

# Cambridge Journal of International and Comparative Law

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## Editorial

# Developing Democracy: Conversations on Democratic Governance in International, European and Comparative Law

Clara Rauchegger\* and Anika Seemann\*\*

Conference Conveners

This Issue results from the Fourth Annual Conference of the *Cambridge Journal of International and Comparative Law*, which was held at the University of Cambridge on 8 and 9 May 2015.

The Conference theme, ‘Developing Democracy: Conversations on Democratic Governance in International, European and Comparative Law’, was chosen to promote an international exchange on current challenges to democracy. The Conference theme understood democracy as a work in progress, both at a normative and at a practical level. By placing the concept of ‘democracy’ in the context of ‘development’, we invited speakers to (re-)define its meaning, to confront political realities with democratic ideals and to explore promising solutions to the challenges they identified.

In line with the international and comparative law focus of the *Journal*, scholars from several transnational fields of legal research came together in Cambridge for a joint exploration of democratic governance from various perspectives. The Conference thus brought together debates that tend to be held separately. We were heartened to find that there was much demand for this platform of exchange. Our call for papers attracted responses from all corners of the globe and from a variety of fields of legal research. We had to make difficult choices as more than 200 abstracts were submitted.

The final Conference programme featured speakers from five continents, including early career researchers and established academics, as well as legal practitioners. The Conference papers, grouped into ten panels, were complemented by three highly insightful keynote speeches, delivered by Dame Rosalyn Higgins DBE QC, former President of the International Court of Justice, Judge James Crawford AC SC FBA of the

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International Court of Justice, and Judge Christopher Vajda of the Court of Justice of the European Union. These presentations, in conjunction with a book launch—Dr Freya Baetens introduced the co-edited book *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*—and a book discussion—between Dr Russel Buchan, author of *International Law and the Construction of the Liberal Peace*, and Jessica Corsi—ensured that the Conference theme was explored from a variety of angles. The discussions continued over coffee breaks and during the Conference dinner, and we are pleased that a number of joint research projects have emerged from this exchange. Overall, the Conference attracted 150 participants.

The transnational and interdisciplinary focus of the Conference is reflected in the variety of analytical approaches and normative outlooks of the articles in this Issue, as well as in the spectrum of legal and geographical backgrounds of the authors. The following 12 articles were selected from the more than 40 papers presented at the Conference through a rigorous peer review process and the authors were given the chance to revise their papers for publication.

The Conference opened with the keynote address by Dame Rosalyn Higgins DBE QC, which has been reproduced in this Issue. In this contribution, Dame Rosalyn argues that we cannot think of democracy in an international context without taking into account human rights and the rule of law. She explores how this approach may help us define more clearly and better promote the concept of democracy at the international level. Judge Christopher Vajda's contribution to this Issue, also based on his keynote speech, examines the democratic legitimacy of the European Union's institutional structure and of its legislative and adjudicative processes. He refers to a number of recent judgments of the Court of Justice of the European Union to illustrate his arguments. The two keynote addresses constitute the first section of this Issue.

The second section of this Issue addresses democratic challenges in times of crisis in the European Union. Matej Avbelj identifies internal and external processes that affect democracy in the European Union. He makes a number of normative proposals embedded in the theory of constitutional pluralism. Antonia Baraggia examines the impact of conditionality measures to be implemented by money-borrowing countries on democratic governance, and the role of domestic supreme courts as watchdogs of democratic ideals in this context. Afroditi Ioanna Marketou argues that constitutional developments within crisis-hit countries merit closer attention than they have been given so far. She observes a 'loss of faith' in the Greek Constitution as a consequence of the financial crisis.

The third section of this Issue focuses on the promotion of democracy through international law and the interplay of democracy and the principle of self-determination. Russell Buchan proposes an explanatory framework that distinguishes between the international community, formed of liberal states, and the pluralist international society. By distinguishing between the group of liberal states and the group of non-liberal states, and by exploring their interaction, Buchan argues that we can better understand how and why conflicts in the international community occur, and how certain liberal values



are promoted. Kalkidan N Obse and Christian Pippin illustrate the limits of the African Union's policy on constitutionalism and democratic governance in Africa in light of political realities. They suggest that the definition and application of the concept of 'unconstitutional changes of government' should be clarified. In Amichai Magen's view, the global decline in interest among states in the promotion of democracy is no longer hypothetical. He proposes that democratic rights are 'layered', and analyses the current status of these different democratic layers in the international legal order. Vladyslav Lanovoy looks at the operation of the right to self-determination outside of the context of decolonisation. He analyses the relationship between self-determination and democracy, with particular reference to Kosovo and Crimea.

The final section of this Issue is devoted to the diverse actors which can contribute to generating democratic norms outside of national parliaments and national executives. Silvia Suteu explores the role of citizen assembly-style constitutional conventions for the revitalisation of representative democratic institutions. She warns that they should not be advocated as a 'one size fits all solution' to the challenges of representative democracy. Anna Gamper distinguishes different types of law-making by constitutional courts from a comparative perspective, and critically appraises their democratic legitimacy. She assesses whether constitutional courts can compensate for the democratic deficit which she detects through their function as guardians of the constitution. Finally, Andreas Kulick discovers the intersections of international investment law and democratic governance. His contribution focuses on the role of the different actors in investment disputes, and points towards the potential limits of furthering democracy in this forum.

Without the help of the members of the Faculty of Law of the University of Cambridge, who so willingly offered their expertise and time, neither this Issue nor the Conference would have been possible. Many members of the Faculty supported the Conference by chairing its panels and reviewing papers. Professor Richard Fentiman, Chair of the Faculty Board, kindly agreed to open the Conference. Professor Christine Gray assisted greatly in securing one of the most outstanding conference venues in Cambridge—the Old Divinity School at St John's College. We would also like to thank Professor Kenneth Armstrong, Director of the Cambridge Centre for European Legal Studies, and Professor Marc Weller, Director of the Lauterpacht Centre for International Law, for their invaluable support. Special thanks are in order to Professor James Crawford, who has now become His Excellency Judge James Crawford, for his continued contribution to the success of the *Journal*.

We are also extremely grateful to our team of Conference Assistants, Massimo Lando, Michele Grassi and Jing Zhao, for their hard and diligent work. They committed much of their time in the course of this project to its eventual success. Emma Bickerstaffe provided thoughtful advice regarding the logistics of the Conference throughout our preparation for it. Special thanks are due to our Editors-in-Chief, Ana Júlia Maurício and Naomi Hart, who assisted in every way with the project at all of its stages. All members of the Editorial Board contributed to the preparation of this Issue for publication, and we are very grateful for this.

We would also like to acknowledge the financial support of Hart Publishing, Cambridge University Press, the Cambridge Centre for European Legal Studies, the Lauterpacht Centre for International Law, the Cambridge Law Journal, and the Whewell Fund.

Finally, we are grateful to all those who attended and participated.

# Democracy and the United Nations

*Dame Rosalyn Higgins DBE QC\**

## Abstract

Dame Rosalyn Higgins DBE QC delivered the Keynote Address at the Cambridge Journal of International and Comparative Law Fourth Annual Conference, 'Developing Democracy: Conversations on Democratic Governance in International, European and Comparative Law', on Friday 8 May at the Divinity School of St John's College at the University of Cambridge. This address examines the place of democracy in international law, focusing on instruments from the Charter of the United Nations to the Montevideo Convention on the Rights and Duties of States. These instruments illustrate that democracy has never been a critical element for recognition of statehood. Rather, the promotion of democracy as a significant value is evident in human rights instruments which suggest that democracy, rather than being a free-standing legal concept, is intertwined with concepts of human rights and the rule of law. The address concludes by reflecting on the most recent trajectory of democracy as a concept amongst the international law community.

## Keywords

Democracy, Human Rights, Rule of Law, Council of Europe, Van Dijk Report, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Interdependence of Concepts, Democracy as a Freestanding Legal Obligation/Entitlement, Democracy under Threat

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## 1 Introduction

In what I have to say this morning it will become apparent that 'democracy' cannot—either legally or politically—be usefully talked about without also talking about *human rights* and the *rule of law*. As we will see, these are unavoidably related, so I will have to wander down some other highways and byways. Indeed, we will need to see if we should really think of 'democracy' as a legal right at all; and also briefly take a look at its state of health at the present time.

So let's make a start by looking for the sources of international law which might suggest this concept of democracy. The United Nations (UN) Charter itself makes no mention of the word 'democracy'. Some say that the idea of democracy is to be read into

\* Former President of the International Court of Justice. The author wishes to thank Philippa Webb for her assistance with the preparation of this lecture.

the opening words of the Charter, ie, 'We the Peoples (...)'.<sup>1</sup> There is something to this important reference to the entitlement and desires of '[w]e the peoples', especially as the membership of the UN has always been one of states. The point of departure has been article 4 of the UN Charter, which as you know provides:

1. Membership in the United Nations is open to all other<sup>2</sup> peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

There is absolutely no reference in these words to a state needing, to qualify for membership, to be democratic.

More generally, the Montevideo Convention on the Rights and Duties of States, still regarded as the classical statement on the subject, stipulates that 'the State as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States'.<sup>3</sup> The emphasis is thus on realism, on effective control. This immediately feeds into the question of recognition—which is beyond the scope of my talk today. As you will know, there are those who say that the recognition of a state must depend upon criteria of statehood being met. And there are those who say that recognition by others is itself a prerequisite of statehood. There is some truth in both perceptions.

But the essential point for us today is that none of this debate is about democracy. Democracy is not in international law a requirement for statehood, nor indeed for recognition of statehood. And it could not have been otherwise. The whole point of the UN was for it to be an inclusive organisation, where the problems of the world could be addressed. And at the time of the inception of the UN, the vast majority of its membership was made up of states that were not democracies. What do I mean by that? The will of its people was not reflected in the acts of those who governed.

Of course, the meaning of 'state' has indeed somewhat varied over the years. Its definition has been contextual. The UN Charter itself mentions the term 'state' no fewer than 31 times. These mentions obviously do not all relate to admission for membership. The term is also used in the context of claims to appear before specific organs of the UN, to participate in certain specialised agencies, to bring matters affecting peace and security to the notice of the UN, and to be a party to the Statute of the International Court of Justice (ICJ).<sup>4</sup>

<sup>1</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

<sup>2</sup> The reference to 'other states' is in distinction to 'original Members,' as mentioned in *ibid* art 3.

<sup>3</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

<sup>4</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

So it has been possible to say that what the UN treats as a state is more rigorous than the functional answers of certain specialised agencies. And mechanisms have been found over the years for non-state entities to appear before bodies where their presence (normally reserved to states) has been thought desirable. Even the ICJ, appearance before which is limited in its Statute to states,<sup>5</sup> has found ways to hear, in particular cases, Palestine and Kosovo. But none of this—none of these developments—has related to democracy. That has been a different question altogether. Even in the fraught problem of Kosovo—whether its Declaration of Independence was in accordance with international law—democracy was not the key.

\* \* \*

So if statehood and democracy have no direct relationship, and the UN Charter has rather little to say on democracy, where has the great push underlying the promotion of democracy come from? Well, democracy is indeed mentioned as a value of great significance in other important organisations. The Preamble to the Statute of the Council of Europe refers to freedom and the rule of law as forming ‘the basis of all genuine democracy.’<sup>6</sup> Interestingly, the preamble to the European Convention on Human Rights refers to the common heritage of the European governments,<sup>7</sup> and makes mention of ‘freedom and the rule of law’—but not democracy.

The Basic Document of the Organization for Security and Co-operation in Europe (OSCE) states, ‘Democracy is an inherent element of the Rule of Law.’<sup>8</sup> The Organisation for Economic Co-operation and Development, referring to the rule of law, identifies various key elements and adds that ‘the law can be changed by an established process that is itself transparent, accountable and democratic.’<sup>9</sup> The way in which several concepts are intertwined is evidenced in article 2 of the Treaty of the European Union (EU), which provides, ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’<sup>10</sup> So it is clear that we will need to say something about human rights and also about the rule of law if we are to examine further the idea of democracy.

<sup>5</sup> *ibid* art 34(1).

<sup>6</sup> Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 8 UNTS 103, preamble.

<sup>7</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, preamble.

<sup>8</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen (29 June 1990), art I(3).

<sup>9</sup> Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee, ‘Mainstreaming Conflict Prevention’ (2005) quoted in European Commission for Democracy through Law (Venice Commission), ‘Report on the Rule of Law’ (Study No 512/ 2009) para 27.

<sup>10</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, art 2.

## 2 Human rights and democracy

We have seen how democracy, human rights and the rule of law are intertwined concepts, each depending on the other two for its realisation. The relevant human rights are those concerning self-determination in its broadest sense. The Universal Declaration of Human Rights—imprecise in the formulation of its terms, technically non-binding, but widely invoked—projects the concept of democracy by stating that ‘the will of the people shall be the basis of the authority of government.’<sup>11</sup> And it lays out the rights that are the bedrock of effective political participation.

As with the term ‘democracy’, the UN Charter contains few references to self-determination. The references in articles 1(2) and 55, which couple ‘equal rights and self-determination of peoples’ suggest (as I have had occasion to write elsewhere)<sup>12</sup> that it was equal rights among states that was being referred to, not equal rights of individuals. So self-determination was a concept cautiously drafted in the UN Charter. In due course, the relationship between self-determination and decolonisation came to the fore—though for some years the colonial powers insisted that self-determination was a political aspiration rather than a legal right. By 1971 the ICJ determined that the principle of self-determination was applicable to all non-self-governing territories.<sup>13</sup> And it was not to be understood as a right to independence. It was a right for peoples to choose their own destiny: including, at the moment of independence, joining another country.<sup>14</sup> While the concept of self-determination had its origins in colonialism, it gradually was realised to be applicable as a human right.

In 1966, the texts of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provided:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>15</sup>

The famous Helsinki Final Act of the early seventies makes it absolutely clear that

all peoples always have the right (...) to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.<sup>16</sup>

<sup>11</sup> Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 16 December 1949) UNGA Res 217 A(III), art 21(3).

<sup>12</sup> Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (OUP 1994) 112.

<sup>13</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 31.

<sup>14</sup> UNGA Res 1514 (XV) (14 December 1960).

<sup>15</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1(1).

<sup>16</sup> Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accord) (1 August 1975), reproduced in (1975) 14 ILM 1292, art VIII.

Nor does the African Charter on Human and Peoples' Rights limit the right that all peoples have to self-determination to situations of decolonisation.<sup>17</sup> The Human Rights Committee (interpreting the ICCPR) has consistently told states appearing before it for examination of their periodic reports that the right to self-determination requires that a free choice be afforded to peoples on a continuing basis.<sup>18</sup> It has also made clear that this is virtually impossible in a one-party state.<sup>19</sup> Even in one-party systems that allow some form of participatory democracy, outcomes are predetermined.

It hardly needs saying that minorities have minority rights under article 27 of the ICCPR—but that does not give that minority a so-called 'right to self-determination' and still less, a 'right to secession'. These legal issues, somewhat beyond the scope of this lecture, are dealt with in depth in the *Reference re Secession of Quebec* case.<sup>20</sup> Article 1 of the two Covenants speaks of self-determination. And article 25 of the ICCPR is concerned with the detail of how democratic free choice is to be achieved—by periodic elections, on the basis of universal suffrage. It deals with the entitlement of participation without discrimination in the public life of one's country—whether as a politician, civil servant or voter. None of this is to say that democracy—the essential bedrock of continuing self-determination and the right to participate in the public life of the country—comes only in one form. But within various possibilities there are essential elements that must be there.

### 3 Rule of law

Let us then take a closer look at the other concept so closely related to democracy. I have said earlier that democracy is closely intertwined with the rule of law. And in the last decade that concept has attracted much attention. What does 'the rule of law' mean to an international lawyer? It is not a term of international law, as such, so let us begin by looking at what the term means to a domestic lawyer, and see where we go from there.

Dicey famously identified three principles which together establish the rule of law:

- (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;
- (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; and

<sup>17</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5, art 20(1).

<sup>18</sup> See, for example, UNGA 'Report of the Human Rights Committee' (1997) 51st Session vol I Supp No 40 UN Doc A/51/40, annex V, para 2. See also Higgins (n 12) 120.

<sup>19</sup> See, for example, UNGA 'Report of the Human Rights Committee' (2000) 55th Session vol II Supp No 40 UN Doc A/55/40, para 291.

<sup>20</sup> *Reference re Secession of Quebec* (1998) Supreme Court of Canada 2 SCR 217, 37 ILM, 1340.

(3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.<sup>21</sup>

These ideas, still valid, have been fleshed out by much work done on the rule of law, including the so-called Venice Commission and of course Lord Bingham's book, *The Rule of Law*.<sup>22</sup>

Very detailed specifications are offered by the van Dijk report adopted by the Venice Commission in 2009.<sup>23</sup> The annex to the 2011 Venice Commission on the Rule of Law offers a checklist for evaluating the status of the rule of law within states.

1. Legality (supremacy of the law)
  - a) Does the State act on the basis of, and in accordance with the law?
  - b) Is the process for enacting law transparent, accountable and democratic?
  - c) Is the exercise of power authorised by law?
  - d) To what extent is the law applied and enforced?
  - e) To what extent does the government operate without using law?
  - f) To what extent does the government use incidental measures instead of general rules?
  - g) Are there exception clauses in the law of the State, allowing for special measures?
  - h) Are there internal rules ensuring that the state abides by international law?
  - i) Does the *nulla poena sine lege* system apply?
2. Legal certainty
  - a) Are all the laws published?
  - b) If there is any unwritten law, is it accessible?
  - c) Are there limits to the legal discretion granted to the executive?
  - d) Are there many exception clauses in the laws?
  - e) Are the laws written in an intelligible language?
  - f) Is retroactivity of laws prohibited?
  - g) Is there a duty to maintain the law?
  - h) Are final judgments by domestic courts called into question?
  - i) Is the case-law of the courts coherent?
  - j) Is legislation generally implementable and implemented?
  - k) Are laws foreseeable as to their effects?
  - l) Is legislative evaluation practiced on a regular basis?
3. Prohibition of arbitrariness
  - a) Are there specific rules prohibiting arbitrariness?
  - b) Are there limits to discretionary power?
  - c) Is there a system of full publicity of government information?
  - d) Are reasons required for decisions?

<sup>21</sup> AV Dicey, *The Law of the Constitution* (8th ed, Macmillan and Co 1915) 198–99.

<sup>22</sup> Thomas Henry Bingham, *The Rule of Law* (Allen Lane 2010).

<sup>23</sup> Venice Commission (n 9).



4. Access to Justice before independent and impartial courts

- a) Is the judiciary independent?
- b) Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?
- c) Are single judges subject to political influence or manipulation?
- d) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?
- e) Do citizens have effective access to the judiciary, also for judicial review of governmental action?
- f) Does the judiciary have sufficient remedial powers?
- g) Is there a recognised, organised and independent legal profession?
- h) Are judgments implemented?
- i) Is respect of *res iudicata* ensured?

5. Respect for human rights

Are the following rights guaranteed (in practice)?

- a) The right of access to justice: Do citizens have effective access to the judiciary?
- b) The right to a legally competent judge
- c) The right to be heard
- d) *Ne bis in idem*<sup>24</sup>

The rule of law, within countries, is undoubtedly making progress. And many of the elements I have mentioned can be recognised as human rights under the European Convention on Human Rights and the ICCPR. But it is much, much harder to see where the Dicey idea of the rule of law fits into the international system. There is manifestly no world government system into which the model could most easily fit. The UN General Assembly is indeed representative of the international community, with each state having one vote. But the 'executive' of the UN consists of 15 members, five of whom are 'permanent' and hold a veto, and ten of whom are broadly representative of the membership as a whole. These latter serve a rotating two-year term. Kofi Annan, among others, had pushed for a restructuring of the Security Council (for broadly 'rule of law' reasons) during his tenure as Secretary-General, but the many difficulties in achieving this are not yet resolved.

If we continue to work our way through Dicey's rule of law prerequisites, we next come to the principle of 'equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts'. The realities of power, coupled with the promotion of their own interests and the protection of other favoured states, mean that the decisions of the Security Council, while striving for a principled application based on UN Charter requirements, are subject to 'the achievement of the possible'. That in turn means that Security Council decision-making is not always regarded as 'applicable equally to all'. Arguments about lack of consistency in the application of international sanctions make the point.

<sup>24</sup> *ibid*, annex, 15–16.

There has at the UN been much activity, many reports on the rule of law. There have also been resolutions on the topic, such as UNGA Resolution 61/39.<sup>25</sup> This Resolution requested, *inter alia*, that the Secretary-General submit a report identifying ways to provide capacity-building to states in order to assist with the promotion of the rule of law at national and international levels. There has certainly been no lack of drive to breathe life into this idea. This is not the occasion, I think, for me to take you, step by step, through all that has been happening at the UN on this subject. Despite a flood of official reports, we still do not have a clear definition of what is meant by 'the rule of law at the international level'. Speaking during the debate in the Sixth Committee of the General Assembly in October 2006, the representative of India observed:

The rule of law was often advanced as a solution to the abuse of government power, economic stagnation and corruption. It was considered essential to the promotion of democracy, human rights, free and fair markets and to the battle against international crimes and terrorism. It was also seen as an indispensable component for promoting peace in post-conflict societies. The rule of law might therefore have a different meaning and content depending on the objective assigned to it.<sup>26</sup>

We get a sense of the enormity of the scope of the concept of the international rule of law when reading the 2005 World Summit Outcome Document.<sup>27</sup> This document is essentially a statement on everything on which the representatives of the international community can agree. In that light, it is rather impressive. It covers topics as broad-ranging as domestic resource mobilisation, debt, education, HIV/AIDS, migration, terrorism, refugee protection, and reform of the UN Secretariat. There is a specific section on the rule of law in which the Heads of State and Government recognise the need for universal adherence to, and implementation of, the rule of law at both the national and international levels.

#### 4 Is democracy a rule of international law?

As you will know, the Council of Europe regards itself as the continent's leading human rights organisation. It has 47 member states (28 of which are members of the European Union). All Council of Europe members are required to sign and ratify the European Convention on Human Rights. The Council has three so-called 'pillars': the Rule of Law, Democracy, and Human Rights. As I have already suggested, these concepts are intertwined and somewhat difficult to separate. It is hard to conceive that, in the absence of democracy, rule of law can exist. And it is equally difficult to imagine that a country can have the full panoply of human rights if there is no democracy.

<sup>25</sup> UNGA Res 61/39 (2006) GAOR 61st Session.

<sup>26</sup> UNGA 'Report of the Sixth Committee: The Rule of Law at National and International Levels' (17 October 2006) 61st Session UN Doc A/61/142 (India), para 74.

<sup>27</sup> UNGA Res 60/1 (2005) GAOR 8th Plenary Meeting.

That these concepts are intertwined is self-evident. But there are questions, the answers to which are not so apparent. Is the concept of democracy really a right in the sense understood in international law? And although human rights are legal rights, is the rule of law really a legal right? What is the common understanding of a legal right? It is surely a right the fulfillment of which can be claimed as law. I don't think that either an individual, or a state, would be successful in bringing a claim against a state that democracy is lacking. It is much more likely that the claim would be articulated in a national court as a violation—perhaps by reasons of lack of democracy—of a human right. And in an interstate case, before an international tribunal, it is likely to be advanced as a claim that there is no real self-determination, and people do not have the opportunity to choose their own government and to determine their own government.

As I have suggested earlier, it would not be surprising if democracy is not really a legal right. When the UN Charter—notably silent on democracy—was drawn up, the majority of original members and the vast majority of those who later became members, were not democracies. So the UN Charter had to be drawn up to meet the reality of that situation. If legal claims could be brought against them on the grounds that they were not democracies, the UN membership would have been in a state of chaos.

What is very interesting, however, given that reality, is to wonder how the great push for democracy came about. There is no doubt this has happened. Member states of the UN today, in very many resolutions, are willing to condemn a military coup as contrary to democracy. States do this because it is easier for them to insist that, while governments come in many forms, their government is actually democratic. It came to power through the ballot and has the ongoing support of the people. Of course, such claims may be made when ballots are rigged, when membership of the legislature, and indeed of the superior courts, are controlled by governments. We can think of examples. And of course, if a government controls the press and television, then it can remain popular—especially when it engages in military action overseas and presents its acts as a defence against aggression and the ill will of others.

Fair voting for a government, or a President, is crucial. That is why so much has been invested in the monitoring of elections worldwide. That monitoring—by the OSCE, the EU, even occasionally by the UN itself—can of course be resisted. But that itself puts the government or President concerned in a doubtful light. For those interested, there is now a wonderful and large literature on this. Some, like Binder, writing in *European Public Law*, see this as related to the human right of participation rather than to democracy.<sup>28</sup> I have already commented on the impossibility of separating the concepts operationally. Tom Franck, whose writings on the right to democratic governance have attracted recent generations of students, is grounded in human rights.<sup>29</sup> Some have claimed that monitoring reflects double standards, because there are regional or international electoral

<sup>28</sup> Christina Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (2007) 13 EPL 133.

<sup>29</sup> Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

monitors to oversee whether elections are democratic, whereas long established states (such as China) are virtually everywhere regarded as legitimate, even if not democratic.

4.1 A further uncomfortable question: Is democracy going backwards? The close relationship of democracy with freedom for the nationals of that country

In 2014, it was reported (by Freedom House) that of the 195 states in the world today, 88 are free (45 per cent), 59 are partially free (30 per cent) and 48 countries sadly cannot be classified as free (25 per cent—a quarter of the world).<sup>30</sup> When James Crawford gave his inaugural lecture at the University of Cambridge, he was cautiously optimistic, seeing evidence of growing democracy worldwide, and strikingly, in the continent of Africa. He stated that between 1986 and 1993 (the date of his lecture), ‘the proportion of states with democratic systems, however fragile or tentative, has increased sharply.’<sup>31</sup> He saw this process as having begun in Southern Europe, then extending to Latin America and Eastern Europe, the Soviet Union, and many of its former republics, and even to East Asia.

Various groups and publications today suggest that today we are seeing a year-by-year decline in what they sometimes term human rights. Some have, in recent years, suggested that things are going backwards so far as democracy is concerned. It is true that fewer and fewer states insist that democracy is a western value, which should not be imposed on the countries of Africa and Asia. Rather, states (the worst offenders) remain silent on the matter; and all too many others insist that theirs *is* a country of democracy, in that they hold periodic elections. But, as we know, the elections are often held in an atmosphere of intimidation. The opposition is so certain that the electoral process is a sham that it tells its supporters not to vote at all. The government thus wins—even if the turnout is remarkably low. In April 2015, the President of the Sudan, wanted by the International Criminal Court on genocide charges, was re-elected after 26 years in power, on a 25 per cent turnout. It is all too easy to think of countries purporting to be democracies engaging in elections that are not truly free and fair: I do not need to name them.

## 5 Regression or progress in achieving democracy?

While more and more countries are willing to support resolutions at the UN calling for democracy in a particular country going through turmoil, and/or to call for the return of an elected but ousted leader, there are reasons for not being too sanguine. We have seen—for example in Egypt—reversals in hard-won democracy following a military

<sup>30</sup> Freedom House, ‘Freedom in the World 2014’, 6 <[www.freedomhouse.org/report/freedom-world/freedom-world-2014](http://www.freedomhouse.org/report/freedom-world/freedom-world-2014)> accessed 19 August 2015.

<sup>31</sup> James Crawford, ‘Democracy in International Law: Inaugural Lecture’ (delivered 5 March 1993, CUP 1994) 14.

coup. Such reversals are legitimised by the holding of elections with intimidation and fear in evidence, and the legitimacy of the electoral process open to question. The data in recent years suggests elected leaders often rely on modern authoritarianism. We have seen domination of not only the executive and legislative branches, but also the media, the judiciary, civil society, the economy and security forces. Certain regions have, as regards democracy, been volatile, while others have been stable. And, for example, within sub-Saharan Africa, there have been considerable improvements in the achievement of democracy—but also slides into authoritarianism. Many countries are in the grip of corruption, and corruption and democracy do not sit well together.

There have, in the legal journals, been interesting exchanges between academics over whether 1989–2010 in fact marked the high point of the principle of democratic legitimacy. These developments were traced, for example, by Susan Marks in *The Riddle of All Constitutions*.<sup>32</sup> She focuses in considerable detail on the idea of regulating domestic democracy by reference to international law. While agreeing with her conclusions, Professor d'Aspremont of Amsterdam asserts that many facets of democracy (in which he includes human rights instruments) were enshrined in international law even before the end of the Cold War. They were strengthened by 'a new democratic rule'.<sup>33</sup>

And of course both American and European scholars have addressed the idea that democracy plays a crucial role in the international legal order. There is now a huge and interesting literature on all facets of the matter—including the difficult question of whether force may ever be used to restore democracy. Nowrot and Schebackers, in their article on the international legal consequences of the intervention in Sierra Leone by the Economic Community of West African States, note that some missions to restore democracy have been led by non-democratic states.<sup>34</sup> And we all watch the Saudi-led military intervention in Yemen with interest and anxiety.

## 6 Conclusion

Tomorrow this conference is going to pay honour to James Crawford—for long years your Whewell Professor of International Law, and now a Judge at the ICJ. He has written so much, and his inaugural lecture, 'Democracy in International Law', has really stood the test of time. It showed that Cambridge had selected as Whewell Professor a man who thought deeply and perceptively, looking to the future as much as to the past. The lecture contained hope and hard-headedness in equal measure. Now it is the turn of the ICJ to benefit from his considerable knowledge and thinking.

<sup>32</sup> Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003).

<sup>33</sup> Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 551.

<sup>34</sup> Karste Nowrot and Emily W Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 Am U Intl L Rev 321.

# Democracy in the European Union: What has the Court of Justice to Say?

*Christopher Vajda\**

## Abstract

This article examines how the core European Union Treaties and the Court of Justice of the European Union have sought to give effect to the principle of democracy within the European Union legal order. It explains that the complexity of the legislative procedure, with its checks and balances between the relevant European Union institutions, is a reflection of the need to ensure effective participation by all of them. The three main institutions of the European Union, namely the Parliament, the Council, and the Commission, represent different legitimate interests which do not always coincide. The fact that European Union legislation is multilingual and often expressed in broad terms presents its own particular challenges to the Court of Justice of the European Union when it is asked to interpret that legislation. For its part, the Court of Justice of the European Union is sensitive to the wishes of the legislature, and therefore has been willing to modify previous case law based solely on the Treaties where the legislature has subsequently signalled its intention to apply the relevant Treaty provisions in a different manner.

## Keywords

Democracy, European Union, Court of Justice of the European Union

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## 1 Introduction

A commitment to democracy lies at the heart of the European Union (EU). Article 10 of the Treaty on European Union (TEU) reads as follows:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member states are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens.<sup>1</sup>

\* Judge of the Court of Justice of the European Union. This is a slightly fuller version of a Keynote Address given at the Cambridge Journal of International and Comparative Law Fourth Annual Conference, 'Developing Democracy: Conversations on Democratic Governance in International, European and Comparative Law', on Saturday 9 May 2015. I would like to thank Charlotte Alport who assisted me greatly in preparing both my talk and this article.

<sup>1</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/15.

I shall begin by briefly discussing various models of democratic states, and will then focus on the institutions that comprise the Union and their respective roles in the legislative process at the EU level. I will then turn to an analysis of how the Court of Justice of the European Union (CJEU)<sup>2</sup> interprets EU legislation, before, lastly, looking briefly at the application of the Charter of Fundamental Rights<sup>3</sup> to EU legislation.

## 2 The various models of democratic states

### 2.1 Nation states

In a unitary state, the basic principle is that a democratically elected legislature adopts primary legislation. In the United Kingdom (UK), many Acts of Parliament provide, however, for the executive to adopt what is termed delegated or secondary legislation. Where a state has a written constitution, such as in Germany or the United States, the legislature has to act within the confines of the constitution, which is the supreme law of that state. Adapting to the supremacy of what is now EU law has caused difficulties for some Member States whose constitutions are supreme. For example, for Germany, such difficulties arose as a result of a potential conflict between its domestic human rights protection, enshrined in its Basic Law, and the perceived absence of such protection under EU law.<sup>4</sup>

### 2.2 The EU

In a regional supranational organisation, such as the Council of Europe or the EU, the participating states agree to pool part of their sovereignty. This pooling or limitation has to be agreed by the national legislature. The EU is a very particular supranational organisation as it has its own legislative capacity.

It is clear that the EU, made up of 28 Member States, has a plethora of competing interests to consider, and, in order to function successfully, requires a complex and unique system of checks and balances. This is achieved, in part, through the upholding of

<sup>2</sup> Prior to the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 (Treaty of Lisbon), the CJEU was known as the European Court of Justice but in this article I will refer to the CJEU also in respect of judgments delivered before 1 December 2009.

<sup>3</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

<sup>4</sup> Case C-29/69 *Stauder v Stadt Ulm* [1969] ECR 419; Case C-11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case C-4/73 *Nold KG v Commission* [1974] ECR 491. See also *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540 (*Solange I*); *Wünsche Handelsgesellschaft* [1987] 3 CMLR 225 (*Solange II*).

institutional balance between the main institutions, namely, the Council, the Parliament and the Commission, as set out in article 13(2) TEU:

Each institution shall act within the limits of the powers conferred upon it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

This ensures that a careful weighting of institutional power is achieved in order to safeguard both national and Union interests. Within this institutional structure, each body represents the different interests which make up the Union:

1. It is the European Parliament which, through being directly elected by EU citizens, represents directly the citizens in the legislative process.
2. The Council represents the interests of the individual Member States, whose governments have all been democratically elected.
3. It is the Commission that has been given the role of initiator of the legislative process and is the guardian of the Treaties.

### 3 The EU legislative process

The delicate balancing act between these three institutions is illustrated by the Union's legislative procedures, which show the extent of each body's input and the voting requirements put in place by the Treaties in order to regulate the process.

There is no single EU institution that is prescribed sole responsibility for the adoption of legislation—the Commission, Council and Parliament share this duty, and carry out the various roles prescribed to them in the Treaties. There are two legislative processes, the ordinary legislative procedure<sup>5</sup> and the special legislative procedure.<sup>6</sup> The ordinary legislative procedure applies to the vast bulk of the legislation adopted by the EU.

#### 3.1 The ordinary legislative procedure

The procedure consists of a number of different stages, which vary depending on the point at which agreement, in the manner set out in the Treaties, is reached. The process often involves three stages, comprising a first and second reading, and the establishment of a subsequent conciliation committee if no agreement is reached.

The Commission submits its proposal to the Parliament and Council for what is termed a first reading. It is the Commission, therefore, that sets the framework for the entire legislative process, subject to three caveats. The first two have a legal basis: article 2 of Protocol 2 requires the Commission to consult widely before making

<sup>5</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 294.

<sup>6</sup> Art 289(2) TFEU.



legislative proposals;<sup>7</sup> also the European Citizens Initiative gives EU citizens, under certain conditions, the opportunity to invite the Commission to bring forward an appropriate proposal (which includes legislation).<sup>8</sup> Finally, from a practical perspective, the Commission has to be alert to the wishes of the Council and European Parliament.

The Council and Parliament have equal power within the decision-making process; however, put briefly, the Council and Parliament are not entitled to depart from the parameters set by the Commission's proposal. In *Eurotunnel v SeaFrance*,<sup>9</sup> Eurotunnel challenged the validity of an article in a Council Directive which gave a temporary reprieve to pre-existing duty free arrangements within the European Community (EC). The Commission's proposal, in the context of the single market, which came into force on 1 January 1993, abolished such arrangements from that date. The Council added a number of provisions<sup>10</sup> at the final stage of the legislative process, maintaining in force the exemption conditions for intra-Community trade involving air and sea travellers, for a limited period. The CJEU ruled that, as long as the Council's amendments did not stray beyond the scope of the Commission's original proposal, the Council did not exceed its power to amend.<sup>11</sup>

If the Commission does not agree with the amendments made by the Council and Parliament it may amend<sup>12</sup> or withdraw its proposal until the start of the conciliation process. Very recently, the CJEU had to decide the circumstances in which the Commission can withdraw its proposal.<sup>13</sup> The Commission made a proposal, initiating the ordinary legislative procedure, for a framework regulation, which laid down general provisions for the dispersal of aid to third countries. The Commission stated in the recitals to the proposal that such a framework regulation would avoid the unnecessary delays engendered when aid decisions were made on an ad hoc basis via the ordinary legislative procedure. The Parliament and Council expressed concerns that such a regulation would lead to insufficient political and democratic scrutiny and so decided

<sup>7</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C326/206, art 2.

<sup>8</sup> Art 11(4) Treaty of Lisbon, and see further below.

<sup>9</sup> Case C-408/95 *Eurotunnel and Others v SeaFrance* [1997] ECR I-6315. Although the legislative procedure was different at that time, the Council was still bound to remain within the parameters of the Commission's proposal. See art 189a(1) Treaty of Lisbon: 'Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal, subject to Article 189b(4) and (5).'

<sup>10</sup> Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes—Common system of value-added tax: uniform basis of assessment [1977] OJ L145/1, art 28k, as inserted by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers [1991] OJ L376/1, art 1(22); Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [1992] OJ L76/1, art 28.

<sup>11</sup> Case C-408/95 *Eurotunnel v SeaFrance* (n 9) paras 33–62.

<sup>12</sup> Art 293(2) TFEU: 'As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act.'

<sup>13</sup> Case C-409/13 *Council v Commission* [2015] EU:C:2015:217.

that they intended to retain the use of the ordinary legislative procedure as the process for making such decisions. The Commission withdrew its proposal, on the grounds that such an amendment would distort its original proposal and deprive it of its *raison d'être*. The Council brought an action before the CJEU for the annulment of the Commission's decision. The Council argued that the Commission exceeded the powers conferred upon it in the Treaties and, as such, undermined the principle of institutional balance and infringed the principle of sincere cooperation, and acted contrary to the democratic principles of the Union.<sup>14</sup> The judgment found in favour of the Commission.<sup>15</sup> The CJEU stated that, in making a proposal, the Commission's role is to promote the general interest of the EU.<sup>16</sup> This comes with two safeguards attached:

1. the Council alone can amend the proposals put forward by the Commission only if it acts unanimously; and
2. the Commission may alter its proposal at any time during the procedure leading to the adoption of an act, as long as the Council has not yet acted.<sup>17</sup>

The CJEU found that the amendments put forward by the Parliament and the Council would have distorted an essential element of the proposal for a framework regulation in a manner irreconcilable with the objective pursued by the proposal of improving the effectiveness of EU policy in this area.<sup>18</sup> The CJEU held that the Commission's power to withdraw the proposal is inseparable from its right to initiate the legislative procedure which derives from the Treaties.<sup>19</sup> This case illustrates that the principle of democracy cannot be regarded in isolation from other EU principles, including that of institutional balance.

If, after the completion of the first and second readings, no agreement is reached, the Presidents of the Council and the Parliament have six weeks in which to form a conciliation committee, consisting of an equal number of Council and Parliament members. In *Elfaa*,<sup>20</sup> the CJEU identified the very nature of the term 'conciliation' as

<sup>14</sup> *ibid* paras 32–50.

<sup>15</sup> *ibid* paras 108–09.

<sup>16</sup> *ibid* para 70.

<sup>17</sup> *ibid* para 71–73.

<sup>18</sup> *ibid* para 91.

<sup>19</sup> *ibid* para 96:

As to the line of argument alleging an infringement of the principle of democracy laid down in art 10(1) and (2) TEU, it is apparent from art 17(2) TEU, read in conjunction with arts 289 TFEU and 293 TFEU, that the Commission has the power not only to submit a legislative proposal but also, provided that the Council has not yet acted, to alter its proposal or even, if need be, withdraw it. Since that power of the Commission to withdraw a proposal is inseparable from the right of initiative with which that institution is vested and its exercise is circumscribed by the provisions of the abovementioned articles of the FEU Treaty, there can be no question, in this instance, of an infringement of that principle. Accordingly, this line of argument must be rejected as unfounded.

<sup>20</sup> Case C-344/04 *IATA and ELFAA* [2006] ECR I-403.

conferring a wide discretion.<sup>21</sup> The CJEU also highlighted that the committee's main purpose is to reach agreement on a *joint text*, taking into account the Parliament's proposed amendments and the position adopted by the Council. The committee would not, for example, exceed its powers by adopting an amended article when no amendment had been made to that article by the Parliament at the second reading.<sup>22</sup> During this process, the Commission, which no longer has the right to withdraw its proposal, takes on the role of mediator between the Council and Parliament.

Unless stated otherwise in the Treaties, the Council shall act by qualified majority.<sup>23</sup> This is also the case throughout the ordinary legislative process. The Council, comprising 28 members, one from each Member State, therefore makes a series of compromises during the adoption of legislation. However, some exceptions exist to this voting system. For example, if at the second reading, the Commission returns a negative opinion on the Parliament's amendments, the Council has the power to adopt the amended proposal if it returns a unanimous vote.<sup>24</sup>

### 3.2 The special legislative procedure

The special legislative procedures apply to a smaller number of areas of Union law-making than the ordinary legislative procedure. However, many of these areas have far-reaching implications covering areas such as taxation, passport provisions and accession of new Member States.<sup>25</sup> The process is entirely different in terms of the level of participation allowed to the Parliament. The Parliament is either consulted on or is required to give its consent to the Council's decisions, so does not take the role of co-legislator as it does in the ordinary legislative procedure.

Where Parliament's consultation is required, the Council is under a duty to request an opinion from the Parliament, allowing it a reasonable period of time to provide its opinion. However, there is no requirement for the Council to account for the impact of the Parliament's opinion in the legislation adopted. In *Isoglucose*, it was stated that, although the Parliament's role is limited, 'it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power'.<sup>26</sup> Consultation of the Parliament is required, for example, under article 77(3) TFEU with regards to provisions for passports, identity cards and residents' permits.<sup>27</sup>

<sup>21</sup> *ibid* para 58.

<sup>22</sup> *ibid* para 59.

<sup>23</sup> Art 16(3) TEU.

<sup>24</sup> Art 294(9) TFEU.

<sup>25</sup> Arts 113, 77(3), 218 TFEU.

<sup>26</sup> Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333, para 33.

<sup>27</sup> Art 77(3) TFEU:

If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards,

Sometimes the consent of the Parliament is required by the Treaties. Dialogue between the Parliament and Council is limited relative to the ordinary legislative procedure. However, the consent of the two institutions is still required for an act to be adopted. Parliamentary consent is required, for example, when a new Member State accedes to the Union.<sup>28</sup>

### 3.3 Differences at the EU and national levels

This system of checks and balances obviously differs in many ways from the procedures at the national level. First, it is the Commission that has a virtual monopoly on initiating legislation, rather than, at national level, the executive or indeed the democratically accountable legislator.<sup>29</sup> Secondly, the Parliament and Council have equal weight in the ordinary legislative process, taking a shared role in proposing and reconciling amendments to Commission proposals. Finally, a considerable degree of compromise is required on the part of Member States and their individual citizens, who must embrace the 'give-and-take' nature of EU decision-making procedures. Each Member State is just one of 28, so compromise must occur within the Council. The Treaties prescribe qualified majority voting as the normal procedure for Council decision-making. However, exceptions exist which require unanimity from the Council in areas of particular importance, such as taxation.<sup>30</sup> As we have also seen, further compromise may be required during the legislative process between the Parliament and Council.

Although the process is cumbersome and requires compromise it cannot be described as undemocratic. It is, rather, a very different form of democracy than that which exists within the Member States. One of the main criticisms of the EU legislative process is that the role of national parliaments has been seriously undermined. An attempt to address this criticism has been made in the TEU.

### 3.4 The role of national parliaments: Subsidiarity

The principle of subsidiarity guards against the Union acting, unless the objectives of the proposed action cannot be sufficiently achieved at the Member State level, ensuring that decision-making is entrusted to each individual Member State as far as possible, and that, therefore, any decision embodies the national identity and democratic will of that state.

residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

<sup>28</sup> Art 49 TEU: 'The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members.'

<sup>29</sup> See Case C-409/13 *Council v Commission* (n 13).

<sup>30</sup> Art 113 TFEU.

To reinforce the observance of the principle, article 12(b) TEU states that national parliaments contribute actively to the good functioning of the Union: by seeing to it that the principle of subsidiarity is respected. The principle of subsidiarity, as described in article 5(1)–(4) TEU, is to ensure that decisions are taken as closely as possible to the citizens of the EU.<sup>31</sup>

National parliaments, within eight weeks of the transmission of a draft legislative act, have the right to object to the act on the grounds that it does not comply with the principle of subsidiarity. This is achieved by submitting an opinion, with reasons, to the European Parliament, the Council and the Commission. However, this does not automatically lead to the opinion being taken into account. Each national parliament has two votes. An objection of one-third of all of the votes allocated to the national parliaments is required before what is called the ‘yellow card procedure’ is activated.<sup>32</sup>

However, the procedure is relatively limited in scope, in that, when activated, the Commission must review the draft proposal in light of the opinion put forward, but is under no obligation to amend or withdraw the proposal. It must, however, offer reasons for its decision. The ‘orange card procedure’<sup>33</sup> goes one step further, in that, during the ordinary legislative procedure, if the majority of national parliaments object, the Commission must not only review its proposal, but also provide a written explanation of how the subsidiarity principle is complied with should it wish to maintain the proposal.

<sup>31</sup> In Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, the CJEU ruled that if two interdependent issues were at stake, one which could be dealt with at national level, the other a matter for the Union, both issues should be dealt with at the Union level in order to secure the smooth functioning of the Union, by providing a single coherent regulatory framework. The intervention by the Community legislature in such a case is not a breach of the principle of subsidiarity.

<sup>32</sup> Arts 6, 7 Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. Art 7 provides:

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of member states, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

<sup>33</sup> *ibid* art 7(3).

### 3.5 European Citizens' Initiative (ECI)

The introduction of the ECI<sup>34</sup> allows EU citizens to participate directly in the development of EU policies by inviting the European Commission to propose legislation where the EU has competence to legislate. The initiative must be backed by at least one million EU citizens, coming from at least seven of the 28 Member States, with further requirements that a certain number of those signatories come from each of the Member States. However, the Commission has no obligation to take any action. Since the coming into force of implementing legislation in April 2012,<sup>35</sup> three petitions have fulfilled the requirements set out in the Regulations, although 20 different initiatives have been launched and have been submitted to the Commission. The first entitled 'Water and Sanitation are a human right! Water is a public good, not a commodity!' received a positive response in March 2014.<sup>36</sup> The Commission identified gaps and areas where more can be done at both EU and national level in existing EU water legislation. The

<sup>34</sup> Art 11(4) TEU:

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

<sup>35</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1; Commission Implementing Regulation (EU) No 1179/2011 of 17 November 2011 laying down technical specifications for online collection systems pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the citizens' initiative [2011] OJ L301/3.

<sup>36</sup> Communication from the European Commission on the European Citizens' Initiative 'Water and sanitation are a human right! Water is a public good, not a commodity!' of 19 March 2014 COM (2014) 177 Final 13:

In response to the citizens' call for action, the Commission is committed to take concrete steps and work on a number of new actions in areas that are of direct relevance to the initiative and its goals. In particular, the Commission:

- will reinforce implementation of its water quality legislation, building on the commitments presented in the 7th EAP and the Water Blueprint;
- will launch an EU-wide public consultation on the Drinking Water Directive, notably in view of improving access to quality water in the EU;
- will improve transparency for urban wastewater and drinking water data management and explore the idea of benchmarking water quality;
- will bring about a more structured dialogue between stakeholders on transparency in the water sector;
- will cooperate with existing initiatives to provide a wider set of benchmarks for water services;
- will stimulate innovative approaches for development assistance (eg support to partnerships between water operators and to public-public partnerships); promote sharing of best practices between Member States (eg on solidarity instruments) and identify new opportunities for cooperation.
- will advocate universal access to safe drinking water and sanitation as a priority area for future Sustainable Development Goals.

Finally, the Commission invites the member states, acting within their competences, to take account of the concerns raised by citizens through this initiative and encourages them to step up their own efforts to guarantee the provision of safe, clean and affordable drinking water and sanitation to all.

second, against financing activities presupposing embryo destruction,<sup>37</sup> was rejected, and the third recently received a reply.<sup>38</sup>

### 3.6 Role of the CJEU

The arbiters and enforcers of this complex set of rules are the EU courts. All three main institutions are not shy in coming to the CJEU to enforce what they consider to be their legislative prerogatives. Thus, the European Parliament has exercised this right in 142 cases in the last five years before either the CJEU or the General Court.

## 4 Interpretation of legislation

The role of a court in interpreting any legislation is to give effect to the will of the legislator. At the Union level, problems arise in the interpretation of legislation which are not present at the national level.

### 4.1 Language

Unlike the UK, the EU has 24 official languages. The problems that arise from this are well illustrated in the *EMU Tabac* case,<sup>39</sup> on the interpretation of a customs directive. EMU Tabac raised the point in proceedings before the CJEU that the French, Italian, Spanish, German, Dutch and Portuguese versions of the relevant directive did not preclude the use of an agent in order to benefit from the rate of duty in the Member States from which the goods were dispatched which, in that case, was lower than the duty applicable in the member state of destination. By contrast, the Danish and Greek versions clearly indicated that for excise duty to be payable in the country of dispatch, transportation must be effected *personally by the purchaser* of the products subject to duty. EMU Tabac argued that, in so far as they were inconsistent with other versions, the Danish and Greek versions ought to be disregarded, especially given the fact that, at the time the Directive was adopted, those two Member States represented in total only 5 per cent of the population of the then 12 Member States, and their languages were not easily understood by the nationals of the 10 other Member States.<sup>40</sup> It is not surprising that the CJEU firmly rejected this approach. In its view, to discount two language versions, as the applicants in the main proceedings were suggesting, would run counter to the CJEU's

<sup>37</sup> Communication from the European Commission on the European Citizens' Initiative 'One of us' of 28 May 2014 COM (2014) 355 Final.

<sup>38</sup> Communication from the European Commission on the European Citizens' Initiative 'Stop Vivisection' of 3 June 2015 COM (2015) 3773 Final.

<sup>39</sup> Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac and others* [1998] ECR I-1605.

<sup>40</sup> *ibid* para 34.



settled case law that, in the interests of a uniform interpretation of EU law, the text of a provision must be interpreted and applied in the light of the versions existing in the other official languages, and not in isolation.<sup>41</sup>

#### 4.2 Recitals and other aids to interpretation

Legislation of the UK is generally drafted in a much more detailed way than EU legislation. This means there are fewer ‘gaps’ to be filled by the courts. When UK legislation is truly ambiguous, the courts can seek guidance, albeit under very strict conditions, from parliamentary statements concerning the purpose of legislation in order to interpret ambiguous statutory provisions in line with the decision in *Pepper v Hart*.<sup>42</sup>

At the EU level, the legislative procedure is complex, as we have seen. The CJEU generally restricts itself to relying on the recitals contained within a piece of legislation to determine its purpose. There are real difficulties in looking back to the various steps in the legislative process as it is complex and involves three main players. Nevertheless, the CJEU can refer to the *travaux préparatoires*, principally to support an interpretation of the legislation as adopted.<sup>43</sup>

Although the recitals are available to assist the CJEU, a warning was issued by Lord Mance in the *HS2* case of the over-expansive interpretation of Union legislation. He stated that ‘[w]here the legislature has agreed a clearly expressed measure, reflecting the legislators’ choices and compromises in order to achieve agreement, it is not for courts to rewrite the legislation, to extend or “improve” it in respects which the legislator clearly did not intend.’<sup>44</sup> Lord Mance included among the issues that can arise from an over-zealous purposive approach to interpretation the following: first, the ‘risk of loss of confidence’ in EU law at the national level; second, the risk of national courts struggling to determine whether ‘a point of EU law is acte clair or not’, leading to a noticeable increase in the CJEU’s caseload; and, finally, it becoming increasingly difficult for agreement to be reached on the adoption of EU legislation.<sup>45</sup>

<sup>41</sup> *ibid* para 36. See, in particular, Case C-9/79 *Koschniske v Raad van Arbeid* [1979] ECR 2717, para 6.

<sup>42</sup> *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, [1993] AC 593, as qualified by *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 1 AC 1189 [104] (Lord Sumption); *R (Brown) v Secretary of State for the Home Department* [2015] UKSC 8, [2015] 1 WLR 1060 [27] (Lord Toulson).

<sup>43</sup> Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107, para 58. However, for an earlier case where the Court appeared to place greater reliance still on the *travaux préparatoires*, see Case C-402/03 *Skov and Bilka* [2006] ECR I-199, para 27.

<sup>44</sup> *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport and another* [2014] UKSC 3, [2014] 1 WLR 324 [171] (Lords Neuberger and Mance).

<sup>45</sup> *ibid* [172]–[174] (Lords Neuberger and Mance).



### 4.3 The role of the Treaties

Very often the CJEU has no legislation at all to interpret, but is asked to interpret Treaty articles. Many of the major judgments of the CJEU involve interpretation of Treaty articles. Perhaps the most celebrated example is the recognition of direct effect in *Van Gend en Loos* in 1963.<sup>46</sup> When the legislator legislates, it is not bound absolutely by the CJEU's case law on a Treaty article. First, where there has been complete harmonisation by the legislator, the CJEU will look to the harmonised measure, and not to the Treaty.<sup>47</sup> Secondly, where there is legislation, the CJEU may reconsider its previous approach under the Treaty. I will mention two examples relating to the Free Movement of Citizens Directive (Directive 2004/38).<sup>48</sup>

*Bidar*<sup>49</sup> concerned a French national, Dany Bidar, who completed his secondary education in the UK. He applied for a maintenance loan for a UK university course. The loan was refused on the basis that Mr Bidar was not 'settled' in the UK. At the time, in order to be 'settled' a person had to have lived in the UK for four years other than for the purposes of receiving full-time education. Mr Bidar did not meet that requirement. Mr Bidar challenged the decision on the grounds that it was discriminatory, and thus prohibited under article 12 of the then European Communities Treaty (EC).<sup>50</sup>

The CJEU first held that assistance to cover maintenance costs, whether in the form of subsidised loans or grants provided to students lawfully resident in the host Member State, fell within the scope of the application of the Treaty on the basis of article 18 EC (citizenship rights). This meant that the prohibition on discrimination set out in article 12 EC was engaged. The CJEU accepted the argument that a Member State was entitled to limit such assistance to those students who demonstrated a certain degree of integration into the host Member State. The CJEU accepted that three years of residency would be permissible, so the settlement rules went too far.

This case was reconsidered in *Förster*,<sup>51</sup> three years later. The Centrale Raad van Beroep, which had to rule on appeal on the action brought by Ms Förster, made an order for reference to the CJEU, requesting it to state under what conditions a student from

<sup>46</sup> Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Berlingen* [1963] ECR 1.

<sup>47</sup> See, for example, Case C-593/13 *Rina Services* [2015] EU:C:2015:399, Opinion of AG Cruz Villalón, footnote 7: 'It should be recalled that, according to settled case-law, where a sphere has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of primary law.'

<sup>48</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

<sup>49</sup> Case C-209/03 *Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119.

<sup>50</sup> Consolidated Version of the Treaty establishing the European Community [2002] OJ C325/33.

<sup>51</sup> Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

another Member State may be entitled to a maintenance grant. The CJEU observed that it is legitimate for a Member State to grant assistance covering students' maintenance costs only to those students who have demonstrated a certain degree of integration into the society of that State, and that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.<sup>52</sup>

The CJEU held that a condition of five years' uninterrupted residence was permissible for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State. It reached that conclusion by looking at Directive 2004/38—although not applicable in time to the facts of the case—which provides in article 24(2) that Member States are not obliged to grant maintenance assistance to students who have not acquired the right to permanent residence, which requires five years' continuous residence.<sup>53</sup>

Hence, the CJEU borrowed directly from the EU legislator to find a precise solution to the problem of eligibility for maintenance grants that it had determined in a different way in the earlier *Bidar* case, emphasising the degree to which the CJEU will defer to the legislator in its task of resolving cases. This has happened more recently in the case of social assistance benefits.

In *Trojani*,<sup>54</sup> a case that also predated Directive 2004/38, the CJEU held that an EU citizen enjoyed a right of residence by direct application of article 18(1) EC. Once such a person had a resident permit he was entitled, pursuant to article 12 EC,<sup>55</sup> to be granted social assistance benefit, such as the *minimex* in Belgium.<sup>56</sup>

However, the analysis was different in the more recent case of *Dano*.<sup>57</sup> The case concerned Ms Dano, a Romanian national who entered Germany in November 2010. For several years, Ms Dano and her son—who was born in Germany—had lived with Ms Dano's sister, who provided for them. Ms Dano did not enter Germany in order to look for work, nor was she actively seeking work in that country. In July 2011, Ms Dano was issued with a residence certificate of unlimited duration. The proceedings arose out of a request for benefits under the German Social Code by way of basic provision. Ms Dano's claim included subsistence benefits for herself, as well as social allowances and a contribution to accommodation and heating costs for her son. The case raised the question of whether EU law precludes nationals of other Member States from being refused entitlement to a special non-contributory cash benefit where the criteria adopted by the relevant host Member State, in this case Germany, excludes people who arrive

<sup>52</sup> *ibid* paras 50–60.

<sup>53</sup> *ibid*; art 16(1) Directive 2004/38.

<sup>54</sup> Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573.

<sup>55</sup> Art 12 Treaty of Lisbon: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

<sup>56</sup> Case C-456/02 *Trojani* (n 54) para 46.

<sup>57</sup> Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] EU:C:2014:2358.

solely in order to benefit from the social assistance scheme of that Member State, rather than seeking to integrate themselves into the labour market.

The CJEU began its analysis by pointing out that the rights of EU citizens to move and reside within the EU were, as per article 21(1) TFEU, subject to compliance with the limitations and conditions laid down in the Treaties and by measures adopted to give them effect.<sup>58</sup> It therefore considered whether Ms Dano's residence met the conditions laid down in Directive 2004/38. It held that it did not. For a period of residence longer than three months in the case of someone who is not a worker, as was the case for Ms Dano, the resident needs to comply with article 7(1)(b) of the Directive, that is to say, to have sufficient resources for him- or herself and his or her family members not to become a burden on the social assistance system of the host Member State during their period of residence, and to have comprehensive sickness insurance cover in the host Member State. As the CJEU pointed out:

to accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host member state would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other member states from becoming an unreasonable burden on the social assistance system of the host member state.<sup>59</sup>

Such unequal treatment is a direct result of Directive 2004/38. It is founded on the link established by article 7 of the Directive between the need to have sufficient resources and the objective of not being a burden on the social assistance system of the host Member State. Seeing as Ms Dano and her son did not have sufficient resources, and so could not claim a right of residence in Germany under the Directive, they could not invoke the principle of non-discrimination laid down by article 24(1) of the Directive. The result was therefore different from that in *Trojani*, decided before Directive 2004/38 came into force.

I now turn to two recent cases regarding the entitlement to rights under EU employment legislation in the case of mothers who use surrogates for carrying and giving birth to their children. Surrogacy raises complex ethical and legal issues which are not easy to solve. In *CD v ST*,<sup>60</sup> a reference from the UK, the CJEU was asked whether a woman who used the services of a surrogate for the birth of a child, but subsequently breastfed the baby, could benefit from the maternity provisions of Directive 92/85,<sup>61</sup>

<sup>58</sup> *ibid* para 60.

<sup>59</sup> *ibid* para 74.

<sup>60</sup> Case C-167/12 *CD v ST* [2014] EU:C:2014:169. The CJEU reached the same conclusion in a subsequent case: Case C-363/12 *Z v A Government department and Board of management of a community school* [2014] EU:C:2014:159.

<sup>61</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [1992] OJ L348/1.

which provides for certain measures in favour of breastfeeding mothers. CD was neither the biological nor the carrying mother of the child—she was the commissioning mother. The CJEU stated that the maternity leave provisions from which the female worker benefits under article 8 of the Directive are intended, first, to protect a woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.<sup>62</sup> The CJEU inferred that the objective of the Directive is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy, and that the objective to ensure that the special relationship between a woman and her child is protected only concerns the period after 'pregnancy and childbirth'.<sup>63</sup> Consequently, seeing as CD had never been pregnant at any material time, she was not covered by the Directive despite breastfeeding the baby.

These cases are therefore also examples of where the CJEU is anxious not to usurp the role of the legislator. It is for the EU legislator to decide what, if any, protection should be given to commissioning mothers.

## 5 The Charter of Fundamental Rights

Article 6(1) of the TEU recognises the rights and freedoms set out in the Charter of Fundamental Rights as having the same legal value as the Treaties. The existence of human rights instruments always gives rise to the question of whether judges, when interpreting such instruments, might be said to override the democratic will of the people as expressed by the legislator.<sup>64</sup> In this regard, I will refer to just one case decided recently by the CJEU.

In April 2014, the CJEU gave its ruling in the *Digital Rights Ireland* case.<sup>65</sup> The CJEU found that the Data Retention Directive 2006/24<sup>66</sup> infringed article 7 of the Charter, concerning the respect for private life and article 8 on the protection of personal data. The Directive compelled internet service and telecommunications providers to collect and retain data from their subscribers for a period of between six months (minimum) and 24 months (maximum). This data included incoming and outgoing phone calls, IP addresses, and location data, but did not extend to the contents of the communications.

<sup>62</sup> Case C-167/12 *CD v ST* (n 60) paras 34–35.

<sup>63</sup> *ibid* para 36.

<sup>64</sup> The dichotomy is not as great as is sometimes suggested since human rights instruments are themselves approved by the legislature. The problem arises because of the open-textured nature of a human rights instrument.

<sup>65</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] EU:C:2014:238.

<sup>66</sup> Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

The CJEU found that the Directive's requirements made it possible for competent national authorities to access very precise information about the private lives of those whose data was retained and, as such, to interfere with the fundamental rights of respect for private life and protection of personal data. The key issue was whether this interference was justified as being proportionate. In assessing this question, the CJEU noted, in particular, that the Directive gave no objective criteria from which to determine the period of retention in order to ensure that it is limited to what is strictly necessary and lacked a number of procedural safeguards concerning access to the retained data. As such, the CJEU held that the Directive entailed a wide-ranging and particularly serious interference 'with the fundamental rights of practically the entire European population', which was not justified.<sup>67</sup>

The invalidation of the Directive in *Digital Rights Ireland* left a gap at the national level. In the UK, emergency primary and secondary legislation was adopted in order to fill this gap, as a lack of data retention powers would impact heavily on law enforcement.<sup>68</sup> This new legislation reflects some of the concerns expressed by the CJEU in *Digital Rights Ireland*.<sup>69</sup> The most significant change relates to the safeguards surrounding the retention of data. Prior to the judgment, the retention period in the UK was automatically set at 12 months. Under the new Regulations, retention of data may only occur in the UK if a retention notice is issued, which is not valid for a period of more than 12 months. Before the notice can be issued the Secretary of State must take into account a number of criteria, including the likely benefit of the notice, and the likely number of users it would affect. Furthermore, the retention notice must be kept under review. Thus, *Digital Rights Ireland* is a good example of how the CJEU and the legislature are able to ensure, within their respective fields, a high standard of human rights protection.

<sup>67</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* (n 65) para 56.

<sup>68</sup> The Data Retention (EC Directive) Regulations 2009, which was the UK statutory instrument giving effect to Directive 2006/24, no longer had a valid legal basis following *Digital Rights Ireland* (n 65). Those Regulations were replaced by primary legislation in the form of the Data Retention and Investigatory Powers Act 2014, together with implementing legislation in the form of the Data Retention Regulations 2014.

<sup>69</sup> UK Government 'Data Retention and Investigatory Powers Bill: Government Note on the European Court of Justice Judgment' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/331106/DRIPgovernmentNoteECJjudgment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331106/DRIPgovernmentNoteECJjudgment.pdf)> accessed 31 August 2015.

# Integral Pre-emption of EU Democracy in Economic Crisis under Transnational Law

*Matej Avbelj\**

## Abstract

This article examines the challenges of transnational law for democracy in the European Union in times of economic crisis. The concept of democracy is fleshed out first. This is followed by a two-pronged study of the internal and external democracy-affecting processes, taken separately as well as jointly, and of their impact on democracy in the European Union. Finally, some normative proposals, embedded in the theory of legal pluralism, to improve the state of European Union democracy in the present unfavourable internal and transnational environment are offered in the conclusion.

## Keywords

European Union, Democracy, Economic Crisis, Transnational Law, Legal Pluralism

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## 1 Introduction

This article examines the challenges of transnational law for democracy in the European Union (EU) in times of economic crisis. Much has already been written about the ills and virtues of EU democracy. The so-called democratic deficit has been treated, if not exhaustively, then to the exhaustion of its audience. Making little progress, one should add, the debate has boiled down to entrenched opinions on the very existence or non-existence of an actual democratic deficit. To avoid this limbo, my focus on EU democracy here will be much more specific. I will concentrate exclusively on democratic developments in the EU in the context of the ongoing financial and economic crisis. In so doing, two distinct and yet related democracy-affecting processes will be investigated. The first process is internal to the EU. It results from the EU's own response to the

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economic crisis in the context of the Union's specific constitutional structure.<sup>1</sup> The second process is external to the EU, and essentially concerns its Member States' access to credits offered by global financial markets. As the accessibility of funds in global financial markets depends heavily on the sovereign bond ratings provided by credit rating agencies (CRAs), the external impact of these transnational actors on national and supranational democracy in the EU will also be studied.

Both democracy-affecting processes under investigation here are underpinned by an assumption that democracy is about self-determination.<sup>2</sup> A democratic polity is one in which its members decide together on the resolution of collective problems, issues and challenges in procedurally pre-determined ways. However, a real and meaningful democracy only exists in a polity in which self-determination is actual and not merely hypothetical. This means that the decision-makers in such a polity possess actual means for deciding on major issues of genuine and concrete relevance to the polity. The former stands for economic, and the latter for political sovereignty. In other words, a democratic polity must possess sufficient economic resources (economic sovereignty) to be able to exercise competencies over the key aspects of its socio-political existence (political sovereignty). Of course, both terms—sufficient economic resources and key competencies—are relative, context-dependent and a question of degree, making it hard, if not impossible, to argue *in abstracto* when a polity runs out of its economic and political sovereignty.

However, irrespective of the exact point of the drying out of economic and political sovereignty, I argue that a meaningful democracy is in close correlation with them. If a polity is bankrupt or at least heavily indebted, then it is obvious that the democratic process of self-determination in such a polity has no way available to influence the socio-political world to any tangible extent. A polity without economic resources is practically dysfunctional, a failed polity, but also democratically emptied. Its democracy might still exist formally, on paper, but not in practice. The outcome is similar if a polity, even if it has economic funds available, has refrained from exercising its key competencies. Also in such a polity, democracy as self-determination might exist as a formal, yet practically empty, shell.

The argument of this article is therefore structured as follows. The concept of democracy will be fleshed out first. This will be followed by a two-pronged study of the internal and external democracy-affecting processes described above, taken separately as well as jointly, and of their impact on democracy in the EU. Finally, some normative proposals, embedded in the theory of legal pluralism, to improve the state of EU democracy in the present unfavourable internal and transnational environment will be offered in the conclusion.

<sup>1</sup> See Matej Avbelj, 'Theory of European Union' (2011) 36 EL Rev 818.

<sup>2</sup> The idea goes back to Kant and Rousseau who have insisted that the addressees of the laws must also understand themselves as their authors—which is the expression and a proof of their political autonomy. See, eg, Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Pol Theory 767.



## 2 On the concept of democracy

There are many conceptions of democracy out there. Eleftheriadis broadly distinguishes three competing theories of democracy: the collective theory, the procedural theory and the substantive theory.<sup>3</sup> The collective theory conceives of democracy as the self-government of a sovereign people.<sup>4</sup> The procedural theory defines democracy as a fair procedure for participation in deliberation and decision-making,<sup>5</sup> while the substantive theory postulates the equal treatment of every individual as a paramount substantive value of democracy.<sup>6</sup> Rather than seeing these theories in competition, this article opts for an integral approach so that the concept of democracy defended here is the sum of all these theories. Accordingly, inspired by the work of Fritz Scharpf, I have argued<sup>7</sup> that democracy can best be described as consisting of three elements: input legitimacy, democratic political process, and output legitimacy, whereby all of its elements are conducted within the framework of the rule of law.

The starting point of input legitimacy is a free individual whose equal human dignity awards them with an unalienable right of self-realisation within the limits set by the equal rights of others. The purpose of democracy is to ensure the flourishing of individuals pursuant to their own chosen conception of a good life. Since there are many different individuals, there are many conceptions of a good life, which means that a free society is inherently pluralist. The essence of democracy is to cherish this plurality and make it work. A prerequisite for democracy is thus a pluralist polity, a polity in which all encompassing pluralism—political, value, religious, cultural, interest-based and economic pluralism—exists, is ensured and fostered. To limit or even to deny pluralism means curtailing an individual's right to self-fulfilment. The suppression of pluralism always leads to an incursion into an individual's freedom and their autonomy, and ultimately afflicts their human dignity.

The input legitimacy in a democracy must therefore enable the most faithful translation of this societal pluralism possible, composed of individuals' and collective interests, in the formation of a government. To do so, democracy must be inclusive. This is best ensured by fair elections which comply with the highest constitutional standards,<sup>8</sup> including a free and pluralist media, a vibrant civil society and robust

<sup>3</sup> Pavlos Eleftheriadis, 'Democratic Accountability for a Monetary Union' in Richard Bellamy and Uta Steiger (eds), *The Eurozone Crisis and the Democratic Deficit* (European Institute 2013) 5–7.

<sup>4</sup> *ibid* 5.

<sup>5</sup> *ibid* 7. This theory is most closely associated with the works of Habermas including Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996), but perhaps also with Jeremy Waldron, *Law and Disagreement* (OUP 1999).

<sup>6</sup> Eleftheriadis (n 3) 7. The substantive theory of democracy has been defended in, for example, Ronald Dworkin, *Law's Empire* (Harvard UP 1986).

<sup>7</sup> See Matej Avbelj, 'Crises and Perspectives of Building a European Nation—The Case of Slovenia' in Peter Jambrek (ed), *Nation's Transitions: Social and Legal Issues of Slovenia's Transitions: 1945–2015* (Graduate School of Government and European Studies, European Faculty of Law 2014).

<sup>8</sup> The elections must be general, equal, direct, secret and, of course, free.



political parties. The latter represent the backbone of democracy as they stand for an institutional link between individuals, civil society and the political process conducted in the parliament.

Directly elected by the people, the parliament enjoys the highest democratic legitimacy, and is therefore endowed with the power to select the executive branch. The latter manages the state by proposing new laws and executing the existing ones. The judiciary, as the third independent branch, ensures that the law is observed and that individuals' rights are not violated. From a democratic perspective, it is crucial that the parliament's composition reflects the plurality residing inside the polity, and that those elements of the polity who failed to prevail in the elections enjoy all the rights and privileges of the opposition. The latter controls those in power and suggests alternative solutions with an ambition to win the next elections. At the heart of the parliamentary proceedings thus lies a political conflict which must be conducted in dialogical way by striking compromises in view of achieving the polity's common good. The media plays a decisive role here, monitoring the work of both the government coalition and the opposition, enabling the voters to form their political preferences for the next election. This system of checks and balances between different branches of government is sometimes also complemented by popular referenda, which serve as an additional check on the decisions of elected officials, as well as by the constitutional courts.

Finally, any government, including a democratic one, is there to achieve certain outcomes. It is on this basis that its outcome legitimacy is measured. In a democracy the outcomes ideally have to benefit as many as possible, but they must simultaneously come into being in accordance with the law. This is important so that democracy remains faithful to its essential commitment to respect the freedom and equal human dignity of every individual, rather than turning into a utilitarian system in which individuals are instrumentalised in the hands of the arbitrary power.

Having said that, what remains to be emphasised is the inherent, intimate link and mutual dependence between democracy and the rule of law. In a democracy, all three of its elements—input and output legitimacy, and the political process through which they are connected—have to take place within the framework of the rule of law. Simultaneously, there can be no rule of law if the laws that govern people do not come into being in a democratic manner. Democracy and the rule of law thus presuppose each other, but at the same time their relationship is not entirely symbiotic. There is a dormant democratic threat that a democratic majority trumps the rights of the outvoted minorities. This is what the rule of law is there to prevent. This counter-majoritarian problem, as it has come to be known,<sup>9</sup> is, however, only a purported one. If democracy is not understood as a simple rule by the majority, but as a system for the organisation of political power whose central value is the protection of equal human dignity, then

<sup>9</sup> The term was first introduced by Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962) 16.

the constitutional self-limitation of a democratic majority does not entail the denial of democracy, but is its vindication.<sup>10</sup>

### 3 Democracy in the EU

Having outlined the concept of democracy to be used here, it cannot be overlooked that this concept derives from the statist tradition and is expected to do its work inside a state. Like many, if not even all constitutional concepts, democracy also carries a strong statist imprint.<sup>11</sup> Democracy simply is a statist concept and, when juxtaposing it with the EU, which is not a state, what one finds is not a democratic deficit but a conceptual misfit. As it makes very little sense to argue that pears suffer from an apple deficit, because they are not apples but pears, it is equally unproductive to draw up a laundry list of democracy within states, compare it line by line with democracy in the EU, and then because of its missing statist democratic elements declare the EU democratically deficient. This comparative exercise, so typical of EU scholarship, will therefore be eschewed here by simply assuming that the EU as a union is not a state, thereby making any mechanical comparison between intra-state democracy and democracy in the EU inappropriate.

As I have argued elsewhere, the supranational level of the EU has developed its own, particular supranational political community.<sup>12</sup> The EU polity is composed of the citizens of the Member States who have been recognised with the complementary status of EU citizens. Through the rights attached to their status, whose essence is equal treatment within the material scope (*ratione materiae*) of EU law, they have been legally acknowledged and constructed as a supranational constituency which can directly inspire the EU political authority via a bottom-up influence. On the one hand, this legally mandated de-alienation effect has paved the way for the gradual sociological emergence of the Community-wide ‘we feeling’;<sup>13</sup> whereas on the other hand the EU institutional decision-making structure has been set up in a way to mimic as far as possible the elements of a statist democracy: input legitimacy, a democratic political process, and output legitimacy.

The success of this latter strategy has been mixed, presumably because of the very conceptual inappropriateness of translating statist democratic mechanisms to a non-statist entity. For example, since the 1970s the EU has worked hard to improve its input

<sup>10</sup> This would be again in line with Dworkin’s conception of substantive democracy. See Dworkin (n 6). For further discussion, see Frank Michelman, *Brennan and Democracy* (Princeton UP 1999) ch 1.

<sup>11</sup> Neil Walker, ‘EU Constitutionalism in the State Constitutional Tradition’ (2006) 21 *European University Institute Working Papers—Law Department*, 1 <<http://cadmus.eui.eu/bitstream/handle/1814/6248/LAW-2006-21.pdf?sequence=1>> accessed 31 August 2015. Walker writes, ‘Although the term constitution, like much of our contemporary political vocabulary—including democracy, republicanism, federation and citizenship—predates the modern state, its mature conventional meaning has emerged from the social and political context of the modern state and bears its imprint.’

<sup>12</sup> *ibid.*

<sup>13</sup> Karl W Deutsch and others, *Political Community and the North Atlantic Area* (Princeton UP 1957) 36.

democratic legitimacy by strengthening the role and powers of the European Parliament. However, with the growing role of the Parliament, which has eventually become an equal co-legislator, we have also paradoxically witnessed growing abstention from elections. The formal attempts to improve input legitimacy have not been internalised by EU citizens. This is notwithstanding the attempts to make EU elections even more attractive by translating the latter's result directly, in the form of *Spitzenkandidaten*,<sup>14</sup> into the composition of the European Commission whose by now (at least allegedly) independent, bureaucratic supranational character will inevitably, but also more unpredictably, become politicised. This might also impact on the dynamics of the EU democratic political process which continues to take place in the more or less vacuous EU public sphere.<sup>15</sup> It is also here in the institutional triangle between the Commission, the Parliament and the Council that the legislative process, characterised by its peculiar absence of ideological divisions between the coalition and the opposition, is conducted. However, the EU has been able benignly to neglect all of these democratic peculiarities as long as it could rely on its traditionally dominant way of democratically legitimising itself through the output legitimacy.<sup>16</sup> The process of EU integration has been about uploading competencies from the national to the supranational level motivated and legitimated by the greater output on both levels. As is well known, the outbreak of the acute financial and economic crisis has decisively put an end to this possibility.

A friend in need is a friend indeed; and it has been only with the emergence of the economic crisis that the true extent of the crisis of democracy in the EU has become apparent. Fritz Scharpf has aptly dubbed this state of affairs the pre-emption of democracy.<sup>17</sup> The pre-emption of democracy in the EU has occurred on both the national and supranational levels across three dimensions: substantive, institutional and economic. The pre-emption of national democracy has mainly occurred under the internal constraints of the EU's specific constitutional structure, whereas the pre-emption of supranational democracy has been caused by external constraints resulting from the actions of transnational actors. We turn next to a more detailed description of this phenomenon, starting with the pre-emption of national democracy first.

<sup>14</sup> See, eg, Mattias Kumm, 'What Kind of a Constitutional Crisis is Europe in and What should be Done about it?' (2013) 801 WZB Discussion Paper 1, 18 <<http://econstor.eu/bitstream/10419/86147/1/770693296.pdf>> accessed 5 August 2015. Kumm writes, 'It is high time to be serious about proposals, endorsed among others by current President of the European Parliament Martin Schulz and by Wolfgang Schäuble, to make the elections for the European Parliament genuine European elections for the choice of the President of the European executive.'

<sup>15</sup> For a more in depth discussion of this particular problem, see Francisco Perez, *Political Communication in Europe: The Cultural and Structural Limits of the European Public Sphere* (Palgrave MacMillan 2013).

<sup>16</sup> See, eg, Jürgen Habermas, 'Democracy, Solidarity and the European Crisis' (lecture delivered at KU Leuven, 26 April 2013) <<http://www.socialeurope.eu/2013/05/democracy-solidarity-and-the-european-crisis-2/>> accessed 31 August 2015, who stated that '[t]he Union legitimized itself in the eyes of the citizens primarily through its outcomes and not so much from the fact that it fulfilled the citizens' political will'.

<sup>17</sup> Fritz Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' (2011) Max Planck Institute for the Study of Societies Discussion Paper 11 <[http://www.mpifg.de/pu/mpifg\\_dp/dp11-11.pdf](http://www.mpifg.de/pu/mpifg_dp/dp11-11.pdf)> accessed 23 September 2015.

## 4 The pre-emption of national democracy in the EU

The pre-emption of national democracy in the EU has occurred across three dimensions: substantive, institutional and economic. The substantive pre-emption of democracy describes the process of reducing the number of competencies preserved by the Member States. The institutional pre-emption of democracy denotes the declining role of national parliaments as a core representative institution of the people, which is simultaneously at the heart of the national democratic political process. Finally, the economic pre-emption of democracy indicates the factual incapacity to exercise competencies due to a lack of economic resources. The three processes are both independent of each other as well as closely intertwined, and together contribute to the hollowing out of the national democratic process. The substantive pre-emption feeds directly into the declining role of the national parliaments as they are formally left with fewer substantive policy fields in which they can legislate. However, the role of national parliaments can be decreasing even if the scope of the national competencies is left intact, so that other branches, in particular the executive one, take up tasks, sometimes even informally, traditionally belonging to the legislative branch. However, the latter phenomenon is not exclusive to the EU. Most modern democracies have seen the trend of a rising executive, but the EU has added its own special twist to this.<sup>18</sup> Finally, the economic pre-emption of democracy can again happen in the circumstances of the full preservation of both substantive and institutional democracy when the two cannot be practised simply because the state has run out of money to fund its apparatus and core functions. Several EU Member States, as we shall see below, have found themselves in a similar situation in the economic crisis context due to the transfer of monetary competencies to the EU. The substantive pre-emption of democracy has therefore importantly contributed to the economic pre-emption of democracy. We now turn to a more detailed description of these processes.

The substantive dimension of democracy denotes the material competencies that remain within the domain of the national democratic process. The state has traditionally been considered to have comprehensive control over all social affairs in the public domain. As a sovereign state it has exercised the entire bundle of competencies in full and to the exclusion of any other non-statist authority in its territory.<sup>19</sup> All political issues *lato sensu*, which encompass everything that is not of an exclusively private concern, have been subject to democratic decision-making. The people of the state have thus self-legislated *in toto*. The national democratic process was thereby fully substantiated. Nothing would be beyond its control. Of course, while such a total democratic state

<sup>18</sup> See Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart Publishing 2014) 205. Curtin refers to Peter Mair who has argued that the EU has been 'deliberately constructed as "a protected sphere" in which policy-making can evade the constraints imposed by representative democracy at national level': see Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013) 99.

<sup>19</sup> Matej Avbelj, 'Theorizing Sovereignty and European Integration' [2014] *Ratio Juris* 344, 345.

has always been just an ideal, perhaps even a fiction, with the co-operation of states under international law and furthermore under the impact of processes of supranational integration, such as the EU, and globalisation the gap between the national democratic ideal and reality has been growing steadily.

In the process of EU supranational integration, the Member States have thus transferred an ever bigger share of the national bundle of their competencies to the supranational level. The uploading of national competencies to the EU has taken place gradually, through different stages. In the first stage, economic competencies were transferred to the EU, closely following the well known Balassa model of economic integration.<sup>20</sup> In 1968, the Member States formed a customs union, and in 1993 the single market was completed, with this leading to the creation of the monetary union with the issuance of a single currency in 2001, whose crisis several years later prompted the laying down of the keystone of a nascent fiscal union.<sup>21</sup> In the second, more political stage of integration, competencies beyond economic ones have been transferred: such as justice, security and foreign affairs.<sup>22</sup> The sheer number of competencies transferred to or even taken over by the EU through the proverbial competence creep<sup>23</sup> has been detracting from the substance of the national democratic processes to the extent that theory has started to talk about *Entstaatlichung* (emptying of the state)<sup>24</sup> and the national constitutional courts—in particular the Federal Constitutional Court of Germany (BVerfG)—were prompted to draw a line in the sand of what is still acceptable so that a Member State and its democracy can still be meaningfully described as such.<sup>25</sup>

However, the full extent of the substantive pre-emption of national democracy can be understood best if our focus is complemented with the pre-emption of democracy in its institutional dimension. The two have been occurring side by side and simultaneously. In national institutional terms, the process of European integration has meant the persistent rise of the executive branch at the expense of the legislative branch. For several decades, the representatives of the national governments were exclusive EU legislators in the Council whose legal acts held, according to the principle of primacy, precedence in application before national laws, as well as the incipient capacity of pre-empting national legislative fields in the domains unified or fully harmonised by the EU legislature.<sup>26</sup> The national parliaments have thus not only become substantively undernourished, but also increasingly institutionally side-lined. They have tried to fight back on the national level

<sup>20</sup> Béla Balassa, *The Theory of Economic Integration* (Allen and Unwin 1961).

<sup>21</sup> See, eg, Derek W Urwin, *The Community of Europe: A History of European Integration since 1945* (2nd edn, Routledge 2014); Chris J Bickerton, *European Integration: From Nation-States to Member States* (OUP 2012).

<sup>22</sup> *ibid.*

<sup>23</sup> Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 YB Euro L 1.

<sup>24</sup> Julio Baquero Cruz, 'The Legacy of the Maastricht Urteil and the Pluralist Movement' (2008) 14 ELJ 389, 392.

<sup>25</sup> See the Lisbon Treaty decision of Germany's Federal Constitutional Court Judgment, 2 BvE 2/08 (2009).

<sup>26</sup> See Robert Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 CML Rev 1023, 1032.

by increasing control over national governments' actions in the EU legislative process, as well as on the supranational level by involving themselves in scrutiny of the European Commission's respect of the subsidiarity principle.<sup>27</sup> The new approach to harmonisation and other models of the so-called new EU governance<sup>28</sup> designed to leave more room to the national legislature for the autonomous exercise of national regulatory choices have also been attempted.

#### 4.1 The substantive and institutional pre-emption of national democracy in an economic crisis

The outcome has been modest, but even as such it has been almost entirely offset by substantive and institutional developments in the wake of the EU economic crisis. As is well known, in 2009 the Eurozone countries found themselves in a vicious circle of a sovereign debt crisis which threatened not only their individual economies, but by way of a domino effect the survival of the single currency as such. Almost entirely unprepared for such a scenario and under great pressure, the EU sought the assistance of the International Monetary Fund (IMF) and hastily drew together rescue funds for the most vulnerable economies in need of financial assistance.<sup>29</sup> These so-called bail-out funds have enabled the struggling Member States to meet their financial obligations to external and internal creditors and thus escape almost imminent bankruptcy. However, this financial assistance came with strict conditions, mandating comprehensive and not infrequently painful structural reforms, the purpose of which was twofold; namely, to ensure that the credits would be repaid as the reforms take shape and the economy picks up, and to prevent the moral hazard lurking in the possibility of using the money while continuing on the same old economically devastating course.

However, while well motivated, the effect of these conditions has been a *de facto* substantive and institutional emptying of national democracies in the economically pre-empted Member States. The national parliaments have been turned into rubber-stamping institutions.<sup>30</sup> The Member States, which have already transferred a significant share of their national competencies to the EU, now find themselves in a dire economic situation leaving them, in political terms, with a take-it-or-leave-it scenario. This is an example of a 'zero-choice democracy'.<sup>31</sup> They either signed up to the troika conditions or faced a

<sup>27</sup> Davor Jancic, 'Representative Democracy across Levels: National Parliaments and EU Constitutionalism' (2012) 8 Croatian YB Euro L & Policy 227, 264.

<sup>28</sup> See Burkard Eberlein and Dieter Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 J Common Market Studies 121.

<sup>29</sup> In particular, Portugal, Ireland, Greece and Spain.

<sup>30</sup> See, eg, Ari Hirvonen, 'Reinventing European Democracy: Democratization and the Existential Crisis of the EU' in Massimo Fichera, Kaarlo Tuori and Sakari Hänninen (eds), *Polity and Crisis* (Ashgate 2014) 154.

<sup>31</sup> Christian Joerges, 'The Transformations of Europe and the Search for a Way out of its Crisis' in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart Publishing 2014) 35 n 30 referring to Nikos Hlepas, 'Supranational Technocracy and Zero Choice



default on their debts, with potentially disastrous and therefore practically unthinkable national and supranational economic and political consequences. As a result, even those limited material competencies that have at least formally remained with the Member States can no longer be de facto self-legislated upon by these countries' peoples in the context of their indebtedness. This confirms a simple truth: while in liberal democratic countries the economy is to enjoy as much autonomy from the political as possible,<sup>32</sup> on the other hand politics cannot be meaningfully exercised in the absence of sufficient economic funds. In other words, political self-determination is only possible in the conditions of economic independence, which as a rule applies to any entity, national or supranational.

The depth of the crisis, however, suggested that a one-off response to it was insufficient and that a more systemic approach to reforming the EU's economic governance is called for. As we shall see, its implementation has put additional strains on national democratic processes. A systemic shift in EU economic governance was introduced by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact)<sup>33</sup> together with the so-called 'six-pack'<sup>34</sup> and 'two-pack' legislation.<sup>35</sup> They intended to achieve several objectives. First, they reinforced the Stability and Growth Pact<sup>36</sup> as the substantive framework of European economic governance and placed it within a well defined timeframe known as the European Semester. The substantive framework centres on fiscal and economic policies, such as budgetary control and

Democracy: The Greek Experience' <[https://www.academia.edu/7879909/Supranational\\_Technocracy\\_and\\_Zero\\_Choice\\_Democracy](https://www.academia.edu/7879909/Supranational_Technocracy_and_Zero_Choice_Democracy)> accessed 17 December 2015.

<sup>32</sup> Karl-Heinz Ladauer, 'Globalization and Public Governance—A Contradiction?' in Karl-Heinz Ladauer (ed), *Public Governance in the Age of Globalization* (Ashgate 2004) 9.

<sup>33</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact) (adopted 1 February 2012, entered into force 2 March 2012) D/12/2 <[http://europa.eu/rapid/press-release\\_DOC-12-2\\_en.htm](http://europa.eu/rapid/press-release_DOC-12-2_en.htm)> accessed 17 December 2015. The Fiscal Compact is not an instrument of EU law; rather it was concluded as an international treaty among all the EU Member States, other than the UK and the Czech Republic.

<sup>34</sup> Council Regulation (EU) 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Council Regulation (EU) 1174/2011 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8; Council Regulation (EU) 1175/2011 of 16 November 2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Council Regulation (EU) 1177/2011 of 8 November 2011 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Council Directive 2011/85/EU of 8 November 2011 on requirements of budgetary frameworks of the Member States [2011] OJ L306/41.

<sup>35</sup> Council Regulation (EU) 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Council Regulation (EU) 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

<sup>36</sup> The Stability and Growth Pact is a collection of rules, an overview of which can be found at: European Commission, 'Stability and Growth Pact' (30 July 2015) <[http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm)> accessed 17 September 2015.

control of macroeconomic imbalances in the Member States, and consists of so-called preventive and corrective arms.<sup>37</sup> The former's purpose is to ensure that Member States do not deviate from the agreed fiscal and economic criteria, while the latter provides for the measures, including sanctions, necessary to ensure compliance in cases of deviation.

The cycle of a European semester starts in November each year, when the Commission presents its annual growth survey<sup>38</sup> along with the alert mechanism report in which it singles out for an in-depth review those Member States that exhibit macroeconomic imbalances.<sup>39</sup> Simultaneously, the Member States have to report on their fiscal policy. Their budgetary duty is two-fold. First, they are to present a draft annual budget for assessment to the European Commission and the Council, as well as the preparation of the Stability Programme laying down the national mid-term budgetary objectives (MTBO) for the next three years. The latter is, again, evaluated by the European Commission, both *ex ante* and *ex post* (that is, confirming past and likely future compliance with commitments).<sup>40</sup> Besides the Stability Programme, the Member States also have to present the National Reform Programme in accordance with the Europe 2020 Strategy and the Euro Plus Pact<sup>41</sup> to demonstrate how they intend to meet the latter's economic objectives.

The European Commission integrates its findings on both the fiscal discipline and the national macroeconomic situation into country-specific recommendations, which are finally adopted by the European Council. If a Member State falls short of the prescribed fiscal benchmarks or exhibits an excessive macroeconomic imbalance, the corrective arm of the EU's economic governance is launched, resulting in an excessive deficit procedure (EDP)<sup>42</sup> and/or an excessive imbalance procedure (EIP). The EDP is triggered if a Member State violates the deficit or the debt rule. According to the former, the annual budgetary deficit cannot exceed 3 per cent of GDP; according to the latter the national debt must be less than 60 per cent of GDP or, if higher, it must be shrinking at a satisfactory pace.<sup>43</sup> Following adoption of the Fiscal Compact, the national budgetary positions, such as the Member States' MTBO, have to be balanced or in surplus. This is achieved if the MTBO deficit does not exceed 0.5 per cent<sup>44</sup> or 1 per cent for those

<sup>37</sup> For a general overview, see European Commission, 'The Preventive Arm' (2015) <[http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/preventive\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/preventive_arm/index_en.htm)> accessed 17 December 2015; European Commission, 'The Corrective Arm' (2015) <[http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/corrective\\_arm/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/corrective_arm/index_en.htm)> accessed 17 December 2015.

<sup>38</sup> European Commission, 'Making it Happen: The European Semester' (European Commission, 7 July 2015) <[http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm)> accessed 4 August 2015.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> European Central Bank, 'Economic Policy: Economic Reforms' (2015) <<https://www.ecb.europa.eu/mopo/eaec/ecopolicy/html/index.en.html>> accessed 4 August 2015.

<sup>42</sup> See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 126.

<sup>43</sup> The gap between the national debt and the 60 per cent requirement must be diminishing at 1/20 annual rate.

<sup>44</sup> Art 3(b) Fiscal Compact.



Member States whose national debt is significantly less than 60 per cent.<sup>45</sup> If this benchmark is not achieved, other than in cases of exceptionally permitted deviations,<sup>46</sup> an automatic correction mechanism is initiated.<sup>47</sup>

The EDP results in enhanced surveillance of a Member State by the European Commission, the strictness of which varies depending on the gravity of the economic situation in a Member State. Three types of EDP can thus be effectively distinguished: (1) regular enhanced surveillance; (2) enhanced surveillance with precautionary financial assistance; and (3) enhanced surveillance under the macroeconomic adjustment programmes. Once subject to a regular EDP, a Member State must adopt a budgetary and economic partnership programme consisting of a detailed description of the structural reforms required to correct the excessive deficit.<sup>48</sup> In addition, the Commission can request a number of specific measures to implement the enhanced surveillance.<sup>49</sup> The Commission carries out regular review missions together with the European Central Bank (ECB), the European Supervisory Authorities and the IMF.<sup>50</sup> These are reinforced in case of enhanced surveillance with precautionary financial assistance from the European Stability Mechanism (ESM)<sup>51</sup> and/or European Financial Stability Facility (EFSF)<sup>52</sup> under an Enhanced Conditions Credit Line or a Precautionary Conditioned Credit Line, for which a Member State has to meet specific criteria and policy conditions.<sup>53</sup> Finally, countries in the Macroeconomic Adjustment Programmes<sup>54</sup> are subject to the strictest

<sup>45</sup> Art 3(d) Fiscal Compact.

<sup>46</sup> Art 3(c) Fiscal Compact.

<sup>47</sup> Art 3(e) Fiscal Compact.

<sup>48</sup> Art 5 Fiscal Compact.

<sup>49</sup> European Commission, 'The Two-Pack on Economic Governance: Establishing an EU Framework for Dealing with Threats to Financial Stability in Euro Area Member States' (2013) 147 Occasional Papers 1, 10 <[https://lirias.kuleuven.be/bitstream/123456789/440085/1/ocp147\\_en.pdf](https://lirias.kuleuven.be/bitstream/123456789/440085/1/ocp147_en.pdf)> accessed 17 December 2015. Under this document, the Commission can request:

1) A stress test on banks to be implemented by the ECB/EBA; 2) An assessment of the domestic financial supervisory capacity to be implemented by the ECB/EBA; 3) Any information needed for the monitoring of macro-economic imbalances; 4) A comprehensive independent audit of the public accounts of all sub sectors of the general government; 5) Any information available for the monitoring of the fiscal deficit; 6) Access to disaggregated data on the developments of the financial sector. In addition, Member States must also meet new reporting requirements foreseen for countries under the excessive deficit procedure (EDP) irrespective of the existence of the latter [internal citations omitted].

<sup>50</sup> *ibid* 11.

<sup>51</sup> For a general overview of this mechanism, see 'European Stability Mechanism' (2015) <<http://www.esm.europa.eu/index.htm>> accessed 15 September.

<sup>52</sup> For a general overview of this facility, see 'European Financial Stability Facility' (2015) <<http://www.efsf.europa.eu/about/index.htm>> accessed 15 September.

<sup>53</sup> European Commission, 'The Two-Pack on Economic Governance' (n 49) 11–13.

<sup>54</sup> Greece, Ireland, Portugal and Cyprus were subjected to a macroeconomic adjustment programme. Portugal and Ireland have already exited it, and are now in the post-programme surveillance phase. Spain was not part of the macroeconomic adjustment programme as it requested financial assistance for the recapitalisation of its financial institutions only: Communication from the Commission of 28 November 2014 to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 'Economic Governance Review: Report on the

surveillance and must ensure full cooperation with the Commission, the ECB and the IMF to prevent the Council interrupting their access to the financial assistance.<sup>55</sup>

On the other hand, the EIP imposes on the affected Member State a duty to prepare a corrective action plan, which must be endorsed by the Council and the Commission, the latter also being responsible for closely monitoring the plan's implementation.<sup>56</sup> All of these surveillance measures, in both the preventive and corrective arms of fiscal and macroeconomic control, are supported by the threat of sanctions. These sanctions, depending on the infringement, can be gradually increased from an interest-bearing deposit of up to 0.2 per cent of GDP to a non-interest-bearing deposit of the same size and, finally, a fine of 0.2 per cent of GDP or a maximum 0.5 per cent of GDP.<sup>57</sup>

The thus reformed EU economic governance model has importantly impinged on national democracy in both substantive and institutional ways. In substantive terms, national fiscal powers have been constrained the most, to the extent that two important democracy pre-empting effects can be spoken of. First, by constitutionalising the golden fiscal rule requirement on the national level, a whole set of important economic questions will be removed from the national ordinary democratic process and political contestation.<sup>58</sup> Secondly, by increasing EU control even over the exercise of national budgetary competencies the Member States might be giving up the last material brick of national democracy. If anything constitutes the heart of national self-legislation or self-determination, then this is collectively making or at least influencing the decisions on how to spend the money the state collects from its taxpayers. As there should be no taxation without democratic representation, this very representation becomes meaningless if it can no longer decide how and what the collected taxes are to be spent on. If decisions regarding the fiscal burden imposed on citizens and the social conditions in which they will live are effectively taken away from the national electorate,<sup>59</sup> then the national democracy has undergone a systemic substantive pre-emption, not only a temporary one, resulting out of a transient troika conditionality.

application of Regulations (EU) 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013' COM(2014) 905, 9.

<sup>55</sup> Art 7 Council Regulation 472/2013 integrates the previous intergovernmental macroeconomic adjustment programmes with the new supranational regulation.

<sup>56</sup> European Commission, 'The EU's Economic Governance Explained' (Fact Sheet) (European Commission, 28 November 2014) 4 <[http://europa.eu/rapid/press-release\\_MEMO-14-2180\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-2180_en.htm)> accessed 4 August 2015.

<sup>57</sup> *ibid.*

<sup>58</sup> Pursuant to art 3 Fiscal Compact, the national budgets must be balanced or in surplus (art 3(1)), which means that other than in explicitly prescribed exceptional cases (art 3(3)), a lower level of structural deficit cannot exceed 0.5 per cent in GDP at market prices (art 3(1)(b)) or 1 per cent in case of countries whose general government debt in GDP is significantly lower than 60 per cent (art 3(1)(d)). These rules must be inscribed in the national law of a binding and permanent character, preferably constitutional (art 3(2)), a lower level of a structural deficit.

<sup>59</sup> See Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 MLR 817, 823. In this piece, the authors are alluding to the Lisbon decision of Germany's Federal Constitutional Court (n 25) paras 256, 259.

This is not to argue that such a point in national democratic development has already been reached, but important steps have indeed been taken in that direction, depending on the economic stature of a given Member State. As we have seen above, the EU economic governance regulation draws an important distinction between Member States with balanced economic figures and those which exhibit either fiscal or even broader macroeconomic imbalances. In the economically balanced states, the EU's material inroads into national democratic processes will be more limited than in the economically imbalanced states. While both groups of Member States face EU legal restrictions on growth in domestic expenditure, which in principle cannot exceed potential growth in GDP, the imbalanced states must also cut their domestic expenditure to compensate for the identified budgetary imbalance.<sup>60</sup> In addition, they must 'ensure rapid convergence' towards a balanced budget.<sup>61</sup> This adjustment path is then subject to the annual assessment of the stability programme of each Member State which is, as reported by Chalmers, wide-ranging and onerous: 'it assesses not simply their targets, the robustness of their planning, the direction of any reforms and crucially but the socio-economic context and the demands placed on them by this.'<sup>62</sup> It goes without saying that these rules translate directly into how taxes are being decreased or increased; they determine the scope of the governmental investment as well as the depth and breadth of the national welfare state. All of these are issues that national parliamentary elections should be decided on and decide about.

When combining this substantive pre-emption of national democracy in economic governance by the institutional regime, we can see that the position of national parliaments has been further weakened. Their fiscal competencies have, as described above, been substantively limited, and also put under a great time constraint due to the timing of EU semesters. After the EU institutions have spoken about the soundness of a proposed national budget, a national parliament is left with very little time and even less room for democratic political manoeuvre. The national parliament is thus again being turned into a rubber-stamping institution.<sup>63</sup> Things get even worse for the national parliaments of those Member States under enhanced surveillance. The present EU legislation provides only for a limited information flow to them from the EU institutions involved in the surveillance and for so-called economic dialogue whereby representatives of the Commission may be invited by a national parliament to justify the specific measures to be adopted by that Member State.<sup>64</sup>

Further, at the peak of the economic crisis in 2011, the Member States decided to coordinate on the EU level even those economic policies that had formally remained

<sup>60</sup> Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *ELJ* 667, 679.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> Dawson and de Witte (n 59) 834. The authors write, 'The time constraints imposed by the European Semester make it all but impossible for national parliaments to control their own executives.'

<sup>64</sup> See, eg, European Commission, 'The Two-Pack on Economic Governance' (n 49) 17.

outside of the scope of EU competencies. The Europe 2020 Strategy and the Euro Plus Pact<sup>65</sup> have been decisive in that regard. They provide for so-called integrated guidelines, combining the broad economic policy guidelines and employment guidelines, covering the macroeconomic, microeconomic and employment policies, which are proposed by the Commission and adopted by the Council. They serve as the common objectives which ought to be achieved in a country-specific way by each Member State through the National Reform Programme. The national parliaments, social partners and civil society are specifically invited to participate in preparation of the Programme. However, this is more to create the impression of the ongoing national ownership of the structural reforms, while the latter are essentially being driven by the Commission, the Council and the European Council.<sup>66</sup> What we are witnessing here is the significant inroads of EU institutions into the formally exclusive national economic competencies through the allegedly nationally 'owned' and controlled open method of coordination.<sup>67</sup> This is an example of a further substantive pre-emption of national democracy without any formal transfer of competencies.

Finally, during the economic crisis, formal and informal institutional shifts, to be described in more depth below, have taken place in the EU and affected not only supranational but also national democracy. An important formal shift was the introduction of so-called reversed qualified majority voting in the Council,<sup>68</sup> which means that an economic measure proposed by the Commission against a Member State in the EDP and/or EIP is deemed adopted unless blocked by a qualified majority of the Member States. This system, again, tips the balance in favour of the supranational institutions, which is all the more apparent, as pointed out by Dawson and de Witte, in smaller Member States which now face a much harder task of blocking legislation they oppose.<sup>69</sup> This effect is exacerbated by the informal institutional shift taking place on the level of the Council whose steering and controlling role over the EU decision-making process has expanded substantially,<sup>70</sup> even to the extent that the Council has increasingly assumed the role of a *de facto* legislative initiator.<sup>71</sup> The combined effect of these institutional shifts is an appreciable strengthening of the executive branch in

<sup>65</sup> European Commission, 'The Euro Plus Pact' (2015) 3 EPSC Strategic Notes 1 <[http://ec.europa.eu/epsc/pdf/publications/strategic\\_note\\_issue\\_3.pdf](http://ec.europa.eu/epsc/pdf/publications/strategic_note_issue_3.pdf)> accessed 19 September 2015. The purpose of the Euro Plus Pact is to foster competitiveness and employment; contributing further to the sustainability of public finances and reinforcing financial stability: ECB, 'Economic Policy' (n 41) 4.

<sup>66</sup> *ibid* 3.

<sup>67</sup> However, Joerges (n 31) 41 provides a more optimistic view arguing that the powers of national parliaments remain considerable as long as they retain their so-called 'ownership' of the national contributions to the Semester process. On the other hand, see Davor Jancic, 'Countering the Debt Crisis: National Parliaments and EU Economic Governance' (2014) LSE Law: Policy Briefing Papers 1/2014 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2482309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482309)> accessed 4 August 2015. Jancic argues that national parliaments are actually the beneficiaries of the euro crisis.

<sup>68</sup> Art 238(3) TFEU.

<sup>69</sup> Dawson and de Witte (n 59) 839.

<sup>70</sup> *ibid* 832.

<sup>71</sup> *ibid* 830; Curtin (n 18) 210.

the EU and, in particular, of the most powerful EU Member States with the greatest influence in the Council, at the expense of the national legislative branches as well as of the smaller and economically weaker Member States in general.<sup>72</sup>

#### 4.2 The economic pre-emption of national democracy in an economic crisis

In the course of the development of the European integration, but especially in the years following the outbreak of the economic crisis, national democracy has thus come under considerable strain in its substantive and institutional dimensions. The situation has been exacerbated when we add the economic dimension. To repeat the simple truth: in practice there can be no democracy conceived of as self-legislation by the people in the absence of the economic funds required for its exercise. The state can typically rely on three sources of revenue to fund its activities: fiscal resources, monetary resources and foreign loans. The process of European integration has affected all three of them. With the establishment of the single market a whole range of protectionist measures, including fiscal ones, was eliminated which initially led to a decline in national fiscal resources that was latter compensated for through the positive effects of economies of scale.<sup>73</sup> The greater yield of the single market thus offset the loss or the capping of many national fiscal measures. This positive economic effect was further increased, although unevenly among the Member States,<sup>74</sup> by establishment of the single currency, although this move meant that the euro Member States relinquished their monetary competencies and turned them into an exclusive EU competence under the control of the ECB.<sup>75</sup> These positive economic effects lasted as long as the economic trend also remained positive. As this suffered from a downward turn, the Member States found themselves in an uneasy fiscal situation which could no longer be rescued by the traditional resort to the national monetary instruments of currency devaluation intended to pump the necessary money into the domestic economic system and simultaneously improve, albeit artificially, its level of competitiveness in the world economy. The only way out was to raise loans in the global financial markets. However, this option was foreclosed immediately when the markets, also under the impression of the global economic crisis, sensed the high risk associated with the troubled countries' national bonds and claimed yields on them that were economically unsustainable.

<sup>72</sup> Dawson and de Witte (n 59) therefore speak about the dismantling of the substantive, institutional and spatial balance so crucial for the EU's legitimate functioning and its overall viability.

<sup>73</sup> It has been estimated that the single market has contributed 2–3 per cent to the growth of the EU GDP: see, eg, Bas Straathof and others, 'The Internal Market and the Dutch Economy' (2008) 168 CPB Netherlands Bureau for Economic Policy Analysis 1, 9 <<http://www.cpb.nl/sites/default/files/publicaties/download/internal-market-and-dutch-economy-implications-trade-and-economic-growth.pdf>> accessed 17 September 2015.

<sup>74</sup> Frank Mattern and others, 'The Future of the Euro: An Economic Perspective on the Eurozone Crisis' (McKinsey Germany, January 2012) <[http://www.mckinsey.de/sites/mck\\_files/files/The%20future%20of%20the%20euro\\_McKinsey%20report.pdf](http://www.mckinsey.de/sites/mck_files/files/The%20future%20of%20the%20euro_McKinsey%20report.pdf)> accessed 4 August 2015.

<sup>75</sup> Art 3(1)(c) TFEU.

At the peak of the crisis, the Member States thus found themselves in a triple economic deadlock. Their budgets were deeply in the red, of course in violation of EU law; the monetary competencies to alleviate the situation had gone; and access to the global financial markets was effectively closed. The only way out of the economic collapse was to turn to the EU—but the EU, too, as explained above, was completely unprepared. Unlike in a federal state, the EU was legally and practically prevented from assisting its Member States in need in either monetary or fiscal terms. With regard to the former, the EU founding treaties contain a no-bail-out clause<sup>76</sup> and the ECB's power to print money is limited,<sup>77</sup> whereas in fiscal terms the EU budget, as noted by Scharpf, 'is miniscule in comparison to the budget of federal states,' largely because 'there are no European taxes and there is no European social policy to alleviate interregional imbalances'.<sup>78</sup> As a result, the economic crisis has threatened to create a domino effect, spilling over from one country to another, to eventually engulf the EU as a whole. Ultimately this would lead to the complete economic pre-emption of democracy not only on the national, but also on the supranational level. To prevent this, the Member States and the EU have struggled to regain access to the global financial markets. But, in so doing, they have run into external constraints posed by a specific set of transnational actors: CRAs.

## 5 The pre-emption of supranational democracy

Having described the pre-emption of democracy on the national level, which has occurred in the process of European integration and in particular under the impact of the economic crisis, it is important to note that these democracy pre-emption effects have not been limited to the Member States, but extend to the EU at a supranational level, too. Here, one cannot speak of a substantive pre-emption of democracy, as the material scope of EU competencies has been increasing rather than decreasing. Similarly, in institutional terms on the supranational level the trend has been one of democracy-enabling, rather than one of pre-emption. In order to escape the charge of a democratic deficit, the EU has been doing its best to mimic as far as possible the institutional structure of national democracies. This has translated directly into constant improvement of the European Parliament's position in the EU institutional constellation, so that it has eventually become an equal co-legislator.<sup>79</sup> The chain of democratic legitimation from EU citizens to the European Parliament has thus been formally established and made operational, even though it is widely believed that this link has not been appropriately internalised

<sup>76</sup> Art 125 TFEU.

<sup>77</sup> The ECB has, however, been losing these bounds, especially recently with the so-called quantitative easing programme.

<sup>78</sup> Scharpf (n 17) 34.

<sup>79</sup> See, eg, Berthold Rittberger, 'Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament' (2012) 50 *J Common Market Studies* 18.

by the EU constituency.<sup>80</sup> In this respect, at least formally, the institutional dimension of EU democracy serves well the requirements of input and representative democracy as described at the beginning of this chapter. Nevertheless, as already intimated above, the EU response to the economic crisis has brought about certain institutional changes that are reversing this established trend.

First of all, several of the crisis mechanisms had to be concluded under international law so they are intergovernmental rather than supranational in nature. This per se brings them beyond the scope of competencies of the European Parliament, which is thus excluded from their shaping and control. Moreover, even those legislative mechanisms in six-pack and two-pack forms that have been adopted by the European Parliament only provide for a duty of notification and economic dialogue of the European Commission and the Council with the European Parliament. As observed by Dawson and de Witte, with the escape to international law, the core legislative institutional triangle between the Commission, the Council and the European Parliament has been seriously weakened,<sup>81</sup> and the institutional balance has been shifting to the most influential capitals of Europe, as represented in the European Council. In institutional terms, the most important decisions regarding the crisis and post-crisis management are therefore not adopted by democratically representative institutions, but by an intergovernmental forum that many argue leans in favour of the biggest and economically more powerful Member States. These institutional changes clearly detract from the ideal of a supranational democracy: they lend support to the claims of the existence of a democratic deficit and, if nothing else, fuel the impression of the pre-emption of supranational democracy.

However, the most significant impact of the democratic crisis in the EU has been in the latter's economic dimension. For the first time, the EU, or at least the Eurozone, has found itself in an economic situation beyond its control, whereby the availability of funds needed for the functioning of both the EU and national democracies hinges on the global financial markets' willingness to make loans available under still acceptable or at least economically sustainable financing conditions. What is also new, perhaps even unprecedented, is the fact that in determining the lending conditions the global financial markets have, rather than relying on the actions or assurances of the Member States or even the EU as a whole, followed the sovereign bond ratings of the CRAs. In this way, these agencies have started to act as gatekeepers of the global financial markets, determining the economic and therefore, at least indirectly, also the democratic fate of the EU as a whole. This confronts us with an interesting case study of the influence of transnational actors such as CRAs on democracy in the EU.

<sup>80</sup> This is also confirmed by a declining interest in the EU citizens' initiative: while 49 such initiatives have been launched, only two have been completed. Even these two have lacked meaningful follow-up by the European Commission. See Honor Mahoney, 'EU Democracy Tool Hanging in the Balance' *EUObserver* (26 February 2015) <<https://euobserver.com/political/127808>> accessed 15 September 2015.

<sup>81</sup> Dawson and de Witte (n 59) 828 ff.



## 6 CRAs and the economic pre-emption of democracy in the EU

CRAs form part of the international financial architecture<sup>82</sup> and profoundly influence the ordering of global financial markets.<sup>83</sup> CRAs are typical actors of transnational law. They belong to the field of private administrative transnational law, and consist of: (1) administrative rules adopted by (2) private transnational actors, which (3) bind or regulate through acceptance (4) the collective practices of numerous entities in designated sectors without their prior assent to these rules.

The designated sector at hand is a global market in sovereign bonds, such as debt securities issued by states to raise money in global financial markets. The three biggest world CRAs—Moody's, Standard & Poor's and Fitch—jointly control around 70 per cent of the overall market,<sup>84</sup> and as much as 90 per cent of the sovereign bond market,<sup>85</sup> and are all private companies established in New York with many branches worldwide. Despite national legal anchoring, they are transnational actors because their activities stretch far beyond the USA; they perform services for a majority of states, and make their products available to the global financial markets.<sup>86</sup> The latter adapt their actions subject to the ratings issued by CRAs. They do so voluntarily, in pursuit of the greater efficiency generated by CRAs, which arguably help reduce the asymmetry of information traditionally existing in the markets.<sup>87</sup>

The products of CRAs in the sovereign bonds market are ratings which assess the credit capacity of a state. These ratings do not have a legal character, and are therefore not binding with the force of positive law. Their formal authority stems from the CRAs' expertise, while their practical authority derives from the fact that the produced ratings are followed in practice by the relevant markets. The states which order and pay for their ratings cannot influence the criteria under which they are developed. They are therefore set unilaterally by the CRAs and are not based on a contract or any other instrument requiring the consent between the CRA and the country ranked. This endows the CRAs' ratings with elements of vertical hierarchy and authority and hence makes them administrative in their character.

The ratings are thus private administrative norms<sup>88</sup> which, following the criteria chosen by the CRAs, establish the state's credit capacity which is then followed by the

<sup>82</sup> Aline Darbellay, *Regulating Credit Rating Agencies* (Edward Elgar 2013) 5.

<sup>83</sup> *ibid* 6.

<sup>84</sup> This ranking is determined according to the percentage of customers served by the CRA with respect to the overall market, in which the leaders have the following market shares: Moody's: 35.8 per cent; Standard & Poor's: 20.25 per cent; and Fitch: 16.05 per cent (figures 2012). See Gianluca Mattarocci, *The Independence of Credit Rating Agencies* (Elsevier 2014) 40.

<sup>85</sup> Rawi Abdelal, *Capital Rules, The Construction of Global Finance* (Harvard UP 2007) 162.

<sup>86</sup> The main contemporary uses of CRAs have been described as: financial information, regulatory tools, contracting tools and monitoring tools. See Darbellay (n 82) 37–41.

<sup>87</sup> *ibid* 38.

<sup>88</sup> This is confirmed by the European Parliament, Council Regulation (EU) 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L146/1 (CRA III Regulation)



global markets in determining the interest rates to be paid on the national bonds. The CRAs' rating has important direct public and private economic consequences. If the required interest rates are low, loans are more readily available and the state does not find it hard to finance its needs even in the absence of its own funds. In contrast, if the interest rates are (too) high, the state's access to the global markets becomes limited or even closed, which can (potentially) place huge constraints on the provision of public services. However, the worsening of a sovereign bond rating also negatively affects the private sector due to the so-called sovereign ceiling effect. Private entities normally cannot be ranked higher than the state in which they are established.<sup>89</sup> If a state is downgraded, the ratings of private companies incorporated within them also decrease. Money then also becomes more expensive for those companies, which all translates into a worse overall business environment. In short, the CRAs' ratings directly affect the economic conditions of the public and private sector in a given state and as such—since modern democracies are fund-dependent—have an important impact on democratic life in that state.

For example, in the above described situation of an internal economic pre-emption of national democracies in the conditions of exclusive EU monetary competencies with the concurrent absence of EU fiscal competencies, several EU Member States found themselves on the brink of bankruptcy due to the prohibitive bond yields resulting from the CRAs' ratings. For the first time, the CRAs' systemic importance in global financial markets had become apparent and the systemic risk for sovereign states and the global economy as a whole that CRAs' ratings can (potentially) bring about had also become obvious. This spurred several critical reactions.

The CRAs were attacked for their lack of transparency and accountability in the production of ratings.<sup>90</sup> The arguments that a degree of secrecy and distance from the rated state are necessary to shield the independence and expertise of the CRAs<sup>91</sup> were objected to as falling short of rule-of-law standards. In particular, this is because the rated state (or other entity) basically lacks any means to have its voice heard or to challenge the rating in an appropriate forum. Moreover, the impartiality of the CRAs

para 8, which makes it explicit:

Credit ratings, unlike investment research, are not mere opinions about a value of a price for a financial instrument or a financial obligation. Credit rating agencies are not mere financial analysts or investment advisors. Credit ratings have regulatory value for regulated investors, such as credit institutions, insurance companies and other institutional investors. Although the incentives to rely excessively on credit ratings are being reduced, credit ratings still drive investment choices, in particularly because of information asymmetries and for efficiency purposes.

<sup>89</sup> Heitor Almeida and others, 'The Real Effects of Sovereign Ratings: The Sovereign Ceiling Channel' (11th Annual Conference on Corporate Finance, Washington, 2015) 1 <<https://www.business.illinois.edu/halmeida/Ratings.pdf>> accessed 4 August 2015.

<sup>90</sup> Dieter Kerwer, 'Holding Global Regulators Accountable: The Case of Credit Rating Agencies' (2004) 11 School of Public Policy Working Paper Series 2, 10 <<https://www.ucl.ac.uk/spp/research/publications/downloads/spp-wp-11.pdf>> accessed 4 September 2015.

<sup>91</sup> *ibid.*

was contested too.<sup>92</sup> Concerns were raised about potential conflicts of interest due to the issuer-pays model<sup>93</sup> and preferential treatment of the economies of big and strong states over those of smaller and weaker ones.<sup>94</sup>

This perception has been reinforced by the fact that the three biggest CRAs are all based in the United States. In addition to their American leaning, the CRAs have also been criticised for keeping an oligopoly in the market,<sup>95</sup> which contributes to the homogenisation of information.<sup>96</sup> This has further accentuated the systemic risk, in particular when combined with the pro-cyclical effect of the CRAs' actions.<sup>97</sup> Especially in times of crisis, the CRAs have often been slow to react.<sup>98</sup> They have tended to downgrade a state only when a crisis was already in full swing, but in so doing have intensified the affected state's worsening economic conditions.<sup>99</sup> As the EU found itself in this situation, it had to react to the CRA challenge as part of its anti-crisis mechanism. Its strategy has been two-fold: to strengthen the EU regulatory control over CRAs and simultaneously to undermine the latter's importance. In an attempt to increase its regulatory sway over CRAs, in 2009 the EU adopted a new regulation,<sup>100</sup> which has since been amended twice.<sup>101</sup> It has attempted to address the shortcomings of CRAs identified above: the lack of transparency and accountability, the potential conflicts of interest, the unreliability of ratings, and rule-of-law concerns.<sup>102</sup> These objectives were to be achieved through territorialisation. Any CRA that wishes to operate in Europe must register with the European Securities and Market Agency (ESMA). To do so, it must meet a number

<sup>92</sup> Council on Foreign Relations, 'The Credit Rating Controversy' (February 2015) <<http://www.cfr.org/financial-crises/credit-rating-controversy/p22328>> accessed 4 August 2015.

<sup>93</sup> See, eg, European Parliament Resolution 2010/2302(INI) on credit rating agencies: future perspectives (23 March 2011).

<sup>94</sup> Deena Zaidi, 'A New Credit Rating Agency for BRICS' (*Economy Watch*, 13 February 2015) <<http://www.economywatch.com/features/A-New-Credit-Rating-Agency-for-BRICS.02-13-15.html>> accessed 4 August 2015.

<sup>95</sup> Olaf Cramme, 'The EU's War against Credit Rating Agencies is Symptomatic of a New Struggle between Politics and the Market, but it also Lays Bare Growing Tensions in the European Project and Globalisation as a Whole' (*LSE Blogs*, 19 July 2011) <[http://eprints.lse.ac.uk/37969/1/blogs\\_lse\\_ac\\_uk-The\\_EUs\\_war\\_against\\_credit\\_rating\\_agencies\\_is\\_symptomatic\\_of\\_a\\_new\\_struggle\\_between\\_politics\\_and\\_the\\_.pdf](http://eprints.lse.ac.uk/37969/1/blogs_lse_ac_uk-The_EUs_war_against_credit_rating_agencies_is_symptomatic_of_a_new_struggle_between_politics_and_the_.pdf)> accessed 4 August 2015.

<sup>96</sup> Darbellay (n 82) 179 ff.

<sup>97</sup> *ibid* 186.

<sup>98</sup> Jakob de Haan and Fabian Amtenbrik, 'Credit Rating Agencies' (2011) 278 DNB Working Paper 2 <[http://www.dnb.nl/en/binaries/Working%20Paper%20278\\_tcm47-246556.pdf](http://www.dnb.nl/en/binaries/Working%20Paper%20278_tcm47-246556.pdf)> accessed 4 September 2015.

<sup>99</sup> Darbellay (n 82) 188.

<sup>100</sup> Council Regulation (EC) 1060/2009 of 16 September 2009 on credit rating agencies [2009] OJ L302/1.

<sup>101</sup> European Parliament and Council Regulation (EU) 513/2011 of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies [2011] OJ L145/30 (CRA II Regulation). The CRA II Regulation came into force on 1 June 2011. See also the CRA III Regulation, which came into force on 20 June 2013.

<sup>102</sup> European Parliament, Directorate General for Internal Policies, 'Credit Rating Agencies: Implementation of Legislation' Study for the Econ Committee 1, 6 <<http://www.europarl.europa.eu/document/activities/cont/201407/20140731ATT87404/20140731ATT87404EN.pdf>> accessed 15 September 2015.

of demanding material conditions,<sup>103</sup> which are continuously observed by ESMA. The latter is allowed to impose fines<sup>104</sup> or even to withdraw a registration if a CRA fails to satisfy these conditions.<sup>105</sup> The new legal regulation also provides for a European civil liability regime, enabling the aggrieved parties (investors or issuers) to claim damages from CRAs in case of their malpractice.<sup>106</sup> By tying CRAs back to the EU territory and prescribing detailed material standards for their functioning, the EU is striving to regain regulatory control over their activities at home as well as to spread its normative regulatory influence beyond its confines to the realm of transnational law.

On the other hand, the strategy of undermining the importance of CRAs consists of two main elements: deregulation and pluralisation. De-regulation involves reducing the regulatory reliance, both national and supranational, on the CRAs' ratings. The EU, as well as the United States,<sup>107</sup> are thus trying to roll back a long present trend in which they have co-opted CRAs for their specific expertise and outsourced certain regulatory functions to them, essentially endowing them with the influence they presently have.<sup>108</sup> The regulatory over-reliance ought to be redressed by removing the references to CRA ratings from EU and national law by 2020 and by encouraging practices via ECB and national central banks that will dissuade market actors from mechanistic reliance on CRA ratings.<sup>109</sup> Further, the CRAs are also explicitly prohibited from equipping their sovereign bond ratings with any direct or explicit policy recommendations on policies of sovereign entities.<sup>110</sup> However, the efforts of diminishing the influence of CRAs have not been very successful so far, especially in the absence of a meaningful alternative source of credit ratings.<sup>111</sup>

With regard to the intended pluralisation, this has combined the objectives of Europeanisation and antitrust measures. The political heads of Europe,<sup>112</sup> as well as the EU legislature,<sup>113</sup> have called for the establishment of a European public CRA. Alternatively, it was also suggested that public credit ratings could be issued by the ECB, which has rejected the idea,<sup>114</sup> or that the Commission's reports on the Member

<sup>103</sup> *ibid* 7. Here, the quality of credit ratings and rating methodologies, the independence of the credit rating process, the disclosure of credit ratings and methodologies, and the corporate governance and organisational arrangements are crucial.

<sup>104</sup> Art 36 CRA III Regulation.

<sup>105</sup> European Parliament (n 95) 7.

<sup>106</sup> Art 35 CRA III Regulation.

<sup>107</sup> The US Dodd-Frank Act of 2010 is reported to have removed all regulatory references to ratings: Darbellay (n 82) 9.

<sup>108</sup> Darbellay (n 82) 47: 'Credit ratings are generally used by regulators for two main purposes: determining risk sensitive capital requirements and defining investment restrictions.'

<sup>109</sup> Para 6 CRA III Regulation.

<sup>110</sup> Para 45 CRA III Regulation.

<sup>111</sup> European Parliament, 'Credit Rating Agencies' (n 102) 10.

<sup>112</sup> Andrew Willis, 'Merkel Backs Creation of European Credit Rating Agency' *EUObserver* (4 May 2010) <<https://euobserver.com/economic/30001>> accessed 4 August 2015.

<sup>113</sup> Preamble, para 43 CRA III Regulation.

<sup>114</sup> See Nikki Tait, 'ECB Cool on Plan for Credit Rating Agency' *Financial Times* (24 February 2011) <<http://www.ft.com/cms/s/0/3ffa993a-3f6c-11e0-a1ba-00144feabdc0.html#axzz3TWA3C8rM>> accessed 4 August 2015.

States' economic situation should be complemented by an assessment of their creditworthiness.<sup>115</sup> All of these proposals intend to decrease the influence of American CRAs and, simultaneously, by bringing in new regional CRAs, to gradually contribute to a reduction of the presently existing oligopoly. The same objective is pursued by the requirements to rotate CRAs when rating a specific entity and the involvement of smaller CRAs whose market share does not exceed 10 per cent. Smaller CRAs were even considered by the Commission to be financially supported and integrated in a more formal network.<sup>116</sup> However, the Commission's recent follow up report casts significant doubts on the feasibility of such a plan, especially since it has failed to win the support of smaller CRAs themselves.<sup>117</sup>

## 7 Assessment from the perspective of legal pluralism

Having presented the state of national and supranational democracy in the EU and its degree of pre-emption in the substantive, institutional and economic dimensions due to the internal and external constraints under which the EU operates, what can be said about it from the perspective of legal pluralism and what, if any, normative prescription can the latter prescribe for it? In answering this question, account shall be taken of an important difference between the internal and the external constraints on the democracy in the EU. The internal constraints, which derive from the EU's own constitutional structure, can still be controlled and even removed by the EU and its Member States, whereas the external constraints cannot be. The latter therefore pose a more formidable, and to a certain extent also unprecedented, practical and theoretical challenge. Most of the discussion that follows will therefore be dedicated to addressing the external constraints on EU democracy under transnational law. Nevertheless, a few words should be said about the internal constraints too.

Internal constraints have already been subject to an extensive debate within the EU democratic deficit literature.<sup>118</sup> This has also featured the pluralist attempts of remedying the EU democratic deficit. One such alternative has been the constitutional form of a union that comes along with some normative prescriptions for reducing the national and supranational pre-emption of democracy. It requires the EU to walk a fine line between the two opposites: supranational centralisation and national devolution. With regard to the former, it is necessary to acknowledge that the economic objectives have traditionally entailed a transfer of competencies from the national to the supranational level in the

<sup>115</sup> Para 40 CRA III Regulation.

<sup>116</sup> Para 50 CRA III Regulation.

<sup>117</sup> European Commission, 'Report on the Feasibility of a Network of Smaller Credit Rating Agencies' COM/2014/0248 final.

<sup>118</sup> See, eg, Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *J Common Market Studies* 533.

EU. This effect increases in times of crisis. The ECB quantitative easing programme<sup>119</sup> is a paradigmatic example, an attempt to quell the crisis by additional centralisation of powers that might not have even been envisaged in the EU founding Treaties. This centralisation, admittedly, eases the economic situation in the most affected countries. By providing a fresh flow of supranational money it decreases the national dependence on the external transnational actors, and in so doing it improves at least the economic state of national and EU democracy. But this improvement is only ostensible.

Quantitative easing is already a form, admittedly a very rudimentary one, of a transfer union: from the rich north to the less prosperous south, which requires not only a democratic back-up, but also strong inter-state solidarity. As neither is present in the EU, the push towards a transfer union automatically generates the opposite reaction of a devolution. Rather than internalising the externalities of the economically poorly performing Member States, those Member States which are faring better economically push for a repatriation of competences from the supranational to the national level.<sup>120</sup>

In this case, economic centralism is replaced by national isolationism. Both are, obviously, normatively monistic solutions, not concerned with the preservation of the pluralist balance between the national and supranational level. The national isolationism is, moreover, clearly economically unfeasible in the context of the globalised economy. Additionally, neither of them is appealing from a democratic perspective. Centralising solutions result in the further substantive and institutional erosion of national democracy, whereas the national devolutionary demands inevitably detract from the substantive and institutional supranational democracy. A fine-tuned balance between the national and supranational democratic dimension is therefore necessary. By preserving the ethos of a common pluralist whole, some more flexible institutional and even constitutional solutions that would give a better expression to the diversity of the national and supranational expectations, needs and requirements, and which would therefore also better address the internal constraints on EU democracy, could be attempted.<sup>121</sup>

Having briefly touched upon the internal constraints, let us now look in some more detail at the external ones. Here, we focus on the relationship between the EU and CRAs as transnational actors. Can this relationship be expounded in a legally pluralist way and, if not, what needs to be changed? I want to promote legal pluralism conceived of as a principled legal framework. This requires the presence of several elements: (1) the factual existence of a legal plurality; (2) recognition and continuous commitment to its preservation; (3) a dialectic open-self entailing a reflexive attitude in and among the entities forming up a plurality; and (4) finally a commitment to the common pluralist whole.

<sup>119</sup> Grégory Claeys, Alvaro Leandro and Allison Mandra, 'European Central Bank Quantitative Easing: The Detailed Manual' (2015) Bruegel Policy Contribution 1 <<http://www.bruegel.org/publications/publication-detail/publication/872-european-central-bank-quantitative-easing-the-detailed-manual/>> accessed 4 August 2015.

<sup>120</sup> The United Kingdom is the most vocal proponent of this development.

<sup>121</sup> Matej Avbelj, 'Differentiated Integration—Farewell to the EU-27?' (2013) 14 German LJ 191.

The presence of the first element is established. There is the EU with its own pluralist legal order, and CRAs' private transnational legal entities as a source of private transnational administrative law. These two legal entities recognise their individual and separate legal existence as a matter of fact. However, it is far more questionable whether they are committed to preserving this plurality. This shadow of doubt pertains, in particular, to the EU. As CRAs have neither a normative ambition nor a practical capacity to subsume the EU legal order under themselves, we have few reasons to assume that they are not committed to preserving the EU legal order's continuous independent and autonomous existence. As we have seen, the same is not true of the EU. Its legislature has explicitly recognised that 'for the time being credit rating agencies are [still] important participants in the financial markets',<sup>122</sup> but this ought to be changed. As we have seen, it has been part of the EU's deliberate strategy to undermine the importance of CRAs; to intervene in their sphere by establishing its own public CRA or to bolster the existing smaller private CRAs; to tie CRAs to its territory and render them subject to its own regulatory regime. This is anything but a commitment to the CRAs' continuous meaningful independent existence. Instead, it exhibits a monist attitude, which however in the absence of a dialectic open-self is detectable on both sides.

Indeed, there are basically no data demonstrating that CRAs in any way take into account the consequences, direct or indirect, of their sovereign bond ratings for the rated entities beyond the immediate increase or decrease of the yields on the bonds under review. Even though, as has been illustratively argued, downgrading a state can be compared with 'dropping a bomb' on a country,<sup>123</sup> the CRAs fail to account for the (in)direct implications of their economic ratings on, for example, democracy in a rated entity. The EU, as we have seen, has reacted to this by upgrading and adjusting its economic structure to the challenges posed by the CRAs, but this has undermined its democracy, perhaps unintentionally, even further. The EU's response has also been less dialectically self-reflexive as anticipated by pluralism. Rather than investing more in reforms of its own constitutional structure, which has provided fertile grounds for an external pre-emption of democracy by CRAs, it has turned its critical edge against the CRAs, attempting to limit them in what they can or cannot do with their ratings. Finally, in the absence of a commitment to plurality, lacking a dialectic open-self, it is also very hard to expect the development of the commitment to the common whole—that is, of the awareness that the actions of CRAs and the EU are mutually interdependent, and that they cannot be treated in isolation as they affect each other as well as cause externalities beyond their own immediate realms.

<sup>122</sup> Recital 8 Regulation 462/2013.

<sup>123</sup> Frank Partnoy, 'The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies' (1999) 77 *Wash UL Quarterly* 619, 620, quoted in Darbellay (n 82) 153: '[T]here are two superpowers in the world today in my opinion. There's the United States and there's Moody's Bond Rating Service. The United States can destroy you by dropping bombs, and Moody's can destroy you by downgrading your bonds. And believe me, it is not clear sometimes who's more powerful.'

This brief review demonstrates that the relationship between the EU and CRAs as transnational legal actors has so far not been carried out in legally pluralist terms and that neither the proposed nor implemented EU reforms point in that direction. Simultaneously, these rather monistic reforms in which the EU strives to undermine CRAs, bring them back under its territorial regulatory regime and stretch its regulatory umbrella over the realm of transnational law, have so far not worked and are unlikely to do so in the future. The CRAs have simply overgrown not just the national regulatory capacity, but also that of the EU. The global financial markets' habit of obedience to CRAs vindicates their administrative legal character, irrespective of the EU's attempts to limit or undercut them. The monistic aspirations of EU institutions to bring CRAs under their control are therefore doomed to fail. A different approach is therefore called for—not only on the side of the EU, but also on behalf of the CRAs. They must be reminded that great power comes with great responsibility. As their products are not mere opinions or investment research results, but have a regulatory value,<sup>124</sup> the CRAs need to ensure that they meet the procedural and substantive rule-of-law standards and they, similarly, need to be aware of and mitigate the consequences of their ratings beyond the immediate economic ones. This is essentially what legal pluralism as a principled framework requires.

## 8 Conclusion

In conclusion, the argument is that had the EU and the CRAs conducted their relationship pursuant to the normative guidance of legal pluralism as a principled legal framework, the circumstances of the economic crisis, its outcome and the consequences for democracy in the EU and its Member States, described above, would have been less grave. For the future, it is thus necessary for the CRAs and the EU to develop an epistemic awareness about the common whole they form, the commitment to which will gradually grow. In their actions, they have to develop a reflexive self-openness that, on the side of CRAs, will require a reform of the key elements of the rating process along the lines of the rule of law and greater accountability, whereas the EU should simultaneously work on its internal democratic constitutional structure and engage externally with the CRAs on cooperative rather than dominating terms. This reflexive self-openness should, however, not remain exclusively on the level of aspiration or normative orientation, but should gradually adopt a more concrete institutional form. The key role in the EU should be played by the ESMA, with which the CRAs could engage either individually or through a common representative.

<sup>124</sup> Para 8 CRA III Regulation.



# Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?

*Antonia Baraggia\**

## Abstract

The crisis of the Eurozone and the risk of default for countries like Greece, Ireland and Portugal has led to the intervention of international and supranational institutions like the International Monetary Fund, the European Central Bank and the European Commission, which provided bailouts under a strict programme of conditionality measures to be implemented by the borrowing countries. The first part of the article explores the nature of conditionality measures and their impact on democratic governance within the European Union legal framework. The second part of the article considers the challenges posed by conditionality specifically to the European Union legal framework—including human rights protection and the democratic principle—both at the European Union and at national levels. The third part deals with the role of the national supreme courts in judging the legitimacy of such interventions, acting as watchdogs with respect to the democratic principle but, at the same time, creating a ‘short circuit’ of legitimation regarding decisions made by national governments (even if conditional).

## Keywords

Conditionality, Memorandum of Understanding, European Stability Mechanism, Euro Crisis, Democracy

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## 1 Introduction

Six years on from the eruption of the economic crisis within the European Union (EU)—in spite of its aftershock and the ongoing economic challenges endured by some Member States, as recent events in Greece have highlighted—it is now possible to begin to look with a detached gaze at the systemic effect of the crisis on the EU’s legal space. One of the most evident effects of the economic crisis is that it has turned into a sort of existential crisis for the EU as a whole. The economic emergency unveiled the limits of the EU project, and it heightened the still-unsolved issues of its governance and of its democratic deficit, threatening the legitimacy of the integration process. However,

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it also appeared clear that the future of the Member States could not be drawn outside the boundaries of the EU space. The interdependency of the Member States' economies, societies, and institutions has emerged as an incontrovertible fact of the EU space. Christian Joerges observed that European societies now sense that 'they are not or are no longer in a position to ensure responses to their concerns autonomously but instead depend on transnational co-operation'.<sup>1</sup>

Here, however, lies a sort of paradox. Joseph Weiler argued:

[E]veryone knows that a solution has to be European, within a European framework. And yet, it has become self-evident that crafting a European solution has become so difficult that the institutions and the European [Union]'s decision-making process do not seem to be engaging satisfactorily and effectively with the crisis, even when employing intergovernmental methodology; and that it is the governments, national leaders of a small club, who seem to be calling the shots. The problem is European, but Europe as such is finding it difficult to craft the remedies.<sup>2</sup>

In fact, the response of the Member States to the crisis has been a substantial use of international law when establishing economic mechanisms in order to sustain the economies of the Member States in difficulties, and, as it will be shown, this decision has been made even outside of the framework of the EU treaties.

This new economic governance drafted chiefly through international law has represented a challenge to the democratic principle—to the principle of accountability and the protection of human rights both at the EU and national levels. The emblematic instruments that have characterised the *modus operandi* of the Member States outside the EU legal framework are 'conditionality measures', legitimacy and legality of which is debated among scholars, since they influence and bind what, by definition, should be unbound: the States' sovereignty. Moreover, it has been argued that conditionality, as prescribed in a Memorandum of Understanding (MoU), 'amounts to a sell-out of the political autonomy and responsibility of democratically legitimate institutions, an exchange of obedience for money'.<sup>3</sup> Starting from this point, the first part of the present paper explores the nature of conditionality measures and their impact on democratic governance within the EU legal framework. This is analysed through a review of the early mechanisms adopted to tackle the Eurozone crisis—the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM)<sup>4</sup>—

1 Christian Joerges, 'Three Transformations of Europe and the Search for a Way Out of its Crisis' in Christian Joerges and Carolina Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance* (Hart Publishing 2014) 32.

2 Joseph Weiler, 'Europe in Crisis—On "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] Singapore JLS 248, 249.

3 Joerges (n 1) 34–35.

4 Consolidated Version of the European Financial Stability Facility Framework Agreement (adopted 7 June 2010, entered into force 18 October 2011) <[http://www.efsf.europa.eu/attachments/20111019\\_efsf\\_framework\\_agreement\\_en.pdf](http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf)> accessed 11 November 2015; Regulation (EU) 407/2010 of the Council of 11 May 2010 establishing a European Financial Stabilisation Mechanism [2010] OJ L118/1.

and their problematic ‘constitutionalisation’ with the adoption of the European Stability Mechanism (ESM),<sup>5</sup> through the amendment of article 136 of the Treaty on the Functioning of the European Union (TFEU)<sup>6</sup> and the case law of the Court of Justice of the European Union (CJEU).<sup>7</sup>

The second part of the paper considers the challenges posed by conditionality specifically to the EU legal framework—to human rights protection and to the democratic principle—both at the EU and national levels. The third part reviews the reactions of the national institutions to such an intrusive exercise of power. In particular, I debate the role of the national supreme courts in judging the legitimacy of such interventions, acting as watchdogs with respect to the democratic principle but, at the same time, creating a ‘short circuit’ of legitimisation regarding decisions made by national governments (even if conditional).

## 2 Emergence of conditionality as a leitmotiv of EU financial assistance

Until 2010—when the initial bilateral loans were negotiated and the first mechanisms were created in order to tackle the Greek crisis—the word ‘conditionality’ was, from an EU perspective, associated with the requirement of meeting certain conditions by candidate Member States in order that they might enter the Union.<sup>8</sup> Alternatively, ‘economic conditionality’ specifically referred to the policy of international financial institutions (ie, the International Monetary Fund (IMF)) of providing loans and financial aid to developing countries under a strict set of macroeconomic conditions.<sup>9</sup> The EU participates in financial aid provision to non-Member States through its ‘Macro-Financial Assistance to Non-EU Countries’ programme, a complement to IMF financing that has provided, since 1990, financial support to partner countries experiencing a balance of payments crisis.<sup>10</sup> In addition, article 143 TFEU provided the possibility of financial assistance to Member States facing difficulties in their balance of payments.

However, when the Greek crisis erupted in 2010, the EU did not have any instrument or procedure with which to tackle such a crisis in a Eurozone state. Therefore, based on a sort of ‘legal experimentalism’,<sup>11</sup> we witnessed the ‘translation’ of such policies from

<sup>5</sup> Consolidated Version of the Treaty establishing the European Stability Mechanism (adopted 2 February 2012, entered into force 27 September 2012) (ESM Treaty) <<http://esm.europa.eu/about/legal-documents/ESM%20Treaty.htm>> accessed 11 November 2015.

<sup>6</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

<sup>7</sup> Case C-370/12 *Pringle v Government of Ireland, Ireland and the Attorney General* [2012] EU:C:2012:756.

<sup>8</sup> See Marise Cremona, ‘Accession to the European Union: Membership Conditionality and Accession Criteria’ (2001) 25 *Polish YB Intl L* 219; Cesare Pinelli, ‘Conditionality and Enlargement in Light of EU Constitutional Developments’ (2004) 10 *ELJ* 354.

<sup>9</sup> Axel Dreher, ‘IMF Conditionality: Theory and Evidence’ (2009) 141 *Public Choice* 233.

<sup>10</sup> See European Commission, ‘Macro-Financial Assistance to non-EU Countries’ (2015) <[http://ec.europa.eu/economy\\_finance/eu\\_borrower/macro-financial\\_assistance/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/macro-financial_assistance/index_en.htm)> accessed 12 November 2015.

<sup>11</sup> Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 90.

within the context of the relations among Member States of the Economic and Monetary Union (EMU).<sup>12</sup> The story is well known: in May 2010, the Eurogroup signed a Draft Statement to activate, further to a request from the Greek government, stability support to Greece via bilateral loans centrally pooled by the European Commission.<sup>13</sup> From the start, the Statement prescribed a regime of strong conditionality,

on the basis of a programme which has been negotiated with the Greek authorities by the Commission and the IMF, in liaison with the [European Central Bank (ECB)]. The programme has been approved by the Greek Council of Ministers on 2 May and endorsed by the Eurogroup on the basis of a Commission and ECB assessment.<sup>14</sup>

These elements of conditionality were further detailed in a MoU signed by the Greek government and the European Commission on behalf of the euro-area Member States.<sup>15</sup>

Following this first ad hoc intervention, enacted by means of intergovernmental agreements, two temporary funds were settled in order to assure the financial stability of the Eurozone as a whole: the EFSM and the EFSF. Aside from the differences between the two instruments (the former was an emergency funding programme, established under the provision of article 122(2) TFEU; the latter was a limited liability company under Luxembourg law), a common feature of the interventions was the provision of a conditionality regime, settled in the MoU that the Commission would sign with the beneficiary Member State.

Conditionality is even at the core of the ESM, an intergovernmental organisation under public international law that was first introduced by the European Council in 2010 (but that only entered into force in September 2012) as a permanent financial assistance programme to replace the temporary EFSF and EFSM funds. Article 3 of the Consolidated Version of the Treaty establishing the European Stability Mechanism (ESM Treaty) affirms that the purpose of the ESM ‘shall be to mobilise and provide stability support under strict conditionality’ in favour of ESM members that experience or are threatened by severe financial problems—but it also points out that conditionality should be appropriate to the financial assistance instrument chosen. Moreover, article 12 of the ESM Treaty underlines that conditionality ‘may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions’. In article 13, the European Commission is entrusted, in liaison with the ECB and, wherever possible, with the IMF, with the task of negotiating (and signing) a MoU with the assisted Member State, and therein detailing the conditionality attached to the financial assistance facility.

<sup>12</sup> See European Commission, ‘Economic and Monetary Union’ (2015) <[http://ec.europa.eu/economy\\_finance/euro/emu/index\\_en.htm](http://ec.europa.eu/economy_finance/euro/emu/index_en.htm)> accessed 12 November 2015.

<sup>13</sup> Eurogroup, ‘Statement by the Eurogroup—Draft’ (2 May 2010) <[http://www.consilium.europa.eu/uedocs/cmsUpload/100502-%20Eurogroup\\_statement.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/100502-%20Eurogroup_statement.pdf)> accessed 11 September 2015.

<sup>14</sup> *ibid.*

<sup>15</sup> Greece, ‘Memorandum of Understanding on Specific Economic Policy Conditionality’ (3 May 2010) <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2010/pdf/ocp61\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf)> accessed 12 November 2015.

Conditionality emerges, from this sketch briefly drafted, as a leitmotiv of the different instruments adopted by the Member States, the European Commission and the IMF to face the debt crisis and to safeguard the financial stability of the euro-area. However, the legitimacy and legality of such measures, and of the procedures through which they have been adopted, are highly contested. From a substantive point of view, as asserted by Joerges, conditionality as prescribed in a MoU 'amounts to a sell-out of the political autonomy and responsibility of democratically legitimate institutions, an exchange of obedience for money'.<sup>16</sup> From the procedural perspective, these measures have been adopted outside the legal framework of the Treaties by intergovernmental agreements under which compliance with the 'no bailout' clause of article 125 TFEU is questionable.

### 3 'Constitutionalisation' of strict conditionality

The eruption of the debt crisis caught the EU institutions completely unprepared, and they thus adopted an experimental approach and endeavoured to tailor its institutional instruments to the exceptional circumstances determined by the crisis. When the first programme for Greece and the EFSF were put in place, the legal basis was found in article 122(2) TFEU, according to which:

Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned.

However, even this interpretation appeared ambiguous. For example, it might be argued that 'Greece and Ireland were not facing exceptional occurrences beyond their control (as the text of Art 122 requires), since their governments had contributed to create the sovereign debt crises which they were facing'.<sup>17</sup>

Further, the question of the legal basis of a financial assistance instrument arose following the proposal to establish the ESM as a permanent mechanism, in the light of which a revision of the Treaty was perceived as inevitable in order to resolve the legal uncertainties raised by the EFSM and the EFSF. The decision to start the revision procedure was taken during the same European Council of 28–29 October 2010 in which the creation of a permanent mechanism (ie, the ESM) was discussed. The amendment of article 136 TFEU was then adopted by Decision 2011/199,<sup>18</sup> according to the simplified revision procedure in article 48(6) TEU. Specifically, article 136(3) TFEU states that:

<sup>16</sup> Joerges (n 1) 34.

<sup>17</sup> Bruno de Witte, 'The European Treaty Amendment for the Creation of a Financial Stability Mechanism' (2011) 6 *Eur Policy Analysis* <[www.sieps.se/sites/default/files/2011\\_6epa.pdf](http://www.sieps.se/sites/default/files/2011_6epa.pdf)> accessed 8 July 2015.

<sup>18</sup> Decision (EU) 2011/199 of the European Council of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro [2011] OJ L91/1.

The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to *strict conditionality*.<sup>19</sup>

Thus, strict conditionality appears as a fundamental feature for the concession of financial assistance provided by a permanent crisis resolution mechanism settled in light of article 136 TFEU.

The same process of the constitutionalisation of strict conditionality was undertaken by the Court of Justice in its *Pringle* decision, in which the Court, stating the compatibility of the ESM with the Treaties and upholding the legitimacy of the revision of article 136, recognised strict conditionality as a requirement for financial assistance.<sup>20</sup> The Court also stated that strict conditionality works as a guarantee that ‘the mechanism will operate in a way that will comply with European Union law’.<sup>21</sup> In other words, the Court recognised that:

the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States’ economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy.<sup>22</sup>

According to this reasoning, conditionality is included in order to induce the beneficiary Member State to prudent fiscal policy, pursuing ‘the very same objectives which the no bailout clause is expected, but has not managed, to achieve’.<sup>23</sup>

Finally, yet importantly, the process of the institutionalisation of conditionality has been concluded with Regulation 472/2013, establishing ‘a single EU framework for conditional sovereign lending common for all form of financial assistance’.<sup>24</sup>

However, while strict conditionality may have attained constitutional status within the EU legal framework (ie, through CJEU case law and the amendment of article 136 TFEU), substantive doubts remain regarding its compatibility with principles such as democracy, accountability and sovereignty.

<sup>19</sup> Art 136(3) TFEU (emphasis added).

<sup>20</sup> Case C-370/12 *Pringle* (n 7) para 72.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid* para 143.

<sup>23</sup> Tuori and Tuori (n 11) 131. In this way, the CJEU also affirmed the compatibility of the ESM with the no bailout clause of art 125 TFEU.

<sup>24</sup> Michael Ioannidis, ‘EU Financial Assistance Conditionality After Two Pack’ (2014) 7 *ZaöRV* 61, 64; Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

## 4 Conditionality and the EU legal framework: Open issues

Despite the explicit provision in article 136 TFEU, the strict conditionality provided by the ESM still represents something of a black hole, prompting further questions. In this section, I will address some of the enduring issues concerning conditionality under the ESM.

First, the legal form of the ESM itself is examined, as it operates outside of the umbrella of EU law but within the realm of international law, which raises questions regarding its democratic nature and its accountability. The second issue concerns the legal nature and binding force of MoUs, which are still debated among legal scholars.<sup>25</sup>

### 4.1 'Escape' from the Treaties

One of the most debated issues of the anti-crisis mechanism was that they were instituted outside of the legal framework of the EU, but through the intergovernmental procedure, resulting in a sort of 'circumvention of Union law', and thereby a potential threat to European democracy and to the rule of law.<sup>26</sup> That is, since the first rescue programme was set up for Greece, and adopted in the form of bilateral agreement by Member States, to the EFSF, EFSM and the ESM, a sort of 'escape' from EU law has taken place, through the use of public international law or private international law.<sup>27</sup>

Of course, the main reasons for this recourse to measures outside the EU legal framework were the extraordinary circumstances of the debt crisis, and the need for flexibility and a prompt response to such events that would not be possible to achieve following the EU decision-making procedures.<sup>28</sup> Moreover, we have to acknowledge the likelihood that only Member States possessed the necessary fiscal means for rescue operations, not the Union.<sup>29</sup> Lastly, according to many commentators, the solution that led to the establishment of the ESM was perhaps inevitable in light of the formulation of article 136 TFEU: 'The fact that the amendment indicated that the mechanism would be established "by the Member States whose currency is the euro", left no other choice than the use of an international agreement.'<sup>30</sup>

However, we cannot ignore the consequences that such a choice had on the EU and national legal spheres. Critically, this intergovernmental approach signalled a step back

<sup>25</sup> See Xenophon Contiades and Ioannis A Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013) 202.

<sup>26</sup> Jonathan Tomkin, 'Contradiction, Circumvention, and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 German LJ 169, 180.

<sup>27</sup> On the different nature in the legal form of the mechanisms adopted, see Tuori and Tuori (n 11) 97.

<sup>28</sup> See Edoardo Chiti and Pedro Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CML Rev 683.

<sup>29</sup> Tuori and Tuori (n 11) 123.

<sup>30</sup> Bruno de Witte and Thomas Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: *Pringle*' (2013) 50 CML Rev 805, 812.

from the efforts made through the Treaty of Lisbon to enforce the democratic principle and accountability at the EU level. While the Treaty stressed the role of democracy and enforced the powers of the European Parliament and of national parliaments, the response to the crisis determined an affirmation of a sort of executive federalism, 'which would provide the template for a post-democratic exercise of political authority', as Jürgen Habermas has argued.<sup>31</sup>

Within the ESM context, no powers have been given to the European Parliament. The latter, after examining the Draft of the European Council Decision on the establishment of the ESM, proposed some changes to article 136, providing in particular that the rules for conditionality of financial assistance should have been determined by an EU regulation adopted under co-decision.<sup>32</sup> However, this proposal was discarded by the European Council, which provided only to strengthen the involvement of the European Commission in the operation of the ESM, thereby acting as an 'agent of the intergovernmental cooperation system'.<sup>33</sup>

Additionally, not only does the ESM elude any kind of democratic accountability, but nor are its operations subject to the constraints of the EU legal system, such as, for example, the subsidiarity control.<sup>34</sup> Another issue here concerns the applicability of the Charter of Fundamental Rights of the EU (Charter) to the EU institutions and to the Member States acting under the ESM.<sup>35</sup> For instance, the Court of Justice in the *Pringle* case ruled that the Charter did not bind the Member States because, when they established a stability mechanism such as the ESM, they were not implementing EU law, since the Treaties 'do not confer any specific competence on the Union to establish such a mechanism'.<sup>36</sup>

There is also some controversy in the application of the Charter to EU institutions acting in the context of the ESM—on this point, the Court of Justice was silent, leaving the issue open.<sup>37</sup> Textual interpretation of article 51 of the Charter refers the limit of 'implementing Union law' only to Member States, making the EU institutions bound by the Charter whether they act within the scope of EU law or not, and therefore even when they act as an ESM 'agent'. However, such a conclusion prompts further questions. For example, when the Commission signs MoUs *on behalf* of the ESM, is it bound by the Charter? In *Pringle*, the Court of Justice seemed to exclude such a conclusion:

<sup>31</sup> Jürgen Habermas, *The Crisis of the European Union: A Response* (Ciaran Cronin tr, Polity Press 2012) viii.

<sup>32</sup> European Parliament Resolution of 23 March 2011 on the Draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] P7\_TA(2011)0103.

<sup>33</sup> de Witte (n 17) 812.

<sup>34</sup> *ibid* 846.

<sup>35</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

<sup>36</sup> Case C-370/12 *Pringle* (n 7) para 180.

<sup>37</sup> Paul Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 *EuConst* L Rev 263. See also Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 *ELJ* 521.



[T]he duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.<sup>38</sup>

In other words, the fact that EU institutions within the ESM could not adopt binding decisions per se, but just on behalf of the ESM, seemed to render the question of the binding nature of the Charter superfluous in the eyes of the Court.<sup>39</sup> However, a different narrative has been sustained by Andreas Fischer-Lescano, who affirmed that article 51 of the Charter applies to the EU institutions ‘always and at all times’, even when they undertake tasks under the ESM.<sup>40</sup>

As this uncertain situation regarding the Charter demonstrates, the use of international instruments by Member States and the involvement of EU institutions in international organisations creates a sort of ‘free zone’ in which guarantees accorded by the application of EU law are weakened and their legitimacy is contested.

#### 4.2 A corollary: The controversial nature of MoUs

In this context, even the legal nature of MoUs is debatable and so deserves a brief reflection. Some scholars have argued that they constitute ‘simplified agreements’, in the sense of article V of the Articles of Agreement of the IMF, with no binding value nor restricting national sovereignty.<sup>41</sup> According to this reasoning, they are just political programmes, containing programmatic provisions.

In contrast, others recognise MoUs as international law treaties having binding force.<sup>42</sup> This interpretation is based on International Court of Justice (ICJ) case law, which does not exclude an agreement not having the traditional form of a treaty from being considered as an international law treaty.<sup>43</sup> The Portuguese Constitutional Court (*Tribunal Constitucional*) seems to agree with the latter view, having underlined the binding effect of MoUs in its Decision No 187/2013, which is further discussed below.<sup>44</sup> Conversely, the Greek Council of State (the Supreme Administrative Court of Greece) denied the categorisation of international treaty to MoUs, designating them instead as political programmes, ‘setting targets to be achieved and policies to be implemented in

<sup>38</sup> Case C-370/12 *Pringle* (n 7) para 161.

<sup>39</sup> Steve Peers, ‘Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework’ (2013) 9 *EuConst L Rev* 37. For a different view, see Salomon (n 37).

<sup>40</sup> Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy: The EU Institutions and the Conclusion of Memoranda of Understanding* (Nomos 2014) 9.

<sup>41</sup> See Afroditi Ioanna Marketou and Michail Dekastros, ‘A Multi-Level Legal Analysis—Reports by Country—Greece’ (*Constitutional Change through Euro Crisis Law*, 16 January 2014) <<http://eurocrisislaw.eui.eu/greece/>> accessed 15 April 2015; Articles of Agreement of the International Monetary Fund (adopted 22 July 1944, entered into force 21 December 1945) 2 UNTS 39, art V.

<sup>42</sup> Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International 1996) 42.

<sup>43</sup> Fischer-Lescano (n 40) 32, citing *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 7, 112.

<sup>44</sup> Portuguese Constitutional Court Decision No 187/2013 of 5 April 2013.



due time'.<sup>45</sup> Finally, other scholars consider MoUs as *sui generis* acts, not being formally international treaties but having binding effects.<sup>46</sup>

The unresolved issue of the nature of MoUs also impacts on their status within EU law and, in particular, on the question of whether or not they represent an implementation of EU law, and therefore if they are justiciable in the light of the Charter. According to CJEU case law, MoUs do not constitute an implementation of EU law. The Court ruled in that sense in Case C-128/12 *Sindicato dos Bancários do Norte and Others*, where it affirmed that it had no jurisdiction in evaluating the conformity of the national implementation law of the MoU with the Charter.<sup>47</sup> However, this conclusion of the Court of Justice is contested in the literature. In particular, it has been affirmed that 'MoUs do constitute an implementation of EU law'.<sup>48</sup> This assessment

is more prevalent since EU Regulation 472/2013 entered into force on 30 May 2013, which reinforces the link between EU law and financial aid awarded upon the basis of international law. Article 7(1) obliges the EU Member States that request or receive financial assistance to present a macroeconomic adjustment programme that 'shall fully observe' Art 28 [of the Charter].<sup>49</sup>

This provision applies to Member States that, on 30 May 2013, received financial assistance, and therefore it concerns Ireland, Portugal, Greece, and Cyprus.

## 5 Impacts of conditionality: Challenges and contradictions

Even under a substantial point of view, conditionality measures are highly contested. The first issue that will be addressed in this section concerns the content of MoUs signed under the ESM and providing the conditions of financial assistance. The latter range from financial measures to macroeconomic decisions that correspondingly affect fundamental social rights of the beneficiary States, in turn raising questions concerning a trade-off between human rights and financial stability.

Secondly, I address the democratic deficit of the ESM as seen from a national perspective and, in particular, by the marginal role reserved to national parliaments in the definition and in the acceptance of the conditions imposed through a MoU and signed by the benefitting government.

<sup>45</sup> Contiades and Tassopoulos (n 25) 203.

<sup>46</sup> Fischer-Lescano (n 40) 32.

<sup>47</sup> Case C-128/12 *Sindicato dos Bancários do Norte and Others v BPN—Banco Português de Negócios, SA* [2013] EU:C:2013:149, paras 10–14. See also Case C-434/11 *Corpul Național al Polițiștilor v Ministerul Administrației și Internelor (MAI) and Others* [2011] EU:C:2011:830.

<sup>48</sup> Florian Rödl and Raphael Callsen, 'The Struggle for Union Rights under the Euro and the Dialectics of Social Integration' in Christian Joerges and Carolina Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance* (Hart Publishing 2014) 117.

<sup>49</sup> *ibid.*

## 5.1 Conditionality and the 'human rights trade-off'

Moving from a formal to a substantial approach regarding strict conditionality and MoUs, the scenario is even more complex, and perplexing questions remain unresolved.

It is generally agreed that austerity measures have had an extensive impact in the field of social rights, such as in health care, social protection and education—areas that, as expressed by the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) in the Treaty of Lisbon (*Lissabon Urteil*), pertain to the core of national sovereignty.<sup>50</sup> Furthermore, this impact has often resulted in an encroachment of fundamental rights.<sup>51</sup> To consider this issue in more detail, I will analyse the MoUs negotiated by the Troika (the IMF, EU and ECB) and signed by Greece,<sup>52</sup> Portugal,<sup>53</sup> and Ireland.<sup>54</sup>

A common area of intervention of MoUs is that of labour law—probably one of the areas most affected by conditionality. In the case of Greece, its conditionality measures prescribed, among other things, a reduction of the highest pensions and a reduction of the Easter, Summer and Christmas bonuses and allowances paid to civil servants.<sup>55</sup> In Ireland, the MoU laid down an obligation for a reduction in the minimum wage level and, in Portugal, a reduction of unemployment insurance benefits.<sup>56</sup>

Even health and education rights have been affected by the conditionality provisions: the MoUs for Greece required a reduction in pharmaceutical expenditure, cuts in health care services, and the implementation of a comprehensive reform of the health care system.<sup>57</sup> Obligations affecting the right to education provided for a reduction of costs and for a more efficient use of resources.<sup>58</sup> In Ireland, the MoU prescribed an increase in student contributions toward tertiary education.<sup>59</sup> It has been argued that the conditions settled by the MoUs imposed a 'welfare state retrenchment unprecedented

<sup>50</sup> Germany's Federal Constitutional Court Judgment, 2 BvE 2/08 (2009).

<sup>51</sup> Fischer-Lescano (n 40) 32.

<sup>52</sup> European Commission, 'The Second Economic Adjustment Programme for Greece—Fourth Review' (2014) European Economy Occasional Papers 192, 181 <[http://www.efsf.europa.eu/attachments/ocp192\\_en.pdf](http://www.efsf.europa.eu/attachments/ocp192_en.pdf)> accessed 12 September 2015.

<sup>53</sup> 'Portugal: Memorandum of Understanding on Specific Economic Policy Conditionality' (17 May 2011) (Portugal MoU) <[http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf)> accessed 10 April 2015.

<sup>54</sup> 'Ireland: Memorandum of Understanding on Specific Economic Policy Conditionality' (3 December 2010) (Ireland MoU) <[http://ec.europa.eu/economy\\_finance/articles/eu\\_economic\\_situation/pdf/2010-12-07-mou\\_en.pdf](http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf)> accessed 10 April 2015.

<sup>55</sup> European Commission, 'Second Economic Adjustment Programme for Greece' (n 52) 47–50.

<sup>56</sup> Ireland MoU (n 54) 5; Portugal MoU (n 53) 21.

<sup>57</sup> European Commission, 'Second Economic Adjustment Programme for Greece' (n 52) 39–43.

<sup>58</sup> *ibid* 44–45.

<sup>59</sup> Aoife Nolan, 'Welfare Rights in Crisis in the Eurozone: Ireland' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014) European University Institute LAW Working Paper 2014/05, 30, 33–35 <<http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>> accessed 22 December 2015.

in the post-war period.<sup>60</sup> Furthermore, conditionality also included a massive process of privatisation of public sector operations (such as water, electricity and transportation services and companies).<sup>61</sup>

Prominent legal scholars have addressed this level of austerity measures as a violation of fundamental principles entrenched in national constitutions.<sup>62</sup> Referring to the Greek case, Katrougalos observed that the above-mentioned measures violated structural constitutional principles, such as the principle of equality and fundamental social rights (as provided by articles 21, 22 and 23 of the Greek Constitution).<sup>63</sup> Recently, the supreme courts of Greece and Portugal ruled against the compatibility of such measures with their respective constitutions arising in such a way as the bastions of national democracy and of human rights. Even at the supranational level, these austerity measures have attracted doubts concerning their compatibility with the provisions of the Charter and with the European Social Charter.<sup>64</sup> The European Committee of Social Rights condemned Greece for violation of articles 10 and 12 of the European Social Charter because of its austerity legislation enacted in 2010.<sup>65</sup>

Last but not least, we cannot ignore the popular perception of such measures. The recent result of the political election in Greece as well as the protests in Athens, Madrid and Lisbon indicate that citizens 'experience a rigid dis-embedding of their markets and cannot believe that austerity will lead to sustainable societal reform.'<sup>66</sup> The negative impact of the austerity measures, the widespread discontent across both debtor and creditor countries, and the encroachment of fundamental rights all suggest a need to 'complement austerity with ideas to strengthen the social dimension of the EMU' and the human rights side of the EU—to date, a 'road not taken.'<sup>67</sup>

## 5.2 Conditionality and the democratic trade-off: Parliaments as 'side players'

In addition to the human rights issue, the other major objection to regimes of strict conditionality is a democratic concern—specifically, the marginalisation of parliaments in the decision-making process that led to the negotiation of the MoUs and in the

<sup>60</sup> Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2013) 41 *Industrial LJ* 276, 277.

<sup>61</sup> European Commission, 'Second Economic Adjustment Programme for Greece' (n 52) 26–29; Ireland MoU (n 54) 10; Portugal MoU (n 53) 13–14.

<sup>62</sup> Salomon (n 37) 532–35.

<sup>63</sup> George Katrougalos, 'The Greek Austerity Measures: Violations of Socio-Economic Rights' (*Intl J Const L Blog*, 29 January 2013) <[www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights](http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights)> accessed 10 April 2015.

<sup>64</sup> Revised European Social Charter (adopted 3 May 1996, entered into force 1 July 1999) 2151 UNTS 277.

<sup>65</sup> *Federation of employed pensioners of Greece (IKA-ETAM) v Greece* (Complaint) European Committee of Social Rights No 76 (16 January 2012).

<sup>66</sup> Joerges (n 1) 43.

<sup>67</sup> *ibid.* See also Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *AJIL* 649.

scrutiny of the conditions of financial assistance. As Ioannidis advises, in the context of EU financial assistance, three different categories of parliaments can be distinguished: the European Parliament, the national parliaments of the creditor countries and the national parliaments of the assisted countries.<sup>68</sup> Regarding the European Parliament, the procedure to accord financial assistance within the framework of the ESM did not reserve much space for parliamentary control. As noted above, according to article 13 of the ESM Treaty, the European Commission—in liaison with the ECB and, wherever possible, together with the IMF—is entrusted with the task of negotiating, with the ESM Member State concerned, a MoU detailing the conditionality attached to the financial assistance facility. Following the approval of the Board of Governors, the European Commission signs the MoU on behalf of the ESM, and the Board of Directors approves the financial assistance facility agreement detailing the financial aspects of the stability support to be granted.<sup>69</sup> Note, too, that the European Commission—in liaison with the ECB and the IMF—is entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.<sup>70</sup> Thus, the pivotal role is exerted, on one side, by the executive branch (Board of Governors, EU Commission) and, on the other, by the technocratic branch (Board of Directors, IMF, ECB) of the ESM.

Regulation 472/2013 introduced some negligible procedures regarding the involvement of the European Parliament, in particular in the area of the exchange of information and views. Article 7 of the Regulation provides that, in the case of a Member State requesting financial assistance, the ESM authorities have to draft a macroeconomic adjustment programme, and the Commission orally informs the Chair and Vice-Chairs of the competent committee of the European Parliament of the progress made in the preparation of the draft macroeconomic adjustment programme.<sup>71</sup> Moreover, the competent committee of the European Parliament may offer the opportunity to the Member State concerned and to the Commission to participate in an exchange of views on the progress made in the implementation of the macroeconomic adjustment programme.<sup>72</sup> However, even if the provisions of Regulation 472/2013 represent a breach into the executive-dominated procedures, the role of the European Parliament is confined to the exchange of information, which has nothing to do with the exercise of parliamentary control and accountability. Neither do the provisions of this Regulation carve out a role for the European Parliament in the decision-making process. As Ioannidis has pointed out, a situation of accountability would require not only duties of information, but also the possibility for the European Parliament to impose sanctions if not satisfied with the information and justification given.<sup>73</sup>

<sup>68</sup> Ioannidis (n 24) 100.

<sup>69</sup> Art 13 ESM Treaty.

<sup>70</sup> *ibid.*

<sup>71</sup> Art 7(4) Regulation 472/2013.

<sup>72</sup> Art 7(10) Regulation 472/2013.

<sup>73</sup> Ioannidis (n 24) 103.

With regard to national parliaments, their power varies in different Member States, and in particular in creditor and debtor countries. While in the former (namely Germany, France, and Austria) national parliaments have strengthened their control powers and their participation in economic and financial matters, in the latter (Greece, Portugal, and Spain in particular) parliaments had to comply with austerity programmes and with the rules set up at the European level.<sup>74</sup> In recipient countries, therefore, national parliaments remain in the penumbra of the decision-making process on financial programmes and on conditionality. Negotiations of conditions are undertaken by governments, with parliaments confined to the role of ratification of the decision taken in other fora, without the chance to assure democratic accountability control on their respective governments.

However, even the role of national parliaments in the transposition of MoUs and other financial agreements into the national legal orders depends on the recognised value of the international agreement and on specific constitutional provisions in each Member State. For example, in Ireland, MoUs are not international agreements, and therefore they do not require authorisation by the national parliament.<sup>75</sup> In Portugal, on the other hand, the question was seriously debated, as the nature of MoUs was considered to be controversial. The MoU was approved by the government, without any parliamentary contribution. However, it has been argued that, 'as the obligations included in the MoU fall into Parliament competences, it should have been actually approved by the Parliament'.<sup>76</sup> The Portuguese parliament has played, though, a fundamental role in discussing and approving, or not approving, bills that implement measures agreed in its MoU. Different again and much more troubled has been the solution adopted by Greece. As already mentioned, there has been great national debate about the nature of MoUs. In particular, the issue was debated in parliament during the approval of Law 3845/2010.<sup>77</sup> At the time of the first rescue programme, MoUs had been recognised as part of the nature of the political programme, and therefore not requiring parliamentary approval. MoUs were, however, annexed to Law 3845/2010, which was approved by the Greek parliament on 6 May 2010. It has been asserted that the Greek parliament, by voting on Law 3845/2010,

sanctioned from the point of view of the domestic legal order the various acts through which political actors (other than the Greek state) cooperating in the Greek bailout had tried to

<sup>74</sup> Arthur Benz, 'An Asymmetric Two-level Game: Parliaments in the Euro Crisis' in Ben Crum and John Erik Fossum (eds), *Practices of Interparliamentary Coordination in International Politics: The European Union and Beyond* (ECPR Press 2013) 135–37.

<sup>75</sup> Darren O'Donovan, 'IMF Conditionality, the Irish Constitution and the Need for a Dáil Vote on the Bailout Agreement' (*Human Rights in Ireland*, 22 November 2010) <<http://humanrights.ie/constitution-of-ireland/imf-conditionality-the-irish-constitution-and-the-need-for-a-dail-vote-on-the-bailout-agreement/>> accessed 21 November 2015.

<sup>76</sup> See Rita de Brito Gão Hanek and Daniele Gallo, 'A Multi-Level Legal Analysis—Reports by Country—Portugal' (*Constitutional Change through Euro Crisis Law*, 2 February 2015) <<http://eurocrisislaw.eui.eu/portugal/>> accessed 4 July 2015.

<sup>77</sup> Law 3845/2010 of 6 May 2010, Government Gazette A 65 (Greece).

invest in the appropriate legal form and to ground their political decisions as provided in the basic legal instrument (treaties, charters and so forth) out of which they derived their authority.<sup>78</sup>

However, the procedure adopted for the second rescue programme, which was considered to be a simplified agreement, was different. The Greek parliament passed Law 4046/2012 regarding the approval of the new Loan Agreement with the IMF on 12 February 2012, before the signature of the MoUs by the government. In this way, the country's parliament approved the acts of the financial assistance and delegated their signature to the Minister of Finance.

Overall, Regulation 472/2013 has introduced limited prerogatives for national parliaments, in the form of information rights—but even weaker privileges were reserved for the European Parliament. Certainly, according to the domestic rules of procedures, national parliaments are not prevented from exercising their legislative powers when called to adopt the national measures necessary to implement the conditions established in the MoUs and in bailout programmes. However, the power of a national parliament to refuse to implement the programmes signed by its government remains only written on paper. Moreover, the conditions of assistance programmes have already been decided by the Troika and the executive: national parliaments have just to accept the deal or maybe 'draw some broad red lines of accepted policies rather than making concrete decisions'.<sup>79</sup>

National parliaments are forced to accept the conditions settled in bailout programmes, since they are under a sword of Damocles with respect to the possibility of losing economic assistance. This marginalisation of national parliaments is in conflict with the spirit of the Treaty of Lisbon, which positions democracy at the heart of the EU, providing for the enhancement of the role of national parliaments, both through political dialogue and the 'early warning system' mechanism.<sup>80</sup> The *sui generis* nature of MoUs and of the related agreements, which cannot be subject to subsidiarity controls as they are not acts of the EU institutions, has weakened the role of national parliaments in the EU space, which they had earlier gained after being appointed for years the 'losers of integration'.<sup>81</sup> Moreover, as Arthur Benz argued, 'the crisis further weakened national parliaments in some of those Member States which, according to research findings, had been assessed as comparatively weak in any case'.<sup>82</sup> Identifying this democratic concern confirms what has already emerged through analysing the human rights issue: the legislation of the debt crisis and, in particular, the conditionality regime represent a sort of 'enclave' within the EU legal framework, in which the basic commitments of the EU

<sup>78</sup> Contiades and Tassopoulos (n 25) 199–200.

<sup>79</sup> Ioannidis (n 24) 103.

<sup>80</sup> Arts 2, 4, 12 TEU.

<sup>81</sup> As Habermas observes, national parliaments 'cannot avoid the suspicion of merely rubber-stamping prior decisions taken elsewhere—that is, merely reproducing them in a more concrete form. This suspicion inevitably corrodes any democratic credibility': Habermas (n 31) 130.

<sup>82</sup> Benz (n 74) 137.

as a constitutional project, above all democracy and human rights protection, seem to have been broken up.

## 6 Role of the national judiciary: The case of the Portuguese Constitutional Court

Conditionality measures and austerity policies suffer, as has been demonstrated above, from a democratic deficit: they are negotiated by supranational authorities, whose nature is executive or technical, and by national governments. The legislatures, both at national and at EU level, are excluded from the decision-making process and, even when there is a kind of involvement, it is either limited to informative duties or it lacks effectiveness. In addition, austerity measures and their national implementation affect fundamental rights and social rights of citizens.

In this scenario, in which traditional democratic circuits have been circumvented, constitutional courts would seem to offer a crucial role in protecting fundamental rights enshrined in national constitutions that were violated by some of the legislation enacted to face the debt crisis.<sup>83</sup> However, the price of the activism of a national judiciary in striking down legislation implementing international financial commitments might be high, both in financial and in political terms. This is why, at least at the very beginning of the assistance programmes, national courts adopted a cautious approach in assessing the constitutionality of the austerity measures. The Greek crisis case law, for example, shows a very deferential attitude towards the decisions taken to implement the conditions of the MoUs: the Greek Council of State in Decisions No 668/2012 and No 1685/2013 upheld the measures prescribed in the first Memorandum, grounding its ruling on the state of exception and on the need to enhance the financial credibility of Greece, with respect to the commitments assumed with the Troika.<sup>84</sup>

Emblematic of this dilemma is the approach that the Portuguese Constitutional Court, the most active constitutional court in dealing with debt crisis legislation, adopted towards the austerity measures introduced in the country on the impulse of the Troika, with particular reference to social rights protection. As Cristina Fasone has recorded, in the constitutional case law dealing with the Eurozone crisis, the Portuguese Constitutional Court gradually abandoned the deferential approach towards the legislator and, having issued warnings to the government and to the parliament, finally 'dropped the bomb' in

<sup>83</sup> For a comparative overview, see Cristina Fasone, 'Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective' (2014) European University Institute Working Paper MWP 2014/25 <[http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP\\_WP\\_2014\\_25.pdf](http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf)> accessed 4 July 2015.

<sup>84</sup> See Christina M Akrivopoulou, 'Facing l'Etat d'Exception: The Greek Crisis Jurisprudence' (*Intl J Const L Blog*, 11 July 2013) <[www.icconnectblog.com/2013/07/facing-letat-dexception-the-greek-crisis-jurisprudence/](http://www.icconnectblog.com/2013/07/facing-letat-dexception-the-greek-crisis-jurisprudence/)> accessed 30 June 2015.



2013 with Decision No 187/2013, in which the Court struck down the pay and pension cuts for public employees.<sup>85</sup>

In the very first decision concerning the crisis legislation, the Portuguese Constitutional Court maintained the traditional self-restraint, upholding the provisions of the State Budget Law for 2011 on the cutback of public salaries.<sup>86</sup> In this case, the Court dismissed the challenges to the Budget Law, ruling that there was no violation of the principle of equality, the principle of protection of legitimate expectations, or the principle of proportionality. According to the Court, the transitional nature of the measures challenged, due to the '*conjuntura de absoluta excepcionalidade*' (absolutely exceptional context), justified the cuts to public salaries.

However, a few months later, the position of the Court moved from this traditionally deferential approach to parliament to a challenging one: in its Decision No 353/2012, the Court declared several provisions of the State Budget Law for 2012 unconstitutional.<sup>87</sup> In particular, according to the Court, the norms providing for the suspension of Christmas and holiday-month payments during 2012–14 for public sector workers and retirees were unconstitutional because they violated the principle of equality, requiring the just distribution of public costs between all citizens in proportion to each one's financial capacity. This decision is interesting from a couple of different points of view. The first one to be underlined is the fact that, even while declaring the proposed provisions unconstitutional, the Court restricted the temporal effects of the declaration of unconstitutionality, ruling that it did not apply to the suspension of payment of Christmas and holiday bonuses with respect to 2012. The Court assessed that, since the execution of the 2012 Budget was already well underway, the consequences of an unqualified declaration of unconstitutionality could endanger the maintenance of the agreed financing, and thus the state's solvency.<sup>88</sup> The second remarkable aspect of this decision is the fact that the Court defined, for the first time, that the MoUs on the basis of which the contested measures had been adopted were binding instruments of international law and EU law. However, this did not prevent the Court from affirming that:

[T]he extremely serious economic/financial situation and the need for the measures that are adopted to deal with it to be effective cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key structural principles of the state based on the rule of law, and this is true namely with regard to parameters such as the principle of proportional equality.<sup>89</sup>

<sup>85</sup> Fasone (n 83) 24. Portuguese Constitutional Court Decision No 187/2013 (n 44).

<sup>86</sup> Portuguese Constitutional Court Decision No 396/2011 of 21 September 2011; State Budget Law No 55-A/2010 of 31 December 2010 (Portugal).

<sup>87</sup> Portuguese Constitutional Court Decision No 353/2012 of 5 July 2012 <<http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html>> accessed 17 November 2015. State Budget Law No 64-B/2011 of 30 December 2011 (Portugal).

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*



A decisive aspect in the Court's overturning of its precedents was the fact that the cuts to remunerations and pensions lost their original 'extraordinary and provisional' nature due to the emergence of the economic crisis, and instead seemed destined to endure for years, with terrible and persistent consequences for the levels of remuneration for the specified categories of workers.<sup>90</sup>

After this 'warning', the Portuguese Constitutional Court, in subsequent case law, adopted a progressively more 'activist' approach. The foremost case of this period of jurisprudence was the above-mentioned Decision No 187/2013.<sup>91</sup> The Court declared as unconstitutional several provisions of the Budget Law for 2013, namely, the suspension of the additional holiday month of salary for public administration staff (and also for teachers and researchers), the suspension of the holiday month of pensions for public and private sector retirees, and the duty imposed upon the beneficiaries of unemployment subsidies to pay social security contributions of 6 per cent instead of 5 per cent, in violation of the principles of equality and proportionality.<sup>92</sup> Thus, it was argued:

[T]he Portuguese jurisprudence represents a judicial response to austerity measures. (...) In this way, the [Portuguese Constitutional Court], relying on the principle of equality (and on its corollaries), seems to have urged the legislator to better exercise the competences and powers it seems to have given up in favour of international and European constraints.<sup>93</sup>

Furthermore:

[S]uch decisions can be paradoxically regarded as aimed at protecting the national legislator, by giving back to it the power to decide on some critical issues, under, evidently, the guidance provided by the [Portuguese Constitutional Court] as regards the respect of fundamental rights under the national Constitution.<sup>94</sup>

However, this decision to strike down some of the austerity measures taken based on the MoUs produced divisions both in the national political situation and in the relationship between Portugal and the Troika, as was perhaps inevitable. Regarding the former, the Prime Minister, following the decision of the Constitutional Court, threatened to resign and, later on, the Minister for Parliamentary Affairs and the Minister of Finance both left their respective posts. As for Portuguese relations with the Troika and the EU, Portugal had to renegotiate the conditions of its financial assistance programme. In particular, during the seventh update of its MoU, a point on 'legal safeguards' was added, explicitly stating

<sup>90</sup> *ibid.*

<sup>91</sup> Portuguese Constitutional Court Decision No 187/2013 (n 44); State Budget Law No 66-B/2012 of 31 December 2012 (Portugal).

<sup>92</sup> Portuguese Constitutional Court Decision No 187/2013 (n 44).

<sup>93</sup> Roberto Cisotta and Daniele Gallo, 'The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal' in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014) European University Institute LAW Working Paper 2014/05, 92–93 <<http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>> accessed 30 June 2015.

<sup>94</sup> *ibid* 91.

that the Portuguese authorities ‘will take a number of steps aimed at mitigating legal risks from future potential Constitutional Court rulings.’<sup>95</sup> However, the Constitutional Court went on to follow, in subsequent rulings, the trend it had established with Decision No 187/2013. In Decisions No 602/2013, No 862/2013, No 413/2014 and No 575/2014, the Court once more struck down provisions concerning labour law (for example, legislative measures that would make it easier for the government to dismiss civil servants, cuts in public wages) and the public pension system’s reform, thereby affecting its relation with the government and the legislature.<sup>96</sup>

It can be argued that the reaction of the Portuguese Constitutional Court to the austerity measures set to comply with international agreements is emblematic of the new challenges that economic governance poses to national democracy. It may well be ‘quite *natural* for a Constitutional Court to evaluate the reasonableness—in terms of proportionality, as well as of their suitability to achieve the prefixed goals—of measures adopted by a government, also if previously agreed on the international plane,’<sup>97</sup> but we cannot help but notice that the struggle engaged in by the Portuguese Constitutional Court had an effect both on the balance of powers in the domestic domain, reshaping the relations between the government and parliament, as well as on the supranational level, requiring ongoing negotiations of conditions among the actors involved, determining in this way a sort of ‘short circuit’ of legitimization.

## 7 Conclusions

This article has endeavoured to shed light on the ‘black holes’ that the adoption of the instrument of conditionality within the EMU implies, both at national and at EU levels.

<sup>95</sup> In particular, the following ‘legal safeguards’ were added:

First, expenditure reforms will be designed with the principle of public/private sector and intergenerational equity in mind as well as the need to address the sustainability of social security systems. Second, legislation underpinning the expenditure reforms will be duly justified on compliance with the fiscal sustainability rules in the recently ratified European Fiscal Compact which now ranks higher than ordinary legislation. Third, the government will rely as much as possible on general laws rather than on one-year budget laws consistent with the structural nature of the reforms. This also opens the possibility of prior constitutional review of said laws, thus allowing early reaction on the part of the government in case these reforms raise constitutional issues.

IMF, ‘Portugal: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding’ (12 June 2013) <[www.imf.org/external/np/loi/2013/prt/061213.pdf](http://www.imf.org/external/np/loi/2013/prt/061213.pdf)> accessed 7 July 2015. See also Miguel Nogueira de Brito, ‘Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis’ in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (2014) European University Institute LAW Working Paper 2014/05, 70 <<http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>> accessed 30 June 2015.

<sup>96</sup> Portuguese Constitutional Court Decisions: No 602/2013 of 20 September 2013; No 862/2013 of 19 December 2013; No 413/2014 of 30 May 2014; No 575/2014 of 14 August 2014.

<sup>97</sup> Cisotta and Gallo (n 93) 91 (emphasis in original).

They represent controversial instruments, as well as an expression of a new model of economic governance raised by the incapacity of the EU institutions to react to the debt crisis and justified by the attending state of emergency.

The legitimacy of such conditionality measures, adopted through the framework of international law, as well as their legally binding nature, are the subject of much debate. What is certain is that they represent an exercise of authoritarian power ‘neither based upon democratic process, nor upon an exchange of reasons among equals.’<sup>98</sup> They represent an *enclave of international law within the EU legal framework*, where the core principles of the EU project can be derogated by reason of a state of emergency determined by the debt crisis and the risk of default of some Member States. The result has been a step backwards to a model of intergovernmental relationships based on a clear asymmetry between debtor and creditor Member States, where ‘it is the creditor states that call the shots, leaving the debtors the simple choice of compliance or exit.’<sup>99</sup>

Instead of moving toward an ever-closer Union, this approach to managing the debt crisis has unveiled the weakness of the EU, in terms of political and fiscal powers, previously hidden, on the one hand, by the realisation of the monetary union and, on the other hand, by the narrative of the EU as a fundamental rights organisation, developed after the entry into force of the Charter. In other words, the Eurozone crisis has shed light on the unresolved compromises upon which the EU has been developed, reflecting ‘the different perspectives on the Union that have accompanied the latter’s institutionalization as a political system.’<sup>100</sup> In particular, the constraints imposed by the MoUs over basic social rights enshrined in national constitutions have revealed the need for a European social model, as well as highlighting a ‘lack of a Union-level monitoring mechanism and (...) the non-existent commitment of key Union institutions.’<sup>101</sup>

Moreover, the democratic trade-off brought about by the conditionality measures can be seen as a synecdoche for the democratic crisis of the EU as a whole. The marginal role of parliaments, with particular reference to the European Parliament, is a symbol of the democratic disconnect of the EU, stressed by the debt crisis management. Moreover, the lack of accountability that characterised decisions taken by the Troika cast shadows over the democratic principle at the EU level, and stressed what has been defined as the model of executive federalism.<sup>102</sup>

In sum, Europe’s debt crisis management has highlighted the paradoxes and the compromises upon which the EU legal framework has been built. Whichever model ultimately prevails, the contentious nature of past approaches may suggest its future

<sup>98</sup> Joerges (n 1) 34.

<sup>99</sup> Ben Crum, ‘Saving the Euro at the Cost of Democracy?’ (2013) 51 JCMS 614, 622.

<sup>100</sup> Sergio Fabbrini, *Which European Union?* (CUP 2015) xvii.

<sup>101</sup> Tuori and Tuori (n 11) 241.

<sup>102</sup> Habermas (n 31) 6. See also Federico Fabbrini, ‘From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of EMU’ in Federico Fabbrini, Ernst H Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015).

direction: 'Rights must be complemented by political empowerment and civic solidarity for the Union to be able to develop a genuinely legitimate form of economic and political governance.'<sup>103</sup>

<sup>103</sup> Miguel Poiates Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) European University Institute RSCAS PP 2012/11, 1 <[http://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS\\_PP\\_2012\\_11rev.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1)> accessed 7 June 2015.

# Economic Emergency and the Loss of Faith in the Greek Constitution: How Does a Constitution Function when it is Dying?

*Afroditi Ioanna Marketou\**

## Abstract

The legal story of the Eurozone crisis is by now well known. Most commentators have focused on the impact of the crisis on the organisation of the European Union. However, the dominant Euro-centric discourse has neglected the important changes brought about by the crisis in the constitutions of 'weak' Member States—those who have received financial assistance. Domestic scholars are typically unable to offer a coherent account, let alone justification, of these transformations from a constitutional law point of view. Outside the domestic sphere, constitutional change within 'crisis-hit' countries has not attracted enough attention; it is considered not to be the problem, but rather the solution or an inevitable side-effect of the European developments. Still, it is precisely these 'weak' states that form exemplary cases for the study of how economic emergency and European integration operate in the domestic sphere of liberal constitutional democracies. The purpose of this paper is to shed some light on this 'dark side' of the Eurocrisis, through the study of a particular, albeit exemplary, national case: Greece. How was the Greek Constitution deconstructed by legal means? How do domestic actors justify the significant constitutional-political changes brought about by the Eurocrisis? How can we observe the loss of faith in the Greek Constitution?

## Keywords

Economic Emergency, Eurocrisis, Greek Constitutional Politics, Constitutional Change, Constitutional Faith

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The legal story of the Eurozone crisis (Eurocrisis) is now well known. Most commentators have focused on the impact of the crisis on the organisation of the European Union (EU). In particular, the legal discussion concentrated on the compatibility of the crisis-related

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measures to the general legal framework of the EU and, more recently, on aspects related to European fundamental rights and the rule of law. In recent analyses, the scholarship has focused on institutional or cultural-ideological elements behind the Eurocrisis changes in order to identify possible future developments. It is now widely acknowledged that the changes following the Eurocrisis have fundamentally shifted the EU as an organisation. It is thus more relevant to analyse the potential of these changes, rather than further discuss their legality. Analyses from the viewpoint of national constitutional law have been rare. When scholars turn to the matter, they are mostly interested in the German Basic Law and the position of the *Bundestag* or *Bundesverfassungsgericht* towards the new situation established at the EU institutional and legal levels.<sup>1</sup>

However, the dominant Euro-centred discourse has neglected the impact of the financial crisis on the constitutions of 'weak' Member States, namely those that have received financial assistance. Domestic scholars have failed to offer a coherent account, let alone justification, of the developments from a constitutional law point of view. At the same time, changes within 'crisis-hit' countries have not attracted enough attention outside the domestic sphere; these are considered not to be the problem, but rather the solution or an inevitable side effect of the general European developments. Still, it is precisely these Member States that form exemplary cases for the study of how economic emergency operates in the domestic sphere of liberal constitutional democracies. Accounts of European institutional and constitutional developments, which have so far mostly focused on the discourse of the EU legal actors, would benefit from an empirical basis in the domestic spheres as well. More generally, the striking constitutional political transformations occurring without constitutional amendment in these Member States are of extreme importance for legal scholars, since they reveal much about the function and meaning of modern constitutions.

The purpose of this paper is to shed some light on this 'dark side' of the Eurocrisis through the study of a particular, albeit exemplary, national case. Greece has been at the epicentre of the crisis and was the first Eurozone Member State to receive financial assistance. In domestic public debates, Greece has long been considered the major cause of the Eurocrisis: a weak and corrupt Member State, needing the help of its strong partners in order to regain access to the markets.<sup>2</sup> When the crisis hit Greece, there was no European financial assistance mechanism. The Greek Loan Facility was thus initially agreed on an intergovernmental basis with the participation of the International Monetary

<sup>1</sup> For another perspective, see the contributions in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014). See also the contributions in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013); Emiliós Christodoulidis, 'Europe's Donors and Its Supplicants: Reflections on the Greek Crisis' in Johan Willem Gous Van der Walt and Jeffrey Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos 2014). However, in these analyses the authors only trace the constitutional changes without any effort to offer an account or explanation from the point of view of constitutional law.

<sup>2</sup> See, eg, Minutes of the Greek Parliament (6 May 2010) <[www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506\\_1.pdf](http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100506_1.pdf)> accessed 6 March 2016.

Fund (IMF).<sup>3</sup> This complicated mechanism was instituted after long negotiations and under strong market pressures. The complexity of the intergovernmental construction of this mechanism and the perception of some kind of collective responsibility by both the creditors and the Greek people made it so that Greek public debates regarding the economic emergency acquired a tempestuous dynamic.

Facing the crisis became *the* stake of domestic political decisions; the advancement of this objective became *the* criterion for evaluating political propositions. Other constitutional values were subjugated to economic emergency; so were the procedures and rules contained in the Greek Constitution which protect these values. Greece is an extreme case of constitutional transformation in the face of the Eurozone crisis. This paper traces the evolution of this phenomenon, seeking to uncover its domestic meaning. How was the Constitution deconstructed by legal means? How do domestic actors justify the significant constitutional-political changes brought about by the Eurocrisis? How can we 'constitutionally' observe a loss of faith in the Constitution?

The paper begins by exploring the way economic emergency led to the introduction of legal norms in the domestic sphere with no respect for domestic constitutional forms and procedures (1). Soon it became clear that constitutional deconstruction was not simply an exceptional consequence of a temporary crisis. The possibility for legal norm production outside constitutional conditions and procedures was permanently extended (2). This is connected to the fact that emergency itself was 'normalised' by clothing exceptional measures in a formal legal garb (3). After five years of continuous crisis, this evolution has led to a paradox: the Constitution seems to be valid in some respects but not others. Is it possible to offer a coherent account of this phenomenon from a domestic constitutional point of view?

I propose to analyse Greek constitutional politics through the lens of the constitutional faith metaphor, well known to US lawyers (4). Current constitutional-political transformation would thus be understood as a loss of faith in the Greek Constitution, expressed in the argumentation advanced by certain constitutional-political actors. In the rhetoric of these actors, faith in the Constitution, in the sense of a formal legal text, is replaced by faith in a 'spirit' transcending and founding the Constitution. Therefore, popular sovereignty and democracy, traditionally ensured by the formality of the Constitution itself, are no longer the ultimate objectives of constitutional politics. Instead, as the study of this argumentation unveils, in this new type of faith another objective is perceived as more imperative: economic independence under the particular economic policy dictated by the state's creditors (5). In the afterword, the proposed approach is applied in order to account for the policy of the SYRIZA-ANEL government

<sup>3</sup> Loan Facility Agreement (8 May 2010) <<http://www.irishstatutebook.ie/eli/2010/act/7/schedule/2/enacted/en/html>> accessed 5 March 2016 (First Loan Agreement). This text, contained in a schedule annexed to the Irish statute 'Euro Area Loan Facility Act 2010', is the only official English version of the Agreement that could be retrieved. On the participation of the IMF, see preamble, para 3.

during the negotiations with Greece's creditors and to assess the new agreement within the framework of the European Stability Mechanism (ESM) (6).

## 1 Deconstructing constitutional forms: The First Economic Adjustment Programme in the domestic legal sphere

The domestic constitutional story of the Eurocrisis starts with Law 3845/2010.<sup>4</sup> This was certainly an atypical piece of legislation. First, its distinctiveness lay in its content. Under the title 'Measures for the implementation of the support mechanism for the Greek economy by the Eurozone Member States and the International Monetary Fund', the statute included in an annex a draft of the first Memorandum of Understanding (MoU), as well as relevant statements by the Euro-area Member States' heads of state and government. It thus introduced into the domestic legal sphere, in a rather unorthodox way, developments that had taken place during the weeks that preceded its voting in parliament. This story has been told elsewhere;<sup>5</sup> I will attempt only to summarise it here.

In early 2010, the Eurostat data on the Greek deficit were revealed. In March 2010, the socialist government, elected shortly before under an anti-austerity platform, decided to adopt an austerity package. Nonetheless, rating agencies further downgraded the country's credit rating, making access to the markets difficult. In April 2010, the Greek government officially requested the financial assistance of the IMF and the EU. An ad hoc mechanism was established in order to provide Greece with a total of €110 billion, coming from individual Euro-area Member States and from the IMF. On 2 May 2010, the Eurogroup decided to activate the support mechanism for the Greek economy. The next day, the Greek authorities signed the MoU with representatives of the state's creditors. The agreement was brought for discussion and voting in the Greek parliament on 4 May 2010 as an annex to Law 3845/2010. The statute was adopted on 6 May and entered into force the following day. The measures described in the MoU were included in subsequent Council Decisions, issued after recommendation by the Commission, under the excessive deficit procedure.<sup>6</sup> The First Loan Agreement was signed on 8 May 2010.<sup>7</sup> The next day, the IMF executive board approved the relevant Stand-by Arrangement.<sup>8</sup>

<sup>4</sup> Law 3845/2010 of 6 May 2010, Government Gazette A 65.

<sup>5</sup> See, eg, Xenophon Contiades and Ioannis Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013).

<sup>6</sup> See Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L145/6, and its amendments.

<sup>7</sup> See the First Loan Agreement (n 3).

<sup>8</sup> See IMF External Relations Department, 'IMF Executive Board Approves €30 Billion Stand-By Arrangement for Greece', Press Release No 10/187 (9 May 2010) <<https://www.imf.org/external/np/sec/pr/2010/pr10187.htm>> accessed 6 February 2016.



Financial assistance was provided to Greece on the condition that the state would respect the agreed MoU, containing measures of unprecedented austerity.<sup>9</sup> The 80 pages of the MoU declared general objectives for the Greek economy, such as a balanced budget and competitiveness targets, and defined the specific economic policies that the Greek government should implement in various domains (taxation, public employees' salaries, social security and pension, and others). Administrative and legislative measures were concretely defined on a three-month basis and their expected financial impact was calculated. The MoU was accompanied by letters of intent by the Greek Minister of Finance and the President of the Bank of Greece, expressing their commitment to complying fully with the programme.<sup>10</sup>

The policies contained in the First Economic Adjustment Programme, as this complex body of measures and instruments was called, were partly inserted into the main part of Law 3845/2010. Article 3 imposed severe cuts on the revenues of public employees and pensioners. This article also affected privately employed workers and declared that it prevailed over any contrary provision, be it part of a collective agreement, arbitral award or individual contract. The remaining articles imposed tax increases and exceptional levies. It is no exaggeration to say that Law 3845/2010 was the legal event that divided the Greek polity into two camps: pro-MoU and anti-MoU forces. Due to the substantive changes introduced at the level of socio-economic policy, the discussion of Law 3845/2010 in parliament was perceived by all parties as a 'historical moment', which would determine the future of the state.<sup>11</sup>

Despite its historical importance, the economic emergency left no place for parliamentary discussion on the policies or specific measures enacted by Law 3845/2010. The law was brought to parliament under an emergency procedure. The government stated that voting on the law was urgent because the relevant loan agreement had to be concluded before 19 May 2010. On this date, a €10 billion bond loan matured and, if the state had been unable to repay its creditors, it would have faced bankruptcy and isolation from its Eurozone partners.<sup>12</sup> The members of parliament had less than three days to read the statute and its annexes, and only one day to discuss it in parliament. Even members of the government later admitted that they had not had time to read the MoU. The support mechanism and the measures it implied were approved as a whole in one single article, rendering any amendments to specific austerity provisions impossible. Strict party discipline was imposed on the members of the two biggest parties in parliament. Errors in the Greek translation of the MoU further stymied the national debate.

<sup>9</sup> See First Loan Agreement (n 3), preamble, para 7, art 1.

<sup>10</sup> See 'Greece—Memorandum of Economic and Financial Policies' in International Monetary Fund 'Greece: Staff Report on Request For Stand-By Arrangement' (3 May 2010) 47 <[www.imf.org/external/pubs/ft/scr/2010/cr10110.pdf](http://www.imf.org/external/pubs/ft/scr/2010/cr10110.pdf)> accessed 12 September 2015 (MoU). The MoU is composed of three texts: the Memorandum of Economic and Financial Policies, the Technical Memorandum of Understanding and the Memorandum of Understanding on Specific Economic Policy Conditionality.

<sup>11</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6714.

<sup>12</sup> See *ibid* 6728.

However, from a legal scholar's point of view, Law 3845/2010 was even more impressive in formal terms, that is, as far as the production of legal norms is concerned. What was the parliament actually *doing* when voting on the statute? This matter, concerning the status of international agreements in the domestic sphere, has raised important academic debates in Greece.<sup>13</sup> Article 36 of the Constitution regulates the conclusion of international treaties and attributes the relevant constitutional competence to the President of the Republic. Paragraph 2 of the same article declares that conventions on trade, taxation, economic cooperation and participation in international organisations or unions, as well as other conventions containing concessions for which a statute is required or which may burden Greeks individually, 'shall not be operative without ratification by a statute voted by the Parliament'.<sup>14</sup>

Once operative according to article 36, article 28 of the Constitution defines the status of international law in the domestic legal order. Paragraph 1 states that ratified international conventions 'shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law'. Paragraphs 2 and 3 set particular procedural and substantive conditions for the ratification of certain conventions. They declare:

2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

Article 28 of the Constitution is followed by an interpretative clause stating that it 'constitutes the foundation for the participation of the Country in the European integration process'.

Was the MoU an international agreement requiring ratification? This was the argument of the left in parliament, which raised a procedural objection when voting on Law 3845/2010. According to the members of parliament in this camp, the MoU implied the concession of constitutional competences and essential parts of national sovereignty to international organisations. It would determine governmental and social policy for many years and would constitute a precedent which would apply for decades. Should the MoU have been voted by a qualified majority as article 28 of the Constitution requires?

<sup>13</sup> See Afroditi Marketou and Michail Dekastros, 'Report on Greece' (*Constitutional Change Through Eurocrisis Law*, 16 January 2014, last updated 9 June 2015) para X.3 <[eurocrisislaw.eu/greece/](http://eurocrisislaw.eu/greece/)> accessed 12 September 2015.

<sup>14</sup> An official parliamentary translation of the Constitution of Greece (last revised 27 May 2008) is available at <[www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf](http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf)> accessed 12 September 2015.

The socialist government at the time did not take any position during parliamentary discussions. Parties from the right, on the other hand, contended that the agreements had no legal character. However, in the introductory report to the draft bill it was stated that the annexed MoU was an ‘integral part of the draft bill’.<sup>15</sup>

If the MoU was not legal in nature, was it simply the political programme of the government, attached to the statute as part of its explanatory report, or as a solemn declaration of the meaning of the statute? This was the line of argument applied by the Council of State in the decision concerning the constitutionality of Law 3845/2010.<sup>16</sup> According to the judges, the MoU could not be submitted to judicial scrutiny since it had no direct legal consequences.<sup>17</sup> The law’s non-legal character was evident in the fact that the constitutionally competent domestic authorities needed to enact implementing measures.<sup>18</sup> However, this solution would not resolve all constitutional quandaries. Article 82 of the Constitution attributes the responsibility for defining and directing the general policy of the state to the government. Eventually, parliamentary confidence or censure as regards this policy should be declared under a special motion, in accordance with article 84 of the Constitution. Otherwise, the Constitution does not provide for the possibility to vote on the government’s political programme.

According to the majority opinion of the Council of State, eventual legal obligations of the state to implement the economic policy defined in the MoU may result only from the subsequent Loan Agreement.<sup>19</sup> Until the crisis, however, loan agreements were not deemed to be international conventions creating public law obligations for the state and did not require ratification in order to be operative in the domestic legal sphere. This seemed to be the case for the Greek Loan Facility as well, which was drafted as an economic agreement governed by English law.<sup>20</sup> Did things change because Greek debt was bought by public organisations, outside the context and rules of the market? The issue has been contested in the Greek academic literature.<sup>21</sup> The First Loan Agreement, providing for high interest rates and austerity conditionality, seemed to be a convention that needed ratification according to article 36(2) of the Constitution. In

<sup>15</sup> See the introductory report to the bill, ‘Eisigitiki Ekthesi sto schedio nomou “Metra gia tin efarmogi tou michanismou stirixis tis ellinikis oikonomias apo ta krati meli tis zonis tou evro kai to Diethnes Nomismatiko Tameio” [Introductory report to the draft bill, “Measures for the implementation of the support mechanism of the Greek economy by the Member States of the euro zone and the International Monetary Fund”]’ (4 May 2010) 3 <[www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf](http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/AOIKONOMIKVN.pdf)> accessed 12 September 2015.

<sup>16</sup> See Greek Council of State (Plenary Session) Decision 668/2012 of 20 February 2012, 60 *Nomiko Vima* 384.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> First Loan Agreement (n 3) art 14.

<sup>21</sup> See, eg, Antonis Manitakis, ‘Ta syntagmatika zitimata tou Mnimoniou enopsei kratikis kyriarchies kai epitiroumenis dimosionomikis politikis [The Constitutional Issues of the Memorandum in View of the Divided National Sovereignty and the Monitored Fiscal Policy]’ (2011) 51 *DtA* 689. For further analysis of the domestic discussion on the matter, see Marketou and Dekastros (n 13) para X.3.

this case, a qualified majority, according to article 28 of the Constitution, might have been required: imposing the definition of governmental policy, at least partially, by supra- and international organisations, it ceded to them important competences that constitutionally belong to the government.

The procedure followed for its implementation, however, indicates that the Loan Agreement was purported to have only a private economic legal nature. Law 3845/2010 was voted on before the signing of the agreement, and thus did not ratify it. Nor did a draft ratification bill that was brought to parliament on 4 June 2010.<sup>22</sup> Indeed, this bill was never discussed or subject to a vote in the Plenum because the competent parliamentary commission considered the ratification of the Loan Agreement not necessary.<sup>23</sup> From the point of view of transparency, moreover, official versions of the Loan Agreement were difficult to find at the time even in English, let alone in Greek.

Nonetheless, in the public discourse of the government, the fulfilment of the loan agreement conditions was perceived as a binding obligation imposed on the state. In the relevant parliamentary debates, the Prime Minister repeatedly stated that the MoU and the statute had not been the government's political choice but had been imposed by creditors.<sup>24</sup> Even more, Law 3845/2010 contained provisions that conferred on the Agreement a nebulous public law status. In its first article, it contained a description of the steps taken for the institution and activation of the support mechanism.<sup>25</sup> Further, annexed to the statute was the request by the Greek authorities for the activation of the support mechanism and the relevant statements of the Euro-area leaders.

Was thus governmental policy in Greece defined according to a non-ratified international agreement? And what does this mean for national sovereignty? It might be that the obligatory nature of the Economic Adjustment Programme resulted from the state's EU and Eurozone membership, which was a choice of Greece as a sovereign state. This hypothesis, expressed by the Council of State majority, is reinforced by the adoption of the MoU provisions in subsequent Council Decisions.<sup>26</sup> However, it is generally accepted that Member States have not conferred the competence to decide broad domains of governmental policy, such as the ones regulated by the MoU, on the EU institutions.

<sup>22</sup> See the draft bill entitled 'Ratification of the 8 May 2010 Loan Facility Agreement between the Hellenic Republic as debtor and the Member States of the Eurozone and of the KfW as creditors, as well as of the 10 May 2010 IMF Stand-by arrangement. Participation of Greece to the European Support Mechanism' <<http://www.hellenicparliament.gr/UserFiles/c8827c35-4399-4fbb-8ea6-aebdc768f4f7/ADANEIO.pdf>> accessed 3 November 2015. The title and the explanatory report of the draft bill explicitly refer to *ratification* of the First Loan Agreement.

<sup>23</sup> See Christos Staikouras (member of parliament in the right wing group Nea Dimokratia), 'Dilosi gia ti syzitisi kai enimerosi epi mnimonion, symfonion kai symvaseon [Declaration on the discussion and information on memoranda, agreements and conventions]' (23 June 2010) <<http://www.cstaikouras.gr/2010/06/dilosi-gia-ti-sizitisi-ke-enimerosi-epi-mnimonion-simfonion-ke-simvaseon/>> accessed 5 March 2016.

<sup>24</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6766.

<sup>25</sup> Law 3845/2010, art 1(1)–(2).

<sup>26</sup> See Council Decision 2010/320/EU and its amendments.

The Economic Adjustment Programme was thus introduced into the domestic legal order with no respect for constitutional procedures and forms. Incoherent justifications of the measures, opportunistically advanced by the government according to the forum to which they were addressed, excluded every kind of accountability. Legal accountability was excluded since the text was presented as a political programme that could not be submitted to judicial scrutiny.<sup>27</sup> Furthermore, political accountability was considerably limited, since the government argued that the programme had resulted from binding supra- or international obligations and its specific provisions were barely discussed in parliamentary debates. These features have seemed to acquire a permanent character in following developments.

## 2 Crisis management or permanent transformation?

Scheuerman observes that 'executive-dominated emergency economic regulation now represents a more or less *permanent* feature of political life in many liberal democracies'.<sup>28</sup> This is true at least for Greece. Many different persons and political parties have participated in the political branches of the Greek government since 2010, but the major policy guideline has remained unique: to respond to the economic emergency faced by the state. Law 3845/2010 thus marks the starting point of a serious degradation of Greek constitutional democracy.

Deconstruction of constitutional forms and procedures became permanent in the main body of Law 3845/2010. The government exploited the ambiguity as to the nature of the instruments employed, in order to limit the role of parliament in the implementation of the relevant agreements. Article 1(4) of Law 3845/2010 delegated to the Minister of Finance the power to bind the state to future agreements regarding the application of the Economic Adjustment Programme. The original version of the provision required that relevant agreements be brought to parliament for ratification. However, it was amended two days later, by a last minute 'legal-technical' correction, voted on again through the emergency procedure: the term 'ratification' was replaced by the terms 'discussion and briefing', rendering agreements operative from the moment of their signature.<sup>29</sup> According to the representative of the government, the amendment was necessary in order for the First Loan Agreement, signed some days later, to come into immediate effect, and thus before 19 May 2010, the date on which the bond loans matured.<sup>30</sup> Less than a month later, article 93 of Law 3862/2010 reiterated that agreements and MoUs relevant to the participation of the state in the European Financial Stability Facility (EFSF) would

<sup>27</sup> See Council of State (Plenary Session) Decision 668/2012 (n 16).

<sup>28</sup> William Scheuerman, 'The Economic State of Emergency' (2000) 21 *Cardozo L Rev* 1869, 1870 (emphasis in original).

<sup>29</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2).

<sup>30</sup> *ibid* 6742.

be brought before parliament only for discussion and briefing.<sup>31</sup> Nevertheless, such instruments, creating economic burdens for the Greek people and imposing austerity policies, might need ratification according to article 36 of the Constitution.

Constitutional deconstruction does not only concern the openness of the domestic system to international legal instruments; it also takes place in the internal distribution of constitutional competences between the legislature and the executive. Article 2 of Law 3845/2010 conferred on the executive a broad range of powers to take the necessary measures for the application of the Economic Adjustment Programme. This broad delegation met objections even by parties that voted in favour of the MoU.<sup>32</sup> Article 43 of the Constitution concerns the delegation of powers to the executive. It declares:

2. The issuance of general regulatory decrees, by virtue of special delegation granted by statute and within the limits of such delegation, shall be permitted on the proposal of the competent Minister. Delegation for the purpose of issuing regulatory acts by other administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature.

(...)

4. By virtue of statutes passed by the Plenum of the Parliament, delegation may be given for the issuance of general regulatory decrees for the regulation of matters specified by such statutes in a broad framework. These statutes shall set out the general principles and directives of the regulation to be followed and shall set time-limits within which the delegation must be used.

The MoU, affecting virtually all domains of governmental policy, could not be considered as addressing ‘more specific matters or matters of local interest or of a technical and detailed nature’, as paragraph 2 imposes. Nor was Law 3845/2010 valid as a framework statute, as defined in paragraph 4; constitutional law scholars agree that the formal conditions for such a statute were not fulfilled.<sup>33</sup> Therefore, the relevant statutory provisions, far too broad to meet the commonly accepted constitutional limits to the delegation of legislative power, made emergency norm production a permanent possibility.<sup>34</sup>

But the government was not alone in this reign of the executive. The Loan Agreement provided that the disbursement of each tranche would take place through a unanimous Eurogroup decision. This decision would be based on the evaluations of

<sup>31</sup> See Law 3862/2010 of 8 July 2010, Government Gazette A 113.

<sup>32</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6788.

<sup>33</sup> See, eg, Prokopis Pavlopoulos, ‘Paratiriseis os pros ti nomiki fysi kai tis ennomes synepeies tou “Mnimoniou” [Comments on the legal nature and the legal consequences of the “Memorandum”]’ (22 October 2010) <[http://prokopispavlopoulos.gr/index.php?option=com\\_content&view=article&id=197:-qq-&catid=48:2010-10-22-17-50-50&Itemid=71](http://prokopispavlopoulos.gr/index.php?option=com_content&view=article&id=197:-qq-&catid=48:2010-10-22-17-50-50&Itemid=71)> accessed 5 March 2016. For further analysis and literature on the matter, see Marketou and Dekastros (n 13) para X.7.

<sup>34</sup> It is generally accepted that a framework-statute must concern a homogeneous subject matter and must determine the general legislative guidelines for the regulation of the matter. See Marketou and Dekastros (n 13) para X.7.

the domestic reforms by a technocratic body composed of a representative of each of the European Central Bank (ECB), the IMF and the European Commission (EC), on behalf of the Euro-area Member States.<sup>35</sup> In public debates, this body was referred to as the troika. The broad powers of the troika in the determination of governmental policy were not mirrored in legislation. Instead, these powers operated *de facto*, and were accommodated through their 'coating' with a domestic political garb. In other words, whenever the legality of the troika's requirements was contested, the creditors claimed that the particular measures adopted were the choice and exclusive competence of the Greek government.<sup>36</sup> On the contrary, in public debates recommendations by the troika were claimed to determine every aspect of governmental policy.<sup>37</sup> They were repeatedly invoked by the Greek government to justify the use of emergency procedures and instruments.

The economic crisis was not overcome and the situation of legal emergency was extended as well. On 14 March 2012, a second rescue package was agreed upon between Greece and its creditors.<sup>38</sup> The troika preserved its broad powers and became subtly institutionalised; it was expressly mentioned in many official documents of the Second Economic Adjustment Programme.<sup>39</sup> Thus, it seems that under the force of economic adjustment the Greek political regime shifted to a system whereby parliament became impotent in the face of an 'executive unbound';<sup>40</sup> or, put more bluntly, with an executive solely bound by the precepts of international institutions or formations, claiming technocratic legitimacy. The loss of national sovereignty and of legislative autonomy caused by the troika review missions, combined with the lack of political accountability of the troika members, provoked constant argument in public and parliamentary debates.<sup>41</sup> Despite this state of exception, law and legality have played an important role in emergency argumentation.

<sup>35</sup> See First Loan Agreement, preamble, para 8.

<sup>36</sup> Regarding the questions raised in the European Parliament on the closure of ERT (Greece's National Radio and Television Foundation), see 'Joint answer given by Mr Rehn on behalf of the Commission' (European Parliament, 2 August 2013) <[www.europarl.europa.eu/RegData/questions/reponses\\_qe/2013/006815/P7\\_RE\(2013\)006815\\_EN.pdf](http://www.europarl.europa.eu/RegData/questions/reponses_qe/2013/006815/P7_RE(2013)006815_EN.pdf)> accessed 12 September 2015.

<sup>37</sup> See, eg, 'Tin epomeni evdomada sti Vouli to nomoschedio me ta proapaitoumena [The bill containing the preconditions is introduced to Parliament next week]' (25 July 2014) <<http://news.in.gr/economy/article/?aid=1231337007>> accessed 5 March 2016.

<sup>38</sup> See European Commission, 'The Second Economic Adjustment Programme for Greece' (Occasional Paper on the European Economy No 94, March 2012) <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp94\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf)> accessed 6 March 2016.

<sup>39</sup> See, eg, European Commission, 'The Second Economic Adjustment Programme for Greece—Second Review' (Occasional Paper on the European Economy No 148, May 2013) <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/ocp148\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp148_en.pdf)> accessed 12 September 2015.

<sup>40</sup> Lina Papadopolou, 'Can Constitutional Rules, Even if "Golden", Tame Greek Public Debt?' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 236.

<sup>41</sup> See, eg, Minutes of the Greek Parliament (28 March 2012) 8032ff <<http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20120328.pdf>> accessed 5 March 2016.



### 3 Exception 'normalised' through law

While constitutional forms and procedures were deconstructed, a web of international legality was being fashioned around the Loan Facility that Greece had agreed with its creditors. As we saw, article 93 of Law 3862/2010, enacted by parliament on 5 July 2010, declared that agreements and MoUs relevant to the participation of the state in the EFSF were to be brought before parliament only for discussion and briefing. However, the same article explicitly provided for the legal status of loan agreements as *international conventions* which, contrary to other agreements, would be brought to parliament for *ratification*, and would be valid only after the publication of the relevant statute in the Official Gazette.<sup>42</sup> Following this provision, the EFSF Framework Agreement, together with its amendments, was brought to parliament for ratification, more than a year after its initial signature.<sup>43</sup> If we take into account that such ratification did not take place in other EFSF countries, why was it needed in Greece?

The answer is that the 'legalisation' of international agreements in the domestic sphere was deemed to protect creditors from the consequences of an abrupt political change, already predictable at the time.<sup>44</sup> Indeed, article 28(1) of the Constitution confers supra-legal status on ratified international agreements. Therefore, generally, promoters of austerity have always presented the measures in public debates as resulting from a *legal* obligation of the Greek government. Possessing an ambiguous status (European norms, international norms or economic agreements concluded by the state as *fiscus*), Eurocrisis legal instruments have acquired a *de facto* validity and binding nature in the domestic sphere.

Sometimes this apparent validity was obtained by invoking Greece's EU commitments. Austerity measures included in Law 3845/2010 did not have a temporary character. Since economic emergency was invoked for their justification, the measures were contested before the Council of State as disproportionate to their aim. However, the Court specified that the legislative purpose was 'not only to face, according to the assessments of the legislature, the sharp fiscal crisis but also [to consolidate] public finances in a way that will be sustainable in the future'.<sup>45</sup> This purpose was characterised as a 'compelling public interest' and 'an aim of common interest for Eurozone Member States, in view of the obligation of fiscal discipline and guarantee of the stability of the Eurozone as a whole, established by EU legislation'.<sup>46</sup> Was it an economic emergency, or

<sup>42</sup> Yet, according to art 94 of Law 3862/2010, this provision is retroactively valid only from 1 June 2010; it thus does not concern the First Loan Agreement. See Marketou and Dekastros (n 13) para IV.2. It is interesting to note that the same provision had been included in the draft law ratifying the First Loan Agreement, which was never discussed or voted on in Parliament.

<sup>43</sup> Art 48 of Law 4021/2011 of 3 October 2011, Government Gazette A 218.

<sup>44</sup> The representatives of the socialist government actually admitted that ratification was required by the creditors in some cases. See Minutes of the Greek Parliament (5 July 2010) 9581 <[www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf](http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20100705.pdf)> accessed 12 September 2015.

<sup>45</sup> See Decision 668/2012 (n 16) para 35.

<sup>46</sup> *ibid.*



was it rather a *requirement by EU legislation* to follow a certain economic policy, that necessitated the measures?

The ambiguity surrounding the status of the MoU and the Loan Agreement was deliberately preserved in the Second Economic Adjustment Programme. The drafts of the relevant texts were annexed to Law 4046/2012,<sup>47</sup> before their signature. Through the vote on the statute, the government was asking for the approval of the annexed drafts. They were also asking the parliament to authorise the Minister of Finance and the President of the Bank of Greece to represent the state in the negotiations of the texts and to sign the relevant agreements, which would be immediately operative.<sup>48</sup> However, such approval is not a procedure envisaged by the Greek Constitution, which only provides for *ratification* of international agreements.<sup>49</sup> In the competent parliamentary committee, the Minister of Finance at the time argued that the MoUs were staff level agreements, not needing ratification.<sup>50</sup> Still, article 1(6) of Law 4046/2012 declared that certain provisions of the Memorandum of Understanding on the Specific Conditions of Economic Policy were ‘perfect legal rules of direct application’ and thus, in a sense, ratified them.

Ambiguity continued to exist at a supranational level as well. The First Review of the Second Economic Adjustment Programme declared that ‘[t]he EU Council decision (...) adopted upon a recommendation of the European Commission, sets the steps and deadlines to be respected to correct the situation of excessive deficit.’<sup>51</sup> In other words, it seems that the programme acquired a European legal mantle. However, the Review went on to state that the MoU documents were drafted jointly by the troika and the Greek authorities, and were implemented according to a pre-agreed timetable.<sup>52</sup> In other words, though the ‘steps and deadlines’ were European legal obligations, the specific provisions in the MoU—which ‘comprehensively identified the specific measures to be taken, going into a high degree of detail’—were not.<sup>53</sup>

The ambiguous nature of the MoU commitments did not reassure the state’s creditors, who sometimes required personal written confirmations by Greek political leaders that

<sup>47</sup> Law 4046/2012 of 29 February 2012, Government Gazette A 40.

<sup>48</sup> Arts 1(3)–(6) of Law 4046/2012. The statute in its title itself explicitly stated that what the Government was requesting was the *approval* of the annexed texts.

<sup>49</sup> See arts 28 and 36 of the Constitution.

<sup>50</sup> See the speech by Evangelos Venizelos, Minister of Finance, in the competent parliamentary committee (11 February 2012) <[www.hellenicparliament.gr/Vouli-ton-Ellinon/ToKtirio/Fotografiko-Archeio/#a9f345a6-5cad-40e9-b36a-0a416f376a8c](http://www.hellenicparliament.gr/Vouli-ton-Ellinon/ToKtirio/Fotografiko-Archeio/#a9f345a6-5cad-40e9-b36a-0a416f376a8c)> accessed 12 September 2015.

<sup>51</sup> European Commission, ‘The Second Economic Adjustment Programme for Greece—First Review’ (Occasional Paper on the European Economy No 123, December 2012) 7 <[ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/pdf/ocp123\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf)> accessed 12 September 2015.

<sup>52</sup> See European Commission, ‘The Second Economic Adjustment Programme for Greece—Fourth Review’ (Occasional Paper on the European Economy No 192, April 2014) 9 <[ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2014/pdf/ocp192\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp192_en.pdf)> accessed 12 September 2015.

<sup>53</sup> European Commission, ‘Second Economic Adjustment Programme for Greece—First Review’ (n 51) 7.

they would follow the policies defined in them.<sup>54</sup> Even though such confirmations would only have a political nature, their international and constitutional legality is doubtful, especially insofar as they were required as a condition for the application of the Loan Agreement by the creditors. Even more, in the First Review of the Second Economic Adjustment Programme it was stated that the MoU documents would be ‘subsequently transformed into a *cogent* law through a vote in Parliament.’<sup>55</sup> Still, when a normal voting procedure is employed, a law can be ‘cogent’ in Greece only if it is ratifying international legal agreements. In other words, it seems that, whilst a web of international legality was being constructed, it was only operating in the domestic legal sphere, binding parliament and future governments. On the contrary, the troika’s missions and the MoUs did not need to be founded on any international or European legal text, and did not engage the accountability of the European institutions involved before the Court of Justice of the EU.

What is more, the MoU progressively ceased to be perceived as an exceptional instrument to face the economic emergency; it was ‘normalised’. For the first time, the First Review of the Second Adjustment Programme stated that the MoU texts

are living documents and are modified at every quarterly review mission, based on implementation of previous commitments and identification of new ones. The first programme documents were established in May 2010. The set of documents included in this publication constitutes the seventh version since then.<sup>56</sup>

This declaration, repeated in following reviews, established continuity and coherence between the First and the Second Economic Adjustment Programme. Most importantly, omitting any reference to exceptional circumstances and characterising the MoUs as ‘living documents’, the declaration overturned their ad hoc nature.

‘Normalisation’ of the emergency further took place in the domestic sphere, through the use, or rather abuse, of constitutional procedures. Even though loan agreements are legally defined as international agreements needing ratification, no loan agreement was ever ratified by parliament. For the Second Loan Agreement and its Amendments, the procedure used to circumvent the ratification requirement would confuse the most cunning of constitutional lawyers: the government issued an emergency decree-law, approving the draft of the relevant loan agreement and authorising the competent authorities to sign it. Then, when agreements were already valid and operative in the international economic sphere, the relevant decree-laws were introduced into parliament for ratification, which validated them retroactively in the domestic legal order.<sup>57</sup>

<sup>54</sup> See Jan Strupczewski, ‘Eurogroup Set to Release Greek Tranche, Fix EFSF Leveraging Rules’ *Reuters US* (25 November 2011) <[www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125](http://www.reuters.com/article/2011/11/25/eurogroup-idUSL5E7MO3NZ20111125)> accessed 12 September 2015.

<sup>55</sup> See European Commission, ‘Second Economic Adjustment Programme for Greece—First Review’ (n 51) 7 (emphasis added).

<sup>56</sup> *ibid.*

<sup>57</sup> See Marketou and Dekastros (n 13) 94.

This is not the only example of parliament having been called upon to ratify *de facto* established situations. Indeed, during the crisis governments have made increasingly extensive use of the emergency decree-laws, in Greek called ‘acts of legislative content’. According to article 44(1) of the Greek Constitution:

Under extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of Article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force.

Usually putting forward a formal, self-serving justification,<sup>58</sup> governments have used this *sui generis* instrument to implement complex and contentious provisions. This practice is even more degrading for the role of the parliament, if one considers that often many such administrative acts were subsequently ratified en masse, annexed to legal statutes that were brought to vote under the emergency procedure.<sup>59</sup>

Five years of prolonged economic emergency have produced thus an unusual constitutional situation. Constitutional politics and norm production in Greece are not anymore based on democratic parliamentary deliberation, as the Constitution requires, but on international agreements concluded by the executive, and having ambiguous nature and changing content. Constitutional rules are continuously circumvented or abused. Still, the Constitution is broadly recognised as a valid legal text. Though a state of emergency has sometimes corroded its forms, the institutions for which it provides are operating according to its procedures and in its name. In the end, emergency is being ‘normalised’ *through the Constitution itself*. How can we account for this contradiction from an internal constitutional law point of view?

#### 4 Constitutional transformation as loss of faith in the domestic Constitution

What local constitutional transformation means depends to a large extent on the local form and meaning of the Constitution before the crisis. National constitutions can be very different in this respect. In the United Kingdom, even though famously there is no written constitution, there is a long-standing belief in certain political conventions so firm that nobody would dare contest them. Greece is a very different case. Since the

<sup>58</sup> Typically, these acts start with a statement that the government took into account the ‘extraordinary circumstances of an urgent and unforeseeable need’ to take the measures each time contained in the act. See, eg, the acts ratified by Law 4111/2013 of 25 January 2013, Government Gazette A 18.

<sup>59</sup> See, eg, Law 4111/2013. This statute ratified under the emergency procedure six decree-laws containing various complex and totally irrelevant provisions. Among them, there were certain austerity measures, as well as an amendment of the Second Loan Agreement.

beginnings of the Greek state almost two hundred years ago, its Constitution has always been written. Always, except for periods of oppression and turmoil—such as control by military juntas, the occurrence of coups d'état and wars, including a civil war—that the country has experienced in its short history.<sup>60</sup> The Constitution, in its formal incorporation into a written and entrenched document, symbolises the existence of the state itself and a strong commitment to liberty and equality against the arbitrary powers of the Ottoman local authorities. Unsurprisingly, the Constitution is dear to the Greek people as a symbol of national independence and guarantee against oppression. For instance, the central square of Athens is called *Syntagma*, ie Constitution Square.

The English constitution is said to have its source in long-lived social practices and to be itself a result of the liberty of the English people. On the contrary, constitutional texts adopted over time in Greece have always been ambitious and have illusorily represented social reality. More than a functional document, the Constitution in Greece has had a strong symbolic value; it has rather expressed an ideal, a level of 'civilisation' that the Greek people want to achieve. Often following the model of more 'advanced' European countries, the drafters of Greek constitutions have always expressed the popular image of a desired polity with European orientation. This popular image, whenever it existed, has been founded on a consensus on certain fundamental political moral values. Mazower relates the words of an inhabitant of Ottoman Salonika in 1908: 'Constitution is such a wonderful thing that he who does not know what it is is a donkey.'<sup>61</sup> Still, the strong commitment to the Constitution has not impeded the existence of authoritarian regimes, with the military regime of 1967 still lively social memory.

The fall of the junta, in 1974, inaugurated a new era in Greek political history, the so-called *Metapolitefsi* (change of regime). The Constitution of 1975, to a large extent still formally valid today, was the fruit of the rejection of the nationalist authoritarian regime and the tool for the re-establishment of democracy. It 'reconnected Greece with the European constitutional tradition'.<sup>62</sup> Furthermore, the 1975 Constitution was deemed to be one of the most progressive ones at a European and international level at the time it was enacted.<sup>63</sup> Until recently, it was generally considered a 'constitutional success',<sup>64</sup> as for long it had, more effectively than any text preceding it, organised the domestic political life. Indeed, the 1975 Constitution consolidated democracy, the rule of law and human rights protection in Greece. Until recently, domestic constitutional scholarship was still proud of the regime established in 1975. In the words of Alivizatos, 'for the

<sup>60</sup> For an interesting essay on Greek constitutional history, see Giannis Drosos, *Dokimio Ellinikis Syntagmatikis Theorias* [An Essay on Greek Constitutional Theory] (Sakkoula 1996).

<sup>61</sup> Mark Mazower, *Dark Continent: Europe's Twentieth Century* (1st edn, Vintage Books 2000) 4.

<sup>62</sup> Nicos Alivizatos, *O Avevaio Eksygychronismos kai i Tholi Syntagmatiki Anatheorisi* [The Uncertain Modernization and the Vague Constitutional Reform] (Polis 2001) 174.

<sup>63</sup> Aristovoulos Manessis, 'Oi Kyries Synistoses tou Systimatos Themeliodon Dikaionaton tou Syntagmatos tou 1975 [The Main Composants of the Fundamental Rights System in the Constitution of 1975]' in Aristovoulos Manessis, *Syntagmatiki Theoria kai Praxi* [Constitutional Theory and Practice], vol II (Sakkoula 2007).

<sup>64</sup> Alivizatos (n 62) 185.

Greek constitutional law scholars, 1974 was what 1945 had been for their European colleagues.<sup>65</sup> In their minds, Greek society had for once reached close to the ideal polity depicted in its Constitution.<sup>66</sup>

The metaphor of constitutionalism as a civil religion is well known to US lawyers. I propose that it is a useful metaphor in order to account for the ongoing constitutional-political transformation in Greece. In the Greek context, at least since 1975, there has traditionally been a 'reverence' for the Constitution, as emanating from the 'democratic deity' The People.<sup>67</sup> Indeed, the dominance of the 'will of the people' was the major stake in the first years of the *Metapolitefsi*. The 1975 Constitution formally expresses and institutionalises this: article 1, which has not yet been subject to constitutional amendment, defines the principle of popular sovereignty as the foundation of the polity. It concretises the principle with the following statement: 'All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution.' Faith in 'the People' has thus been closely connected to the existence of a written formal constitution which regulates political life and constrains public power. The formal qualities of the Constitution as an entrenched text have determined to a large extent the rites of Greek constitutionalism. Exegesis and formalism are traditionally essential features of Greek legal and constitutional scholarship.

Other elements seem to enforce the religious analogy. Kennedy observes that in a world of believers, people understand their constitutional history in the modes of patriotism and morality.<sup>68</sup> Indeed, the Greek constitutionalist narrative, widely shared in Greek society, expresses both these visions. Greek constitutions have expressed the particularities of the Greek people and have represented a particularly Greek way of national self-determination. The 1975 Constitution, for example, begins with an admittedly strange phrase, fruit of a particularly Greek understanding of political morality: 'In the name of the Holy and Consubstantial and Indivisible Trinity'. Constitutionalism as patriotism is expressed in the last provision of the Constitution: 'Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution.'<sup>69</sup>

Moreover, Greek constitutions have embodied the moral values of the most idealistic image of the Greek people. Interestingly, despite their historic particularities and their devotion to the Orthodox Church, constitutional texts have always depicted the Greek people as a European-oriented liberal democratic society. They have comprised long catalogues of constitutional rights and have been open to European integration. This

<sup>65</sup> *ibid* 23.

<sup>66</sup> See Dimitrios G Sioufas (member of parliament), 'Foreword', in the official parliamentary translation of the Constitution of Greece (n 14) 7.

<sup>67</sup> Duncan Kennedy, 'American Constitutionalism as Civil Religion: Notes of an Atheist' (1995) 19 *Nova L Rev* 908, 909.

<sup>68</sup> *ibid*, especially 919ff.

<sup>69</sup> Constitution of Greece, art 120(4).

European orientation is combined with the belief in the power of the Constitution as a vehicle to achieve the more ‘advanced’ level of ‘civilisation’ and sometimes even the economic prosperity of Greece’s European partners.<sup>70</sup> The foreword of the 1975 Constitution, for example, states that its text ‘fully expressed the *acquis* of post-war European constitutionalism, and, indeed, considering the institutional backwardness of the Country at the political level during the first decades following World War II, signalled a real advance in that direction.’<sup>71</sup>

Of course, there is always a shift between how a constitution works in the popular imagination and how it actually works in practice. For example, while in the dominant political morality, expressed in the constitutionalist religion, parliament might be the primary legislator, in practice, legislative initiative has its source in the government; parliament is usually confined to approving draft bills. Even more, popular constitutionalist imagination might be consciously wrong or even hypocritical. In this sense, believing in popular sovereignty should not be considered a ‘mistake’; it might be a custom, nostalgically preserved, even if it is naïvely or in bad faith used by people exercising public power. This does not reverse the fact that constitutionalism as faith has always played a role in political argumentation. Even if it found poor correspondence in practice, since its enactment, the 1975 Constitution, in the sense of a formal text guaranteeing popular sovereignty and liberal values, has had a strong symbolic value. It has been a criterion for the legitimacy of political arguments and propositions.<sup>72</sup> Constraining the argumentation of political actors, it has constrained political practice as well.

In contrast, the abuse of constitutional procedures in Eurocrisis legislative practice shows that this symbolic value of the Greek Constitution has been lost, even though the constitutional text is still formally valid.<sup>73</sup> The excessive use of emergency procedures and ‘acts of legislative content’, for example, bears a strong symbolic meaning: a similar practice by Ioannis Metaxas in the 1930s completely degraded the role of the parliament and led to the dictatorship of August 1936. Symbolism is important, especially when it concerns what is generally accepted as fundamental in a constitutional democracy. The public television and radio have long functioned as national symbols of free speech and have always been attacked by oppressive regimes. In 2013, the public media were shut down after the issuing of an act of legislative content that expanded an existing

<sup>70</sup> See more generally Drosos (n 60) 39ff.

<sup>71</sup> See Sioufas (n 66) 7.

<sup>72</sup> Indeed, the conformity or non-conformity of a certain political proposition to the Constitution has been often used as a moral-political argument itself. This is usually the case in constitutional democracies.

<sup>73</sup> Observing the deconstruction of constitutional forms and symbols does not necessarily presuppose faith in the Constitution. Even more, it does not presuppose faith in the existence—or the accessibility of knowledge—of a *correct* constitutional solution for each case. Finally, it does not imply any normative evaluation of constitutional deconstruction. Even taking a point of view totally external to the Greek system of constitutional law, one can observe that constitutional precepts and values are not anymore constraining local constitutional actors.

legislative delegation to the administration on the matter.<sup>74</sup> Their closing was presented by the government as satisfying a requirement set by the troika for reducing the number of public employees, an allegation denied by the creditors.<sup>75</sup> Whatever its source and the reasons for the emergency, the act of legislative content was never ratified by parliament, and therefore ceased to be valid. However, it succeeded in fully producing *de facto* consequences.

‘Continuity’ and ‘change’ in the English constitution are criteria for accepting or criticising political propositions in the English political sphere.<sup>76</sup> In this sense, the English constitution, dynamic and unwritten, still channels the evolution of domestic politics. On the contrary, what is observed in Greece under the Economic Adjustment Programmes is *rupture*. Since the outburst of the Eurocrisis, Greece has experienced a rather inverse phenomenon from what is happening in the UK. Though the country possesses a written constitution, no one seems to believe anymore in the political conventions that it formalises. The crisis abruptly unveiled the deficiencies of the Greek polity. Suddenly, the ‘constitutional success’ of 1975 was reinterpreted as a failure, as the grounding for the establishment of a rotten political system, which the Constitution sustained and even nourished for more than 30 years. Everyone started talking about replacing the 1975 Constitution; propositions for constitutional amendments were included in the political programmes of the major parties in the 2012 elections. Venizelos even referred to a ‘constituent’ power of parliament, thus making rupture with the 1975 Constitution explicit.<sup>77</sup>

However, very soon it became clear that the Greek people could no longer agree on what their desired polity would be. So, while constitutional amendment discussions have been temporarily silenced, the loss of faith in the Constitution remains. The Constitution has lost its capacity to shape constitutional politics in Greece and its importance as a criterion for the legitimacy of political propositions. Its forms, categories and instruments—when they are respected at all—are rather mobilised by legal-constitutional experts in the Scientific Service of Parliament,<sup>78</sup> in the ministerial cabinets and in public debates, in order to *circumvent* parliamentary deliberation.

<sup>74</sup> See Act of Legislative Content, ‘Amendment of the provisions of article 14(B) Law 3429/2005’ (10 June 2013) Government Gazette 139 A. This act was the legal basis of Decision OIK.2/2013 of the Minister of Finance, ‘Suppression of the public enterprise Greek Radio-Television, AE (ERT-AE)’ (11 June 2013) Government Gazette B 1414, issued the next day.

<sup>75</sup> See, eg, ‘Joint answer given by Mr Rehn on behalf of the Commission’ (n 36).

<sup>76</sup> For a survey of various examples of constitutional evolution in the United Kingdom, see John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007).

<sup>77</sup> Xenophon Contiades and Ioannis Tassopoulos (n 5).

<sup>78</sup> The Scientific Service of Parliament is a body composed of experts in various domains, including public law, constitutional and institutional history, environmental issues, European law and international relations. The mission of this service is to provide technical advice to parliament on the various bills that are introduced for discussion.



## 5 Loss of faith in the domestic constitutional discourse

Loss of faith is demonstrated at the level of the domestic constitutional discourse. Indeed, domestic political and legal actors often justify the changes brought about by the Eurocrisis from the point of view of the Constitution. This justification discourse appears in parliamentary debates, in statutes' explanatory and introductory reports, in public and academic debates and in judicial decisions and opinions. The various arguments express different versions of constitutional faith. In some cases, they even express a total loss of faith in the Greek Constitution. Here, I will only refer to some examples of constitutionally relevant arguments.

At a first level, domestic actors have sometimes attempted to accommodate the socio-political situation within pre-existing constitutional categories, rules and concepts. In their reasoning, constitutional forms operate differently due to the influence of exceptional circumstances. For example, called to rule upon the constitutionality of Law 3845/2010, the Council of State dedicated half of its reasoning to the description of the exceptional situation that the state was facing.<sup>79</sup> Then, as we saw, it went on to declare that the impugned measures were justified by the 'fiscal emergency' or the 'compelling public interest' of the consolidation of public finances, which also constituted the 'aim of common interest for Eurozone Member States'.<sup>80</sup> Admittedly, it is not usual for a domestic court to justify restrictions to fundamental rights by referring to the common interest of the members of a supranational organisation. But, as noted above, this is related to the ambiguous foundation of the Economic Adjustment Programme. Besides, it is not the only originality in the Council of State's qualification: until recently, the same Court had constantly rejected the nature of a 'fiscal interest of the State' as a legitimate reason justifying fundamental rights' restrictions.<sup>81</sup> However, since the beginning of the crisis, the financial public interest had been progressively qualified as a 'compelling national interest' in previous cases.<sup>82</sup> Thus, the path to decision 668/2012 had been paved.<sup>83</sup>

Exceptional circumstances affect not only the definition of constitutional concepts; they also have an impact on the intensity of judicial scrutiny, and unavoidably affect the scope of constitutional protection of fundamental rights.<sup>84</sup> This is usually justified through the principle of proportionality. In the decision 668/2012, the majority of the Council of State, citing Strasbourg case law on the right to property, deferred to governmental policy choices. The judges stated that assessments by the legislature concerning the

<sup>79</sup> See Decision 668/2012 (n 16) paras 9–14.

<sup>80</sup> *ibid* para 35.

<sup>81</sup> See Council of State (Plenary Session) Decision 1663/2009 of 13 May 2009 [2009] EEvrD 435.

<sup>82</sup> See Council of State (6th Section) Decision 1620/2011 of 30 May 2011 [2011] EDKA 350.

<sup>83</sup> Iakovos Mathioudakis, 'Metaschimatismoi tou Tameiakou Symferontos tou Dimosiou se Periodo Entonis Oikonomikis Krisis [Transformations of the Cash Interest of the State in a Period of Intense Economic Crisis]' [2011] EFDD 478.

<sup>84</sup> See, eg, in the domestic literature, Panagiotis Pikrammenos, 'Dimosio dikaio se ektaktes synthikes apo tin optiki tis akvyrotikis dioikitikis diadikasias [Public law under exceptional circumstances from the point of view of the administrative procedure of annulment]' [2012] ThPDD 97.

importance of the public interest that the austerity measures were advancing, as well as the suitability and the necessity of those measures, were political or factual evaluations subject only to marginal judicial scrutiny.<sup>85</sup> Therefore, the Court applied only a kind of rational basis test: it stated that the impugned measures were part of a 'broader programme of economic adjustment and structural reforms' that, 'comprehensively and coordinately applied', would purportedly respond to the fiscal crisis and lead to economic sustainability.<sup>86</sup> The measures, directly contributing to the reduction of public spending, were thus not 'manifestly unsuitable', and could not be deemed unnecessary for the pursuit of the compelling public interest of the consolidation of public finances.<sup>87</sup>

The incidental and fragmented way in which cases arrive before the Council of State does not allow for a holistic account of the matter. In contrast, academic scholarship confronts the new constitutional situation at a more abstract level. When they do not object to the incompatibility of the new state of affairs with constitutional precepts, domestic authors often try to justify the constitutional-political changes by 'dressing them in familiar clothes.' According to Drosos, for example, the MoU and the central role that the troika acquired in the determination of governmental policy mark a 'turning point' in the Greek polity, which took place *de facto*, without the need for constitutional amendment.<sup>88</sup> The author suggests that similar fundamental shifts have occurred in the past and do not contest the validity of the Constitution.<sup>89</sup>

This type of argumentation is often combined with an attempt to 'force' the Constitution in order to make it fit reality. An article written by Contiades and Fotiadou is illustrative of this.<sup>90</sup> The authors propose the principle of proportionality as a method for the definition of the content of fundamental social rights.<sup>91</sup> Crisis-related case law and legislation is used as a support for their arguments. According to their line of reasoning, it is constitutional theory that should fit reality and not the other way around. Similarly, Manitakis offers a constitutional account of the situation which is influenced by the 'existential dimensions' that the financial crisis has acquired.<sup>92</sup> Thus, the author re-invents constitutional concepts, such as national sovereignty and public interest, in order to accommodate the MoU. Mobilising highly complex technical arguments and distinctions, he attempts to justify constitutional political changes.

What is common in the above justifications is that emergency is accommodated by the Constitution. Though exceptional, the situation remains within the constitutional realm. The constitutional text remains a central part of constitutional-political

<sup>85</sup> See Decision 668/2012 (n 16) para 35.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> See Giannis Drosos, 'To "Mnimonio" os Simeio Strofis tou Politevmatos [The "Memorandum" as a Turning Point of the Regime]' (2011) 6 *The Book's J* 41.

<sup>89</sup> *ibid.*

<sup>90</sup> Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 *Intl J Con L* 660.

<sup>91</sup> *ibid.*

<sup>92</sup> See Manitakis (n 21) 707.

argumentation, even though the scope of its provisions is fluid and adapted to the circumstances. This is not surprising, since the Council of State, like constitutional law scholars, derive their authority as constitutional-political actors from the existence of a valid Constitution. Therefore, in these actors' argumentation, constitutionalist faith is not lost; we are rather in what Balkin has called a 'middle game relationship', where one can still hope for improvement after the economic and constitutional crisis ends.<sup>93</sup> Thus, unless the Constitution is not turned into something totally elastic, in this type of reasoning constitutional theory preserves a minimal critical function. In other words, courts preserve for themselves the possibility of declaring legislative or administrative choices unconstitutional in the future. In subsequent cases, Greek courts have indeed scrutinised more stringently legislative interferences with fundamental rights, and have declared measures implementing the Economic Adjustment Programme to be unconstitutional.<sup>94</sup>

A subtle but fundamental change occurs when it is claimed that the measures actually *implement* the Constitution. This argument, existing already in an embryonic form in decision 668/2012, is more explicit in the public discourse of the supporters of austerity policies. Thus, it has been generally advanced by the government that the statutes related to Eurocrisis law were applying, and not violating, national constitutional law. The main legal-technical argument is that article 28 of the Constitution explicitly provides for European integration and that implementation of the Economic Adjustment Programme is a necessary step in this direction. More broadly, budgetary discipline is argued to contribute to the modernisation of the Public Administration and to the elimination of Greek pathologies, deemed to be culturally specific.<sup>95</sup> Austerity is argued to be necessary in order for the state to regain its sovereignty, lost as a consequence of the debt crisis.<sup>96</sup>

In this kind of rhetoric, the Constitution no longer represents a text composed of written rules, procedures and substantive provisions. Instead, those supporting this argumentation refer to the 'spirit', 'orientation' or 'foundation' of the Constitution as a whole.<sup>97</sup> Article 28 of the Constitution, regulating the openness of the constitutional order to European integration becomes the Trojan horse for transforming the polity and deconstructing the Constitution. In this way, national sovereignty is re-interpreted as implying *economic* independence within the EU and Eurozone, pursued at the cost of political independence. Indeed, economic independence is argued to be achievable only through a particular economic policy, imposed by the EU. The foundation of the State is no longer popular sovereignty, as one routinely hears in the halls of Greek law schools;

<sup>93</sup> Jack M Balkin, 'Sanford Levinson's Second Thoughts About Constitutional Faith' (2012) 48 *Tulsa L Rev* 101, 107.

<sup>94</sup> See the case law summarised in Marketou and Dekastros (n 13) para X.9.

<sup>95</sup> See, eg, Minutes of the Greek Parliament (28 March 2012) (n 41) 8004ff.

<sup>96</sup> *ibid.*

<sup>97</sup> See, eg, the argumentation by the members of the governing party in the parliamentary debates of the 28 March 2012, *ibid.*

it has been replaced by economic sovereignty of the state as a public organisation with a European orientation. The 'people' is lost from the political background; economic rationality, as dictated by the state's creditors, has taken its place. In other words, this type of reasoning expresses a very different version of faith, though it still claims to be constitutional. No longer attached to a text that constrains political actors, this new type of faith upsets fundamental features of Greek constitutionalism.

Responding to the accusations by the left that, by ratifying Eurocrisis legal instruments, the government was 'acting in absentia of the Greek people', a member of the parliamentary majority contended on the contrary that '[they were] supporting the fundamental choice of the Greek people, namely that the country remains in the Eurozone.'<sup>98</sup> However, no referendum on Eurocrisis policies had taken place in Greece at the time; nor was the issue at stake in any elections preceding the statement of that member of parliament. Messianic parliamentary majorities become the sovereign interpreters of the will of the people, and the interpretation is now reduced to a fundamental choice: European integration, or isolation and destruction. It is not difficult to notice that this rhetoric is equivalent to an overall contestation of the formal Constitution as a valid criterion for the legitimacy of political propositions. In the discussions of Law 3845/2010, Venizelos, Minister of Finance at the time and a prominent constitutional law scholar, argued:

The Constitution (...) is not a text, is not a code of civil or criminal procedure. It is a great, historic, national pact. Substantively, it is the framework of the consensus that governs our nation in the long historic time. Thus, when [procedural constitutionality] matters are raised, in reality it is the legitimacy of Parliament and Government, the legitimacy of the political and State system of the country itself that is contested. We cannot respond technically to this matter. (...) We must convince citizens that we know what we are doing, not hidden behind the provisions of the Constitution and of the Standing Orders of Parliament, but before our historic responsibilities.<sup>99</sup>

A similar way to justify the incompatibility of a certain situation to the Constitution is to appeal to a kind of legitimacy or responsibility *transcending* the formal Constitution. During the same parliamentary debates, left wing parties blamed the unconstitutional violation of social rights and social *acquis*. In support of their arguments, they cited a report by the Scientific Service of the parliament.<sup>100</sup> The government in response compared the situation of the country to a state of war.<sup>101</sup> In the explanatory report accompanying

<sup>98</sup> *ibid* 8043.

<sup>99</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6750.

<sup>100</sup> The report on Law 3845/2010 raised issues of constitutionality or compatibility to the ECHR of many of the statute's provisions. The report expressed clear doubts concerning the respect by the legislature of labour and social rights guaranteed by the Greek Constitution. See 'Report on the bill "Measures for the implementation of the support mechanism of the Greek economy from the Member States of the Eurozone and the International Monetary Fund"' (5 May 2010) 4ff <[www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/m-dnt-epistimoniki.qxp.pdf](http://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/m-dnt-epistimoniki.qxp.pdf)> accessed 12 September 2015.

<sup>101</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6714.

the statute, the government argued that the activation of the support mechanism and the onerous measures agreed in the MoU were an ‘action of responsibility and an historical obligation to face the danger of collapse of the Greek economy’.<sup>102</sup> Moreover, in the introductory report annexed to the statute, it is mentioned that the only alternative to these measures would be ‘collapse and destruction’.<sup>103</sup> Against procedural objections raised by left wing parties during the voting on the first MoU, the Prime Minister at the time argued that the major concern should not be the qualified majority eventually required by constitutional provisions, but the national and political responsibility of the parliament and of its members personally towards the state and its creditors.<sup>104</sup> Similar arguments were mobilised by the government during the voting of the second rescue package, against accusations for ‘constitutional deviance’, ‘colonisation’ of the country and ‘dictatorship of the markets’ launched by the parties of the opposition.<sup>105</sup>

In the above discussions, representatives of the government have drawn upon the image of a state of exception, where constitutional norms do not apply. However, they have not referred to article 48 of the Constitution which provides for a constitutional state of siege. Besides, the very strict conditions of this article would not be met.<sup>106</sup> Courts are incompetent when faced with such a situation, since the *interna corporis* of the parliament are traditionally immune from judicial scrutiny. It is clear that the above argumentation is not anymore characteristic of what Balkin has called a ‘middle game relationship’.<sup>107</sup>

The paradox, emphasised by Venizelos himself, a little further in his speech on Law 3845/2010, is striking: the last remaining defenders of the Constitution are left wing parties.<sup>108</sup> Ironically, it is those parties that, until recently, were contesting the political *status quo*, precisely the one institutionalised in the same Constitution.<sup>109</sup> In contrast, for the traditional ‘priests’ of constitutional faith, the Government and constitutional law scholars, the Constitution has become something purely formal, almost pagan.<sup>110</sup> In their discourse, international legality, coupled by technical economic standards, has

<sup>102</sup> See the explanatory report to Law 3845/2010, 1 <[www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf](http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/M-DNTAMEIO-eis1.qxp.pdf)> accessed 12 September 2015.

<sup>103</sup> *ibid* 2.

<sup>104</sup> See Minutes of the Greek Parliament (6 May 2010) (n 2) 6762.

<sup>105</sup> See Marketou and Dekastros (n 13) para X.2.

<sup>106</sup> This article can only be invoked ‘in case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime’.

<sup>107</sup> See Balkin (n 93).

<sup>108</sup> See Evangelos Venizelos, Minutes of the Greek Parliament (6 May 2010) (n 2) 6750.

<sup>109</sup> *ibid*.

<sup>110</sup> See Xenophon Contiades, *To Anorthologiko mas Syntagma: Giati Apetychan oi Politikoi Thesmoi? [Our Irrational Constitution: Why Did Political Institutions Fail?]* (Papazisis 2015). See also Evangelos Venizelos, ‘Ethniko Syntagma kai ethniki kyriarchia ypo synthikes diethnous oikonomikis krisis: to provlima itan kai paramenei politiko kai ochi syntagmatiko [National Constitution and National Sovereignty in Circumstances of International Economic Crisis: The Problem was and Remains Political and not Constitutional]’ [2011] EfDD 2.

substituted the constitutional text in its legitimising function. The Constitution has progressively surrendered to the much more concrete and technical precepts of market rationality and Eurocrisis legal instruments.

Under this view, since politics has lost its sense, popular sovereignty has lost its sense as well. Deprived of its foundation, of its symbolic value, the Constitution is turned into a tool, consciously and even explicitly manipulated by governments. Its value becomes only a functional one. Those who invoke it in order to *constrain* executive economic regulation are deemed at best to appeal to some kind of 'bourgeois formalism' in the present existential crisis of the Greek state.<sup>111</sup> At worst, they are deemed to be pursuing the destruction of the Greek polity in its present form, the destruction of what is most valuable in the new faith expressed by the promoters of austerity: the European orientation of the state and its economic independence according to a certain economic model. Paraphrasing Levi-Strauss, we can say "The Constitution, a symbol of irreligion, what a paradox!"<sup>112</sup> In this rhetoric, objections to the constitutionality of political propositions are easily rebutted with the aphorism 'the Constitution is not eatable', as I once heard a Greek constitutional law professor say during a conference. However, since no constitution is or will ever be 'eatable', does this discourse, far from a redefinition of Greek constitutionalism, express a more general loss of faith in constitutional democracy? And, if Weiler is right in saying that "legitimacy resources" of the [European] Union (...) are depleted, and that is why the Union has had to turn to its Member States for salvation,<sup>113</sup> what does the loss of faith in national constitutions mean for European integration?

## 6 Afterword: Latest developments

The constitutional faith metaphor proves useful in the account of the latest developments in Greek constitutional politics. In the January 2015 elections, the self-proclaimed radical left party of SYRIZA won, obtaining an impressive vote. From a legal point of view, the party's political programme can be read as a campaign of restoration of constitutional faith, even if this adds a patriotic tenor to its discourse and ideology. SYRIZA's members had fiercely denounced the rule of law crisis provoked by the Economic Adjustment Programmes, claiming even their right to resist the violent abolition of the Constitution according to article 120. The invocation of this article provoked heated political debates; this provision had been famously mobilised by the left during the period of political turmoil that had preceded the military junta.

After the elections, SYRIZA formed a government with the far right Independent Greeks. The focus on the Constitution became characteristic of governmental policy

<sup>111</sup> Mazower (n 61) 23.

<sup>112</sup> Claude Lévi-Strauss, 'Le Père Noël Supplicié' (1952) 77 *Les Temps Modernes* 1572, 1754.

<sup>113</sup> Joseph Weiler, 'Europe in Crisis: On "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] *Sing JLS* 248, 249.

during the first months of this extraordinary coalition. Anti-austerity legislation was justified by invoking constitutional articles and European fundamental rights.<sup>114</sup> In this respect, the contrast with previous crisis-related legislation is striking. At a symbolic level, the government restored ERT, the public radio and television which had been violently shut down in June 2013. The explanatory report accompanying the ERT statute resembles a constitutional law handbook analysis of article 15 of the Constitution.<sup>115</sup>

In fact, the rule of law and the Constitution became a weapon in the hands of the left in their effort to give leeway to democratic politics again. Members of the governing parties often used constitutionalist argumentation against the cold economic rationality of the creditors. Their discourse sometimes acquired a specialist, scientific tone. It did not only concern substantive values, like human dignity and social rights. Indeed, the most powerful arguments had a distinctive formal and procedural tone, in harmony with the rites of Greek constitutionalism. In his first press conference, for instance, the Greek Finance Minister refused to negotiate with the troika, which he characterised as a structurally rotten committee; he requested institutional interlocutors instead.<sup>116</sup> One of the most significant achievements of the Greek government was to enhance the visibility and transparency of the Economic Adjustment Programme negotiations, which beforehand were taking place in a technocratic 'black box'. Most importantly, what the government was aiming for was the revival of the *essence* of Greek constitutionalism: the idea of the people, expressing itself through the Constitution, as the source of political power; the idea of the people's will as the main directive of government policy. The government, defying market rules, rejected any possible extension of the Second Economic Adjustment Programme, since the 'people' itself in the January 2015 elections had rejected its rationale.

However, creditors proved hard to convince with this constitutionalist burst. Economic pressures on the state became stronger and stronger, and the Greek government was soon obliged to cede virtually all the crucial points of its political programme. During the final stage of the negotiations, the creditors insisted on an extension of the existing programme under the condition that the Greek government would implement harsh austerity and privatisation policies. Creditors' proposals generally included

<sup>114</sup> See the reports accompanying Law 4325/2015 of 11 May 2015, Government Gazette A 47 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=89e03b77-5816-4313-a5ee-a47300035379](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=89e03b77-5816-4313-a5ee-a47300035379)> accessed 12 September 2015. See also the relevant reports for Law 4320/2015 of 19 March 2015, Government Gazette A 29 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=65cc459d-46da-48b3-a4d7-a4500148fbae](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=65cc459d-46da-48b3-a4d7-a4500148fbae)> accessed 12 September 2015.

<sup>115</sup> See the explanatory report to Law 4324/2015 of 18 March 2015, Government Gazette B 372 <[www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law\\_id=43568363-af33-4f55-8e17-a46d01455ede](http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=43568363-af33-4f55-8e17-a46d01455ede)> accessed 12 September 2015.

<sup>116</sup> See 'Greece's Varoufakis: "No Debt Talks with EU-IMF Troika"' *BBC News* (30 January 2015) <[www.bbc.com/news/world-europe-31055069](http://www.bbc.com/news/world-europe-31055069)> accessed 27 October 2015. See also 'Greece Warned against Reversing Austerity as it Rejects Bailout Administrators' *Euronews* (30 January 2015) <[www.euronews.com/2015/01/30/greece-warned-against-reversing-austerity-as-it-rejects-bailout-administrators/](http://www.euronews.com/2015/01/30/greece-warned-against-reversing-austerity-as-it-rejects-bailout-administrators/)> accessed 2 November 2015.



detailed measures on a broad range of governmental policies, with a calculated financial impact and a precise and pressing timeline for their implementation. The state's partners left little flexibility to the Greek authorities and rejected alternative solutions proposed by them. Draft proposals sometimes contained a declaration of faith in the Economic Adjustment Programme and in its policies, contrary to the clearly stated government ideology.<sup>117</sup> These requirements were totally opposed to the political platform on which both governing parties had been elected some months earlier. In line with the constitutionalist tack followed until then, the government used the last resort option that the Constitution enshrines the expression of the popular will: it submitted the creditors' proposals to a referendum on 5 July 2015.<sup>118</sup>

Interestingly, constitutional argumentation found itself again at the heart of political debates. Many constitutional law scholars and political personalities criticised the referendum as unconstitutional. Some of them even called the Council of State or the President of the Republic to impede its realisation.<sup>119</sup> The unconstitutionality argumentation was neatly presented by Venizelos in parliament in the relevant voting session:<sup>120</sup> the only argument actually invoking an *existent* constitutional provision relevant to the case was an argument from article 28 and the spirit of the Constitution.<sup>121</sup> Indeed, there was a general fear, supported by ambiguous statements by European officials, that an eventual rejection of the creditors' proposal would lead to an exit of Greece from the common currency (the so-called 'Grexit') and, contrary to article 28, would threaten the European orientation of the state. In other words, it was not the Constitution in the form of a written and entrenched document that was opposed to a referendum; rather, it was the creditors' will and the agreements signed by previous governments. Once again, constitutional procedures were being used as an obstacle to the executive economic regulation dictated by the creditors. Once again, the Constitution became a symbol of irreligion in the new 'constitutional' faith.

<sup>117</sup> See, eg, an English translation of the text published to accompany the referendum, 'Reforms for the completion of the current programme and beyond' 1 <[www.referendum2015.gov.gr/wp-content/uploads/2015/06/REFORMS-FOR-COMPLETION-OF-CURRENT-PROGRAM-1.pdf](http://www.referendum2015.gov.gr/wp-content/uploads/2015/06/REFORMS-FOR-COMPLETION-OF-CURRENT-PROGRAM-1.pdf)> accessed 6 February 2016 ('The Greek Government remains fully committed to the program supported by the lending arrangement. It believes that its policies are adequate to achieve the objectives under the program and stand (sic) ready to take any measures that may become appropriate for this purpose as circumstances change').

<sup>118</sup> See Helena Smith, 'Greek PM Alexis Tsipras Calls Referendum on Bailout Terms' *The Guardian* (26 June 2015) <<http://www.theguardian.com/world/2015/jun/26/greece-calls-referendum-on-bailout-terms-offered-by-creditors>> accessed 3 November 2015.

<sup>119</sup> The Council of State avoided answering a relevant question of constitutionality, reviving the theory of governmental acts. See Council of State (Plenary Session) Decision 2787/2015 (3 July 2015) available at the official website of the Council of State <[www.ste.gr/portal/page/portal/StE/ProsfaresApofaseis#a376](http://www.ste.gr/portal/page/portal/StE/ProsfaresApofaseis#a376)> accessed 12 September 2015.

<sup>120</sup> Minutes of the Greek Parliament (27 June 2015) 3825 <<http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20150627.pdf>> accessed 6 February 2016.

<sup>121</sup> For more information see Afroditi Marketou, 'The Greek Referendum: Is it Unconstitutional?' (*Constitutional Change Through Eurocrisis Law*, 3 July 2015) <[eurocrisislaw.eui.eu/news/the-greek-referendum-is-it-unconstitutional/](http://eurocrisislaw.eui.eu/news/the-greek-referendum-is-it-unconstitutional/)> accessed 12 September 2015.

The result of the referendum was striking. Despite prolonged bank holidays and capital controls imposed during the campaign, the creditors' proposal was rejected by 61.3 per cent of the voters. However, in substance nothing changed. In the meantime, the extension period of the Second Economic Adjustment Programme had expired, and the Greek government sent a request to the ESM for support. After hard negotiations, the Euro Summit issued a statement on the matter on 13 July 2015. Invoking 'the need to rebuild trust with Greece', the state's European partners forced the Greek government to request the support of the IMF and to legislate a set of prior actions.<sup>122</sup> According to the Statement, these actions should be implemented 'without delay', which for some major reforms meant in three days' time.<sup>123</sup> Determination of governmental policy went so far as to require changes to the core of the Greek legal system such as, most notably, an extensive reform of the Code of Civil Procedure.<sup>124</sup> What is more, the Greek authorities committed to change to reexamine with a view to amending 'legislations (...) backtracking on previous programme commitments or identify clear compensatory equivalents for the vested rights that were subsequently created'.<sup>125</sup>

The prior actions required by the creditors were included in an emergency omnibus bill and were voted in one single article, a procedure that left no possibility for any party to amend or reject specific provisions of the programme. To justify the circumvention of constitutional procedures, the government invoked the Euro Summit Statement and the 'particularly exceptional circumstances' triggered by it.<sup>126</sup> The implementation of the measures, verified by the European institutions, opened the way for the negotiation of a new programme under the ESM framework. The European leaders, however, had specified that this programme would necessarily contain harsh austerity, privatisations and labour market deregulation.<sup>127</sup> Further, Greece assumed the obligation to create an independent fund responsible for the privatisation of valuable Greek assets. Following its political endorsement by the Eurogroup and its approval by national parliaments, on 19 August 2015, a detailed MoU was finally signed by the EC and the Greek authorities.<sup>128</sup> The Financial Assistance Facility Agreement between Greece and the ESM was concluded the same day.<sup>129</sup>

<sup>122</sup> See Euro Summit, 'Statement' SN 4070/2015 (12 July 2015) 1 <[www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/](http://www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/)> accessed 2 November 2015.

<sup>123</sup> *ibid* 1ff.

<sup>124</sup> *ibid* 2. Note that the deadline for the implementation of this reform was 11 days.

<sup>125</sup> *ibid* 5.

<sup>126</sup> See Law 4334/2015 of 16 July 2015, Government Gazette A 80, and the relevant explanatory report at <[www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf](http://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/e-ems-eis.pdf)> accessed 12 September 2015.

<sup>127</sup> See Euro Summit, 'Statement' (n 122).

<sup>128</sup> See Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (19 August 2015) <[ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/01\\_mou\\_20150811\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf)> accessed 12 September 2015.

<sup>129</sup> See Financial Assistance Facility Agreement (19 August 2015) <[www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf](http://www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf)> accessed 5 March 2016.

Though certain constitutionalist symbols have been endorsed by the drafters of the new Economic Adjustment Programme, technocracy remains dominant. Important policy measures are mentioned in the form of bullet points and their implementation is monitored in a checklist manner.<sup>130</sup> For the application of the programme, the troika, elegantly renamed 'Institutions', will continue sending review missions to Athens.<sup>131</sup> The Greek government has committed 'to consult and agree with the Institutions on all draft legislation in relevant areas with adequate time before submitting it for public consultation or to Parliament.'<sup>132</sup> Though the new MoU does not contain the declaration of faith found in previous creditors' proposals, ownership of the programme by the Greek authorities is required.<sup>133</sup> And, although the need for social justice and fairness is stressed in the document, in no place do we find a contestation of the austerity rationale; such contestation would be destructive for the technocratic legitimacy to which the 'Institutions' are appealing. As Camus already observed with irony in the 1950s: '[O]ur old Europe at last philosophizes in the right way. We no longer say as in simple times: "This is the way I think. What are your objections?" We have become lucid. For the dialogue we have substituted the communique.'<sup>134</sup>

Seeking a fresh democratic legitimization in order to apply the MoU, the Prime Minister called early elections. However, this time the political programme that the new government would follow was predefined. What the result of the election would determine was *who* would apply it. Indeed, since September 2015, harsh austerity measures have been justified by a constant invocation of economic emergency, of the obligation of the government to apply the MoU and of the need for domestic legislation to be approved by the 'Institutions'.<sup>135</sup> Faith in politics is totally lost and constitutional symbolism is turned into some kind of aestheticism; democratic decision-making applies only as to superficial matters. The MoU, now adopted by all Euro-area parliaments just like an international convention, is much more difficult to contest. The Loan Agreement itself is normalised within the EU law framework. The state of economic emergency persists; but European institutions cannot anymore remain unaccountable.

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<sup>130</sup> See European Commission, 'Report on Greece's compliance with the draft MOU commitments and the commitments in the Euro Summit statement of 12 July 2015' (14 August 2015) <ec.europa.eu/economy\_finance/assistance\_eu\_ms/greek\_loan\_facility/pdf/report\_on\_compliance\_with\_prior\_actions\_en.pdf> accessed 12 September 2015.

<sup>131</sup> See the Euro Summit, 'Statement' (n 122) 5.

<sup>132</sup> *ibid.*

<sup>133</sup> Memorandum of Understanding between the European Commission and the Hellenic Republic and the Bank of Greece (n 128) 4.

<sup>134</sup> Albert Camus, *The Fall* (Justin O'Brien tr, 1st edn, Vintage International 1991) 45.

<sup>135</sup> See, eg, on the ongoing discussion on the reform of the pensions system: Sotiris Nikas and Eleni Varvitsioti, 'Epimenoun oi daneistes gia metra 1,8 dis. fetos kai 5,5 dis. eos to 2018 [The creditors insist on measures of 1.8 billion for this year and 5.5 billion until 2018]' (*Kathimerini*, 12 January 2016) <<http://www.kathimerini.gr/845234/article/oikonomia/ellhnikh-oikonomia/epimenoun-oi-daneistes-gia-metra-18-dis-fetos-kai-55-dis-ews-to-2018>> accessed 7 March 2016.

The above analysis is incomplete; its subject is difficult to grasp, due to the continuing political and constitutional instability in Greece. The purpose of this article has been to show that domestic constitutional politics is a neglected but important field in Eurocrisis legal literature and to propose a grid of analysis for the current transformations in one of the countries most affected by the crisis. Other interpretations of the situation are of course possible. Further analyses of national cases and comparative studies on the matter could substantially enrich our understanding of constitutional law and constitutional change.

# Developing Democracy through Liberal International Law

*Russell Buchan\**

## Abstract

By deploying the concepts of the international society and the international community this article constructs and defends an explanatory framework that enables us to better understand the complex international political and legal structure of the contemporary world order and better explain why violations of international peace and security occur. The international community describes an association of liberal states that has formed within the politically pluralist international society of sovereign states since the end of the Cold War and which considers only those states that exhibit respect for liberal values as legitimate. Moreover, it argues that the international community has demonstrated a tendency to deny non-liberal states their previously held sovereign right to non-intervention and has instituted a global campaign for their liberal reformation. The existence of the international community is evidenced by reference to the practice of liberal states vis-à-vis non-liberal states since the end of the Cold War and particular attention is paid to the reaction of the international community to the overthrow of the democratic regimes in Honduras and the Ivory Coast and the violent suppression of pro-democracy demonstrations in Libya and Syria. In light of these developments, this article assesses the impact of the international community upon international law and suggests that international law is being reformulated in order to construct a liberal international law that allows for the effective promotion of liberal values.

## Keywords

Liberalism, International Community, International Society, Arab Spring

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## 1 Introduction

‘The dominant approach in international relations theory for virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau, has been Realism.’<sup>1</sup> Stated succinctly, the gist of realism is that states exist in a condition of anarchy because there is no overarching international government that is capable of guaranteeing their

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<sup>1</sup> Anne-Marie Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 EJIL 503, 507.

survival. In this environment, states are by necessity selfish and untrusting actors that are primarily concerned with pursuing material power in order to deter potential aggressors and, where necessary, to repel them. In this realist world state survival, and thus international peace and security more generally, is maintained where there is a balance of material power between states. Where power becomes unbalanced and the system moves towards hegemony, the maintenance of international peace and security becomes susceptible to violation. With its focus upon material power, realism therefore sees little utility in international law and international law is regarded as more or less irrelevant as to whether international peace and security is maintained.<sup>2</sup>

In 2013, I published a monograph that challenged the adequacy of realism as a theoretical framework to explain the political and legal interactions of states in the contemporary world order and to understand why violations of international peace and security occur or, where it is maintained, why this is the case.<sup>3</sup> This challenge was pursued by constructing a unique explanatory framework that was predicated upon the concepts of the international society and the international community. In short, the argument developed in the monograph was that since the end of the Cold War an international community of liberal states has formed within the politically pluralist international society of sovereign states. Significantly, I argued that this international community demonstrates a tendency to dismiss states that fail to demonstrate respect for liberal values as illegitimate and, perhaps more significantly, to deny them their previously held sovereign right to non-intervention. In fact, I submitted that this international community is engaged in a sustained campaign to promote respect for liberal values to non-liberal states.

The monograph has attracted considerable attention. Whilst there has been praise for the arguments it develops,<sup>4</sup> others have voiced criticism,<sup>5</sup> some vociferously.<sup>6</sup> In particular, these critics challenge the explanatory strength of the concepts of the

<sup>2</sup> For a general discussion of realism, see Kenneth Waltz, *Theory of International Politics* (McGraw-Hill 1979).

<sup>3</sup> Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013).

<sup>4</sup> *International Law and the Construction of the Liberal Peace* was the recipient of the 2014 American Society of International Law's Francis Lieber prize for an outstanding monograph in the field of the law of armed conflict. The book has also been positively reviewed by Eric De Brabandere in (2014) 61 NILR 249 and Achilles Skordas in (2015) 64 ICLQ 491. For a positive yet more modest review, see Jean d'Aspremont, 'Democracy and International Law according to Russell Buchan: Prescribing under the Guise of Explaining?' (*EJIL: Talk!*, 17 November 2014) <<http://www.ejiltalk.org/democracy-and-international-law-according-to-russell-buchan-prescribing-under-the-guise-of-explaining/>> accessed 14 September 2015.

<sup>5</sup> Brad Roth, 'International Law's Enemy Within: Buchan's "International Community" as Rival to the Positive Legal Order' (*EJIL: Talk!*, 17 November 2014) <<http://www.ejiltalk.org/international-laws-enemy-within-buchans-international-community-as-rival-to-the-positive-legal-order/>> accessed 14 September 2015; Astri Suhrke, 'From Principle to Practice: US Military Strategy and Protection of Civilians in Afghanistan' (2015) 22 Intl Peacekeeping 202.

<sup>6</sup> Gregory Fox, 'A Comment on Russell Buchan's "International Law and the Construction of the Liberal Peace"' (*EJIL: Talk!*, 18 November 2014) <<http://www.ejiltalk.org/a-comment-on-russell-buchans-international-law-and-the-construction-of-the-liberal-peace/>> accessed 14 September 2015.

international society and the international community and thus their utility in explaining the character of international relations, both in their political and legal dimension.

The objective of this article is to engage with and respond to these criticisms. In pursuit of this objective, this article is structured as follows. In section 2, I sketch out the key arguments of the book and, in particular, I elaborate upon the concepts that I refer to as the international society and the international community. In section 2, I also outline the main criticisms that have been levied against this explanatory framework and attempt to rebut them. In rebutting these criticisms, I examine events that have occurred subsequent to the publication of the book and argue that these developments add additional weight to my thesis that through the activities of the international community the promotion of liberal values has now become embedded in international practice. Sections 3 and 4 discuss the international community's reaction to the overthrow of democracy in Honduras and the Ivory Coast, respectively. In section 5, I examine the international community's response to the Arab Spring and, in particular, I focus on events in Libya and Syria. In section 6, my attention turns to the role of international law in the international society and the international community. I examine how the content and character of international law is affected by these two opposing associations and the normative contestation that exists between them. In a nutshell, I argue that the international community has instigated a liberal international law to which the *raison d'être* is the promotion of liberal democracy to non-liberal states.

## 2 The international society and the international community

The concepts of the international society and the international community are central to the explanatory framework that I develop. I argue that when confronted with the global devastation wrought by the Second World War states recognised that they embraced a common interest in forging an international environment where their political independence and territorial integrity (that is, their sovereignty) could be protected and international peace and security maintained, and that this was best achieved through the implementation of a comprehensive international legal framework. What emerged in the years following the end of the Second World War, I submit, was an international society of states that was constituted by a universally accepted international legal rule that regarded all states *qua* states as sovereign equals.<sup>7</sup> Thus, provided a political community is a state under international law, it is regarded as sovereign and so legally entitled to determine its internal affairs to the exclusion of all others.

In terms of determining membership of this international society, and more crucially who is entitled to sovereignty as a product of this membership, the definition of statehood is all important. As we know, a political community is a state under international law where it exhibits a permanent population, a defined territory, an effective government

<sup>7</sup> See Robert H Jackson, *The Global Covenant: Human Conduct in a World of States* (OUP 2000).



and the capacity to enter legal relations.<sup>8</sup> Significantly, the requirement of an effective government refers to a government's effective *physical* control over the population within that territory; this criterion makes no reference and requires no normative judgement as to the *quality* of the control that the government imposes. What this means is that all states, regardless of whether the government in effective control of that state is fascist, communist, democratic or autocratic, are legitimate members of this international society and cast as sovereign equals.

Importantly, in order to formalise and ultimately strengthen its association, the international society created the United Nations (UN). In this sense, the UN emerged as the institutional representation of the international society and, at least until the end of the Cold War, was dedicated to protecting the sovereign equality of its member states.<sup>9</sup> Organs of this organisation such as the Security Council and General Assembly were therefore intended to act as guardians of state sovereignty and, more broadly, international peace and security.<sup>10</sup>

Given that membership of the international society is conferred automatically upon achievement of statehood, all states are legitimate members of the international society, and thus this society confers universal membership. I submit, however, that the end of the Cold War represented a seminal moment in the trajectory of international relations, and that since this date the political and legal structure of the world order cannot be adequately captured by the concept of the international society alone.

The end of the Cold War is such a significant date because it was at this time that liberal states began seriously to assess the performance of the international society (and the international legal framework it represents) in achieving its overarching goal of protecting state sovereignty from external intervention and thereby maintaining international peace and security. Significantly, for liberal states this empirical assessment revealed a failing of the international society and the legal regime it imposes to eliminate not just intervention in state sovereignty but in particular armed intervention, which is undoubtedly the most pernicious form of intervention.<sup>11</sup> However, although international legal rules were considered generally ineffective in maintaining international peace and security, for liberal states all was not lost because 'there nevertheless exists an island of peace in an ocean of conflicts and wars.'<sup>12</sup>

<sup>8</sup> Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

<sup>9</sup> See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, arts 2(1), 2(4), 2(7) (UN Charter).

<sup>10</sup> *ibid* arts 2(1), 2(7), 39. See generally Frederic Kirgis, 'The Security Council's First 50 Years' (1995) 89 AJIL 506.

<sup>11</sup> In 1970, Franck argued that art 2(4) had been violated so frequently that it 'mocks us from the grave': Thomas Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States' (1970) 64 AJIL 809, 809.

<sup>12</sup> Thomas Risse-Kappen, 'Democratic Peace—Warlike Democracies? A Social Constructivist Interpretation of the Liberal Argument' (1995) 1 Eur J Intl Relations 491, 492.

I argue that liberal states subscribe to the empirical 'fact'<sup>13</sup> that notwithstanding the continual inter-state violence experienced within the international society, liberal states enjoy a stable peace where any disputes that have emerged between them have been resolved without recourse to violence.<sup>14</sup> That liberal states have managed to forge a zone of peace is most often explained on the basis of the normative structure of liberal states. The argument runs that at the heart of a liberal state is the belief 'that individuals everywhere are fundamentally the same, and are best off pursuing self-preservation and material well-being. Freedom is required for these pursuits, and peace is required for freedom; coercion and violence are counter-productive.'<sup>15</sup>

If freedom is to be preserved, violence as a form of political adjudication must be forgone at all costs. As a result, '[m]odern democratic societies foster the internalization of norms for regulating and reconciling competing interests and values in public affairs in ways that are neither violent nor coercive.'<sup>16</sup> The consequence is that 'if the norms regulating the decision-making processes in a democratic system are orientated toward non-violence and the peaceful resolution of political conflicts, one could expect that democracies externalise these norms when dealing with one another.'<sup>17</sup> If a norm exists that requires the peaceful resolution of disputes *within* two states, it will also require the peaceful resolution of disputes *between* them.<sup>18</sup> Thus, when two liberal states come into contact in the international sphere and, after observation and scrutiny of each other's political constitution, perceive each other to be genuinely liberal a mutual trust of peaceful exchange will be established.

Motivated by the liberal peace thesis,<sup>19</sup> I argue that liberal states have formed a cohesive international community that exists within the international society and which

<sup>13</sup> Bruce Russett, 'The Fact of Democratic Peace' in Michael E Brown, Sean M Lynn-Jones and Steven E Miller (eds), *Debating the Democratic Peace* (MIT Press 1996) 58, 59.

<sup>14</sup> Much empirical research is available to substantiate the claim that liberal states have always enjoyed peaceful relations. Levy explains that the practical absence of war between liberal states is 'the closest thing we have to an empirical law in the study of international relations': Jack S Levy, 'Domestic Politics and War' in Robert I Rotberg and Theodore K Rabb (eds), *The Origin and Prevention of Major Wars* (CUP 1989) 79, 88.

<sup>15</sup> John M Owen, 'How Liberalism Produces Peace' in Michael E Brown, Sean M Lynn-Jones and Steven E Miller (eds), *Debating the Democratic Peace* (MIT Press 1996) 116, 118.

<sup>16</sup> William J Dixon, 'Democracy and the Peaceful Settlement of International Conflict' (1994) 88 APSR 14, 16.

<sup>17</sup> Risse-Kappen (n 12) 500.

<sup>18</sup> '[Thus] the culture, perceptions and practices that permit compromise and the peaceful resolution of conflicts without the threat of violence within countries come to apply across national boundaries toward other democratic countries': Dixon (n 16) 15–18.

<sup>19</sup> The liberal peace thesis has become firmly embedded in the political rhetoric of liberal states. In 1994, US President Bill Clinton explained 'democracies do not attack each other': Bill Clinton, 'Confronting the Challenges of a Broader World' (US Department of State Dispatch, 27 September 1993) <<http://dosfan.lib.unc.edu/ERC/briefing/dispatch/1993/html/Dispatchv4no39.html>> accessed 28 September 2015. In 2006, for example, US President George Bush declared that 'democracies yield the peace we all want. History has taught us democracies don't war. (...) Democracies yield peace': George W Bush, 'President Thanks US and Coalition Troops in Afghanistan' (US Department of State Archive, 1 March 2006) <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060301-3.html>> accessed 28 September 2015.

considers only those states that demonstrate respect for the liberal values of democracy, human rights and the rule of law as legitimate.<sup>20</sup> Note that liberal states of the international community do not forfeit their membership of the international society. As states, liberal states continue to enjoy membership of the international society. However, they now possess additional, overriding membership of the international community and subscribe to its normative framework and agenda. Importantly, the international community has sought to reserve sovereignty (and the protection it affords) for liberal, legitimate states only. Non-liberal states have therefore been increasingly denied their previously held sovereign right to determine their own internal political configuration and the international community has engaged in an often aggressive campaign for their liberal reformation. In particular, liberal states have sought to exploit their growing influence within the world order in order to cajole international organisations, and especially the UN Security Council because of its mandatory powers, into taking decisions that facilitate the promotion of liberal values.<sup>21</sup>

As I have already noted, my use of the concept of the international community as an explanatory tool has come under criticism since the publication of my book. In their reviews of my thesis Professors Greg Fox and Brad Roth, scholars who have been pioneers in assessing the role of international law in democracy promotion,<sup>22</sup> have made it clear that they consider the bright lines I draw between the international society and the international community to be far murkier in reality, and that the political structure of the contemporary world order is far more complex and nuanced than I portray. In particular, Fox and Roth argue that there are many instances in the post-Cold War era where liberal states have failed to dismiss non-liberal states as illegitimate and, in fact, have enjoyed close relationships with them. Their argument is that discrete national interests of liberal states are sufficiently prominent to prevent them from transforming their grand political rhetoric relating to the normative supremacy of liberal democracy into practice, such as the desire to preserve beneficial economic or security arrangements. In light of this, Roth explains that my understanding of the international community is overly 'bold' and 'straightforward' and which pictures the scene far 'too starkly'. Ultimately, Roth concludes that the account I offer is 'premature' and needs to

<sup>20</sup> It is not the objective of this article to identify which states can be regarded as liberal and therefore members of the international community. This being said, Freedom House publishes annually a list of 'free' states within the world order and Freedom House's understanding of which states are 'free' broadly aligns with my understanding of which states are liberal: Freedom House, '2015 Freedom in the World' (2015) <<https://freedomhouse.org/report-types/freedom-world#.VeGZnGC4nfY>> accessed 14 September 2015.

<sup>21</sup> Numerous examples are available. See, eg, the Security Council's use of its Chapter VII powers to restore the democratically elected President to power in Haiti (UNSC Res 940 (31 July 1994) UN Doc S/RES/940) and its use of Chapter VII to authorise the liberal reconstructions of Kosovo (UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244) and East Timor (UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272). More recently, the Security Council authorised the use of 'all necessary means' under Chapter VII to protect civilians in Libya (UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973).

<sup>22</sup> See, eg, Gregory Fox and Brad Roth, *Democratic Governance and International Law* (CUP 1999).

be more 'moderate' in order to be convincing. Fox makes a similar point when he labels the framework I develop 'reductionist'.<sup>23</sup>

To a certain extent I accept this criticism. It is correct that in the post-Cold War era there are examples of liberal states engaging with non-liberal states in such a manner as to indicate that they are tolerant of their non-liberal ideology. The argument is that where the maintenance of cordial relations is beneficial to liberal states (perhaps for economic reasons such as maintaining or improving trade relations or for security reasons such as deterring and suppressing international terrorism), liberal states are prepared to recognise non-liberal regimes as legitimate. Roth identifies the example of liberal states having 'recently embraced non-liberal solutions' in Egypt on the basis that it is 'convenient to other agendas'.<sup>24</sup> Another recent and prominent example would be the international community's seemingly close relationship with Saudi Arabia, which is clearly not a liberal state. In the words of the government of the United Kingdom (UK):

We develop and maintain the long-standing relationship between the UK and Saudi Arabia. We build on the bilateral relationship between our two governments and peoples, especially in the areas of trade and investment, education, culture, energy and climate security, and defence.<sup>25</sup>

It goes without saying that the social realities of the institution of recognition within the international community are complex and can take different meanings within a particular context. I therefore accept that factors other than a state's political constitution can influence the way in which it is perceived by liberal states. However, my objective is not to construct an explanatory framework that accounts for every micro-aspect of international social reality. If it were, then my project would essentially be a restatement of a mass of raw data. This may make for a robust research project in descriptive or explanatory terms. Ultimately, however, it would be unimpressive analytically because it would fail to judge what data is significant causally to the world order and that which is less relevant. In addition, and significantly, it would also fail to identify what I still believe to be a convincing line of explanation: namely, that since 1990 liberal states have exhibited consistent trends and patterns of conduct in their interactions with non-liberal states. Thus, it is not my objective to provide an all-encompassing 'theory of everything' which can explain international relations in their entirety since 1945 or even 1990. Instead, my objective is to identify salient empirical data and, on this basis, propose an explanatory framework that utilises ideal-types like the international society and the international community to elucidate generic transformations to the structural and normative configuration of the world order.

<sup>23</sup> Roth (n 5); Fox (n 6).

<sup>24</sup> Roth (n 5).

<sup>25</sup> UK Foreign and Commonwealth Office, 'UK and Saudi Arabia' (2015) <<https://www.gov.uk/government/world/saudi-arabia>> accessed 14 September 2015. See generally John Wight, 'Britain's Relationship with Saudi Arabia is a Disgrace' *The Huffington Post* (14 March 2015) <[http://www.huffingtonpost.co.uk/john-wight/saudi-arabia-britain\\_b\\_6451044.html](http://www.huffingtonpost.co.uk/john-wight/saudi-arabia-britain_b_6451044.html)> accessed 14 September 2015.

Of course my claim is an empirical one; that liberal states have cohered into an international community which exhibits a tendency to dismiss non-liberal states as illegitimate and take reformative action against them. It is therefore essential that I am able to draw upon a sufficient amount of empirical evidence to substantiate my claim.

Propelled by the hype and hubris of the Bush and Blair administrations there is much practice during the 1990s to support the existence of this international community of liberal states. At a glance, obvious examples would be: the intervention in Haiti in response to the overthrow of the democratically elected President;<sup>26</sup> the use of military force by the North Atlantic Treaty Organization (NATO) in Kosovo to end the egregious human rights abuses; and the liberal reconstructions of Kosovo and East Timor.<sup>27</sup> Indeed, during the mid-to-late 1990s, a considerable amount of academic literature was published which documented the preparedness of liberal states to dismiss non-liberal states as illegitimate and, where necessary, to intervene in their internal affairs in order to promote respect for liberal values. The likes of Michael Reisman, Thomas Franck and Jean d'Aspremont were key protagonists in this literature.<sup>28</sup> However, in terms of defending the existence of the international community, the more significant date is 11 September 2001. The reason for this is because in the wake of the devastating 9/11 terrorist attacks previously seminal proponents of the international community doctrine started to reject this thesis, and instead assert that in their foreign policy leading states within the international community have exhibited a return to realist ideology. These commentators now argue that because of the likes of international terrorism, the global economic downturn and the emerging multipolar world, the nature of the international environment has changed—or at least had become more complex—and that liberal states are no longer (as) concerned with the promotion of liberal values but instead (more) preoccupied with protecting discrete national security interests such as their security and economic prosperity. Consider the following remarks by d'Aspremont:

Contemporary practice shows signs of a return to realist and non-ideological foreign policies, threatening the centrality of democracy promotion in the foreign policies of most democratic states.<sup>29</sup>

The battle lines over whether the doctrine of the international community remains a convincing tool to explain the nature of international relations are therefore drawn in the post 9/11 era. For this reason, I will identify and analyse post-9/11 examples of the international community dismissing governments as illegitimate on the basis of their non-liberal credentials and, where necessary, intervening in such states in order

<sup>26</sup> UNSC Res 940 (31 July 1994) UN Doc S/RES/940.

<sup>27</sup> See UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244; UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272.

<sup>28</sup> W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866; Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46; Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NY J Intl L & Politics 877.

<sup>29</sup> Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 551.

to protect and promote respect for liberal values. Particular emphasis will be given to examples that were developing as I was writing the book and examples that have developed subsequently.

### 3 Honduras

A good illustration of the role of the international community engaging in a normative assessment of the political credentials of a state is in relation to the events that began to unfold in Honduras in 2009. In 2009, the democratically elected President of Honduras, Manuel Zelaya, attempted to initiate constitutional reform by holding a non-binding referendum. The Supreme Court of Honduras adopted what was regarded as a legally binding decision that required this poll to be cancelled.<sup>30</sup> Zelaya refused to heed the Supreme Court's decision and the Honduran Supreme Court issued a warrant for his arrest. Importantly, it is widely accepted that the Supreme Court did not have the authority to issue such a warrant under the constitution.<sup>31</sup> Acting on this order, during the night of 28 June 2009, the Honduran army stormed the presidential home and detained Zelaya. Rather than bringing him to trial as the arrest warrant required, the soldiers forced him onto a plane to Costa Rica. Later that day, after receiving a letter of resignation from Zelaya (although Zelaya protested that the letter was fabricated), the Supreme Court voted to remove him from office and appointed his successor.<sup>32</sup>

In the days and weeks following his exile there was widespread condemnation of the events that had occurred. The UN General Assembly adopted a resolution unambiguously stating that Zelaya was the legitimate President of Honduras because of his democratic credentials and that he must be returned expeditiously to power.<sup>33</sup> The General Assembly condemned

the *coup d'état* in the Republic of Honduras that has interrupted the democratic and constitutional order and the legitimate exercise of power in Honduras, and resulted in the removal of the democratically elected President of that country, Mr. José Manuel Zelaya Rosales [and demanded] the immediate and unconditional restoration of the legitimate and Constitutional Government of the President of the Republic of Honduras, Mr. José Manuel Zelaya Rosales, and of the legally constituted authority in Honduras, so that he may fulfil the mandate for which he was democratically elected by the Honduran people.<sup>34</sup>

<sup>30</sup> Supreme Court of Honduras Communiqué, 9 July 2009; Doug Cassel, 'Honduras: Coup d'Etat in Constitutional Clothing?' (2009) 13 ASIL Insights 9 <<http://www.asil.org/insights/volume/13/issue/9/honduras-coup-d%E2%80%99etat-constitutional-clothing>> accessed 14 September 2015.

<sup>31</sup> The President was 'forced out of the country in breach of the Constitution. Zelaya was formally deposed by a Congress with no clear constitutional power to remove him in the circumstances at hand, let alone summarily, without so much as a hint of due process of law. This was indeed a *coup d'état*': Cassel (n 30).

<sup>32</sup> William Booth and Juan Forero, 'Honduran Military Sends President into Exile; Supportive Congress Names Successor' *The Washington Post* (29 June 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062800635.html>> accessed 14 September 2015.

<sup>33</sup> UNGA Res 63/301 (30 June 2009) UN Doc A/Res/63/301.

<sup>34</sup> *ibid* paras 1–2.



Similarly, the Organization of American States (OAS) condemned the President's removal as illegitimate and unlawful.<sup>35</sup> Furthermore, the OAS invoked for the first time article 21 of the Inter-American Democratic Charter, which enabled the OAS to suspend Honduras from the organisation.<sup>36</sup> In particular, the OAS was clear that its suspension of Honduras's membership was on the basis of the unconstitutional interruption of the democratic order. Interestingly, anticipating suspension, the Honduran regime sought to unilaterally withdraw from the OAS. However, as the OAS Assistant Secretary-General Albert Ramdin explained that '[t]he current regime is not recognised as the legitimate government of Honduras; and so only a legitimate government can withdraw from the organization.'<sup>37</sup> Honduras's attempt to withdraw from the OAS was therefore considered void and Honduras was duly suspended.<sup>38</sup>

Many other states in the region unilaterally declared that there had been an unconstitutional overthrow of the democratically elected President,<sup>39</sup> as did the Inter-American Commission on Human Rights.<sup>40</sup> The statement by the President Barack Obama is particularly interesting:

All of us have great concerns about what's taken place there. President Zelaya was democratically elected. He had not yet completed his term. We believe that the coup was not legal and that President Zelaya remains the President of Honduras, the democratically elected President there. In that we have joined all the countries in the region, including Colombia and the Organization of American States.

I think (...) it would be a terrible precedent if we start moving backwards into the era in which we are seeing military coups as a means of political transition rather than democratic elections. The region has made enormous progress over the last 20 years in establishing democratic traditions in Central America and Latin America. We don't want to go back to a dark past. The United States has not always stood as it should with some of these fledgling democracies, but over the last several years, I think both Republicans and Democrats in the United States have recognized that we always want to stand with democracy, even if the results don't always mean that the leaders of those countries are favorable towards the United States. And that is a tradition that we want to continue.<sup>41</sup>

<sup>35</sup> OAS General Assembly Res AG/RES 1 (XXXVIII-E/09) (30 September 2009).

<sup>36</sup> OAS General Assembly Res AG/RES 2 (XXXVII-E/09) (4 July 2009).

<sup>37</sup> Quoted by Ginger Thompson and Marc Lacey, 'OAS Votes to Suspend Honduras Over Coup' *New York Times* (4 July 2009) <[http://www.nytimes.com/2009/07/05/world/americas/05honduras.html?\\_r=0](http://www.nytimes.com/2009/07/05/world/americas/05honduras.html?_r=0)> accessed 14 September 2015.

<sup>38</sup> In justifying the decision of the OAS, the Brazilian Foreign Minister explained, 'If the OAS doesn't work to give guarantees to a democratically elected government, in the case of a coup like this, then what is it for?': quoted by Elizabeth Malkin, 'Ousted Leader Returns to Honduras' *New York Times* (21 September 2009) <[http://www.nytimes.com/2009/09/22/world/americas/22honduras.html?\\_r=0](http://www.nytimes.com/2009/09/22/world/americas/22honduras.html?_r=0)> accessed 14 September 2015.

<sup>39</sup> See Booth and Forero (n 32).

<sup>40</sup> Inter-American Court of Human Rights, 'IACHR Strongly Condemns Coup in Honduras' (Press Release 42/09, 28 June 2009) <<http://www.cidh.org/Comunicados/English/2009/42-09eng.htm>> accessed 14 September 2015.

<sup>41</sup> The White House Office of the Press Secretary, 'Remarks by President Obama and President Uribe of Colombia' (29 June 2009) <<https://www.whitehouse.gov/the-press-office/remarks-president-obama-and-president-uribe-colombia-joint-press-availability>> accessed 14 September 2015.



The reason this statement is so interesting is because President Obama clearly recognises that during the Cold War the policy of the international society was to remain agnostic to events internal to a state and it was for the state to decide its own political future, even if this meant violently through a military *coup*. President Obama explains however that ‘over the past several years’ the political climate is different and that the violent displacement of a president appointed by the people through free and fair elections is no longer acceptable. Accordingly, the United States (US) suspended military and inter-governmental development aid to Honduras.<sup>42</sup> Eventually, fresh elections were held and a new president was elected, bringing some much needed political stability within Honduras and substantially easing relations between Honduras and the international community.

#### 4 Ivory Coast

Another recent and interesting example of the international community condemning the overthrow of a democratically elected government and refusing to recognise the incumbent government is in the Ivory Coast. Since the civil war in 2002 instability and ethnic tensions dominated the political landscape in the Ivory Coast. As violence between the rebel-held Muslim north and the government-controlled Christian south intensified, in February 2004, the UN Security Council engaged its Chapter VII powers and deployed a peacekeeping mission (known as UNOCI) to establish a ‘zone of confidence’ that essentially divided the warring communities of the north and the south.<sup>43</sup> As the violence eased, in 2005 the Security Council extended the mandate of UNOCI to support the organisation of ‘open, free, fair, and transparent elections.’<sup>44</sup>

On 28 November 2010, the second round of presidential elections was held and, on 2 December 2010, the Independent Electoral Commission announced that Alassane Ouattara had won the election with 54 per cent of the vote.<sup>45</sup> That Ouattara had won the election was also confirmed by UNOCI.<sup>46</sup> Against the backdrop of profound ethnic tensions, Ouattara’s main opponent in the election, Laurent Gbagbo, claimed that the election had been rigged and the President of the Constitutional Council declared Gbagbo the winner.<sup>47</sup>

<sup>42</sup> US Department of State, ‘Question Taken at the July 6 Daily Press Briefing’ (Office of the Spokesman, 7 July 2009) <<http://www.state.gov/r/pa/prs/dpb/2009/july/125757.htm>> accessed 14 September 2015.

<sup>43</sup> UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528, para 6; UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609, para 2(a).

<sup>44</sup> UNSC Res 1609 (24 June 2005) UN Doc S/RES/1609, para 2(q).

<sup>45</sup> ‘Ivory Coast Election: Alassane Ouattara “Beats Gbagbo”’ *BBC News* (2 December 2010) <<http://www.bbc.co.uk/news/world-africa-11903470>> accessed 14 September 2015.

<sup>46</sup> Choi Young-Jin, Special Representative of the Secretary-General and Head of UNOCI, ‘Statement on the Certification of the Result of the Second Round of the Presidential Election Held on 28 November 2010’ (Abidjan, 3 December 2010) <[http://www.un.org/en/peacekeeping/missions/unoci/documents/unoci\\_srs\\_g\\_certification\\_en\\_03122010.pdf](http://www.un.org/en/peacekeeping/missions/unoci/documents/unoci_srs_g_certification_en_03122010.pdf)> accessed 18 September 2015.

<sup>47</sup> ‘Ivory Coast Election’ (n 45).

The international community swiftly endorsed the decision of the Electoral Commission and confirmed Ouattara as the legitimate President of the Ivory Coast. For example, on 7 December 2010, the Economic Community of West African States (ECOWAS) called upon Gbagbo to abide by the election results 'and to yield power without delay'.<sup>48</sup> ECOWAS subsequently suspended the Ivory Coast's participation in the organisation 'until further notice'.<sup>49</sup> On 9 December 2010, the African Union (AU), which usually defers to sub-regional bodies regarding events in its jurisdiction, endorsed the decision of ECOWAS and suspended participation of the Ivory Coast 'in all AU activities, until such a time [as] the democratically-elected President effectively assumes State power'.<sup>50</sup> In December 2010 and January 2011, ECOWAS twice sent delegations to Gbagbo to urge him to step down voluntarily or be forced from power by military means.<sup>51</sup>

On 20 December 2010, the UN Security Council urged 'all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union's recognition of Alassane Ouattara as President-elect of Côte d'Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission'.<sup>52</sup>

This was followed, on 23 December 2010, by a resolution of UN General Assembly which approved (by consensus) the 22 December decision in the Report of the Credentials Committee to accept Ouattara as the legitimate representative of the Ivory Coast, and thereby rescind the credentials of Gbagbo's UN representatives.<sup>53</sup> On 24 December, the UN Secretary-General released a statement hailing the General Assembly's confirmation of Ouattara's credentials, which he said 'reflects the united position of the international community with respect to the legitimacy of the new government led by President Ouattara'.<sup>54</sup>

On 29 December, the European Union (EU) adopted a similar position, endorsing the General Assembly's approval of Ouattara's credentials and declaring that only

<sup>48</sup> ECOWAS, 'Final Communiqué on the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire' (No 188/2010, 7 December 2010) para 9 <<http://news.ecowas.int/presseshow.php?nb=188&lang=en&annee=2010>> accessed 29 December 2015.

<sup>49</sup> *ibid.*

<sup>50</sup> AU Peace and Security Department, 'Communiqué of the 252nd Meeting of the Peace and Security Council, adopted following Decision on the Situation in Côte d'Ivoire' (PSC/PR/COMM.2(CCLII) 9 December 2010) <<http://www.peaceau.org/uploads/communiquy-of-the-252nd.pdf>> accessed 29 December 2015.

<sup>51</sup> 'Kenya PM Says Ivory Coast's Gbagbo should be Forcibly Removed' *The New Age* (17 December 2010) <[http://thenewage.co.za/6059-1020-53-Kenya\\_PM\\_says\\_Gbagbo\\_should\\_be\\_forcibly\\_removed](http://thenewage.co.za/6059-1020-53-Kenya_PM_says_Gbagbo_should_be_forcibly_removed)> accessed 14 September 2015.

<sup>52</sup> UN Meetings Coverage and Press Releases, 'Security Council Extends Mission in Cote d'Ivoire until 30 June 2011, Strongly Condemns Attempts to Usurp Will of People, Urges Respect for Election Outcome' (Press Release SC/10132, 20 December 2010) <<http://www.un.org/press/en/2010/sc10132.doc.htm>> accessed 18 September 2015. See also UNSC Res 1962 (20 December 2010) UN Doc S/RES/1962.

<sup>53</sup> UNGA Res 65/237 (23 December 2010) UN Doc A/RES/65/237.

<sup>54</sup> Statement Attributable to the Spokesperson for the Secretary-General on the Credentials of the Representatives of the Côte d'Ivoire Government (New York, 24 December 2010) <<http://www.un.org/sg/statements/?nid=5013>> accessed 18 September 2015.

ambassadors named by Ouattara would be accepted by the EU and its Member States.<sup>55</sup> Significantly, in addition to this refusal to recognise Gbagbo as President, the EU imposed a host of sanctions against his regime, primarily in the form of travel bans and asset freezes. For example, on 22 December 2010, the Council of the EU adopted a decision imposing a visa ban 'on former president Laurent Gbagbo and 18 other individuals'.<sup>56</sup> On 31 December, this ban was extended to a further 59 'persons who are obstructing the peace process on Cote d'Ivoire and are jeopardising the proper outcome of the electoral process'.<sup>57</sup> On 14 January 2011, the Council imposed an asset freeze on '85 individuals that refuse to place themselves under the authority of the democratically elected president, as well as of 11 entities that are supporting the illegitimate administration of Laurent Gbagbo'.<sup>58</sup>

Notwithstanding international condemnation, Gbagbo refused to relinquish power and violence spread across the country. In March 2011, in the face of worsening violence, forces loyal to Ouattara took the initiative and marched north to Abidjan, where Gbagbo's support was concentrated. At the same time, UN forces remained active in the Ivory Coast and were provided with a fresh mandate. The Security Council adopted Resolution 1975 on 30 March 2011, which recognised Ouattara as President and demanded an end to the violence. Moreover, it entitled UNOCI to use 'all necessary means' to protect civilians from imminent threat of attack. This resolution also authorised French forces stationed in the Ivory Coast to support UNOCI.<sup>59</sup> There was controversy as UN forces began using military force directly against Gbagbo's forces. Gbagbo claimed that UN forces were exceeding their mandate and using force with the objective of implementing regime change, although the UN Secretary-General claimed that UN forces only used military force where it was necessary to protect civilians from attack and for the purpose

<sup>55</sup> 'France says EU Recognizes only Ouattara's Ambassadors' *Reuters* (29 December 2010) <<http://www.reuters.com/article/2010/12/29/us-ivorycoast-diplomacy-idUSTRE6BS1SC20101229>> accessed 18 September 2015. Certain EU Member States went further and unilaterally declared their support for Ouattara and explained that they would only accept ambassadors acting under his authority. For example, the UK Foreign and Commonwealth Office explained that the UK 'does not accept the validity of statements made by others': 'Ivory Coast: Gbagbo "Expels UK and Canada Envoys"' *BBC News* (7 January 2011) <<http://www.bbc.co.uk/news/mobile/world-africa-12132835>> accessed 28 September 2015. See also the statement of Canada, which declared that 'Canada does not recognize Laurent Gbagbo's claim to government. As such his request is illegitimate. We will continue to urge Laurent Gbagbo to cede power to President Ouattara who has been recognized internationally as the legitimate President of Cote d'Ivoire following the November 28 elections': 'Britain, Canada Reject Gbagbo's Authority on Envoys' *CNN* (7 January 2011) <<http://edition.cnn.com/2011/WORLD/africa/01/06/ivory.coast.britain/>> accessed 28 September 2015.

<sup>56</sup> Council of the EU, 'Cote d'Ivoire: Council Adopts Visa Ban List' (Press Release 18206/10, Brussels, 22 December 2010) <[europa.eu/rapid/press-release\\_PRES-10-357\\_en.pdf](http://europa.eu/rapid/press-release_PRES-10-357_en.pdf)> accessed 18 September 2015.

<sup>57</sup> *ibid.*

<sup>58</sup> Council of the EU, 'Cote d'Ivoire: Council Adopts Assets Freeze and Designates Additional Persons and Entities Subject to Restrictive Measures' (Press Release 5361/11, Brussels, 14 January 2011) <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/118854.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118854.pdf)> accessed 18 September 2015.

<sup>59</sup> UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975, para 7.

of self-defence.<sup>60</sup> Gbagbo was eventually defeated and arrested on 11 April 2011, effectively bringing the crisis to an end.

## 5 The Arab Spring

My attention will now turn to the reaction of the international community to the Arab Spring, the name given to the democratic uprising that originated in Tunisia in December 2010 and which quickly swept across North Africa and the Middle East, in particular affecting Egypt, Libya, Syria, Yemen, Bahrain, Saudi Arabia and Jordan. I will focus in particular upon the reaction of the international community to the events in Libya and Syria because, in addition to space and time constraints, it was in these states that pro-democracy demonstrations were at their most intense and where the incumbent regimes reacted most violently in their attempt to suppress them. As we shall see, these events provoked a considerable international reaction from the international community in favour of human rights protection.

Within my broader thesis the events in Libya and Syria are of particular importance because, unlike in Honduras and the Ivory Coast where internationally verified elected governments had been prevented from exercising authority, in Libya and Syria there was no elected government that had been deposed from power. Instead, on the basis of the government's lack of liberal credentials these governments were de-recognised and entities that were considered to be broadly representative of the people, and which had promised to implement democratic reform, were instead recognised and accorded legitimacy. In light of this, I submit that the presence of the international community and its impact upon international relations becomes particularly apparent.

### 5.1 Libya

In Libya, Colonel Muammar Gaddafi had been in power for over 41 years when he was faced with mass pro-democracy demonstrations. Gaddafi's regime refused to stand down, fiercely resisted democratic reform and engaged in a prolonged and bloody campaign against those that were considered hostile to the government. As the violence intensified and human rights abuses became severe and widespread (and with war crimes and crimes against humanity being reported),<sup>61</sup> the international community determined that Gaddafi had lost legitimacy and could no longer be regarded as the legitimate representative of the Libyan people. Moreover, the international community recognised the Libyan National Transitional Council (NTC) as the legitimate government of Libya on the basis that its composition was representative of the people of Libya and because

<sup>60</sup> Barbara Plett, 'Did UN Forces Take Sides in Ivory Coast?' *BBC News* (7 April 2011) <<http://www.bbc.com/news/world-africa-13004462>> accessed 14 September 2015.

<sup>61</sup> 'Libya Conflict: UN Accuses Both Sides of War Crimes' *BBC News* (1 June 2011) <<http://www.bbc.com/news/world-africa-13622965>> accessed 14 September 2015.

it promised 'to guide the country to free elections'.<sup>62</sup> For example, then US Secretary of State Hilary Clinton declared:

The United States views the Gadhafi regime as no longer having any legitimate authority in Libya. (...) And so I am announcing today that, until an interim authority is in place, the United States will recognize the NTC as the legitimate governing authority for Libya, and we will deal with it on that basis.<sup>63</sup>

Importantly, on 15 July 2011, a Contact Group of 32 states, including leading members of the international community, such as the US and UK, and seven international organisations (including the UN, EU and NATO), banded together and released a joint statement determining:

The Contact Group reaffirmed that the Qaddafi regime no longer has any legitimate authority in Libya and that Qaddafi and certain members of his family must go. Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya.<sup>64</sup>

Perhaps more significantly, as the human rights situation in Libya deteriorated, the Security Council adopted Resolution 1970 (2011) under Chapter VII of the UN Charter, demanding 'an immediate end to the violence' and called 'for steps to fulfil the legitimate demands of the population'. In addition, Resolution 1970 referred the situation in Libya to the International Criminal Court (ICC).<sup>65</sup>

In April 2011, the UN Security Council, faced with evidence that there was a real threat of a civilian massacre in Benghazi (not least because of Gaddafi's declaration that he would show 'no mercy' to anti-government supporters),<sup>66</sup> and at the encouragement of the international community, adopted Resolution 1973 which authorised the use of 'all necessary means' to protect civilians from the violence in Libya, subject to the caveat that there could be no deployment of forces into the territory of Libya.<sup>67</sup> What this meant was that NATO forces, which sought to implement the Security Council's resolution, were limited to conducting military strikes from the sea and air. As the air and sea campaign progressed, many protested that NATO forces were exceeding their mandate by conducting military strikes against Gaddafi forces even though they posed

<sup>62</sup> Quoted in 'Q&A Libyan National Council' *BBC News* (10 March 2011) <<http://www.bbc.com/news/world-africa-12699785>> accessed 14 September 2015. On the recognition of the NTC, see Patrick Capps, 'British Policy and the Recognition of Governments' [2014] PL 229.

<sup>63</sup> 'US Recognises Libyan Rebel TNC as Legitimate Authority' *BBC News* (15 July 2011) <<http://www.bbc.co.uk/news/world-africa-14164517>> accessed 14 September 2015.

<sup>64</sup> 'Fourth Meeting of the Libya Contact Group Chair's Statement' (Istanbul, 15 July 2011) <[http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair\\_s-statement\\_-15-july-2011\\_-istanbul.en.mfa](http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa)> accessed 14 September 2015.

<sup>65</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, paras 1, 4.

<sup>66</sup> See David Bosco, 'Was there Going to be a Benghazi Massacre?' *Foreign Affairs* (7 April 2011) <<http://foreignpolicy.com/2011/04/07/was-there-going-to-be-a-benghazi-massacre/>> accessed 14 September 2015.

<sup>67</sup> UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

no immediate threat to civilians, and that by doing so effectively ensured regime change in Libya, because NATO's involvement gave opposition forces the upper hand in the civil war and ultimately enabled them to overthrow the Gaddafi regime.<sup>68</sup>

## 5.2 Syria

A similar story can be told in relation to the international community's engagement with Syria in 2011. In Syria, President Assad was also confronted with mass pro-democracy demonstrations and sought to end these protests through violence and intimidation. As the violence intensified and the human rights situation worsened, members of the international community declared that the Assad regime had lost its legitimacy and could no longer be regarded as the legitimate representative of the Syrian people. For example, the UK, France and Germany issued a joint statement declaring:

Our three countries believe that President Assad, who is resorting to brutal military force against his own people and who is responsible for the situation, has lost all legitimacy and can no longer claim to lead the country. We call on him to face the reality of the complete rejection of his regime by the Syrian people and to step aside in the best interests of Syria and the unity of its people.<sup>69</sup>

Like in Libya, the international community instead accorded legitimacy to the opposition group known as the Syrian Revolutionary and Opposition Forces, or in short the Syrian Opposition Coalition (SOC), on the basis that it was considered representative of the people of Syria and because it had undertaken to guide Syria toward democratic reform.<sup>70</sup> The government of France announced that: 'it recognizes the Syrian National Coalition as the sole legitimate representative of the Syrian people and thus as the future provisional government of a democratic Syria which paves the way to put an end to Bashar Assad's regime.'<sup>71</sup>

Numerous other states quickly followed in recognising the SOC (and thereby contemporaneously de-recognising the Assad regime). The US, for example, referred to the SOC as the 'legitimate representative of the Syrian people.'<sup>72</sup> Italy declared that

<sup>68</sup> See Geir Ulfstein and Hege F Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62 ICLQ 159.

<sup>69</sup> Quoted in Chris McGreal and Martin Chulov, 'Syria: Assad Must Resign, Says Obama' *The Guardian* (19 August 2011) <<http://www.theguardian.com/world/2011/aug/18/syria-assad-must-resign-obama>> accessed 14 September 2015.

<sup>70</sup> On recognition of the SOC, see Stefan AG Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 Chinese JIL 219.

<sup>71</sup> French President François Hollande, quoted in 'Reconnait la Coalition Nationale Syrienne' *France 24* (13 November 2012, tr by author) <<http://www.france24.com/fr/20121113-paris-syrie-hollande-nouvelle-coalition-opposition-bachar-al-assad-livraisons-armes-asl>> accessed 14 September 2015.

<sup>72</sup> US State Department, 'Daily Press Briefing' (13 November 2013) <<http://www.state.gov/r/pa/prs/dpb/2013/11/217517.htm>> accessed 14 September 2015.



'Italy recognizes the coalition as a legitimate representative of the Syrian people'.<sup>73</sup> The UK similarly explained that 'Her Majesty's Government has decided to recognise the National Coalition of the Syrian Revolutionary and Opposition Forces as the sole legitimate representative of the Syrian people'.<sup>74</sup> As a collective, the EU recognised the SOC as the legitimate representative of Syria.<sup>75</sup> Perhaps most importantly, at a meeting of the so-called Group of Friends of the Syrian People, a statement was released on behalf of 'all participants' contributions,<sup>76</sup> which included 130 state representatives (including approximately 60 ministers), the Syrian opposition and officials from several international and regional organisations and NGOs. This document stated, 'Participants acknowledged the National Coalition as the legitimate representatives of the Syrian People and the umbrella organisation under which the Syrian opposition groups are acting'.<sup>77</sup>

In addition to recognising the SOC, various sanctions (including the freezing of assets and travel bans) were imposed by a variety of states and international organisations against members of the Assad regime.<sup>78</sup> Perhaps more importantly, as the human rights abuses became more severe and a 'red line' was crossed when chemical weapons were used against civilians, members of the international community started to call for military intervention in Syria, as there had been in Libya.<sup>79</sup> Because of the Russian veto in the Security Council the international community was unable to secure UN-authorized humanitarian intervention in Syria. This notwithstanding, certain members of the international community made it clear that they were prepared to take military action even without UN authorisation in order to alleviate the humanitarian suffering in Syria. Indeed, members of the international community such as the UK and US came extremely close to using military force.<sup>80</sup> Military intervention was only avoided at the last moment when the British Parliament refused to sanction the government's proposal

<sup>73</sup> 'Syria: "Coalition is Valid," says Monti' *ANSamed* (19 November 2012) <[http://www.ansamed.info/ansamed/en/news/nations/syria/2012/11/19/Syria-coalition-valid-says-Monti\\_7820520.html](http://www.ansamed.info/ansamed/en/news/nations/syria/2012/11/19/Syria-coalition-valid-says-Monti_7820520.html)> accessed 14 September 2015.

<sup>74</sup> HC Deb 20 November 2012, vol 553, col 444.

<sup>75</sup> Council of the EU, 'Council Conclusions on Syria' (EU Doc 17515/12, Brussels, 10 December 2012) <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2017515%202012%20INIT>> accessed 28 September 2015.

<sup>76</sup> Fourth Ministerial Meeting of the Group of Friends of the Syrian People, 'Chairman's Conclusions' (12 December 2012) <[http://www.mofa.go.jp/mofaj/area/syria/friends\\_kaigo/2012\\_12/pdfs/2012\\_12\\_01.pdf](http://www.mofa.go.jp/mofaj/area/syria/friends_kaigo/2012_12/pdfs/2012_12_01.pdf)> accessed 14 September 2015.

<sup>77</sup> *ibid.*

<sup>78</sup> For an overview of these sanctions, see UK Foreign and Commonwealth Office, 'Embargoes and Sanctions on Syria' (13 August 2012) <<https://www.gov.uk/guidance/sanctions-on-syria>> accessed 14 September 2015.

<sup>79</sup> Glenn Kessler, 'President Obama and the "Red-Line" on Syria's Chemical Weapons' *The Washington Post* (6 September 2013) <<http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/>> accessed 14 September 2015.

<sup>80</sup> Russell Buchan, 'Syrian Intervention: Legality and Legitimacy' *The Times* (5 September 2013) <<http://www.thetimes.co.uk/tto/law/article3859348.ece>> accessed 14 September 2015.



to use of force, and the Assad regime agreed to the implementation of a stringent regime that enabled an international body to oversee the destruction of Syria's chemical weapons.

It is true that with the rise of the terrorist organisation Islamic State (IS) the conflict in Syria has become more complex. Given that IS is based at least in part in Syrian territory, there has become an urgent need to cooperate with those exercising effective control over territory in Syria (by and large the Assad regime) in order to address the threat to international peace and security that IS represents. But this does not mean that the international community has turned from its commitment to liberal democracy in Syria. The US, for example, has continued to reiterate that, although it must cooperate with the Assad regime out of 'necessity',<sup>81</sup> it continues to be the case that the Assad regime has 'lost legitimacy to govern'.<sup>82</sup> Thus, although practically the exigencies of the situation demand cooperation, normatively the stance of the international community vis-à-vis the Assad regime 'has not changed'.<sup>83</sup>

By way of conclusion, I would suggest that the conduct of the international community since 9/11, and more recently the reaction of the international community to the Arab Spring, lends further support to my claim that there now exists an international community of liberal states that is increasingly dismissing non-liberal states as illegitimate and taking enforcement action against them, seeking to push these states towards liberal reform. Of course there are exceptions and caveats to this explanatory theory, as there is with any such theory. But my claim is that in contrast to the practice of the international society during the Cold War years, where it was agnostic to the form of political governance implemented by its member states, since the end of the Cold War liberal states have consistently engaged in a practice of making normative judgements about the political quality of states on the basis of whether they exhibit respect for liberal values.

## 6 Liberal international law

By definition, all associations comprise individual members that are bound together by a particular normative framework. It is the commitment of these members to this normative framework that provides the association with its sense of collective identity. In order to protect these values the association will necessarily produce and develop

<sup>81</sup> 'By necessity, there has always been a need for representatives of the Assad regime to be part of this process': US State Department spokeswoman Marie Harf, quoted in 'State Department: Kerry will not Speak to Syrian President Assad' *The Guardian* (16 March 2015) <<http://www.theguardian.com/world/2015/mar/15/kerry-us-negotiate-bashar-assad-syria>> accessed 14 September 2015.

<sup>82</sup> John Allen, US Special Envoy to the international coalition against IS, quoted in Nick Tattersall and Stephen Brown, 'US Wants Assad out, Germany Says Talks with Him may be Necessary' *Reuters* (18 March 2015) <<http://www.reuters.com/article/2015/03/18/us-mideast-crisis-syria-usa-idUSKBN0ME1K420150318>> accessed 14 September 2015.

<sup>83</sup> 'General Allen reiterated that the United States position on Assad has not changed': US Embassy in Turkey, quoted in Tattersall and Brown (n 82).

rules that govern the relations between its members and regulate interaction between members and non-members.

As already noted, the international society is premised upon the principle of the sovereign equality of its member states. In this sense, the principle of sovereign equality can be regarded as a constitutional norm of the international society.<sup>84</sup> In order to protect this constitutional norm, the international society created concrete international legal rules and, in order to protect these rules, embedded them within international organisations such as the UN.<sup>85</sup> Vivid illustrations of these legal rules include the principles of non-intervention and the non-use of force.

Although the principle of non-intervention is not expressly included within the UN Charter, it is considered to be the 'corollary' of state sovereignty and 'part and parcel of customary international law'.<sup>86</sup> Turning to the definition of this principle, in the words of the International Court of Justice (ICJ):

Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion (...) defines, and indeed forms the very essence of, [a] prohibited intervention.<sup>87</sup>

Coercion is therefore the defining characteristic of intervention. Coercion denotes the imposition of 'imperative pressure', whether it be through military, political or economic means, which manipulates the will of the state, thus compromising or usurping its sovereign authority, in order for the state exercising coercion to realise certain objectives.<sup>88</sup> It is therefore apparent that it is not possible to define coercion in abstract terms. This is because coercion describes conduct that violates state sovereignty. The concepts of state sovereignty and coercion are thus in a state of mutual dependence whereby our understanding of what matters fall under a state's sovereign authority directly impacts upon what conduct constitutes coercion.

It is for this reason that, at least until the end of the Cold War, the scope of the non-intervention principle was impressively wide. The international society embraced a pristine definition of state sovereignty and for this reason states were considered to possess absolute competence over their domestic affairs. As a result, any dictatorial interference in internal matters was considered to amount to coercion in a state's sovereignty and thus in violation of the principle of non-intervention. As we shall see later in this section, due to the influence of the international community and its redefinition of state sovereignty,

<sup>84</sup> According to the International Court of Justice, 'the fundamental principle of State sovereignty [is the basis] on which the whole of international law rests': *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 14 (*Nicaragua*), 133.

<sup>85</sup> Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia J Transnatl L* 529.

<sup>86</sup> *Nicaragua* (n 84) 106.

<sup>87</sup> *ibid* 108.

<sup>88</sup> W Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale UP 1971) 839–40.

the content of the non-intervention principle has changed dramatically since the end of the Cold War.

The international society also developed the prohibition against the use of force, contained in both article 2(4) UN Charter and also customary international law. The use of force is regarded as a 'particularly obvious' form of intervention which, because of its violent effects on the target state, is considered especially offensive to state sovereignty and therefore deserving of express prohibition.<sup>89</sup> The prohibition against the use of force extends to conduct that produces 'violence';<sup>90</sup> that is, the infliction of deprivations upon a state in the form of 'destruction to life and property' through the use of the military or an equivalent instrument.<sup>91</sup> Note that this prohibition does not only apply to acts of war. This prohibition extends to any use of force which, as just noted, includes any acts producing violent effects. In this sense, article 2(4) is 'intended to be of a comprehensive nature'.<sup>92</sup>

The comprehensive nature of this prohibition is further evidenced by the fact that it applies not only to uses of force but also to threats of force. From the perspective of the international society, a prohibition on threats of force is important because threats of force can be just as damaging as actual uses of force. In addition, threats of force often precede uses of force, as hostilities often escalate. Thus, in order to robustly protect state sovereignty, the international society created a prohibition against the threat or use of force as a means of conflict resolution.

The emergence of the international community has had a profound effect on the content and character of international law. As already explained, the international community is situated within the international society and the regulatory framework that it created. However, whereas the international society is committed to protecting the sovereignty of its member states, the international community possesses an overriding commitment to the promotion of liberal values to non-liberal states. Crucially, the international community seeks to utilise international law to enable and justify its campaign for liberal development. As the influence of the international community has grown, as more states have become liberal, the international community has been able to increasingly adapt existing principles of international law so as to allow for the effective protection and promotion of liberal values.

Consider, for example, the changes to the scope of the non-intervention principle since the end of the Cold War. For the international community, the concept of sovereignty has been redefined. Sovereignty is now defined in terms of responsibility. States are now considered to be subject to an international legal responsibility to protect

<sup>89</sup> *Nicaragua* (n 84) 108.

<sup>90</sup> For Dinstein, '[i]t does not matter what specific means—kinetic or electronic—are used to bring it about but the end result must be that violence occurs or is threatened': Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 88.

<sup>91</sup> Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 362.

<sup>92</sup> Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 2.

the fundamental human rights of their people and where they fail to do this they forfeit their sovereignty.<sup>93</sup>

Given that conduct will only constitute intervention where it impinges upon matters that fall within a state's sovereignty, as the definition of sovereignty has contracted, so has the principle of non-intervention. Thus, since the emergence of the international community there have been suggestions that the practice of liberal states has modified the scope of the non-intervention principle to the extent that it now recognises a 'human rights exception';<sup>94</sup> namely, that states are no longer precluded from intervening in the internal affairs of another state where the objective is to promote respect for human rights. For example, during the Cold War it was well established that where political entities within a state were in the process of determining (whether it be through peaceful or even violent means) who was the government of that state, a state that prematurely recognised an entity as the government committed an unlawful intervention. The principle of non-intervention only permitted states to recognise an entity as the government of a state once that entity had succeeded in exercising effective physical control over the population.<sup>95</sup> In the contemporary era, however, we witness members of the international community de-recognising incumbent regimes, such as those in Libya and Syria, and instead recognising opposition groups as the legitimate representatives of these states even though they do not exercise effective physical control over the population. Yet, there were few protestations that such conduct constituted a violation of the non-intervention principle, presumably because the Gaddafi and Assad regimes were regarded as having forfeited their sovereignty because of the human rights violations that they perpetrated and because the opposition groups committed themselves to leading these states to a democratic, human rights-respecting future.

Determining under what circumstances intervention is permissible (for example, what types of human rights violation trigger the human rights exception and how severe these abuses must be) and what forms of intervention are acceptable in order to mitigate human rights violations (for example, whether the provision of civilian or even military support and resources to more liberally orientated opposition groups is permissible) requires a careful assessment of state practice. However, this is not the place to engage in a detailed and comprehensive assessment of state practice in order to determine the exact contours of the non-intervention principle. Instead, my argument is that the fact that there is now considerable support for the proposition that the non-intervention principle recognises a human rights exception can be explained on the basis that an intentional community of liberal states has formed within the international society and

<sup>93</sup> See, eg, UN Meetings Coverage and Press Releases, 'Secretary-General Presents his Annual Report to General Assembly' (Press Release SG/SM/7136, 20 September 1999) <<http://www.un.org/press/en/1999/19990920.sgsm7136.html>> accessed 14 September 2015.

<sup>94</sup> Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 LJIL 345, 376.

<sup>95</sup> See Brad Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 Melb JIL 1.

is seeking to redefine existing principles of international law in order to allow for the effective protection of fundamental human rights.<sup>96</sup>

Similar developments have occurred in relation to the non-use of force prohibition. Since the end of the Cold War we have witnessed increasing claims that where a state is unable or unwilling to protect the human rights of its citizens, and where the Security Council is unable to act because of the so-called unreasonable veto, other states can permissibly use armed force in order to alleviate humanitarian suffering—that is, they can use force without committing a violation of article 2(4) UN Charter.<sup>97</sup> This was the justification of many NATO states when they used force to protect the ethnic Albanians in Kosovo.<sup>98</sup> More recently, in relation to events in Syria, the UK unambiguously declared that the right to unilateral humanitarian intervention was available under customary international law.<sup>99</sup> Whether or not humanitarian intervention is a recognised legal basis upon which to use force requires a careful analysis of state practice. Again, this is not the place to engage in such debates. But the point I am making is that the extent to which liberal states are now making such claims is illustrative of the impact of the international community upon the content of international law.

In addition to adapting existing international law principles, the international community has also sought to develop new principles of international law that facilitate the promulgation of liberal values. For example, during the Cold War there was no suggestion that customary international law required states to organise themselves upon a democratic basis. On the contrary, such was the international society's commitment to the sovereign equality of its members that, through the principle of non-intervention, customary international law expressly protected the right of states to determine their own form of political organisation. However, in the years following the end of the Cold War and with the emergence of the international community, it was famously argued by Thomas Franck that the right to democracy was 'emerging' as a principle of customary international law.<sup>100</sup> As the influence of the international community has increased in recent years, it is now argued that the right to democracy under customary international law is 'undeniable'.<sup>101</sup> I argue that the development of this customary entitlement (or at

<sup>96</sup> See Danilo Turk, 'Reflections on Human Rights: Sovereignty of States and the Principle of Non-Intervention' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003) 753.

<sup>97</sup> Fernando R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Transnational 1997).

<sup>98</sup> See, eg, the UK's justification in a statement by the UK Secretary of Defence George Robertson, HC Deb, 25 March 1999, vol 328, col 616. For Belgium's justification, see 'Speech by Mr Rusen Ergec, Counsel for Belgium' in *Legality of Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (ICJ Verbatim Record, CR 1999/15, 10 May 1999) 6.

<sup>99</sup> UK Government, 'Policy Paper: Chemical Weapons Use by Syrian Regime: UK Government Legal Position' (29 August 2013) <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>> accessed 14 September 2015.

<sup>100</sup> See generally Franck, 'The Emerging Right to Democratic Governance' (n 28).

<sup>101</sup> Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) 497.

least to the extent that it is emerging or developing) can be attributed to the international community.

The emergence of the doctrine of the responsibility to protect (R2P) is also important in this context. In 2001, the Canadian-sponsored International Commission on Intervention and State Sovereignty coined the concept of R2P in order to develop a new framework through which to address humanitarian crises such as those witnessed in Somalia, Rwanda, Bosnia and Kosovo.<sup>102</sup> The Commission explained that states were under a positive duty to protect the rights of their citizens. Importantly, the Commission suggested that if states failed to perform this duty then the responsibility to protect would pass to the UN. In the first instance, it would pass to the Security Council acting under Chapter VII, but if the Security Council was unable to address the crisis (because of the veto, for example) then the duty must be 'borne by the broader community of states', including regional organisation or even coalitions of states.<sup>103</sup> In 2005, the General Assembly broadly adopted the position of the Commission, embracing the concept of R2P and declaring that states are under a positive duty to protect the fundamental human rights of their citizens.<sup>104</sup> The General Assembly explained that, if a state fails to perform this duty, then the Security Council is entitled to take enforcement action under its Chapter VII powers. Importantly, and in contrast to the Commission's report, the General Assembly did not consider the Security Council to be subject to a positive duty to act; instead, the General Assembly explained that the Security Council had a discretionary power to intervene. Moreover, the General Assembly seemed to reject the idea that if the Security Council were unable to act, the duty to protect would pass to members of the international community more broadly.

It is incontrovertible that the General Assembly watered down the Commission's report and failed to provide an answer to the important question as to how humanitarian crises should be addressed in the face of Security Council paralysis. Stahn therefore contends that the resolution is 'old wine in new bottles'.<sup>105</sup> Although this may be true in substantive terms, this does not mean that the R2P doctrine is without significance. On the contrary, the deployment of the concept of R2P allows for an important *conceptual development* in international law; namely, that the concept of R2P serves an important rhetorical function in spurring states and international organisations into effectively addressing humanitarian catastrophes.<sup>106</sup> In a similar vein, the development of the concept of R2P is being used by the international community as a foundation or catalyst

<sup>102</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 28 September 2015.

<sup>103</sup> *ibid* viii.

<sup>104</sup> 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, paras 138–39.

<sup>105</sup> Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *AJIL* 99, 102.

<sup>106</sup> UN Meetings Coverage and Press Releases, "Responsibility to Protect" Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict before it Breaks Out' (Press Release SG/SM/14068, 18 January 2012) <<http://www.un.org/press/en/2012/sgsm14068.doc.htm>> accessed 14 September 2015.

to generate additional international principles and doctrines that may potentially be used to enable the better protection of fundamental human rights, such as the ‘Responsibility to Rebuild’<sup>107</sup> and the ‘Responsibility to Prosecute.’<sup>108</sup>

Although these concepts are in their early stages, even to the extent that they do not constitute international legal rules, I argue that these developments are nevertheless significant and can be explained on the basis of the international community. Stahn recognises that these developments are:

testimony to a broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of ‘human security’. Under the concept of responsibility to protect, matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader international community (eg, third states, multilateral institutions, and nonstate actors). This development is part and parcel of a growing transformation of international law from a state and governing-elite-based system of rules into a normative framework designed to protect certain human and community interests.<sup>109</sup>

In its pursuit of liberal reform, the international community has not therefore abandoned international law. As the international community has been able to exercise increasing influence over the world order, the content of the international legal framework constructed by the international society has gradually been modified in order to allow for the promotion of liberal values. In this sense, the will of the international community has emerged as a normative source of international law. This has produced what I call *liberal international law*.

## 7 Conclusion

This article has defended an explanatory framework that is based upon two co-existing spaces of the international, which I refer to as the international society and the international community. The international society is inclusive of all states regardless of their political identity and is passive in the sense that it seeks to maintain international peace and security by constructing legal rules which prevent intervention in state sovereignty. In contrast, the international community is normatively stronger because it perceives only liberal states to be legitimate, and is future-oriented insofar as it seeks to promote liberal reform to non-liberal states. I argue that it is the interface between these

<sup>107</sup> James Patterson, ‘Jus Post Bellum and the Responsibility to Rebuild’ (2014) 45 BJPolS 1.

<sup>108</sup> Although the principle of *aut dedere aut judicare* (the obligation to prosecute or extradite) predates the R2P doctrine, recasting this obligation upon states to prosecute or extradite as a responsibility upon the international community to ensure prosecution is clearly significant: see Jason Ralph and Adrian Gallagher, ‘Legitimacy and Faultlines in International Society: The Responsibility to Protect and Prosecute after Libya’ (2014) 41 Rev Intl Stud 1.

<sup>109</sup> Stahn (n 105) 100–101 (footnotes omitted).



two associations, and in particular the determination of the international community to subject non-liberal states to liberal reform, that can explain why violations of international law and security occur in the contemporary world order.

In this article, I have discussed at length recent examples of the international community engaging in normative judgements of the political quality of states and, where necessary, taking enforcement action against them in order to demonstrate that the doctrine of the international community continues to represent a useful explanatory tool to help explain the nature and character of the contemporary world order. It is important to note that my objective is to *explain* contemporary events through the doctrine of the international community. I certainly do not attempt to defend (from a normative perspective) the conduct of the international community (for example, whether the international community is correct in its view that liberal states do in fact forge a zone of peace). Clearly, a normative defence of the international community's activities would involve a completely different project. At some point, I may assess the normative desirability of the international community's agenda. But first we must explain why international events occur before they can be understood as a positive or negative development.

# Collectively Protecting Constitutionalism and Democratic Governance in Africa: A Tale of High Hopes and Low Expectations?

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## Abstract

Initially introduced as a response to the recurrent problem of military coups d'état, the rejection of unconstitutional changes of government has evolved to become the lynchpin of the African Union's policy on constitutionalism and democratic governance in Africa. However, the prevailing political realities in many African countries, including the (re-)introduction of anti-democratic policies and dubious constitutional manoeuvres by incumbent governments, as well as recent events associated with the so-called 'Arab Spring' have highlighted the limitations of the African Union's existing strategy both in theory and practice. Based on a critical analysis of the African Union's regime on unconstitutional changes of government, its normative design and practical application, this article argues that—and explains why—the organisation has so far generally overpromised, but under-delivered, on the stated goal of collectively safeguarding constitutional democracy in its member states. While recognising its achievements in the progressive development and consolidation of a regional norm outlawing unconstitutional changes of government, the analysis identifies a host of conceptual and practical problems that have hampered the capacity of the African Union to effectively deal with diverse forms of illegitimate disruptions of democratic processes in several African countries. Apart from cases involving popular uprisings, in respect of which the organisation is still in search for a coherent policy framework, there is also a lack of conceptual clarity as to which cases of democratic backsliding can be brought under the rubric of unconstitutional changes of government, as well as a general reluctance on the part of the African Union to apply its policy against incumbent governments entangled in unconstitutional preservations of power. The article provides some recommendations aimed at realising the potential of the African Union's normative framework on unconstitutional changes of government as a meaningful tool for the promotion of constitutional democracy in Africa.

## Keywords

Constitutionalism, Democracy, Africa, African Union

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## 1 Introduction

The 50th Anniversary Solemn Declaration of the Organization of African Unity (OAU) and the African Union (AU), adopted by the Assembly of Heads of State and Government of the AU in May 2013, includes a section on ‘democratic governance’, in which African leaders reiterated their rejection of unconstitutional changes of government (UCG), while at the same time seemingly qualifying this rejection by the remarkable recognition of what they called ‘the right of our people to peacefully express their will against oppressive systems’.<sup>1</sup> Obviously, this new, two-pronged approach was influenced by the so-called ‘Arab Spring’ and the dynamics it has set free in a number of countries in the Maghreb and Mashreq region. A year later, the AU Peace and Security Council (AUPSC)—the AU’s standing decision-making body responsible for the maintenance of continental peace and security—acknowledged that both UCG and popular uprisings were ‘deeply rooted in governance deficiencies’.<sup>2</sup> In an open session specifically devoted to the theme, the Council went on to elaborate on the language used in the 50th Anniversary Solemn Declaration by expressing its support for the right of peoples to peacefully stand up against oppressive systems ‘[i]n circumstances where governments fail to fulfil their responsibilities, are oppressive and systematically abuse human rights or commit other grave acts and citizens are denied lawful options’.<sup>3</sup>

While the above statements are by no means meant to put an end to the strict rejection of UCG by the AU, they nevertheless highlight some of the dilemmas and tensions that characterise the policy. Indeed, a key dilemma currently facing the AU is the question of how to place the outlawing of unconstitutional accession to, and preservation of, political power within the overarching objective of supporting transitions to democracy in Africa more broadly. Though defining the precise contours of a regional norm on the rejection of UCG remains a contested process,<sup>4</sup> there seems to be increasing acceptance for a broadening of the scope of the norm to include serious instances of ‘democratic backsliding’ in addition to the forceful (usually military-backed) ouster of an elected government (the traditional coup d’état scenario).

Overall, the case for the region-wide support of democracy clearly extends beyond the issue of UCG, as evidenced by the comprehensive nature of existing AU instruments on human and peoples’ rights, elections, constitutionalism and democratic governance. Nevertheless, recent political and constitutional developments in a number of African

<sup>1</sup> Assembly of the African Union, 50th Anniversary Solemn Declaration (26 May 2013) Assembly/AU/Decl.3 (XXI), para F(ii).

<sup>2</sup> Peace and Security Council of the African Union (AUPSC), ‘Press Statement on Unconstitutional Changes of Governments and Popular Uprisings in Africa’ (29 April 2014) PSC/PR/BR (CDXXXII).

<sup>3</sup> *ibid.* Other situations that were identified as ‘potent triggers for unconstitutional changes of government and popular uprisings’ include mismanagement of diversity, marginalisation, corruption, refusal to accept electoral defeat, as well as unconstitutional constitutional revisions and manipulations.

<sup>4</sup> See, eg, Julia Leininger, ‘A Strong Norm for Democratic Governance in Africa’ (2014) IDEA Discussion Paper <[https://www.die-gdi.de/uploads/media/Leininger\\_2014\\_A-Strong-Norm-for-Democratic-Governance-in-Africa.pdf](https://www.die-gdi.de/uploads/media/Leininger_2014_A-Strong-Norm-for-Democratic-Governance-in-Africa.pdf)> accessed 30 April 2015.

countries have highlighted some significant conceptual weaknesses in the AU's existing pro-democracy framework. Based on a critical analysis of the normative design and practical application of the current AU regime on UCG, it will be argued here that Africa's principal intergovernmental organisation has so far generally overpromised, but under-delivered, on its stated goal of collectively safeguarding constitutional democracy in its member states.

Following this introduction, the second part of the present paper will briefly revisit the wider international context of the AU's current efforts at promoting and protecting constitutionalism and democracy in Africa. The third part will then explore in more detail the relevant standards and mechanisms set up by the AU as part of its anti-coup/pro-democracy strategy. The paper's fourth part will subsequently try to carve out the limitations and shortfalls of the AU's existing legal and policy framework by taking a closer look at the organisation's response to some recent instances of UCG, including cases involving popular uprisings against elected regimes. The final section summarises the major findings and presents some recommendations as to the future of the AU's strategy on UCG.

## **2 Collectively safeguarding constitutionalism and democratic governance: The international legal context**

For much of the history of international law, the notion that 'every State [possesses] the faculty of adopting any Constitution it likes and of changing such Constitution according to its discretion'<sup>5</sup> was taken as an undisputable legal proposition flowing directly from the paramount principle of state sovereignty and the concomitant rule of non-intervention in a state's domestic affairs. Even the adoption, in 1945, of the Charter of the United Nations (UN Charter) did not seem to pose any direct challenge to this long-standing dictum. The UN Charter reaffirmed both the principle of state sovereignty and the rule of non-intervention in a state's domestic affairs. It also only made vague references to the novel, yet ideologically contested idea, of 'human rights and fundamental freedoms for all'.<sup>6</sup> However, with the subsequent evolution of the UN Charter-inspired international human rights system—ushered in by the 1948 Universal Declaration of Human Rights (UDHR)<sup>7</sup>—and the UN's gradual outlawing of colonial regimes and racially motivated repression, the traditional dogma of international law's blindness towards domestic constitutional orders soon came under fire. During the years of the Cold War, the most relevant example in this respect was the UN's long struggle for a democratic, non-racially segregated South Africa. In the course of that struggle, the UN Security Council at some point went as far as to declare the country's 1983 apartheid

<sup>5</sup> Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green & Co 1905) vol 1, 403.

<sup>6</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) arts 1(3), 55(c), 62(2).

<sup>7</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

Constitution 'null and void' for the purposes of the international community.<sup>8</sup> As Tom Farer has rightly noted, the sustained efforts by the UN to bring about majority rule in South Africa can be seen as 'one of the clearest precedents for [international] action to promote and defend democracy' in a sovereign state.<sup>9</sup>

Following the end of the Cold War, the UN's engagement with domestic political and constitutional issues grew considerably both in degree and in substance. As a result of this gradual process, the organisation is today no longer limiting itself to the selective condemnation of some particularly repulsive (fascist, colonial or racist) regimes. Rather, it has singled out one specific regime type—democracy—as the preferred 'standard model' of governance.<sup>10</sup> In practice, evidence for this new posture comes in a number of ways including, inter alia, the regular adoption of thematic resolutions on democracy-related matters by the General Assembly and UN human rights bodies; the implementation by the UN of various forms of electoral assistance and democracy support programmes, as well as the almost routine integration of a democracy component in 'third-generation' UN peacekeeping and post-conflict state building operations. In addition—using its enforcement powers under Chapter VII of the UN Charter—the Security Council has occasionally adopted coercive (political, economic and even military) measures in defence of democratically elected governments, based (at least implicitly) on a determination that the disruption of democracy in the country concerned has led to a 'threat to international peace and security'.<sup>11</sup> Eventually, therefore, the fact that the UN Charter does not formally contain a 'democracy clause' has not prevented the UN from identifying democracy as 'a universal and indivisible core value and principle' of the organisation.<sup>12</sup> Rather, it has seemingly heeded the 1993 Vienna World Conference on Human Rights' call on the international community to 'support the strengthening and promoting of democracy (...) in the entire world'.<sup>13</sup>

<sup>8</sup> UNSC Res 554 (17 August 1984) UN Doc S/RES/554, para 2. In the judgment of the Security Council, South Africa's 1983 Constitution had not brought any significant changes to the oppressive system of apartheid (which would ultimately remain in place until the promulgation of South Africa's first democratic Constitution in 1993).

<sup>9</sup> Tom J Farer, 'The Promotion of Democracy: International Law and Norms' in Edward Newman and Roland Rich (eds), *The UN Role in Promoting Democracy* (UNU Press 2004) 35.

<sup>10</sup> Christian Pippan, 'Democracy as a Global Norm: Has it Finally Emerged?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2013) 212.

<sup>11</sup> So far, the Security Council has (albeit infrequently) resorted to such measures in two sets of cases: i) when a democratic government, whose claim to power appears to be reliably based on the will of the people, is forcefully ousted by anti-democratic forces; ii) when a democratically elected leader is arbitrarily prevented from taking office by the incumbent regime. For an overview of relevant cases, see Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2008) 34 Brooklyn J Intl L 33, 75–81; Thilo Marauhn, 'The United Nations and Political Democracy' in Michael Bäuerle and others (eds), *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde* (Mohr Siebeck 2013) 659, 669–72.

<sup>12</sup> UNGA Res 60/1 (16 December 2005) UN Doc A/RES/60/1, para 119.

<sup>13</sup> UNGA, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23 (1993 Vienna Declaration) para I(8).

Regional organisations in practically all parts of the globe have adopted a similar stance.<sup>14</sup> In fact, some organisations, particularly in Europe and in the Americas, must even be considered ‘forerunners’ of the normative trend alluded to here. For instance, ever since its adoption, the Statute of the Council of Europe (CoE) has provided in article 3 that every member state ‘must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms’.<sup>15</sup> Democratic principles are not explicitly mentioned in the operative part of the Statute; yet, since its preamble declares individual freedoms and the rule of law to form ‘the basis of all genuine democracy’,<sup>16</sup> the said principles have always been regarded by the CoE as an implicit element of article 3.<sup>17</sup> Likewise, while any reference to human rights and democratic values has been absent from the early European Treaties (including the 1957 Treaty establishing the European Economic Community),<sup>18</sup> it has not taken the European Council—then and today the highest political body within the supranational structure of the ‘European Project’—too long to confirm that the principle of representative democracy has to be respected and safeguarded as one of the ‘cherished values of the legal, political and moral order’ of all states belonging to the (then) European Communities.<sup>19</sup> Today, this approach is codified in the Treaty on European Union (TEU).<sup>20</sup> Article 2 TEU lists democracy among the values upon which the Union is founded, and which must be adhered to both by the EU itself and by its Member States.<sup>21</sup> Furthermore, article 7 TEU provides for a sanction procedure allowing for the suspension of certain rights deriving from EU membership to a Member State found to be in ‘serious and persistent breach’ of the Union’s values (including democracy).<sup>22</sup>

<sup>14</sup> For a general discussion, see Jon C Pevehouse, *Democracy from Above: Regional Organizations and Democratization* (CUP 2005) 15ff, 77ff; Theodore J Piccone, ‘International Mechanisms for Protecting Democracy’ in Morton H Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington Books 2005) 101ff; Edward R McMahon and Scott H Baker, *Piecing a Democratic Quilt? Regional Organizations and Universal Norms* (Kumarian 2006) 35ff.

<sup>15</sup> Statute of the Council of Europe (5 May 1949) 87 UNTS 103 (CoE Statute) art 3.

<sup>16</sup> CoE Statute, preamble, para 3.

<sup>17</sup> Only (European) states which are deemed to be able and willing to fulfil the provision of art 3 may be invited to become a member of the CoE (CoE Statute, art 4). Art 8 CoE Statute contains both a suspension and an expulsion clause, the application of which may be considered by the Committee of Ministers of the CoE whenever a member state has ‘seriously violated’ the (written and unwritten) commitments enshrined in art 3.

<sup>18</sup> Treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) EEC Doc 11957E/TXT.

<sup>19</sup> European Council, Declaration on Democracy (7–8 April 1978) Bull EC No 3-1978, 5.

<sup>20</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU).

<sup>21</sup> Art 2 TEU. Art 49 TEU extends the obligation to respect the principle of democracy to all European countries aiming to become full members of the Union.

<sup>22</sup> For a recent discussion of art 7 TEU and its practical application, see Bojan Bugarić, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LSE ‘Europe in Question’ Discussion Paper No 79/2014, 14ff <<http://www.lse.ac.uk/EuropeanInstitute/LEQS/LEQSPaper79.pdf>> accessed 30 April 2015.

With regard to the 'Wider Europe', the Organization (formerly Conference) of Security and Cooperation in Europe (OSCE) has adopted a series of important documents in the early 1990s entailing far-reaching political commitments in respect of democracy and the rule of law.<sup>23</sup> In a ground-breaking 1991 meeting in Moscow, the OSCE's member states also pledged to 'support vigorously (...), in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law'.<sup>24</sup> Since then, however, the lack of effective enforcement tools, the organisation's conventional mode of decision-making (according to which practically all important decisions are taken by consensus) and the accelerated expansion of other organisations in Europe have left the OSCE with a rather limited role in protecting democracy in the region.<sup>25</sup>

Extensive commitments concerning the promotion and protection of democracy are also part and parcel of the normative framework of the Organization of American States (OAS). Although a provision indicating that the political organisation of member states shall be based on 'the effective exercise of representative democracy' was already included in the original text of the OAS Charter,<sup>26</sup> mechanisms providing for collective responses to anti-democratic developments at member state-level were only introduced in the final decade of the 20th century.<sup>27</sup> Based on a resolution adopted by its General Assembly in June 1991, the OAS is empowered to concern itself with 'any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member States'.<sup>28</sup> If such a situation arises, a complex procedure can be set in motion, at the end of which the Ministers of Foreign Affairs or the General Assembly are free to adopt 'any decisions deemed appropriate', in accordance with the OAS Charter and international law. The organisation's determination to serve as an 'above-the-state' guarantor of democracy in the Americas was further enhanced in 1997 with a revision of the OAS Charter (providing, inter alia, for the suspension of a state's right to representation in the organs of the OAS if its democratically constituted

<sup>23</sup> See, in particular, Conference of Security and Cooperation in Europe (CSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension (26 January 1990) (1990) 29 ILM 1305; Charter of Paris for a New Europe (adopted 21 November 1990) (1991) 30 ILM 193.

<sup>24</sup> CSCE, Document of the Moscow Meeting of the Conference on the Human Dimension (3 October 1991) (1991) 30 ILM 1670 (1991 CSCE Moscow Document) para 17.1.

<sup>25</sup> See Richard Burchill, 'Cooperation and Conflict in the Promotion and Protection of Democracy by European Regional Organizations' in David J Galbreath and Carmen Gebhard (eds), *Cooperation or Conflict? Problematising Organizational Overlap in Europe* (Ashgate 2010) 67.

<sup>26</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 1602 UNTS 48 (OAS Charter) art 5(d).

<sup>27</sup> For a detailed account of the evolution of the 'OAS democratic paradigm', see Jorge Heine and Brigitte Weiffen, *21st Century Democracy Promotion in the Americas: Standing Up for the Polity* (Routledge 2015) 30ff.

<sup>28</sup> OAS GA Res AG/RES 1080 (XXI-O/91) (5 June 1991).



government has been overthrown by force)<sup>29</sup> and with the adoption, in 2001, of the landmark Inter-American Democratic Charter.<sup>30</sup> The latter reiterates, among other things, that democracy is ‘the only legitimate form of government’ in the Americas, and obliges the states of the hemisphere ‘to promote and protect’ it.<sup>31</sup> Following the lead of the OAS, many Latin American (sub-)regional organisations likewise established mechanisms in support of democracy. While a democratic form of government is regularly a *sine qua non* for membership, some organisations have also gone further by providing for the adoption of additional (diplomatic and/or economic) measures in defence of democracy.<sup>32</sup>

The firm anti-coup/pro-democracy policy of the AU will be dealt with in the following sections. It should be noted here, however, that—similar to the situation in the Americas—this policy is by no means limited to the continental organisation as such. Rather, it is supplemented and supported by a growing number of African sub-regional organisations as evidenced, for example, by the revised 2001 Southern African Development Community (SADC) Charter,<sup>33</sup> the 2001 Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance,<sup>34</sup> and the 2006 International Conference on the Great Lakes Region (ICGLR) Protocol on Democracy and Good Governance.<sup>35</sup> By contrast, regional arrangements in Asia have long been reluctant to concern themselves with domestic constitutional issues, such as a government’s political character and/or source of authority. At least in the case of the

<sup>29</sup> Protocol of Amendment to the Charter of the Organization of American States (14 December 1992) (1994) 33 ILM 1005 (Protocol of Washington) art 9.

<sup>30</sup> Inter-American Democratic Charter (adopted 11 September 2001) (2001) 40 ILM 1289.

<sup>31</sup> Although the Inter-American Democratic Charter is not legally binding as such, it counts as one of the region’s defining international instruments, entailing authoritative interpretations and clarifications of the pro-democracy provisions of the OAS Charter and relevant General Assembly resolutions.

<sup>32</sup> See, inter alia, Additional Protocol to the Cartagena Agreement: Andean Community Commitment to Democracy (adopted 7 August 1998, entered into force 10 June 2000) <[http://www.sice.oas.org/CAN/Protodmc\\_e.asp](http://www.sice.oas.org/CAN/Protodmc_e.asp)> accessed 30 April 2015; Ushuaia Protocol on Democratic Commitment in the Mercosur, the Republic of Bolivia and the Republic of Chile (adopted 24 July 1998, entered into force 17 January 2002) 2177 UNTS 375; Additional Protocol to the Constitutive Treaty of Unasur on Commitment to Democracy (adopted 26 November 2010, entered into force 19 March 2014) <[http://www.isags-unasur.org/it\\_biblioteca.php?cat=1&lg=3&bb=166](http://www.isags-unasur.org/it_biblioteca.php?cat=1&lg=3&bb=166)> accessed 30 April 2015; Special Declaration on the Defence of Democracy and Constitutional Order in the Community of Latin American and Caribbean States (adopted 3 December 2011) <[http://www.embavenelibano.com/music/04-Declaracion\\_Defensa\\_Democracia-e.pdf](http://www.embavenelibano.com/music/04-Declaracion_Defensa_Democracia-e.pdf)> accessed 30 April 2015.

<sup>33</sup> Consolidated Version of the Treaty of the Southern African Development Community (adopted 17 August 1992, as amended 14 August 2001, consolidated version 21 October 2015) (SADC Treaty) <[http://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf)> accessed 30 December 2015. According to art 5(1)(c) of the Treaty, one of SADC’s main objectives is to ‘consolidate, defend and maintain democracy, peace, security and stability’.

<sup>34</sup> Economic Community of West African States (ECOWAS), Protocol on Democracy and Good Governance (21 December 2001) ECOWAS Doc A/SP1/12/01 (ECOWAS Protocol).

<sup>35</sup> International Conference on the Great Lakes Region, Protocol on Democracy and Good Governance (1 December 2006) (ICGLR Protocol) <[http://www.icglr.org/images/LastPDF/Protocol\\_on\\_democracy\\_and\\_Good\\_Governance.pdf](http://www.icglr.org/images/LastPDF/Protocol_on_democracy_and_Good_Governance.pdf)> accessed 30 April 2015.

Association of Southeast Asian Nations (ASEAN), arguably the region's most prominent organisation, the situation has however started to change in recent years. While still putting much emphasis on the traditional values of non-interference and respect for national identity, the 2007 ASEAN Charter now mandates the organisation in surprisingly clear terms to 'strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights'.<sup>36</sup> At least on paper, this commitment also extends to ASEAN member states, which are required (under article 5) to 'take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter'.<sup>37</sup>

What, then, explains the increasing willingness of international organisations to openly embrace democracy and to engage in diverse activities geared towards the promotion and protection of democratic regimes? From a normative perspective, two strands of explanation take centre stage here.<sup>38</sup> On the one hand, there seems to be a general consensus that democracy has considerable instrumental benefits with respect to two of the modern international community's most important concerns: the maintenance of (international) peace and universal respect for fundamental human rights. According to the neo-Kantian 'democratic peace' argument, democracies are normally less inclined to fight each other.<sup>39</sup> Though questioned (in full or in part) by some authors, the thesis generally does appear to be supported by historical experience. Hence—to borrow from the text of the 1991 CSCE Moscow Document—the development of societies based on pluralist democracy is widely seen as a 'prerequisite for a lasting [international] order of peace, security and justice'.<sup>40</sup> Closely related to this argument (and likewise broadly supported) is the view that democratic, inclusionary and representative constitutional structures are also significantly reducing the risk of violent political conflict within states.<sup>41</sup> In a similar vein, the contemporary international system is clearly informed by the belief that human rights are usually better and more effectively protected in a democratic, rather than in a non-democratic, constitutional setting. At the global level, this is succinctly reflected by the standard formula, now routinely repeated in relevant

<sup>36</sup> Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) (ASEAN Charter) art 1(7) <<http://www.asean.org/storage/images/archive/publications/ASEAN-Charter.pdf>> accessed 30 April 2015.

<sup>37</sup> ASEAN Charter, art 5(2). For a closer analysis, see Richard Burchill, 'Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN' (2007) 13 Asian YB Intl L 51.

<sup>38</sup> See Gregory H Fox, 'Election Monitoring: The International Legal Setting' (2000) 19 Wisconsin Intl LJ 295, 304–08; Charles Sampford and Margaret Palmer, 'The Theory of Collective Response' in Morton H Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington Books 2005) 27ff; Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 211ff.

<sup>39</sup> For a discussion of the thesis and its impact on the contemporary international legal order, see Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013) 73ff.

<sup>40</sup> 1991 CSCE Moscow Document (n 24) preamble, para 6. See also the OAS Charter, preamble, para 3: 'Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region.'

<sup>41</sup> UNGA Res 68/164 (21 February 2014) UN Doc A/RES/68/164, preamble, para 10.

UN documents, that ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing’.<sup>42</sup>

On the other hand, the enhanced international concern for democracy is also the result of a re-interpretation of the meaning of sovereignty in the so-called ‘post-Westphalian age’.<sup>43</sup> Indeed, as the decolonisation saga has elevated the principle of self-determination from a political objective to a universal norm, a revised, more people-oriented understanding of sovereignty has begun to gradually permeate the international system. Departing from traditional international law’s exclusive focus on the rights of ‘states’, the said principle emphasises the right of ‘peoples’ to ‘freely determine their political status (...) and their economic, social and cultural development’.<sup>44</sup> While first predominantly seen as a legal tool for the emancipation of dependent peoples from colonial oppression, the right has soon come to be viewed as being equally applicable to ‘all peoples’, including those in sovereign states.<sup>45</sup> The UN General Assembly (UNGA) highlighted the internal aspect of self-determination in its famous 1970 Friendly Relations Declaration, by declaring that states can only be deemed to fully adhere to the principle of self-determination if they are ‘possessed of a government representing the whole people belonging to the territory without distinction’.<sup>46</sup>

Evidently, states are afforded with a considerable measure of discretion as to the practical realisation of this requirement. Yet, if one reads it in conjunction with the proposition—famously articulated in article 21 UDHR, and repeatedly reaffirmed in more recent UNGA resolutions—that ‘the will of the people [as expressed in periodic and genuine elections] shall be the basis of the authority of government’,<sup>47</sup> the normative contours of the notion of ‘governmental representativeness’ become markedly clearer. At the very least, such a reading allows for the conclusion that a state will normally be in compliance with the right to self-determination when it verifiably respects the ground rule of popular sovereignty; ie, when the authority of government is rooted in the consent of (a majority of) the people concerned.<sup>48</sup> In turn, a state will generally be in

<sup>42</sup> See, eg, 1993 Vienna Declaration (n 13) para I(8); UNGA Res 60/1 (16 December 2005) UN Doc A/RES/60/1, para 119; UNGA Res 64/12 (9 November 2009) UN Doc A/RES/64/12, preamble, para 4.

<sup>43</sup> See, eg, Jackson N Maogoto, ‘Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept’ in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-Envisioning Sovereignty: The End of Westphalia?* (Ashgate 2008) 211; Simona Tutuianu, *Towards Global Justice: Sovereignty in an Interdependent World* (Asser 2013) 43ff.

<sup>44</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.

<sup>45</sup> See Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 77–85; James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Nijhoff 2007) 372ff.

<sup>46</sup> UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/2625/XXV, para V; see also 1993 Vienna Declaration (n 13) para I(2).

<sup>47</sup> UNGA Res 217/III (10 December 1948) UN Doc A/RES/217/III, para 21; UNGA Res 68/164 (21 February 2014) UN Doc A/RES/68/164, preamble, para 11.

<sup>48</sup> According to some authors, a modern reading of the right to self-determination, combined with recent interpretations of the participatory rights enshrined in global and regional human rights instruments, both

violation of the self-determination norm when its government is imposed on the people, particularly—as explained by Michael Reisman—when a regime ‘seizes and purports to wield the authority of the government against the wishes of the people by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 per cent of the electorate purportedly votes for the incumbent’s list.’<sup>49</sup>

### 3 The African Union policy on the protection of constitutionalism and democratic governance: Evolution and design

Similar to the case of many other organisations, the recent AU engagement with constitutionalism and democratic governance represents a departure from previous practice. For the most part of its existence, the AU’s predecessor—the OAU—placed a particularly strong premium on state sovereignty and the principle of non-interference in internal affairs. In practice, this has been particularly visible in the organisation’s policy on the recognition of governments, which was unable to effectively discourage the seizure of political power through military coups.<sup>50</sup> Likewise, in spite of the entry into force of the African Charter on Human and Peoples’ Rights in 1986 (Banjul Charter),<sup>51</sup> the organisation was unable and unwilling to speak out against notoriously undemocratic practices of ruling elites, ranging from vote rigging to various manipulations of constitutional processes with the obvious aim of extending a government’s claim to power almost indefinitely. Overall, the OAU operated as a statist institution, thus earning it the characterisation of a ‘mutual preservation club’ for incumbent regimes.<sup>52</sup>

In the wake of the changing global and regional realities following the end of the Cold War, the OAU came under increasing pressure to gradually reform its policies. The 1990s witnessed the collapse of military regimes in several African countries, and occasioned a renewed commitment to representative government through the holding

by relevant treaty bodies and by international organisations, does in fact provide the normative core of an (emerging) ‘right to democratic governance’ in contemporary international law. See, in particular, the seminal contribution by Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46. For a more recent assessment of the ‘democratic entitlement thesis’, see Susan Marks, ‘What has Become of the Emerging Right to Democratic Governance?’ (2011) 22 EJIL 507; Jean d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law’ (2011) 22 EJIL 549; Pippin (n 10) 206ff.

<sup>49</sup> W Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 239, 243.

<sup>50</sup> Akinwande Bolaji Akinyemi, ‘Organization of African Unity: The Practice of Recognition of Governments’ (1975) 36 Indian J Pol Sci 63, 63–79. See also Kofi Oteng Kufuor, ‘The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposals for the Future’ (2002) 17 American U Intl L Rev 369, 369–92.

<sup>51</sup> African Charter on Human and Peoples’ Rights (adopted on 27 June 1981, entered into force 21 October 1986) 1520 UNTS 26363 (Banjul Charter).

<sup>52</sup> Samuel M Makinda and F Wafula Okumu, *The African Union: Challenges of Globalization, Security and Governance* (Routledge 2008) 11.

of multi-party elections and the promulgation of new constitutions. In February 1990, participatory democracy was made the primary focus of the International Conference on Popular Participation in the Recovery and Development Process in Africa.<sup>53</sup> Although primarily organised by the UN Economic Commission for Africa, the conference drew active participations of diverse stakeholders, including African and non-African governments, NGOs and the OAU. The conference adopted the African Charter for Popular Participation in Development and Transformation (Arusha Charter), which highlighted the importance of popular participation in Africa's political and socio-economic transformation and urged African governments unequivocally 'to yield space to the people, without which popular participation will be difficult to achieve'.<sup>54</sup> Meeting in July 1990 in Addis Ababa, the Assembly of Heads of State and Government of the OAU affirmed the necessity 'to promote popular participation (...) in the processes of government and development', while at the same time stressing the right of member states 'to determine, in all sovereignty, their system of democracy on the basis of their socio-cultural values'.<sup>55</sup>

In contrast to the picture portrayed by these developments, the fledgling democratisation process was faced with serious setbacks in a number of African countries; the major threat being the continued practice of (military) coups d'état. As a result, the organisation could no longer ignore the urgent need for a formal anti-coup policy as a key element of a region-wide overall strategy on the promotion and protection of democracy. The May 1997 coup in Sierra Leone, which had deposed the democratically elected president Ahmed Tejan Kabbah, provoked particularly serious international reactions, thereby also galvanising regional efforts towards a more principled anti-coup approach. Meeting days after the event, the OAU Council of Ministers harshly condemned the coup and called for an immediate restoration of the democratic constitutional order.<sup>56</sup> The Council also called on African governments and the international community not to recognise the coup-regime, and requested the intervention of ECOWAS to reinstall President Kabbah to power. The UN Security Council soon followed suit by likewise condemning the coup and endorsing the ECOWAS intervention.<sup>57</sup>

The OAU's stance on the coup in Sierra Leone and the ultimate success in reinstalling constitutional order in the country provided the momentum to accelerate efforts at generally promoting democratic governance and constitutional fidelity on the African continent. In April 1999, the first OAU Ministerial Conference on Human Rights

<sup>53</sup> International Conference on Popular Participation in the Recovery and Development Process in Africa (Arusha, 12–16 February 1990).

<sup>54</sup> African Charter for Popular Participation in Development and Transformation (16 February 1990) UN Doc E/ECA/CM.16/11 (Arusha Charter) para 16.

<sup>55</sup> OAU, Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (11 July 1990) OAU Doc AHG/Decl I (XXVI) para 10.

<sup>56</sup> Decisions of the OAU Council of Ministers (28 May–4 June 1997) OAU Doc CM/DEC (LXVI).

<sup>57</sup> UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, para 1; UNSC Res 1156 (16 March 1998) UN Doc S/RES/1156, para 1.

adopted the Grand Bay Declaration and Plan of Action, which affirmed, *inter alia*, 'the interdependence of the principles of good governance, the rule of law, democracy and human rights'.<sup>58</sup> Nevertheless, the problem of UCG continued unabated. In 1999, four African countries (Niger, Côte d'Ivoire, Guinea Bissau and the Comoros) experienced coups just within a month. This prompted the 1999 Algiers Summit, for the first time in the OAU's history, to adopt a decision rejecting UCG as a matter of principle.<sup>59</sup>

Support for such a move also came from the African Commission on Human and Peoples' Rights (ACHPR)—the treaty body established under the Banjul Charter—which around the same time started to address the issue of UCG by creatively employing the Banjul Charter's article 13 (on the right to participation) and article 20 (on the right to self-determination). In *Jawara v The Gambia*, the ACHPR considered the question of legality of the 1994 coup d'état which had ousted the democratically elected government of former Gambian President Dawda Jawara.<sup>60</sup> In its recommendation, the ACHPR reasoned that 'the military regime came to power by force (...) not through the will of the people who, since independence, have known only the ballot box as a means of choosing their political leaders'.<sup>61</sup> It went on to declare that the military coup amounted to 'a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the [Banjul] Charter'.<sup>62</sup> A further ground-breaking case (*Constitutional Rights Project v Nigeria*) dealt with the military dictatorship of Sani Abacha, who had assumed power following the annulment of Nigeria's 1993 presidential elections.<sup>63</sup> In deciding the case, the ACHPR held that 'the annulment of the election results, which reflected the free choice of the voters, is in violation of Article 13(1) [of the Banjul Charter]'.<sup>64</sup> It also stated that the actions of the military violated the right of the people to determine their political status under article 20(1), which it considered to be 'the counterpart of the right enjoyed by individuals under Article 13'.<sup>65</sup>

<sup>58</sup> OAU, Ministerial Conference on Human Rights: Grand Bay Declaration and Plan of Action (16 April 1999) OAU Doc MIN/CONF/HRA/Decl 1, paras 1, 3, 8.

<sup>59</sup> OAU, Declarations and Decisions Adopted by the 35th Assembly of the Heads of State and Government (12–14 July 1999) OAU Doc AHG/Decl.1 (XXXV) (Algiers Declaration). In a noteworthy passage (para 19), the Algiers Declaration reads: 'We are convinced that (...) the establishment of democratic institutions that are representative of our peoples and receiving their active participation would further contribute to the consolidation of modern African States.'

<sup>60</sup> *Sir Dawda K Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) 118, para 73.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.* In light of the OAU's inability to react to the coup, the ACHPR decision can be considered a key contribution to the then emerging anti-coup policy of the regional organisation: see Terrence Lyons, 'Can Neighbors Help? Regional Actors and African Conflict Management' in Francis M Deng and T Lyons (eds), *African Reckoning: A Quest for Good Governance* (Brookings Institution 1998) 83.

<sup>63</sup> *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (2000) AHRLR 191 (ACHPR 1998) 198, para 50.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.* para 52. By further arguing that '[i]t would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election was the final arbiter of whether the election took place in accordance with international standards', the ACHPR applied remarkably progressive reasoning, highlighting the importance of international law in the context of elections.



In July 2000, the growing anti-coup sentiment finally led to the adoption of the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government in Africa during the 36th OAU Summit in Lomé, Togo (Lomé Declaration).<sup>66</sup> The Lomé Declaration officially declares the resurgence of coups d'état in Africa to be a 'threat to peace and security' and 'a serious setback to the ongoing process of democratization in the Continent'.<sup>67</sup> Regarding the essential question as to what exactly constitutes a UCG, the Declaration lists four instances:

- i) a military coup d'état against a democratically elected government;
- ii) intervention by mercenaries to replace a democratically elected government;
- iii) replacement of a democratically elected government by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.<sup>68</sup>

The first three cases may be considered to be pro-incumbent provisions proscribing instances of 'unconstitutional accession to power'.<sup>69</sup> The fourth case, on the other hand, addresses the problem of 'unconstitutional preservation of power' or 'reverse coup' by incumbent governments.<sup>70</sup> In the event of a UCG, the Lomé Declaration provides for a range of both diplomatic and coercive measures to safeguard constitutional rule, including—inter alia—calls on perpetrators to effect a return to constitutional order within six months, suspension of the state in question from participation in organs of the continental organisation, and targeted sanctions (for example, visa denials, restrictions of government-to-government contacts and trade restrictions) in case of failure to restore constitutional order within the six-month period.<sup>71</sup> Taken together, the Lomé Declaration and the AU Constitutive Act (which were both adopted at the same OAU

<sup>66</sup> OAU, Declaration Adopted by the 36th Assembly on the Framework for an OAU Response to Unconstitutional Changes of Government (10–12 July 2000) OAU Doc AHG/Decl.5 (XXXVI) (Lomé Declaration).

<sup>67</sup> *ibid* preamble. The document also outlines a number of key elements regarding this process, including the adoption of a constitution that shall be in conformity with generally acceptable principles of democracy; respect for the constitution and the rule of law; separation of powers; political pluralism; regular, free and fair elections; the constitutional recognition and protection of fundamental rights; and the principle of democratic change of government. A similar set of principles is included in: AU, Declaration on the Principles Governing Democratic Elections in Africa (8 July 2002) AU Doc AHG/Dec.1 (XXXVIII).

<sup>68</sup> Lomé Declaration (n 66) para 11.

<sup>69</sup> See Francis N Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa' (2007) Institute for Global Dialogue Occasional Paper No 55 <<http://www.igd.org.za>> accessed 30 April 2015; Issaka K Souaré, 'The African Union as a Norm Entrepreneur on Military Coups d'État in Africa (1952–2012): An Empirical Assessment' (2014) 52 *J Modern African Studies* 69, 78–79.

<sup>70</sup> *ibid*.

<sup>71</sup> Lomé Declaration (n 66) paras 12–15. However, the six-month grace period under the Declaration was shortened to 90 days in a decision of the AU Assembly, which was adopted in February 2010. See AU, Decision on the Report of the Peace and Security Council on its Activities and on the Peace and Security Situation in Africa (2 February 2010) AU Doc Assembly/AU/Dec.268 (XIV) para 5(i).



Summit) clearly reflect a new regional emphasis on key constitutional ideals such as democracy, the rule of law and constitutional fidelity.<sup>72</sup> Notably, the AU Constitutive Act further limits the scope of the traditional non-interference rule by permitting the organisation to intervene in member states in cases of war crimes, genocide, and crimes against humanity.<sup>73</sup> Moreover, by confirming the principle of rejection of UCG and the threat of suspension of states whose regime came to power through unconstitutional means, the AU Constitutive Act translates central aspects of the Lomé Declaration into 'hard (international) law'.<sup>74</sup>

A further milestone achievement in the promotion of constitutional rule in Africa was made in January 2007, when the AU adopted the African Charter on Democracy, Elections and Governance (Democracy Charter) at its 8th Summit in Addis Ababa.<sup>75</sup> The Democracy Charter, which came into force in February 2012, is a remarkably ambitious instrument. While its preamble reiterates the state parties' concern about the problem of UCG and their determination 'to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections', the operative provisions deal with several cross-cutting issues of governance, including democracy and constitutional rule, the rule of law, respect for human rights and various aspects of economic and social policies.<sup>76</sup> As to implementation and enforcement, the Democracy Charter transfers upon the AUPSC two central tasks. On the one hand, the AUPSC is empowered to act, in accordance with the relevant provisions of its Protocol,<sup>77</sup> whenever a situation arises in a state party 'that may affect its democratic political institutional arrangements or the legitimate exercise of power'.<sup>78</sup> In the specific case of a UCG, on the other hand, the AUPSC shall 'immediately' suspend the state in question from participation in AU activities, in accordance with article 30 of the AU Constitutive Act and article 7(g) of the AUPSC Protocol.<sup>79</sup> Moreover, additional to the measures already foreseen under the Lomé Declaration, the AUPSC is authorised to take a number of further steps in order to effectively deal with 'UCG situations', such

<sup>72</sup> Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001) 2158 UNTS 37733 (AU Constitutive Act).

<sup>73</sup> For an assessment, see Grimachew A Aneme, *A Study of the African Union's Right of Intervention Against Genocide, Crimes against Humanity and War Crimes* (Wolf Legal Publishers 2011).

<sup>74</sup> See, eg, the language of AU Constitutive Act, arts 4(p), 30.

<sup>75</sup> African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) (Democracy Charter) <[http://www.achpr.org/files/instruments/charter-democracy/aumincom\\_inst\\_charter\\_democracy\\_2007\\_eng.pdf](http://www.achpr.org/files/instruments/charter-democracy/aumincom_inst_charter_democracy_2007_eng.pdf)> accessed 3 January 2016.

<sup>76</sup> Democracy Charter, preamble.

<sup>77</sup> AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) (AUPSC Protocol) art 7 <<http://www.peaceau.org/uploads/psc-protocol-en.pdf>> accessed 4 January 2016.

<sup>78</sup> Democracy Charter, art 24.

<sup>79</sup> Democracy Charter, art 25(1). However, the PSC applies a grace period of two weeks in practice before the suspension of the state concerned from membership. See Addis Ababa Institute for Security Studies, 'Peace and Security Council Report' (2014) 64, 3 <<https://www.issafrica.org/publications/peace-and-security-council-report?page=2>> accessed 2 March 2016.

as ensuring that coup perpetrators are prohibited from taking part in elections held to restore constitutional order, or imposing sanctions on any member that has instigated or supported a UCG in another member state.<sup>80</sup>

On account of its binding and comprehensive nature, the Democracy Charter currently occupies a central position in the AU's emerging African Governance Architecture (AGA).<sup>81</sup> Interestingly, the Democracy Charter does not employ the catchword 'constitutionalism' per se, although its provisions repeatedly refer to related notions such as 'constitutional rule' and 'constitutional order'.<sup>82</sup> However, apart from its reaffirmation of what has been labelled the 'trinitarian mantra of the constitutionalist faith' (democracy, the rule of law and human rights),<sup>83</sup> the Democracy Charter's allegiance to core elements of constitutionalism is plainly reflected in its endorsement of the principles of supremacy of the constitution, separation of powers, independence of the judiciary, and civilian control of the military and security forces.<sup>84</sup> Moreover, the Democracy Charter seemingly pays tribute to a 'thick' conception of democracy, by requiring not only the organisation of 'regular, transparent, free and fair elections', but also the promotion of political pluralism through the provision of adequate space for opposition parties and civil society.<sup>85</sup>

As to the cardinal principle of non-acceptance of UCG, article 23 of the Democracy Charter reiterates the four instances of unconstitutional changes mentioned in the Lomé Declaration, followed by a supplementary prohibition of 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principle of democratic change of government'.<sup>86</sup> The somewhat awkwardly formulated clause was introduced as a modification to an earlier draft, which would have explicitly proscribed

<sup>80</sup> Democracy Charter, art 25(2)–(10). Beyond the fact that the latter is obviously *lex specialis* to the former, the relationship between art 24 and art 25 Democracy Charter is not entirely clear.

<sup>81</sup> See AU, 'Towards Greater Unity and Integration through Shared Values' (31 January 2011) AU Doc Assembly/AU/Decl 1 (XVI). In addition to the Democracy Charter and the AU Constitutive Act, the AGA comprises a number of further OAU/AU instruments addressing diverse governance issues in Africa (including the African Charter on Human and Peoples' Rights; the Algiers Declaration; the Lomé Declaration; the 2002 Declaration on Principles Governing Democratic Elections in Africa; the AUPSC Protocol; AU, Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006) <[http://www.eods.eu/library/AU\\_Convention%20on%20Combating%20Corruption\\_2003\\_EN.pdf](http://www.eods.eu/library/AU_Convention%20on%20Combating%20Corruption_2003_EN.pdf)> accessed 4 January 2016; AU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) AU Doc CAB/LEG/66.6; and AU/New Partnership for Africa's Development, Post-Conflict Reconstruction Policy Framework (June 2005) <<https://www.issafrica.org/uploads/PCRPOLJUN05.PDF>> accessed 4 January 2016). The fact that the majority of these instruments also make up the African Peace and Security Architecture (APSA) speaks to the intertwined nature of the objectives of peace and democratic governance in Africa.

<sup>82</sup> Democracy Charter, arts 2(2), 5, 14, 15, 24.

<sup>83</sup> Mattias Kumm, 'Editorial: How Large is the World of Global Constitutionalism?' (2014) 3 Global Constitutionalism 1, 3.

<sup>84</sup> Democracy Charter, arts 2–3.

<sup>85</sup> Democracy Charter, arts 3(11), 12.

<sup>86</sup> Democracy Charter, art 23(5).

the amendment of constitutions with a view to extending term limits.<sup>87</sup> The ensuing debate on this draft provision proved to be controversial and, hence, the final text settled for a more softened and deliberately flexible language. While some observers regret the abandonment of the initial draft, which is seen as having directly challenged the notorious practice of some African leaders of tampering with the term limit provisions of their state's constitution,<sup>88</sup> a closer look appears to allow for the argument that the broad language of article 23 is well suited to generally addressing constitutional manoeuvres that have 'the cumulative effect of maintaining government in power illegitimately', including the problematic practice of unduly prolonging presidential term limits.<sup>89</sup>

#### 4 Limitations and shortfalls of the existing AU regime: A glimpse at recent practice

Since the adoption of the Lomé Declaration and the entry into force of its Constitutive Act in 2001, the seriousness of the AU in enforcing the new regional norm on UCG has been visible in a number of cases; a process that has received a further boost with the coming into force of the Democracy Charter in 2012. Thus, the organisation has condemned and/or sanctioned UCG, for example, in the Central African Republic (2003), São Tomé and Príncipe (2003), Guinea-Bissau (2003, 2012), Togo (2005), Mauritania (2005, 2008), Guinea (2008), Madagascar (2009), Côte d'Ivoire (2010), Niger (2010), Mali (2012), Egypt (2013), and Burkina Faso (2015).<sup>90</sup> Yet, despite this activism, it is glaringly clear that neither the AU's comprehensive normative regime on UCG nor the regime's enhanced practical implementation have, up until now, yielded significant democratic gains. Although the fact that African states 'span all shades along the democracy spectrum'<sup>91</sup> cautions against a simplistic or generalised picture of the state of democratisation in Africa, the recent trend nevertheless appears to be one of decline rather than progress. The latest Freedom House Report describes only 10 countries in Sub-Saharan Africa as 'free', while 21 countries are labelled as 'not free', and 18 others as

<sup>87</sup> Antonia Witt, 'Rather Turbulence than Wave: The Development of Continental Norms on Democratic Governance' (5th European Conference on African Studies, Lisbon, 27–29 June 2013) 15.

<sup>88</sup> Sekai Sangweme, 'A Critical Look at the Charter on Democracy, Elections, and Governance in Africa' Africa Governance Monitoring & Advocacy Project Paper (Open Society Institute 2007) <[http://www.afrimap.org/english/images/paper/ACDEG\\_Sangweme.pdf](http://www.afrimap.org/english/images/paper/ACDEG_Sangweme.pdf)> accessed 30 April 2015.

<sup>89</sup> Edward R McMahon, 'The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path' Africa Governance Monitoring & Advocacy Project Paper (Open Society Institute 2007) <[http://www.afrimap.org/english/images/paper/ACDEG&IADC\\_McMahon.pdf](http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf)> accessed 30 April 2015.

<sup>90</sup> For a selected discussion of these cases, see Jeremy I Levitt, 'Pro-democratic Intervention in Africa' (2006–07) 24 *Wisconsin Intl LJ* 785; Eki Y Omorogbe, 'A Club of Incumbents? The African Union and *Coups d'État*' (2011) 44 *Vanderbilt J Transnatl L* 123, 137ff; Souaré, 'The African Union as a Norm Entrepreneur on Military Coups d'État in Africa' (n 69).

<sup>91</sup> Patrick J Glen, 'Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance' (2012) 5 *African JL Studies* 119, 120.

‘partly free’.<sup>92</sup> Overall, the Report points to a net decline of freedom both in North Africa and Sub-Saharan Africa, suggesting a general trend of ‘democratic backsliding’ on the African continent.<sup>93</sup>

The AU is not necessarily—and certainly not exclusively—to be blamed for this fairly sober assessment. To state the obvious, success or failure in defending democracy and preventing authoritarian regression usually depends on a host of complex political dynamics within the countries concerned. External actors, such as the AU, are only one of many players in such scenarios and will, more often than not, play only a limited or secondary role.<sup>94</sup> That said, the AU’s exceptionally broad mandate nevertheless affords the organisation a fairly broad arsenal to contribute to the resolution of political conflicts in member states, ranging from promotional activities to more interventionist policies in defined crisis situations.

As indicated in the previous section, the relevant AU regime applies to cases of: i) a military coup against a democratically elected government; ii) intervention by mercenaries to replace a democratically elected government; iii) replacement of a democratically elected government by armed dissidents or rebels; iv) refusal by an incumbent government to relinquish power to the winning party or candidate after free and fair elections; and v) amendment or revision of the constitution in violation of the principles of democratic change of government.<sup>95</sup> Evidently, the protection accorded to incumbent governments in the first three instances specifically applies to ‘democratically elected governments’, implying that the ouster of unelected regimes may not amount to an unconstitutional change in a technical sense.<sup>96</sup> Similarly, the fourth instance of unconstitutional preservation of power is designed to benefit an opposition party or candidate that has won in democratic elections.<sup>97</sup> Finally, the fifth case seeks to prevent possible attempts at subverting basic elements of democratic governance through constitutional amendment or other changes to the legal system.<sup>98</sup> As mentioned above, this provision can and should serve as a major tool against various forms of ‘democratic backsliding’,<sup>99</sup> including the scrapping of (presidential) term limits by incumbent leaders.

As far as conventional coup situations are concerned, recent practice seems to support the impression that the AU has in fact adopted a blanket policy covering all

<sup>92</sup> Freedom House, ‘Discarding Democracy: Returning to the Iron Fist’ (Freedom in the World Report, 2015) <[https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf)> accessed 30 April 2015.

<sup>93</sup> *ibid.* Some African countries did gain positive scores, which however did not change their principal designation (with the exception of Tunisia, which graduated from ‘partly free’ to ‘free’, and Guinea-Bissau, which improved from ‘not free’ to ‘partly free’).

<sup>94</sup> On the significance of domestic factors for the ‘success’ of efforts by international organisations at promoting democracy, see generally Daniel Silander, *Democracy From the Outside-In? The Conceptualization and Significance of Democracy Promotion* (Vaxjö UP 2005) 61ff.

<sup>95</sup> Lomé Declaration (n 66) para 11; Democracy Charter, art 23.

<sup>96</sup> Lomé Declaration (n 66) para 11; Democracy Charter, art 23(1)–(3).

<sup>97</sup> Lomé Declaration (n 66) para 11; Democracy Charter, art 23(4).

<sup>98</sup> Lomé Declaration (n 66) para 11; Democracy Charter, art 23(5).

<sup>99</sup> Freedom House (n 92).

coups, not just those directed at democratically elected governments. In part, this might be explained by the predominance of peace and security considerations when dealing with such events. Thus, strictly limiting the prohibition of coups to cases affecting elected governments may ultimately obstruct the AU's overall aim of ensuring regional peace and stability. Moreover, a literal interpretation of the regional norm against UCG might reinforce the impression that only coups against elected governments are considered illegal, while those targeting unelected regimes appear perfectly lawful. Implicitly, this would lead to a distinction between good (or 'legitimate') and bad (or 'illegitimate') coups—an exercise the AU has never been particularly keen to indulge in, favouring instead a rhetoric of 'zero tolerance' vis-à-vis all coups.<sup>100</sup> At the same time, however, the distinction between good coups and bad coups has been openly debated in academic and policy circles.<sup>101</sup> According to some commentators, good coups may be defined as those that topple authoritarian governments and usher in a transition towards democracy, while bad coups can be understood as those that target democratic governments and hence thwart the will of the people.<sup>102</sup> Along these lines, several observers have considered the 2005 Mauritanian coup a 'good' coup, despite the fact that it was met with condemnation and sanctions on the part of the AU.<sup>103</sup>

Upon closer inspection, though, one can indeed detect some subtle variations in the tone and aggressiveness of the AU in its reaction to the 2005 coup in Mauritania, especially if compared to its actions in respect to the 2008 coup in the same country. The 2005 coup attracted much local and international sympathy in light of the repressive nature of the government of Maaouya Ould Sid'Ahmed Taya, who had seized power in a 1984 coup and later established his grip by winning subsequent elections that were widely considered to be a sham. While the AUPSC swiftly condemned the coup and suspended Mauritanian membership, demanding a restoration of constitutional order, the organisation generally supported the transition process as laid out by the leaders of the coup, and lifted the suspension as soon as Sidi Ould Cheikh Abdallahi was elected as president.<sup>104</sup> However, the rule of the newly elected president was short-lived as he, too, was deposed in a further coup in August 2008. This coup provoked a decidedly

<sup>100</sup> See AU Assembly, Report of the Chairperson of the Commission submitted to the 14th Ordinary Session of the AU Assembly on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage Such Situations (31 Jan–2 Feb 2010) AU Doc Assembly/AU/4(XIV), para V(30).

<sup>101</sup> For an early account, see Charles Sampford, 'Coups d'État and the Law' (1989) 13 Bull Australian Soc L Phil 253, 284–85. See also Andrew C Miller, 'Debunking the Myth of the "Good" Coup d'État in Africa' (2011) 12 African Studies Q 45; Omorogbe (n 90) 153–54.

<sup>102</sup> Ozan O Varol, 'The Democratic Coup d'État' (2012) 53 Harvard Intl LJ 292, 295.

<sup>103</sup> Issaka K Souaré, 'The AU and the Challenge of Unconstitutional Changes of Government in Africa' (2009) ISS Paper No 197, 5 <<http://africacenter.org/wp-content/uploads/2009/08/Th-AU-and-the-Challenge-of-Unconstitutional-Changes-of-Government-in-Africa.pdf>> accessed 4 January 2016. See also Boubacar N'Diaye, 'Mauritania, August 2005: Justice and Democracy, or Just Another Coup?' (2006) 105 African Affairs 420, 421–41.

<sup>104</sup> AUPSC, Report of the 163rd Meeting of the Chairperson of the Commission on the Situation in Mauritania (22 December 2008) AU Doc PSC/MIN/3 (CLXIII) (AUPSC Mauritania Report).

more aggressive reaction from the AUPSC, which immediately demanded 'the return to constitutional order through the unconditional restoration of (...) Abdallahi, President of the Islamic Republic of Mauritania, in his functions' within two weeks.<sup>105</sup> In addition to again suspending the country from the AU, the AUPSC imposed sanctions, including visa denials, travel restrictions and the freezing of assets on 'all individuals, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania'.<sup>106</sup> The AU's robust stance produced some effect, as the ousted president was made the head of a transitional government on the basis of a power-sharing deal. Mauritania's suspension was eventually lifted; the subsequent election, however, produced a somewhat unsatisfactory outcome for the AU, as General Mohamed Ould Abdel Aziz, the main author of the coup, finally became the newly elected president.

Prompted by the Mauritanian situation, the 2010 AU Summit decided that, as a matter of principle, perpetrators of coups should be barred from taking part in transitional elections (thereby affirming a rule of the Democracy Charter which had not yet come into force at the time).<sup>107</sup> Yet, complying with this rule in a coherent fashion is all but an easy task to complete, particularly in a post-crisis environment. In fact, the Mauritanian situation has vividly exemplified the recurring problems posed by a resort to power-sharing arrangements in an attempt at resolving coup-related stand-offs. While some coups may simply be the result of a personal thirst for power, or of rivalry between politicians and disgruntled members of the military, many coups in Africa tend to exploit existing ethnic and/or religious cleavages, as well as deep-rooted conflicts over the distribution of power and resources within society, hence garnering significant support from sections of the population. Such situations are putting the AU in the difficult position of having to deal with not just the coup in question, but also with the usually complex political and socio-economic issues underlying it. At the end, power-sharing arrangements are often seen as a necessary, if not desired, tool for conflict resolution.<sup>108</sup> The main challenge for the AU is that these arrangements may be in conflict with the logic of the regional norm on UCG by permitting coup perpetrators to participate in the newly formed transitional government. To subsequently bar these actors from standing as candidates in elections, which usually are seen as the culmination of a successful transition period, may not be easy to explain, and runs the risk of undermining the acceptance of the entire process by significant segments of the population of the country concerned.

<sup>105</sup> AUPSC, Communiqué (22 September 2008) AU Doc PSC/MIN/Comm.2 (CLI).

<sup>106</sup> AUPSC Mauritania Report (n 104).

<sup>107</sup> AU Assembly, Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations (2 February 2010) AU Doc Assembly/AU/4 (XIV) 5 (AU Decision on the Prevention of UCG).

<sup>108</sup> For a discussion, see Andreas Mehler, 'Introduction: Power-Sharing in Africa' (2009) 44 *Africa Spectrum* 2; Carl LeVan, 'Power Sharing and Inclusive Politics in Africa's Uncertain Democracies' (2011) 24 *Governance: Intl J of Policy, Administration & Institutions* 31; Stef Vandeginste, 'The African Union, Constitutionalism, and Power Sharing' (2013) 57 *J African L* 1.



Cooperation with other external actors involved in the resolution of coup-related crisis situations in Africa is a further (potentially) problematic issue for the AU. On the one hand, the AU often needs to rely on actors such as the UN, the EU, African sub-regional organisations and/or individual states,<sup>109</sup> all of which might be in a more favourable position to force conflicting factions into agreeing to a political settlement and to impose hard-hitting sanctions in case of non-compliance. The apparent reason for this is the fact that, absent more far-reaching economic integration at the continental level, the AU simply lacks the capacity to impose effective sanctions (the temporary suspension of states from membership or visa denials are all too often not ‘convincing’ enough to force perpetrators to ensure a speedy return to constitutional order).<sup>110</sup> On the other hand, the plurality of actors may easily result in incoherence and contradictions in the approaches followed by the various institutions involved in coup-related crisis situations. A case in point is the 2011 Libyan crisis, in which the AU preferred a negotiated solution. Although the AU had condemned ‘the indiscriminate and excessive use of force (...) against peaceful protesters’ by the (former) regime of Muammar Gaddafi, it had also explicitly rejected ‘any foreign military intervention, whatever its form.’<sup>111</sup> However, this fairly clear message did not deter the non-permanent African members of the UN Security Council at the time (South Africa, Nigeria and Gabon) to vote in favour of Security Council Resolution 1973, which eventually authorised NATO’s heavily debated intervention in Libya.<sup>112</sup>

The so-called ‘Arab Spring’ presented further challenges to the AU policy on UCG. For one, the North African uprisings served as a further reminder of the need for a more effective linkage of the rejection of the UCG norm with the broader goal of democratisation. In addition, the events in Tunisia, Libya and Egypt revived the debate on ‘good’ coups versus ‘bad’ coups and, to some extent, forced the AU to openly engage in the debate by considering the question of whether and under what circumstances legitimacy should be accorded to regime changes based on popular uprisings.<sup>113</sup> Indeed, some commentators have advised the AU to recognise revolutions and broad-based popular uprisings as a matter of principle.<sup>114</sup> As has been argued elsewhere, such proposals

<sup>109</sup> As to the involvement of foreign states, it suffices to recall the decisive role played by France in the recent coup-related conflicts in Côte d’Ivoire (2010–11), Mali (2012), and Central African Republic (2013).

<sup>110</sup> Other punitive measures envisaged by the Democracy Charter, such as the trial of perpetrators by a regional court (art 25(5)), remain elusive at this point because of the absence of a court to exercise such jurisdiction.

<sup>111</sup> AUPSC, Communiqué (23 February 2011) AU Doc PSCPR/COMM (CCLXI).

<sup>112</sup> UNSC Res 1973 (11 March 2011) UN Doc S/RES/1973. To be sure, the ‘regime-changing’ result of NATO’s UN-authorised air operation and the murdering of Colonel Gaddafi (a prominent long-time backer of the OAU/AU) at the hands of rebel groups did not go down well within AU circles.

<sup>113</sup> Varol (n 102) 356; Jordan Paust, ‘International Law, Dignity, Democracy, and the Arab Spring’ (2013) 46 Cornell Intl LJ 1; Jonathan M Powell, ‘An Assessment of the Democratic Coup Theory: Democratic Trajectories in Africa’ (2014) 23 African Security Rev 1.

<sup>114</sup> Solomon A Dersso, ‘The Adequacy of the African Peace and Security Architecture to Deal with Serious Democratic Deficits’ (2012) 21 African Security Rev 4, 13–15; Mehari T Maru, ‘The North African Uprisings Under the African Union’s Normative Framework’ (*Mehari Taddele Maru*, 11 October 2012)



tend to prematurely conflate the question of 'legality' with the question of 'legitimacy' of such events.<sup>115</sup> Considering the AU's overall pro-democracy framework, one would assume that the latter should be determined not just by the degree of popular support for regime change (however that change is effectuated) but—first and foremost—by the democratic nature of the post-revolutionary process and resulting (new) government.<sup>116</sup> Inconveniently, such an evaluation can almost always only be carried out retrospectively. The spectacular case of Egypt 2011–13 may serve to illustrate the problem.

While the protests in Tunisia, which triggered the Arab Spring, did not raise substantive legal issues, as they quickly led to the peaceful resignation of the government of former President Ben Ali, one may have thought that the ousting of President Mubarak during the 2011 Egyptian revolution (which only succeeded in the end due to the involvement of the military on the side of the protesters) would present a more critical situation to the AU. However, unimpeded by its previous practice on UCG, the AU was willing to throw its blessings on the revolution by publicly expressing support to what it described as 'the legitimate aspirations of the people'.<sup>117</sup> As already pointed out in the paper's introduction, the AU's 50th Anniversary Solemn Declaration (adopted two years after the Egyptian revolution) even went to such lengths as to generally recognise 'the right of [the] people to peacefully express their will against oppressive systems'.<sup>118</sup> Yet, only a month after the adoption of the 50th Anniversary Solemn Declaration, Egypt was to witness a further regime change at the hands of the military, again allegedly based on popular support, this time resulting from wide-spread dissatisfaction with the governance record of the new government under President Mohamed Morsi. This time, however, the protests and the subsequent action taken by the military were directed at a President who had been elected in free and fair elections and who served his term on the basis of a new democratic constitution (promulgated in December 2012).<sup>119</sup>

While the 50th Anniversary Solemn Declaration may appear to be generally sympathetic to regime changes based on popular protests, such an interpretation is, at best, unwarranted if the AU's strong reaction to the July 2013 Egyptian coup is anything to go by. In stark contrast to the muted response of other major international actors, such as the UN and the EU, the AU suspended Egypt from the organisation, thereby apparently demonstrating its will to ensure coherence in the implementation of the regional norm on UCG. In its decision, the AUPSC recalled the provisions of the Lomé Declaration and the Democracy Charter, and declared that 'the overthrow of

<<http://meharitataddele.info/2012/10/the-north-african-uprisings-under-the-african-union-s-normative-framework/>> accessed 4 January 2016.

<sup>115</sup> Kalkidan N Obse, 'The Arab Spring and the Question of Legality of Democratic Revolution in Theory and Practice' (2014) 27 LJIL 817, 822.

<sup>116</sup> *ibid.*

<sup>117</sup> AUPSC, Communiqué (16 February 2011) AU Doc PSCPR/COMM (CCLX). For a detailed account of the Egyptian 'coup' of 2011 and the AU's response, see Varol (n 102) 339–56.

<sup>118</sup> 50th Anniversary Solemn Declaration (n 1).

<sup>119</sup> Constitution of the Arab Republic of Egypt (2012).

the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government'.<sup>120</sup> Eventually, however, the suspension was quickly lifted following a new round of presidential elections in May 2014, in which the main architect of the 2013 coup, Abdul Fattah al-Sisi, was perfectly able to take part<sup>121</sup>—a practice quite obviously deviating from the text of the African Democracy Charter and official AU Assembly Decisions.<sup>122</sup>

The 2014 coup in Burkina Faso further illustrates the difficulty in adequately responding to unconstitutional regime changes associated with popular uprisings. As such, the coup was directly rooted in President Blaise Compaore's attempt to (again) extend his 27 years in power through constitutional amendment.<sup>123</sup> Though Burkina Faso had, at the time, already ratified the Democracy Charter, the AU was unable to intervene in the dispute concerning the constitutional amendment, only arriving at the scene following the popular uprising which led to the resignation of the President and the military's eventual stepping in to lead the ensuing transition.<sup>124</sup> The AUPSC responded by expressing its acknowledgement of the 'profound aspiration [of the people of Burkina Faso] to uphold their Constitution and to deepen democracy in the country', while at the same time condemning the military's suspension of the constitution and assumption of power as constituting 'a coup d'état'.<sup>125</sup> Tellingly, however, the AUPSC—being aware of the lack of ECOWAS support for such action—shied away from suspending Burkina Faso from the AU, although it demanded that 'the military steps aside and hands over power to a civilian authority (...) within a maximum period of two weeks (...), failure of which, [sanctions] shall be instituted'.<sup>126</sup> Burkina Faso's new regime seemed rather unimpressed. While confirming his government's will to soon take steps towards a civilian-led transition process and the restoration of constitutional order, the country's interim leader, Lieutenant Colonel Isaac Zida, responded to the AU's threat of sanctions by stating: 'We are not afraid of sanctions; [we] care much more about stability. (...) We have waited on the African Union in moments when it should have shown its fraternity and friendship but instead was not there'.<sup>127</sup>

<sup>120</sup> AUPSC, Communiqué (5 July 2013) AU Doc PSC/PR/COMM (CCCLXXXIV).

<sup>121</sup> AUPSC, Communiqué (17 June 2014) AU Doc PSC/PR/COMM.2 (CDXLII).

<sup>122</sup> Democracy Charter, art 25(4); AU Decision on the Prevention of UCG (n 107).

<sup>123</sup> See 'Burkina Faso General Takes over as Compaore Resigns' *BBC News* (1 November 2014) <<http://www.bbc.co.uk/news/world-africa-29851445>> accessed 4 January 2016.

<sup>124</sup> As a result, the AU has arguably neglected art 23(5) Democracy Charter.

<sup>125</sup> AUPSC, Communiqué (3 November 2014) AU Doc PSC/PR/COMM (CDLXV).

<sup>126</sup> *ibid.*

<sup>127</sup> See 'Burkina Faso's Isaac Zida dismisses African Union intervention' *BBC News* (7 November 2014) <<http://www.bbc.com/news/world-africa-29948773>> accessed 30 April 2015.

## 5 Concluding remarks

In recent years, the AU has gone to great lengths in establishing and consolidating a regional norm against UCG; a norm it has clearly linked to the broader goal of entrenching constitutionalism and democratic governance in Africa. However, notwithstanding the AU's 'zero-tolerance' rhetoric in respect of UCG and the formal strengthening of its sanction machinery against coup perpetrators under the 2007 Democracy Charter, the organisation continues to grapple with the general difficulty of applying a rather static and formalistic international rule to what will almost always present itself as a complex, fluid and inherently political domestic crisis situation. Indeed, both 'unconstitutional accessions to power' as well as 'unconstitutional preservations of power' will usually have the effect of altering the existing political and legal status quo in the country concerned, thereby producing a new situation (*a fait accompli*), which makes the task of restoring the status quo ante a tremendously difficult undertaking. In the African context particularly, authors of coups often exploit ethnic and/or religious cleavages as well as deep-rooted social conflicts over the distribution of power and resources, hence garnering significant support for their actions from sections of the population. If successful, such coups thus usually force international actors involved in the resolution of the crises to pursue an outcome that is somehow acceptable to the coup plotters and their respective support base. This partly explains the difficulty facing the AU in enforcing the more punitive aspects of the regional norm against UCG and the resort to power-sharing arrangements when attempting to resolve coup-related stand-offs. Specifically, it explains the AU's repeated inability to enforce the rule prohibiting coup perpetrators from taking part in post-coup elections and newly formed governments.

Recent events associated with the 'Arab Spring' have presented further challenges to the AU policy on UCG, and forced the organisation to openly engage the question of whether (and under what circumstances) to accord legitimacy to regime changes based on popular uprisings. Egypt obviously is the most significant example in this regard. While the AU has been generally supportive of the 2011 Egyptian revolution, the 2013 coup—again allegedly based on 'legitimate' demands by the Egyptian people—clearly has tested the AU's initial enthusiasm for popular uprisings. At the end, the AU's handling of the case—especially its quick lifting of the Egypt's suspension from the organisation after the contested 2014 presidential elections (which were held without participation of the Muslim Brotherhood, whose political arm had won every prior post-Mubarak electoral contest)—has sent conflicting messages. More recently, the 2014 coup in Burkina Faso is a further reminder of the difficulty in responding to UGC that are presumably in accordance with the will of a vast majority of the population concerned. In its reaction to this crisis, the AU designated the eventual stepping in of the military as a coup d'état, regardless of the fact that the military's move was preceded by widespread civilian protest against the ousted ruler's attempt to once again extend his 27 years in power through constitutional amendment. In what appears to be a sort of 'self-restraint', however, the AU refrained from suspending Burkina Faso from the organisation.

While the AU has generally been more hostile to unconstitutional action against (elected) incumbent governments, it has, more often than not, turned a blind eye to cases of unconstitutional preservation of power by governments that refuse to accord equal rights and a level playing field to opposition candidates (particularly in the context of elections).<sup>128</sup> Although there has been increasing realisation within the AU that UCG result from various ‘democratic deficits’, it is still unclear which cases of ‘democratic backsliding’ can be brought under the rubric of UCG. Owing to its limited scope, the regional norm on the rejection of UCG only seems to outlaw some of the most obvious instances of threats to democratic governance. In spite of the progressive nature of the relevant normative framework, cases of failure to respect democratic principles and the rule of law short of coups d’état and unconstitutional removals of existing term limits simply lack reliable and efficient monitoring and enforcement mechanisms within the AU. Theoretically, the standing African Court on Human and Peoples’ Rights (ACtHPR) could have a role to play here—a thought assisted by the Court’s 2013 decision in the *Mtikila* case, in which it interpreted article 10 (freedom of association) and article 13 (participation in government) of the Banjul Charter so as to firmly uphold the right of independent candidates to run for presidency (thereby rendering illegal a recent constitutional amendment in Tanzania that has barred such candidates from presidential elections).<sup>129</sup> Unfortunately, as a result of the current non-ratification of its Statute by half of the AU’s member states, and the fact that only a handful of those who ratified have also recognised its capacity to entertain individual complaints, the ACtHPR suffers the fate of a rather neglected institution within the AU system.<sup>130</sup>

Overall, the recent emergence of a comparatively progressive AU framework tackling the continent’s recurring problem of UCG is, as such, certainly a positive and laudable development. However, given its significant limitations and shortcomings, particularly in terms of practical implementation and enforcement, any hopes that the existing AU regime on UCG will bring about the effective protection and lasting entrenchment of the values of constitutionalism and democratic governance in Africa should be balanced by realistic and, hence, decidedly lowered expectations.

<sup>128</sup> Ademola Abass, ‘African Regional Organizations, the African Peace and Security Architecture and the Protection of Human Rights’ in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 280.

<sup>129</sup> *Mtikila and others v Tanzania* App nos 009/2011 and 011/2011 (ACtHPR, 14 June 2013) paras 99, 114.

<sup>130</sup> Of the 54 AU member states, 27 have so far ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 10 June 1998, entered into force 25 January 2004) OUA Doc OUA/LEG/EXP/AFCHPR/PROT (III), with only seven of these states making the optional declaration permitting the Court to entertain individual complaints. Against this backdrop, it is particularly regrettable that the AU has so far been overly sluggish in establishing the planned (merged) African Court of Justice and Human Rights, whose broad mandate would likely enable it to interpret the obligations entailed under the full range of instruments that make up the AGA.

# The Democratic Entitlement in an Era of Democratic Recession

*Amichai Magen\**

## Abstract

The global democratic boom, which transformed much of the world's political landscape in the three decades between 1974 and 2004, has also had an indelible impact on international law, most notably in the development of the 'democratic entitlement' claim—namely, that in a world increasingly dominated by democracies there exists an emergent enforceable right to democratic governance in international law. But what would become of the democratic entitlement if the boom turned to bust? The question is no longer hypothetical. For a decade now the momentum of world politics has turned increasingly against democracy's champions. While the dramatic gains of the late twentieth century have not been erased, the global democratic wave hit the shoal somewhere around 1999–2000, plateaued between 2000 and 2005, and has since suffered sustained reversals. This article re-examines the democratic entitlement thesis in light of these recent negative trends in democracy's international fortunes. It argues that the right to democratic governance is a layered, and potentially severable, edifice, parts of which now seem to be eroding, but which is unlikely to be entirely undone by a reverse wave of democratic breakdowns and resurgent authoritarianism. The article then examines some of the main implications of the current democratic recession for the right to democratic governance in international law.

## Keywords

Democracy, Governance, Entitlement, Recession, International Law

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## 1 Introduction

The global democratic boom, which transformed much of the world's political landscape in the three decades between 1974 and 2004, has also had an indelible impact on international law, particularly in its latter half, following the end of the Cold War. In a 1992

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article described variably as ‘seminal’, ‘path-breaking’, and ‘pioneering’,<sup>1</sup> Thomas Franck asserted that the demise of Soviet communism and the triumph of Western political and economic liberalism put an end to international law’s traditional agnosticism regarding forms of domestic governments and paved the way for the emergence of a ‘democratic entitlement’, meaning an enforceable right to democratic governance in international law.<sup>2</sup>

Franck’s thesis unleashed a two-decade torrent of policy and academic debate about the nature of this (alleged) democratic entitlement, its content and scope, and the international legal and institutional consequences flowing from the recognition of such an entitlement.<sup>3</sup> Disagreements about this or that aspect of the right to democratic governance notwithstanding, the notion of such a right has become deeply entrenched in contemporary international legal thought, borne and undergirded by the global democratic boom. But what would become of the democratic entitlement if the boom turned to bust?

The question is no longer hypothetical. For a decade now the momentum of world politics has turned increasingly against democracy’s champions. While the dramatic gains of the late twentieth century have not been erased, the global democratic wave hit the shoal somewhere around 1999–2000, plateaued between 2000 and 2005, and has since suffered sustained reversals. By 2015 the condition of global democratic institutions and procedures declined for nine consecutive years. Indeed, Freedom House observes in its latest ‘Freedom in the World’ report that ‘acceptance of democracy as the world’s dominant form of government—and of an international system built on democratic ideas—is under greater threat than at any point in the last 25 years.’<sup>4</sup>

This article examines the right to democratic governance in light of recent trends in democracy’s international fortunes. It argues that the democratic entitlement is a layered, and potentially severable, construct that may well be eroded but is highly unlikely to be obliterated. The article then explores some of the main implications of the current democratic recession for the right to democratic governance in international law.

<sup>1</sup> For a description of the various accolades and impact of Franck’s article, see Susan Marks, ‘What has become of the Emerging Right to Democratic Governance?’ (2011) 22 EJIL 507.

<sup>2</sup> Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46.

<sup>3</sup> The accumulated literature pertaining to Franck’s thesis is enormous. Leading statements in this field include: Gregory Fox, ‘The Right to Political Participation in International Law’ (1992) 17 YJIL 539; James Crawford, ‘Democracy and International Law’ (1993) 64 BYBIL 113; the contributions in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) and in Richard Burchill (ed), *Democracy and International Law* (Ashgate 2006); Steven Wheatley, ‘Democracy in International Law: A European Perspective’ (2002) 51 ICLQ 225; Jackson N Maogoto, ‘Democratic Governance: An Emerging Customary Norm?’ (2003) 5 U Notre Dame Aust L Rev 55; Christian Pippin, ‘International Law, Domestic Political Orders, and the “Democratic Imperative”: Has Democracy Finally Emerged as a Global Entitlement?’ (2010) Jean Monnet Working Paper 2/10 <<http://www.jeanmonnetprogram.org/papers/10/100201.html>> accessed 31 March 2015; Jean d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks’ (2011) 22 EJIL 549; Fabienne Peter, ‘The Human Right to Political Participation’ (2013) 7(2) J Ethics & Soc Phil 1.

<sup>4</sup> Freedom House, ‘Freedom in the World 2015: Discarding Democracy: Return of the Iron Fist’, 1 <[https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf)> accessed 29 March 2015.

The article proceeds in two main sections. The first section contributes to the ongoing debate about the democratic entitlement by proposing that it is best understood as being composed of four distinguishable, and potentially severable, layers. This is important because the erosion of one or more layers of Franck's construct does not necessarily mean the dissolution of the entire edifice. It also demonstrates that only the two top layers—enforceability and the claim to an emergent international customary norm—developed under the extraordinary conditions of the immediate post-Cold War era. The remaining two base layers are older, more deeply entrenched in international law, and therefore less susceptible to erosion. Finally, this section outlines the main consequences of the democratic entitlement thesis for international legal and political practice.

The second section proceeds to explore the democratic recession and its potential repercussions for the democratic entitlement. It begins by identifying a number of contemporary dynamics which, taken together, indicate we may indeed be witnessing an incipient global democratic recession. Should current declines persist or deepen, the democratic entitlement is likely to weaken in several respects. First, this section argues that the stall (or worse, reversal) in the forward momentum of democracy inherently erodes the claim to an *emergent* customary entitlement to democratic governance in international law. Second, it demonstrates that even at the zenith of the democratic boom—in the decade and a half between 1990 and 2005—the claim to an emergent right to democratic governance was contested theoretically and practically, and was therefore always somewhat fragile. Finally, the article warns that recent international practice shows significant evidence of weakening international commitment to the democratic entitlement. Should the current slump persist or accelerate, the article concludes, the top two layers of the democratic entitlement edifice in particular are in genuine danger of being undermined.

## 2 The democratic boom and its international legal consequences

To understand the claim to an emergent enforceable right to democratic governance in international law, and so be able to evaluate its ongoing validity, it is important to recognise the layered nature of the claim, and the potential severability of its different components, or layers. Indeed, the right to democratic governance may be understood as layered in two intertwined but distinct senses—historical and substantive—with the earlier two layers deeply embedded in modern international law, and the latter two emerging only in the relatively recent, and in many respects extraordinary, post-Cold War period.

Franck himself saw the democratic entitlement as the outcome of a historical layering process—a dynamic construction progressively built at formative periods of international legal development. The first layer, dating back to the interwar years, was the principle of self-determination which, according to Franck, entailed 'the right of a people organized in an established territory to determine its collective political destiny



in a democratic fashion.<sup>5</sup> Looking at the League of Nations and its successor, the United Nations (UN), Wheatley also observes that the idea of sovereign equality between states ‘exactly replicates that of political equality within democratic systems of government’ and that the opening words of the UN Charter, ‘We the Peoples’, may also be read to indicate that popular sovereignty forms one of the core principles of the modern international system in general.<sup>6</sup>

Substantively, at the base layer of the edifice lies the idea that the form of domestic political regimes is not solely a matter of state discretion (an internal affair unchecked by international rules) but that international law has some valid role to play in determining its shape. This notion has become deeply embedded in international legal thought, despite the fact that it represents a departure from international law’s traditional strict agnosticism concerning domestic sources and forms of governmental authority.<sup>7</sup>

The second layer, emerging as part and parcel of the anti-totalitarianism impetus of the post-Second World War international settlement, and extending until the collapse of the Soviet Union and the end of the Cold War, involved the beginning of acceptance of the idea that domestic power would be constrained by universal human rights. It entailed more specifically that those rights included a right to political participation, as represented particularly in article 21 of the 1948 Universal Declaration of Human Rights (UDHR).<sup>8</sup>

Franck saw this second layer as also supplemented by certain civil and political rights—freedom of opinion, expression and assembly—necessary for a genuinely open and competitive electoral process, and embodied in various global and regional regimes.<sup>9</sup> In ideologically divided Europe, for example, the 1949 Statute of the Council of Europe<sup>10</sup> affirmed democracy as a central goal of the newly formed organisation. In

<sup>5</sup> Franck (n 2) 52.

<sup>6</sup> Wheatley (n 3) 227.

<sup>7</sup> With one or two narrow and fairly recent caveats, international law has traditionally eschewed the subject of domestic governance institutions, procedures or norms, leaving the form and contents of political regimes largely to the discretion of states, as a matter of internal affairs unchecked by international rules. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 132. The caveats to this general rule are historically recent and pertain to a prohibition of apartheid (see International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243) and, more ambiguously, Nazi or fascist political regimes (see Maogoto (n 3) 56–57). Indeed, prior to the great democratic boom of 1974–2004, the only broadly applicable restrictions pertaining to domestic governance were to be found in human rights law, notably in conventions relating to political and civil rights. Yet, these prescriptions addressed limitations on how power could be exercised by governments, rather than how those governments were to be formed, constrained or replaced.

<sup>8</sup> Universal Declaration of Human Rights, UNGA Res 217 A(III) (10 December 1948) (UDHR). The right to participate in public affairs, including the right to genuine and periodic elections found in art 21 UDHR is reaffirmed in art 25 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). However, the latter provision (which, unlike the UDHR, is legally binding) does not condition governmental authority on respect for the will of the people, as art 21(3) UDHR does.

<sup>9</sup> Franck (n 2) 61.

<sup>10</sup> Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) 87 UNTS 103.

Latin America, although state practice contradicted it sharply until the 1980s, as early as 1948 the Charter of the Organization of American States (OAS) required that member states be constituted ‘on the basis of the effective exercise of representative democracy’.<sup>11</sup>

Substantively, it is within this layer that we identify at least the foundations of the principle that under international law it is democracy, and *democracy alone*, that has become the basis for governmental legitimacy. While it was only with the West’s decisive ideological triumph at the end of the Cold War that the idea of democracy as the sole foundation of political legitimacy gained broad (though never universal) international support, the groundwork for this notion was already put in place earlier, both in the decolonisation context and in the more broadly applicable provisions relating to the right of political participation enshrined in the UDHR and the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>12</sup>

The third layer (and, to Franck’s mind, the final one) was the emerging right to democracy, understood as an entitlement to periodic free and fair elections. With a majority of states in the world coming to practise electoral democracy by the early 1990s, Franck concluded that provisions in human rights regimes begin ‘to approximate prevailing practice and thus may be said to be stating what is becoming a customary legal norm applicable to all’.<sup>13</sup> Viewed substantively, this third historical phase of development produces two important and distinct principles capping the democratic entitlement edifice.

The penultimate constitutive principle is the notion of its enforceability. This dimension is dependent upon state practice and the broad acceptance of the legitimacy of actions concerning democratic criteria for membership in regional and international organisations—the use of democratic conditionality by international organisations and democratic socialisation within them<sup>14</sup>—international elections monitoring,<sup>15</sup> and collective responses to coups d’état—the latter extending as far as internationally sanctioned ‘pro-democratic’ armed interventions.<sup>16</sup> Finally, and most ambitiously, comes

<sup>11</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, art 5(d).

<sup>12</sup> Both instruments are cited in n 8 above. For analysis, see Maogoto (n 3) 60–64; Peter (n 3) 1.

<sup>13</sup> Franck (n 2) 64.

<sup>14</sup> See Leonardo Morlino and Amichai Magen, ‘Methods of Influence, Layers of Impact, Cycles of Change: A Framework for Analysis’ in Amichai Magen and Leonardo Morlino (eds), *International Actors, Democratization, and the Rule of Law: Anchoring Democracy?* (Routledge 2009) 31; Stephen J Schnably, ‘Constitutionalism and Democratic Government in the Inter-American System’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 155; Jon C Pevehouse, ‘Democracy from the Outside-In? International Organizations and Democratization’ (2002) 56 IO 515.

<sup>15</sup> On the origins and evolution of international elections monitoring, see Roland Rich, ‘Bringing Democracy into International Law’ (2001) 1(3) J Democ 20; Arturo Santa-Cruz, ‘Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Elections Monitoring’ (2005) 59 IO 663.

<sup>16</sup> On the use of coercive measures in response to coups or attempted ones, see Brad Roth, ‘Government Illegitimacy Revisited: “Pro-Democratic” Armed Intervention in the Post-Bipolar World’ [1993] Trans L & Contemp Probs 481; Michael Byers and Simon Chesterman, “You, the People”: Pro-democratic Intervention in International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 259.

the notion that the democratic entitlement has achieved the status of a customary international norm, even if only an emergent rather than a fully established one.

Two main observations are important at this juncture. First, just as the different substantive layers of the right to democratic government emerged at different historical periods, with widely varying international attitudes towards democracy, they are divisible and, in theory at least, severable. The first two layers—the relevance of international law and the notion of democratic legitimacy—could, in theory at least, endure even if the latter two layers—enforceability and the customary status of the democratic entitlement—were to erode partly or completely. Second, it is vital to remember both the relative brevity of the historical period which has given rise to the last two layers of Franck's construct, and to appreciate the exceptional nature of this historical period, the unipolar moment.

Indeed, the demise of Soviet communism and the end of the Cold War generated three extraordinary liberalising dynamics, which combined to elevate the status of democracy in international politics and law as never before. First, the heady exuberance experienced in the West by the triumph of its capitalist-democratic ethos—a mood famously captured in Francis Fukuyama's *The End of History* essay<sup>17</sup> in the summer of 1989—resulted in a reinvigorated sense of Wilsonian zeal. This zeal was experienced mainly, but not exclusively, among Americans,<sup>18</sup> for the reshaping of the world in line with the 'unabashed victory of economic and political liberalism' appeared to be sweeping across many regions of the world at the time.<sup>19</sup> In a bipolar world, both the United States and Soviet Union generally coveted allies regardless of their liberal credentials and avoided potentially destabilising political and legal experiments in democracy. The end of the Cold War not only opened the possibility of democratic expansion into the former Communist bloc and non-aligned group of states, it also removed a major rationale for tolerating autocratic practices, particularly among already isolated regimes such as apartheid South Africa and Ceauşescu's Romania.<sup>20</sup>

Second, the international legal order had become more amenable to the idea that in the post-Cold War era there existed a right of democratic governance, because democracy was rapidly becoming not merely a widely shared human aspiration but the dominant form of government around the world. As Samuel Huntington demonstrated in his influential book, the third wave of global democratic expansion began well before the fall of the Berlin Wall—arguably with the April 1974 Portuguese *Revolução dos*

<sup>17</sup> Francis Fukuyama, 'The End of History?' (The National Interest, Summer 1989) <<https://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf>> accessed 15 December 2015.

<sup>18</sup> On the American Wilsonian tradition and history of seeking to promote democracy, see Thomas Smith, *America's Mission: The United States and the Worldwide Struggle for Democracy in the Twentieth Century* (PUP 1994).

<sup>19</sup> Fukuyama (n 17) 1.

<sup>20</sup> Amichai Magen and Michael McFaul, 'Introduction: American and European Strategies to Promote Democracy—Shared Values, Common Challenges, Divergent Tools?' in Amichai Magen, Thomas Risse and Michael McFaul (eds), *Promoting Democracy and the Rule of Law: American and European Strategies* (Palgrave-Macmillan 2009) 4–5.

*Cravos* that overthrew one of the longest standing dictatorships in southern Europe—but accelerated markedly after the mid-1980s.<sup>21</sup> Whereas in 1973 only 26.7 per cent of all states then existing (150) constituted electoral democracies, in 1984 the percentage reached 36.1 and, by 1992, 53.2 per cent. This proportional increase occurred despite the growth in the number of states in the world (to 190). The democratic boom continued throughout the 1990s, reaching a zenith at the turn of the millennium, when 62.6 per cent of all states ranked as electoral democracies.<sup>22</sup>

Moreover, unlike the first two waves of democratisation, the third wave was a truly global phenomenon. In fact, it unfolded mainly outside modern democracy's traditional cradles and boundaries in northern Europe, North America, and among several former colonies of the British Empire. From Portugal in 1974, the third wave spread to the rest of the Iberian Peninsula and Greece, then in the 1980s to Latin America, and in the period of 1990–2000 to much of central and eastern Europe and substantial portions of Eurasia, the Asia-Pacific region, and sub-Saharan Africa.<sup>23</sup> For the first time in human history, democratic governance could be plausibly portrayed as a (near) universal norm, not a highly bounded regional one.

The idea that democratic entitlement ought to be an integral part of the international legal order also received powerful impetus by—and at the same time helped provide legal legitimacy to—stark policy linkages made by prominent liberal internationalists, in government and academia alike, between domestic democracy and a host of desirable international goods; ranging from democratic peace and reduced transaction costs in global trade to better economic development and compliance with human rights and environmental protection standards.<sup>24</sup>

This 'democratic imperative' thesis was enthusiastically endorsed and promoted by the Clinton Administration—one of whose early foreign policy decisions was to replace George Keenan's doctrine of containment with 'Democratic Enlargement' as the new all encapsulating sobriquet for post-Cold War US foreign policy—and later adopted warmly

<sup>21</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (U Oklahoma P 1991) 3–5.

<sup>22</sup> All figures from Freedom House, 'Freedom in the World: The Annual Survey of Political Rights and Civil Liberties', annual volumes, compiled and cited in Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Around the World* (Times Books 2008) app, Table 2.

<sup>23</sup> For a detailed account of this process, see Jørgen Møller and Svend-Erik Skaaning, 'The Third Wave: Inside the Numbers' (2013) 24(4) *J Democ* 97.

<sup>24</sup> For classic statements of this sentiment in the early to mid-1990s, see Anne-Marie Burley (now Slaughter), 'Toward an Age of Liberal Nations' (1992) 33 *HILJ* 393; Fernando R Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia L Rev* 53; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503; Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *IO* 513. For later formulations linking democracy to security, economic development and human wellbeing, see, eg, Bruce M Russett and John R O'Neal, *Triangulating Peace: Democracy, Interdependence, and International Organizations* (Norton 2000); Joe Siegle, Michael Weinstein and Mort Halperin, *The Democracy Advantage: How Democracies Promote Prosperity and Peace* (Taylor & Francis 2004); Francis Fukuyama and Michael McFaul, 'Should Democracy Be Promoted or Demoted?' (2008) 31 *Washington Q* 23.

by European leaders.<sup>25</sup> By 1991, the Conference on Security and Cooperation in Europe (CSCE) and the OAS had already endorsed democracy as the only game in town for their member states, paving the ground for Franck's proclamation of an internationally constituted emerging right to democratic governance.<sup>26</sup> Between the time of Franck's writing and roughly 2005, the democratic entitlement idea amassed policy and scholarly support, particularly in Europe and the Americas.<sup>27</sup>

### 3 International legal consequences

In the period marking the zenith of the global democratic boom—spanning approximately the decade and a half between 1990 and 2005—we can identify several developments which, taken together, amount to a compelling argument in favour of an emergent international customary obligation for states to live up to at least some standard of democratic legitimacy. This is most strongly evident in those regions of the world, Europe and the Americas, which have made membership and various associated privileges in regional organisations contingent upon formal acceptance of, and respect for, democratic principles. Among members of the European Union (EU) and OAS, at least, democratic procedure as the sole legitimate foundation for government has not only become settled practice but acquired the status of *opinio juris sive necessitatis*—the accepted notion that the (democratic) practice has become obligatory.

Reflecting a two-decade process of legal development within the EU, post-Lisbon, the Treaty of the European Union (TEU) itself purports to be 'founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights including the rights of persons belonging to minorities', which are considered 'values [that] are common to the Member States'.<sup>28</sup> A clear risk of a serious breach by a Member State of these values can result in the suspension of the rights deriving from membership in the EU, including voting rights in the Council.<sup>29</sup> At the same time, articles 9–12 TEU give comprehensive expression to the principle of democracy within the EU legal order. The Court of Justice of the European Union (CJEU) regularly interprets and applies the principle,<sup>30</sup> and in its external action, too,

<sup>25</sup> Amichai Magen, 'The Rise and Stall of Democratic Enlargement' in Federiga Bindi and Irina Angelescu (eds), *The Frontiers of Europe: A Transatlantic Problem?* (Brookings 2011) 229.

<sup>26</sup> On the CSCE (which in 1994 became the Organization for Security and Cooperation in Europe, OSCE) see the Charter of Paris for a New Europe (adopted 21 November 1990, entered into force 21 November 1990) (1991) 30 ILM 190. On the OAS, see the Santiago Commitment to Democracy and the Renewal of the Inter-American System, 21st Session of the OAS General Assembly (4 June 1991) OAS/Ser.P/AG Doc 2734/91; OAS General Assembly Resolution 1080 (5 June 1991) OAS/Ser.P/AG Doc 2739/91.

<sup>27</sup> See Magen and McFaul (n 20) 2–5.

<sup>28</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/15 (TEU) art 2 (emphasis added).

<sup>29</sup> Art 7 TEU.

<sup>30</sup> See Koen Lenaerts, 'The Principle of Democracy in the Case Law of the European Court of Justice' (2013) 62 ICLQ 271.

the EU is formally committed to being 'guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: *democracy*, the rule of law, the universality and indivisibility of human rights and fundamental freedoms'.<sup>31</sup>

In Europe beyond the EU, the Council of Europe's European Court of Human Rights has ruled that democracy 'appears to be the only political model contemplated by the [European Convention on Human Rights] and, accordingly, the only one compatible with it'.<sup>32</sup> The member states of the Organization for Security and Cooperation in Europe (OSCE) have pledged to 'build, consolidate and strengthen democracy as the only system of government of our nations' as well as to 'cooperate and support each other with the aim of making democratic gains irreversible'.<sup>33</sup> In practice, by the end of the 1990s, monitoring elections, providing financial and technical assistance aimed at strengthening democracy, and judging the extent to which member states were pursuing democratic development had become a central objective for the OSCE.<sup>34</sup>

A similar process, whereby regional organisations institutionalised provisions intended to promote and anchor democratic gains, occurred over the same period in the Americas. Building on its Cold War pro-democracy foundations, in its 1991 Santiago Declaration the OAS committed itself to ensuring the promotion and defence of representative democracy.<sup>35</sup> By 2001, article 1 of the Inter-American Democratic Charter stated plainly, 'The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it'.<sup>36</sup> Beyond declarations, in 1990 the OAS established a Department of Electoral Cooperation and Observation, with a specialised electoral quality and certification office operating since 2007 under the auspices of the regional organisation.

Another indicator of normative commitment to democracy pertains to the reaction of the international community to the usurpation of governmental power by extra-constitutional means, typically coups d'état. In the 1990–2005 period, we observe broad international objections to such action, sometimes backed by substantial sanctions.<sup>37</sup> For instance, under Resolution 1080 adopted by the OAS General Assembly in 1991, in the event of 'any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by a democratically elected government,' OAS member states are collectively empowered

<sup>31</sup> Art 21 TEU (emphasis added).

<sup>32</sup> *United Communist Party of Turkey and others v Turkey* (1998) 26 EHRR 121, para 45. The instrument referred to is European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.

<sup>33</sup> Charter of Paris for a New Europe, 4.

<sup>34</sup> Rich (n 15) 28.

<sup>35</sup> OAS Santiago Commitment to Democracy.

<sup>36</sup> OAS, Inter-American Democratic Charter (adopted 11 September 2001) (2001) 40 ILM 1289, art 1.

<sup>37</sup> See Jean d'Aspremont, 'Responsibility for Coups in International Law' (2010) 18 *Tulane J Intl & Comp L* 451. Note, however, that such sanctions have typically been eased once the perpetrators of the coups make a credible promise to hold free and fair elections.



to 'adopt any decisions deemed appropriate, in accordance with the [OAS] charter and international law'.<sup>38</sup> By 2005, Resolution 1080 was invoked five times—in Haiti (1991), Peru (1992 and 2000) Guatemala (1993) and Paraguay (1996).<sup>39</sup> The existence of collective mechanisms for protecting democracy—which also exist, albeit less robustly, in the Commonwealth of Nations<sup>40</sup> and African Union<sup>41</sup>—lend credence to the notion of the international community is at least resisting authoritarian backsliding and seeking to lock in existing democratic gains.<sup>42</sup>

Most remarkable, and controversial, has been the appeal to collective military intervention to enforce the ostensible right to democratic governance.<sup>43</sup> While stopping well short of Michael Reisman's call for the development of a general customary right to unilateral armed intervention as a measure of last resort in cases of violation of democracy,<sup>44</sup> the post-Cold War period has in fact produced a limited doctrine of coercive intervention, under Chapter VII of the UN Charter, in support of the democratic entitlement. As Roland Rich observes, in at least three cases over the 1990–2005 period—in Haiti (1994), Sierra Leone (1997) and East Timor (1999)—a credible argument can be made that the Security Council authorised coercive enforcement action on human rights and democracy grounds even where there was very little danger to international peace and security.<sup>45</sup>

Finally here, the right to democratic governance as an emergent customary international norm was buttressed to some extent between 1990 and 2005 by international practice pointing to democratic legitimacy as a factor affecting the recognition of new states. Traditionally, state recognition did not address questions of domestic regime structure, and even today there is certainly no evidence to indicate that states refuse to recognise the existence of another state simply because it possesses a non-democratic form of government.<sup>46</sup> A notably pro-democracy development in recognition practice did take place in the immediate aftermath of the Cold War, however, when both the United States and EU declared that, with respect to the dissolution of the Soviet Union and Yugoslavia,

<sup>38</sup> OAS General Assembly Resolution 1080, art 2. For commentary and analysis of these cases, see Ruben M Perina, 'The Role of the OAS' in Morton Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington 2005) 127.

<sup>39</sup> Perina (n 37) 127.

<sup>40</sup> Charter of the Commonwealth of Nations (adopted 14 December 2012) art 1 <<http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf>> accessed 2 October 2015.

<sup>41</sup> Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15, arts 3(g), 4(m).

<sup>42</sup> See Theodore J Piccone, 'International Mechanisms for Protecting Democracy' in Morton Halperin and Mirna Galic (eds), *Protecting Democracy: International Responses* (Lexington 2005) 101; Niels Peterson, 'The Principle of Democratic Teleology in International Law' (2008) Max Planck Institute for Research on Collective Goods 16/2008 <<http://core.ac.uk/download/pdf/7372250.pdf>> accessed 15 April 2015.

<sup>43</sup> See the debate about the legality of coercive intervention in support of democracy in part III of Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000).

<sup>44</sup> W Michael Reisman, 'Humanitarian Intervention and Fledgling Democracies' (1994) 18 FILJ 794.

<sup>45</sup> Rich (n 15) 31.

<sup>46</sup> Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 545, 556.



recognition would require not only the fulfillment of the traditional Montevideo criteria, but adherence to democracy.<sup>47</sup> Similarly, the international trusteeships established to shepherd Bosnia-Herzegovina, East Timor, and Kosovo towards full statehood all required that the transitional entities become democratic states.<sup>48</sup>

In sum, over the period 1990–2005 we observe a structural shift in the status of democracy, as an ideal and model of government, in the international system. Writing in 2004, leading democratisation scholar Laurence Whitehead captured this sense of democratic triumphalism and necessity, observing that:

Democratization is now more commonly viewed as the norm rather than the exception. Unsatisfactory outcomes are most often presented as temporary setbacks to a predetermined course. There has been an explosion of international political and economic incentives for states to qualify as democracies. Where such expectations are clearly being frustrated, the leaders of international opinion reach for such labels as ‘rogue states,’ ‘collapsed’ or ‘failed’ states, often as a pretext for encroachments on state sovereignty. There has been a proliferation of the use of coercion and intervention in the name of human rights and democracy, and transitional administrations that are supposed to help instill new democratic regimes. This radical shift in the outlook of international actors reflects the end of the bi-polar conflict and the discredit of socialist economic models. More recently it has been reinforced by a perception that Western-led security interests are best served by managing the risks of controlled democratization.<sup>49</sup>

It is during this latter period of ‘the third wave’ that a credible (though, as we shall see, not overwhelming) argument can be made for the emergence of the democratic entitlement as an enforceable customary norm, extending beyond democracy’s traditional cradle in western Europe, North America and a handful of former colonies of the British Empire.

#### 4 The democratic recession and what it may mean for international law

Gains in political freedom worldwide reached a high water mark around 1999–2000, stagnated between the turn of the millennium and 2005–06, and then entered a process of decline after 2006. Since 2006, there has been no net expansion in the number of electoral democracies—which has wavered between 114 and 119, or between 60 and 63

<sup>47</sup> See ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ (1991) 62 BYBIL 559; ‘Declaration on Yugoslavia’ (1991) 62 BYBIL 559. For commentary, see the same volume at 558–66.

<sup>48</sup> See Oisín Tansey, *Regime-Building: Democratization and International Administration* (OUP 2009) 61–204. On the democratic dilemmas of building democratic states through ‘benevolent autocracy’, see Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (OUP 2004) 126–52.

<sup>49</sup> Laurence Whitehead, ‘Democratization with the Benefit of Hindsight: The Changing International Components’ in Edward Newman and Roland Rich (eds), *The UN Role in Promoting Democracy: Between Ideals and Reality* (UNUP 2004) 135–36.

per cent of the world's states—and the number of both electoral and liberal democracies has dropped slightly.<sup>50</sup> The average level of freedom in the world, as measured by the Freedom House index, also worsened somewhat over this period, from a best score of 3.22 in 2005 to 3.30 in 2013–14.<sup>51</sup>

While it is still unclear whether we are witnessing a stock market-like temporary correction in an otherwise upward historical trend, or the advent of a genuine 'reverse wave' characterised by democratic breakdowns and authoritarian resurgence, the combined impact of several dynamics now give substantial cause for concern of an accelerating global democratic recession.

Beyond the halting of the 1974–2004 positive momentum and the erosion in the number of democracies, the world has experienced a growing rate of democratic breakdowns in the last decade and a half. Between 2000 and 2015, 17.6 per cent of democracies in the world broke down—as a result of coups, rigged elections or other incremental degradations of democratic procedures—compared to lower democratic failure rates of only 8 per cent in the period 1984–93 and 11 per cent in 1994–2003.<sup>52</sup> Many of these have taken place in large, strategically important states, including Pakistan (1999)—which prominent analysts saw as a harbinger of future decline<sup>53</sup>—Russia (2000), Nigeria (2003), Venezuela (2005), Thailand (2005 and 2014), the Philippines (2007), Kenya (2007), Ukraine (2012), and Turkey (2014).

In addition to outright democratic breakdowns, we also observe accelerating declines in scores of freedom in a number of regions of the world post-2006. After a decade of nearly uninterrupted gains in freedom outpacing losses by a ratio of at least two to one, the trend was broken in 2006, and since then more countries have consistently declined in freedom than improved. By 2014, Freedom House notes that:

nearly twice as many countries suffered declines as registered gains, 61 to 33, with the number of gains hitting its lowest point since the nine-year erosion began. This pattern held true across geographical regions.<sup>54</sup>

The erosion is compounded by the fact that a troubling number of backsliding states are either large, economically powerful, or regionally influential ones—including Russia, Venezuela, Egypt, Turkey, Thailand, Nigeria, Kenya, Azerbaijan—or are members of the EU, especially Hungary and Romania.<sup>55</sup>

<sup>50</sup> Larry Diamond, 'Facing Up to the Democratic Recession' (2015) 26(1) *J Democ* 141, 142.

<sup>51</sup> *ibid.* The Freedom House index assigns each country and territory two numerical ratings—one for political rights and one for civil liberties—based on a 1–7 scale, with 1 being the best and 7 the worst. A larger average score demonstrates a global deterioration in the level of political rights and civil liberties tracked by the index.

<sup>52</sup> Diamond (n 50) 144.

<sup>53</sup> See, eg, Larry Diamond, 'Is Pakistan the (Reverse) Wave of the Future?' (2000) 11(3) *J Democ* 91.

<sup>54</sup> Freedom House (n 4) 1.

<sup>55</sup> On the deteriorating conditions of democracy inside the EU, see Attila Agh, 'Decline of Democracy in East-Central Europe: The Last Decade as the Lost Decade in Democratization' (2014) 7(2) *J Comp Pol* 4;

Just as disturbing as the statistical declines is an increasingly assertive authoritarian resurgence. This has taken a number of forms. At the height of the democratic boom, nearly all dictatorships either sought to persuade international public opinion that their regimes *were* democratic (as in the case of Vladimir Putin's 2005 claim that Russia constituted a 'managed democracy')<sup>56</sup> or that they are gradually moving towards democracy (China, Egypt, Jordan, Kuwait, Saudi Arabia). Now, autocrats feel freer to flout democratic values openly, assert the superiority of non-democratic forms of government, and violate the core principles of the liberal international order. This trend has been most pronounced in Russia—which has sharply restricted space for political dissent, treats human rights activists as enemies of the state, and directly violated international agreements guaranteeing Ukraine's territorial integrity—and China, which has abandoned 'softer' methods of authoritarian control, and has resorted to cruder Cold War-era tools, including criminal sanctions designed to restrict civil activists, administrative detention, and even the placement of dissidents in psychiatric hospitals.<sup>57</sup>

At the same time, Russia, China and regional powers such as Iran and Venezuela increasingly seek to wield economic, diplomatic and 'soft power' instruments in an attempt to discredit Western democracies and promote their own models as legitimate alternatives for other countries to emulate.<sup>58</sup> As part and parcel of the new assertiveness, authoritarian and semi-authoritarian regimes are leading a growing, and increasingly coordinated, assault on Western democracy promotion efforts; imposing various constraints on NGOs, closing down pro-democracy organisations, and harassing activists.<sup>59</sup>

Another facet of the democratic recession can be observed in the general dashing of the Arab Spring hopes for political liberalisation in north Africa and the Middle East, the cascade of state failure in the region (most notably in Iraq, Libya, Syria and Yemen), and the rising influence of revolutionary Shi'a and radical Sunni movements from Marrakesh to Bangladesh. Indeed, in the post-Arab Spring resurgence of radical Islamist ideologies and groups we observe not only the return of religion as an alternative organisational principle of world politics, but the outright rejection of all forms of man-made law, democracy, and the Westphalian international order.<sup>60</sup> Salafist jihadi movements in

Ulrich Sedelmeier, 'Anchoring Democracy from above? The European Union and Democratic Backsliding in Hungary and Romania' (2014) 51 *JCMS* 105.

<sup>56</sup> Vladimir Putin, 'Annual Address to the Federal Assembly of the Russian Federation' (The Kremlin, Moscow, 25 April 2005) <[http://archive.kremlin.ru/eng/speeches/2005/04/25/2031\\_type70029type82912\\_87086.shtml](http://archive.kremlin.ru/eng/speeches/2005/04/25/2031_type70029type82912_87086.shtml)> accessed 14 December 2015.

<sup>57</sup> Agh (n 55) 3–5. The Freedom House 2015 Report (n 4) also identifies similar trends in Turkey, Venezuela, Azerbaijan, Ethiopia, Vietnam, and Saudi Arabia.

<sup>58</sup> See Andrew Nathan, 'China's Challenge' (2015) 26(1) *J Democ* 156.

<sup>59</sup> See Thomas Carothers, 'The Continuing Backlash against Democracy Promotion' in Peter Burnell and Richard Youngs (eds), *New Challenges to Democratization* (Routledge 2010) 59.

<sup>60</sup> See Barak Mendelsohn, 'God vs Westphalia: Radical Islamic Movements and the Battle for Organizing the World' (2012) 38 *Rev Int Stud* 589; Daveed Gartenstein-Ross and Tara Vassefi, 'Perceptions of the "Arab Spring" within the Salafi-jihadi Movement' (2012) 35 *Studies in Conflict & Terrorism* 831.

particular (notably Al Qaeda, its regional affiliates, and ISIS) are increasingly contesting the most fundamental values and institutions of modern political liberalism.

Perhaps the most serious contemporary challenges to the democratic entitlement idea, however, emanate from within the democratic world itself. Here we can identify three main causes of growing democratic fragility.

First, within the most powerful democracies—in North America and Europe—democratic performance has been conspicuously deficient. The United States and the EU, arguably the two geographical epicentres of the liberal international order (and the main drivers of the democratic entitlement idea), have experienced a profound financial crisis in the late 2000s, appear mired in political paralysis (where their respective democratic institutions seem unable to answer citizen expectations and deliver effective governance), and face a series of daunting, long term, structural socioeconomic challenges. These challenges range from slow growth and stagnating income, to ageing populations and looming entitlements crises, and (in the case of European states) demographic decline. At the same time, voter turnout, levels of political party membership and public trust in government are all declining in America and Europe.<sup>61</sup>

Second, as has been evident throughout recorded human history, and as Robert Kagan aptly puts it, ‘Politics follows geopolitics.’<sup>62</sup> Just as the rise of Athenian democracy in the fifth century BCE prompted the spread of democratic ideas and models of government among the Greek city states, Sparta’s eventual victory in the Peloponnesian War was reflected in the proliferation of oligarchic rule. When the Soviet Union’s power increased in the early years of the Cold War, the number of communist regimes in the world rose; when it disintegrated, countries flocked to emulate the peerless American hegemon, including its triumphant model of government. It should come as no surprise, therefore, that the (at least relative) decline in Western power, self-confidence, and energy is producing a downturn in the appeal of democracy, if not yet an outright drift towards its enemies.

Lastly, democratic fragility is increasingly pervasive, especially among newer liberal democracies, as well as the weaker, more illiberal ones, because of their apparent inability to fulfill citizen expectations of effective public services provision.<sup>63</sup> Conversely, the fact that authoritarian regimes, such as China and Singapore in Asia and, to a lesser extent, Venezuela in Latin America, have been able to deliver seemingly effective governance raises their prestige relative to democracy.<sup>64</sup>

<sup>61</sup> For a detailed discussion of democratic decay within the West, see in particular Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (Farrar, Straus and Giroux 2014) 455–548; Philip Coggan, *The Last Vote: Threats to Western Democracy* (Penguin 2013); ‘What’s gone Wrong with Democracy and how to Revive it’, *The Economist* (London, 1–7 March 2014) 43.

<sup>62</sup> Robert Kagan, ‘The Weight of Geopolitics’ (2015) 26(1) *J Democ* 21.

<sup>63</sup> See Francis Fukuyama, ‘Why is Democracy Performing so Poorly?’ (2015) 26(1) *J Democ* 11; Emmanuel Gyimah-Boadi, ‘Africa’s Waning Democratic Commitment’ (2015) 26(1) *J Democ* 101; Scott Mainwaring and Anibal Perez-Linan, ‘Cross-Current in Latin America’ (2015) 26(1) *J Democ* 114; Alina Mungiu-Pippidi, ‘The Splintering of Postcommunist Europe’ (2015) 26(1) *J Democ* 88.

<sup>64</sup> See Nathan (n 58); Kagan (n 62).

Well performing modern democracies, as Fukuyama shows, combine three core functions: the state, the rule of law, and democratic accountability.<sup>65</sup> In many new democracies, state capacity and the rule of law have lagged well behind the progress in democratic accountability achieved by the spread of electoral democracy over the past decades; creating growing popular disillusionment with (and ultimately the delegitimation of) democracy in many societies.<sup>66</sup> State capacity and rule of law gaps exist to some extent even within the democratic heartland of the EU,<sup>67</sup> but are most prevalent in those regions of the world that have made democracy a truly international, not merely regional, norm—in Africa, Latin America, and the former Soviet bloc.<sup>68</sup>

## 5 What implications for the right to democratic governance?

How will the post-2006 decline in the fortunes of democracy impact the emergent right to democratic governance in international law? The answer to this question will ultimately hinge on how democracy will fare in the international system, at the regional and global levels, in the coming years and decades. Should the current slump prove to be a short term correction in an otherwise robust, historical ‘freedom’s march’, one can expect the gradual, long term consolidation and deepening of the democratic entitlement, quite possibly to the point of becoming a universal, enforceable rule.<sup>69</sup>

In contrast, should post-2006 declines endure and deepen, the democratic entitlement will weaken and erode, though it is highly unlikely to be obliterated. The remainder of this section identifies the factors that are likely to contribute to the erosion of the right to democratic governance, should the contemporary democratic recession persist or accelerate. At the same time, it advances the argument that, given the layered nature of the democratic entitlement idea, the right to democratic governance is unlikely to be entirely undone even in the face of deep reversals.

One set of factors that endanger the future of the democratic entitlement idea pertain to the fragility of the concept itself. The claim to an emergent right to democratic governance in the post-Cold War era depends in some vague but fundamental way on the forward momentum of democracy as an ideal and model of government in the world. Where that momentum is stalled, let alone reversed, the emergent right is no

<sup>65</sup> Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux 2011) 14–16.

<sup>66</sup> Fukuyama, ‘Why is Democracy Performing So Poorly?’ (n 63).

<sup>67</sup> See Agh (n 54); Sedelmeier (n 54).

<sup>68</sup> See Freedom House (n 4); Gyimah-Boadi (n 63); Mainwaring and Perez-Linan (n 63); Mungiu-Pippidi (n 63).

<sup>69</sup> Some policy makers and scholars have suggested mechanisms for moving in this direction. See, eg, John McCain, ‘An Enduring Peace Built on Freedom’ *Foreign Affairs* (November–December 2007) <<https://www.foreignaffairs.com/articles/2007-11-01/enduring-peace-built-freedom>> accessed 15 December 2015; Piccone (n 39) 122–23.

longer emergent and the validity of the notion is inherently undermined, though it is still unclear to what extent it suffers and with what exact consequences.

Even at the height of the global democratic boom, moreover, the democratic entitlement notion was always a contested one, both theoretically and as evidenced by the state practice of non-democracies.

In the realm of theory, Franck's thesis has attracted varied and substantial challenges for its alleged conceptual shortcomings and undesirable policy implications. Susan Marks, for instance, faults the democratic entitlement idea, as formulated by American scholars in particular, for being both too shallow and narrow. Franck's emphasis on the electoral, procedural dimensions of democracy, she argues, means that his conception is a minimalist and superficial one—what she calls 'low-intensity democracy'—that privileges elite political competition at the expense of genuine democratic inclusion and empowerment.<sup>70</sup> Echoing David Held's work, Marks further charges that the democratic entitlement's 'pan-national' focus is too narrow, in that it addresses municipal-level democracy alone and neglects the need for democratic accountability in those decision-making realms that are transnational or supranational in nature.<sup>71</sup>

Christian Pippan similarly observes that, even at its apex, the ambit of the principle of democracy in international law was highly limited, extending only to the thin, electoral or procedural understanding of democracy. In other words, Pippan contends, a democratic entitlement can only be said to have emerged if democracy is equated with periodic free elections alone.<sup>72</sup> As such, the right to democratic governance, as presently formulated, can be seen to neglect all non-electoral dimensions of democracy—to use Fukuyama's terms, the statehood and rule of law functions—and so is tainted by the growing disillusionment with the poor performance of many contemporary democracies.

Other critics have rejected the right to democratic governance on policy grounds, castigating it as a pernicious instrument designed to erode long-established norms of Westphalian sovereignty, non-intervention, and the general prohibition of aggression. Brad Roth, for instance, has sharply attacked Franck's 'democratic legal rhetoric', calling it 'an inherently mischievous device to legitimate the interference of hegemonic external forces in local democratization processes'.<sup>73</sup> While Roth's attack might be dismissed as extreme and unwarranted—both for its uncorroborated presumption of malice and for ignoring the many facets of external influence on domestic political change—its sheer acerbity serves to emphasise the contested nature of Franck's claim.

<sup>70</sup> Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000) 50–75.

<sup>71</sup> *ibid* 76–100. In this latter critique Marks echoes David Held's call to expand the democratic ethos to political life beyond national state systems to all arenas of authority exercising major influence on people's lives. See David Held, *Democracy and the Global Order: From the Modern State to Democratic Governance* (Stanford UP 1995).

<sup>72</sup> Pippan (n 3) 32–33.

<sup>73</sup> Brad R Roth, 'Book review: *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* by Susan Marks' (2001) 77 *Intl Affairs* 411, 412.

More importantly perhaps, inconsistent state practice has always ensured that the claim to an enforceable customary norm has been fragile. The proportion of democracies in the world never exceeded 62.6 per cent, with three major regions—Asia, sub-Saharan Africa, and north Africa and the Middle East—never achieving even a bare majority of electoral democracies, and authoritarian colossi (including China and virtually all Arab countries) persisting throughout the global democratic boom.<sup>74</sup> In this context, Jean d'Aspremont is surely correct in asserting that any customary obligation that exists in relation to a democratic entitlement probably constitutes an *erga omnes* obligation but is certainly not of a *jus cogens* character given the continuous existence of substantial persistent objectors to the principle in the international system.<sup>75</sup> Should democratic reversals and resurgent authoritarianism deepen or accelerate, particularly in Europe, but also in those regions of the world that presently appear most vulnerable to decline—Africa, Asia, those parts of the former Soviet bloc not integrated into the EU and NATO, and Latin America—it is difficult to see how the notion of a customary right—that is, the top layer of the democratic entitlement idea—can resist erosion.

Similarly, maintaining the existence of a customary obligation upon states to live up to some democratic standard would become more difficult if anti-democratic ideological movements acquire more adherents in Central Asia, Africa and the Middle East, if the open flouting of democratic norms become more widespread, or if authoritarian action to undermine pro-democracy international instruments and programmes become more brazen and systematic.

In reality, over the past few years there are indications of weakening state practice regarding the efficacy of democratic credentials or protection of democratic standards. Given the newness of the trend, firm conclusions are impossible to draw, however the trend is manifested in several tangible ways.

Most seriously perhaps, unlawful seizures of power, while still likely to produce some diplomatic opprobrium, no longer appear to prompt non-recognition of the new government or some other serious sanction. For example, following the 2006 military coup in Thailand, the United States condemned the generals responsible and suspended US\$24 million in military aid to the country.<sup>76</sup> By the time of the second Thai coup, which deposed Prime Minister Yingluck Shinawatra in May 2014, however, the Obama administration temporarily held back some US\$4.7 million in military aid and halted a small officer exchange programme,<sup>77</sup> yet there is no evidence to suggest the United States

<sup>74</sup> Møller and Skaaning (n 23).

<sup>75</sup> d'Aspremont, 'A Reply to Susan Marks' (n 3) 557.

<sup>76</sup> Thomas Lum, 'US Foreign Aid to East and South Asia: Selected Recipients' (Congressional Research Service Report for Congress, 3 January 2007) <<http://fpc.state.gov/documents/organization/81357.pdf>> accessed 13 August 2015. The suspension included military aid and counter-terrorism assistance. Assistance was restored in February 2008, only after elections judged to be free and fair where conducted in Thailand.

<sup>77</sup> Emma Chanlett-Avery, Ben Dolven, and Wil Mackey, 'Thailand: Background and US Relations' (Congressional Research Service Report for Congress, 29 July 2015) <<https://www.fas.org/sgp/crs/row/RL32593.pdf>> accessed 13 August 2015.



considered non-recognition of the usurper government. In fact, the United States quickly joined Thailand in two military exercises after the coup,<sup>78</sup> signaling that regional security competition with China trumped any American concern over the second military coup in Thailand in seven years.

Similarly, in Egypt, the Obama administration stopped short of defining Abdel Fattah el-Sisi's July 2013 toppling of the country's elected government a military coup, though it clearly was,<sup>79</sup> since doing so would have automatically triggered the suspension of military assistance to Egypt under the United States Foreign Operations Appropriations Act.<sup>80</sup> Although condemned rhetorically, the 2013 Egyptian coup carried only minor and temporary unease for Egypt's new strongman. By June 2014, US\$575 million in American aid that had previously been held back was released<sup>81</sup> and, in March 2015, a further US\$700 million was promised.<sup>82</sup> In August 2015, US Secretary of State, John Kerry, visited Cairo for a strategic dialogue, and western leaders, including French President, François Hollande, attended the opening ceremony of the new Suez Canal.<sup>83</sup>

More importantly still, in terms of state practice and *opinio juris*, is the fact that, in January 2014, Congress passed legislation exempting Egypt (and Egypt alone) from the clause in the Appropriations Act which prohibits military aid to countries that have undergone a military coup prior to the restoration of a democratic government by means of free and fair elections.<sup>84</sup>

Another apparent withdrawal from earlier state practice is observable in the area of recognition of new states and the criteria for the transition of political entities into full statehood. Two recent cases are illustrative in this regard. After 2010, international deliberations concerning South Sudan's impending independence and recognition as

<sup>78</sup> Craig Whitlock, 'US Military to Participate in Major Exercise in Thailand Despite Coup' *The Washington Post* (Washington, 8 February 2015).

<sup>79</sup> Tarek Masoud, 'Has the Door Closed on Arab Democracy?' (2015) 26(1) *J Democ* 74, 76.

<sup>80</sup> Foreign Operations Appropriations Act § 508, which provides that such funds shall not be made available to any country whose duly elected head of government was deposed by a military coup. Under § 508, the funds can be reinstated once a democratically-elected government is in place. See Lum (n 76) 25. For analysis of the dilemma facing US State Department lawyers in the case of the 2013 Egyptian military coup, see Elizabeth Imbarlina, 'Reforming the FAA Section 508' (*Jurist*, 29 July 2013) <<http://jurist.org/dataline/2013/07/steven-aiello-legislation-reform.php>> accessed 13 August 2015.

<sup>81</sup> 'US Unlocks Military Aid to Egypt, Backing President Sisi' *BBC News* (24 June 2014) <<http://www.bbc.com/news/world-middle-east-27961933>> accessed 13 August 2015.

<sup>82</sup> Peter Baker, 'Obama Removes Weapons Freeze Against Egypt' *New York Times* (31 March 2015) <[http://www.nytimes.com/2015/04/01/world/middleeast/obama-lifts-arms-freeze-against-egypt.html?\\_r=0](http://www.nytimes.com/2015/04/01/world/middleeast/obama-lifts-arms-freeze-against-egypt.html?_r=0)> accessed 13 August 2015.

<sup>83</sup> Eric Knecht, 'Egypt's Sisi Opens New Suez Canal, Says to Defeat Terrorists' *Reuters* (6 August 2015) <<http://uk.reuters.com/article/2015/08/06/uk-egypt-suezcanal-idUKKCN0QB1JW20150806>> accessed 13 August 2015.

<sup>84</sup> See Amy Hawthorne, 'What's Happening with US Military Aid to Egypt, Part II: Everything you Ever Wanted to Know about Foreign Military Financing for Egypt' (*Atlantic Council*, 17 November 2014) <<http://www.atlanticcouncil.org/blogs/egyptsource/what-s-happening-with-us-military-aid-to-egypt-part-ii-everything-you-ever-wanted-to-know-about-the-2014-legislation-on-foreign-military-financing-for-egypt>> accessed 13 August 2015. The statute in question is Consolidated Appropriations Act 2014 (US).

the 193rd member state of the UN contain remarkably little attention to domestic governance arrangements, and virtually no indication that democratic legitimacy would constitute a factor in its recognition. Security Council Resolution 1996 (2011) recognises the establishment of South Sudan as an independent state and establishes a UN mission in the new state's capital, Juba. However, in the eight-page document, democracy is mentioned only once and then in reference to the mandate of the new UN mission (UNMISS), not the expected domestic government arrangement of the newly formed state.<sup>85</sup> Similarly, UNSC Resolution 1999 (2011), which grants South Sudan full membership in the UN, speaks of the need for the new state to work closely with the UN to ensure, *inter alia*, 'establishment of core governmental functions, provisions of basic services, establishment of the rule of law, respect for human rights [and] management of natural resources',<sup>86</sup> but makes no mention of free and fair elections or any other reference to democracy *per se*.

This retreat from the democratic principle lends support to d'Aspremont's observation in 2011 that we may be witnessing a weakening, in the international community, of care for the origin of government—whether it is democratic or not—in favour of growing attention to what he and de Brabandere call the 'legitimacy of exercise' of power—that is, whether political power is exercised in an effective manner, ensuring security, the rule of law, and provision of other public goods, with less attention paid to electoral competition or other democratic procedures.<sup>87</sup>

The trend of de-emphasising democratic credentials in recent years is also apparent in the case of the Palestinian quest for recognition of full statehood status and membership in the UN. A comparative examination of the formal statements of the Middle East Quartet (composed of the US, the EU, Russia and the UN) demonstrates the gradual decline of attention to democracy. In 2002–03, the Quartet made three formal statements—most notably in its April 2003 performance-based roadmap to a permanent two-state solution to the Israeli-Palestinian conflict—on the conditions for peace between Israelis and Palestinians and a vision of a two-state solution, with a democratic Palestinian state living securely alongside democratic Israel.<sup>88</sup> All three statements mentioned democracy explicitly. Similarly, in 2004, the Quartet made two statements, both of which stated that a future Palestinian state must be democratic. The trend continued until 2010 but has since stopped. Since September 2010, the Quartet has made 11 formal statements about a future Palestinian state, but none have mentioned democracy.<sup>89</sup>

<sup>85</sup> UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996.

<sup>86</sup> UNSC Res 1999 (13 July 2011) UN Doc S/RES/1999.

<sup>87</sup> d'Aspremont, 'A Reply to Susan Marks' (n 3) 560–61; Jean d'Aspremont and Eric de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2011) 34 FILR 190.

<sup>88</sup> See US Department of State, 'A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict' (30 April 2003) <<http://2001-2009.state.gov/r/pa/prs/ps/2003/20062.htm>> accessed 13 August 2015.

<sup>89</sup> See UN News Centre, Middle East Quartet Statements <<http://www.un.org/apps/news/docs.asp?Topic=Middle%20East&Type=Quartet%20statement>> accessed 13 August 2015.

## 6 Conclusions

Though the brevity of the period of time we are examining makes the drawing of any decisive observations about international trends with significant legal consequences difficult, current state practice demonstrates a loosening commitment to democracy, notably in comparison to the immediate post-Cold War period. Anti-liberal states and movements increasingly challenge regional and global mechanisms based on democratic conditionality and socialisation, and Western actors appear less determined to press for such mechanisms, preferring perhaps to emphasise security, energy and other 'hard interests' while de-emphasising democratic legitimacy as a factor in international cooperation. Commitment to democratic institutions and norms appear to be playing a lesser role in contemporary practice pertaining to the formation of new states and recognition of new states, and even outright military coups do not always lead to significant sanctioning.

Taken together, the incipient democratic recession and current indications of weakening international commitment to democracy do not fundamentally endanger the first base layers of the democratic entitlement, but they do place in jeopardy the top two layers achieved only in the aftermath of the Cold War. The customary nature of the claim, and the notion that it has become enforceable, stand to be seriously eroded if the current democratic slump—including Western policies demonstrating an acceptance of a weakened international commitment to democracy—is permitted to persist or, worse, accelerate.

Preserving the democratic entitlement idea requires democracy's champions to deepen their resolve to safeguarding existing gains and, at the same time, to develop, *inter alia*, new democracy-supporting international instruments. One future direction would promote the development of a new species of democratic governance treaties, as a means of overcoming the legitimate critique that the right to democratic governance, as conceived of to date, is shallow and narrow to the point of being self-defeating. Moreover, the development of a new wave of regional, perhaps even global, democratic governance treaties would seek to bolster the protection, anchoring, and promotion of political rights within domestic systems. As the author has written elsewhere, the rule of law is an area that can lead the development of a new species of democratic governance treaties, given the broad international legitimacy now accorded to the idea and ideal of the rule of law.<sup>90</sup>

<sup>90</sup> See Amichai Magen, 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' (2009) 45 *Stanford J Intl L* 51.

# Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?

*Vladyslav Lanovoy\**

## Abstract

In recent years, the right to self-determination has been prone to abuse because of the uncertainties as to its proper operation outside the decolonisation context. This article revisits the content and role of self-determination in light of the recent assertions of this right, with particular reference to Kosovo and Crimea. It examines different facets of this right, and whether it holds an intrinsic link to a democratic form of government. The right to self-determination encompasses the right of a people to choose freely their own political system and to pursue their own economic, social, and cultural development. However, states have no duty in positive international law to introduce or maintain a democratic form of government as a requirement for the realisation of the right to self-determination. Moreover, democracy, construed narrowly as the majority rule of an electoral process, is not a guarantee of the realisation of the right to self-determination. This article will test the extent to which democracy and the development of human rights law have impacted upon the content, limitations and exercise of the right to self-determination.

## Keywords

Self-determination, Secession, Democracy, Elections, Human Rights, Political Participation

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## 1 Introduction

The concept of self-determination of peoples occupies a central place in international law, underlying and at the same time challenging the existence of a sovereign state. From its origins in the late 19th and early 20th centuries, the concept of self-determination has had a strong ideological foundation, polarised between a liberal ideal of democracy and a socialist conception of revolution. It was not until the United Nations (UN) Charter that it gained proper legal recognition,<sup>1</sup> to be identified later as ‘one of the essential

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<sup>1</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

principles of contemporary international law'.<sup>2</sup> The purpose of this article is to distil the actual content of self-determination as the legal right from the rhetoric that it fuels, in particular, the idea that its exercise is dependent on the existence of democracy.<sup>3</sup>

The UN Charter sets out the concept of self-determination among the purposes of the organisation, albeit in a rather state-centred approach.<sup>4</sup> Originally, 'self-determination' was tied up with 'equal rights' (of states) and had a rather limited meaning, making no reference 'to a right of dependent peoples to be independent, or, indeed, even to vote'.<sup>5</sup> The provisions of the Charter applicable to non-self-governing territories and trusteeship system (ie articles 73(b) and 76(b)) do not use the term 'self-determination', referring instead to 'self-government' or 'independence'.<sup>6</sup> It was only with the development of the decolonisation process that a consensus emerged as to the application of self-determination to all non-self-governing territories.<sup>7</sup> The concept of self-determination of peoples gained a prominent place in General Assembly resolutions and became accepted as a legal right in the context of decolonisation.<sup>8</sup> This right has since been expressed in

(UN Charter). For the treatment of self-determination in the context of the League of Nations, see League of Nations, 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aland Islands Question 5' [1920] Official Journal of the League of Nations, special supplement no 3. For an overview of self-determination as a political concept, see Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 Human Rights L Rev 239, 243–45. For an overview of development from a political principle to legal norm, see Zolio A Velasco, 'Self-Determination and Secession: Human Rights-Based Conflict Resolution' (2014) 16 Intl Community L Rev 75, 78–81.

<sup>2</sup> *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29 (*East Timor Judgment*).

<sup>3</sup> For an overview of the rhetoric of self-determination and the impact of political institutions on its exercise, see James J Summers, 'The Rhetoric and Practice of Self-Determination: A Right of All Peoples or Political Institutions?' (2004) 73 Nordic J Intl L 325.

<sup>4</sup> UN Charter, art 1(2), which provides that one of the purposes is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Art 55 refers 'to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 112. For a detailed analysis of the diplomatic history and the *travaux préparatoires* in relation to the concept of self-determination in the UN Charter, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 34–42.

<sup>5</sup> Higgins (n 4) 112.

<sup>6</sup> UN Charter, arts 73(b), 76(b).

<sup>7</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, paras 52–53 (*Namibia Advisory Opinion*). All states with self-governing territories have accepted the applicability of the right to self-determination. See, eg, the United Kingdom (15 November 1978) UN Doc CCPR/C/1/Add.37; the Netherlands (16 March 1981) UN Doc CCPR/C/10/Add.3, (4 September 1981) UN Doc CCPR/C/10/Add.5; Australia (11 December 1981) UN Doc CCPR/C/14/Add.1; and New Zealand (29 January 1982) UN Doc CCPR/C/10/Add.6.

<sup>8</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV) (proclaiming that 'all peoples have the right to self-determination' and that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the

regional and universal treaties, notably article 1 common to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>9</sup> and is part and parcel of customary international law.<sup>10</sup> It has been widely acknowledged in state practice, and judicial and quasi-judicial pronouncements.<sup>11</sup> Self-determination has been recognised as an *erga omnes* right<sup>12</sup> and even as a peremptory (*jus cogens*) norm.<sup>13</sup>

Although the provisions on self-determination and state practice are clear on the options available for exercising such a right, they provide little guidance as to its content, the 'self' or 'people' entitled to exercise it and its implications outside the decolonisation context. This article cannot do justice to all the ongoing debates surrounding self-determination.<sup>14</sup> Instead, it focuses on the interaction between self-determination and democracy, and the extent to which the developments in human rights law more broadly

United Nations'); Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, UNGA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV) (providing in principle VI that 'a Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State'); Declaration of Principles of International Law concerning Friendly Relations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (Friendly Relations Declaration); Organization of African Unity Charter (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 art 3(3); Organization of African Unity Assembly, Cairo Ordinary Session (17–21 July 1964) AHG/Res 17(I). For early views on self-determination as a legal right, see Georges Scelle, 'Quelques Réflexions sur le Droit des Peuples à Disposer d'Eux-mêmes' in DS Constantopoulos and others (eds), *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Schmimelbusch & Co 1957); Constantin Economides, 'Le Droit des Peuples à Disposer d'Eux-mêmes' (1957) 9 *Revue Hellenique de Droit International* 298; Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester UP 1963) 78; Rupert Emerson, 'Self-Determination' (1971) 65 *AJIL* 464; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 101–06.

<sup>9</sup> Article 1 common to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) provide that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

<sup>10</sup> *Namibia Advisory Opinion* (n 7) para 52.

<sup>11</sup> See Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/Conf.157/24 (Part I) reprinted in (1993) 32 *ILM* 1661, 1665; *Reference re Secession of Quebec* [1998] SCR (Canada) 217, para 124 (*Quebec Reference*); UN Human Rights Committee, 'General Comment 12: Article 1 (Right to Self-Determination), The Right to Self-Determination of Peoples' (13 March 1984) UN Doc HRI/GEN/1/Rev.1, 12.

<sup>12</sup> *East Timor Judgment* (n 2) para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155 (*Wall Advisory Opinion*).

<sup>13</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 65. See also David Raić, *Statehood and the Law of Self-determination* (Kluwer Law International 2002) 218–19; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 90 (Dissenting Opinion of Judge Kreća).

<sup>14</sup> Interesting areas of development concern the gradual recognition by the international community of the notion of remedial secession and the extension of the right to self-determination to indigenous people: see United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) UN Doc A/Res/61/295, art 3.



have affected the content and scope of self-determination outside the decolonisation context.

Traditionally, international law has been silent on the choice of internal governance structures to be adopted within each state. However, the end of the Cold War has led to the dissemination of democracy as a system of government, including to the countries that emerged from the dissolution of the USSR and Yugoslavia, a so-called ‘Third Wave of Democratization’ to borrow the words of Samuel Huntington.<sup>15</sup> Legal scholarship, in particular across the Atlantic, promptly advocated for an emerging ‘right to democratic governance’ in international law.<sup>16</sup> The argument is that democratic governance, in particular its procedural elements such as multiparty elections, is necessary for the realisation of self-determination. This article re-evaluates the underlying thesis and argues that democracy conceived as a multiparty political system is not a sufficient condition for the realisation of the right to self-determination in contemporary international law. While there is undeniably a strong link between certain *democratic principles* and the exercise of the right to self-determination, the concepts of democracy and self-determination should not be conflated, contrary to a common view advocated in some circles of scholarship and policy. The validity of self-determination claims today, particularly the ones aiming at disintegration from the parent state, cannot be assessed exclusively against the benchmark of referenda and plebiscites. The risk is one of diluting and abusing the right to self-determination, and perverting its function in international law.

This article is structured as follows: section 2 discusses the operation and limits of the exercise of the right to self-determination outside the decolonisation context; section 3 examines the existing links between self-determination, democratic governance and the human right to political participation as set out in the ICCPR; and section 4 uses the recent examples of Kosovo and Crimea to demonstrate the dangers of too broad a conception of the right to self-determination and the associated risks to the stability of borders in international law.

## 2 The right to self-determination: Its operation and limits outside the decolonisation context

Like many other human rights, the right to self-determination is not absolute. Its exercise is limited by the principles of territorial integrity and *uti possidetis juris* (ie the creation of a new entity must occur within the previous administrative boundaries).<sup>17</sup> It is widely agreed that there are two means of exercising the right to self-determination in international law: an external one, which provides the people with the right to determine

<sup>15</sup> For an overview, see Amy E Eckert, ‘Free Determination or the Determination to Be Free: Self-Determination and the Democratic Entitlement’ (1999) 4 UCLA J Intl L and Foreign Affairs 55.

<sup>16</sup> Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46.

<sup>17</sup> *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, para 25. See also Robert McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1994) 43 ICLQ 857, 875–76.



the international status of the territory; and an internal one ensuring the right of peoples to self-government within the confines of the parent state.<sup>18</sup>

Outside the decolonisation context, and subject to the potential exception of remedial secession,<sup>19</sup> international law does not bestow upon groups, including ethnic, national, religious, cultural, or linguistic minorities, the right to exercise external self-determination. These groups are instead entitled to a form of self-government or autonomy within the confines of their parent state.<sup>20</sup> As the Supreme Court of Canada held:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.<sup>21</sup>

Similarly, the Badinter Commission of the International Conference on the Former Yugoslavia stressed that 'communities' within a state may have the right to self-determination, but its exercise could not (in the absence of agreement) result in changes to state borders existing at the time of independence. Rather, the right implied an acknowledgement of a people's cultural identity and their legal protection as minorities under relevant international instruments.<sup>22</sup> Accordingly, today self-determination is mainly consummated in its internal form, so as not to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'<sup>23</sup>

It is questionable whether the choice of a democratic form of government, within the understanding of a multiparty democracy, is yet an additional limitation to the people's exercise of the right to self-determination.<sup>24</sup> The traditional position of international law

<sup>18</sup> Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 5–6.

<sup>19</sup> *Quebec Reference* (n 11). The doctrine of remedial secession remains highly controversial. In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 81 (*Kosovo Advisory Opinion*), the Court took a minimalist approach without discussing the subject. See, eg, Antonello Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006); Simone F van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (CUP 2013); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (OUP 2004).

<sup>20</sup> For state practice see Raić (n 13) 230–33. See generally, Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 EJIL 111 (identifying nine different categories of self-determination settlements).

<sup>21</sup> *Quebec Reference* (n 11) para 126.

<sup>22</sup> Arbitration Commission of the International Conference on the Former Yugoslavia, 'Opinion No 2' (reprinted in 1992) 31 ILM 1497, 1498–99 (Badinter Opinion No 2). See Jan Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Q 186, 204; suggesting that 'the right to internal self-determination came about, it could be argued, as a compromise position: Where secession or external self-determination would be out of reach, the least one could expect from states is that they would somehow not make peoples' lives too miserable.'

<sup>23</sup> Friendly Relations Declaration (n 8) principle 5, para 7.

<sup>24</sup> The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) art 21 and ICCPR, art 25 do not require a multiparty setting as a precondition of the right to political participation. See also UN Human Rights Committee, 'CCPR General Comment 25: Article 25

has been to regard the system of government and the process for decision-making as part of the *domaine réservé* of states. International law does not impose a restriction on the people's choice as to the form of government, as long as the exercise of that choice takes place in a free manner, without any external influence or coercion. Foreseeing democracy as the only legitimate outcome 'cannot truly be considered a free act of self-determination'.<sup>25</sup> Moreover, democracy, conceived as a majority rule in elections, is not a sufficient guarantee for the proper operation of the right to self-determination outside the decolonisation context. The genuine realisation of the right to self-determination implies not only a transparent electoral benchmark, but also respect of the principles of territorial integrity and sovereignty, compliance with and promotion of other human rights, and the implementation of the rule of law.

### 3 Interaction between self-determination, democracy and other human rights

The right to self-determination of peoples has been at the forefront of the 'humanization and democratization of international law'.<sup>26</sup> The end of the Cold War allowed for the recognition of the emerging right to democratic governance in international law.<sup>27</sup> Vidmar writes, 'The entanglement of post-Cold War political development and the emergence of new states led to the idea that democracy should be brought into international law as a normative framework in relation to both existing and emerging states'.<sup>28</sup>

Many scholars have used the right to self-determination as a platform for giving a normative content to the right to democratic governance. At a first glance, there is a considerable interaction between self-determination and certain democratic principles, but is there an intrinsic, even more an automatic link between democracy and the realisation of the right to self-determination? The right to self-determination needs to be exercised in a free and fair way, benefiting from a representative government. However, the choice of people as to the governing system and its modalities is not dictated as

(Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7 (General Comment 25). See also Jure Vidmar, 'Judicial Interpretation of Democracy in Human Rights Treaties' (2014) 3 CJICL 532, 535–38.

<sup>25</sup> Cecile Vandewoude, 'The Rise of Self-Determination versus the Rise of Democracy' (2010) 2 Goettingen J Intl L 981, 984; Eckert (n 15) 69–70.

<sup>26</sup> Abdulqawi A Yusuf, 'The Role that Equal Rights and Self-Determination of Peoples can Play in the Current World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 376.

<sup>27</sup> See Franck (n 16); Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000); Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in Christian Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 270–72.

<sup>28</sup> Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 1.

a matter of positive international law. Mandating that a people must determine to be free, as defined by a particular procedural model of democracy, significantly constrains their right to make a free determination of their own political status.<sup>29</sup> This, of course, is not to say that self-determination should not be exercised, or that the full extent of its consequences can be realised in practice outside a functioning democracy.

One commonly identified link between democracy and self-determination has its foundation in the interdependence of human rights, in particular the individual right of political participation (article 25 ICCPR).<sup>30</sup> Franck contended that the right to self-determination entitled peoples to 'free, fair and open participation in the democratic process of governance freely chosen by each state'.<sup>31</sup> There is some evidence in support of this proposition in the practice of the UN General Assembly.<sup>32</sup> Article 25 ICCPR provides that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives, which necessarily entails the right to vote and to be elected at genuine periodic elections. Such elections must be by universal and equal suffrage, held by secret ballot 'in circumstances which guarantee the free expression of the will of the electors'.<sup>33</sup> Other provisions of international and regional instruments set up similar parameters for the expression of the will of the people.<sup>34</sup>

However, critically, the democratic interpretation of article 25 ICCPR is not universally accepted in contemporary international law.<sup>35</sup> Nor does the interdependence of human rights imply that self-determination can only be exercised with a particular form of government in place.<sup>36</sup> As the Human Rights Committee pointed out in its General Comment:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1) peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.<sup>37</sup>

<sup>29</sup> Eckert (n 15) 57.

<sup>30</sup> Matt Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 237; Vidmar, *Democratic Statehood in International Law* (n 28) 153.

<sup>31</sup> Franck (n 16) 50.

<sup>32</sup> Question of Southern Rhodesia, UNGA Res 2022 (XX) (5 November 1965) UN Doc A/RES/2022(XX) para 8.

<sup>33</sup> ICCPR, art 25.

<sup>34</sup> UDHR, art 21; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, protocol 1, art 3 (European Convention on Human Rights); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 23; and African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 13.

<sup>35</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 19–39.

<sup>36</sup> See Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1); Vidmar, 'Judicial Interpretation of Democracy' (n 24).

<sup>37</sup> General Comment 25 (n 24) 2.

On the one hand, both democracy and self-determination are 'sources of political legitimacy, both are considered to be important for the enjoyment of individual rights and both hold that the power derives from the people'.<sup>38</sup> Article 1 ICCPR and ICESCR could then be regarded 'as affirming the self-direction of each society by its people, and thus as affirming the principle of democracy at the collective level'.<sup>39</sup> As Cassese pointed out, outside the context of decolonisation, 'a general rule is now gradually emerging to the effect that peoples of sovereign states are entitled to internal self-determination, ie democratic government'.<sup>40</sup>

On the other hand, what kind of democracy does this imply? Are we talking about democracy as a political system? Or democracy in the sense of a government representative of its people without any discrimination? Are we simply talking about particular democratic principles and practices, like elections? Can people's representation be achieved only in a multiparty electoral context? As James Crawford put it, 'There can be different ideals or legitimate versions of democracy: is one particular ideal or version to be externally imposed?'<sup>41</sup>

Democracy's conception in human rights law is ultimately a 'reflection of the idea that every person, whether a member of a majority or a minority, has basic rights, including rights to participate in public life'.<sup>42</sup> The political theory generally provides for a definition by reference to its procedural and substantive components. The procedural component defines democracy by reference to free and fair elections. The substantive component aims to define democracy by reference to its underlying principles, including political equality and popular sovereignty.<sup>43</sup> Similarly, whereas democracy is not defined in international law, free and fair elections are an integral part of the right to political participation under international human rights law.<sup>44</sup> While the right to political participation and the right of self-determination are interdependent,<sup>45</sup> it is not clear whether the joint reading of these two rights leads to an obligation for states to hold

<sup>38</sup> James J Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff 2007) 372.

<sup>39</sup> James Crawford, 'Democracy and International Law' (1993) 64 BYBIL 113, 116. See UN Human Rights Committee, 'Third Periodic Reports of States Parties due in 1992' (17 June 1996) UN Doc CCPR/C/76/Add.6, 32. States often refer to the democratic process or the right to democracy in relation to the right of self-determination: eg '[t]he exercise of the right to self-determination required the democratic process' (Germany (13 October 1988) UN Doc A/C.3/43/SR.7, 76); '[t]he internal aspects of self-determination (...) includes [sic] the right of people to choose their own form of government and the right to democracy' (India (17 June 1996) UN Doc CCPR/C/76/Add.6, 32). See also Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *Modern Law of Self-determination* (Martinus Nijhoff 1993) 120; Wheatley (n 18) 135–36.

<sup>40</sup> Antonio Cassese, 'The International Court of Justice and the Right of Peoples to Self-Determination' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 352.

<sup>41</sup> Crawford (n 39) 113.

<sup>42</sup> *ibid* 114.

<sup>43</sup> Wheatley (n 18) 128.

<sup>44</sup> UDHR, art 21; ICCPR, art 25.

<sup>45</sup> General Comment 25 (n 24) 2.

elections in a multiparty setting.<sup>46</sup> For example, in the aftermath of the Cold War, the UN General Assembly passed a number of resolutions aimed at promoting and consolidating democracy, which do not specify the requirement of elections in a multiparty setting and often affirm that the choice of political system is a domestic matter for each state.<sup>47</sup>

It is also not necessarily the case that a 'multiparty democracy automatically leads to realisation of the right to self-determination'.<sup>48</sup> The correlation between the electoral democracy and the exercise of the right to self-determination is not without problems, particularly as it may result in the 'tyranny of the majority'.<sup>49</sup> This in turn could lead to the breach of the right to internal self-determination of a people that constitutes a numerical minority within a state, even in a flawless representative democracy.<sup>50</sup> Vidmar points out to the complexity of voters' decision-making as yet another potential problem of associating the right to self-determination with the electoral process.<sup>51</sup>

Another commonly identified link between the self-determination and the right to democratic governance lies in the 'safeguard clause' of the Declaration on Principles of International Law, where it refers to a 'government representing the whole people belonging to the territory without distinction as to race, creed or colour'.<sup>52</sup> In the *Western Sahara* Advisory Opinion, the International Court of Justice (ICJ or the Court) clarified that the people of a territory entitled to self-determination have the right 'to determine their future political status by their own freely expressed will'.<sup>53</sup> The Court stressed that '[t]he validity of the principle of self-determination, defined as the need to pay regard

<sup>46</sup> Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1) 241.

<sup>47</sup> See, eg, Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UNGA Res 60/253 (24 May 2006) UN Doc A/RES/60/253, preamble, 11; UNGA, 'Report of the Secretary-General on the United Nations Voluntary Fund for Victims of Torture' (28 July 2006) UN Doc A/61/226, preamble, 8; Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UNGA Res 62/7 (13 December 2007) UN Doc A/RES/62/7, preamble, 8. For a detailed analysis of different pronouncements of the international community showing no requirement for a multi-party setting of elections, see Vidmar, 'Judicial Interpretation of Democracy in Human Rights Treaties' (n 24) 536–37.

<sup>48</sup> Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1) 242.

<sup>49</sup> Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy?' (2003) 41 *Columbia J Transnatl L* 601, 634–44.

<sup>50</sup> Raić (n 13) 280.

<sup>51</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 156–57.

<sup>52</sup> Friendly Relations Declaration (n 8) principles 5, 7.

<sup>53</sup> *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 70. See also paras 121–22 (Separate Opinion of Judge Dillard) ('the present Opinion is forthright in proclaiming the existence of a "right" (...) The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations'); para 81 (Declaration of Judge Nagendra Singh) ('the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. (...) Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization'). See also The Right of Peoples and Nations to Self-Determination, UNGA Res 637A (VII) (16 December 1952) UN Doc A/RES/637(VII) [A], 2, which expressly states that the exercise of the right to self-determination should take place in accordance with 'the freely expressed wishes of the peoples concerned, the wishes of the people being

to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.<sup>54</sup> As the Court explained in the *Western Sahara* Advisory Opinion, only in those cases where a collectivity did not constitute a people for the purpose of decolonisation or in cases where, for instance, the wishes of the people were so obvious as to render superfluous any act of consultation, this requirement could be dispensed with.<sup>55</sup> In practice, 'the will of the people' meant the will of the *majority* of the inhabitants of a colonial territory.<sup>56</sup>

Yusuf argues that the right to self-determination 'is manifestly opposable to unconstitutional forms of government such as military governments, as well as to authoritarian or despotic government'.<sup>57</sup> However, are all non-democratic governments *prima facie* in breach of the right to self-determination because they do not have democratic electoral procedures in place? The Declaration on Principles of International Law defined a representative government by reference to 'race, colour or creed'.<sup>58</sup> As the right to self-determination only applies to peoples, the representativeness of the government for the purposes of self-determination 'cannot be extended beyond the identities identifying a separate people'.<sup>59</sup>

The response of international community to breaches of the right to self-determination does 'not suggest that governmental representativeness could be understood in terms of party politics or in any other way beyond the identities relevant for the existence of a separate people'.<sup>60</sup> For example, the UN Security Council has 'never denied legitimacy to non-elected governments on democracy considerations' in non-coup situations.<sup>61</sup> There are multiple examples in practice that show that governmental legitimacy is not correlated with a democratic political process. The UN Security Council proclaimed the legitimacy of the government of Kuwait in the context of the Iraqi occupation in 1990 notwithstanding Kuwait's questionable record of compliance with democratic principles and human rights.<sup>62</sup> Similarly, while the UN Security Council denied legitimacy to the

ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations'.

<sup>54</sup> *Western Sahara* (n 53) para 33: the Court explained that 'those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances'.

<sup>55</sup> *ibid* para 59; para 73 (Declaration of Judge Nagendra Singh). See also Michla Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff 1982) 27.

<sup>56</sup> Higgins, *The Development of International Law* (n 8) 104; Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study prepared by Héctor Gros Espiell: The Right to Self-Determination—Implementation of United Nations Resolutions' (20 June 1978) UN Doc E/CN.4/Sub.2/405, 10–11.

<sup>57</sup> Yusuf (n 26) 384.

<sup>58</sup> Friendly Relations Declaration (n 8) principle 5, para 7. See also Vienna Declaration and Programme of Action (n 11) para 2, defining a representative government as the one 'representing the whole people belonging to the territory without distinction of any kind'.

<sup>59</sup> Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 1) 249.

<sup>60</sup> See Vidmar, *Democratic Statehood in International Law* (n 28) 147–48.

<sup>61</sup> *ibid* 149.

<sup>62</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/661.



Taliban government of Afghanistan in several resolutions, it did so without qualifying the representativeness in terms of electoral proceedings.<sup>63</sup> Vidmar brings up examples of the dissolution of Yugoslavia that distil democracy from the right to self-determination.<sup>64</sup>

The idea of imposing democracy as the requirement *sine qua non* for the lawfulness of the exercise of self-determination is commendable yet legally questionable. First of all, as the Court stressed in the *Nicaragua* case, the universal human rights instruments do not bind state parties to holding multiparty elections.<sup>65</sup> Second, what international law requires and regards as representative government for the purposes of self-determination does not necessarily coalesce with its conception in the democratic political theory.<sup>66</sup> Third, scholars, in particular across the Atlantic, tend to use democracy as a political system as a solution to all the imperfections of positive law on self-determination. In fact, what they have done is further dilute the content of the right to self-determination by conflating two separate concepts: ie democracy as a political system and the operation of certain democratic principles in the context of self-determination.<sup>67</sup> As Jean Salmon points out, there are indeed many governments in the world that do not adhere to democracy but are nevertheless representative of their peoples.<sup>68</sup> Finally, the exercise of the right to self-determination, in particular in its internal mode, may 'take a variety of forms, from autonomy over most policies and laws in a region or part of a State (...) to a people having exclusive control over only certain aspects of policy'.<sup>69</sup> International law provides no 'guidelines on the possible distribution of power among institutionalized units or regions'.<sup>70</sup> One possible way to define the representativeness of the government in the context of the right to self-determination is that:

the government and the system of government is not imposed on the population of a State, but that it is based on the consent or assented by the population and in that sense is representative of the will of the people regardless of the forms or methods by which the consent or assent is freely expressed.<sup>71</sup>

<sup>63</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333; UNSC Res 1378 (14 November 2001) UN Doc S/RES/1378.

<sup>64</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 151–52.

<sup>65</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 261: 'the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections'.

<sup>66</sup> Vidmar, *Democratic Statehood in International Law* (n 28) 7–8; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 205.

<sup>67</sup> For the critique of the understanding of the concept of democracy in the literature on the democratic governance, see Susan Marks, 'The "Emerging Norm": Conceptualizing "Democratic Governance"' (1997) 91 ASIL 372; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000); Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549.

<sup>68</sup> Salmon (n 27) 280.

<sup>69</sup> McCorquodale (n 17) 864.

<sup>70</sup> Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (n 4) 332.

<sup>71</sup> Raić (n 13) 279.



It remains questionable how much democratic pedigree exists in the concept of self-determination. In the author's view, a right to democracy or democratic governance remains *de lege ferenda*, and should not be conflated with the right to self-determination.

#### 4 Modern assertions of self-determination: Potential for abuse?

Self-determination takes new dimensions in the 21st century. The examples of Kosovo and Crimea, and the volatile status of other similarly placed regions, such as Abkhazia and Ossetia, demonstrate the danger of interpreting and applying self-determination too broadly in detriment of the stability of borders in international law.<sup>72</sup>

During the events leading to the referendum in Crimea on 16 March 2014, the Crimean and Russian authorities sought to justify their actions under international law with reference to the right to self-determination, citing the ICJ's Advisory Opinion on Kosovo.<sup>73</sup> In a statement of 11 March 2014, the Supreme Council of the Autonomous Republic of Crimea proclaimed that it was acting:

with regard to the Charter of the United Nations and a whole range of other international documents and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July, 22, 2010, which says that unilateral declaration of independence by a part of the country does not violate any international norms.<sup>74</sup>

In a matter of days following the referendum, the Russian Federation took control over Crimea.<sup>75</sup> The example of Crimea shows the misuse of the Kosovo precedent and the implications of the Court's reluctance to circumscribe the concepts of self-determination and secession in its Advisory Opinion. The Court reduced the UN General Assembly's request to a narrow question of whether a declaration of independence as such was prohibited under general international law. The Court avoided any pronouncements on

<sup>72</sup> See 'Medvedev's statement on South Ossetia and Abkhazia' *New York Times* (New York, 27 August 2008) <[http://www.nytimes.com/2008/08/27/world/europe/27medvedev.html?\\_r=0](http://www.nytimes.com/2008/08/27/world/europe/27medvedev.html?_r=0)> accessed 7 August 2015. On 26 August 2008, the Russian Federation recognised the independence of the Georgia's provinces of Abkhazia and South Ossetia. In his statement, the then President Dmitry Medvedev referred to the 'freely expressed will of the Abkhaz and Ossetian peoples' and to international instruments on self-determination, including the UN Charter, the Declaration on Principles of International Law and the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe.

<sup>73</sup> See, eg, Speech by President Putin (18 March 2014) <<http://eng.kremlin.ru/transcripts/6889>> accessed 7 August 2015: 'we had to help create conditions so that the residents of Crimean for the first time in history were able to peacefully express their will regarding their own future'. For a summary of the background on the Crimea crisis, see for example Christian Marxen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 *ZaöRV* 367, 368–70.

<sup>74</sup> 'Crimea Parliament Declares Independence from Ukraine ahead of Referendum' *RT News* (Moscow, 11 March 2014) <<http://www.rt.com/news/crimea-parliament-independence-ukraine-086/>> accessed 7 August 2015.

<sup>75</sup> 'Ukraine: Putin Signs Crimea Annexation' *BBC News* (London, 21 March 2014) <<http://www.bbc.com/news/world-europe-26686949>> accessed 7 August 2015.

whether there was a right to unilateral secession.<sup>76</sup> However, a broader reading of the Opinion by policy makers created room for misinterpretation, gaining a prominent role among the justifications for the referendum and annexation of Crimea by the Russian Federation in March 2014.<sup>77</sup> Peters concludes that ‘the Advisory Opinion, while not being a precedent in a technical sense, has the unfortunate effect, due to its failure to spell out any clear limits of secession, of not preventing subsequent (erroneous) reliance on its narrow findings.’<sup>78</sup> As Judge Yusuf predicted in 2010:

The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by the international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimizing such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence.<sup>79</sup>

Crimea and Russia’s reliance on the right to self-determination and the Kosovo precedent was misconceived both factually and legally. Factually, Crimea has benefited from an autonomous status since the emergence of an independent Ukraine, and there were no signs of widespread or systematic violations of the rights of ethnic minorities or the Russian majority on the peninsula.<sup>80</sup> Legally, the evidence of the purported right to remedial secession is inconclusive. Even assuming such right exists in positive international law, there are certain substantive and procedural conditions for its exercise,<sup>81</sup> which only by a whim of imagination could be satisfied in the case of Crimea.

As for the substantive condition, Grant states that ‘[a] community could invoke the right only if the incumbent State committed a serious breach of its obligations to the community.’<sup>82</sup> Grant further explains that ‘[a] serious breach would exist where the government denied the people “a fundamental human right” or failed to represent the people, or both.’<sup>83</sup> As for the procedural condition, there is a need to exhaust effective

<sup>76</sup> See Thomas D Grant, *Aggression against Ukraine* (Palgrave Macmillan 2015) 23–25.

<sup>77</sup> See Anne Peters, ‘Has the Advisory Opinion’s Finding that Kosovo’s Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 291–313.

<sup>78</sup> *ibid* 293. See also *Kosovo Advisory Opinion* (n 19) para 4 (Dissenting Opinion of Judge Koroma): ‘The Court’s Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.’

<sup>79</sup> *Kosovo Advisory Opinion* (n 19) paras 6, 17 (Separate Opinion of Judge Yusuf).

<sup>80</sup> Any conflict as to the status of Crimea was formally settled by the Treaty on Friendship, Cooperation and Partnership (Ukraine-Russian Federation) (adopted 31 May 1997, entered into force 14 January 1988) reproduced in Andrew D Sorokowski, ‘Ukraine in the World: Studies in the International Relations and Security Structure of a Newly Independent State’ (1996) 20 *Harvard Ukrainian Studies* 319, 319–29; and the 1996 Constitution of Ukraine, granting Crimea the status of Autonomous Republic.

<sup>81</sup> See, eg, *Kosovo Advisory Opinion* (n 19) Written Statement of Albania (14 April 2009) paras 75–85; Written Statement of Denmark (17 April 2009) paras 12–13; Written Statement of Switzerland (25 May 2009) paras 57–97; Written Statement of Germany (15 April 2009) paras 32–37.

<sup>82</sup> Grant (n 76) 27.

<sup>83</sup> *ibid*.

remedies; in other words, secession proper is a question of last resort.<sup>84</sup> Neither of these conditions were met.

The exact threshold for the exercise of remedial secession remains unclear. However, it is a high threshold, which would require showing a systematic and widespread pattern of violations of the rights of a particular community. The human rights record on the peninsula showed some concerns in relation to the treatment of the Crimean Tatar minority, but not the Russian majority or other minorities.<sup>85</sup> Similarly, the rehearsed argument in the media as to the potential repeal of the 2012 legislation indicating Russian as one of Ukraine's minority languages would arguably not reach the threshold of gross and systematic failure to represent the people.<sup>86</sup> For example, in early March 2014, the Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities concluded a visit to Crimea, reporting no human rights issues affecting the Russian population.<sup>87</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) concluded that the violations of the rights of the Russian majority were 'neither widespread nor systematic'.<sup>88</sup> The situation in Crimea preceding the referendum and its integration with the Russian Federation cannot be compared to cases of protracted oppression and exclusion or other violations of human rights, including the apartheid system in South Africa or the campaign of ethnic cleansing in Kosovo. Moreover, there was no form of negotiation or dialogue preceding the separation and annexation of Crimea, which clearly demonstrates the failure to seek a consensual solution and thus exhaust any remedies available (even on the assumption that there were violations of such a nature as to warrant remedial secession, which was clearly not the case).<sup>89</sup> As several international bodies have recognised, this represented a failure to seek a remedy and reach a consensual solution through multilateral efforts as a procedural condition of remedial secession.<sup>90</sup>

Crimea could only have seceded within the constitutional framework of Ukraine and in circumstances free from external intervention. The UN General Assembly recognised this in its Resolution 68/262, stating that the referendum 'having no validity,

<sup>84</sup> See, eg, *Kosovo* Advisory Opinion (n 19) Written Statement of the Netherlands (17 April 2009) para 3.11.

<sup>85</sup> See, eg, Committee on Economic, Social and Cultural Rights, 'Consideration of Sixth Periodic Report of Ukraine' (27 December 2012) UN Doc E/C.12/UKR/6, 50–52; Committee on the Elimination of Racial Discrimination, 'Summary Record of the 2099th Meeting' (19 August 2011) UN Doc CERD/C/SR.2099, 8–10.

<sup>86</sup> For a summary of different reports on the human rights compliance in Crimea, see Grant (n 76) 30–33.

<sup>87</sup> See 'Statement by the OSCE High Commissioner on National Minorities on her recent visits to Ukraine' OSCE (The Hague, 4 April 2014) <<http://www.osce.org/hcnm/117175>> accessed 7 August 2015.

<sup>88</sup> OHCHR, 'Report on the Human Rights Situation in Ukraine' (15 April 2014) 73 <<http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/UAREports.aspx>> accessed 7 August 2015.

<sup>89</sup> See Grant (n 76) 29.

<sup>90</sup> See, eg, European Commission for Democracy Through Law, 'Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles"', Opinion No 762/2014 (21 March 2014) CL-AD(2014)002, 26, noting that 'no negotiations aimed at a consensual solution took place before the referendum was called'.

cannot form the basis for any alteration of the status of the Autonomous Republic of the Crimea or the city of Sevastopol.<sup>91</sup> In the preambular part of this Resolution, the UN General Assembly further noted that the referendum ‘was not authorized by Ukraine’. The Resolution is otherwise silent on the invalidity of the referendum albeit making a strong link to the use of force and the territorial integrity of Ukraine.

As the Court stressed in the *Kosovo* Advisory Opinion, any declaration of independence (whether or not preceded by a referendum or plebiscite) may be rendered unlawful in the presence of ‘unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*ius cogens*)’.<sup>92</sup> The Court did not find any such unlawfulness in the declaration of independence of Kosovo, albeit the validity of the act should have been questioned more carefully in the light of the framework set out in the UN Security Council Resolution 1244.<sup>93</sup> The ICJ’s approach to the lawfulness of the declaration of independence in the *Kosovo* Advisory Opinion may be regarded as constructively ambiguous, particularly given its interpretation of whom the authors of the declaration were.

In contrast, the referendum in Crimea was not lawful under international law. First, the referendum was tainted by the Russian aggression against the sovereign territory of Ukraine and the presence of its troops in Crimea prior to and during the referendum.<sup>94</sup> The OSCE Parliamentary Assembly concluded that the referendum was ‘conducted in an environment that could not be considered remotely free and fair’.<sup>95</sup> Second, by contrast to the case of Kosovo (ie of a genuine declaration of *independence*), Crimea’s declaration of independence was from its outset aimed at the territorial integration with Russia. Accordingly, ‘the Crimean secession claim by necessity affects the borders between Russia and Ukraine’, in breach of the principle of territorial integrity in general international law as well as article 3 of the 1997 Treaty of Friendship, Cooperation, and Partnership

<sup>91</sup> Territorial Integrity of Ukraine, UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262, para 5.

<sup>92</sup> *Kosovo* Advisory Opinion (n 19) para 81.

<sup>93</sup> UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244. See Marcelo G Kohen and Katherine Del Mar, ‘The *Kosovo* Advisory Opinion and UNSCR 1244 (1999): A Declaration of “Independence from International Law”?’ (2011) 24 *Leiden J Intl L* 109. See also Sean Murphy, ‘Reflections on the ICJ Advisory Opinion on *Kosovo*: Interpreting Security Council Resolution 1244 (1999)’ in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 134–66.

<sup>94</sup> See Statement by the Ministry of Foreign Affairs of Ukraine, ‘On Violations of Ukraine’s Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine’ (3 March 2014) <<http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-vijsykovimi-formuvannyami-chf-rf-na-teritoriji-ukrajini>> accessed 7 August 2015; ‘Vladimir Putin Submitted Appeal to the Federation Council’ (1 March 2014) <<http://eng.kremlin.ru/news/6751>> accessed 7 August 2015; Kathy Lally, Will Englund and William Booth, ‘Russian Parliament Approves Use of Troops in Ukraine’ *The Washington Post* (Washington, 1 March 2014) <[https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7\\_story.html](https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html)> accessed 7 August 2015.

<sup>95</sup> European Union OSCE Permanent Council No 992, ‘EU Statement on Ukraine’ (27 March 2014) PC.Del/346/14.

between Ukraine and the Russian Federation.<sup>96</sup> As Grant puts it, ‘The main concern is the effective separation of the territory from the State to which it was understood to belong—and the modality by which that separation was brought about.’<sup>97</sup>

Fundamentally, Crimea never became a new state, and could not be incorporated lawfully into the Russian Federation.<sup>98</sup> Crimea did not fulfil any criteria of statehood in the short period between the referendum, held on 16 March 2014, and the execution of the Agreement on Admission of the Republic of Crimea into the Russian Federation, on 18 March 2014.<sup>99</sup> It certainly lacked any ‘independent public authority and could not be qualified as an independent state.’<sup>100</sup> From a strictly legal point of view, the integration of Crimea into the Russian Federation was nothing else than a forcible acquisition of territory.<sup>101</sup>

The Crimea events also show the need for international law to set more clearly the limits of self-determination and the democratic expression of the will of the people. The fact that the UN General Assembly resolution condemning the annexation of Crimea and affirming the invalidity of the referendum was not passed universally, notably with 11 votes against and 58 abstentions, only confirms this continuing uncertainty or rather neutrality of international law on the possibility of unilateral secession.

## 5 Conclusion

Eleanor Roosevelt stated back in 1952 that ‘[j]ust as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos.’<sup>102</sup> Once regarded

<sup>96</sup> See also Agreement establishing the Commonwealth of Independent States (adopted 8 December 1991) (reprinted in 1992) 31 ILM 143, art 5; Alma-Ata Declaration (adopted 21 December 1991) (reprinted in 1992) 31 ILM 148. For an analysis of the legal obligations breached by the Russian Federation, see Grant (n 76) 103–16.

<sup>97</sup> Grant (n 76) 24.

<sup>98</sup> cf ‘Executive Order on Recognizing Republic of Crimea’ (17 March 2014) <<http://en.kremlin.ru/events/president/news/20596>> accessed 7 August 2015; ‘Speech by the Russian Foreign Minister, Sergey Lavrov, and his Answers to Questions from Deputies during the Plenary Session of the State Duma of the Russian Federation’ (20 March 2014) <[http://archive.mid.ru/brp\\_4.nsf/0/94D6676508BC6C4844257CA2005B0613](http://archive.mid.ru/brp_4.nsf/0/94D6676508BC6C4844257CA2005B0613)> accessed 7 August 2015; ‘Executive Order on Executing Agreement on Admission of Republic of Crimea into the Russian Federation’ (18 March 2014) <<http://en.kremlin.ru/events/president/news/20600>> accessed 7 August 2015.

<sup>99</sup> Christian Walter, ‘Postscript: Self-Determination, Secession, and the Crimean Crisis 2014’ in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and Secession in International Law* (OUP 2014) 304.

<sup>100</sup> *ibid.*

<sup>101</sup> Council of Europe Parliamentary Assembly Resolution 1988, ‘Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions’ (9 April 2014) para 12 <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20873>> accessed 7 August 2015.

<sup>102</sup> Eleanor Roosevelt, ‘The Universal Validity of Man’s Right to Self-determination’ (8 December 1952) 27 Department of State Bull 919.

as ‘incalculably explosive and disruptive’,<sup>103</sup> self-determination has not caused over the years the instability or disorganisation of the international society as some had predicted. In a great majority of cases, it has allowed people to liberate themselves from colonialism and alien domination. As the 21st century unfolds, the internal dimension of the right to self-determination becomes prevalent, a trend which aims to ensure the stability of international borders and coherence of the international legal system more generally. However, as the recent example of Crimea demonstrates, the right to self-determination is prone to abuse of becoming ‘all things to all men’.<sup>104</sup>

This article has examined the exercise of self-determination outside the decolonisation context in the light of developments of human rights law and the universalisation of democracy following the end of the Cold War. It has deconstructed the right to self-determination and its links to democratic governance. It is undeniable that any people entitled to the right to self-determination must exercise it freely, whether through a plebiscite, referendum, or some other agreed procedure. However, the imposition of a multi-party democracy as the form of government is not a requirement in positive international law for the exercise of the right to self-determination, even if many authors argue the point *de lege ferenda*. What international law requires for the exercise of self-determination is the existence of a government that is representative (not necessarily a multiparty democracy), that respects human rights, and that does not discriminate against the people entitled to the right to self-determination.

The international community is yet to witness the emergence of ‘a duty not only of the state concerned, but also of other states and international organisations, to ensure the respect of the rights of peoples freely to choose a government which *truly represents them* and reflects the expression of the will of the majority in free and fair elections’.<sup>105</sup> Yusuf explains that ‘such legal obligation of other states could consist of the withholding of recognition, individually or collectively, from governments which are not respectful of the will of their peoples or the suspension of their membership in universal or regional organizations’.<sup>106</sup> Against the ICJ’s silence in the *Kosovo* Advisory Opinion and Crimea’s annexation, it is hoped at a minimum that self-determination does not regress in time to ‘the sport of national or international politics’.<sup>107</sup>

<sup>103</sup> Rupert Emerson, *Self-Determination Revisited in the Era of Decolonization* (Harvard University Center for International Affairs 1964) 63.

<sup>104</sup> Higgins, *Problems and Process* (n 4) 128.

<sup>105</sup> Yusuf (n 26) 384 (emphasis in original).

<sup>106</sup> *ibid.* For the consequences of the breach of the right to self-determination on third parties, see *Wall* Advisory Opinion (n 12) para 159 (including the obligations of non-recognition and non-assistance).

<sup>107</sup> Jan HW Verzijl, *International Law in Historical Perspective*, vol I (A W Sijthoff-Leyden 1998) 324.

# Developing Democracy through Citizen Engagement: The Advent of Popular Participation in the United Kingdom's Constitution-Making

*Silvia Suteu\**

## Abstract

This paper looks at citizen assembly-style constitutional conventions as a path towards revitalising representative democratic institutions. Such conventions were notoriously set up in British Columbia, The Netherlands, Ontario, Iceland and Ireland; the Scottish Government promised one for an independent Scotland, and calls for a United Kingdom-wide convention remain strong following the Scottish referendum. The assumption behind such calls has been that direct citizen engagement in constitutional revision processes will supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument goes, actualises the hitherto mythical 'people' and turns self-government into an empirical reality.

This paper seeks to test this assumption. While acknowledging the numerous potential benefits of citizen assemblies in constitution-making, it is suggested that more thought is necessary before advocating them as a one-size-fits-all solution to the woes of representative democracy. To begin with, they need to be seen as legitimate themselves. This will involve complex decisions over inclusiveness, allocated resources and how to define their success. For example, would a highly participatory process suffice even if the resulting proposals are not adopted? Furthermore, the democratic potential of constitutional conventions may be frustrated in the likely event of certain options being a priori taken off the table. For instance, would a United Kingdom-wide constitutional convention have been worthy of its name working under a mandate as limited as that of the Smith Commission?

Finally, one must remember that the costs of popular constitution-making, including in terms of political will and citizen interest, will unavoidably render constitutional conventions exceptional. The majority of constitutional reforms are bound to come about via more traditional channels. Thus, focusing solely on popular involvement in times of crisis may be short-sighted and ultimately detrimental. If democracy is a work in progress, it is still representative democracy that we are working towards improving, including via boosts of participatory activity.

## Keywords

Participatory Democracy, Citizen Assemblies, Constitutional Conventions, Constitutional Reform, Scottish Referendum

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## 1 Introduction

This paper looks at the turn towards participation in constitution-making, including in the United Kingdom (UK) following the Scottish independence referendum in 2014. The highly participatory and deliberative nature of the referendum resulted in it being called a successful exercise in direct democracy,<sup>1</sup> with one author arguing that it 'is likely to lead to greater demand for the use of direct democracy in processes of constitutional change'.<sup>2</sup> Alongside more use of the referendum, including on European Union (EU) membership,<sup>3</sup> the UK constitutional landscape may yet be enriched with another participatory mechanism: a citizen assembly-style constitutional convention.

Understood generically as a 'representative body collected together to discuss constitutional change',<sup>4</sup> constitutional conventions have received increased scholarly and practical attention. They promise greater legitimacy and longevity of the constitutional agreement they produce, as well as democratic renewal. If a 'new model of democracy' is indeed emerging as some have argued, one that requires more from its citizens,<sup>5</sup> then constitutional conventions are an embodiment of this innovation.

Cheryl Saunders has argued that 'there is now, effectively, universal acceptance that the authority for a Constitution must derive, in one way or another, from the people of the state concerned'.<sup>6</sup> She has argued that we may broadly identify a trend 'towards openness, inclusivity and the active involvement of the people of a state at all stages of the process through participation, rather than mere consultation'.<sup>7</sup> Others have echoed this view,<sup>8</sup> even going so far as to identify a right to participate in democratic governance,

1 Stephen Tierney, 'And the Winner is... the Referendum': Scottish Independence and the Deliberative Participation of Citizens' (*I-CONnect Blog*, 26 September 2014) <[www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/](http://www.iconnectblog.com/2014/09/and-the-winner-is-the-referendum-scottish-independence-and-the-deliberative-participation-of-citizens/)> accessed 10 July 2015.

2 Stephen Tierney, 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum' (2015) 86 *Pol Q* 226.

3 At least one author has also explored the case for a referendum on the repeal of the Human Rights Act as necessary given the Act's constitutional status. See Cormac Mac Amhlaigh, 'HRA Watch: Reform, Repeal, Replace? A Referendum on Repeal of the Human Rights Act? Why not?' (*UK Constitutional Law Blog*, 25 May 2015) <[www.ukconstitutionallaw.org/2015/05/25/hra-watch-reform-repeal-replace-cormac-mac-amhlaigh-a-referendum-on-repeal-of-the-human-rights-act-why-not/](http://www.ukconstitutionallaw.org/2015/05/25/hra-watch-reform-repeal-replace-cormac-mac-amhlaigh-a-referendum-on-repeal-of-the-human-rights-act-why-not/)> accessed 10 July 2015.

4 Political and Constitutional Reform Committee, *Do We Need a Constitutional Convention for the UK?* (HC 2012–13, 371) 9.

5 David Farrell, Eoin O'Malley and Jane Suiter, 'Deliberative Democracy in Action Irish-Style: The 2011 *We the Citizens* Pilot Citizens' Assembly' (2013) 28 *Irish Pol Studies* 99, 100, citing Russel J Dalton, *The Good Citizen: How a Younger Generation Is Reshaping American Politics* (2nd edn, Congressional QP 2009) 1.

6 Cheryl Saunders, 'Constitution Making in the 21st Century' (2012) 4 *International Review of Law* 2–3, <<http://www.qscience.com/doi/abs/10.5339/irl.2012.4>> accessed 10 July 2015.

7 *ibid* 9.

8 See Vivien Hart, 'Constitution-making and the Transformation of Conflict' (2001) 26 *Peace & Change* 153; Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 435–36.

which extends to constitution-making, in international law.<sup>9</sup> Examples of this trend have included the rise in recourse to constitutional referendums—referendums which bring to the voting public questions of constitutional significance.<sup>10</sup> Scotland and Catalonia are only the most recent and visible examples of what has been called Europe entering the ‘age of referendums’.<sup>11</sup> When it comes to experiments with deliberative mini-publics, understood as ‘forums, usually organised by policy-makers, where citizens representing different viewpoints are gathered together to deliberate on a particular issue in small-N groups’,<sup>12</sup> British Columbia, The Netherlands and Ontario are prominent first examples. British Columbia in particular was a ground-breaking experiment with a citizen assembly, sparking a ‘demonstration effect’ in the other two<sup>13</sup> and, subsequently, in Iceland and Ireland.<sup>14</sup> These earlier examples were all aimed at effecting electoral reform and not far-reaching constitutional change. Nevertheless, they also shared a commitment to participatory and deliberative democracy aimed at ‘inject[ing] some popular legitimacy into policymaking’.<sup>15</sup>

Participatory mechanisms of constitutional change have also been linked to the crisis of democracy generally, and of representative democracy in particular. In an age where citizens feel detached from regular politics, participatory and deliberative forms of engagement may yet resurrect their interest. Perhaps it is not unrelated that these mechanisms have been called for in the aftermath of economic crises (as in Iceland and Ireland) or of ‘once in a generation’ decisions (as in Scotland). The advantages promised by participatory and deliberative institutions—creativity, openness and consensus-based (rather than adversarial) politics among them—are that much more attractive when confronted with constitutional failure and stale institutions.

Similar arguments have been made in the UK context. Calls for a UK constitutional convention have gained momentum in the aftermath of the Scottish independence referendum and seem closer than ever to gaining political traction. A careful analysis of what employing such a mechanism to achieve constitutional reform in Britain would entail is thus essential. This paper proceeds by, first, outlining the types of proposals

<sup>9</sup> Vivien Hart, ‘Democratic Constitution Making’ (United States Institute of Peace Special Report 107, July 2003) 1 <[www.usip.org/sites/default/files/resources/sr107.pdf](http://www.usip.org/sites/default/files/resources/sr107.pdf)> accessed 10 July 2015.

<sup>10</sup> Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 11.

<sup>11</sup> Stephen Tierney, ‘Europe Is Entering the “Age of the Referendum”, but there Is Nothing to Fear for European Democracy if Referendums Are Properly Regulated’ (*Democratic Audit*, 22 October 2014) <[www.democraticaudit.com/?p=8777](http://www.democraticaudit.com/?p=8777)> accessed 10 July 2015.

<sup>12</sup> Kimmo Grönlund, André Bächtiger and Maija Setälä, ‘Introduction’ in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (ECPR Press 2014) 1.

<sup>13</sup> Patrick Fournier and others, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (OUP 2011) 28.

<sup>14</sup> For more on the experience of British Columbia, see the various contributions in Mark E Warren and Hilary Pearce (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (CUP 2008).

<sup>15</sup> Fournier and others (n 13) 18.

hitherto on the table. It then explores three potentially controversial areas which require delineation before such a convention can be set up: ensuring its legitimacy, explored here from the point of view of its capacity to represent the relevant political community; entrusting it with a clear substantive mandate; and avoiding the alienation of political institutions. While these three aspects are here labelled as ‘challenges’, my aim is not to negate the potential benefits of constitutional conventions. Nor am I putting forth a defence of representative democracy in the face of participatory challenges. Instead, I wish to raise key questions which need to be asked before a participatory instrument is set up in the UK. In doing so, I apply a comparative lens to arguments in favour of a UK constitutional convention, which helps illustrate that much more thought needs to be given before taking such a step.

## 2 Calls for a UK constitutional convention

At the same time as the British constitution has been said to be in crisis,<sup>16</sup> calls for one or more constitutional convention(s) in the UK have grown louder. Such calls are not new,<sup>17</sup> but they have been reinvigorated in recent years. The issue was discussed in a March 2013 Report of the Political and Constitutional Reform Committee of the UK Parliament entitled ‘Do We Need a Constitutional Convention for the UK?’.<sup>18</sup> The Report recommended that the government consider establishing a constitutional convention with a clear remit, popular participation, involvement of politicians and a timetable of one to two years. However, its recommendations were not unanimous and the resolution of the English Question<sup>19</sup> featured as the priority, preceding any such wider convention. Models considered were the Philadelphia Convention, the Scottish Constitutional Convention, Iceland, and British Columbia. In 2014, the Committee again considered a constitutional convention as one of the institutional options available to draft ‘a new Magna Carta’,<sup>20</sup> and by 2015 more confidently declared that ‘[p]erhaps the “constitutional moment”, which in quieter times some believed was a prerequisite for change, is now close at hand.’<sup>21</sup>

<sup>16</sup> Vernon Bogdanor, ‘The Crisis of the Constitution: The General Election and the Future of the United Kingdom’ (*The Constitution Society*, February 2015) <[http://www.consoc.org.uk/wp-content/uploads/2015/02/COSJ2947\\_The-Crisis-of-the-Constitution\\_WEB\\_FINAL.pdf](http://www.consoc.org.uk/wp-content/uploads/2015/02/COSJ2947_The-Crisis-of-the-Constitution_WEB_FINAL.pdf)> accessed 10 July 2015.

<sup>17</sup> For a discussion of debates predating the Scottish referendum, see Owain Roberts, ‘Towards a UK Constitutional Convention?’ (2012) National Assembly for Wales Commission Paper No 12/023, 4–5 <<http://www.assembly.wales/Research%20Documents/Towards%20a%20UK%20Constitutional%20Convention%20-%20Research%20paper-21052012-234096/12-023-English.pdf>> accessed 12 September 2015.

<sup>18</sup> Political and Constitutional Reform Committee (n 4).

<sup>19</sup> The report defined it as ‘the issue that the people of England, outside of London, are governed by Westminster, with little authority to propose local solutions that benefit their own communities’: Political and Constitutional Reform Committee (n 4) para 68.

<sup>20</sup> Political and Constitutional Reform Committee, *A New Magna Carta?* (HC 2014–15, 463).

<sup>21</sup> Political and Constitutional Reform Committee, *Consultation on a New Magna Carta?* (HC 2014–15, 599).

Talk of a constitutional convention was prominent in the run-up to the Scottish referendum, with the Scottish Government pledging one tasked with the aim of drafting a constitution for an independent Scotland. Both the November 2013 White Paper<sup>22</sup> and the June 2014 draft Scottish Independence Bill<sup>23</sup> detailed these plans, with models invoked therein being British Columbia, The Netherlands, Ontario, Iceland, and Ireland.

In fact, the Scottish referendum created a veritable participatory momentum, with all but one of the major political parties coming out in favour of holding a constitutional convention. The Green Party called for a 'People's Constitutional Convention' to 'map out a new settlement for the rest of the United Kingdom', stating that '[i]f it is possible to negotiate Scottish Independence in less than two years it need not take decades to agree a new settlement for the rest of the United Kingdom'.<sup>24</sup> Ed Miliband at the Labour Conference in September 2014 also stated:

If the problem is Westminster we can't have a quick fix, a stitch up in Westminster. We've got to mobilise and harness the energy of people all across the country. That's why only a constitutional convention will do. And giving voice to everyone in Britain is also about who we are.<sup>25</sup>

Nick Clegg welcomed 'Labour's decision to embrace the longstanding Liberal Democrat call for a constitutional convention', but indicated the need to seize the moment, set it up with a clear mandate which would include House of Lords reform, and have citizens at its heart.<sup>26</sup> Even Nigel Farage called for a convention 'to be rapidly established to put in place a plan for a Federal UK'.<sup>27</sup> Most parties maintained these stances in their manifestos for the 2015 general election.<sup>28</sup> The All-Party Parliamentary Group for Reform had in fact called on parties to adopt a common platform on this issue, believing that '[a] constitutional convention is an accepted method of securing broad agreement (and is tried and tested, in differing forms, in the Scottish and Welsh contexts as well as internationally)'.<sup>29</sup>

<sup>22</sup> Government of Scotland, 'Scotland's Future: Your Guide to an Independent Scotland' (26 November 2013) 22 <<http://www.gov.scot/resource/0043/00439021.pdf>> accessed 10 July 2015.

<sup>23</sup> *ibid* 61.

<sup>24</sup> Green Party, 'Democracy for Everyone: The UK after the Scottish Referendum' (September 2014) <[www.greenparty.org.uk/assets/files/democracy\\_for\\_everyone.pdf](http://www.greenparty.org.uk/assets/files/democracy_for_everyone.pdf)> accessed 10 July 2015.

<sup>25</sup> Ed Miliband, 'Speech to the Labour Conference: Full Text' (*New Statesman*, 23 September 2014) <[www.newstatesman.com/politics/2014/09/ed-miliband-s-speech-labour-conference-full-text](http://www.newstatesman.com/politics/2014/09/ed-miliband-s-speech-labour-conference-full-text)> accessed 10 July 2015.

<sup>26</sup> Nick Clegg, 'This Opportunity cannot be Hijacked' (Liberal Democrats, 22 September 2014) <[www.libdems.org.uk/nick\\_clegg\\_this\\_opportunity\\_cannot\\_be\\_hijacked](http://www.libdems.org.uk/nick_clegg_this_opportunity_cannot_be_hijacked)> accessed 10 July 2015.

<sup>27</sup> Nigel Farage, 'A Voice for England' (United Kingdom Independence Party, 19 September 2014) <[www.ukip.org/nigel\\_farage\\_a\\_voice\\_for\\_england](http://www.ukip.org/nigel_farage_a_voice_for_england)> accessed 10 July 2015.

<sup>28</sup> See 'Policy Guide: Where the Parties Stand' (*BBC News*, April 2015) <[www.bbc.co.uk/news/election/2015/manifesto-guide](http://www.bbc.co.uk/news/election/2015/manifesto-guide)> accessed 10 July 2015.

<sup>29</sup> Jeremy Purvis and Andrew Blick, 'A Parliament for Reform 2015–2020: Legacy Paper of the All-Party Parliamentary Group for Reform, Decentralisation and Devolution in the United Kingdom' (March 2015) <[www.local.gov.uk/documents/10180/6917361/L15-79+APPG+for+reform+Devolution/891e0442-8692-4153-bf35-f12e61207508](http://www.local.gov.uk/documents/10180/6917361/L15-79+APPG+for+reform+Devolution/891e0442-8692-4153-bf35-f12e61207508)> accessed 10 July 2015.

Notably missing among these were Conservative voices. This is perhaps less surprising when considering that the Government's response to the Political and Constitutional Reform Committee's report on the matter had been to reject the timeliness of setting up a constitutional convention due to competing economic priorities and the lack of public appetite.<sup>30</sup> David Cameron's post-referendum speech mentioned the need for 'wider civic engagement' but made no direct reference to a convention. Instead, he brought up the need to deal with the 'English votes for English laws' as central to any constitutional reform.<sup>31</sup> The same concern was at the core of the December 2014 policy paper addressing devolution in England.<sup>32</sup> The latter also briefly touched on the prospect of a constitutional convention, emphasising the need for decisions on its terms of reference and scope; its composition; timescales; and how it would interact with parallel changes taking place, notably devolution in Scotland.<sup>33</sup> But whereas the Liberal Democrats reiterated their desire that such a body 'should be legislated on at the earliest possible opportunity so its work can start as soon as possible',<sup>34</sup> the Conservative stance remained non-committal.<sup>35</sup>

A similar momentum has been growing in civil society<sup>36</sup> and academic circles,<sup>37</sup> and was particularly strong around the time of the Scottish independence referendum. Academic discussions have revolved around whether a constitutional convention is opportune; the various types of conventions one could opt for; the best model to emulate; and the issues it should be entrusted with.<sup>38</sup> Scholarly opinion is split on whether a

<sup>30</sup> Deputy Prime Minister, 'Government Response to the House of Commons Political and Constitutional Reform Committee Fourth Report of Session 2012–13: Do We Need a Constitutional Convention for the UK?' (November 2013) paras 1.3, 2.1, 3.18, 4.1 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264086/8749.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264086/8749.pdf)> accessed 13 September 2015.

<sup>31</sup> See 'In Full: David Cameron Statement on the UK's Future' (*BBC News*, 19 September 2014) <[www.bbc.co.uk/news/uk-politics-29271765](http://www.bbc.co.uk/news/uk-politics-29271765)> accessed 10 July 2015.

<sup>32</sup> First Secretary of State and Leader of the House of Commons, 'Implications of Devolution for England' (December 2014) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387598/implications\\_of\\_devolution\\_for\\_england\\_accessible.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387598/implications_of_devolution_for_england_accessible.pdf)> accessed 10 July 2015.

<sup>33</sup> *ibid* 21.

<sup>34</sup> *ibid* 32.

<sup>35</sup> *ibid* 27.

<sup>36</sup> For a list of civil society initiatives predating the Scottish referendum, see Political and Constitutional Reform Committee, *A New Magna Carta?* (n 20) 376.

<sup>37</sup> See LSE Institute of Public Affairs, 'Crowdsourcing a New UK Constitution' (*LSE Constitution UK Blog*, 8 October 2013) <<http://blogs.lse.ac.uk/constitutionuk/2013/10/16/video-crowdsourcing-a-new-uk-constitution/>> accessed 13 September 2015.

<sup>38</sup> See, among others, Alan Renwick, 'After the Referendum Options: For a Constitutional Convention' (*The Constitution Society*, May 2014) <[www.consoc.org.uk/wp-content/uploads/2014/05/J1847\\_Constitution\\_Society\\_Report\\_Cover\\_WEB.pdf](http://www.consoc.org.uk/wp-content/uploads/2014/05/J1847_Constitution_Society_Report_Cover_WEB.pdf)> accessed 10 July 2015; Cormac Mac Amhlaigh, 'For a Constitutional Convention for the United Kingdom' (*UK Constitutional Law Blog*, 22 September 2014) <<http://ukconstitutionallaw.org/2014/09/22/cormac-mac-amhlaigh-for-a-constitutional-convention-for-the-united-kingdom/>> accessed 10 July 2015; Alan Renwick, 'How to Design a Constitutional Convention for the UK' (*Our Kingdom*, 22 September 2014) <[www.opendemocracy.net/ourkingdom/alan-renwick/how-to-design-constitutional-convention-for-uk](http://www.opendemocracy.net/ourkingdom/alan-renwick/how-to-design-constitutional-convention-for-uk)> accessed 10 July 2015; Robert Hazell, 'You Want a Constitutional Convention? This is what You Need to Think through First' (*Constitution Unit Blog*, 8 October 2014) <<http://constitution-unit.com/2014/10/08/you-want-a-constitutional-convention-this-is-what-you-need->

constitutional convention would be the best way to achieve the constitutional reform most agree is needed. Some have pointed to 'the accumulation of unresolved constitutional problems' as creating a strong case for a convention with popular participation and tasked with considering the constitution as a whole.<sup>39</sup> Others, however, have preferred alternative bodies similarly tasked, assuming public apathy and governmental resource shortage.<sup>40</sup> Even those taking the constitutional convention option seriously point to past failures in pan-UK constitutional renovation as cause for pessimism.<sup>41</sup>

What emerges, thus, is a mixed picture. While few would dispute the need for serious thought on Britain's constitution in light of recent changes, the process by which this is to be achieved has been more controversial. Even the aims attached to this process have varied. They have included: seizing the referendum moment, with a desire to channel popular energy into concrete change; fixing the perceived inadequacy of current mechanisms to achieve such change; correlating the type of mechanism to the scale and holistic nature of the constitutional overhaul; as well as the desire for genuine democratic innovation and a willingness to experiment in order to achieve it. However, there is a real risk of instrumentalisation, with the convention being manipulated by political parties wishing to see their own agendas reflected in its mandate and outcomes. Moreover, occasionally arguments for a UK constitutional convention have been combined with those for a written constitution for the country, which unhelpfully mixes two very different avenues of constitutional debate.

Constitutional conventions have been discussed as one possible mechanism for effectuating the needed change, with their advocates believing such a convention to be the only way to achieve both comprehensive constitutional change and democratic legitimacy. The normative assumption behind such arguments has been that direct citizen engagement in constitutional revision processes can supplement or even replace traditional political institutions and thereby invigorate democracy. Involving the people in constitution-drafting, the argument would go, actualises the hitherto mythical 'people' and turns self-government into an empirical reality. In what follows, I scrutinise this assumption with reference to the UK context in comparative perspective. My aim will not be to debate whether a constitutional convention is adequate for UK constitutional

to-think-through-first/> accessed 10 July 2015; David Farrell, 'The Irish Constitutional Convention Offers a Potential Route-map for Renewing UK Democracy' (*Democratic Audit*, 15 October 2014) <[www.democraticaudit.com/?p=8625](http://www.democraticaudit.com/?p=8625)> accessed 10 July 2015; Clodagh Harris, 'The UK has Much to Learn from the Irish Constitutional Convention' (*LSE British Politics and Policy*, 17 November 2014) <<http://blogs.lse.ac.uk/constitutionuk/2014/11/17/the-uk-has-much-to-learn-from-the-irish-constitutional-convention/>> accessed 10 July 2015. More recently, see statement by academics of Constitution Society and Constitution Unit, 'What a Constitutional Convention Needs to Succeed' (*UCL Constitution Unit Blog*, 30 April 2015) <[www.ucl.ac.uk/constitution-unit/news/what\\_a\\_constitutional\\_convention\\_needs\\_to\\_succeed\\_apr15](http://www.ucl.ac.uk/constitution-unit/news/what_a_constitutional_convention_needs_to_succeed_apr15)> accessed 10 July 2015.

<sup>39</sup> Bogdanor (n 16) 36–37.

<sup>40</sup> See Robert Blackburn, 'Enacting a Written Constitution for the United Kingdom' (2015) 36 *Statute L Rev* 1, 21.

<sup>41</sup> See Adam Evans, 'Back to the Future? Warnings from History for a Future UK Constitutional Convention' (2015) 86 *Pol Q* 24.



reform today or not. Rather, I am interested in the UK case as a potential testing ground for participatory democracy and in the distinct challenges it poses to the promise of constitutional conventions more specifically.

### 3 A UK constitutional convention: Three challenges

Fundamental constitutional change needs to be, or at least to be perceived as, legitimate if it is to take root. This is even truer in the UK considering the scale and scope of the reforms said to be needed in order to give coherence to the British constitution. Several authors have discussed the prospect of a UK constitutional convention as needing to ‘command[] such legitimacy that it would be able to create a new “rule of recognition” supplanting notions of parliamentary “sovereignty”’.<sup>42</sup> The notion that ‘[f]or the outcome to be legitimate so must be the process’<sup>43</sup> is widespread in constitution-making scholarship today. To quote Saunders again:

Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instil a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution-making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.<sup>44</sup>

In other words, there is an educational element involved in having a constitution-making process perceived as legitimate, as it can serve as model for subsequent political interactions. There is also a link to public ownership and increased vigilance: an informed public will know when the constitution has been transgressed and demand accountability.<sup>45</sup>

I have suggested elsewhere five principles of participatory constitution-making good practice, on the basis of lessons drawn comparatively (mainly from Iceland and Ireland).<sup>46</sup> These five principles were: (1) inclusiveness, aimed at ensuring the process is representative and responsive at all stages; (2) clarity of process, achieved via advance notice of the steps of the process and its outcome; (3) the involvement of all relevant actors, so as to avoid alienation and to ensure public and political ownership of the process (I discuss this in greater detail below); (4) equality as parity of esteem, referring to responsive and transparent decision-making procedures; and (5) consensus-

<sup>42</sup> Andrew Blick, ‘Entrenchment and the United Kingdom Constitution’ (Constitution Society, 16 December 2014) 6 <[www.consoc.org.uk/2014/12/%E2%80%98entrenchment-and-the-united-kingdom-constitution%E2%80%99%E2%80%93%E2%80%93new-discussion-paper/>](http://www.consoc.org.uk/2014/12/%E2%80%98entrenchment-and-the-united-kingdom-constitution%E2%80%99%E2%80%93%E2%80%93new-discussion-paper/>) accessed 10 July 2015. See also Bogdanor (n 16) 39.

<sup>43</sup> Richard Simeon, ‘Constitutional Design and Change in Federal Systems: Issues and Questions’ (2009) 39 *Publius* 241, 251.

<sup>44</sup> Saunders (n 6) 3.

<sup>45</sup> See Jennifer Widner, ‘Constitution-Writing in Post-Conflict Settings: An Overview’ (2008) 49 *William & Mary L Rev* 1513, 1519.

<sup>46</sup> See Silvia Suteu, ‘Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland’ (2015) 38 *Boston College Intl & Comp L Rev* 251.



based decision-making, aimed at avoiding the mere aggregation of preferences and at facilitating true deliberation.<sup>47</sup> These types of considerations would be equally relevant to a UK constitutional convention, which would, like its predecessors, also face complex decisions over inclusiveness, clarity of mandate, allocated resources, working methods and how to define its success. Of these, I will focus on inclusiveness in the first section below and on mandate in the following section. My choice relates to the centrality of these two questions for the legitimacy of any participatory body set up to effect constitutional change, but also to their elusiveness in the literature on a British constitutional convention. Moreover, while other aspects such as budgets, timeframes or terms of reference may be resolved at the stroke of a governmental pen, the inclusiveness and mandate questions pose fundamental problems which require more careful theoretical consideration.

### 3.1 The inclusiveness challenge

When discussing the need for a UK constitutional convention to be inclusive, the question immediately arises: what is the relevant political community which this convention would be tasked with representing? Those writing on this topic, whether academics or politicians, have given rather different answers and have discussed a convention for the UK as a whole, Scotland only, the rest of the UK minus Scotland, or even England alone. These disagreements are not inconsequential: path dependence theory tells us that subsequent decisions will be constrained by initial ones.<sup>48</sup> Thus, whether an English pre-convention is to be established, as the current government has at various times suggested, is a decision the outcome of which could influence the parameters of a wider convention, if the latter would still be held at all.

Moreover, we must remember that a UK constitutional convention would be concerned with constitutional change, including in the form of further devolution of powers from the centre to a unit, in the context of a multi-level, plurinational, asymmetrical system.<sup>49</sup> Thus, whatever lessons are sought from comparative work need to be measured against and adapted to the UK's distinct context. As noted above, the comparators most often invoked have consistently been small countries, or sub-units of a federal state, and most have relatively homogenous populations. Thus, achieving inclusiveness may have been difficult but manageable in places like Iceland or Ireland, but would certainly prove even more complex in the UK. The latter would at the very least add another, territorial, layer to considerations of representativeness. As of yet, there are no adequate comparators for the accommodation of such territorial diversity in the composition of a citizen assembly-style constitutional convention. While there

<sup>47</sup> *ibid* 275–76.

<sup>48</sup> Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System' (2001) 86 *Iowa L Rev* 101, 106.

<sup>49</sup> Also noting the added difficulties of the UK's multinational nature for a constitutional convention is Evans (n 41) 29.

is some evidence that participatory mechanisms can be scaled up in federal systems,<sup>50</sup> there remain many unanswered questions as to their suitability to one constitutional context or another. Given that the most recurrent theme in criticism of the Smith Commission process has had to do with precisely achieving a coherent reform of the territorial constitution, this is not an issue to be cast aside lightly.

Even if the issue of the relevant political community were to be resolved, the inclusiveness requirement would still need to be addressed at the level of individual convention member selection. Proponents of a UK constitutional convention have tended to agree that it would comprise representatives of civil society, political actors, and individual members of the public, whether directly elected or randomly selected. Again, comparisons here have tended to focus on Ireland in particular, which included citizens as well as politicians in equal proportion (civil society organisations, though invited to submit proposals, were not directly represented in the convention itself), selected quasi-randomly, ie adjusted for gender, geography and age. While that model could be emulated in the British case, it bears noting that it was itself contested in the Irish context. Civil society organisations in particular lamented their exclusion from actual deliberations.<sup>51</sup> The fear related to statistical notions of representativeness is that, in its attempt to mirror society at large, it fails to ensure that minority voices are also included. In a constitution-making context, where majoritarian usurpation could have dire consequences, silencing minorities via non-inclusion in the body drafting the constitution might bear a heavy price.

A separate point concerns timing. It may seem a trivial observation, but a UK constitutional convention would come in the aftermath of (and possibly spurred by) the Scottish independence referendum, with its high turnout, closer than anticipated result and distorted meaning of the ‘no’ vote (to mean more devolution rather than closure). Some have suggested that what has ensued has been a ‘chain reaction (...) which has transformed the seemingly straightforward “yes/no” of the Scottish referendum into something more complex and unpredictable that spills over across the UK’s internal boundaries’.<sup>52</sup> Interpreting a relatively narrow ‘no’ vote is difficult and potentially speculative, but it is not meaningless. It is true that ‘the constitutional debate looks completely different once the threat of independence drops out of the equation’,<sup>53</sup> but it is not the same as it would have been without that referendum. There is work

<sup>50</sup> See Thamy Pogrebinschi, ‘The Squared Circle of Participatory Democracy: Scaling Up Deliberation to the National Level’ (2013) 7 Critical Policy Studies 219.

<sup>51</sup> See Irish Council for Civil Liberties, ‘Developing a Model for Best Practice for Public Participation in Constitutional Reform’ (7 June 2012) <[www.iccl.ie/attachments/download/260/ICCL\\_%20Best%20Practice%20for%20Constitutional%20Reform%2020%20June%202012%20FINAL.pdf](http://www.iccl.ie/attachments/download/260/ICCL_%20Best%20Practice%20for%20Constitutional%20Reform%2020%20June%202012%20FINAL.pdf)> accessed 10 July 2015.

<sup>52</sup> Charlie Jeffrey, ‘Constitutional Change—Without End?’ (2015) 86 Pol Q 275.

<sup>53</sup> Scott Hames, ‘No Face Paint beyond this Point: Pro-Independence Politics after No’ (*Scottish Constitutional Futures Forum Blog*, 29 September 2014) <[www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4330/Scott-Hames-No-Face-Paint-Beyond-This-Point-Pro-Independence-Politics-After-No.aspx](http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4330/Scott-Hames-No-Face-Paint-Beyond-This-Point-Pro-Independence-Politics-After-No.aspx)> accessed 10 July 2015.

suggesting that even constitutional amendments which fail at the ratification stage may, by providing evidence of growing national consensus, amount to *de facto* constitutional change.<sup>54</sup> Expectations differ because our constitutional imagination has been enriched. What this means for the inclusiveness requirement of a UK constitutional convention is that what would have seemed legitimate before may now no longer suffice. Who sits at the table is determined by who wields influence, and the Scottish referendum may have tilted the scale in this regard irreversibly. Similarly, the results of the 2015 general election have redrawn the parameters of any future decision to set up a constitutional convention, with Scotland's voice now even more difficult to ignore in the process of UK-wide constitutional reform.

### 3.2 The mandate challenge

No less controversial may prove to be the question of what mandate a UK constitutional convention would have. The scope of its remit would need to be clearly set out before the convention started its work so as to ensure that the process was seen as legitimate and the 'rules of the game' were known to all. Such clarity would also help prevent abuse or the later delegitimising of the convention's work. Similar calls have been made with reference to the increased use of referendums in the UK, whose 'lack of regulation has opened up the potential for [their] manipulation'.<sup>55</sup> Others have echoed this need for codification irrespective of the type of process or set of procedures resorted to for constitutional change.<sup>56</sup> Indeed, we may be witnessing the realisation of a perceptive observation made almost two decades ago, namely, that it may be 'that in the future, constitutional amendment will become a more controlled process, with greater constraints on the government being exercised not only by Parliament and the courts, but also by the people'.<sup>57</sup> The need for a clear mandate for a constitutional convention would be part of that increased control, but also a logical requirement: an unclear process would be unlikely to achieve clarification of the UK constitution.

More contentious would be to set out the content of a UK convention's mandate. As already noted, one of the criticisms levied against the Smith Commission process was that its limited remit meant it could not adequately address the need for a coherent

<sup>54</sup> See discussion of the failed 1972 Equal Rights Amendment to the US Constitution in Rosalind Dixon, 'Amending Constitutional Identity' (2012) 33 *Cardozo L Rev* 1847.

<sup>55</sup> Peter Leyland, 'Referendums, Popular Sovereignty, and the Territorial Constitution' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 163.

<sup>56</sup> Robert Blackburn, 'Constitutional Amendment in the United Kingdom' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013) 380.

<sup>57</sup> Peter Oliver and Adam Tomkins, 'Constitutional Change in the United Kingdom' in Mads Andenas (ed), *The Creation and Amendment of Constitutional Norms* (BIICL 2000) 357.

territorial constitution.<sup>58</sup> There was a sense, after the Scottish referendum, that a more profound (re)thinking of the substantive content of the UK constitution was needed, and that the Smith Commission was not adequate to achieve it.<sup>59</sup> (Such fundamental rethinking of the UK constitution had been demanded for some time, with authors warning that the centrifugal dynamics of devolution required a ‘sustained attempt to review and renew the purposes of union.’)<sup>60</sup> If it is to avoid such criticism, therefore, a constitutional convention would need to have a mandate that was not only clear and manageable, but also sufficiently ambitious so as to provide the answers the Smith Commission could not and to warrant the investment in its work.

Options for the scope of the convention’s mandate include for it to produce a written constitution or merely to make recommendations on discrete issues. The latter may result in the same type of piecemeal constitutional reform that advocates of a constitutional convention have deplored in the past. Nevertheless, it is precisely what the Irish constitutional convention, the model most often invoked in the UK context, was entrusted to do. In Ireland, the convention was called on to make recommendations on seven issues, to which it added two more based on public input. In fact, the Irish process’ relative success, and avoidance of any blockages, has been attributed by some to precisely this sequencing of its work.<sup>61</sup> Most of the other instances of constitutional conventions invoked as models (British Columbia, The Netherlands and Ontario) similarly dealt with isolated issues of electoral reform. The sole exception was Iceland, whose convention had a full constitutional project to deliver. This list shows some promise for far-reaching reform being possible via constitutional convention, but there is still no direct model for the type of territorial reallocation of powers the UK would seek.

A last observation here refers to the lack of unanimity with regard to the need for a written constitution in the UK.<sup>62</sup> While the fervour of writings on a constitutional convention for the UK would seem to indicate agreement on this issue, there are still prominent voices which hold such a development not to be essential.<sup>63</sup> Such disagreements raise the broader question of the type of document the constitutional convention would

<sup>58</sup> Select Committee on the Constitution, *Proposals for the Devolution of Further Powers to Scotland* (HL 2014–15, 145) para 23.

<sup>59</sup> See Christine Bell, ‘Separation or Sharing? The Critical Choice for the Union (and Smith)’ (*Scottish Constitutional Futures Forum Blog*, 4 November 2014) <<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4568/Christine-Bell-Separation-or-Sharing-The-Critical-Choice-for-the-Union-and-Smith.aspx>> accessed 13 August 2015.

<sup>60</sup> Charlie Jeffrey, ‘Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change’ (2009) 39 *Publius* 289, 289.

<sup>61</sup> See ‘Constitutional Reform in Ireland: Legal Memorandum’ (Public International Law and Policy Group, 17 February 2014) 27 <[www.mreza-mira.net/wp-content/uploads/Constitutional-Reform-in-Ireland-Feb-2014.pdf](http://www.mreza-mira.net/wp-content/uploads/Constitutional-Reform-in-Ireland-Feb-2014.pdf)> accessed 10 July 2015.

<sup>62</sup> See Blackburn, ‘Enacting a Written Constitution for the United Kingdom’ (n 40) and ‘Political and Constitutional Reform Committee, *A New Magna Carta?*’ (n 20).

<sup>63</sup> James Melton, Christine Stuart and Daniel Helen, ‘To Codify or Not to Codify? Lessons from Consolidating the United Kingdom’s Constitutional Statutes’ (*Constitution Unit*, March 2015) <[www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/162.pdf](http://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/162.pdf)> accessed 10 July 2015.

be tasked to prepare. I have been writing on the assumption that it would be a substantive identification and reimagining of core constitutional tenets and not a purely technical exercise in codifying existing rules. As others have noted, such a technical endeavour would be better suited for professionals; a 'written constitution proper' would instead 'be more intensive and complex than a non-legal Code or Consolidation Bill, as it would symbolically become *the* Constitution in the state, providing the basic law and primary source of authority in the United Kingdom'.<sup>64</sup>

### 3.3 The exceptionality challenge

Finally, one must remember that the high costs of popular constitution-making, including in terms of political will and citizen interest, will unavoidably render constitutional conventions exceptional. The majority of constitutional reforms are bound to come about via more traditional channels. This is especially true of the UK, where almost all major constitutional change 'needs to be formulated and presented to Parliament by the government of the day'.<sup>65</sup> Thus, focusing solely on popular involvement in times of crisis may be short-sighted and ultimately detrimental. If democracy is a work in progress, it is still representative democracy that we are working towards improving, including via boosts of participatory activity. The question then becomes how best to balance, or integrate, the two types of processes—the participatory and the representative democratic—in such a way as to have them reinforce each other's strengths. How to do this in the British context where, as Dawn Oliver has observed, democracy 'is a slippery term, and one about which UK politicians are rather coy',<sup>66</sup> may prove even more challenging.

Paradoxically, the UK has had experience with both a highly participatory event, the Scottish independence referendum, and a more conventionally political one, the Smith Commission, within the same year. While the former was lauded as ultimately a good example of a participatory process,<sup>67</sup> the latter was received with much unease. The procedurally problematic aspects of the Smith Commission were in fact commented upon soon after it was set up.<sup>68</sup> They included the fact that the Smith Commission process was distinctly elite-driven, having been initiated by political elites but also because,

<sup>64</sup> Blackburn, 'Enacting a Written Constitution for the United Kingdom' (n 40) 20 (emphasis in original).

<sup>65</sup> Blackburn, 'Constitutional Amendment in the United Kingdom' (n 56) 369.

<sup>66</sup> Dawn Oliver, 'The United Kingdom' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing 2011) 353.

<sup>67</sup> Tierney, 'And the Winner is... the Referendum' (n 1). See also Tierney, 'Reclaiming Politics' (n 2).

<sup>68</sup> See Stephen Tierney, 'Solomon Grundy does Constitutional Change: The Smith Commission Timetable to Transform the Scottish Parliament' (*UK Constitutional Law Association Blog*, 31 October 2014) <<http://ukconstitutionallaw.org/2014/10/31/stephen-tierney-solomon-grundy-does-constitutional-change-the-smith-commission-timetable-to-transform-the-scottish-parliament/>> accessed 10 July 2015. See also Tom Mullen, 'Further Devolution: Evaluating the Parties' Proposals' (*Scottish Constitutional Futures Forum Blog*, 30 October 2014) <[www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4518/Tom-Mullen-Further-Devolution-Evaluating-the-](http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4518/Tom-Mullen-Further-Devolution-Evaluating-the-)

outside of a month-long period during which it gathered proposals from citizens and civil society, it was only open to political parties. Unsurprisingly, the parties' submissions to the Commission largely reflected previously expressed positions.<sup>69</sup> However, the Commission's broader outreach efforts were not insignificant: despite the tight timeline, it received 407 submissions from civic institutions, organisations and groups, and 18,381 from members of the public.<sup>70</sup> And, while its final report has been criticised for failing—due to the Commission's limited remit rather than anything else—to consider the wider and longer term impact of its proposals for the Union as a whole,<sup>71</sup> the Smith Commission process itself was more in line with UK constitutional practice than the independence referendum had been.

To this descriptive point—that British constitutional tradition favours piecemeal reform through political channels rather than revolutionary change through participatory processes—I wish to add two further points, which build on comparative insights. One is that it is not at all clear that all constitutional crises are best resolved via recourse to the people. Jon Elster, for instance, has advocated for constitution-making processes to contain both elements of secrecy and of publicity due to their disparate strengths and drawbacks, as '[w]ith total secrecy partisan interests and logrolling come to the forefront, whereas full publicity encourages grandstanding and rhetorical overbidding'.<sup>72</sup> To uncritically advocate for popular involvement in constitutional change is thus to take for granted that anything imbued with the participatory aura will be better and more legitimate than politically-negotiated products. Concerns over popular expertise and interest are relevant here, alongside the shortcomings of publicity when seeking delicate compromise.

With regard to the assumed lack of the public's expertise, sceptics would do well to consider the British Columbia, Ontario and Netherlands citizen assemblies tasked with the complex and technical matter of electoral reform. In spite of this technical nature of their mandate, those involved succeeded not only in understanding the various options available to them, but also in deliberating upon the best alternative for their polity. However, these assemblies only worked in the context of ample time allocated for learning and deliberation (for example, a full year for the learning phase in British Columbia, and another year for its deliberative work). All three of their proposals

Parties-Proposals.aspx> accessed 10 July 2015, which raises questions about the appropriateness of the Smith Commission process, its outcome and aftermath.

<sup>69</sup> See Political Party Proposals, Smith Commission website <[www.smith-commission.scot/resources/political-party-proposals/](http://www.smith-commission.scot/resources/political-party-proposals/)> accessed 10 July 2015.

<sup>70</sup> Smith Commission, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament' (27 November 2014) para 11 <[www.smith-commission.scot/smith-commission-report/](http://www.smith-commission.scot/smith-commission-report/)> accessed 10 July 2015.

<sup>71</sup> Select Committee on the Constitution (n 58).

<sup>72</sup> Jon Elster, 'Ways of Constitution-Making' in Axel Hadenius (ed), *Democracy's Victory and Crisis* (CUP 1997) 138. See also discussion in Fernando Mendez and Jonathan Wheatley, 'The Constitution-Making Process: An Analytical Framework' in Jonathan Wheatley and Fernando Mendez (eds), *Patterns of Constitutional Design* (Ashgate 2013) 12–13.

eventually failed due to a lack of popular interest, the two Canadian ones via popular referendums which did not meet the necessary thresholds, and the Dutch due to political changes which deprived the assembly of its support.<sup>73</sup>

In the context of the UK, we may well wonder whether the kind of complicated financial and monetary policy arrangements which came under the remit of the Smith Commission were ever really going to be decided otherwise than via political negotiations. Even commentators critical of the Smith Commission process have contrasted the further devolution debates to the buoyant independence referendum ones, calling the former ‘deadly dull’;<sup>74</sup> ‘a long trudge through closed committees and impenetrable reports’;<sup>75</sup> and something to at best ‘muddl[e] through.’<sup>76</sup> This is not to say public input and oversight was not desirable in the process, but that the minutiae of negotiation were likely never truly going to escape elite hands.

Of course, this only addresses the problem of technical constitutional change and its public palatability. Most advocates of a constitutional convention for the UK link it to a need to (re)consider fundamental values and principles of the British constitution, the scale of which only a broad public debate can achieve. My answer to this is to caution against alienating political elites, which bears a heavy price in any process of constitutional change. Here, again, comparative insights may suggest that we temper our optimism for a participatory approach.

Iceland’s experiment with a constitutional convention in the aftermath of the country’s economic collapse in 2008 may serve as a warning tale. Despite the clamour with which the draft constitution produced by the convention was received, and notwithstanding a successful referendum which approved it, the text never came into force. The Parliament failed to discuss the bill a third and necessary time in 2013, and the new constitution dropped from amidst priorities in the general election that same year. A new procedure to amend the existing constitution by 2017 was instead proposed, and thus the ‘world’s first crowdsourced constitution (...) ultimately fell at the final hurdle.’<sup>77</sup> Iceland’s failure to adopt the popularly produced constitutional draft had a lot to do with the late involvement of political elites, which as a consequence felt alienated from the process.<sup>78</sup>

<sup>73</sup> On the causes of their failure, see Fournier and others (n 13) 126–44.

<sup>74</sup> Hames (n 53).

<sup>75</sup> *ibid.*

<sup>76</sup> Aileen McHarg, ‘What Does the Union Need to Do to Survive?’ (*Scottish Constitutional Futures Forum Blog*, 25 September 2014) <[www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4325/Aileen-McHarg-What-Does-the-Union-Need-to-Do-to-Survive.aspx](http://www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4325/Aileen-McHarg-What-Does-the-Union-Need-to-Do-to-Survive.aspx)> accessed 10 July 2015.

<sup>77</sup> Hélène Landemore, ‘Iceland’s “Crowd-sourced” Constitution may Have Stalled, but the Experience Offers Lessons for Constitutional Reform in Other States’ (*LSE EUROPP Blog*, 24 July 2014) <<http://blogs.lse.ac.uk/europpblog/2014/07/24/icelands-crowd-sourced-constitution-may-have-stalled-but-the-experience-offers-lessons-for-constitutional-reform-in-other-states/>> accessed 10 July 2015.

<sup>78</sup> Baldvin T Bergsson and Paul Blokker, ‘The Constitutional Experiment in Iceland’ in Ellen Bos and Kálmán Pócsa (eds), *Verfassungsgebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?* (Nomos 2014) 171.



Indeed, Ireland's constitutional convention success has been partly attributed to maintaining political actors engaged with the constitutional convention's work.<sup>79</sup> In fact, the process itself was initiated by the Irish executive, which also clearly indicated its response to the outcome of deliberations. This, together with its seeming success, may help explain the support which the Irish model has seemed to elicit in the UK.<sup>80</sup> Nevertheless, that very success of the Irish constitutional convention has more recently come to be questioned.<sup>81</sup> It was neither a lack of interest from citizens, nor poor quality work which have doomed the Irish convention to futility, these critics have argued; instead, it was the ability of the government to only partially acquit itself of its obligation to respond to the convention's reports and its choice to put only the most frivolous matters to referendum votes.<sup>82</sup> Thus, the Irish constitutional convention 'brand' has been said to be in jeopardy due to the government's attempts to sideline the reform project.<sup>83</sup>

This brief comparative excursion yields contradictory results: involving politicians in the deliberations of a constitutional convention seems both to help increase its effectiveness and not to guarantee eventual success. Nevertheless, the limited comparative evidence that does exist suggests the exclusion of political elites is more prone to doom the work of a popular constitutional convention to irrelevance than keeping them invested in, and thus protective of, the constitutional change process. I admit that this may be a strategic consideration more so than a principled one, though not entirely. Given that it is political representatives who will then have to implement and work with new constitutional tools, there is value in attempting to have participatory democracy enhance, rather than supplant or alienate, representative institutions. And to the fear of elite control—of political actors exploiting their role for narrow political advantage<sup>84</sup>—the Irish constitutional convention's success in avoiding this problem suggests hope.<sup>85</sup>

Although reverting to an elite-driven process in the aftermath of the Scottish referendum was decried as 'disappointing'<sup>86</sup> and called 'deeply ironic' given that the impetus for it was the referendum itself,<sup>87</sup> the political process is in fact the typical arena

<sup>79</sup> See David Farrell, 'The Irish Constitutional Convention: A Bold Step or a Damp Squib?' in John O'Dowd and Giuseppe Franco Ferrari (eds), *Comparative Reflections on 75 Years of the Irish Constitution* (Clarus Press 2013) 198.

<sup>80</sup> See sources listed above at n 38.

<sup>81</sup> Fintan O'Toole, 'How Hopes Raised by the Constitutional Convention were Dashed' (*The Irish Times*, 3 March 2015) <[www.irishtimes.com/opinion/fintan-o-toole-how-hopes-raised-by-the-constitutional-convention-were-dashed-1.2123435](http://www.irishtimes.com/opinion/fintan-o-toole-how-hopes-raised-by-the-constitutional-convention-were-dashed-1.2123435)> accessed 10 July 2015.

<sup>82</sup> *ibid.*

<sup>83</sup> David Farrell, 'Constitutional Convention "Brand" is in Jeopardy' (*The Irish Times*, 17 March 2015) <[www.irishtimes.com/opinion/david-farrell-constitutional-convention-brand-is-in-jeopardy-1.2142826](http://www.irishtimes.com/opinion/david-farrell-constitutional-convention-brand-is-in-jeopardy-1.2142826)> accessed 10 July 2015.

<sup>84</sup> Tierney (n 10) 23.

<sup>85</sup> Jane Suiter and others, 'It's Good to Talk: Citizen-Politician Deliberations in Ireland's Constitutional Convention of 2012–14' (ECPR General Conference, Glasgow, 3–6 September 2014).

<sup>86</sup> McHarg (n 76).

<sup>87</sup> Tierney (n 68).

for effecting constitutional change, at least in the UK. Recent experiments with popular mechanisms such as constitutional conventions are exceptional. Their success, partial at best, has had much to do with the degree to which political actors were engaged in the process alongside the citizenry. Thus, while a trend towards more direct democracy may be afoot, including in the UK, it would be a mistake to embrace the participatory promise at the expense of, rather than alongside, representative institutions.

## 4 Conclusion

The choice of mechanism to decide on and enact constitutional change is nowhere an easy one. The recent turn in constitution-making scholarship in favour of participatory approaches, including advocacy for mechanisms such as constitutional conventions which involve the citizens directly in deliberations, has much persuasive force. Indeed, who could resist the promise of better decisions taken in a more legitimate manner and resulting in a long-lasting constitutional settlement? As I have tried to show in this paper, however, the evidence for the success of such mechanisms is still incomplete. Their promise of increased legitimacy for and greater public ownership over constitutional reform coexists with the risk that ‘politics as usual’ will take over before participatory constitution-making can deliver.

Comparative work inspires cautious hope, however. Despite their failings, the Icelandic and Irish processes in particular have shown that expanding constitution-making beyond elites can yield workable results. These same cases also serve as cautionary tales on the importance of clear and thorough planning and implementation of constitutional change initiatives. Nevertheless, these two experiments indicate that, under the right conditions, the public can fruitfully be at the centre of a constitutional reform process. Some of these conditions, such as economic crises as triggers for constitutional overhaul, cannot easily be replicated elsewhere. Others—such as growing dissatisfaction with the current constitutional settlement, a sense of the inadequacy of traditional reform channels, and a genuine willingness to bring the people closer to their constitution—are more familiar, including to a UK audience.

As I have argued throughout this article, UK political and academic debates took just such a pro-participatory turn around the time of the Scottish independence referendum. Constitutional conventions inspired by comparative experiences were soon discussed as an option, having both strong advocates and also detractors. At the very least, I have argued, policy makers and academics in the UK who support such an instrument must answer the three challenges raised above. Any UK constitutional convention would need to have from the outset: legitimacy in the form of inclusiveness, both at the level of individual members and of the territorial unit(s) represented; a clear mandate, likely to go beyond the merely technical codification of existing constitutional rules and into substantive rethinking of the constitution; and a link to the political process to ensure

that representative institutions are not alienated but support, and are thus likely to endorse, its work.

Perhaps the most important prerequisite to establishing a UK constitutional convention is widespread support from all major political players, both for its establishment and for the implementation of its proposals. As this article has indicated, however, such cross-cutting commitment to participatory constitutional change has been lacking. Moreover, the Conservative success in the May 2015 general election may have significantly diminished the momentum towards participatory constitution-making in the country. Constitutional convention advocates may still hold onto a glimmer of hope, however, after the introduction of a private member's bill in the House of Lords calling for the establishment of such a body.<sup>88</sup> Its initiator still saw a constitutional convention as what 'will help us reach a settlement that protects the future of the UK and delivers communities the powers they need to thrive'.<sup>89</sup> As of the time of writing, the bill had yet to have its second reading. Furthermore, the Government's plans to go forward with 'English votes for English laws' reform by way of amendment to the Standing Orders of the House of Commons sparked criticism that such an issue would be best resolved via a constitutional convention instead.<sup>90</sup>

While this paper has raised more questions than it has provided answers, the comparative lessons invoked throughout are a first step in finding the best solution for the UK context. Given that a constitutional convention is at least nominally still on the table, such lessons are important to avoid misusing this mechanism and merely displacing the country's 'constitutional unsettlement'.<sup>91</sup> What is clear is that the choice of constitutional change instrument should not be made casually for, in the words of Edward McWhinney, '[w]hat looks like a simple, technical machinery choice may in fact predetermine or influence the final substantive recommendations as to the content and direction of a new, or "renewed," constitutional system'.<sup>92</sup> Given the significance of the constitutional moment in which the UK may find itself, this forewarning has never been more pertinent.

<sup>88</sup> See Constitutional Convention HL Bill (2015–16) 10.

<sup>89</sup> Although Lord Purvis of Tweed explained that '[a] constitutional convention will help us reach a settlement that protects the future of the UK and delivers communities the powers they need to thrive'. See 'Lord Purvis Launches Constitutional Convention Bill' (*BBC News*, 1 June 2015) <[www.bbc.co.uk/news/uk-scotland-scotland-politics-32953249](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-32953249)> accessed 10 July 2015.

<sup>90</sup> See 'EVEL—The Leader of the House and the Prime Minister should not be so Reckless with the Future of the United Kingdom—Angela Eagle' (*Labour Press*, 3 July 2015) <<http://press.labour.org.uk/post/123027179179/evel-the-leader-of-the-house-and-the-prime>> accessed 10 July 2015. See also Katie Boyle, 'The Government's New EVEL Timeline Still isn't Sufficient to Facilitate the Necessary Debate and Deliberation' (*Democratic Audit*, 10 July 2015) <[www.democraticaudit.com/?p=14436](http://www.democraticaudit.com/?p=14436)> accessed 10 July 2015.

<sup>91</sup> Neil Walker, 'Our Constitutional Unsettlement' [2014] PL 529.

<sup>92</sup> Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (U Toronto P 1981) 27.

# Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters

*Anna Gamper\**

## Abstract

Law-making, understood as the process of making, amending or abrogating laws, is traditionally conceived as the domain of the legislative power and not that of the judiciary, even though courts certainly make law inasmuch as they create and enact their own judgments. But even the making of laws may fall into different spheres of power, depending on whether we conceptualise legislation from an organisational or functional viewpoint. Firstly, this article distinguishes six different types of judicial law-making by constitutional courts from a comparative perspective. Secondly, it critically assesses the significance of judicial input both in the pre- and post-enactment phase of legislation vis-à-vis the democratic legitimacy of constitutional courts. The argument here is that constitutional courts, as organisational structures, can hardly ever claim the same democratic legitimacy as is usual for other bodies involved in law-making processes. Thirdly, the article addresses the question of whether constitutional courts are able to compensate for this deficit through their function as protectors of the constitution, and whether this democratic function legitimises all types of judicial law-making.

## Keywords

Constitutional Courts, Negative Legislation, Positive Legislation, Interpretation, Separation of Powers, Judicial Review, Democracy

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A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, (...) the Constitution ought to be preferred to the statute. (...) Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.<sup>1</sup>

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<sup>1</sup> Alexander Hamilton, *The Federalist Papers* (McLean's 1788) No 78.

## 1 Introduction

In terms of the classical separation of powers, judicial law-making at first appears as a *contradictio in adiecto*. At least, law-making, understood as the process of making, amending or abrogating laws, is naturally conceived of as the domain of the legislative power and not that of the judiciary, even though courts certainly make law inasmuch as they create and enact their own judgments.<sup>2</sup> But even the making of laws may fall into different spheres of power, depending on whether we conceptualise legislation from an organisational or functional viewpoint. Firstly, therefore, this article seeks to distinguish six different types of judicial<sup>3</sup> law-making<sup>4</sup> by constitutional courts<sup>5</sup> from a comparative perspective. Secondly, it will critically assess the significance of judicial input both in the pre- and post-enactment phase of legislation vis-à-vis the democratic legitimacy of constitutional courts. The argument here is that constitutional courts, as organisational structures, can hardly ever claim the same democratic legitimacy as is usual for other bodies involved in law-making processes. The article will, thirdly, address the question of whether constitutional courts are able to compensate for this deficit through their function as protectors of the constitution, and whether this democratic function legitimises all types of judicial law-making.

## 2 Classifying judicial law-making

### 2.1 Negative legislation

The primary power of a constitutional court is the constitutional review of laws.<sup>6</sup> This usually vests the court with a function which Hans Kelsen called that of a ‘negative

<sup>2</sup> On the law-creating—and not just law-applying—function of courts, see Hans Kelsen, *Allgemeine Staatslehre* (J Springer 1925) 229–31; Hans Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’ in Vereinigung der Deutschen Staatsrechtslehrer (ed), *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol 5 (De Gruyter 1929) 30–32.

<sup>3</sup> The political influence exerted by constitutional courts and their judges that may have an informal impact on legislation will not be examined here.

<sup>4</sup> This is understood as the making or unmaking of laws in a sense equivalent to a legislature. This article therefore examines more than just cases of ‘positive’ legislation while it does not regard all possible categories of judicial decision-making as ‘law-making’. For a different focus, see Allan R Brewer-Carías, ‘Constitutional Courts as Positive Legislators in Comparative Law’ in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (CUP 2013) 13–188.

<sup>5</sup> Although the term usually refers to specialised constitutional review, here it is also applied to courts under the integrated model as far as this is compatible. See Andrew Harding and others, ‘Constitutional Courts: Forms, Functions and Practice in Comparative Perspective’ (2008) *J Comp L* 1, 2–5; Victor Ferreres Comella, ‘The Rise of Specialized Constitutional Courts’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 265–66; Alec Stone Sweet, ‘Constitutional Courts’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 817–20.

<sup>6</sup> Ferreres Comella (n 5) 266–68; Stone Sweet (n 5) 822–23; Harding and others (n 5) 6.

legislator', namely, not a maker, but 'unmaker' of laws which the court holds to be unconstitutional.<sup>7</sup> Although the term is rather catchy, it needs some clarification. First of all, it only applies to those courts that enjoy some kind of strong-form judicial review,<sup>8</sup> which allows them to repeal<sup>9</sup> laws. Courts that are only entitled to weak-form review, ie to interpret laws so as to make them consistent with the superior law or to appeal to Parliament by a declaration of incompatibility,<sup>10</sup> are not negative legislators in the true sense of the word, even though their review may have some indirect impact on the law.<sup>11</sup> Even where courts exercise strong-form review and thus have the power to repeal a law, their role as negative legislators is not simply a mirror image of the positive legislator.<sup>12</sup> The only option for them is to state whether the law is constitutional or not,<sup>13</sup> which in the latter case implies a repeal of that law.

In contrast, a positive legislator has much more choice; the creative selection between (almost) endless options of design and content of a law is naturally different from the simple choice between the verdict of constitutionality or unconstitutionality. Moreover, while the process of positive legislation does not necessarily undergo negative legislation afterwards, negative legislation at any rate presupposes a previous act of positive legislation. While positive legislation normally needs a complex process consisting of different phases and involved legislative organs, negative legislation by courts is much simpler and performed by them single-handedly. Constitutional courts are, however, always rivalled by other negative legislators, namely, the law-maker itself that is not prevented from repealing a law of its own free will—which, paradoxically, needs a positive law-making process in order to enact a law that ends the validity of the

<sup>7</sup> See, eg, Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (n 2) 56.

<sup>8</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2008); Mark Tushnet, 'The Rise of Weak-form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 323; Albert HY Chen and Miguel Poiars Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet and others (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 102–03.

<sup>9</sup> For the sake of clarity of language, the term 'repeal', as used here and throughout the text, comprises all forms of an *erga omnes* invalidation of a law.

<sup>10</sup> See, eg, Human Rights Act 1998 (UK) ss 3–4; Tushnet, 'The Rise of Weak-form Judicial Review' (n 8) 323–26 (distinguishing between three different types of weak-form review, including also a type such as the Canadian 'notwithstanding clause'). See also Chen and Poiars Maduro (n 9) 103.

<sup>11</sup> On the particular opportunities for dialogue between courts and legislatures emerging from weak-form review, see Tushnet, 'The Rise of Weak-form Judicial Review' (n 8) 325–27.

<sup>12</sup> See Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (n 2) 56.

<sup>13</sup> Constitutional courts may often decide on whether a repeal has retrospective effect or whether the norm ceases to be in force at a later date after the judgment. See, from a comparative perspective, Patricia Popelier and others (eds), *The Effects of Judicial Decisions in Time* (Intersentia 2013); Wen-Chen Chang and others (eds), *Constitutionalism in Asia: Cases and Materials* (Hart Publishing 2014) 447–56; Daniele Butturini and Matteo Nicolini (eds), *Tipologie ed Effetti Temporalis delle Decisioni di Incostituzionalità: Percorsi di Diritto Costituzionale Interno e Comparato* (Edizioni Scientifiche Italiane 2014). These ancillary competences, however, are tangential to the power of repeal and do not constitute any kind of positive legislation, since they can just mitigate negative legislation (similarly, Brewer-Carias (n 4) 94).

previous law. In contrast, it would appear at first glance that positive law-makers have no rival, but this assertion will be put under critical test later.<sup>14</sup>

An as yet neglected aspect of negative legislation by constitutional courts is the question of whether this function is necessarily limited to the post-enactment phase of legislation. Normally, it would seem, constitutional courts repeal a law after and because of its enactment. If we think, however, of those not infrequent cases where constitutions entitle constitutional courts to exercise *ex ante* review of draft laws,<sup>15</sup> negative legislation might to some extent be even part of a pre-enactment process. Constitutions vary as to whether they make such *ex ante* review compulsory or dependent on the decision of other organs and whether the relevant constitutional court's negative assessment of a draft law has binding force, ie absolutely stops the legislative process, or just requires the legislative organs to reflect on the assessment before they decide in accordance with their own wishes. Constitutions often respect the separation of powers inasmuch as a court's assessment of a draft law does not absolutely prevent the law-maker from enacting the law.<sup>16</sup> But it is questionable whether the court's decision, even if it had an absolute and binding impact, could really constitute negative legislation. If constitutional courts repeal a law after its enactment, this will be negative legislation because the court eliminates an existing law. In a phase when the law has not yet been enacted we cannot properly speak of 'negative legislation', because it is not a law that is declared invalid, but a draft that is prevented from becoming a law. If we accepted this term, all kinds of deadlocks and vetoes in such a process would constitute 'negative legislation'. This would, however, unduly confuse the particular function of a constitutional court in the post-enactment phase of legislation with the political veto-stages of the creation of a law.

## 2.2 Positive legislation as entailed by negative legislation

Paradoxically, a possibility for a constitutional court to act as positive legislator could emanate from its negative legislation. When a law is repealed, the question might arise

<sup>14</sup> See below 2.6–2.7.

<sup>15</sup> An *ex ante* review of laws by judicial bodies is, eg, provided by the constitutions of Angola, Benin, Bolivia, Bulgaria, Burundi, Chad, Chile, Colombia, Congo, Cyprus, Djibouti, Ecuador, Estonia, Finland, Gabon, France, Haiti, Hungary, Ireland, Madagascar, Mali, Mauritania, Moldova, Poland, Portugal, Romania, Senegal, Somalia, Sweden, Syria and Zimbabwe. Sometimes, an *ex ante* review of laws is only required for regional laws (see, eg, Scotland Act 1998 (UK) ss 32–33 and 36; Government of Wales Act 2006 (UK) ss 111–12; Northern Ireland Act 1998 (UK) ss 11–13) or in the context of competence conflicts (see Austrian Federal Constitutional Act, art 138(2)). Stone Sweet (n 5) 823 calls the *ex ante* review 'abstract review', which, however, confuses two different matters. *Ex ante* review comprises all kinds of review by constitutional courts before a law is enacted (see Chen and Poiars Maduro (n 8) 102), while abstract review refers to the fact that a law is reviewed without its concrete application in the course of litigation. Although abstract review comprises *ex ante* review, it also comprises *ex post* review, provided that certain organs uninformed in litigation, such as parliaments or governments, are entitled to request a constitutional review.

<sup>16</sup> In contrast, an absolute preventive power is, eg, provided by s 144(2) of the Constitution of South Africa, according to which no text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has given its certification.



whether a previous law that had been amended or revoked by that law will be automatically reinstated or not, and whether the constitutional court will have discretion to decide on this issue. An example is article 140(6) of the Austrian Federal Constitutional Act according to which a previous law will once again become operative if the revoking law is itself repealed by the Constitutional Court—unless the Constitutional Court decides otherwise. Paradoxically, this implies that it would need a positive action of the Court to confirm some kind of negative legislation apart from the negative legislation stemming from the repeal of the revoking law. If the Constitutional Court decides not to enact such a provision, the previous law will be re-enacted *ex constitutione*, while it will not be re-enacted if the Constitutional Court does so decide. This implies, on the one hand, that the Constitutional Court may be a negative legislator, if it positively prohibits the re-enactment of the previous law; and that it will be a ‘confirmative’ positive legislator, if it remains passive—ie simply allows the previous law to become operative following the repeal of the revoking law. And yet, the Constitutional Court will not become a genuine positive legislator even if it chooses the latter option, because the Court cannot of its own create a law with whatever content. Moreover, the re-enactment does not result from a positive decision to re-enact the law, but from the Court’s decision not to counteract the re-enactment as an *ex constitutione* corollary. The legislature may also enact another law that either terminates, reinstates or replaces the previous law despite the Constitutional Court’s decision.

Similarly, article 282(1) of the Portuguese Constitution provides that a declaration of unconstitutionality or illegality with generally binding force shall cause the revalidation of such rules as the unconstitutional rule may have revoked. According to article 282(4), however, the Constitutional Court may rule that the scope of the effects of the unconstitutionality or illegality shall be more restricted when so required for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest.

The particularly interesting feature of this power lies in its Janus-faced character. The re-enactment follows an act of negative legislation by the constitutional court, and that court may then decide whether to allow or prevent that re-enactment, being, however, limited to a ‘yes/no’ determination and rivalled by the legislature.

If, however, a constitutional court repeals just one or several provisions, while the law as such remains, the remaining provisions might get a more or less different meaning, because the context will be changed. Even though courts may seek to adapt the scope of the repeal in order to avoid this change of meaning as far as possible, the repeal will always have some impact on the remaining provisions of a law. Therefore, despite the court not positively changing the text of the remaining law, its interpretation may become different after the repeal. It will be for the constitutional court to balance the scope of the repealed provisions with the risk of a change of meaning,<sup>17</sup> even though this must not prevent the court from repealing all that is unconstitutional.

<sup>17</sup> A constitutional court might thus repeal even a little more than just the unconstitutional provision, if this would help maintain the previous meaning (see, eg, the established ‘balancing formula’ used in the context

## 2.3 Pre-enactment scrutiny

As mentioned earlier,<sup>18</sup> the pre-enactment scrutiny of draft laws does not vest constitutional courts with the function of a negative legislator, since there is no legislation yet that could be ‘unmade’ and their *ex ante* decisions often have persuasive rather than binding authority on a legislature. The question is, however, whether the power of pre-enactment scrutiny bestows on them a positive law-making function. Although it may be doubtful whether a court’s negative assessment that a draft law would be unconstitutional could be subsumed as a ‘positive’ contribution to the creation of that law, this may be different when a constitutional court replies in the affirmative, namely, that the draft law is consistent with the constitution; or it could, in case of a negative assessment, trigger a re-drafting and renewed deliberation of the bill. Admittedly, the constitutional court would not act as an autonomous positive legislator in such a case, since the enactment of the law would essentially depend on the decision of other bodies, but the court would nonetheless contribute to positive legislation—even with a view to depriving itself of occasion for negative legislation; if a court certifies the constitutionality of the draft law, it will hardly repeal it as unconstitutional after its enactment.

## 2.4 Legislative proposals

While the previous cases discussed here relate to *ex ante* or *ex post* constitutional review as a classical function of constitutional courts, some constitutions provide for judicial law-making of a strikingly different nature. In these extremely rare cases, constitutional courts resemble positive legislators to a much closer degree, since they are engaged in the pre-enactment phase of legislation not as a reviewing body, but as a body that designs and initiates laws.<sup>19</sup>

According to article 134(4) of the Constitution of Ecuador, the Constitutional Court has the right to submit bills in the subjects that pertain to the Court in accordance with its competences. Similarly, article 104 of the Russian Constitution provides that the right of legislative initiative shall belong to the Constitutional Court on issues within its competence. An even wider empowerment can be derived from article 203 of the Constitution of Paraguay according to which the Supreme Court of Justice—which also exercises constitutional review—may propose laws ‘in the cases and in the conditions specified in this Constitution and in the law’. A specific right of the Constitutional Court to submit proposals for constitutional amendments is entrenched in article 68 of the Mongolian Constitution. Even though most constitutions do not provide for

of repeals by the Austrian Constitutional Court). As the interference with the legislative power will thus be the greater, this ‘ancillary repeal’ must be handled very carefully.

<sup>18</sup> See above 2.1.

<sup>19</sup> Tom Ginsburg and Zachary Elkins, ‘Ancillary Powers of Constitutional Courts’ (2009) 87 Texas L Rev 1432, 1444–45.

such rights, these examples show that constitutional courts are sometimes regarded as suitable initiators of legislation—in particular, if their expertise in constitutional affairs is considered to be valuable, such as in the context of constitutional amendments or of specific legislation on the constitutional courts themselves.

This is the only instance, however, where constitutional courts are involved in a positive law-making procedure without being restricted to constitutional review. In other words, these courts may positively design a law or constitutional amendment in accordance with their own ‘political’ views and not just review the constitutionality of a draft law submitted by another organ. However, this formal power to initiate laws must be distinguished from merely informal suggestions on how a new law could be formulated in order to be constitutional; such suggestions are sometimes included in constitutional courts’ decisions on the unconstitutionality of a law.<sup>20</sup> Even though these suggestions may have a political impact on the re-formulation of repealed laws, they are not legally binding, but rather offer some sort of advice to the positive law-maker.

## 2.5 Substitute and mandated legislation

While legislative proposals by constitutional courts do not necessarily become law, since this depends on the legislature’s decision, constitutional courts in exceptional cases positively make laws without the assistance of any other legislative organ. What would normally appear as a serious violation of both democracy and the separation of powers, is considered to be legitimate in case of the legislature’s omission to legislate. Such omissions will be particularly critical when constitutions entrench certain objectives or even human rights with the proviso that ordinary legislation needs to implement these constitutional guarantees in order for them to become operative.<sup>21</sup> If the law-maker fails to do so, the constitutional guarantees will remain inapplicable.

<sup>20</sup> *ibid.* A particularly far-reaching example is the ‘admonitory decision’ by the German Constitutional Court in which the Court, though it held a reviewed norm to be constitutional at the time of the review, suggests to the legislature to amend the norm in the future, because, with changing circumstances, it might become unconstitutional. See Ines Härtel, ‘Germany: Constitutional Courts as Positive Legislators’ in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators: A Comparative Study* (CUP 2013) 514–15.

<sup>21</sup> See, eg, Constitution of Ireland, art 45 (‘The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution’); Constitution of India, s 37 (‘The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws’); Constitution of South Africa, ss 25–27 and s 29 (which entrench socio-economic rights requiring the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights, to foster conditions which enable citizens to gain access to land on an equitable basis or to further education, which must be made progressively available and accessible through reasonable measures). In many other cases, constitutions just entrench certain principles or directives without expressly declaring that they need to be implemented by ordinary legislation. A crucial question is whether the ordinary law-maker is absolutely obliged to enact implementing legislation or whether it is just obliged to consider certain principles when it enacts a law, and whether the implementation creates

When such an omission is challenged before a constitutional court, most constitutional courts will be unable to enact legislation on behalf of the omitting law-maker, although some of them will be able to hold that the constitution was violated by that omission and request the omitting law-maker to enact legislation within a certain time-limit.<sup>22</sup> Other courts will not even be able to state an unconstitutionality, because they have no competence to examine a legal lacuna.<sup>23</sup> Nevertheless, it has happened that a court decided not only that the omission was unconstitutional, but itself enacted substitute legislation as a provisional measure to remain valid until the 'true' law-maker had itself enacted implementing legislation.<sup>24</sup> What is more, there are even constitutions that explicitly provide for such a possibility. Article 436(10) of the Constitution of Ecuador, for instance, empowers the Constitutional Court to declare the unconstitutionality incurred by state institutions or public authorities that fail to observe, either totally or partially, the mandates contained in constitutional rules, within the time limits deemed to be reasonable by the Constitutional Court. If this failure persists, after this time limit has elapsed, the Court shall provisionally issue the rule or enforce the observance in accordance with the law. In this case, the Constitutional Court may not only declare the unconstitutionality, but it is also empowered (and obliged) to enact substitute legislation. The only difference between such a judge-made law and a law enacted by the legislature is that it has a provisional nature—although not necessarily so, if the legislature, for whatever reason, remains inactive. A crucial question refers to the

justiciable human rights or not. See also Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited' (2007) 5 *ICON* 391; Dennis M Davis, 'Socio-economic Rights: Has the Promise of Eradicating the Divide between First and Second Generation Rights been Fulfilled?' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 519–29; Anna Gamper, 'Relativer Grundrechtsschutz' in Rudolf Feik and Roland Winkler (eds), *Festschrift für Walter Berka* (Jan Sramek Verlag 2013) 62–72. On the risks of judicial enforcement of constitutional constraints, Mark Tushnet and Juan F González-Bertomeu, 'Justiciability' in Mark Tushnet and others (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 116–18.

<sup>22</sup> See, eg, Constitution of Slovakia, art 127(2); Law of the Hungarian Constitutional Court, art 46(1). See also the German Federal Constitutional Court's Rendsburg Illegitimacy Case, 25 BVerfGE 167 (1969), in which the Court held that a constitutional mandate could and had to be directly realised by the courts, unless the law-maker did not do so within due time, even though the Court also spoke of the 'alternative realization of the will of the constitution (...) as far as this is possible without the law-maker'. Further examples are given by Ginsburg and Elkins (n 19) 1445–46.

<sup>23</sup> The Austrian Constitutional Court, eg, held that it had no power to declare the unconstitutionality of a 'total lacuna', since in such a case no legal act exists that could be challenged or repealed (see Constitutional Court of Austria 14.453/1996). In contrast, the Court will be able to repeal a 'partial lacuna', ie a law or provision containing only some partial treatment of a subject matter, eg, because it violates the principle of equality. For the Italian Constitutional Court, see Daniele Butturini, 'Caratteri e Tipologie delle Sentenze Additive di Prestazione' in Daniele Butturini and Matteo Nicolini (eds), *Tipologie ed Effetti Temporalmente delle Decisioni di Incostituzionalità: Percorsi di Diritto Costituzionale Interno e Comparato* (Edizioni Scientifiche Italiane 2014) 48–51. On total ('absolute') and partial ('relative') omissions, see Brewer-Carías (n 4) 125–65.

<sup>24</sup> In particular, the Supreme Court of India has delivered several judgments including substitute legislation. See Surya Deva, 'India: Constitutional Courts as Positive Legislators: The Indian Experience' in Allan R Brewer-Carías (ed), *Constitutional Courts as Positive Legislators: A Comparative Study* (CUP 2013) 594–600; Chang and others (n 13) 459–61. Critically on similar case law by the Venezuelan Constitutional Chamber, see Brewer-Carías (n 4) 37, 165–71.

time limit, since constitutions will not always explicitly provide for this. Does this imply that a constitutional court could enact substitute legislation as soon as the respective constitutional provision entered into force and as long as the ordinary law-maker omitted to enact such legislation? Does substitute legislation require constitutional provisions that explicitly request the ordinary law-maker to enact a law, or is substitute legislation an implied power? In other words, does a court have power to enact implementing legislation because the constitution explicitly empowers the court to do so, as in the case of the Constitution of Ecuador, or just because the court considers this to be an implied power falling under, for example, 'remedies for enforcement of rights,'<sup>25</sup> such as orders or writs? It goes without saying that cases without explicit constitutional authorisation for doing so will have to be viewed much more critically.<sup>26</sup>

## 2.6 Legislation through interpretation

A last issue to be referred to here regards judicial law-making through interpretation.<sup>27</sup> Interpretation by judges should, in Montesquieuan terms, not affect legislation, since the judge is conceived solely as the 'bouche qui prononce les paroles de la Loi.'<sup>28</sup> Still, the 'words of the law' or those of the constitution respectively are often not as explicit as one could wish them to be. As constitutions even more rarely entrench explicit interpretation rules,<sup>29</sup> so that constitutional courts usually have discretion to develop their own interpretive rules, the distinction between interpretation of a law and the creation of laws by judges is sometimes rather difficult to draw.<sup>30</sup> When a constitutional court understands a legal term either in a wider sense than the word linguistically, historically or contextually suggests or when it uses a wholly different meaning, this may be equivalent to an amendment of the law. But also where a court understands a term in a narrower sense than suggested by either language, historical genesis or context, this will have a law-making character. It will be as if the positive law-maker had restrained the term by a subsequent legal definition according to which that term was not allowed to be understood in another way. Further, occasions may arise where a linguistic, historical or contextual interpretation might not be compatible or be controversial, and where it will be necessary to opt for only one type of interpretation: either linguistic, historical or contextual.<sup>31</sup> Even the use of all these interpretive methods may not resolve

<sup>25</sup> See Constitution of India, s 32; see, similarly, Constitution of South Africa, ss 8(3), 172(1)(b).

<sup>26</sup> Similarly, Brewer-Carías (n 4) 36.

<sup>27</sup> See also Stone Sweet (n 5) 827–28; Brewer-Carías (n 4) 29–31.

<sup>28</sup> Charles De Secondat, Baron De Montesquieu, *De l'Esprit des Loix* (Chatelain 1748) vol XI, ch VI.

<sup>29</sup> See the comparative survey of constitutions entrenching explicit interpretive rules in Anna Gamper, *Regeln der Verfassungsinterpretation* (Springer 2012) 7–100. If such rules are entrenched at all, they mostly refer to human rights interpretation, while general rules on constitutional interpretation constitute rare cases.

<sup>30</sup> See also Brewer-Carías (n 4) 79–94.

<sup>31</sup> See, on the various methods and approaches employed by courts, Chen and Poiarés Maduro (n 8) 104–06; Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 692–93.

doubtful cases which require courts to use further methods. Among these, we often find ‘consistency interpretation’,<sup>32</sup> which means that the doubtful meaning of a law will be interpreted in a way that makes it compatible with superior law, such as the constitution, EU law,<sup>33</sup> international law<sup>34</sup> or even foreign law.<sup>35</sup> In this case, constitutional courts will be required to select one option, even if the constitution does not determine the interpretive method, simply because they are obliged to decide. If courts arbitrarily apply the consistency method, without having previously applied the more orthodox methods, this will be looked at more critically. In both cases, courts will to some extent resemble positive legislators, since they alter (extend, reduce or totally reinvent) a meaning that *could* be interpreted differently. The question is, however, whether they are constitutionally empowered or even constrained to act in this way or whether their choice stems just from their own preferences.

But even where courts positively alter the law through interpretation, the effect of their ‘interpretation’ will still be different from that of a properly enacted law. While a law must be obeyed by all courts and authorities, the interpretation by a court does not necessarily have such a binding effect even though this might be desirable<sup>36</sup>. On the one hand, this concerns the difference between common law and civil law systems whose courts follow the *stare decisis* doctrine in different degrees or not at all.<sup>37</sup> On the other hand, some interpretation methods may be *ex natura* unsuited for some courts, as they are limited to apex or constitutional courts. If a constitution provides, for example, that constitutional questions must be referred to a constitutional court by other courts when these other courts apply laws the constitutionality of which appears doubtful to them, it would not be for these courts to use the consistency method.<sup>38</sup> Rather, they must ask the

<sup>32</sup> The requirement to interpret dubious laws as consistent with the constitution is sometimes expressly entrenched in constitutional law (Constitution of Barbados, s 49(6); Constitution of Slovakia, art 152(4); Constitution of Hungary, art 28; Constitution of Ghana, ch IV art 11(6); Constitution of Lesotho, art 156(1); Constitution of Zambia, s 6(1)), but sometimes it just results from the case law of constitutional courts (see, for Austria, Gamper, *Regeln der Verfassungsinterpretation* (n 29) 217–32). In specific constitutional contexts, particularly those of human rights interpretation, a large variety of constitutions provide further consistency rules (see below n 34 and n 35). In contrast, some constitutions (eg, Constitution of Namibia, art 146) stipulate that the (younger) constitution should be interpreted in consistency with previous laws ‘unless the context otherwise indicates’. See also Brewer-Carías (n 4) 32, 73–78.

<sup>33</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 4(3).

<sup>34</sup> See, eg, Constitution of Spain, art 10(2); Constitution of Peru (fourth transitory provision); Constitution of Romania, art 20; Constitution of Ethiopia, art 13(2); Constitution of Timor-Leste, s 23; Constitution of Portugal, art 16(2); Constitution of Cape Verde, art 17(3); Constitution of Guinea-Bissau, art 29(2); Constitution of Maldives, art 68; Constitution of Bolivia, art 13; Constitution of Colombia, art 93; Constitution of Angola, art 26(2); Constitution of Mozambique, art 43; Constitution of Serbia, art 18; Constitution of Mexico, art 1(2); Human Rights Act 1998 (UK) s 3(1).

<sup>35</sup> See Constitution of South Africa, s 39(1)(a)–(c); Constitution of the Marshall Islands, art I s 3(1); Constitution of Malawi, s 11; Constitution of Papua New Guinea, s 39.

<sup>36</sup> Harding and others (n 5) 7.

<sup>37</sup> *ibid* 8–9.

<sup>38</sup> The problem arises in systems with specialised constitutional review in which other courts must ask the constitutional court to resolve constitutional questions instead of resolving them themselves. The application of the consistency method would undermine this requirement, because dubious laws would be



constitutional court to decide on the constitutionality of the law without anticipating the court's decision. Whether the constitutional court itself applies the consistency method or not, will remain to be decided by that court. So, if a constitutional court declares a law to be consistent with the constitution (even if it is possible that this is not the case), the court will give a restrictive meaning to the wider wording of that law even though there is nothing but doubt that advocates such a meaning. If other courts, however, are prevented from using the consistency method, the effect of the constitutional court's consistency interpretation might not have the force of a law, simply because the same interpretive method is not applied by those other courts. Moreover, apex courts will not be prevented from changing their own interpretation from time to time,<sup>39</sup> which means that the effect of a previous interpretation might not be permanent—whereas the legislature's law remains in force until a proper amendment procedure has taken place. What we expect from legal certainty (ie clarity, consistency and easy access to the law in force), may not, to the same extent, be guaranteed by courts' interpretation, since the law formally remains as it is, while the courts' interpretation may not be equally binding on all possible enforcers of the law.

An exception to this rule arises in cases when constitutional courts are constitutionally empowered to enact an authoritative interpretation that is as binding as a legal definition entrenched in a law or even a constitutional law.<sup>40</sup> When, for example, the Austrian Constitutional Court is requested to decide whether a draft federal or regional law is consistent with the federal constitutional distribution of competences, its decision has the 'effect of an authentic interpretation'<sup>41</sup> of federal constitutional law. Actually, the Court interprets a competence in as binding a way as if the federal constitutional law-maker had enacted a legal definition.

If a legislature disagrees with the interpretation given to its law by a court, it will usually have three options to react. Firstly, the legislature might change the law in a way which excludes the meaning suggested by the court. Secondly, the legislature might, in accordance with the relevant constitution, enact an 'authentic interpretation', which is nothing but a subsequent legal definition of a term or provision. Thirdly, the legislature could enact a law requesting the court to use a certain interpretive method or to prohibit the court from using another method. As these options—which could, moreover,

interpreted as constitutional instead of being submitted to the constitutional court. See Gamper, *Regeln der Verfassungsinterpretation* (n 29) 217–21.

<sup>39</sup> This possibility relativises even strong-form review. See Tushnet, *Weak Courts, Strong Rights* (n 8) 22.

<sup>40</sup> See, with examples, Kasia Lach and Wojciech Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' (2008) *J Comp L* 212, 221; Brewer-Carías (n 4) 15.

<sup>41</sup> See, eg, Constitutional Court of Austria 3055/1956, 4446/1963, 6685/1972, 7780/1976, 16.929/2003. Since the Court is not the federal constitutional law-maker, it cannot enact an 'authentic', but only an 'authoritative' interpretation with the 'effect of an authentic interpretation'. See also Ulrich E Zellenberg, 'Art 138 Abs 2 B-VG' in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht. Textsammlung und Kommentar* (4th edn, Verlag Österreich 2001) 19–20; Martin Hiesel, 'Art 138 B-VG' in Benjamin Kneih and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (11th edn, Verlag Österreich 2013) 71–72.



encounter some constitutional limits—<sup>42</sup> show, however, interpretation by courts may indeed induce the law-maker to respond, and the emergence of this (sometimes euphemised) ‘dialogue’<sup>43</sup> demonstrates how interpretation and law-making obviously share a common object and are thus strongly interrelated.

## 2.7 Hans Kelsen revisited: The distinction between negative and positive legislators

The survey in the previous sections of this article shows that constitutional courts may possess a rather large variety of legislative powers of either a more positive or negative character. But still, the argument upholds the Kelsenian dualism, namely, that there is more than just a formal distinction between positive and negative legislation, whereas, according to Tom Ginsburg and Zachary Elkins, ‘the slight distinction between negative and positive legislation breaks down completely when the court has the power to hold legislative *omissions* unconstitutional’.<sup>44</sup> They argue that some courts could set a deadline by which the legislature must act to correct an omission.<sup>45</sup> They also point out that the distinction between both kinds of legislation in the end refers to the power of initial proposal, because all decisions restricting the proposal, based on certain veto rights, imply a negative law-making power.<sup>46</sup> However, even if the term ‘negative legislation’ might be applied to all forms of veto rights in the law-making process, there will still be a difference between pre-enactment and post-enactment scrutiny, because there will only be a law (and not just a legislative proposal) that is challenged before a constitutional court in the latter case. Moreover, there is a considerable difference among different ‘veto rights’, namely, whether they are exercised unrestrictedly in accordance with political views or, as in the case of constitutional courts, because of the unconstitutionality of a bill. Where constitutional courts are empowered to exercise *ex ante* scrutiny, their decisions usually do not have the power of an absolute veto, and they often require a previous appeal by another legislative organ. A characteristic of ‘negative’ legislation must be, though, that a law is indeed repealed. Accordingly, this power requires full authority to unmake a law. When a constitutional court only takes part in a legislative process on the appeal of another body and when its *ex ante* review is mainly advisory,

<sup>42</sup> A constitution might prevent the ordinary law-maker from enacting certain pieces of law or even interpretive methods. Even the constitutional law-maker could encounter some limits, if constitutional amendments taken in response to decisions by the constitutional court threaten the core values of the constitution, provided that the constitution accordingly limits the possibility for constitutional change.

<sup>43</sup> See, eg, Rosalind Dixon, ‘Constitutional Amendment Rules: A Comparative Perspective’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 98. For a more moderate perspective, see Yasuo Hasebe and Cesare Pinelli, ‘Constitutions’ in Mark Tushnet and others (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 18 (‘dialectical relation’). For a more critical view, see Ferreres Comella (n 5) 271.

<sup>44</sup> Ginsburg and Elkins (n 19) 1445 (original emphasis).

<sup>45</sup> *ibid* 1445–46.

<sup>46</sup> *ibid* 1444.

we cannot properly classify this as ‘negative legislation’ even if we equalized a bill with existing law.<sup>47</sup>

As regards legislative omissions, a vast majority of courts do not command the power to set deadlines let alone the power to enact substitute laws on behalf of the omitting law-maker. However, the setting of a deadline does not, at least, replace positive legislation, and thus heeds the separation of powers. The court requests the legislature to enact a law *in concreto*, because the constitution (already) requests it *in abstracto*. A point that Hans Kelsen also considered important for the general distinction between positive and negative legislation is, moreover, that the court does not exert influence on the exact design and content of such a mandated law.<sup>48</sup> It may thus be doubted whether it is really ‘not much of a jump from this type of review to one that explicitly allows the constitutional court to propose legislation.’<sup>49</sup> As far as this latter power may be exercised by courts at all—as we have seen, in extremely few cases—the gap appears rather larger. While the right to initiate laws implies the court’s free choice of ‘political’ design, the setting of a deadline for the legislature neither implies any kind of ‘political’ impact on the content of that law nor does it replace the responsible legislative body by the constitutional court. The court actually does nothing but ‘translate’ a constitutional provision, requesting that an ordinary law comply with that provision within a concrete time period. Whether the law-maker really obeys the time limit, and accordingly enacts a law, remains to be seen.

Therefore, the categories belonging to the complex spectrum of judicial law-making need to be handled carefully and distinctly. In particular, we need to distinguish between any kind of contribution to or participation in a legislative process and full responsibility for positive or negative legislation. We need to be cautious about the conditions for positive or negative legislation and the respective scope and discretion given to legislatures or constitutional courts. While legislatures retain full power to make or unmake a law, constitutional courts only partially possess concurrent powers of law-making. Lastly, we need to distinguish between negative or positive law-making by constitutional courts either in the sense that they act as a legislature or that they engage in any kind of interpretation or judicial decision-making. It is a matter of course that constitutional courts create a type of law, because they deliver judgments. The relevant question in this context, though, is whether they also have power to make or unmake laws as a quasi-legislature. As a consequence, not every kind of decision-making power or interpretation by constitutional courts should be considered as being equivalent to a legislature’s law-making power.

<sup>47</sup> The same would be said with regard to any other organ without sufficient power to positively prevent a law from being enacted or to repeal it, such as a second chamber with only a suspensive veto right or a head of state that is constitutionally constrained not to deny its assent to a law or any court under weak-form review that could not repeal a law but just convey a message on its constitutionality.

<sup>48</sup> Kelsen, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’ (n 2) 56. Similarly, Brewer-Carías (n 4) 29.

<sup>49</sup> Ginsburg and Elkins (n 19) 1446.

### 3 The democratic dilemma of constitutional courts and the separation of powers

The diverse powers of constitutional courts regarding negative or even positive legislation to some extent overthrow the separation of powers—at least, if we conceive it as a system of clearly divided departments each remaining in complete isolation, a state of affairs that probably no constitutional system has really managed. However, a main worry here is not just the relativisation of the separation of powers doctrine as such, but also that the exercise of legislative powers by the judiciary entails a loss of democracy.<sup>50</sup> This loss becomes evident when we compare the degree of democracy inherent in the creation process of legislatures with the appointment of constitutional judges. If we conceive a legislature as the entirety of the different organs involved in a legislative process (for example, governments, parliaments, heads of states or perhaps even constituent states), constitutional courts might be part of it inasmuch as they propose laws or exercise *ex ante* constitutional review. For the sake of the argument, therefore, we need to compare the democratic legitimacy of constitutional courts with non-judicial bodies that are typically responsible for law-making and this is, first and foremost (at least ideally),<sup>51</sup> a parliament.

In terms of organisation, hardly any constitutional court will ever be able to keep up with a parliament, since constitutional judges are, as a rule, appointed and not elected by the people.<sup>52</sup> At second glance, we may detect some thin democratic legitimacy even there, since the appointing bodies, such as heads of states, governments or parliaments, themselves possess some kind of direct or indirect democratic legitimacy, though still much weaker than that of a directly elected body; there will be even less legitimacy where associations of lawyers or academies of sciences or courts propose or appoint judges.<sup>53</sup> At any rate, national constitutional courts' judges are hardly ever elected by the people, probably with good reasons,<sup>54</sup> a rare exception is, for example, the Bolivian Constitutional Court.<sup>55</sup> Therefore, from an organisational viewpoint, constitutional courts cannot normally claim as much democratic legitimacy as a parliament. They cannot even claim as much democratic legitimacy as that of non-parliamentary bodies

<sup>50</sup> Brewer-Carías (n 4) 36–40.

<sup>51</sup> Anthony W Bradley and Cesare Pinelli, 'Parliamentarism' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 665–67.

<sup>52</sup> Harding and others (n 6) 12–14; Lach and Sadurski (n 40) 213–14.

<sup>53</sup> See, Harding and others (n 5) 13–14. A particularly far-reaching example is constituted by the Russian Constitutional Law on the Constitutional Court, art 9.

<sup>54</sup> According to Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Walther Rothschild 1931) 50–51, nothing would prevent a democratic organisation of a constitutional court, including the direct election of the judges by the people, even though this might not be the 'most practical' way of creation.

<sup>55</sup> See Constitution of Bolivia, art 198. See also Anna Gamper, 'Verfassungsrechtliche Voraussetzungen des öffentlich-rechtlichen Richteramts in Österreich und Europa' in Karim Giese and others (eds), *Verwaltung im demokratischen Rechtsstaat—Festschrift für Harald Stolzlechner zum 65. Geburtstag* (Verlag Österreich 2013) 151.

usually taking part in a legislative process, such as governments or (republican) heads of states, since these bodies are normally either elected by parliament or appointed by an elected head of state or directly elected by the people.

How can the exercise of legislative powers by constitutional courts be reconciled with the principle of democracy? To some extent,<sup>56</sup> the separation of powers requires democratic concessions. The repeal of laws on account of a finding of unconstitutionality by an independent court is essential for a system of checks and balances.<sup>57</sup> However, the more constitutional courts engage in positive law-making, the more tensions will arise. The separation of powers will not legitimate independent courts as positive legislators, since this interference with the domain of the legislature raises the 'counter-majoritarian difficulty'.<sup>58</sup> Why have a constitutional court, with less democratic legitimacy than the legislature, rivalling that legislature? This will not be the case, though, when, for example, a constitutional court exercises *ex ante* constitutional review at the proposal of a legislative organ, since the court exercises its competences only because of that other organ's request. However, where a constitutional court initiates laws of its own free will or where it even enacts substitute legislation because of the legislature's fault, there remain two apparent deficits. Firstly, the constitutional court cannot claim the democratic legitimacy of a legislature in terms of organisation. And secondly, the separation of powers does not furnish constitutional courts exercising positive legislative powers with 'compensational' legitimacy.

#### 4 Functional democracy

In order to assess the democratic legitimacy of constitutional courts, however, it is not enough to look at the way their judges are appointed, and whether they are bound to any kind of democratic control. The simple answer to this would be that judges are not normally elected by the people and that, due to the desired independence of these courts, they can neither be bound to instructions nor be subject to any kind of accountability towards parliament or the electorate.<sup>59</sup> At the utmost, they will have to leave office after a fixed period of time and, in order to be re-appointed (if this is possible at all), need

<sup>56</sup> Several other partially similar 'grounds of legitimacy of judicial power' are listed by Daniel Smilov, 'The Judiciary: The Least Dangerous Branch?' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 863. Hasebe and Pinelli (n 42) 16–17 emphasise the legitimising effect of human rights protection as being 'inextricably connected with the democracy's functioning'. However, judicial law-making does not always involve human rights, and political rights, on the exercise of which parliaments base their legitimacy, are, in turn, part of human rights.

<sup>57</sup> Smilov (n 56) 864.

<sup>58</sup> Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) *passim*.

<sup>59</sup> Lach and Sadurski (n 40) 213–14.

the support of other bodies that propose or appoint them.<sup>60</sup> They are also bound to the relevant constitution and, as far as this is compatible with the exercise of constitutional review, even with ordinary laws, but as long as there is no supervising authority that examines whether courts act in line with the rule of law, this obligation will be a *lex imperfecta*.

Democracy and constitutional courts have a much more complex relationship, though. The ingenious invention of constitutional review, brilliantly spelt out in the above quoted Federalist No 78, builds on the idea of functional democracy. Irrespective of democratic deficits regarding their appointment and independence, it is for constitutional courts to protect the constitution. This function is essentially democratic, since in liberal democracies<sup>61</sup> the constitution is the most democratic of all sources of law. In written constitutions, this becomes manifest in the amendment provisions, where usually a larger quorum and majority in parliament are needed in order to create constitutional law. Often, additional requirements such as a referendum, parliamentary elections or the particular assent of second chambers or regional parliaments are stipulated.<sup>62</sup> In short, it needs more democratic input to create and amend the constitution than to create any other piece of law. As a consequence, the constitution possesses more democratic legitimacy than other sources of law. Constitutional courts thus receive democratic legitimacy through their function to protect the constitution in order to safeguard that the will of the people, as expressed in the constitution, is obeyed. This will definitely be the case when an unconstitutional law is repealed; it will also be the case when a draft law is not enacted on account of a constitutional court's *ex ante* decision that it would be unconstitutional. If a constitutional court decides on whether the repeal of a revoking law does or does not reinstate the revoked previous law, this will, in terms of democracy, have a zero-sum effect, since both decisions could be legitimised with a historical will of the legislature that first enacted the law and revoked it afterwards. But does the democratic function of 'guardian of the constitution'<sup>63</sup> refer to all those other kinds of judicial law-making identified above?

Let us take the rare example of a constitutional court's right to initiate laws.<sup>64</sup> This power is not exercised in order to defend the constitution from the law-maker's interference; rather, the court itself proposes a law which may or may not be constitutional. Indeed, it may be expected that a constitutional court will take care that its proposal is constitutional. It may also be supposed that the *ratio* behind this power lies in the expectation that constitutional courts will be able to deal with delicate

<sup>60</sup> See also Gamper, 'Verfassungsrechtliche Voraussetzungen des öffentlich-rechtlichen Richteramts in Österreich und Europa' (n 55) 147–49.

<sup>61</sup> See Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 116–19.

<sup>62</sup> See Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 438–40.

<sup>63</sup> See Kelsen, *Wer soll der Hüter der Verfassung sein?* (n 54) in his famous dispute with Carl Schmitt.

<sup>64</sup> See above 2.4.

matters such as constitutional changes or constitutional adjudication in an expert and hopefully constitutional way. Nevertheless, none of those constitutions which empower constitutional courts to initiate laws positively command that such a legislative proposal must be in conformity with the constitution. Admittedly, the legislature may successfully prevent the proposal from becoming a law, but this does not change the rather undemocratic origin of the proposal itself.

Similarly problematic are those cases of positive legislation where a constitutional court sets a deadline for an omitting legislature, or perhaps even itself enacts substitute legislation. If a constitutional court reminds the legislature to enact a law that is stipulated by the constitution—sometimes in only an implied way—<sup>65</sup> this will be done with a view to protecting the constitution. The setting of fixed deadlines may be already critical, since constitutions normally are not explicit on that issue.<sup>66</sup> But when a constitutional court itself enacts a substitute law, without being explicitly empowered to do so by the constitution, democratic tensions will increase dramatically, since the court positively designs the content of that law instead of the legislature. Although the constitutional request for a law is satisfied in that way, will the constitution not be also violated if a constitutional court assumes implied responsibility for a task explicitly assigned to another branch? And if the constitution is thus violated, then will the argument of functional democracy still be valid?

Lastly, functional democracy does not legitimise any kind of ‘law-making through interpretation’. Most constitutions do not provide explicit rules on interpretation, while they usually entrench explicit rules on law-making processes, in which constitutional courts play a minor or no role at all. It is evident that most constitutions do not provide alternative processes of law-making, but that they assign this role to the—in principle, unrivalled—legislature. Again, it would be a violation of the constitution if constitutional courts thus violated the legislature’s monopoly, so that the argument of functional democracy would not apply. The problem here is rather the legal limbo between interpretation and law-making, since there may be exceptional cases, such as analogies, where the very purpose that was intended by the legislature, as it is assumed, endorses judicial law-making.<sup>67</sup> Another interesting example is the ‘consistency method’ according to which the constitutional court upholds an ordinary law by interpreting it in a way that is consistent with the constitution. This interpretation avoids a repeal of the law and thus respects the democratic authority of the law-maker as well as the constitution with which the ordinary law is made compatible. Nevertheless, the consistency method might not be applied by other courts and authorities, which implies that the constitution might still be violated by a non-consistent interpretation, so that there will be more uncertainty than in the case of a repeal.

<sup>65</sup> Constitutions do not always expressly require an implementing law (see, however, above n 21) but simply set out certain aims and objectives.

<sup>66</sup> Where constitutions expressly require a law, this is normally not done with an exact time limit.

<sup>67</sup> See Goldsworthy (n 31) 693.

## 5 Conclusions

The democratic dilemma of constitutional courts is resolvable, even though their judges continue to be appointed instead of being elected. The condition, however, is that constitutional courts only perform those functions that protect the constitution. This condition also implies that constitutional courts only perform those functions that the constitution intends them to have, which is not equivalent to well-meant endeavours to 'realise' the constitution under all circumstances. In other words, *any* constitutional purpose cannot legitimate *any* interference by constitutional courts. Where constitutions explicitly authorise a constitutional court to rival the legislature outside the context of protecting the constitution, it could be argued that their democratic legitimacy simply stems from the fact that the constitution itself, being the most intensive expression of the will of the *demos*, empowers them to do so. Quite apart from other infringed constitutional principles such as the separation of powers, however, such a constitution will nevertheless be less democratic than a constitution that entrusts positive law-making to the people or its (directly or indirectly) elected representatives only. Otherwise, any constitution would have to be called democratic whatever its content may be, simply because it was the constitution originally enacted by the people. This is related to the question—which will not be studied here—of whether the *demos* might deprive itself of its power if it decided to do so in a constitutional way.

Democratic legitimacy matters—also for constitutional courts. The very concept of the 'will (...) of the people, declared in the Constitution', by which 'judges ought to be governed'<sup>68</sup>, gave birth to constitutional review and to constitutional courts worldwide. Jeopardising democracy thus means jeopardising themselves.

<sup>68</sup> Hamilton (n 1) No 78.



# Investment Arbitration, Investment Treaty Interpretation, and Democracy

Andreas Kulick\*

## Abstract

It has become a widespread concern in recent years that there exist frictions between international investment law and arbitration and democratic governance. In particular, investor-state tribunals can issue awards that may reverse, at least *de facto*, decisions by democratically legitimated and democratically accountable domestic decision-makers that are deemed pivotal, by those decision-makers, for the pursuit of the public interest of their constituency. The pressure on domestic and regional decision-makers to find responses to such frictions, through treaty-drafting or otherwise, has increased considerably in recent years and arguably has led to a shift in the official policy of traditional proponents of the established system of international investment law and arbitration. This paper explores the potential and the pitfalls of democracy as an argumentative topos informing our view on investment arbitration and the interpretation of international investment agreements, with a specific focus on the allocation of interpretative authority among the contracting parties, investor-state tribunals and state-state tribunals.

## Keywords

Investment Law and Arbitration, Treaty Interpretation, Democracy, Sovereignty, Trusteeship

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## 1 The perceived problem of democratic legitimacy and states' reassertion of control

Ever since the tribunal in *Asian Agricultural Products Ltd v Sri Lanka*<sup>1</sup> issued the first arbitral award based on an international investment agreement (IIA), there has been a constant flow of investment treaty arbitration disputes and awards, currently numbering

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<sup>1</sup> International Centre for the Settlement of Investment Disputes *Asian Agricultural Products Ltd v Republic of Sri Lanka* (1990) 30 ILM 577.

more than 500.<sup>2</sup> The number of awards increased and so did the amounts claimed. Further, the IIA provisions did not merely sanction expropriation without compensation, but allowed, through clauses such as fair and equitable treatment and indirect expropriation, for more subtle ways of host states depriving investors of their rights. Consequently, nationalisations or other direct expropriations became rather rare, arguably a success attributable to the increasing web of IIAs.<sup>3</sup> Instead, governmental measures of a more general nature, including legislation or other regulatory activity, came under scrutiny in investor-state disputes.<sup>4</sup>

With the focus of these disputes changing or at least widening, it became increasingly apparent that many of them were fundamentally different from commercial disputes between private actors or classical public international law disputes between sovereign states, but rather displayed a considerable resemblance to domestic public law litigation.<sup>5</sup> These disputes permit the control of the exercise of public authority, followed by a sanction (usually monetary damages or compensation), the enforcement of which is quite effective. Indeed, if the claims target, for example, a statute or even a far-reaching governmental response to a financial crisis,<sup>6</sup> what makes the dispute functionally different from administrative or even constitutional judicial review?

However, while similar to domestic public law disputes in function and effect, investor-state dispute settlement differs in that the adjudication is international, ie beyond the sphere of influence of the host state, and the treaty instruments on which

<sup>2</sup> United Nations, 'Recent Developments in Investor-State Dispute Settlement (ISDS)—Updated for the Multilateral Dialogue on Investment' (United Nations Conference on Trade and Development (UNCTAD) 28–29 May 2013, IIA Issue Notes No 1) 3, fig 2 <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf)> accessed 18 September 2015; United Nations, 'World Investment Report: Investing in the SDGs—An Action Plan' (UNCTAD, 2014) 124, fig III.13 <[http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf)> accessed 24 September 2015.

<sup>3</sup> See Andreas Lowenfeld, 'Investment Agreements and International Law' (2003) 42 *Columbia J Transnatl L* 123, 129–30.

<sup>4</sup> See Mara Valenti, 'The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 38–54.

<sup>5</sup> See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 48–50; Stephan W Schill, 'International Investment Law and Comparative Public Law—An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 10–17; Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 94–97; Andreas Kulick, 'Book Review: International Investment Law and Comparative Public Law' (2011) 22 *EJIL* 917. See also generally, David Schneiderman, *Constitutionalizing Economic Globalization—International Investment Law and Democracy's Promise* (CUP 2008); Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009).

<sup>6</sup> See, for instance, International Centre for the Settlement of Investment Disputes *CMS Gas Transmission Company v Argentine Republic* (2005) 44 ILM 1205; *CMS Gas Transmission Company v Argentine Republic* (Decision of the Ad Hoc Annulment Committee) ICSID Case No ARB/01/8 (25 September 2007); *G&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006); *El Paso Energy International Company v Argentine Republic* (Award) ICSID Case No ARB/03/15 (31 October 2011); *Poštová banka as and ISTROKAPITAL SE v Hellenic Republic* (Award) ICSID Case No ARB/13/8 (9 April 2015). See also the pending case, *Cyprus Popular Bank Public Co Ltd v Hellenic Republic*, ICSID Case No ARB/14/16 (pending).

the claims are based in the vast majority of cases, only deal with investor rights but do not take into account the various interests at stake if issues of public interest are brought to litigation. This is what I have called elsewhere the ‘public interest challenge’.<sup>7</sup> Since the early 2000s, calls from literature and public opinion to find ways to take issues of public interest into account in investor-state dispute settlement have not—or at least not yet—found resonance in arbitral decisions. What is even more, and this leads to the topic of the present paper (and what is perceived as one of the most problematic issues), investment disputes often deal with domestic policies determined by democratically elected and accountable domestic decision-makers. Not infrequently, such policies represent the outcome of complex domestic deliberation processes that articulate the express will of the democratically legitimated majority. IIAs grant investment arbitration tribunals the power to review such policies and to sanction an encroachment on investor rights enshrined in the treaty, while at the same time they fail, at least for the most part, to recognise legitimate issues of public interest. The model of private adjudication, the ad hoc nature of the arbitral panel and the increasing but still limited level of public access to the proceedings<sup>8</sup> are all factors that fuel what has been perceived for more than a decade now as the ‘legitimacy crisis’ of international investment law.<sup>9</sup>

Such a crisis of (democratic) legitimacy—whether perceived or real—has left the ivory tower of academia, and is starting to resound in public opinion and policy. After three decades of proliferation of investor-friendly IIAs enfranchising the investors to bring international claims against their host states and, accordingly, proliferation of investor-state disputes, public opinion is changing from indifference or ignorance towards international investment law and arbitration to predominantly scepticism or even fierce opposition.<sup>10</sup>

<sup>7</sup> Kulick, *Global Public Interest* (n 5) 50–52.

<sup>8</sup> However, transparency has improved significantly in investment arbitration with the amended ICSID Arbitration Rules of 2006 and the recent UNCITRAL Rules on Transparency of 2014. See ICISD Arbitration Rules (as amended and entered into force 10 April 2006) <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> accessed 18 September 2015; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (adopted 16 December 2013, entered into force 1 April 2014) <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>> accessed 18 September 2015. However, it is hard to deny that the level of transparency in an investor-state dispute rarely equals the level of openness domestic public law adjudication usually displays.

<sup>9</sup> See Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2004–05) 73 *Fordham L Rev* 1521; David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ (2011) 2 *JIDS* 471. See generally Van Harten, *Investment Treaty Arbitration and Public Law* (n 5) 175–84.

<sup>10</sup> Note that even *The Economist* has recently published a piece doubting the added value of investor-state dispute settlement and promoting an exclusively inter-state dispute settlement system modelled on the WTO Dispute Settlement Understanding. See ‘A Better Way to Arbitrate’ *The Economist* (11 October 2014) <<http://www.economist.com/news/leaders/21623674-protections-foreign-investors-are-not-horror-critics-claim-they-could-be-improved>> accessed 24 September 2015; ‘The Arbitration Game’ *The Economist* (11 October 2014) <<http://www.economist.com/news/finance-and-economics/21623756-governments-are-sourcing-treaties-protect-foreign-investors-arbitration>> accessed 24 September 2015.

This is spurred by the fact that, over the course of the past ten to fifteen years, the old capital exporting countries of the West have realised that bilateral investment treaties (BITs) are not a one-way street, but indeed thus: bilateral. Originally intended to warrant investors from wealthy, predominantly Western countries a certain standard of protection, IIAs, so the old proponents of investment protection realise, can be targeted as much at their policies as they have been targeted at the policies of their treaty partners from the so-called developing world. Regulatory states with complex regimes for protection and conciliation of a myriad of different interests existing in a modern civil society, so it is submitted by many, are particularly prone to fall prey to a system of international investment law and arbitration that is not designed to make the careful balancing choices required of judicial decision-making in complex societal structures.<sup>11</sup> To name but a few examples from recent years, Germany has been requested to pay damages for its decision to phase out nuclear energy,<sup>12</sup> Australia faces a claim by Philip Morris for its plain packaging legislation,<sup>13</sup> and Spain is subject to numerous claims for withdrawal of subsidies to the solar energy sector.<sup>14</sup> The pressure on decision-makers to recalibrate treaty standards and dispute settlement is high. Democratic governments in particular find themselves in the uncomfortable position that their constituencies are calling for an overhaul or termination of their current IIA policies, while at the same time they remain locked into treaty obligations that they have advocated for themselves not such a long time ago.

Moreover, the world economy is becoming more and more complex and intertwined. Not only is the classical dichotomy between capital exporting (developed) states and capital importing (developing) states becoming blurred, but there is also a growing tendency among developing or emerging economies to conclude BITs amongst each other.<sup>15</sup> These changes in economic realities and IIA parties bring about a veritable change of IIA contracting parties' policy with regard to international investment law and arbitration. I posit that we are currently witnessing a paradigm shift where IIA contracting parties are severely reasserting control over IIAs and the arbitration process or at least attempting to do so.

<sup>11</sup> I only refer to the numerous submissions by non-governmental organisations to the consultations by the European Commission on investor protection in TTIP, which, in the vast majority, expressed general concerns with regard to investor-state dispute settlement and investment law in general. See, eg, Online Public Consultation on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) <[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)> accessed 2 July 2015. See also generally Kulick, *Global Public Interest* (n 5) 77–167.

<sup>12</sup> *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (pending).

<sup>13</sup> *Philip Morris Asia Limited v Commonwealth of Australia*, PCA Case No 2012-12 (UNCITRAL) (pending).

<sup>14</sup> For instance, *AES Solar and Others v Spain* (UNCITRAL) (pending); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30 (pending); *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No ARB/13/31 (pending); *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain*, ICSID Case No ARB/14/11 (pending).

<sup>15</sup> See UNCTAD, *World Investment Report 2014* (n 2) 114–16.

Examples supporting the notion of a paradigm shift are myriad. Contracting parties are increasingly commencing inter-state arbitrations, such as the recent *Ecuador v United States* arbitration;<sup>16</sup> they make use of, or are seriously considering making use of, joint interpretations of specific treaty provisions;<sup>17</sup> they terminate their IIAs and/or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or launch a general overhaul of their BIT regime;<sup>18</sup> they make increasing use of frivolous claim mechanisms, such as rule 41(5) of the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (ICSID),<sup>19</sup> or consider introducing similar mechanisms into IIAs;<sup>20</sup> they include definitions of standards such as fair and equitable treatment or indirect expropriation into their (model) IIAs;<sup>21</sup> they consider introducing appeal mechanisms or facilitations to challenging an investment treaty arbitration award;<sup>22</sup> and on the European Union (EU) level, the European Commission is contemplating a regime for extra-EU BITs that foresees a number of control mechanisms for the contracting parties over investment disputes and the

<sup>16</sup> *Republic of Ecuador v United States of America* (Award) PCA Case No 2012-5 (29 September 2012).

<sup>17</sup> See on this issue generally JR Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 2.39–2.51; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), arts 31(3)(a)–(b): ‘There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’

<sup>18</sup> See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159; UNCTAD, World Investment Report 2014 (n 2) 114. See also UNCTAD, ‘Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims’ (IIA Issues Note No 2, December 2010) <[http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf)> accessed 23 December.

<sup>19</sup> ICSID, ‘Rules of Procedure for Arbitration Proceedings (Arbitration Rules)’ <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>> accessed 18 September 2015.

<sup>20</sup> ICSID Arbitration Rule 41(5) has been introduced in April 2006. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 282–83. See also the European Commission’s leaked position paper in the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) of 2 July 2013, 47, No 12 <<http://keionline.org/sites/default/files/eu-kommission-position-in-den.pdf>> accessed 17 September 2015: ‘[T]he agreement will include provisions dealing with manifestly unjustified claims.’

<sup>21</sup> See European Commission—Directorate General for Trade, ‘Investment Provisions in the EU–Canada Free Trade Agreement (CETA)’ (26 September 2014) <[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf)> accessed 2 July 2015.

<sup>22</sup> See European Commission—Directorate General for Trade, ‘Factsheet on Investor-State Dispute Settlement’ (3 October 2013) 4–5 <[http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151791.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf)> accessed 2 July 2015: ‘[T]he EU believes that on the basis of the agreements we have signed with our trading partners there should be a debate setting up an appeals mechanism for ISDS disputes. This would also lead to greater consistency in how the provisions of investment agreements are interpreted.’ See the discussion within ICSID dating back until 2004: ICSID Secretariat, ‘Possible Improvements of the Framework for ICSID Arbitration’ (Discussion Paper, 22 October 2004) <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> accessed 24 September 2015. On possible appeals mechanisms in international investment arbitration, see the various contributions in Karl P Sauvants (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008).

interpretation of the agreement—and has pushed for the termination of all intra-EU BITs altogether.<sup>23</sup>

State practice exhibits a number of examples. Germany, for instance, the world's BIT champion, with over 130 such treaties concluded,<sup>24</sup> now calls for the re-introduction of the local remedies rule in new IIAs to which it or the EU may become a party.<sup>25</sup> Its government hesitates to agree to include a chapter providing for investment protection and investor-state dispute settlement mechanisms in EU free trade agreements under negotiation, such as the Comprehensive Economic and Trade Agreement and the Transatlantic Trade and Investment Partnership.<sup>26</sup> If enacted, Germany would abandon a decades-old tradition of investment-friendly foreign economic policy. Similarly, there is an ongoing discussion within the government of the Netherlands calling into question the established investment policy which led to a recent general impact study of investor-state dispute settlement.<sup>27</sup> Further, I have already mentioned some initiatives and considerations with regard to the EU investment policy.

Public opinion is also a factor in why all contracting parties, including the traditional capital exporters, will be more and more prone to push for a restrictive interpretation of their old, liberal IIAs. Adding to this, of course, is the aforementioned increased likelihood that both contracting parties may find themselves in the respondent seat in an investor-state arbitration. The quasi-precedential effect of investment arbitration awards and decisions plays a significant role here. As is established practice in investor-state arbitration, tribunals frequently refer to prior decisions on other IIAs and the argumentation employed therein as persuasive authority.<sup>28</sup> Hence, only a change in case

<sup>23</sup> See European Commission—Directorate General for Trade, 'Factsheet' (n 21); European Commission, 'Towards a comprehensive European international investment policy' COM (2010) 343 final.

<sup>24</sup> According to UNCTAD, as of December 2014, Germany has concluded 134 BITs that are still in force: see UNCTAD—Division on Investment and Enterprise, 'Investment Policy: International Investment Agreements Navigator' (2013) <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu>> accessed 2 July 2015.

<sup>25</sup> See the official position of the German government: Federal Ministry for Economic Affairs and Energy, 'Frequently Asked Questions about the Transatlantic Trade and Investment Partnership (TTIP)' (2015) <<http://www.bmwi.de/EN/Topics/Foreign-trade/TTIP/faq.html>> accessed 2 July 2015: 'When is investor-to-state dispute settlement needed? (...) It should only be possible to initiate investor-to-state dispute settlement as a last resort after exhausting the legal process before the national courts.'

<sup>26</sup> *ibid.*: 'The German government takes the view that special investment protection provisions are not required in an agreement between the EU and the US as both parties provide sufficient legal protection through their national courts.'

<sup>27</sup> See Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014).

<sup>28</sup> See Christoph Schreuer and Matthew Weiniger, 'Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?' (5 January 2007) <[http://www.univie.ac.at/intlaw/conv\\_across\\_90.pdf](http://www.univie.ac.at/intlaw/conv_across_90.pdf)> accessed 2 July 2015; Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012–13) 51 *Columbia J Transnatl L* 418, 436–47. For an example from the case law, see *Impregilo SpA v Argentine Republic* (Award) ICSID Case No ARB/07/ 17, para 108:

It is true that (...) the jurisprudence regarding the application of MFN clauses to dispute settlement provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to 'all



law will reduce the risk for the contracting parties to find themselves subject to awards that clash with fundamental domestic policies, including important public interest issues, often enacted after careful deliberation of democratically elected and legitimated domestic institutions. Therefore, in a nutshell, reassertion of control as described here serves as the contracting parties' vehicle to link their international investment law policies to their (domestic) democratic accountability.

For the purpose of this paper, 'democracy' shall denote, in Abraham Lincoln's famous words, 'government of the people, by the people, for the people'<sup>29</sup>—that is, majority rule, usually through elected bodies, qualified by a concern to protect the rights of minorities and the opposition. One important aspect of this basic understanding of democracy is accountability. Democratic governments have to answer for their decisions to their people, the *demos*, and are elected (or not) because their decisions reflect the will of the *demos* (or not).<sup>30</sup> Such accountability entails 'the great privilege', as Alexis de Tocqueville noted, of 'being able to repair the faults [one] may commit'<sup>31</sup>—that is, of changing policy and adapting it to what is in the best interest of the *demos* and/or what accords to its will. Hence, 'democratic government requires that the citizens can give their input to decisions of law and policy, and that political processes produce outputs in the interest of the citizens'.<sup>32</sup>

## 2 Democracy and IIA interpretation

This contribution focuses on the potential of democracy to serve as a theoretical foundation for IIA interpretation, in particular the allocation of interpretative authority among the stakeholders of investment dispute settlement and treaty interpretation. Hence, it does not discuss the potential impact of considerations of democracy and democratic accountability on other aspects of international investment law and arbitration including,

matters' or 'any matter' regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules of the Argentina[–United States] BIT and that the case cannot be dismissed for non-observance of the requirements in Article 8(2) and (3) of the Argentina-Italy BIT.

This reliance on decisions of other investment tribunals considering different IIAs is fuelled by what Stephan Schill termed the 'multilateralization' of international investment law—that is, the fact that many IIAs contain very similar language, which invites tribunals to cite decisions on similar clauses in other IIAs indiscriminately. See generally Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009). However, as noted by many, such indiscriminate reference often brushes over subtle or not so subtle differences in treaty language and thus is prone to draw conclusions that cannot be drawn. See, for instance, Cate (n 28) 447ff.

<sup>29</sup> Abraham Lincoln, 'Gettysburg Address' (Infomotions Inc 2001) 1.

<sup>30</sup> See Anne Peters, 'Dual Democracy' in Jan Klabbbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 265–66.

<sup>31</sup> Alexis de Tocqueville, *Democracy in America* (Bantham 2000) vol 1, 268.

<sup>32</sup> Peters, 'Dual Democracy' (n 30) 265.



inter alia, procedural aspects, such as transparency, arbitrator selection, public access and publication of decisions, or the profile and selection of arbitrators.<sup>33</sup> Those are pivotal aspects of the relationship between international investment law and democracy and, in particular, the perceived deficit of democratic legitimacy of investor-state arbitration. However, I focus here on IIA interpretation and how and to what extent democracy can be employed as an argumentative *topos*.

The relationship of democracy and IIA interpretation features two main aspects. First, what is the (potential) impact of democracy as an argumentative *topos* on the interpretation of specific treaty clauses, such as ‘fair and equitable treatment’, ‘discriminatory and arbitrary measures’, ‘full protection and security’ and the like? Secondly, what can democracy as an argumentative *topos* tell us about the allocation of interpretative authority among the relevant stakeholders? As foreshadowed above, in this contribution I choose to concentrate mainly on the second question. This is not only for lack of space, but also because this issue is the more general and theoretically more interesting one that may, in turn, also influence our understanding of the first question. For this reason, I will be very brief with regard to the first aspect.

Investment arbitration awards have been severely criticised for not taking into account the host state’s democratic accountability and the mechanics of democratic deliberation processes.<sup>34</sup> For example, Gus Van Harten claims ‘that some arbitrators appeared to view electorally and politically-accountable processes with suspicion as opposed to the respect that courts often show’.<sup>35</sup> He uses *Tecmed v Mexico* in particular as a showcase, where the tribunal refuted ‘political circumstances’ induced by responses of the Mexican authorities to ‘community pressure’ as a legitimate ground for the decision not to renew the operating permit.<sup>36</sup> Indeed, such portrayal of democratic processes would be problematic both under the Tocquevillian account of democracy as the ability to make ‘repairable mistakes’,<sup>37</sup> as well as under the Habermasian account of democracy

<sup>33</sup> For an account of these matters, see Barnali Choudhury, ‘Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights’ (2008–09) 46 *Alberta L Rev* 983, 1005–07; Steffen Hindelang, ‘Part II: Study on Investor-State Dispute Settlement (“ISDS”) and Alternatives of Dispute Resolution in International Investment Law’ in Directorate-General for External Policies Policy Department, *Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements* (European Parliament 2014) vol 2, 98–104 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO\\_STU\(2014\)534979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf)> accessed 23 December 2015; Eric de Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 148–74. With regard to international courts and tribunals generally, see Armin von Bogdandy and Ingo Venzke, *In Wessen Namen?—Internationale Gerichte in Zeiten Globalen Regierens* (Suhrkamp 2014) 218–54.

<sup>34</sup> See, for instance, Schneiderman (n 5) 3, 16 and 206; Gus Van Harten, *Sovereign Choices and Sovereign Constraints* (OUP 2013) 68–76.

<sup>35</sup> Van Harten, *Sovereign Choices and Sovereign Constraints* (n 34) 72.

<sup>36</sup> *ibid* 73–74, citing *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award) ICSID Case No ARB (AF)/00/2 (29 May 2003) paras 128, 132, 151.

<sup>37</sup> Schneiderman (n 5) 13 (paraphrasing Alexis de Tocqueville (n 31)).

as deliberative process.<sup>38</sup> However, looking at more recent case law, the picture does not look as dreadful. For instance, the tribunal in *Paushok v Mongolia* recognised precisely de Tocqueville's yardstick of the ability to repair mistakes as the defining characteristic of democratic process and rejected the claimant's attempt to portray such process alone as evidence of frustration of its legitimate expectations that leads to a breach of the 'fair and equitable treatment' standard:

[T]he fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to [sic] conclude that a breach of an investment treaty has occurred. (...) Legislative assemblies around the world spend a good part of their time amending substantive portions of existing laws in order to adjust them to changing times or to correct serious mistakes that were made at the time of their adoption.<sup>39</sup>

Equally, the *Electrabel* decision took account of the deliberative element of democracy by stressing that political considerations are 'necessarily' at the heart of decision-making by democratically accountable governments. Consequently, the tribunal refused to see such political deliberation process as evidence for arbitrariness and a frustration of legitimate expectations, stating that 'politics is what democratic governments necessarily address'.<sup>40</sup>

In a similar fashion, *Continental Casualty v Argentina* acknowledged the specific accountability of the democratically elected Argentine government to its people with regard to 'restor[ing] civil peace and the normal life of society' for purposes of interpreting the emergency clause of article XI of the US-Argentina BIT.<sup>41</sup>

Finally, democratic accountability may serve a role with regard to compensation. I recall Ian Brownlie's separate opinion in *CME v Czech Republic*.<sup>42</sup> When determining the amount of compensation to be awarded, according to Brownlie, a tribunal must be attentive to 'the significance of the fact that the Respondent is a sovereign State, which is responsible for the well-being of its people'.<sup>43</sup> Brownlie illustrated that there is a considerable difference between a corporation and a state with regard to allocation of assets for paying damages:

<sup>38</sup> See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W Rehg tr, MIT 1996) in particular 104–10. See also Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2009) 102–06.

<sup>39</sup> *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia* (Award on Jurisdiction and Liability) UNCITRAL (28 April 2011) para 299.

<sup>40</sup> *Electrabel SA v Republic of Hungary* (Decision on Jurisdiction, Applicable Law and Liability) ICSID Case No ARB/07/19 (30 November 2012) para 8.23. See also *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary* (Award) ICSID Case No ARB/07/22 (23 September 2010) paras 10.3.23–10.3.24, which also Van Harten mentions: Van Harten, *Sovereign Choices and Sovereign Constraints* (n 34) 74.

<sup>41</sup> *Continental Casualty Company v Argentine Republic* (Award) ICSID Case No ARB/03/9 (5 September 2008) para 174.

<sup>42</sup> *CME Czech Republic BV (The Netherlands) v Czech Republic* (Final Award) UNCITRAL (14 March 2003) (Separate Opinion of Sir Ian Brownlie).

<sup>43</sup> *ibid* para 74.

The resources of a corporation entail considerable flexibility in changing the location of assets and in changing the organisation of assets. The resources of a country, its human and natural resources, are a given: they are necessarily fixed.<sup>44</sup>

Such difference, says Brownlie, must be taken into account when calculating the damages due by a respondent state in an investment arbitration.<sup>45</sup>

### **3 Allocation of interpretative authority among investor-state tribunal, state-state tribunal and the contracting parties with regard to democratic accountability**

#### **3.1 Reassertion of control, agency, trusteeship and investment arbitration**

The reassertion of control as described above means an attempt to shift power, back from the investor and the investor-state tribunal to the contracting parties. One of the motives for the intended power shift is the perception, among the contracting parties themselves and among their civil societies, that a system that at least may adjudicate issues of public interest must take such public interest into account.<sup>46</sup> If the contracting parties to IIAs take control over the agreements and/or the arbitration, the question arises as to whether contracting parties have the right and should be the only trustees of the public interest. The answer to this question, in turn, depends on how much control the contracting parties are legitimately able to assert.

International relations theory offers models of agency and trusteeship to explain why states delegate authority to international courts and tribunals.<sup>47</sup> Under a principal-agent model, states (principals) delegate authority to international courts and tribunals (agents) to resolve international disputes for reasons of efficiency—that is, because a tribunal is better placed to resolve a dispute than the parties to the dispute themselves.<sup>48</sup> The trusteeship model, by contrast, follows a different rationale, focusing on credibility and independence rather than efficiency. According to this model, states delegate

<sup>44</sup> *ibid* para 76.

<sup>45</sup> See also case law of the European Court of Human Rights, where the Court held that ‘exceptional circumstances’ might justify expropriation without any compensation: *Case of the Holy Monasteries v Greece* App nos 13092/87, 13984/88 (ECtHR, 9 December 1994) para 71; *Case of Jahn and Others v Germany* ECHR 2005–V 630, paras 116–17. See on this also Andreas Kulick, ‘Sneaking Through the Backdoor—Reflections on Public Interest in International Investment Arbitration’ (2013) 29 *Arbitration Intl* 435.

<sup>46</sup> See Kulick, *Global Public Interest* (n 5) 151.

<sup>47</sup> See Andrew T Guzman, ‘Why LDCs Sign Treaties that Hurt them’ (1998) 38 *VJIL* 639; Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *AJIL* 179, 186.

<sup>48</sup> See, for instance, Eric Posner and John Yoo, ‘Judicial Independence in International Tribunals’ (2005) 92 *California L Rev* 1, 6–7, 14; Tom Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’ (2005) 45 *VJIL* 631, 641–44.

authority to international judicial bodies because the decision of a neutral third party increases the confidence in, and credibility of, their commitments and other obligations under public international law.<sup>49</sup> This entails an aspect of legitimacy because of the international control of national decision-making by ideally independent international judicial bodies.<sup>50</sup> The reach of agents' and trustees' authority is defined and thereby limited by their respective underlying rationales of efficiency (agency) and credibility (trusteeship). Under a trusteeship model the permissible level of control to be exerted by the contracting parties to a treaty providing for international judicial dispute resolution is hence lower than under an agency model.<sup>51</sup>

Following Anthea Roberts' classification, I agree with her overall assessment that the present system of investment arbitration is a hybrid of agency and trusteeship models.<sup>52</sup> Investor-state tribunals are trustees of dispute resolution. One of the main purposes of the current system of investment law and arbitration is investment promotion through international legal standards and international adjudication beyond the full control of the host state.<sup>53</sup> Such a legitimising function may only be achieved by a relatively independent judicial body that is entrusted with settling the dispute between the investor and the host state. Moreover, notably, with regard to investor-state dispute resolution as such, the principals are here the contracting parties (or, to be more precise, one of them—that is, the host state), on the one hand, and the investor, on the other hand. The IIA makes investor-state arbitration possible and usually provides for the contracting parties' general consent to this form of dispute resolution. However, a specific dispute to be resolved can only be introduced by the investor.<sup>54</sup> Hence, an agency model based exclusively on the contracting parties' consent to dispute resolution would be inaccurate to capture the specific features of investment arbitration.

Nonetheless, some features of investment law and arbitration may not be fully explained by a trusteeship model either.<sup>55</sup> Dispute resolution proper is not the only task bestowed upon investment law and arbitration. Rather, the interpretation of IIAs—in

<sup>49</sup> See, for instance, Karen J Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 EJIR 33, 38; Laurence Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California L Rev 899, 917.

<sup>50</sup> See Armin von Bogdandy and Ingo Venzke (n 33) 26–27. See also, in more general terms and with regard to state-state judicial dispute settlement, Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 AJIL 225, 259–60.

<sup>51</sup> See Roberts, 'Power and Persuasion' (n 47) 186–87.

<sup>52</sup> *ibid* 188. See also Alec S Sweet and Florian Grisel, 'Transnational Investment Arbitration: From Delegation to Constitutionalization' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 124–26, who regard investor-state tribunals furthermore as agents of 'the greater community'.

<sup>53</sup> See Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013) 217.

<sup>54</sup> This second hybrid aspect of investor-state arbitration does not find mention in Anthea Roberts' analysis: see Roberts, 'Power and Persuasion' (n 47) 188.

<sup>55</sup> See also the notion of constrained independence advanced in Helfer and Slaughter (n 49) 929–30.

other words, defining the scope of investors' rights and the limits of contracting parties' lawful exercise of governmental authority—is a crucial feature that is usually intertwined with dispute resolution. That is, when resolving a dispute, an investor-state tribunal must interpret the IIA in order to determine whether the investor's claims are well-founded or not. The investor-state tribunal shares the authority to interpret the terms of the IIA with the contracting parties—who can amend, terminate and interpret the treaty—and usually a state-state tribunal for which the IIA often specifically reserves the role to resolve disputes of interpretation between the contracting parties. Consequently, here the limits for contracting parties' reassertion of control are wider. As a preliminary conclusion, these considerations suggest that contracting parties may enjoy more leeway reasserting their control when matters of treaty interpretation are at stake compared to issues where the dispute resolution function is in the foreground.

This may translate into responses to specific doctrinal questions. These considerations may provide guidelines as to, for example, until what point in time in an investor-state dispute an instrument of reassertion of control (such as joint interpretation), may still be legitimately employed by one contracting party and when a tribunal may legitimately disregard it. Taking the example of joint interpretation, the guidelines developed here would suggest that such an interpretation would infringe upon the trusteeship bestowed upon an investor-state tribunal with regard to dispute resolution if undertaken after the request for arbitration. In that case, the purpose of the specific joint interpretation is not so much to retain general control over how the terms of the respective IIA are to be interpreted, but rather to influence the outcome of the particular dispute. That is, there is dispute resolution in favor of one contracting party rather than a genuine interest in preserving the true intention of both contracting parties with regard to the meaning of the treaty.

### 3.2 Democracy and sovereignty

At first glance, in the context of investment arbitration, sovereignty and democracy seem unlikely bedfellows. First, are international investment law and arbitration not precisely about limiting sovereignty? Secondly, is sovereignty not about, *inter alia*, states' free choice over their internal political system—that is, about international law's neutrality in that regard? However, this and the following subsection will explore the reach of the relationship of these two concepts—sovereignty and democracy—for the purposes of international investment arbitration and demonstrate their potential impact on IIA interpretation, while the next section will address the limits of democracy as an argumentative *topos* in this regard.

As already mentioned, international investment law and arbitration limit sovereignty. By concluding an IIA, the contracting parties consent to observing the rules enshrined in that treaty and thus consent to limit their freedom of action, as they do with the conclusion of any treaty. Furthermore, they usually consent to the idea that any dispute arising over the interpretation of that treaty is to be settled by an arbitral tribunal.

Hence, the contracting parties confer—to some extent—the authority to determine the contents of the obligations the treaty imposes upon them on a third party,<sup>56</sup> namely, the arbitral tribunal. What is even more, they consent, generally and without qualification that any investor—that is, not a contracting party, but rather a national of the other contracting party—can bring a claim before an arbitral tribunal that has the authority to determine the contents of the obligations that the treaty imposes upon the contracting parties. Consequently, sovereignty plays a pivotal role in investment arbitration. That is, investment arbitration involves the conferral of authority by the contracting authorities to the arbitral tribunal in order that it might determine the reach and limits of IIA obligations and sanction a contracting party for exercising its sovereign authority in a manner that contravenes its IIA obligations. This ceding of sovereign authority is significant, as the arbitral tribunal becomes the agent and/or trustee of the contracting parties with regard to the IIA.<sup>57</sup>

However, what is the content of the contracting parties' sovereignty that they partly cede to their agent/trustee, the arbitral tribunal? This is where democracy enters the stage. Many authors suggest that nowadays the concept of sovereignty has ventured far beyond the old *Lotus* paradigm.<sup>58</sup> Sovereignty, so they argue, cannot be understood any longer as merely the freedom to do as one pleases unless one has consented to limiting that freedom. In a recent groundbreaking piece, Eyal Benvenisti reconceptualises sovereignty as trusteeship.<sup>59</sup> The legitimacy of a state, so he argues, hinges on its role of serving as 'an important democratic venue for exercising personal and communal self-determination.'<sup>60</sup> In other words, the existence of states is justified by their task to pursue the public interest of their people, both internally and externally.<sup>61</sup> Thus, sovereignty can only be understood as a vehicle to further such pursuit of the public interest on behalf of the constituency. Similarly, Christian Tomuschat writes, 'States are no more than instruments whose inherent function is to serve interests of their citizens,'<sup>62</sup> and Jeremy

<sup>56</sup> See, for instance, Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton UP 2014) 9.

<sup>57</sup> See *ibid* (with regard to international courts and tribunals in general).

<sup>58</sup> See *Case of the SS 'Lotus' (France v Turkey)* (Merits) PCIJ Rep Series A No 10, 3, 18–19.

<sup>59</sup> Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295.

<sup>60</sup> *ibid* 300.

<sup>61</sup> See also James Crawford, 'Democracy and the Body of International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 92–93. In fact, one can trace back this idea at least as far as Aristotle: see Nick W Barber, *The Constitutional State* (OUP 2010) 38. See also Martti Koskeniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian J Intl L 61, 65, who refers to Pufendorf.

<sup>62</sup> Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 RCADI 1, 70; Christian Tomuschat, 'Möglichkeiten und Grenzen der Globalisierung' in Jürgen Schwarze (ed), *Globalisierung und Entstaatlichung des Rechts—Ergebnisse der 31. Tagung der Gesellschaft für Rechtsvergleichung vom 20. bis 22. September 2007 in Halle: Beiträge zum Öffentlichen Recht, Europarecht, Arbeits und Sozialrecht und Strafrecht* (Mohr Siebeck 2008) 31ff (where Tomuschat makes some disclaimers with regard to the current state of the law); Armin von Bogdandy, 'The Telos of International Law—Christian Tomuschat's General Course and the Evolution of the Universalist Tradition'



Waldron emphasises that ‘a government is a trustee for its people’s interests.’<sup>63</sup> They refer to the Universal Declaration of Human Rights (‘the will of the people shall be the basis of the authority of government’)<sup>64</sup> or more recent efforts such as the ‘Responsibility to Protect’<sup>65</sup> for evidence in multilateral instruments that such understanding of sovereignty as trusteeship also finds acceptance in state practice.<sup>66</sup> However, note that this model of sovereignty as trusteeship does not at all posit the demise of sovereignty, but instead promotes sovereignty as a vehicle for self-authorship. Martti Koskeniemi writes of ‘the hope of experiencing the thrill of having one’s life in one’s own hands.’<sup>67</sup> Sovereignty as trusteeship hence means that such thrill is experienced by and on behalf of the sovereign’s democratic constituency.<sup>68</sup>

Of note, Benvenisti’s concept of sovereignty as trusteeship makes a bolder statement than endorsed here. He posits that sovereigns are in fact trustees of humanity at large.<sup>69</sup> However, as Joseph Weiler argued so poignantly: ‘there is no convincing account of democracy without demos. (...) There is no demos underlying international governance.’<sup>70</sup> Indeed, ‘[w]hat is required is (...) a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither State or Nation’—rethinking which is yet to occur.<sup>71</sup> Therefore, all convincing accounts of ‘dual legitimacy’ that draw on both domestic and cosmopolitan democratic models eventually hinge on the link to domestic democratic legitimacy.<sup>72</sup> I will thus limit my considerations to conclusions drawn from domestic democratic models.<sup>73</sup>

Finally, connecting the model of sovereignty as trusteeship with the model of investment arbitration as agency/trusteeship, if adjudication of investment disputes by an international arbitral tribunal means that the contracting parties to IIAs cede part

in Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung—Common Values in International Law: Festschrift für Christian Tomuschat* (KP Engel 2006) 703, 707.

<sup>63</sup> Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 EJIL 315, 326.

<sup>64</sup> Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948) art 21(3).

<sup>65</sup> See International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (2001) available at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 2 July 2015.

<sup>66</sup> See Benvenisti (n 59) 296.

<sup>67</sup> Koskeniemi (n 61) 70.

<sup>68</sup> Consequently, sovereignty as trusteeship does not view sovereignty in the Schmittian sense, ie as an extra-legal concept (cf Carl Schmitt, *Politische Theologie* (1st edn, Duncker & Humblot 1922)), but rather as ‘sovereignty *within* public international law’: see Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 184 (emphasis in original).

<sup>69</sup> Benvenisti (n 59) 300ff.

<sup>70</sup> Joseph Weiler, ‘The Geology of International Law—Governance, Democracy and Legitimacy’ (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 560.

<sup>71</sup> *ibid* 561.

<sup>72</sup> See, for instance, von Bogdandy and Venzke (n 33) 200, who see a ‘supplementary’ role of international democratic legitimacy that builds on domestic democratic legitimacy.

<sup>73</sup> For a model of a ‘non-state democratization of global governance’, see Peters, ‘Dual Democracy’ (n 30) 296–341.



of their sovereign authority to the tribunal, the agency/trusteeship by the international tribunal that results from such cession can only be exercised within the confines of the sovereignty entrusted to the contracting parties. In other words, the sovereignty (partially) ceded to the arbitral tribunal necessarily implies the concept of sovereignty as trusteeship on behalf of the domestic democratic constituency. However, if, in turn, the contracting parties' sovereignty is to be understood as trusteeship on behalf of the *demos* of each contracting party, the investment tribunal can and may exercise its adjudicatory role granted by the contracting parties only within the confines so defined. It follows from this that public interest and domestic democratic accountability must play a considerable role in the investment tribunal's exercise of its judicial function.<sup>74</sup> Moreover, under this view, contracting parties' reassertion of control may be employed or even in itself regarded as a means to recalibrate the investment regime towards taking due account of democratic accountability and the public interest.

### 3.3 Consequences for treaty interpretation

This brings me back to treaty interpretation, as the central function of an investment arbitration tribunal under an IIA. From the above considerations, we can draw some conclusions vis-à-vis the allocation of interpretative authority among the stakeholders involved—that is, the investor-state and state-state tribunals and the contracting parties.

Let me start again with a general account of contracting parties' reassertion of control as described above. Such reassertion of control over the IIA emanates from the relationship between an investor-state and a state-state tribunal with regard to matters of treaty interpretation: whose, if any, interpretation enjoys priority if both interpret the same clause in the same IIA differently? Anthea Roberts, when discussing the relationship of investor-state and state-state tribunal decisions with joint interpretations by the contracting parties, argues for a three-level hierarchy.<sup>75</sup> She places joint interpretations at the top, declaring them binding on any tribunal. Second in rank comes the state-state tribunal's interpretation. To Roberts, such interpretation award is 'highly persuasive' to investor-state tribunals—that is, it creates a 'rebuttable presumption' that the state-state tribunal's interpretation is correct and is thus to be adopted.<sup>76</sup> Investor-state awards interpreting the same treaty are at the bottom of the hierarchy and are 'just persuasive'.<sup>77</sup>

I agree with Roberts that joint interpretations by the contracting parties are binding on any tribunal, be it in a state-state or an investor-state dispute. The contracting parties are the creators of the IIA and they could make way with it in an afternoon if they

<sup>74</sup> See also Kulick, *Global Public Interest* (n 5) 85–94, 149–50.

<sup>75</sup> Anthea Roberts, 'State-to-State Investment Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority' (2014) 55 *Harvard Intl L J* 1, 62–63.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

decided to do so.<sup>78</sup> Further, even if articles 31(3)(a)–(b) of the Vienna Convention on the Law of Treaties (VCLT) merely provide that subsequent practice and agreements between the contracting parties ‘shall be taken into account, together with the context’ of the respective treaty, the tribunals’ interpretative authority—granted by the contracting parties’ agreement—can only go as far as allowed by the contracting parties’ agreement.<sup>79</sup> Further, at this point, the above argumentation with regard to sovereignty and democracy would provide support for this position. If the IIA expresses the joint will of the contracting parties, who thereby have ceded some part of their sovereignty (as trusteeship), their accountability to their domestic constituencies may speak for a prevalence of their will that an investment arbitration tribunal cannot disregard or by which it is arguably even bound. I refer here also to the *Methanex* case with regard to the Free Trade Commission’s interpretation of article 1105(1) of the North American Free Trade Agreement, where the tribunal endorsed similar reasoning when it held that clarifying rules if courts misconstrue them is ‘obligatory in a democratic and representative system in which legislation expresses the will of the people.’<sup>80</sup>

With regard to the next issue, I also think that investor-state tribunals’ interpretation should be at the bottom of the hierarchy.<sup>81</sup> Provided that the respective IIA grants jurisdiction for a state-state tribunal to decide general disputes as to the interpretation of the treaty, the state-state tribunal’s interpretation of treaty clauses enjoys primacy over the investor-state tribunal’s interpretations. While in an investor-state dispute, the tribunal is called upon to resolve a specific matter where the interpretation of the IIA is an albeit possibly decisive corollary in a state-state dispute, the interpretation of the IIA is the very purpose why the contracting parties have created this dispute settlement mechanism.

I disagree, however, with Roberts’ classification of state-state interpretative awards as a category of lower authoritative value than joint interpretations. To her, ‘a state-to-state award is less persuasive than an interpretative agreement because it involves a disagreement, rather than an agreement, between the masters of the treaty.’<sup>82</sup> To

<sup>78</sup> See Martins Paparinskis, ‘International Investment Law: Analogy and Cohesiveness of International Law’ (CJICL Conference, Cambridge, 11 May 2014).

<sup>79</sup> I recognise that such understanding may be viewed as deviating from *International Status of South West Africa* (Advisory Opinion) (11 July 1950) [1950] ICJ Rep 128, 135–36 (where the Court stated that joint interpretations are ‘not conclusive as to their meaning’ but rather enjoy merely ‘considerable probative value’). Indeed, it may create frictions with treaty amendments, since joint interpretations consequently have the same effect as treaty amendments. However, in this latter regard, I accept that the contracting parties do not enjoy unlimited discretion as to how the terms of the treaty can be interpreted. A tribunal must reject a joint ‘interpretation’ that is logically impossible and de facto amends the treaty, ie that is impossible to reconcile with the wording. Only with respect to such off-limits control may a tribunal review and reconsider the contracting parties’ joint interpretation. This is what, to my mind, still preserves a difference between joint interpretation and amendment.

<sup>80</sup> *Methanex Corporation v United States of America* (Final Award on Jurisdiction and Merits) (2005) 44 ILM 1345, part IV.C, para 22; North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289.

<sup>81</sup> See Roberts, ‘State-to-State Investment Arbitration’ (n 75) 63.

<sup>82</sup> *ibid.*

my mind, the contracting parties, by consent to state-state arbitration, have delegated authority to the state-state tribunal to resolve their dispute over the interpretation of the IIA. Therefore, the tribunal's interpretation is the functional equivalent to a joint interpretation by the contracting parties. The contracting parties agreed that in case they cannot come to an agreement about what they intended with the treaty provision, the tribunal as an independent third party should decide. In both cases, the decision about what the treaty provision should mean has its roots in the contracting parties' agreement, not in their disagreement. The disagreement in that case is no more than the switch point that opens the path to state-state arbitration, and hence to the subsequent authoritative decision about what the treaty provision should mean, which is anchored in the consensus of the contracting parties. Here again, the democracy argument supports this position: the state-state tribunal is called upon to decide authoritatively what the contracting parties intended with a specific treaty provision if they cannot agree on a joint interpretation themselves. The authority conferred upon the tribunal stems from both contracting parties' sovereignty as trusteeship on behalf of their respective *demoi*, not only by the IIA itself but by their party status to the specific dispute. Such state-state tribunals' determination of the meaning of a treaty clause therefore must enjoy prevalence over the interpretation by an investor-state tribunal. The latter only contains one of the contracting parties as party to the dispute and an individual or corporation as the other party, thereby lacking that aspect of democratic accountability that the contracting parties possess.

#### 4 A 'gentle civilizer'<sup>83</sup>?

All the above makes good material for the enthusiast of democratic liberalism. However, let us take a step back and reflect on where such reasoning, if untamed, leaves us. Inherent in our contemporary understanding of sovereignty is the idea of equality. If states are sovereign, an international order that ascribes itself to the maintenance of international peace and security<sup>84</sup> must be founded on state equality. Hence, article 2(1) UN Charter posits the sovereign equality of states as the first principle of the UN, regardless of their internal political order. Furthermore, consider the general principle of international law, which finds expression, *inter alia*, in article 27 VCLT or the customary rule enshrined in article 3 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, that reference to domestic law is no justification of a breach of international law.<sup>85</sup> Why would or could, then, the organisation of a state's

<sup>83</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2001).

<sup>84</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 1(1).

<sup>85</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts of its 53rd Session' (2001) UN Doc A/56/10, chp.IV.E.1; see also James Crawford, *State Responsibility: The General Part* (CUP 2013) 100–03.

internal order influence the range of its rights as a sovereign on the international plane, specifically in an investment dispute before an investment arbitration tribunal? Let me explain my concerns.

The above reasoning on the role of democracy as an argumentative *topos* for IIA interpretation begs the question: what if a contracting party is not a democracy? In other words, what does the absence of a democratic internal system of governance mean for the range of rights of such a sovereign, particularly if the government disregards the people's (majority's) will? In that case, should an investment tribunal be less deferential towards public interest arguments brought forward by such state? Pursuant to the above reasoning, the answer would have to be yes: a state that does not pursue the public interest on behalf of its people as determined through democratic process falls short of its trusteeship role which entitles it to exercise its sovereignty. Mind-boggling questions ensue. Would a joint interpretation of two non-democratically governed contracting parties have less value with regard to interpretative authority than the joint interpretation of two democratically governed ones? What if, of the two contracting parties issuing the joint interpretation, one is democratically governed and the other one is not? As different states exhibit different levels of democratic accountability, by law and in practice, should we differentiate according to how 'good' a democracy is or how well it works? In any event, who would determine all this? If it were for the tribunal to determine, this would defeat the very purpose of granting more interpretative authority and/or deference to the contracting parties. Eventually, it would still be the tribunal who has the last word—not about the contents of the treaty obligation, but about whether a/the contracting party/ies is/are entitled to determine the contents of such obligations; and thereby ranking its/their level of democratic governance!

In any event, whether or not assessing the value or level of democratic governance and accountability were within the competence of an investment tribunal, the relevance of such assessment for the outcome of the dispute would provide tremendous opportunity for abuse among the contracting parties and might result in a considerable re-politicisation of the investment dispute. Portraying the host state as undemocratic, either by the investor or jointly with its home state, would constitute a return to gunboat diplomacy in modern cloth—only that the fusillade would take the form of an image campaign instead of gunfire.

Anne Peters has argued that differentiated treatment among states, based on their respect for democracy or human rights, may conform to the principle of sovereign equality if it takes the shape of what she calls 'proportionate equality'.<sup>86</sup> Hence, in whatever way we frame the argument, we would have to translate democratic accountability and legitimacy into legal categories that require evaluating the level of 'democracy' that an IIA contracting party exhibits.<sup>87</sup> While there is the obvious challenge of categorisation, let us assume we were able to create such categories and make evaluation based on such categories. Under

<sup>86</sup> Peters, 'Global Constitutional Community' (n 68) 192–93.

<sup>87</sup> *ibid* 193.

any possible scenario, we would arrive at more or less sophisticated variations of these three categories: democratic states, semi-democratic states and non-democratic states. Does this sound familiar? It should. It reminds us of late 19th century categorisations of nations—and, in consequence, political organisation—as ‘civilised’, ‘half-civilised’ and ‘savage’.<sup>88</sup> The similarity is not mere folklore but demonstrates the danger that a thorough application of the democracy argument entails. It recalls Carl Schmitt’s famous assessment that ‘[t]he concept of humanity is an especially useful ideological instrument of imperialist expansion’.<sup>89</sup> Replace ‘humanity’ with ‘democracy’ and you get the idea.<sup>90</sup> Anne Orford has unmasked similar trends with regard to exceptions of the prohibition of the use of force by way of a ‘responsibility to protect’ as neo-colonial tendencies<sup>91</sup> that international investment law is well-advised not to emulate.

Anne Peters contends with regard to human rights that, according to her concept of proportionate equality, differentiation would be reversible and limited to specific instances that shift once the problematic policy is abandoned and thus would not lead to ‘the creation of fixed categories of states, as in the 19th century international legal doctrine’.<sup>92</sup> However, I am concerned that a more permanent labelling of states would be the consequence if that concept was applied based on democracy as the differentiating factor. This is particularly so because a state’s political system and culture are far more static and domestically engrained than most policies with regard to specific human rights issues—not to mention that leaving such labelling to an investment tribunal appears as undesirable as leaving it to the investor or its home state.

## 5 Conclusion

In this contribution, I have fleshed out both the potentials and the pitfalls of a reasoning pondering on democracy as an argumentative *topos* for treaty interpretation. Hence, a tribunal that endorses such reasoning must tread very carefully in order not to fall back into argumentative patterns we hoped to have left long behind us. Democracy should not become a disguise for a neo-colonial attitude in fancy cloth. For those who are tempted

<sup>88</sup> See, for instance, James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Blackwood & Sons 1883) vol 1, 101 (‘civilized’, ‘barbarian’ and ‘savage’); Lassa Oppenheim, *International Law: A Treatise* (1st edn, Longmans, Green & Co 1905) vol 1, 154–57. See also Koskenniemi (n 83) 70–71, 127–32; Benedict Kingsbury, ‘Sovereignty and Inequality’ (1998) 9 EJIL 599, 605–06, 622.

<sup>89</sup> Carl Schmitt, *The Concept of the Political* (George Schwab tr, Chicago UP 2007) 54. It goes without saying that this statement should be read *cum grano salis*, considering Schmitt’s *opus* and biography.

<sup>90</sup> Benvenisti (n 59) 328 acknowledges this *problematique*. See also Anthea Roberts, ‘The Next Battleground: Standards of Review in Investor–State Arbitration’ in Albert J Van Den Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer 2012) 178; Caroline Henckels, ‘Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration’ (2013) 4 JIDS 197, 205.

<sup>91</sup> See, in particular, Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011).

<sup>92</sup> Peters, ‘Global Constitutional Community’ (n 68) 195.

to promote democracy as a central argumentative *topos* in investment arbitration, this consequence may be unintended. However, this makes it no less problematic. In fact, too much of this argumentation may lead international investment law back to an age it has gladly escaped.

So, what remains? I think that we can—and must—distinguish the concept of sovereignty as trusteeship from democracy per se. One of the pivotal issues that this contribution has fleshed out is accountability as inherent in the trusteeship model. However, while we usually associate accountability with democracy, there exist elements of accountability to their people in government forms that are not role model democracies. If we hence start with the rationale of sovereignty as trusteeship, I contend that, with regard to public interest policies on matters of high importance for the domestic society as a whole, IIA contracting parties must be granted some leeway in the choice and adoption of such policies that must find its way into investment tribunals' reasoning when assessing breaches of IIA provisions. As the *Lemire* tribunal acknowledged, a state enjoys an 'inherent right to regulate (...) in order to protect the common good of its people'.<sup>93</sup> Even if it might hurt the democratic heart, such an 'inherent right' should be granted any sovereign, regardless of how its internal political system is organised.

Naturally, this is not a *carte blanche* for disrespecting the rule of law vis-à-vis foreign investors, or international law in general, and arguably more questions arise from this conclusion than it answers or that can be addressed here. But regarding IIA interpretation, there should be some consequences to the understanding of sovereignty as trusteeship. One consequence concerns matters of deference that have been suggested and discussed brilliantly elsewhere, so that I can content myself with just mentioning the adoption of different levels of scrutiny, in particular with regard to domestic public interest legislation, and the introduction of a margin of appreciation of some sort.<sup>94</sup> The second consequence is what I fleshed out above with regard to the allocation of IIA interpretative authority—that is, the prevalence of joint interpretations of the contracting parties and of decisions of the state-state tribunal.

<sup>93</sup> *Joseph Charles Lemire v Ukraine* (Decision on Jurisdiction and Liability) ICSID Case No ARB/06/18 (14 January 2010) para 505.

<sup>94</sup> See, for instance, Andreas von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 J Intl Constl L 1023 (promoting and developing the concept 'normative subsidiarity'); William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 689; Henckels (n 90) 197; Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 JIDS 577; Roberts, 'The Next Battleground' (n 90) 170.