies'.¹⁵ On the one hand, national parliaments debate on policy measures already decided at the EU level. On the other hand, the European Parliament's elections are focused on whether and to which extent the EU should legislate, 'not on how [its members] actually (co-)legislate'.¹⁶ The author contends that the euro crisis has rendered this peculiar division of labour more evident. Yet, she maintains that representative assemblies are trying to bring back 'voice' and 'will' in the appropriate *loci*. National parliaments have 're-appropriated their constitutional role'¹⁷ and have started to address the possibility of reforming the Union.

Among the most compelling issues defining the current status of the EU democracy, 'executive dominance' features prominently. Curtin (Ch 10) characterizes this phenomenon as 'the migration of executive power towards types of decision-making that eschew forms of electoral accountability and popular democratic control'.¹⁸ She scrutinizes the evolution of the EU executive power in its various manifestations: the 'leading' (the European Council); the 'normal' (the Commission) and the 'intervening' (the ECB). Curtin thoroughly examines the law and practice of the three manifestations

¹⁴ *ibid* 122.

¹⁵ *ibid* 133.

¹⁶ *ibid* 145.

¹⁷ *ibid* 149.

¹⁸ *ibid* 174.

of the executive power grounding her analysis on both Treaty obligations and institutional working practices. She also sets the exercise of executive power against the three different stages of accountability she identifies. Curtin's findings are not entirely reassuring on the status of the EU democracy. She powerfully captures the gist of the challenges of accountability in the EU underlining that the EP does not adequately challenge the dominance of the executive actors at the EU level.¹⁹ Less bleak is the picture she portrays of some national parliaments, as the House of Commons in the UK, which have been able to exert countervailing power to confine the executives.²⁰ The author's reform proposal is oriented towards a less executive-dominated future to be achieved through more constructive horizontal dialogue between parliaments. Curtin is very effective in pointing out that the capacity and the responsibility of parliaments to fully exercise their role in the political system without being dominated by the executives ultimately rest with the parliaments themselves.²¹ The necessity for the European and national parliaments to effectively exercise their controlling roles *vis á vis* the executives is crucial in light of the shortcomings, accurately highlighted by Marxsen (Ch 9), of the mechanisms of participatory democracy in the EU.²²

A final cluster of contributions enters into the engaging debate on the institutional parliamentarisation of the EC brought about by the European Parliament elections in 2014. Kocharov (Ch 13) provides sound arguments against what she depicts as the 'Spitzenkandidaten invention'.²³ After a thoughtful scrutiny of the letter of the Treaty, she finds that assigning a dominant position to the Parliament in nominating the candidate for President of the Commission would amount to a change necessitating Treaty

¹⁹ *ibid* 192.

²⁰ Albeit written before the Brexit referendum, Curtin's observations on the House of Commons maintain their validity in explaining how national parliaments could counteract the executive dominance.

²¹ *ibid* 193.

²² According to some commentators, the democratic legitimacy of the EU could be increased through the institutionalisation of inter-parliamentary cooperation as envisaged in Article 13 TSCG. Kreiling (Ch 15) recognises the potential of this cooperation to counteract the executive dominance. He advises, however, against the possibility of the inter-parliamentary cooperation bodies to acquire decision-making powers arguing that this would alter the EU inter-institutional equilibrium.

²³ *ibid* 234.

amendment. Indeed, this would revert the procedure envisaged by the Treaties.²⁴ In addition, Kocharov denounces the inappropriateness of the politicization of the Commission through an inquiry into the spirit of the treaties. Since the European Commission is not ultimately driving the European policy choice²⁵, assigning accountability for shortcomings in the EU policy output to the President of the Commission would allow Member State governments to 'evade democratic accountability in the national political process'.²⁶ With a remarkable intellectually sophisticated analysis of the peculiar constitutional construct of legitimacy of the EU, she highlights the pitfalls entailed in modelling accountability for Union policies on that of a state. According to Kocharov, in the current Treaty framework, 'legitimacy of the Union derives from the national political process'²⁷ and as '[a]ccountability needs to follow the *locus* of power', the attempts to devise a European democracy which 'bypasses accountability on the national level' exacerbates the risks of undermining the legitimacy of both the Union and national governments.²⁸

Antphöler (Ch 12) shares Kocharov's criticism towards 'unwarranted analogies with nation states' and towards the progressive erosion of the agenda-setting powers of the Commission.²⁹ He reaches, however, opposite conclusions. Antphöler convincingly describes article 17(7) TEU as a provision 'offer[ing] a framework for the political process to function' which does not enshrine any 'duty for the institutions to behave in a certain manner'.³⁰ He therefore questions the utilization of the dichotomy of legal/illegal for assessing the *Spitzenkandidaten* procedure. I found myself in accord with this characterization. I think that the politicization of the European Commission's President, albeit legally and politically contestable,

²⁴ *ibid* 238.

²⁵ According to this thesis, notwithstanding the power of initiative enjoyed by the EC pursuant to article 17 TEU, the Commission has progressively witnessed a decrease of powers in this respect. Cf fn 61 at 246. This thesis is also shared by Antphöler (p 219).

²⁶ *ibid* 247.

²⁷ *ibid* 249.

²⁸ *ibid* 233.

²⁹ *ibid* 219. Cf. considerations made by Kocharov, at 242 and 246 respectively.

³⁰ *ibid* 222.

demonstrates how the mechanisms governing the dynamic evolution of a legal system may change the legal norms themselves.³¹ As it has been convincingly argued, this dynamic reflects 'the primacy of politics over law'.³² Antphöler goes further, maintaining that the 'increased democratic credential of the Commission and stronger standing in public'³³ resulting from this procedure could counteract the fragile democratic foundations of the depoliticized and intergovernmental crisis management and the European Council predominance. I am, however, rather sceptical that this change would produce any improvement in terms of democratic legitimacy of the EU. As emphasized by Craig, the EP and the EC are not the only centres of political decision in the EU, and the role of the Council and the European Council in determining the EU policy agenda is not affected by this new procedure. Doubts on this matter are also casted by Kelemen. In his thought-provoking contribution, Kelemen underlines the inappropriateness of trying to export Westminster, majoritarian visions of democracy to the EU, which remains a consensus democracy. Moreover, he perceptively points out the negative consequences that might arise from the politicization of the Commission President and from the strengthened participation of the national parliaments in the EU governance.

In conclusion, albeit the book certainly delivers on its promises, the analysis on how the governance in the EU and Eurozone works could have been explored further with an inquiry on the role played by the EU in the global financial and economic institutions. Indeed, the separation of powers in the EU manifests all its complexity in the external representation of the euro area. A discussion on the proposals of institutional reforms in this domain could have offered a more comprehensive picture on the system of governance of the EU and the Eurozone. Moreover, one of the major controversial issues on which the book is premised is the existence of an EU government. The EU is traditionally understood as a system 'governance without Government' and the absence of the possibility to replace a government responsible of discretionary policy choices through the elections

³¹ S. Romano, *L'Ordinamento Giuridico* (2nd edn, Giuffrè 1946), 15-16.

³² JHH Weiler, 'Editorial-European Parliament Elections 2014: Europe's Fateful Choices'(2016) 24 EJIL 747, 750.

³³ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 232.

lies at the very foundations of the EU's problems of accountability and representativeness.³⁴ Only Curtin engages in the exercise of explaining the interrelationship between governance and government in the EU.³⁵ Given the crucial relevance of this issue for the development of the themes addressed in the book, it would have been beneficial if this clarification exercise had been undertaken at the beginning of the volume by the editors or in a dedicated contribution.

The issues tackled in the book eschew easy simplifications. The responses to the euro-crisis have elicited complex transformations in the intra-EU allocation of powers. New delicate supervisory functions have been assigned to the ECB. The Commission has seen strengthened its role in the coordination and sanctioning of the Member States' fiscal policies. These changes have not been accompanied by equally significant improvements in the legitimacy and accountability of the EU constitutional construct. In particular, the *Spitzenkandidaten* procedure and other attempts to overhaul the democratic foundations of the EU have not produced the expected results. The contributors have managed to present these knotty issues in a clear and refined manner. This is one of the major strength of the volume which constitutes a valid point of reference for scholars and policy-makers interested in the debate on the challenges the EU and the EMU are facing.

³⁴ JHH Weiler 'Living in a Glass House: Europe, Democracy and the Rule of Law', in C Closa, D Kochenov and JHH Weiler (eds), *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper, RSCAS 2014/25, 25.

³⁵ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 175.