Vol XII, Issue 1

E L R

The European Law Students' Association

Vol XII, Issue 1

THE ELSA LAW REVIEW

The European Law Students' Association

ELSA Law Review is published by the European Law Students' Association.
The publication may be cited as [2020] ELSA LR.
ISSN: 1012-5396 (print), ISSN: 2415-1238 (e-version)

Editor in Chief:	Sarah Ikast Kristoffersen *Vice President in charge of Academic Activities of ELSA International 2019/2020*
Deputy Editor in Chief:	Hendrik Daði Jónsson
Article Editors:	Maria Sofia Lourenco Ferreira Ljubica Kaurin Sara Osmanağaoğlu
Linguistic Editor:	Madeleine Geerarts
Publications Editor:	Nikoleta Symela Mavromati
Director for Legal Writing:	Nikola Ćirić
Academic Partner:	Católica Global School of Law
Academic Reviewers:	Gonçalo Saraiva Matias *Dean of Católica Global School of Law* Armando Rocha *Associate Dean of Católica Global School of Law*
Logo creator:	Nikolai Karleif Lyngnes
Website:	https://lawreview.elsa.org/

The European Law Students' Association

CATÓLICA FACULDADE DE DIREITO ESCOLA DE LISBOA

CATÓLICA Global School of Law

All rights reserved. No part of the material protected by this copyright notice may be reproduced, utilised in any form or by any means electronic or mechanical, including photocopying, recording or storing in a retrieval system or transmitted in any form or by any means without the prior permission of the Vice President in charge of Academic Activities of ELSA International. The views expressed by the authors are their own and do not necessarily reflect those of the publishers.

Copyright © The European Law Students' Association and the authors, 2020

TABLE OF CONTENTS

LETTER FROM THE EDITORS

Dear Reader,

The first issue of the XII volume of the ELSA Law Review has been compiled amid a worldwide pandemic the effects of which have impacted the lives of most people on the planet. Throughout our editorial process, our editors have worked through quarantines, national lockdowns and bouts of illness with the novel coronavirus all the while remaining committed to the high qualitative standards of the ELSA Law Review. Fortunately, our diverse and dispersed international association is well versed in remote working thereby allowing us to assemble the spring 2020 issue on screens spanning Europe from Reykjavík to Thessaloniki. It is thus with great pride that we present to you this issue and officially bring the ELSA Law Review into the 2020s.

If the first six months of this new decade have brought us any lesson, it is a powerful reminder of the truth contained in John Donne's words from the seventeenth century that "No man is an island entire of itself". Medical professionals the world over have professed the grave responsibility of each individual to stop the spread of the virus, a global campaign the course of which is chartered by the behaviour of every person in every society. The world has been reminded of the imperative of international cooperation and mutual learning. It is fitting in this context that the topic of this issue of the ELSA Law Review, in addition to the permanent topic of human rights law, is comparative law.

This issue is opened by a piece on the connection between human rights and businesses in proposing a CSR and human rights focused lex mercatoria. This modern approach to human rights protection is followed by an article on what is arguably the most fundamental of human rights: the right to life. This article argues that the right to life is threatened due to lack of understanding of the term "life". The last human rights focused piece of the issue is centred around the right to self-determination as challenged by the autonomy of third parties. Moving to comparative European law, the topical focus of this issue, the fourth piece analyses and compares the right to housing in Finland and Ireland with the former serving as the international best practice. From there, the focus moves to EU competition law, as the fifth piece explores how soft law of the EU Commission is perceived by different actors. The sixth piece analyses the development of cultural heritage law with a particular comparative and human rights centred approach. Finally, the seventh piece explores the originality requirement set out under EU copyright law. In addition to the seven pieces

chosen by the Editorial Board, this issue also features the winning essay of the ELSA and LexisNexis Essay Competition on the Rule of Law. This essay explores what the rule of law is and how law students and young lawyers may contribute to its protection and furtherance.

We, as the Editor and Deputy Editor in Chief of the ELSA Law Review, are humbled by the support we have received in assembling this issue. Firstly, we extend our sincerest gratitude to Robert Spano, the President of the European Court of Human Rights, for providing his patronage of the ELSA Law Review. We also wish to thank the Articles Editors, Maria Sofia Lourenco Ferreira, Ljubica Kaurin and Sara Osmanağaoğlu, who have shown immense dedication in shortlisting of submissions. Madeleine Geerart, the Linguistic Editor, has ensured a streamlined and professional outlook throughout the ELSA Law Review, and our Publications Editor, Nikoleta Symela Mavromati, has spread the important message of the ELSA Law Review across Europe. All shortlisted submissions have been peer-reviewed by academics from Católica Global School of Law without whom the quality of the law review would suffer. Finally, we are honoured to work with Wolf (Legal) Publishers who conduct the typesetting and publication of the ELSA Law Review, thus ensuring a professional outcome.

Finally, this issue marks the end of the term for the 2019-2020 Editorial Board. As we have worked to improve and advance the ELSA Law Review through this past year, we have only grown in our conviction that the voices of law students and young lawyers deserve to be heard and can make a positive difference to our world. We wish the greatest of success to the Editorial Boards and authors of the future as we pass the baton, bolstered in our commitment to the vision of ELSA: "A just world in which there is respect for human dignity and cultural diversity".

Kind regards,

Sarah Ikast Kristoffersen
Editor in Chief

&

Hendrik Daði Jónsson
Deputy Editor in Chief

A CSR-INSPIRED LEX MERCATORIA: CODES OF CONDUCT AND HUMAN RIGHTS

Enrica Bertoldi*

Abstract

As a Copernican revolution, the rise of capitalism - especially in its international and boundaryless form - has challenged the meaning and the real utility of the traditional concept of 'law' and its paradigms. Indeed, legal centralism, built on a state-based form, has been scratched by the trans-nationalisation of trade and financial markets and the emersion of a myriad of non-state actors, dialoguing, conflicting and, most of all, developing norms in such global scale. Among those, multinational business corporations (MNCs) - although historically considered as lacking international legal personality - have played a pivotal role in creating a new paradigm of order, namely the (new) lex mercatoria. Gunther Teubner has defined such self-referential economic systems as 'the most successful example of global law without a state' since state bodies failed to regulate it efficiently. By contrast, as private-members-only clubs, MNCs have spontaneously drawn their own rules, relying on their alleged ability to better answer to the ever-broadening specialisation and differentiation of the new markets. In such self-interests-centred scenario, what role is left for the 'public' goal of justice and, yet, what relevance is ensured to human rights' protection? This article tries to suggest a solution to that challenging question. The first section introduces the issue and the impact of the above-mentioned disaggregation of the international legal framework. The second section gives a non-comprehensive overview of the historical evolution of the lex mercatoria, from its very roots in the Ancient centuries until its newest re-emergence. Moreover, the section analyses the role of MNCs as actors within global relations, and their standard tools: codes of conduct. These declarations of standards, even if 'soft on the inside', may be 'hard on the outside', successfully impacting on corporations' credibility, accountability and economic revenue through collective punishment and the power of information and words. Third section suggests considering Corporate Social Responsibility

* Enrica Bertoldi is a final year law student at the University of Turin in Italy. She has recently returned from an exchange semester at the Georgetown Law Center for Transnational Legal Studies (CTLS) in London. Her academic interests revolve around commercial and international law. As she believes in the importance of hands-on and collaborative learning methods, she has successfully participated in the ELSA Italy Essay Competition 2019 and in the 27th Willem C Vis Moot Court on behalf of CTLS.

(CSR) as a legitimacy's provider. Indeed, as implemented in codes of conduct, CSR may be able to drive business behaviour even though in the absence of a recognised or effective hierarchical command and, in the end, may inspire the new lex mercatoria to self-implement fundamental rights and common interests. This suggested CSR synthesis of the notorious contrast between MNCs and human rights' protection is deepened in the fourth section. Section five concludes the article indicating an answer to the question posed above: MNCs' CSR initiatives and codes of conduct should welcome the public dimension incorporating and implementing fundamental human rights and common interests into their private and voluntary scheme. In doing so, a CSR and human rights-oriented lex mercatoria would embrace both liberalism and democracy, and then give renewed vital lymph and coherency to the 'old' constitutionalism and the new lex mercatoria.

1. Postnational Constellation and Non-State Actors

As a Copernican revolution, the rise of capitalism - especially in its international and boundaryless form - has challenged the meaning and the real utility of the traditional concept of 'law' and its paradigms. From the internationalisation of trade and financial markets to the complex interrelation between state authority and supranational entities such as the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ) and the World Trade Organization (WTO), nation-states are losing their relevance: this is the advent of Habermas' Postnational Constellation.[1] In the shift from a unitary to a post-unitary system of law, the breaking-point is the emersion of what Philip Jessup defined 'transnational law', albeit 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.'[2]

As echoed by the New Haven School of International Law (NHSIL),[3] such law overcomes the dichotomies both of national and international law and of monism[4] and dualism,[5] since, on the one hand, it denies the existence of only one legal order, and, on the other, recognises the overlapping between a plethora of systems. Moving from the NHSIL's critique of positivism,[6] Berman interprets these horizontal interactions through the lens of pluralism and invokes the rejection of the 'ideology of legal centralism'.[7] Particularly, he suggests to abandon the discussion on the nature of the law by adopting a non-essentialist position, thus 'treating as law that which people view as law.'[8] In order to understand what people see 'as' law - and why they do that - is essential to identify the myriad of non-state actors dialoguing, conflicting and, most of all, developing norms in the global scale.

---

1 Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr, MIT Press 2001).

2 Philip C Jessup, *Transnational law* (YUP 1956) 2.

3 Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) 1 Yale Journal of International Law 30.

4 Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2nd edn, University of California Press 1967).

5 HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon 1983) 309-342.

6 Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (OUP 2016) 235; See also Janet Koven Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 Yale Journal of International Law 393; Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 Yale Journal of International Law 559.

7 Paul Schiff Berman, 'A Pluralist Approach to International Law' [2007] Yale Journal of International Law 301; Paul Schiff Berman, 'Global Legal Pluralism' [2007] South California Law Review 1155, 1171.

8 Berman, 'Global Legal Pluralism' (n 7) 1178.

1.1 Subjects - Objects v Participants

The international legal system has traditionally been constructed on a state-centric and state sovereignty's supremacy form.[9] Under this positivist approach, an entity has international legal personality if it has direct international rights and responsibilities, can bring international claims and is able to participate in the creation and enforcement of international law, i.e. if it is a 'subject' of the international legal system.[10] In contrast, an 'object' of international law is merely indirectly vested with obligations and rights.[11]

Rosalyn Higgins, former President of the ICJ, has firmly accused this binomial of lacking 'credible reality' and 'functional purpose,' and actually being nothing more than 'an intellectual prison.'[12] Embracing McDougal and Lasswell's 'actor conception', she countered the idea of 'participation' in the international decision-making process; participation whose extension depends on the activity and involvement of manifold entities.[13]

Particularly, even if not formalised, the involvement of highly respected multinational business corporations (MNCs) and Non-Governmental Organisations (NGOs) in the so-called upstream law-making is - as will be further discussed below - directly proportional to their reputation.[14] Oftentimes, states have solicited and MNCs shared their business and technical information to draft key treaties on the exploitation of natural resources (e.g. the

---

9 Samantha Besson, 'Sovereignty', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 1 June 2020.

10 See: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), arts 1-5; Christian Walter, 'Subjects of International Law', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law- 9780199231690-e1476> accessed 31 May 2020.

11 Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (2nd end, OUP 2006) 307–332 (as cited in José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 Santa Clara Journal of International Law 1, 8).

12 Rosalyn C Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49.

13 See: Myres S McDougal, Harold D Lasswell, W Michael Reisman, 'The World Constitutive Process of Authoritative Decision' (1967) 19 Journal of Legal Education 253, 260ff.

14 Stephen Tully, *Corporations and International Lawmaking* (Martinus Nijhoff 2007) 305ff.; Anne Peters, Lucy Koechlin and Gretta Fenner Zinkernagel, 'Towards non-state actors as effective, legitimate, and accountable standard setters' in Anne Peters and others (eds), *Non-State Actors as Standard Setters* (CUP 2010).

law of the sea, biological diversity),[15] international trade[16] and investment protection.[17] In this last regard, NGOs and indigenous groups strenuously prevented the adoption of the OECD's Multilateral Agreement on Investment, perceived as a threat to human rights and environmental standards.[18] By contrast, the US Business Roundtable endorsed the government's decision not to ratify, after intense negotiations, the Kyoto Protocol.[19] Indeed, non-state actors also exercise a pervasive influence submitting views and having concerns taken into consideration in inter-governmental conferences. Namely, the United Nations Framework Convention on Climate Change (UNFCCC)[20] grants a seat at the Conferences of the Parties (COP) to more than 500 NGOs and to the largest (new-)merchants' institutional representative, the International Chamber of Commerce (ICC).[21]
However, despite the undeniable role of non-state actors in this co-operative norm-creating process,[22] the 'actor conception' is not without criticism.

1.2 Redefining International Legal Personality: The Influence of the Requirements of International Life

Roland Portmann contends that there is very little support in contemporary international law for the basic premises of the actor conception: neither the international legal system is generally conceived decision-making process in which policy considerations take precedence over legal peremptory rules and principles, nor is effective action directly

15 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) UN Doc A/CONF.62/122; UN Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) (1992) 31 ILM 818.

16 HJ Jacek, 'The Role of Organised Business in the Formation and Implementation of Regional Trade Agreements in North America' in Justin Greenwood and H Jacek (eds), *Organized Business and the New Global Order* (MacMillan Press 2000) 39-40.

17 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 17 UST 1270 (ICSID Convention).

18 Organisation for Economic Co-operation and Development (OECD), Draft Multilateral Agreement on Investment, OECD Doc DAFFE/MAI(98)7/REV1 (1998); Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 The International Lawyer 1033, 1037ff.

19 Tully (n 14) 171.

20 UN Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 9 March 1994) (1992) 31 ILM 849 (UNFCCC).

21 Indeed MNCs can only obtain an official observer or participatory status in international organisations or negotiating forums through the guise of non-governmental organisations, such as the International Chamber of Commerce. See: Peters, Koechlin and Fenner Zinkernagel (n 14) 495.

22 ibid.

relevant in normative terms.[23] International law is an open system of rules and principles of a general nature, in (and from) which no entity is a priori included (nor excluded). International personality is a 'a posteriori' concept: an international person simply represents those international rights, duties and capacities directed at it.[24] It is then a matter of norm interpretation - and not of being an effective actor - whether a specific entity enjoys international personality in a particular legal context.[25]

The only consequence directly stemming from international personality is the capacity to invoke international responsibility and to be held internationally responsible.[26] In the context of fundamental human rights, there is a presumption for their direct application towards and upon individuals. Thus, insofar as analogy is not precluded on logical grounds, this may also hold true for other non-state actors as MNCs and NGOs.[27] Accordingly, after the ECtHR found that the legal status of a company does not exclude the protection of the European Convention on Human Rights,[28] corporations should no more be invisible to human rights obligations.[29]

John Ruggie's innovative 'protect-respect-remedy' governance project delineates a pragmatic and evidence-based corporate responsibility/accountability.[30] As elucidated by Larry Backer, it is grounded not on a priori assertions of personhood but on facts, including the reality that corporations operate under a social and not only a legal licence; have unique systems of monitoring, information gathering and disclosure; may be made accountable through their own due diligence; and may owe differing human rights obligations depending on their sphere of business, their structure, or their relationships with partners and suppliers.[31]

---

23 Roland Portmann, *Legal Personality in International Law* (CUP 2010) 208ff, 282-283.

24 ibid 271ff.

25 Corporations clearly have a degree of international legal personality which encompasses for example locus standi before ICSID Tribunals and the opportunity to submit amicus briefs to WTO Panels. See: Tully (n 14) 322; Alvarez (n 11) 5, 11.

26 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

27 Portmann (n 23) 280.

28 *Autronic AG v Switzerland* (1990) Series A no 178.

29 Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 Melbourne University Law Review 893, 902, 922. See: Peter T Muchlinski *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 100-104.

30 John G Ruggie, 'Protect, Respect and Remedy: A United Nations Policy Framework for Business and Human Rights' (2009) 103 American Society of International Law 282.

31 Larry Cata Backer, 'On the Evolution of the United Nations "Protect-Respect-Remedy Project": The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara Journal of International Law 37. See: UN Human Rights Council (HRC), 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including the Right to Development. Report of the Special Representative

As these factors will be discussed below, it should now be concluded that, embracing a pragmatic approach, international law, its entities and sources are a variable-geometry process influenced by 'the requirements of international life.'[32] The spontaneous emergence of transnational economic interactions and the pivotal contribution of MNCs has led to the tarnish of international law and to the creation of a 'new paradigm of order'[33] or, better said, of 'a post-unitary understanding of order',[34] namely the (new) lex mercatoria.

2. The (New) Lex Mercatoria: 'The most successful example of Global Law without a State'

According to Gunther Teubner, "creator" of the new theory of lex mercatoria as a boundaryless and autopoietic legal regime to stabilise the self-referential economic system, it is 'the most successful example of global law without a state.'[35] To fully understand Teubner's contribution, it is crucial to start the analysis on the lex mercatoria from its very roots.

Indeed, scholars are unanimous on the point that the phenomenon of an a-national body of rules and principles, spontaneously developed by the international business community and based on customs, expertise practices and private actors' interaction is not a new one, but roots its origins in Antiquity.[36]

First, on the one side, the Hellenistic and Roman socio-philosophical 'doctrine of universal economy'[37] already emphasised the advantageous effects of the free trade of goods on common harmony; on the other, the *ius gentium* (Latin for Law of Nations, initially opposed to the citizenship-based *ius civile*)[38] set customs founded on the *naturalis ratio* shared by all

---

of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (7 April 2008) A/HRC/8/5, para 54.

32 *Reparation for Injuries* (n 27) 178. See: Harold J Laski, 'The Pluralistic State' in Paul Q Hirst (ed), *A Pluralist Theory of State* (Routledge 1989) 188.

33 Armin von Bogdandy and Sergio Dellavalle, 'The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective' (2013) 4 Transnational Legal Theory 59.

34 ibid 61.

35 Gunther Teubner, "'Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth Publishing 1997) 3.

36 See: Stephan W Schill, 'Lex mercatoria', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1534> accessed 1 June 2020.

37 Douglas A Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton UP 1996) 15 (as cited in von Bogdandy and Dellavalle (n 33) 63).

38 Berthold Goldman, *Lex Mercatoria: Lecture* (Kluwer Law and Taxation Publishers 1983) 276-277.

people.[39] The term 'lex mercatoria' itself, however, originates in the Middle Ages revival of trading activities and merchants' self-organisation. In the unresponsiveness and inability of local commercial laws (*ius commune*) to address problems arising from conducting activities in multiple settings, this body of self-regulations was principally aimed to avoid discriminations of foreign merchants in transnational bargaining,[40] and to equalise the distribution of goods.[41] Slightly different from both these two public goods-oriented historical theories, the third redefines the relationship between private interest and the public dimension. Precisely, Adam Smith was the first to see the pursuit of self-interests of individuals as a natural push towards not only the maximisation of personal profits, but, in the end, the enhancement of general welfare.[42] From this point of view, it is clear how, for instance, imposing barriers to trade and bans limits merchant's freedoms to invest their capitals and, in the long run, damages the whole society. At the same time, with the 18th century's rise of nation-states, lex mercatoria became incorporated into national laws and codes.[43]

Nevertheless, as previously mentioned, in the wake of globalisation in the late 20th century, something changed, insofar as well-organised private groups, fully independent from the public powers, emerged with an 'unprecedented urgency, persuasiveness and coherence'.[44] As private-members-only clubs, corporations and non-state institutions have started to draw their own rules, relying on the fact that (a pretending to be) efficient regulation of the ever-broadening specialisation and differentiation of the markets need to be more and more detailed and qualified.

Already in 1997, Teubner highlighted the failure of state bodies in regulating the most disparate systems, from economy to social services, from the technology to the health sector: that was the re-emergence of Bukowina under Austrian rules, the advent of the 'Global Villages'.[45] The spontaneous, polyarchic and self-referential global law applied to these villages is characterised by four key aspects.[46] First, it is not bound by national and territorial borders, since it is beyond them. Second, public institutions have no meaning, nor their imposed rules have relevance because private entities have their own highly specialised

39 Aldo Petrucci, *Manuale di diritto privato romano* (Giappichelli 2019) 7.
40 von Bogdandy and Dellavalle (n 33) 65.
41 Gerard Malynes*, Consuetudo, vel, Lex Mercatoria, or, the Ancient Law-Merchant* (Redmayne 1622) 2 (as cited in von Bogdandy and Dellavalle (n 33) 65).
42 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Sálvio Marcelo Soares ed, MetaLibri Digital Library 2007).
43 See: *Code de Commerce* (1807).
44 von Bogdandy and Dellavalle (n 33) 70.
45 Teubner, "'Global Bukowina'" (n 35) 7.
46 ibid 7ff.

and self-organised experts in governing themselves. Third, these practitioners ensure a reliable and secure tie with the respective social field, while states, sitting up in their ivory towers, move further and further away from the society, which hence looks at them as obtrusive and obtuse presences. Finally, the emblematic state need of unity has been replaced by global legal pluralism.

Closely linked to this last concept is the evident fragmentation of Global Law.[47] Indeed, grounded that every social system consolidates its particular rationality, autonomous private regimes develop, and are then strengthened, at the global level. Therefore, some scholars understand the global private law regimes to be fully independent of the public powers - or, using the words of Teubner, 'without a State'- and with no institutional nor normative reference to a general interest or to a common good.

In the final analysis, here lies the crucial difference between the traditional concept of lex mercatoria and the new one. The first - as the three historical approaches presented above demonstrate -, graduating the weight given to personal interests, ultimately pursues the achievement of a universal advantage. The latter, on the contrary, only seems focussed on - or capable to reach? - private benefits.[48] In such self-interests-centred scenario, some questions arise: what role is then left for the political goals of peace, public security and justice? What relevance is given to human rights' protection and the even more modest values of better global governance?[49]

2.1 The role of Multinational Corporations in the New Lex Mercatoria: Codes of Conduct

Traditionally, corporations as legal entities were created by states mainly to assist individuals to combine capital and to be protected from personal liability.[50] Accordingly, it has thus seemed undisputed that the standard roles of states and corporations are interdependent, but still defined - the first ensuring the enforcement of property rights and public security, while the latter providing employment and state's incomes through the taxation system.[51] However, after the breakthrough of globalisation, this distinction has been blurred. Consequently, scholars have taken different positions on the revisited power's balance in

47 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization* (OUP 2012).

48 von Bogdandy and Dellavalle (n 33) 77.

49 ibid; Armin von Bogdandy and others, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 The European Journal of International Law 115, 121.

50 Michael Mayerfeld Bell and Loka Ashwood, *An Invitation to Environmental Sociology* (SAGE Publications 2015) 97.

51 Milan Babic and others, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52 The International Spectator 20, 22.

international politics. At one end, the state-centrist approach continues to emphasise the analytical priority of nations; at the other, transnational capitalism rather scales back the state's relevance in the light of the increased dimensions and revenues of MNCs.[52]

Both theories clearly represent typical summaries of more nuanced viewpoints, but still are a perfect springboard for a further discussion. As mentioned above, the actual revitalisation of the lex mercatoria - regardless of its classification as a real autonomous paradigm of order - seems to be a matter of fact. 'The tendency towards a universal business law increased by multinational law firms, auditing companies, and last but not least, by the international arbitration systems and the increasing number of conflicts that cannot be adequately resolved under national law' confirm MNCs' role as 'private norm entrepreneurs' of the new lex mercatoria's.[53]

Global legal pluralism is - also - rooted in the interaction and conflict between state and non-state norms:[54] transnational corporate governance regulation is a case in point as it is polycentric, 'neither national nor international, neither public nor private.'[55] Enterprises' codes of conduct are standard tools of corporate (self-)governance which can regulate companies' behaviour more effectively than a top-down state sanction.[56] These codes identify corporate responsibilities towards stakeholders, requiring managers and directors to comply with specific guidelines when exercising their authority, both inside and outside the company, or to explain the departure from them (the 'comply or explain principle').[57] Moreover, codes of conduct - specifically when value-based and thus providing the set of ethical principles the MNC commits to respect - are a declaration of the corporate culture addressed to all the company's interlocutors.[58]

---

52 Robert Gilpin, *The Political Economy of International Relations* (Princeton University Press 1987); William I Robinson, *A Theory of Transnational Capitalism: Production, Class, and State in a Transnational World* (The Johns Hopkins University Press 2004) (as cited in Babic and others (n 51) 22).

53 Hans-Joachim Mertens, 'Lex Mercatoria: A self-applying system beyond national law?' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth Publishing 1997) 141.

54 Berman, 'Global Legal Pluralism' (n 7) 1197ff.

55 Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 Journal of Law and Society 50, 56.

56 Levit (n 6); Berman, 'A Pluralist Approach to International Law' (n 7) 311.

57 James Weber, 'Codes of Conduct, Ethical and Professional' in Robert W Kolb (ed), The SAGE Encyclopedia of Business Ethics and Society (2nd edn, SAGE Reference 2018) 498; OECD, 'Guidelines for Multinational Enterprises' (1976) OECD Doc C (76) 9930, para 34.

58 Stuart C Gilman, 'Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons' (Poverty Reduction and Economic Management (PREM) World Bank, Washington, Winter 2005) 8ff <www.oecd.org/mena/governance/35521418.pdf> accessed 2 June 2020.

2.2 Soft on the Inside, Hard on the Outside: the Legal Nature of Codes of Conduct

As Kristina Sandberg, former Business Area Manager of Management Systems at the Swedish Standard Institute icastically states: 'It is not money, but standards that make the world go around.'[59] Precisely, 'in a more globalised, interconnected and competitive world, the way that environmental, social and corporate governance issues are managed is part of companies' overall management quality needed to compete successfully.'[60] Codes of conduct, even if not law nor formally binding,[61] represent clear evidence that normative expectations of governments, NGOs and all relevant actors are now shifting.[62] From a reflective analysis, some authors have indeed argued that codes of conduct meets the three 'features of (hard) law'.[63]

First, codes of conduct are lawfully adopted as they fill the 'governance gap'[64] in accordance with the principle of subsidiarity. In other words, MNCs are the most closely related to those transnational issues that public actors fail to regulate.[65] The alleged democratic deficit of non-State actors may be something of a red-herring, insofar as states need not be democratic and the notion of civic participation is weak within the international legal order.[66] Moreover, corrupt governments have frequently accomplished the perpetration of human rights and environmental abuses at the expenses of their citizens.[67] Additionally,

---

59 Kristina Sandberg (Speech at the Social Responsibility Day, Stockholm, 14 October 2009) (as cited in Anders Carlsson, 'Corporate Social Responsibility: The Lex Mercatoria of Corporate Governance in the 21st century' (LLM thesis, University of Stockholm 2010) 53 <http://sccl.se.24-7webhosting.com/archive/uploads/documents/anders_carlsson_examensuppsats_anders_carlsson.pdf> accessed 2 June 2020).

60 UN Global Compact and Swiss Federal Department of Foreign Affairs, 'Who Cares Who Wins: Connecting Financial Markets to a Changing World' (United Nations Department of Public Information 2004) <www.unglobalcompact.org/docs/issues_doc/Financial_markets/who_cares_who_wins.pdf> accessed 2 June 2020, 1.

61 Christian Lundblad, 'Some Legal Dimensions of Corporate Codes of Conduct' in Ramon Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International 2005).

62 Hans W Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer 1980).

63 M Antonio García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law' (2011) 27 International Journal of Comparative Labour Law and Industrial Relations 337.

64 HRC (n 31) para 3.

65 García-Muñoz Alhambra, ter Haar and Kun (n 63) 361.

66 Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal 443, 462; Tully (n 14) 330-335.

67 *World Duty Free Company Limited v Kenya* (4 October 2006) Award, ICSID Case No ARB

despite their lack of representivity or electoral unaccountability, MNCs' democracy can be partly ensured through representivity and their capacity to speak for a sufficiently broad constituency in terms of membership and mandate.[68]

Second, clearly worded codes' specific commitment 'to comply with the law' have a normative quality and may be used as evidence in legal proceedings.[69] Furthermore, non-state standards fulfil both a pre-law (i.e. provide normative guidance and harmonisation, and build mutual confidence and transnational social consensus) and a para-law (i.e. contribute to the formation of the new lex mercatoria) functions.[70]

Third, 'while a company is not legally obliged under international law to comply with standards, those companies who have violated them have found, to their cost, that society at large will condemn them.'[71] Consumers want to know that the products they buy are not made by children or forced labour, with miserable pay, or through otherwise ethically questionable means. Pressures for social regulation arise out of the market itself, not out of concerns over sovereignty felt by the political leaders of countries in which the work for a multinational enterprise takes place.[72] Yet, a TV expose or individuals armed with a laptop can undo years effort to build brand loyalty;[73] by relying on their role of 'voice of

(AF)/00/7; Elena Pariotti, 'International Soft Law, Human Rights and Non-State Actors: Towards the Accountability of Transnational Corporations?' (2008) 10 Human Rights Review 139, 145; Tully (n 14) 330-335.

68 Questioning NGOs' legitimacy, the same reasoning may apply.

69 Hans W Baade, 'Codes of Conduct for Multinational Enterprises' in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer 1980) 407; O C Ferrell, Debbie Thome Le Clair and Linda Ferrell, 'The Federal Sentencing Guidelines for Organizations: A Framework for Ethical Compliance' (1998) 17 Journal of Business Ethics 353. See also *Marc Kasky v Nike Inc et al* 79 Cal App 4th 165 (1st Dist 2000), revised 45 P.3d 243 (Cal 2002); petition for certiorari filed (2002) 02 US 575 (*Kasky v Nike*).

70 Peters, Koechlin and Fenner Zinkernagel (n 14) 500; Eva Koche, 'Private standards in the North – effective norms for the South?' in Anne Peters and others (eds), *Non-State Actors as Standard Setters* (CUP 2010) 409ff.

71 Peter Frankental and Frances House, *Human Rights: Is It Any of Your Business?* (Amnesty International UK and Prince of Wales Business Leaders Forum 2000) 83-85.

72 Kari Tapiola, 'The Importance of Standards and Corporate Responsibilities- The Role of Voluntary Corporate Codes of Conduct' (OECD Conference on the Role of International Investment, Paris, 20-21 September 1999) <www.oecd.org/investment/mne/2089872.pdf> accessed 1 June 2020, 3.

73 Richard P Nielsen, *The Politics of Ethics: Methods for Acting, Learning, and Sometimes Fighting with Others in Addressing Ethics Problems in Organizational Life* (OUP 1996) 202.

society',[74]NGOs-led shame-and-blame campaigns can boycott a company's reputation;[75] ESG investors' mobilisation can impact on share price performances.[76] Rather than affecting freedom via physical coercion, hence, actors of contemporary Global Villages exercise 'softer' authority,[77] namely clever compliance mechanisms, [78] semantic authority[79] and governance by information.[80] What it is likely to be emphasised here is the three mechanisms' common ground, i.e. their ability to impact other actors' freedoms influencing their perceptions, creating pressure on their behaviours, shaping their reputation purely through the power of information and words. Unavoidably, tangible economic implications follow the 'collective punishment' of loss of credibility.[81]

As an example, the recent unearth of various corrupt corporate governance-related scandals (e.g. Enron[82] and Parmalat[83]) and the 2008 global financial crisis has have raised awareness

---

74 Jonathan P Doh and Hildy Teegen, 'Nongovernmental organizations as institutional actors in international business: theory and implications' (2002) 11 International Business Review 665, 667; Hildy Teegen, 'International NGOs as Global Institutions: Using Social Capital to Impact Multinational Enterprises and Governments' (2003) 9 Journal of International Management 271.

75 Maria S Tysiachniouk, *Transnational governance through private authority: The case of Forest Stewardship Council certification in Russia* (Wageningen Academic Publishers 2012) 52.

76 Anusha Goel, 'Volkswagen: The Protagonist in Diesel Emission Scandal' (2015) 5 *South Asian Journal of Marketing & Management Research* 32; Elizabeth Pollman, 'Corporate Social Responsibility, ESG, and Compliance' in D Daniel Sokol and Benjamin van Rooij (eds) *Cambridge Handbook Of Compliance* (forthcoming).

77 von Bogdandy and others, 'From Public International to International Public Law' (n 49) 141; Armin von Bogdandy and others, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German Law Journal 1375, 1388; Max Weber, *Law in Economy and Society* (Max Rheinstein 1954) 18-19 (as cited in Berman, 'Global Legal Pluralism' (n 7) 1178) (describing means of coercion applied by 'private' organisations).

78 von Bogdandy and others, 'From Public International to International Public Law' (n 49) 141. Clever compliance mechanisms induce actors to ensure compliance (eg nation-states to enforce international arbitral awards) under the threat of reputational or diplomatic damages.

79 ibid 142. See: Ingo Venzke, 'Semantic Authority' in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts of International Law: Constructing Intelligibility in International Legal Studies* (Edward Elgar Publishing 2014) 815: 'The concept of semantic authority [is] defined as an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape'.

80 von Bogdandy and others, 'From Public International to International Public Law' (n 49) 143.

81 Johan J Graafland and Hugo Smid, 'Reputation, Corporate Social Responsibility and Market Regulation' (2004) 49 Tijdschrift voor Economie en Management 271, 275.

82 Paul M Healy and Krishna G Palepu, 'The Fall of Enron' (2003) 17 Journal of Economic Perspectives 3.

83 Vincent Boland, 'Fall of Parmalat is a saga of baroque proportions' *The Financial Times* (Milan, 19 December 2008) <www.ft.com/content/c275dc7c-cd3a-11dd-9905-000077b07658>

of the broader social footprint of corporations. To legislative[84] and political[85] responses of dubious - if not minor - efficacy, non-mandatory measures have echoed. Mentioning one, the UN Global Compact is a policy framework which provides voluntary principles and standards for responsible business conduct in a variety of human rights areas including labour, environment, anti-corruption and bribery.[86] Tellingly, it finally aims to make the MNCs' achieving the greater good, developing solutions to address poverty and inequality and to support education and health.[87] Although the principles are of course non-binding, companies may choose to incorporate the Global Compact into their strategies and share their activities and results on an online community. Once again, hence, information disclosure and public image demonstrate to pressure corporations' performances more than rigid bureaucratic structures.

3. A New Corporate Social Responsibility-inspired Lex Mercatoria

In light of the above, it seems, thus, reasonable to argue that the 21st century corporations' economic success is depending upon their capacity to satisfy the new demands of Corporate Social Responsibility (CSR). In the last decades, increasing attention has been posed to the development of corporate governance in close relation with issues concerning business ethics, human rights, environmental protection and accountability, suggesting that corporations ought to be operated for the users' benefit of more than just the shareholders.[88] In other words, if corporate governance seeks to ensure MNC's compliance with applicable laws and minimum standards, CSR refers to corporations' ability to move beyond

accessed 2 June 2020.

84 Sarbanes-Oxley Act (2002) PL 107-204, 116 Stat 745 (SOX). The SOX Act was the political answer to the Enron's scandal. See: Roberta Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance' (2005) 114 Yale Law School Faculty Scholarship Series 1521.

85 G20 and OECD, 'Principles of Corporate Governance' (OECD Publishing 2015) <www.oecd.org/daf/ca/Corporate-Governance-Principles- ENG.pdf> accessed 2 June 2020; See: Cally Jordan, 'International Financial Standards: An Argument for Discernment' (2018) 135 Center for International Governance Innovation Policy Brief 7: 'the new political dimension to the OECD Principles became unabashedly manifest' and 'a riot of diverse views.'

86 UN Global Compact, 'Guide to Corporate Sustainability' (UN Global Compact Library 2014) <www.unglobalcompact.org/library/1151> accessed 2 June 2020, 11.

87 ibid 30ff.

88 Doreen McBarnet, 'Corporate Social Responsibility beyond Law, through Law, for Law' (University of Edinburgh Working Paper Series 2009/3, 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369305> accessed 2 June 2020, 1, 9ff).

compliance and to 'mee[t] ethical and social expectations and respon[d] in a responsible manner to new challenges.'[89]

A crucial next step in the reasoning is noting that considering CSR as an instrument to increase financial performances, reputation, brand awareness toward consumers or loyalty of the enterprise's employees, allows CSR itself to ultimately gain the role of legitimacy's provider. According to theorists of the 'Instrumental View on CSR', it both enables the company to be seen as a benefit to the society by deploying strategic policies (i.e. 'pragmatic' legitimacy) and to obtain a positive reputation by conforming to broadly shared values (i.e. 'cognitive' legitimacy).[90] However, if rejecting this approach and instead embracing the 'Political-Normative View on CSR', the acquisition of another kind of legitimacy seems to be necessary: that is the 'moral' legitimacy. How can MNCs' outputs, procedures or boards reflect a shared moral consensus in today's globalised, fragmented and multi-level order? The answer - again - is kept on the usage of information and words, albeit in the development of a communicative deliberative process with all stakeholders (creditors, investors, employees, customers, suppliers, groups representing the environment and the wider community).[91]

Finally, this statement also seems to give a satisfactory answer to the questions posed at the end of section 2. Precisely, MNCs' legitimacy requirement is satisfied by a due diligence process which calls companies to stop chasing only profits (i.e. their egoistic interests), but rather acting according to social values and being careful not to 'infring[e] the rights of others':[92] shortly said, 'being socially responsible is no longer an option, it is now a business requirement.'[93] Still voluntary, yet indispensable. This hybrid *corpus* of CSR initiatives thereby drives business behaviour in the absence of a recognised or effective hierarchical command

---

89 Elisabet Garriga and Domènec Melé, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53 Journal of Business Ethics 51, 59-60.

90 Friederike Schultz, 'The Construction of Corporate Social Responsibility in Network Societies: A Communication View' (2013) 115 Journal of Business Ethics 681, 682-683.

91 Guido Palazzo and Andreas Georg Scherer, 'Corporative legitimacy as deliberation: A communicative framework' (2006) 66 Journal of Business Ethics 71, 73ff; Andreas Georg Scherer and Guido Palazzo, 'The new political role of business in a globalized world - A review of a new perspective on CSR and its implications for the firm, governance, and democracy' (2011) 48 Journal of Management Studies 899, 914-917 (as cited in Schultz (n 90) 683-684); Alice Klettner, 'Governing Corporate Responsibility: the Role of Soft Regulation' in Güler Aras and Coral Ingley (eds), *Corporate Behavior and Sustainability. Doing Well by Being Good* (Gower 2016) 87.

92 John G Ruggie, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (Human Rights Council 4th Session, A/HRC/4/035 9 February 2007) 9.

93 Samuel O Idowu and Walter Leal Filho, *Global Practices of Corporate Social Responsibility* (Springer 2009) 3.

and, in the end, may inspire the new lex mercatoria to implement fundamental rights and shared interests.[94]

4. MNCs v Human Rights: CSR synthesis

Among the higher political goals left aside by the new lex mercatoria, human rights undoubtedly and dramatically stand out. From the well-known *Kasky v Nike* case,[95] to the Rana Plaza disaster, the world's deadliest accidental building collapse ever,[96] and again from Nestlé, fighting child labour allegations in Ivory Coast and Thailand,[97] to the Chevron's involvement in its subsidiary Texaco Inc.'s harms to the indigenous inhabitants in the Ecuadorian rainforest,[98] blatant abuses have been tragically frequent and often dismissed as unavoidable consequences and natural *contrapasso* for the wide benefits the globalisation has brought.[99] However, in the heels of the massive availability of information thanks to ICTs, demands for greater corporate responsibility have urgently emerged.[100] In this direction, CSR voluntary codes have begun to (try to) fill the gap between traditional corporate governance goals (i.e. egoistic business profits) and the evidently missing sustainability.[101] In conjunction, international entities and communities, such as the aforementioned UN Global Compact and the OECD Guidelines for Multinational Enterprises recommend the

94 Anders Carlsson (n 59) 80-84.

95 *Kasky v Nike* (n 69).

96 See: Greg Meckbach, 'Top court releases decision in $2-billion building collapse lawsuit against Loblaws', *Canadian underwriter* (8 August 2019) <www.canadianunderwriter.ca/insurance/top-court-releases-decision-in-2-billion-building-collapse-lawsuit-against-loblaws-1004166803/> accessed 2 June 2020.

97 Annie Kelly, 'Nestlé admits slavery in Thailand while fighting child labour lawsuit in Ivory Coast', *The Guardian* (London, 1 February 2016) <www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand- fighting-child-labour-lawsuit-ivory-coast> accessed 2 June 2020; See also: *John Doe I v Nestlé SA*, 748 F Supp 2d 1057 (CD Cal 2010).

98 Diane Desierto, 'From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investors' Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of International Environmental Remedies for Private Victims' (*EJIL Talk!*, 13 September 2018) <https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/> accessed 2 June 2020.

99 Eg free trade, easier and faster flux of information, open lines of communication; See: Jagdish N Bhagwati, *In Defense of Globalization with a New Afterword* (OUP 2007).

100 McBarnet (n 88) 7ff; *Kasky v Nike* (n 69).

101 World Commission on Environment and Development, 'Our Common Future' (OUP 1987) 4: 'sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.

adoption and the implementation of policy commitments to respect the environment and human rights and encourage the cooperation with states and non-state bodies in the remediation of violations.[102]

All the MNCs listed above have now been introducing - and then disclosing on their respective websites - codes of conducts and CSR commitments to core labour rights, healthy and safe working environment.[103] Undoubtedly, mere commitments are not enough.[104] Nevertheless, as already analysed, these programmes are anything but meaningless words.[105] In the governance gaps left by an insufficient public dimension and in the weakness and delegitimisation of the national governments, it would not seem helpful precluding the emergence of spontaneous and addressees-closer systems of regulation.[106] To succeed in instilling the pursuit of common interests (i.e. human rights) may finally be the key element to guarantee the full legitimacy (the above-mentioned 'ethical legitimacy') of the new CSR-oriented lex mercatoria.

---

[102] OECD, 'OECD Guidelines for Multinational Enterprises' (OECD Publishing 2011)<http://dx.doi.org/10.1787/9789264115415-en> accessed 31 May 2020, ch IV.

[103] See: Mango, 'Sustainability Report 2017' <https://shop.mango.com/web/oi/servicios/company/rsc/memorias.php> accessed 2 June 2020; Auchan Holding, 'Our responsible commitments' <www.auchan-holding.com/en/our-responsible-commitments> accessed 2 June 2020; Benetton Group, 'Sustainability reports' <www.benettongroup.com/sustainability/> accessed 2 June 2020; Nike, 'Human Rights and Labor Compliance Standards' <https://purpose.nike.com/human-rights> accessed 2 June 2020; Nestlé, 'Respecting and Promoting Human Rights. Rights are for everyone' <www.nestle.com/csv/impact/respecting-human-rights> accessed 2 June 2020; Chevron Corp, '2019 Corporate Responsibility Report. The human energy company' (2020) <www.chevron.com/-/media/shared- media/documents/2019-corporate-sustainability-report.pdf> accessed 2 June 2020.

[104] See: Richard Luscombe, 'Nestlé plan to take 1.1m gallons of water a day from a natural springs sparks outcry', *The Guardian* (26 August 2019) <www.theguardian.com/business/2019/aug/26/ nestle-suwannee-river-ginnie-springs-plan-permit> accessed 2 June 2020.

[105] MP Miles and Jeffrey Corvin, 'Environmental Marketing: A Source of Reputational, Competitive, and Financial Advantage' (2000) 23 Journal of Business Ethics 299; W Gary Simpson and Theodor Kohers, 'The Link Between Corporate Social and Financial Performance: Evidence from the Banking Industry' (2002) 32 Journal of Business Ethics 97.

[106] Susan Strange, *The Retreat of The State: The Diffusion of Power in the World Economy* (CUP 1996) 16-43.

5. Conclusion: The New Lex Mercatoria through the lens of Liberal-Democratic Constitutionalism

It has been described how, in times of post-unitary models, the increasing importance of private, informal and transnational phenomena renders public law approaches 'ill-suited, if not hopeless, to take care of common interests.'[107] However, scholars have questioned the real nature of the new lex mercatoria, its legitimacy and, ultimately, its real autonomy and self-sufficiency.[108] If the legitimacy issue can be solved by the development of a communicative deliberative process, it is not that simple to answer affirmatively to the last two objections. Indeed, adopting a public law point of view, all deficits of the Teubner's 'self-referentiality'[109] theory of new lex mercatoria arise.[110] Teubner, in fact, flings the constitution - emblem of the highest democratic and common interests - as a state's authoritarian and paternalistic imposition, neutralising economic powers and stamping out all private resourcefulness. As a matter of facts, the crucial role of private actors and the much more solid efficiency of their autonomous codes of conduct are undeniable: a return to the traditional concept of constitutionalism would end up in a nation-state's counterproductive act of arrogance and blindness. Nevertheless, if - following again the suggestions of Gunther Teubner - the constitution and, broadly speaking, the public domain would be abolished in favour of merely egoistic goals, what kind of space would be left for the protection of equality, shared values and human rights?

Multinational business corporations, as de facto participants of the new lex mercatoria that has woken up in the Postnational Constellation, have the power and the authority to shape new sub-paradigms and rules, insofar as the word- and information-based coercion push the conducts of the different interactors.[111] But with power comes responsibility.[112] Under the pressure of the civil society and other international regulatory bodies, MNCs have the social duty to shift their balance from a particularistic profit-based-only focus to once more caring of the *res publica*. In pursuing this, their tools are the private and voluntary codes of CSR, which are, on one side, reports of the sustainable goals already achieved and a

---

107 von Bogdandy and others, 'From Public International to International Public Law' (n 49) 121.

108 von Bogdandy and Dellavalle (n 33) 77ff.

109 Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 American Journal of Comparative *Law* 769, 790ff.

110 ibid.

111 Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 Boston University International Law Journal 309, 345.

112 Justine Nolan, 'With Power Comes Responsibility: Human Rights and Corporate Accountability' (2005) 28 UNSW Law Journal 581.

programmatic *manifesto* of the ones still in the making, on the other. Effective disclosure and public accountability should, thus, be the keys to externally check and balance corporations' actions.

It is, however, evident that the signalling effect will never be fully avoidable and CSR itself may end being 'a mere choosing and picking by the corporate actors, limiting the intervention to the fields where costs are low and media impact is high.'[113] Nevertheless, even though a mere signal, initial announcements may successfully lead to change corporate governance views and to instil a better culture in the long period, becoming new legal customs.[114] Tellingly, such a shift may be already in the making. Recently indeed, historical shareholders-value-dogma supporters as the US[115] and the UK[116] have taken an ethical stand, strengthening fiduciary duties on a more stakeholders-friendly basis. On the European continent, France has redefined *la raison d'être* of enterprises[117] and Italy has eventually demonstrated due attention to the 'sustainable success of the firm' and ESG investments.[118] Lastly, on 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced that by 2021 the European Commission will develop legislation that would require EU companies to carry out human rights and environmental due diligence.[119] Meaningfully, a joint call pushing for such mandatory human rights due diligence had come from more than 100 international investors representing assets over US$4.2 trillion.[120]

---

113 Sergio Dellavalle, 'Responsibility and Rights' (2019) 20 German Law Journal 449, 457.

114 Cristie Ford and David Hess, 'Corporate monitorships and new governance regulation: in theory, in practice and in context' (2011) 55 Law & Policy 509, 513; Bob Hepple, 'Does Law Matter? The Future of Binding Norms' in George P Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO Studies 2007) 222-224.

115 Business Roundtable, 'Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"' (Washington, 19 August 2019) <www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> accessed 2 June 2020.

116 Companies Act 2006 s 172; Financial Reporting Council, The UK Code of Corporate Governance (2018) 1, principles 1, 4-5.

117 *Loi* n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (Loi Pacte)

118 Comitato per la Corporate Governance, 'Codice di Corporate Governance' (2020) <www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf> accessed 2 June 2020, art 1.

119 Heidi Hautala MEP office, 'Webinar hosted by Responsible Business Conduct Working Group' (29 April 2020) <https://vimeo.com/413525229> accessed 2 June 2020.

120 Investor Alliance for Human Rights, 'The Investor Case for Mandatory Human Rights Due Diligence' (24 April 2020) <https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case% 20for%20mHRDD%20-%20FINAL_0.pdf> accessed 2 June 2020.

Without denying their autonomy, CSR programs can - and should - welcome the 'public' dimension incorporating and implementing fundamental human rights and common interests into their own private framework. Accountability mechanisms and external scrutiny, such as NGOs, customers and stakeholders' activism, but also peer and competition pressure, will be essential in order to avoid the downgrading of such responsibility into an enlightened paternalism or selfishness.[121]

Significantly, this path would not contest with the inspirational solution suggested by some scholars of saying 'no' to a transnational law that favours the developed over the developing,[122] and then evolving from traditionally hierarchical constitutionalism to *liberal-democratic* constitutionalism.[123] Yet, rather it would constitute an ideal completion of those approaches: a CSR- and human rights-oriented lex mercatoria would be able to embrace both the liberalism typical of the free-markets and the democracy characterising universal principles, and then to give both renewed vital lymph to the 'old' constitutionalism and full coherency and rationality to the new lex mercatoria.

[121] Dellavalle (n 113) 457.

[122] Muthucumaraswamy Sornarajah, 'Why "No" to Transnational Legal Studies', in Cornelia T L Pillard and others, 'Why Transnational Legal Education?' (Georgetown CTLS, London, December 2009) 20, 25 <www.law.georgetown.edu/ctls/wp-content/uploads/sites/33/2018/01/CTLS-Why-Transnational- Education.pdf> accessed 2 June 2020.

[123] von Bogdandy and Dellavalle (n 33) 82.

THE RIGHT TO LIFE: ARE THE STANDARDS DEVELOPED BY GLOBAL AND REGIONAL HUMAN RIGHTS MECHANISMS SUFFICIENT?

Lydia Sedda*

Abstract

'The most sacred laws of justice are the laws which guard the life and person of our neighbour.'
- Adam Smith, The Theory of Moral Sentiments (1979), Part II, Chapter 2.
This article aims to question the protection of the fundamental right to life, recognised in almost all international and regional human rights provisions, among which Article 3 of the Universal Declaration of Human Rights (UDHR): 'Everyone has the right to life, liberty and security of person.'
Far from being absolute, ensuring the right to life is challenged by the meaning of "life", which should perhaps rely more on the principle of dignity in human life.

* Lydia Sedda is a 20-year-old French student, currently enrolled in her third year of Law and Economics double bachelor's degree in Nancy (France). She spent one semester at the University of Leeds where she discovered ELSA UK and studied, among other things, International Human Rights Law. Passionate about legal issues surrounding human rights, she is willing to pursue a career advocating for fundamental freedoms in international and European organisations.

1. Introduction

While more than a hundred countries entirely abolished the death penalty, Japan is still executing in secrecy, violating the right to life protected by international human rights law. Amnesty International exposed 'the government's shocking lack of respect for the right to life'.[1] International provisions protecting the right to life are numerous: from the Universal Declaration of Human Rights (UDHR, Article 3), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Article 2), the International Covenant on Civil and Political Rights (ICCPR, Article 6) to the Convention on the Rights of the Child (CRC, Article 6); international and regional treaty-bodies have included this fundamental right. However, the right to life is far from being an absolute right since it is limited in many ways, for instance when 'non-arbitrary'[2] lethal force or the death penalty is permitted. It might be at risk in several contexts, because of state or non-state actors, thus the recognition of the states' positive obligations implied by the right to life is increasing and evolving. Therefore, positive obligations can be tackled when they are not considered 'reasonable' because too expensive or intrusive.[3] Above all, the meaning of life perhaps should shift to a more philosophical understanding, based on the principle of dignity in human life, ensuring the effective protection of the right to life.

2. The recognition of the right to life in international human rights law

Recognised in almost all international and regional human rights treaties and instruments, the right to life has fundamental importance. The negative obligation of the right to not be arbitrarily deprived of one's life has become a customary international norm thus is non-

1 Amnesty International, 'Japan: Execution on a shameful stain on human rights record of Olympic hosts' (26 December 2019) <https://www.amnesty.org/en/latest/news/2019/12/japan-execution-a-shameful-stainon-human-rights-record-of-olympic-hosts/> accessed 12 January 2020.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

3 S Wicks, 'The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties', (2012) 12 Human Rights Law Review 199.

derogable,[4] even in time of public emergency threatening the life of the nation.5 However, this prohibition is not an absolute right because international conventions such as the ICCPR and the ECHR allow in certain circumstances the use of lethal force, e.g. ICCPR (n 3) Article 6. Multiple treaties increasingly recognised the positive obligations binding on the states, emphasising that the right to life shall be protected by law:[6] it is required to 'regulate the protection of life and prohibit the arbitrary deprivation of life',[7] to take measures and minimise the risk of 'potentially lethal hazards'[8] and to 'criminalise, investigate, prosecute and punish unjustified killings'.[9] The state parties must 'put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life',[10] including unjustified killings or disciplinary sanctions,[11] avoiding a lawful

4 Bantekas and Oette, *International Human Rights Law* (CUP 2016) 342; UN Human Rights Committee 'General Comment 6: The right to life' (Sixteenth session, 30 April 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) para 1; UN Human Rights Committee, 'General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 para 10.

5 UN Human Rights Committee, 'General Comment 6' (n 4) para 1.

6 For physical abuse in detention, see: *Selmouni v France* ECHR 1999-V 149; ICCPR art 6(1); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 6; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW) art 9; UN General Assembly, Convention on the Rights of Persons with Disabilities, Resolution 61/106 (24 January 2007) UN Doc A/RES/61/106 (CRPD) art 19; ECHR art 2(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 4(1).

7 *White and Potter (Baby Boy) v United States* Inter-American Commission on Human Rights Resolution 23/81 Case 2141 (6 March 1981); See embryo not considered as a person in *Artavia Murillo et al. 'In Vitro Fertilization' v Costa Rica* Inter-American Court of Human Rights Series C No 257 (28 November 2012) para 185-264; *Vo v France* ECHR 2004-VIII 1; See the judicial authorisation of withdrawal of artificial nutrition and hydration regarding Article 2 in *Lambert and Others v France* ECHR 2015-III 1.

8 *Öneryildiz v Turkey* ECHR 2004-XII 1, para 89.

9 Bantekas and Oette (n 4) 350; *La Cantuta v. Peru* Inter-American Court of Human Rights Series C No 162 (2006).

10 *Pueblo Bello Massacre v Colombia*, Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 120; UN Human Rights Committee 'Camargo (on behalf of Suarez de Guerrero) v Colombia, Communication No 45/1979' (1979) UN Doc CCPR/C/15/D/45/1979.

11 *Mapiripan Massacre v Colombia* Inter-American Court of Human Rights Series C No 122 (2005) para 235; See certain cases where the killing was not intentional and civil sanctions may be sufficient e.g. in *Vo v France* (n 7) para 90.

situation where a person's life is at risk.[12] Positive obligations are heavier when there is a 'known risk';[13] such as a complaint on which the authorities should 'investigate promptly' and provide special protection.[14] When a serious violation of the right to life is stated, the state shall undertake a complete investigation providing sufficient evidence and information to prosecute and punish (see McCann v UK or Dodov v Bulgaria).[15] However, this duty to investigate and prosecute is often limited and delayed, implying impunity and inadequate legal measures.[16] States also must prevent the disappearance of individuals, usually leading to 'arbitrary deprivation of life'.[17] In the Kurt v Turkey case, the European Court of Human Rights (ECHR) held that the 'crime of disappearances' consists of 'deprivation of liberty, affected by government agents, in absence of information or refusal to disclose thereby placing such persons outside the protection of the law'.[18] It is a 'complex' form of human rights violation, in absence of a body, where the state is unable or unwilling to explain the disappearance, concerning not only the right to life but also the right not to be subjected to ill-treatment.[19] Therefore, the recognition of positive obligations is tackled by certain

12 For women forced to undergo life-threatening illegal abortions, see: UN Human Rights Committee 'Concluding Observations: Venezuela' (26 April 2001) UN Doc CCPR/CO/71/VEN para 19; For a vulnerable group previously targeted, see: *Gonzalez et al. ('Cotton Field') v Mexico* Inter-American Court of Human Rights Series C No 205 (16 November 2009) para 249-402.

13 See 'real and immediate risk' in *Osman v United Kingdom* App no 23452/94 (ECHR, 28 October 1998), para 116; A Donald and others, *Evaluating the Impact of Selected Cases under the Human Rights Act on Public Services Provision* (Equality and Human Rights Commission 2009) 28-39.

14 *Gongadze v Ukraine* (8 February 2006) ECHR App no 34056/02 paras 164-171, 175-180; *Hugh Jordan v United Kingdom* (4 May 2001) ECHR App no 24746/94; *Brecknell v United Kingdom* (4 January 2007) ECHR App no 18727/06.

15 *Mapiripan Massacre v Colombia* (n 11) para 219; For 'prompt, impartial and effective information', see: *Hugh Jordan v United Kingdom* (n 14) 105-8; *Nachova and Others v Bulgaria* ECHR 2005-VII 1; UN Human Rights Committee 'Communication No. 1862/2009' (18 April 2012) UN Doc CCPR/C/103/D/1862/2009 para 7.4; *McCann and others v United Kingdom* (1995) ECHR Series A no 324; *Dodov v Bulgaria* (17 January 2008) ECHR App no 59548/00.

16 *Barrios Altos v Peru* Inter-American Court of Human Rights Series C No 83 (2001) para 41; See 'duty to investigate alleged violations of the right to life' in *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights Series C No 4 (1988) paras 172-7.

17 UN Human Rights Committee 'General Comment 6' (n 4); *Kurt v Turkey* ECHR 1998-III 1187; *Timurtas v Turkey* ECHR 2000-VI 303; UN Human Rights Committee 'Elcida Arévalo Perez et al v Colombia, Communication No 181/1984' (22 November 1989) UN Doc CCPR/C/37/D/181/1984; *Velasquez Rodriguez v. Honduras* (n 16).

18 *Kurt v Turkey* (n 17).

19 For 'the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the state parties are obliged to respect and guarantee', see: *Velasquez-Rodriguez v Honduras* (n 16) para 155; *Timurtas v Turkey* (n 17).

circumstances enabling the state to justify its inaction, when it is for instance expensive or dangerous to enforce them: in the EW v The Netherlands judgment, deployment of nuclear weapons was not considered as a violation of the right to life regarding Article 6 of the ICCPR because there was no 'real or immediate risk' onto the applicants' life.[20]

3. The right to life, threatened by state and non-state actors

The right to life is threatened in multiple contexts and is traditionally protected from state actors. According to the United Nations Special Rapporteur, life is at risk through (1) a state's use of force and (2) its failure to provide adequate protection from threats to life;[21] meaning the state accountability is always triggered. Article 6(1) of the ICCPR highlights how states should 'take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces'.[22] Indeed, deliberately killing individuals or groups, even extrajudicial targeted persons, is included in the use of lethal force.[23] This operation is permitted when absolutely necessary and proportionate to the aims. Article 2 (2) of the ECHR states it has to be in 'defence of any person from unlawful violence'; 'in order to effect a lawful arrest or to prevent escape of a person lawfully detained' or 'in action lawfully taken for the purpose of quelling a riot or insurrection',[24] also affirmed in the leading case *McCann v UK* about a shoot-to-kill operation to prevent a terrorist attack. However, the right to life is also at risk when no death occurs:[25] through violence in the custodial context or when individuals are enforced to disappear.[26] The state parties are entailed to provide safeguards against violence and special assistance in custody,[27] but also to take precautionary measures about prison violence, avoiding the killing

20 UN Human Rights Committee 'EW et al v The Netherlands, Communication No 429/1990' (19 April 1993) UN Doc CCPR/C/47/D/429/1990.

21 UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (28 March 2010) UN Doc A/HRC/14/24/Add.6.

22 ICCPR art 6(1); UN Human Rights Committee 'General Comment 6' (n 4).

23 UN Human Rights Council (n 21).

24 ECHR art 2(2); *Gulec v Turkey* (27 July 1998) ECHR App no 21593/93 para 71; *McCann v UK* (n 15) para 149; For 'no alternative to protect life', see: *Andronicou and Constantinou v Cyprus* (1997) 25 ECHR 491; For 'chaotic use of firearms, not reasonable circumstances', see *Makaratzis v Greece* ECHR 2004-XI 195; *Nachova v Bulgaria* (n 15); For 'no negotiation, warning nor opportunity to surrender', see: *Camargo v Colombia* (n 10).

25 *Makaratzis v Greece* (n 24).

26 UN Human Rights Council (n 21)

27 *Salman v Turkey* ECHR 2000-VII 365; *Ximenes-Lopes v Brazil* Inter-American Court of Human Rights Series C No 149 (4 July 2006) para 101-11 and 120-50; For prison violence, see: Council of Europe: Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT Standards*, (8 March 2011) CPT/Inf/E (2002)1-Rev 2010, para 27, <https://www.refworld.org/docid/4d7882092.html> accessed 19 June 2020.

of an individual at risk (*Edwards v UK*).[28] The possession of nuclear weapons threatens the right to life and squanders 'vital' resources, considered as the 'greatest danger to the right to life which confront mankind today' even if fear and suspicion between the states preserve to some extent the right to life.[29] International provisions such as the ICCPR, ECHR or ACHR consider the capital punishment as an exception to the right to life,[30] and it is not 'arbitrary' according to the ACHPR.[31] Therefore, abolition of the death penalty is 'desirable',[32] regarding Article 6 of the ICCPR and regional protocols moved this matter forward (a majority of African states have abolished the death penalty since).[33] The death penalty can only be applied for the most serious crimes and is subject to a strict series of conditions,[34] restricting the scope of the capital punishment. The Courts shall respect the procedures[35] and consider special circumstances before imposing it:[36] they have for instance to exempt certain categories of individuals, as children (under 18 years old when the crime was committed)[37] and mentally ill persons. The death penalty is often closely considered as inhuman and degrading treatment, especially when imposed following an unfair trial,

---

28 For self-harm or violence from other prisoners which may engage the responsibility of the state both under the right to life and prohibition of ill-treatment (the authorities ignored the vulnerability of certain prisoners and a young detainee was killed by his violent mentally ill cellmate), see: *Paul and Audrey Edwards v United Kingdom* ECHR 2002-II 137, para 57.

29 UN Human Rights Committee 'General Comment 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life' (9 November 1984) UN Doc HRI/GEN/1/Rev.1.

30 ICCPR art 6(2); ECHR art 2(1); ACHR art 4(2).

31 *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*, Communication no 242/2001 (20 November 2003) African Commission on Human and Peoples' Rights (ACHPR), para 43.

32 ICCPR art 6; UN General Assembly, Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty, Resolution 44/128 (15 December 1989) UN Doc A/RES/44/128.

33 Protocol to the American Convention on Human Rights to Abolish the Death Penalty ('Pact of San Jose') (entered into force 28 August 1991) OAS Treaty Series No 73 (1990); 'Report of the Working Group on the Death Penalty: Study on the Question of the Death Penalty in Africa' (ACHPR 2011); *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Repuclic of Congo*, Communication no 259/2002 (24 July 2013) ACHPR, paras 68-9.

34 UN Human Rights Committee, 'General Comment 6' (n 4) para 6.

35 *Khoroshenko v Russian Federation* (UN HRC, 29 March 2011) UN Doc CCPR/C/101/D/1304/2004 para 9.11; *Öcalan v Turkey* ECHR 2005-IV 47, para 166; UN Human Rights Committee, 'General Comment 6' (n 4) para 7; UN Human Rights Committee, '*Khalilov v Tajikistan*, Communication No 973/2001' (13 April 2005) UN Doc CCPR/C/83/D/973/2001 paras 7.5-7.6; *Al-Saadoon and Mufdhi v United Kingdom* 2010-II 61, paras 120-122.

36 *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* Inter-American Court of Human Rights Series C No 9 (2002) para 98-109; UN Human Rights Committee, 'Anura Weerawansa v Sri Lanka, Communication No 1406/2005' (17 March 2009) UN Doc CCPR/C/95/D/1406/2005 para 7.2.

37 CRC art 37(a); ICCPR art 6(5); UN Human Rights Committee 'Sahadath v Trinidad and Tobago, Communication No 684/1996' (1996) UN Doc CCPR/C/74/D/684/1996.

because of the method of execution or the lack of notice to the convict and its relatives.[38] However, binding the capital punishment to inhuman treatment may shift the focus from the right to life to the prohibition of inhuman treatment, allowing the states to tackle the fundamental right to life.[39] Abolition was strongly suggested by Article 6 (2) to (6) of the ICCPR but it is more echoing as a limit than a prohibition. Increasingly, the death penalty is considered as unacceptable in international law: the Council of Europe at first introduced a soft requirement 'for those countries who felt prepared for the step' to abolish the capital punishment, but after the Cold War revolutions it decided to make it mandatory and a requirement to obtain the Council's membership.[40] Progress has been made, nonetheless capital punishment is still known as a breach to the right to life. Furthermore, non-state actors can threaten the right to life during a conflict where rebel or violent groups (such as Al-Qaida or the so-called Islamic State) are responsible of numerous killings.[41] For instance, *Ergi v Turkey,* alongside *McCann v UK,* represents a "milestone" in the ECtHR caselaw: the applicant's sister was accidentally shot by the Turkish authorities in a planned armed ambush aiming to capture members of the Kurdish Workers' Party (PKK, a guerrilla organisation). Even if there was no evidence that the bullet which killed Havva Ergi was fired by the military, the Courts held in paragraph 79 that Turkey should have investigated the killing especially when the serious and frequent conflicts between the authorities and the PKK were known.[42] The arbitrary deprivation of life might constitute a crime against humanity,

---

38 *Öcalan v Turkey* (n 35) paras 167-75; UN Human Rights Committee 'Mwamba v Zambia, Communication No 1520/2006' (2010) UN Doc CCPR/C/98/D/1520/2006 para 6.8; UN Human Rights Committee, 'Chitat Ng v Canada, Communication No 469/1991' (7 January 1993) UN Doc CCPR/C/49/D/469/1991 paras 16.2-16.4; UN Human Rights Committee, 'Natalia Schedko v Belarus, Communication No 886/1999' (3 April 2003) UN Doc CCPR/C/77/D/886/1999 para 10.2; *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*, Communication No 277/2003 (12 October 2013) ACHPR paras 174-177.

39 Bantekas and Oette (n 4); UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (14 January 2009) UN Doc A/HRC/10/22 paras 29-48; *Al-Saadoon and Mufdhi v UK* (n 35) para 120.

40 Council of Europe, *Death Penalty: Beyond Abolition* (Council of Europe Publishing 2004); ECHR Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty; B Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62 International and Comparative Law Quarterly 523.

41 UN Human Rights Council (n 21).

42 *Ergi v Turkey* (28 July 1998) ECHR App no 23818/94; For 'the absence of any state responsibility for the death of [the husband] does not exclude the applicability of Article 2', see: *Rod v Croatia* (18 September 2008) ECHR App no 47024/06; J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 European Journal of International Law 701.

as much as genocide, severely prohibited in International Human Rights Law.[43] This fundamental right to life is also at risk in a context of peace, threatened by deadly domestic violence (*Opuz v Turkey*), sexual violence *('Cotton Field'* case) or health fatalities (*Oneryildiz v Turkey, Erikson v Italy*).[44] In a context of the Covid-19 pandemic, we could argue that the lack of precautionary measures might be a threat to the right to life, especially for at-risk individuals. As the *Osman v UK* (n 14) case sets the positive obligation to 'take preventive operational measures to protect an individual whose life is at risk' (para 115), state parties are expected to establish a framework such as the Coronavirus Act 2020 passed under the Health Protection (Coronavirus Restrictions) Regulations 2020 in the United Kingdom, including a national quarantine. These measures infringe on certain rights and freedoms to protect people's lives, thus ensuring greater value to the fundamental right to life.

4. The absence of a consensus on the meaning of "life"

The meaning of life is important to ensure the effective protection of the right to life by the state parties. In fact, a narrow interpretation would threaten the right to life, but an overinclusive understanding raises complex controversies.[45] As previously mentioned, the traditional understanding of the right to life preserves civil rights against an 'arbitrary' deprivation of life from state or non-state actors. However, Article 6 (2) of the CRC includes a right to survival: 'state parties shall ensure to the maximum extent possible the survival and development of the child' leading states to take measures 'reducing infant mortality, increasing life expectancy' (eliminating malnutrition and epidemics).[46] We could thus argue that the meaning of life should be extended to include the conditions necessary for life, such as the basic economic and social needs.[47] The African Commission on Human Protection of Rights (ACHPR), the Asian Human Rights Charter and the Arab Charter on Human Rights acknowledged the duty of state parties to ensure the right to life with access to basic needs and inherent dignity of human life including the right to a 'clean and healthy

43 Rome Statute of the International Criminal Court (ICC Rome Statute, as amended) 2187 UNTS 3, arts 6-8.

44 Bantekas and Oette (n 5) ch 8.2; For domestic violence, see: *Opuz v Turkey* ECHR 2009-III 107; For sexual violence, see: *Gonzalez et al. ('Cotton Field') v Mexico* (n 12); For health hazards such as operation of dangerous plants, see: *Öneryildiz v Turkey* (n 8); For hospital fatalities, see: *Erikson v Italy* (26 October 1999) ECHR App no 37900/97.

45 For 'often the information given concerning the right to life was limited to only one aspect of this right and it shouldn't be interpreted narrowly', see: UN Human Rights Committee (n 4).

46 UN Human Rights Committee (n 4) and CRC art 6.

47 S Wicks (n 3) p 1.

environment' and 'an adequate standard of living'.[48] Recognised in the Council of Europe's Handbook on the ECHR Article 2, "Life' here means human life: neither the right to life of animals, nor the right to existence of 'legal persons' is covered by the concept' leaving the protection of life unclear because of an absence of a legal and scientific consensus on the beginning and the end of 'life'.[49] The ECtHR highlighted multiple times the fundamental nature of the right to life but never took the opportunity to clarify the gap caused by the word 'everyone' in Article 2. The ACHR (Article 4) signed in San José is the only international human rights treaty to provide a definition including the beginning of life: 'every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.'[50] However, the words 'in general' generate ambiguity about this overinclusion. Moreover, in the 'Baby Boy' case the Courts stated that Article 4 'represented a compromise' and did not intend to extend protection to the foetus,[51] a conclusion also affirmed by the ECtHR. If the foetus is protected under the scope of the right to life, abortion might be considered as a violation to this fundamental right, which in our modern societies is controversial. The Roe v Wade case led the United States to authorise abortion[52] however the Courts in A., B. & C. v Ireland held the contrary and showed that Article 8 of the ECHR (right to private life) did not include a right to have an abortion.[53] The unborn is limiting the mother's right to private life, so could we argue that the right to life of the foetus is more important than the rights of the mother?[54] The Courts

48 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, arts 4-5; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication no 155/1996 (27 May 2002) ACHPR; African Commission on Human and Peoples' Rights, Annual Activity Report No 15 of the ACHPR (2001-2002, Done at the 31st Ordinary Session of the African Commission from 2nd to 16th May 2002 in Pretoria, South Africa) paras 44–4; Asian Human Rights Commission, Asian Human Rights Charter (Declared in Kwangju, South Korea on 17 May 1998) Article 3.2 <https://www.refworld.org/docid/452678304.html> accessed 19 June 2020; League of Arab States, Arab Charter on Human Rights (Adopted on 15 September 1994) preamble and Article 5 <https://www.refworld.org/docid/3ae6b38540.html> accessed 19 June 2020.

49 Council of Europe, 'The right to life: A guide to the implementation of Article 2 of the ECHR' (Human rights handbooks, last updated on 30 April 2020); S Wicks (n 3) 2-4.

50 ACHR art 4(1); ECHR art 2; See: 'everyone' in ICCPR art 6.

51 *White and Potter (Baby Boy) v United States* (n 7); *Paton v United Kingdom* (1980) 3 EHHR 408 (Commission Decision); *Vo v France* (n 7).

52 Shannon Calt, 'A., B. & C. v. Ireland: 'Europe's Roe v. Wade'?' (2010) 14 Lewis & Clark Law Review 1189; *Roe v Wade* (1973) 410 US 113.

53 See 'whenever a woman is pregnant, her private life becomes closely connected with the developing foetus' in: *A, B and C v Ireland* ECHR 2010-VI 185, para 213; For 'lack of consensus', see: *Brüggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244 and *Vo v France* (n 7).

54 For 'implied limitations' limiting the scope of the norm, see: *X v United Kingdom* (1981) Series

are avoiding the vexed question by excluding abortion from the scope of the treaties (see X v UK 'implied limitations'). Furthermore, the HR Committee emphasised how states should interpret the meaning of life broadly to ensure that women do not have to threaten their own lives in order to have a clandestine abortion for instance.[55] Thus, 'any regulation of abortion must not violate the right to life or any human right under the ICCPR', calling for a safe and legal access to abortion especially when the women's life is at risk or when the pregnancy is the result of rape.[56] In some countries such as Ecuador, women having an abortion are risking penalties, including from 6 months to 2 years imprisonment.[57] The World Health Organisation pointed that the withdrawal of restrictions on abortion could result in reduction of maternal mortality, since 8 to 11% of maternal deaths relate to abortion (between 22,800 and 31,000 preventable deaths each year).[58] In the same manner, the Courts size-backed the controversial subject of the end of life: in Pretty v UK, the ECtHR considered that Article 2 did not include the right to die within the right to life, so euthanasia is not allowed under the scope of the Convention. The applicant was suffering from a degenerative non-curable disease for which the final stages are distressing and undignified, that is why she wanted her husband to assist her suicide. Although suicide is not a crime in English law, euthanasia is. Of the 193 member states of the United Nations, only four have legalised euthanasia such as Luxembourg or Switzerland. No treaty is establishing a 'right to die', creating a legal loophole in international and regional human rights law. However, other human rights such as the right to dignity or autonomy could be interpreted to include a right to end life. Still, the Council of Europe encouraged the member

A no 46, para 244; S Kirchner, 'The Personal Scope of the Right to Life under Article 2(1) of the European Convention on Human Rights After the Judgment in A, B and C v. Ireland' (2012) 13 German Law Journal 783.

55 UN Human Rights Committee 'General Comment No. 28 on equality of rights between men and women' (2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 10.

56 UN Human Rights Committee 'General Comment No. 36 on the right to life' (2018) UN Doc CCPR/C/GC/36 para. 8.

57 Human Rights Watch, 'Ecuador: Memorandum on Abortion and International Human Rights Law' (Memorandum addressed to the President of the National Assembly of Ecuador, 25 April 2019) <https://www.hrw.org/news/2019/04/25/ecuador-memorandum-abortion-and-international-human-rights-law> accessed 12 January 2020.

58 Susheela Singh and others, 'Abortion Worldwide 2017: Uneven Progress and Unequal Access' (Guttmacher Institute 2018) 10-33 <https://www.guttmacher.org/report/abortion-worldwide-2017> accessed 19 June 2020; For 'the accumulated evidence shows that the removal of restrictions on abortion results in reduction of maternal mortality due to unsafe abortion and, thus, a reduction in the overall level of maternal mortality', see: World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (World Health Organization 2012) <https://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/> accessed 19 June 2020.

states in 1999 to uphold 'the prohibition against intentionally taking the life of terminally ill or dying persons' while recognising the right to life.[59] Moreover, when is a disappeared person protected under the right to life? Treaty-bodies are divided on this question: the IACtHR is taking a wider approach while the ECtHR is more restrictive, recognising the violation of rights other than to liberty and security when a person disappears.[60]

5. The principle of dignity: A potential shift to ensure the right to life?

A philosophic grounding based on the principle of dignity would ensure the protection of the right to life by state parties and broaden the evolving understanding of "life". In fact, a democratic state is not 'a panacea for rights protection'[61] since structural issues such as inequality and discrimination occur in all systems. The right to life includes, according to the IACtHR in *Villagran Morales v Guatemala*, the right to have access 'to the conditions that guarantee a dignified existence' and this definition is broader than the mere absence of death.[62] Explicitly cited in the UDHR preamble, the dignity of human life is implied by most of the treaty-bodies but the right to life needs to be interpreted broadly to comprise economic and social rights ensuring dignity,[63] including the right to health care and housing.[64] In *Vo v France*, the ECtHR avoided the triggering question of abortion but Judges Ress, Mularoni and Strazincka argued Article 2 should be evolutive to 'confront the real dangers now facing human life' such as genetic manipulation.[65] The general term 'everyone' does not seem to include the foetus, yet it needs legal protection, perhaps elsewhere than under the unsatisfactory right to life, considering dignity and the right to private life.[66] Many support the principle of individual autonomy in order to ensure dignity, justifying euthanasia

59 Parliamentary Assembly of the Council of Europe, 'Protection of the human rights and dignity of the terminally ill and the dying' (Recommendation 1418, Session 1999) art 9.

60 *Velasquez-Rodriguez Case* (n 16) para 155.

61 Bantekas and Oette (n 4) 340-353.

62 *Villagran Morales et al v Guatemala ('Street Children' Case)* Inter-American Court of Human Rights Series C No 63 (1999) paras 144 and 191.

63 For 'inherent dignity', see: UDHR preamble para 1; See: ECHR art 3 in *Tyrer v United Kingdom* (1978) Series A no 26.

64 UN Human Rights Committee, 'General Comment 6' (n 4); For the right to life including bare necessaries of life in India, see: *Maneka Gandhi v Union of India* (1978) 1 SCC 248; See: 'Everyone has the right to lead a life in conformity with human dignity' in The Belgian Constitution (17 February 1994) art 23; For 'the rights of the elderly to lead a life in dignity', see: ECHR art 35; Catherine Dupré, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' [2009] European Human Rights Law Review 190, 190-200.

65 *Vo v France* (n 7) Dissenting Opinion of Judge Ress, para 5.

66 *Paton v UK* (n 51) para 9; ECHR art 2.

within the right to life,[67] because medical assistance can ease the dying process considering the individual's wishes. *Vo v France* implicitly acknowledged dignity in human life, opening a possibility for the freedom to choose death with respect for this principle.[68] Wicks highlighted how a 'narrow interpretation of the right to life which focuses almost exclusively on the avoidance of death will overlook the true meaning of life':[69] an individual life is protected when bound with the wider concept of dignity. While many states are not reaching the minimum protection of the right to life, the pressure of accountability is an effective mechanism to move towards a secured right; that is why international and regional treaty-bodies should review their strict interpretation of the right to life.

6. Conclusion

The customary and non-derogable right to life is not absolute since the disappearing death penalty and the use of lethal force are legitimised when necessary and proportionate. International human rights mechanisms increasingly use positive obligations binding on the state parties to ensure the protection of the right to life, threatened by state or non-state actors. Therefore, these obligations can be undermined by multiple factors such as individual autonomy or finite public resources. A restrictive interpretation of the meaning of "life" endangers the right to life and unable the states to adopt positive measures. Plus, constantly avoiding controversial questions does not make them disappear, as human life is challenged by evolving risks (gene mutation, nuclear weapons…). An emphasis on dignity in human life within the right to life would extend the necessary conditions of life beyond the arbitrary death and respect the individuals' needs as a whole, from abortion to euthanasia. Progress has been made, but a democratic state is not a panacea for human rights and the role of international treaty-bodies is to pressure the states to fully comply with fundamental rights without political bias.

---

67 Hazel Biggs, *Euthanasia, Death with Dignity and the Law* (Hart Publishing 2001) 143; See 'that life ends appropriately, that death keeps faith with the way we want to have lived' in Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (HarperCollins 1993) 199; See 'the right to life implies the right to die a natural death' (Hamilton CJ) in *Re Ward of Court* [1995] 2 ILRM 401 para 165.

68 *Vo v France* (n 7); Margaret Pabts Battin, 'Suicide: A Fundamental Human Right?' in Margaret Pabst Battin (ed), *The Least Worse Death: Essays in Bioethics on the End of Life* (Oxford University Press 1994) 284.

69 S Wicks (n 3) 199.

THE BATTLE OF AUTONOMIES: WHEN THE RIGHTS TO SELF-DETERMINATION OF THE PATIENT AND A THIRD PARTY CONFLICT

Malwina Anna Wojcik*

Abstract

Following the judgment in *Montgomery v Lanarkshire Health Board*, the patient autonomy has become the leading principle of medical practice. The right to self-determination is protected both under the common law and the European Convention of Human Rights (Article 8). This article explores challenging cases which involve a conflict between the autonomy of the patient and the autonomy of a third party. Such a 'battle of autonomies' most commonly arises in (but is not limited to) genetic scenarios, where a patient does not consent to inform his relatives of a genetic condition that might affect their self-determination right. A recent example is provided by a tragic case of *ABC v St George's Healthcare NHS Trust* which involved a failure to inform a pregnant daughter of the patient of the possibility of contracting Huntington's disease.

This article will present three approaches to the 'battle of autonomies' cases. Firstly, it will explore the merits of the solution proposed by the Court of Appeal in the *ABC* judgment, which established that genetic cases should be treated exceptionally, allowing non-patient autonomy to trump patient confidentiality, if relevant circumstances arise. It will be argued that an approach based on the classification of cases as genetic or non-genetic is likely to result in considerable injustice. The second solution to the 'battle of autonomies' will be based on a proportionality exercise involving balancing autonomy with other legal and ethical values. It will explore the argument against the pre-eminence of autonomy and the consumerist model of the doctor-patient relationship. Lastly, the article will introduce an approach which allows to settle the 'battle of autonomies' by recourse to relational autonomy, reconciling the patient and the non-patient autonomy.

* The author is a recent LLB English and European Law graduate from Queen Mary University of London. She is currently pursuing LLM degree in the University of Bologna. Her interests involve medical law and ethics, family law and constitutional law.

1. Introduction

The doctor-patient relationship has long been marked by paternalism, which accorded a passive, 'sick role' to patients,[1] allowing doctors to exercise almost unconstrained power, often against patient's wishes. The 'doctor knows best' approach was slowly eroded by the rise of self-determination. Nowadays, the courts are increasingly eager to recognise autonomy as the leading principle of medical practice. This trend is well demonstrated by the judgment in *Montgomery v Lanarkshire Health Board*,[2] which redefined the meaning of informed consent to treatment. The decision marked a departure from the previous law, as reflected in *Sidaway v Bethlem Royal Hospital Governors,*[3] where a *Bolam*-style test of what a responsible body of medical opinion thought appropriate to disclose was applied.[4] *Montgomery* shifted the standard from following acceptable practice in information disclosure to ensuring that the patient has enough information to exercise a fully informed choice. The material risk to be warned against was defined both objectively, as such that a reasonable person in the circumstances would be likely to attach significance to it, and subjectively, as such that the particular patient would attach significance to it.[5] *Montgomery* strongly emphasises the patient's right to know, which permits him to make informed choices about his treatment and thus allows for effective self-determination, a right protected by both common law and Article 8 of the European Convention of Human Rights.

While informed consent constitutes an important aspect of autonomy, so does confidentiality. The obligation to disclose relevant information and the right not to disclose one's confidential information seems to be two sides of the same coin. What happens when they conflict with each other? In certain circumstances upholding a patient's confidentiality results in harm to a third person's self-determination, such as the possibility to make informed choices about one's health. Whose autonomy prevails then? One of the biggest challenges associated with the rise of autonomy are the 'battle of autonomies' cases, where autonomy of one person has to be weighed against the autonomy of another. An excellent example is provided by the decision of the Court of Appeal in *ABC v St George's Healthcare NHS Trust.*[6] In this case the patient's confidentiality clashed with his daughter's right to know about a genetic condition that might seriously affect her and her unborn baby. In turn, she was prevented from making an informed reproductive choice. The claimant alleged

1 Talcott Parsons, *The Social System* (Routledge & Kegan Paul 1951) in Jonathan Montgomery, 'Patient No Longer. What Next in Healthcare Law?' (2017) 70 CLP 73, 80.
2 [2015] UKSC 11.
3 [1985] AC 871.
4 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
5 *Montgomery* (n 2) [87].
6 [2017] EWCA Civ 336.

negligence of her father's doctors as well as a breach of her Article 8 right. Irwin LJ, who delivered the unanimous decision, allowed the daughter's appeal and held that the doctors of the patient suffering from Huntington's disease could own a duty of care to the patient's pregnant daughter to inform her about the relevant genetic risk, even against the patient's will. Although the ruling did not concern the substance of the claim but merely its admissibility, its outcome is revolutionary as it suggests a troubling conclusion that the autonomy of a patient is capable of being trumped by the autonomy of a non-patient. The decision raises many controversies because it extends a doctor's duty of care to cover relevant third-parties. This means that confidentiality, which is an essential feature of the patient's autonomy, can be disregarded in favour of a non-patient's autonomy. Hence, the trust, which is crucial in a doctor-patient relationship, is significantly undermined.

This essay will analyse three different approaches to the 'battle of autonomies' cases. Firstly, it will explore the merits of the solution proposed in the *ABC* judgment, which established that genetic cases should be treated exceptionally, allowing non-patient autonomy to trump patient confidentiality if relevant circumstances arise. It will be argued that an approach based on the classification of cases as genetic or non-genetic is likely to result in considerable injustice. Secondly, the essay will propose a solution to the 'battle of autonomies' based on a proportionality exercise involving balancing autonomy with other legal and ethical values. It will explore the argument against the pre-eminence of autonomy and the consumerist model of the doctor-patient relationship. Lastly, the essay will introduce an approach which allows to settle the 'battle of autonomies' by recourse to relational autonomy, reconciling the patient and the non-patient autonomy.

2. Classification – Genetic Cases as Sui Generis?

Many commentators argue that the unique nature of genetic conditions warrants a special treatment because these cases are essentially different from other clinical negligence claims, and therefore can justify the breach of patient autonomy.[7] This reasoning was adopted by Irwin LJ in the *ABC* decision, in which he held that a doctor's duty of care to third parties should be limited to genetic cases.[8] Irwin LJ contended that the special nature of genetic conditions allows for a relative's right to be informed to prevail over patient confidentiality. The decision suggests that the 'battle of autonomies' should be decided on the basis of classification, with only one exception from a general rule. Hence, in practice, the outcome

7 Loane Skene, 'Patients' Rights or Family Responsibilities? Two Approaches to Genetic Testing' (1998) 6 Med L Rev 1.

8 *ABC* (n 6) [43]-[45].

of the battle of autonomies will mostly see the patient autonomy prevailing, except for genetic cases that can justify the triumph of non-patient autonomy. These cases will be very limited, as studies show that patients are usually eager to share their genetic information with their family.[9]

Irwin LJ made the distinction in response to the defendants' argument that recognition of a duty of care existing outside of the traditional doctor-patient relationship would result in an avalanche of claims.[10] He contended that the genetic cases should be treated exceptionally because the group of potential claimants is easily and unequivocally ascertainable.[11] Unlike in cases concerning, for example, HIV infection, where a doctor is not able to draw a closed list of people who might have been affected, a geneticist will almost immediately know the identity of potential third parties. Indeed, the very nature of genetic practice often involves analysis of pedigrees which allows ascertaining which family members are at risk.[12] This distinguishing feature was also articulated in *Safer v Pack*,[13] one of the American decisions that Irwin LJ referred to in his judgement. In this case, the claimant successfully established that her deceased father's doctor owed her a duty to inform about the risk of developing a hereditary disease that can lead to cancer. Breach of confidentiality was not a matter in the case, and the Superior Court merely recognised that a conflict between the autonomy of the patient and his relative might arise. Nevertheless, the court was unequivocal in finding that the duty to warn a relative of a genetic condition is 'sufficiently narrow to serve the interests of justice.'[14]

The reasoning of Irwin LJ is in line with Loane Skene's argument that genetic cases should be treated as *sui generis*.[15] She disagrees with Dean Bell and Belinda Bennett who claim that the problem can be adequately addressed by the common law exception of public interest.[16] Skene argues that the genetic cases should be treated differently because they involve blood relatives. This biological fact, in her opinion, should be the basis of the special legal framework.[17] She perceives genetics not as an individual, but familial concern. This reasoning seems to correspond with medical practice, with many geneticists encouraging the flow of genetic information within a family because it fosters common interest.[18] The

9 Loane Skene, 'Genetic Secrets and The Family: A Response to Bell And Bennett' (2001) 9 Med L Rev 162, 166.
10 *ABC* (n 6) [42].
11 ibid [43].
12 Skene (n 9) 166.
13 291 N.J.Sup. 619, 677 A. 2d. 1188.
14 ibid.
15 Skene (n 9) 169.
16 Dean Bell and Belinda Bennett, 'Genetic Secrets and The Family' (2001) 9 Med L Rev 130.
17 Skene (n 9) 169.
18 ibid 166.

medical practitioners can be said to implicitly accept that they have duties not only towards patients but also their families. These duties, Skene argues, should be discharged with particular caution to the family dynamics.[19] Following Skene's argument, the conflict between the autonomy of a patient and his relatives can be resolved by distinguishing two kinds of genetic information: the individual and the familial.[20] The former is private information about the condition of an individual, that should be, as far as possible, kept confidential. The latter is shared information about a particular mutation being present in the family. A problem with this distinction is that it might be difficult to apply in practice. If a patient desires to keep his genetic condition secret, it will often be challenging to disseminate the familial information without raising suspicion about private information. It must be noted that the unique nature of the genetic information might be seen as a reason to keep them especially confidential. Genes form an integral part of one's self and cannot be changed. Hence, patients with genetic disorders might fear embarrassment and ostracism, even within their own families. A counter argument is that we should challenge, rather than feed, the societal attitude towards genetic conditions. The openness about the genetic status can be an important step to achieve it.[21]

Roy Gilbar perceives the exception made by Irwin LJ regrettable and would happily see the same approach applied to other clinical negligence claims.[22] He argues that the restriction is ill-founded because what Irwin LJ claims to be a distinguishable feature of genetics, is in fact a simple question of foreseeability and proximity.[23] Indeed, what seems to underlie the reasoning of Irwin LJ is an assumption that genetic cases automatically satisfy the proximity and foreseeability requirements of the duty of care. This is not always true. As Charles Ngwena and Ruth Chadwick rightly point out, different types of genetic diseases carry different probability of transmission.[24] Only unifactorial genetic mutations allow for a certainty of prediction. The spread of multifactorial and chromosomal diseases is much more difficult to predict. Moreover, some of the genetic mutations can be both hereditary and spontaneous. What follows is that foreseeability of genetic harm is not always as high as it appears to be. Equally, the assumption that proximity is always present in genetic cases raises a concern. It seems to give proximity a narrow meaning, equating it with blood proximity. It is doubtful that this definition is correct. Would a doctor be liable for failure

19 ibid 164.
20 ibid 166.
21 Charles Ngwena and Ruth Chadwick, 'Genetic Diagnostic Information and the Duty of Confidentiality: Ethics and Law' (1993) 1 Med L Intl 73, 75.
22 Roy Gilbar, 'It's Arrived! Relational Autonomy Comes to Court: *ABC v St George's Healthcare NHS Trust* [2017] EWCA 336' (2018) 26 Med L Rev 125, 132.
23 ibid 132.
24 Ngwena and Chadwick (n 21) 83.

to identify and warn an estranged daughter of his patient about genetic harm? Should a pregnant spouse of a patient with Huntington's disease be refused protection afforded to his daughter, just because the genetic disease is not transmitted horizontally?[25] These simple examples show that something more than blood ties is needed to satisfy proximity. Regrettably, the *ABC* decision provides no clarification. The first two limbs of the *Caparo*[26] test are not discussed in the case since the defendants accepted that they are both satisfied. Even if it is accepted that foreseeability and proximity are significantly easier to establish in genetic disputes, it is arguable that they can be equally satisfied in some instances of non-genetic clinical negligence. The doctor cannot be reasonably expected to conduct an investigation on the identities of all the sexual partners of his patient who is tested HIV positive. However, the situation is considerably different if it is known to the doctor that his patient has only one sexual partner and that the partner is pregnant. It is difficult to see why a pregnant woman who might be affected by HIV deserves less protection than a pregnant woman who might be affected by Huntington's disease, when both conditions carry considerable risk for the patient and the offspring. Therefore, limiting the admissibility of third party claims to genetic relatives is likely to lead to considerable inequality of treatment.

The *ABC* judgment focused on the third limb of the *Caparo* test. Irwin LJ admitted the claimant's argument for the policy considerations underlying the disclosure by accepting that it can be in the public interest to prevent conception of a child that is under a high risk of developing a dangerous condition, and will require state support, especially when its mother herself will become unfit to care for it.[27] Some geneticists would perhaps take this claim further, arguing that preventing the spread of severe genetic diseases could in itself constitute a good justification.[28] However, is the duty to disclose 'fair just and reasonable' only in genetics? An example of a case where the duty of care was owed to a third party outside of a genetic relationship is provided by *Tarasoff v Regents of the University of California*;[29] another American authority referred to by Irwin LJ. In this case, the doctor had a duty to directly warn the ex-girlfriend of his patient who confessed that he intends to kill her. Ngwena and Chadwick expressed their doubts as to whether the decision could be adopted by the English courts.[30] However, their objections were mainly based on the lack of recognition of third party claims. Post-*ABC*, the question is worth reconsidering. Irwin LJ

25 ibid 85.
26 *Caparo Industries Plc v Dickman* [1990] UKHL 2.
27 *ABC* (n 6) [29].
28 Ngwena and Chadwick (n 21) 79.
29 (1976) 551 P.2d 334.
30 Ngwena and Chadwick (n 21) 89.

distinguished *Tarasoff* from the genetic scenario on the basis of quantification of risk and the possibility of unnecessary warning.[31] However, it is well established that every case in which the patient's right to confidentiality conflicts with other public or private interests requires a careful balancing of harms. In *Re C*[32] the harm to the best interest of the child in adoption proceedings allowed the GP to disclose confidential information about the genetic mother that would make her an unsuitable carer. In *W v Egdell*[33] the magnitude of harm that could be caused by a considerably dangerous psychiatric patient with an interest in high explosives was big enough to warrant the disclosure of a confidential medical report to the Home Office against his will. These are, of course, cases where a mere discretion, as opposed to a duty to disclose, was considered. However, the author of this essay argues that there are no compelling reasons why the same approach should not be adopted in the breach of duty cases. Instead of establishing the exception for genetic cases, it might be desirable to establish a general framework for third party claims in clinical negligence, allowing to reach a balance between autonomy of the patient and the autonomy of a third party. Unfortunately, apart from mentioning that the departure from confidentiality would have to be reasonable under the *Bolam* test, Irwin LJ does not provide much guidance on when imposing a duty to the relative is justified.[34] Some helpful directions are given by Ngwena and Chadwick who formulated four criteria to be considered in cases where two autonomies clash.[35] The first one is the exceptional and compelling nature of the circumstances. They note that interest in protecting public trust in the medical profession sets a high threshold to pass, preventing confidentiality from being easily trumped.[36] The second criterion is the probability and magnitude of harm to be averted. As discussed earlier, it is not always straightforward in genetic cases. The third criterion is the extent to which the disclosure is necessary to avert that harm. It can be argued that if a family member already possesses the gene, it is very likely that the harm cannot be fully averted, while it can be in cases of, for example, contagious diseases. However, as accepted in *ABC* the relevant harm can include the impossibility of informed reproductive decisions. The last criterion is the possibility to identify the harmed individual or a class of individuals, a feature discussed by Irwin LJ, that would perhaps, as Gilbar claims, fit better with the proximity or foreseeability limb.[37] The

31 *ABC* (n 6) [56].
32 *C (a minor) (Medical treatment)* (1991) 7 BMLR 138.
33 [1989] 1 All ER 1098.
34 *ABC* (n 6) [35].
35 Ngwena and Chadwick (n 21) 81-85.
36 ibid.
37 Gilbar (n 22) 132.

conclusion is that the above criteria can be successfully applied to both genetic and non-genetic claims.

3. The Conflict of Values – Autonomy Deposed?

Ngwena and Chadwick underline that where respecting patient autonomy has implications for the autonomy of others, the decision cannot be taken solely on autonomy grounds.[38] Another way to approach the 'battle of autonomies' is to view it in a wider context of conflicting interests and values. However, this necessarily requires rethinking the pre-eminence of autonomy and accepting that it must be balanced against other relevant principles. Margaret Brazier argues that a long tradition of paternalistic approach resulted in the balance in the doctor-patient relationship being 'overcorrected'.[39] It can be argued that current law places too much weight on patient autonomy when 'it is not the only god in the ethical, or indeed legal, pantheon'.[40] In *Ex p. Brady* Kay J noted that it would be 'regretful if the law developed to a point where the rights of patients count for everything and other ethical values for nothing'.[41] Medical ethics is one-sided when focused on patient autonomy with exclusion of all other values. It leads to the doctor-patient relationship becoming consumerist, with patients treating the health professional as a service provider, who is expected to simply fulfil his wishes. A balance between medical paternalism and consumerism should be reached, fostering the relationship of mutuality. Irwin LJ acknowledged the dominant position of autonomy in clinical negligence. Nevertheless, he emphasised that it would be irrational to embrace the autonomy of patients and at the same time deny any legal protection to those who, because of their possible condition, should become patients.[42] This seems to be the position followed by General Medical Council's guidelines,[43] which provide that confidentiality needs to be balanced against a public interest,[44] a wider duty to protect and promote public health,[45] as well as a duty to protect an individual from serious harm where genetic information is involved.[46] This approach might be preferable from a doctor's point of view, as it involves a balancing exercise which,

38 ibid 77.
39 Margaret Brazier, 'Do no harm - do patients have responsibilities too?' (2006) 65 CLJ 397, 398.
40 ibid.
41 *R v Collins and Ashworth Hospital Authority ex p. Brady* [2000] Lloyds Rep. Med. 355, 357.
42 *ABC* (n 6) [28].
43 General Medical Council, 'Confidentiality: good practice in handling patient information' (25 April 2017).
44 ibid [22]-[23].
45 ibid [60].
46 ibid [75].

as reiterated by Irwin LJ, is inherent in the medical practice.[47] It can be argued that it is desirable to translate the soft law guidelines into common law requirements which would oblige a doctor to consider whether the disclosure of confidential information is justified by public interest or private interest of a relevant third party. In the absence of a comprehensive legal framework, medical professionals remain exposed to conflicting negligence claims. Establishing proportionality exercise as a legal requirement would ensure that the self-determination of both patients and the relevant third parties is protected. The problem of putting undue pressure on health professionals could be resolved by adopting a *Bolam*-style test for establishing negligence. This means that doctors would be granted much discretion, and a decision to disclose or not to disclose the information concerning a patient would not be negligent as long as a responsible body of medical professionals would deem it acceptable.

Brazier goes even further in advocating the need to balance out patient autonomy and other legal and ethical considerations. She argues that Beauchamp's and Childress' four principles of bioethics: autonomy, non-maleficence, beneficence and justice should be equally respected by health professionals and patients.[48] It is widely accepted that we all have ethical and legal responsibilities towards others. Brazier points out that they do not simply disappear when we acquire a patient status.[49] Johnathan Montgomery claims that medical paternalism will not be fully defeated if patients continue to be infantilised, and their self-determination will be limited to accepting a treatment proposed by their doctor.[50] Infantilisation can also be understood as denial of responsibilities. Under this view, not only the doctors, but also the claimant's father in *ABC*, had a responsibility to ensure that the claimant was informed about the relevant harm.

An argument in favour of balancing autonomy against other values is supported by the fact that autonomy itself can be interpreted very broadly, including both the right to know and the right not to know. This generates confusion and uncertainty. One of the arguments raised by the defendants in *ABC* was that the relatives' right not to know about the genetic danger should be equally respected. As genetic diseases are mostly untreatable, it is probable that some family members would prefer to stay uninformed, avoiding psychological distress of a life in fear. A question arises if it is possible for autonomy to cover the right not to know. Rosamond Rhodes argues that an autonomous action requires being informed of what a reasonable person would have wanted to know.[51] Refusal to receive reasonable

47 *ABC* (n 6) [31].
48 Brazier (n 39) 398.
49 ibid 422.
50 Montgomery (n 1) 107.
51 Rosamond Rhodes, 'Genetic Links, Family Ties, and Social Bonds: Rights and

genetic information cannot be justified by autonomy because autonomy requires rationality. The problem with this argument is that a 'reasonable man' test involves objectivity, while autonomy is based on subjectivity, as underlined in *Montgomery*. Victoria Chico argues that autonomy can justify the right not to know, albeit only in cases which she calls 'known unknowns'.[52] These involve some awareness of the possibility of mutation but no precise diagnosis. On the other hand, Chico claims it is impossible to justify the right not to know the 'unknown unknowns', since complete lack of knowledge prevents the exercise of autonomy.[53] If a patient has no clue that he might be a carrier of a genetic mutation, he cannot assert full control over his life. Moreover, it is virtually impossible for the healthcare practitioner to ascertain what is the attitude of the patient towards particular information. The argument that there are some established patterns of what people want or do not want to know must fail. Even if it was true, such generalisations would clearly go against the idea of self-determination.

Divergence of opinions about the content of autonomy makes resolving the 'battle of autonomies' particularly difficult. While it is widely recognised that self-determination is an enforceable right on its own, when two parallel rights contrast, they have to be balanced with consideration of other values, such as benefice of the relevant parties and public interest.

4. Relational Autonomy – an Armistice Declared?

Autonomy does not have to be considered in individualised terms, in the context of isolation and pure self-determination. An alternative version of autonomy, based on the individual's relationships with others, might be more appropriate to address the conflict between confidentiality and the right to be informed. Jennifer Nedelsky argues that autonomy is only possible 'in the context of social relations'.[54] Such relational autonomy can be distinguished by addition of the moral concern, which translates into autonomous decisions being taken

Responsibilities in the Face of Genetic Knowledge' (1998) 23 The Journal of Medicine and Philosophy 10.

52 Victoria Chico, 'Known unknowns and unknown unknowns: the potential and the limits of autonomy in disclosure of genetic risk' (2012) 28(3) Journal of Professional Negligence 162.

53 ibid 162.

54 Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale J L & Feminism 7, 25.

through an open dialog with the healthcare professional,[55] with consideration of the well-being of those close to the patient.[56]

Relational autonomy is particularly relevant in genetic cases, in which the patient's choice affects the self-determination of his relatives. Although the term itself was not mentioned in *ABC*, the decision seems to implicitly recognise a shift from individualistic to relational autonomy. In his judgment Irwin LJ underlined that the interests and rights of the relatives should not be completely abandoned in favour of the patient's rights. He argued that protecting the relatives when necessary is fact a part of a public interest in upholding trust in the medical profession.[57] This finding is compatible with the arguments advanced by feminist writers, who claim that relational autonomy should be preferred because it protects the autonomy of the weaker and vulnerable members of the family,[58] such as the claimant in *ABC*.

It might be questionable whether the relational model of autonomy is appropriate in health law, where, as Irwin LJ has noted, the dualistic model of patient-doctor relationship rightly prevails.[59] The therapeutic relationship is defined by the concept of the patient's best interests, to the exclusion of all others. However, Paula Case points out that in reality references to psychological and social interests of the patient often conceal advancements of third party interests.[60] In *Re Y*[61] a donation of bone marrow to her sister was considered to be in the patient's best psychological interest because it facilitated family stability. Nevertheless, the application of relational autonomy is less straightforward in cases of patients with capacity.

Let us consider Irwin LJ's decision through the alternative understandings of autonomy outlined by John Coggon.[62] The judgement seems compatible with the 'ideal desire autonomy', understood as encompassing universal moral values. It provides what the claimant's father should have objectively wanted, taking into account the relevant circumstances, including his daughter's welfare. At the same time, it trumps his 'best desire for autonomy', which reflects judgment based on his own subjective values. It must be

---

55 Alasdair Maclean, *Autonomy, Informed Consent and Medical Law. A Relational Challenge* (CUP 2009) 232.

56 ibid 22.

57 *ABC* (n 6) [26].

58 Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist perspectives on autonomy, agency and the social self* (OUP 2000).

59 *ABC* (n 6) [28].

60 Paula Case, 'Confidence Matters: The Rise And Fall Of Informational Autonomy In Medical Law' (2003) 11 Med L Rev 208, 211.

61 [1997] 2 FCR 172.

62 John Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism' (2007) 15 Health Care Analysis 235.

noted that the father's decision was reflective and not entirely based on selfish considerations. He wanted to conceal the information about his disease, fearing that his daughter will terminate the pregnancy. Hence, it appears that he considered the welfare of others while taking the decision. It might seem questionable why sanctity of life that the father considered pre-eminent should be given less recognition than other universal values. Application of relational autonomy solves this problem. It cannot be considered that the father gives accurate weight to the well-being of his daughter simply by substituting his moral judgement for hers. If it was possible, the daughter's autonomy would still be disregarded. The distinctiveness of relational autonomy is therefore based on fostering genuine dialog, considering the actual wishes of others, giving effect to their right to self-determination.

The relational autonomy in genetic cases implies that the family of the patient should be treated as a 'fundamental unit of responsibility'.[63] Skene promotes the familial model of genetic information, which is based on common obligations, rather than individual rights.[64] This communitarian approach allows us to depart from the strict legal confidentiality, encouraging controlled flow of genetic information. It is designed to mitigate the strictness of the legal model, based on privacy and consent.[65] While Skene underlines that the consent should be sought and encouraged, her model permits the doctors to act against a patient's will, if his relatives are at risk.

An opposing view is presented by Graeme Laurie, who argues that informational privacy, a concept even wider than confidentiality, should prevail.[66] His view is that the strict protection of all private information contributes to the flourishing of relationships. This argument is not convincing, especially in genetic cases. Where the information is biologically shared within the family, it is difficult to imagine how one can build sincere and long lasting relationships without at least considering disclosing genetic risks to his relatives.

John Christman provides a more balanced criticism of relational autonomy. He warns against the possibility of the individual's wishes being easily defeated by the wishes of those with whom he is in a relationship.[67] It is true that the conflicting interests of family members in genetic cases are difficult to reconcile and can sometimes put pressure on the individual.

---

63 Karen Temple and Greta Westwood, 'Do Once and Share: Clinical Genetics Project Report' (British Society for Genetic Medicine, 5 May 2006) [1.2].

64 Skene (n 9) 162.

65 ibid.

66 Graeme T Laurie, 'The Most Personal Information of All: An Appraisal of Genetic Privacy in the Shadow of the Human Genome Project' (1996) 10 IJLPF 74.

67 John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 143, 145.

This concern is evident in the argument of Gerald Dworkin, who claims that there are two inherent features to autonomy: authenticity and independence.[68] The former encompasses the critical evaluation of one's immediate, so called first order desires. The latter entails the lack of undue influence of others, so that the decision is 'one's own'. The second limb seems potentially problematic in case of relational autonomy. If a decision is one's own, can it be influenced by consideration of wellbeing of others? Dworkin answers this question by distinguishing procedural and substantive independence. The latter is violated when a decision is influenced by the needs of others. However, Dworkin rejects the substantive independence in favour of procedural one, claiming that it would be unsatisfactory if moral and compassionate behaviour would be necessarily seen as breaching autonomy.[69] It follows that Dworkin's model is compatible with relational autonomy, as far as the wishes of third parties are not forced on the individuals.

The above conclusion brings a concern that creation of a duty to disclose, as opposed to discretion, will in fact force an individual to give effect to wishes of their relatives against his will. However, Irwin LJ in *ABC* explicitly recognised that if the balance falls in favour of disclosure, a professional duty, rather than a mere discretion arises.[70] It appears that what the court wanted to achieve was to translate the requirements of the relevant professional guidance into the law. In this respect, Irwin LJ followed *Montgomery*, trying to codify what was already perceived as good medical practice. He emphasised that the health professionals already face the ethical dilemmas in question. Therefore, he did not perceive it wrong to put the ethical problem in a legal framework.

Some supporters of relational autonomy argue that it would be more appropriate to impose a duty to disclose on the patient himself. In this model, the doctors would be facing only a 'weaker' form of duty[71] to accurately inform the patient of the genetic dangers. This approach is in line with the definition of autonomy proposed by Ruth Faden and Tom Beauchamp, which includes responsibility for one's choices.[72] Following this concept, Brazier argues that 'patients have responsibilities too'.[73] She contends that since the duty rests mainly on familial relationship, the ethical obligation to share information is primarily the patient's. Hence, it would be unfair to 'shuffle off responsibility to doctors'.[74] Although

---

68 Gerald Dworkin, 'Autonomy and behaviour control' (1976) 6(1) The Hastings Center Report 23.

69 ibid 26.

70 *ABC* (n 6) [23].

71 Rachel Mulheron, *Medical Negligence: Non-Patient and Third Party Claims: Non-Patient and Third Party Claims* (Ashgate Publishing 2010) 127.

72 Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (OUP 1986) 7.

73 Brazier (n 38).

74 ibid 413.

Brazier recognises that failure to honour obligation towards family members may allow a doctor to forfeit the confidential relationship with his patient and act against his will, it would depend on a doctor's discretion. Gilbar agrees with Brazier, claiming that an appropriate disclosure procedure should be based on exchange and cooperation between the healthcare professional and the patient.[75] While the latter would be the one to inform his relatives, the former would be expected to offer considerable assistance during the process, including, if necessary, drafting a letter of advice.[76] This model, in Gilbar's opinion, is the most effective in combating the 'passive patient' syndrome,[77] which involves a failure to inform the relatives, although no express objection was expressed. It is true that a bottom-up process seems to be more suitable to promote relational autonomy through dialogue and education. The knowledge that a health professional may be required to disregard a patient's decision is likely to discourage patients from considering the welfare of others. Why should I care, if the final decision will be taken by my doctor either way, a patient may ask. In other words, relational autonomy is better taught than imposed.

5. Conclusion

This article has considered three approaches to the 'battle of autonomies' cases, which involve a clash between patient autonomy and non-patient autonomy.

The first approach to 'battle of autonomies' is classification. Following the judgement of the Court of Appeal in *ABC*, non-patient autonomy can prevail over patient autonomy in genetic cases, whereas in other cases of clinical negligence, patient autonomy will come first. The possibility to ascertain a closed group of claimants is the distinguishing feature. While Irwin LJ accepted that genetic cases would not inevitably justify disclosure of information against a patient's will, his decision failed to clarify what is needed to justify the breach of confidence. It remains unclear if proximity and foreseeability are established only on the particular facts of the case, where the doctors knew the claimant well because she participated in the family therapy or, as the exceptional treatment of genetic cases would suggest, they are automatically present for genetic relatives. If the latter is true, considerable difficulties arise. Foreseeability and proximity are not always easily established as genetic conditions carry different degrees of predictability. Moreover, it is unclear if a spouse of the patient should be protected against the reproductive risk in the same way his children are. Limiting third party claims to genetic cases leads to inequality of treatment because

75 Roy Gilbar, 'Patient and Disclosure of Genetic Information: Can English Tort Law Protect the Relatives' Right to Know?' (2016) 30 IJLPF 79.

76 ibid 99.

77 ibid 100.

proximity and foreseeability can also be satisfied in many non-genetic cases. The classification approach seems to be designed to address the floodgate argument and preserve public trust through respect of confidentiality. While it relaxes the burden put on the doctors thanks to clarity and simplicity of application, it is capable of leading to arbitrary results and injustice.

The second approach considered in the essay involves solving the 'battle of autonomies' by departing from the paramountcy of autonomy and balancing it against other relevant principles and values. Under this view, the patient autonomy and the non-patient autonomy must be seen in a broader perspective, and the conflict between them must be resolved by weighting different public and private interests. Both the *ABC* judgement and the medical practice, as outlined in GMC's guidance, recognise that patient confidentiality can be occasionally trumped in favour of other values. It was argued that unconditional pre-eminence of autonomy can lead to erosion of doctor-patient relationship, favouring consumerism rather than relationship of mutuality. That is why some academics argue that not only the health professional, but also the patient himself should be bound by relevant legal and ethical principles. It was noted that the concept of autonomy in third party claims is vague, as it can arguably involve both the right to know and the right not to know about the harm. Hence, a careful balancing exercise is needed to reach a just decision in 'battle of autonomies'.

The third approach explored in the essay purports to resolve the 'battle of autonomies' by portraying autonomy as a relational concept. This understanding allows us to construct patient autonomy in a way that respects the autonomy of a non-patient. It was argued that this solution seems particularly appropriate in genetic cases, which are familial by nature. It allows to protect weaker members of the family and contributes to building long lasting relationships. Relational autonomy should be understood as self-determination with the addition of a moral factor. However, it must be reiterated that the presence of a moral judgment does not in itself make exercise of autonomy relational. A genuine dialogue and respect for actual wishes of others are needed. This however creates a risk that a patient's decision will not be 'his own'. It was argued, in line with Dworkin's definition, that a decision has to be only procedurally, and not substantially, independent, to respect autonomy. Hence, relational autonomy is compatible with Dworkin's concept, as long as it is not forced on patients. In the light of this, it is difficult to reconcile relational autonomy with the imposition of a duty, as opposed to discretion, to disclose genetic information.

While relational autonomy permits to effectively avoid the conflict between patient and non-patient autonomy, it cannot be simply imposed by legal tools. It is more desirable that health professionals focus on educating patients in relational autonomy than force them to comply with it. Nevertheless, a comprehensive legal framework is needed to effectively settle the

'battle of autonomies' and avoid harm to non-patient autonomy where necessary. Although the ground-breaking judgment in *ABC* allows for patient autonomy to be trumped in favour of a relative, it offers little guidance as to when it is appropriate. It is argued that the 'battle of autonomies' is better addressed by setting criteria for when a departure from patient autonomy is 'fair, just and reasonable', than by following the classification approach. These criteria should encompass balancing of relevant ethical and legal values. The public interest in preserving trust in the medical profession dictates that patient autonomy should generally prevail, unless the breach of non-patient autonomy will cause him significant harm that can otherwise be averted or ameliorated.[78]

[78] Shortly after the present article was submitted for publication, the High Court passed a substantive judgment in ABC v St George's Healthcare Trust and Others [2020] EWHC 455 (QB). Justice Yip recognised that a duty of care can arise outside of the doctor-patient relationship, albeit in very specific circumstances. Rather than limiting the scope of the duty to genetic scenarios, Her Honour emphasised that it depends on the proximity limb of the Caparo test. In the case of ABC, proximity was established due to the fact that the doctors were familiar with the claimant's personal situation because she participated in the family therapy. The potential harm of non-disclosure was foreseeable and imposition of the duty was fair, just and reasonable, given that a parallel non-legal duty has already existed in professional guidelines. Crucially, Justice Yip underlined that the scope of the legal duty involves conducting the necessary balancing exercise and acting in accordance with its outcome. In challenging the decision to disclose or not to disclose, the Bolam test applies. Although the duty of care was found, ABC's claim did not succeed because the breach and causation were not established. Justice Yip opined that the alternative claim based on Article 8 of the Convention did not add anything to the common law approach.

FROM BAD TO WORSE, AND FROM GOOD TO BETTER: A COMPARATIVE ANALYSIS OF HOUSING PROTECTION AND POLICY BETWEEN IRELAND AND FINLAND

Eolann Davis*

Abstract

This essay compares the treatment of a right to housing between Ireland and Finland. It focuses first on Irish jurisprudence where the courts have afforded broad discretion to the legislature to address the concurrent national housing and homelessness crises. Both the Irish Constitution and international instruments which Ireland has ratified are alluded to in advancing the view that the right to housing should be formally recognised by the Irish government. The article looks at Finland as an example of international best practice in this area, focusing on how the right to housing is enshrined within the Finnish constitutional framework. A comparison of housing policy between the two countries is made to illustrate how different levels of commitment to the right to housing translate to widely divergent housing policy between the two jurisdictions. The article concludes that recognising a universal right to housing is a prerequisite for Ireland to effectively resolve its homelessness crisis.

* LL.B. Law Candidate (Senior Sophister), Trinity College Dublin.

1. Introduction

This essay will provide a comparative analysis of the rights to shelter and housing between Ireland and Finland. The decision to compare these two jurisdictions was made as they have both garnered attention for their handling of this issue. After a predictable pre-election dip, the lamentable milestone of over ten thousand people using emergency accommodation across Ireland was returned to, with many organizations saying the actual number is far higher.[1] Failure on the part of successive Irish governments to secure a right to housing and to effectively manage the consequent housing and homelessness crisis has received increasing levels of criticism from national and international bodies.[2] In contrast, Finland has received international praise for its focused and overwhelmingly successful effort on eradicating long-term homelessness.[3] It has also been suggested by experts in the field that the Finnish example could be of particular use to Ireland in implementing an effective housing-led strategy.[4]

The essay will focus on the legal foundations of the right to shelter and housing in the respective jurisdictions. Turning first to Ireland, it will discuss how the lack of a universal constitutional or statutory enumeration of these rights has translated to a low level of

---

1 Kevin O'Neill, 'Number of recorded homeless surpasses 10,000 again as charities blame government inaction' *Irish Examiner* (Cork, February 27 2020).

2 In their most recent assessment of the government's overall treatment of children, the Children's Rights Alliance gave an F-its lowest grade ever given to the government- for its failure in dealing with child and family homelessness. Children's Rights Alliance, *Report Card 2019* (CRA 2019) 32 <www.childrensrights.ie/sites/default/files/submissions_reports/files/CRA-Report-Card-2019.pdf > accessed February 20 2020; Irish Society for Prevention of Cruelty to Children, 'Homeless children in Ireland worse off than their UK peers' <www.ispcc.ie/ news-media/news/homeless-children-in-ireland-worse- off-than-their-uk-peers--ispcc-highlights-failures-of-state-on-international-human-rights-day-/15376> (ISPCC 2019) accessed February 20 2020. United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report: Ireland (UNCESCR 2015) para 26. The Committee expressed their concern over a number of issues, from a lack of affordable housing, rises in rents and inadequate assistance services. See Mercy Law Resource Centre, *The Right to Housing in Ireland* (MLRC 2016) 9.

3 Alex Gray, 'Here's how Finland Solved its Homelessness Problem' (World Economic Forum, 13 February 2018) <www.weforum.org/agenda/2018/02/how-finland-solved-homelessness> accessed 20 February 2020. See Volker Busch-Geertsema, Lars Benjaminsen, Filipovič Maša, and Nicholas Pleace, 'Extent and Profile of Homelessness in European Member States: A Statistical Update' (2014) 4 European Observatory on Homelessness Comparative Studies on Homelessness; Sirkka Liisa Kärkkäinen 'Housing Policy and Homelessness in Finland' in Dragana Avramov (ed), *Coping With Homelessness: Issues to be tackled and Best Practices in Europe* (Routledge Revivals 2018).

4 Nicholas Pleace and Joanne Bretherton, 'Finding The Way Home: Housing Led Responses and The Homelessness Strategy in Ireland' (Simon 2013) 32.

protection, considering their fundamental importance. It will be contended that the lack of statutory protection, combined with the large degree of deference afforded to public authorities and other branches of government by the judiciary on this issue, has failed to vindicate the rights of thousands of Irish citizens.

In contrast, it is submitted that the Finnish Constitution, explicitly including rights to housing and social assistance, offers a much greater degree of protection. The Finnish constitutional model is also advantageous, as it ensures greater levels of legislative compliance with the Constitution and reduces the amount of constitutional litigation applicants must engage in, while still allowing for the judiciary to play a residual role in the vindication of individual rights.

The essay will then compare the social policy of Ireland and Finland dealing with those most acutely impacted by the existence or absence of these rights-the homeless and those at risk of becoming homeless. Both countries made commitments at similar times to adopting strong housing-led models to combat homelessness. Unfortunately, it is clear that the Irish government has not been as committed to this issue as the Finnish government. The essay will conclude that the best way to ensure the Irish government follows through on their repeated promises to address this issue is to provide a clear legal basis for both the right to housing and for adequate shelter, and ensure these rights are directly enforceable.

2. Right to Shelter and Housing in Irish Law

The rights to housing and shelter are socioeconomic rights that are not explicit in the Constitution. In recent years the courts have demonstrated a reluctance to recognise such rights when to do so would necessitate public expenditure, citing concerns over breaching the separation of powers.[5] With no direct right for litigants to rely on, they must argue alleged breaches of related unenumerated rights previously recognised by the Court.[6] The lack of recognition is complimented by a deferential position towards the discretion of local authorities.[7] The courts have proven to only be willing to intervene in extreme cases, involving the most vulnerable applicants.[8] In *O'Donnell v South Dublin County Council*,[9] a Traveller family sought relief having lived for three years in an overcrowded caravan without basic sanitation. They argued that the respondent authority, which had full knowledge of

5 *Sinnott v Minister for Education* [2001] IESC 63, [2001] 2 IR 545; *TD v Minister for Education* [2001] 4 IR 259, [2001] IESC 101.

6 Mercy Law Resource Centre (n 2) 19.

7 Mercy Law Resource Centre, Third Right to Housing Report: Children and Homelessness: A Gap in Legal Protection (MLRC 2018) 10.

8 Mercy Law Resource Centre (n 2) 19.

9 [2015] IESC 28.

their living situation, had violated their rights to bodily integrity and the person under Article 40.3. Of the applicants, MacMenamin J held that only Ellen O'Donnell, who was severely disabled, was entitled to damages for breach of statutory duty under the Housing Act 1988. While acknowledging the authority possessed this discretion under the Act, MacMenamin J relied on *O'Brien v Wicklow UDC* [10] to hold that the word 'may' in section 10(1) of the Act that grants authorities their discretion, ought to have been read as owing Ellen O'Donnell a mandatory 'discrete and special duty'[11] to provide for her housing needs. This was based on the exceptional levels of disability, degradation and hardship she had to endure which the respondents were aware of, combined with regard to the applicant's capacities under Article 40.1 and the State's duty to vindicate her rights under Article 40.3.1. MacMenamin J awarded damages on foot of this breach of statutory duty.[12] This was a rare success in establishing the local authority breached their duties under the Act, and was considered by some as evidence of a shift from the deferential approach taken since *TD*.[13] However, a common criticism of the 1988 Act is the absence of relevant factors for decision makers exercising their discretion,[14] and that it imposes no obligation on the authority to exercise their discretion after a finding of homelessness is made.[15] *O'Donnell* was an opportunity for MacMenamin J to provide some clarity on both these issues, but his reasoning is as devoid of explanation as to the impugned legislation, apart from him saying the applicant's circumstances were particularly severe.

This lack of clarity combined with a vaguely high standard for exceptions ensured that all subsequent attempts to rely on *O'Donnell* have been unsuccessful. In *Mulhare v Cork County Council,*[16] Baker J refused relief for the applicants seeking accommodation within five miles

---

10 (High Court, 10 June 1994). In this case, the applicants argued the authority had a duty to provide them with a serviced halting site. Costello J opined that in certain circumstances, the right to bodily integrity may be infringed by an authority's failure to provide accommodation or shelter. This case is noteworthy because Costello J expresses how his opinion has changed on the distinction between commutative and distributive justice he set out in *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC), another case involving Traveller accommodation. His analysis in *O'Reilly* was endorsed in *TD*, and until there is further Supreme Court determination, it appears that it can be relied on despite Costello J's personal abandonment of this position.

11 *O'Donnell* (n 9) [70].

12 Ibid [86].

13 Conor Casey and Dáire McCormack-George, 'An analysis of the right to shelter in Irish law for children and adults' (2015) 54(2) Irish Jurist 131, 134.

14 Blánaid Ní Bhraonáin, 'Children's Accommodation and the Irish Court - Part 1' (2019) 37(4) Irish Law Times 54, 55. The author contends that this vagueness is 'regrettable', and leaves open the risk of inconsistent decisions between different public authorities.

15 Mercy Law Resource Centre (n 7) 10.

16 [2017] IEHC 288.

of a hospital to cater for the child applicant's needs, despite the respondent conceding their current accommodation was deeply unsuitable. In *Middleton v Carlow County Council,* the High Court refused to overturn the respondent council's decision that the applicant did not meet the definition of 'homeless' under s. (2) of the 1988 Act, as she had family members who could reasonably house her. Meenan J refused the relief sought, contending that the Courts were bound by the *O'Keeffe* standard to only overturn the decisions of expert administrative bodies when they are fundamentally at variance with reason and common sense.[17] Even with this extremely high standard of review, it is submitted that the authority's decision not finding the applicant as homeless is irrational, and *O'Donnell* should arguably have been held to apply. The applicant was living with her son in a tent across from the respondent's offices, having fled her home following domestic abuse, and had repeatedly asserted her family and friends were unwilling to house her and her son.[18] It may not be living in an overcrowded caravan as an autistic child, but in this author's opinion, it is hard to see how Ms Middleton's circumstances did not amount to exceptional hardship, justifying the imposition of a strict duty on the authority in the same way as *O'Donnell.*

The courts have also taken the stance that given the demand for emergency and temporary accommodation, recipients must be prepared to endure reduced standards of living, education and care, even when these arguably jeopardise their bodily integrity. This arose in *C v Galway County Council.*[19] The applicants refused their accommodation offer from the respondents, as it would have meant the autistic sixth applicant would have been much further away from a centre where they received therapy five days a week. Similar facilities near the accommodation only offered therapy three days a week, amounting to a forty percent reduction in the applicant's developmental support. The Court found for the respondent, with Hamilton CJ affirming *O'Keeffe* and *TD* as the appropriate tests in addressing this issue, reaffirming the courts should be slow to interfere with the decisions of expert administrative tribunals.[20] Three criticisms can be made of this case. First, the *O'Keeffe* standard of review was originally intended for authorities with *technical* expertise, such as the respondent in that case, An Bord Pleanála.[21] It is debatable whether housing authorities should have the same discretion, considering the decisions they make in granting emergency accommodation are (or should be) common sense judgments of priority and availability. However, if it is accepted that these authorities have technical expertise warranting the O'Keeffe standard, it is submitted that any decision-maker deserving of being

17 *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, cited by Meenan J at para [48] of *Middleton* (n 16).
18 Mercy Law Resource Centre (n 7) 11.
19 [2017] IEHC 784.
20 ibid [17].
21 Mercy Law Resource Centre (n 7) 12.

granted such discretion would not force a single mother of five to decide between stable accommodation and the treatment of her disabled child being almost halved. If Hamilton CJ relied on *TD* in this case, given the factual scenario he should have also considered its precursor, *Sinnott v Minister for Education.*[22] A key reason that case was brought, and an aspect the State conceded to, was that the plaintiff had received a fraction of the education he was entitled to as a child, and this had a serious negative impact on his development and level of dependence in adulthood. It is worrying that for disabled applicants in these cases, there is an undefined but substantial level of developmental degradation that the courts are allowing to occur, without properly considering the potentially ruinous impact on their bodily integrity that this could result in.

A more general criticism of all of these cases is that there is a lack of meaningful engagement with the applicants' arguments that certain constitutional rights apply, whether it is bodily integrity, the right to the person, or the rights of the child under Article 42A.[23] It is predicted that as long as there are no general constitutional or statutory rights to housing and shelter, these frustrating judgments will continue unabated. Reversion to judicial deference to the other branches of government is a convenient option for the courts when dealing with politically contentious issues such as socioeconomic rights. As this approach seems entrenched, the most effective solution would be for the rights to be specifically enumerated, either constitutionally via referendum, or through statute. Considering such explicit rights exist in the Constitutions of 81 nations worldwide,[24] and were voted for by an overwhelming majority by the Constitutional Convention in 2014,[25] it is doubtful this would be a controversial decision amongst the electorate.

3. Impact of European and International Human Rights Instruments

The value of the European Convention in furthering the case for a right to housing and shelter has been contested. Kenna notes how while there is no obligation for universal provision of housing by a state within the Convention, a combination of obligations under

22 (n 5). Here, a Supreme Court majority overturned the granting of a mandatory order by Barr J in the High Court ordering the State to provide the plaintiff with free education for as long as he could benefit from it.

23 As part of this strand of jurisprudence, see CA v TA (a minor) v Minister for Justice, Equality, Minister for Social Protection, the Attorney General and Ireland [2014] IEHC 523; Tee v Wicklow County Council [2017] IEHC 623.

24 Mercy Law Resource Centre (n 2) 3.

25 ibid 20.

Article 3[26] and Article 8[27] are fashioning minimum obligations for States.[28] More recently, Whyte has noted that the ECtHR has moved more towards leaving the provision of housing as an entirely political matter, which would weaken the prospects of the Convention for the domestic advancement of socioeconomic rights in any individual state.[29] This departure has not stopped applicants from arguing that their Convention rights have been infringed in tandem with claims of violations under the Constitution. So far, the Court has seemed unreceptive to these arguments. For example, this line of reasoning was advanced by counsel for the applicants in *O'Donnell*. In the High Court, [30] Laffoy J held that a Traveller family living in overcrowded, unsanitary conditions for over three years did not amount to conditions severe enough to constitute as inhuman and degrading under Article 3. However, she held that Article 8 had been breached in relation to the fifth applicant, based on her level of disability and the hardship she had to endure.[31] MacMenamin J modified this ruling on appeal, accepting only that Ms. O'Donnell's constitutional rights had been infringed. Following the *Ullah* principle,[32] it was not open for the Court to make a ruling on the application of Article 3 or Article 8 without further Strasbourg jurisprudence.[33]

While possible arguments for rights to housing and shelter under the Convention appear quite narrow at the moment, one European commitment worth mentioning is that Ireland is bound by the Revised European Social Charter which it ratified in 2000. The right to housing is included in Article 16[34] and Article 31.[35] The Additional Protocol to the Charter

---

26 Prohibiting against torture and inhuman and degrading treatment.

27 Guaranteeing the right to respect for private and family life.

28 Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 561, paras 8-102.

29 Gerry Whyte, 'Lord Ellenborough's Law of Humanity and the Legal Duty to Relieve Destitution' (2018) 60 Irish Jurist 1, 14.

30 [2007]149 ILR 579, [2007] IEHC 204.

31 ibid 607.

32 The ratio from R (Ullah) v Special Adjudicator [2004] 2 AC 323 is that the duty of national courts is to keep up with Strasbourg jurisprudence.

33 O'Donnell v South Dublin County Council [2015] IESC 28, [77]-[80].

34 Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.
Article 16 – The right of the family to social, legal and economic protection.
With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, *provision of family housing*, benefits for the newly married and other appropriate means (emphasis added).

35 ibid.
Article 31 – The right to housing.
With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1 to promote access to housing of an adequate standard; 2 to prevent and reduce homelessness with a view to its gradual elimination; 3 to make the price of housing accessible to those without adequate resources.

allows for a complaint mechanism between Contracting States and NGOs.[36] In 2014, Ireland was subject to a collective complaint made by the International Federation for Human Rights on behalf of local social housing tenants alleging inadequate conditions. In 2017, Ireland was found in breach of Article 16 of the Charter based on these inadequate conditions.[37]

Similarly, Ireland has ratified a host of international agreements protecting the right to housing.[38] A similar complaints mechanism to the Economic Social Charter exists for the International Covenant on Economic, Social and Cultural Rights, through its Optional Protocol, but Ireland has yet to ratify this agreement.[39] These international agreements often can be criticised for their lack of enforcement mechanisms, but the exceptions to this rule mentioned above offer compelling examples of what these agreements can achieve once they are ratified. Ireland already has ratified enough agreements that include a right to housing and shelter for an enumeration of these rights within its own Constitution or statute book to be long overdue. Until it does, these agreements further this goal in a number of ways as a source of mounting international pressure to keep up with international human rights best practice, and simultaneously showcasing the Irish government's hypocrisy in failing to do so.

4. Right to Shelter and Housing in Finnish Law

The Finnish approach to housing differs vastly to the Irish approach. First, it obviates the majority of the issues attached to the right to housing and shelter in Ireland by having clear constitutional recognition of the right to housing. As part of the Finnish Constitution's protection of social security, there is a duty on public authorities to promote the right of

[36] Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995 ETS 158.

[37] Complaint 110/2014 International Federation for Human Rights (FIDH) v. Ireland (European Committee of Social Rights, October 23 2017). See FLAC, 'Tenants Welcome European Committee of Social Rights Finding That Ireland Has Failed to Provide Adequate Housing Conditions on Local Authority Estates' (FLAC 2017) <www.flac.ie/news/latestnews/2017/10/23/tenants-welcome-european-committee-of-social-right/> accessed 20 February 2020.

[38] For a list of these agreements, see Mercy Law Resource Centre (n 2) 12-13.

[39] Department of Foreign Affairs, 'International Agreements signed but not ratified by Ireland' (DFA March 27 2018) <www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/Agreements-by-Dept-Signed-not-ratified-as-of-27-March-2018a.pdf> accessed 21 February 2020. As mentioned earlier, the UNCESCR has been strongly critical of Ireland's lack of effort to implement the covenant and from issues surrounding, inter alia, the right to housing. See UNCESCR (n 2).

everyone to housing, and to the opportunity for them to arrange their own housing.[40] A more general protection also exists for those who cannot obtain the means to live a dignified life to have a right to indispensable subsistence and care.[41] The Finnish approach also differs through the unique Finnish constitutional model. Finnish constitutionalism can safely be described as more balanced and less contested between organs of government than it is in Ireland. This is achieved through a combination of Constitutional Review of prospective legislation by a specialised Committee, and a limited form of ex-post judicial review by the Courts.[42]

It is submitted that the clarity of the Finnish approach allows for both organs of government to embrace their role as partial protectors of the Constitution. The Constitutional committee takes the form of a non-partisan collection of members of parliament.[43] Individuals are scrutinised for compliance with the Constitution, and the committee is relatively active and assertive, given how findings of unconstitutionality are not a rarity.[44] If any issues remain following this rigorous process, Article 106 of the Finnish Constitution allows for judicial review of legislation in cases of manifest conflict with the Constitution.

A paradox that can be observed through comparison of the Irish and Finnish Constitutions is that while the Irish Constitution is textually far more individualistic, the Finnish constitution, through a greater focus on the collective, allows for stronger, *individualised* constitutional protection. For example, the Irish constitution places more importance on individual property rights than the Finnish constitution. They are explicitly enumerated in Article 43, but are also included in Article 40.3.2 alongside life, liberty and good name as part of a collection of rights the State is to regard as of particular importance in vindicating and preventing unjust attack. In contrast, property rights in the Finnish constitution appear to be just granted constitutional protection, as opposed to the particular constitutional protection of Article 40.3.2. Article 15 of the Finnish Constitution simply says: 'The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.' The Finnish constitution has a balance of one reference to property's protection, and one reference to its expropriation for the public need. Compared to this, the Irish approach seems excessive. Property is

40 Article 19.4, Constitution of Finland.

41 ibid Article 19.1.

42 Mercy Law Resource Centre, Second Right to Housing Report: The Right to Housing in Comparative Perspective (MLRC March 28 2018) 7-8.

43 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' International Journal of Constitutional Law, Vol 9(2) (2011) 505-531, 511.

44 ibid.

guaranteed as a personal right.[45] There is a constitutional acknowledgement of private property as a natural right.[46] It guarantees this right will never be abolished by the State.[47] Finally, there is a more opaque and reluctant acknowledgement of the necessity of expropriation through 'regulation by the principles of social justice'[48] and 'as occasion requires … reconciling [property rights] exercise with the exigencies of the common good.'[49]

In contrast, the Finnish constitution provides stronger social security protection. Article 19 is headed, 'the right of social security' and places duties on the government to guarantee the health and welfare of its citizens and to promote the right to housing. The creation of positive obligations for the Finnish government varies wildly with the absence of a direct right to housing or shelter, and the Irish Constitution's Directive Principles of Social Policy under Article 45. These are explicitly limited to being of general guidance to the Oireachtas and not cognisable by the Courts.

Despite placing greater emphasis on collective responsibility, the range of dynamic remedies the Finnish court has adopted, along with enforceable rights to social security, arguably allows for more individualised constitutional protection.[50] A salient example of this can be seen in the courts quashing of a blanket income threshold-based social assistance policy that did not consider individual needs. The applicant's income exceeded the threshold for entitlement to social assistance, but as he was deeply in debt and financially struggling, he applied. The court held the applicant's right to social assistance could be derived from his factual life situation and expenses, regardless of the presumptions employed by the authority.[51]

The difference is stark between this case and the Irish approach evident from the cases involving emergency accommodation applications discussed earlier. In the Irish cases, the only individual exercise of discretion was in cases of 'exceptional hardship' such as *O'Donnell*. It is submitted that a more favourable reading of the Constitution is not to ensure the

45 Article 40.3.2.

46 Article 43.1.1.

47 Article 43.1.2. It is submitted this is a self-evident corollary of the two other constitutional guarantees of property.

48 Article. 43.2.1.

49 Article 43.2.2.

50 This is a core suggestion by Scheinin in Martin Scheinin, 'Economic, Social and Cultural Rights: Models of Enforcement', Keynote Address at the Irish Human Rights Commission conference, Dublin 9-10 December 2005. </www.ihrec.ie/documents/prof-martin-scheinin-keynote-address-ihrc-conference-9-and-10-december-2005/> accessed 21 February 2020.

51 See Martin Scheinin, 'Protection of Economic, Social and Cultural Rights in Finland - A Rights-Based Variant of the Welfare State?', in Martin Scheinin (ed), *Welfare State and Constitutionalism - Nordic Perspectives*, (Nordic Council of Ministers, 2001), 245, 249.

absolute minimum level of protection in favour of granting the maximum level of deference to the local authority. Rather, the courts should function as aiding in the invocation by applicants of constitutional rights in relation to a state authority who 'deny what has been promised in the Constitution'.[52] Of course, it helps when applicants have a clearly defined, enforceable right that the court cannot dispute the existence of. That being said, the focus in the Irish analysis on judicial recognition and the large number of cases being brought on this issue, is arguably symptomatic of larger systemic failures on the part of the government and local bodies to address this issue at a policy level. While judicial recognition of a right to housing would offer some protection, lasting success can only be achieved by executive action.[53] The truth of this statement is evident from a comparison of recent Finnish and Irish approaches to tackle homelessness.

5. Finnish Homelessness Policy

According to Tainio and Fredriksson, the development of a Finnish strategy to address homelessness was the identification of long-term homeless people as being especially resistant to previous assistance measures.[54] This target was easily settled upon as it quickly gained political consensus.[55] This led to the establishment of clear goals in PAAVO I and II. The objective of PAAVO I was to halve long term homelessness in Finland from 2008 to 2011, while PAAVO II aimed to eliminate long-term homelessness entirely. The combination of clear goals and political consensus was aided by co-ordination of all levels of government, with city representatives signing letters of intent, and over €34 million assigned to the strategy.[56]

A number of aspects of this strategy were unique. The initial focus on long-term homelessness and PAAVO II's renewed focus on the concealed homeless were both unusual, as the typical aim of the homeless strategy is just to reduce public visibility of the homeless.[57] At the core of the strategy was the concept of Housing First. This approach

52 ibid 283.

53 Mercy Law Resource Centre (n 42) 10.

54 Hannele Tainio and Peter Fredriksson, 'The Finnish homelessness strategy: from a "staircase" model to a "housing first" approach to tackling long-term homelessness' (2009) 3 European Journal of Homelessness 181, 183.

55 Nicholas Pleace and others, 'The Strategic Response to Homelessness in Finland: Exploring Coordination and Innovation with a National Plan to Reduce and Prevent Homelessness' (2016) Canadian Observatory of Homelessness 426, 427.

56 ibid 2008.

57 See Volker Busch-Geertsema, 'The Finnish National program to Reduce Long-Term Homelessness: Synthesis Report' (2010) Bremen, European Commission Directorate General of Employment, Social Affairs and Equal Opportunities.

views housing as a human right that should not be dependent on engaging in treatment for addiction or psychological issues. Rather, it views housing as providing the necessary stability to enable people to engage with treatment at their own pace.[58] The Finnish approach departed from a traditional Housing First pathway model of using ordinary housing in ordinary communities. While some of the housing provided could be categorized like this, it was primarily a replacement of the existing homeless service infrastructure with a mix of congregate housing First services, where the majority of occupants within an apartment block would be Housing First occupants, along with scattered housing services.[59] The congregate model drew some concern, as social integration is seen as a key goal of Housing First.[60] However, these concerns did not materialise in any meaningful way, and despite not eradicating homelessness entirely, PAAVO is seen as a huge success for reducing long-term homeless by 25% across each phase.[61] Despite this success, Finland is maintaining its commitment to eradicating long-term homelessness. The Minister of the Environment launched an Action Plan for Preventing Homelessness for 2016-2019.[62] The document states the plan is necessary to link the efforts on homelessness to work on preventing social exclusion through Housing First. It has set its objectives as reducing the current numbers, reforming the system to be more user focused, and achieving cost savings, noting how housing one long term homeless person saves fifteen thousand euro in public funds per year. Key among its preventive measures are increasing the production of affordable housing,[63] as it has been suggested as the main barrier inhibiting complete success.[64]

6. Irish Homelessness Policy

At the same time PAAVO I was commencing in Finland, Ireland was launching its own strategy to curb homelessness. In 2008, an ambitious five-year strategy was launched, and

58 See Sam Tsemberis, Housing First: The Pathways Model to End Homelessness for People with Mental Illness and Addiction Manual (1st edn, Hazelden Press 2010).

59 Pleace and others, (n 55) 430-432.

60 The importance of social integration is discussed at length in Guy Johnson, Sharon Wilkinson and Cameron Parsell, 'Policy shift or program drift? Implementing Housing First in Australia' (2012) Australian Housing and Urban Research Institute Final Report.

61 Pleace and others (n 59).

62 Action Plan for Preventing Homelessness in Finland 2016–2019 (2016 Ministry of the Environment) <https://asuntoensin.fi/assets/files/2016/11/ACTIONPLAN_FOR_PREVENTING_HOMELESSNESS_IN_FINLAND_2016_-_2019_EN.pdf> accessed 21 February 2020.

63 ibid 3-5.

64 Pleace N, Knutågard Culhane DP and Granfelt R, *The Finnish Homeless Strategy: An International Review* (3rd edn, Reports of The Ministry of the Environment 2015) 85-88.

ten statutory homeless Action Plans were introduced.[65] Throughout this period, new plans were introduced without clarity as to the status of earlier plans. The Department of Environment, Community and Local Government issued a Housing Policy Statement in 2011,[66] and a Homelessness Policy Statement in 2013.[67] While both plans called for a housing-led approach and attributed the crisis to a lack of affordable housing following the financial crash, the phrase 'right to housing' is markedly absent from both policy documents. Despite the homelessness policy paper adopting the same goal as PAAVO of ending homelessness by 2016,[68] the numbers of homeless people continued to rise,[69] leading to criticism of the government for their policies being a complete failure.[70] Interest groups used this inaction to advocate for the prioritisation of a right to housing, but so far, the government has not been overly enthusiastic. A Right to Housing Bill was defeated by vote in March of 2017.[71] A 2018 Bill proposing an amendment of the Constitution to introduce economic, social and cultural rights is yet to be debated.[72] In the time Finland has dramatically reduced their levels of long term homeless, Ireland has seen its numbers of people in emergency accommodation increase by 50%, and the number of children in emergency accommodation has tripled, from 1000 in 2014 to 3000 by the end of 2018.[73] Other pervading issues are the lack of a clear line between temporary and emergency accommodation,[74] which leads to the latter being used as the former when the accommodation is unsuitable, particularly for young children. This ties into the overarching

65 Department of Environment, Heritage and Local Government, *The Way Home: A Strategy to Address Adult Homelessness in Ireland 2008-2013* <www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownLoad%2C18192%2Cen.pdf> accessed 22 February 2020.

66 Department of Environment, Community and Local Government, Housing Policy Statement (2011) <www.housingagency.ie/regulation/housing-policy-statement-2011.pdf> accessed 21 February 2020.

67 Department of Environment, Community and Local Government, Homelessness Policy Statement (2013) <https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownLoad%2C26867%2Cen.pdf> accessed 21 February 2020.

68 ibid 2.

69 Mercy Law Resource Centre Submission to the Oireachtas Committee on Housing and Homelessness 10 May 2016, 2.

70 ibid 3.

71 Thirty-fifth Amendment of the Constitution (Right to Housing) Bill 2017. (Bill 41 of 2017)

72 Thirty-Seventh Amendment Of The Constitution (Economic, Social And Cultural Rights) Bill 2018 (Bill 99 of 2018).

73 European Observatory on Homelessness, 'Homelessness Services in Europe' (2018 Brussels) 8 European Observatory on Homelessness Comparative Studies of Homelessness 27.

74 ibid 30

issue of a complete lack of regulation of emergency accommodation.[75] The government's proposed solution is a commitment in their latest proposal, 'Rebuilding Ireland' to ending the use of B&B accommodation and a transition to the limited use of hotels and family hubs solely for emergency accommodation.[76] This is quite a piecemeal solution, considering hotels and family hubs often have the exact same issues and lack of facilities as B&Bs.[77] The minute silver lining is that on the small scale that Housing first operations akin to PAAVO are operating, they appear to be relatively effective.[78] On the other hand, the functionality of these schemes catering to a few hundred is scant comfort when Ireland requires a housing-led scheme that can accommodate several thousand.

7. Conclusion

This essay has sought to provide a comparative analysis of the rights to shelter and housing in Ireland and Finland. Having examined the issue from the perspectives of case law, constitutional and statutory protection, and government policy, it is safe to conclude that overall the approach in Finland is to be much preferred. This is exemplified by analysis of how in policy terms, both jurisdictions began with the same intentions. It is submitted a number of factors have contributed to the Irish approach being so much poorer. Primarily, the lack of a textual basis for a general right to housing or shelter is a massive obstacle in creating effective policy and effecting social change on this issue. Addressing systemic issues such as ensuring the availability of affordable housing is imperative to tackling any housing crisis. However, it is submitted that as these rights are enshrined internationally and given the negative impact the absence of such rights has caused thousands of citizens, this should be Ireland's next priority.

75 Mercy Law Research Centre (n 7) 19

76 Rebuilding Ireland, 'Action Plan Addressing Homelessness', 33 <https://rebuildingireland.ie/wp-content/uploads/2016/07/Rebuilding-Ireland_Action-Plan.pdf> accessed 21 February 2020.

77 Mercy Law Resource Centre (n 75).

78 Rachel Manning, Courtney Kirby and Ronni Michelle Greenwood, 'Building a Way Home: A Study of Fidelity to the Housing First Model in Dublin, Ireland' <www.feantsa.org/public/user/Observatory/12-3_CONCLUSION_v04.pdf > accessed 21 February 2020.

THE ROLE OF SOFT LAW IN THE DEVELOPMENT, IMPLEMENTATION AND ENFORCEMENT OF EU COMPETITION LAW: A COMPARATIVE ANALYSIS

Kyrill Ryabtsev*

Abstract

The body of European Union competition law occupies a crucial place within the EU legal order. It is responsible for promoting and safeguarding the European internal market and ensures fair competition between corporations. Competition law is gradually developing and adapting to modern specifics and needs of the European market. On the one hand, one can see this process as a smooth evolution of legal theories, rules of conduct for companies and competition authorities. However, it has to be emphasised that changes of EU competition rules require a highly complicated interplay between various stakeholders in this field, such as the European Commission, EU courts and national competition authorities. One of the practices which acquired a vital role in this process is soft law enacted by the Commission. Being previously seen as a non-binding legal instrument, soft law created a great interest among legal scholars regarding the extent of its influence on the EU competition law sector. This paper will conduct a comparative analysis of various EU competition law actors regarding the application of the Commission's soft law. Notably, it will target approaches used by the Court of Justice of the European Union and Commission, on the one hand, and the national competition authorities and national courts of the Member States, on the other. Accordingly, it will provide the reader with valuable insight into the role of non-binding rules in the harmonisation of EU competition law.

* Kyrill Ryabtsev is an LLB candidate with Honours in International and European Law programme at the University of Groningen, the Netherlands. He is specialising in various aspects of EU Law and ICT Law. Additionally, he holds a position of a research assistance in EU law at the University of Groningen, EU Law department. Kyrill also works as a President and Editor-in-Chief of the Groningen Journal of International Law and as a Vice President for Marketing for ELSA the Netherlands.

1. Introduction

The European Union (the EU) legal order is a complex system which includes a variety of political and legal instruments used to facilitate the European integration process.[1] One of the main areas where the policies of the EU are playing a crucial role is competition law. This legal field is responsible for the maintenance and promotion of the competitive market.[2] The European Commission (the Commission) plays the primary role not only in initiating EU competition laws, but also, being the guardian of the Treaties, in enforcing them.[3] It should be emphasised that, according to the case law of the Court of Justice of the EU (the Court), it enjoys a significant amount of discretion while scrutinising the Member States and companies for non-compliance with EU rules.[4]

Nevertheless, not all EU documents are legally binding on the Member States and individuals. Notably, the TFEU mentions two legal instruments - recommendations and opinions - which do not have a legally binding force.[5] Together with other types of documents issued by the Commission, these have the status of soft law and thus cannot create legal obligations. Importantly, these instruments form a large part of the competition law field.[6] By utilising soft law, the Commission communicates to national authorities and companies about how it sees the regulation of the internal market and clarifies its interpretation of EU competition rules.[7] Hence the question arises - whether soft law, even though not being legally binding, should be relied upon during enforcement of European competition law and to what soft law influences its development

This research seeks to give an introduction to the topic of soft law and its place in the EU legal order, particularly to its application in the competition law field. It will advocate the thesis that in order to promote the internal market further, soft law should be taken into

1 David Trubek and Louise Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination.' (2005) 11 European Law Journal 343, 344.

2 Kati Cseres, 'Comparing laws in the enforcement of EU and national competition laws' (2010) 3 European Journal of Legal Studies 7, 9.

3 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 17(2); Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, art 258; Anne Bonnie, 'The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?' (2007) 1 IJCER 39, 40.

4 Case 247/87 *Star Fruit Company SA v Commission of the European Communities* [1989] ECR 291, para 11.

5 TFEU (n 3) art 288.

6 Oana Ștefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 European Law Journal 1, 2.

7 Linda Senden, 'Soft law and its implications for institutional balance in the EC' (2005) 1 Utrecht Law Review 79, 82.

account seriously by courts and competition authorities in the EU and its Member States, but without threatening the EU democratic values. Accordingly, this article will provide the reader with a comparative analysis of soft law application by EU supranational institutions, namely the Court and the Commission on the one hand and the national courts and antitrust authorities of the EU Member States on the other.

2. Soft Law in the EU Competition Law: A Theoretical Background

As a concept, soft law emerged a long time ago and has been largely used in different legal fields for more than twenty years.[8] One can call it a 'quasi-legal instrument' which is used by the Commission as a way to promote its policies and indirectly influence legal practices of the Member States.[9] Currently, the body of EU soft law is quite diverse and entails such documents as recommendations, opinions, notices and guidelines.[10] The term 'quasi-legal' can be explained by the varied nature of those documents and their contradictory status under EU law. It should be reiterated that according to the TEU, legislative powers in the EU lies within the European Parliament and the Council of the European Union.[11] Accordingly, the Commission has explicit powers to produce only non-binding documents.[12] Contrariwise, it is observed that in practice, soft law may lead to tangible results.

There are several reasons why soft law became relevant in the EU. Firstly, the Commission started issuing more soft law instruments in the competition law area[13] and thus brought more attention upon it at both EU and national levels. This phenomenon is called the Open Method of Coordination, and soft law of the Commission plays a crucial role in it.[14] In this light, one can argue that in some senses for the Member States fields, harmonisation by soft law is more appropriate than by legally binding norms. Secondly, there is no doubt that instruments issued by the Commission are very authoritative and are regularly taken into account by national authorities when the question of application of EU law arises.[15]

8 Hakon Cosma and Richard Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 European Business Law Review 25.

9 ibid 26.

10 Importantly, this list is not exhaustive. One can find other examples of soft law among the list of other Commission's legal acts; See ibid 46.

11 TEU (n 3) arts 14, 16.

12 Senden (n 7) 88; ibid art 17.

13 Zatina Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective' (2015) 16 German Law Journal 223, 277.

14 Trubek and Trubek (n 1) 344.

15 Oana Ştefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*

Through its recommendations and guidelines, the Commission seeks to give Member States further explanations regarding EU law application on a case-by-case basis and unpacks its provisions in a more detailed manner than it is in the hard law of the EU. Thirdly, soft law can also be understood as a complementary mechanism to the body of EU hard law and has to be applied in conjunction with it[16] in order to give the full effect to the EU law.[17] Lastly, soft law draws its importance from the general principles of EU law, particularly the principle of legitimate expectations.[18] Accordingly, it advocates a statement that an entity can expect the Commission to 'play' according to the rules and guidelines it has issued. Importantly, it can be observed that, particularly in the competition law field, soft law is occupying a unique place.[19]

Competition law lies at the heart of the EU legal order and has a crucial role in protecting the internal market. Therefore, the Commission gives it much attention, which is reflected through a drastically significant amount of soft and hard legislation in that sector.[20] In the domain of competition, soft law instruments usually play two leading roles. Firstly, the Commission issues soft law to inform national competition authorities about its view on the correct implementation of competition rules and gives its interpretation of hard competition legislation. The Commission *De Minimis* Notice perfectly illustrates this case.[21] It gives national authorities a guideline regarding the gravity of the anti-competitive behaviour which has to be reached in order for it to be considered a threat to the market competition. Additionally, it has to be noted that soft law instruments are usually based on a prior Commission's experience in antitrust issues and the case law of the Court on that matter. Thus, they show a general attitude of the EU towards specific competition law cases and contribute to the transparency of Commission's activities.[22] Moreover, according to the

(OUP 2017) 205.

16 Zlatina Georgieva, 'The judicial reception of competition soft law in the Netherlands and the UK' [2016] European Competition Journal 54, 71.

17 Commission, 'European Governance - A White Paper' COM (2001) 428 final, 20.

18 András Kovács, Tihamér Tóth and Anna Forgács, 'The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts' [2016] ELTE Law Journal 53, 60.

19 Oana Ştefan and Arnaud van Waeyenberge, 'L'Évolution du Droit Européen de la Concurrence: Défis et Transformations de la Méthode Communautaire' (2013) 2 Cahiers de Droit Européen 395, 403.

20 For example, see European Commission, *EU Competition Law Rules Applicable to Antitrust Enforcement. Volume I: General Rules. Situation as at 1st July 2013* (European Union 2013) 8.

21 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) [2001] OJ C291/1.

22 Thomas Devine and Mariolina Eliantonio, 'EU Soft Law in the Hands of National Authorities: The Case Study of the UK Competition and Markets Authority' (2018) 1 Review of European Administrative Law 49, 58; Oana Andreea Ştefan (n 6) 15.

Commission, soft law is contributing to a uniform and consistent application of EU competition policies. Accordingly, it ensures a successful harmonisation of policies among the Member States.[23] The second significant role played by the soft law in competition regulation is its ability to make already established principles of competition law more accessible and clear for the companies.[24] Accordingly, the guidelines can entail not only explanations used by competition authorities, but also by private parties in conducting business. Thus, the latter can foresee how the state government or the Commission would act in case of breach of competition law and how the EU sees optimal market-friendly behaviour. Nonetheless, the extent of soft law application varies from one Member State to another.

3. The EU and National Courts Attitude: when to apply?

Due to the procedural autonomy enjoyed by Member State while applying EU law,[25] each of them sees soft law differently. The Court has a specific attitude towards soft law as well, conducting an in-depth analysis of the circumstances surrounding the case and the level of soft law involvement in it. Consequently, in order to understand the trend regarding soft law application in the EU, it is necessary to perform a comparative analysis of the case law of the Court and of courts at the national level. Furthermore, it will help to illustrate the impact of these courts' decisions on practices of the Commission and national competition authorities.

Firstly, it is crucial to discuss the Court approach towards soft law.[26] As a general rule, the Court cannot base its decisions only on soft instruments. According to the positivist theory of law, only laws enacted by the EU legislature can be invoked in courts and form the *ratio decidendi* of their verdicts.[27] Nevertheless, the Court tends to reference soft law in its

---

23 Marine Briard, *Recherche sur la détermination du droit de l'Union européenne par le droit international : l'exemple de la soft law* (CERIC 2017) 79.

24 Cosma and Whish (n 8) 29; Ştefan (n 6) 9.

25 Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1986; Zlatina Georgieva, 'Competition soft law in French and German courts: A challenge for online sales bans only?' (2017) 24 Maastricht Journal of European and Comparative Law 175, 176.

26 It has to be underlined that Advocate General also includes Commission's notices and guidelines in the Opinions and the reasoning is usually similar to the one of the Court; For example, see Case C-16/16 K*ingdom of Belgium v European Commission* [2017] OJ C 134, Opinion of AG Bobek.

27 Boris Barraud, 'Les nouveaux défis de la recherche sur les sources du droit' (2016) 164 Revue de la Recherche Juridique - Droit Prospectif 1, 4.

judgments.[28] One can identify several reasons why it is inclined to do so. Firstly, the principle of legitimate expectations can be invoked. Being a general principle of EU law, it is capable of legitimising the use of soft law in the proceedings. Accordingly, private parties can expect the Commission to act in line with rules imposed on them, even if those rules are not legally binding.[29] Importantly, the Court stated in the *Dansk Rørindustri* case that soft law rules prevail over Commission's past practices in competition law.[30] Therefore, the Court can refer to soft law while assessing the Commission's actions in line with EU general principles. Lastly, in the *Polska Telefonia* case, the Court established a divide between legally binding obligations and legal effects.[31] It stated that non-binding rules may still create practical consequences for the individual and thus they have to be taken into account during proceedings. However, the Court always reiterates that soft law has the lowest rank in the hierarchy of the EU legal order. The *Archer Daniels* case illustrates this statement, where the Court declared that soft law instruments cannot be inconsistent with hard competition law.[32] Thus, the Court is more confident to apply Commission's non-binding instruments in conjunction with hard competition law and never exclusively uses soft law in its *ratio decidendi*.[33]

Secondly, the view of national courts has to be considered. It is a well-established fact that interpretations of the Court are binding not only on the parties to the proceedings but also on all national courts of the Member States.[34] Therefore, the Court's practice influenced the national attitude towards soft law in the competition sphere. The *Grimaldi* case is remarkable because it clarified the role of national courts in the implementation of soft law. In that case, the Court stated that national courts are bound to take soft law into account while dealing

---

28 Importantly, the European Court of Justice (the ECJ) is more reluctant towards soft law than the General Court. It can be explained by the hierarchy of the two instances of the Court. The ECJ takes appeal cases only on the points of law, thus it has to be extra scrupulous towards sources used for its legal reasoning. Contrary, the General Court is the court of first instance and thus there is a possibility for appeal, which allows it to be more lenient regarding grounds for its decisions; See Ştefan (n 6) 7.

29 Petra Láncos, 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?' (2018) 24 European Public Law 755, 767.

30 Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para 260; Ştefan (n 6) 9.

31 Oana Ştefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) 75 The Modern Law Review 879, 882; Case C-410/09 *Polska Telefonia Cyfrowa* [2011] ECR I-3853, para 35.

32 Case C-397/03 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission* [2006] ECR I-4429, para 19.

33 Georgieva (n 16) 71.

34 Case C-52/76 *Luigi Benedetti v Munari F.lli s.a.s.* [1977] ECR 163, para 26.

with competition law cases, regardless of its non-binding nature.[35] Thus, it advocated the possibility of consistent interpretation of national law not only in line with hard rules of the EU, but also with other EU legal instruments.[36] However, one should not forget the large discretion given to Member States in that regard.[37] One can argue that the statement 'to take into account' should not be interpreted as imposing an obligation on national courts to base their *ratio decidendi* on soft law, thus giving the latter a fair amount of discretion.[38] Usually, national courts tend to base their reasoning on soft law instruments which are related to already existing competition law provisions or Court case law.[39] This can be explained by the fact that they are aiming to be in line with the Court rulings in order to ensure a uniform application of EU competition law. Lastly, soft law can be invoked on the national level as a way to ensure the *effet utile* of EU competition law.[40]

Accordingly, it can be argued that in order for EU competition policies to be effectively enforced in the Member States, soft law has to be taken into consideration by courts[41] in order to corroborate their reasoning.

After looking at the courts' approach, it is useful to examine how it has influenced the practices of competition authorities in the EU and its Member States. Firstly, the Commission's view needs to be considered. On the one hand, it is arguable that through soft law the Commission is trying to find a back-door to the legislative powers.[42] It is partially true, as via soft law the Commission attempts to impose its implementation rules on national competition authorities.[43] This statement can be further illustrated by an example of Guidelines on Fines.[44] This document introduces the Commission's view on the calculation of the fines in case of competition law breaches, regardless of already existing national rules on that matter. On the other hand, one should not forget that the Commission does not try to occupy the interpreter seat of the Court.[45] Moreover, soft law is viewed by

35 Case-C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, para 18.
36 Ștefan (n 6) 15.
37 Case C-150/11 *Commission v Belgium* [2012] OJ C160, para 34.
38 Kovács and others (n 18) 65.
39 Georgieva (n 16) 70; Ștefan and van Waeyenberge (n 19) 441.
40 Case 158/80 *Rewe Handelsgesellschaft Nord mbH and Rewe Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805, para 46.
41 Devine and Eliantonio (n 22) 2.
42 Barraud (n 27) 12.
43 Zlatina Georgieva, 'Competition Soft Law in National Courts: Quo Vadis?' (TILEC Discussion Paper No. 2016-038 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888000> accessed 7 November 2019, 5.
44 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2.
45 Marion Barbe, 'De la soft law en droit de la concurrence: Partie I' (*Le Petit Juriste*, March

the Commission as the lowest instrument in the hierarchy of EU norms, thus being invoked as a supportive mechanism to the competition hard law.[46] Hence, when the Commission abused its discretion and made soft law to go further than the actual EU law is quite rare.[47] Lastly, one should not forget that soft law is considered to be binding on the Commission as a result of the earlier discussed principles of legitimate expectations.[48] Accordingly, by issuing competition soft law, the Commission has limited its discretion and cannot depart from the rules and procedures prescribed by those documents.[49]

In contrast to the Commission's approach, national competition authorities' attitude towards soft law is more complicated.[50] The Court never explicitly required them to integrate the Commission's soft law in their assessments, thus respecting their procedural autonomy in that regard.[51] However, for the reason of the uniform implementation of the EU law, national authorities tend to pay due regard to the Commission's soft lawl.[52] Moreover, they are bound by another principle of EU law, namely by the duty to give reasons. Consequently, they are expected to consider soft law during their practices or to explain to the accused party their reasons for why they will refrain from doing so.[53] Furthermore, similarly to the national courts, competition authorities tend to apply those soft law instruments, which have a sufficient base in hard competition law.[54] As an illustration of that reasoning, Commission Guidelines on Vertical Restraint[55] and Guidelines on Horizontal Agreements[56] should be mentioned. The Vertical Guidelines are occupying around 62% of the national judicial mentioning of soft law rules.[57] The Horizontal Guidelines have 13% of such case law referencing to soft law instruments.[58] Accordingly,

2016) <www.lepetitjuriste.fr/soft-law-droit-de-concurrence-partie-i-2/> accessed 7 November 2019.

46 Cosma and Whish (n 8) 51.

47 Georgieva (n 43) 6.

48 Kovács and others (n 18) 61.

49 Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* (n 30) para 260.

50 Godefroy de Moncuit, 'Un requiem pour la loi, un plaidoyer pour la soft law : L'effet positif du « droit souple » sur la dissuasion des infractions de concurrence' [2015] Droit et Croissance 1, 9.

51 Devine and Eliantonio (n 22) 8.

52 Georgieva (n 25) 178.

53 Ingrid Opdebeek and Stéphanie de Somer, 'The Duty to Give Reasons in the European Legal Area a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) 2 RAP 97, 102.

54 Georgieva (n 25) 183.

55 Guidelines on Vertical Restraints [2010] OJ C 130/1.

56 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, [2011] OJ C11/1.

57 Georgieva (n 43) 10.

58 ibid 11.

as so many national cases are referencing those guidelines, it can be observed that national competition authorities are frequently invoking them in their practices.

4. Quasi-legal instruments: What is next?

In light of this analysis, there is no doubt that soft law occupies a peculiar place in the body of EU antitrust regulations. Accordingly, one can notice a mutualistic system of reasoning used by different courts and competition authorities regarding soft law status in the competition field.[59] First of all, one can see the case of inter-institutional cooperation through which the process of competition law development is happening.[60] The Commission is interacting with the Court, and the latter sets the framework for national courts and competition authorities. Hence, one can observe that soft law in competition law is usually seen as a supporting instrument to the already existing hard law.[61] It helps the Commission enhance the EU integration process and to protect the internal market effectively. However, it rarely occupies the primary place in the assessment of competition cases both by courts and by competition authorities. Nevertheless, after looking at the Court competition case law and national practices, it can be concluded that soft law instruments do influence the implementation and enforcement of EU competition law. Firstly, the Commission guides national authorities by its soft law and enhances the successful enforcement of competition rules by explaining their correct meaning.[62] Therefore, such instruments are capable of indirectly influencing national systems of competition control and encouraging the development of new trends in market competition protection. Furthermore, antitrust authorities tend to adapt their procedures to the European standards in order to ensure the effectiveness of EU law and to avoid possible legal conflicts with the Commission. Secondly, EU courts are showing interest in soft law and are referencing it in their decisions.[63] Soft law plays a crucial role in guiding judicial reasoning and might influence the output of the proceedings. Thirdly, as soft law is considered to be binding on the Commission's actions, the latter is required to act within the limits of its competences. Consequently, the Commission's acts are reflecting rules of soft law and might be even found in the Commission's draft legislative proposals to the EU legislator. Lastly, it can be noticed that through catalysing the EU harmonisation of competition regulations, soft law is guiding the enforcement mechanisms via the path preferred by the Commission.

59 Georgieva (n 16) 59.
60 Senden (n 7) 83.
61 Ștefan and van Waeyenberge (n 19) 396.
62 Georgieva (n 25) 176.
63 Georgieva (n 16) 84.

Accordingly, without having a legally binding impact, competition soft law is, as was observed by the Court in the *Polska Telefonia* case, producing practical effects on public and private parties.[64] Therefore, soft law can be called a quasi-legal instrument, which safeguards the uniform application and *effet utile* of European competition law among the Member States.

Nonetheless, one should not overestimate the importance of soft law, as it still does not have the status of a legally binding norm. Consequently, for the reason of respect of the legal certainty principle, it has to be carefully applied in order to avoid its transformation into hard law by other actors than the EU legislator.[65] Accordingly, soft law has to strengthen the successful enforcement of competition law, but not to change the nature of the EU inter-institutional relations. Moreover, it should refrain from infringing the procedural autonomy given to Member States.[66] Therefore, through *de facto* producing practical effects on the competition law actors, soft law instruments should not become an oxymoron by creating unofficially *de jure* legally binding obligations. Otherwise, it can infringe the democratic values of the EU.[67] Therefore, the Commission's soft law cannot contradict EU hard legislation, by for example, prescribing more serious punishments for antitrust violations or dominating national procedural aspects.

Consequently, it can be presumed that it is hard to see either the EU courts or competition authorities adopting a more stringent application of the Commission's soft law in the competition area than the one practised now. However, if Member States or the EU gives soft law a bigger role, the role of the EU legislator would consequently be undermined, and thus threaten democracy in the EU. The Commission should not occupy the seat of the legislator and has to stay within the boundaries of its powers. Furthermore, such a hypothetical case can create an extra limit on the procedural autonomy enjoyed by the Member States. As a consequence, the Commission has to cooperate with all the EU market competition stakeholders and refrain from abusing its discretionary powers by imposing additional legal obligations on the Member States through soft law instruments.[68]

64 Case C-410/09 *Polska Telefonia* (n 31) para 35.

65 Ștefan and van Waeyenberge (n 19) 416.

66 de Moncuit (n 50) 6.

67 Ulrika Mörth, 'Soft Law and New Modes of EU Governance – A Democratic Problem?' (Stockholm Centre for Organisational Research 2005) 11.

68 ibid 40.

5. Conclusion

This paper discussed the role of soft law enacted by the Commission in the development, implementation and enforcement of EU competition law. To conclude, it can be reiterated that soft law in the EU legal order occupies a controversial place and is often considered to be a back-door for the Commission when it comes to the legislative powers. Importantly, as competition law plays a crucial role in the process of European integration, the Commission is actively involved in harmonising its implementation and enforcement among the Member States. As a consequence, the body of soft law instruments in this legal field is very diverse, as it is capable of increasing uniformity of competition law application by national antitrust authorities. Therefore, the Court and national courts are increasingly engaging with soft law instruments while hearing disputes than it was in the past. Consequently, soft law is influencing the behaviour of national competition authorities and the Commission, which is subsequently reflected by their control and assessments of antitrust cases.

The question that lies at the heart of this research was the extent to which non-binding mechanisms impact the development and enforcement of competition law in the EU. After critically exploring the nature of soft law instruments and how various institutions around the EU apply them, it can be deduced that its role became much more important than it used to be in the past. Soft law started having an indirect influence on the evolution of competition law through EU courts' interpretation and various antitrust authorities' reliance on it. The latter was taking soft law more seriously as they found it highly authoritative due to its substance and clarity. Furthermore, the Commission itself is bound by its own rules due to the legitimate expectations principle and thus reflects soft law measures through its actions. Nonetheless, the Court emphasised that even though Commission soft law is highly authoritative, it still has to stay in line with provisions of competition hard law. Thus, an interdependent system was established, where soft law works as a comprehensive explanatory instrument only operates within the limits of hard law of the EU. It does provide an additional explanation to antitrust rules, but does not interpret the law further than the EU legislator intended or the Court specified.

Consequently, being an important aspect of competition law development, soft law should be taken into account by various antitrust authorities and courts. In this respect, they are not creating new rules and obligations upon the competition authorities of the Member States and private parties or in any other way contradicting EU competition law. Consequently, the degree of soft law application in the antitrust field should be in line with democratic values of the EU, particularly by avoiding the situation where the Commission

substitutes the European Parliament and Council of the European Union or otherwise breaching the procedural autonomy of Member States.

LEGACIES OF STATIST MAJORITARIANISM IN THE PROTECTION OF CULTURAL HERITAGE

George Hill*

Abstract

This paper asks to what extent cultural heritage law is inherently inclined towards the protection of the culture of national majorities and to what extent this continues to inhibit the democratisation and universalisation of cultural heritage protection. It explores the evolution of cultural heritage from an exclusionary fixation on the cultural patrimony of the nation-state towards a more universal conception of culture. Two distinct but intertwined narratives are of particular intrigue: the emergence of international cultural heritage law as distinct from cultural property law as well as parallel developments in cultural rights through the lens of international human rights law. While cultural heritage law still bears the scars of the nation-state, the influx of a human rights-based emphasis on minority and group rights provides seeds of hope.

* LLM Candidate, Jesus College, Cambridge; European Legal Studies (LLB) Graduate, University of Kent. This essay was completed during the author's exchange study at Maastricht University in 2017-18.

1. Introduction

It is not the design of this paper to offer a definitive and comprehensive history of cultural nationalism, nor of the evolution of minority cultural rights. Instead, it seeks to address two interconnected questions. First, it tracks the emergence of early international legal references to cultural property from a politico-legal climate heavily insistent on the preservation of dominant national identities, treating cultural property as the exclusive object of the nation-state. Against this background, it will consider the extent to which modern cultural heritage law continues to propagate structures of protection engineered exclusively to national culture and, implicitly, national majorities and elites. This first question is inspired by Fechner's accusation of nation-centrism through the depiction of cultural property law as '*a method for the arbitration of national interests.'*[1] The second limb of this inquiry assesses the extent to which minorities and indigenous groups have been afforded second-rate protection because of this nationalistic legacy. In analysing the evolution of the current model, possible future developments in the field of minority cultural rights will be briefly evaluated.

2. Methodology

In tracking the reversal of the nationalistic framing of early cultural property standards, this paper locates and analyses two strands of legal development that are teleologically confluent yet disciplinarily distinct: the predominantly soft-law influence of UNESCO and the parallel emergence of cultural rights in International Human Rights Law.

It is proposed that the universalisation of cultural heritage indicates an erosion of the nation-state's centrality as the key actor in cultural heritage discourse. To use the terms popularised by James Crawford, it will be argued that a shift has occurred from the 'rights of governments' to the 'rights of peoples' within cultural heritage law.[2] In parallel, a shift has also occurred between Merryman's two '*dissonant sets of values',* with a transition towards cultural universalism and away from cultural relativism.[3] Crucially, this paper analyses the view that the traditional emphasis on cultural nationalism is declining, in favour of a universalist outlook.

---

1 Frank G Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 International Journal of Cultural Property 376.

2 James Crawford, 'The Rights of Peoples: Peoples or Governments' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 136.

3 John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 AJIL 831, 833.

In this light, the movement towards minority self-determination will be considered as a basis for future minority emancipation. It is posited that existent international provisions have been ineffectual in realising the cultural dimensions of the right to self-determination. While incremental action is being taken in this direction,[4] it is argued that centralised governmental discretion in the determination of cultural significance continues to perpetuate the toxic legacy of nationalistic models of culture and thus remains a prominent obstacle to the diversification of existent conceptions of culture.

3. The Historical Origin of Cultural Property Protection

Contemporary cultural heritage law is largely the product of its post-renaissance origin, where culture was secondary to the interests of the warring nation-state. This secondary status arguably continues to haunt modern cultural heritage law.

3.1 Cultural Nationalism in the Law of Nations

It is Merryman who delves furthest into legal history to explain the origin of cultural nationalism. Merryman quotes Polybius, who notes that the acquisition of cultural property had the central intent of weakening other peoples, rendering *'the misfortunes of other peoples the adornments of their own country'*.[5] The acquisition of cultural property held great political currency in the inter-civilizational struggle for domination. While references to the sanctity of cultural property emerged early in modern legal history, they rarely held this protection as an independent end.[6] The Treaty of Westphalia was amongst the first instruments to codify an obligation to restore looted objects and impose their restitution to their place of origin but did so exclusively with the preservation of national sovereignty (and identity) in mind.[7]

Amongst the first references to the protection of art and cultural property, and typical of early references, is that of Grotius. Grotius condemns the destruction or wrongful acquisition of culturally significant property, but only insofar as that destruction may be unnecessary and disproportionate, rather than being reprehensible in its own right.[8] Rather

4 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), arts. 3-4.

5 John Henry Merryman, 'Cultural Property Internationalism' (2005) 12 International Journal of Cultural Property 11, 13.

6 Ana Filipa Vrdoljak, 'Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage', (ESIL Research Forum on International Law, Conference on Contemporary Issues 2005), 1.

7 Lyndel v Prott, *Witnesses to History* (UNESCO 2009) 2; Treaty of Westphalia art CXIV.

8 Hugo Grotius, Rights of War and Peace, in Three Books: Wherein Are Explained, the Law

than identifying the protection of culturally significant property as an independent objective, it is posed as a merely unfortunate by-product of armed conflict.

While the concept of a natural right to pillage and depredate is abhorrent to modern notions of cultural heritage, belligerent acquisition of enemy property was an accepted component of the early law of nations. Gentili, in *De Iure Belli Libri Tres,* asserted that the right to 'despoil the conquered of their ornaments', was not only lawful, but a 'custom handed down from ancient times'.[9] Echoing this, Rousseau asserted the grounding of such a right in natural law, again limited only by the constraints of proportionality.[10] Within this conception, animosity between states would legitimise the reciprocal destruction or appropriation of culturally significant property. Such destruction was deemed to be an acceptable manifestation of state sovereignty in its pursuit to augment its dominion over neighbouring states. Through this, the protection of cultural property came to be associated with the majority identity of warring nations.

To some degree, parallel motivations underlie the modern destruction of cultural heritage. In the Yugoslav conflict, assaults on the *Vijecnica* in Sarajevo and the old town of Dubrovnik, as well as the destruction of *Stari Most* in Mostar, are demonstrative of a persistent recourse to the destruction of cultural symbolism in ethnocultural conflict.[11] The modern pertinence of early motivations in the protection of culture is not to be understated.

The dominant theme throughout these references is that they were corollary to considerations of sovereignty and nationhood. This approach accorded a unique interest to the nation-state, with heightened importance flowing from the attribution of 'national character' to property.[12] Arguably, the historical assimilation of cultural property with images of nationhood is partially responsible for the prevalence of cultural nationalism in early 20th century instruments.

---

of Nature and Nations, and the Principal Points Relating to Government. (Inns, Manby, Knapton, Brown, Osborn and Wicksteed 1738), Book III, Ch I S I 2; Book III, Ch XII, S V; Roger O'Keefe, The Protection of Cultural Property in Armed Conflict (Cambridge University Press 2006) 6.

9 Alberico Gentili, *De Iure Belli Libri Tres* (Clarendon Press 1612) Book III, Ch VI, 310.

10 Jean-Jacques Rousseau and Maurice Cranston (tr.), *The Social Contract* (Penguin 1968) 56-7.

11 Marc Balcells, 'Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Deterring It and Cultural Heritage Prevention Policies in the Aftermath of the Balkan Wars' (2015) 21 European Journal on Criminal Policy and Research 1.

12 Merryman (n 3), 832.

3.2 Early Developments in Cultural Heritage

Remarkably, the framework for the peacetime protection of cultural property underwent little radical transformation between the Treaty of Westphalia and the eve of the 20th century. Restitution occurred intermittently through treaties,[13] but no coherent system of peacetime cultural heritage protection emerged. As noted by Fechner, disputes in cultural property are the product of compromise.[14] Until the latter half of the 20th century, the peacetime protection of cultural property was predominantly confined to case-specific compromise and bilateral negotiation.[15] Where restitution was amenable to two nations, it would occur; otherwise, it would not. The dominance of national interests persisted. It remained that minority groups had few if any, viable avenues for redress in the event of interference with their cultural heritage.

3.3 International Cultural Heritage provisions and the reconceptualization of international relations

Particularly problematic to early 20th century provisions on the preservation of cultural property was its contingency on the adoption and acceptance by states of novel relationships between them. In stark contrast to the antagonistic, sovereignty-oriented approach of preceding centuries, the Hague Convention of 1907 demanded a new conceptualisation of the interaction between states in pursuit of the universal protection of cultural property.[16] Article 55 of the Convention characterised the role of the occupying state as one of an 'administrator and usufructuary' over the property of the occupied territory. This 'trustee' relationship was largely alien to the existent modalities of international relations. Fechner, for instance, mirrors the wording of the 1907 Convention, posing the role of the state as one of a mere trustee for the whole of humanity.[17] This provision and its descendants required the rapid realignment of the international debate on cultural property. While was now framed around culture as possessing cultural value beyond the nation-state, it remained that only the national culture of a sovereign state possessed this status – the culture of national minorities, non-national groups and indigenous peoples was not afforded this value.

---

13 The 1919 Treaty of St. Germain, art 196; The 1921 Treaty of Riga; The 1921 Treaty of Trianon, art 177.
14 Fechner (n 1) 377.
15 Vrdoljak (n 6).
16 Convention concerning the Laws and Customs of War on Land, The Hague, 1907.
17 Fechner (n 1) 388.

3.4 Early 20th Century developments in the protection of minorities and indigenous groups

The protection of minority rights remained the subject of debate and scepticism into the first decades of the 20th century. Indeed, it was not until the work of Raphael Lemkin that group rights entered the international legal lexicon. In 1925, national representatives to the League of Nations feared the emergence of 'states within states' should minorities be afforded specialised rights. In the words of Dutch Senator Baron Wittert von Hoogland, specialised legal rights for minorities 'would be enough to cause them to spring up where they least expected (…) to create an artificial agitation of which no one had up to that moment dreamed.' In the same report, an exceptionally restrictive definition of 'minority' was also alluded to, with the rapporteur opining that a minority must be 'the product of struggles, going back for centuries (…) and of the transference of certain territories from one sovereignty to another through successive historic phases.'[18] The 1919 Treaty of Versailles made provisions for minority rights, but these extended only to a small number of specified minority groups in specified states.[19] Inter-war minority protection was piecemeal and inconsistent.[20] Resistance to a universal acknowledgement of minority rights also explains the fixation on national culture before the Second World War. Indeed, to this day, the full implementation and realisation of minority self-determination remain limited by fears of instability.[21] Underlying this scepticism is continued adherence to the traditional, unitary conception of culture.

3.5 The pre-UNESCO international consensus

National interests continued to prevail in pre-UNESCO references to the protection of cultural property. From this, there flowed a conceptualisation of cultural property as mere pawns in inter-state struggles for dominion. Ultimately, this constrained the scope of cultural property law to that which was inextricably symbolic of, or precious to, a discernible and conquerable national identity. Even to this day, certain commentators deem cultural heritage as almost indissociable from nationhood.[22]

In polar contrast, the underlying rationale for recent developments in cultural property protection is one of collective human interest in the preservation of culture, an

18 'Report of M. de Mello-Franco, 9 December 1925' (1926) 7th Year League of Nations Official Journal 141.

19 The 1919 Treaty of Versailles, art 86 on the Former Czecho-Slovak State, art 93 on Poland.

20 Vrdoljak (n 6) 2.

21 ibid 12.

22 Alan Audi, 'A Semiotics of Cultural Property Argument' (2007) 14 International Journal of Cultural Property 131, 140.

acknowledgement that 'the integrity of the cultural patrimony of a nation is more important than considerations circumstantial to the state of war'.[23] Evident from this polarity is a tectonic shift in the international law consensus over the international protection of cultural heritage. It is the legacy of this former mentality from which cultural property has had to liberate itself in the pursuit of cultural universalism, and which arguably continues to hinder its effective and universal protection to this day.

4. The emergence of cultural heritage universalism

It has been the task of 20th century instruments to disentangle cultural heritage law from intertwined notions of national identity and state sovereignty. The realisation of a universal right to cultural heritage has been pursued both by UNESCO soft law and the parallel emergence of cultural human rights.

4.1 The role of UNESCO

Non-binding UNESCO provisions on the protection of cultural property have played an integral role in engendering the emergent inclination towards cultural universalism at a normative level.[24] These efforts have, in turn, bridged the chasm between cultural heritage law and human rights law, offering fresh hope to national minorities in the pursuit of an enforceable and universal right to freely express their cultural identity and to have that identity actively protected. UNESCO holds an a-national, universalist agenda.[25] It has frequently restated its intention to protect the common 'cultural heritage of all mankind', beyond the nation-state.[26] Its constitution, concluded in November 1945, proclaims that '…since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed…'.[27] It is largely in the actualisation of this spirit that a universal right to cultural heritage has started to take shape.

---

23 Alessandro Chechi, 'Evaluating the Establishment of an International Cultural Heritage Court' (2013) 18 Art Antiquity and Law 31.

24 Lyndel v Prott and Patrick J O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (1992) 1 International Journal of Cultural Property 307, 309; Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002).

25 UNESCO Constitution, art 1(1).

26 The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

27 Preamble to the UNESCO Constitution.

4.1.1 UNESCO perpetuation of the status quo

While influential, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is a prime example of the entrenchment of archaic attitudes towards cultural property. Contending that it merely perpetuated existent ideals, Merryman notes the contingency of the protection enshrined in article 4 (2) of the Convention on the absence of military necessity. This arguably mirrors the provisions of the Lieber Code, which held precisely the same caveat some ninety-one years later.[28] The Convention demonstrates the passive integration of outdated approaches to cultural heritage in post-war treaties.

In a similar vein, UNESCO continued to afford disproportionate weight to the protection of national culture and interests in a 1976 recommendation. The preamble to the recommendation makes explicit reference to the centrality of cultural property to nationhood and propagates a particularly statist conception of cultural property. In claiming that 'cultural property constitutes a basic element of (…) national culture' and that international cultural heritage is 'the sum of all national heritages', the priority of national identity persists.[29] This formulation demonstrates a continued attachment to the unique importance of the nation-state in international cultural protection. It is directly to the detriment of national, trans-national or stateless minority groups that the international cultural patrimony is understood as the mere sum of its accumulated national heritages.

UNESCO's influence remains largely normative in character. While certain instruments have acquired significant import and influence, such as the 2005 Convention on Cultural Diversity, these are few and far between. To take the example of the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, when, in 1985, states were asked to evaluate its efficacy, just two mentioned the protection of minority cultures in their responses.[30] This is demonstrative of UNESCO's occasional inability to independently compel or instigate change, and the apathy of certain nations to their efforts to do so.

A significant inter-jurisdictional issue inhibits UNESCO efforts to concretise cultural rights. States have begun to consider UNESCO actions – particularly those proposed by the UN-UNESCO subsidiary World Commission on Culture and Development[31] – to be somewhat idealistic, and beyond its prerogative as an institution.[32] This has may lead some

[28] Merryman (n 5) 20.
[29] Preamble to the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property.
[30] Donders (n 24) 117.
[31] World Commission on Culture and Development, 'Our Creative Diversity' (1996).
[32] Donders (n 24) 132.

commentators to the conclusion that UNESCO is close to its maximum potential as concerns minority cultural rights.

4.1.2 Effective UNESCO influence

However, the exact relationship between UNESCO provisions and the right to culture requires qualification and caveat. UNESCO holds no pretence of legal authority, its influence squarely limited to its task of normative 'standard-setting' for subsequent binding law.[33] It has, however, carved out an influential position as an intermediary between the previously unacquainted fora of international human rights and cultural heritage, and in bringing the democratisation of cultural protection to the forefront of international legal discourse.

The 1966 Declaration of Principles of International Cultural Co-operation was a crucial instigator to the contemporary movement towards cultural rights for national minorities and indigenous peoples. Article 1 of the Declaration provides the unqualified right of each culture and every people to dignity[34] and development[35], coupled with respect for their variety and diversity.[36]

Equally pivotal, yet more preparatory than active in effect, was the 1976 Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it. This recommendation crucially observed the detrimental impact of 'the prevalence of inappropriate models' in the universal protection of cultural property.[37] A substantial addition was made to the rights contained in the 1966 Declaration, referring to the right of minorities to the active safeguarding and preservation of their cultural property.[38]

The influence of UNESCO remains constrained by its soft-law character. However, the 2005 UNESCO Convention on Cultural Diversity may well have marked the dawn of a more substantial approach towards the democratisation of cultural protection. The Convention, to date, has been ratified or acceded to by 148 nations as well as the European Union.

33 ibid 110.
34 The 1966 Declaration of Principles of International Cultural Co-operation, art 1(1).
35 ibid art 1(2).
36 ibid art 1(3).
37 Preamble to the 1976 UNESCO Recommendation on Participation by the People at Large in Cultural Life.
38 ibid art 4(f).

4.2 The parallel emergence of the right to culture within human rights

A clear disjunct existed between cultural heritage law and international human rights law for the greater part of the 20th century and continues to some extent.[39] The universalisation of cultural rights has been prolonged somewhat by their perceived inferiority to first-generation civil and political rights.[40] This, intriguingly, mirrors its secondary positioning in relation to national interests before the World Wars.

A new chapter in the preservation of cultural heritage has been inaugurated by the development of directly effective cultural rights within human rights frameworks, most notably in Article 15 ICESCR. As a former Director-General of UNESCO once proclaimed, 'The recognition of the right to culture as a human right marks the end of culture as an object and of culture for the élite, quite as much as of the laissez-faire abstentionist attitude of the state in cultural matters'.[41]

The reception of minority cultural rights was, in the infancy of the UN framework, limited and conservative. As indicated by the *travaux préparatoires* of Article 27 (1) of the Universal Declaration on Human Rights, a narrow conception of culture, widely criticised for its acceptance of assimilative homogenisation,[42] was endorsed while minority cultural rights were omitted.[43] This demonstrates that flaws in the protection of minority cultures were not only the product of a *laissez-faire* framework but also active policies of assimilation.

Cultural rights have gradually acquired a more prominent footing in Human Rights law. Recognition of the universal right to participate in cultural life[44] and the specific right of minorities to non-interference with their cultural liberty by the state[45] represent two considerable landmarks in this process. At its peak, UN Special Rapporteur Francesco Capotorti declared that Article 27 of the International Covenant on Civil and Political Rights (ICCPR) confers a positive obligation on states to actively pursue and facilitate the

---

39 Vrdoljak (n 6) 3.

40 Vrdoljak (n 6) 11; Lyndel v Prott, 'Cultural Rights as Peoples' Rights in International Law' in James Crawford (ed), *Cultural Rights as Peoples' Rights in International Law* (Clarendon Press 1988) 94.

41 Donders (n 24) 115; UNESCO, 'Intergovernmental Conference on Cultural Policies in Europe' UNESCO Doc SHC/EUROCULT/4, 30 March 1972, § 8.

42 Roger O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (1998) 47 International & Comparative Law Quarterly 904; Christian Groni, 'Background Paper to the Committee on Economic, Social and Cultural Rights Fourtieth Session - the Right to Take Part in Cultural Life (Article 15(1)(a) of the Covenant)' (2008).

43 Vrdoljak (n 6) 6; Donders (n 24) 139.

44 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR) art 15.

45 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (ICCPR) art 27.

development of minority cultures.[46] The inference of a positive element to this obligation right constitutes a major divergence from the preceding hesitance towards the acknowledgement of any such obligation, in either negative or positive form.

5. The current position - contemporary issues in the effective protection of minority cultural property

5.1 Perpetuation of the traditional model of cultural property and its enduring impact on minority culture

The cultural hegemony of the nation-state remains an evergreen present in cultural heritage law. In the aftermath of the Yugoslav conflict, Balcells notes that ethnopolitical tensions have often centred around the centralised interpretations of culture and identity. This is demonstrative of the persisting existence of prejudicial inclinations towards accepted majority culture, prejudices which are only more accentuated and detrimental in cases of peacetime quasi-conflict between ethnic groups.

5.2 Questions of Definition

Frank Fechner draws attention to the fact that international law, far from providing an effective tribunal or source of redress for interferences with cultural property, fails even to define the term authoritatively.[47] International conventions often afford broad discretion to national authorities concerning the designation of 'cultural property' status.[48] In deferring the act of definition to national authorities, a plurality of disparate and politically motivated interpretations and consensuses is effectively permitted, to the detriment of the universal and equal protection of minority cultural rights and property. While an element of restraint is required in defining cultural property, certain methods of restriction may have prejudicial or discriminatory effects.

46 Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UNDoc E/CN.4/Sub.2/384/Rev.1; Vrdoljak (n 6) 5.

47 Fechner (n 1) 388.

48 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 art 1.

5.3 The homogenising effect of national discretion in identifying cultural significance and the necessity of cultural self-determination

National discretion in the demarcation of cultural value is fuel to what Vrdoljak identifies as 'oft-concerted assimilationist policies and practices'.[49] In simple terms, governments are allowed to police what is, and what is not, 'culture', often to the detriment of national minorities. The criterion of 'significance', widely cited as a determinant of cultural value,[50] is particularly problematic. A considerable threat is posed by excessive national discretion in determining cultural importance as national governments may intentionally abuse this discretion to exclude nonconformist minorities from protection. If such an amorphous and subjective notion as 'significance' is deemed an apt criterion, assimilationist prejudice is more likely to influence the law.

A prime example of assimilationist discrimination against minority groups, highlighted by Donders, is the treatment of the indigenous *Sami* population in Northern Scandinavia and Russia. This indigenous group formerly suffered severe, yet passive discrimination through the non-acknowledgement of their cultural autonomy for many years. Distinctive elements of intangible *Sami* culture were left unprotected, most notably reindeer herding and seasonal migration.[51] However, shifts in the international law consensus have since empowered the *Sami* population to such an extent that it now possesses its own devolved parliament and certain elements of political, as well as merely cultural autonomy.[52] This demonstrates not only the stranglehold that centralised government possesses in identifying cultural significance but also the normative influence of the indigenous rights movement.

Alternatively, a more nuanced form of discrimination may manifest. As noted by Roger O'Keefe, centralised discretion in the acknowledgement of 'culture' may be conducive only to the perpetuation of state-endorsed *'anodyne homogeneity'*.[53] Governmental bodies are unlikely to be so diverse as to encapsulate every one of the cultures within national jurisdiction. Accordingly, preferential treatment will be afforded to majority culture and that of the national elite. A parallel to this argument is found in the work of Merryman, who portrays cultural property as prioritising artefacts deemed significant to the art world.[54] Implicitly, minority cultural expression is tossed aside.

---

49 Ana Filipa Vrdoljak, 'Liberty, Equality, Diversity: States, Cultures, and International Law' in Ana Filipa Vrdoljak (ed), *The Cultural Dimension of Human Rights* (Oxford University Press 2013) 26.

50 Fechner (n 1), 309; Prott and O'Keefe (n 24) 308.

51 Donders (n 24) 301-308.

52 Norwegian Act of 12 June 1987 No. 56, concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act).

53 O'Keefe (n 42) 916.

54 Merryman (n 5) 12.

5.4 Unilateral application of western conceptions of 'culture' to culturally distinct minorities

The 'cultural property' approach is widely considered unable to adequately preserve non-western culture, insofar as it does not always materialise in uniformly tangible objects capable of constituting 'property'. Brown uses the phrase 'dematerialisation of heritage' to describe this phenomenon.[55] In this vein, the term cultural heritage has come to displace notions of cultural property in the protection of intangible culture. This illuminates the fact that cultural property law has developed firmly within the remit of European culture, and is inherently modelled on the preservation of material inventories and national collections. The expansion of this conception of culture has, in the words of Vrdoljak, endured a 'lengthy gestation period'.[56] This inclination, another remnant of cultural property law's statist genealogy, naturally predisposes favourable protection towards discernible and material national culture.

As minority culture often does not conform to national conceptions of culture, and may indeed manifest itself in wholly distinct forms, centralised determination of cultural significance is, once again, problematic.[57] The exclusive acknowledgement of classical understandings of culture alone may, if persistent, undermine the universality of cultural rights.[58]

5.5 The role of cultural self-determination in the reversal of this model

The right of self-determination is a central and irreplaceable facet of the devolution of cultural autonomy to minorities and indigenous groups. As observed by Turner, the balancing of interests, in this instance between those of majority and minority groups, is heavily contingent on which group influences that decision.[59] Invariably, the traditional position is prejudicially inclined towards the culture of the majority population. The repatriation of cultural sovereignty seeks to reverse the legacy of cultural nationalism and, in the case of many indigenous populations, colonial subjugation. Arguably instigated by the sequence of ILO Conventions that brought it into the public eye, minority cultural self-determination is now an achievable reality. Major steps towards the realisation of this ideal

55 Michael F Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property' (2005) 12 International Journal of Cultural Property 40, 41.

56 Vrdoljak (n 6).

57 Brown (n 55); Vrdoljak (n 6).

58 Groni (n 42) 5.

59 Stefan Turner, 'Cultural Property as National Heritage and Common Human Heritage: The Problem of Reconciling Common and Individual Interests' in Lyndel v Prott (ed), *Witnesses to History* (UNESCO 2009) 113.

have been taken by the Declaration on the Rights of Indigenous Peoples (UNDRIP), Articles 3 and 4 thereof specifically mandating the right to self-determination. This non-binding instrument, and the movement that it is the product of, is largely responsible for the continuing redistribution of cultural decision-making and sovereignty.

5.6 The evaporation of intangible cultural heritage, and the exigency of cultural devolution

While the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage imposes a legal framework and positive obligations for states parties, it is the responsibility of those states to take active steps to ensure the preservation of such heritage. In practice, this is not universally enforced to an adequate standard. In the twelfth session of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, taking place in December 2017, several pressing cases were raised before the committee. Ranging from the protection of Earthenware pottery-making skills in Botswana's Kgatleng District to Traditional design and practices for building Chinese wooden arch bridges,[60] the committee seeks to raise awareness of declining cultural practices. Continued inaction vis-à-vis intangible minority culture is actively and enduringly detrimental to cultural diversity.

5.7 Acceptance of a right to culture in human rights courts

5.7.1 The European Court of Human Rights (ECtHR)

Cultural rights continue to inhabit the shadow of their more foundation civil and political counterparts. In the ECtHR, limited circumstantial reference has been made to UNESCO instruments, typically only in the context of the right to property contained in Article 1 of Protocol 1.[61] As regards a broader right to culture, Article 8 has been construed as incorporating a positive obligation on states to facilitate diverse ethnocultural identities. [62] However, this right is widely limited when balanced against substantial national justifications.[63] Cultural Rights are yet to realise comprehensive *de facto* protection within Convention case law.

---

60 Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 'Periodic Report on the current status of an element inscribed on the Urgent Safeguarding List (item 8.c)' ITH/17/12.COM/8.c.

61 *Beyeler v Italy (no.2)* App no 33202/96, para 73.

62 *Winterstein v France* App no 27013/07.

63 *Buckley v United Kingdom* App no 20348/92; *Chapman v United Kingdom* App no 27238/95; *Beard v United Kingdom* App no 24882/94; *Coster v United Kingdom* App no 24876/94; *Lee v United Kingdom* App no 25289/94; *Smith (Jane) v. United Kingdom* App no 25154/94.

5.7.2 UN Human Rights Committee (HRC) Jurisprudence

Crucially, the HRC accepts that culture 'manifests itself in many forms'.[64] The aforementioned rights to culture enshrined in Article 15 ICESCR and Article 27 ICCPR continue to acquire greater substance as universal, rather than nationally unique rights. Through both the expansion of existing rights and the adoption of novel instruments, the democratisation of such rights appears to be prominent in the cultural rights agenda. Further, Claridge and Xanthaki highlight linkages between the development of treaty law and the jurisprudence of the Human Rights Committee. The HRC has begun to prioritise indigenous and minority rights, and in this way bears a shared purpose to the World Heritage Convention, the Framework Convention on National Minorities and UNDRIP, *inter alia*.[65] It is arguable, however, that the plethora of independent, yet not hierarchically distinct instruments is dangerously conducive to the dilution of this field of law.

5.8 An Alternative Approach

In light of these difficulties, Justine Ferland questions the ability of positive law to provide universal protection of cultural property. Ferland instead favours the implementation of a softer, yet pervasive ethical code governing cultural heritage.[66] This argument is grounded in the contended efficacy of soft law instruments in inducing shifts in international legal consensus. This point is of particularly pronounced relevance to the right to restitution of human remains enshrined in Article 12 of UNDRIP and the *de facto* enforcement of this right. In contrast, Ferland accuses the existent treaty law of legitimising numerous injustices in the restitution of looted art. A flexible, morally-guided code of ethics is, however, limited by its implications on national sovereignty and international legal certainty. Given the ongoing apathy at national level towards the ratification of non-binding UNESCO declarations, it appears unlikely that national jurisdictions would willingly accept an uncertain and unforeseeable ethical code. This proposition does, however, highlight the need for greater flexibility in the law of cultural heritage in light of the amorphous and fluctuating substance of cultural heritage.

---

64 UN HRC, General Comment No 23, Art 27 (Rights of Minorities) UN doc. CCPR/C/21/Rev.1/ Add.5 (1994) para 7.

65 Lucy Claridge and Alexandra Xanthaki, 'Protecting the Right to Culture for Minorities and Indigenous Peoples: An Overview of International Case Law' (*State of the World's Minorities and Indigenous Peoples 2016,* Minority Rights Group 2016) 61.

66 Justine Ferland, 'Ethics and Cultural Heritage: Viewpoints (Éthique et Patrimoine Culturel: Regards Croisés)' (2017) 24 International Journal of Cultural Property 249.

6. Future developments necessary to the effective and universal realisation of minority cultural rights

6.1 Cultural Heritage as an independent body of law

The disparate fora of international human rights law, cultural heritage law and the soft-law influence of UNESCO appear to be approaching confluence in the pursuit of a universal right to culture. Increasingly, cultural rights are becoming a facet of human rights, while UNESCO instruments are developing a greater gravitas and efficacy in international fora rather than merely occupying the chasm between human rights and cultural heritage.

6.2 Towards an international court for cultural heritage?

It is to be noted that both cultural heritage law and international human rights law remain confined to the *realpolitik* of treaty law and thus depend on the ratification or accession of nations. This is arguably the final obstacle to the universalisation of cultural rights. As noted by Donders, reservations by states continue to undermine the supposed universality of the rights contained in treaties.[67] In the absence of persistent treaty revision, cultural heritage law may achieve its potential by unifying its efforts into one, definitive convention and accompanying court.

Despite its considerable soft-law impetus, the international protection of cultural heritage remains heavily fractured.[68] As de Wet and Vidmar note, the absence of a 'fully-fledged centralised judiciary' accords disproportionate interpretative discretion to domestic and regional legal bodies.[69] Further, the creation of an impartial international tribunal would work to alleviate the political dynamics criticised by Fechner.[70] Minority groups who are not accorded sufficient protection at the national level would become able to enforce their cultural rights internationally. In this respect, it may not be until the various fragmented strands of cultural protection are synthesised that an effective and accessible tribunal for international cultural heritage may come to exist.

---

67 Yvonne Donders, 'Cultural Pluralism in International Human Rights Law' in Ana Filipa Vrdoljak (ed), *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

68 Chechi (n 23) 32.

69 Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012).

70 Chechi (n 23) 34.

7. Conclusion

It is evident that echoes of the nationalistic rhetoric that pervaded early legal references to cultural property endure in the modern manifestations of that origin. These echoes are, however, dwindling, as cultural heritage begins to develop a universal and democratic nature. Now, more than ever before, culture is being re-appropriated and liberated. The future is uncertain for culture heritage law, and progress is gradual at best, by the indication of preceding decades. However, if the osmosis of human rights law and cultural heritage law achieves concrete unity, it may ultimately come to liberate itself of the shackles of its burdensome history.

HOW ORIGINAL?
THE DEVELOPMENT OF THE ORIGINALITY REQUIREMENT IN EU COPYRIGHT LAW FROM *INFOPAQ* TO *COFEMEL*

Eolann Davis*

Abstract

This article will critically analyse the function and development of the originality requirement under EU copyright law. After briefly touching on theoretical conceptions of originality, approaches to the originality requirement by the domestic courts of Member States and the Court of Justice of the European Union will serve as the primary focus of this essay. Through this analysis, it is hoped to illustrate the harmonising effect of the CJEU applying their definition of originality as the 'author's own intellectual creation' to an increasingly wide range of subject matter. The article will conclude with an analysis of the culmination of this harmonising process, the recent decision by the CJEU in Cofemel v G-Star Raw, and it is this author's contention that the case may resurrect calls for legislative, rather than judicial, harmonisation of the originality requirement.

* LL.B. Law Candidate (Senior Sophister), Trinity College Dublin.

1. Introduction

This essay aims to describe the function of the originality requirement under EU copyright law. It will approach this task by first providing a brief discussion of various conceptions of originality and arguments on the purpose of this requirement within copyright law. These theoretical considerations will be referenced to frame the analysis of EU efforts at harmonisation of copyright and with that the originality requirement. Through discussion of both approaches of the EU and Member States to this concept, the functionality of the originality requirement will also be considered. While legislation has achieved some harmonisation of the originality requirement, in recent years this process has been primarily achieved through the Court of Justice of the European Union (the CJEU).

In light of this reality, the jurisprudence of the Court addressing originality will be the main focus of this essay. It will be demonstrated how starting with the decision in *Infopaq v DDF,*[1] the CJEU has consistently affirmed the standard of originality as the 'author's own intellectual creation'. Clarity on this standard has been provided through the Court expanding the remit of this definition as the sole determinant of originality for a wide range of subject matter. While the harmonising effect of this has been praised, this proactive approach is not without its critics, and the recent expansion of the originality requirement to designs in *Cofemel v G-Star Raw,*[2] may be a step too far. The author will conclude that while the benefits of harmonisation are self-evident, the jurisprudence also demonstrates the logical dilemmas and practical consequences it brings, therefore the case for legislative unification of copyright law should be re-examined.

2. The function of the originality requirement

Originality is at the basis of copyright protection;[3] thus it is useful to examine the justifications for copyright as they reflect the value placed on originality.

Copyright can broadly be defined as exclusive rights of control in relation to cultural works.[4] There are numerous justifications for this protection, including economic and utilitarian arguments that it incentivises the production of creative works, deontological arguments that the creator of a work deserves protection over its use, and arguments that control ought

1 Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

2 Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019] EU:C:2019:721.

3 Eleonora Rosati, 'Judge-made EU Copyright Harmonisation: The Case of Originality' (DPhil thesis, European University Institute 2012) 57.

4 Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2017) 58.

to be afforded to the creator based on considerations of personhood and personal autonomy.[5]

In contrast, originality evades as straightforward a definition. Many commentators have noted how originality is neither explicitly defined nor expressly mandated by international copyright law.[6] This allows for a variance in approach across Berne Convention member states.[7] Fisher holds this variance towards the originality requirement arguably reflects the weight afforded to various conceptions of originality in these states.[8] These conceptions can be summarised as independent creation, labour, skill, the degree the work reflects independent choice, the degree it reflects the author's personality, and novelty.[9]

While many of the above rationales can be equally applied to both copyright and the originality requirement, the application of these considerations to the latter will be reflected in the former as it will determine the scope of subject matter afforded copyright protection in a given jurisdiction. In this regard, this author would contend Aplin and Davis's hypothesis, that the originality requirement functions as a filtering mechanism to determine which intangible goods deserve protection, is as close to a tenable general function of the originality requirement as can be articulated.[10]

Furthermore, within the EU the economic and utilitarian objective of realising an EU Single Market has been the primary driving force behind the increasingly harmonised definition and scope of the originality requirement in both European copyright legislation and CJEU jurisprudence.[11]

3. EU Harmonisation

The EU has passed several Directives addressing the copyright protection of various subject matter.[12] Legislatively, originality has been harmonised for computer programmes,

5 See: Michael Spence, 'Justifying Copyright' in Karsten Schubert and Daniel McClean (eds), *Dear Images: Art Copyright and Culture* (1st edn, Ridinghouse 2002) 389-403.

6 Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' (Draft paper, 2016) 3 <https://www.researchgate.net/profile/Thomas_Margoni/publication/303514866_The_Harmonisation_of_EU_Copyright_Law_The_Originality_Standard/links/5a831ab4aca272d6501c361e/The-Harmonisation-of-EU-Copyright-Law-The-Originality-Standard.pdf> accessed 1 December 2019; Aplin and Davis (n 4) 107.

7 ibid 6.

8 William Fisher, 'Recalibrating Originality' (2016) 54 Houston Law Review 437, 450.

9 ibid 448-449.

10 Aplin and Davis (n 4) 108.

11 Eleonora Rosati, *Originality in EU Copyright: Full Harmonization through Case Law* (1st edn, Edward Elgar 2013) 1.

12 For a list of these Directives, see: Justine Pila and Paul Torremans, *European Intellectual Property*

photographs and databases, which are protected as original works provided they are the author's own intellectual creation.[13] These areas were harmonised as they were the areas with the most disparate approaches across the Union before legislative intervention.[14] An absence of clear authority to regulate copyright led to this fragmentary and subject-matter specific approach to harmonisation through EU Directives.[15] Arguably, the Lisbon Treaty altered this dramatically.[16] The insertion of Article 118 TFEU permitting Parliament to enact measures for the uniform protection of intellectual property across the Union is a clear justification for harmonisation, and has been held to provide a basis for the codification of EU copyright law.[17] Despite this, such unitary reform has not occurred. There is a view that unitary protection of copyright across is less likely than for other intellectual property rights,[18] because copyright subsists automatically in all EU Member States so there is no mechanism for choosing protection on a regional rather than national basis.[19]

4. Judicial harmonisation: *Infopaq*

Over the past decade, there has been less legislative harmonisation but more judicial harmonisation. This trend began with the CJEU judgment in *Infopaq.*[20] This case involved a dispute between a collection of Danish newspapers and the claimant, who sought to continue publishing short summaries of articles from papers represented by DDF without having to obtain consent. The case was referred to the CJEU to determine whether Infopaq's activities amounted to reproduction of authorial works under the Information Society Directive.[21] The Court affirmed that under the Directive, copyright will only subsist if the subject matter is original in the sense that it is its author's own intellectual creation. There was nothing to say parts of a work were not to be afforded the same protection of the work as a whole, as they share the work's originality . Thus, parts of a work are also

Law (2nd edn, Oxford University Press 2019) 228.

13 Aplin and Davis (n 4) 120.

14 ibid.

15 Margoni (n 6) 6.

16 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

17 Marco Ricolfi, 'Towards a European Union Copyright Code: A Conceptual Framework' (2015) 5 Bocconi Legal Papers 1, 10.

18 Rosati (n 3) 220.

19 Trevor Cook, *EU Intellectual Property Law* (1st edn Oxford University Press 2010) 69.

20 *Infopaq* (n 1).

21 Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

protected, provided they contain elements expressing the author's intellectual creation.[22] The Court ruled that while newspaper articles and parts within them are literary works, words are not. It is only through the choice, sequence and combination of words that an author may express his creativity in an original manner and produce an intellectual creation.[23]

The Court's pronouncement of a general test of originality applicable to all authorial works has been lauded as 'the crucial transition from a partially harmonised to a fully harmonised standard of originality'.[24] It has also been regarded more suspiciously as 'the rather radical step of making the exception as regards harmonisation of originality the rule'[25] and worse still, if somewhat hyperbolically, as 'a bomb in the… copyright landscape'.[26]

Critics argue the CJEU conflated authorial works and their parts and collapsed the distinction between the two by uniformly defining them.[27] While this argument is not entirely without merit, this author would note that subsistence is dependent on part of a work reflecting the intellectual creation of the author. This arguably mitigates potential issues of innocuous excerpts being unduly afforded copyright protection as original works. The decision in *Meltwater* exemplifies this.[28] Proudman J ruled a newspaper headline could be afforded copyright protection as an original work if it demonstrated 'the stamp of individuality reflective of the creation of the author or authors of the article'. As headlines are usually one-sentence summaries of an article, it seems logical that they are afforded the same protection. Rather than saying *Infopaq* introduced a complete conflation, perhaps a more incisive criticism is that the question of what the minimum threshold is for an excerpt to constitute a literary work is unanswered.[29]

22 *Infopaq* (n 1) paras 37-39.
23 ibid paras 44-46.
24 Margoni (n 6) 15.
25 Aplin and Davis (n 4) 123.
26 Estelle Derclaye, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law' (2010) European Intellectual Property Review 247.
27 Pila and Torremans (n 12) 262.
28 *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and other companies* [2010] EWHC 3099 (Ch) [83]: The approach of Proudman J was endorsed by the Court of Appeal in *Newspaper Licensing Agency & ors v Meltwater Holding BV & ors* [2011] EWCA Civ 890.
29 Luke McDonagh, 'Headlines and hyperlinks: UK copyright law post-Infopaq: Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and other companies' (2011) 1 Queen Mary Journal of Intellectual Property 184, 187.

5. Post-*Infopaq* Jurisprudence

Subsequent CJEU decisions have affirmed the test of the author's own intellectual creation while incrementally expanding this test to other, novel forms of works.[30]

Computer programs had long been protected as authorial works under EU Directives.[31] Their initial inclusion within schemes of copyright protection marked a fundamental change for copyright law. Traditionally, copyright protected forms of communication, whereas computer programs were closer to machine processes with particular outcomes dependent on their precise formulation.[32] In *BSA,*[33] the CJEU held that graphic user interfaces were not protected as computer programs under the Software Directive but could still be protected as works under the Information Society Directive if they were their author's own intellectual creation.[34] Copyright would not subsist when an expression of the components comprising the interface was determined by technical function.[35]

This decision drew comparable criticism to *Infopaq* as it was seen as having the potential to vastly expand the scope of the originality requirement, making the author's own intellectual creation test to be the only requirement for a given subject-matter to be protected as a copyrighted work.[36] It was a discordant decision for the national copyright regime in the United Kingdom, which operates under a closed-list system with protection only being awarded to eight specific categories of subject matter.[37] The exclusion of subsistence of copyright where the expression was the result of a technical function also directly contravened UK jurisprudence on this issue.[38]

It is this author's opinion that the criticisms raised towards the decision in *BSA* are valid, regardless of whether one is in favour of complete European harmonisation of the originality standard or committed to preserving Member State autonomy. A noteworthy critic of this verdict was Lionel Bently; a member of the Wittem Group that drafted a model

30 Aplin and Davis (n 4) 124.

31 Council Directive 91/250/EEC on the legal protection of computer programs [1991] OJ L122/42; This was superseded by: Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs OJ L111/16.

32 Daniel Gervais and Estelle Derclaye, 'The scope of computer program protection after SAS: are we closer to answers?' (2012) 34 European Intellectual Property Review 565.

33 Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971.

34 ibid paras [28]-[47].

35 ibid paras [48]-[51].

36 Jonathan Griffiths, '*Infopaq, BSA* and the Europeanisation of United Kingdom Copyright Law' (2011) 16 Media and Arts Law Review 1, 8.

37 ibid 9; See: the Copyright Designs and Patents Act 1998.

38 ibid 11; See *Sawkins v Hyperion Records Ltd* [2005] EMLR 29 (CA).

European Copyright Code. Involvement in this project would suggest he was not opposed to greater harmonisation of EU copyright law. However, he argued this should be achieved politically, as this would allow for transitional measures to be formulated and for consideration of the appropriate standard for the UK to be achieved.[39] Instead, the decision of the CJEU means that these matters were 'simply not agreed'.[40]

Football Association Premier League (FAPL),[41] marked an important decision for the originality requirement, considering the case centred around issues of free movement of trade.[42] In the context of the reproduction of satellite broadcast fragments, the Court affirmed the *Infopaq* originality requirement,[43] then held this reproduction will amount to an infringement of copyright if material within the fragments amounts to the intellectual creation of an author.[44] The Court fell short of stating that Premier League matches could amount to authorial works, holding that rules prevented any creative freedom.[45]

This author contends this is a correct finding achieved through flawed reasoning. As Pila and Torremans note, it is hard to accept that the rules of football constrain creative freedom any more than technical limitations constrain programming.[46] An alternative justification for not classifying football games as works can be achieved by taking a historical analysis and recognising that this form of subject matter has not traditionally been regarded as an authorial work by society.[47] While this makes sense, extracts of the kind at issue in *Infopaq* have also not been historically regarded as authorial works.[48]

Individual expression and creative choices were once again affirmed as central to a finding of originality in *Painer v Standard Verlags GmbH*.[49] The CJEU was referred the question of whether Article 6 of the Term Directive,[50] which protected photos that were an author's

---

39 Lionel Bently quoted in 'The Lionel, the Bezpečnostní softwarová asociace and the Wandering Court of Justice' (IPKAT Blog, 11 January 2011) <http://ipkitten.blogspot.com/2011/01/lionel-bezpecnostni-softwarova-asociace.html> accessed 1 December 2019.

40 ibid.

41 Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and Case C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083.

42 Mireille van Eechoud, 'Along the road to uniformity: diverse readings of the Court of Justice judgments on copyright works' (2012) 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 60, 66.

43 *Football Association Premier League* (n 41) para 157.

44 ibid para 159.

45 ibid para 98.

46 Pila and Torremans (n 12) 263.

47 ibid.

48 ibid.

49 Case C-145/10 *Painer v Standard Verlags GmbH* [2011] ECR I-12533.

50 Council Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights OJ L372/12.

own intellectual creation applied to portrait photographs. The Court ruled that portraits could amount to works. Here, the originality requirement was satisfied as the author was able to make free and creative choices at various points of the process, stamping the work with her personal touch and making the photograph a reflection of her individual personality.[51]

Painer provided some much-needed clarification on the application of the originality requirement through the Court's discussion of personal touch and free and creative choices.[52] It is consistent with the principle of equal treatment in copyright, as simplicity in a work is no bar, nor will realism limit the scope of protection, so long as creative choices were exercised.[53]

In *SAS Institute Inc v World Programming Ltd,*[54] the court demonstrated that traditional principles of copyright could still place limits on the definition and scope of originality.[55] The defendant company developed software that was able to read the plaintiff's computer language, which negated the need for the subscription renewal of SAS software.[56]

The Court held that while computer programs are protected under the Software Directive, the ideas and principles underlying any elements of a computer program are not conferred the same protection. Copyright only protects the expression of the program, so to the extent logic, algorithms and programming languages are ideas and principles, those ideas are not protected under the directive.[57] In this case, however, the claimant had written his own language for SAS software. The Court referred to *BSA* as authority confirming source code, object code and preparatory design were sources of expression. However, neither the functionality of a computer program or programming language nor the format of data files amounted to a form of expression.[58] If someone were to rely on the original code to develop similar elements this would amount to partial reproduction, but as the defendants reproduced the functionality through mere observation and analysis of *SAS*, there was no infringement.[59]

The author's own intellectual creation creation standard was held to apply to databases in *Football Dataco v Yahoo.*[60] The Court was asked to consider whether a fixture list for football

51 *Painer* (n 49) paras 87-92.
52 Aplin and Davis (n 4) 126.
53 Pila and Torremans (n 12) 253-254.
54 Case C-406/10 *SAS Institute Inc v World Programming Ltd* unreported 2 May 2012 (ECJ).
55 Gervais and Dercaye (n 32) 565.
56 Aplin and Davis (n 4) 84.
57 *SAS* (n 54) paras 30-32.
58 ibid paras 35-39.
59 ibid paras 43-46.
60 Case C-604/10 *Football Dataco and Others v Yahoo! UK Ltd and Others* [2012] para 38.

leagues in England and Scotland compiled by Football Dataco amounted to an original work protected by copyright. The Court reaffirmed the findings in *Painer* that the originality standard is satisfied when free and creative choices are made in the selection and arrangement of data that stamp the work with the author's personal touch. Applying reasoning apparent from *BSA and FAPL*, the Court held that a database will not be protected by copyright if this process is solely dictated by technical considerations that leave no room for creative freedom. Even if significant skill and labour is involved (as it was in this case), this is not enough for copyright to subsist if no originality is expressed in that skill and labour, as originality is the sole criterion to be applied when determining if a database should receive copyright protection, including over national regimes. [61]

Football Dataco shares similarities with *BSA* in that its implications were most disruptive for those Member States who applied a lower standard for copyright protection to subsist for databases than the test of the author's own intellectual creation.[62] The UK is a salient example, as it traditionally viewed arrangements of data that required the exercise of judgment and discretion in their creation to be original.[63] Thus it is once again unsurprising that some commentators from the UK were particularly direct about the impact of this decision on their legal tradition, even when lauding the decision as a welcome clarification of the originality standard.[64]

6. Recent Developments: Works of Applied Art

As evidenced above, over three years the CJEU established a clear position on the definition of originality in EU copyright law and expanded its scope to a wide variety of subject matter. Up until the recent decision of *Cofemel*, one remaining area of ambiguity was whether this originality standard applied to industrial designs or works of applied art, or whether these were excluded.[65] There had been criticism of the existing EU design regime, based on the same kinds of economic and utilitarian justifications inextricably bound to harmonisation that are apparent through the cases and commentary discussed above. It was noted the various design directives allowed for different originality standards in a market that aims to

61 ibid paras 38-43.

62 See: Eleanora Rosati, 'Towards an EU-wide copyright? Judicial (pride) and legislative (prejudice)' (2013) 1 Intellectual Property Law Quarterly 47.

63 Pila and Torremans (n 12) 260-261.

64 See: Estelle Derclaye, '*Football Dataco*: Skill and Labour is Dead!' (Kluwer Copyright Blog, 1 March 2012) <http://copyrightblog.kluweriplaw.com/2012/03/01/football-dataco-skill-and-labour-is-dead/> accessed 30 November 2019.

65 Margoni (n 6) 16; Tito Rendas, 'Copyright Protection of Designs in the EU; how many designs is too many?' (2018) 13 Journal of Intellectual Property Law and Practice 439.

become common.[66] This allowed for a product to be protected in one Member State but not in another, causing a dilemma for trade across the internal market.[67] A prime example of this occurred in *Criminal Proceedings against Titus Alexander Jochen Donner*.[68] Here the plaintiff distributed copies of furniture that were manufactured and not protected by copyright in Italy but were protected in Germany. For this, he was convicted in Germany for aiding and abetting in the commercial exploitation of copyright protected works.[69] In his Opinion, Attorney General Jääskinen concluded that the varying copyright standards amounted to a barrier for the free movement of goods that was justified on the basis of protecting commercial and industrial property.[70]

Signs of a possible change in approach were first seen in *Flos v Semeraro*.[71] Despite it not directly relating to the matter referred to them, which concerned the compatibility with design directives of a moratorium for copyright protection for industrial design,[72] the court suggested that:

'[I]t is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive's application are met, a matter which falls to be determined by the national court.'[73]

This statement was interpreted in different ways by various Member States and commentators. In Italy for example, the Member State that originally referred the case to the CJEU, *Flos* led to amendments to national copyright regimes that allowed for copyright to subsist to unregistered designs so long as the design possessed 'inherent artistic value'. The approach to assessing whether a design met this standard was clarified, requiring an objective assessment of the work's appreciation in the cultural sector.[74] This author would contend the Court of Milan interpreted *Flos* as permitting copyright to subsist for

66 Margoni (n 6) 17.
67 ibid.
68 Case C-5/11 *Criminal Proceedings against Titus Alexander Jochen Donner* [2012] OJ C/250
69 Opinion of Advocate General Jääskinen, Case C-5/11*, Criminal proceedings against Titus Donne*r, 29 March 2012 paras 68, 77; See: Ana Ramalho, 'The Donner Case: Where EU Law Meets Copyright Law' (Kluwer Copyright Blog, 2 April 2012) <http://copyrightblog.kluweriplaw.com/2012/04/02/the-donner-case-when-eu-law-meets-copyright-law/> accessed 29 November 2019.
70 ibid.
71 Case C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA* [2011] ECR I-00181.
72 Margoni (n 6) 16.
73 *Flos* (n 71) para 34.
74 Antonella Barbieri and Federica DeSantis Stampa, 'Copyright Protection for Designs: The Approach of the Italian Courts and Italian Law following the Decision of the ECJ in Flos v. Semeraro' (2014) 19 Art, Antiquity and Law 281, 284.

unregistered designs, but that it still afforded Member States the discretion to set their own standards of originality.

In contrast to the Italian approach, Margoni argued that *Flos* should be interpreted as a message by the CJEU that different requirements of originality for applied art should be abandoned,[75] and supported this claim by noting how the German Supreme Court abandoned their doctrine requiring a higher standard for industrial design than had previously been required soon after *Flos*.[76] A congruous argument was recently advanced by Rosati who said *Flos* suggested Member States cannot set any particular requirements as to how protection is to be secured. Evidence of this could be seen through the reading taken by AG Jääskinen in *Titus Donner*,[77] and the trend of a harmonised criterion and standard of originality superseding national copyright regimes.[78] While Rosati's argument was written in the wake of *Cofemel* and therefore enjoys the benefit of hindsight, this does not detract from the evidence that the Court was hinting at the EU standard of originality being extended to industrial designs. In light of *Cofemel*, Margoni's earlier words seem quite prophetic.

7. Cofemel

The recent decision of *Cofemel v G-Star Raw*[79] has confirmed that the harmonised originality requirement of 'the author's own intellectual creation' is the sole standard that can be employed by Member States in their assessment of whether copyright subsists in a work of industrial design or applied art. The case concerned Cofemel copying the designs of G-Star Raw for jeans and t-shirts. The question referred to the CJEU was whether Member States enjoyed freedom to choose the level of originality pertaining to works of applied art or must they apply the standard of 'the author's own intellectual creation' articulated by the Court. Unsurprisingly, the court opted for the latter .[80] This decision was in line with the Attorney General's opinion, the thrust of which was that uniformly interpreting work, including the originality requirement, is paramount to harmonising EU copyright.[81] It also echoed

75 Margoni (n 6) 21.

76 ibid citing Geburtstagszug [2013] I ZR 143/12.

77 *Titus Donner* (n 68) para 31.

78 Eleonora Rosati, 'CJEU rules that copyright protection for designs only requires sufficient originality' (2019) Journal of Intellectual Property Law & Practice 1.

79 *Cofemel* (n 2).

80 Estelle Derclaye, 'CJEU decides that the originality level is the same for all copyright works, including works of applied art' (Kluwer Copyright Blog, 18 September 2019)<http://copyrightblog.kluweriplaw.com/2019/09/18/cjeu-decides-that-the-originality-level-is-the-same-for-all-copyright-works-including-works-of-applied-art/> accessed 1 December 2019.

81 Estelle Derclaye, 'Member States can no longer require a higher level of originality for works

decisions reached by both the first instance and appellate courts in Portugal where the case was referred from.[82]

The Court reached this decision by first exploring the concept of a work. It held the concept presupposes the fulfilment of two criteria.[83] Affirming *Infopaq*, the court held there must be the existence of an object that is original in the sense of it being the author's own intellectual creation.[84] It then held that a work needs to be expressed in a manner making it identifiable with sufficient precision and objectivity, albeit not necessarily permanent form.[85] In making this observation the Court relied on the recent judgment of *Levola*,[86] where the Court rejected the proposal that copyright protection could subsist in a particular taste because of taste's inherently subjective nature. While the court did not go as far as saying all objects or categories shall benefit from identical protection,[87] it held that if a design falls within the scope of the Information Society Directive, the sole requirement for copyright protection is that it satisfies the originality criterion and can be classified as a work, and that national law requirements of a higher artistic or aesthetic value would contradict the requirement of objectivity mandated under EU law.[88]

As the judgment was handed down so recently, commentary on *Cofemel* is limited, so the reception is difficult to ascertain at this stage. However, a glimpse of this forthcoming debate can be witnessed in the criticism and support for the various options available to the CJEU that emerged before the judgment was handed down. Rendas, opposed to further judicial harmonisation, has contended that harmonising the originality requirement is irreconcilable with EU design law, to such an extent that it transcends judicial activism and amounts to judicial reform of legislation.[89] Another issue raised is that any potential benefits from a harmonised standard of originality for intra-Community trade may be outweighed by the drawbacks from a competitiveness standpoint. Most designs, including functional ones, will amount to original works under the Court's standard, which could lead to the creation of monopolies.[90]

---

of applied art/designs, says AG Szpunar in Cofemel' (Kluwer Copyright Blog, 3 May 2019) <http://copyrightblog.kluweriplaw.com/2019/05/03/member-states-can-no-longer-require-a-higher-level-of-originality-for-works-of-applied-artdesigns-says-ag-szpunar-in-cofemel/> accessed 1 December 2019.

82 Rendas (n 65) 440.

83 Rosati (n 78) 1.

84 *Cofemel* (n 2) para 39.

85 ibid para 40.

86 Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* (unreported, 13 November 2018 GC).

87 *Cofemel* (n 2) para 38.

88 Rosati (n 78) 2.

89 Rendas (n 65) 440.

90 ibid 440-441.

As a counter-argument, the European Copyright Society offer some reasons to be hopeful about the decision in *Cofemel*. First, the alternative of allowing Member States to set varying levels of protection could lead to uncertainty and internal market disruption.[91] Second, harmonisation is consonant with the principle of equal treatment between authors of industrial designs and applied art and authors of other forms of works.[92] Third, applying the 'authors own intellectual creation' standard to designs would not exceed the responsibility of the Court, as it has already developed an extensive body of jurisprudence applying this standard to various categories of works. In doing so, the Court would have to prevent monopolies of functional designs, but the ESC point to cases such as *FAPL* and *Painer* as evidence that the Court has already interpreted originality in a manner that mitigates over-protection, based on the requirements of intellectual freedom and creative choices.[93]

However, the ESC was equally cognisant of the potential negative consequences of the decision. They noted that the application of the originality requirement should be conducted in a manner that applies principles from design law, as this would effectively prevent monopolies from arising and foster greater convergence between design and copyright law.[94] They also noted another potential cost of harmonisation in that it will be difficult to restrict protection to non-functional or non-technical features, turning copyright into a back door for entities that no longer qualify for registered design protection, and disincentivising the application for said protection.[95]

Applying these points to the judgment, it can be noted that the Court issued a detailed pronouncement on the originality requirement and the requirements for an object to constitute a work, with the reliance on *Levola* to develop bipartite criteria providing greater clarity than before. However, while the Court had regard to the various Design Directives, they fell short of incorporating principles of design law into the originality standard in any tangible sense. Apart from that, the implications of this judgment will only become clear as national courts attempt to reconcile with it. However, it can be said with a degree of certainty from *Cofemel* that national regimes with additional criteria for the copyright to subsist to designs other than the EU originality standard are no longer compliant with EU copyright law.[96]

---

91 European Copyright Society, Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Cofemel v G-Star, C-683/17 (2019) 4.

92 ibid.

93 ibid 12-13.

94 ibid 14.

95 ibid 17.

96 Rosati (n 78) 2.

8. Conclusion

This essay has attempted to describe the function of the originality requirement under EU copyright law. In doing so, the theoretical underpinnings, as well as legislative and judicial approaches to this issue, were discussed. It is submitted the originality standard articulated in Directives and by the Court of Justice of 'the author's own intellectual creation' reflects many of the conceptions of originality such as free and independent creation and independent choice along with personhood and autonomy. However, analysis of the case law demonstrates that economic and utilitarian justifications related to copyright harmonisation are arguably just as important to the function and functionality of the originality requirement, if not more so. The primary criticism repeatedly made against this expansion of originality by the judiciary is that it limits Member State discretion without the legislative authority to do so. With this in mind, this author is of the view that any further expansion of the originality requirement would be better achieved through the EU legislative bodies rather than the Court of Justice.

ELSA AND LexisNexis
RULE OF LAW ESSAY COMPETITION WINNER

The rule of law is the foundation of all other rights. Without the rule of law, nothing else works. Without the rule of law, there is no contract system, there is no protection for intellectual property, there is no protection for personal security and abuse. Hence, the rule of law is not just a "nice to have", it is an absolute necessity for success. The rule of law is not merely an issue for developing countries; it is under constant threat in all countries of the world and we must be vigilant everywhere. ELSA and LexisNexis wish to honour rule of law commitment among law students and young lawyers across Europe. Therefore, in collaboration, we created the ELSA x LexisNexis Essay Competition on the Rule of Law which sought to raise the awareness of law students and young lawyers across Europe and across the globe on the importance of the rule of law. We encouraged law students and young lawyers to engage actively with the rule of law by asking them to answer the following question: "How can you, as a law student or young lawyer, contribute to advancing the rule of law?" Below, the reader may find the winning essay of that competition. The essay winner was announced at the Annual Reception of ELSA, which was moved online in response to the pandemic. ELSA and LexisNexis are honoured to present the essay and hope you enjoy reading it.

HOW CAN YOU, AS A LAW STUDENT OR YOUNG LAWYER, CONTRIBUTE TO ADVANCING THE RULE OF LAW?

Vissarion Petrikis*

Abstract

This essay aims at effectively answering the question set out in its title. First, it outlines the importance of the rule of law and points out the factors that jeopardise it in modern societies. It then proceeds to give a general overview of the various rule of law definitions, before moving on to suggesting ways that law students and young lawyers can contribute to advancing the rule of law, while underlining the author's personal contribution.

* The author is a trainee lawyer from Greece. He holds a bachelor's degree in law from the Aristotle University of Thessaloniki and he is currently serving in the Supporting battalion of the NATO Rapid Deployable Corps Headquarters in Thessaloniki. The author is also a member of the Research Institute for Transparency, Corruption and Financial Crime of the Aristotle's University of Thessaloniki Law Faculty and his main academic interests include criminal law, financial crime and corruption.

1. Introduction

The rule of law proved to be a very interesting essay subject. A concept so old, yet so contemporary that occupies a big share of modern days' both academic and political dialogue. A concept that all law students know about and tend to surpass it as something self-explanatory, yet it turns out that most law scholars and legal practitioners have different theories on its definition and its consisting elements. A founding principle of the European Union,[1] which value is well established but, at the same time, serious rule of law deficiencies are detected all across Europe. Still, there is one view shared by every citizen in all European societies: The rule of law is a sine qua non prerequisite for every modern democracy.

2. The rule of law problem

If one would search for the founding reasons of this shared view, the answers would vary. One of them would be that the rule of law forms a robust triangular relationship with the value of democracy and the effective exercise of fundamental rights.[2] There can be no democracy and respect for fundamental rights without the rule of law and when deficiencies appear in one of these three pillars, the other two deteriorate as well. The framework of, among other factors, independent judiciary, equality before the law and effective access to legal remedy that the rule of law produces, fortifies and protects democracy.[3] This same framework is a necessary supplement to the respect of fundamental rights, simply because if violations of fundamental rights were not followed by sanctions provided from written laws and implied effectively by independent courts, they would end up being mere castles in the air.[4]

Another answer would be that, without the rule of law, the European Union cannot function effectively as an area of freedom, security and justice.[5] When rule of law deficiencies are

1 Treaty on European Union (Consolidated Version), Treaty of Maastricht, art. 2

2 Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law* [COM(2014) 158 final], p.4

3 Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law* [COM(2014) 158 final], p.4

4 Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law* [COM(2014) 158 final], p.4, Communication from the Commission to the European Parliament and the Council - Further strengthening the Rule of Law within the Union *State of play and possible new steps* [COM(2019) 163 final], p.1, European Economic and Social Committee, *Opinion* (SOC/627) chap. 3.4

5 Communication from the Commission to the European Parliament and the Council - Further strengthening the Rule of Law within the Union *State of play and possible new steps* [COM(2019) 163 final], p.2

observed in a Member State, the trust in the justice and administrative system of the respected State is questioned and a series of European Union innovations are destined to under-perform. For instance, a recent judgment of the European Court of Justice ruled that a national judge does not have to respect a European Arrest Warrant issued by a member State when there are rule of law deficiencies in the issuing State. [6] [7] In addition, it could be added that when there are rule of law deficiencies resulting from corruption, the European internal market will as a result be heavily dysfunctional.[8] Furthermore, there is a risk that the Union's financial aid will be misused, damaging the Union's budget and the mutual trust which is necessary for the proper function and further development of the Union.[9]

The above are only some of the reasons why we need to address the current situation concerning the rule of law swiftly and firmly. All over Europe, serious concerns arise regarding powerful political actors threatening the independence of the judiciary, for example by trying to bypass a High Court's final judgment ruling with retrospective law making. Fundamental rights are often constraint, with the constraints being justified by security concerns or financial emergencies. The necessity and proportionality of these constraints is sometimes questionable. The malfunctions resulting from lack of transparency and corruption, as well as the Union's efforts to build a robust framework to resolve them have already been noted above. Last but not least, the increasing tendency of hybrid (State-private) or even purely private factors taking over formerly State authority task, presents a new challenge.[10]

---

6 Case C-216/18 PPU, ECHR, 25 July 2018

7 In particular, the Grand Chamber of the ECJ ruled that, when a national judge establishes that systemic or generalised deficiencies with the rule of law exist in the issuing member State, and these deficiencies are threatening the fundamental right to a fair trial of the accused, the national judge is not bound by the European Arrest Warrant and can refuse the extradition of the plaintiff.

8 Communication from the Commission to the European Parliament and the Council - Further strengthening the Rule of Law within the Union *State of play and possible new steps* [COM(2019) 163 final], p.2

9 It is important to note that the European Union is well aware of the ongoing and graduating threat that corruption based Rule of law deficiencies pose to the Union's budget. This lead to a Commission proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards to the rule of law in the Member States in 2018 and the recent establishment of the European Public Prosecutor's Office.

10 European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law* [CDL-AD(2011)003rev], p.13

3. Defining the rule of law

It is well established by now that the rule of law is an absolute necessity in every modern constitutional democracy, and that the current situation calls for vigilance and action, form governments and Union organs to the last citizen. Nevertheless, in order to effectively protect and promote the rule of law in modern States, it is necessary to deepen our insight into the exact meaning of the rule of law notion. Therefore, a step back to address this matter proves timely.

Given the importance of the issue, it appears fitting that its exact definition governs a sufficient of academic literature and institutional document production. The fact that legal scholars and practitioners around Europe still have not reached a consensual definition regarding the rule of law consisting elements, shows nothing but the vagueness and the complexity of the task at hand. When discussing the rule of law, legal practitioners do not deal with a procedural formality, but with a fluid 'umbrella concept'. This exact aspect of the rule of law is what enables it to be an integral part of every different modern constitution and offer its protection in countries with variable political, legal and constitutional traditions and systems.

Lord Bingham, as the main modern representative from the academic point of view, provides for a general definition. In his opinion, the rule of law means that '[…] all persons and authorities within the State, whether public or private, should be bound and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.[11] He then proceeds to break down the core principle and determine that the rule of law consists of the following eight 'sub-rules':

1. Accessible, intelligible, clear and predictable laws: When discussing this first principle, Lord Bingham underlines that the rising trend of legislative hyperactivity (which on multiple occasions even leads to contradicting laws) poses a serious threat to the rule of law.
2. Questions of legal rights and liability should ordinarily be resolved by application if the law and not the exercise of discretion.
3. Equality under the law.
4. The laws must afford adequate protection of fundamental human rights.
5. Means must be provided to for resolving, without prohibitive costs or inordinate delays, bona fide civil disputes, which the parties themselves are unable to resolve: The rule of law calls not only for the abstract right to judicial protection, but also for its actual enjoyment from every citizen.

[11] The Rule of Law, 66 Cambridge L.J. 67 (2007), p. 69

6. Public authority should be exercised reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limit of such powers: Along with sub rule 2, Lord Bingham appears to be concerned about the potential abuse of executive powers. Among its multiple functions, the rule of law appears to set a limit on the governmental authorities' powers.
7. Adjudicative procedures provided by the State should be fair.
8. Compliance by the State with its obligations in international law: This is the most revolutionary of the eight sub rules. Given the increased significance of international law (both deriving from treaties and international custom) in the adequate and holistic protection of fundamental human rights and civil liberties, this last sub rule provides for a new aspect in the understanding of the rule of law.[12]

From an institutional point of view, the European Union's institutions, assisted by the European Court of Human Rights and the notable work of the Venice Commission, have reached a consensus on the absolute necessary consisting elements of the rule of law, which are the following:

1. Legality.
2. Legal certainty.
3. Prohibition of arbitrariness of the executive powers.
4. Independent and impartial courts.
5. Effective judicial review including respect for fundamental rights.
6. Equality before the law.[13]

This definition does not add anything new or revolutionary to other existing definitions. However, it holds its own value. It is a more practical, accurate and comprehensive definition, adapted to the purpose of informing the citizens of the European Union's member States about the certain aspects of the rule of law notion that apply directly in their everyday lives and their interaction with their respective States.

Finally, yet importantly, there is another list of 'rule of law principles' or, as its creators call it, the 'LexisNexis rule of law equation'. It is a definition coming from people well infused in the everyday legal practice, who take part in the adjudicative system by defending and upholding rights and civil demands. This is why it should be included and elaborated further

12 The Rule of Law, 66 Cambridge L.J. 67 (2007) p. 69-84

13 Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law* [COM(2014) 158 final], p. 4

on, among the academic and institutional definitions. This equation breaks down the rule of law in four essential principles.

1. Equality under the Law: A core element of the principle of separation of powers, which can be found in every modern constitution.
2. Transparency of the Law: Meaning that the Law must be clear and precise, so that its consequences will be easily detected.
3. Independent judiciary: In order for the Law to be applied consistently and equally to all, adjudicators have to be both independent (external essence of independence), and impartial (internal essence of independence).
4. Accessible legal remedy: All the aforementioned principles would be pointless, if access to courts comes with unreasonable costs or inordinate delays, which prevent the citizens from actually resolving their disputes. In addition, the legal profession must remain independent and be left to operate freely from governmental or otherwise external pressures.[14]

Personally, I do believe that it is important to define the rule of law not just as a constitution article or as a mere legal obligation. It is important to view the rule of law more deeply, as a fluid protective shield that governs and limits every aspect of a citizen's interaction with the State, ensuring the full enjoyment of fundamental rights and civil liberties. Principles such as legality, equality under the law and access to legal remedy are not mere formalities that should just vaguely be met. Instead, States should invest in actually implementing these principles in every aspect of everyday life, forming a rule of law culture that flows through the head of the government to the last citizen, tackling rule of law deficiencies at their core. For example, in my home country, Greece, the effective access to legal remedy is heavily challenged. Factors such as prohibitive costs, dysfunction of the legal aid scheme and most importantly, excessive delays in the publication of final court judgments that can reach up to ten years are part of the adjudicative procedure. It is clear that this situation drives citizens, especially those financially struggling, reluctant to seek judicial protection, or even not able to enjoy this fundamental right at all. This example makes evident that, even when a right is formally included in a State's constitution,[15] its proper enjoyment, as the rule of law demands, is still not guaranteed.

[14] The 'LexisNexis rule of law equation' can be found at https://www.lexisnexis.com/en-us/rule-of-law/default.page

[15] The access to effective legal remedy is set out in article 20 par.1 of the Greek constitution

4. Contributing to the rule of law

It is true that this brief introduction was not that brief after all, but it is not something to regret. As in every subject as intricate and interesting as this, in order to answer the question 'How can you, as a law student or a young lawyer, contribute to advancing the Rule of Law?' one first need to decompose, analyse and provide a good overview of its components. As this duty is fulfilled, I can move on to the matter at hand.

4.1 As a law student

Regarding the first part of the topic question, law students can first of all contribute to advancing the rule of law by using the opportunities that arise within their studies to educate themselves of the academic definition and the practical importance of the rule of law and be eager to research and remain informed on newer developments on the matter. Building a robust rule of law culture is also a matter of personal responsibility. Moreover, by participating in Civil Society Organisations that promote the awareness for human rights and civil liberties, such as the European Law Students Association (ELSA), law students can raise their voice and reach out to a wider audience, contributing in building a common European rule of law culture. Summer schools, workshops and conventions offered by these organisations provide an ideal environment for law students to interact, share their views and exchange knowledge on a variety of rule of law aspects.

I was lucky enough to engage in ELSA activities early in my student years. By participating in conventions, summer schools, study visits and law reviews organised by ELSA Thessaloniki and ELSA Greece, I was able to educate myself on rule of law related subjects. Most importantly, I was given the chance to exchange my views with law students originating from different cultural, legal and academic backgrounds and discuss with them the current rule of law related situation (for example, governmental powers, independence of the judiciary, corruption concerns) all across Europe. These experiences widely enriched my view on the matter and helped me understand the need of developing a common European strategy for battling rule of law deficiencies in every member State.

4.2 As a young lawyer

Moving on to young lawyers, I believe that their role in advancing the rule of law is even more crucial and competent, given their active involvement in their countries judiciary system, their deeper understanding of the matter and their bigger influence power to the public. First of all, young lawyers can greatly contribute with their participation in rule of law related Civil Society Organisations by providing their expertise. Moreover, by actively

participating in judicial networks, expert groups and lawyers' associations, they can promote awareness by informing the general public about recent relevant case law of the European Court of Justice and the European Court of Human Rights, opinions and recommendations from institutional factors like the Council of Europe or the Venice Commission (by means such as relevant newsletters, organising conferences, thus helping in the development of a common rule of law culture). In addition, through these organisations law students will be able to share knowledge with each other and initiate grassroot conversations for recent developments in their States of origin, creating a network that can recognise warning signs early. Moreover, local bar associations can quickly identify rising threats and publicly raise the alarm on them, applying pressure to governments authorities to look up and quickly resolve these issues.

However, the decisive area where young lawyers can contribute to the best of their abilities and become real-life rule of law guardians, lies within their very job description. It is true that the public holds an unflattering opinion on lawyers, and at a certain degree this opinion is well justified. Because sometimes, even lawyers forget that they are not just professionals, but officers and integral parts of the judiciary system. By faithfully serving the legal professions constitutional role and upholding the client's legal interests with dignity, respect for the general good and by contributing to the well-functioning of the respective State's adjudicative system, young lawyers can hugely enhance a basic pillar of the rule of law. For example, a common lawyer practice of stalling court procedures in bad faith exists. This practice serves primarily to buy the attorney some time when the possible outcome is not in favour of the client. Abolishing this practice could help resolve huge defect of many European legal systems, one that is seriously affecting the access to effective legal remedy: The inordinate delay of adjudicative procedures. Moreover, especially young lawyers can staff the various legal aid schemes in their respected countries and provide their services in defending the rights of the less well off, practically exercising the core sense of 'Access to effective legal remedy for all'.[16]

4.3 Personal contribution

Personally, as a young lawyer, I share the view that we need to take swift and vigilant action against corruption, a prominent and growing threat to the rule of law. Corruption and lack of transparency can result in serious rule of law deficiencies, such as clouding the independency of the judiciary, enable third parties to affect the law-making process on their

[16] As set out above, the 'Access to effective legal remedy for all' is one of the four elements of the 'LexisNexis rule of law equation', which can be found at https://www.lexisnexis.com/en-us/rule-of-law/default.page

favour, or even diminishing the equal and complete enjoyment of fundamental rights and civil liberties.

This is the reason why I chose to devote my working experience and my academic capacity to the battle against this modern age Hydra, by participating in the Research Institute for Transparency, Corruption and Financial Crime of the Aristotle's University of Thessaloniki Law Faculty. The Institute's primary goal is to contribute to the planning of Greece's institutional reconstruction towards increased transparency and more effectively addressing corruption and financial crime, based on the rule of law. For this purpose, the Institute develops activities that promote these objectives in practice and enhance awareness among State authorities as well as within civil society on the importance of the matter. These activities constitute organisation of information days, workshops and academic conventions which address, where appropriate, either an academic audience or a wider portion of the civil society. By these means, the Institute aims to inform the public and raise awareness for new developments on this crucial matter and promote grassroot dialogue wand exchange of views among the legal community. Moreover, the Institute conducts academic research, which leads not only to the publication of articles in well-known scientific publications. More importantly, it produces institutional interventions that aim to affecting the legislative framework and the much needed and the urgency of the situation, while simultaneously promotes the rule of law and respects fundamental rights and civil liberties. A tightrope walker's exercise for sure, but not an impossible one.

5. Conclusion

The advancement and proper function of the rule of law is essential for exercising fundamental human rights and civil liberties and to fully enjoy the advantages of a constitutional democracy. This is why it is every citizen's duty to defend the rule of law from is defecting factors, while helping in the further advancing and development of the rule of law. Law students and young lawyers, due to their field of expertise, should be at the forefront of this battle, by educating themselves and the general public. In addition, young lawyers should set out an example by acting out to abolish rule of law deficiencies and advance the rule of law through the way they exercise their profession.

CATÓLICA GLOBAL SCHOOL OF LAW

Católica Global School of Law was established in 2009 at the Law School of the Catholic University of Portugal and has become the center of the Católica's growing focus on international legal education.

Since its founding, **Católica Global School of Law** has been successful in achieving a series of goals: it has attracted a remarkable group of scholars and classes of graduate students, both coming from prestigious law schools from all over the world; it has launched three state of the art programmes (an **LL.M. Law in a European and Global Context,** an **Advanced LL.M. in International Business Law** and a **Global Ph.D. in Law**) and, responding the new market challenges and needs, will launch a new one for the academic year 2020-2021(**LL.M. in a Digital Economy**); and it is becoming an important center of graduate teaching and research in law from a global perspective in Lisbon. The quality of its programmes has been consistently recognized by international rankings, as well as the Financial Times, which selected **Católica Global School of Law** as one of the most innovative law schools in the world, for six consecutive years.

The ELSA Law Review is produced by:
Wolf Legal Publishers, P.O. Box 313, 5060 AH Oisterwijk, The Netherlands
info@wolfpublishers.nl https://www.discoverlawbooks.com

ELSA Law Review 2020

The ELSA Law Review is a peer-reviewed law journal published by the European Law Students' Association (ELSA). It features contributions authored and edited by students and young lawyers. The ELSA Law Review strives to create an open forum for legal analysis and discussion, and it serves as an international platform through which engaged law students and young legal professionals can showcase their legal research. Additionally, the ELSA Law Review aims to provide an enthusiastic international readership with access to scholarly discussion of contemporary legal issues, exposure to which they may otherwise not have.

For the 2020 issue, the Editorial Board invited submissions on human rights law as well as comparative European law, and hence the reader will be able to explore both topics in this issue. The Editorial Board invites article submissions from current law students, recent law graduates, and young legal professionals. Founded in 1989, the ELSA Law Review was one of the first and major projects of ELSA in the past and after many years it is revived thanks to the dedication of the Editorial Boards and the valuable academic contribution of Católica Global Law School.

CONTENTS: