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EDITORIAL

Tiago Andreotti[*]

CHANGES IN THE EJLS

Any organization needs continuity to be able to function properly. Recently the journal had a few members who left and in the near future almost half of the current board will be stepping away from the Journal. This is normal due to the institutional aspects of the EJLS, a journal run by PhD researchers at the European University Institute, but it also poses problems for the development of our activities. After considering this issue the Board decided to withdraw our previous limit and expand the number of Board Members. The advantages of this decision are not limited to administrative issues as it not only allows us to enhance our transition process by having more people with knowledge of our internal procedures and policies but also enables us to increase our critical mass and review quality due to the higher number of people committed to the Journal.

To implement this change we issued a call for new members and received various applications from the EUI community. I am glad to announce that Afroditi Marketou, Argyri Panezi, Betul Kas, Chloé Papazian, Emma Linklater, François Delerue, Jorge Piernas, Lucila Almeida and Tessa Innocenti are now part of the EJLS.

IN THIS ISSUE

Eduardo Dubout opens this issue discussing the new role of EU fundamental rights protection in constraining national power and attempts to explain the change as a compensation of the partial character of the European integration.

The second article is by Janja Hojnik. Setting the tone with former Internal Market Commissioner McCreevy's statement that the internal market needs to become more decentralized, she analyzes the application of the *de minimis* rule in the EU's internal market and concludes that it is a low impact measure that strengthens the autonomy of national authorities and democratic decision-making at the EU level.

Following we have Merita Huomo-Kettunen discussing the constitutional linkages between national legal orders, the EU legal order and the ECHR Convention System. She argues that these constitutional linkages can be

[*] European University Institute (Italy). Any errors or omissions are entirely my own

best described as heterarchical structures because they enable legal orders to flexibly work together without any predetermined hierarchical relationship.

Rossana Deplano questions the validity of using constitutional concepts as a means for interpreting international law and makes two arguments: that current contributions on international constitutionalism are grounded on unstated assumptions and that in order to restore coherence and unity within the international legal system interpretations of international law should be carried out through interpretive means that are specifically conceived for international law.

In the fifth article Nikos Vogiatzis shows that the European Citizens' Initiative's legislative framework as it is neither affects the Community method nor seriously increases democratic legitimacy at the EU level. He also makes the claim that the European Citizens' Initiative should be evaluated in the light of the post-Lisbon Community method and not as an additional 'opportunity structure for citizens' participation'.

Tareq Al-Tawil follows with an article analyzing the justifications for corrective justice and deterrence and proposes a mixed theory that accommodates both in the field of contract law.
Finally, Sondre Torp Helmersen attempts to clear up the confusion on the concept of evolutive interpretation in customary international law and shows us that the approaches to it vary depending on the category of the terms used, which can be value driven evolving terms, non-value driven evolving terms and non-evolving terms.

LE DÉFI DE LA DÉLIMITATION DU CHAMP DE LA PROTECTION DES DROITS FONDAMENTAUX PAR LA COUR DE JUSTICE DE L'UNION EUROPÉENNE

Edouard Dubout*

Le sens de la protection des droits fondamentaux dans l'Union européenne a changé. A l'origine destinés à s'assurer de la légitimé de l'exercice du pouvoir européen, ils servent désormais de support à une nouvelle contrainte sur l'exercice du pouvoir national. Cette contrainte est néanmoins limitée à un champ particulier dont les contours apparaissent largement incertains, empiétant bien souvent sur la compétence nationale. Après avoir identifié les hypothèses problématiques, et examiné les différentes solutions qui pourraient y être apportées, la thèse qui est proposée ici est que ce débordement procède d'une démarche de compensation du caractère partiel de l'intégration européenne.

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* Professeur à l'Université Paris Est, Directeur du Master Droit européen. Ce texte est issu d'une présentation orale donnée à l'Université Paris-Assas en octobre 2011 dans le cadre d'un colloque consacré à *L'Union européenne et les droits fondamentaux: nouveaux défis*, sous la direction des Professeurs E Decaux, J Dutheil de la Rochère, et C Blumann.

I. INTRODUCTION

Normes en partage, les droits fondamentaux se situent au cœur de la délicate articulation des systèmes juridiques concurrents opérant sur un même espace. Parmi les principaux défis juridiques auxquels est confrontée la protection dans droits fondamentaux dans l'Union européenne, celui de la délimitation des champs respectifs des différents organes juridictionnels nationaux et européens fait figure d'enjeu majeur. D'une part, dans la perspective de l'adhésion au mécanisme de protection de la Convention européenne des droits de l'homme, la répartition des champs de contrôle conditionne la délicate question de l'imputabilité des responsabilités respectives des Etats et de l'Union en cas de violation. D'autre part, l'identification d'un champ de protection propre à l'Union européenne tel que défini par la Cour de justice détermine pour le justiciable la sphère de revendication des droits qu'il tire de son appartenance au système d'intégration.

A première vue, ce défi de la délimitation du champ de la protection des droits fondamentaux offerte par la Cour de justice de l'Union européenne n'est pas totalement nouveau[1]. Il remonte finalement au principe même d'une protection prétorienne des droits fondamentaux et à la coexistence des contrôles qui en découle. Mais la question se trouve exacerbée désormais par la combinaison de deux facteurs : l'entrée en vigueur du traité de Lisbonne reconnaissant la force contraignante de la Charte des droits fondamentaux de l'Union européenne d'un côté, et les développements de la jurisprudence de la Cour de justice d'un autre côté. En effet, alors que la Charte affiche une volonté conventionnelle de restreindre le champ d'application de la protection conformément à son article 51 §1 à la seule action des institutions de l'Union européenne et à celle des Etats lorsqu'ils « mettent en œuvre le droit de l'Union », la Cour de justice exprime quant à elle une volonté jurisprudentielle

[1] Joseph Weiler, 'The European Court at a Crossroads: Community Human Rights and Member State Action', *in* Francesco Caportoti and others (eds), *Du Droit International au Droit de l'Intégration. Liber Amicorum Pierre Pescatore*, (Nomos Verlagsgesellschaft 1987) 821

d'étendre plus largement le champ de cette protection à des situations relevant jusqu'alors du seul contrôle national. Ce *hiatus* des volontés conventionnelle et jurisprudentielle dans la délimitation du champ de la protection européenne des droits fondamentaux est source d'une forme particulièrement problématique de tension. Le discours de la répartition des compétences étant opposé à celui de la protection des droits, les deux corps du droit constitutionnel européen se trouvent ainsi confrontés. En ce sens il s'agit bien d'un « nouveau » défi, et même d'un défi *inversé* par rapport à celui qui avait présidé à l'émergence d'une protection des droits fondamentaux par l'Union européenne. Tandis que le contexte initial souffrait du reproche d'une protection insuffisante des droits fondamentaux face au principe de primauté du droit de l'Union européenne[2], le contexte actuel voit se formuler le grief inverse d'une protection surabondante des droits fondamentaux qui pourrait le cas échéant s'apparenter à une forme d'*ultra vires* jurisprudentiel[3]. A l'origine de la revendication d'une prise en compte de ces droits par la Cour de justice[4], les juridictions internes, notamment constitutionnelles, redoutent de se voir dépossédées de leur pouvoir d'interprétation des droits fondamentaux qui fonde l'émergence du modèle contemporain de démocratie « judicaire ». C'est qu'à ne point y prendre garde, l'intrusion de la Cour de justice en matière de protection des droits fondamentaux pourrait se généraliser et priver les ordres nationaux de l'autonomie d'interprétation de leurs normes fondatrices, déjà bien entamée par le contrôle strasbourgeois. Ironie de l'histoire, qui voit la Cour de justice passer du statut de cour « pas assez » protectrice des droits fondamentaux à celui de cour « trop » protectrice de ces mêmes droits.

Abondance de biens ne nuit, pourrait-on être tenté d'objecter. Sauf que chacun sait bien que la protection des droits se prête mal à la confusion et à l'insécurité juridique. Or, il manque pour le moment une véritable méthodologie du contrôle jurisprudentiel des droits fondamentaux dans l'Union[5] qui serait capable de circonscrire avec précision le champ de la protection. Contrairement à l'exemple etats-unien et à la doctrine de la « pleine incorporation », le champ de la protection par la Cour de justice n'est pas total[6]. Entre une protection limitée à la seule mise en œuvre du

[2] *Solange I* Bverfg 37 [1974] 271.
[3] *Lisbonne* Bverfg 123 [2009] 267, para 338.
[4] Pierre Pescatore, 'Les Droits de l'Homme et l'Intégration Européenne' [1968] *Cahiers de Droit Européen* 629.
[5] Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law* (Hart Publishing 2010) xix.
[6] Aida Torres Perez, 'The Dual System of Rights Protection in the European Union in the Light of US Federalism' in Elke Cloots, Geert de Baere, and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) 110.

droit de l'Union et une protection généralisée à toute situation, la Cour de justice a, comme souvent, choisi l'entre-deux, sans pour autant fixer de critères clairs et stables de partage entre les niveaux de protection. Au point qu'il est désormais particulièrement délicat de savoir quelles situations mettant en cause les droits fondamentaux sont susceptibles de se revendiquer d'une protection par le droit de l'Union européenne. Malgré la confusion évidente qui en résulte, il serait envisageable d'essayer de relativiser l'importance de cette incertitude en mettant en avant le fait qu'ultimement il reviendra à la Cour européenne des droits de l'homme d'unifier la protection et de fixer un standard largement commun aux juges nationaux et à la Cour de justice. Dès lors, peu importerait que le partage des responsabilités soit approximatif puisqu'en définitive la protection offerte serait sensiblement la même. Néanmoins, si le pouvoir du dernier mot reviendra certainement à la Cour de Strasbourg, il ne faut pas négliger pour autant celui du premier mot qu'offre à la Cour de Luxembourg l'avantage de la procédure préjudicielle. En outre le degré de contrôle qu'exercera la Cour de Strasbourg sur le niveau de protection ainsi étendu à vingt-sept Etats reste à connaître. Délivrer sa propre vision des droits fondamentaux et en persuader les autres acteurs juridiques nationaux et européens du bien-fondé, tel est en réalité l'enjeu de la délimitation du champ de protection. La tentation sera grande pour la Cour de justice d'offrir une protection plus élevée, à la fois pour la rendre visible et pour l'immuniser préventivement contre une éventuelle remise en cause par la Cour européenne des droits de l'homme. L'intrusion dans l'office des juges nationaux en sera perçue comme d'autant plus importante, augmentant les risques de contestation.

Une question se pose immédiatement au regard des difficultés engendrées. Quel besoin si pressant y a-t-il pour la Cour de justice de braver la volonté étatique et d'insécuriser le partage des fonctions afin d'étendre au-delà même des compétences de l'Union l'application de son propre standard de protection des droits fondamentaux ? N'aurait-elle pas plutôt intérêt à faire preuve de prudence à ne pas s'aventurer sur la pente glissante du contrôle des mesures nationales au péril de s'attirer les foudres des juges nationaux et d'empiéter sur l'office de la Cour de Strasbourg ? On devine bien qu'au-delà de la question du champ d'application de la protection se profilent d'autres défis qui ne sont plus exclusivement juridiques mais qui ont trait à des enjeux de pouvoir liés à une entreprise de légitimation de l'intégration européenne. Derrière la question du champ d'application de la protection des droits fondamentaux se dissimule celle de la nature de la société européenne en gestation à laquelle la Cour de justice s'emploie à donner corps. Il apparaît que le défi que représente la délimitation du champ de la protection des droits fondamentaux naît d'un processus constant d'extension (2), qui provoque

une situation embarrassante de contradiction (3), nécessitant pour être dépassée un discours cohérent de justification (4).

II. L'Extension du Champ de la Protection

Le champ de la protection des droits fondamentaux par la Cour de justice est le fruit d'une superposition casuistique de décisions au sein desquelles il est difficile de dégager une véritable logique d'ensemble. L'étendue de la protection concerne tout d'abord et originellement l'action des institutions et organes de l'Union[7]. Cette hypothèse initiale ne soulève pas de difficulté d'identification majeure, ni de véritable contestation puisqu'elle était réclamée par les juges nationaux. La protection assurée par la Cour de justice s'étend ensuite au contrôle des mesures nationales qui présentent un *lien de rattachement suffisant* avec le champ d'application du droit de l'Union. Or, ces liens se multiplient augmentant d'autant le contrôle de la Cour de justice. Alors que l'on peut identifier classiquement deux hypothèses traditionnelles de rattachement des mesures nationales au champ du droit de l'Union (2.1), il faut désormais probablement y ajouter deux autres plus récentes dont la portée demeure toutefois incertaine (2.2).

1. *Les Hypothèses Traditionnelles de Protection : Exécution et Dérogation*

Elles sont connues et concernent le contrôle des mesures nationales de mise en œuvre du droit de l'Union d'une part, ainsi que celui des mesures de dérogation aux libertés de circulation d'autre part. La seconde, déjà, est plus contestable que la première.

a. Les Mesures D'Exécution

La première hypothèse traditionnelle de protection est celle du contrôle des mesures nationales de mise en œuvre du droit de l'Union. Initiée dans l'arrêt *Wachauf*[8], elle se justifie par un souci d'assurer un niveau suffisant et homogène de protection des droits fondamentaux quelque soit le mode d'exécution - direct ou indirect - du droit de l'Union. Elle n'allait pourtant de soi, notamment au regard de l'ancien article 46 *d)* TUE ou encore de l'exemple étatsunien[9]. Il en résulte qu'agissant en tant de dépositaire de l'exercice d'un pouvoir européen les organes nationaux se voient soumis à un standard de protection propre à l'Union qui se *substitue* au standard national. Face à un risque de diminution de ce dernier et partant de

[7] Case 29/69 *Stauder* [1969] ECR 419, Case 11/70 *Internationale Handelgessellschaft* [1970] ECR 1125.
[8] Case 5/88 Wachauf [1989] ECR 2609, para 19.
[9] La Cour suprême américaine a refusé dans un premier temps et avant l'adoption du Quatorzième amendement de contrôler le respect des droits constitutionnels fédéraux par les actes des organes fédérés, voir *CS Barron v Baltimore* 32 US 243 [1833].

contradiction avec les droits constitutionnels internes, la Cour de justice optera généralement pour une protection équivalente, voire supérieure, à celle du droit interne.

L'identification précise des mesures de « mise en œuvre » est particulièrement importante, notamment afin de savoir ce qui relève respectivement des Etats et de l'Union dans la perspective de l'adhésion à la Convention européenne des droits de l'homme[10]. Il semblerait qu'elles recouvrent celles qui ont pour objet l'exécution des normes immédiatement applicables ainsi que la transposition des directives, voire les mesures d'exécution des accords liant l'Union européenne[11]. Sont ainsi concernées les situations dans lesquelles les Etats membres ont une compétence liée, et le cas échéant celles dans lesquelles ils adoptent de leur propre chef des mesures qu'ils jugent nécessaires à la bonne application du droit dérivé de l'Union[12]. La marge de manœuvre laissée aux Etats dans la mise en œuvre du droit de l'Union pourrait alors servir de critère à la délimitation du champ des contrôles. Toutefois, la Cour de justice a précisé que cette latitude laissée à la discrétion des autorités nationales ne pouvait servir de fondement à une méconnaissance des droits fondamentaux[13]. Dans un important arrêt *N.S. et autres*, elle paraît même désormais estimer que le fait d'agir sur le fondement du droit de l'Union, y compris sur une base discrétionnaire, constitue une mesure de « mise en œuvre » du droit de l'Union et entraîne l'applicabilité du standard européen de protection des droits fondamentaux[14]. Que ce soit le droit de l'Union qui pose lui-même le pouvoir d'appréciation national emporte ainsi le rattachement de la mesure au champ du contrôle. Ce faisant, la marge discrétionnaire d'action des autorités nationales ne l'est plus vraiment... En outre, la Cour a estimé, dans une lecture extensive de l'article 51 CDFUE, que relevaient des mesures d'exécution, les réglementations nationales permettant de sanction, y compris pénalement, le non-respect d'obligations issues du droit de l'Union, y compris bien que de telles

[10] Par exemple la Cour européenne des droits de l'homme a reconnu la responsabilité individuelle de la Belgique dans la mise en œuvre du droit de l'Union en matière d'asile, dès lors qu'était aménagée une certaine marge de manœuvre aux autorités nationales qui aurait pu leur permettre d'éviter la violation de la Convention, *M.S.S. v Belgique and Greece* App no 30696/09 (ECtHR, 21 Janvier 2011).

[11] Bruno De Witte, 'Le Rôle Passé et Futur de la Cour de Justice des Communautés Européennes dans la Protection des Droits de l'Homme', in Philipp Alston (ed), *L'Union Européenne et les Droits de l'Homme*, (Bruylant 2001) 910.

[12] Joined Cases C-20 and C 64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, para 88 s.

[13] Case C-540/03 *Parlement v Conseil* [2006] ECR I-5769, para 105.

[14] Joined Cases C-411 and C-493/10 *N. S. and Others* (ECJ, 21 decembre 2011), para 68.

réglementations n'aient pas été adoptées à cette fin[15].

b. Les Mesures de Dérogation

La seconde hypothèse traditionnelle de contrôle du respect des droits fondamentaux par les mesures nationales a été dégagée dans l'arrêt *ERT*[16]. Elle concerne les mesures nationales qui dérogent à une liberté de circulation, quelque soit d'ailleurs le fondement de cette dérogation[17] et quelque soit la liberté de circulation en cause. La Cour l'a ainsi étendu aux situations de dérogation à la libre circulation du citoyen dans l'arrêt *Tsakouridis*[18]. Cette extension offre de nombreuses potentialités dans la mesure où il suffit désormais à un citoyen qui se déplace de revendiquer une atteinte à ses droits fondamentaux, découlant par exemple des disparités des droits nationaux, pour déclencher le rattachement au champ du contrôle. L'importance de cette hypothèse de protection est doublement déterminante. D'une part, elle amorce un dépassement du champ du contrôle au-delà des limites des compétences de l'Union européenne, créant ainsi un décalage entre champ d'application et champ de compétence (cf *infra*). D'autre part, il y a dans l'arrêt *ERT* un tournant axiologique crucial par rapport à l'hypothèse précédente: alors que dans l'arrêt *Wachauf* la perspective était plutôt de prolonger le contrôle des actes des institutions par celui des actes des Etas agissant comme agent d'exécution du droit de l'Union, l'arrêt *ERT* ambitionne quant à lui d'offrir un standard *supplémentaire* de protection[19].

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[15] Case C-617/10 *Åkerberg Fransson* [2013] (ECJ, 26 févier 2013), para 28 : « Le fait que les réglementations nationales qui servent de fondement auxdites sanctions fiscales et poursuites pénales n'aient pas été adoptées pour transposer la directive 2006/112 ne saurait être de nature à remettre en cause cette conclusion, dès lors que leur application tend à sanctionner une violation des dispositions de ladite directive et vise donc à mettre en œuvre l'obligation imposée par le traité aux États membres de sanctionner de manière effective les comportements attentatoires aux intérêts financiers de l'Union ».

[16] Case C-260/89 *E.R.T.* [1991] ECR I-2925, para 42 : « Dès lors qu'une réglementation [nationale] entre dans le champ d'application du droit communautaire, la Cour, saisie à titre préjudiciel, doit fournir tous les éléments d'interprétation nécessaires à l'appréciation, par la juridiction nationale, de la conformité de cette réglementation avec les droits fondamentaux dont la Cour assure le respect »

[17] ibid, para 42 (pour les clauses du traité) ; Case C-368/95, *Familiapress* [1997] ECR I-3689, para 24 (pour les motifs jurisprudentiels d'intérêt général) ; Case C-482/01 and C-493/01 *Orfanopoulos* [2004] ECR I-5257, para 97 (pour le droit dérivé).

[18] Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 52.

[19] Damien Chalmers, 'Looking Back at *ERT* and its Contribution to an EU Fundamental Rights Agenda', in Loïc Azoulai and Miguel Poiares Maduro (ed) (n 5) 145.

En effet, la mesure nationale subit alors un triple contrôle : le respect de la protection nationale des droits fondamentaux, le respect de la liberté de circulation, et quand bien même aurait-elle passé ces deux tests précédents avec succès, elle doit subir un dernier contrôle du respect des droits fondamentaux tels que protégés par la Cour de justice. Ce faisant, la juridiction de l'Union ajoute son propre cadre de justification de l'action des autorités nationales à celui existant en droit interne, alors même qu'elles agissent au sein de leur marge d'appréciation et dans le respect des libertés de circulation. Plus qu'une substitution comme dans l'hypothèse précédente, il faut y voir une *superposition* des standards de protection. Une étape déterminante est franchie puisque le risque de concurrence des contrôles joue pleinement. La Cour de justice se met en position non plus seulement d'assurer que l'exécution du droit de l'Union ne diminue pas la protection des droits nationaux, mais également de proposer un standard éventuellement supérieur à celui offert par les juges internes sur le fondement du droit national. L'on passe ainsi d'une posture d'encadrement de l'exercice national du pouvoir *européen* à celle d'un encadrement additionnel de l'exercice du pouvoir *national*.

Le champ d'application de la protection jurisprudentielle ne se limite plus désormais à ces deux hypothèses traditionnelles. D'autres ont été ajoutées par la Cour de justice, mais leur portée reste encore à préciser.

2. *Les Nouvelles Hypothèses de Protection: Horizontalité et «Internalité»*

Les développements contemporains de la jurisprudence font apparaître un nouvel élargissement du contrôle de la Cour de justice sur les mesures nationales au nom du respect des droits fondamentaux. Il s'agit des hypothèses de protection dans un litige horizontal d'une part, et dans une situation auparavant purement interne d'autre part.

a. Les Situations Horizontales

La première nouvelle hypothèse de protection concerne le prolongement des directives de lutte contre les discriminations dans les litiges horizontaux. Elle découle des arrêts *Mangold*[20] et *Kücükdeveci*[21], dans lesquels la Cour de justice s'est fondée sur un principe de non-discrimination en raison de l'âge pour étendre son contrôle des mesures nationales qui y porteraient atteinte dans des litiges opposant deux personnes privées. En l'occurrence, la directive de lutte contre les discriminations (n° 2000/78) invoquée par les requérants ne pouvait, seule, fonder la mise à l'écart du droit national contraire en vertu d'une

[20] Case C-144/04 *Mangold* [2005] ECR I-9981.
[21] Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

jurisprudence constante selon laquelle les directives ne produisent pas un tel effet dans les litiges horizontaux[22]. Le droit fondamental à ne pas subir de discriminations fondées sur l'âge, issu des principes généraux du droit puis de la Charte (article 21), est alors combiné par la Cour de justice à la directive qui en précise la portée afin d'étendre le champ de la protection aux situations interindividuelles. Tandis que les droits fondamentaux sont conçus avant tout comme des obligations destinées à encadrer les pouvoirs étatiques, la Cour de justice leur confère une dimension horizontale et accentue l'emprise du droit de l'Union sur le droit privé des Etats membres[23]. Cette protection est problématique en ce qu'elle peut aboutir à faire peser sur un particulier le poids de la non-conformité du droit national au standard de protection européen. Ultimement, elle pourrait même aboutir à contrôler directement des normes émanant des personnes privées en limitant leur autonomie. Il semble bien s'agir en tout état de cause d'une hypothèse de contrôle inédite qui jusqu'alors n'entrait pas dans le champ traditionnel de la protection par Cour de justice, en ce sens que la mesure contrôlée n'a pas nécessairement pour objet ou pour effet de mettre en œuvre le droit de l'Union[24].

Il est encore difficile de dire quelle est la portée précise de cette protection. Une première incertitude provient du point de savoir si elle doit être limitée aux seules situations entrant dans le champ d'une directive dont l'objet principal est lui-même de protéger les droits fondamentaux, ou si elle s'étend à d'autres situations[25]. Il conviendra d'éviter un risque de « confusion des sources » pour reprendre la formule de l'avocat général V Trstenjak[26]. En effet, l'association d'une directive et

[22] Case 152/84 *Marshall* [1986]ECR 723, para 48 ; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para 24.

[23] Christian Joerges, 'Sur la Légitimité d'Européaniser le Droit Privé. Plaidoyer pour une Approche Procédurale' [2004] EUI Working Paper 04.

[24] 'The Scope of Application of General Principles of Union law: An Ever Expanding Union?' (2010) 47 CMLR 1589.

[25] Pour la première branche de l'alternative, les conclusions de l'Avocat Général Bot (para 90) dans l'affaire Kücückdeveci. Lire également les conclusions de l'Avocat Général Kokott dans l'affaire Bartsch (C-427/06) qui adopte une position différente et propose de distinguer selon la présence ou non d'une mesure nationale spécialement destinée à transposer une directive, que celle-ci ait pour objet ou non la protection des droits fondamentaux.

[2626] Voy. les conclusions du 8 septembre 2011 (para 154 s.) dans l'affaire Dominguez (C-282/10) qui concerne notamment la transposition du raisonnement Kücükdeveci au doit fondamental au congé du travailleur, tel que précisé par la directive n° 2003/88. Dans son arrêt du 24 janvier 2012, la Grande Chambre de la Cour de justice n'a pas statué sur ce point, se contentant de rappeler qu'une directive n'est pas invocable dans un litige entre particuliers, sauf à fin d'interpréter le droit national (C 282/10).

d'un droit fondamental – lui-même issu des principes généraux du droit ou de la Charte – donne naissance à une norme « hybride » dont le maniement, en termes par exemple d'autorité hiérarchique ou d'invocabilité contentieuse, présente certaines difficultés[27]. Ensuite, cette hypothèse de protection ouvre la voie à une applicabilité horizontale plus généralisée des droits fondamentaux. La question se pose notamment de savoir si le champ d'application de la Charte ne pourrait s'y étendre. Interpellée sur ce point par son Avocat général, la Cour ne s'est pas encore prononcée[28]. Enfin, le régime de cette protection horizontale – qu'elle soit partielle ou générale – reste à inventer. Comment le particulier à qui il est reproché une atteinte aux droits fondamentaux peut-il être en mesure de justifier son comportement, et selon quel type de raisonnement ? Voici les écueils principaux qui se dressent face à la protection horizontale des droits fondamentaux et qui entraîne la Cour de justice vers la fondamentalisation des rapports privés.

b. Les Situations Internes

La seconde nouvelle hypothèse de protection est encore plus incertaine. Elle s'appuie sur le statut de citoyen de l'Union, fût-il sédentaire et concerne donc une situation dite « purement interne ». Il ne manque pas de critiques contre la limitation du champ du droit de l'Union à l'égard de ces situations et des conséquences qu'elle entraîne[29]. La nouvelle protection offerte par la Cour contribue à y répondre, mais de manière partielle. Découlant de l'arrêt *Zambrano*[30], cette hypothèse voit la Cour de justice considérer que le droit de l'Union, et en particulier l'article 20 TFUE, s'oppose à une mesure nationale « ayant pour effet de priver les citoyens de l'Union de la jouissance effective de l'essentiel des droits conférés par leur statut de citoyen de l'Union ». En l'occurrence il s'agissait d'une mesure d'éloignement des parents d'enfants citoyens de l'Union européenne que la Cour de justice estime contraire aux droits de ces derniers. Aucun des protagonistes n'ayant fait usage de la liberté de circulation, leur situation de sédentarité ne pouvait relever de l'hypothèse traditionnelle de contrôle des droits fondamentaux liée à l'exercice du droit à la mobilité. On peut donc y voir une nouvelle hypothèse de protection, en précisant toutefois que la Cour de justice, contrairement à

[27] Par exemple, nos remarque dans « L'invocabilité d'éviction des directives dans les litiges horizontaux : le bateau ivre a-t-il sombré ? » (2010) 46 RTDE 277.
[28] Conclusions du 8 septembre 2011 (para 83 s.) dans l'affaire Dominguez (C-282/10) et la doctrine citée notes 50 et 51.
[29] Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 CMLR 73.
[30] Case C-34/09 *Zambrano* [2011] ECR I-1177, para 42.

l'Avocat Général Sharpston[31], ne fait pas directement référence aux droits fondamentaux, et notamment à celui du respect de la vie privée et familiale, mais uniquement au statut de citoyen. C'est pourtant bien la violation d'un tel droit qui déclenche l'atteinte au statut de citoyen. De sorte que la question se pose de savoir si toute violation des droits fondamentaux des citoyens de l'Union, même sédentaires, emporte automatiquement méconnaissance de leur statut, ou si seulement certaines violations peuvent avoir cet effet, et dans ce cas lesquelles.

Le critère de l'« essentialité » des droits mentionné par la Cour fait plutôt pencher en faveur de la seconde option. La jurisprudence postérieure le confirme en refusant d'assimiler une violation potentielle, voire probable, de la vie privée et familiale à une atteinte à l'« essentiel » des droits attachés au statut de citoyen[32]. Aux termes de l'arrêt *Dereci*, seuls certains droits seraient susceptibles d'être considérés comme tels à savoir principalement le droit au séjour sur le territoire de l'Union[33], auquel il est éventuellement possible d'ajouter le droit à la nationalité qui conditionne le bénéfice même de la citoyenneté[34]. Il s'agirait donc d'une hypothèse à la fois indirecte et partielle de protection des droits fondamentaux, le critère de l'atteinte à l'essentiel des droits attachés au statut de citoyen servant uniquement de lien de rattachement au droit de regard de la Cour de justice. Outre la faiblesse logique du raisonnement consistant à fusionner l'étape du rattachement au contrôle et celle du résultat de celui-ci, cette position prête le flanc à la critique en ce qu'elle se fonde sur une conception particulièrement « étroite » du statut de citoyen aboutissant à le déconnecter d'une pleine protection des droits fondamentaux qui, en tout état de cause, sera opérée le cas échéant devant la Cour de Strasbourg[35]. Par ailleurs seul le citoyen « dépendant » se trouve ainsi protégé[36]. La préoccupation est néanmoins compréhensible : elle est d'éviter que la Cour de justice ne s'érige en la garante d'une protection généralisée des droits fondamentaux de l'ensemble des citoyens européens,

[31] Conclusions du 30 septembre 2010, para 62 and 81 s.
[32] Case C-434/09 *McCarthy* [2011] ECR I-3375.
[33] Case C-256/11 *Dereci* [2011] (ECJ, 15 Novembre 2011), para 66: « Il en découle que le critère relatif à la privation de l'essentiel des droits conférés par le statut de citoyen de l'Union se réfère à des situations caractérisées par la circonstance que le citoyen de l'Union se voit obligé, en fait, de quitter le territoire non seulement de l'État membre dont il est ressortissant, mais également de l'Union pris dans son ensemble ».
[34] Pour un raisonnement de cette sorte dans une situation de mobilité, Case C-135/08 *Rottmann* [2010] ECR I-1449.
[35] Paolo Mengozzi, '*Zambrano*, An Unexpected Ruling', in P Cardonnel, Allan Rosas and Nils Wahl (eds) *Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 244.
[36] Joined Cases C-356 and C-357/11 *O,S v Maahanmuuttoviraso* (ECJ, 6 decembre 2012).

y compris sédentaires. Et pourtant n'est-ce pas là ce qu'appelle la qualité de citoyen d'un ordre juridique et politique ? Des solutions intermédiaires sont envisageables, mais il conviendrait à tout le moins d'affirmer plus ouvertement le lien difficilement niable entre la valorisation du statut de citoyen et la protection des droits fondamentaux[37]. Les frontières de la protection des droits fondamentaux des citoyens en situations internes par la Cour de justice restent encore à tracer.

On pourrait penser que ces hypothèse nouvelles de protection des droits fondamentaux par la Cour de justice au regard de leur caractère en apparence limité et presque immature, n'auraient pas vocation à engendrer des difficultés autres qu'une forme toujours préjudiciable de complexité inutile. En réalité, il en va autrement en ce qu'elles ignorent ouvertement la volonté des Etats de restreindre plus étroitement le champ de la protection, ce qui engendre une situation de contradiction conflictuelle.

III. LA CONTRADICTION DANS LE CHAMP DE LA PROTECTION

Depuis l'entrée en vigueur du traité de Lisbonne, se profile la perspective de l'existence d'un double standard au sein même de la protection des droits fondamentaux offerte par l'Union. Conformément aux paragraphes 1 et 3 de l'article 6 TUE, la protection s'effectue soit sur le fondement conventionnel de la Charte, soit sur le fondement jurisprudentiel des principes généraux du droit. Après l'adhésion à la Convention européenne des droits de l'homme, un troisième s'y ajoutera en vertu des accords internationaux liant l'Union européenne. Cette accumulation de fondements différents pour protéger les mêmes droits pourrait être organisée et unifiée si, à tout le moins, leur applicabilité convergeait. Or, pour ce qui est de l'étendue de la protection offerte à l'égard des mesures nationales, le constat s'impose que les champs de la protection découlant des différents fondements possibles ne coïncident pas nécessairement. De là provient le risque de contradiction. Après l'avoir plus précisément identifié (3.1), il faudra envisager les manières d'y remédier (3.2).

1. *Identification de la Contradiction: Droits versus Compétences*

La contradiction naît de la rédaction de l'article 51 de la Charte au sujet duquel on a écrit qu'« il aurait pu logiquement en constituer l'article

[37] Dans ses conclusions dans l'affaire Centro europa du 12 septembre 2007 (C-380/05, para 21), l'Avocat Général Poiares Maduro avait évoqué l'idée d'une protection généralisée des droits fondamentaux en dehors de tout lien de rattachement au droit de l'Union par la Cour de justice, mais avec un degré de contrôle restreint, limité aux seules violations « structurelles », c'est-à-dire graves et persistantes.

premier »[38]. Schématiquement, cette disposition pose deux séries de limites au champ de la protection. Une limite *rationae personae* concerne les destinataires de la protection, et l'autre *rationae materiae* est relative aux domaines de cette protection. Destinées à protéger le principe cardinal du respect compétences d'attribution[39], ces limites sont contredites par la jurisprudence avec une évidence variable.

a. Ratioane Personae

L'article 51 §1 prévoit que la protection offerte par la Charte ne s'étend « aux institutions, organes et organismes de l'Union dans le respect du principe de subsidiarité, ainsi qu'aux Etats membres uniquement lorsqu'ils mettent en œuvre le droit de l'Union ». Pareille rédaction exclut en principe la protection des droits fondamentaux sur le fondement de la Charte dans les litiges horizontaux, c'est-à-dire lorsque le destinataire de la protection est un particulier ne présentant aucun lien fonctionnel avec les pouvoirs publics[40]. Or, tel est précisément l'apport de l'hypothèse *Mangold/Kücükdeveci* de permettre à la Cour de connaître des situations horizontales grâce à une combinaison d'un droit fondamental et d'une directive. Certes, il ne s'agit que d'une justiciabilité limitée découlant d'une invocabilité d'exclusion et non de substitution, et il est loisible de se demander s'il s'agit d'un « plein » effet horizontal, dans le sens où il aboutirait à faire peser directement des obligations sur un particulier et non pas seulement à le priver du soutien de la conformité de son comportement au droit national. A cette nuance propre aux différentes formes de justiciabilité dégagées par la Cour, il convient de constater que le simple fait d'en revendiquer le bénéfice dans un litige entre personnes privées devrait conduire à y voir une forme d'effet horizontal direct (*unmittelbare Drittwirkung*), par opposition à un effet horizontal indirect (*mittelbare Drittwirkung*) consistant à rechercher la responsabilité des pouvoirs publics du fait d'une violation d'un droit fondamental par un particulier.

Déjà, cette prise de position de la Cour de justice contraste avec celle des juges constitutionnels nationaux, qu'ils soient européens[41] ou américains[42],

[38] Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne – Témoignage et commentaires*, (Le Seuil 2001) 250.

[39] Koen Lenaerts and Jose-Antonio Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLR 1629

[40] La question pourrait se poser de la transposition de la jurisprudence relative à la définition des litiges verticaux et horizontaux s'agissant de l'invocabilité des directives pour identifier la portée de l'article 51 §1 de la Charte.

[41] Pour un aperçu de droit comparé, Christoph Busch and Hans Schulte-Nölke (eds), *EU Compendium: Fundamental Rights and Private Law* (Sellier European Law Publishers 2010) 10-16.

qui refusent pour la plupart d'étendre leur contrôle des droits fondamentaux dans les litiges horizontaux au nom de leur attachement à ne contrôler que l'action des pouvoirs publics[43]. Cette extension est encore plus intrusive dans le système juridique particulier de l'Union européenne. En effet, la conséquence de la protection des droits fondamentaux dans les litiges horizontaux découlant de l'hypothèse *Mangold/Kücükdeveci* aboutit à ce qu'un particulier se voit en substance opposé par le truchement des droits fondamentaux le non-respect d'une directive qui ne lui est en principe pas adressée. Or, l'enjeu de l'invocabilité des directives est déterminant sous l'angle de la répartition des compétences. On se souvient que dans l'arrêt *Faccini Dori* la Cour avait elle-même justifié l'absence d'effet direct des directives dans les litiges horizontaux par un appel au respect des compétences d'attribution duquel découle la distinction entre le règlement et la directive[44]. Une partie de la doctrine justifie donc l'absence d'invocabilité de substitution des directives dans les litiges entre personnes privées par l'argument issu du respect des compétences d'attribution [45] . Faire revêtir à la directive, par biais des droits fondamentaux, les mêmes effets qu'un règlement reviendrait ainsi à permettre à l'Union de réglementer des situations pour lesquelles elle n'aurait pas reçu les compétences nécessaires à cette immixtion au sein des droits nationaux. On comprend donc mieux les réactions virulentes qu'a suscitées la position de la Cour de justice[46]. Le risque est que les juges nationaux entrent en résistance contre ce qui pourrait être considéré comme une atteinte au respect de la répartition des compétences[47]. C'est ainsi que le bien-fondé de la jurisprudence *Mangold* a été remis en cause devant la Cour constitutionnelle allemande. La crainte d'une fronde ouverte sous forme d'une déclaration d'*ultra vires* pour méconnaissance des compétences d'attribution n'a finalement été écartée qu'*in extremis* par l'arrêt *Honeywell*[48]*,* au prix d'une interprétation minimisant le dépassement des compétences, ce dernier étant considéré comme « mineur » et « peu

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[42] Elizabeth Zoller, 'Considérations sur les Causes de la Puissance de la Cour Suprême des États-Unis et de Sa Retenue ' (2011) 33 Les Nouveaux Cahiers du Conseil Constitutionnel 246.

[43] Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341.

[44] Case C-91/92 *Faccini Dori* [1994] (n 22), para 24.

[45] Denys Simon, *La Directive Européenne*, (Dalloz 1997) 73-74.

[46] Roman Herzog, ‚Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung* (Francfort, 8 septembre 2008).

[47] Paul Craig, 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis', (2011) 48 CMLR 403 s.

[48] Bvfge 06 [2010] 2661.

significatif »[49]. L'avertissement mérite néanmoins d'être entendu.

b. Rationae Materiae

L'article 51 §2 précise avec une redondante insistance que la Charte « n'étend pas le champ d'application du droit de l'Union au-delà des compétences de l'Union, ni ne crée aucune compétence ni aucune tâche nouvelles pour l'Union et ne modifie pas les compétences et tâches définies par les traités ». Cette disposition a pour objectif évident de limiter le champ de la protection aux domaines de mise en œuvre du droit de l'Union et partant au champ des compétences de celle-ci, en réponse à la préoccupation des représentants de certains gouvernements. De cette formulation découle en principe que les droits fondamentaux ne sauraient être protégés dans le champ des domaines de compétences retenues des Etats. L'idée est de lier le champ d'application des droits au champ d'attribution des compétences. Cette solution a le mérite de la simplicité devant le caractère insaisissable du champ d'application du droit de l'Union. Toutefois, elle ne correspond pas à l'évolution de la jurisprudence qui, rapidement, a déconnecté le champ d'application des dispositions fondamentales des traités et notamment des libertés de circulation, dont la Cour n'hésite pas à contrôler le respect au sein des compétences retenues des Etats distinguant ainsi existence et exercice de la compétence retenue[50]. La formule est désormais récurrente selon laquelle « s'il est constant que le droit de l'Union ne porte pas atteinte à la compétence retenue des Etats membres [...], il n'en demeure pas moins que les Etats membres doivent exercer cette compétence dans le respect du droit de l'Union ». En découle une forme de « totalisation » du champ des libertés de circulation et une intrusion du droit de l'Union au sein des compétences réservées des Etats[51]. Là encore, il apparaît évident que les hypothèses de protection des droits fondamentaux par la Cour de justice découlant des arrêts *ERT* et *Zambrano* prolongent cette extension du champ du contrôle en dehors de celui des compétences d'attribution.

Ces hypothèses de protection sont indifférentes au domaine de compétence concernée. Dans le cas *ERT*, cela avait déjà été noté dès l'adoption de la Charte, le vecteur des libertés de circulation étend le

[49] Dominik Hanf, 'Vers une Précision de la *Europarechtsfreundlichkeit* de la Loi Fondamentale - L'Apport de l'Arrêt « rétention des données » et de la décision « *Honeywell* » du BVerfG' (2010) 3 *Cahiers Juridiques* 16 s.

[50] Koen Lenaerts, 'L'encadrement par le Droit de l'Union Européenne des Compétences des Etats Membres' in *Chemins d'Europe – Mélanges en l'honneur de Jean Paul Jacqué*, (Dalloz 2010) 433 s.

[51] Loïc Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 EJLS 192.

regard de la Cour aux situations de dérogation. Or, les libertés de circulation s'appliquant elles-mêmes indifféremment selon le domaine de compétence concerné, il en découle que la protection des droits emprunte logiquement la même voie autorisant la Cour de justice à exercer son contrôle en dehors du champ des compétences de l'Union[52]. De cette façon notamment, le contrôle du respect des droits fondamentaux des citoyens mobiles dans l'Union européenne s'exerce au sein des domaines de compétences retenues, comme par exemple s'agissant des questions d'état civil et de droit au nom de famille[53]. Plus encore dans le cas *Zambrano*, l'atteinte aux compétences retenues est accentuée par le fait que non seulement la protection est indifférente au domaine matériel en cause mais que de surcroît l'absence de transnationalité de la situation confère une dimension purement nationale à l'exercice de la compétence étatique. Le cantonnement à une situation interne est en effet généralement un indice supplémentaire de libre réglementation des pouvoirs nationaux. L'introduction d'un contrôle du respect des droits fondamentaux dans cette hypothèse par le biais du statut de citoyen, même sédentaire, contredit frontalement l'idée que les Etats conservent en principe la maîtrise de l'exercice de leur compétence dans des situations ne présentant pas d'élément d'extranéité. On peut voir dans le droit de regard que s'octroie la Cour de justice à l'égard des effets internes des réglementations nationales une forme de fédéralisation du statut de citoyen. En l'occurrence, ce sera essentiellement le domaine particulièrement sensible de l'immigration des ressortissants de pays tiers membres de la famille d'un citoyen de l'Union qui sera soumis au regard de la Cour de justice[54]. De la combinaison de ces deux hypothèses, il apparaît que le citoyen de l'Union bénéficie d'une protection de ses droits fondamentaux dans tous les domaines continuant pourtant de relever de la compétence étatique : soit pleinement s'il est mobile, soit partiellement - en tant que les droits fondamentaux relèvent de l'essentiel des droits découlant du statut de citoyen - s'il est sédentaire.

Entre ce que dicte la Charte et ce que fait la Cour, la contradiction est profonde. Derrière elle, se profile une intrusion dans la sphère de compétence et de liberté des Etats. La résolution n'en est que plus délicate.

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[52] Allard Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 CMLR 367-398.

[53] Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693 ; Case C-391/09 *Runevic-Vardyn* [2011] ECR I-3787.

[54] Voy. les commentaires de Kay Hailbronner et Daniel Thym, 'Annotation of Case C-34/09' (2011) 48 CMLR 1264 s.

2. *Résolution de la Contradiction: Unitarisme versus Pluralisme*

Une alternative, insatisfaisante dans chacune de ses branches, se présente à la Cour de justice afin de résoudre la contradiction entre le champ de protection défini par l'article 51 de la Charte et celui élaboré par la jurisprudence. Elle consiste à choisir entre l'unité et la pluralité du ou des champs de protection.

a. Unité

Dans un souci de sécurité et de clarté, la Cour de justice peut choisir de faire coïncider le champ conventionnel et le champ jurisprudentiel de protection. Cette manière de résoudre la contradiction se dédouble néanmoins selon qu'est privilégié le premier ou le second. Une première possibilité consisterait à faire prévaloir l'article 51 de la Charte en limitant le contrôle des mesures nationales à la seule hypothèse *Wachauf*. Elle aurait le mérite de la simplicité, mais pourrait aussi être considérée comme une régression du standard de protection offert par l'Union. En ce cas, cette solution contredirait potentiellement l'article 53 de la Charte qui pose une clause cliquet *pro homine*. De plus, cette option cadrerait mal avec les Explications de la Charte qui adoptent une rédaction plus large que celle de l'article 51 selon laquelle « il résulte sans ambiguïté de la jurisprudence de la Cour que l'obligation de respecter les droits fondamentaux définis dans le cadre de l'Union ne s'impose aux États membres que lorsqu'ils agissent dans le champ d'application du droit de l'Union », ce qui est susceptible d'englober d'autres hypothèses que la seule mise en œuvre du droit de l'Union. Dans son ordonnance *Asparuhov Estov*[55], la Cour constate que sa compétence pour interpréter la Charte n'est pas établie, dès lors qu'aucun élément ne montre que la décision nationale en cause « constituerait une mesure de mise en œuvre du droit de l'Union ou qu'elle présenterait d'autres éléments de rattachement à ce dernier ». Cette dernière incise milite a contrario pour le maintien d'une interprétation plus large du champ du contrôle que ce que prévoit la lette de l'article 51 CDFUE. Dans son ordonnance *Chartry*, la Cour tout en s'estimant incompétente pour contrôler le respect des droits fondamentaux en l'espèce, mentionne expressément que le rattachement au champ du contrôle peut continuer d'être opéré par le biais des libertés de circulation[56]. L'unité du champ d'application ne peut alors se faire qu'au profit du standard le plus étendu.

La seconde façon de résoudre de manière unitaire la contradiction serait de

[55] Case C-339/10 *Asparuhov Estov e.a.* [2010] ECR I-11475, para 14 ; ainsi que Case C-267/10 et C-268/10 *Rossius et Colliard* [2011] ECR I-81, para 19.
[56] Case C-457/09 *Chartry* [2011] ECR I-819, para 25.

faire prévaloir la protection la plus étendue, à savoir la protection jurisprudentielle et d'ignorer la lettre de l'article 51 de la Charte. La Cour semble s'y aventurer : dans l'arrêt *Kücükdeveci* elle se fonde ouvertement sur le principe de non-discrimination protégé par la Charte (article 21) pour connaître du litige horizontal[57]. De même, dans l'arrêt *Runevic-Wardyn* elle fait référence au droit à la vie privé et familiale consacré par la Charte (article 7) pour statuer sur la compatibilité aux droits fondamentaux d'une mesure nationale dérogeant à une liberté de circulation dans un domaine de compétence pourtant réservé aux Etats[58]. L'argument utilisé en doctrine pour justifier cette méconnaissance de la volonté étatique au profit du standard de protection le plus large est celui du pragmatisme. Rien ne servirait de maintenir deux standards de protection différents si l'un est plus protecteur que l'autre, dès lors que le requérant aurait alors toujours le loisir de se tourner vers celui qui lui offre le plus de garanties. Autrement dit, quand bien même les limitations posées par l'article 51 de la Charte seraient respectées, il resterait possible de maintenir une protection des droits fondamentaux plus étendue sur le fondement des principes généraux du droit[59]. Dès lors autant ignorer les premières au profit de l'application d'un standard unique, plus protecteur[60]. En ce qu'elle contredit ouvertement la volonté des Etats et qu'elle expose la Cour à la menace de l'*ultra vires*, il n'est toutefois pas certain que la solution unitaire soit nécessairement celle qui sera retenue.

b. Pluralité

Empruntant le chemin de la de la complémentarité et de la complexité, la Cour de justice peut également opter pour le maintien de la pluralité des champs de contrôle selon que le fondement de la protection provient de la Charte ou des principes généraux du droit. Le pluralisme du champ de protection prendrait tout d'abord la forme d'un dualisme consistant à maintenir un double standard de délimitation. En effet, il n'est pas certain que le standard jurisprudentiel soit nécessairement plus étendu que le standard conventionnel. Il pourrait y avoir un intérêt à maintenir ce dernier parallèlement à la protection jurisprudentielle, notamment s'agissant du contrôle des droits fondamentaux dans le domaine sensible de l'ex-troisième pilier de l'Union européenne au sein duquel la protection

[57] C 555/07 *Kückükdeveci* [2011] (n 21), para 22.
[58] Case C 391/09 *Runevic-Vardyn* [2011] (n 53), para 89.
[59] Koen Lenaerts and Jose-Antonio Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU law' (2010) 47 CMLR 1657-1660; T Tridimas, *The General Principles of EU Law* (2e éd., OUP 2006) 363; Alexander Egger, 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited' (2006) 25 YB Eur L 547-550.
[60] En ce sens les conclusions de l'Avocat Général Y Bot du 5 avril 2011 dans l'affaire *Scattolon* (C-108/10, para 116 et s.), mais la Cour n'y a pas répondu dans son arrêt du 6 septembre 2011.

jurisprudentielle est pour le moment limitée[61]. D'ailleurs, la Cour de justice montre quelques signes d'attention à l'article 51 de la Charte, signifiant par là qu'elle n'entend pas l'ignorer totalement. Dans l'arrêt *McB.*, rendu selon la procédure préjudicielle d'urgence, elle s'attache, conformément à la prise de position de l'Avocat général, à souligner l'absence de compétence européenne en matière de réglementation du droit de garde pour n'utiliser la Charte qu'à des fins interprétatives du droit de l'Union et non pour y confronter directement la mesure nationale litigieuse[62]. De même, dans les ordonnances *Vino*, la juridiction européenne cite expressément l'article 51 §2 CDFUE pour considérer que la situation ne relève pas du champ d'application du droit de l'Union et de la protection des droits fondamentaux qui en découle dès lors qu'elle n'est pas couverte par le droit dérivé[63]. Il en résulte une hésitation entre les décisions ignorant la limitation conventionnelle du champ de protection au profit du standard jurisprudentiel et celles qui en tiennent compte, ce qui pourrait laisser penser que les deux régimes seraient amener à coexister. Il ne faudrait pas cependant que la Cour de justice renonce à fixer elle-même, serait-ce de façon duale, le champ de la protection. Or, toute évolution en ce sens n'est pas à écarter.

L'éventualité d'une délimitation pluraliste du champ de protection des droits fondamentaux pourrait découler de sa délégation aux juges nationaux. Il leur reviendrait alors d'identifier les situations qu'ils estiment relever de la protection des droits fondamentaux par la Cour de justice ou celles continuant de relever du standard national, voire de la Convention européenne des droits de l'homme. En résulterait un risque évident de variabilité du champ de la protection en fonction des interprétations potentiellement divergentes des différentes juridictions nationales. Et pourtant, dans un arrêt *Dereci et a.*, la Cour de justice a semblé s'avancer dans cette voie en jugeant qu'il appartenait à la juridiction *a qua* de décider si la situation relevait ou non du champ de la protection offerte par la Charte ou de celle découlant de la Convention européenne des droits de l'homme. Après avoir expressément rappelé l'importance et la lettre de l'article 51 de la Charte, la Grande chambre estime au point suivant que

> si la juridiction de renvoi considère, à la lumière des circonstances des litiges au principal, que la situation des requérants au principal relève du droit de l'Union, elle devra examiner si le refus du droit de

[61] Eleanor Spaventa, 'Remembrance of Principles Lost: Fundamental Rights, the third Pillar and the Scope of Union Law'(2006) 25 YB Eur L 153-176.
[62] Case C-400/10 *PPU McB.* [2010] ECR I-8965, para 51.
[63] C-20/10 *Vino* [2010] ECR I-148, para 52 ; Case C 161/11 *Vino* [2011] ECR I-91, para 23 s.

> séjour de ces derniers porte atteinte au droit au respect de la vie privée et familiale prévu à l'article 7 de la charte. En revanche, si elle considère que ladite situation ne relève pas du champ d'application du droit de l'Union, elle devra faire un tel examen à la lumière de l'article 8, paragraphe 1, de la CEDH.[64]

Un choix s'offrirait donc au juge national. Cette perspective de nationalisation de la délimitation des champs de protection, que l'Avocat général n'avait pas envisagée dans sa prise de position, est particulièrement lourde de conséquences : elle sonne comme un renoncement à l'autonomie d'interprétation du droit de l'Union. Une manière de la comprendre tient peut-être à la spécificité de l'espèce à l'occasion de laquelle la Cour tente de définir plus précisément ce qu'elle entend par l'atteinte à l'« essentiel » des droits du citoyen de l'Union qui justifie un rattachement au champ du contrôle dans les situations internes. Considérant dans la suite de l'arrêt que l'atteinte au droit de séjour du conjoint du citoyen sur le territoire de l'Union encourt la critique sur un autre fondement, il s'ensuit que l'essentiel de ces droits n'est pas en cause et que dès lors la protection de la Cour de justice ne peut être revendiquée. Il demeure que la formulation laissant aux juges nationaux le soin de déterminer eux-mêmes la protection applicable, quand bien même serait-elle *in fine* équivalente ce qu'il est difficile de prédire avec certitude à l'avance, ouvre des perspectives d'éclatement du champ de protection.

Si aucune de ces pistes ne semble pleinement satisfaisante, il faudra bien trancher en faveur de l'unité ou de la dualité, voire de la pluralité, des champs de protection selon le fondement invoqué[65]. La question que l'on est en droit de se poser est celle de savoir pourquoi la Cour de justice s'évertue à étendre le champ de son contrôle des droits fondamentaux au risque de la résistance et de l'incohérence. La réponse requiert de se pencher sur le discours qui justifie le passage d'une cour pas assez protectrice à une cour trop protectrice des droits. Seule une justification

[64] Case C-256/11 *Dereci* [2011] (n 33), para72.

[65] La Cour a été saisie d'une demande préjudicielle en ce sens dans l'affaire C-40/11, *Ilidia* par laquelle, la juridiction allemande de renvoi a notamment posé la question suivante : « Les droits fondamentaux "non écrits" de l'Union européenne, tels qu'élaborés dans la jurisprudence de la Cour depuis l'arrêt du 12 novembre 1969 Stauder (29/69, Rec. p. 419, point 7) jusqu'à, par exemple, l'arrêt du 22 novembre 2005 Mangold (C-144/04, Rec. p. I-9981, point 75), peuvent-ils s'appliquer dans leur intégralité, même si la Charte des droits fondamentaux de l'Union européenne n'a pas vocation à s'appliquer en l'espèce; en d'autres termes, les droits fondamentaux qui conservent leur validité en tant que principes généraux du droit de l'Union aux termes de l'article 6, paragraphe 3, TUE existent-ils de manière autonome et indépendante à côté des nouveaux droits fondamentaux de la Charte reconnus au paragraphe 1 dudit article ? ». Toutefois, elle n'y pas véritablement répondu.

d'ensemble est susceptible de mener à une redéfinition du champ de la protection offerte par le droit de l'Union.

IV. LA JUSTIFICATION DU CHAMP DE LA PROTECTION

La délimitation du champ de la protection des droits fondamentaux découle en définitive d'une conception de la nature et de la portée de l'intégration européenne. Essentiellement mouvante, elle fait pour le moment défaut. Le discours de justification s'en ressent. L'explication généralement avancée pour justifier l'extension du champ de la protection des droits fondamentaux par la Cour consiste à mettre en avant un argument d'efficacité insistant comme souvent sur l'effet utile des normes européennes (4.1). On peut lui préférer une analyse centrée sur un argument d'équité lié à la volonté de compenser les désavantages nés de la spécificité de certaines situations qu'engendre le caractère partiel de l'intégration (4.2). Cette proposition de justification du champ d'application de la protection des droits fondamentaux permet de mieux rendre compte de l'entreprise jurisprudentielle de constitution d'un corps social européen qui se joue derrière la question du champ de la protection des droits fondamentaux.

1. *L'Argument de l'Efficacité: La Justification Utilitariste*

La doctrine et certains membres de la Cour tentent de justifier les avancées du champ de la protection des droits fondamentaux par un argument d'efficacité ou d'« effet utile » du droit de l'Union, décliné parfois en termes d'uniformité et de primauté. Ce discours dominant n'est pas pleinement convaincant.

a. Effet Utile

En dehors de l'hypothèse *Wachauf* qui ne soulève pas de protestations des juges et droits nationaux sous l'angle de la répartition des compétences, les autres hypothèses de protection susceptibles d'y porter atteinte ont toutes été soutenues par un triple argument d'efficacité/uniformité/primauté.

Ainsi, l'hypothèse *ERT* de protection des droits fondamentaux dans les situations de dérogation aux libertés de circulation se justifierait par l'achèvement du marché intérieur qui se trouverait compromis « si chaque Etat membre pouvait déterminer, en se référant à ses propres lois et valeurs – sans aucune référence au droit communautaire – ce qui est ou

n'est pas visé par l'interdiction et la dérogation à cette interdiction »[66]. L'idée est que la dérogation aux libertés de circulation devrait se faire uniformément au regard des droits fondamentaux afin d'éviter des disparités entre Etats qui, par nature, sont autant d'obstacles potentiels à la création d'un espace de mobilité[67]. On peut demeurer sceptique à l'égard ce raisonnement en termes d'effet utile et d'uniformité : dès lors que le contrôle de la dérogation à la liberté de circulation en elle-même est bien centralisé par la Cour, quel besoin y a-t-il du point de vue de l'efficacité de la liberté de circulation de garantir *de surcroît* le respect des droits fondamentaux ? Il est en effet parfaitement envisageable que les Etats protègent différemment les droits fondamentaux à partir du moment où le respect de la liberté de circulation est bien assuré. La justification semble ainsi assez faible[68].

Dans l'hypothèse *Mangold/Kücükdeveci*, la justification généralement avancée pour étendre le contrôle du droit national aux situations horizontales tient à la préservation du *«plein effet»*[69] du principe de non-discrimination en raison de l'âge dont une directive, pourtant formellement non-invocable, précise la portée. Pour certains, l'exigence de primauté justifierait ainsi que le contrôle du respect des droits fondamentaux l'emporte sur la prise en compte de la spécificité de la directive, et donc du respect des compétences[70]. Là encore, il est possible de douter de la cohérence d'ensemble du raisonnement, notamment si l'on se place du point de vue de l'invocabilité des directives. En effet, si l'efficacité et la primauté sont les arguments qui justifient l'invocabilité du droit fondamental précisé par la directive, il faudrait en ce cas lui reconnaître une justiciabilité maximale de substitution et non se contenter d'en reconnaître l'invocabilité d'exclusion[71].

Enfin, dans l'hypothèse *Zambrano*, l'appel à l'efficacité et à l'uniformité est au cœur des conclusions de l'Avocat général E Sharpston dont on connaît l'hostilité à l'égard des situations « purement internes » et des

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[66] Joseph Weiler and Sybilla Fries, 'Une Politique des Droits de l'Homme pour la Communauté et l'Union Européenne : La Question des Compétences', *in* Alston (n 11) 164.

[67] Koen Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *ELR* 590.

[68] Zdenek Kühn, '*Wachauf* and *ERT*: On the Road from Centralised to the Decentralised System of Judicial Review', in Azoulai and Maduro (n 5) 157.

[69] Case C-555/07 *Kückükdeveci* [2011] (n 21), para 53

[70] Koen Lenaerts et T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 ELR 290-291.

[71] Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349-377.

« discriminations à rebours » qu'elles engendrent[72]. La Cour confirme cette justification en soulignant le nécessaire *«effet utile»* du statut de citoyen en situation interne[73]. Pourtant, les questions ne manquent pas de surgir face à cette nouvelle extension du contrôle, notamment celle de savoir à l'aune de quel(s) critère(s) s'effectue le rattachement de la situation. Il semblerait qu'un certain degré de violation soit requis afin de priver le citoyen de « l'essentiel » des droits qu'il tire de son statut. L'idée là encore serait de garantir une sorte d'effet utile minimal du statut de citoyen. Ce raisonnement est néanmoins problématique : il aboutit à faire dépendre le lien rattachement nécessaire au déclenchement du contrôle de la Cour de justice du résultat de ce même contrôle. Autrement dit pour savoir si la Cour de justice peut se prononcer, il faut déjà savoir s'il y a atteinte aux droits. Bel exemple d'illogisme consistant à faire dépendre la possibilité du contrôle du résultat de celui-ci... Tel est finalement le défaut majeur de l'argument d'efficacité.

b. Circularité

L'argument du triptyque efficacité/uniformité/primauté pour justifier l'extension du champ de la protection des droits fondamentaux souffre de circularité. Il n'a en réalité qu'une faible vertu explicative de l'état actuel du droit positif.

Tout d'abord, il est logiquement déroutant de soutenir que la recherche d'efficacité justifie une extension du champ d'application. Raisonner de la sorte revient à ignorer la distinction de l'applicabilité et de l'application d'une norme. En effet, la question de l'applicabilité concerne la validité matérielle de la norme, son « secteur de vie » en tant que norme. En revanche, la question de l'efficacité est essentiellement relative à son application, c'est-à-dire aux effets qu'elle produit au sein de son secteur de validité matérielle. L'inclusion dans le champ d'application d'une norme doit être envisagée comme une *condition* même du recours à l'argument de recherche d'efficacité de cette norme et non comme une conséquence de celui-ci. C'est pourquoi, une norme doit être efficace parce qu'elle s'applique, et non qu'elle doit s'appliquer pour être efficace. L'exigence d'efficacité ne peut être invoquée qu'une fois le champ d'application de la protection connu et non pour en justifier l'élargissement.

Ensuite et à l'inverse, si la recherche d'efficacité devait être la justification à l'extension du champ d'application de la protection, elle imposerait d'aboutir en dernière analyse à sa pleine généralisation. Pourquoi, si l'efficacité est à la base de l'extension du contrôle, ne pas étendre la

[72] Para 125 et s. des conclusions du 30 septembre 2010 (C-34/09).
[73] Case C-256/11 *Dereci* [2011] (n 33), para 67.

protection à l'ensemble des droits fondamentaux du citoyen et se limiter à ceux qui forment l'« essentiel » de son statut ? Pourquoi, également, limiter la protection horizontale aux hypothèses de combinaison d'une directive et d'un principe général du droit ? La radicalité de l'argument d'efficacité est telle qu'il ne peut *in fine* mener qu'à une extension totale. Or, on l'a vu, tel n'est pas le cas actuellement en droit positif, et il est peu probable que la Cour de justice ose franchir ce cap dans un avenir proche. Il est certes possible de dire que l'argument d'efficacité s'oppose alors à d'autres arguments, comme celui de la limitation des compétences de l'Union et du consentement démocratique à être lié par des normes externes, mais en ce cas il n'est plus le seul discours permettant de conférer une cohérence d'ensemble à la construction jurisprudentielle qui continue d'être habitée par une tension profonde, irrésolue et source d'incertitude. Il devient nécessaire de le concilier avec d'autres arguments, et il ne saurait dès lors être présenté comme la clé explicative du phénomène d'extension.

Si l'argument d'efficacité/uniformité/primauté ne suffit pas à expliquer l'état actuel du droit positif, il faut tenter de se tourner vers un autre discours de justification de l'extension du champ de la protection des droits fondamentaux à l'égard des mesures nationales. On peut préférer à l'argument d'efficacité, un argument d'équité.

2. *L'Argument de l'Équité: La Justification Compensatrice*

L'argument d'équité consiste à soutenir qu'en étendant le champ de son contrôle du respect des droits fondamentaux, la Cour de justice propose un cadre de justification couvrant la spécificité des situations frontalières à l'existence même du droit de l'Union. Elle cherche ainsi à compenser les désavantages découlant du caractère partiel de l'intégration, et à légitimer cette particularité.

a. « Résidualité »

Un point commun existe aux situations dans lesquelles la Cour étend son contrôle au-delà de la seule mise en œuvre nationale du droit de l'Union. Il s'agit de situations limitrophes, qui sortent de peu des frontières de la capacité d'action et de regard de l'Union européenne. En empruntant la terminologie de l'Avocat général Maduro il est possible de les nommer comme des situations *«résiduaires»* du droit de l'Union[74], dans la mesure où elles n'ont de sens et d'existence qu'en lien avec lui. Ces situations sont celles dans lesquelles le requérant se trouve *in extremis* privé du bénéfice du droit de l'Union, ce qui entraîne quelque part une forme de désavantage. Ainsi, la dérogation aux libertés de circulation limitant la mobilité, une fois

[74] Conclusions du 6 mai 2004 dans l'affaire *Carbonati Apuani* (Case C-72/03) para 58.

considérée compatible avec elle, aboutit à isoler la situation de celui qui se trouve privé de son bénéfice par une dérogation autorisée. Le fait que le droit de l'Union tolère cette dérogation singularise celui qui en est l'objet par rapport à celui qui a pu tirer pleinement profit du droit de circuler librement. De même, l'exclusion des situations horizontales du contrôle de la conformité du droit national à une directive isole le requérant confronté à un litige purement privé plutôt qu'à un litige administratif dans lequel il aurait obtenu gain de cause. Enfin, la situation du citoyen statique contraste avec celle du citoyen mobile qui a eu la chance ou la prévoyance de franchir une frontière intracommunautaire.

La singularité de ces situations et les désavantages qui en résultent ne peuvent se comprendre que du fait même du caractère partiel de l'intégration européenne. En octroyant de nouveaux droits à ceux qui relèvent de sa sphère d'influence, l'Union crée également des situations d'exclusion du fait de la limitation de son action. Partant l'idée peut germer que ce désavantage des situations limitrophes doit être justifié au regard des normes fondamentales du système juridique qui l'engendre leur dénuement. Elle prend la forme du contrôle du respect des valeurs essentielles qui fondent le système lui-même et assurent sa légitimité : les droits fondamentaux. Empruntant cette perspective, c'est précisément parce que le droit de l'Union n'a qu'un champ d'action limité que se justifie l'extension de la protection de ses valeurs fondamentales aux situations limitrophes nées de sa coexistence avec la sphère de compétence libre des Etats. Ces situations n'ayant d'existence qu'en raison de la présence du droit de l'Union dont elles subissent l'incomplétude, elles doivent pouvoir bénéficier du cadre de légitimation de l'exercice du pouvoir national propre au droit européen afin d'en compenser ainsi les éventuels inconvénients.

b. Légitimité

La spécificité des droits fondamentaux tient probablement à leur capacité d'injecter du juste dans le droit, de réunir le légitime et le légal. Elle explique pour partie leur importance grandissante dans les systèmes juridiques contemporains qui passent progressivement d'une conception procédurale à une conception substantielle de la légitimité. L'idée qui faut éprouver serait que la diffusion au sein des droits nationaux de son propre standard de protection des droits fondamentaux par la Cour de justice permet de légitimer la présence du droit de l'Union, y compris dans les cas où il n'est pas directement en cause mais lorsque la situation nationale est comme *déformée par sa présence*. L'argument d'équité et de compensation consistant à protéger les intérêts essentiels des membres de la société européenne face aux désavantages qu'ils subissent en raison du caractère

partiel de l'intégration pourrait ainsi constituer la justification du contrôle juridictionnel du respect des droits fondamentaux au-delà des compétences de l'Union.

De cette façon, la Cour de justice se met en position d'inclure dans la société européenne les personnes qui se trouvent pourtant en principe exclues de sa sphère de compétence et qui subissent une distorsion de la protection des droits fondamentaux du fait de cette exclusion. On peut y voir un moyen de donner corps à la société européenne *globale* malgré le caractère partiel de l'intégration européenne par un effort de compensation des inconvénients qui en découlent. Sur cette base pourrait naître une véritable théorie plus rationnelle de la protection des droits fondamentaux par la Cour de justice. Elle ne le sera jamais pleinement, le recul de la frontière du contrôle en créant une nouvelle, et repoussant d'autant le problème de la limite ultime du champ contrôle. Reste que cette proposition permet de donner sens à la protection et à son éventuelle extension.

V. CONCLUSION

Pour conclure, demeurera un autre défi à relever afin solidifier le contrôle des droits fondamentaux par la Cour de justice et de l'assoir sur une base rigoureuse. Ce défi n'est plus celui de la délimitation du champ de protection mais celui de la fixation d'un degré de protection. Une des questions posées à la cour de justice est de savoir si au sein du champ de protection dont elle est la gardienne, une pluralité de niveaux de protection est envisageable au profit de standards éventuellement plus favorables au sien[75]. A quoi bon, en effet, étendre le champ de la protection si le degré de protection y est inférieur à celui proposé par les droits et juges nationaux, sous le contrôle de la Cour de Strasbourg ? L'écueil à éviter est celui d'une dérive « droits de l'hommiste », l'Union n'apparaissant visible dans son champ de protection qu'au prix d'une surenchère dans le standard de protection, qui sera vécue comme d'autant plus intrusive par les ordres nationaux. En cas de résistance sur un conflit de valeur, la protection des droits fondamentaux censée augmenter la légitimité de l'Union européenne aurait le résultat opposé à celui initialement souhaité. La solution passe probablement par l'invention d'une méthode de contrôle fondée sur la reconnaissance mutuelle des standards dans laquelle la Cour de justice plutôt que de prétendre imposer une interprétation unique pourrait servir de cadre de dialogue et de réflexivité aux standards nationaux de protection.

[75] Voy. sur cette question Case C-399/11 *Melloni* (ECJ, 26 février 2013).

DE MINIMIS RULE WITHIN THE EU INTERNAL MARKET FREEDOMS: TOWARDS A MORE MATURE AND LEGITIMATE MARKET?

Janja Hojnik*

Deriving from the former internal market Commissioner McCreevy's statement that the internal market needs to become more decentralised, the article explores to what degree the de minimis rule applies or should apply to the internal market, discussing in the process the advantages and disadvantages of the transfer of this rule from the field of competition to the internal market law. Although there are some conceptual as well as practical problems related to the application of the de minimis rule to fundamental freedoms, the author concludes that in the field of the internal market law the de minimis rule increases the autonomy of national authorities thereby strengthening democratic decision-making in the EU which is conceived as a multi-level governance system. Through this rule the Member States preserve their competence in the domain of market law with respect to rules which do not formally discriminate between domestic and foreign goods, people and services, the aim of which is not to regulate trade between Member States and whose restrictive effects on the internal market are too uncertain and too indirect for the measure to present a breach of the TFEU.

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I. INTRODUCTION

Over fifty years after the goal of a common market was determined in the Rome Treaty and twenty years after the deadline for its completion, as established in the Single European Act, the European Union (hereinafter EU) is discussing the future of its internal market, which is seen as the main economic leverage of the EU. With respect to the future development of the internal market the former internal market Commissioner McCreevy made an interesting statement in his speech in Sophia in 2007 by saying that 'we need to accept that the nature of the game has changed. [...] The Single Market must become more decentralised [...]. We need to improve the ownership in the Member States. And we must strengthen cooperation between the national and EU level'.[1] On the other hand, the Commission found in the Single Market Act, adopted in 2011, that the growth potential of the internal market has not been fully exploited yet.[2] On the basis of the latter, as well as on the basis of other recent internal market documents, it may be concluded that the aim of the Commission is no longer to adopt a great deal of new market legislation, but to assure a more legitimate and effective internal market, where the Member States will play a (an important) part in the creation of market regulation and will furthermore enforce it in cases of

[1] Charlie McCreevy, 'The Future of the Single Market', (Sofia University, 14 May 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/308&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 16 June 2013.

[2] 'Twelve Projects for the 2012 Single Market: Together for New Growth' Press Release, IP/10/1390.

restrictions.[3]

The main objective of the article is to examine how the *de minimis* rule might contribute to both abovementioned goals of the future regulation of the EU internal market – ie legitimacy and effectiveness. According to the *de minimis* rule, should it be recognised in the field of the internal market, only measures (of the Member States and private entities) which significantly hinder the functioning of the internal market would be prohibited, while measure that do not would stay within the bounds of national autonomy. Despite such advantages of the *de minimis* rule, its application in the field of the internal market is all but simple.

The article compares the internal market provisions, where the *de minimis* rule is quasi absent, with some other EU legal fields, where the *de minimis* rule is applied. In this respect the article explores the general characteristics and functions of the *de minimis* rule, its current application in the field of EU competition law and public procurement and also discusses the application of this rule to the field of internal market freedoms. It points out internal market judgments in which the application of the *de minimis* rule was rejected, as well as a growing number of the EU Court's decisions ruling quite the opposite. On the basis of theoretical commentaries on this rule the article discusses the advantages and disadvantages of the potential application of this rule to the field of the internal market.

II. PROCEDURAL AND SUBSTANTIVE *DE MINIMIS* RULE ACROSS LEGAL DISCIPLINES

The *de minimis* rule derives from Roman law and has two meanings: a procedural and a substantive one. The procedural aspect is derived from the *'de minimis non curat praetor'* principle, in accordance with which the praetor does not concern himself with trifles. Consequently, court proceedings do not deliberate about unimportant or petty matters. In such cases the court dismisses the claim or decides in a simplified proceeding intended for the so-called 'bagatelle' disputes.[4] In this sense the *de minimis* rule is recognised world-wide. The European Court for Human Rights

[3] See eg Commission staff working document; accompanying document to the Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, impact assessment, SEC(2007)112.

[4] Janez Kranjc, Latinski Pravni Reki (GV Založba, Ljubljana 2006) 66. Kranjc also refers to a less known version of the rule: *Minima non curat praetor*.

(ECtHR), for example, held in 2010 in *Korolev v Russia*[5], where the applicant complained about the failure of Russian authorities to pay him the 22.50 roubles (0.56 EUR), that applications are inadmissible where 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'. Similarly, in *Bock v Germany*[6], the applicant, a civil servant with a monthly salary of 4,500 EUR, asked to be reimbursed for a part of the costs, namely 7.99 EUR, which he paid for magnesium tablets prescribed by his physician. Due to the length of the proceedings, the case reached the ECtHR, which evoked the *de minimis rule* by claiming: 'The Court shall declare inadmissible any individual application (...) which it considers (...) an abuse of the right of application.' The *de minimis* rule enables the Court to dispose more rapidly of unmeritorious cases and to focus on its key role of providing legal protection of human rights at the European level.[7] In a similar sense this rule is also recognised in the courts of common law, where it is known through the maxim 'the law does not concern itself with trifles'.[8] In this respect the rule was used by the English Judge Lord Stowell already in 1818 in the *Reward* case[9], where he held:

> The law permits the qualification implied in the ancient maxim De minimis non curat lex. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

Similar interpretations of the rule can be found in the case law of the US courts.[10]

On the other hand, the substantive meaning of the rule appears from the maxim *'de minimis non curat lex'*, ie the law does not concern itself with

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[5] *Korolev v Russia*, App no 5447/03 (ECHR, 01 April 2010).
[6] *Bock v Germany*, App no 22051/07 (ECHR,16 February 2010).
[7] *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention, CETS No. 194, <http://conventions.coe.int/Treaty/en/Reports/Html/194.htm> accessed 16 June 2013. See also* Adrian Mihai Ionescu v Romania*, App no 36659/04 (ECHR, 01 June 2010).*
[8] Translation from *French: 'Les Magistrats ne doivent pas s'attacher à des vétilles'.*
[9] *The "Reward"* (1818) 2 Dods 265, 165 ER 1482.
[10] See eg *The People of the State of Illinois v Daniel Durham*, No. 4-08-0448, 25.6.2009 (Steigmann J).

trifles.[11] Consequently, only matters of wider community relevance are of concern of the law, while issues which are irrelevant from the aspect of a community as a whole, are usually not considered by the legislator. This assures the consistency of the legal system, as intervention into irrelevant details could disturb the balance within the legal system and diminish legal certainty.[12] In this sense the *de minimis* rule is particularly widespread in criminal law, where certain *de minimis* conducts satisfying the definition of an offense are nonetheless declared noncriminal, because they "really" do not violate the legal virtue protected by the law (eg tipping the mailman is not considered bribery, playing penny poker is not considered gambling, etc).[13] The *de minimis* rule is further relevant in the field of risk regulation where it is assumed that risks that are highly unlikely to be realised (eg where the probability is one in a million) do not need to be regulated.[14] The *de minimis* rule can also be found in copyright law, where it applies to a violation so trivial that the law will impose no consequence to it because its effect on the copyright owner is so insignificant as to be deemed meaningless. In the copyright context, *de minimis* can also be applied to the use of a work which does not involve a high enough level of copying to constitute substantial similarity - a required element of actionable copying.[15]

In the following chapters the article focuses on the *de minimis* rule in the substantive sense – ie not as an admissibility requirement for judicial review, but as guidance to determine the most optimal content of the EU substantive law.

III. THE *DE MINIMIS* RULE UNDER EU SUBSTANTIVE LAW

1. *De Minimis Agreements between Undertakings*

In the field of EU competition law the *de minimis* rule requires that agreements between undertakings must have a *considerably* restrictive effect upon free competition in order to be caught by Article 101 TFEU

[11] Max L Veech and Charles R Moon, 'De Minimis Non Curat Lex', (1947) 45 Michigan L Rev 537.
[12] Kranjc (n 5) 66.
[13] Indian Penal Code 1860, sec 95 for example provides: 'Nothing is an offence by reason that is causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.'
[14] Matthew D Adler, 'Why De Minimis?' University of Pennsylvania Law School, Public Law Research Paper No. 07-26, 2007 <http://ssrn.com/abstract=992878> accessed 16 June 2013.
[15] James B Astrachan, 'De Minimus Copyright Infringement' *The Daily Record* (Baltimore MD, 2008) <http://ssrn.com/abstract=1625037> accessed 16 June 2013

(ex 81 EC), which prohibits agreements between undertakings; an agreement that has a negligible effect on competition is not caught by the prohibition of restricting competition and is as such acceptable. When considering the illegality of agreements between undertakings, prohibited under Article 101 TFEU, the intensity of competition restrictive effect is thus of vital importance. As long as agreements, decisions of associations and concerted practices do not affect trade between EU Member States, they are not prohibited by Article 101(1) TFEU as the effect upon interstate trade is one of the conditions for its application. Such agreements fall under national law. Furthermore, Article 101(1) TFEU does not foresee legal consequences for agreements that affect interstate trade and competition but have only a marginal effect.[16] The *de minimis* rule applies to all agreements that restrict competition on the internal market; however, it is assumed that they do not breach competition law as they only have a minimal effect on competition and interstate trade.[17]

The effects of a particular agreement on competition and interstate trade are determined using economic analysis. The Court, however, refuses to apply purely a quantitative approach. Hence, for this rule to apply, a very detailed analysis of the market is needed, determining the potential market fragmentation, the competitors' market shares as well as the general annual income of the company concerned.[18] Despite meeting the general criteria for the application of the *de minimis* rule, Article 101(1) TFEU nevertheless applies to agreements between competitors, which have as their object price fixing, limiting output or sales or the allocation of markets or customers, as well as to agreements between non-competitors, which determine sale prices or restrict the territory where the buyer may sell the contracted goods or services. With regard to agreements, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the abovementioned hard-core restrictions are prohibited.[19] According to Monti, this almost completely diminishes the importance of the *de*

[16] Richard Wish, *Competition Law* (OUP 2009) 137-142.

[17] Marjana Coronna, 'Konkurenčno pravo EU in Mala in Srednja Podjetja' (2002) 5 Podjetje in Delo 767. When considering minimal effect one must take into consideration the Commission's Notice on agreements of minor importance - The Commission has issued several such notices, the most recent of which appeared in 2001 – Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community *(de minimis)*, OJ 2001/C 368/07.

[18] See Martina Repas, Ekonomski Pristop Določanja Upoštevnega Trga v Konkurenčnem Pravu EU (2010) II(1) LeXonomica 35-65. See Case 30/78 *Distillers Co. Ltd v Commission* [1980] ECR 2229, para 28 and Case 100/80 *Musique Diffusion Francaise v Commission* [1983] ECR 1825.

[19] Notice (n 17) point 11(3).

minimis rule.[20] On the other hand, Jones and Sufrin find that the exclusion of agreements containing hard-core restraints from the ambit of the notice does not mean that these agreements may never fall outside the scope of Article 101(1) TFEU on grounds that they do not appreciably restrict competition. Rather, this could reflect the view that where an agreement contains particularly serious restrictions of competition from an EU perspective, it will not be considered to be of minor importance unless the parties' market shares are considerably lower than set in the notice. Jones and Sufrin thus conclude that 'the more serious the restrain the less likely it is to be insignificant' and that it seems unlikely that the Commission would allocate resources to cases in which market shares were small.[21] Accordingly, the *de minimis* doctrine is particularly relevant for small and medium sized enterprises (SMEs). Agreements between them will rarely have a negative effect on interstate trade in the EU and will thus fall under the *de minimis* rule.[22] This enables the SMEs to avoid provisions of competition law and the dangers of having an unenforceable agreement, thereby saving money with regard to administrative costs and having a better starting position when competing with giant agglomerations, holdings and trusts.[23]

2. *De Minimis State Aids*

The second area of EU competition law, which recognises the *de minimis* rule, concerns state aids. In 2001 the Commission adopted a Regulation on *de minimis* state aids whose purpose was to explain the application of the rule to state aids.[24] Prior to the adoption of this Regulation it was, however, unclear whether the rule applied to state aids or not, taking into consideration that Article 107(1) TFEU *(ex 87 EC)* does not contain direct grounds for the *de minimis* rule and that the European Court of Justice was not very fond of it. Although the Court in 1970 in *Commission v France*[25] implied that the amount of the aid is relevant and as a matter of principle agreed that insignificant aids do not fall within the scope of Article 107(1)

[20] Giorgio Monti, 'New Directions in EC Competition Policy' in T Tridimas and others (eds), *European Union Law for the Twenty-first Century: Internal Market and Free Movement Community Policies*, *Vol II - Rethinking the New Legal Order. Essays in European Law* (Hart 2004) 187.
[21] Alison Jones and Brenda Sufrin, *EU Competition Law* (OUP 2011) 171-172; also referring to Jonathan Faull and Ali Nikpay (eds) *The EC Law of Competition* (OUP 2007) para 3.164.
[22] Notice, (n 17) point 3.
[23] Coronna (n 17) 769.
[24] Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid [2001] OJ L10/30-32.
[25] Case 47/69, [1970] ECR 487.

TFEU, in 1987 in *France v Commission*[26], the Court decided that circumstances in which the aid was awarded are of greater significance than its scale.[27] Ferčič emphasises that in this context particular importance is given to performance surpluses and to a high level of market competition, which demand high cost effectiveness and produce low profits.[28]

On the other hand, the Commission has recognised the *de minimis* rule in the field of state aids already in 1992, providing that certain criteria have been met. This recognition was legally disputable causing constant dilemmas, which eventually led to the adoption of a *de minimis* state aid Regulation in 2001,[29] which was later repealed by the Regulation 1998/2006 (*De Minimis Regulation*).[30] The Regulation provides the criteria for a *de minimis* aid, its legal consequences and control mechanisms. The *de minimis* rule determines the amount of the state aid, below which Article 107(1) TFEU does not apply, as well as the respective public measures which need not to be notified to the Commission. The rule is based on the assumption that small amounts of aid generally do not affect market competition and trade between two or more Member States.[31]

3. *De Minimis Public Purchasing*

The third field of EU law applying the *de minimis* rule concerns public purchasing. In order to apply EU rules to public purchasing, the 'European dimension' condition must be met, which depends upon the value of public purchasing.[32] Purchasing that does not meet the values (thresholds) is called *'sub-dimensional public purchasing'*. In this respect the *de minimis* principle, as defined in Regulation 1177/2009,[33] allows authorities to avoid

[26] Case 259/85, [1987] ECR 4393.
[27] Conor Quigley, *European State Aid Law and Policy* (Hart Publishing 2009) 60-61.
[28] Aleš Ferčič, *Državne Pomoči Podjetje, Teorija, Praksa in Predpisi (*Uradni list RS 2011) 67.
[29] Regulation on the application of Articles 87 and 88 of the EC Treaty.
[30] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid [2006] OJ L379 p 5-10.
[31] Ferčič (n 28) 68-69. See also Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [2012]OJ L114/ 8-13.
[32] The thresholds are dependent upon the subject-matter of public purchasing and range between 125.000 (for public sector supply and service contracts) and 4,845.000 EUR (for public works concession contracts).
[33] Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and

an expensive and lengthy tendering and award procedure for low-value contracts where the costs of the procedure would exceed the public welfare benefits of increased transparency and competition associated with the procedure. On the other hand, it is understandable that the *de minimis* principle also provides an incentive for authorities to divide contracts into separate lots for the purpose of avoiding bothersome procedures. Although this is prohibited by the Directive 2004/18/EC,[34] such avoidance of procurement law is difficult to detect and enforce and it is thought to be the main reason behind the low percentage of public contracts published in the EU Official Journal.[35]

IV. DE MINIMIS RULE IN THE FIELD OF THE INTERNAL MARKET FREEDOMS

In contrast to the competition law and public purchasing, the European Court of Justice has, ever since *Van de Haar*,[36] refused to apply the *de minimis* rule in the field of the EU internal market.[37] In *Corsica Ferries* the Court even made a general statement claiming that 'the articles of the (...) Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.'[38] However, the Court's case law of the past twenty years regarding the topic of minor restrictions to trade has not been consistent. The following chapters analyse the case-law of the Court in which it has not expressly accepted the *de minimis* rule in the field of the four freedoms, but how it has nevertheless given signs suggesting that the *de minimis* rule is gaining ground in the field of the internal market

1. *Free Movement of Goods*

Free movement of goods is founded on the removal of charges having equivalent effect to customs as well as on prohibition of measures having equivalent effect to quantitative restrictions. Both concepts have been interpreted by the Court as incompatible with the *de minimis* rule. Charges,

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of the Council in respect of their application thresholds for the procedures for the award of contracts [2009] OJ L314/64-65.

[34] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114-240.

[35] Christopher Bovis, *EU Public Procurement Law* (Edward Elgar Publishing 2012) 71-72.

[36] Joined Cases 177 and 178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797.

[37] See eg Case 269/83 *Commission v France* [1985] ECR 837.

[38] Case C-49/89 *Corsica Ferries France v Direction Générale des Douanes*, [1989] ECR I-4441, para 8.

prohibited by Article 30 TFEU *(ex 25 EC)*, have been defined as 'any pecuniary charge, however small and whatever designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier'.[39] The Court consequently prohibited an Italian statistical levy on goods exported to the other Member States and explained that 'the very low rate of the charge cannot change its character with regard to (...) the legality of those charges'. Similarly broad is the Court's definition of measures having equivalent effect to quantitative restrictions prohibited by Article 34 TFEU (ex 28 EC). In *Dassonville* the Court explained that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'[40] Considering the broad scope of the *Dassonville* formula there was no room for the recognition of the *de minimis* rule in the context of Article 34 TFEU.[41] This was expressly held in *Van de Haar,*[42] where the Court clarified this refusal with the following terms:

> Article (34 TFEU), which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of Article (101), which seeks to maintain effective competition between undertakings. A Court called upon to consider whether national legislation is compatible with article (34) of the Treaty must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.[43]

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[39] Case 24/68 *Commission v Italy* [1969] ECR 193, para 7.

[40] Case 8/74 *Procureur du Roi v Dassonville*, [1974] ECR 837, para 5. Reference to direct and indirect, actual or potential hindrance to the trade between the Member States the Court 'borrowed' from its first ruling in the competition law field – Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429, para 6. In this respect Steiner points out that the 'effect upon intra-Community trade' criteria could serve as a limitation of the scope of Article 34 TFEU – J Steiner 'Drawing the Line: Uses and Abuses of Article 30 EEC' (1992) 26 CMLR 749.

[41] For most recent case law, in which the Court still refers to the *Dassonville* formula, see eg Case C-420/01, *Commission v Italy* [2003] ECR I-6445, para 25; Case C-192/01, *Commission v Denmark* [2003] ECR I-9693, para 39; Case C-41/02, *Commission v Netherlands* [2004] ECR I-11375, para 39, and Case C-147/04 *De Groot en Slot Allium et Bejo Zaden* [2006] ECR I-245, para 71.

[42] *Jan van de Haar* (n 36). See also *Commission v France* (n 37).

[43] *Jan van de Haar* (n 36), para 14.

The question of applicability of the *de minimis* rule has further been raised in *Bluhme.*[44] The defendant breached the Danish rules prohibiting the import of bees to a small island of Læso and some of its neighbouring islands, the aim of which was to protect the Læso brown bee on the islands. One of the arguments of the Danish government was that the measure was not caught by Article 34 TFEU as it was of a *de minimis* nature, considering that it only concerned 0,3 per cent of the Danish territory. The Court rejected the argument.[45] Similarly, in *Yves Rocher* the Court again affirmed that with the exception of rules having a purely hypothetical effect on intra-Community trade, Article 34 TFEU does not draw any distinction, with regard to the degree of effect on trade, between measures which can be classified as measures having equivalent effect to a quantitative restriction.[46]

This position has, however, been refused by Advocate General Jacobs in his well-known opinion in the case *Leclerc-Siplec,*[47] where he presented his critical standpoint towards the *Keck and Mithouard*[48] judgment, where the Court re-affirmed the discrimination principle. In this respect Jacobs claimed that 'all undertakings should have unfettered access to the whole of the Community market', and concluded that in order to prove a breach of Article 34 TFEU a 'substantial restriction on that access' should be the relevant factor, even though this amounts to the introduction of the *de*

[44] Case C-67/97 *Criminal Proceeding against Ditlev Bluhme* [1998] ECR I-8033.

[45] See also Joined Cases C-277, 318 and 319/91 *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale* [1993] ECR I-6621, concerning a prohibition of the municipality of Genova in accordance with which traders importing fresh meat into the municipality were banned from using their own means of transport to deliver their goods within the territory of the municipality, unless they paid a local undertaking the amount corresponding to the services which that undertaking provided under an exclusive concession for handling in the municipal slaughterhouse, transporting and delivering the goods in question. Although the rule was limited to one municipality, it was found to breach Article 34 TFEU. Similarly, the Court refused to apply the *de minimis* rule also in Case 16/83 *Prantl* [1984] ECR 1299; *Commission v France* (n 37); and in Case 103/84 *Commission v Italy* [1986] ECR 1759.

[46] Case 126/91 *Schutzverband gegen Unwesen in der Wirtschaft e. V v Yves Rocher* [1993] ECR I-2361, para 21. See also Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, Opinion of AG Tesauro.

[47] Case C-412/93 *Edouard Leclerc-Siplec v TF1 Publicité* [1995] ECR I-179, Opinion of AG Jacobs paras 195 and 196. See also his opinion in case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659, para 65, where he stated: 'It would seem for example out of the question that a brief delay to traffic on a road occasionally used for intra-Community transport could in any way fall within the scope of Article (34). A longer interruption on a major transit route may none the less call for a different assessment.'

[48] Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

minimis rule into Article 34 TFEU.[49] Albeit Jacobs was aware that the Court refused to apply the *de minimis* rule in its previous free movement of goods case law, he insisted that 'restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty'.[50] In this respect Jacobs was surprised by the fact that 'in view of the avowed aim of preventing excessive recourse to Article (34), the Court did not opt for such a solution in *Keck*.' While applying the *de minimis* rule to restrictions on advertising, which were at stake in *Leclerc-Siplec*, Jacobs suggested that 'a total ban on the advertising of a product which may lawfully be sold in the Member State where the ban is imposed and in other Member States cannot lie outside the scope of Article (34).'[51] Even though Jacobs applied the *de minimis* test the French measure was nevertheless found to breach free movement of goods.[52] The Court, however, rejected his proposal altogether. On the basis of this case law it may be concluded that a state measure can constitute a prohibited measure having an equivalent effect even if: a) it is of relatively minor economic significance; b) it is only applicable to a very limited geographical part of a national territory; and c) it only affects a limited number of imports/exports or a limited number of economic operators.[53]

Nevertheless, certain national rules have been found to fall outside the scope of Article 34 TFEU if their restrictive effect on trade between Member States is too uncertain and too indirect. In this respect the Court held in *Burmanjer*[54] that the national rules at issue, which made the itinerant sale of subscriptions to periodicals subject to prior authorisation, had an effect on the marketing of products from other Member States that was too insignificant and too uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States. That the restrictive effects on the free movement of goods are 'too uncertain and too indirect to be considered to be an obstacle to trade between the

[49] See para 42 of the opinion in Case C-412/93 (n 47). See also Rosa Greaves, 'A Commentary on Selected Opinions of Advocate General Jacobs' (2006) 29 Fordham Intl L J 690-715.
[50] Opinion of AG Jacobs (n 47), para. 40.
[51] ibid para 50.
[52] For a comment see Laurence Idot 'Annotation, Case C-412/93, Société d'Importation Édouard Leclerc-Siplec v TF1' (1996) 33 CMLR 120.
[53] See *Van de Haar* (n 36); *Commission v France* (n 37); *Commission v Italy* (n. 41). See also European Commission, Free Movement of Goods, Guide to the Application of Treaty Provisions Governing the Free Movement of Goods, 2010 <http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf> accessed 16 June 2013).
[54] Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133.

Member States' was further held by the Court in *BASF*,[55] where the President of the German Patent Office ruled that a European patent belonging to BASF was void in Germany on grounds that its proprietor had not filed a German translation of the patent specification. A similar decision was also adopted in *Krantz*,[56] where a German debt collector seized all the movable property found on the premises of the company in order to recover a tax debt. The Court ruled that the possibility of nationals of other Member States hesitating to sell goods on instalment terms to purchasers because such goods could be liable to seizure by the collector of taxes if the purchasers failed to discharge its tax debts was 'too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States'.[57] From this series of cases a conclusion can be made that Article 34 TFEU is not breached by national legislation which makes no distinction between the origin of the substance transported, whose purpose is not to regulate trade in goods with other Member States and whose potential restrictive effects on the free movement of goods are too uncertain and too indirect to be regarded as a hindrance to trade between Member States.[58]

Furthermore, the applicability of Article 35 TFEU *(ex 29 EC),* which prohibits trade barriers to export, was narrowed in *Italo Fenocchio*.[59] From the latter it is evident that with regard to measures with an effect equal to quantitative restrictions in exports, the *de minimis* test must be used, according to which the remoteness of the effect on exports is assessed. The case referred to a national provision prohibiting the issuance of a summary payment order in cases where the defendant lived in another Member State. The plaintiff believed that such a provision restricted exports but the Court did not agree, explaining that 'the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member States is too uncertain and indirect for that national

[55] Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269.
[56] Case C-69/88 *Krantz* [1990] ECR I-583, para 11.
[57] ibid para 11.
[58] See eg Catherine Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26 European L Rev 52.
See Case C-379/92 *Peralta* [1994] ECR I-3453, para. 24. The case concerned the rules applicable to the discharge of hydrocarbons and other harmful substances into the sea. See also Case C-93/92 *CMC Motorradcenter v Pelin Baskiciogullari* [1993] ECR I-5009, para. 12 – in this Case a German importer was required to inform the purchaser of a Yamaha motorcycle that German dealers, authorized by the Yamaha corporation, often refused to carry out repairs under the warranty for vehicles which were subject to parallel imports. The test has also been applied in Cases C-266/96 *Corsica Ferries France* [1998] ECR I-3949, para. 31 and C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 41.
[59] Case C-412/97 *ED Srl v Italo Fenocchio* [1999] ECR I-3845.

provision to be regarded as liable to hinder trade between Member States.'[60]

2. *Free Movement of Workers*

Just like in the field of free movement of goods, the Court has also not expressly recognised the application of the *de minimis* rule in the field of free movement of workers. In *Bosman*[61] it was held that free movement of workers is based on the market access principle. Even though citizenship played no role in the application of the disputed rules, this did not prevent the Court from applying Article 45 TFEU *(ex 39 EC)*. Based on this ruling the Court further held in *Graf* that '(p)rovisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement [...] constitute an obstacle to that freedom (of movement of workers, N/A). However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market.'[62] The *Graf* case concerned German regulation which prevented workers from receiving compensation on termination of employment in cases when it was the worker, as opposed to the employer, who terminated the employment contract. The Court's ruling is important from the point of view of application of the *de minimis* rule to the field of the internal market, for the Court introduced the test of an 'uncertain and indirect'[63] restriction to free movement from *Krantz* and other rulings to the field of free movement of workers and furthermore decided that such barriers do not breach Article 45 TFEU. Due to the fact that the respective national regulation did not deny workers the right to compensation on termination of employment because they terminated the employment contract for reasons of finding employment in another Member State, the Court found that 'such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers'.[64] With this the *de minimis* rule was introduced into the scope of this freedom.[65]

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[60] *ibid* para 11.
[61] Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and others v Jean Marc Bosman* [1995] ECR I-4921. For comments see Amicam Omer Kranz, 'The Bosman Case: The Relationship between European Union Law and the Transfer System in European Football' (1999) 5 Columbia J Eur L 431; Stephen Weatherill, 'Comment on Case C-415/95, Bosman' (1995) 32 CMLR 991; Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (OUP 2002), fn 99.
[62] Case C-190/98 *Volker Graf* [2000] ECR I-493, para 23.
[63] French: *aléatoire et indirecte*; German: *ungewiß und indirekt*.
[64] *Volker Graf* (n 62) para 25.
[65] See also Anthony Arnull, *The European Union and its Court of Justice* (OUP 2006) 491.

3. *Free Movement of Services and Freedom of Establishment*

As was the case with free movement of goods and workers, the Court has likewise not expressly accepted the *de minimis* rule in the field of free movement of services. In *Säger v Dennemeyer*[66] the Court explained that Article 56 TFEU *(ex 49 EC)*

> requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[67]

This ruling follows the all-encompassing interpretation of the internal market freedoms in line with the *Dassonville* formula. Notwithstanding this, however, signs suggesting that the *de minimis* rule is gaining ground can also be found in the field of free movement of services. In this regard, *Viacom II*[68] is authoritative. In this case it was disputed whether a special municipal tax on poster advertising constituted a (part of the) service which must be paid for by the recipient of the service. The recipient of the service claimed that such a tax (which amounted to more than two hundred EUR) was prohibited by Article 56 TFEU *(ex 49 EC)*. Despite the fact that the tax itself was non-discriminatory, the recipient claimed that it represented an obstacle to the free movement of services which, taking into account the rule referred to in *Säger*,[69] should not exist. The Court held that such a tax

> is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it' and that 'the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned.[70]

Accordingly, the tax was found not to be in contravention of Article 56 TFEU, as it was neither discriminatory nor too high. By applying the latter condition, the Court has actually introduced the *de minimis* rule into

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[66] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-4221.
[67] ibid para 12.
[68] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL* [2005] ECR I-1167.
[69] *Säger v Dennemeyer* (n 66).
[70] Viacom (n 68) para. 38.

Article 56 TFEU.[71] Similarly in *Mobistar*,[72] where municipal legislation imposing a tax on pylons, mast and transmission antennae for mobile communication systems was challenged, the Court observed that 'measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article (56) of the Treaty'.[73] Meulman and Waele thus conclude that with regard to the service provision, permissible measures under Article 56 TFEU could in the future be those which would apply without distinction - either consisting of minor obstacles to market access or failing that, affecting in the same manner, in law and in fact both, bilateral and unilateral service transactions.[74] Arnull similarly concludes that Article 56 TFEU 'bites only where there is more than a remote or uncertain effect on freedom of movement'.[75]

Additionally, the *de minimis* rule can also be found in the field of freedom of establishment. In *Semeraro Casa*,[76] which concerned Italian legislation on closing retail outlets on Sundays and public holidays, the Court decided, in line with Article 49 TFEU *(ex 43 EC)*, that the legislation in question was applicable to all traders exercising their activity on national territory; that its purpose was not to regulate the conditions concerning the establishment of the undertakings concerned; and that any restrictive effects which it might have on the freedom of establishment were 'too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom'.[77] Consequently, the Court found that the freedom of establishment did not preclude national rules from regulating the closing times of shops.

4. *Free Movement of Capital*

A focus on impediments to market access, which tries to be accommodated with the *de minimis* test can also be traced in the field of free movement of capital. A *de minimis* exception within the ambit of this freedom has been suggested by the United Kingdom in the golden shares

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[71] Johen Meulman and Henri de Waele, 'A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 L Issues of Economic Integration 226.
[72] Joined Cases C-544 and 545/03 *Mobistar SA v Commune de Fléron* [2005] ECR I-7723.
[73] ibid, para 31.
[74] ibid. See also Rajko Knez, Prosto Opravljanje Storitev in Razvoj Sodne Prakse do Leta 2006 – Ali je Zadeva Säger še Pomembna? (2007) 2 Revizor 115.
[75] Arnull (n 65) 492, also referring to Case C-159/90 *Grogan* [1991] ECR I-4685 and Joined Cases C-51 and 191/97 *Deliège* [2000] ECR I-2549.
[76] Case C-418/93 *Semeraro di casa* [1996] ECR I-2975.
[77] ibid para 32.

case,[78] where the UK government argued that the national measures at issue were not of such a nature as to restrict access to the market, for they were too uncertain and too indirect to amount to a restriction on the freedoms and would thus not be subject to Article 63 TFEU *(ex 56 EC)*. The Court entered into a substantive examination of the effects of the national measures, which it would not have done, had it proceeded from the assumption that such a consideration would be inadmissible with respect to the free movement of capital.[79] Hindelang states that in principle any national measure ultimately affects the access of capital to a market, whereas many do it only insignificantly. By paraphrasing the Court's judgment in the UK golden shares case he concludes that a measure substantially impedes market access when it affects 'the position of a person acquiring a shareholding as such',[80] which must be left to the Court to clarify – in a casuistic way.[81]

5. *Rocky Road to Define De Minimis in the Internal Market Field*

From the above analysis it may be deduced that the Court has never explicitly applied the *de minimis* rule to the field of the internal market; even so, some measures in the field of all four freedoms are considered as insubstantially restricting market access and are thus not caught by the articles of the Treaty regulating the freedoms. Since there are different opinions among commentators whether 'substantial restriction' (also called the 'remoteness') test is in fact a form of the *de minimis* rule or not, it is submitted that from the author's point of view there are two aspects of the *'de minimis'* rule in the field of the internal market:

a) *De minimis* in terms of quantity: this is *de minimis* in the sense the European Court of Justice understands it. When the Court has ruled in *Van de Haar*[82] that the *de minimis* rule is not acceptable in the area of free movement, it has taken more of a quantity approach – i.e. the number of concerned products. According to the Court's view, for a certain measure to be challenged under free movement rules it does not have to affect a great amount of products (workers, services or capital flows); it suffices for a natural person to be restricted when importing a *single* product and reliance on Article 34 TFEU is already allowable.

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[78] Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, para 36.
[79] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment*, (OUP 2009) 126.
[80] *Commission v United Kingdom* (n 78) para 61.
[81] ibid 127.
[82] *Jan van de Haar* (n 36).

b) *De minimis* in terms of quality: here *de minimis* is not about the number of the concerned products, workers, services, capital flows, but about the *intensity* of a measure's effect.[83] If the factors of production are heavily affected, if the measure has a significant (certain and direct) effect on the market access, then the measure will be caught by the principles on fundamental freedoms. If, however, the effect of the measure is 'too uncertain and indirect', 'too remote', if it lacks significant effect on the market access, then it is not caught by the Treaties. The Court recognised this in a series of cases, eg in *Kranz,* although in a non-consistent manner and without detailed explanation what the terms, such as significant, certain, direct and remote mean.

As the word *significant* is considerably ambiguous and cannot be expressed in quantitative terms it is a convenient concept of interpretation for both advocates of a centralist and decentralist internal market. The remoteness test is closely related to the question of causality or to the jurisdictional criteria, according to which measures having no effect on cross-border trade stay in the national autonomy, whereas those having (any) effect on trade are within the scope of the fundamental freedoms. Nevertheless, the *de minimis* rule in this sense is not just about causality, but it requires a *significant* effect upon the cross-border trade for a measure to legitimately fall within the Treaty.

In this respect Jacobs explains that where a measure prohibits the sale of goods lawfully placed on the market in another Member State (as in *Cassis de Dijon*), it may be presumed to have a substantial impact on access to the market, since the goods are either denied access altogether or can gain access only after being modified in some way; the need to modify the goods is in itself a substantial barrier to market access.[84] On the other hand, however, one cannot claim the same for measures applicable without distinction, which simply restrict certain selling arrangements, by stipulating when, where, how, by whom or at what price the goods may be sold. Whether such measures significantly hinder free movement would, according to Jacobs, depend on a number of factors, such as whether it applies to certain goods,[85] to most goods[86] or to all goods[87] on the extent to

[83] In this sense *de minimis* is understood, eg, by Arnull (n 65) 491; Hindelang (n 79) 125; and Christoph Krenn, 'A Missing Piece in the Horizontal Effect 'jigsaw': Horizontal Direct Effect and the Free Movement of Goods', (2012) 49 CMLR 210-212.
[84] Opinion of AG Jacobs (n 47) para 44.
[85] As in Case 75/81 *Belgium v Blesgen* [1982] ECR 1211, in the Case 382/87 *Buet* [1989] ECR 1235 or in Case C-23/89 *Quitlynn* [1990] ECR I-3059.
[86] As in Case 145/88 *Torfaen BC v B&Q* [1989] ECR 3851.

which other selling arrangements remain available, and on whether the effect of the measure is direct or indirect, immediate or remote, or purely speculative[88] and uncertain.[89] Accordingly, Jacobs emphasises that the magnitude of the barrier to market access may vary enormously: it may range from the insignificant to a quasi-prohibition. In this respect the *de minimis* test could perform a useful function.[90] His explicit proposal in *Leclerc-Siplec* to introduce the *de minimis test* to the field of the internal market freedoms thus understandably led to mixed responses.

V. Arguments against adopting the de minimis rule in the internal market field

Scholars offer various explanations why EU law recognises the *de minimis* rule in the field of competition law but not in the field of the internal market.

1. *The Difference between the Internal Market and Competition Law*

Gormley recognises the differences between the two fields, emphasising that the internal market and competition law have different roles and subject-matter, which makes the *de minimis* rule more appropriate to one field than the other.[91] He particularly highlights that competition law concentrates on the effects a measure has on patterns of trade between Member States and not on effects on trade itself, which is a much simpler concept.[92] At the same time competition law, as opposed to the internal market, does not assist in the removal of national hindrances to trade between Member States through negative integration. Davies, on the other hand, with regard to the differences between the two fields, highlights that competition law is able to build itself around non-legal ideas, as no competition case is complete without a market survey, while free movement law lacks enthusiasm for empiricism, particularly because free movement cases do not tend to pass through the Commission on their way to the Court, but rather arise from preliminary references by national courts. Since the Court decides principles rather than facts, which are then applied by the national courts to the individual facts, claims Davies, the Court held in *O'Flynn*[93] that in order to establish discrimination it is not

[87] *Keck and Mithouard* (n 48).
[88] As an example Opinion of AG Jacobs (n 47) refers to para. 15 of the Court's judgment in Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635.
[89] For example Case C-69/88 *Krantz* [1990] ECR I-583, para 11 of the judgment.
[90] Opinion of AG Jacobs (n 47) para. 45.
[91] Laurence W Gormley, 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?' (2002) 13 Eur Business L Rev 517, 520.
[92] Thereby referring to Case 15/79 *P.B. Groenveld BV* [1979] ECR 3409.
[93] Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.

necessary to show an 'actual' disparate impact on the internal market, but merely that a measure is liable to have one.[94] Furthermore, since market surveys cost money, competition law is concerned merely with big commerce, significant restrictions and important economic players, who have such money, whereas free movement often concerns small players, like Bosman. Requiring market investigations in order to determine whether such small player's rights to free movement have been breached would almost certainly mean denying them of their rights. On these bases, Davies concludes that market language cannot automatically be transferred from one field to another.[95]

2. *Public and Private Interventions in the Market*

An additional reason for refusing the *de minimis* rule to enter the field of the internal market is that the freedoms predominantly concern the measures of Member States and not those of private entities, as is the case with competition law. It is the public bodies who should have a greater responsibility for the functioning of the internal market than private entities. In this respect Barents observed years ago that 'state interventions on the market may be said to have an appreciable effect by their very nature',[96] whereas Krenn recently proposed a more convergent approach towards public and private intervention on the market and argued in favour of introducing the horizontal direct effect of Article 34 TFEU accompanied by a recognition of the *de minimis* rule[97] in order to prohibit only those barriers of private entities that significantly hinder access to the market. According to his opinion, most private measures would not be caught by Article 34 TFEU as there are alternative channels to market goods; the recognition of the horizontal direct effect of Article 34 TFEU as a matter of principle would, however, bring free movement of goods in line with the case law in the field of personal freedoms.

3. *National Courts' Concern*

An additional explanation for the refusal of the *de minimis* rule in the field of the internal market was given by Advocate General Jacobs,[98] who pointed out the danger of applying the *de minimis* test to all measures affecting trade in goods, as this might induce national courts, who are primarily responsible for the application of the fundamental freedoms, to

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[94] ibid para 21.
[95] Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer 2003) 96-98.
[96] Rene Barents, 'Measures of Equivalent Effect: Some Recent Developments' (1981) 18 CMLR 287.
[97] Krenn (n 83) 177-215.
[98] Opinion of AG Jacobs (n 47) para 42.

exclude too great a number of measures from the scope of the prohibition laid down by this provision. Similarly, Mortelmans pointed out that the *de minimis* test would not assure clear guidelines for the explanation of judgements by national courts, as it would demand a complete review of the legal and economic framework,[99] while Oliver warned that reliance on statistical data would lead to depraved results as the legality of a measure could change on a monthly basis.[100] Oliver thus claimed that the application of the *de minimis* rule to the internal market freedoms would cause practical problems, introduce a new element of legal uncertainty and consequently make it much more difficult for national courts to apply the internal market provisions of the Treaty.[101] Finally, Advocate General Tesauro was of the opinion that 'to apply a de minimis rule in the field of trade in goods (...) is, it seems to me, very difficult, if not downright impossible'.[102] Jacobs, who generally defended the application of the *de minimis* rule to the field of the freedoms, warned that caution must be exercised and if the *de minimis test* is to be introduced, the circumstances, under which it should be applied, must be carefully defined.[103] He particularly pointed out that it would not be appropriate to apply the *de minimis test* to measures which overtly discriminated against goods from other Member States; such measures should remain, in line with the *per se* prohibition of overtly discriminatory measures, prohibited by Article 34 TFEU even if their effect on inter-State trade is only slight.[104] According to Jacobs, the introduction of a substantial restriction on market access requirement would therefore only be necessary in relation to measures which are applicable without distinction to domestic goods and goods from other Member States.[105]

4. *Fundamental Principles Argument*

The final reason why the Court refused to apply the *de minimis* rule to the field of economic freedoms, as is evident from *Corsica Ferries*, might lie in the fact that it considers the freedoms as fundamental principles of EU law

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[99] Kamiel Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition' (1991) 28 CMLR 127 and Kamil Mortelmans, 'Towards Convergence in the Application of Rules on Free Movement and on Competition?' (2001) 38 CMLR 626.
[100] Peter Oliver, 'Some Further Reflections on the Scope of Articles 28-30' (1999) 36 CMLR 796.
[101] Peter Oliver (ed) *Oliver on Free Movement of Goods in the European Union* (Hart Publishing 2010) 92-93, para 6.18.
[102] *Ruth Hünermund* (n 48) Opinion of AG Tesauro, para 21.
[103] Opinion of AG Jacobs (n 47) para 42.
[104] ibid para 43.
[105] ibid para 44.

where all barriers should be prohibited, including minor ones[106] - much the same as the *de minimis* rule cannot be applied to the field of human rights. On the other hand, the Court also regards Article 101 TFEU to be 'a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market',[107] but even so this provision is subject to the *de minimis* rule. This speaks in favour of a systematic recognition of the *de minimis* rule in the internal market field.

VI. ARGUMENTS SUPPORTING THE DE MINIMIS RULE IN THE INTERNAL MARKET FIELD

1. *Sensible and Mature Market Regulation*

According to Greaves, the proposal of Advocate General Jacobs in *Leclerc-Siplec* is highly persuasive and has much in its favour as it reflects the competition law approach to the field of the internal market freedoms. This makes sense, says Greaves, as the two share a common objective, which is to integrate national markets into a single market, undivided by national territorial boundaries, national laws and regulations or private contractual arrangements.[108] In this respect O'Keeffe and Bavasso note that the aim of creating an internal market constitutes 'a unifying thread' between EU internal trade law and competition law and that the 'common ancestry' of competition and free movement can be traced to the fact that both sets of rules are subject to an assessment of the effect on trade between Member States.[109] Krenn too is of the opinion that excluding certain insignificant threats from the scope of the freedoms would be a sign of maturity in the application of the internal market provisions, allowing efficient control of those measures that do present a significant peril to the internal market. This is accepted as common sense in competition law and should, according to Krenn, be accepted also with

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[106] *Corsica Ferries* (n 38), para 8; Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* [2008] ECR 1683, para 52. See Oliver (n 101) 91, para 6.18.

[107] Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV, [1999] ECR 3055, para. 36.

[108] Greaves (n 49) 696. See also Ulrich Immenga and Ernst-Joachim Mestmäcker, 'Die Bedeutung der Wettbewerbsregeln in der Wirtschaftsvefassung der EG' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds) *Wettbewerbsrecht, Volume. 1 Part 1*(Beck, 2007) 26.

[109] David O'Keeffe and Antonio Bavasso, 'Four Freedoms, One Market and National Competence: In Search of a Dividing Line' in David O'Keeffe and Antonio Bavasso (eds) *Judicial Review in European Union Law* (Kluwer Law International 2000) 543-544.

regard to Article 34 TFEU.[110] Krenn furthermore stresses that the thresholds for the application of the *de minimis* rule to the field of the internal market will necessarily differ from the ones in the field of competition law, thereby advocating the *effet utile* approach in the field of the internal market in order to effectively monitor significant threats to the internal market.[111]

In this respect Perišin points out that nothing distinguishes the *de minimis* rule from other formulas, such as the one for selling arrangements in the *Keck* ruling, emphasising that all substantive assessments of a measure leave a degree of discretion to the adjudicator which can cause legal uncertainty.[112] The latter has been defined by Advocate General Kokott as the main downside of the *de minimis* rule in the field of the internal market,[113] however, Perišin states that the *de minimis* rule is a substantive criteria and as such much more appropriate than formal criteria, such as the one in the *Keck* formula, which, according to Kokott's opinion, should also be applied to measures concerning the use of goods.

2. *Subsidiarity Aspect – More Legitimate Market Regulation*

Perhaps the most important advantage of the *de minimis* rule is that it presents a convenient concept for reducing centralisation in the field of the internal market and it balances free trade and national autonomy. The rule addresses questions about the desirable degree of market integration as well as the recommendable scope of prohibition within the EU law. These issues touch upon the main problem that is the line between legitimate and illegitimate national legislation: how many restrictions can the internal market handle and when do national measures need to be removed. The establishment of the internal market has brought many advantages to the EU Member States and can in this respect be considered as indisputable success. Nevertheless, economic liberalisation has inevitably also brought costs to the Member States. These are related not only to the loss of national legislative autonomy far beyond strict market law, but also to the resulting erosion of national social and cultural values. This often occurred without discussing various institutional alternatives that are available when setting legal rules, even though economic analyses

[110] Krenn (n 83) 211 – referring to Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (2nd edn, CUP 2010) 754.
[111] Krenn (n 83) 211.
[112] Tamara Perišin, *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and WTO* (T.M.C. Asser Press 2008) 39.
[113] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, Opinion of AG Kokott, para. 46.

pose various issues of democracy.[114]

The application of the *de minimis* rule to various fields of EU law reflects the principle of subsidiarity, which was introduced to the Treaties in order to increase the flexibility of European governance and to limit centralism.[115] It protects the rights of the national legislators to choose between various political alternatives within the scope of their competences and discretions.[116] Each institution entrusted with the regulation of the internal market needs to protect, according to the principle of subsidiarity, the appropriate balance between different goals of EU legal acts. Namely, the main goal of the EU is to achieve optimal benefits for society by balancing free trade interests with other EU and Member States' interest. In this respect, the recognition of the *de minimis* rule in the field of the internal market is in line with the abovementioned statement of the former internal market Commissioner McCreevy on the need of the internal market to become more decentralised. In this regard the principle of subsidiarity must be taken into consideration when adopting EU secondary legislation as well as when interpreting the provisions of the EU Treaties. Substantive market rules (eg the *Dassonville* formula) are in fact hidden institutional criteria for the division of powers between EU institutions and Member States. In line with this the principle of subsidiarity requires genuine institutional criteria which will enable the identification of situations where complete unification of market law is legitimate and where it is not, or in other words, where the effectiveness of the internal market requires diversity (ie preservation of various national rules) and where unification is needed (ie common rules).

In this context the *de minimis* rule presents an important concept for the enforcement of the principle of subsidiarity in the field of the internal market. As Perišin points out, it is appropriate, in view of EU's ambitious aims - primarily the creation of a single market, to go beyond non-protectionism, which is still the main requirement of the WTO, and even beyond non-discrimination. She emphasises, however, that times have

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[114] Miguel Poiares Maduro, *We the Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); Neil K Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1994).

[115] See art 5(3) TEU.

[116] George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 Columbia L Rev 332-455; Grainne de Burca, 'Reappraising Subsidiarity's Significance After Amsterdam', Harvard Jean Monnet Working Paper, No. 7/1999; Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2012) 50 Journal of Common Market Studies 267-282.

changed since *Dassonville* and *Cassis de Dijon*,[117] as it is no longer necessary for the freedoms to be as broad as to cover all obstacles to trade and that the Court's review of measures only remotely connected to the internal market would present an unnecessary burden for national regulatory autonomy. This would furthermore also endanger the legitimacy of the EU. In this regard Perišin notices that an approach based on substantial hindrance of market access seems to be developing and advocates that only this kind of measures should be caught by the EU Treaties.[118]

Broadening the concept of *uncertain and indirect* hindrances to free movement, which are not prohibited by EU law, is also in line with the Court's interpretation of Article 114 TFEU *(ex 95 EC)*, considering its emphasis in the tobacco advertising case[119] that recourse to Article 114 TFEU as a legal basis is only possible if the 'aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws', adding that 'the emergence of such obstacles must be likely'[120] and that reliance on Article 114 TFEU is not legitimate 'when the measure to be adopted only incidentally harmonises market conditions within the Community'.[121] For this reason the Court held that Article 114 TFEU cannot be applied to the so-called static advertising media as the effect on free movement of goods was too 'remote and indirect'.[122]

As an instrument for establishing balance between state and federal authorities in the field of interstate regulation, the *de minimis* rule is also

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[117] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.
[118] Perišin (n 112) 39.
[119] Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, para 86.
[120] ibid para 86.
[121] ibid para 33.
[122] ibid para. 109. It is also worth noting that since the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1-25 entered into force, argumentation that enforcement of competition law is centralised, whereas enforcement of the *de minimis* rule in the field of market freedoms by national authorities would keep too many (significant) hindrances to the internal market, is no longer convincing. Regulation 1/2003 provides for a decentralised application of arts 101 and 102 TFEU by the Commission, national competition authorities and national courts – arts 4, 5 and 6 of the Regulation 1/2003. See for example Jones and Sufrin (n 21) 1021 and Michael J Frese, 'Decentralised Enforcement of EU Competition Law and the Institutional Autonomy of the Member States: A Case Commentary', Amsterdam Centre for Law & Economics, Working Paper No. 2011-04.

applied in the USA. In the famous *Pike v Church*[123] case, the US Supreme Court decided: 'where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Furthermore, the Supreme Court held in *Hughes v Oklahoma*[124] that 'the range of regulations that a State may adopt [...] is extremely broad, particularly where, as here, the burden on interstate commerce is, at most, minimal', and judge Frankfurter noted in *H P Hood & Sons*[125] that '[b]ehind the distinction between 'substantial' and 'incidental' burdens upon interstate commerce is a recognition that, in the absence of federal regulation, it is sometimes (...) of greater importance that local interests be protected than that interstate commerce be not touched.' Finally, the case of *Jones & Laughlin Steel* should be pointed out, where the Supreme Court warned that competences to regulate interstate trade must be assessed 'in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[126] This proves the Supreme Court's practical orientation towards assuring a workable market, whereas the refusal to apply the *de minimis* test systematically in the EU internal market shows the EU Court's determination to establish an ideal internal market, despite the fact that the former judge of the Court Jann realistically noted that: 'Discussions must concentrate on the common market that truly exists and not on the ideal market that has no failures. The latter simply does not exist'.[127]

VII. CONCLUSIONS

The *de minimis* rule is recognised in various legal fields, within procedural as well as substantive law. Even though this rule is derived from various laws, executive acts and case law and has broad support by scholars, Adler emphasises that relying on the *de minimis* rule is not morally justifiable.

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[123] *Pike v Bruce Church, Inc* 397 U.S. 137 (1970).
[124] *Hughes v Oklahoma* 441 U.S. 322 (1979).
[125] *H P Hood & Sons, Inc v Du Mond* 336 U. S. 525, at 567 (1949).
[126] 301 U.S. 1 (1937) at 37. See also *United States v Darby*, 312 U.S. 100 (1941) where it has been decided that: 'Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce'; and *Wickard v Filburn* 317 U.S. 111 (1942), where the Supreme Court held that the Congress may regulate activity that 'exerts a substantial economic effect on interstate commerce.
[127] Interview with the Judge Peter Jann, Trybunal Sprawiedliwosci i Integracija, Radca Prawny (12 February. 2002) 100.

According to him, *de minimis* tests have no basis in the *ideal moral theory*. The ideal moral theory provides norms for idealized decision makers, who are fully rational and motivated to comply with the norms. Although there are no ideal decision makers, ideal moral theories can be seen as a useful analytical tool to review legal rules in general, including the *de minimis* rule.[128] The ideal moral theory ignores the problems of bounded rationality and imperfect compliance,[129] however, Adler finds that none of the moral theories would direct an *idealized* government decision maker, who is fully rational and conscientious in complying with the demands of the theory, to employ a *de minimis* test.[130]

In contrast to these general conclusions about the *de minimis* rule, one may nevertheless conclude that this rule has a rather different meaning under EU internal market law, as it increases the autonomy of national authorities, thereby strengthening democratic decision-making in the EU as a multi-level governance system. On the basis of this rule, Member States keep their competences in the field of market law with regard to rules which do not formally discriminate between domestic and foreign goods, people, services and capital, the purpose of which is not to regulate trade with other Member States and whose potential restrictive effects on the functioning of the internal market are too uncertain and too indirect for the obligation which they lay down to be regarded as being in breach of the EU Treaties. In this respect one may argue that it is immoral (or at least democratically illegitimate) for EU law to prohibit all Member States' trading rules, as the European Court of Justice has proclaimed in its 40-year old judgment of *Dassonville*.

As the Court already discovered twenty years ago that the *Dassonville* formula was too wide, that Member States did not approve of it and that, despite its breadth it still did not enable effective enforcement of the internal market law, the Court narrowed it down by forming a formal (*Keck*) test, according to which rules on selling arrangements were left to national autonomy. By contrast, the *de minimis* test is a substantive test, which does not differentiate between rules on certain selling arrangements and the characteristics of goods, but regardless of the content of a rule it is judged by its effect on the internal market – in so far as this effect is not significant, the rule does not breach EU law. Additionally, systematic recognition of the rule would facilitate the understanding of the horizontal

[128] In this respect the latter can be compared to the plea of statute of limitations (or lapse of time) which, as stated already in Roman law, is predominantly used by dishonest people.
[129] More about these theories in Shelly Kagan, *Normative Ethics* (Westview Press 1998).
[130] Adler (n 14) 2007, p. 9.

direct effect of the freedoms and enable the EU Court of Justice to accept the horizontal direct effect in the field of free movement of goods and capital.[131] In accordance with the *de minimis* rule, insignificant barriers to free movement imposed by private entities would not present a breach of the internal market rules, whereas national measures would be subdued to a 'remoteness' test, which would measure how direct the impact of the rules concerned is on free movement of goods, workers, services and capital between Member States. In this respect all four freedoms could prohibit formally (directly) as well as actually (indirectly) discriminatory measures that significantly hinder access to the market – such as a complete prohibition of selling certain goods or providing certain services,[132] whereas national and private measures with an insignificant effect on the internal market, could remain.

Despite all the advantages of the transfer of the *de minimis* rule from the EU competition law to the field of the internal market, the actual transfer is all but easy. It must foremost be accepted that the rule is not identical in both fields, as its purpose is not the same. In this respect one cannot count on having concrete mathematical criteria for defining a significant and an insignificant (remote, uncertain, indirect) restriction to the single internal market. One must also recognise that although the *de minimis* rule would increase the autonomy of the Member States in the market field and thus increase the legitimacy of EU law in light of the subsidiarity principle, most national courts would not necessarily accept such broader competences with delight.[133] An additional difficulty related to the application of the *de minimis* rule by national courts lies in the fact that even within a single Member State national judges might come to different conclusions. This is the main concern of advocates of centralism in the market field as differential application of the rule can lead to compartmentalisation of the single market. In this respect, the *de minimis* rule would firstly have to be interpreted by the EU Court of Justice and only when sufficient criteria would be developed through its case law, as

[131] For the latter see eg Case C-112/05 *Commission v Germany (Volkswagen)* [2007] ECR I-8995; on the issue of horizontal direct effect of art 63 TFEU see Siniša Rodin, *Ford, Dodge i Lehtinen – šutnja je Zlato*, Banka 24.5.2012.

[132] Eg Case C-36/02 *Omega Spielhallen v Bundesstadt Bonn* [2004] ECR I-9609. For a comment see Perišin (n 112), 41.

[133] In this respect some parallels could be drawn between the review of the *de minimis* rule and the principle of proportionality. With regard to the latter, the English Judge Mustill in W. H. Smith Do-It-All and Payless DIY Ltd v Peterborough City Council, 1990 (2) CMLR 577 asked rhetorically: 'How could [say] a desire to keep the Sabbath holy be measured against the free-trade economic premises of the common market?' See more in Richard Rawlings, 'The Eurolaw Game: Some Deductions from a Saga' (1993) 20 J L & Society 309.

was also the case with the principle of proportionality, would it be reasonable to transfer this competence to national courts.

Considering all the arguments in favour and against the application of the *de minimis* rule to the field of the internal market it may be concluded that this rule probably presents the least worrisome contribution of the EU Court of Justice (and the Commission) towards the decentralisation of the internal market regulation and the increase of its legitimacy. Any other demands made by the Member States for the enhancement of their autonomy as market regulators would probably have much greater consequences for the effectiveness of the internal market.

HETERARCHICAL CONSTITUTIONAL STRUCTURES IN THE EUROPEAN LEGAL SPACE

Merita Huomo-Kettunen*

The article focuses on the constitutional linkages between national legal orders, the EU legal order, and the ECHR Convention system. The first, and the main, question the article addresses is how these intertwined constitutional structures can be described. This article shows that the interrelationship of these legal orders could be best described as heterarchical as opposed to hierarchical. The article also tries to tentatively examine the meaning and influence of these heterarchical constitutional structures. The concept of heterarchy is used to illustrate the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of heterarchical constitutional structures is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as communicative in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

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I. INTRODUCTION

The European legal space consists of various different legal orders: national legal orders, the EU legal order, the ECHR Convention system, the United Nations legal system, WTO law and others. This article focuses on the constitutional linkages between national legal orders, the EU legal order, and the ECHR Convention system. The first, and the main, question the article addresses is how these intertwined constitutional structures can be described. This article shows that the interrelationship of these legal orders could be best described as heterarchical as opposed to hierarchical. The article also tries to tentatively examine the meaning and influence of these heterarchical constitutional structures.

In section two the concept of *heterarchy* is used to illustrate the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of *heterarchical constitutional structures* is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as *communicative* in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

Three interrelationships in the following three sections exhibit heterarchical constitutional structures. The article studies the principle of primacy, the doctrine on conforming interpretation, Member States as the masters of the treaties, and the principle of sincere co-operation in the relationship between EU and national legal orders. The doctrine of margin of appreciation is examined in the relationship between the ECHR Convention system and national legal orders. Finally, the principle of equivalent protection and the doctrine of margin of appreciation are considered in the relation between the EU and the ECHR Convention

system.

The last section draws upon previous sections and attempts to analytically answer a second research question: what is the jurisprudential impact of these heterarchical constitutional structures? Examples are drawn from the field of criminal law because of its close relation to national sovereignty and constitutional law. The main argument here is that a doctrine of sources of law needs to be reconsidered. In short, a rigid and pre-set doctrine of sources of law no longer satisfies today's pluralistic and heterarchical demands.

II. THEORETICAL BACKGROUND

The theoretical framework of this Article consists of two *isms*. First, constitutionalism, which means a will to exercise state power within a constitutional framework, or in other words, governance within pre-set conditions.[1] Constitutionalism is usually described as being about limiting the use of power by its division (legislature, executive and judiciary) through recourse to the principle of the rule of law, and by fundamental and human rights provisions.[2] Constitutionalism recognises the people (*demos*) as a legitimising source for state powers.[3] And second, pluralism, which in short is about recognizing the plurality of legal orders, their partial overlapping nature, and their rival claims over authority.

Pluralism is not so much an attribute of law but rather an attribute of the social realm: a single social realm is affected by more than one legal order.[4] Pluralism recognises the different legal and normative systems but its aim is not to create or suggest hierarchical structures between them.[5] According to Daniel Halberstam, pluralism manifests itself especially well in the plurality of claims made over authority. It does not seek to settle the claims in one order, but instead is concerned about the accommodation persisting between different institutions and systems in the absence of

[1] Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 3–5.
[2] Michel Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction' (1992–1993) 14 Cardozo L Rev 497.
[3] Grimm (n 1) 9.
[4] John Griffiths, 'What is Legal Pluralism?' (1986) 24 J L Pluralism & Unofficial L 1, 12; Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991–1992) 13 Cardozo L Rev 1443, 1457, 1448.
[5] Paul Schiff Berman, 'Global Legal Pluralism' (2006–2007) 80 Southern California L Rev 1155, 1166.

settled hierarchical structures.[6]

Legal reality clearly eschews the idea of one singular legal order in one geographical area or in one social realm. In addition to state actors, different international organisations, such as the UN, and different treaty organisations, such as different human rights treaties and organisations, are part of the pluralistic legal field.[7] Since the pluralism of legal orders includes different organisations in addition to states, one can speak of the fragmentation of the constitutional field. Fragmentation in this context means that some legal orders are oriented only to specific tasks, and not to the entirety of tasks over which the states have control. The legal orders are separate from each other, but in legal reality they overlap and closely bound up with each other. Some of those legal orders might even share heterarchical constitutional structures.

As a response to increasing international activity among states,[8] or perhaps because of the compensatory and reconstructionist need for constitutionalism arising from the compromises that it has undergone at the national level,[9] the idea of constitutionalism has settled on the international or transnational level. Interdependence between states has increased and public interests are regulated increasingly beyond the states' constitutional framework.[10] As a theoretical position, constitutional pluralism recognises that states are not the sole source of constitutional authority. There are also other post-state sites of constitutional authority.[11]

Neil Walker has argued that the relationship between states and other sites of constitutional authority is best understood as heterarchical rather than hierarchical.[12] And specifically in relation to EU it has been argued that the EU and the Member States have only partial constitutional jurisdiction, because the constitutional field in Europe is manifold and

[6] Daniel Halberstam, 'Local, Global and Plural Constitutionalism' in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 175.
[7] Keebet von Benda-Beckmann, 'Globalisation and Legal Pluralism' (2002) 4 Intl L FORUM du Droit International 19, 21.
[8] Grimm (n 1) 3–4.
[9] Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana J of Global L Studies 397, 404–405; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 Leiden J Intl L 579; Anne Peters, 'Global Constitutionalism Revisited' (2005) 11 Intl L Theory 39, 40.
[10] Peters, 'Global Constitutionalism Revisited' (n 9) 41.
[11] Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 4; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.
[12] ibid.

overlapping.[13] The Union and the individual Member States could be seen to be creating a new kind of hybrid constitutional jurisdiction or sovereignty which is sometimes described as heterarchical rather than hierarchical.[14] The concept of *heterarchy* is used to describe the new challenges of constitutionalism in the European area, but the denotation and semantics of heterarchy in this context has remained somewhat ambiguous. The word derives from the Greek words *heteros* (the other, different) and *archē* (meaning sovereignty). Whereas hierarchical constitutional structures suggest vertical, pyramid-like power structures and the existence of a single absolute highest authority in one area, the sovereign in the traditional sense, the concept of heterarchy could be used to describe a relatively new and different kind of sovereignty or reign that can be detected in European constitutional structures.

The concept of *heterarchy* then can be used to describe the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of *heterarchical constitutional structures* is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as *communicative* in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

One can picture the interrelationship between the legal orders by using the image of an onion. The most general system is the ECHR Convention system, in the sense that it sets minimum requirements for the national legal orders and for the EU legal order, and thus the ECHR Convention system constitutes the outermost layer of the onion. EU law sets requirements for national legal orders but not for the ECHR Convention system, thus constituting the middle layer of the onion. And finally, the national legal orders need to follow the requirements of both the ECHR

[13] Neil Walker and Stephen Tierney, 'Introduction: A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism', in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011) 9.

[14] ibid; Walker, 'The Idea of Constitutional Pluralism' (n 11); Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does It Matter?' (2011) 17 ELJ 744; Inger-Johanne Sand, 'Constitutionalism and the Multi-Coded Treaties of the EU: Changing the Concepts of Constitutionality' in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010) 52–53.

Convention system and EU law, and thus they are located at the inner core of the onion. However, when considered in terms of function, the national legal orders constitute the outermost layer of the onion. The national legal orders manage a diversity of tasks, some of which are not related to the EU's competence or the ECHR Convention system. In functional terms, the EU constitutes the middle layer, leaving the ECHR Convention system as the innermost layer or core of the onion, since the ECHR's functions cover solely human rights issues.

III. HETRARCHICAL CONSTITUTIONAL STRUCTURES: EU LAW – NATIONAL LAW

There are a few principles in EU law which illustrate the heterarchical constitutional structures between the European Union and the individual Member States. The premise is that constitutionalism and pluralism are not mutually exclusive. The constitutions of the Union and the individual Member States can be seen as separate but at the same time as inseparable and integral owing to the communicative heterarchical constitutional principles.

The constitutionalization of EU law is often linked to the CJEU's case law which has aimed to strengthen the effectiveness of EU law,[15] such as case law concerning primacy. The principle of effectiveness in EU law can be seen to derive from CJEU's case law but also a priori from the principle of loyalty. The EU constitution is perceived to be a collection of the norms that create a foundation for the European Union's legal order: the norms concerning the EU's institutions and their functions, the fundamental rights norms, and the fundamental principles and doctrines of the EU law enshrined in the EU primary law or recognised by the CJEU. The most important constitutional documents are the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the accession treaties and the Charter of Fundamental Rights in the European Union. The EU constitution is functionalized differently when compared with national constitutions since it covers relatively few of the tasks that are usually bound by state constitutions. The EU constitution is oriented in fulfilling the purpose of the Union. The objectives of the EU are the promotion of the Union's values, peace and security, and the establishment of the area of freedom, security and justice, the internal market, and the economic and monetary union (Article 3 TEU). The EU constitution contains also several provisions concerning the allocation of competences

[15] Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing – Verlag CH Beck 2011) 30.

between the EU and the Member States.

The communicative heterarchical constitutional principles build linkages between the EU constitution and the national constitutions, thus intertwining these constitutional orders one with the other. The heterarchical constitutional structures make the Union constitution an integral part of national constitutions. However, there is no strict hierarchical interrelationship between these legal orders. The legal orders of the Union and the individual Member States seem to be parallel and complementary. In a similar way Miguel Poiares Maduro has used the concept of *counterpunctual law* to describe EU constitutional law, meaning that the relationship between the legal orders of the Union and the Member States is not hierarchical.[16] Four heterarchical constitutional principles are chosen as examples: the principle of primacy, the interpretation doctrine on conforming interpretation, Member States as the masters of the treaties, and the principle of sincere co-operation.

1. *The Principle of Primacy*

The CJEU has recognised the principle of primacy in its legal praxis. In the case of *Costa v ENEL*, the Court stated that the law stemming from the Treaty could not be overridden by domestic legal provisions, however they were framed. As is well known, the Court's interpretation of the primacy of European Union law is based on the direct applicability of regulations. The CJEU found that the application of Union law would be contingent if Union law did not have primacy over national legislation.[17] The primacy of Union law can be seen to derive already from the agreements made by the Member States when they joined the European Union.[18] In the case of the *Internationale Handelsgesellschaft*, the CJEU added that the EU law has primacy over constitutional principles as well.[19] In the case of *Simmenthal*, the Court repeated that the scope of the primacy of European Union law extends over all of the Member States' legislation.[20] These cases demonstrate that the primacy of Union law extends over all aspects of the national law, including constitutions.

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[16] Miguel Poiares Maduro, 'Europe and the Constitution: What if this is as good as it gets?' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (OUP 2003) 98.
[17] Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR I-00585.
[18] Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (5th edn, OUP 2011) 258.
[19] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-01125, para 3.
[20] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629, para 24.

A declaration concerning *primacy* is annexed to the Treaty of Lisbon. It refers to the Court's case law generally.[21] There is no particular mention of primacy over constitutions. However, the fact that there is a declaration concerning the primacy principle annexed to the Lisbon treaty indicates that the principle is widely recognised and accepted by the Member States. Nevertheless, the principle's status in relation to the Member States' constitutions is not clearly defined in the declaration, which simply mentions that the Union law has primacy over the laws of the Member States. It is worth pointing out however, that as early as in the case of *Costa v ENEL*, the CJEU stated that primacy concerns national legislation 'however framed'. Even here, the primacy of Union law can be seen to concern all national legislation, including constitutions.

The primacy of Union law does not establish any absolute hierarchy of powers between the Union and the Member States. The principle of primacy simply expresses a rule concerning the *application* of law between the Union legislation and the Member States' domestic legislation. According to the principle, Union law prevails over national law, but the national law will not be declared invalid by the Union Courts[22]. From a heterarchical perspective, the principle of primacy is not understood to be about the validity of law.[23] The primacy of Union law simply expresses *a rule concerning the application of law* in areas where the Member States have transferred their powers or competences or sovereignty to the Union. The CJEU has stated this in the case *IN.CO.GE*. When national law is incompatible with EU law, the national law does not become 'non-existent'. Instead the national courts must simply 'disapply that rule'.[24]

The principle of primacy seems to be somewhat similar in nature to connecting factor rules, at least in situations where there is an obvious clash of norms between EU and national law provision. However, the principle of primacy is not a connecting factor rule, because it can also function as a weighing and balancing principle in cases where the norm conflict can be avoided by interpreting national law provisions in line with EU law provisions. In other words, the principle of primacy can lead to either EU law-oriented interpretation or, in some cases, to the non-application of a provision of national law, leaving the national law

[21] Declaration Concerning Primacy [2010] OJ C83/33.
[22] Joined Cases C-10 to 22/97 *Ministero delle Finanze v INCOGE'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A Cecchini & C Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing Luigi Martini Srl, Giacomo Srl and Mafar Srl* [1998] ECR I-06307, para 21. See also Allan Rosas and Lorna Armati, *EU Constitutional Law, An Introduction* (Hart Publishing 2010) 55–56.
[23] Avbelj (n 14) 750–51.
[24] *INCOGE'90* (n 22) para 21.

provision still valid but non-applicable in that particular case.

In situations of norm conflict between national and EU law, the principle of conforming interpretation offers an important means to resolve the conflict compared to non-application of national law provision. Conforming interpretation means that Member States have an obligation to interpret national law harmoniously and in conformity with EU law as far as is possible. If national law cannot be applied in conformity with EU law, such domestic law must be held inapplicable. [25] Conforming interpretation cannot lead to interpretation of national law *contra legem*.[26] In all cases where EU-influenced national law is applied, the indirect effect of EU law is at hand regardless of whether the national law in question has or has not been amended as a result of the implementation of EU law into national law.[27] Conforming interpretation applies to all EU law[28], including provisions which are directly applicable or have direct effect. The meaning of conforming interpretation is however emphasized in relation to directives. When the indirect effect is given to the EU provision, the national provision maintains its position as the provision that is applied primarily.[29] In the field of criminal law, the principle of legality restricts the indirect effect because criminal liability cannot be determined or aggravated on the basis of a framework decision or directive alone.[30] Thus the interpretation of penal provisions is possible only within the wording of a national penal provision.[31] The principle of conforming interpretation can be seen as an expression of heterarchical structures between EU law and national law as well. Its influence and the heterarchical structure might be seen to be at its strongest in the field of criminal law because of the principle of legality.

It is essential to distinguish *primacy* from *supremacy*, because each has a different connotation. Supremacy refers to hierarchical structures between the Union and the Member States, to supreme legal acts and to the validity of norms, whereas primacy refers to heterarchical structures and to the

[25] Case C-157/86 *Mary Murphy and others v An Bord Telecom Eireann* [1988] ECR 00673, para 11.
[26] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, paras 43, 47.
[27] Sakari Melander, *EU-rikosoikeus* (WSOY 2010) 91.
[28] Murphy and others (n 25) para 11.
[29] Juha Raitio, *Eurooppaoikeus ja Sisämarkkinat* (Talentum 2010) 234–37.
[30] *Pupino* (n 26) paras 44–45; Case C-14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 02545, para 20; Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 03969, para 14.
[31] Melander (n 27) 92.

possible sidelining of norms when laws are applied.[32] Understanding this terminological distinction is relevant to a comprehensive understanding of the nature of the EU legal order.

Primacy seems to be the term chosen and used by the CJEU to describe the interrelationship between EU law and national law. In the context of the supremacy or primacy of the Community or Union law the CJEU seems to have used the English term 'supremacy' or 'supreme' in only three cases. In the most recent of these cases (1973), the CJEU used the term 'primacy' (*primauté*) in its French-language version. In the other two cases, the terms *prééminent* (adjective) or *prééminence sur* (noun + preposition) were used in the French-language version, which translate into English as *pre-eminent*, *pre-eminence*, *precedence over*.

In the case of *CILFIT*, the CJEU has stated that all language versions are equally authentic and that the interpretation of Community or Union law requires a comparison between the different language versions. Moreover, EU law needs to be interpreted in the light of the provisions of Union law as a whole and the objectives of the Union.[33] However, the French language has a special position because the CJEU uses French as the common working language. Deliberations are taken and judgments are drafted in French. After this, the judgments are translated into the language of the case.[34] Therefore, it is useful to compare other language versions to the French version.

In the case of *Walt Wilhelm,* the Court stated that 'Article 87(2)(E), in conferring on a Community institution the power to determine the relationship between national laws and the community rules on competition, confirms the supremacy of Community law'. In French the phrase is '*le caractère prééminent du droit communautaire*'.[35] In case *93/71* the term *supremacy* is among the keywords in the judgment, but appears nowhere else in the text of the judgment. The French version of the decision uses the phrase '*prééminence sur le droit interne*',[36] which refers to 'pre-eminence' or 'supremacy' because of the preposition *sur*, equivalent to the English prepositions *on*, *over*, *upon*. In the case of *Fratelli Variola,* the

[32] Likewise, Avbelj (n 14) 744.
[33] Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-03415, paras 17–20. See also Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 ELJ 395, 396.
[34] Anthony Arnull, *The European Union and its Court of Justice* (OUP 2006) 13.
[35] Case C-14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR I-00001, para 5.
[36] Case C-93/71 *Orsolina Leionesio v Ministro dell'agricoltura e foreste* [1972] ECR I-00287.

Court has stated that the supremacy of the Community legal system is a fundamental principle of Community law. The French version of the judgment uses the phrase '*le principle fundamental de la primauté de l'ordre juridique communautaire*'.[37] *Primauté* does not refer to 'supremacy', but to the primacy of the Community legal order instead.

It is undeniable that the Court has sometimes used terminology that can be interpreted as referring to 'supremacy', at least in the case *93/71*. However, the Court has not used the English terms 'supreme' or 'supremacy' in this context since 1973, and the French-language version in the case from 1973 refers to 'primacy'. The UK acceded to the European Communities in 1973[38] and thus the two earlier cases (14/68 and 93/71) have been translated into English at a later date.

The plurality of official languages poses a challenge and therefore teleological reasoning is essential in interpreting Union law. Owing to the use of several official languages, indeterminacy of the meanings of words in the Union law is greater than in national legal orders, and it is often difficult to determine precise meanings for words. Teleological interpretation in the EU law context guarantees uniform application of EU law at the national level better than literal interpretation, for example.[39] Teleological interpretation aims to fulfil the objective and purpose of the EU treaties and also the effectiveness of EU law. The setting of strict hierarchical structures between EU law and national law has probably not been the aim behind the primacy case law. Rather its purpose seems to be the effectiveness of EU law. The CJEU's phrasing in *Costa v ENEL* illustrates this argument quite well. The Court stated that '[t]he obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories'.[40]

In the 2000s, the Court frequently used the term *primacy of Community law* or, in French, *primauté du droit communautaire*,[41] and the term *primacy of*

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[37] Case C-34/73 *Fratelli Variola SpA v Amministrazione italiana delle Finanze* [1973] ECR I-00981, para 15.

[38] [1972] OJ L73. English became an official language of the Communities in 1973.

[39] Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) EJLS 1, 6–9. See also Paunio and Lindroos-Hovinheimo (n 33) 397–399, 409.

[40] *Costa v ENEL* (n 17).

[41] For example Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-11049, Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl* [2009] ECR I-07501, Joined Cases C-392 and C-422/04 *i-21 Germany GmbH and Arcor AG & Co KG v Bundesrepublik*

Union law, or in French *principe de primauté du droit de l'Union*.[42] The declaration concerning primacy annexed in the Lisbon treaty also uses the term 'primacy' instead of 'supremacy.' Even if in the late 1960s and early 1970s the Court might have tried to establish a continual legal praxis on the supremacy of Community legal order over national legal orders, it appears as if the phrase 'primacy of Union law' is preferred today, given the language used in the Court's case law and in the declaration annexed to the Treaties.

2. *Member States as the Masters of the Treaties*

The principle of the Member States as Masters of the Treaties is set out in Article 48 TEU, which regulates the amending of the Treaties. Treaty amendments that are made at the Intergovernmental Conference (in an ordinary revision procedure) enter into force after being ratified by all the Member States (Article 48(4) TEU). The treaty amendments can either increase or reduce the Union's competences. In addition, Article 50 TEU stipulates that any Member State can withdraw from the Union. These provisions demonstrate that the ultimate power to amend the Union's constitution and/or to withdraw from the Union lies with the Member States. Article 50 TEU is a novelty in the Lisbon treaty.

It could be argued that Article 50 embodies a heterarchical structural idea especially well. A State's belonging or not belonging to the Union is voluntary, and therefore the Union's legal order does not rank higher than the legal order of the Member State. If the EU constitutional law had *supremacy* over national constitutional law, then the option to withdraw would not seem to be in line with supremacy. And this rationale supports the claim that primacy is a preferred concept for describing the interrelationship between EU law and national law.

3. *Principle of Sincere Cooperation*

Article 4(3) TEU stipulates the scope and substance of the principle of sincere cooperation, also known as the principle of loyalty. The principle applies to both the Union and the Member States. Article 4(3) TEU stipulates that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. In addition to the Member States and their public authorities, the Union's institutions must follow the principle. This obligation can be

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Deutschland [2006] ECR I-08559, Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-02585, C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-00837.

[42] Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-08015.

seen to include the requirements arising from the principles of subsidiarity and proportionality. Since the commitment to loyalty is not restricted to the Member States only, the principle of sincere cooperation can be seen to express a heterarchical structure of the EU legal order. Without the principle of sincere cooperation, the binding nature of Union law would lose its meaning, or in other words, be inflated. The principle of primacy would also lose its impact. The principle of primacy and the principle of sincere cooperation are closely connected, and both foster the effectiveness of Union law.

IV. PRINCIPLES OF HETRARCHICAL STRUCTURES: ECHR REGIME – NATIONAL LAW

Constitutional Status of ECHR Convention System in National Legal Orders. In the case of *Loizidou*, the European Court of Human Rights (ECtHR) has stated that the Convention is a 'constitutional instrument of European public order'.[43] It is not entirely clear, however, whether the ECHR has a constitutional status in all of the judicial systems of its contracting parties.[44] The manner of incorporation of the ECHR (or of international treaties in general) varies. Some countries have a monist system, while others have a dualist one. Regardless of the manner in which the Convention is accepted into the national legal orders, the ECHR has the status of a binding international treaty and the Convention's norms become part of the national legal orders. The hierarchical status of the Convention varies among the contracting parties and the Convention affects those contracting parties which are Member States of the EU, also via EU law.[45]

The ECHR concerns human rights issues only and therefore represents a functionalised legal regime. If and when the ECHR is considered constitutional by nature, one needs to keep in mind that the Convention has no effect on other parts of the constitutions of the contracting parties other than human rights and fundamental rights and their monitoring systems.

It is reasonable to start by noticing that some scholars find it quite problematic to refer to the ECHR as a constitutional document. One

[43] *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995), para 75.
[44] Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal System*s (OUP 2008).
[45] Matti Pellonpää and others, *Euroopan Ihmisoikeussopimus* (Talentum 2012) 47–50; Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal System*s (OUP 2008) 683.

problematic aspect is the lack of a separation of powers in the ECHR Convention system. The ECtHR functions as a judiciary but the contracting parties act as both the legislature (as the constitutional assembly) and the executive quarter.[46]

The status of the ECHR varies considerably from one Contracting Party to another. Some contracting parties recognise that the Convention has a constitutional status within their legal order. For example, nowadays Austria finds this as an indisputable fact.[47] The Austrian Constitutional Court has stated directly that the ECHR has been elevated to constitutional status. However, the Austrian Constitutional Court has set limits on the authority of the ECHR by declaring that the state authorities are bound to the constitutional principle of state organisation even if there would be a discrepancy between them and the Convention ('*An die verfassungsrechtlichen Grundsätze der Staatsorganisation ist der Gerichtshof aber auch im Falle eines Widerspruches zur Konvention gebunden*'). [48] In the Netherlands, the ECHR even has supraconstitutional status. [49] This Article resembles much the principle of primacy in EU law: both of them lead to the non-application of contradicting national provision but do not nullify the provision in question.

In Finland, the ECHR has been incorporated into national legislation and it has the formal status of ordinary law, but the ECHR is seen to have constitutional status only indirectly, because the provisions of the ECHR have had a great influence on the Finnish fundamental rights reform in 1995 where ECHR provisions were used as examples for new Finnish fundamental rights provisions.[50] Similarly, Norway and Sweden enacted new statutes in order to fill gaps in their constitutions with respect to the

[46] Evert Albert Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court' in Paul Mahoney and others (eds) *Protection des Droits de l'Homme: La Perspective Européenne, Protecting Human Rights: The European Perspective – Studies in memory of Rolv Ryssdal* (Carl Heymanns, 2000) 45, 62.

[47] Daniela Thurnherr, 'The Reception Process in Austria and Switzerland' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal System*s (OUP 2008) 325.

[48] Collection number 11500 (Austrian Constitutional Court, 14 October 1987) 3–5 <http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_10128986_86B00267_01/JFR_10128986_86B00267_01.pdf> accessed 4 May 2013. See also Nico Krisch, 'The Open Architecture of European Human Rights Law' (2007) LSE Law, Society, and Economy Working Papers 11/2007, 15 <http://www.lse.ac.uk/collections/law/wps/WPS11-2007Krisch.pdf> accessed 4 May 2013.

[49] The Dutch Constitution of 1983 Article 94.

[50] Pellonpää and others (n 45) 79.

ECHR.[51]

In the Spanish constitution, the ECHR is ranked below the national constitution but above (conflicting) national statutes (Articles 95 and 96 of the Spanish Constitution). As far as basic rights are concerned, the Spanish constitution stipulates that the provisions concerning fundamental rights and liberties will be interpreted in conformity with the international treaties, especially ECHR, which Spain has ratified (Article 10 of Spanish Constitution).[52] In Italy, the ECHR has the status of ordinary law.[53]

Helen Keller and Alec Stone Sweet have assessed the impact the ECHR has on national legal orders. Even though it might seem rational at first glance that the reception of the ECHR would be more effective in monist countries than in dualist countries, Keller and Sweet argue that *ex ante* there is no causal linkage between the monist or dualist posture of a state and the effective reception of the ECHR. The effectiveness of the reception of the ECHR also depends on what kind of hierarchical status is given to the ECHR in national legal orders, which reflects the potential constitutional status of the ECHR. However, what really defines the constitutional status of the ECHR is the judicial practice of state parties, and not so much how the ECHR has been incorporated into the legal order.[54]

Regardless of the fact that the ECHR constitutes some kind of surrogate Bill of Rights and that it protects more of a minimum standard of human rights and is seen as having a complementary or supplementary role in the national system of protection of rights, the ECHR may be considered to have a constitutional status in the legal orders of the contracting parties.[55] The impact of the incorporation of ECHR into national legal orders and the way the ECHR regime operates after its transformation through Protocol no 11 (individual application procedure) supports the claim that

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[51] Ola Wiklund, 'The Reception Process in Sweden and Norway' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal System*s (OUP 2008) 182–184; Alec Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering' (2012) 33 Cardozo L Rev 1859, 1865.

[52] The Spanish Constitution of 1978. See also Mercedes Candela Soriano, 'The Reception Process in Spain and Italy' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal System*s (OUP 2008) 403–404; Krisch (n 48) 6.

[53] Candela Soriano (n 52) 403–406.

[54] Keller and Stone Sweet (n 45) 682–86.

[55] ibid 701–06.

the ECHR Convention system would be constitutional in nature.[56]

Some principles of the ECHR regime seem to be essentially heterarchical. These are the doctrine of margin of appreciation (and proportionality analysis) and the doctrine on equivalent protection. Margin of appreciation is a doctrine that enables flexible co-operation between national legal orders and the ECHR regime when the State Parties restrict the Convention rights. The doctrine leaves room for State Parties to strike a balance between the common good of society and the rights of individuals,[57] as there is room for the national authorities to determine whether an interference with the right is 'necessary in a democratic society'.[58] The state parties are free to choose the measures they adopt to fulfil the obligations deriving from the ECHR.[59] The extent of the discretion varies in relation to different Articles of the Convention, depending on how detailed the text of the Article is.[60] Moreover, the principle of proportionality imposes limits on the margin of appreciation. The doctrine has been developed in order to strike a balance between national views on human rights and the uniform application of the Convention.[61]

Margin of appreciation relates also to a methodological issue concerning the interpretation of the Convention as a living instrument. This type of *evolutive interpretation* was developed against the background of the Second World War. The intention behind it was to give flexibility to the interpretation of the Convention, bearing in mind that situations which the drafters of the Convention could not have foreseen might evolve in the future.[62]

In *Tyrer*, the ECtHR stated that 'the Convention is a *living instrument* which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions'. In the *Tyrer* case, a juvenile court in UK had

[56] Stone Sweet (n 51) 1859–860.
[57] Murat Tümay, 'The "Margin of Appreciation Doctrine" Developed by the Case Law of the European Court of Human Rights' (2008) 5 Ankara L Rev 201, 201.
[58] Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004–2005) 11 Columbia J Eur L 113, 116.
[59] "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium* (Merits) App no 1474/62, 1677/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968), para 10.
[60] Brauch (n 58) 120.
[61] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001) 2–3.
[62] Tümay (n 57) 209–210; Alastair Mowbray, 'The Creativity of the European Court of Human Rights'(2005) 5 Human Rights L Rev 57, 58.

sentenced a fifteen-year-old citizen to birching. The ECtHR evaluated whether birching would constitute inhuman and degrading punishment within the meaning of Article 3 of the Convention. The ECtHR stated that even if judicial corporal punishment would have strong deterrent effects, the Court must be influenced by the 'developments and commonly accepted standards in the penal policy of the Member States', thus relying on the methodology of the Convention as a living instrument. The Court found that the use of the judicial corporal punishment of birching constituted a breach of Article 3 of the Convention.[63] The methods of interpretation of the Convention can be described as both dynamic and evolutive, and practical and effective.[64] The evolutive and dynamic approach supports the ECtHR's case law on margin of appreciation because if there were no room for discretion the Convention parties could not interpret the Convention in a dynamic and evolutive fashion.

It needs to be kept in mind that even though the Convention needs to be interpreted in a dynamic and evolutionary way, the interpretation must be tied to the text of the Convention. There are also limitations to the margin of appreciation. The ECtHR has tried to bring clarity to the doctrine by introducing a balancing of the importance of the right with the importance of the restriction. The margin is narrower if, for example, free speech, and especially free political speech, is restricted.[65] By contrast, the margin is wider when a state restricts a right in order to protect national security.[66] The more consensus there is between the ECHR member states on a particular issue, the narrower the margin of appreciation is on that issue. By the same token, diversity in understanding a particular issue increases the margin of appreciation. This latter limitation is, to some extent, difficult to determine precisely. Is there a need for European consensus or international consensus? When is consensus at hand, when can we recognise it, and ultimately, who decides?[67] Margin of appreciation expresses acceptance of pluralism of legal orders and it enables flexible co-operation between the legal orders. Thus, margin of appreciation could be seen to represent a heterarchical constitutional structure pertaining between the ECHR Convention system and national legal orders.

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[63] *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), paras 30–35.
[64] *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 74.
[65] Brauch (n 58) 148, 126–27.
[66] Klass and Others v Germany App no 5029/71 (ECtHR, 6 September 1978), paras 49–50, 59–60. See also Brauch (n 58) 127.
[67] Brauch (n 58) 128, 144–145. See also Ignacio de la Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' (2006) 7 German L J 611, 617.

V. INTERRELATIONSHIP OF EU LAW AND ECHR CONVENTION SYSTEM

Protection of fundamental and human rights entered into EU law as a result of the supremacy/primacy case law. The protection of fundamental and human rights in Union law increases the acceptability of the primacy doctrine[68] by assuring the Member States that the Community guarantees fundamental and human rights while Community law is applied.

1. *Current Interrelationship of EU Law and the ECHR Convention System – The Situation Before the EU's Accession to the ECHR: Doctrine of Equivalent Protection*

In the *Kadi* case the CJEU has given guidelines concerning the interrelationship of Union law and international law from the Union's perspective. The Union must respect international law[69]. However, from the CJEU's perspective, the Union's constitutional principles have primacy over international law obligations '[...] an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition for their lawfulness [...]'.[70]

The CJEU's rulings are effective only within the Union's municipal legal order. Therefore, conflicts in the obligations of the Member States of the Union in the arena of international law will be solved by the rules of public international law.[71] This means that a separation must be made between conflicts of Union law and international law within the Union legal order and of those possible conflicts the Member States face because the Member States ought to respect both their obligations to the Union and the obligations deriving from other international treaties. This also means that CJEU can give judgments concerning the interpretation of EU law but the EU Member States need to ensure that they comply with their obligations deriving from both EU law and international law.

The rules of public international law can be found in the Vienna

[68] Elizabeth Defeis, 'Dual System of Human Rights: The European Union' (2007–2008) 14 ILSA J Intl & Comparative L 1, 2.
[69] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, para 291.
[70] ibid para 285.
[71] *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, Opinion of AG Poiares Maduro, para 39.

Convention on the Law of Treaties[72] (VCLT) for example. The VCLT applies to treaties made between states (Article 1)[73]. According to Article 27 of VCLT, 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Therefore it can be argued that a Member State of the EU cannot invoke regional Union law provisions, which are directly applicable or have been implemented by the Member States, as justification for its failure to perform some other obligations it has based on international treaty. Since EU law can be perceived to be an integral part of the Member States' legal orders, the interpretation that Union law could be parallel with Member States' domestic law within the scope of Article 27 VCLT can be seen as a valid argument.

Article 351 of TFEU regulates the status of agreements that are concluded before 1 January 1958, or for acceding States, before the date of their accession. The rights and obligations arising from those agreements are not affected by the provisions of the Treaties.[74] This means that if a EU Member State has ratified the ECHR before its EU membership, there will be no changes to the obligations deriving from the ECHR Convention system. However, the EU Member States are obliged to 'take all appropriate steps to eliminate the incompatibilities established' (Article 351(2) TFEU). This provision expresses the more general principle of loyalty. EU Member States ought to realise their obligations deriving from both EU law and international law to the fullest. Article 351 TFEU and the embodiment of the principle of loyalty it contains demonstrates heterarchical constitutional structures between EU law and international law from the EU law perspective.

The ECtHR has had cases concerning the question of whether an EU Member State has violated the ECHR by simply implementing Union law.[75] In *Matthews,* the ECtHR stated that even though EU Member States have subsequent obligations arising from the Union treaties, they still have the responsibility to execute their obligations arising from the ECHR.[76] In *Bosphorus,* the ECtHR stated:

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[72] UN Treaty Series, Registration Number I-18232.

[73] The Convention applies only to those treaties that are concluded after the entry into force of the VCLT (Article 4) 27 January 1980.

[74] See also Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 J Intl L 463, 471–75.

[75] *Matthews v the United Kingdom* App no 24833/94 (ECtHR 18 February 1999); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005). See also Ličková (n 74) 479–482.

[76] *Matthews* (n 75) paras 32–35. See also Ličková (n 74) 480.

> [A] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. (...) The state is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[77]

This conclusion is consistent with the Article 351 TFEU described above.

In the *Bosphorus* case, the ECtHR also created a doctrine of equivalent protection of human rights according to which state actions taken in compliance with legal obligations such as those deriving from Union membership are justified as long as the organisation in question is considered to protect fundamental rights. The protection must cover both the substantive guarantees and the mechanisms controlling their observance. The protection ought to be considered as at least equivalent to that for which the Convention provides. If the protection provided by the organisation is seen to be equivalent, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations deriving from its membership in the organisation. The ECtHR has specifically stated that protection of fundamental rights in EU law can be considered equivalent to that of the Convention system.[78]

It is worth noting that any such equivalence is not considered to be continual unconditionally. Any findings of equivalence can be reviewed if there are relevant changes in the protection of fundamental rights. A presumption of equivalence can be rebutted if the protection of Convention rights is seen to be manifestly deficient when considered in the light of the circumstances of a particular case. The equivalence of EU law with the ECHR that was found in the *Bosphorus* case was reasoned *inter alia* by stating that the Charter might become part of the Union's primary law.[79] Since the Charter nowadays has the same legal value as the Treaties, the presumption of equivalence is arguably quite strong.

It could be argued that nowadays the presumption of equivalence symbolises a heterarchical structure between the EU legal order and the ECHR Convention system. It has brought flexibility to the interrelationship of these two European legal systems by the presumption

[77] *Bosphorus* (n 75) paras 153–54.
[78] ibid paras 155–56, 165.
[79] ibid paras 155–56, 159.

that the EU does respect fundamental and human rights because it is founded by the Member States as the framework for co-operation and because the legitimacy of EU law is ultimately reliant on the approval of the Member States.

2. *The Relationship between EU Law and the ECHR after the EU's Accession to the Convention: Normalisation and Margin of Appreciation*

According to Article 6(2) TEU, the Union shall accede to the ECHR. The Steering Committee for Human Rights has given a report to the Committee of Ministers concerning the Union's accession to ECHR.[80] The next presentation is heavily based on that report. As far as possible, the Union ought to have the same rights and obligations as the other Contracting Parties.[81] Accession to the ECHR would mean that all acts, measures and omissions of the Union, will be subject to the control exercised by the ECtHR,[82] and that the decisions of the ECtHR, in cases to which EU is a party, will be binding on all of the EU's institutions, including the CJEU.[83]

The case law concerning the presumption of equivalence that was established in the *Bosphorus* case might come to lose its meaning in relation to EU law. If the presumption of equivalence were to remain, it would establish unequal standing between the different parties, because EU would be privileged by it.[84] The ECtHR might renounce the *Bosphorus* case law after EU's accession[85] which would bring EU in line with the other parties of ECHR. This might be preferable following already from the Draft Accession Agreement explanatory report, according to which the Convention control mechanism should be applied to the EU, as a main

[80] Steering Committee for Human Rights, 'Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights' CDDH(2011)009. There are disagreements on the content of the draft. See also Friends of Presidency (FREMP), 'Accession of the EU to the ECHR: Working Document from the Presidency' (DS 1675/11).

[81] Steering Committee for Human Rights (n 80) 16, 19.

[82] ibid 15.

[83] ibid 18.

[84] Xavier Groussot, Tobias Lock and Laurent Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011'(2011) 218 Eur Issues 1, 4; Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 L and Practice of Interl Courts and Tribunals 375, 395.

[85] Lock (n 84) 396; Laurent Scheeck, 'The Relationship between the European Courts and Integration through Human Rights' (2005) 65 Zeitschrift für Ausländishes Öffentliches Recht und Völkerrecht 837, 862.

rule, in the same way as it applies to the other contracting parties.[86] The Draft Accession Agreement remains unclear on the matter, which means that the ECtHR can return to the issue later on.[87]

The Draft Accession Agreement enables the ECtHR to review EU primary law.[88] The Court could, however, only investigate whether EU law is compatible with the Convention. In other words, it could not declare provisions of EU law invalid. This means that the exclusive jurisdiction and interpretative autonomy of EU law would remain with the CJEU.[89] The Draft Accession Agreement also clarifies circumstances in which the CJEU can review EU law-related cases before of the review of the ECtHR. The main rule is that the applicant must exhaust only the remedies in the legal order of the main respondent, whether it is the EU or an EU Member State, but not the remedies of the co-respondent. If the EU is the main respondent, the applicant must first exhaust all remedies in the EU legal order, which are the general court and the CJEU. If the EU is a co-respondent (meaning that the main respondent is an EU Member State; the status of co-respondent is voluntary), the CJEU can review the case before the ECtHR reviews it. Equally, if the EU is not a co-respondent in a case where an EU Member State is the main respondent, the CJEU cannot review the case. In such situations the only way the CJEU could have reviewed the case would be if a national court had asked for a preliminary ruling from the CJEU at an earlier stage during the national proceedings.[90]

If the Union's accession to the ECHR complies with this draft agreement made by the Steering Committee, the Union would have the same obligations as the State parties of the Convention. This could mean that there could be changes in the interpretation of some provisions of Union instruments. For example, human rights violations could be seen as an excuse to not surrender a person to another state based on the issue of a European arrest warrant (EAW), because EU law ought to comply with the ECHR[91]. Differences in national law, or regional transnational law,

[86] Steering Committee for Human Rights (n 80) 16.
[87] Groussot, Lock and Pech (n 84) 9.
[88] Steering Committee for Human Rights (n 80) 7; Groussot, Lock and Pech (n 84) 9.
[89] Groussot, Lock and Pech (n 84) 9–10.
[90] Steering Committee for Human Rights (n 80) 24–25; Groussot, Lock and Pech (n 84) 14–15.
[91] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (ECJ, 26 February 2013). In Melloni the CJEU considers the Framework Decision on the European Arrest Warrant to be compatible with the ECHR. See also Samuli Miettinen, 'CJEU judgment in C-399/11 Melloni: Member States may not offer a 'greater level of protection' than under the

compared to the Convention are not acceptable excuses for not complying with the Convention.

The whole idea of the Convention is to bring coherence to the protection of human rights in the European area. The Union's accession would enhance this coherence.[92] Following accession, the doctrine on equivalent protection concerning EU law might get renounced by the ECtHR for the sake of equal standing of the Convention contracting parties. The EU's position as a contracting party would thus become normal when compared to the state parties. The Union would have negative and positive obligations arising from the Convention, and it would have the same margin of appreciation in fulfilling its obligations as the state parties have.

VI. CONCLUSIONS

The various European legal systems are linked in complex ways. This contribution aimed to clarify some of those linkages. Constitutions at the European level have been given only some of the functions traditionally held by national constitutions. Given key differences between European and national constitutional functions, how should the norms described in the previous sections be modelled? This section reflects on the meaning and influence of heterarchical constitutional structures and draws some tentative conclusions. However, further study on their influence would be welcome. What is the purpose of such structures? How do these structures manifest themselves in different branches of law? Criminal law is used as an example when answering these questions because of its close connections to national sovereignty and constitutional law. Criminal law is also a good example because the principle of legality imposes fairly strict requirements for the ways in which criminal law may be applied.

EU constitutionalism differs from state constitutionalism in at least one vital aspect. State constitutionalism is about imposing limitations on the use of power and of hierarchical structures within the polity. EU constitutionalism is, in addition to these, about heterarchical constitutional structures between the EU polity and the individual Member States. Neither the Union nor the Member States occupy an absolute higher hierarchical level in the constitutional structure. Rather, the common constitutional framework for the Union and the Member States could be described as parallel, complementary or integral.

European Arrest Warrant' (*Research, Consultancy and Teaching in EU Law*, 26 February 2013) <http://miettinenlaw.com/author/samulimiettinenlaw/> accessed 15 March 2013.

[92] Steering Committee for Human Rights (n 80) 16.

The heterarchical constitutional principles described above, mainly the principle of primacy and the doctrine concerning margin of appreciation, aim at flexible co-operation between different legal orders. This reduces the need to create new rules simply to connect different constitutional orders. Heterarchical principles are principles properly so called: they are more open to case-specific interpretation than strict rules. This is both their strength, and their weakness.

A concept of *deep pluralism* has been used to describe a situation 'where actors of each legal order proceed without systemic regard for the coherence of the whole'.[93] Flexible heterarchical constitutional structures which facilitate cooperation between the EU and its Member States contribute to deepening cooperation without clearly defining the constitutional relationship. Some preliminary steps have been taken towards a more clearly defined relationship. For example, the declaration concerning primacy has been annexed to the Lisbon Treaty. Article 6(2) TEU now explicitly stipulates that the Union shall accede to the ECHR convention.

Special characteristics of national constitutions can flourish within the European constitutional setting. Article 4(2) TEU states that the EU respects the national identities of the Member States. Heterarchical constitutional principles emphasise voluntariness in the relationship between the EU and the Member States. Article 50 TEU makes it possible for the Member States to leave the Union.[94] Thus, EU law must be acceptable in order to legitimize its position in the material sense, as well as its role in the national legal orders. Article 67(1) expresses respect for different legal systems and traditions of the Member States in the context of criminal law cooperation.

The principle of conforming interpretation gives an important role to national legislation. The field of criminal law is sensitive from the perspective of national sovereignty. The use of conforming interpretation is therefore restricted in this context, as presented above in section three. A framework decision or a directive cannot independently determine or aggravate criminal liability.[95] Therefore the principle of primacy should not to be considered absolute. The principle of primacy is applied only after determining that national legislation cannot be interpreted harmoniously

[93] Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 40.
[94] What obligations the Member States would have to fulfill if they wish to leave the Union is another question.
[95] *Pretore di Salò* (n 30) para 20; *Kolpinghuis* (n 30) para 14; *Pupino* (n 26) paras 44–45.

with EU law in the case in question. In cases where national legislation and its EU law-oriented interpretation do not allow determination or aggravation of criminal liability, the principle of primacy cannot be used as an alternative means for determining or aggravating criminal liability. In cases like these, limits to the use of conforming interpretation and the restriction on the principle of primacy expresses one of the sub-principles of the principle of legality: the principle of strict construction, also known as the prohibition of analogous application to the detriment of the accused (*nulla poena sine lege stricta*). The limits to the use of the principle of conforming interpretation and the restriction on the principle of primacy in the field of criminal law also represent heterarchical structures between the EU legal order and the national legal orders quite well since the restrictions show that strict preset hierarchical structures have not been established between the orders.

The Lisbon Treaty also introduced the so-called emergency brake procedure. Article 82(3) TEU (concerning procedural cooperation) and Article 83(3) TEU (concerning the approximation of substantive criminal law) are likely to prevent situations described in the paragraph above where the EU legislator might otherwise create criminal legislation which Member States consider excessive.[96] The emergency brake procedure can be seen as a more efficient expression of the more general principle of subsidiarity in fields of shared competence such as criminal law. In the fields of shared competence draft legislative acts are forwarded to national Parliaments so that they can review whether the draft legislative act is in compliance with the principle of subsidiarity.[97] If at least a quarter of the votes given to the Parliaments declare that proposed criminal legislation does not comply with the principle of subsidiarity, the draft will be reviewed.[98]

In the emergency break procedure, where an EU Member State considers that 'a draft directive would affect fundamental aspects of its criminal justice system', it can ask for a referral to the European Council. This suspends the ordinary legislative procedure. The wording that is used, 'fundamental aspects of criminal justice system', seems to leave quite a wide margin of appreciation for the Member States to use the emergency brake. Before the Lisbon Treaty, there was no need for an emergency

[96] Of course this does not affect to the possibility that the implementation acts by the Member States can be delayed.
[97] Protocol on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C326/206, Article 6.
[98] ibid Article 7(2).

break because third pillar instruments required unanimity.[99] The wording of the emergency brake procedure now clearly acknowledges that there are differences between national criminal justice systems. The emergency brake procedure enables discussions concerning the proposed directive in the European Council. A consensus is required for the determination of the suspension of the legislative process. Thus the procedure creates material legitimacy for the directive.

The limited scope for employing conforming interpretations or primacy in the field of criminal law as well as the emergency brake procedure in the EU criminal law legal bases show that cooperation within the EU framework is quite flexible and also takes national special characteristics into account. The use of mutual recognition as the primary principle[100] for cooperation in criminal matters also expresses the heterarchical nature of such cooperation. Heterarchical constitutional principles are elastic. They enable flexibility in cooperation. Heterarchical principles bring legitimacy to EU criminal law legislation because they take into account national specificities. Deeper studies on the influence of heterarchical constitutional structures in the field of criminal law, and in other fields, are required.

The picture formed by the constitutions of the individual Member States, the EU and the ECHR convention system can be seen as a dynamic whole. On one hand the CJEU considers the ECHR and the ECtHR case law[101] as an important and fundamental source for its own argumentation. At the same time, the ECHR case law concerning the principle of equivalent protection has simplified transnational cooperation for Member States that are implementing, interpreting and enforcing these European norms. Both European courts seem to take the special characteristics of the other system into account.

Two further general conclusions can be drawn. First, the formal status of the European regional legal orders in the national legal orders is not the determining factor when assessing their influence on national legal orders. How the European regional legal orders are valued and how effectively they are applied in national legal practices are of greater importance.

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[99] Petter Asp, *The Substantive Criminal Law Competence of the EU* (Jure Förlag 2012) 140.

[100] Presidency Conclusions Tampere European Council 15 and 16 October 1999, para 33.

[101] For example concerning the principle of legality see case of C-63/83 *Regina v Kirk* [1984] ECR I-02689, para 22; Joined Cases of C-189/02 P, C-202/02 P, C-205/02 P – C-208/02 P and C-213/02 *Dansk Rørindustri and others v Commission of the European Communities* [2005]ECR I-05425, paras 215–220.

Second, the doctrine of sources of law needs to be reconsidered. A doctrine of sources in European law should not aim to establish a strict hierarchical model encompassing the different legal orders. Instead, more weight ought to be given to the different *communicative principles* between the legal orders, such as the principle of primacy and the doctrine of margin of appreciation. National legislation differs from European regional legal orders in that it functions as the framework and infrastructure for the European regional legal orders. Different legal orders do not need to be hierarchically interrelated, even though each of the systems has an internal hierarchy of norms. This demonstrates that different communicative principles apply between the legal orders.

FRAGMENTATION AND CONSTITUTIONALISATION OF INTERNATIONAL LAW: A THEORETICAL INQUIRY

Rossana Deplano*

A growing body of interdisciplinary scholarship addresses the issue of global constitutionalism. Scholarly contributions analyse the allocation of power within rule-systems of international law, how it affects subsequent international practice and its connection with political institutions. This article questions the validity of the use of constitutional concepts as a means for interpreting international law. An argument is made that current contributions on international constitutionalism are grounded on unstated assumptions. It is maintained that in order to restore coherence and unity within the international legal system, interpretations of international law should be carried out through interpretive means that are specifically conceived for international law. This article shows that although constitutionalism may be featured as an autonomous concept of international law, it is not able to restore coherence and unity within the international legal system. Therefore, it cannot be regarded as a remedy to the phenomenon of fragmentation.

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I. INTRODUCTION

It is widely recognised that international law is becoming increasingly fragmented into various fields governed by own principles and rules. Known as the phenomenon of fragmentation, such a functional specialization is generally regarded as a characteristic of modern international law. From international legal perspective, there are two main methodological approaches to fragmentation. The first one is represented by the Report on Fragmentation of the International Law Commission (ILC) of 2006.[1] It establishes a set of basic guidelines on normative conflicts and is entirely based on provisions of the Vienna Convention on the Law of Treaties (VCLT) of 1969.[2] The second one is represented by the idea of constitutionalisation of international law. This is a theoretical approach and refers to the process of constitutionalisation of both the entire international legal system and functional regimes of international law.

Existent approaches to fragmentation aim at restoring coherence and unity within international law. Although there is no universally accepted definition of either fragmentation or international law,[3] proponents of the constitutionalisation of international law assume that fragmentation is a characteristic of modern international law. However, the main problem associated with the idea of constitutionalisation is that, in light of the uncertainty surrounding the phenomenon of fragmentation, the ultimate purpose of scholarly contributions on constitutionalisation becomes questionable. Such contributions fail to provide any terminological or theoretical justification for the use of constitutional language in international law. Equally they do not provide any definition of fragmentation, which is the problem they are trying to redress. An argument is therefore made that although the nature of contested concepts can be maintained in relation to any key concept in law in general, and international law in particular, conceptions of international constitutionalism turn out to be grounded on unstated assumptions.

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[1] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682.

[2] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1969) 8 ILM 679 (VCLT).

[3] Tai-Heng Cheng, 'Making International Law without Knowing What It Is' (2011) 10 Washington University Global Studies L Rev 1.

This article questions the validity of the use of constitutional concepts as a means for interpreting international law in general, and restoring coherence and unity within international law in particular. By pursuing a theoretical inquiry into the structural nature of international law, it aims to establish whether constitutional interpretations of international law are able to address concerns of coherence of conflicting provisions of international law and, therefore, represent a remedy to the phenomenon of fragmentation. To that end, the analysis is articulated into two strands. On one hand, it provides an account of existent conceptions of global constitutionalism. For the purpose of this article, the inquiry is limited to conceptions of constitutionalism beyond the state and does address issues of comparative constitutional law. On the other hand, it shows that, in theory, constitutionalism may be conceived as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism. Hence, by featuring international constitutionalism as a methodological approach to fragmentation with own characteristics, the article contributes a framework for further advancing the theory of constitutionalism beyond the state.

This article is divided into two parts, followed by some final remarks. Section 2 conceptualises the relationship between fragmentation and constitutionalisation of international law. It examines substantive issues underlying the idea of fragmentation and provides an account of existent remedies thereto. Section 3 examines issues of autonomy and originality of constitutionalism as a methodological approach to fragmentation. It explores the idea of constitutionalism as an autonomous concept of international law.

II. FRAGMENTATION OF INTERNATIONAL LAW

1. *Conceptualising Fragmentation*

The idea of fragmentation of international law is generally regarded as a phenomenon associated with the globalization of international society, especially the economic side of globalization.[4] Although there is no universally accepted definition, international legal scholars maintain that fragmentation consists of the development of highly specialised fields of

[4] Malcolm N Shaw, *International Law* (6th ed, CUP 2008) 66; Joel P Trachtman, *The Economic Structure of International Law* (Harvard University Press 2008) 196-207; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 Intl L & Politics 259, 262-264.

international law. Accordingly, some acknowledge that fragmentation is a technical problem rooted on conceptual matters. Martineau, for instance, writes that 'the possibility of a debate on fragmentation presupposes that people disagree on how the tension between unity and diversity [in international law] is and should be managed'.[5] Others recognise that it is a technical problem stemming from procedural matters. Koskenniemi and Simma, for example, refer to fragmentation as the manifold act of transposition of technical expertise from the national to the international context.[6] Finally, others identify fragmentation with the interaction between conflicting rules and institutional practices culminating in the erosion of general international law.[7]

International legal scholars also argue that fragmentation is a characteristic of modern international law stemming from international practice.[8] The *MOX Plant* case of 2006,[9] for instance, is regarded as a prominent example of this phenomenon. The dispute concerned the construction of a nuclear power installation – the MOX plant – in Sellafield (United Kingdom) and involved three stages and three different jurisdictions.[10]

In the first stage, following several rounds of correspondence between the United Kingdom and Ireland which failed to address Ireland's concerns regarding the radioactive discharges of the MOX plant, Ireland instituted an international tribunal for violation of Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[11] The OSPAR arbitral tribunal considered itself

[5] Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22(1) LJIL 1, 27.

[6] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern L Rev 1, 4; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 270.

[7] Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 LJIL 23, 24-25.

[8] Benvenisti and Downs, for instance, argue that fragmentation consists of 'the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries'. Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford L Rev 595, 596; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998-99) 31 NYU J Intl L & Politics 791.

[9] Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635.

[10] For a background on the litigation see, among many, Robin Churchill and Joanne Scott, 'The Mox Plant Litigation: The First-Half Life' (2004) 53 ICLQ 643.

[11] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) (1993) 32 ILM 1072(OSPAR Convention). For extensive analysis of the case, see Malgosia Fitzmaurice, 'Dispute Concerning Access to Information Under Article 9 of the

competent to take into consideration only the provisions of the OSPAR Convention.[12] It held that the United Kingdom had not violated the duty to make available the relevant information to Ireland under Article 9 of the OSPAR Convention.[13]

In the second stage, Ireland claimed a violation of the UN Convention on the Law of the Sea (UNCLOS) of 1982[14] for contamination of its water by the operation of the MOX plant. It brought proceedings against the United Kingdom pursuant to Article 287 UNCLOS, requesting the suspension of the MOX plant activities or, at least, interim measures.[15] The ITLOS took the view that, although competent, it would be necessary to determine whether itself or the European Court of Justice (ECJ) had definite jurisdiction to settle the dispute.[16] Thus, bearing in mind considerations of mutual respect and comity between the two judicial institutions, the ITLOS stayed the proceedings in order to avoid the risk of conflicting decisions.[17] At the same time, the European Commission started an infringement procedure against Ireland[18] for violation of Article 292 of the European Community (EC) Treaty[19] and Article 193 of the Euratom Treaty.[20]

OSPAR Convention *(Ireland* v *United Kingdom and Northern Ireland)*' (2003) 18 Intl J Marine and Coastal L 541.

[12] *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland versus United Kingdom of Great Britain and Northern Ireland)*, final award, 2 July 2003, UN Reports of Iternational Arbitral Awards 2006, vol XXIII 59, paras 85 and 92, <http://untreaty.un.org/cod/riaa/cases/vol_XXIII/59-151.pdf> accessed 8 May 2013.

[13] ibid para 106.

[14] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 21 ILM 1261(UNCLOS).

[15] International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant Case* (Ireland v United Kingdom) (request for provisional measures) (2003) 41 ILM 405. For a comment, see Chester Brown, 'International Tribunal for the Law of the Sea: Provisional Measures before the ITLOS: The MOX Plant Case' (2002) 17 J Intl Maritime and Coastal L 267.

[16] For a detailed comment on this issue, see Barbara Kwiatkowska, 'The *Ireland v United Kingdom* (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 J Intl Maritime and Coastal L 13.

[17] International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant case* (Ireland v United Kingdom) (suspension of proceedings on jurisdiction and merits, and request for further provisional measures) (2003) 42 ILM 1187, especially para 29, 1191.

[18] Case C-459/03 *Commission of the European Communities v Ireland* (MOX plant case) [2006] ECR I-4635. On this issue, see Gao Jianjun, 'Comments on *Commission of the European Communities v. Ireland*' (2008) 7 Chinese J Intl L 417.

[19] Now art 344 of the Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47(TFEU).

[20] Treaty Establishing the European Atomic Energy Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 167(Euratom Treaty).

In the third stage, the ECJ held that by establishing an arbitral tribunal for alleged violations of UNCLOS provisions by the United Kingdom, Ireland had violated EC law.[21] The ECJ recognised that both the EC and its members entered the UNCLOS as a mixed agreement,[22] and established that since mixed agreements have the same status within EC law as agreements concluded by the EC alone, they become integral part of EC law.[23] Hence, the ECJ concluded that it had exclusive jurisdiction under Article 292 EC Treaty[24] and found Ireland in breach of the duty to inform and consult the competent EC institutions prior to establishing the UNCLOS arbitral tribunal.[25]

Koskenniemi and Lavranos argue that, from the limited perspective of concerns of fragmentation, in this case the ECJ's decision avoided the fragmentation of EC law without taking into consideration other international provisions relevant to the dispute.[26] It thus contributed to the perceived fragmentation of international law.

Other case law shows that functional regimes of international law act like autonomous regimes. In *Kadi and Al-Barakaat*,[27] for example, the ECJ held that implementation of provisions of a UN Security Council's resolution by EU member states cannot violate certain basic human rights that are protected under EU law. It thus established the primacy of EU law over other norms of international law. Likewise, in the *Beef Hormone* case the Appellate Body of the World Trade Organization (WTO) decided that the precautionary principle developed under international environmental law was not binding under the WTO covered treaties[28] while in *EC-Biotech* the WTO panel held that some international treaties, such as the Biosafety

[21] *Commission of the European Communities v Ireland* (n 9).
[22] ibid para 61.
[23] ibid para 69. On this issue, see Paul J Cardwell and Duncan French, 'Who Decides? The RCJ's Judgment in the MOX Plant Dispute' (2007) 19 J Env L 121, 123-124.
[24] *Commission of the European Communities v Ireland* (n 9), paras 63, 133 and 136.
[25] ibid para 184.
[26] Nikolaos Lavranos, 'Freedom of Member States to Bring Disputes Before Another Court or Tribunal: Ireland Condemned for Bringing the MOX Plant Dispute Before an Arbitral Tribunal. Grand Chamber Decision of 30 May 2006, Case C-459/03, Commission v Ireland' (2006) 2 Eur Constl L Rev 456, 465-466.
[27] Joined Cases C-402 and 415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.
[28] WTO, *European Communities – Measures Concerning Meat and Meat Products–Report of the Panel* (13 February 1998) WT/DS26/AB/R [123]–[125].

Protocol, represent non binding informative law that could be taken into account in interpreting WTO agreements.[29]

Although the phenomenon of fragmentation may arguably be regarded as either the precondition or the consequence of the emergence of functional regimes of international law,[30] there is no agreement on which perspective is the correct one. Koskenniemi, for example, argues that, given the structural nature of autonomous regimes, the tendency of international courts and tribunals to interpret international law provisions from the perspective and within the limits of their own jurisdiction contributes to an uncertain process of development of international law:

> It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias... *whatever the rules*.[31]

Despite the fact that international lawyers resort to different techniques to try to overcome the phenomenon of fragmentation,[32] there is no agreement on the relationship between general rules and special rules of international law.[33] This prevents the formulation of a universally accepted hierarchy of the sources of international law, which would be used as the international law of normative conflicts.[34] Hence, fragmentation turns out to be a condition inherent to international law, that is to say, a phenomenon to be managed rather than a problem to be solved.

2. *Remedies to Fragmentation*

a. ILC Report on Fragmentation

To restore unity in international law, scholars and practitioners rely upon two main approaches to fragmentation. The first one consists of the

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[29] WTO, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products–Reports of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) (2000) 39 ILM (2000).

[30] See (n 5) and (n 6).

[31] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 EJLS <http://www.ejls.eu/1/3UK.htm> *accessed 14 January 2013 (emphasis original)*.

[32] As discussed in sec 2.2 below.

[33] See text (n 37).

[34] Koskenniemi argues that '[t]he choice of the frame determine[s] the decision. But for determining the frame there is no meta-regime, directive or rule'. Koskenniemi (n 6) 6.

findings of the ILC Report on Fragmentation. Conceived as a technical tool-box for the legal professional,[35] it offers the most comprehensive approach to the idea of fragmentation of international law. Since the ILC Report on Fragmentation aims at addressing normative conflicts arising from the emergence of autonomous regimes of international law, provisions of the VCLT (1969) are regarded as the basis of a possible international law of conflicts. The second methodological approach to fragmentation is represented by scholarly contributions on the constitutionalisation of international law.[36]

The ILC Report on Fragmentation establishes that normative conflicts may be approached from both the perspective of the subject-matter and the perspective of the number of subjects bound by the same rule(s) of international law. Each methodology is grounded on the assumption that there is no formal hierarchy governing the primary sources of international law, due to the decentralised nature of international law.[37] However, in some cases the determination of the same subject-matter within which to locate the relationship between general and special law may not be obvious, as long as the distinction between general and special rules is not always clear.[38] For instance, a treaty on maritime transport of chemicals relates to various fields of international law, including trade law, the law of the sea and maritime transport.[39] Hence, as a matter of principle, the Report on Fragmentation recognises that no rule 'is general or special in the abstract but in relation to some other rule'.[40] For the condition of same-subject matter cannot be regarded as decisive in establishing whether or not there is a conflict of international rules, the Report on

[35] Against the formalistic approach of the ILC Report on Fragmentation (n 1), see Maksymilian Del Mar, 'System Values and Understanding of Legal Language' (2008) 21 LJIL 29 (arguing that the ILC's formalistic approach to international law leads to a surface coherence of the system instead of bolstering its responsiveness to social problems); Singh (n 7) arguing against international law as a system and in favour of formal unity governed by a hierarchical conception of the sources of international law.

[36] See sec 2.2.2 below.

[37] ILC Report on Fragmentation (n 1), paras 9, 14, 485 and 493. See also Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; Antonio Cassese, *International Law* (2nd ed, OUP 2005) 198-199.

[38] Like general rules, special rules must be generally defined, even when they apply to a few cases only. This marks the difference between a special rule and an order given to somebody. ILC Report on Fragmentation (n 1), paras 111, 116.

[39] ibid para 21.

[40] ibid para 112.

Fragmentation establishes that logical reasoning needs to be complemented by legal reasoning.[41]

For the purpose of the Report on Fragmentation, the process of legal reasoning comprises three steps.[42] The first one consists of the initial assessment of what the applicable rules and principles to the case in point might be.[43] This step aims to single out the regulatory purpose of a specific cluster of provisions. The second step consists in determining which particular rules apply to the selected case.[44] To that end, the choice must be consistent with and justified in light of the regulatory purpose. The third step consists in formulating the conclusions of the legal argumentation. Its purpose is to establish the pertinent relationship between conflicting principles and rules.[45] Such conclusions must comport with general international law, including the rules of the VCLT (1969), customary international law and general principles of law recognised by civilized nations.[46]

The main strength of this model of legal reasoning is that it is simple and clear, and proves to be a valuable tool for practitioners and scholars alike. However, it is grounded on the premise that 'no homogeneous, hierarchical meta-system is realistically available to do away with such problems [of fragmentation]'.[47] It also recognises that logical reasoning alone is not able to solve normative conflicts, but needs to be complemented by legal reasoning.[48] Consequently, it acknowledges general principles and rules as interpretive guidelines on one hand, and provides that the pertinent relationship between the relevant rules must be established 'in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole' on the other hand.[49]

Within this context, the systematic use of the provisions of the VCLT (1969) operates only once the regulatory purpose has been chosen. It follows that, although this model of legal argumentation may contribute to restore coherence in international law, it does not provide evidence of the legitimacy of the process of legal argumentation in itself. This in turn

[41] ibid para 25.
[42] ibid para 36.
[43] ibid.
[44] ibid.
[45] ibid.
[46] ibid para 492.
[47] ibid para 493.
[48] ibid para 21.
[49] ibid para 36.

suggests that, since international norms are not organised around a formal hierarchy, the process of establishing the regulatory purpose through which interpret the correct relationship between the relevant clusters of rules turns out to be based on an arbitrary choice.

The considerations above show that, given the structural nature of international law as a consensual system governed by a relative hierarchy of norms, clashes between international legal provisions turn out to be unavoidable. From this perspective, the model of legal reasoning set forth in the Report on Fragmentation is aimed at managing normative conflicts on a case-by-case basis rather than eliminating the perceived idea of fragmentation. Therefore, it cannot be regarded as a remedy to the phenomenon of fragmentation.

b. Constitutionalisation of International Law

Terminological Issues

Current scholarship on international constitutionalism appears to divide into three schools, namely, the normative school, the functionalist school, and the pluralist school.[50] The normative school is based on the assumption that domestic constitutionalism needs to be complemented by international institutions and practices. From this perspective, international constitutionalism represents a form of supplemental constitutionalism. The functionalist school evaluates the process of constitutionalisation of selected regimes of international law. It analyses the extent to which a centralised authority enables or restrains the production of international law. Finally, the pluralist school examines processes of constitutionalisation beyond the state and comprises several conceptions of transnational constitutionalism.

Despite the fact that there is a growing body of scholarly literature on constitutionalism beyond the state, there exists no generally accepted definition of constitutionalism or constitutionalisation of international law.[51] Some authors use the terms constitutionalism, the international constitution and constitutionalisation as synonyms. Stone Sweet, for instance, examines the meaning of both constitutionalism and the

[50] Antje Wiener and others, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 Global Constitutionalism 1.

[51] Garrett Wallace Brown, 'The Constitutionalization of What?' (2012) 1 Global Constitutionalism 201; Bardo Fassbender, 'The Meaning of International Constitutional Law' in Ronald St J Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Nijhoff 2005) 837; Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Colum J Transnational L 529, 552ff.

constitution, and concludes that 'the constitutional*isation* of the legal system is largely the product of how the tensions inherent in legal pluralism are resolved'.[52] Others use them associated with different meanings.[53] For instance, constitutionalism is generally regarded as a concept broader than that of constitutionalisation. Others avoid any definitional conundrum not to restrict the field within the boundaries of any arbitrary definition[54] while others rely upon them as if they were concepts taken for granted.[55] Besson, for example, examines the concepts of constitution and constitutionalism in light of the debate on constitutional pluralism. However, the analysis is entirely grounded on the idea of constitutionalisation of international law, the definition of which is not provided. Within this context, what exactly constitutes the process of constitutionalisation of international law remains unclear.[56] Hence, the interpretive function of constitutionalism remains an unstated assumption.

Theoretical Issues

Although existent scholarly contributions rely upon the idea of constitutionalism as an instrument through which conceptualise issues of legitimacy of international institutions and practices, such as the systemic relationship between conflicting principles and rules of international law, its theoretical foundations remain largely undermined by the uncertainty surrounding the use of constitutional language in international law.

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[52] Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 Indiana J Global Legal Studies 644 (emphasis added).

[53] For example, Johnston refers to constitutionalism as a model of international utopianism whereas Fassbender endorses the vision of constitutionalism as a normative and institutional project. Douglas M Johnston, 'World Constitutionalism in the Theory of International Law' in Macdonald and Johnston (n 51) 27; Fassbender (n 51) 552.

[54] Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 9; Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Nijhoff 2011).

[55] Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Dunoff and Trachtman (n 54) 381-407. See also Susan C Breau, 'The Constitutionalization of the International Legal Order' (2008) 21 LJIL 545; Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 1.

[56] Bardo Fassbender, 'The Meaning of International Constitutional Law' in Macdonald and Johnston (n 51) 837; Fassbender, 'The United Nations Charter' (n 51) 552; Jörg Kammerhofer, 'Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems' (2010) 23 LJIL 725 (arguing that '[i]nternational constitutionalism is not a legal theory').

Regarding this, the theoretical inquiry into the terminology associated with international constitutionalism has practical implications that are related to the purpose of international constitutionalism. Schwöbel, for example, proposes a classification of conceptions of international constitutionalism that is based on the purpose of such conceptions.[57] It comprises four dimensions, which 'reflect the primary focus of the contributors of public international law to the field of global constitutionalism'.[58]

The first dimension is referred to as social constitutionalism. It recognises that the purpose of constitutionalism is to promote and protect the web of social relations that emerge under international law. Concerns about participation as a means of limiting power, accountability of all international actors and individual rights are central to this vision. For example, Teubner argues that constitutionalism is entirely disassociated from the state while Fischer-Lescano maintains that global constitutionalism is a political process that goes beyond public international law and state sovereignty to include civil society.[59]

The second dimension is referred to as institutional constitutionalism. It acknowledges that international constitutionalism is a network of constitutional levels traversing both the national and the international order. It deals with the institutionalization or limitation of power, especially in the form of accountability of decision-makers. Peters, for instance, argues that the constitutions of states do not form anymore a complete basic order. In particular, it is contended that the combined effects of the phenomenon of globalization and the related de-constitutionalisation of domestic law entail that national constitutions can no longer regulate the totality of governance, with the consequence that the relationship between national and international law turns out to be a network rather than a hierarchy of norms.[60]

The third dimension is referred to as normative constitutionalism. It establishes that international law is governed by certain superior rules whose legitimacy lies in their moral value for society. For example, de Wet argues that the international constitutional order is composed of *jus cogens* norms and obligations *erga omnes*, which represent the core of the international value system. Since international law is conceived as a system

[57] Schwöbel (n 54) 4; Christine EJ Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 IJCL 611.
[58] Schwöbel, *Global Constitutionalism* (n 54) 13.
[59] ibid 17-18.
[60] ibid 22-23.

with strong ethical underpinnings, emphasis is thus placed on human rights as the common value of international society.[61]

The fourth dimension is referred to as analogical constitutionalism. It draws analogies between features of the national and the international constitutional order. The EU, in particular, is regarded as a model of constitutionalism beyond the state. Drawing from this assumption, scholars make analogies between EU law and international law. For example, Habermas and Petersmann consider the EU as a political and legal model of constitutionalism for international law, respectively. Likewise, Kumm suggests that in order to assess the degree of legitimacy of international law from a constitutional perspective, the international legal principle of sovereignty should be replaced with the EU legal principle of subsidiarity.[62] From another perspective, Walker argues that the debate surrounding EU constitutionalism refers to the act of translation of constitutional concepts from the national to the international settings and is aimed at solving problems of responsible and legitimate self-government within the EU.[63]

It follows from the preceding that global constitutionalism is not a comprehensive theory but a conglomeration of scholarly contributions addressing concerns related to the issue of legitimacy of international institutions and practices rather than normative conflict. As a result, the ultimate purpose of global constitutionalism as a remedy to fragmentation turns out to be another unstated assumption.

Methodological Implications

From international legal perspective, one of the weaknesses of international constitutionalism is that, considered as an interpretive instrument, it lacks the objectivity of a methodological approach. Therefore, it may be argued that if the purpose of constitutional interpretations of international law is to restore coherence and unity within international law, then the positional perspective of analysis remains unstated. Alternatively, there are as many positional perspectives as the number of scholars that entered the debate. This suggests that in order to restore coherence and unity within international law, interpretations of the international legal system should be carried out by using legal tools that are tailored to the characteristics of modern

[61] ibid 40-41.
[62] ibid 47-48.
[63] Neil Walker, 'Postnational Constitutionalism and the Problem of Translation' in Joseph HH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 32.

international law. Furthermore, to be original the selected methodology should not double the findings of the ILC Report on Fragmentation.[64]

It is however difficult to envisage a model of legal reasoning alternative to the findings of the ILC Report on Fragmentation that is able to restore the alleged unity of general international law. Indeed, it is widely accepted among the international community of scholars that international law is a system based on state consent whose ultimate purpose consists in facilitating inter-state relations, with a view to support the interest of each state. Thus, as a functional system, international law does not possess any overarching teleology or ultimate purpose of its own. Alternatively, there are as many purposes of international law as the number of state interests protected by clusters of international provisions, which end up legitimating the perception of the idea of fragmentation.

Within this context, existent conceptions of global constitutionalism cannot be regarded as an original approach to fragmentation, since they aim at restoring coherence in international law without addressing normative conflicts. However, existent scholarly contributions do not cover the whole spectrum of conceptions of constitutionalism beyond the state. An argument is therefore made that a possible way to frame the debate on constitutionalism as a remedy to the phenomenon of fragmentation is to conceive constitutionalism as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism.

The following section explores the idea of international constitutionalism as a methodological approach specifically devised for interpreting international law. It aims to show whether constitutionalism is able to address normative conflicts and, consequently, restore coherence within international law.

III. CONSTITUTIONALISM AS AN AUTONOMOUS CONCEPT OF INTERNATIONAL LAW

Despite terminological and theoretical differences characterising the debate on post-national constitutional settings, a shared characteristic of all conceptions of international constitutionalism is that they are conceived as interpretive instruments of international law. However, international law is a contested concept[65] and scholars refer to it according to their understanding of the idea of legal system. For instance, some argue

[64] As discussed in sec 2.2.1.
[65] Cheng (n 3).

that international law is not even law[66] while others write that it is a conglomeration of rules instead of a system.[67] Others also maintain that it is a social system[68] rather than a legal system.[69]

Beyond the differences surrounding substantive arguments about the nature of international law, a common feature of all such conceptions is that they ultimately understand the international order as the product of the interaction between certain rules and certain subjects. However, questions such as who the subjects of international law are or what the ultimate sources of international law are remain without a universally accepted answer, although they have practical relevance. Likewise, it is not clear whether the ultimate purpose of international law is to facilitate inter-state relations[70] or to establish an autonomous system that prevails over state will and national interests.[71] Within this context, the issue of international personality, including its relation with the sources of international law, turns out to be the cornerstone of any theory of international law, since the notion of personality is used to distinguish between those actors that international law takes into account and those that are excluded from it.

Regarding this, it is widely accepted that the definition of international personality is the one articulated by the International Court of Justice (ICJ) in the *Reparation* Opinion of 1949:

> [A]n international person is... capable of... possessing international rights and duties, and has capacity to maintain its rights by bringing international claims.[72]

However, this definition does not say which entities are international persons, nor does it state the criteria according to which international personality is attributed. An argument is therefore made that, from a

[66] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, CUP 1995) 117-26.
[67] HLA Hart, *The Concept of Law* (Clarendon Press 1961) 208-231.
[68] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan J Intl L 999 (arguing that international law is a system grounded on social relations).
[69] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).
[70] See, for instance, Eric A Posner, 'International Law: A Welfarist Approach' (2006) 73 U of Chicago L Rev 487.
[71] In relation to the international human rights treaty regime, see Eric A Posner, 'Human Welfare, Not Human Rights' (2008) 108 Columbia L Rev 1758.
[72] *Reparation for Injuries in the Service of the United Nations* (Advisory Opinion) 1949 < http://www.icj-cij.org/docket/files/4/1835.pdf > accessed 19 April 2013 [179].

logical point of view, it is possible to single out as many definitions of international personality as the number of conceptions of international law. It is further contended that resort to the findings of the most recent scholarship on international legal personality turns out to be helpful in order to examine the structural nature of international law in light of concerns of fragmentation and constitutionalisation.

According to Portmann, there are three main conceptions of modern international law – namely, the formal conception, the individualistic conception and the actor conception.[73] By implication, conceptions of international constitutionalism may be grounded on each of the three above mentioned conceptions of modern international law. As a thought-experiment, this section attempts to feature constitutionalism as an autonomous concept of international law. Its purpose is to establish the extent to which, if any, such conceptions of constitutionalism are able to address concerns of fragmentation of international law and whether they double the findings of the ILC Report on Fragmentation or possess conceptual autonomy.

In order to avoid the terminological and theoretical concerns related to the idea of constitutionalisation of international law,[74] the analysis of models of international constitutionalism is based on a conception of constitutionalism beyond the state that applies, in turn, to each of the three conceptions of modern international law. Such conception establishes that 'constitutionalism provides the ideological context within which constitutions emerge and constitutionalisation functions'.[75]

Although a seminal idea, this procedural conception of constitutionalism comprises three elements. First, constitutionalism is regarded as the idealistic component beyond the process of constitutionalisation. For the purpose of this article, such idealistic component is represented by each of the three conceptions of modern international law. Second,

[73] Portmann's analysis is the most comprehensive contribution to the issue of international personality from a normative point of view. Roland Portmann, *Legal Personality in International Law* (CUP 2010). For an historical perspective, see Janne E Nijman, *The Concept of Legal Personality: an Inquiry into the History and Theory of International Law* (TMC Asser Press 2004). For a selection of essays, see Fleur Johns, *International Legal Personality* (Ashgate 2010).

[74] See sec 2.2.2.1 above.

[75] Nicholas Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in Nicholas Tsagourias (ed), *Transnational Constitutionalism. International and European Perspectives* (CUP 2007) 1. Likewise, Walker describes constitutionalism as 'a multidimensional form of practical reasoning,' that is to say, 'a framing mechanism'. Neil Walker, 'Constitutionalism Beyond the State' (2008) 56 Political Studies 525.

constitutionalisation is conceived as the process of implementation of the idealistic components of constitutionalism.[76] Third, a constitution is regarded as the outcome of the process of constitutionalisation.

1. *Formal Conception*

a. Constitutionalism

Basic Propositions

According to the procedural structure of international constitutionalism,[77] the basic propositions of the formal conception of international law may be used as the idealistic component beyond the process of constitutionalisation of international law. The latter, in turn, represents the methodology through which interpret rule systems of international law.

Regarded as the dominant conception of international law,[78] the formal conception has two main propositions. The first one acknowledges that the personal scope of international law is an open concept and establishes that international actors are the addressees of the norms of international law. It thus recognises that the status of international personality is a byproduct of the international law-making process. The second one establishes that there are no further consequences attached to international legal personality. Its main manifestations in legal practice are the *LaGrand*[79] and *Avena*[80] cases before the ICJ and the *AMCO v Indonesia* case[81] before the International Centre for Settlement of International Disputes (ICSID).

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[76] In this context, constitutionalisation is understood as 'a constitution-hardening process'. See Tsagourias (n 75).

[77] Tsagourias (n 75).

[78] Portmann (n 73) 248.

[79] The ICJ held that, according to general principles of treaty interpretation, art 36(1) (b) of the Vienna Convention on Consular Relations (1963) directly applies to individuals. According to the ICJ, direct effect of treaty provisions granting rights on individuals is an issue concerning treaty interpretation. There is no presumption or consequence associated with the concept of legal personality of the individual. *LaGrand Case (Germany v. United States)* (Judgment) [2001] ICJ Rep 466.

[80] The ICJ reaffirmed its interpretation of art 36(1) (b) of the Vienna Convention on Consular Relations (1963) as articulated in *LaGrand*. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* [2004] ICJ Rep 12.

[81] In *Amco v Indonesia* the arbitral tribunal held that, in the absence of any specific clause in the contracts entered by Amco and the state-owned Indonesian company, international law applies, directly and fully, to those contracts. By interpreting art 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, 1965) without any restriction, the arbitral tribunal stated that international law prevails over national law. Consequently, it granted compensation to Amco without relying on the issue of

Considered 'a merely descriptive device belonging to the realm of legal doctrine and as such being without concrete legal implications',[82] this conception of international law provides that international legal personality does not confer the competence to create international law on international actors. In particular, it acknowledges that the capacity of international law creation stems from customary international law, which contains rules declaring that states are competent to create law by concluding international treaties.[83] This creates a hierarchy of norms authorising specific international actors to create and apply international law.

Purpose of Constitutionalism

Any model of international constitutionalism aims to provide interpretations of international law in light of the structural nature of the system, as established by the underlying conception of international law adopted. Accordingly, the purpose of international constitutionalism comports with the purpose of the selected conception of international law. In the case of the formal conception of international law, its basic propositions do not clarify what the ultimate purpose (or teleology) of international law is. Instead, they establish that the subjects of international law are the recipients of the norms of international law and that the ultimate sources of international law consist of treaties and international customary law.

Since the concept of personality is used to distinguish between those actors that international law takes into account and those that are excluded from it, recourse to it has practical implications. With regard to

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international personality. This shows that, although in principle companies may be considered international persons, there are neither presumptions nor consequences associated with such recognition. *Amco Asia Corporation and Others v. The Republic of Indonesia*, Resubmitted Case: Award on Merits (31 May 1990), reported in [1992] ILR 580.

[82] Portmann (n 73) 174.

[83] Kelsen writes that international law is a system of norms created by customs. As long as the state is regarded as an organ of international law, a legal rule created by international custom also obligates states which did not participate to its creation. Drawing from this assumption, Kelsen concludes that '[l]aw regulates its own action. So does international law'. Hans Kelsen, *General Theory of Law and the State* (Russell&Russell 1961) 351–354, 354. See also Portmann (n 73) 176-177; Jochen von Bernstorff and Thomas Dunlap, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 165-178; Francois Rigaux, 'Hans Kelsen on International law' (1998) 9 EJIL 325; Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 EJIL 287; WB Stern, 'Kelsen's Theory of International Law' (1936) 30 American Political Science Rev 736.

the concept of subjects of international law, the first basic proposition of the formal conception of international law endorses the definition of international legal personality articulated by the ICJ in the *Reparation* opinion of 1949.[84] Although this definition does not say which entities are international persons, nor does it state the criteria according to which international personality is attributed, it does say that international actors have rights and duties and, accordingly, can act in a legally relevant way. Viewed from this angle, international actors are the recipients of the norms of international law.

With regard to the ultimate sources of international law, the first basic proposition complies with the provision of Article 38(1) of the Statute of the ICJ, according to which the sources of international law comprise treaties and customs.[85] This suggests that states are regarded as the primary subjects of international law.

However, to say that international law is a state-centered system implies a circular definition of international law: states are the primary actors of international law, that is to say, the recipients of the norms of international law, but they create the norms of international law themselves. From this perspective, the ultimate purpose of international law turns out to be what states have chosen to regulate for their mutual benefit and, consequently, to be bound by. While such regulations may address both state and non-state actors, the issue of the binding force of international law provisions becomes independent of state will by means of tacit agreement and creates a supra-national system of rules. It follows that there are as many purposes of international law as the number of interests covered by regulation and such purposes stay on an equal footing of importance. Hence, international law cannot be regarded as a homogeneous system of rules.

In this context, the purpose of international constitutionalism consists in preserving the heterogeneous nature of international law. This implies that as long as it is conceived as an interpretive instrument, constitutionalism relies upon a model of legal reasoning that by necessity duplicates the one set forth in the ILC Report on Fragmentation, even though the relative nature of such model of legal reasoning does not entail that provisions of the VCLT (1969) represent the sole positional perspective of analysis.

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[84] See (n 72).

[85] Art 38(1) ICJ Statute also refers to general principles of law recognised by civilised nations and the decisions and teachings of the most highly qualified publicists of all nations. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Annex I (ICJ Statute).

b. Constitutionalisation

The second element of the procedural definition of international constitutionalism is constitutionalisation.[86] Dunoff and Trachtman write that a functional approach to the constitutionalisation of international law provides insights into the purposes that international constitutional norms are intended to serve.[87] They argue that constitutionalisation is a process[88] and propose a functionalist methodology that is based on the constitutional matrix of international law.[89]

Regarded as an analytical device,[90] the constitutional matrix aims to rationalise the allocation of powers within the legal order of both international organisations and the international law system as a whole. Dunoff and Trachtman argue that:

> [A] functional approach permits conceptual analysis that is not premised upon a definition setting forth a group of necessary and sufficient conditions which determine whether a given order is constitutional or not. ... [C]onstitutionalism consists of a type – rather than a quantum – of rules.[91]

Such a functional approach is grounded on the presumption that 'the distinguishing feature of international constitutionalization is the extent to which international law-making authority is granted (or denied) to a centralized authority'.[92] Accordingly, the purpose of the constitutional matrix is to establish the extent to which a centralised authority enables or restrains the production of international law. To that end, it possesses a normative structure comprising seven mechanisms[93] whose function is to implement three basic constitutional functions.[94] Such functions serve the purpose of enabling the formation of international law, constraining the formation of international law and supplementing deficiencies of domestic constitutional law caused by the phenomenon of globalization.[95]

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[86] Tsagourias (n 75).
[87] Dunoff and Trachtman (n 54) 10.
[88] ibid 18.
[89] ibid 26.
[90] ibid 26-30.
[91] ibid 9.
[92] ibid 4.
[93] They are horizontal allocation of powers, vertical allocation of power, supremacy, stability, fundamental rights, review and accountability/democracy. ibid 27-29.
[94] They are referred to as enabling constitutionalisation, constraining constitutionalisation and supplemental constitutionalisation. ibid 10.
[95] ibid.

The constitutional matrix complies with the two basic propositions of the formal conception of international law and it has been used to assess the process of constitutionalisation of five selected regimes of international law – namely, the international legal system, international human rights law, UN law, EU law and WTO law.[96] However, Dunoff and Trachtman argue that the constitutional matrix aims 'to allow to compare the constitutional development of different regimes, but it does not allow to identify strengths and weaknesses in various regimes'.[97] As a result, the functional approach to constitutionalisation embedded in the constitutional matrix provides a map of the law-making centres of international regimes.

c. Fragmentation and Constitutionalisation

In order to determine whether the formal conception of international constitutionalism is a methodological approach endowed with conceptual autonomy or it relies upon the same model of legal reasoning set forth in the ILC Report on Fragmentation, this sub-section draws a comparison between the two models of legal reasoning.

The constitutional matrix entails a functional approach to international law. Viewed from this angle, the rule-system of international law under scrutiny may be regarded as the equivalent of the regulatory purpose of analysis, as set forth in the ILC Report on Fragmentation. Compliance with the other two steps of the ILC's model of legal reasoning follows as a logical consequence. This shows that the constitutional matrix lacks originality with regard to the methodology proposed. There are nonetheless significant differences between the two models of legal reasoning.

In particular, while the ILC Report on Fragmentation recognises provisions of the VCLT (1969) as the nascent international law of conflict, the constitutional matrix establishes a hierarchy of the norms of international law consisting of the constitutional norms of the regime of international law under scrutiny. This shows that the ultimate purpose of the process of constitutionalisation through the constitutional matrix turns out to be an assessment of internal efficiency of the selected regimes of international law. Consequently, the constitutionalisation of international law turns out to be aimed at strengthening the emergence of autonomous regimes of international law, thus contributing to normative conflict and the erosion of general international law.

[96] ibid 27-29.
[97] ibid 30.

2. *Individualistic Conception*

a. Constitutionalism

Following the pattern of analysis adopted in relation to the formal conception of international constitutionalism, the basic propositions of the individualistic conception of international law may be regarded as the idealistic component beyond the process of constitutionalisation of international law. Such a conception of international constitutionalism may thus be referred to as the individualistic conception of international constitutionalism.

Basic Propositions

The individualistic conception of international law is currently regarded as a conception that is functional to the field of human rights law. It draws on the teachings of Lauterpacht[98] and it has two basic propositions. The first proposition establishes that states are entities created by individuals for individuals. In principle, this entails that there is no difference between the interest of the state and the interest of individuals, so long as the latter are regarded as the beneficiaries of all law, including international law. Regarding this, Lauterpacht writes that:

> No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.[99]

From this standpoint, international law creates basic rights and duties of the individual, in addition to rights and duties of states, state actors and non-state actors.

The second basic proposition maintains that, in addition to treaties and customs, the sources of international law include general principles of law, which are independent of state will. This entails a qualified presumption in favour of the international legal personality of the individual, which is not derived from state will. Its main manifestations in legal practice are the Nuremberg trials,[100] the US *Alien Tort Claims Act* case law[101] and the case law on the European Convention of Human Rights (ECHR).[102]

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[98] Portmann (n 73) 126-172.

[99] Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 430-31.

[100] In the judgment of 1 October 1946, the International Military Tribunal (IMT) at Nuremberg sentenced to death twelve Nazi defendants. It held them individually responsible for committing the crime of war aggression under international law. The

Purpose of Constitutionalism

The basic propositions of the individualistic conception of international law show that, as a conception functional to the field of human rights, it pursues a teleological and normative approach to international law. Hence, the conception of international constitutionalism grounded on the individualistic conception of international law recognises that the ultimate beneficiary of the international legal system is the world community of individuals. [103] It then assesses the legitimacy and coherence of international law against this assumption. Viewed from this angle, the individualistic conception turns out to be an interpretive, non-binding device.

By establishing that the primary normative unit is the individual rather than the State, [104] the individualistic conception of international law recognises that the boundaries of international law are not limited to horizontal relationships between sovereign states. Likewise, certain scholarship maintains that international law is entirely based on an individualized view of sovereignty[105] where the principles of equality and

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IMT held that Germany was a party of the Kellogg-Briand Pact of 1928 prohibiting the use of war as an instrument of national policy. Subsequently, it established that aggressive war was not only illegal under international law, but that it should be treated as an international crime. It derived this status from general principles of justice instead of the provisions of the treaty itself. It then established the presumption that the international crime of aggression entails international responsibility of individuals and not of states. *In re Goering and Others, Judgement of the Nuremberg International Military Tribunal* (1947) 41 AJIL 172, 220-221.

[101] *Alien Tort Claims Act*, 28 USC §1350. The Alien Tort Act is a civil procedure enacted in 1789 that allows non-US citizens to bring a tort action in US courts 'for violation of the law of nations or a treaty of the United States'. In the *Kadic* v. *Karadzic II* judgment of 1995, the Court of Appeals affirmed that private entities can violate international norms of *jus cogens*. It held that *jus cogens* norms equally apply to individuals acting on behalf of the state or of a non-state entity, therefore they cannot be judged by different standards. *Kadic* v. *Karadzic II* (US Court of Appeals, Second Circuit, 1995) (Chief Judge Newman), (1997) 104 ILR 149.

[102] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) ETS No. 5; 213 UNTS 221. In *Loizidou v. Turkey*, for example, the ECtHR affirmed that the ECHR 'is an instrument for the protection of individual human beings'. *Loizidou v Turkey I*, (1995) Series A No 310, para 75.

[103] Anne Peters, 'Membership in the Global Constitutional Community' in Klabbers, Peters and Ulfstein (n 55) 155.

[104] cf Fernando R Tesón, 'The Kantian Theory of International Law' (1992) 92 Columbia L Rev 53, 54.

[105] Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, 515ff. Against Peters's position, see Emilie Kidd White, Catherine E Sweetser, Emma Dunlop and Amrita Kapur, 'Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters' (2009) 20 EJIL 545. See also Anne Peters, 'Humanity as the A and Ω

human dignity constitute the pillars of the international legal system.[106] This suggests that the teleological perspective embodied in the individualistic conception of international law extends far beyond international human rights law.

b. Constitutionalisation

According to the procedural definition of constitutionalism, [107] constitutionalisation is the process of implementation of the normative components of constitutionalism. In this case, it represents the methodology used to interpret clusters of international provisions in light of the basic propositions of the individualistic conception of international law. As long as the individualistic conception of international law is a teleological conception, an argument is made that a possible constitutional matrix grounded on its two basic propositions should be based on the twin concepts of human dignity and human rights. From this perspective, implementation of the normative components of constitutionalism turns out to be based on a human rights constraint, which, in turn, entails the idea of rule of law.

Within the individualistic conception of international constitutionalism, the process of operationalization of the rule of law possesses four normative features. The first feature acknowledges that individuals are decision-makers. This characteristic stems from the presumption in favour of the personality of international law of the natural person.[108] A similar argument is put forward by Peters, who argues that the natural person is 'the ultimate unit of legal concern'[109] and partakes in the process of creation of international norms by virtue of her participatory rights.[110]

The second feature establishes that the rule of law is a means for the empowerment of individuals. It stems from the assumption that the individual possesses rights and obligations under international law, irrespective of nationality concerns[111] and entails that the function of the rule of law consists in creating the conditions for the fulfilment of the

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of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur' (2009) 20 EJIL 569.

[106] Peters, *Humanity as the A and* Ω (n 105) 515 ff.

[107] Tsagourias (n 75).

[108] As established by the basic propositions of the individualistic conception of international law.

[109] Anne Peters, *Membership in the Global Constitutional Community* (n 103) 155.

[110] ibid 160. Peters also writes that 'the individual capacity to claim [before an international tribunal] is a limited functional equivalent to the law-making power of states'. ibid 161.

[111] ibid 174.

individual's needs, both as a single and in society. The UN Secretary-General, for example, writes that the rule of law is a powerful tool for the empowerment of individuals and civil society.[112]

The third feature recognises the value-oriented character of the process of implementation of the rule of law. It is derived from the normative concept of human dignity. The UN Secretary-General, for example, stresses that engagement in the rule of law assistance rests upon the 'need to evaluate the impact of [its] programming *on the lives of the peoples* the Organization serves'.[113] This entails that the operationalization of the rule of law requires the constant participation of local communities in the various decision-making and verification processes.

The fourth feature acknowledges that the rule of law as a mere concept is not enough.[114] For instance, Ringers writes that to become operational, the idea of the rule of law should be accompanied by a structured procedure.[115] In context of the individualistic conception of constitutionalism, this process of operationalization of the rule of law fosters a bottom-up perspective[116] while recognising the existence of several decision-making levels, including the individual.

The observations above suggest that a possible constitutional matrix may be represented by the normative structure of the right to development, as set forth in the UN Declaration on the Right to Development of 1986.[117]

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[112] Report of the Secretary-General, 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities' (2009) UN Doc A/64/298, paras 42-45.

[113] Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law' (2008) UN Doc A/63/226, para 64 (emphasis added).

[114] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005, para 133.

[115] Thom Ringer, 'Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice' (2007) 10 Yale Human Rights & Development L J 186.

[116] '[S]tates should not be conceived as the 'primary' subjects of international law'. Peters (n 103) 179. See also Janet K Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 Yale J Intl L 395. In favour of a state-centered conception of international law, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005).

[117] UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128. For a historical and normative account, see Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart 2012); Richard N Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development' (1988) 35 NILR 257. On the legal rationale behind the right to development, see Stephen P Marks, 'Obligations to Implement the Right to Development: Philosophical, Political and Legal Rationales' in Bård A Andreassen and Stephen P Marks (eds),

There are three reasons supporting this view. First, solemnly proclaimed as a human right in itself, the Declaration on the Right to Development comprises all other human rights. It is therefore regarded as a particular vector of human rights.[118] Second, it is a procedural right. The UN Independent Expert on the Right to Development, for instance, suggests that one way to implement the right to development consists in adopting development compacts. The latter require specific negotiations on a case-by-case basis.[119] Such negotiations must ensure the prioritization of certain basic commitments,[120] popular participation[121] and the accountability of the actors involved.[122] Third, the process of operationalization of the right to development through development compacts turns out to be consistent with the bottom-up conception of the rule of law. Implementation of a global compact would thus represent a constitutional outcome, according to the procedural definition of constitutionalism.

c. Fragmentation and Constitutionalisation

The findings of the analysis carried out in the previous sub-section shows that as long as the ultimate purpose of the individualistic conception of constitutionalism does not consist in solving normative conflicts,

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Development as a Human Right: Legal, Political and Economic Dimensions (2nd ed, Intersentia 2010) 73, 90-98. On the issue of justiciability of the right to development, see Amartya Sen, 'Human rights and Development' in Andreassen and Marks (eds), ibid 3, 8-9; Martin Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights treaties' in Andreassen and Marks (eds), ibid, 339ff.

[118] Arjun Sengupta, 'The Human Right to Development' (2004) 32 Oxford Development Studies 183, 191 (arguing that the right to development represents a right to a process of development or a meta-right).

[119] UNHCHR 'First Report of the Independent Expert on the Right to Development, Dr. Arjun
Sengupta' (27 July 1999) UN Doc E/CN.4/1999/WG.18/2, para 34. Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 Human Rights Quarterly 837, 880-83.

[120] Priority should be accorded to the protection of the worst-off, the poorest and the most vulnerable. See UN Independent Expert on the Right to Development (n 119), paras 32 and 69–76.

[121] A passage from the Global Consultation report reads: 'participation is the right through which all other rights in the Declaration on the Right to Development are exercised and protected'. Report of the Secretary-General 'Global Consultation on the Right to Development as a Human Right' (1990) UN Doc E/CN.4/1990/9/Rev.1, para 177.

[122] For example, the UN Independent Expert writes that '[the responsibility of states] is complementary to the individuals' responsibility [...] and is just *for the creation of the conditions for realizing*, not for actually realizing the right to development. Only the individuals themselves can do this'. UN Independent Expert on the Right to Development (n 119), para 41 (emphasis added).

fragmentation is not a component of the process of constitutionalisation. This suggests that the individualistic conception of constitutionalism does not aim at restoring coherence within the international legal system. Hence, it cannot be regarded as a remedy to the phenomenon of fragmentation of positive international law.

As noted above in relation to the formal conception of international constitutionalism, the process of constitutionalisation of selected regimes of international law entails a functional approach to international law. Likewise, the process of constitutionalisation implementing the basic propositions of the individualistic conception of international law entails a teleological, that is to say functional, approach to international law. This further strengthens the conclusion that the teleological matrix does not represent a remedy to the phenomenon of fragmentation of positive international law.

However, the main difference between the two constitutional matrices is that they do not rely upon the same model of legal reasoning. Consequently, as the constitutional matrix implementing the tenets of the individualistic conception of constitutionalism does not double the findings of the ILC Report on Fragmentation, it turns out to be an interpretive instrument of international law endowed with conceptual autonomy.

3. *Actor Conception*

The actor conception is currently regarded as the minoritarian conception of international law. It proposes a policy-oriented approach to international law and draws on the teachings of the scholars of the New Haven school of international law.[123] It has two basic propositions. The first proposition establishes that international law is not a set of rules but a process of authoritative decision-making. The second proposition maintains that participation in the decision-making process is open to all those state and non-state actors that have authoritative power. Its main manifestations in legal practice are the *Reineccius et al v Bank for International Settlements* case,[124] the *International Tin Council* case[125] and the *Sandline v Papua New Guinea* award.[126]

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[123] Portmann (n 73) 208-242.

[124] In its judgment of 2002, the Permanent Court of Arbitration declared the Bank for International Settlements (BIS) an international person. Created in 1930 by two international treaties, the BIS is chartered as a 'Company by limited shares' under Swiss law. Its shares are held by some of the contracting governments and private parties. The Permanent Court of Arbitration ruled on the legality of the BIS Board of Directors' proposal to amend the BIS Statutes in order to recall all privately held

Like the individualistic conception, this policy-oriented conception of international law is also a teleological conception of international law. Such a characteristic stems from a two-fold consideration. First, the actor conception establishes the presumption that law is a means for creating a global public order of human dignity.[127] A world order of human dignity is described as 'one which approximates the optimum access by all human

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shares against payment of compensation. The arbitral tribunal established that 'the functions of the Bank were essentially public international in their character'. It held that the BIS was an international organisation and concluded that the applicable law was international law, not municipal law. It thus found that there was no violation of the BIS Constitutive Instruments. In addition, it established that under general international law on expropriation, the share recall was lawful. However, after further research into international case law on compensation for expropriation, it found that BIS owed full compensation to its former private shareholders. Permanent Court of Arbitration, *Dr. Horst Reineccius, First Eagle SoGen Funds, Inc., Mr. Pierre Mathier and La Société de Concours Hippique de la Châ*tre, v. *Bank for International Settlements*, Partial Award on the Lawfulness of the Recall of the Privately Held Shares and the Applicable Standards for Valuation of those Shares, 8 January 2001, (2003) 15 World Trade and Arbitration Materials 73.

[125] Recalling the conclusions of the ICJ Advisory Opinion on *Reparation for Injuries*, the ECJ Advocate-General Darmon declared that the International Tin Council (ITC) possessed personality in international law, since it was an independent organ having its own decision-making power. Drawing from this assumption, the English Court of Appeal concluded that this precluded liability of member states for the debts of the organization, even in the absence of any international rule declaring such liability. Case C-241/87 *Maclaine Watson & Company Limited* v. *Council and Commission of the European Communities* [1990] ECR I-01797, Opinion of M Darmon, para 133; *Maclaine Watson & Co Ltd* v. *Department of Trade and Industry; J. H. Rayner (Mincing Lane)* v. *Department of Trade and Industry and Others*, England, Court of Appeal, 1988, (1989) 80 ILR 49, 108.

[126] The dispute arised from the interpretation of the agreement between Papua New Guinea and Sandline International Inc. establishing that Sandline would provide military and security services to Papua New Guinea against payment of a fee of 36 million US dollars, in two instalments. Following the refusal by Papua New Guinea to pay the second instalment, an *ad hoc* arbitral tribunal was constituted to settle the dispute. According to terms of the agreement, the parties chose English law as the applicable law. However, the arbitral tribunal held that, as a contract concluded by a state, public international law was the applicable law. It also pointed out that international law forms a part of English law. The arbitral tribunal thus established that a state cannot rely on its internal law for justifying the non-performance of an international obligation and concluded that the contractual obligation still existed and ordered Papua New Guinea to pay the second fee to Sandline. *Sandline Inc.* v. *Papua New Guinea*, Interim Award, 9 October 1998, (2000) 117 ILR 552, paras 10-13.

[127] Siegfried Wiessner, 'Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman' (2009) 34 Yale J Intl L 525, 528. Myres S McDougal, 'Perspectives for an International Law of Human Dignity' (1959) 53 American Society Intl L Proceedings 107.

beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude'.[128] Second, like the individualistic conception of international law, it recognises that the natural person is the ultimate beneficiary of all law. Wiessner, for example, writes that 'an ideal legal order should allow all individuals, and particularly the weakest among them, to realize themselves and accomplish their aspirations'.[129]

However, the two conceptions of international law rely upon different methodological approaches. On one hand, the actor conception does not provide any definition of human dignity. It acknowledges that the process of law-making consists of a sequence of authoritative and controlling decisions. [130] On the other hand, the individualistic conception of international law implies that commitment to individual empowerment is based on the idea of rule of law while the policy-oriented approach fostered by the actor conception does not acknowledge international law as a system of rules. This suggests that the actor conception of international law does not recognise the idea of constitutionalisation of international law altogether.

IV. Conclusion

The elusive challenge of restoring unity in international law has fascinated generations of scholars. The nascent literature on constitutionalism beyond the state is the last attempt to organize the body of international laws into a predictable, value-oriented system of rules. However, as a system created by state consent, international law proves to be a system crystallized on international practice rather than constrained by superior rules. Whether this makes the hunt for unity of the system an impossible task, the issue of coherence of existent international rules and principles represents the ultimate goal of existent methodological approaches to fragmentation, including global constitutionalism.

Current conceptions of constitutionalism in international law conflate the idea of unity and coherence of the system. This results in a lack of terminological and theoretical consensus among scholars, which ultimately undermines the ultimate purpose of such conceptions. In particular, constitutional interpretations of international law attempt to tackle the perceived phenomenon of fragmentation of international law by creating

[128] W Michael Reisman, Sigfried Wiessner and Andrew R Willard, 'The New Haven School: A Brief Introduction' (2007) 32 Yale J Intl L 575, 576.
[129] Wiessner (n 127) 531.
[130] Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) 1 Yale Studies in World Public Order 1, 29.

hierarchies of extra-legal values – eg the Western conception of human dignity and human rights – and of rules such as *jus cogens* without addressing normative conflicts.

This article examined the idea of global constitutionalism from international legal perspective. It showed that in the absence of any definition of either fragmentation or constitutionalism, the latter may be featured as an interpretive means endowed with conceptual autonomy under international law. Since international law is in turn regarded as a contested concept, the analysis established the presumption that conceptions of international constitutionalism may be grounded on each of the three conceptions of modern international law taken into consideration.

The findings of the analysis show that resort to different conceptions of constitutionalism is not able to restore coherence and unity within international law. In particular, the inquiry reveals that the purpose of the formal conception of international constitutionalism is to address concerns of optimization of internal allocation of powers of functional regimes of international law whereas the purpose of the individualistic conception of constitutionalism is to evaluate whether a selected cluster of international provisions is able to protect a minimum core of human dignity through the process of implementation of human rights provisions. The findings of the analysis also show that as long as it implies a policy-oriented approach, there is no scope to feature constitutionalism from the perspective of the actor conception of international law.

It follows from the preceding that it is difficult to envisage a model of legal reasoning that is able to restore the alleged unity of general international law. Indeed, it is widely accepted among the international community of scholars that, as a consensual and decentralised system, international law does not possess any overarching teleology or ultimate purpose of its own. Alternatively, there are as many purposes of international law as the number of state interests protected by clusters of international provisions, which end up legitimating the perception of the idea of fragmentation. This suggests that, perhaps, it is not possible to redress the phenomenon of fragmentation, either through the findings of the Report on Fragmentation or through the process of constitutionalisation. If this holds true, then the Report on Fragmentation ought to be regarded as a means for managing normative conflict rather than a remedy to fragmentation while constitutional interpretations of international law eventually turn out to be an academic, though valuable, exercise in normative theory.

IS THE EUROPEAN CITIZEN'S INITIATIVE A SERIOUS THREAT FOR THE COMMUNITY METHOD?

Nikos Vogiatzis*

This article proceeds to a normative claim that the potential of the European Citizens' Initiative (ECI) – an instrument expected to increase democratic legitimacy in the EU – should be evaluated in the light of the post-Lisbon Community method and not as an additional 'opportunity structure for citizens' participation'. The first section explains why the Community method is primarily a mechanism of 'output legitimacy', even after the Lisbon Treaty. Furthermore, the legal framework of the ECI (notably the Regulation 211/2011 but also the Commission's Green Paper preceding the adoption of the Regulation) is provided. The evaluation section concludes that the ECI's legislative framework, far from an instrument of direct democracy, perhaps an additional 'opportunity structure', cannot affect the Community method nor seriously increase democratic legitimacy at the EU level due to the – simultaneous – presence of two thresholds: the intactness of the Commission's legislative monopoly and the burdensome formalities imposed upon citizens and organisers.

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I. INTRODUCTION: WHY THE ECI SHOULD BE SEEN ALONGSIDE THE STATUS OF THE POST-LISBON COMMUNITY METHOD

When the Lisbon Treaty entered into force on December 1st, 2009, the students of the European Union were particularly interested in the potential of the long promised, discussed and publicized 'European Citizens' Initiative' (ECI), ie the possibility of one million citizens to contact the Commission in order to initiate the decision-making process. Would it mark a new democratic chapter in the life of the EU's decision-making or would it be a symbolic declaration of faith in the citizens of Europe?

This article suggests that the potential of the ECI should be evaluated in relation to its possible impact on the post-Lisbon Community method and not as an addition to the existing 'opportunity structures for citizens' participation'.[1] Two principal reasons could be identified. First, undeniably the purpose of the ECI is to produce legislation and this can be confirmed by a series of provisions.[2] The European Parliament referred to the citizens' initiative as 'a means of exercising public sovereign power in the area of legislation'.[3] This is clearly stated in the Commission's online interactive guide, 'If the Commission decides to follow your initiative [...] the legislative procedure starts'.[4] Therefore its purpose is to directly affect the Union's decision-making processes, where the Community method's presence has admittedly become dominant. Second, and equally important, it appears that the EU institutions (and in particular the Commission) have recognized the need of the Community method to follow a different path.

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[1] See Michael Nentwich, 'Opportunity Structures for Citizens' Participation: The Case of the European Union' in Albert Weale and Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998) 125 – 140.

[2] As art 11.4 TEU verifies, but also art 4.2(b) of Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L 65/1 (Regulation). Besides, as will be seen below, the organisers of the ECI should specify the Treaty provisions that enable the Commission to act, whereas they may optionally submit a draft legal act to the Commission.

[3] European Parliament Resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative [2009] (Resolution).

[4] <ec.europa.eu/citizens-initiative/public/how-it-works/answer?lg=en> accessed 11 January 2013.

In the well known White Paper on European Governance,[5] there were explicit references to the shortcomings of the Community method, which should take in the future a 'less top-down approach', characterized by openness, clarity and interaction with the regional level, in order to help reduce the state of alienation between the citizens and the Union's work and eventually meet their expectations.[6] Similarly, in a Communication on the future of the Community method, the shortcomings of the latter were summarized by the Commission as follows, 'It [the Community method] has proved its *effectiveness* and must preserve it. It must gain in terms of *democratic legitimacy*. Future reforms of the treaties will therefore need to look at *renewing the Community method*'.[7] Third, and related to the above, it is suggested that an instrument designed primarily to involve citizens in decision-making will increase democratic legitimacy only if it is going to contribute to nothing less but exactly this; affect decision-making and in particular the Community method. I return to this point in the penultimate section of this contribution.

A discussion on the EU's insufficient democratic legitimacy and its nature exceeds the purposes of this study.[8] One thing is certain, the debate is far from outdated, not only in scholarly terms[9] but also in discourses by national and EU leaders in the context of the current crisis.[10] For present purposes, if we accept first, that the Union's decision-making, placing centrally the Community method, is still widely based on 'output' legitimacy mechanisms (efficiency) rather than 'input' mechanisms (processes)[11] and second, putting aside scholarly accounts, that the Union's institutions and in particular the Commission has highlighted – as shown

[5] Commission of the European Communities, 'European Governance: A White Paper' [2001] COM 428 (White Paper)
[6] ibid 4 and 7.
[7] Commission of the European Communities, 'Communication on the Future of the European Union – European Governance: Renewing the Community Method', [2001] COM 727 final, 8 (emphasis in the original).
[8] But see a comprehensive overview in Beate Kohler-Koch and Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield, 2007). Furthermore, as Philippe Schmitter wisely put it, legitimacy is 'invoke[d] [...] when it is missing or deficient'. See Philippe C Schmitter, 'Can the European Union be Legitimised by Governance?' (2007) 1 EJLS 1.
[9] Compare for instance the recently published paper by Schmidt, where she inserts the notion of 'throughput legitimacy', in other words 'governance *with* the people': Vivien Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' [2012] Political Studies 1-21 and references cited therein.
[10] Giovanni Moro (ed), *The Single Currency and European Citizenship: Unveiling the Other Side of the Coin* (Continuum 2013, forthcoming).
[11] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

above the need for a less top-down approach with a view to involving the citizens and thus gain in democratic legitimacy, then it is pivotal to examine to what extent the citizens' initiative strengthens the input side of democracy at Union level.

Given that the contribution this article aims at making resides in the possible impact of the ECI upon the Community method, it is opportune to delimitate from the start the two ways in which this could take place. On the one hand, the ECI could penetrate to the Community method from a pragmatic perspective by affecting the agenda-setting monopoly of the Commission. On the other hand and in a broader context, a *flexible* initiative that would prioritize the involvement of the European citizens without imposing unnecessary thresholds could add to the overall improvement of the democratic character of the EU process of decision-making. Thus, before any assessment, it is crucial to present the main features of the Community method with a view to demonstrating how the method is a mechanism of primarily output legitimacy (see next section). This section will be followed by the provisions on the ECI, focusing on the Treaties, the Commission's Green Paper and the Regulation 211/2011. The final section will attempt to answer the research question of the article, namely whether the ECI could offer any alternatives to the current framework of a largely output-oriented Community method.

II. THE COMMUNITY METHOD AS A MECHANISM OF (PRIMARILY) OUTPUT LEGITIMACY

The Community method has been the cornerstone of the production of transnational law of a multilevel polity, the EU. An extensive exposition of its features appears unnecessary.[12] The focus of this contribution will therefore shift to the demonstration of its output-oriented character. As a preliminary remark, nonetheless, one may distinguish between the Community method *stricto sensu* and the Community method *lato sensu*. The latter could be defined as follows: beyond the minimum version of decision-making presented in the White Paper, there is a whole cycle of preparation for the Commission before the actual activation of its initiative right, which runs from 'agenda-setting' to 'policy formulation'

[12] One might wish to consult the White Paper, 8; Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2005) and recently Renaud Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011).

(the discussion of the alternatives) and *vice versa.*[13]

The Commission claimed that the Community method *stricto sensu* respects representative democracy, because the European Parliament represents the citizens of the Union, while the Council represents the member states.[14] As Lord has shown, however, the so-called 'dual representation' is to a certain extent utopian, given that the elections for the European Parliament are considered as second-order, with very limited campaigns and debates on European issues,[15] whereas it would be rather difficult to prove that national voters, when electing their governments, take into account to a considerable degree the performance or the agendas of their candidate-ministers in the Council.

More importantly, however, the Commission, along with scholarship, understands that the Community method widely favours efficiency, trying 'to arbitrate between different interests'.[16] This is in line with the classic Majone view, that the EU is a 'regulatory model' sacrificing democracy for 'efficiency-oriented policies' which, at the end of the day, leave no member state on the losing side and therefore, only popular support for a federal idea can fulfil the call for a truly democratic EU.[17] In this context, as will be further demonstrated below, the Commission proposes bills that are likely to be accepted at the levels of the European Parliament and the Council. At the Council, the practice of 'issue linkage' among member states – with the assistance of Coreper - facilitates the consensual spirit of decisions and the resolution of conflicts.[18] As Dehousse observes, 'an ideological commitment to European integration' is not imperative; even if member states adopt 'a pure strategy of self-interest', they still 'could [...] support (limited) transfers of sovereignty to improve the efficiency of

[13] Alasdair R Young, 'The European Policy Process in Comparative Perspective' in Helen Wallace, Mark A Pollack and Alasdair R Young (eds), *Policy-making in the European Union* (OUP 2010) 52-55.
[14] White Paper 8.
[15] Christopher Lord, 'Democracy and the European Union: Matching Means to Standards' (2006) 13 Democratization 668 – 684. See further Karlheinz Reif and Hermann Schmitt, 'Nine Second-Order National Elections - A Conceptual Framework for the Analysis of European Elections Results' (1980) 8 Eur J Political Research (1980) 3-44.
[16] White Paper 8.
[17] Giandomenico Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 ELJ 5-28.
[18] Thomas König and Dirk Junge 'Conflict Resolution in the Council by Linkage of Commission Proposals' in Renaud Dehousse (ed) *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan 2011) 76-88.

international policy-making'.[19] Therefore, an outcome (output) that will leave most actors satisfied is the priority. Why efficiency, then?

Historically, the Community method has been, to a large extent, an evolution of the Monnet method without producing the overall spill over effect that Monnet and other fathers of European integration had predicted.[20] According to Majone, supranational independent institutions, producing legally-binding decisions and bigger in competences in relation to international organizations known at that time, were particularly relevant in terms of integrating highly regulatory national markets and preserving the initial separation between politics and economics.[21] The institutions largely play on a non-majoritarian basis, ignoring the government/opposition dimension and thus 'the prime theme of the internal political process is the contest among autonomous institutions over the extent and security of their respective jurisdictional prerogatives'.[22]

In parallel, the Community method has not been static and concrete over the years. As the integration process was evolving, it has been subject to the shift of dynamics among institutions and member states. For instance, the establishment of Coreper and the highly debated comitology phenomenon have had an undeniable overall impact on the Commission's independence/defence of the European interest.[23] What is more, beyond its classic cases establishing direct effect and supremacy, the CJEU has admittedly yet indirectly co-shaped co-decision. A notable example is *Les Verts*[24] concerning the *locus standi* of the European Parliament, the latter coming out stronger in every Treaty reform from Maastricht onwards. [25] Furthermore, recent research demonstrates that the

[19] Renaud Dehousse, 'Conclusion: Obstinate or Obsolete?' in Dehousse (ed) (n 12) 201.

[20] Brigid Laffan and Sonia Mazey, 'European Integration: The European Union – Reaching an Equilibrium?' in Jeremy Richardson (ed) *European Union: Power and Policy-Making* (Routledge 2006) 32-54.

[21] Majone (n 12) 33-36 and 43-44.

[22] ibid 50.

[23] Renaud Dehousse and Paul Magnette, 'Institutional Change in the EU', in John Peterson and Michael Shackleton (eds) *The Institutions of the European Union* (OUP 2006) 20-32.

[24] Case 294/83, *Parti écologiste 'Les Verts'* v *European Parliament* [1986] E.C.R. 1339.

[25] Jean-Paul Jacqué, 'Les Verts v The European Parliament', in Miguel Poiares Maduro and Loic Azoulai (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 316-323. In particular, on p 323, he argues: 'But one must recognise that the Court brought about a revolution, not only in granting Parliament capacity to be sued and, thus, opening the way to granting it standing to sue and then to the recognition in the Treaties of a

Commission is losing significantly vis-à-vis its legislative monopoly to the benefit of the European Council and the Council.[26]

Accordingly, the Commission being a 'policy initiator' implies that it has the final word as regards the proposal (or not) of legislation, but this doesn't mean that it is unexposed to considerable pressures. As previously shown, the European Council's guidelines certainly affect the Commission's policy, and the same applies to the other two actors, the European Parliament and the Council (or its rotating Presidency), let alone the numerous pressure groups that deliberate with the Commission.[27] This phase, which is described here as the Community method *lato sensu*, may involve contacts with interest groups, 'expert' and 'consultative committees', invitations/political pressures from other EU institutions to legislate, publication of White and Green papers and respective feedback, and context-evaluation by the Commission. [28] In sum, a privileged networking that enables the Commission to figure out which policy proposal is likely to be accepted by the Council and the European Parliament and which one is likely to be rejected. [29] Therefore, the Commission does not propose *ex nihilo*, and certainly, this pivotal practice further increases the chances of effectiveness, or output legitimacy. And it is unquestionable that the Community method does not end there as beyond the Commission's initiative, one could refer to the comitology phenomenon,[30] the role of Coreper, contributions from the Committee of the Regions or the Economic and Social Committee, and so on. The above exceed the objectives of this contribution.

On the post-Lisbon status of the method, one observes that the Treaty strengthens the Community method *stricto sensu* by abolishing the pre-existing three pillars, by renaming the co-decision legislative procedure to

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status for Parliament equivalent to that of the Council and the Commission'. For further arguments on the 'transformation' of the Community method see Dehousse (n 19) 201-203.

[26] See Paolo Ponzano and others, *The Power of Initiative of the European Commission: A Progressive Erosion?* (Notre Europe 2012); Uwe Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance' (2012) 19 J Eur Public Policy 162.

[27] Liesbet Hooghe and Neill Nugent, 'The Commission's Services' in John Peterson and Michael Shackleton (eds) *The Institutions of the European Union* (OUP 2006) 152.

[28] Neill Nugent, *The Government and Politics of the European Union* (Palgrave Macmillan 2006) 163-171 and 395-404.

[29] ibid.

[30] Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 ELJ 273-299.

'ordinary legislative procedure' [31] and by extending its application significantly. This signalises the strengthening of the European Parliament, but not automatically a critical augmentation in democratic terms; as Weiler put it, legitimizing the process by relying on co-decision only ignores that the procedure is still under the control of the Council, which is the 'ultimate legislator'. [32] Concerning the subsequent extension of qualified majority voting (QMV) in the Council, different views have been expressed. Majone accentuates the delays in decision-making whenever QMV is used to the expense of unanimity,[33] whilst Bribosia finds that after Lisbon, 'the Community method has not only been reasserted, but also reinforced'.[34] For present purposes, the differences are not substantial as Majone argues that the Community method should be even more efficient, and Bribosia that the status quo (an efficiency-oriented method) has been expanded *ratione materiae*.

To resume this discussion, the following thoughts might be of relevance; whereas the claims for the significance of the production of outcomes in a supranational multilevel polity retain their validity, the author subscribes to views suggesting that the EU should seriously consider, if not prioritize, input mechanisms as well,[35] not least since there might occur times when the EU might not be able to 'deliver' according to citizens' preferences, thereby instantly bringing to surface the perennial issue of its insufficient democratic legitimacy.

The ECI presented an excellent opportunity to depart from the prioritization of considerations on the effectiveness of the method, as

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[31] Art 294 TFEU.

[32] JHH Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* (CUP 1999) 38.

[33] Majone (n 12) 56-59.

[34] Hervé Bribosia, 'The Main Institutional Innovations in the Lisbon Treaty', in Stefan Griller and Jacques Ziller (eds) *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Springer 2008) 78. This seems to be the view of the Commission as well, which had stated that '[w]ith regard to *effectiveness, the scope of majority decision-making needs to be extended*'. See Commission (n 7) 7 (emphasis in the original).

[35] Consider for instance Richard Bellamy, 'Democracy Without Democracy? Can the EU's Democratic "Outputs" be Separated from the Democratic "Inputs" Provided by Competitive Parties and Majority Rule?' (2010) 17 J Eur Public Policy 2-19; Christopher Lord, *A Democratic Audit of the European Union* (Palgrave Macmillan 2004); Dimitris Chryssochoou, *Democracy in the European Union* (Tauris 2000); Óscar García Agustín, 'Transnational Deliberative Democracy in the Context of the European Union: The Institutionalisation of the European Integration Forum' (2012) 16 Eur Integration Online Papers <eiop.or.at/eiop/texte/2012-010a.htm> accessed 11 January 2013.

previously described, towards a more democratically legitimized Community method through the direct participation of citizens in the process. Given that the Lisbon Treaty left many aspects of the ECI unsettled, it would fall upon the Regulation – on the basis of Article 24 TFEU to essentially determine the ECI's direction. That being said, we may now focus on the legal framework of the ECI.

III. The ECI'S Legal Framework: Treaty of Lisbon, the Commission's Green Paper and Regulation 211/2011

As an introductory remark, it should be noted that along with referenda, initiatives are considered as the modern applications of direct democracy. Why is direct participation critical? As Dahl maintains, the 'fundamental democratic dilemma' of a polity is whether it will sacrifice its size for participation, or inversely, whether it will grow and operate as a 'large-scale unit' leaving policy-making and decision-making to representatives and experts.[36] In this respect, it appears that the abovementioned tools of direct democracy are well suited to cover the shortcomings of representative democracy, whenever they occur.[37]

In the European Union, with the well known and discussed characteristics of diversity and pluralism, the ECI figured among the provisions of the 'Constitutional' Treaty, but despite (or because of) the disappointment by the two negative referenda, it still features in Lisbon. Indeed, it is now part of the provisions on democratic principles of the EU (Title II TEU). Article 11.4 TEU states:

> Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

Furthermore, in Article 24 TFEU, one reads that the ECI forms part of the European citizenship, but residency in the EU is not adequate; the signatories must be member state nationals, therefore (as Article 20 TFEU verifies) EU citizens. However, Dougan's excellent analysis of the legal and potentially constitutional implications of the ECI questions the exclusion

[36] Robert A Dahl, *On Democracy* (Yale UP 2000) 100-118.

[37] For a strong defence of this point see David Altman, 'Bringing direct democracy back in: toward a three-dimensional measure of democracy' (2012) 19 Democratization 1-27.

of third country nationals and rightly points out that, after all, the right to petition the European Parliament is open to everyone.[38]

On November 11th, 2009, the Commission published a Green Paper on the citizens' initiative, [39] which broadly outlined its views. The citizens' initiative (as a draft legislative Resolution) was voted by an emphatic majority by the European Parliament, receiving 628 out of 667 votes (94.2%),[40] demonstrating the European Parliament's will to support this new tool of political participation. On 16th February 2011, the European Parliament and the Council adopted the Regulation 211/2011, the legally binding version of the ECI, relying considerably on the Commission's Green Paper. In what follows, I examine in parallel the views of the Commission and the final provisions of the Regulation.

In the introduction of the Green Paper, the Commission set out its expected outcomes, while recognizing the absence of a European public sphere:

> It will add a new dimension to European democracy, complement the set of rights related to the citizenship of the Union and increase the public debate around European politics, helping to bring a genuine European public space. Its implementation will reinforce citizens' and organized civil society's involvement in the shaping of EU policies.[41]

Furthermore, the preamble of Regulation 211/2011 states that the initiative should be 'clear, simple, user-friendly [...] so as to encourage participation by citizens and to make the Union more accessible'.[42] Besides, modern technology should be a useful 'tool of participatory democracy', whereas data protection is a high priority.[43]

The Green Paper recognized a few priorities regarding consultation. First, what should be the minimum number of member states? Examining the various options, the Commission's view was that the two opposite choices

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[38] Michael Dougan, 'What are we to make of the Citizens' Initiative?' (2011) 48 CMLR 1821-1822.

[39] Commission of the European Communities, 'Green Paper on European Citizens' Initiative', [2009] COM 622 final (Green Paper).

[40] Votewatch, 'European Parliament – Citizens' Initiative' <www.votewatch.eu/en/citizens-initiative-draft-legislative-resolution-vote-legislative-resolution-ordinary-legislative-pr.html> accessed 11 January 2013.

[41] Green Paper 3.

[42] Recital n 2 of Regulation.

[43] See Recitals n 14 and 21 of Regulation, respectively.

would be to either require a majority of member states or one quarter of them.[44] According to the Commission, the two pivotal explanations of the use of the phrase 'significant number of member states' in the Treaty were that the initiative should be, on the one hand, 'sufficiently representative of a Union interest' and on the other hand, a flexible mechanism which could actually work in practice. The Commission concluded that the balanced choice would be one third of member states. The Regulation slightly departs from this view, since it was finally decided that the minimum number of member states should be one quarter.[45] For now, this number is 7.

Further in the Green Paper, the Commission endorsed the viewpoint that the collection of signatures must be somehow proportional across member states, thus fixing additional minimums there; besides, this was in accordance with the 'spirit of the Treaties' and it would indeed reflect that the proposed legislation would represent a 'reasonable body of opinion' in each member state.[46] Instead of fixing a specific minimum number across member states, the Commission observed that the proportional option would be 0.2% of the population of each participating member state. The reason was that out of 500 million citizens (the population of the Union) 1 million is needed, which is 0.2%.[47] The Regulation somehow slightly departs from this position, stating that the minimum signatories per member state should be calculated in accordance with the number of MEPs multiplied by 750.[48] Thus, Annex I of Regulation confirms that countries electing, for instance, 22 MEPs (Belgium, Czech Republic, Greece, Hungary and Portugal) will have to certify that at least 16,500 of their nationals support the initiative.

A link with the European elections may also be identified as regards minimum age requirements for citizens. It was therefore proposed by the Commission to refer to the voting age for the elections for the European Parliament in each member state, which is 16 in Austria and 18 in the remaining states.[49] The proposal was eventually followed.[50]

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[44] Green Paper 4.
[45] Art 7.1 of Regulation. See also Recital n 5 of Regulation, where the rationale provided by the Commission is reproduced, without further justifications, 'In order to ensure that a citizens' initiative is representative of a Union interest, while ensuring that the instrument remains easy to use, that number should be set at one quarter of Member States'.
[46] Green Paper 5.
[47] Ibid. This was the view of the European Parliament as well. See Resolution (n 3).
[48] Article 7.2 of Regulation.
[49] Green Paper 6.

The Regulation stresses the role of organisers, who are 'natural persons forming a citizens' committee responsible for the preparation of a citizens' initiative and its submission to the Commission', [51] including the responsibility of registering the initiative and collecting the signatures. Article 3 contains further prerequisites: EU citizenship is required (therefore a non-EU citizen cannot organize a campaign), while the members of the committee must be 'at least seven persons who are residents of at least seven different Member States' and they should select 'contact persons' to connect with the institutions. Members of the European Parliament are excluded.

Another interesting point is to determine whether the submission of the initiative must have a certain legal form, eg a draft law, or whether it is sufficient to demonstrate clearly in the text the 'subject-matter and objectives of the proposal', leaving the further translation into a legal document to the Commission. Indeed, the Commission endorsed the second option[52] and so does the Regulation. The submission of a 'draft legal act' is optional.[53]

An online register will be maintained by the Commission in order to accommodate the registration of the initiatives.[54] The registration should be followed by a title, the subject matter, the objectives and the pertinent Treaty provisions that enable the Commission to act, the details of the organisers, and the exact sources of funding, all of which serve the overall transparency of the process.[55] The Commission will provide the organisers with a registration number within two months, after having performed a very critical control in terms of its content.[56] This control should work as a counter-balance to the initiative being used for populist purposes or manipulation. More specifically, it has to be verified that the proposal 'does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act'.[57] The term 'manifestly' points to the discretionary powers of the Commission, and also leaves the door open for a second, *ex post* control, once the signatures have been collected. In addition, the initiative should not be 'manifestly abusive, frivolous or

[50] Art 3.4 and Recital 7 of Regulation. The same age requirements apply to the organisers of the initiative (see below n 51).
[51] Art 2.3 of Regulation.
[52] Green Paper 7.
[53] Annex II of Regulation.
[54] Art 4 of Regulation.
[55] Annex II of Regulation.
[56] The Regulation reflects here the Resolution of the European Parliament.
[57] Art 4.2 (b) of Regulation.

vexatious"[58] and should be in accordance with the values of the Union of Article 2 TEU, such as human dignity, the rule of law, fundamental rights and democracy.[59] In the case of a negative response, the Commission should provide thorough explanations, notably by identifying which of the abovementioned conditions were not met, and it should inform the organisers of any available means of action, notably Court remedies or the possibility of contacting the European Ombudsman.[60] Once registered, the initiative will become publicly accessible, in accordance with the principle of transparency.[61] Transparency is also guaranteed via the absence of central EU funding, which will ensure the 'independence and citizen-driven nature of initiatives'.[62]

In relation to time limits, the Commission observed that the deadline should be 'reasonable and sufficiently long so as to allow a campaign'.[63] The Regulation states that the organisers benefit from a 12-month period to collect the signatures.[64] The time limit can be characterized as fair and reasonable. The collection of signatures may be achieved via the completion of detailed forms indicating full name, residence, place of birth, nationality, date/signature and for some countries, a personal identification number.[65] An additional form should be completed by the organisers, along with the signatories' form. Furthermore, if one opts for the online collection of signatures (incontestably a positive development), one should obtain a specific certificate for this, ensuring that the collection complies with Regulation 211/2011.[66] The Regulation applies from April 1st, 2012, whereas pursuant to its Article 15 the Commission has now uploaded on its website a list of competent national authorities to certify the statements of support and another list for the online collection system.[67] In typical bureaucratic fashion, the authorities will have to issue another certificate concerning the number of valid signatures in a maximum period of 3 months,[68] which should be afterwards forwarded to the Commission by the organisers, along with the forms concerning the

[58] Art 4.2 (c) of Regulation.
[59] Art 4.2 (d) of Regulation.
[60] Art 4.3 of Regulation.
[61] Art 4.4 of Regulation.
[62] Green Paper 10.
[63] ibid.
[64] Art 5.5 of Regulation.
[65] Annex III of Regulation.
[66] Art 6 of Regulation.
[67] <ec.europa.eu/citizens-initiative/public/implementation-national-level?lg=en> accessed 11 January 2013.
[68] Art 8.2 of Regulation.

content of the initiative.[69] Upon the receipt of the proposal, the Commission must publish it, meet with the organisers so as the key elements of the proposal be explained and finally, publish within 3 months a communication concerning the Commission's 'legal and political conclusions'.[70] Note that in the Green Paper, the Commission had pointed out that its role consists of an evaluation of the ECI before deciding 'whether the substance of the initiative merits further action from its side', followed by conclusions which should take the form of a communication, in a fixed deadline, according to the principles of good administration.[71] A public hearing at the European Parliament[72] will provide the organisers with the opportunity for further attention. This appears to be the only instance where the European Parliament engages in the process.[73]

IV. Evaluation of the Legislative Framework: A Symbolic Introduction which cannot increase the Democratic Legitimacy of the Community Method

Before assessing the potential impact of the ECI on the Community method, it is useful to recall the threshold of this paper. The ECI, due to its nature, should affect decision-making and, more specifically, the Community method, the latter being output-oriented. Only an impact on decision-making will increase the democratic legitimacy of the Union, which needs to be looked at in the Commission's own words,[74] besides the numerous scholarly accounts. It is not suggested that the ECI should amount to a national instrument of direct democracy without counter-majoritarian adaptations, but it should at least *affect decision-making*.

As previously demonstrated, the ECI could affect the Community method via two avenues. It could either decisively influence the Commission's agenda-setting monopoly (or, should we choose to place the threshold lower, it could at least affect the Community method *lato sensu*) or it could facilitate the involvement of European citizens by refraining from imposing burdensome, unnecessary formalities, thereby adding to the overall improvement of the democratic character of the EU process of decision-making.

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[69] Art 9 of Regulation.
[70] Art 10 of Regulation.
[71] Green Paper 12-13.
[72] Art 11 of Regulation.
[73] Exclusive of the obligation of the Commission to submit a Report to the European Parliament every three years on the application of the Regulation. See Art 22 of Regulation.
[74] See above n 7

The title of this section has already set the tone, but it is opportune to refer in the first place to some provisions of the Regulation that point in the right direction: the control before the collection of signatures ensures that the values of the Union but also the Commission's competences are respected; the minimum number in each member state depends on the number of MEPs; the collection of signatures accurately does not exceed the time-limit of 12 months; from a democratic legitimacy perspective in particular, the wide application of the principle of transparency at all the levels of the process and the possibility for the online collection of signatures certainly a faster mechanism add some limited elements of democratic legitimisation to the broader picture of decision-making in the EU.

In what follows, the criticism will focus on two main issues, namely the possibility of the Commission to set aside one million signatures and the widespread existence of formalities. The simultaneous presence of both, it is argued, undermines the potential of the ECI in relation to the abovementioned threshold.

1. *The Intactness of the Commission's Agenda Setting Monopoly*

I will subscribe from the start to the viewpoint that the ECI, as presented in the Lisbon Treaty and more importantly in Regulation 211/2011, is first and foremost a mechanism of transnational participatory, rather than direct democracy.[75] Indeed, the European model of the citizens' initiative is a 'non-binding agenda-setting' version[76] differing from most of member states' analogous mechanisms, where citizens can forward the proposal directly to the legislative chamber, an option which is not possible at the European level due to the presence of the Commission.[77] According to one view, the European initiative is not a proper 'popular legislative initiative' for the above reasons – the EU policymakers do not trust their citizens 'to initiate the decision-making process' being in the risk to be classified as

[75] See Miguel Sousa Ferro, 'Popular Legislative Initiative in the EU: *Alea Iacta Est*' (2007) 26 YB Eur L 355 - 385 and in particular a comprehensive table on p 360; see also Janice Thomson, '"A Space inside Europe for the Public" before "A European Public Space": The European Citizens' [2011] Initiative and the Future of EU Public Engagement, online: <www.involve.org.uk/wp-content/uploads/2011/03/ECI-A-Space-Inside-Europe-for-the-Public.pdf> accessed 11 January 2013; Paolo Ponzano, 'A Million Citizens can Request European Legislation: A *Sui Generis* Right of Initiative' [2011]: <blogs.eui.eu/eudo-cafe/a-million-citizens-can-request-european-legislation-a-sui-generis-right-of-initiative.html> accessed 11 January 2013; Dougan (n 38), 1807 and 1834.

[76] Thomson (n 75) 3.

[77] Ponzano (n 75).

a more sophisticated right to petition the European Parliament.[78] The European Parliament had highlighted this danger, citizens must identify the differences between the two instruments and the eventual Regulation should point to that direction.[79]

Subsequently, it appears incontestable that the major institution that will deal with the ECI has been decided to be the European Commission; in other words, the success of the story has been entrusted to the Commission. The Commission will issue reports every three years, and further to Article 290 TFEU, it may amend the Annexes of the Regulation using delegated acts,[80] leaving a right to revocation or objection to the European Parliament and the Council,[81] as a counter-balance to the Commission's powers. One might wonder why the Commission would need to be the responsible EU institution for the ECI, given the Commission's perception among citizens as a technocracy that cannot reach the European citizens. The European Parliament could be a valid alternative. The overwhelming voting percentage at the European Parliament (94.2%) is perhaps another indication that the European Parliament was enthusiastic to make efforts so as to boost the possibilities of this new instrument. Furthermore, given the limited participation in European elections, the active involvement of the European Parliament in the initiative could be a good opportunity to re-connect with citizens.

Furthermore, and related to the above, it appears that the Commission has complete discretionary powers in relation to the handling of the initiative, its only obligation being to justify and explain the possible absence of action (or inversely the action), 'the Commission should explain in a clear, comprehensible and detailed manner the reasons for its intended action, and should likewise give its reasons if it does not intend to take any action'.[82] From a direct-democratic perspective, this is an obvious shortcoming. While the first scanning in relation to the admissibility, *before* the collection of signatures is totally understood, the eventual rejection of the initiative on the basis of merits will leave citizens, EU democracy supporters and civil society organizations largely disappointed. Accordingly, the first level of scrutiny (*ex ante* approval in procedural and substantial terms) should ensure that even if citizens ask for anything, or act further to populist manipulation, that proposal will not be forwarded. Imagine, for example, a campaign against fundamental rights or an action

[78] Sousa Ferro (n 75) 360 and 376.
[79] Resolution (n 3).
[80] Art 16 of Regulation.
[81] Arts 18 and 19 of Regulation, respectively.
[82] Recital n 20 of Regulation.

which falls outside the scope of the EU competences as described now in Title I of the TFEU. However, upon the collection and verification of signatures, the Commission should have been obliged to start the respective legislative procedure and subsequently accept the replacement of its monopoly, a scenario which would indeed affect the initiative part of the Community method. One should not forget that even under this scenario, there would still be room for deliberation in the Council and the European Parliament. In order to become EU law, the proposal would still have to pass by the two Institutions, which further ensures a final round of scrutiny,[83] however not performed by the Commission.

Laurent argues that the Commission needs to act with 'prudence' and to apply the standards of 'sincere cooperation', in order to avoid a perception of the instrument as a 'democratic illusion', from the citizens' perspective.[84]

Thus, the European Parliament's reference to the ECI as 'a means of exercising public sovereign power in the area of legislation'[85] was not followed by far. It is striking that none of the abovementioned documents (Regulation 211/2011, but especially the Commission's Green Paper, or even the Resolution of the European Parliament) [86] make any recommendation or provide insight as to how the Commission should use its discretionary powers in relation to the final decision on the initiative. This could perhaps be regarded as a manifestation of the willingness of all institutions to leave the Community method 'undamaged'. On the question whether, from a legal perspective, it could (or should) be otherwise, divergent lines of argumentation may be identified. Ponzano answers in the negative, stressing the 'particularities of the European Union's institutional system', and inviting us not to underestimate that the citizens have been granted a right equivalent to the right both the

[83] If the act indeed falls under the scope of the ordinary legislative procedure.
[84] Sylvain Laurent, 'Le droit d'initiative citoyenne : en attendant l'entrée en vigueur de la Constitution européenne' (2006) 497 Revue du Marché Commun et de l'Union Européenne 225 (author's translation).
[85] Resolution.
[86] One could add here the contribution of the European Ombudsman to the Commission's Public Consultation, where in brief he argued that he is willing to supervise the Commission's stance towards the admissibility stage of the initiative, which is a purely legal issue, contrary to the final assessment which is a political matter and should be dealt with by the European Parliament. See European Ombudsman 'Contribution to the Public Consultation on the European Citizens' Initiative':
<www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/4592/html.bookmark> accessed 11 January 2013.

European Parliament and the Council enjoy.[87] Dougan argues that 'it always seemed doubtful that [the ECI's Regulation] could lawfully have been used to go much further' without 'infring[ing] the Commision's institutional prerogative of legislative initiative'.[88] Sousa Ferro in his sceptical account accentuates the policy-oriented issues that occurred during the Constitutional Convention, namely the undesirability of introducing a popular legislative initiative without extending accordingly the right of the European Parliament.[89] That being said, and regardless of a definitive answer to this interesting question, one observes that, in the context of a *de facto* 'progressive erosion' of the Commission's legislative monopoly discussed above, which is widely perceived as a natural evolution of the method, it would need to fall upon the ECI to stick to the formal observation of the Commission's prerogative.

Besides, the whole round of policy-preparation (or, the Community method *lato sensu*) can difficultly be affected. The Commission has practically 18 months after the registration (12 months for the collection, 3 months for the verification and another 3 months after the submission and until the communication) to form its final position, which is sufficient time to seek for the abovementioned well-established consultation practices. Upon the submission, there is a time limit of only 3 months, but we can estimate that the Commission might already possess the necessary information to assess the potential of the initiative well in advance of the deadline of 12 months. Also, the public hearing of Article 11 before the European Parliament could be seen as an additional source of networking. What is more, the Commission may decide to reject the proposal even by suggesting that this preparatory phase is incomplete and that it needs more time to decide on the substance; according to the spirit of the Regulation, it appears that a well justified/explained conclusion of this kind would be totally acceptable (of course the danger of maladministration is always present for the Commission).

2. *The Burdensome Formalities Imposed upon Citizens and Organisers*

Let us now turn to the second leg of our examination, namely an assessment on the thresholds of the citizens' initiative. It was previously argued that the ECI could perhaps provide an alternative to the current system of decision-making, had it not been designed as a mechanism where unnecessary formalities would have been imposed. In this context, I

[87] Ponzano (n 75).
[88] Dougan (n 38) 1842.
[89] Sousa Ferro (n 75) 375.

subscribe to the concerns of civil society,[90] adding that the instrument is in the danger of becoming quite impractical to use. A synoptic presentation of the prerequisites is worth mentioning: a minimum number of member states; a minimum number of signatories per member state; requirements for the citizens' committee; the registration/registration number; the receipt of a certificate for the online collection; the receipt of a certificate verifying the statements of support; the completion of detailed forms; and of course, the clarification of the authorities of member states in the first place. On the one hand, it is understood that the EU officials wish to verify the validity of the signatures and the levels of actual support across member states. On the other hand, the overall process does not sound user-friendly and appealing. One would expect more simplified procedures for a new tool promising to boost political participation.

More in detail, the choice of the minimum number of member states was based on an incomplete analysis which in any case did not consider the present obstacles for political participation at the EU level. The Regulation merely declares that one quarter of member states ensures simultaneously representativeness and flexibility. [91] The Commission's position, expressed in the Green paper (one third of member states), was based on references to rather irrelevant articles of the Lisbon Treaty,[92] or experiences from one EU (Austria) and one non-EU (Switzerland) country. However, derogations from this rule could have been provisioned, with a view to enhancing the chances of appropriate endorsement and therefore citizens' involvement. For instance, in areas of regional interest (eg an environmental issue in Scandinavia or in the Adriatic Sea), since it might be difficult to launch a pan-European action, an initiative from the nationals of the member states directly concerned could have been provisioned. In fact, this argument could indeed stem from the abovementioned Protocol on subsidiarity, given that Article 2 states that, '[b]efore proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged'.

In addition, as previously explained, the responsibility to verify the authenticity of each signature shall remain with the member states, for their respective citizens. However, the Commission was preoccupied to

[90] <www.act4europe.org/code/en/policy.asp?Page=267&menuPage=214> accessed 11 January 2013.
[91] Recital n 5 of Regulation.
[92] The 'enhanced cooperation' mechanism and the involvement of national parliaments in the observance of the subsidiarity principle, as defined in Art. 7.2 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality of the Lisbon Treaty.

impose certain panuropean administrative provisions in the first place, as a choice between 'full harmonisation of procedural requirements' and member-state flexibility, because this 'approach could preserve the European-wide nature of the citizens' initiative'.[93] One might be somewhat sceptical as to whether, by preventing member states from utilizing flexible mechanisms, the Commission indeed struck the right balance there.

What is more, the capability of the organisers to withdraw the initiative after the registration, but before its submission[94] is partly problematic as well, giving the impression that the proposal 'belongs' to the organisers, instead of citizens, although it was the European Parliament that suggested this provision. A more justifiable option would be to leave the process open after the registration. One cannot entirely preclude this scenario as once the initiative is published, on highly sensitive issues, the organisers could be subject to diverse political pressures. Nonetheless, their eventual decision to withdraw cannot prevail over the voice of thousands of citizens. Accordingly, as Dougan asserts, the organizational prerequisites imposed by the Regulation render 'the prospect of NGOs monopolizing whatever agenda-setting influence might be squeezed from the new [E]CI a real one'.[95] Inversely, the European Parliament had proposed that any statement of support could be withdrawn before the expiration of the period of 12 months.

In a broader context, it has been supported that 'modern citizens are, on the whole, better educated', demand direct involvement and there is evidence of this 'in declining voter participation and collapsing political party membership'.[96] They have enormous access to information and they prioritize accountability; for instance, the *Indignados* exercised considerable pressure in Spain, Greece and elsewhere. Generally, an evolution worth noticing is, according to della Porta, the emergence of European movements and various forms of activism, which do not question the European polity as such, but rather the quality of decision-making.[97] Applying these thoughts to Regulation 211/2011, it is arguably unpromising that the final framework of the ECI overlooked the possibilities for a more direct involvement.

To put it differently, one could understand either a less formal/more

[93] Green Paper 7-9.
[94] Art 4.5 of Regulation.
[95] Dougan (n 38), 1833.
[96] Thomson (n 75).
[97] Donatella della Porta, 'The Emergence of European Movements? Civil Society and the EU' (2008) 3 EJLS 1-37.

flexible process and the Commission's initiative monopoly remaining unaffected, or a strict procedure with various levels of scrutiny, but the eventual outcome being the submission of the proposal by the Commission to the European Parliament and the Council.[98] But the inclusion of both thresholds gives us grounds to assume that for the EU policymakers and despite the rather generous promises, the citizens' involvement in decision-making is still not a priority. Eventually, one can still hope that one million signatures of seven member states under such formalities are a heavy political input and it would be really surprising to see the Commission finally rejecting the initiative (see more on this point below). What the Commission could opt for, though, would be to retain the principal idea the rationale of the proposal and amend some specific (or crucial) details. In any case, only the Commission's actual policy on this matter will tell. What we do know, nonetheless, is that the legal framework, which is under evaluation in this contribution, leaves in principle ample room for discretion to the European Commission.

3. *Some Thoughts on the ECI as an Addition to Existing 'Structures for Participation'*

Finally, I shall briefly refer to a few more optimistic accounts on what appears at first sight a different in nature, yet equally important, path of assessment; the possibilities for deliberative/participatory democracy, inclusive of an active civil society dialogue on EU matters and/or 'the Europeanisation of national public discourses'.[99] One preliminary enquiry arises as follows: if the purpose was to add another opportunity for participation, why the ECI had to be entitled an 'initiative' and not, for instance, a Forum for EU-wide consultation? This would lower expectations for legitimisation, since the word 'initiative' inevitably points to a certain impact on legislation. Currently, as observed by at least two accounts,[100] a petition to the European Parliament is more user-friendly and inclusive *ratione personae* than the ECI, while essentially amounting, from a legal perspective, to the same result.

Putting comparisons aside, a vicious cycle might emerge and this points to

[98] Assuming that the act falls under the ordinary legislative procedure, which is a very likely scenario.

[99] See CEPS and others, *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (Brussels, 2010) 131, online: <www.ceps.eu/book/treaty-lisbon-second-look-institutional-innovations> accessed 11 January 2013; recently Elizabeth Monaghan, 'Assessing Participation and Democracy in the EU: The Case of the European Citizens' Initiative' (2012) 13 Perspectives on Eur Politics and Society 285-298.

[100] Soussa Ferro (n 75); Dougan (n 38).

the formalities of the ECI in how to foster a European public sphere (an EU-wide mobilisation) without a pre-existent civic *demos* and public sphere? The online collection of signatures appears as the way forward, with any consequences for citizens still not familiar with new media.[101] The Commission should be credited for temporarily providing its servers for organisers, in order to facilitate the online collection of signatures.[102]

However, one could still argue that despite the possibilities for a significant EU-wide communicative interaction and dialogue that are indeed opening up (albeit in an unnecessarily formalistic context), any prospects for input legitimacy would be instantly undermined by a decision of the Commission to reject the proposal after the collection of signatures. This inevitably brings us back to the main argument of this contribution, namely to the normative claim on the ECI's link with the Community method and the effect on decision-making. Thus, since the instrument is legislative in nature, and since the formalities imposed by Regulation 211/2011 cannot be overcome now, the only viable option appears – again to be the Commission setting aside *de facto* its discretion on legislative monopoly to the benefit of one million citizens or more. One should acknowledge that it is not an easy policy choice, but it is admittedly a choice that would increase the Commission's own legitimacy as well. For that to happen, it would merely suffice that the messages on the ECI website be followed, the ECI 'allows *one million EU citizens* to participate *directly* in the development of EU policies' – 'You can set the agenda!'.[103]

V. Conclusions

Any assessment arguably depends on the threshold one will employ, and this applies to this contribution as well. If one chooses to evaluate the ECI as an addition to existing opportunity structures for participation, one might share the optimism occasionally expressed, though one might still need to identify what more the ECI has to offer (apart from a complicated procedure) when compared with the right to petition the European Parliament (even in that case, it has been shown why the setting aside of the Commission's legislative monopoly is necessary for legitimisation purposes).

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[101] See a recently published paper on this topic by Sephane Carrara, 'Towards e-ECIs? European Participation by Online Pan-European Mobilization' (2012) 13 Perspectives on Eur Politics and Society 352-369.

[102] <ec.europa.eu/commission_2010-2014/sefcovic/headlines/press-releases/2012/07/2012_07_18_eci_en.htm> accessed 11 January 2013.

[103] <ec.europa.eu/citizens-initiative/public/welcome>, accessed 11 January 2013. The word 'directly' emphasized by the author, otherwise emphasis in the original.

On the contrary, this paper focused on the purpose of the ECI, in other words decision-making and legislation, where the post-Lisbon Community method remains preponderant. It was found that the ECI's legislative framework, unsurprisingly, creates an instrument far from the field of direct democracy, in a context where the Community method remains widely unaffected. More in detail, it was demonstrated that it is rather unlikely for the ECI to 'threaten' the Community method *stricto sensu*, by affecting the Commission's agenda-setting monopoly or the range of discretion of the Commission and increasingly of other institutional actors concerning the preparatory phase of decision-making (*lato sensu*); simultaneously, from a broader perspective, that it is unlikely to mark a turn to input-oriented mechanisms at the EU level due to various (but frequently unjustified) formalities.

Despite the aforementioned unfavourable legal framework, the EU practice (and I am referring primarily to the Commission, because the formalities imposed by Regulation 211 cannot be amended at this stage) could contribute towards a more prosperous future for the initiative, therefore towards a more identifiable influence on the Community method. Such optimistic scenario should include the extensive and *successful* use of the tool by European citizens[104] and possibly a positive contribution by the CJEU. The Court, if asked to review a decision of the Commission to reject or amend the proposal, could base its reasoning – beyond the proportionality test on the presence of the ECI in the articles concerning the EU citizenship, or it could refer to the principles of openness and proximity to citizens[105] and the provisions on participation, especially the 'right to participate in the democratic life of the Union'.[106]

[104] It is interesting to note that in 2010 and almost one year after the entry into force of the Lisbon Treaty, but before the adoption of the Regulation, some environmental NGOs submitted an 'initiative' on the ban of genetically modified organisms in the EU to the Commission, having managed to collect one million signatures. After an initial hesitation to accept the petition, the Commission eventually decided to consider it, while underlining that the formal mechanism had not been set up at that time. See generally: <euobserver.com/institutional/31388>; <www.euractiv.com/cap/citizens-initiative-call-gm-crop-news-498524>; <euobserver.com/environment/31474> all accessed 2 February 2013.

[105] Art 1 TEU.

[106] Art 10.3 TEU. Dougan expresses concerns on whether such a stance from the Court is legally permissible, given the Commission's monopoly on legislation, but he anticipates a contribution from the Court at the first stage, namely the Commission's decision on whether or not to register the initiative, thus 'open[ing] up a whole new avenue for constitutional adjudication concerning some important grey zones in EU law': Dougan (n 38) 1843 and 1848. One should add potential contributions from the European Ombudsman as well, who is both competent (Art

Otherwise, the risk of a symbolic introduction with limited input is visible.

4.3 of Regulation) and determined (see above n 86) to supervise the Commission's stance towards the admissibility stage of the ECI.

CORRECTIVE JUSTICE AND DETERRENCE: CAN THEY CO-EXIST?

Tareq Al-Tawil *

Abstract–Restitutionary justice and deterrence have completely different types of justification. Although deterrence and restitutionary justice are quite different, this does not prevent the two from sharing the same means to their different ends, namely, stripping the defendant of the gain which he has made from his breach of contract and awarding it to the claimant. But the crucial question is: how can these diverse ideas be joined in a coherent unified theory? This article aims to deliver a mixed theory of restitutionary justice and deterrence in contract law.

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I. INTRODUCTION

The measure of compensatory damages for breach of contract is limited to the claimant's direct and/or consequential loss, which may flow from the violation of his right to performance. However, in some contractual breaches, the defendant may make a gain or benefit without causing any financial loss to the claimant. Therefore, if the traditional measure of damages were applied, no compensatory damages at all would be awarded, because the claimant is no worse off than if the contract had been fulfilled and restitution for wrongs is thus the only remedy available to the claimant. This remedy is directed towards the defendant's gain and is triggered by a wrongful action. It, in other words, addresses the

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defendant's gain independently of any further considerations; for example the claimant suffering a financial loss. It is argued that the remedy of restitution deters deliberate and opportunistic wrongdoing.[1] Breaching a contract by the defendant in order to make profit will not be tempting idea if there is a strong possibility of him being asked to hand over his profit to the claimant. Therefore, the availability of restitution will encourage performance as it removes the temptation to breach. While the deterrent purpose can explain why the defendant should not profit from their wrong, and so why they have to be deprived of their profits, it fails to explain why profits must be assigned to the claimant, rather than to the state or someone or something else. It is true that in the case of deterrence (or punishment) there is a connection between the wrong, the perpetrator and the legal response. Nevertheless, careful consideration shows us that the innocent party — the claimant — stays strange to (or out of) this connection, given that the defendant — the wrongdoer — is punished independently of their relationship to the claimant. For this reason, awarding restitutionary damages ought not to be conceived of as serving to facilitate a deterrent or punitive purpose only, for it cannot explain why the claimant, of all people, should receive the defendant's profit. To put this differently, 'it fails to link the damages that the [claimant] receives to the normative quality of the defendant's wrong'[2] or fails to 'create party-related reasons to act'.[3]

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[1] Daniel Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 Columbia L Rev 504, 513; Daniel Friedmann, 'Restitution of Profits Gained by a Party in Breach of Contract' (1988) 104 LQ Rev 383. See also Richard O'Dair, 'Remedies for Breach of Contract: A Wrong Turn' (1993) Restitution L Rev 31, 38; James Edelman, 'Restitutionary Damages and Disgorgement Damages for Breach of Contract' (2000) Restitution L Rev 129, 136; Peter Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 374-76; Mark Gergen, 'What Renders Enrichment Unjust?' (2001) 79 Texas L Rev 1927. According to Birks, that restitution is based on deterrence and punishment, is not seen as inconsistent, because a defendant is necessarily punished to some degree by a monetary award and is likely to consider being obliged to pay considerable damages under civil law as no less burdensome and ruinous than a fine or other penalty under criminal law. Peter Birks, 'Civil Wrongs: A New World' in *Butterworths Lectures 1990-1991* (Butterworths 1992) 55, 86.

[2] Ernest Weinrib, 'Restitutionary damages as Corrective Justice' (2000) 1 Theoretical Inquires in Law 1, 6.

[3] Francesco Giglio, The Foundations of Restitution for Wrongs (Hart Publishing 2007) 195, 202. It is also not convincing to say that awarding restitutionary damages is necessary to deter future contracting parties from committing opportunistic breaches. It may be argued that contracting parties do not know the details of the law or that remedial rules have no significant influence on how contracting parties behave, because they hope that the wrongful act which has enriched them but not impoverished the other party will not be known about, or if it is known about, that the other party will be reluctant to bring legal action against them.

Generally speaking, is it possible that linking the deterrent argument with the facilitative institution argument will help us in explaining why the defendant has to be deprived of their profits and why profits must be given and assigned to the claimant, rather than anyone else? The answer is 'no'.

Daniel Friedmann argues that the public interest requires a general right to recover profits derived from breach of contract.[4] He also argues, with regard to the facilitative institution of contract, that institutional harm necessitates disgorging the defendant of the profits that he has made from his breach of contract. In this view, the aim of restitutionary damages is not to protect the innocent party of a wrong, but rather to preserve and protect facilitative institutions. There can be little doubt that the remedy of restitution offers excellent support to the institution of contracting, because it deters deliberate wrongdoing. In the words of Ralph Cunnington, 'Without such a remedy [*ie* restitutionary damages], the bargained-for interest in performance would be left hopelessly unprotected and society's confidence in the institution of contracting would be severely undermined'.[5] However, the objection faced by the deterrent argument applies with equal force to the facilitative institution argument. More specifically, if it is argued that the aim of the wrong is the protection against institutional harm, one can understand why the defendant, that is, the person who has perpetrated the wrong, has an obligation on their part to pay restitutionary damages. Nevertheless, the matter that remains ambiguous is the reason why the claimant has to be the one who receives such damages, them being the one who enjoys the benefit from such an obligation. Should the aim of the restitutionary obligation imposed on the defendant be to protect an institutional harm, then this result undoubtedly can be accomplished by requiring the defendant to pay damages to the state or, as Francesco Giglio says, 'to a fund for the protection of certain legal institutions'.[6] The facilitative institution argument does not manage to tie both the defendant to the claimant and the remedy to the wrong that has been committed between the parties.

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[4] Daniel Friedmann, 'Restitution for Wrongs: The Basis of Liability' in William Cornish and others (eds), *Restitution—Past, Present, and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 133.

[5] Ralph Cunnington, 'The Measure and Availability of Gain-Based Damages for Breach of Contract' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 242. As Ian Jackman argues: 'the rationale for the right to restitution for wrongs is the protection of a variety of private legal facilities, or facilitative institutions, namely private property, relationships of trust and confidence, and (with some qualification) contracts'. Ian Jackman, 'Restitution for Wrongs' (1989) 48 CLJ 302, 302.

[6] Giglio (n 3) 202.

Anyway, it is not a very convincing argument to say that awarding restitutionary damages is necessary to deter future breaching parties. The following example will elucidate this. Suppose that Britney Spears offers employees good terms of employment, but in every case, from gardener to personal assistant, extracts the same contractual promise not to make money by selling (or disclosing) stories or pictures to the media. The personal assistant, nonetheless, breaks his promise by disclosing stories and pictures about his employer's private life. He is willing to pay compensation to Britney Spears because he believes that the gain he will make from his wrongful breach of contract will far outweigh (or exceed) the monetary award. It is clear, then, that the possibility of having to pay compensatory damages will not deter this personal assistant from going ahead with his plan to disclose the stories and pictures.[7]

James Edelman argues that a restitutionary award would lead to a more appropriate result.[8] Accordingly, in the current example, he believes that the personal assistant will be reluctant to disclose the stories and pictures, since he bears in mind the possibility that he could be obliged to disgorge his gain. Nevertheless, it is difficult to see why this would happen. This is because if the personal assistant considered the possibility of Britney Spears bringing legal action requiring him to pay restitutionary damages, then surely he would also consider that the worse thing that could ever happen to him in the light of this legal action would be placing him in the exact financial situation in which he would have been if the stories and pictures concerned had not been disclosed in the first place. The aim of awarding restitutionary damages is not to punish the wrongdoer, but rather to deprive him of the wrongful gain.[9]

Therefore, the personal assistant may still seek to publish the stories and pictures, bearing the risk of having to pay restitutionary damages. In fact, he may even be more willing and attracted to do so, particularly if he knows that, under the current system, the issue of whether the claimant should be granted a restitutionary remedy in cases where he suffers no pecuniary loss remains unresolved, pending further discussion (i.e. disputed and left to the discretion of the judge).[10] Edelman does not in fact explain why such an indifferent stance should deter the defendant from committing the wrongful breach, or indeed ensure a 'greater level of

[7] ibid 208.
[8] James Edelman, *Gain-based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002) 83.
[9] Giglio (n 3) 208.
[10] ibid.

deterrence [...] than compensatory damages can produce.'[11] Nor does he sufficiently explain why, of all kinds of relationship problems, the legal system should award restitutionary damages only for fiduciary relationships, or why they deserve such protection.[12]

Awarding restitutionary damages should not, therefore, be seen as serving a deterrent or punitive function only. Restitution should also be seen as a way of attaining justice between the parties (ie restitutionary justice). What follows is that apart from seeking to lay down standards for individual actions and offer incentives to behave and act in accordance with those standards (i.e. the deterrence objective), courts also seek to achieve justice between the parties.

Giglio argues that restitutionary justice is a particular application of corrective justice. For him, it does not primarily seek to deter, but deterrence is one of its by-products (or parts).[13] He apparently seems to suggest that law should be conceived and comprehended through a mixed theory that affirms both corrective justice and deterrence. One might wonder whether such a mixed theory is possible. It may initially appear, given that corrective justice accounts for restitutionary damages and deterrence are genuinely diverse ideas that such distinct principles cannot coherently exist. But this would be a mistake, as will be explained in more detail below.

Before showing how a mixed theory, combing corrective justice and deterrence, can still be unified and coherent, it is necessary to explain how corrective justice can offer an adequate explanation of why the defendant should give up to the claimant, rather than the state (or anyone else), the benefit obtained through his wrongful breach of contract.

II. CORRECTIVE JUSTICE AND RESTITUTION FOR WRONGS

The idea of corrective justice received an early formulation in Aristotle's treatment of justice in Nicomachean Ethics, Book V.[14] For Aristotle, corrective justice is the theory of the mean; more specifically, 'the just, or the equal, is the mean between the more and the less.'[15] Once it is established that the defendant has, as a result of his wrongful act, taken and acquired more than he ought to have—that is, more than the mean—

[11] Edelman (n 8) 83.
[12] Giglio (n 3) 209.
[13] Francesco Giglio, 'Restitution for Wrongs: A Structural Analysis' (2007) 20 (1) Canadian J of L and Jurisprudence 5, 28.
[14] Aristotle, *Nicomachean Ethics* (R Crisp tr, CUP 2000) V, 2-5, 1130a14-1133b28.
[15] Giglio (n 13) 22.

then he must surrender his surplus to the claimant, who has less than the mean, or who has less than what he would have had, had the defendant never acted wrongfully towards him.[16] As a result of the wrong there is an excess (gain) for the defendant, while the claimant endures deficit (loss) as a result of an injustice at the defendant's hands.

That Aristotle refers to the gains and losses of corrective justice normatively, rather than materially or financially, is indisputable. He considers that the equality between the particular parties is disturbed whenever corrective justice is violated. In this way, he lays the complete normative weight of his theory on that equality. The question now to be examined is this: In what regard could the parties possibly be equal? Aristotle provides no clear answer to this crucial question. He simply offers corrective justice as a transactional equality, yet without saying in what respect the parties are equal. The result is that we cannot, in a dialogue, merely state that the defendant's behaviour is an 'injustice', because merely to state this does not provide an argument. We must provide an explanation of why this word arises or is applied in the first place and that requires an account of the kind of equality applicable here, and an account of why it is wrong to disturb it (without justification).

The theory of corrective justice is a philosophical explanation—first outlined by Aristotle and later allegedly incorporated by Immanuel Kant into the notion of natural right—of how justice may be done in private law for both parties.

The Kantian principle of right 'is a philosophy of freedom that starts with the operation of free will conceived as self-determining activity.'[17] In Kant's account, '[t]he fundamental principle applicable to the interaction of self-determining beings is that [one party's freedom of choice to] act [...] should be consistent [or co-exist] with the freedom of whomever the action might affect.'[18] According to Kant, rights—such as contractual performance—'are the juridical manifestations of the freedom inherent in self-determining activity.'[19] Action is thus compatible with the freedom of others so long as it is not contrary to their legal rights. If one has a right to contractual performance, the other is morally bound by a corresponding obligation to perform unless the promisee has released him from that obligation. The promisee has control over the choices available to the

[16] ibid.

[17] Ernest Weinrib, 'The Gains and Losses of Corrective Justice' (1994) Duke LJ 277, 290. See Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, CUP 1991) 40-43.

[18] Weinrib (n 17)290-291.

[19] ibid 291; Kant (n 17) 90-95, 101-103.

promisor who bears the corresponding obligation.[20] To put this differently, the promisee is in a moral position to determine, by his freedom of choice, the way in which the promisor should behave and in this way to limit the latter's freedom of choice.[21] In the words of Kant, '[rights are] moral capacities for putting others under obligations.'[22]

Right and obligation are connected—and so therefore are the promisor and the promisee—by the fact that the substance of the right is the essence of the obligation. The right represents the moral position of the promisee, which is to ensure that he demands and receives just what he has been promised in the contract; the promisee cannot demand more than that. The obligation represents the moral position of the promisor, which is to ensure that he performs no less than what he consented to perform in the contract. If both positions are maintained as stipulated, then the promisor and the promisee are equal. In other words, the equality involves the promisor and the promisee being on an equal footing with respect to their rights and obligations in the contract. The promisor's freedom of action should be capable of coexisting with the freedom of the promisee, which manifests itself in the right to performance, always assuming that the two freedoms must coexist, with the two sides being equal.[23] As Weinrib states:

> [T]he parties to a corrective justice transaction are equal in a very peculiar way: the equality abstracts from the particularity of the parties' social rank or moral character to the sheer relationship of wrongdoer and sufferer. Corrective justice treats the parties as equals because all self-determining beings, regardless of rank or character, have equal moral status. The conjunction of right and duty is simply this equality of self-determining beings viewed juridically, from the standpoint of the correlativity of one person's action and its effects on another.[24]

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[20] Eduardo Rivera-López, 'Promises, Expectation, and Rights' (2006) 81 Chicago-Kent L Rev 21, 34.

[21] HLA Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Rev 175, 180; Peter Vallentyne, 'Natural Rights and Two Conceptions of Promising' (2006) Chicago-Kent L Rev 9, 12.

[22] Kant (n 17) 63.

[23] See Samuel Stoljar, 'Keeping promises: the moral and legal obligation' (1988) 14 LS 258, 269.

[24] Weinrib (n 17) 292. For a more complete argument of the connection between corrective justice and Kantian right, see Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice, (1992) 77 Iowa LR 515, 601-624; Steven Heyman, 'Aristotle on Political Justice' (1992) 77 Iowa LRev 851, 860-63; Weinrib (n 2).

This statement can be best explained through the following example. Suppose that an employer enters into a contract with his employee prohibiting him from selling and disclosing any confidential information during his term of employment and thereafter. The employee has an obligation, which means that there is something due or owed specifically to the employer, so a legal right arises out of this contract. If the employee breaches his contractual promise to the employer by selling and disclosing confidential information to a third party, the employer will claim that the breach represents a wrong against him, that wrong arising from the claim that he has been unequally, unjustly or harmfully treated in the sense of diminishing his status as a promisee. The employer's moral status to determine, by his freedom of choice, how the employee should use the information (and in this way to limit the latter's freedom of choice to act) has been diminished. Thus understood, the absence of coexistence between these two freedoms would simply mean that the employee will cause normative (or as I call it 'intangible') harm to the employer. In this light, the employee's breach of contract leaves the employer in a normatively disadvantaged situation. The two parties are no longer equal in their moral status.

Unless the employee can undo the wrong or injustice he has committed (in terms of breaching the primary right not to sell and disclose confidential information to a third party), the employer will never be able to re-establish or regain his condition as controller of how the information ought to be used by the employee, and, thereby, as a promisee, with respect to the past infringement of the contractual right. However, it is a foregone conclusion that the wrong committed by the employee cannot be undone. The employer cannot require the employee to refrain from doing what he has already done – 'the past cannot be undone'.[25] As Zakrzewski said, '[r]equiring the person owing the duty to abstain from doing what he or she has already done would be a fruitless exercise.'[26] Therefore, regarding this past infringement, the employer cannot regain his status as a promisee. The freedom of both parties can in no way be returned to a state of coexistence. The state of equality, which involves the employee and the employer being on an equal footing with respect to their rights and obligations in the contract, can no longer be achieved (or restored).

The employer can, it is true, rely on this primary right to regulate future conduct by obtaining an injunction to prevent the employee from committing any further infringements, but this primary right will provide no protection with respect to the infringements already committed. Here,

[25] Rafal Zakrzewski, Remedies Reclassified (OUP 2005) 105.
[26] ibid.

the employer can bring a claim for compensatory damages to make good his pecuniary loss concerning the past infringements – the secondary compensation interest.

Clearly, Ernest Weinrib's work provides some valuable clues in what respect the parties are equal. His normative approach provides a background to the idea of equality. However, as will be explained shortly, Weinrib's attempt to situate restitutionary damages within the theoretical framework of corrective justice must be rejected.

III. INTANGIBLE AND TANGIBLE HARMS

If the promisor breaches his obligation to perform—and thus the promisee's right to performance—he has then acted unequally, unjustly or harmfully against the promisee. For example, in the sense of undermining his position as a promisee, the promisee's moral status to determine, by his choice, how the promisor should act has been diminished (this will hereinafter be referred to as 'intangible harm'). The concept of 'intangible harm', it can, therefore, be seen, arises in the absence of the coexistence of the freedoms of, or equality between, the two parties, regardless of whether or not the promisor's breach of promise has actually caused the promisee any financial loss. Stated differently, the promisor's breach of contract is intangibly harmful to the promisee, not because it necessarily deprives him of a financial interest (although it sometimes, perhaps often, does so), but because it leaves him in a disadvantaged situation: his situation as a promisee has been undermined.[27] The 'intangible harm' here is thus independent of any material or financial measurement. It is a normative concept, which refers to the disadvantageous position occupied by the promisee as a result of the promisor's breach of contract.

By compelling the breaching promisor to fulfil his duty to perform, and so the promisee's right to performance, the court seeks to undo the intangible harm or injustice that the promisor has caused to the promisee. The court also restores to the promisee the privilege of limiting the promisor's freedom of choice of how to act, which was undermined by the promisor's behaviour, thereby giving the promisee the performance he contracted for, and protecting his performance interest. The promisee's interest in having the promise performed is a primary interest, which is effectuated by the recognition of the promisee's (primary) right that the promisor should perform his side of the contract. This brings about a corresponding (primary) obligation on the promisor to perform. Correctly understood, the performance interest does not seek to prevent or remedy

[27] See Giglio (n 13) 25.

the financial loss that the promisee may suffer by reason of the promisor's breach of the primary duty. After all, there are cases where, although the promisor's performance was defective, the promisee suffered no financial loss.[28] The promisee's claim for compensation could not therefore be linked with his performance interest claim. The performance interest in such cases seeks to make the promisor perform what he has promised, no more, no less. This primary interest is protected if a prohibitory injunction, cost of cure award, or a specific performance remedy is available to the promisee.

There are, therefore, two distinct ways in which the promisor can cause harm to the promisee, each of which is protected in a different way and for a different purpose. The promisee has a secondary compensation interest in not being left worse off by reason of the promisor's breach of primary duty. This interest is effectuated by recognising a right in the promisee that the promisor should compensate the promisee for any financial losses resulting or flowing from failure to perform his primary duty.[29] It protects the promisee against another kind of harm, although this time it is tangible: direct and/or consequential loss, which may flow from the violation of the promisee's primary right (hereafter referred to as 'tangible harm'). The secondary interest, thus understood, does not seek to undo the intangible harm or injustice that the promisor has caused to the promisee, and so does not give the promisee the performance he contracted for. Rather, the remedy of compensation, unlike specific

[28] Consider the following example. Suppose that a contractor promises to build a house to certain specifications, one of which is that Brand X pipes are to be used in the plumbing. The contractor builds the house according to the specifications, save that he uses different materials, installing Brand Y pipes rather than Brand X. In order to calculate the claimant's financial loss from this breach, the court must determine what the claimant stood to gain from the performance of the contract. Inasmuch as Brand Y is equal in quality, appearance, market value and cost to Brand X, the use of Brand Y pipes does not affect the value of the building work (whether this is assessed at market rates or by reference to the value placed on the work by the claimant). Accordingly, no financial loss is suffered by the claimant. But still the claimant has not received the exact performance he contracted for. In such a case, therefore, if the claimant aims to force the defendant to deliver the promised performance, it will be difficult to argue that compensation can give effect to his interest in having the contract performed as specified. This indeed proves that compensatory damages cannot and should not be said to equate to enforced performance. This example is based on the facts of *Jacob & Youngs v Kent*, 230 NY 239, 129 NE 889 (1921).

[29] See Zakrzewski (n 25) 102-03, 165-66; Stephen Smith, 'The Law of Damages: Rules for Citizens or Rules for Courts?' in Djakhongir Saidov and Ralph Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 36-37; Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 OJLS 41, 45.

performance, cost of cure, or prohibitory injunction, responds to loss resulting from the breach and not to the breach itself. [30]

The promisee's secondary right does not always require the promisor who infringes a primary duty to make good his pecuniary loss. In other words, it does not always seek to undo the tangible harm that the promisee may suffer by reason of the promisor's breach of contract. This is because there are cases where the promisor's breach allows him to make a gain or benefit without causing any financial loss to the promisee. This idea can also be exemplified by revisiting the example of the employee who enters into a contract with his employer promising him that he (the employee) will not sell and disclose any confidential information to a third party during the term of his employment and thereafter. In the case of an employee's breach of contract allowing him to make a benefit without causing any financial loss to the employer, then the latter can only bring a claim for restitutionary damages. The financial gain is the material embodiment of the injustice committed by the employee upon the employer in terms of violating his primary right.

The employer's compensation claim cannot target the gain obtained by the employee, for there is no loss of which it can be said that the gain is a consequence. Here, the employer's secondary right may instead require the employee to surrender to the employer the profits that he has made from his wrongful infringement. In such a case, it is a secondary right to restitution rather than compensation. The employer's compensation interest is replaced by the restitution interest. Therefore, the secondary right to restitution requires the employee to surrender to the employer the profits that he has made from his wrongful breach of the primary duty to perform. Failing to undo this embodiment would be a negation of the injustice or intangible harm that the employer has suffered from the employee's breach. So, the employee has to be deprived of the financial benefit obtained through his wrongful behaviour. In such instances, the remedy of restitution is designed to undo the material embodiment of the intangible harm that the employee has caused the employer by undermining his status as a promisee, rather than to undo the intangible harm itself.

This replaced secondary interest is clearly directed towards the employee's gain and is triggered by a wrongful action. It, in other words, addresses the

[30] Catherine Mitchell, 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 J of Contract L 133, 150; Catherine Mitchell, 'Promise, Performance and Damages for Breach of Contract' (2003) J Obligations & Remedies 67, 69.

employee's gain independently of any further considerations, for example the employer suffering a financial loss, or value being wrongfully subtracted by the employee from the employer

The employer's claim for restitution should not, therefore, be linked with his performance interest claim. The employer will never be able to re-establish or regain his condition as controller of how the information ought to be used by the employee, and, thereby, as a promisee, with respect to the past infringement of the contractual right. However, protection of the secondary restitutionary interest can at least undo the material embodiment of that intangible harm. This part merits further clarification. If the employee had not breached the employer's primary right to performance, he would not have made any financial gain. This financial gain is the material embodiment of the employee's breach of his primary duty to perform and, therefore, the intangible harm suffered by the employer. It represents the material embodiment of the injustice committed by the employee upon the employer; the enrichment is a direct consequence of the wrong of which the employer was the sufferer.

Both compensatory and restitutionary responses are conditional on a promisor's wrongful behaviour. The distinction is that—unlike compensatory damages—the connection to the wrong is not mediated by the presence of a financially quantifiable disadvantage of the promisee, but is direct: restitution requires only that a wrong has been committed and the promisee and promisor are the sufferer and the perpetrator of the wrong respectively. This material embodiment must be undone because failing to do so is a negation of the injustice or intangible harm that the promisee has suffered from the promisor's breach. Accordingly, it would clearly be unjust if the employee in the above case could keep the financial benefit he had made from acting wrongfully or harmfully towards the promisee.

IV. WEAKNESS IN WEINRIB'S THEORY

Weinrib's normative approach provides a background to the idea of equality. Yet, in my view, he fails to situate restitutionary damages within the theoretical framework of corrective justice. But there is a prima facie tension here with my general endorsement of Weinrib's account of corrective justice, and of corrective justice thus understood as the foundation of remedies in private law. How may one accept the general picture of corrective justice and reject the account of remedies Weinrib represents as issuing from it? Both Weinrib and I view the financial gain as the material embodiment of the injustice (or what I refer to as 'intangible harm') suffered by the promisee. Weinrib observes that:

> Gain-based damages are justified when the defendant's gain is of something that lies within the right of the plaintiff and is therefore integral to the continuing relationship of the parties as the doer and sufferer of an injustice. Then the gain stands not merely as the sequel to the wrong but as its present embodiment, and the plaintiff is as entitled to the gain as he or she was to the defendant's abstention from the wrong that produced it. [31]

This, in Weinrib's view, is the case when a property or property-like right is violated. I agree with his statement. The distinction is that—unlike Weinrib—the injustice that the promisor has caused to the promisee cannot be undone by restitutionary damages: only specific performance can do that. Weinrib's position is irreconcilable with my claim that restitution undoes (or nullifies) only the material embodiment of the injustice committed by the promisor upon the promise, rather than the injustice itself, thereby giving effect to a secondary restitution interest and not to a primary performance interest. The point of friction is not related to Weinrib's normative analysis; it is the consequence of his different reading of the aim of restitutionary damages. He states that the potential for gain is part of the right violated by the wrongdoer. If 'the defendant's gain is of something that lies within the right of the plaintiff', then the claimant's action must be directed towards the reintegration of the status quo ante the wrongful event. For Weinrib, thus understood, restitutionary damages are motivated by the need to restore the integral structure of the claimant's right to the pre-wrong position or to pristine condition. But the restoration of the integral structure of the claimant's right is the aim of specific performance, not of restitution for wrongs. In no way can restitutionary damages place the claimant in the same position in which he would originally have been if the wrongful act had never been committed. That Weinrib's restitutionary damages aim to re-establish the integrity of the violated right is confirmed by the following passage:

> [R]estitutionary damages should be available when the defendant's gain is the materialization of a favorable possibility—the opportunity to gain—that rightfully belonged to the plaintiff. Then the gain to be nullified by the award of restitutionary damages represents an injustice both committed by the defendant and

[31] An example of an equitable principle which establishes a prohibition of enrichment to the detriment of another is the old Pomponian principle in Digest of Justinian, 50. 17. 206: '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*' (It is just according to natural law that nobody become richer to the detriment and by the injury of another). See Giglio (n 13) 23.

suffered by the plaintiff. [32]

I supply the legal analysis of restitutionary damages; Weinrib's normative approach provides a background to the idea of equality. All of the above discussion can be exemplified through the following two scenarios:

Scenario A: A specific performance or cost of cure award addresses substantially the promisee's primary performance interest, but despite that, the promisor has obtained a benefit from the breach without causing the former any financial loss.

The promisee's primary performance interest requires the promisor to comply with his duty to perform, either specifically or through the cost of cure award. To put this differently, it seeks to undo the intangible harm that the promisee may suffer by reason of the promisor's failure to perform the primary duty. However, although services have been delivered as stipulated in the contract, because the promisor took advantage of the time between the breach and the award of specific performance or cost of cure, he has still made a profit of say, for example, £10,000 which survives afterward. The promisor's entire benefit made from his breach—say, for example, £30,000 (the surviving £10,000 + £20,000)—does not all vanish with specific performance or cost of cure, because the promisee contracted both for services to be delivered and to be delivered on time, and the promisee has received only the first part of what the stipulated performance should have rendered. If the intangible harm suffered by the promisee, i.e., the undermining of his position as a promisee in terms both of the services to be delivered and to be delivered on time) has altogether been undone by specific performance or cost of cure, then it seems reasonable that the entire gain of £30,000 which represents the material embodiment of this harm should subsequently vanish along with that undoing. Yet only the promisor's breach of the first part of the obligation (viz., for delivery to be made) and, therefore, the intangible harm suffered by the promisee in the sense of his being undermined in the first instance, has been cured and undone by specific performance or cost of cure. The consequence is that only the material embodiment of this first element of the breach and the ensuing intangible harm (namely, £20,000) has vanished.

Of course, the promisor's breach of the second part of the obligation (viz., that delivery be made on time) and, as such, the intangible harm suffered by the promisee in the sense of his being undermined in the second instance, cannot be cured and undone, where the time has already passed

[32] ibid 12.

for the delivery to be made on time. The result is that the material embodiment of that second element of the breach and the ensuing intangible harm (namely, £10,000) would not vanish. It is clear, then, that the remaining gain of £10,000 is a direct consequence of the wrong of which the promisee was the sufferer. Here, the promisee has a secondary restitutionary interest, which requires the promisor to surrender to the former the profit that he has made from his wrongful breach of the second part of the primary duty to perform. This secondary interest clearly seeks to undo the material embodiment of the intangible harm that the promisor has caused the promisee by undermining his position as a promisee in terms of the stipulated date of the delivery, a harm which itself can no longer be undone. After all, failing to undo this embodiment is a negation of that intangible harm which the promisee has suffered. Thus, it would clearly be unjust if the promisor could go scot-free with the benefit he had made from acting harmfully towards the promisee.

Scenario B: A specific performance or cost of cure award addresses substantially the promisee's primary performance interest, but despite that, the promisor has caused a loss to the promisee and obtained a profit from the breach.

The promisee's primary performance interest requires the promisor to comply with his duty to perform. The promisee's secondary compensation right requires the promisor to make good the promisee's pecuniary loss to undo the tangible harm that the promisee has also suffered from the breach. For, when the time has passed for the delivery to be made on time, only the promisor's breach of the first part of the obligation (viz., for delivery to be made) can be cured by specific performance or cost of cure. Here, the promisee's primary performance interest is substantially fulfilled, but he has still suffered financial loss for services having been delivered late. This being so, it follows that the promisor is required to protect the promisee's secondary compensation interest, which ensures that the promisee is not left worse off as a result of not having had his primary performance interest completely and fully addressed. The promisee will then be entitled to be awarded the amount of his pecuniary loss, let's say £15,000 here, as the monetary value calculated to equal the value, to the promisee, of timely delivery. However, let's also say that the promisor has still managed to escape with a profit of £10,000, even after paying compensation of £15,000, so that the promisor profited, in total, by £25,000 from his breach. It is the case that the promisor took a huge advantage of the time between the breach and the award of specific performance or cost of cure. The promisor's surviving benefit, then, of £10,000 does not vanish with having paid the compensation, because it is not a consequence of the promisee's financial loss. Nor does it vanish with

specific performance or cost of cure, because the promisee contracted both for services to be delivered and that they be delivered on time, but has received only the first part of the stipulated performance.

The surviving gain of £10,000 represents here, as in scenario A, the material embodiment of the promisor's breach of the second part of the obligation, a breach which causes the promisee intangible harm. So, to avoid unnecessary repetition, for the same reasons explained in scenario A, the promisee can bring a claim for restitutionary damages—in this example, additional secondary interest. It is clear, then, that the solution or scheme proposed in the analysis of the third scenario (for what was there called secondary interest) applies equally to this scenario, but here called additional secondary interest. The only significant difference is that in this scenario the promisor is also required to protect the promisee's secondary compensation interest.

Now, the judge in the two scenarios ought to hand the wrongful gains over to the promisee. Why can this be claimed? After all, the injustice of allowing the promisor to keep the material embodiment of the intangible harm that the promisee has suffered is avoided once the financial benefit is taken away from the promisor. To begin with, the commission of the wrong establishes an exclusive relationship between the promisee and promisor, between the sufferer and the perpetrator of the wrong. It is a matter between the two of them— i.e., other members of society are not included—and it is, therefore, appropriate that the gain be given to the promisee who has not committed the wrongful act yet suffered intangibly from it, rather than being left with the promisor, who committed the wrongful act.[33] Accordingly, by requiring the promisor to give up and surrender to the promisee the financial benefit obtained through wrongful breach of contract, the judge identifies the promisee as being the party who deserves more than the promisor (or anyone else) to have the wrongful benefit. That is to say, the promisee has a stronger moral claim[34] to the financial benefit than the breaching promisor. Obligating the promisor to surrender to the promisee the benefit obtained through the breach of contract avoids the injustice of not doing so, thereby giving effect to a secondary restitution interest. It is clear that the roles and aims of specific performance, compensation, and restitution for wrongs—usually described as 'gain-based recovery'—as legal responses following a breach of contract are different

V. CONCEPTUALLY SEQUENCED ARGUMENT

[33] Giglio (n 3) 195, 225, 231.
[34] Giglio (n 13) 26.

Corrective justice, unlike deterrence, links both the defendant to the claimant and the remedy to the injustice that has been committed between them. Because of this linkage, the judge cannot be thought of as delivering two independent and unrelated rulings, in the sense of delivering one ruling awarding something to the claimant and then another ruling removing the exact thing from the defendant. Rather, he delivers one ruling addressing both claimant and defendant.[35] The judge's action (of obligating the defendant to give up and surrender to the claimant the benefit) is a response to defendant's wrongdoing towards the claimant. It is the natural response to (or reflex of) the component elements of the injustice that has been committed between the parties. Restitutionary justice, thus understood, does not treat the defendant's wrongful behaviour independently of the claimant's suffering.

By contrast, deterrence does not assign any special importance to the relationship between the two parties. In fact, it treats the defendant's action independently of the claimant's suffering. This simply means that the important 'question of how the law might apply its pressure to prevent undesirable conduct has no [...] connection with the [claimant]-defendant link characteristic of a liability regime.' [36] Even if we assume, counterfactually, that deterrence analysis is able to create a link between the parties,[37] such a link is still not regarded as an essential justification of deterrence. Rather, it is just the accidental consequence of unlinked incentives.[38] Punitive damages are a payment of money intended first and foremost to 'punish and deter'[39] and to 'assuage any urge for revenge.'[40]

From this viewpoint, corrective justice and deterrence have completely different types of justification – they embody different types of reason. Although deterrence and corrective justice are in this respect quite different, this does not prevent the two from sharing the same means to their different ends, namely, stripping the defendant of the gain which he

[35] Ernest Weinrib, 'Deterrence and Corrective Justice' (2002) 50 *UCLA L Rev* 621, 626.
[36] ibid 627.
[37] Pey- Woan Lee, 'Contract Damages, Corrective Justice and Punishment' (2007) 70 (6) MLR 887, 887. See Jean Hampton, 'The Retributive Idea' in Jeffrie Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (CUP 1988). For example, following Pey-Woan Lee's argument that punitive damages apart from being seen as a kind of state punishment and deterrence can be seen (if Jean Hampton's notion of punishment as retribution is adopted) as a kind of correlatively-structured reply which aims to repair the moral injury that the defendant has caused to the claimant.
[38] Weinrib (n 35) 628.
[39] *Rookes v Barnard* [1964] AC 1129, 1221 (HL) (Lord Devlin).
[40] *Lamb v Cotogno* (1987) 164 CLR 1 (HCA). See also Zakrzewski (n 25) 176.

has made from his breach of contract and awarding it to the claimant. But the crucial question is: how can these diverse ideas be joined in a coherent unified theory?

One way in which this might be done is by a conceptually sequenced argument.[41] Such an argument invokes the distinct ideas at different times, with the result that they can be connected even though they are disparate.[42] Such a conceptual sequence has the advantage of ensuring that the joining of these diverse ideas is not arbitrary.[43] The proposal here is that corrective justice comes earlier in the sequence to create the priority of the relationship between the two parties – promisee and promisor – and then deterrence is invoked to function within the binary structure already created. In what follows, I will examine Weinrib's and Gary Schwartz's efforts to deliver a mixed theory of corrective justice and deterrence in contract law. Both propose mixed theories between compensation and deterrence in tort law and this paper examines whether or not their arguments can be extended to contract law.[44]

VI. FROM FREE WILL TO THE PUBLICNESS OF LAW

According to Weinrib, Kant's account of the concept of right is essential to the quest for that mixed theory, given that it offers a conspicuous example of a conceptually sequenced argument. More specifically, as has already been demonstrated, Kant's legal theory is an explanation of how self-determining beings are juridically equal and connected to one another through a right and a corresponding duty. In his legal theory, Kant sets out the conceptual development of right in three sequenced stages: from free will to public law.[45] The first stage, according to Kant, does not necessitate the existence of anyone except the promisor. Accordingly, in the first stage, the address is the single party, and 'the public aspect of action still only implicit'.[46] At the second stage, the promisee emerges. Here, the

[41] Brus Chapman, 'Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation', in Gerald Postema (ed), *Philosophy and the Law of Torts* (CUP 2001) 276, 277. For similar expositions of the role of sequence in ordering different values, see George Fletcher, 'The Right and the Reasonable' (1985) Harvard L Rev 949, 950-54.

[42] Chapman (n 41) 317.

[43] Weinrib (n 35) 630.

[44] ibid; Gary Schwartz, 'Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice' (1997) 27 Texas L Rev 1801. See also Jeffery O'Connell and Christopher Robinette, 'The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah' (2000) 32 Connecticut L Rev 137.

[45] Kant (n 17) 62.

[46] Ernest Weinrib, *The Idea of Private Law* (Harvard UP 1995) 101.

promisor and promisee face one another as embodiments of free will. This means that 'the externally oriented action of the first stage has become an interaction.'[47]

Of course, the interaction of the parties brings them under the principle of right. As we have seen, this principle regulates relationships between parties and states that "the free choice of the one must be capable of coexisting with the freedom of the other in accordance with a universal law"[48], that is, in the light of rules which apply equally to both parties. The Kantian principle of right is mainly concerned with "the sequence from one person's performance of an action to another's suffering of its effects". [49] Stated differently, its concern focuses mainly on a party's external behaviour and actions and the effect thereof on the way in which others enjoy their free will.[50]

Kant's principle of right addresses actions themselves, rather than their internal motivations. Similarly, freedom of action in the external world is its focus, not the effect and consequences of those actions on the internal wishes or needs of another.[51] But why is the Kantian principle of right concerned only with external impingements of one person on another? Why does it ignore internal phenomena such as needs, desires and motivations? The answer is simply that free will essentially means being able to choose not to act out one's inner drives (ie internal motivations).[52] Therefore, the principle of right cannot be invoked to condemn behaviour or actions on the grounds of the actor's internal state of mind or his failure to satisfy the wishes or needs of the other.[53] For Kant, wishes and needs remain internal and cannot be seen as aspects of our external relations. It follows that failing to fulfil them leaves freedom of action unaffected. Thus, the Kantian principle of right judges the interacting parties in the light of their external interactions only.

So far, we are still at the second stage. But notwithstanding this stage brings forward the existence and protection of rights and corresponding duties, their existence and securing do not become explicit until public law comes onto the scene – and thus plays its role in Kant's conceptually sequenced argument – to enforce (through the court) such rights and

[47] ibid.
[48] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 472, 473.
[49] Weinrib (n 46) 98.
[50] Cane (n 48) 473.
[51] ibid.
[52] ibid.
[53] ibid.

duties.[54] This, therefore, requires a third stage – the stage in which there are two reasons for requiring such an impartial and neutral party (ie the court or state). The first is that because each of the contracting parties is concerned with satisfying his own wishes and needs, there is a risk that in some situations – eg where breaching the contract turns out to be more profitable or beneficial for one party than performing it – no right to restitution will be secured, should the decision to hand over the profit resulting from the wrongful breach be left to the interactors alone.[55]

The second reason is that '[i]mplicit in rights as the juridical manifestations of free will is the authorization to use coercion to counteract their infringement'.[56] Herein lies the problem: authorizing the unilateral exercise of coercion by one party upon the other, albeit to secure legitimate rights, is at odds with the equality of the contracting parties.[57] For these two reasons, the second stage does not render the parties' relationship completely and explicitly external. It does not, in other words, render the external aspect of free will fully explicit. In order to achieve this result another party is required to secure the protection of all rights.

With this we enter the third and final stage. Here, a third party is added: the state, which impartially and neutrally secures the protection of rights. The state operates as the institutionalized embodiment of the Kantian principle of right. By giving the norms of right the determinate shape of public law and by using coercion for the enforcement of those public laws, the state bestows on the principle of right a juridical standing. Furthermore, it lays down standards for individual actions and offer incentives to behave and act in accordance with those standards.[58] It is, therefore, this prospect of using coercion to force the promisor to surrender to the promisee the benefit obtained through the breach of contract that gives effect to a secondary (restitutionary) right or interest and gives future would-be contract breakers notice of the consequences that await them in case of any wrongful breach of contract. Seen in this way, coercion leads to both the protection of rights and duties (the *ex post* perspective) and the facilitating of prospective regulation (the *ex ante* perspective). It follows that considerations of deterrence do not play any

[54] Weinrib (n 46) 102.
[55] To put this differently, given that the second stage includes only the interactors, applying the Kantian principle of right and complying with it become completely contingent on – and therefore internal to – the subjective tendency of the parties: 'their ability to discern the significance of right and their willingness to conform to right's requirements.' ibid 101, 105.
[56] Weinrib (no 35) 634.
[57] ibid.
[58] ibid 633-634; Cane (n 48) 473; Schwartz (n 44) 1834.

role in Kant's conceptually sequenced argument until the third stage, when public law emerges to secure rights and corresponding duties.[59]

From the above discussion, it becomes obvious that both the concept of right and the public law are essential building blocks of Kant's legal theory. In the absence of the concept of right, public law would be unable to 'formulate the norms that respect persons' rights', while in the absence of public law, 'those rights could not be given a determinate shape and securely enjoyed'.[60] The first, second and third stages are sequenced, since the public law emerges only after the content of the right-based norms has already been determined and defined, which means that public law presumes the existence of those norms when it comes onto the scene to play its role.[61] Inasmuch as these three stages, albeit essential, stay detached and sequenced, the factor of deterrence which is associated with public law does not define or reveal the content of the right-based norms which arises through and at the previous stages.[62]

VII. DETERRENCE AND CORRECTIVE (OR RESTITUTIONARY) JUSTICE: THE MIXED THEORY

Up to this point, it has been shown how deterrence is one of the essential components of Kant's conceptually sequenced argument. When deterrence takes its place within this sequenced argument it seeks in no way to interfere with the right-based norms established and drawn out at the previous stages. But the question now to be examined is this: How can the above discussion help us in the search for a theory that combines restitutionary (or corrective) justice and deterrence? The answer, as previously noted, is that corrective justice and Kant's theory are intimately connected: the Kantian principle of right offers a philosophical explanation of corrective justice. There can be little doubt that if the model which Kant follows includes deterrence, then one can infer that the same model is relevant and applicable to the coexistence between restitutionary justice and deterrence.

It is clear, then, that corrective justice plays a part in a conceptually ordered sequence of which the factor of deterrence can also be part. This sequence can be summarised as follows. At the first stage, the focus is on the single party. At the next, a second party emerges, which means that "the externally oriented action of the first stage has become an

[59] Weinrib ibid 634.
[60] ibid 637.
[61] ibid.
[62] ibid.

interaction" between parties.[63] Of course, this interaction between free wills requires that each party acts and behaves in a way that is compatible with the other's freedom of choice in the light of rules which apply equally to both of them. This is the Kantian principle of right. Nevertheless, should a party behave incompatibly (or wrongfully) in terms of the Kantian principle of right, then corrective justice defines the nature of that wrong through rights and corresponding duties. But, again, for the reasons explained above, the protection of these rights is a further stage in this sequence.

At the third stage, the state not only gives effect to rights, but also manifests its wish to deter wrongful behaviour. It is thus clear that corrective justice precedes deterrence, because it defines the nature of the wrongs that public law actually deters. This means that the deterrence associated with the publicness of law does not determine the norms of right appearing through and at the previous stages. Rather, it is one of the fundamental parts of this sequence which emerges 'by virtue of being implicated in the actualization of corrective justice through the legal institutions of public law'.[64] It follows that restitutionary justice is not at odds with this role of deterrence, which emerges after, and only after, the nature of the wrong has been illustrated and defined. So, within the structure of this sequenced argument, considerations of deterrence not only leave restitutionary justice untouched, but actually come after it.

VIII. CONCLUSION

To sum up, it can be stated that the theory of corrective justice offers an adequate explanation of why the defendant should give up to the claimant, rather than the state (or anyone else), the benefit obtained through his wrongful breach of contract. Unlike deterrence, which 'fails to link the damages that the [claimant] receives to the normative quality of the defendant's wrong'[65] or fails to 'create party-related reasons to act'.[66] In addition, the remedy of restitution helps us to achieve two important goals in contract law, namely, attaining justice between the parties and protecting the institution of contracting. Thus, contract law should be conceived and comprehended through a mixed theory that affirms both corrective justice and deterrence.

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[63] Weinrib (no 46) 101.
[64] Weinrib (n 35) 639.
[65] Weinrib (n 2) 6.
[66] Giglio (n 3) 195, 202.

EVOLUTIVE TREATY INTERPRETATION: LEGALITY, SEMANTICS AND DISTINCTIONS

Sondre Torp Helmersen*

According to the ICJ, 'generic' terms in long-term treaties were presumably intended to be interpreted evolutively. This 'general rule' on evolutive interpretation appears simple, but leaves unanswered questions. Moreover, linguistic analyses show that the ICJ is inconsistent in its definition of 'generic', and that evolutive interpretations are unsuited to solving ambiguity (as opposed to vagueness). There is, moreover, a tendency in the literature to confuse or conflate evolutive interpretation with the doctrine of intertemporality or the VCLT Article 31.3.c—these are three distinct concepts.

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I. INTRODUCTION

The topic for this article is evolutive interpretation of treaties.[1] The article

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[1] 'Evolutive interpretation' is synonymous with 'dynamic interpretation' (Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 188) and with the European Court of Human Rights' (ECtHR) 'living instrument' doctrine (George Letsas, *A Theory of*

aims both to clear up some confusion regarding the concept and its place in customary international law, and to contribute to our analytical understanding of it.

Apart from this introductory section, the article has four sections. The next section (2) aims to clarify the place of evolutive interpretation in customary international law, primarily through a fresh look at practice from the Permanent Court of International Justice and International Court of Justice (hereinafter the ICJ). The analysis ends in a taxonomy of three types of terms that must be treated differently. Section 3 explores the semantics of evolutive interpretation. The penultimate section (4) seeks to distinguish evolutive interpretation from similar or related concepts, by showing that it is neither the part of the 'doctrine of intertemporality' nor of the VCLT[2] Article 31.3.c. Section 5 is a conclusion.

First, a definition: An evolutive interpretation is an interpretation where a term is given a meaning that changes over time.[3] As with all interpretations, the evolutive *interpretation* of a term is distinct from its *application*.[4] A term that is applied to new circumstances while its meaning remains constant is not being interpreted evolutively. This also means that a change of mind is not an evolutive interpretation. In interpreting a term that is open to multiple interpretations, a court may choose one interpretation in one case, and then change its mind and prefer another in a later case. This way, the term's meaning can be said to have 'changed' over time. However, if the change is not prompted by an evolution

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Interpretation of the European Convention on Human Rights (OUP 2007) 65). Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Beyond Memory and Prophecy' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 123 uses the term 'evolutionary interpretation', while Paul Tavernier, 'Relevance of the Inter-temporal Law', in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2006) 400 also calls it 'progressive' interpretation. 'Evolutive' and 'evolutively' will be used in this article, the former as an adjective, the latter as an adverb.

[2] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[3] See eg the Joint Dissenting Opinion in *Feldbrugge v. The Netherlands*, ECHR (1986) Series A, no 99, 266, para 24.

[4] The two are about 'determining the meaning of a text', and the consequences of that determination, respectively, see Richard Gardiner, *Treaty Interpretation* (OUP 2008) 76, quoting the commentary of the '*Harvard Draft Convention on the Law of Treaties*' (in (1935) 29 Supplement to the AJIL 653, at 938). The distinction is perhaps sharper in theory than in practice; see Richard Gardiner, *Treaty Interpretation* (OUP 2008) 29 and Separate Opinion of Judge Shahabuddeen in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, 59.

intended by the parties, the interpretation is not evolutive. The term has not evolved; only the opinion of the court.

Normally, evolutive interpretations are made possible by evolution in the linguistic meaning of the interpreted term itself, independent of the interpretation.[5] However, a term does not have to evolve linguistically to be interpreted evolutively. Treaty interpretation is an inherently subjective process; if the parties intend a term to evolve, it is irrelevant whether it evolves linguistically as well.[6]

The opposite of an evolutive interpretation can be called a 'static' interpretation (ie an interpretation where terms do not change their meaning over time).

When analysing the process of treaty interpretation, it is pertinent to distinguish between factors that may be invoked when interpreting treaties, methods of treaty interpretation, and the potential results of treaty interpretation. *Factors* are arguments used in the interpretive process.[7] They include the elements mentioned in the VCLT Article 31-33, eg ordinary meaning, context, object and purpose, subsequenct practice, and so on.[8] *Method* is a catch-all term for the approach used when interpreting treaties.[9] Customary international law prescribes a single, unified methodology,[10] of which directions on when and how to interpret

[5] This can be called 'evolving terms'.

[6] Georg Ress, 'The Interpretation of the Charter' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 23 defines evolutive interpretation as 'based on the linguistic usage of the term at the time of interpretation'. That is only fitting for terms that evolve linguistically.

[7] Called 'interpretive arguments' by Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL301, 301-302 and 308, and 'means' by Ulf Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation', in (2007) 54 Netherlands Intl L Rev 133, 135, and Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 435. The VCLT uses the word 'means' in art 32.

[8] As noted in note 24 below, the VCLT art 31-33 prescribes 'principles' (as opposed to rules) of treaty interpretation. The articles thus mention interpretive factors, and lay down principles regarding whether, when, and how these factors should be employed.

[9] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 309 apparently uses the term 'methods' about 'text, context, preparatory work, subsequent practice', ie what was defined as 'factors' above. However, he also calls '[t]ext, context and object-and-purpose' 'factors' at 310-311.

[10] A traditional view has been that there are three 'methods' or 'schools' of interpretation; the 'textual', the 'teleological', and the 'purposive'; see eg ILC, *Yearbook of the International Law Commission 1966 Volume II* (United Nations 1966) 218

evolutively is part. When a treaty term is interpreted evolutively, its content will evolve over time. This is a *result* of the interpretation. Other interpretive results include static interpretations, extensive or restrictive interpretations, and effective interpretations. Evolutive interpretations can be extensive, restrictive and/or effective, but are not inherently so.

Beyond the fact that all legal texts require interpretation,[11] the evolutive variety has considerable practical importance. Treaties, once concluded, tend to remain (formally) static. Amendment is always possible, but can be difficult in practice.[12] At the same time, the reality that treaties operate in is in constant flux. Economic, political, cultural, and technological realities change. In many (if not most) fields, law must be flexible if it is to remain relevant and effective. Flexibility, in turn, has to be constantly balanced against stability, which is an important aspect of the rule of law.[13]

The problems that evolutive interpretation may alleviate are not restricted to international law; they apply universally to all legal systems. The concept is thus well known in domestic law.[14] There is nonetheless a difference between domestic and international law in that the legislative branches of most domestic governments are considerably more flexible

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para 2; Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May 2002) 397-398; Fauchald (n 7) 315. Martin Dixon, *Textbook on International Law* (6th edn, OUP 2007) 71-72 adds 'the principle of effectiveness', while Villiger (n 7) 421-422 adds the 'historical' and 'logical' methods. The VCLT arts 31-33 nonetheless prescribe a single, unified methodology where text ('textual'), good faith, and object and purpose (part of 'teleology') are relevant factors when ascertaining the parties' intentions ('purposive' interpretation); see Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law – Volume 1: Peace, Parts 2 to 4* (Longman 1992) 1272; Orakhelashvili (n 9) 310; Gardiner (n 4) 9-10; Villiger (n 7) 435; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 35-36.

[11] Due to the inherent limits in language and the unpredictability and multitude of reality; see HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 126.

[12] Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 262.

[13] Markus Kotzur, 'Intertemporal Law', *The Max Planck Encyclopedia of Public International Law* (January 2013 edn) <www.mpepil.com> accessed 28 April 2013, para 4.

[14] Søren C Prebensen, 'Evolutive Interpretation of the European Convention of Human Rights', in Paul Mahoney and others (eds), *Protection des droits de l'homme: la perspective européenne* (Carl Heymanns Verlag 2000) 1126. William N Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard Universty Press 1994) writes about it from a US perspective. David Souter, 'Harvard University's 359th Commencement Address' (2010) 124 Harvard L Rev 429 gives the example of the United States Constitution's Equal Protection Clause being interpreted evolutively by the US Supreme Court between *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education*, 347 U.S. 483 (1954).

and responsive in their legislating than States are in drafting and revising treaties. Since one function of evolutive interpretations is to allieviate the need for new rules to address present concerns, the need for (but not necessarily the prevalence of) evolutive interpretations is comparatively greater in the international sphere.

II. EVOLUTIVE INTERPRETATION IN CUSTOMARY INTERNATIONAL LAW

1. *Generally*

The goal is this section is to determine the place of evolutive interpretation in customary international law. This necessitates answering two questions: First, *when* (ie on what conditions) should terms be interpreted evolutively? Second, *how* (ie by what benchmarks) should the terms evolve?

Treaty interpretation is regulated by customary international law and (for its parties) the VCLT. As per the ICJ Statute[15] Article 38.1.b,[16] customary international law is found by examining state practice and establishing opinio juris.[17] In practice, though, it is often difficult to pin down the exact content of customary international law,[18] especially in the indeterminate,[19] contested, [20] and loosely regulated [21] field of treaty interpretation. Therefore, proxies are useful to ascertaining its content.

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[15] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute).

[16] Which, according to eg Jennings and Watts (eds) (n 10) 24; Ian Brownlie, *Principles of International Law* (7th edn, OUP 2008) 5; Malcolm N Shaw, *International Law* (6th edn, OUP 2008) 70, reflects customary international law.

[17] *North Sea Continental Shelf* [1969] ICJ Reports 3, para 77.

[18] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, CUP 2005) 396.

[19] For example, Richard A Falk, *The Status of Law in International Society* (Princeton UP 1970) 372 has written that 'the interpretation of broad international agreement is operating in a largely indeterminate setting'.

[20] Vaughan Lowe, *International Law* (OUP 2007) 73 notes that there are 'debates over every step in the reasoning process that leads from a treaty text to the conclusion concerning its effects in a concrete case'.

[21] Reflected in the fact that interpretation is sometimes said to be 'to some extent an art, not an exact science', originally put forward in the ILC Draft Articles on the Law of Treaties with Commentaries, reproduced in ILC (n 10) 218, and discussed critically in eg Koskenniemi (n 18) 340-341 and Panos Merkouris, 'Introduction: Interpretation Is A Science, Is An Art, Is A Science' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) 8-13.

With regards to treaty interpretation, the VCLT Articles 31-33 is a widely accepted proxy.[22] Its status as a proxy is not relevant to States that are parties to it, even though the underlying customary law still binds them.[23] Two other proxies are mentioned in the ICJ Statute Article 38.1.d: 'judicial decisions' and 'teachings of the most highly qualified publicists'.

The VCLT Articles 31-33 prescribe principles of treaty interpretation,[24] which permit evolutive interpretation. Terms' 'ordinary meaning' (Article 31.1) may change over time, and the VCLT does not determine whether it is the 'ordinary meaning' at the time of a treaty's conclusion or at the time of its interpretation that shall prevail. 'Good faith' and 'object and purpose' (Article 31.1) may require that a term is interpreted evolutively, and may affect how it evolves. A 'subsequenct agreement' (Article 31.3.a) may determine both whether a term should evolve as well as how it should evolve. The same is the true for 'subsequent practice' (Article 31.3.b)[25] and 'relevant rules of international law' (Article 31.3.c)[26]. Non-evolving terms may be given a 'special meaning' (Article 31.4) that nonetheless evolves. 'Preparatory works' and circumstances of a treaty's conclusion (Article 32)

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[22] See eg *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Reports 6, para 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)* [1996] ICJ Reports 803, para 23.

[23] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1984] ICJ Reports 392, para 73 for the general point that customary international law can still bind the parties to a treaty codifying it.

[24] As opposed to 'rules'. Principles 'do not set out legal consequences that follow automatically', whereas rules are 'applicable in an all-or-nothing fashion' (Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 24-25). Even though the VCLT art 31 itself uses the word 'rule', the VCLT arts are sufficiently flexible to make 'principles' (or even 'means') a more appropriate word (see Gardiner (n 4) 36-38; Van Damme (n 10) 35). More generally, the notion of strict 'rules' of interpretation is theoretically problematic; as George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 534 observes, 'no treaty can tell us how to interpret treaties'.

[25] The potential interaction between evolutive interpretation and subsequent practice has been noted in ILC, 'Report on the Work of its Sixty-Third Session' (26 April to 3 June and 4 July to 12 August 2011), UN Doc A/66/10, at 283, which states that '[e]volutionary interpretation is a form of purpose-oriented interpretation that is given direction by subsequent practice in a narrower and a wider sense (specific practice of states parties, as well as other developments in international relations or society)'. This does not explicitly distinguish between subsequent practice establishing *whether* or *how* terms shall interpreted evolutively. The relationship between the two concepts is explained in detail by Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 L and Practice of Intl Courts and Tribunals 443.

[26] See s 4.2 below for a more detailed description of the relationship between evolutive interpretation and the VCLT art 31.3.c.

may support an evolutive interpretation. Beyond permitting evolutive interpretations, however, the VCLT Articles 31-33 provide limited guidance.

Evolutive interpretations are found in 'decisions' from various international tribunals. Since first appearing in the *Tyrer*[27] judgement, it has become a 'key theme' in the jurisprudence of the European Court of Human Rights (interpreting the ECHR[28]).[29] It has also been used by the European Court of Justice,[30] the Inter-American Court of Human Rights,[31] the UN Human Rights Committee,[32] the International Tribunal for the Law of the Sea,[33] in at least one arbitration,[34] and in two reports from the WTO Appellate Body.[35]

The ICJ has used evolutive interpretations in the 1970 *Namibia* advisory opinion,[36] the 1978 *Aegean Sea* judgement,[37] and the 2009 *Dispute Regarding Navigational and Related Rights* judgement.[38] The concept may also have featured in three other cases: The first is *Nationality Decrees Issued in Tunis*

[27] *Tyrer v. The United Kingdom* (1978) Series A no 26, para 31.
[28] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR).
[29] Robin CA White and Clare Ovey, *Jacobs, White & Ovey. The European Convention on Human Rights* (5th edn, OUP 2010) 64.
30 Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 20.
[31] The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion, OC-16, Inter-American Court of Human Rights Series A No 16 (1 October 1999), para 114.
[32] *Roger Judge v. Canada*, Human Rights Committee, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), para 10.3.
[33] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area,* Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Advisory Opinion (1 February 2011) ITLOS/Case 17, para 117.
[34] *Iron Rhine, Arbitration (Belgium v. The Netherlands)* (2005) para 79.
[35] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (22 October 2001) WT/DS58/AB/R, para 130 and WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body* (21 September 2009) WT/DS363/AB/R, para 397.
[36] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Reports 16, para 53.
[37] *Aegean Sea Continental Shelf* [1978] ICJ Reports 3, para 77.
[38] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Reports 213, para 64-66.

and Morocco[39], where the Court held that whether a matter is 'solely within the domestic jurisdiction' of a party is 'essentially relative' and depends 'upon the development of international relations'.[40] The second is *Aegean Sea*, in which the Court called the term 'rights' a 'generic term', noting that it should 'evolve in meaning' in accordance with 'the development of international relations'.[41] Finally, in *Gabcikovo-Nagymaros*[42], the Court labelled certain treaty provisions 'evolving', found that 'the Treaty is not static, and is open to adapt to emerging norms of international law', and that 'current standards' of environmental protection should be taken into account.[43]

There are also examples of tribunals using explicitly static interpretations; see eg the ICJ's *Land and Maritime Boundary between Cameroon and Nigeria*[44] case, and the *Laguna del desierto*[45] and *Decision regarding delimitation of the border between Eritrea and Ethiopia*[46] arbitrations.

Evolutive interpretation is also recognized by 'publicists', who tend to emphasize the concepts,[47] terms,[48] objects and purposes,[49] or intentions[50]

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[39] *Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921*, PCIJ Rep Series B, No 4

[40] *Nationality Decrees Issued in Tunis and Morocco* (n 39) 24. However, 'domestic jurisdiction' is not prone to change over time in the way that 'sacred trust', 'territorial status', and '*comercio*' have; 'domestic jurisdiction' means the same today as it did in 1923.

[41] *Aegean Sea* (n 37) para 78. Similarly to 'domestic jurisdiction', though, 'rights' is a term that cannot be said to change its meaning over time. New rights are created and old rights cease to exist, but they are all 'rights' in the original meaning of the term. (Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 Part One' (1989) 60 BYBIntlL 1, 141 makes a similar point.)

[42] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Reports 7.

[43] *Gabcikovo-Nagymaros* (n 42) paras 112 and 140. This was (perhaps arguably) not an instance of evolutive interpretation by the Court; it merely recommended the parties to take current environmental standards into account when renegotiating the treaty (Dupuy (n 1) 129-130). Judge Bedjaoui interpreted the three articles evolutively; see para 17 of his Dissenting Opinion.

[44] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2002] ICJ Reports 303, para 159.

[45] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitaion [*sic*] of the frontier line between boundary post 62 and Mount Fitzroy,* Reports of International Arbitral Awards volume XXII 3-149, para 130.

[46] *Decision regarding delimitation of the border between Eritrea and Ethiopia*, Reports of International Arbitral Awards volume XXV 83, para 3.5.

[47] Jennings and Watts (eds) (n 10), at 1282.

[48] Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1979) 159 *Recueil des Cours* 1, 49; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 140.

of a treaty as the basis for evolution. There have also been dissenting voices; evolutive interpretation has been called 'one of the most contentious, disputed and discussed issues in treaty interpretation',[51] and its compatibility with the VCLT Articles 31-33 (and thus with customary international law) has been questioned.[52] The methodologies of tribunals have been criticized,[53] as has the normative soundness of the concept.[54]

The rest of this section will focus on ICJ decisions. These are (purportedly) the best proxy for the content of customary international law.[55] Moreover, unlike other tribunals, the ICJ has offered both generalized and relatively detailed instructions on when to use evolutive interpretations.

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[49] Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights', in (1999) 42 German YB Intl L 11, 16-17.

[50] Frank Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (IBFD 2004) 285-286; Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Cristoph Schreuer* (OUP 2009) 694; Dupuy (n 1) 126.

[51] M Fitzmaurice (n 1), at 188.

[52] John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 187; Petros C Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts' (2008) 102 *AJIL* 421, 445. Jackson, however, seems to be caught in a false dichotomy between 'originalism' and 'living document' views, not taking into account that an original intention may be for a text to evolve.

[53] See eg Martin Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica V. Nicaragua' (2011) 24 Leiden J Intl L 201, 221-222; Thirlway (n 41) 137 and 142; Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 *ICLQ* 281, 296-300.

[54] Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United Stated Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed) *A matter of Interpretation: Federal Courts and the Law* (Princeton UP 1997) 44-45 argues that what he labels 'evolutionism' (in the context of United States constitutional law) is 'not a practicable constitutional philosophy' since there is 'no chance of agreement, upon what is to be the guiding principle of the evolution'. However, the chance of agreement on 'present meaning' as the guiding principle of evolution should be no less than the chance of agreement of 'historic meaning' as the guiding principle of static interpretation. What a term meant in the past is no more objectively ascertainable than what it means now.

[55] See eg Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 22; Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (OUP 1994) 202; Alain Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat, and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 789-790. There are also dissenting voices; see eg Jörg Kammerhofer, 'Alexander Orakhelashvili. The Interpretation of Acts and Rules in Public International Law' (2009) 20 EJIL 1282.

2. *Party Intention*

All evolutive interpretations by the ICJ have – at least *prima facie* – been prompted by the intentions of the treaty parties.

In *Namibia*, the Court was asked to clarify the legal consequences of South Africa's continued presence in Namibia, after South Africa's mandate to administer the territory was terminated in 1966. To do this, the Court had to interpret Article 22 paragraph 1 of the Covenant of the League of Nations[56]. The Court held that the terms 'the strenuous conditions of the modern world', 'the well-being and development of such peoples', and 'sacred trust' 'were not static, but were by definition evolutionary'.[57] The Court noted 'the primary necessity of interpreting an instrument according to the intentions of the parties at the time of its conclusion', and found that the parties must 'be deemed to have accepted' the evolution,[58] in the absence of decisive evidence to the contrary. This meant that South Africa's obligations towards the Namibian people (under the 'sacred trust') were affected by 'changes which have occurred' since the drafting of the Covenant.[59] These led the Court to conclude that 'the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned',[60] even though this right of independence was not a reality – and perhaps not even contemplated – when the Covenant was drafted.

The *Aegean Sea* case sprang out of the Aegean Dispute between Greece and Turkey. Greece had requested the Court to rule in a dispute over the continental shelf boundary between the two States. The Court eventually found that it was without jurisdiction to decide the matter. The result hinged on the interpretation of a reservation in Greece's instrument of accession to the General Act[61]. The reservation excluded 'disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication'.[62] One of Greece's arguments was that at the time when the General Act was drafted (1928),

[56] The Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 195.
[57] *Namibia* (n 36) para 53.
[58] ibid para 53.
[59] ibid para 53.
[60] ibid para 53.
[61] General Act for the Pacific Settlement of International Disputes (adopted 26 September 1928, entered into force 16 August 1929) 93 LNTS 344 (General Act).
[62] Cited in *Aegean Sea* (n 37) para 48.

and when Greece acceded to it (1931), 'the very idea of the continental shelf was wholly unknown'.[63] The argument implies that the meaning of the provision was frozen in time, either in 1928 or 1931. The Court did not agree, but rather established a 'presumption' that the meaning of 'territorial status' was 'intended' to 'follow the evolution of the law'. As in *Namibia*, the Court did not examine whether this presumed intention had been explicitly acknowledged at the time of drafting or at the time of accession.

Dispute regarding Navigational and Related Rights concerned the interpretation of an 1858 treaty[64] between Costa Rica and Nicaragua. The treaty, which was drafted only in Spanish, gave Costa Rica rights of navigation '*con objetos de comercio*' on the San Juan River, which runs on the border between the two countries. Nicaragua wanted '*con objetos de comercio*' to be interpreted as 'with articles of trade', ie only transportation of physical goods. Costa Rica argued that the correct interpretation was 'for the purposes of commerce', which would extend the freedom of navigation to a much wider range of activities. The latter interpretation was accepted by the Court.[65] Regarding the term '*comercio*', Nicaragua argued that in 1858, it included only transportation of physical goods, and that this original meaning should prevail. The Court's starting point was that 'a treaty must be interpreted in light of what is determined to have been the parties' common intention', and that the intention is 'contemporaneous with the treaty's conclusion'.[66] The intention may, however, have been 'to give the terms used [...] a meaning or content capable of evolving'. Such an intention does not have to be explicit; it 'may be presumed'.[67] The Court supported its argument with a reference to *Aegean Sea*.[68]

These three cases show that, according to the ICJ, terms must be interpreted evolutively if (and, apparently, only if) the parties intended it. While this only says *when*, and not *how*, terms shall evolve, the latter question is presumably also controlled by party intention.

That a treaty's drafters intended terms to evolve does not presuppose that they could have foreseen the exact interpretive results reached by a future interpreter, or that they intended a specific future interpretation to

[63] ibid para 77.
[64] Treaty of Limits (Costa Rica-Nicaragua, 15 April 1858).
[65] *Dispute regarding Navigational and Related Rights* (n 38) para 56.
[66] ibid para 63.
[67] ibid para 64.
[68] ibid para 65.

prevail.[69] There is an important distinction between intention, control, and prediction. Evolutive treaty provisions may evolve as intended, even though they do so in ways the drafters cannot control and could not predict.[70]

3. *A 'General Rule'*

In *Dispute regarding Navigational and Related Rights*, the ICJ formulated a 'general rule' to determine when an evolutive intention 'must' be presumed:[71]

(1) First, the parties have used 'generic terms' (in which case the parties have 'necessarily [...] been aware that the meaning of the terms was likely to evolve over time'), and

(2) the treaty 'has been entered into for a very long time or is 'of continuing duration''.

Applied on the treaty at issue, the 'general rule' allowed the Court to presume an intention to let the term '*comercio*' evolve; the term was 'generic', and the treaty's duration was 'unlimited'.[72] The conclusion was that Costa Rica's right now covered activities that in 1858 (when the treaty was concluded) were not considered '*comercio*'.

The rule built on the ICJ's approach in *Aegean Sea*, where the fact that 'territorial status' was a 'generic' term gave rise to the presumption that 'its meaning was intended to follow the evolution of the law', an argument that was supported by the fact that the General Act was 'designed to be of the most general kind' and of 'continuing duration'.[73]

The 'general rule' was not used in *Namibia*. There, the Court found that the terms it interpreted were 'by definition, evolutionary' and that the

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[69] See *Matthews v. The United Kingdom*, 30 EHRR (1999) 361, para 39: 'The mere fact that a body was not envisaged by the drafters of the [ECHR] cannot prevent that body from falling within the scope of the Convention'.

[70] Bernhardt (n 49) 17 is at risk of confounding this when presenting a dichotomy between 'the original intentions of the drafters' of the ECHR and 'the relevance of changing conditions and opinions in State and society'. In this sense, evolutive interpretations do not have to be 'removed from' the intentions of the parties, as seems to be suggested by Catherine M Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic J Intl L 383, 394.

[71] *Dispute regarding Navigational and Related Rights* (n 38) para 66.

[72] ibid para 67.

[73] *Aegean Sea* (n 37) para 77.

parties 'must be deemed to have accepted' this.[74] The Court instead supported its reasoning with the observation that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[75] The quote seems to refer to the principle in Article 31.3.c,[76] but has alternatively read been read as a reference to a 'principle of harmonization',[77] and an obiter on evolutive interpretation.[78]

In formulating the 'general rule', the ICJ used the word '*must*'. As a consequence, presuming evolutive intent is an obligation on, not just an option for, the interpreter.

The 'general rule' is retroactive, in the sense that it applies to older treaties (for example, the treaty in Dispute regarding Navigational and Related Rights was concluded in 1858). With regards to treaties, the VCLT restricts retroactive *application* (Article 28), but not retroactive *interpretation*. The issue has practical relevance since customary law of treaty interpretation is continuously developing.[79]

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[74] *Namibia* (n 36) para 53.
[75] ibid para 53.
[76] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 83; Oliver Dörr, 'Article 31. General Rule of Interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2011) 560. Villiger (n 7) 433 and Gardiner (n 4) 255-256 seem to agree. The statement is universal, in the sense that it applies to all 'international instruments'. That makes it similar to the principle in art 31.3.c. It also indicates that the statement is not a reference to the concept of evolutive interpretation, since that only applies to instruments intended to evolve. On the other hand, both the principle in art 31.3.c and the concept of evolutive interpretation concern only the 'interpretation' of treaties, while the quoted passage includes both 'interpreted' and 'applied'. The quote does not seem to be a reference to the doctrine of intertemporality (see s 4.1 below), since the 'continued manifestation' of a 'right' is something else than the 'interpretation and application' of a 'legal instrument'.
[77] Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel Betlehem and other (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 330. This principle is, according to ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682, at para 415, something more than the principle in art 31.3.c. Van Damme backs up her argument by referring to para 38 of the same ILC report. However, that part of the report and the phrase in *Namibia* concern different things: The report refers to 'previous treaty obligations', while *Namibia*'s phrase concerns rules 'prevailing at the time of the interpretation'.
[78] Dupuy (n 1) 129.
[79] See Gardiner (n 4) 51-69 for a historical overview.

According to the Court, presuming evolutive intent in cases where this would expand a State's obligations does not violate the principle that '[r]estrictions upon the independence of States cannot [...] be presumed'.[80] The principle stems from the PCIJ's *Lotus* judgement,[81] and could generally be said to have lost traction (if not disappeared completely) in recent times.[82]

Even though the 'general rule' applies generally, it is no universal solution to all questions regarding evolutive interpretation.[83] It only says that when two conditions are fulfilled, an evolutive intention shall be presumed. This does not exclude establishing evolutive intentions where the conditions are not fulfilled, based on other arguments. And even when the two conditions are fulfilled, the presumption can be refuted by other arguments. Moreover, the rule seems suited only for terms that evolve (linguistically), since it offers no guidance on when to interpret non-evolving terms evolutively. Finally, it only concerns *when* an intention to let terms evolve shall be presumed; it says nothing about *how* terms shall evolve.

The rule has been criticized for an inherent risk of producing fictional intentions, [84] and it has been warned that evolutive interpretations detached from the intention of the parties 'may provide tribunals too much latitude, with too few safeguards, for discretionary decision-making'[85]. Regarding the latter, that is true of all interpretations detached from the parties' intentions. A static interpretation where the parties intended evolution can be just as harmful as an evolutive interpretation the parties did not intend. As for the risk of fictional intentions, this is somewhat mitigated by the fact that the ICJ has on several occasions concluded that treaty parties did *not* intend evolution despite using evolving terms. Two examples are cited in *Dispute regarding Navigational and Related Rights*.[86]

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[80] The point is discussed briefly in *Dispute regarding Navigational and Related Rights* (n 39) para 47.
[81] *The Case of the S.S. Lotus,* [1927] PCIJ Series A No 10, 18.
[82] Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681, 686-688.
[83] As Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I', in (2008) 21 Hague YB Intl L 101, 153 notes, the concept of evolutive interpretation still awaits 'some general and definite conclusions'.
[84] Thirlway (n 41) 142; French (n 53) 296-297.
[85] French (n 53) 300.
[86] *Dispute regarding Navigational and Related Rights* (n 38) para 63.

The first is *Rights of nationals of the United States of America in Morocco*[87]. The Court found that the term 'dispute' in an 1836 treaty[88] between the US and Morocco was intended to cover both civil and criminal cases, since this was how the term was used in the Moroccan legal system when the treaty was drafted.[89] This was despite the argument that the term, in its 'ordinary and natural sense' at the time the case was decided, referred only to civil cases.

The second example, the *Kasikili/Sedudu Island*[90] case, concerned a border dispute. It was settled on the basis of an 1890 treaty[91] between the former empires of Germany and Britain, drafted in both a German and an English version. In interpreting the phrase 'centre of the main channel', which corresponded to 'Thalweg des Hauptlaufes' in the German version, the Court noted that the terms 'centre' and 'Thalweg' did not have the same meaning at the time the case was decided,[92] but also that they were 'used interchangeably' in 1890.[93] Therefore the parties had intended them to mean the same, and the Court solved the dispute on that basis. Put differently, the meaning of the terms had evolved since the treaty's conclusion, but the parties had not intended any evolving meaning to prevail.

A third example of generic terms not being interpreted evolutively is found in the *Petroleum Development Ltd v. Sheikh of Abu Dhabi*[94] arbitration. While not an ICJ case itself, it is notable because the ICJ explicitly distinguished it from its own reasoning in *Aegean Sea*.[95] The case concerned the interpretation of a 1939 contract that gave the company Petroleum Development the right to extract oil from the 'lands which belong to the Ruler of Abu Dhabi and its dependencies' and from 'all the islands and sea waters which belong to that area'.[96] The umpire presumed that by 1939, the modern concept of 'continental shelf' was unknown, and 'sea waters' thus had to be limited to the 'territorial maritime belt and its subsoil' of three

[87] *Case concerning rights of nationals of the United States of America in Morocco* [1952] ICJ Reports 176.
[88] Treaty of Peace and Friendship (United States of America-Shereefian Empire) (16 September 1836).
[89] *Rights of Nationals of the United States of America in Morocco* (n 87) 189.
[90] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045.
[91] Anglo-German Agreement of 1 July 1890 (Great Britan-Germany) (1 July 1980).
[92] *Kasikili/Sedudu Island* (n 90) para 24.
[93] ibid para 25.
[94] *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, (1951) 18 ILR 144.
[95] *Aegean Sea* (n 37) para 77.
[96] *Petroleum Development Ltd v. Sheikh of Abu Dhabi* (n 94) 151.

miles from the coast.[97] An alternative approach would have been to consider 'sea waters' an evolving term, which would include whatever 'sea waters' (and their corresponding shelf) that at any time was under the Sheik's sovereignty. In distinguishing its own reasoning in *Aegean Sea* from the umpire's statement, the ICJ noted that there was 'an essential difference' between the two cases: It may be presumed that someone parting with valuable property rights 'intends only to transfer the rights which he possesses at that time', while a State, 'in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement' a 'generic' category of disputes, can be presumed to have intended to make a reservation against anything falling within the ambit of the reservation in the future.[98]

In sum, these cases indicate that even where terms evolve, the ICJ is not willing to construct an evolutive intention in cases where a non-evolving intention is evident, or where there are specific circumstances that make the presumption of evolving intent implausible.

4. *A Taxonomy of Terms*

For purposes of evolutive interpretation, terms can be divided by two important distinctions. One is between terms that cannot be interpreted without value judgements, and terms whose meaning does not depend on values. These can be called 'value driven' and 'non-value driven' terms, respectively. Examples of the former include 'inhuman punishment', 'fair trial', and 'the well-being and development' of peoples. Examples of the latter include 'territorial status' and '*comercio*'. The other distinction is between terms that do and do not evolve linguistically, as outlined in the introduction above. The two categories can be called 'evolving' and 'non-evolving'.

When value driven terms evolve, tribunals seem to accept that the evolution was intended by the parties, without demanding further justification. That is presumably because values inevitably change over time, as new generations will have their own views on what is (for example) 'inhuman' or 'fair'. The parties are simply assumed to have been aware of this. The evolution of a non-value driven term is, on the other hand, not inevitable, and is thus less easily anticipated. The practice of the ICJ illustrates the point. Of the ICJ's three evolutive interpretations, only those in *Namibia* required value judgements. *Namibia* is also the only case where the ICJ did not see the need for its 'general rule', but established evolutive intent solely on the basis of the nature of the terms themselves.

[97] ibid 152.
[98] *Aegean Sea* (n 37) para 77.

A further example comes from human rights tribunals, who interpret many value driven terms, and frequently use evolutive interpretations.[99]

As noted in section 2, the only way a non-evolving term can be interpreted evolutively is to give it an evolving 'special meaning', as per the VCLT Article 31.4.
A taxonomy of terms could thus look like this:

TABLE I

Category	***Approach***	***Illustrations***
Value driven evolving terms	Evolutive intent can be assumed by default	*Namibia*, human rights tribunals
Non-value driven evolving terms	Evolutive intent can be established after a more comprehensive evaluation, eg the ICJ's 'general rule'	*Aegean Sea*, *Dispute regarding Navigational and Related Rights*
Non-evolving terms	Evolution must be based on a 'special meaning'	The VCLT Article 31.4

III. EVOLUTIVE INTERPRETATION AND SEMANTICS

1. *'Generic Terms'*

The ICJ has made 'generic terms' one of two conditions in its 'general rule' on evolutive interpretation. The closest thing to a definition of 'generic terms' it has given is that they '[refer] to a class of [something]'.[100] The terms that the ICJ has acknowledged to be generic are 'continental shelf'[101] and '*comercio*'.[102]

This section will try to establish what the ICJ means by 'generic' terms.

'Generic reference' is a concept in the philosophy of language.[103] It can be defined as a designation for references that may be used to assert a 'generic proposition'.[104] A generic proposition is one whose referent is not a

[99] See s 2.1 above, on how evolutive interpretation is a 'key theme' of the ECtHR.
[100] *Dispute regarding Navigational and Related Rights* (n 38) para 67.
[101] *Aegean Sea* (n 37).
[102] *Dispute regarding Navigational and Related Rights* (n 38).
[103] Lyons, *Semantics: 1* (1977) 193-197.
[104] ibid 194.

specified group or individual, but an indeterminate class of referents.[105] The generic reference is distinct from the 'singular reference' and the 'general reference'. A singular reference refers to an individual entity, while a general reference refers to a specific set of entities.[106] Both can be either 'definite' or 'indefinite'. The former type refers to some specific individual entity or group, while the latter does not.[107]

Since generic references refer to 'classes' of referents, this philosophical definition looks similar to the one given by the ICJ.

The interpretations of 'territorial status' and '*comercio*' seem to conform to the philosophical definition of generic. 'Territorial status' refers to a class of issues, and '*comercio*' to a class of activities. Neither of them refers to specified entities, but to whatever entities that happen to share some particular trait(s).

In both cases, the interpreted terms had evolved (linguistically), in the manner described in section 1. Such evolution seems to be a prerequisite for using the ICJ's 'general rule', as noted in section 2. Not all generic references evolve, however. A basic example of a generic reference is the proposition 'lions are friendly beasts'.[108] 'Lions' does not refer to any set group of lions, but to lions as such. Yet the term is not likely to change in the way that 'sacred trust', 'territorial status', and '*comercio*' have. Lions will always be lions. While all lions die, and new lions will be borne, they are all 'lions' in the original meaning of the proposition. The 'ordinary meaning' of the term neither has changed nor is likely to change; the term 'lion' does not have to 'evolve' to encompass a lion that will be born tomorrow.

This inevitably leads to the conclusion that genericness, in the philosophical sense, does not necessitate evolution, in the legal sense. This conclusion must be reconciled with the ICJ's statements in *Dispute regarding Navigational and Related Rights*. The Court noted that 'where the parties have used generic terms in a treaty, the parties necessarily having

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[105] ibid 194.
[106] ibid 178.
[107] ibid 178; Linderfalk (n 76) 75-76. For example, the 'the parties' in the VCLT art 31.3.c is a general definite reference. It is ambiguous (see note 144 below), but not generic. Van Damme (n 77) 334-335 notes that the WTO panel in the *European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R, and WT/DS293/R rejected an 'evolutionary and effective interpretation of the phrase'. The Panel was correct in doing so, since the phrase is not generic, and the interpretive issue is about ambiguity rather than vagueness (see s 3.2 below).
[108] Taken from Lyons (n 103) 194.

been aware that the meaning of the terms was likely to evolve over time [...]',[109] but also that 'a generic term' is one that refers 'to a class' of (in this case) activities.[110] As has been shown above, not all generic references are 'likely' (ie have more than a 50 % chance) to evolve. The Court could not infer from the fact that '*comercio*' refers to a class of activities that the term 'was likely to' change meaning over time.[111]

There seems to be three ways of reconciling the ICJ's statements.

The first is to interpret all generic (in the philosophical sense) terms evolutively, regardless of whether they have evolved linguistically. This is not feasible; a term cannot be interpreted evolutively without either having evolved or having been assigned an evolving 'special meaning'.

Another option to apply the rule to all evolving terms, leaving non-evolving terms unaffected (despite the fact these too can be generic). This solution is somewhat unsatisfactory from a *lex ferenda* point of view, since the rule would still apply to *all* generic terms that had evolved; even those where evolution was unlikely, or nigh impossible to predict. In the latter cases, it is hardly fair to presume an intention to let evolved meanings prevail.

The final possibility is to introduce a third condition for presuming evolutive intent. In addition to the evolving term being generic and the treaty being long-term or indefinite, some evolution in the term's meaning must have been more likely than not at the time of the treaty's conclusion.[112] This seems preferable from a *lex ferenda* point of view, but cannot be said to be reflected in the ICJ's doctrine.[113]

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[109] *Dispute regarding Navigational and Related Rights* (n 38) para 66.

[110] ibid para 67.

[111] Just as the fact that the proposition 'lions are friendly beasts' is generic does not imply that 'lions' will change its meaning over time.

[112] Thirlway (n 41) 137 criticizes the ICJ's reasoning in *Namibia*, arguing that it was never proved that at the time of the treaty's conclusion, the concepts being interpreted evolutively were in fact regarded as such. Dawidowicz (n 53) 221-222 criticises *Dispute regarding Navigational and Related Rights* on the same grounds, endorsing the Separate Opinion of Judge Skotnikov. The complaints are fair, and the introduction of this third condition would make the requirement of such proof unequivocal.

[113] The closest approximation is Judge Higgins' Declaration in *Kasikili/Sedudu Island* (n 90), which in para 2 defines 'generic term' as 'a known legal term, whose content the parties expected would change through time'. Her definition is echoed by Dörr (n 76) 534. The synthesis of ICJ doctrine up to 2007 (ie excluding *Dispute regarding Navigational and Related Rights*) contained in Linderfalk (n 76) 95 seems to include the condition as well, in that evolutive interpretation is only permissible if 'it can be

One thing that is clear from the ICJ's decisions is that presumptions in favour of evolutive intent are restricted to generic terms. This is sensible; when a reference is not generic, it is singular or general. When treaty parties use singular or general references, they specify what entities they refer to. They usually do not intend later changes in meaning to affect that. An example is the ICJ's *Land and Maritime Boundary between Cameroon and Nigeria* case. The parties had referred to 'the mouth of the [river] Ebeji', which is a singular reference, in a treaty. The ICJ found that at the time of the treaty's conclusion, 'the parties only envisaged one mouth',[114] and it let that understanding prevail without further discussion. This view also explains the static interpretations reached in the *Laguna del desierto* and *Decision regarding delimitation of the border between Eritrea and Ethiopia* arbitrations mentioned above. In the first, the arbitration panel found that the (singular) reference to a 'water-parting' was 'not susceptible of any subsequent change through usage' or 'evolution of the language'.[115] The commission deciding the *Decision regarding delimitation of the border between Eritrea and Ethiopia* arbitration held that it would interpret treaties 'by reference to the circumstances prevailing when the treaty was concluded', which involved 'giving expressions (including names) used in the treaty the meaning that they would have possessed at that time'.[116] References to names will usually be singular references, which means that static interpretations are the most sensible.

2. *Ambiguity and Vagueness*

Questions of treaty interpretation can exist on two different levels. On one level are questions of resolving *ambiguity*, on another, questions of resolving *vagueness*.

The distinction is relatively clear-cut: 'A vague word has one meaning (and its application is unclear in some cases); an ambiguous word has more than one meaning (and it may be unclear, in some cases, which is in use)'.[117]

To illustrate the distinction, Ogden and Richards' 'triangle of reference' could be a useful tool. It distinguishes between 'symbol', 'reference', and

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shown that the thing interpreted is a generic referring expression with a referent *assumed by the parties* to be alterable' (emphasis added).

[114] *Land and Maritime Boundary between Cameroon and Nigeria* (n 44) para 59.

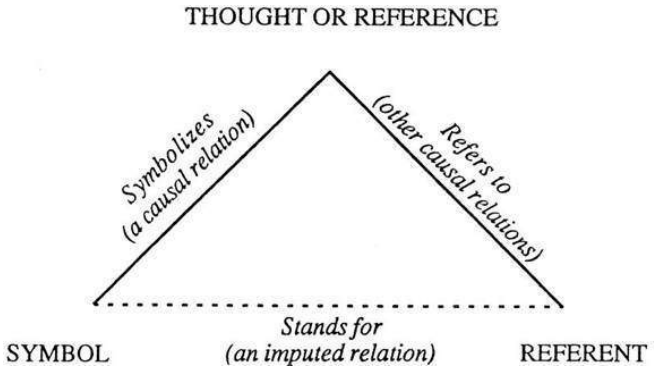
[115] *Laguna del desierto* (n 45) para 130.

[116] *Decision regarding delimitation of the border between Eritrea and Ethiopia* (n 46) para 3.5.

[117] Timothy AO Endicott, *Vagueness in Law* (OUP 2000) 54. Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California L Rev 509, 512-513 has a more detailed explanation.

'referent'. 'Symbols' are words, 'references' are the thoughts symbolized by the symbols, and 'referents' are the phenomena referred to by thoughts.[118] One symbol may symbolize several distinct references, but each reference has only one (more or less clear-cut) referent, which may or may not be fictional.[119]

Ogden and Richards visualized the triangle as follows.[120]



Combining the two theories shows, firstly, that only symbols can be ambiguous, by symbolizing more than one reference, and secondly, that only references can be vague, which is the case when the scope of a reference is unclear.

The distinction between ambiguity and vagueness has implications for the concept of evolutive interpretation.

Treaties (and all other sources of law) consist of symbols. Symbols may be ambiguous, but they are, presumably, always intended to symbolize a single reference. The reference may or may not be vague, and vagueness may or may not be intentional.

Certain references are vague in the sense that their scope varies over time. In such cases, it could be plausible to presume that the text is intended to evolve in line with the changing reference, in which case an evolutive interpretation is appropriate. For example, 'cruel and unusual punishment' (in the Eighth Amendment to the United States Constitution) will always

[118] Ogden and Richards, *The Meaning of Meaning* (10th edn, Routledge & Kegan Paul 1949) 9-11.
[119] For example, the symbol 'Napoleon' symbolizes, among other things, the first Emperor of the French, and a character in George Orwell's 1945 novella *Animal Farm*. Their referents are a real man and a fictional pig, respectively.
[120] Ogden (n 118), at 11.

symbolize the same reference, but the scope of the reference will change in line what is considered 'cruel' or 'unusual' in any given era.

Symbols may also change over time, in the sense that the symbol may come to symbolize new references, and no longer symbolize old references. An example is the word 'gay'. It used to primarily symbolize the attribute of being light-hearted and carefree. Nowadays, the most common symbolization is homosexuality.

Evolutive interpretation is an inappropriate tool for resolving ambiguity, for two reasons.

First, it is generally easier to predict *whether* a reference will change than to predict whether symbolizations will change. For example, using a value driven term makes the reference bound to change over time. Non-value driven terms can also be predicted to change their reference; for example in that the term '*comercio*' can come to include new activities in future. The same can not be said about changing symbolizations.

Second, it is easier to predict *how* a reference will change than to predict how a symbolization will change. When a reference changes, it is usually as a variation on what it was before (such as when a form of punishment that used to be considered human is considered 'inhuman', or when '*comercio*' comes to include a new activity). When a symbolization changes, however, the new symbolization may bear little resemblance to the old. The changing symbolizations of 'gay' is a case in point.

These two reasons make it much less plausible to presume that treaty drafters intended new symbolizations to prevail than it is to presume evolutive intent for changing references. Thus, if an interpretive issue is on the level of resolving ambiguity, evolutive interpretations are of little use. Their main function lies in resolving vagueness.

All the ICJ's evolutive interpretations have concerned vagueness. *Dispute regarding Navigational and Related Rights* illustrates the point especially well. The symbol '*con objetos de comercio*' was ambiguous, and the Court resolved the ambiguity without evolutive interpretations. The reference '*comercio*', which was part of the symbolization the Court chose, was vague, and the vagueness was resolved by an evolutive interpretation.

The distinction also explains an interesting difference between the two evolutive interpretations by the WTO Appellate Body. In *US – Shrimp*, it had to interpret the phrase (ie symbol) 'natural resources' in the GATT

1994[121] Article XX(d). The parties disagreed on whether living resources were covered by the provision.[122] This was about resolving vagueness; the parties agreed that 'natural resources' were resources found in nature, but not on the exact contours of the concept. In *China – Publications*, the interpretation of the phrase (ie symbol) 'Sound Recording Distribution Services' in China's GATS Schedule[123] was contested. The parties offered two rivalling interpretations of 'sound recording': It could refer either to the physical medium on which sound was recorded, or to the intangible 'sound recording' itself.[124] This was a question of ambiguity, since these two are fundamentally distinct references. The question could not be solved by evolutive interpretation. This distinction is reflected by the role the evolutive interpretations played in the two cases. The evolutive interpretation in *US – Shrimp* was part of the report's ratio decidendi, and was used to resolve the interpretive issue.[125] In *China – Publications*, by contrast, the interpretive result was reached on the basis of 'ordinary meaning', 'context', and 'object and purpose';[126] the evolutive interpretation was (and had to be) an obiter. The obiter served to outline the (vague) reference that was chosen by resolving the (ambiguous) interpretive issue of the case.

IV. EVOLUTIVE INTERPRETATION DISTINGUISHED

1. *The Doctrine of Intertemporality*

The so-called '*doctrine of intertemporality*' is conceptually distinct from evolutive interpretation, despite certain similarities between the two.

Giving a precise definition of the doctrine has proven difficult.[127] It most famously featured in the *Island of Palmas*[128] arbitration. It was formulated as a 'principle', designed to answer 'the question which of different legal systems prevailing at successive periods is to be applied in a particular case'.

The umpire presented the doctrine as made up of two 'elements'. The first

[121] General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 187 (GATT 1994).
[122] *US – Shrimp* (n 35) paras 125-127.
[123] Schedule CLII – The People's Republic of China (1 October 2001) WT/ACC/CHN/49/Add.2 (China's GATS Schedule).
[124] *China – Publications* (n 35) paras 349-350.
[125] *US – Shrimp* (n 35) paras 130-131.
[126] *China – Publications* (n 35) para 398.
[127] Koskenniemi (n 18) 455.
[128] *Island of Palmas (The Netherlands v. United States)*, 2 Reports of International Arbitral Awards (1928) 829.

was that 'a juridical fact must be appreciated in light of the law contemporaneous with it, and not of the law in force at the time when a dispute in regards to it arises or falls to be settled'. Secondly, 'the existence of [a] right, in other words its continued manifestation, shall follow the conditions required by the evolution of law'.[129]

The first element in the doctrine concerns which system of law that should be applied on a given 'juridical fact'.[130] Treaty interpretation, including questions of evolutive interpretation, concerns how a treaty (which may be part of the law applied on a juridical fact) is to be interpreted. These are two different matters.[131]

The doctrine's second element is harder to pin down. Prima facie, it only says that a right can be curbed or extinguished because of later developments in international law.[132] The question of how a right must be maintained is clearly distinct from the question of how treaties should be interpreted (eg questions of evolutive interpretation).[133]

The distinction between the doctrine and evolutive interpretation does not seem to be uniformly observed. Evolutive interpretation has been presented as a 'qualification' to the doctrine's first element,[134] and the ICJ's evolutive interpretation in *Aegean Sea* has been called an 'application of the doctrine of intertemporal law to the interpretation of a treaty'.[135] This confuses the distinct processes of deciding what law to apply and interpreting terms. The doctrine can determine what law of treaty

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[129] ibid 845.

[130] A 'juridical fact' can be defined as a 'fact with juridical relevance'; Rosalyn Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krysztof Skubiszewski* (Springer 1996)173.

[131] See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, reproduced in ILC, *Yearbook of the International Law Commission 2001 Volume II, Part Two* (United Nations 2007), para 9 of the commentary to art 13. *Iron Rhine* (n 32) para 79 apparently attempts to link the two concepts, by treating the 'intertemporal rule' as a 'relevant rule of international law' under the VCLT art 31.3.c. The approach is confusing; what the tribunal calls the 'intertemporal rule' is applicable to all treaties by default, there is no need to use art 31.3.c.

[132] Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, 516; Gardiner (n 4) 253.

[133] Higgins (n 132) 178; Ulf Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties' (2008) 10 Intl Community L Rev 109, 118.

[134] John H Currie, *Public International Law* (2nd edn, Irvin Law 2008) 166.

[135] Taslim O Elias, 'The Doctrine of Intertemporal Law' (1980) 74 AJIL 285, 301; Kotzur (n 13) para 7.

interpretation that applies in a given situation, but only that law itself can determine whether terms in a treaty should be interpreted evolutively.[136]

In addition to the 'doctrine of intertemporality', the term 'intertemporal law' is used in various contexts. Textually, 'intertemporal' law means any law concerned with the passage of time. Under that definition, the 'doctrine of intertemporality' and evolutive interpretation are two examples of 'intertemporal law',[137] with other examples being rules concerning retroactivity (such as the VCLT Article 28 on the retroactivity of treaties) and norms of *lex posterior*. The usage of the terms is, however, not uniform.[138] The doctrine of intertemporality has been given various names, including 'the rule of intertemporal law',[139] 'the intertemporal rule', and 'the intertemporal principle'.[140] More problematic is the fact that the doctrine is not always distinguished from intertemporal law in general.[141]

Another related term is the 'principle of contemporaneity', under which 'the terms of a treaty must be interpreted according to the meaning they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded'.[142] With the recognition of evolutive interpretation as part of

[136] Ulf Linderfalk, 'The Application of International Legal Norms over Time: The Second Branch of Intertemporal Law' (2011) 58 Netherlands Intl L Rev 147, note 51 makes a similar distinction.

[137] See eg Tavernier (n 1) 397; Kotzur (n 13) para 1-3. According to Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 316, evolutive interpretation is one response to the 'problem of intertemporality as it applies to treaties'. M Fitzmaurice (n 83) 113 calls the broader concept 'the theory of intertemporal law', which includes both the doctrine and evolutive interpretation. Higgins (n 55) 797 calls evolutive interpretation 'the temporal issue in treaty interpretation', which is presumably one out of several 'temporal issues' to be addressed by different rules of intertemporal law.

[138] While linguistic differences do not necessarily entail legal disagreement, there is a risk that Higgins (n 132) 516 is right in that the doctrine of intertemporality has 'been read in the most remarkably extensive fashion, as providing obligatory rules in circumstances that it never addressed, with consequences that it never intended'.

[139] ibid 515.

[140] Gardiner (n 4) 252 uses 'intertemporal law', 'the intertemporal rule' and 'the intertemporal principle' as synonyms.

[141] ibid 25 equates the doctrine with 'intertemporal law'. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 266 writes: 'This reflects the so-called "evolutionary approach" to treaty interpretation. It is the second part of the intertemporal law'. The statement equates, first, the doctrine of intertemporality with 'intertemporal law' in general, and second, the doctrine's second element with evolutive interpretation.

[142] Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1958) 34 BYBIL 203, 212.

international law, the 'principle' is now only applicable to terms that the parties did not intend to be interpreted evolutively.[143]

2. *The VCLT Article 31.3.c*

The principle in the VCLT Article 31.3.c allows 'any relevant rules of international law applicable in the relations between the parties' to be taken into account when interpreting treaties. There are debates over the interpretation of the provision's various elements,[144] but those will not be pursued here.

Instead, the focus will be on the tendency of some sources to confound Article 31.3.c with evolutive interpretation. One common assumption seems to be that the concept of evolutive interpretation is limited to determining whether 'relevant rules' in Article 31.3.c must exist at the time of a treaty's conclusion or if subsequent rules are relevant as well.[145] Whereas Article 31.3.c does not specify whether subsequent rules can be 'relevant', evolutive interpretation is not necessary to solving the question: Article 31.3.c is located in the same subparagraph as 31.3.a and 31.3.b, both

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The definition is repeated by Dörr (n 76) 533 and Carlos Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (2007) 153 (who calls it the 'principle of contemporariness').

[143] Dörr (n 76) 533 calls static interpretation a 'basic rule', Romani (n 142) 153 calls static interpretation a 'general rule' and evolutive interpretation an 'exception'. That is imprecise; the 'basic rule' is that treaties shall be interpreted according to their drafters' intentions, be it evolutively or statically.

[144] See eg Gardiner (n 4) 259-265; the biggest debate seems to be over the ambiguous phrase 'the parties'.

[145] ILC (n 77) para 478 seems to do this, by referring to *Namibia* (n 36) and *Aegean Sea* (n 37) when interpreting 'relevant rules' in art 31.3.c, not accounting for the fact that art 31.3.c was not invoked in *Aegean Sea*, and only as a supporting argument in *Namibia*. Similar reasoning is found in other sources, including Sinclair (n 48) 139-140; Gabrielle Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement' (1999) 33(5) J World Trade 87, 120-122; Pauwelyn (n 141) 265-266; Aust (n 12) 243-244; Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff Publishers 2010) 75-77; Vassilis P Tzevelekos, 'The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 Michigan J Intl L 621, 660; Matthias Herdegen, 'Interpretation in International Law', The Max Planck Encyclopedia of Public International Law (January 2013 edn) <www.mpepil.com> accessed 28 April 2013, para 22. Bugge Thorbjørn Daniel, 'Chapter 3: Interpretation, sources of law and precedent' in Birgitte Egelund Olsen, Michael Steinicke and Karsten Engsig Sørensen (eds), *WTO Law – from a European perspective* (Kluwer Law International 2006) 83 writes that art 31.3.c 'includes evolutionary interpretation'.

concerning interpretive elements subsequent to the treaty being interpreted, and it may therefore be a plausible conclusion that any rule, regardless of the time of its creation, can be 'relevant'.[146] The problem with the assumption noted above is not that it is superfluous, however, but that it is incorrect: Evolutive interpretation is conceptually independent from Article 31.3.c.[147]

The difference is simply that Article 31.3.c is about interpretation in light of other law, while evolutive interpretation is about interpretation in light of some current meaning. This means that the range of relevant arguments to determine the evolution of an evolving term will often be much broader than just the 'rules of international law' that Article 31.3.c mentions.[148] Moreover, since evolutive interpretations are based primarily on the parties' original intentions, and thus rooted in other parts of the VCLT Article 31 than 31.3.c, they are permissible regardless of whether the conditions in Article 31.3.c are fulfilled. Evolution is thus possible even though the rule being invoked is not a formal 'rule' in Article 31.3.c's sense, and even though it is not binding on 'the parties'. Similarly, Article 31.3.c may be invoked in cases where interpreting evolutively is not permissible, notably when the term being interpreted was not intended to be evolutive.[149]

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[146] Gardiner (n 4) 251 and 259, referring to DW Greig, *Intertemporality and the Law of Treaties* (2001) 46, and Villiger (n 7) 433 support this. Sinclair (n 48) 139; Marceau (n 145) 120-122; Pauwelyn (n 141) 265; Zleptnig (n 145) 75 explicitly disagree.

[147] Donald H Regan, 'International Adjudication: A Response to Paulus–Courts, Custom, Treaties, Regimes, and the WTO' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 235 notes that art 31.3.c gives a rule 'normative significance' to the interpretation, as distinct from treating it as 'empirical evidence'. As Benn McGrady, 'Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: EC – Biotech Products and the Proper Interpretation of Article 31(3)(C) of the Vienna Convention on the Law of Treaties' (2008) 42 J World Trade 589, 593 observes, 'the question of when a decision maker may take an extraneous treaty into account in treaty interpretation is distinct from the question of when Article 31(3)(c) binds a decision maker to do so'. Dörr (n 76) 566 makes a similar point, in that 'rules extrinsic to the treaty' may become relevant without the use of art 31.3.c.

[148] *Dispute regarding Navigational and Related Rights* (n 38) para 64 illustrates this point: '[...] a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, *among other things*, developments in international law' (emphasis added). Ress (n 6) 25 makes a similar point: 'the theory of evolutionary treaty interpretation does not provide for any particular limitation to certain types of legal acts, declarations, or circumstances'.

[149] Lorand Bartels, 'Article XX of the GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 J World Trade 353, note 8.

While the two concepts must be kept apart at the conceptual level, there is nonetheless room for interplay at the practical level.[150] 'Rules of international law' may help determine *whether* a term should be interpreted evolutively; if 'relevant rules of international law' are taken to be evolutive, perhaps the term being interpreted should be evolutive as well. Relevant rules can also be used to determine *how* an evolving term shall evolve; an evolving term can be influenced by 'relevant rules' to the same extent as static terms.

V. CONCLUSION

This article's introduction presented two goals: to clear up confusion regarding the concept of evolutive interpretation, and to deepen our understanding of it.

Confusion is both expressed in and generated by the debate, part lex lata and part lex ferenda, over whether the concept has a place in international law at all. The lex lata part of this debate could have been settled by a clear and general statement from the ICJ. The Court has delivered a statement, which is commendably general and apparently quite clear: '[G]eneric' terms in long-term or indefinite treaties were presumably intented to be interpreted evolutively. However, the Court is not sufficiently consistent when defining 'generic', which means that the debate is not yet completely settled.

Another apparent source of confusion is the tendency to conflate evolutive interpretation with the (itself somewhat unwieldy) 'doctrine of intertemporal law', and with the VCLT Article 31.3.c. These are distinct from the concept of evolutive interpretation, even though they may interact with it on a practical level.

In an attempt to deepen our understanding of evolutive interpretation, the article has shown that the approach to evolutive interpretation seems to vary between three distinct categories of terms: value driven evolving terms, non-value driven evolving terms, and non-evolving terms. The article has also shown that evolutive interpretations may help solve issues of vagueness, but not those of ambuiguity.

[150] *Namibia* (n 36) is an example; art 31.3.c was used as a supporting argument in interpreting an evolving term (see n 76 above).

BOOK REVIEW: CONSTITUTIONAL LIFE AND EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE BY ALUN HOWARD GIBBS

(ASHGATE, 2011, ISBN 978-1409402695, $ 114.95)

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I. INTRODUCTION

Most work on the Area of Freedom, Security and Justice (AFSJ) is sectoral and concentrates on particular policy areas. Recent years have seen a long overdue move to develop a more theoretical and coherent approach and to assess the potential contribution of the AFSJ as a distinct area of integration to the constitutional and political development of the European Union.[1] *Constitutional Life and Europe's Area of Freedom, Security and Justice* forms part of this general trend to 'theorize' the AFSJ and in doing so attempts to establish a new means of understanding constitutionalism itself. It offers a rich and varied set of methodological tools ranging from hermeneutics, linguistics and moral and ethical theory and constitutes a highly original approach to the AFSJ and constitutionalism itself. However in adopting such a variety of perspectives it engages in theoretical detours that detract from the argumentative clarity necessary to meet its ambition.

II. SUMMARY

The main aims and objects of study are first introduced. The author is prompted by certain developments, in terms of policy expansion, institutional structure and critical commentary to 'think constitutionally' about the AFSJ. However in doing so he arrives at a classic problem of constitutionalism in the European Union legal studies – the novelty of the EU as a political entity and its lack of a distinctive political community or other source of sovereignty that might justify and legitimise its activities. Considering legitimacy, Gibbs is sceptical about conceiving it solely as a

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[1] See Hans Lindahl (ed) *A Right to Inclusion and Exclusion? Normative Faultlines in the EU's Area of Freedom, Security and Justice* (Hart 2009). For a notable earlier attempt see Neil Walker (ed) *Europe's Area of Freedom, Security and Justice* (OUP 2004), in particular the thorough assessment of the introduction, Neil Walker, 'Introduction: A Constitutional Odyssey' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (OUP 2004).

'deliverable good' – produced through techniques and procedures. Such an approach ignores the more fundamental publicness of legitimacy and its relationship to 'constitutional life', a problem that is thrown into sharp relief by developments in the AFSJ. Thus from considering the AFSJ constitutionally we are lead to reflect on the nature of constitutionalism itself.

In chapter two the author attempts a reworking of 'constitutionalism' itself by introducing the notion of 'constitutional life' and relating it to 'legitimacy'. For Gibbs traditional constitutional thought is too concerned with establishing legitimacy by techniques of *constraining* power rather than the prior question of *founding* power that he terms the ontological question. In seeking to avoid a Schmittian 'state of exception' he turns to classic Roman notions of '*auctoritas*' and the historic experience of the American revolution and the founding a constitutional document based on 'commitments to rightness over time.' Legitimacy it would seem is therefore based not (only) on a historic act of foundation but is an on-going process of engagement, deliberation, reflection and ultimately transformation of those original commitments. Such an engagement takes place through the medium of language and it is here that hermeneutics is employed in a rather lengthy and technical exposition of Gadamer's 'fusion of horizons'. By such a meaningful engagement the distinction between subject (the individual) and object (constitutional commitments) is collapsed or at least blurred and both undergo transformation. Thus

> the common commitments which are inherently valuable and participation in disclosing their meaning, which changes over time is the basis of constitutional life [...] in this way the hermeneutic understanding of the question of constitutional legitimacy strikes a different note to those which area conventionally adopted in constitutional theory.[2]

The author conceives such constitutional commitments over time as 'constitutional public goods'. Gibbs therefore takes up the notion of 'public goods' and attempts to adapt this term for use in the type of constitutionalism he proposes. Thus classic 'public goods', as originally developed in the literature of economics, are termed 'instrumental'. They are not valuable in themselves, or even inherently public but rather serve the interests, however aggregated, of individuals. Similarly their 'publicness' is not inherent but is contingent on the effectiveness of their delivery as

[2] Alun Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice* (Ashgate 2011), 43.

public. Opposed to this instrumental type of public goods Gibbs outlines a theory of 'constitutional public goods'. That is those goods where:

> 'the relationship between "good" and "public" [is] one of meaning rather than cause...by addressing public as inherently valuable and not just because it delivers, through its institutional structures, goods which are needed by individuals. It [the constitutional public good] must be valued intrinsically as the site where we involve ourselves as constituting the "good" as a "good". In such a way the "public" is a site where meaning is constituted'[3]

It would seem that 'public' and the role we ascribe to the term 'public' is what distinguishes instrumental from constitutional public goods. However the 'publicness' of a good is not something that stands alone, independent from the actions of individuals. Rather it is the agency of individuals, a particular form of engagement and participation in shaping the meaning of these goods, that makes them 'public' in this constitutional sense and hence the foundations of 'common commitments'.

In outlining exactly what this engagement might entail Gibbs turns to theories of linguistics (primarily of Saussure) and their application to political philosophy by Charles Taylor. As with language where our involvement with the social practice through individual acts further shapes the meaning and hence content of that social practice, our continued engagement with 'constitutional commitments' is both drawn from a pre-existing social understanding of those commitments and helps to shape them for the future. Similarly as with language the very act of engagement with the social practice modifies the individual actor involved. However language and linguistics is not used simply as an analogy in Gibbs' analysis. Rather 'constitutional life' (as he terms this continuous engagement) is itself a linguistic practice. Our public life, as expressed through the linguistic practice of constitutional life, enjoys a permanently open-ended quality. And while goods, such as security, freedom and justice, may be both instrumental and constitutional it is important to ensure that their instrumental character is shaped and limited by our engagement with their collective meaning through treating them as constitutional public goods.

Gibbs now moves on to applying this theory to the AFSJ itself and introduces the topic by an abstract consideration of security as a public good. Security, we are told, is a 'super public good' – one that to some extent acts as a prerequisite for all other public goods. Relying on Foucault Gibbs describes security as being at the heart of the modern state and its

[3] ibid 53.

attendant 'governamentality'. Yet its very necessity to the conditions of modern social and political life and its role in governance mean that it is potentially an inherently instrumental public good rather than constitutional. Security is provided to (and indeed acts upon) passive individuals thereby potentially excluding the possibility of individual agency and participation needed to constitute it as a 'constitutional public good'. This is particularly the case where security as a discourse becomes increasingly dominant. Thus 'we potentially encounter the paradox of security in its fullest sense: the need to deliver security becomes more paramount than the political life which must under-grid its own meaning'[4] We are rescued from this paradox by the work of Loader and Walker, *Civilising Security*,[5] that draws out the inherently social nature of security, or more accurately our construction and hence experience of it as inherently social. Such a view of security necessarily implies a degree of reflection and hence reflexivity on the part of individuals. Security experienced reflexively may (it is never quite made clear if it is in fact sufficient) constitute a constitutional public good as such. This reflection, in the form of critical engagement, may indeed hold the key to restraining an overly instrumental (and hence repressive) deployment of a security discourse.

Such an overly instrumentalised construction of security lies at the heart of the construction of the EU as an *area* of freedom, security and justice. The dominance of security is an oft-told story in discussions of the AFSJ,[6] and Gibbs applies this critique to the means by which the AFSJ constitutes an 'area' as such. It is through security, in particular a security overly focused on technology and operational practice, that the common area is constructed. This instrumentalised vision of security is therefore overshadowing, supplanting or even 'reconfiguring' our understanding of freedom. Furthermore a look at the manner in which internal political actors, notably the Council and Commission view the constitutional dimension of the AFSJ, reveals a classic concern with restraining power rather than addressing the more fundamental question of the ontology of constitutional authority.

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[4] ibid 72.

[5] Ian Loader and Neil Walker, *Civilizing Security* (CUP 2007).

[6] See Dora Kostakopoulou, 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited* (OUP 2007) who speaks of a 'discursive chain of freedom, security and justice [leading to] the emergence of a value laden hierarchy, whereby security was promoted at the expense of freedom' on p 174f. See also Sionaidh Douglas-Scott, 'The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice' (2004) 29 EL Rev 219.

A thoughtful discussion follows on the role of the Union in criminal law and in particular criminal procedural cooperation. Identifying the link between mutual recognition and the presupposition of mutual trust, Gibbs provides an insightful discussion of this rather ambiguous concept as it is employed in the AFSJ. Using the case studies of the European Arrest Warrant[7] and the application of the *ne bis in idem* principle we are introduced to the role that criminal law may play in supporting and reflecting the political community by drawing out a relational vision of criminal law as described by Foqué. Criminal law is moved beyond an instrument of (mere) coercion to reflect how we relate to each other and our common commitments. An increasing emphasis on measures designed to reinforce 'mutual trust' and the language of the Stockholm programme offer some hope in the eyes of the author that the AFSJ may be moving in this direction. However he also cautions against adopting a purely operational or instrumental vision of mutual trust such that it 'eclipse[s] the more complex and difficult understanding of political trust.'[8]

In the conclusion Gibbs moves from the particulars of the AFSJ back to the generalities of 'constitutional life'. Departing from the premise that 'at root the EU employs an understanding of security that is intended to offer the basis, or grounding, for the constitutional legitimacy of the activities of the AFSJ'[9] he calls for a reinvigoration of the 'language of constitutionalism by which we can confront the meaning of territory, authority, belonging, participation and the commitments for the sake of which we come together as a political peoples.'[10] And while efforts to increase and improve popular participation in the European political processes should not be dismissed, these purely institutional measures are not, in themselves, sufficient. Indeed to the extent that they mask the underlying problem, they may in fact be damaging. Rather we must engage in a process of *learning* constitutional life and developing 'the disposition to be involved in the very activity of collective life.'[11] Such a disposition consists of a number of elements namely an openness to its transformative nature, humility, mutuality and lastly restfulness.

III. COMMENT

Constitutional Life in Europe's Area of Freedom, Security and Justice is an ambitious work dealing with matters of both theory and practice. As such

[7] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.
[8] Gibbs (n 2) 124.
[9] ibid 127.
[10] ibid 128.
[11] ibid 133.

it is to be welcomed as part of the general trend to explain and consider the AFSJ as whole rather than its constituent parts. It attempts to theorise both the AFSJ and 'constitutional life' itself. However unfortunately in attempting both it succeeds fully at neither.

In discussing constitutional life, Gibb's draws a distinction between the two roles of constitutionalism; the foundation of legitimate political power (what he terms the ontological problem) and the on-going legitimate exercise of political power and its restraint. 'Constitutional life' is intended to address the first of these functions, the foundation of legitimate political power, through a discursive practice whereby common commitments are entered into and continuously renewed and transformed. To look at constitutionalism through a discursive lens is a fresh perspective in the context of the AFSJ.[12] The problem arises when attempting to import a discussion on 'public goods' into this discursive practice of 'constitutional life'.[13] His argument here seems to be that as such goods are public and understood socially they somehow become necessarily constitutional in his sense of 'constitutional life'. At least the practice of publicly deliberating on their common understanding gives them a constitutional character, an argument that amounts to stating that an evolving, common understanding of a particular policy through public discourse is, in and of itself, constitutional. However in doing so it perhaps conflates the constitution and constitutional values with the political community and its on-going politics.

Naturally the two are related and difficult to disentangle. However, unfortunately Gibbs seems either unaware of the problem or unable to solve it. A common understanding of matters of general concern and a communal practice in creating and continuously modifying that understanding are all conditions for a political community; itself a prerequisite for the foundation of legitimate power and therefore a constitution. Similarly the conditions laid down by a constitution provide the framework for and shape any continuing discussion of those original commitments. Such a discourse is expressed or contextualised in matters of high (and sometimes low) politics. Furthermore a continual discussion of constitutional values and institutions and how they are understood is

[12] If not necessarily generally for example Habermas theory of constitutional patriotism is explicitly concerned with developing certain discursive practices. Furthermore he has applied this to the problem of founding a legitimate polity see ex. Jurgen Habermas, 'On the Relation between the Nation, the Rule of Law and Democracy' in Jurgen Habermas (ed), *The Inclusion of the Other* (MIT Press 1998).

[13] A move that one assumes became necessary in the context of a discussion on 'freedom', 'security' and 'justice'.

essential to a healthy political community. After all it is true that we speak of 'constitutional politics.'

Politics and a political community are therefore prerequisites for a constitution and are subsequently shaped by a constitution. The question raised by Gibbs is whether the practice of politics itself (albeit on an abstract level) can be equated to constitutionalism? If it can be then what is the purpose of such a distinction? Gibb's would possibly have been better served in identifying more clearly why public goods fall into the category of the constitutional rather than the political or alternatively to refute the very distinction between the constitutional and political. As it stands the work at best argues for a more thoughtful deliberation and treatment of the politics of security (and to some extent immigration) in the EU and considering them in the context of the Union as a political community. It might therefore be seen as call for a common European political discourse on the meaning of security and thereby found a common political community. Though this process we may certainly discover common constitutional values. Indeed such a constitutional dimension may be inevitable given the nature of the subject matter. The link to constitutionalism is certainly there, but it is indirect and not clearly identified by the author. Instead obtuse and overlong discussions on ethics, linguistics and hermeneutics obscure the central question of how deliberation of matters of public concern translate into constructing what might be termed the constitution of the Union.

Similarly the work fails to identify exactly what the author considers the nature of the AFSJ to be, what role it plays in our understanding of the Union as a constitutional and/or political project (accepting that there might be an overlap or a connection between the two) and lastly what implications we might draw from such an understanding for the future construction of the AFSJ. There does seem to be a broad concern with a deeper engagement on behalf of the public with the AFSJ and the possible meanings it might have and the hope that this engagement itself may lead to restraint on public power. However arguing for a greater balance between 'freedom', 'justice' and 'security' is hardly a novel normative position and one does not need to appeal to theories of hermeneutics in order to be convincing, classic constitutional theories being perfectly serviceable. From a descriptive level there is no evidence provided that greater public discourse on matters of public security will lead to restraint on behalf of the state. On the contrary populist reactions to exaggerated perceived threats may have the opposite result. Having said that, there are some good discussions on particular policy fields of the AFSJ. The discussion on the instrumental treatment of the AFSJ as a territorial construct and the potential of criminal law in reflecting and possibly

constituting a political community are instructive and worthwhile. Furthermore as becomes increasingly evident, the work is more concerned with constitutional thought than with the AFSJ itself. In fact the AFSJ is employed as an interesting case study justified by its peculiar non-state character despite covering policy fields that traditionally lie at the core of state sovereignty. Given its status as a case-study (albeit a case study that is treated throughout) rather than the focus of the work the failure to give a satisfactory account of the AFSJ should not be criticised too harshly. Nonetheless the limits of the analysis in terms of the AFSJ itself could have been more clearly identified.