

# Cambridge Journal of International and Comparative Law

## Publication

The *Cambridge Journal of International and Comparative Law* (CJICL) is an open-access publication available online at <<http://www.cjicl.org.uk>>. Each volume consists of two or more general issues and occasional symposiums on a particular area of law.

## Editorial policy

All submissions are subject to a double-blind peer-review editorial process by our Academic Review Board and/or our Editorial Board.

## Submissions

The Journal accepts the following types of manuscript:

- (i) Long Articles between 6,000 and 12,000 words but not exceeding 12,000 words including footnotes;
- (ii) Short Articles not exceeding 5,000 words including footnotes;
- (iii) Case Notes not exceeding 3,000 words including footnotes; and
- (iv) Book Reviews not exceeding 2,500 words including footnotes.

Please visit our website for submission details.

## Copyright and open-access policy

The CJICL is an open-access publication governed by our publishing and licensing agreement. Any commercial use and any form of republication of material not covered by the applicable license is subject to the express permission of the Editors-in-Chief.

## Contact information

Cambridge Journal of International and Comparative Law

Faculty of Law, 10 West Road

Cambridge, CB3 9DZ

United Kingdom

E-mail: [editors@cjicl.org.uk](mailto:editors@cjicl.org.uk)

Web: <http://www.cjicl.org.uk>

*Typeset in InDesign.*

ISSN 2050-1706 (Print)

ISSN 2050-1714 (Online)

© 2016 Cambridge Journal of International and Comparative Law and Contributors

This issue should be cited as (2016) 5(1) CJICL.

<http://www.cjicl.org.uk>



## Editorial Board 2015–2016

### *Editors-in-Chief*

Catherine Gascoigne

Barry Solaiman

### *General Managing Editors*

Michael Dafel

Darren Harvey

Massimo Lando

Lan Nguyen

Niall O'Connor

Stefan Theil

### *Conference Convenors*

Oliver Butler

Rajiv Shah

### *Blog Managing Editor*

Dennison Giongco

### *Treasurer*

John Magyar

### *General Editors*

John Adenitire  
Sayomi Ariyawansa

Divyanshu Aggarwal  
Jonathan Brosseau

Andrew Brown

Ya Lan Chang

Rosalind Comyn

Theofili Elenoglou

Florian Ettmayer

Raffael Fasel

Nicola Jaccarini

Natalie Jones

Ridhi Kabra

Michael Keks

Sarah McGibbon

Eleni Methymaki

Charles Noonan

Stanley Nweke-Eze

Mark Retter

Alessandro Rollo

Namita Singh

Sophie Starrenburg

Luke Villiers

Sam Wong

### *Conference Assistants*

Ana Carolina Dall'Agnol

Konstantina Goergaki

Abhijnan Jha

Paige Mason

Su Wai Nang

Tianshu Zhang

### *Blog Editors*

Adrian Parker

Furong Yang

## Faculty Advisory Board

Professor Catherine Barnard

Professor John Bell QC

Dr Kate Miles

*Senior Treasurer*

Professor John Bell QC

## Academic Review Board

*Members*

Dr Geert De Baere	Professor Christine Gray	Ms Evgeniya Rubinina
Professor Freya Baetens	Dr Jessie Hohmann	Professor Philippe Sands QC
Dr John Barker	Dr Douglas Guilfoyle	Dr Andrew Sanger
Professor Catherine Barnard	Professor Peter Harris	Mr Daniel Saxon
Dr Lorand Bartels	Dr Gleider I Hernandez	Professor Anat Scolnicov
Professor John Bell QC	Dr Kirsty Hughes	Dr Jillaine Seymour
Dr Eirik Bjørge	Ms Jodie Kirshner	Professor Malcolm Shaw QC
Dr Antje Du Bois-Pedain	Dr Francesco Messineo	Dr Bart Smit Duijzentkunst
Dr Anthony Cullen	Dr Marko Milanovic	Professor Eleanor Spaventa
Dr Dominic De Cogan	Dr Alex Mills	Professor John Spencer QC
Dr Marie-Claire Cordonier Segger	Dr Jasmine Moussa	Lld
Professor Simon Deakin	Dr Jonathan Mukwiri	Mr Christopher Thomas
Professor Andrés Delgado Casteleiro	Dr Eva Nanopoulos	Dr Kimberley Trapp
Professor Zachary Douglas	Professor Lorne Neudorf	Dr Sophie Turenne
Dr Niamh Dunne	Penelope Nevill	Dr Isabelle Van Damme
Dr Matthew Dyson	Dr Sarah Nouwen	Professor Guglielmo Verdirame
Dr Alex Oude Elferink	Dr Patrick O'Callaghan	Dr Michael Waibel
Professor Stefan Enchelmaier	Professor Roger O'Keefe	Dr Santiago Villalpando
Dr David Erdos	Dr Tiina Pajuste	Professor Marc Weller
Professor Charles Garraway	Dr Martins Paparinskis	Dr Ralph Wilde
Dr Markus Gehring	Dr Kate Parlett	Professor Sarah Worthington QC (Hon)
Dr Joanna Gomula-Crawford	Dr Surabhi Ranganathan	Dr Rumiana Yotova
Dr Tom Grant	Dr Pippa Rogerson	Dr Sheng Zhang
	Dr Solène Rowan	

# Contents

Editorial	1
<i>Catherine Gascoigne and Barry Solaiman</i>	

## *I. Long Articles*

Global Public Goods and Democracy in International Legal Scholarship	4
<i>Samuel Cogolati, Linda Hamid and Nils Vanstappen</i>	
European Parliamentary Oversight Behind Closed Doors	31
<i>Vigjilenca Abazi</i>	
The EU's Competence Gap in Public Health and Non-Communicable Disease Policy	50
<i>Oliver Bartlett</i>	
An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union	82
<i>Carlos Arrebola, Ana Júlia Maurício and Héctor Jiménez Portilla</i>	
Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society	113
<i>Ioanna Pervou</i>	

## *II. Short Article*

Constitutionalising the International Legal Order through Case Law: Judgment No 238/2014 from the Italian Constitutional Court	139
<i>Maria Elena Gennusa</i>	

## *III. Book Reviews*

The UK and European Human Rights: A Strained Relationship?	153
<i>Mark Retter</i>	
The Law and Politics of the Kosovo Advisory Opinion	159
<i>Gaiane Nuridzhanian</i>	



# Editorial

*Catherine Gascoigne\* and Barry Solaiman\*\**

In this first issue of the fifth volume of the *Cambridge Journal of International and Comparative Law*, the authors grapple with the broad theme of rule-making in its many forms. To that end, the authors cover rule-making in both international law, European Union (EU) law and domestic law. They consider the perspectives of the executive, the legislature, the judiciary and that ever-amorphous concept, ‘civil society’. In so doing, certain cross-cutting themes emerge, such as the role of experts and the judiciary, regulatory competency as well as public participation and transparency in rule-making.

The first article to explore the idea of rule-making in this issue is ‘Global Public Goods and Democracy in International Legal Scholarship’, by Samuel Cogolati, Linda Hamid and Nils Vanstappen. These authors argue that international legal scholarship could contribute to democratically defining Global Public Goods. In particular, Cogolati, Hamid and Vanstappen contend that two modern approaches to international law—global administrative law and global constitutionalism—could play a particularly prominent role in including world citizens in the process of defining the global public domain. Specifically, global administrative law and global constitutionalism could import new participatory mechanisms to the global regulatory sphere and could include non-state actors in the process of international law-making.

Inclusion and transparency in law-making are also very much at the heart of Vigilenca Abazi’s article, which focuses on European Parliamentary law-making, in relation to which the author contends that public deliberation is dampened by extensive secrecy practices. Abazi examines the way in which the European Parliament is using its new powers conferred by the Lisbon Treaty to oversee law-making, but contends that this oversight is also taking place behind closed doors. The article calls for the European Parliament to make greater efforts to develop its public deliberation function, and in so doing, to bring to light the secrecy practices currently in place.

\* PhD Candidate, Gonville and Caius College, University of Cambridge.

\*\* PhD Candidate, Magdalene College, University of Cambridge.

The deficiencies of the European law-making system are further explored in Oliver Bartlett's article, 'The European Union's Competence Gap in Public Health and Non-Communicable Disease Policy'. In this article, Bartlett argues that, on balance, there are compelling reasons for the EU to engage in public health and non-communicable disease (NCD) policy-making. After surveying the European legal landscape with respect to this question, however, he acknowledges that the public health power in Article 168 of the Treaty for the European Union (TFEU) would be insufficient to realise the EU's regulatory ambitions with respect to NCD prevention. Bartlett therefore discusses the way in which the general internal market harmonisation competence in Article 114 of the TFEU might be drawn upon to bridge this competence gap to some extent, though he concedes that its use here is also problematic. While acknowledging that a more specific public health competence would be the most obvious solution, the probability that the EU would be given such an increased power in relation to public health is also conceded as being low.

Continuing on the theme of law-making in the EU, the fourth article, by Carlos Arrebola, Ana Júlia Maurício and Héctor Jiménez Portilla offers an econometric analysis of the influence of the Advocate General on the Court of Justice of the European Union. This insightful elucidation of the role of the Advocate General (AG) via regression models, highlights that the Court of Justice is 67% more likely to annul an act or part of an act where the AG advises to annul. This is in contrast to cases where the AG advises the Court to dismiss the case or declare it inadmissible. The findings raise important questions regarding judicial independence and the relevance of the AG, and provides a good foundation for future analyses on judicial reform.

The fifth contribution in this Issue is by Ioanna Pervou, who considers European Court of Human Rights (ECtHR) jurisprudence on the Greek economic crisis. Specifically, the author analyses the cases of *Koufaki & ADEDY v Greece* App nos 57665/12 and 57657/12 (ECtHR, 7 May 2013) and *Giavi v Greece* App no 25816/09 (ECtHR, 3 October 2013). Pervou considers the findings of the ECtHR regarding the rights to property and economic interests as well as the relevance of the principle of subsidiarity. Further, the interplay between the decisions of the ECtHR and the national courts reveals a level of congruence with the ECtHR reiterating the dicta of the national courts in support of its rationale. The rationale of those decisions from a democratic principle perspective is significant, given the Court sets limitations on property rights based on democratic justifications. Pervou's detailed analysis leads her to argue that European jurisprudence in the



crisis has been devastating for democracy because of the timidity of the Strasbourg Court. This is underlined by the principle of subsidiarity, which the author argues renders the ECtHR ineffective.

Following on from the previous articles is a case note written by Maria Elena Gennusa, which considers the Italian Constitutional Court Judgment No 238 (2014). In that case, the Italian Constitutional Court held that customary international law on state immunity covering war crimes and crimes against humanity had no effect. Gennusa discusses the legal reasoning of the Court and infers the real purpose behind the judgment and evaluates the appropriateness of the approach used to reach the Court's objectives. The author's concise analysis raises questions about whether the Court was seeking to constitutionalise international law.

Issue 5(1) concludes with two book reviews. The first is a book review written by Mark Retter for the book, *The UK and European Human Rights: A Strained Relationship?* edited by Katja S Ziegler, Elizabeth Wicks and Loveday Hodson. The book is a collection of essays and Retter offers an overview of the book, observes the underlying themes, articulates the methods used and offers insight into the effectiveness of the dialogue between the various authors. The second book review for this issue, by Gaiane Nuridzhanian, considers *The Law and Politics of the Kosovo Advisory Opinion*, edited by Marko Milanović and Sir Michael Wood. Following the general structure of the edited collection, the book provides a summary of the most important chapters in the collection and reflects upon the contribution of the book in the legal and political debate on the Kosovo Advisory Opinion.

Finally, it remains only to thank a number of people and organisations without whose support this issue could not have been produced. First, we are grateful for the generosity of the Cambridge Law Journal, the Lauterpacht Centre for International Law and the Centre for European Legal Studies at the University of Cambridge. Additionally, this issue could not have happened without the hard work and dedication of our Managing Editors: Michael Dafel, Darren Harvey, Massimo Lando, Lan Nguyen, Niall O'Connor and Stefan Theil, as well as their teams of Editors. We are also very fortunate to be well-served by a dedicated and illustrious Academic Review Board, the composition of which we set out on the opening pages to this issue. Finally, we are indebted to the previous Editors-in-Chief, most particularly, Naomi Hart and Ana Júlia Maurício, for guiding us through the transition to the role of Editor-in-Chief with their characteristic thoroughness, dedication and generosity.

# Global Public Goods and Democracy in International Legal Scholarship

*Samuel Cogolati,\* Linda Hamid\*\* and Nils Vanstappen\*\*\**

## Abstract

Over the last decade, global public goods (GPGs) have been at the centre of the policy discourse of prominent international organisations, States, and non-government organisations (NGOs) alike. The concept emerged in 1999, in a seminal book sponsored by the United Nations Development Programme (UNDP), and finds its origins in economic theory. The economic literature defines public goods as non-rival, since anyone can benefit from them without diminishing the quantity available to other consumers, and non-excludable, as no one can realistically be excluded from their consumption. Nowadays, an increasing number of public goods transcend national boundaries. For instance: climate change mitigation, the eradication of infectious diseases, the fight against corruption, or the protection of the ozone layer are all seen as GPGs. But despite its topicality, the concept has attracted little attention from legal scholars around the globe. Not only this, but among the few authors that actually engage with the topic, the majority focus on issues related to the provision of GPGs, while the question of what goods should be publicly provided in the first place, as well as the decision-making process underlying such a determination, has been left largely unexplored. It is with respect to this specific issue that we wish to contribute to the debate. In our view, the definition of GPGs is a matter of policy choice, as it goes beyond economic, value-free considerations. Therefore, it cannot lie beyond the control of democratic structures. GPGs cannot be defined in a democratic and legal vacuum—a legitimate and inclusive decision-making process is required. In this article, we endeavour to explain how international legal scholarship, in particular the global administrative law and global constitutionalism projects, can contribute to integrating democratic standards in the process of defining GPGs.

## Keywords

Global Public Goods, Democracy, Participation, Global Administrative Law and Global Constitutionalism

---

\* Doctoral Researcher, 'Global Governance and Democratic Government' at the Leuven Centre for Global Governance Studies, Katholieke Universiteit Leuven (Belgium) and PhD Fellow at the Research Foundation - Flanders (FWO) (Belgium).

\*\* Doctoral Researcher, 'Global Governance and Democratic Government' at the Leuven Centre for Global Governance Studies, Katholieke Universiteit Leuven (Belgium).

\*\*\* Doctoral Researcher, 'Global Governance and Democratic Government' at the Leuven Centre for Global Governance Studies, Katholieke Universiteit Leuven (Belgium).

The authors would like to thank Dr. Axel Marx, Dr. Martin Deleixhe and the anonymous reviewers of the CJICL for their helpful comments. Any errors or omissions remain, of course, ours.

# 1 Introduction

Over the last decade, global public goods (GPGs) have been at the centre of the policy discourse of prominent international organisations, States, and non-government organisations (NGOs) alike. The concept emerged in 1999 in a seminal book sponsored by the United Nations Development Programme (UNDP), and finds its origins in economic theory.<sup>1</sup> Economic literature defines public goods as *non-rival*, since anyone can benefit from them without diminishing the quantity available to other consumers, and *non-excludable*, as no one can realistically be excluded from their consumption.<sup>2</sup> Nowadays, an increasing number of public goods transcend national boundaries. For instance: climate change mitigation, the eradication of infectious diseases, the fight against corruption, or the protection of the ozone layer are all seen as GPGs. Despite its topicality, however, the concept has attracted little attention from legal scholars around the globe. Not only this, but among the few authors that actually engage with the topic, the majority focus on issues related to the provision of GPGs, while the question of what goods should be publicly provided in the first place, as well as the decision-making process underlying such a determination, has been left largely unexplored. It is with respect to this specific issue that we wish to contribute to the debate. In our view, the definition of GPGs is a matter of policy choice, as it goes beyond economic, value-free considerations. Therefore, it cannot lie beyond the control of democratic structures.

This article supports the broad thesis that GPGs cannot be defined in a democratic and legal vacuum, and that, as such, a legitimate process of decision-making is required. Yet, attempting to provide a fully-fledged democratic procedure to underlie the definition of GPGs within the constraints of the present article would be overly ambitious. Therefore, the scope of our study is methodologically limited in two ways. First, notwithstanding the importance of other democratic standards, such as accountability or transparency, the article operates on a narrower normative basis and focuses only on participation as a requisite standard in the definition of GPGs. Indeed, the UNDP has pinpointed the existence of a ‘participation gap’ as one of the central limitations of the current global governance architecture. In

- 1 See Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999).
- 2 See Paul Samuelson, ‘The Pure Theory of Public Expenditure’ (1954) 36(4) *Rev Econ Stat* 387; Tyler Cowen, ‘Public Goods’ in David R Henderson (ed), *The Concise Encyclopedia of Economics* (2008) (Liberty Fund 2008).

this regard, enhanced representation and involvement of all affected stakeholders is seen as a basic precondition for a legitimate decision-making process on GPGs. Secondly, in an attempt to offer pathways in bridging this so-called participation gap, the article mostly focuses on the doctrinal contributions of two modern fields of international law—global administrative law and global constitutionalism. Accordingly, our analysis is mainly centred on academic commentary and, to a lesser extent, on primary sources of international law, as it is exactly this academic commentary which we attempt to redirect.

In view of the above, this contribution is structured as follows: we start by giving a short account of the emergence of the concept in both economic theory and the global policy discourse (section 2); thereafter, we discuss the normative undertone underlying the rhetoric of GPGs and the policy choices that inevitably surround the definition of GPGs (section 3); finally, we turn to the burgeoning international legal scholarship on GPGs (section 4); and we endeavour to explain how international legal scholarship, in particular the fields of global administrative law and global constitutionalism, can contribute to integrating participation as a democratic standard in the process of defining GPGs (section 5).

## 2 The emergence of the global public goods discourse

### 2.1 Public goods theory

The GPGs project is, in essence, grounded in the neoclassical economic theory of (national) public goods. Therefore, its roots lie outside the realm of international legal doctrine. Some background on the concept is thus warranted here.<sup>3</sup> As opposed to a private good, such as a pie or a car, a public good refers to goods that are non-rival and non-excludable.<sup>4</sup> A lighthouse, for example, is such a good, as any sailor can benefit from the light without diminishing its availability to others (non-rivalry), and no one can be prevented from using its light as a navigational

3 See Meghnad Desai, 'Public Goods: A Historical Perspective' in Inge Kaul, Pedro Conceição, Katell Le Goulven and Ronald U Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003) 63.

4 Compare with 'club goods' that are non-rival but excludable (eg a toll road), and 'common pool resources' that are rival but non-excludable (eg high seas fisheries or the geostationary orbit).

aid (non-excludability).<sup>5</sup> Due to these characteristics, public goods are structurally affected by free-rider and collective-action problems and, as such, suffer from under-provision.

Public goods represent a case of market failures—that is, goods and services that cannot be left to the invisible hand of the free market. By virtue of the inherent free-rider problem in the provision of public goods, coercive authority is considered necessary in ensuring, at the very least, a minimal contribution by all.<sup>6</sup> Therefore, at the national level, State intervention is seen as indispensable in the financing and provision of public goods. In this respect, in one of his landmark articles, Paul Samuelson argued that, since the State is responsible for the welfare of its citizens, it must naturally also provide public goods.<sup>7</sup> Likewise, but from a different standpoint, Mancur Olson defined the state as ‘first of all an organization that provides public goods for its members, the citizens.’<sup>8</sup>

The neoclassical theory of public goods has, of course, also been criticised. Samuelson assumes that the welfare State is best suited to provide and distribute public goods because it could ‘somehow’ infer its citizens’ preferences, but fails to discuss exactly how (ie, through which processes) governments can legitimately define public goods.<sup>9</sup> Indeed, as Elisabetta Marmolo has indicated, ‘whether or not their provision is legitimately within the domain of public action cannot be determined on the basis of a narrow criterion of economic efficiency’.<sup>10</sup> To a

- 5 A lighthouse is indeed most often cited as the classical example of a public good. However, its qualification as such has been challenged on several occasions, most notably by Ronald Coase. This shows that barely any goods can be considered ‘pure’ public goods. See Ronald H Coase, ‘The Lighthouse in Economics’ (1974) 17(2) *JL Econ* 357.
- 6 See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (HUP 1965) 98: ‘[m]ost economists accept a theory which implies that the basic services of government can be provided (...) only through compulsion. This is the theory of “public goods”’; see also Ian Loader and Neil Walker, ‘Policing as a Public Good: Reconstituting the connections between Policing and the State’ (2001) 5(1) *Theor Criminol* 9–35.
- 7 Samuelson (n 2). Although many authors trace the origins of the public goods concept back to Samuelson, the basis for his work can probably be found in earlier German scholarship; see also Richard Sturn, ‘“Public goods” before Samuelson: Interwar *Finanzwissenschaft* and Musgrave’s Synthesis’ (2010) 17(2) *Europ J Hist Econ* 279.
- 8 Olson (n 6) 15.
- 9 Erik A Andersen and Birgit Lindsnaes, ‘Public Goods: Concepts and Definition’ in Erik A Andersen and Birgit Lindsnaes (eds), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff 2007) 32.
- 10 Elisabetta Marmolo, ‘A Constitutional Theory of Public Goods’ (1999) 38(1) *J Econ Behav Organ* 27.

large extent, the critics claim, the provision of public goods depends on political preferences. In this regard, Desai has argued that:

Far from being a neutral technical process of summing up preferences and locating the optimal solution through a social welfare function, as in Samuelson's characterisation, the provision of public goods is a political process—one influenced by elections and mediated by political parties.<sup>11</sup>

In the end, deciding on the public provision of certain goods is a political process that must be democratic in order to be legitimate. With this in mind, it becomes clear that modern liberal states draw their legitimacy from a 'democratically controlled framework that defines what counts as a public good'.<sup>12</sup>

## 2.2 The globalisation of public goods

The origins of the GPGs project can be situated with the UNDP Office of Development Studies, which, in an attempt to understand the conceptual and methodological challenges, as well as the public policy dimensions surrounding the phenomenon,<sup>13</sup> published three books on the topic in 1999,<sup>14</sup> 2003,<sup>15</sup> and 2006.<sup>16</sup> According to Inge Kaul and her co-authors, in addition to sharing the properties of non-rivalry and non-excludability exposed above, GPGs should produce benefits that are available worldwide and across social strata.<sup>17</sup> In this regard, they define GPGs as 'outcomes (or intermediate products) that tend towards universality in the sense that they benefit all countries, population groups, and generations'.<sup>18</sup>

This definition means that, in contrast to neoclassical economic theory, the concept of 'goods', as reconstructed by the UNDP, covers a very large spectrum

11 Desai (n 3) 69; see below text to n 59–62.

12 Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism* (OUP 2010) 250.

13 See also Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (OUP 2007); Todd Sandler, *Global Collective Action* (CUP 2004).

14 Kaul, Grunberg and Stern (n 1).

15 Kaul, Conceição, Le Goulven and Mendoza (n 3).

16 Inge Kaul and Pedro Conceição (eds), *The New Public Finance: Responding to Global Challenges* (OUP 2006).

17 Inge Kaul, Isabelle Grunberg and Marc A Stern, 'Defining Global Public Goods' in Kaul, Grunberg and Stern (n 1) 16.

18 *ibid.*

of global issues:<sup>19</sup> ‘natural global commons’, such as the ozone layer or climate stability; ‘human-made global commons’, like cultural heritage<sup>20</sup> or knowledge;<sup>21</sup> and ‘global policy outcomes’, such as climate change mitigation<sup>22</sup> and distributive justice.<sup>23</sup> Under this approach, it should be stressed that there cannot be any fixed list of GPGs and the term ‘good’ should be understood in the broadest possible sense—not solely as a tangible commodity or a normative standard. GPGs simply point to policy challenges that cannot be adequately resolved at the State level and which, therefore, require collective action at the global level. For instance, the concept has now come to comprise economic governance and trade integration, the eradication of communicable diseases, environment and climate change, food security, and, for some, even democracy.<sup>24</sup>

The under-provision of such GPGs can be explained by drawing a parallel between the international and national levels.<sup>25</sup> States, who—like individuals at the national level—are considered to act as rational, self-interested actors, will not be prepared to contribute or take upon themselves the task of providing GPGs without being somehow coerced to do so. Consider, for instance, major polluter countries such as the United States, which has never ratified the Kyoto Protocol. States and other global actors have an incentive to free-ride on the efforts of others, and in the absence of agreed upon collective action, this will inevitably lead to global underinvestment and undersupply.

According to the first UNDP study, the under-provision of GPGs is caused by three central weaknesses of the current global governance system: (i) the ‘jurisdictional gap’ or, in other words, the absence of a State-like entity at the global level for supplying GPGs, or at least enforcing contribution by all; (ii) the ‘participation gap’, namely the exclusion of certain groups of countries, population

19 We use the same three classes of global public goods as detailed in Kaul, Grunberg and Stern, ‘Global Public Goods: Concepts, Policies and Strategies’ in Kaul, Grunberg and Stern (n 1) 453–55.

20 See Ismail Serageldin, ‘Cultural Heritage As Public Good: Economic Analysis Applied to Historic Cities’ in Kaul, Grunberg and Stern (n 1) 241.

21 See Joseph E Stiglitz, ‘Knowledge As a Global Public Good’ in Kaul, Grunberg and Stern (n 1) 309.

22 See Scott Barrett, ‘Montreal versus Kyoto: International Cooperation and the Global Environment’ in Kaul, Grunberg and Stern (n 1) 193.

23 See Ethan B Kapstein, ‘Distributive Justice as an International Public Good: A Historical Perspective’ in Kaul, Grunberg and Stern (n 1) 89.

24 See Peter J Burnell, ‘International Democracy Promotion: A Role for Public Goods Theory?’ (2008) 14(1) *Contemp Pol* 41.

25 See above text to n 6–9.

groups, including future generations, civil society and business from the decision-making process surrounding the provision of GPGs; and (iii) the ‘incentive gap’, which refers to the lack of perceived benefits for those participating in the production and financing of GPGs at the international level.<sup>26</sup>

Over the last two decades, this concept has gradually permeated the policy discourse of a large number of international organisations, particularly in the field of development.<sup>27</sup> Building upon an idea that emerged during the 2002 International Conference on Financing for Development and the 2002 World Summit on Sustainable Development, Sweden<sup>28</sup> and France<sup>29</sup> signed an agreement to initiate an International Task Force on GPGs. The Task Force, which was co-chaired by Ernesto Zedillo, former President of Mexico, and Tidjane Thiam, former Ivorian Minister of Development, was intended to translate the theoretical concept of GPGs as developed by the UNDP into a more practical tool for policy-makers. The Task Force published its final report in 2006 with a series of recommendations on the financing and production of GPGs, in particular, poverty-reduction.<sup>30</sup> Meanwhile, the United Nations General Assembly (UNGA),<sup>31</sup> the United Nations Industrial Development Organization (UNIDO),<sup>32</sup> the Food and Agriculture Organization (FAO),<sup>33</sup> the World Bank (WB),<sup>34</sup> the Organisation for Economic Coordination

26 Kaul, Grunberg and Stern (n 1) xxvi.

27 Maurizio Carbone, ‘Supporting or Resisting Global Public Goods? The Policy Dimension of a Contested Concept’ (2007) 13(2) *Glob Gov* 179.

28 See the study on development financing prepared for the Swedish Ministry for Foreign Affairs, Francisco Sagasti and Keith Bezanson, *Financing and Providing Global Public Goods: Expectations and Prospects* (Regeringskansliet 2001).

29 See the French position on global public goods, Directorate-General for Development and International Cooperation, Ministry of Foreign Affairs, and Treasury Directorate, Ministry of the Economy, Finance and Industry ‘Global Public Goods’ (February 2002) <[www.diplomatique.gouv.fr/en/IMG/pdf/biens\\_publ\\_gb.pdf](http://www.diplomatique.gouv.fr/en/IMG/pdf/biens_publ_gb.pdf)> accessed 1 April 2016.

30 International Task Force on Global Public Goods, ‘Meeting Global Challenges: International Cooperation in the National Interest’ (2006) <[www.ycsg.yale.edu/assets/downloads/meeting\\_global\\_challenges\\_global\\_public\\_goods.pdf](http://www.ycsg.yale.edu/assets/downloads/meeting_global_challenges_global_public_goods.pdf)> accessed 1 April 2016.

31 See UNGA ‘Recommendations of the High-level Panel on Financing for Development’ (26 June 2001) UN Doc A/55/1000.

32 See UNIDO, ‘Public Goods for Economic Development’ (2008) <[www.unido.org/fileadmin/user\\_media/Publications/documents/Public\\_goods\\_for\\_economic\\_development\\_sale.pdf](http://www.unido.org/fileadmin/user_media/Publications/documents/Public_goods_for_economic_development_sale.pdf)> accessed 1 April 2016.

33 See FAO, ‘The State of Food and Agriculture’ (2002) <[www.fao.org/docrep/004/y6000e/y6000e00.htm](http://www.fao.org/docrep/004/y6000e/y6000e00.htm)> accessed 1 April 2016.

34 See Development Committee, ‘Poverty Reduction and Global Public Goods: Issues for the World Bank in Supporting Global Collective Action’ (2000) DC/2000-16, 2.



and Development (OECD),<sup>35</sup> the World Health Organization (WHO),<sup>36</sup> and the European Union (EU)<sup>37</sup> have all branded the provision of GPGs as a new policy challenge. In fact, the concept has been embraced by so many actors, in so many different contexts, that one commentator has pointed out that ‘the risk is to create a *catch-all* to which people can attach anything they want’.<sup>38</sup>

### 3 The issue of democracy in the definition of global public goods

#### 3.1 Global public goods as a legitimising instrument

As is clear from the developments depicted here, GPGs have gradually become a buzzword in the global policy discourse, evolving from a technical, economic concept to a powerful advocacy tool in favour of increased international cooperation and regulation in today’s globalised world.<sup>39</sup> Beyond the Washington consensus,<sup>40</sup> the concept of GPGs is now frequently used to justify a greater role for international organisations and, in the field of development aid, it has been adopted to highlight the need for a renewed model of development aid, for instance, by raising global

35 See the study on financing global public goods prepared for the OECD Development Centre: Helmut Reisen, Marcelo Soto and Thomas Weithöner, ‘Financing Global and Regional Public Goods through ODA: Analysis and Evidence from the OECD Creditor Reporting System’ (2004) 232 Development Centre Working Papers 1, 11.

36 See WHO, ‘Global Public Goods’ (2016) <[www.who.int/trade/glossary/story041/en/](http://www.who.int/trade/glossary/story041/en/)> accessed 1 April 2016.

37 See European Commission, ‘EU Focus on Global Public Goods’ (2002) <<http://ec.europa.eu/environment/archives/wssd/pdf/publicgoods.pdf>> accessed 1 April 2016; Council Regulation (EC) 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L 77/44; European Report on Development, ‘Combining Finance and Policies to Implement a Transformative Post-2015 Development Agenda’ (2015) <<http://ecdpm.org/wp-content/uploads/2015-European-Report-on-Development-English.pdf>> accessed 1 April 2016; see also Mikaela Gavas, ‘The EU and Global Public Goods: Challenges and Opportunities’, DIIS Report 2013:05 <<http://um.dk/en/~media/UM/English-site/Documents/Danida/Partners/Research-Org/Research-studies/EU-Global-Public-Goods.pdf>> accessed 1 April 2016.

38 Carbone (n 27) 185.

39 Jean Coussy, ‘The Adventures of a Concept: Is Neo-Classical Theory Suitable for Defining Global Public Goods?’ (2005) 12(1) Rev Intl Pol Econ 177.

40 On the concept of the Washington consensus, see Sarah Babb, ‘The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor’ (2013) 20(2) Rev Intl Pol Econ 268.

taxes.<sup>41</sup> This discourse, we contend, has attached an implicit normative undertone to a concept that had initially been designed to describe an objective reality. Therefore, we can now accurately speak of GPGs as a legitimising instrument. In fact, this transformation is splendidly captured by Long and Woolley:

Kaul and her colleagues have increasingly and overtly left the original economic analysis behind, supplementing the idea with concepts and theory from sociology, political science, and other disciplines. But the economic concept is nevertheless still deployed as a signifier or as a persuasive technique, an example of what Donald McCloskey called economic rhetoric. (...) But we should not be deceived: this is a 'UN-plus' framework—the United Nations conceived as a preeminent actor in the world of global public goods, as overseer or coordinator, if not provider.<sup>42</sup>

Not only by adding sociological or political considerations to the concept, but also by depicting GPGs as 'goods and activities with positive utility, including positive externalities', in contrast to global public 'bads' which imply 'public disutility',<sup>43</sup> the UNDP study has moved away from the technical, economic concept. In other words, presenting a policy challenge as a global public 'good' also labels the good in question as something that is normatively positive. For instance, while ozone depletion and global warming would constitute global public 'bads', free vaccinations and reductions of greenhouse gas emissions would represent global public 'goods'.<sup>44</sup> Yet, whereas these simple examples might not raise controversies, people might in fact disagree about the positive or negative externalities of market integration, the prevention of Autoimmune Deficiency Syndrome (AIDS) (in the form of contraception), or nuclear energy. This is why the normative distinction made by the UNDP is entirely absent in economic theory. The word 'good' is normatively neutral in economic theory and, as such, can have both positive and negative connotations.<sup>45</sup>

41 See, eg, Recommendations of the High-level Panel on Financing for Development (n 31) 9: 'The International Conference on Financing for Development should explore the desirability of securing an adequate international tax source to finance the supply of global public goods.'

42 David Long and Frances Woolley, 'Global Public Goods: Critique of a UN Discourse' (2009) 15(1) *Glob Gov* 107, 117–18.

43 Kaul, Grunberg and Stern (n 1) 6.

44 Oliver Morrissey, Dirk Willem te Velde and Adrian Hewitt, 'Defining International Public Goods: Conceptual Issues' in Marco A. Ferroni and Ashoka Mody (eds), *International Public Goods: Incentives, Measurement and Financing* (Kluwer 2002) 35–36.

45 Gregory Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *EJIL* 669, 673–74.

The almost ubiquitous references to the ‘objective’ economic theory of public goods<sup>46</sup> have come to play the role of a legitimising instrument, not only for the UNDP, but also for some of the international organisations mentioned here.<sup>47</sup> In this regard, Daniel Bodansky has rightfully argued that, ‘[r]ecasting an issue in terms of “global public goods” gives it greater status and thus serves a useful rhetorical function.’<sup>48</sup> In the same way as the concept of public goods has served to justify the welfare function of the state at the national level in Samuelson’s theory,<sup>49</sup> the concept of GPGs has been developed ‘to enhance the scope for global governance projects and thus legitimize their pursuit.’<sup>50</sup> Therefore, when an international organisation (or other actors for that matter) labels an issue as a GPG, it tacitly presents it as an economic value-free qualification, and thereby attempts to justify its legitimacy to produce or to supervise the production of the good in question.

### 3.2 Global public goods as a policy choice

Akin to the national level,<sup>51</sup> this economic objectivity can be disputed on the ground that both non-rival and non-excludable aspects are deemed subjective, malleable, or prone to change as technology advances. In fact, most goods cannot be inherently public, they normally become public through public provision.<sup>52</sup> The choice for (or against) public provision is never a neutral one, as it is generally subject to diverging views. Even goods that are ‘*de facto* public,’<sup>53</sup> on account of their non-excludability and non-rivalry, such as the lighthouse, may, under certain circumstances, be considered unworthy of public provision.<sup>54</sup> For instance, a society could very well decide that, since the lighthouse only benefits foreign ships,

46 Daniel Bodansky, ‘What’s in a Concept? Global Public Goods, International Law and Legitimacy’ (2012) 23(3) EJIL 651, 655; Coussy (n 39) 178. See text to n 39.

47 Jean Coussy, ‘Biens Publics Mondiaux : Théorie Scientifique, Réalité Émergente et Instrument Rhétorique’, in François Constantin (ed), *Les Biens Publics Mondiaux: Un Mythe Légitimateur Pour l’Action Collective ?* (L’Harmattan 2002) 31; Coussy (n 39).

48 Bodansky (n 46) 655.

49 See above text to n 6–9.

50 Shaffer (n 45) 674.

51 See above text to n 6–9.

52 See, eg, Marmolo (n 10) 28; John Hudson, Philip Jones, “Public Goods”: An Exercise in Calibration’ (2005) 124 Public Choice 267, 268; Séverine Deneulin, Nicholas Townsend, ‘Public Goods, Global Public Goods and the Common Good’ (2007) 34 Intl J Soc Econ 19, 23.

53 Inge Kaul, ‘Global Public Goods: Explaining their Underprovision’ (2012) 15(3) JIEL 729, 731.

54 See, eg, Deneulin, Townsend (n 52) 23.

it will not bear the cost thereof. The authors of the UNDP study acknowledge this very basic fact as well: “[p]ublic” and “private” are in many—perhaps most—cases a matter of policy choice: a social construct.<sup>55</sup>

GPGs should thus be redefined, not as goods that are purely non-rival and non-excludable at the global level, but as ‘goods that are in the global public domain.’<sup>56</sup> It is not because the WB labels ‘free and open trade’ as a GPG<sup>57</sup> that trade integration is *good* per se—presenting free trade as a global regulatory goal is a policy choice, which should be subject to a democratic debate. Even less controversial examples of GPGs, such as climate change mitigation<sup>58</sup> raise questions as to why to prioritise this particular good (eg over free trade and market efficiency), how to produce the good in question (eg through windmills or nuclear plants), and who should pay (eg developed or developing countries). Undeniably, this requires a number of policy choices to be made.<sup>59</sup> While we may all agree on certain generally defined GPGs, such as human rights protection or the eradication of infectious diseases, the devil lies in the details. As the International Task Force on GPGs has acknowledged, ‘[a] critical reality of global public goods is that they are contested; states have different interests, values and preferences, even where they share long-term goals.’<sup>60</sup> Indeed, there is no such thing as a ‘natural’ GPG, neutrally deducted from objective categories; defining or determining GPGs is always a matter of policy choice.

### 3.3 Global public goods as the ideal outcome of a democratic decision-making process

Once we realise that defining GPGs involves the making of essential policy choices, the underlying issue of a legitimate and democratic decision-making process becomes all the more important. We have already noted here that, at the national level, the State is, most often, in a position to gauge the diverging interests, values and preferences of its citizens through majoritarian, democratic, and constitutional

55 Inge Kaul, Ronald U Mendoza, ‘Advancing the Concept of Public Goods’ in Kaul, Conceição, Le Goulven and Mendoza (n 3) 104; Kaul (n 53) 731.

56 Carbone (n 27) 183.

57 See Development Committee (n 34) 5.

58 See, eg, Barrett (n 22) 192.

59 See Bodansky (n 46).

60 International Task Force on Global Public Goods (n 30) 86.

checks and balances.<sup>61</sup> At the global level, however, the current horizontal, decentralised, and fragmented legal order arguably obstructs the construction of a similar democratic process.

The first UNDP study emphasised from the very beginning that, akin to the national level, ‘most judgments of what is desirable [at the global level] can only be the result of a political process’, and that this process ‘has to be made transparent and participatory’.<sup>62</sup> In this sense, Kaul et al. argue that other important actors, such as NGOs, civil society, and the private sector should be included in decision-making processes at the global level. Interestingly, the Task Force on GPGs has also echoed this concern by characterising GPGs as issues ‘that are defined through a broad international consensus or a legitimate process of decision-making’.<sup>63</sup>

While this should, indeed, be the case, Kaul et al. have nonetheless pinpointed the existence of a ‘participation gap’ as one of the three central limitations of the current global governance architecture.<sup>64</sup> The participation gap essentially refers to the under-representation of many relevant stakeholders, in particular ‘the marginal and voiceless groups’.<sup>65</sup> This gap results largely from the fact that international cooperation remains primarily intergovernmental, although we now live in a multi-actor world. Appropriately, then, Kaul and Mendoza have called ‘for the matching of the circle of stakeholders in a particular public good with the circle of participants in negotiations on its provision, either with a consultative or a decisionmaking voice’.<sup>66</sup> The EU Commission too has indicated that it views this so-called ‘participation gap’ as one of the major shortfalls of the current policy-making arrangements at the global level. In the Commission’s opinion, any decisions on GPGs ‘are political choices in which the maximum involvement of all those affected is crucial’.<sup>67</sup> It seems, therefore, that enhanced participation in the decision-making process on GPGs has become a basic precondition for a more legitimate policy-making architecture.

Of course, this begs the question who exactly should be given enhanced participation rights. Unfortunately, the scope of this article does not allow for a thorough discussion of this question. However, we would like to indicate that

61 See above text to n 6–9.

62 Kaul, Grunberg and Stern (n 1) 6.

63 International Task Force on Global Public Goods (n 30) x.

64 See Kaul, Grunberg and Stern (n 1) xxvi. See also above text to n 23.

65 *ibid.*

66 Kaul and Mendoza (n 55) 91.

67 See European Commission (n 37).

any attempt at an answer should be two-phased. First, the ‘marginal and voiceless’ groups, or ‘disregarded’ as Stewart calls them,<sup>68</sup> should be identified. In other words, this would normally require an analysis of which groups are currently not heard in the global public debate, which may differ from one governance structure to another. Secondly, it should be determined how and by whom these groups would best be represented. This can, for example, require an enhanced role for certain developing States to counter the hegemonic tendencies of international law. In other cases, and we would argue that these cases arise quite often, a more prominent role for NGOs might be (part of) the solution.

## 4 Global public goods in international legal scholarship

### 4.1 A burgeoning legal scholarship with a focus on output legitimacy

Surprisingly, the concept of GPGs has attracted very little attention from international legal scholars, with the majority of authors writing on the topic coming from fields such as economics, political sciences, or international relations. International law has been relatively late in taking notice of the GPGs debate, since it took some years after the publication of the three UNDP volumes on GPGs before a limited, but slowly increasing number of legal scholars have started joining the debate.<sup>69</sup>

68 Richard B Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108(2) AJIL 211.

69 Actually, the majority of legal articles that tackle the GPGs question can be traced back to four fairly recent symposia: (i) the symposium edition of the *Journal of International and Economic Law*, which published four of the papers presented at the European University Institute’s (EUI) February 2011 conference on Multilevel Governance of Interdependent Public Goods. See Ernst-Ulrich Petersmann, ‘Mini-Symposium on Multilevel Governance of Interdependent Public Goods. Introduction and Overview: A Research Agenda for Making Global Public Goods Theory More Policy Relevant’ (2012) 15(3) JIEL 709; Pascal Lamy, ‘Global Governance: From Theory to Practice’ (2012) 15(3) JIEL 721; Kaul (n 53) 729; Jan Wouters and Thomas Ramopoulos, ‘The G20 and Global Economic Governance: Lessons from Multi-Level European Governance?’ (2012) 15(3) JIEL 751; Daniel C Esty and Anthony L I Moffa, ‘Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime’ (2012) 15(3) JIEL 777; (ii) the 2012 volume of the *Duke Journal of Comparative & International Economic Law*, where two of the papers presented at a roundtable organised between distinguished American scholars at Duke Law on 22 October 2011 were published: David Gartner, ‘Global Public Goods and Global Health’ (2012) 22 Duke J Comp & Intl L 303;

While some of these scholars use the GPGs concept as a new spectrum to rehash existing issues of international law,<sup>70</sup> others identify the provision of GPGs as a brand-new challenge for international law,<sup>71</sup> and most, if not all, conclude that international law could, in fact, contribute to the effective provision of GPGs.<sup>72</sup> For instance, Bodansky justly argues that, '[s]ince global public goods cannot be adequately produced by the market, we need international institutions and international law to provide them.'<sup>73</sup> Likewise, Trachtman contends that international law 'comprise[s] a kind of rudimentary government' to provide GPGs,<sup>74</sup> whereas Shaffer affirms that international law 'is required to produce global public goods.'<sup>75</sup>

However, the vast majority of legal scholars writing on the topic argue that international law as it currently stands, with its cardinal principles of state sovereignty and state consent, constitutes a hindrance to the effective provision of

Timothy Meyer, 'Global Public Goods, Governance Risk, and International Energy' (2012) 22 Duke J Comp & Intl L 319; (iii) the 2012 volume of the *European Journal of International Law*, which published eight articles presented at the European Society of International Law and American Society of International law joint symposium organised at EUI on *Global Public Goods and the Plurality of Legal Orders*: Fabrizio Cafaggi and David D Caron, 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium' (2012) 23(3) EJIL 643; Bodansky (n 46); Shaffer (n 45); Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"' (2012) 23(3) EJIL 695; Francesco Francioni, 'Public and Private in the International Protection of Global Cultural Goods' (2012) 23(3) EJIL 719; Petros C Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23(3) EJIL 731; Elisa Morgera, 'Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23(3) EJIL 74; André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23(3) EJIL 769. See also Issue 1 of Volume 23 of the *Indiana Journal of Global Legal Studies*, which published two articles on GPGs presented at a colloquium hosted by the Stellenbosch Institute for Advanced Study on *Global Human Rights Law and the Boundaries of Statehood*: Daniel Augenstein, 'To Whom it May Concern: International Human Rights Law and Global Public Goods' (2016) 23(1) Ind J Global Legal Stud [forthcoming]; Neil Walker, 'Human Rights and Public Goods: The Sound of One Hand Clapping?' (2016) 23(1) Ind J Global Legal Stud [forthcoming].

70 See, eg, Gartner (n 69), reviewing the role of international law in the prevention or containment of communicable diseases; Morgera (n 69) where the author tackles the issue of non-judicial enforcement of global public goods in the context of global environmental law.

71 See, eg, Bodansky (n 46).

72 See Shaffer (n 45).

73 Bodansky (n 46) 652.

74 Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013) 9.

75 Shaffer (n 45) 670–71.

GPGs. Shaffer, for example, warns that international law could ‘potentially impede [the] dynamic processes that are needed to address global public goods challenges’.<sup>76</sup> Moreover, Nico Krisch asserts that ‘classical international law’ is inadequate in providing proper solutions to the challenges posed by the provision of GPGs.<sup>77</sup> Similarly, Trachtman argues that, ‘[i]n the international system, based as it is on individual state consent, it may be tougher to make rules that would bind free riders’.<sup>78</sup> In this sense, Petersmann, too, concludes that, to limit the participation problem, one would need ‘rights-based rules, institutions and governance mechanisms that go beyond those of “Westphalian intergovernmentalism”’.<sup>79</sup> In other words, most legal scholars argue that international law *de lege lata*, ie organised along Westphalian lines, is ill-suited to the provision of GPGs as it lacks coercive mechanisms, but equally contend that international legal rules and institutions are essential to establishing exactly those coercive mechanisms that are currently lacking. In order adequately to provide GPGs, a major overhaul of the international legal system would thus be required.

This fairly radical critique of the current international legal system actually finds its origin in older publications on GPGs. The International Task Force on GPGs opened its final report by highlighting this exact issue, namely that the principles of state sovereignty and state consent are a major obstacle for the effective provision of GPGs and the ‘basic problem [that] underlies all others’.<sup>80</sup> In the same vein, the economist William Nordhaus emphasises that, ‘under international law (...), there is no legal mechanism by which disinterested majorities, or supermajorities short of unanimities, can coerce reluctant free-riding countries into mechanisms that provide for global public goods’.<sup>81</sup> In his view, international law should ‘come to

76 *ibid* 671.

77 Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108(1) *AJIL* 1.

78 Trachtman (n 74) 154.

79 Ernst-Ulrich Petersmann, ‘Introduction and Overview: Lack of Adequate Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century?’ in Ernst-Ulrich Petersmann (ed), *Multilevel Governance of Interdependent Public Goods Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, EUI Working Paper RSCAS 2012/23, 46 <[http://cadmus.eui.eu/bitstream/handle/1814/22275/RSCAS\\_2012\\_23final.pdf?sequence=2](http://cadmus.eui.eu/bitstream/handle/1814/22275/RSCAS_2012_23final.pdf?sequence=2)> accessed 1 April 2016.

80 International Task Force on Global Public Goods (n 30) xi.

81 William D Nordhaus, ‘Paul Samuelson and Global Public Goods’ (5 May 2005) 7 <<http://www.econ.yale.edu/~nordhaus/homepage/PASandGPG.pdf>> accessed 1 April 2016.



grips with the fact that national sovereignty cannot deal with critical global public goods.<sup>82</sup>

The fact that the classical view on international law is increasingly rejected by the GPG literature is no surprise. The prisoner's dilemma, on which the GPGs theory is based,<sup>83</sup> outlines a situation whereby two prisoners are unable to communicate and therefore act solely in their own rational self-interest. As a result, both prisoners confess and each serves more years in prison than they would have if they had established a common strategy. Much like the individuals in the prisoner's dilemma, it is expected that sovereign States acting in total independence will defect from cooperation unless coercive mechanisms are introduced.<sup>84</sup> What this analogy highlights is that, in order to coerce free-rider States, we need to transpose certain domestic strategies at the global level.<sup>85</sup> For instance, the Report of the High-level Panel on Financing for Development has proposed that the supply of GPGs be financed through global taxation.<sup>86</sup> For some legal scholars, it seems, the solution to this inextricable dilemma is to impose inter-state cooperation by 'design[ing] punishments that are sufficient to induce compliance.'<sup>87</sup> Nico Krisch equally argues that the effective supply of GPGs calls for a 'turn to non-consensual law making mechanisms, especially through powerful international institutions with majoritarian voting rules.'<sup>88</sup> In the models promoted by these authors, decisions on GPGs appear to be legitimised through the effectiveness of the output.

#### 4.2 Democracy: The missing link

This emerging scholarship is, of course, welcome. However, as we have previously noted, the focus mainly lies on the effective supply of GPGs, whereas the process of defining and identifying which 'goods' to provide collectively at the global level seems to constitute a blind spot in the current international legal discourse. We

82 *ibid* 8.

83 See Kaul, Grunberg and Stern (n 1) 7.

84 *ibid* 8.

85 François Constantin, 'Les Biens Publics Mondiaux, Un Imaginaire Pour Quelle Mondialisation?' in Constantin (n 44) 81.

86 See above text to n 39. See also Recommendations of the High-level Panel on Financing for Development (n 41) 9.

87 Trachtman (n 74) 161.

88 Krisch (n 77) 1.

find that the link between GPGs, international law, and democracy remains highly unexplored and that very few scholars actually discuss the role that international law could play in guaranteeing a democratic decision-making process on GPGs. This is highly unfortunate, particularly since the UNDP study on GPGs highlights the democratic deficit inherent in the mechanisms that provide public goods at the global level—most notably, the so-called ‘participation gap’.<sup>89</sup> Therefore, if international legal scholarship is to help design appropriate decision-making processes on GPGs, matters of democratic legitimacy and participation should be kept at the forefront of this debate.

It is an interesting, yet largely unexplored question in the literature on GPGs, whether democratic ideals would be better served by a reconfiguration of the international legal order towards centralised and non-consensual coercive mechanisms, rather than traditional multilateral law-making mechanisms established on State sovereignty and State consent. In our opinion, rather than closing the current ‘participation gap’ in global governance, the erosion of the consensual underpinnings of international law runs the risk of widening it.<sup>90</sup> Although we plea in this paper for enhanced participation of different (non-State) actors, we readily admit that States remain central to the representation of individuals’ interests and concerns at the global level, through the democratic procedures established at the State level. Consequently, majoritarian (or otherwise non-consensual) decision-making at the global level might lead to further disregard for the interests of States belonging to the minority or the non-consenting. In this regard, Krisch himself admits that anti-consensual arguments, inspired by an urgency to solve collective-action problems, might, in fact, raise deeper concerns from a democratic perspective.<sup>91</sup> Therefore, what we discuss here can be best understood as an addition to, rather than as a ‘*bouleversement*’, of the existing international legal order.

At this point, we wish to distance ourselves from issues regarding the provision of GPGs by raising a preliminary question which we contend merits as much, if not more, attention from legal scholarship: whether (and how) the decision-making

89 See above text to n 26.

90 Helen Keller, ‘Codes of Conduct and Their Implementation: The Question of Legitimacy’ in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 257.

91 Krisch (n 77) 5–6.

processes underlying the definition of GPGs can be democratised. Even Krisch, who points to the ‘shift from input to output legitimacy’,<sup>92</sup> admits that:

The actual provision of public (...) goods will hardly ever serve entirely to remove questions of input legitimacy from view: even if everybody receives benefits from an institution, some typically gain more and some less; distributional conflict remains ubiquitous.<sup>93</sup>

In our view, the logic of efficiency or urgency cannot sufficiently legitimise the emergence of centralised and non-consensual coercive mechanisms at the global level. Rather than simply dismissing consensualism in the name of effective provision, we argue that an alternative set of ‘global democratic checks’ is much needed.<sup>94</sup> In this regard, it is our belief that international legal scholarship can contribute to rendering decisions on GPGs more adjusted to the preferences of world citizens, or, in other words, impose ‘a constraint on the unilateral definition of global public goods.’<sup>95</sup>

## 5 The way forward: Bridging the participation gap

### 5.1 The participation gap in international legal scholarship

Within a liberal democratic State, legally defined procedures serve to ensure that decision-making processes on public goods are democratic. Conversely, within the horizontal and decentralised international legal order, a similar process on GPGs does not exist. Indeed, as Shaffer explains, contrary to the national level, where citizens are normally involved in decision-making processes on public goods,<sup>96</sup> at the global level, ‘[w]e face considerable obstacles in (...) revealing preferences through democratically accountable international institutions.’<sup>97</sup> In this respect, while we remain thoroughly aware that a more developed account of the principles likely to democratise the policy choices on GPGs is warranted, we have chosen

92 *ibid* 6.

93 Krisch (n 12) 250.

94 Shaffer (n 45) 693.

95 Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16(3) *EJIL* 369, 395.

96 See above text to n 6–9.

97 Shaffer (n 45) 693.

to operate on a narrower normative basis here. More precisely, our focus will lie mainly with the ‘participation gap’ identified by the UNDP study as part of the larger democratisation process underlying the definition of GPGs. Arguably, in this manner we can contribute more effectively to a debate that is, to say the least, extremely broad.

We note, however, that the issue of public participation (or lack thereof) in the decision-making processes at the global level is not entirely unexplored by legal scholars. In fact, the democratic deficit in international law has been the concern of a growing number of legal authors. For instance, Gráinne de Búrca has called for a ‘democratic-striving or democracy-developing approach’, whereby, rather than effectiveness or efficiency (in the provision of GPGs, for example), principles relating to the participation and representation of relevant stakeholders would be paramount to the global governance structure.<sup>98</sup> Still, applying democratic theories developed for the nation-state to the global level has proven, at best, impractical. This, Bodansky argues, has prompted a re-orientation of scholarship toward ‘particular aspect[s] of democracy, namely public participation.’<sup>99</sup> Indeed, since the provision of public goods is no longer the exclusive responsibility of States, but one that is shared with the UN and other global actors, ‘rights of political participation’ should not be limited to the domestic level.<sup>100</sup>

In particular, two emerging fields of international law are of interest here: global administrative law and global constitutionalism, as these attempt to bridge the participation gap in global governance (and, implicitly, the governance of GPGs) by extending domestic administrative and constitutional tools to the global level. Of course, the challenges of transposing participation as a democratic standard from the State to the global level are enormous. The founders of global administrative law readily admit that the pragmatic steps toward greater inclusiveness ‘fall short of representation of the public on a basis equivalent to domestic electoral mechanisms and thus will not be able to justify the exercise of administrative authority on a

98 Gráinne de Búrca, ‘Developing Democracy Beyond the State’ (2008) 46 Colum J Transnatl L 101.

99 Daniel Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (1999) 93(3) AJIL 596, 617.

100 Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 329; this argument is built on observations previously made by Bhikhu Parekh. See Bhikhu Parekh, ‘Cosmopolitanism and Global Citizenship’ (2003) 29(1) Rev of Intl Studies 3.

fully democratic basis'.<sup>101</sup> The same is true of global constitutionalism. As Neil Walker indicates, 'there is no world demos and no democratically supported world constitutional regime available to authorize the terms and conditions of supply of the various [global public] goods, still less (...) to decide the balance between them'.<sup>102</sup> Taking these basic caveats into account, the question then becomes: how could global administrative law and global constitutionalism contribute to redressing the participation gap in the decision-making processes on GPGs?

## 5.2 Global administrative law

A first analytical and normative framework that promotes participation as one of the legitimising standards in global regulatory processes, such as trade, investment, security enforcement, health, education, or environmental protection, is the global administrative law project developed at New York University. In the protagonists' own words, this relatively new field of international law is essentially preoccupied with:

the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring [that] they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.<sup>103</sup>

Global administrative law essentially focuses on treaty-based intergovernmental regulatory bodies (such as those cited above, i.e. UNIDO, the FAO, the WB, the OECD, and the WHO), but also on public-private partnerships (such as the Codex Alimentarius Commission), or even private bodies (such as the International Standardization Organisation (ISO)). What is at stake here is how 'to address the problem of disregard' by 'reforming and using the institutional mechanisms and arrangements that currently exist or that could be developed' in these transnational administrative bodies which are generally not subject to the legal or political control that is normally present in domestic settings.<sup>104</sup>

101 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2004–2005) 68 *L Contemp Probs* 15, 50.

102 Neil Walker, *Intimations of Global Law* (CUP 2014) 123.

103 Kingsbury, Krisch and Stewart (n 101) 17.

104 Stewart (n 68) 213.

While not expressly stated as such in the literature, the global administrative law approach seems to apply the same kind of reasoning to global regulatory bodies as that of the GPGs project. That is, in the same way as States have gradually developed complex administrative legal mechanisms to control agencies responsible for the provision of public goods at the national level, the global administrative law approach could address the participation gap at the level of increasingly powerful global regulatory bodies charged with the definition of GPGs. Not only this, but global administrative law also recognises that States are no longer the sole subjects of global administration. This approach breaks down the 'domestic-international dichotomy': like States, individuals, corporations and NGOs might be affected by decisions of global regulatory mechanisms and therefore must also be heard and allowed to participate in the decision-making processes of global regulatory regimes.<sup>105</sup> Accordingly, it is not sufficient any more to argue that global regulatory bodies are in principle accountable to national governments. Global administrative law invites legal scholars to look for alternative and more demanding checks and balances to constrain the definition of GPGs in specialised and decentralised global regulatory bodies.

Without going into overly theoretical debates, global administrative legal scholars attempt to boost the legitimacy of the global governance system by extending domestic law and implementing new participatory mechanisms to specific and fragmented global regulatory regimes.<sup>106</sup> In this regard, practical mechanisms that address the 'participation gap' have already emerged in specific and compartmentalised regimes of international law.<sup>107</sup> There are many examples in this sense. For instance, in the field of economic development law, when the WB decided to review its Environmental and Social Safeguard Policies in 2012, it invited a wide range of stakeholders—representatives of government, international organisations, civil society, academia, and the private sector—to participate in the consultation meetings on the proposed reform.<sup>108</sup> In the field of international

105 See Kingsbury, Krisch and Stewart (n 101) 23–25.

106 Krisch (n 12) 257.

107 For an overview, see Sabino Cassese, 'A Global Due Process of Law?' in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds), *Values in Global Administrative Law* (Hart 2011).

108 All information related to the consultation and review process of the WB's Environmental and Social Framework is available online: World Bank, 'Review and Update of the World Bank Safeguard Policies' (2015) <<http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>> accessed 1 April 2016.

environmental law, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters stipulates that:

Each Party shall promote the application of the principles of this Convention [including the principle of public participation] in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.<sup>109</sup>

In the field of international food law, it is also noticeable that, apart from 186 member States, 234 observing international organisations, NGOs and UN agencies are included in the Codex Alimentarius Commission which outlines non-binding international food standards and codes of practice.<sup>110</sup> The aim of global administrative law, it appears, is to further discern and extend the application of such participatory tools to constrain the definition of GPGs in global regulatory bodies.

However, pragmatism might represent the main limitation of global administrative law.<sup>111</sup> It is true that democratic legitimacy is generally put forward as one of the three possible normative conceptions underlying the global administrative law research project.<sup>112</sup> Yet, accountability, it appears, is the key word for global administrative law, and democracy seems to play a secondary role only.<sup>113</sup> Participation mechanisms constitute just one part of the global administrative law paraphernalia that could enhance the accountability of global regulatory bodies, next to transparency, the requirement for reasoned administrative decisions, judicial review, and substantive standards for sound administrative action.<sup>114</sup> In this respect, Krisch, one of the co-founders of the global administrative law project, indicates that the school's 'more limited ambition creates serious problems, not least because questions of overall structure can hardly be disentangled—practically and normatively—from those of concrete accountability mechanisms'.<sup>115</sup> While Shaffer,

109 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001), 2161 UNTS 447, Article 3(7).

110 Codex Alimentarius, 'Codex Members and Observers' <<http://www.codexalimentarius.org/members-observers/en/>> accessed 1 April 2016.

111 See Krisch (n 12).

112 Kingsbury, Krisch and Stewart (n 101) 48–51.

113 Krisch (n 12) 256.

114 See Kingsbury, Krisch and Stewart (n 101) 37–42.

115 Krisch (n 12) 265.

too, notes that ‘the global administrative law approach is rather technocratic and thus lacks ambition regarding larger scale questions of governance requiring political decision-making for the production of global public goods.’<sup>116</sup> In fact, decisions on GPGs are sometimes more easily characterised as constitutional, legislative, or even judicial activities, rather than administrative ones.<sup>117</sup> Contemplate, for instance, the dilemma within the EU as to whether human rights should trump fundamental market freedoms.<sup>118</sup> In our view, issues of such political salience cannot be left in the hands of specialised and fragmented global administrative bodies, but must be adjudicated on the basis of more overarching constitutional principles.

### 5.3 Global constitutionalism

Another set of interesting responses to the limitations which have just been observed in global administrative law could potentially be found in global constitutionalism.<sup>119</sup> This school of thought offers an analytical framework that attempts (empirically) to describe the foundations of global governance, and (normatively) to tackle the challenges posed by this ‘new world order’.<sup>120</sup> While there is arguably no document that could currently serve as ‘a global constitution’,<sup>121</sup> global constitutionalists argue that the extension of constitutional principles and more centralised decision-making mechanisms at the global level would improve the democratic underpinnings of the international legal order.

A number of legal scholars writing on GPGs view global constitutionalism as the most suitable framework for reconfiguring the world legal order. Auby, for instance, suggests that the global administrative law approach should be supplemented by a constitutionalisation of international bodies, which, he contends,

116 See Shaffer (n 45) 689.

117 See Jean-Bernard Auby, ‘Public Goods and Global Administrative Law’ in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds), *Values in Global Administrative Law* (Hart 2011) 248.

118 See, eg, Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659.

119 See Anne Peters, ‘The Merits of Global Constitutionalism’ (2009) 16(2) *Ind J Global Legal Stud* 397–411.

120 On what this new order entails, see Anne-Marie Slaughter, *A New World Order* (PUP 2005).

121 *Contra* Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36(3) *Colum J Transnat’l L* 529.



'is the only way by which the public goods of which global bodies are in charge with (...) would clearly be determined on the face of the record'.<sup>122</sup> The 'identification' of GPGs, he claims, must be built on a 'democratic and constitutional' foundation.<sup>123</sup> This is also the main message conveyed in Petersmann's last book:

As multilevel governance of interdependent international public goods has become the most challenging policy task in the twenty-first century—the current under-supply of international public goods requires embedding [international economic law] into stronger constitutional, cosmopolitan and democratically justifiable foundations.<sup>124</sup>

Augenstein similarly notices the strong appeal of global constitutionalism in response to the 'cross-functional' and 'cross-territorial' impacts of GPGs on international law—that is, respectively, the fragmentation and the lack of procedural and substantive legitimacy of international law.<sup>125</sup> Kumm, in turn, observes that international constitutionalists 'point to interdependencies and make functional arguments about the need to provide GPGs that states cannot provide by themselves'.<sup>126</sup> However, Shaffer indicates that there is still much ground to cover and, as such, encourages global constitutionalists to engage more deeply with the issue of GPGs, in particular by designing 'democratic checks and balances at the international level'.<sup>127</sup>

The authors mentioned here focus on different aspects of global constitutionalism. Among the prevailing visions on global constitutionalism,<sup>128</sup> the international community school—whose protagonists include Simma<sup>129</sup> and

122 Auby (n 117) 248.

123 *ibid.*

124 Ernst-Ulrich Petersmann, *International Economic Law in the 21<sup>st</sup> Century: Constitutional Pluralism and Multi-level Governance of Interdependent Public Goods* (Hart 2012) 25; see also Ernst-Ulrich Petersmann, 'De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement' (2008) 6 *Loyola U Chicago Intl L Rev* 209, 217.

125 Augenstein (n 69) 16.

126 Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20(2) *Ind J Global Legal Studies* 605, 611.

127 Shaffer (n 45) 686.

128 For an overview of the different visions on global constitutionalism, see Christine E J Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8(3) *Int'l J Constitutional L* 611.

129 See, eg, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil de Cours* 217; Bruno Simma and Andreas L Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9(2) *EJIL* 266.

Tomuschat<sup>130</sup>—seems the most noteworthy with respect to the debate on GPGs and democracy.<sup>131</sup> This vision of an international community offers, we believe, at least two valuable analytical and normative insights on how international law could become more conducive to filling the participation gap in the definition of GPGs.

First, the idea of an international community goes beyond the voluntarist tradition of international law by postulating that ‘humanity, not sovereignty’<sup>132</sup> is the ultimate source of international law. In this respect, Villalpando signals a paradigm shift in international law from egoistic state interests to community interests in the form of what he interestingly refers to as ‘public goods’.<sup>133</sup> The emergence of *jus cogens* norms (articles 53 and 64 of the Vienna Convention on the Law of Treaties<sup>134</sup>), *erga omnes* obligations,<sup>135</sup> and the prevalence of the obligations of UN Member States over their obligations under any other international agreement (article 103 of the UN Charter<sup>136</sup>) are all manifestations in positive international law of the concern for the protection of community interests, and implicitly, GPGs. Such principles of international law undoubtedly contribute to the vertical integration of the international legal order by recognising public goods which transcend state interests as *global* challenges.

The second major attribute of the international community approach, at least with respect to the concerns that have been unravelled in the present article, is that it aims to enlarge the global community by including actors other than States.<sup>137</sup>

130 See, eg, Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Recueil de Cours* 237; Christian Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ (1993) 241 *Recueil de Cours* 195.

131 For the first apparition of the term of ‘Doctrine of International Community’, see Fassbender (n 121) 546; see also Bardo Fassbender, ‘The Meaning of International Constitutional Law’ in Ronald St John MacDonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 838.

132 Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 155.

133 Santiago Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’ (2010) 21(2) *EJIL* 387, 392.

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

135 See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Merits) [1970] ICJ Rep 3, [33]–[34].

136 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

137 Peters (n 132) 153; see also Anne Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20(3) *EJIL* 513.

To be legitimate, the said GPGs need to account for the preferences of world citizens. Indeed, the international community school looks at the participation of international organisations, NGOs, individuals, transnational corporations, or even hybrid actors as a means of both limiting and justifying power in the definition of GPGs. This strand of global constitutionalism asserts that all affected stakeholders should acquire at least some sort of limited law-making powers at the global level. In a nutshell, participation should be expanded, structured, and formalised. In this regard, the vision advanced by the international community school could function as a heuristic device or a guideline for the interpretation of international law towards a community that is more constitutionalised and, therefore, more involved in the definition of GPGs.

## 6 Conclusion

This contribution started from the idea that the definition of GPGs goes beyond neutral, economic considerations, but inevitably entails policy choices. Mainly, our purpose was to indicate how international legal scholarship could aid in redressing one of the most prevalent flaws of the current global governance system: the ‘participation gap’ highlighted by the UNDP study. Yet, our concern was not so much with how the discipline of international law could facilitate the economically effective production and supply of GPGs, but the role that it might play in the preliminary stage of democratically defining GPGs—a process that is too often ignored in the policy discourse of international organisations and even in international legal literature. Urgency to solve collective-action problems at the global level has prompted some scholars to plead against the centuries-old principles of state sovereignty and state consent by relying on the GPGs discourse in economic theory. However, dismissing the Westphalian tradition as outdated, could, in the end, trigger an even greater democratic dilemma.

For this reason, we sought answers with two modern approaches to international law: global administrative law and global constitutionalism. Both intellectual frameworks, we found, could serve to render the process of defining the global public domain more accountable to the preferences of world citizens. They could do so by extending domestic and implementing new participatory mechanisms to the global regulatory sphere (global administrative law) and by including actors other than States in the formal structure of law-making at the international level (global constitutionalism). Notwithstanding the absence of a world government, both visions of international law remain valuable to structure

and further inspire the debate on how to democratically define GPGs beyond the traditional requirement of State consent. Indeed, neither school of thought satisfies itself that citizens' preferences are represented through the basic requirement of State consent in public international law. Neither of the two fields, it seems, views democratic guarantees of public participation as exclusive to the national level anymore. This, we believe, is what makes both projects so relevant for the question posed here.

However, our findings come with an important caveat: the normative and practical power of international law does not, in the end, depend on the use of terms such as 'global administrative law' or 'global constitutionalism', but rather, on concrete institutions, principles, and rules.<sup>138</sup> In this regard, much remains to be done to connect these two visions with the decision-making process underlying the definition of GPGs. These issues lay the groundwork for our research agenda at the Leuven Centre for Global Governance Studies' Programme on 'Global Governance and Democratic Government'.<sup>139</sup>

138 Peters (n 132) 157.

139 See Leuven Centre for Global Governance Studies, 'Research Programme Global Governance and Democratic Government' (2008) <[https://ghum.kuleuven.be/ggs/projects/research\\_programme](https://ghum.kuleuven.be/ggs/projects/research_programme)> accessed 1 April 2016.

# European Parliamentary Oversight Behind Closed Doors

*Vigjilence Abazi\**

## Abstract

The lack of transparency in European Union (EU) decision-making and integration has been a long-standing concern in academic and public debate. Perhaps paradoxically, parliamentary oversight of executive power in the EU is also increasingly taking place behind closed doors. This closed oversight results from internal rule-making and interinstitutional agreements established by the European Parliament and executive actors without a public debate and is primarily aimed at safeguarding EU official secrets. This paper examines the role of the European Parliament in oversight in the context of EU executive secrecy. The paper argues that, although the European Parliament asserts its prerogatives for gaining access to EU official secrets, its current practice of closed oversight does not facilitate public deliberation. The European Parliament is yet to make serious efforts to develop its public deliberation function and, in doing so, to also bring attention to possible extensive secrecy practices.

## Keywords

European Parliament, oversight, access to information, secrecy, deliberation, executive power

## 1 Introduction

The lack of transparency in European Union (EU) decision-making and integration has been a long-standing concern in academic and public debate.<sup>1</sup> EU integration is

\* Assistant Professor at University of Maastricht and Research Coordinator at the Centre for European Research in Maastricht (CERiM). An earlier draft of this paper was presented at the Durham-Cambridge Doctoral Workshop in EU Law 'Igniting European Union Law: Frameworks for the Future' at Durham University, 5–6 March 2015. The author would like to thank the organisers for their invitation and the commentators Dr. Markus Gehring and Dr. Andrés Delgado Casteleiro for their valuable comments. Usual disclaimer applies.

1 See Deirdre Curtin and Maarten Hillebrandt, 'Transparency in the EU: Constitutional overtones, institutional dynamics, and the escape hatch of secrecy', in Steven Blockmans and Adam Lazowski (eds), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) (forthcoming).

described as having developed through stealth and competence creep.<sup>2</sup> Furthermore, the growing executive power of the EU is exercised in a 'shadowy' manner by an ever-expanding array of institutions, agencies and other actors.<sup>3</sup> Meetings of EU executive actors behind closed doors are still commonplace for crucial policy issues, such as the euro crisis, or the negotiations of international agreements with tremendous impact, such as the Transatlantic Trade and Investment Partnership with the United States.<sup>4</sup>

Perhaps paradoxically, parliamentary oversight of executive power in the EU is also increasingly taking place behind closed doors. This closed oversight results from internal rule-making and interinstitutional agreements established by the European Parliament and executive actors primarily aimed at safeguarding EU official secrets. The latter, more technically known as European Union Classified Information (EUCI), set rigid and very specific rules as to what may be a secret, who determines this, who can see it and who cannot.<sup>5</sup> Consequently, when access to a sensitive document labelled as '*EU Confidential*' is granted to the European Parliament, only selected Members of the European Parliament (MEPs) may read this document.<sup>6</sup> These 'privileged' MEPs cannot take any notes or have their phone devices with them in the strictly protected and secured facilities designated specifically for reading the relevant classified document.<sup>7</sup> They can neither mention it to the news media nor discuss any content related to the document publicly.<sup>8</sup>

2 See Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2005); Ramses A Wessel, 'Integration by Stealth: On the Exclusivity of Community Competence' in Daniela Obradovic and Nikos Lavranos (eds), *Interface between EU Law and National Law* (Europa Law Publishing 2007) 43–50; Mark Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 J Pub Pol'y 95.

3 See Deidre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (OUP 2009) 51–52.

4 See Vigjilenca Abazi and Maarten Hillebrandt, 'The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: Access Info Europe and in 't Veld' (2015) 52 CML Rev 825.

5 See, eg, the EUCI rules of the Council, Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1.

6 See Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy [2014] OJ C95/1 art 5.

7 *ibid* art 6.

8 *ibid*.

As an interviewed former MEP acknowledged, these rigid rules in support of confidentiality make oversight ‘difficult or impossible.’<sup>9</sup>

Another important aspect of closed oversight, thus far neglected in the literature, is that it challenges the essential role of the European Parliament to promote public deliberation. Public deliberation is highly salient from a democratic perspective in order to include citizens’ contributions to EU decision-making. The European Parliament is the only directly elected EU institution and the main public deliberation platform making openness and debate crucial to its workings.

This paper examines the oversight role of the European Parliament in the context of EU executive secrecy. It reveals that the European Parliament asserts its oversight role, but that current practice does not meet the standard of democratic oversight facilitating public deliberation. European parliamentary oversight could contribute to public deliberation as an equally salient democratic process if it were conducted in a more open manner, or if the oversight results were reported and/or discussed publicly.

The paper proceeds as follows: Section II provides the key aspects of the legal framework of EU official secrets, focusing on the main challenge of accessing information. It discusses the efforts of the European Parliament to countervail these limitations as well as the outcome of these efforts. Section III examines in more detail how oversight by the European Parliament takes place and thereupon critically assesses its implications particularly for public deliberation. Section IV offers some conclusions.

## 2 EU secrecy: an invincible parliamentary challenge?

‘Monetary policy is a serious issue. We should discuss this in secret. I am ready to be insulted as being insufficiently democratic, but I want to be serious (...) I am for dark, secret debates.’<sup>10</sup>

This is a frank response by the current President of the European Commission to the questions of journalists regarding the coordination of the euro crisis. Although

9 Interview with former Member of the European Parliament (Amsterdam, the Netherlands, (February 2015)); see also Andrew Rettman, ‘Secret documents group was like “bad Le Carre novel,” MEP says’ *EU Observer* (Brussels, 18 November 2010).

10 Valentina Pop, ‘Eurogroup Chief: “I’m for secret, dark debates”’ *EU Observer* (Brussels, 21 April 2011).

anecdotal, this statement nonetheless illustrates a longstanding preference for secrecy in the European Union.<sup>11</sup> Secrecy may be understood as the inaccessibility of information about an actor, which prevents other actors from monitoring the workings or performance of this actor.<sup>12</sup> Secrecy in the EU is manifest, not only in the form of closed door meetings, but predominately also in a growing set of rules regarding the creation and management of official secrets, the EUCI. These rules establish extremely rigid limitations of access to sensitive information and have become a real challenge to conducting oversight in the EU, be it of a judicial, administrative or parliamentary nature.<sup>13</sup> This section outlines the main aspects of the EUCI legal framework and focuses on the extent to which MEPs have access to official secrets. Moreover, the section examines the institutional efforts of the European Parliament to address the challenges that arise due to limited or belated access to official secrets.

## 2.1 Parliamentary access to EU official secrets

Challenges to parliamentary oversight in the EU arise due to the fact that the EUCI significantly limits access to relevant sensitive information. The EUCI legal framework is fragmented and of an administrative nature. Different rules on access to official secrets apply in the Member States that in turn affect access to official secrets at the EU level. Yet, the framework of rules on official secrets is also varied at the EU level and a variety of actors are involved, such as executive institutions like the Council and the Commission, but also bodies like the European External

11 Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (4th edn, CUP 2010) 381–97.

12 See, by contrast, the definition of transparency in Albert Meijer, ‘Understanding the Complex Dynamics of Transparency’ (2013) 73 *Pub Adm Rev* 429, 430.

13 See Deidre Curtin, ‘Overseeing Secrets in the EU: A Democratic Perspective’ (2014) 52 *J Common Market Studies* 684; Christina Eckes, ‘Decision-making in the Dark? Autonomous EU Sanctions and National Classification’ in Iain Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia 2013) 177–97; Nik de Boer, ‘Secret Evidence and Due Process Rights under EU Law: ZZ’ (2014) 51 *CML Rev* 1235; European Ombudsman Emily O’Reilly, ‘Decision of the European Ombudsman closing the inquiry into complaint 1148/2013/TN as regards Europol’ (European Ombudsman, 8 January 2015) <<http://www.ombudsman.europa.eu/activities/speech.faces/en/58671/html.bookmark>> accessed 10 February 2016.



Action Service or agencies such as Europol.<sup>14</sup> The only directly relevant legislative act for the system of classified information is Regulation 1049/01—the Transparency Regulation, regarding the right to public access of information in the EU.<sup>15</sup> Therein, Article 9 defines the category of classified information as ‘sensitive documents (...) which protect essential interests of the European Union or of one or more of its Member States in the areas (...) [of] public security, defence and military matters’. Regulation 1049/01 does not specify the general principles regarding the management of EUCI, nor is it its legal rationale to do so.<sup>16</sup> It merely points to a different handling process for public access requests of EUCI due to their sensitive nature.

The internal administrative nature of the EUCI system already reflects the fact that the European Parliament did not have a direct say in the manner in which classification rules were to be established. Moreover, to a great extent, the executive actors ignored the calls of the European Parliament for openness, considering that the EUCI was treated as an internal administrative policy and there was no legal obligation to consult the European Parliament or request its consent.<sup>17</sup> The EUCI rules are engineered by executive actors following a security rationale that, in practice, leads to tensions with the European Parliament’s oversight prerogatives, specifically with regard to access to official secrets.<sup>18</sup>

The current EUCI system operates on a rigid principle regarding the sharing of information, known as ‘originator control’, which gives the original institution that created the official secret the discretion to decide whether its disclosure may be

- 14 The following decisions are applicable: Council Decision 2013/488/EU of 23 November 2013 on the security rules for protecting EU classified information [2013] OJ L 274; Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information OJ 2009 [2009] L 332/17; Decision of the High Representative of the Union for Foreign Affairs and Security Policy 2013/C 190/01 of 19 April 2013 on the security rules for the European External Action Service [2013] OJ C 190/1; European Commission Rules of Procedure (C(2000) 3614) of 8.12.2000 [2000] OJ L 308, amended by European Commission Decision 2011/737/EU, Euratom of 9 November 2011 [2011] OJ L 296.
- 15 European Parliament and Council Regulation 1049/2001 of 30 May 2001 regarding Public Access to European Parliament, Council and Commission documents [2001] OJ L145/43.
- 16 See Vigilenca Abazi and Eljalill Tauschinsky, ‘Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union’ (2015) 11 Utrecht LR 78.
- 17 See David Galloway, ‘Classifying Secrets in the EU’ (2014) 52 J Common Market Studies 668; for a different view see Curtin (n 13).
- 18 Deidre Curtin, ‘Top Secret Europe’, Inaugural lecture delivered at the University of Amsterdam (20 October 2011) <[http://www.oratiereeks.nl/upload/pdf/PDF-5066weboratie\\_Curtin.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-5066weboratie_Curtin.pdf)> accessed 1 April 2016.

authorised.<sup>19</sup> In other words, originator control means that the actor who provides the classified information retains complete control over its dissemination by other actors with whom such information has initially been shared. This rule aims at safeguarding the originators' discretion. This key principle of the classification system leads to an inevitable clash between, on the one hand, confidentiality and trust amongst executive actors that maintain the secrets and, on the other hand, the accessibility of information for oversight institutions, such as the European Parliament. In this respect, recent contributions have recognised that access to official secrets is the main challenge for the European Parliament, be it with regard to oversight in law enforcement cooperation,<sup>20</sup> the Common Security and Defence Policy,<sup>21</sup> or international negotiations.<sup>22</sup>

A recent example in this regard is the limitation of access of the European Parliament to a report concerning the EU-US Terrorist Finance Tracking Program Agreement (TFTP).<sup>23</sup> The TFTP provides for the EU to transmit financial messaging data to the United States Treasury Department, while Article 4 of the Agreement assigns Europol, an EU intelligence agency, the task of verifying whether requests from the US authorities to obtain such data from the EU comply with the specified criteria.<sup>24</sup> A Member of the European Parliament filed for access to the document on the implementation of the agreement. The access request was denied by Europol, however, because the US Treasury Department—being the originator of the classified document—refused to allow access to the report.<sup>25</sup> It is indeed quite remarkable that the US Treasury Department, due to arrangements between executives regarding how secrets may be shared, is able

19 See Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1 arts 2 and 13.

20 See Vigjilence Abazi, 'The Future of Europol's Parliamentary Oversight: A Great Leap Forward?' (2014) 15 *German LJ* 1121.

21 Guri Rosén, 'EU Confidential: The European Parliament's Involvement in EU Security and Defence Policy' (2015) 53 *J Common Market Studies* 383.

22 Deidre Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 *CML Rev* 423.

23 Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program [2010] OJ L195/5.

24 Elaine Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program' (2013) 32 *YB Eur L* 368.

25 Nikolaj Nielsen, 'US gag order on EU police agency stirs controversy' *EU Observer* (Brussels, 8 January 2015).

to block parliamentary oversight. Moreover, these arrangements were made on a bilateral basis by the agency and never approved by the European Parliament.<sup>26</sup> In the EU practice of oversight, there are also other examples of limitations of access to official secrets applied by the Council and the Commission. For instance, the Committee on Civil Liberties, Justice and Home Affairs has noted the lack of access to classified information regarding the Schengen Information System for Bulgaria and Romania.<sup>27</sup> In this case, the European Parliament received important classified information through diplomatic channels of exchange with the Romanian Ambassador, instead of being granted access to classified information directly from the Council.<sup>28</sup> Limitations on the sharing of information have also been noted within the relations of the European Parliament and the Commission.<sup>29</sup> In light of these significant limitations of access to official secrets, the question arises as to how the European Parliament can counterbalance executive secrecy. The following subsection examines this aspect of parliamentary oversight.

## 2.2 Institutional responses to challenges of secrecy

The European Parliament has made significant efforts to address the limitations of access to information imposed by EU official secrets rules. One of the first steps of the European Parliament to be able to access classified information was to establish an internal system on EUCI.<sup>30</sup>

The European Parliament's legal framework and practice with regards to classified information is recent. The first reference to 'confidentiality' concerning the European Parliament is found in its 1989 Rules of Procedure. Annex VII of

26 See also European Parliament Legal Service, *Legal Opinion Regarding the European Ombudsman's Access to Documents Concerning Europol's Activities Under the TFTP Agreement* (Document SJ- 1058/14, D(2015)1986, 2 February 2015) <[http://www.europarl.europa.eu/RegData/publications/avis/2015/0001/EP-PE\\_AVS\(2015\)0001\\_XL.pdf](http://www.europarl.europa.eu/RegData/publications/avis/2015/0001/EP-PE_AVS(2015)0001_XL.pdf)> accessed 10 February 2015.

27 General Secretariat of the Council, Summary of the Meeting of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) (Brussels, 31 May and 1 June 2010), Document No 10699/10 (4 June 2010).

28 *ibid.*

29 Sergio Carrera, Nicholas Hernanz and Joanna Parkin, 'The "Lisbonisation" of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice' (2013) CEPS Working Paper No 58 <[http://aei.pitt.edu/44126/1/LSE\\_No\\_58\\_Lisbonisation\\_of\\_EP.pdf](http://aei.pitt.edu/44126/1/LSE_No_58_Lisbonisation_of_EP.pdf)> accessed 10 February 2016.

30 Galloway (n 17).

the 1989 Rules of Procedure stipulated general rules with regard to confidentiality, which were amended in 2001 on the basis of the Maij-Weggen report<sup>31</sup> due to the adoption of Regulation 1049/01 on public access to documents. At this stage, the European Parliament did not have other specific rules on classified information, nor did it have agreements for the exchange of classified information. With the enactment of Regulation 1049/01, the European Parliament made further changes to its Rules of Procedure, especially regarding the notion of confidentiality as a reason to restrict information and access to documents. The European Parliament aligned its system with Article 4 and Article 9 of Regulation 1049/01 as the only basis for the possible rejection of public access to documents. According to the new changes, confidential documents were only excluded from public access by virtue of Article 4 of Regulation (EC) 1049/2001 and the European Parliament's confidentiality rules in Annex VII could not, as such, be the basis for the nondisclosure of documents. The European Parliament's revision of its rules on confidentiality was triggered by the necessity to exchange classified information with the executive actors. The first step towards the exchange of classified information between the Council and the European Parliament was the Agreement in 2002 regarding classified information in the area of security and foreign policy.<sup>32</sup>

The European Parliament's internal rules on classified information are also of an administrative nature. The Bureau of the European Parliament, which is composed of the President and the 14 Vice-Presidents of the European Parliament, established the internal organisation for European Parliament classified information.<sup>33</sup> The Bureau established the internal rules on EUCI taking into account the interinstitutional agreements that the European Parliament had with the Council and the Commission for exchange of classified documents.<sup>34</sup> Prior to the Bureau's Decision, which specifically addressed the internal organisation with

31 See Hanja Maij-Weggen, Committee on Constitutional Affairs, *Report on the Adaptation of the Rules of Procedure to the Regulation (EC) No.1049/2001 of the European Parliament and of the Council regarding Public Access to Documents (2001/2135(REG))* (15 October 2001).

32 See Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy [2002] OJ C298/1.

33 See European Parliament Rules of Procedure of September 2015, rule 22 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20150909+0+DOC+PDF+V0//EN&language=EN>> accessed 10 February 2016.

34 *ibid* rule 23.

regard to classified information, the European Parliament's Decision of 23 October 2002<sup>35</sup>—which provided a basis for the implementation of the Interinstitutional Agreement with the Council—had set out the basic principles and the necessary measures for being able to exchange information in the area of security and foreign policy. It is noteworthy that the manner in which the Bureau established the rules of classification is similar to the executive institutions. This implies that the Bureau did not carry out any public deliberation about the rules. Furthermore, the fact that only the Bureau has worked on the rules since their establishment shows that this was also considered an administrative and internal institutional matter.<sup>36</sup>

The institutional negotiations for the European Parliament to be granted access have been long and arduous.<sup>37</sup> The implication from the fragmented nature of the classification system is that the European Parliament negotiated separately with each institution regarding access to EUCI and with some actors, like Europol, it is only now, through its newly gained oversight prerogatives, that access would be legally possible.<sup>38</sup> Furthermore, in the post-Lisbon context, the European Parliament and the Council still have 'diverging perceptions' on access to classified information, and this issue of access was a matter of discussion in several meetings of the Conference of Presidents of the European Parliament.<sup>39</sup> The European Parliament has stressed that it is of 'utmost importance' to begin negotiations with the Council with a view to amending the 2002 Interinstitutional

35 Decision of the European Parliament of 23 October 2002 on the Implementation of the Interinstitutional Agreement Governing European Parliament Access to Sensitive Council Information in the Sphere of Security and Defence Policy [2002] OJ C 298/4–5.

36 European Parliament Rules of Procedure (n 33) art 25(12): 'The Bureau shall lay down rules concerning the treatment of confidential information by Parliament and its bodies, office-holders and other Members, taking into account any interinstitutional agreement concluded on such matters. Those rules shall be published in the Official Journal of the European Union and annexed to these Rules of Procedure.'

37 European Parliament Resolution 2010/2294(INI) of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009–2010 [2013] C 51 E/72 Point N.

38 Abazi (n 20).

39 On 15 March 2012 the Conference of Presidents endorsed the outcome of negotiations on a draft interinstitutional agreement concerning the forwarding to, and handling by, the European Parliament of classified information held by Council on matters other than those in the area of the Common Foreign and Security Policy and referred the draft IIA to the Committee on Constitutional Affairs pursuant to rule 127 of the Rules of Procedure. The negotiations resulted in the beginning of March 2012 in a jointly agreed draft text for an interinstitutional agreement on access to classified information held by the Council.

Agreement to reflect both the reforms carried out since it was concluded and the current situation of increased prerogatives.<sup>40</sup>

The broader oversight powers of the European Parliament in the context of post-Lisbon reforms of new parliamentary checks are of significant value in enabling the European Parliament to address the limitations of access to official secrets. In this regard, the new explicit prerogative set in primary law for the European Parliament to be informed of international agreements,<sup>41</sup> as well as the initiation of adjudication as a means to receive information from the EU executive institutions have become salient means for the European Parliament to be informed. A recent example is the case, C-658/11 *Parliament v Council*,<sup>42</sup> in which the Court reiterated the relevance and applicability of the European Parliament's access to the relevant information stipulated in Article 218(10) of the Treaty for the Functioning of the European Union (TFEU). Although the issue in this case is not strictly related to access to classified information, the case is significant for the information-sharing obligations required of the executive actors in light of the Court's interpretation of the principle of sincere cooperation. The Court interpreted the principle of sincere cooperation and information-sharing obligations between the institutions rather broadly to include even issues strictly pertaining to the Common Foreign and Security Policy,<sup>43</sup> an area of EU policy where the European Parliament has no political oversight powers.<sup>44</sup>

Besides judicial avenues as a means to attain access to information, the European Parliament uses its veto powers gained as a result of the Lisbon Treaty reforms. For example, in line with Article 218(6)(a) TFEU, the European Parliament has the power to provide or refuse its consent to the final text of an international agreement negotiated by the Commission. In this respect, recent research shows

40 European Parliament, Committee on Constitutional Affairs, Report on the conclusion of an interinstitutional agreement between the European Parliament and the Council concerning the forwarding to, and handling by, the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy 2012/2069, A7-0245/2012 (ACI) of 18 July 2012, point 4 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0245+0+DOC+PDF+V0//EN>> accessed 10 February 2016.

41 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ 326/47 (TFEU) art 218(10).

42 Case C-658/11 *European Parliament v Council of the European Union* [2014] OJ C292/2.

43 *ibid* para 85.

44 TFEU (n 41) art 218(6).

that the European Parliament uses the veto on the external issues of EU law to also strengthen its position internally,<sup>45</sup> and it does so by refusing or delaying consent.<sup>46</sup> For example, the European Parliament refused consent to the EU-US Society for Worldwide Interbank Financial Telecommunication (SWIFT) Agreement and delayed consent to the USA and Australia Passenger Name Records Agreements. Regarding the SWIFT Agreement, the European Parliament gave its consent at a later stage but, as some scholars note, there were 'no remarkable differences between the first and second SWIFT agreements'.<sup>47</sup> Rather, the difference was that, on the second round, the European Parliament was fully informed at all stages of the negotiations.<sup>48</sup>

The European Parliament also has new legislative powers in the Area of Freedom, Security and Justice and has used such powers to enhance its access to classified information. For example, in line with Article 88 TFEU, the European Parliament has become a co-legislator in issues relating to law enforcement cooperation, and on this basis, the European Parliament is in the process of setting up a regime for access to classified information held by Europol. Moreover, even when the European Parliament does not have legislative powers, and is not directly involved in setting up EU bodies, it has used its prerogatives over the EU budget in order to assert its oversight position.<sup>49</sup> For example, in the establishment of the European External Action Service (EEAS), the initial proposals did not contain an explicit right for the European Parliament to have access to the EEAS's classified information. However, the European Parliament on its first position regarding the establishment of the EEAS, was explicit in its ambition to gain access to classified information by calling for a modification of the draft text. Without adopting a separate legal arrangement with the EEAS for access to its classified information,

45 See Christina Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' (2014) 12 *Int'l J Const L* 904.

46 See Jörg Monar, 'The Rejection of the EU-US SWIFT Agreement by the European Parliament: A Historic Vote and Its Implications' (2010) 15 *Eur Foreign Aff Rev* 143.

47 See Juan Santos Vara, 'The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data after Lisbon', *CLEER Working Papers* 2013/2 <[http://www.asser.nl/upload/documents/20130226T013310-cleer\\_13-2\\_web.pdf](http://www.asser.nl/upload/documents/20130226T013310-cleer_13-2_web.pdf)> accessed 10 February 2016.

48 *ibid* 20.

49 Leendert Erkelens and Steven Blockmans, 'Setting Up the European External Action Service: An Institutional Act of Balance', *CLEER Working Papers* 2012/1, 20 <<http://www.asser.nl/media/1630/cleer2012-1web.pdf>> accessed 1 April 2016.

the European Parliament wanted to apply the existing provisions of the 2002 Interinstitutional Agreement on classified information in the area of security and defence policy concluded with the Council.<sup>50</sup> These efforts of the European Parliament for access to EEAS classified information were successful, taking into account that the final Council Decision stipulates in the preamble (paragraph 6) that the European Parliament has access to classified information in accordance with the 2002 Interinstitutional Agreement.

Lastly, access to relevant information may also be facilitated through cooperation between the European Parliament and national parliaments. For example, empirical research shows that, when inter-parliamentary meetings take place between the European Parliament and the national parliaments, they mostly discuss and refer to issues related to oversight within questions of security and foreign policy.<sup>51</sup>

In light of the discussion thus far regarding access to classified information and the European Parliament's efforts to overcome the limits imposed by executive actors, it becomes apparent that the European Parliament has indeed moved forward institutionally to assert its oversight role. Although in practice, limitations of access to classified information in a timely manner is not a foregone issue, in the current legal context, to a significant extent, the European Parliament manages to receive the relevant information for oversight due to its internal rules for EUCI as well as its broader oversight powers, such as consent to international treaties and budgetary powers. Hence, the main aspect in the interplay of parliamentary oversight and executive secrecy is no longer only access to classified information, but also the question of how such access takes place and what are the significant consequences for the democratic role of the European Parliament to have access to classified information.

50 European Communities, Interinstitutional Agreement between the European Parliament and the Council 2002/C 298/01 of 30 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy [2002] OJ C298/1.

51 European Parliament, Report on Interparliamentary relations between the European Parliament and national Parliaments under the Lisbon Treaty, Annual Report 2013/2014 <[http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Publications/Annual report/Relations with National Parliaments - Annual Report 202013.pdf](http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Publications/Annual%20report/Relations%20with%20National%20Parliaments%20-%20Annual%20Report%202013.pdf)> accessed 3 March 2016.



### 3 Closed parliamentary oversight vs public debate

The manner in which parliamentary oversight takes place in the EU, insofar as the EUCI is concerned, has been a somewhat neglected element in the discussion regarding the role of the European Parliament and executive secrecy. This section aims to fill that gap by examining how parliamentary oversight takes place. In particular, under what conditions, and using what methods, do the MEPs—and possibly their staff—access classified information? What precisely can they do once they access those documents?

#### 3.1 Reviewing documents *à huis clos*

When requests for access to classified information are approved by executive actors in line with the prerogatives of the European Parliament for oversight, documents are reviewed at the premises of the Council.<sup>52</sup> Access to EUCI may be granted to the President of the European Parliament and what the Interinstitutional Agreement on classified information calls a ‘special committee’. The ‘special committee’ is comprised of only five individuals, namely the Chairman of the Committee of Foreign Affairs and four members designated by the Conference of Presidents.<sup>53</sup> In addition, there is a difference between individuals who are authorised to make requests for access to classified information and those who actually gain access to EUCI documents and are able to review them. While the former group of individuals is more centralised and focused on the President of the European Parliament, the latter may include the MEPs who have a ‘need-to-know’, which is

52 This was especially the case before the European Parliament adopted internal EUCI rules for the handling of classified information, as Council officials expressed concerns regarding the security arrangements in place in the premises of the European Parliament to review highly sensitive documents. See Galloway (n 17).

53 See Interinstitutional Agreement between the European Parliament and the Council 2002/C 298/01 (n 32) art 3(3); see also the two separate agreements of the European Parliament with the Council on access: Interinstitutional agreement between the European Parliament and the Council of 12 March 2014 (n 6); Draft Arrangement between the European Parliament, the Council and the External Action Service concerning access by the European Parliament to classified information in the area of the Common Foreign and Security Policy of 23 October 2012, Document 15343/12 <<http://www.statewatch.org/news/2012/oct/eu-council-ep-access-class-info-15343-12.pdf>> accessed 10 February 2010.

a key working principle of categorising and limiting access to official secrets. The 'need-to-know' the content of the classified document is determined on the basis of the specific responsibilities of the individual while conducting his or her work.<sup>54</sup> Hence, there is a discrepancy between individuals authorised to file requests for access to classified information and those individuals who receive the classified documents. Furthermore, only those individuals who the President of the European Parliament considers to have a relevant need to read the classified document in relation to their work conduct the review of the classified documents.<sup>55</sup> As a result, it is more appropriate to conclude that access and review of classified documents protected through the EUCI system are concentrated with certain MEPs and relevant Committees as opposed to discussing access and review at a level of the European Parliament as an institution. This leads some MEPs to be very sceptical regarding the prospect of successful oversight, even after having gained access to official secrets:

It is very difficult to really scrutinise [considering the conditions in which oversight involving classified information is organised]. You also cannot really talk to each other, to your MEP colleagues. You are not free to work with the classified documents. And the thing is that I and also many colleagues have our staff reading and writing some of the issues, hence when it is about classified information it becomes difficult or impossible to actually do that.<sup>56</sup>

The MEPs that are granted access to EUCI undergo a strict legal and security procedure in order to review the documents.<sup>57</sup> Furthermore, in accordance with Article 6(5) of the Interinstitutional Agreement, the meetings between the Council and the European Parliament are held behind closed doors when EUCI documents are discussed. Documents are distributed at the beginning of the meeting and collected again at the end; documents may not be copied by any means, such as photocopying or photographing; no notes may be taken; and the minutes of the meeting cannot make any mention of the discussion of the item containing

54 See Interinstitutional agreement between the European Parliament and the Council of 12 March 2014 (n 6) art 4.

55 *ibid.*

56 Interview with former Member of the European Parliament (Amsterdam, the Netherlands, February 2015).

57 See Interinstitutional Agreement between the European Parliament and the Council of 12 March 2014 (n 6).

classified information.<sup>58</sup> Furthermore, for access to documents classified at a higher level than ‘*EU Confidential*’, the Council makes arrangements on an *ad hoc* basis. The experience with the Agreement shows that those documents are accessed at the Council’s premises and under strict security, where all the above-mentioned conditions apply.<sup>59</sup> These arrangements result in parliamentary oversight taking place behind closed doors, or more simply stated, they result in closed oversight. Closed oversight means that both the manner in which oversight is conducted and the results of oversight are not public to the other members of parliament and to the general public.

Closed oversight from the strict perspective of reviewing executive decision-making is not necessarily problematic. Should there be issues of wrongdoing or abuse of power by executive actors, the MEPs would be able to report such conduct and initiate the necessary inquiries as well as legal action in accordance with Article 263(2) TFEU. Nevertheless, closed oversight is problematic from the perspective of the democratic process of public deliberation. The role of MEPs is not merely to ensure that executive actors are not breaching their powers, but it is fundamental that they provide the link between what takes place at the executive decision-making level and the European citizens.

### 3.2 Implications of closed oversight: Missing public debate

Keeping oversight means two main things: First, having the powers and second, mobilising the public. I think that the European Parliament has focused and still does the first thing; it is always trying to secure its powers—it is used to doing that—it knows how to do that. Debate is completely underdeveloped.<sup>60</sup>

This was the frank summary of a former Member of the European Parliament regarding the balance and difficulties in ensuring both processes of oversight and public deliberation. The European Parliament seems to be asserting its powers of oversight through its institutional fights to gain access to classified information, even when this type of access to classified information is done in a

58 *ibid* arts 5–6.

59 Interview with Member of the European Parliament (Amsterdam, the Netherlands, December 2013).

60 Interview with former Member of the European Parliament (Amsterdam, the Netherlands, February 2015).

very rigid manner that limits (public) usability of the information learned. The main implication of closed oversight is that the European Parliament is unable to foster public deliberation. The oversight role of the European Parliament is not strictly relevant for accountability, which is defined in principle as one actor giving account to another actor followed by the consequences. Oversight is relevant for democratic processes that aim to ensure the formation of public opinion and the formation of public deliberation necessary towards that end. This understanding of the role of the European Parliament is based on a conceptualisation of oversight to facilitate processes of accountability and deliberation as equally relevant for the European project. It is important to highlight in this respect that EU primary law stipulates various sets of processes that are conducive to public deliberation and specific processes that aim to ensure accountability. The EU has a constitutional commitment to democracy and the principle of openness.<sup>61</sup>

Processes of deliberation aim to grant citizens a participatory role in decision-making. Deliberation requires that citizens have relevant information to be able to engage in shaping policies and are hence informed about processes of oversight and the exercise of secrecy. From this perspective, it is required that core choices regarding secrecy are made in an open manner and through public debate. Hence, more clarity should be established between what is considered secret and what is open information that may be publically discussed.<sup>62</sup> In this regard, it has been rightly noted that in a representative democracy 'worthy of its name one of the truly distinctive qualities of parliaments is their publicness, the fact that they constitute a public forum as opposed to an accountability relationship among peers'.<sup>63</sup> It is necessary from this perspective of public deliberation that the MEPs discuss and communicate how the interests and rights of citizens are affected and what is relevant for them to know. The requirements for the exercise of secrecy, which are directed at ensuring deliberation, are that citizens must know that discussions or some decisions are being kept secret.<sup>64</sup> The necessity of public information for deliberation creates a higher threshold on the question to what extent secrecy should be limited because, in order to realise processes of deliberation, some information should always be directly available to the citizens. Although that

61 Consolidated Version of the Treaty of the European Union [2012] OJ C 326/13 arts 1–2.

62 Dennis Thompson, 'Democratic Secrecy' (1999) 114 *Political Science Quarterly* 181.

63 Deidre Curtin, 'Challenging Executive Dominance in European Democracy' (2013) 77 *Modern LR* 1, 23.

64 Thompson (n 62).

information does not need to be specific and detailed, it is very relevant that citizens, in broad terms, know what the policy is about, what interests are at stake and what means are suggested to protect those interests. For example, citizens or the European Parliament would know that Europol is conducting an investigation about cybercrime in the EU, but they would not need to know which individuals are being investigated or more specific information about their location, which could possibly jeopardise the outcome of the investigation. Such an approach to availability of information aims to ensure that security concerns are met and public deliberation can take place.

An additional important element is that the outcomes of the oversight process should be public. From this perspective, the question of oversight is not only about 'policing' the actors if there is a wrongdoing, but it is a question of debates that are also oriented towards future prospects of how things should be done and enabling citizens to formulate and express their agreement. Such oversight outcomes may be a public statement, a report or a debate. However, on the basis of the European Parliament's resolutions and statements regarding EUCI and its emphasis on gaining access, rather than fostering transparency and deliberation, it is noticeable that the institutional focus and efforts were centred on the mere point of gaining access to classified information. The European Parliament's main concern was not to be outside the 'secrecy circle' and left uninformed about important EU developments in the area of security and foreign relations. Less attention or concern was paid to the consequences of access to classified information and the manner in which it was organised for the European Parliament's other functions, such as deliberation, or the manner in which access would be organised. Institutional instruments which would allow the European Parliament to be able to make public a clear demarcation of what remains closed are not foreseen in the current EUCI framework, including the European Parliament's own rules about classified information.

Due to closed oversight and the obligations of the European Parliament not to disclose EUCI in any manner, the specific outcomes of the oversight process are not made public. Classified information and its access by MEPs are not allowed to be included even in the meeting minutes.<sup>65</sup> The consequences of closed oversight when considered with the fact that European Parliament has no institutional measures to alert the public (besides individual MEPs alerting the press, for example) raises concerns since, as recent research has shown, 'democratic

65 Interinstitutional Agreement between the European Parliament and the Council of 12 March 2014 (n 6) arts 6(5) and 6(6).

controversy, transparency and critical debate' are mostly avoided.<sup>66</sup> Parliamentary questions are the only form of public oversight.<sup>67</sup> They are also published on the European Parliament's website, as well as in the EU's official journal. The caveat here is that the content of classified information will not be discussed. Hence, when oversight processes are open, crucial questions regarding classified information may be left unanswered by invoking executive secrecy.

Closed oversight is not unique to the European Parliament. Indeed, comparative examples from Member States show that they, too, despite long traditions of civil liberties, have adapted to, and adopted, oversight processes that seriously challenge public deliberation and fundamental rights in the face of security and the secrecy rules that are said to be necessary for such security policies.<sup>68</sup> Moreover, the oversight of intelligence agencies has traditionally been more secluded from public view. What is different in the EU, however, is that oversight processes were negotiated behind closed doors by the executive and oversight institutions and established through interinstitutional agreements and internal rules of procedure. It is not possible to determine at the present stage what interests the European Parliament particularly defended or how the negotiations with the Council regarding access to classified information developed in more detail, since the majority of documents is also undisclosed or significantly redacted, even after more than a decade since these arrangements were made.

#### 4 Towards oversight *and* public deliberation

The role and relevance of the European Parliament for advancing openness in the European Union and ensuring oversight of executive actors are its significant features as the only direct representative of the European citizens. The oversight role of the European Parliament has attracted significant interest,<sup>69</sup> and there is a growing discussion on executive-legislative relations and the lack of information

66 Carrera, Hernanz and Parkin (n 29) 4.

67 European Parliament Rules of Procedure (n 33) rule 130.

68 See David Cole, Federico Fabbrini and Arianna Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar 2013).

69 Elisabeth Wisniewski, 'The Influence of the European Parliament on the European External Action Service' (2013) 18 *Eur Foreign Aff Rev* 81, 94.

sharing.<sup>70</sup> Moreover, the academic and policy debates have been expanding the way in which systems of EU official secrets function and the impacts of the latter for the oversight role of the European Parliament.<sup>71</sup> Whereas this paper drew on these significant discussions, its contribution is not only to point to the challenges in parliamentary oversight due to executive secrecy and limits to access classified information, but also to develop in more detail a new aspect in the debate of European parliamentary oversight by showing how the European Parliament responded to these challenges and the resulting mode of oversight due to such efforts. In particular, neither the process nor the outcomes of parliamentary oversight are made public either to the other Members of the European Parliament, besides the committee members, or to the broader public. European parliamentary oversight predominantly takes place behind closed doors in the context of executive secrecy and under strict rules of official secrets. The European Parliament is using its new powers conferred by the Lisbon Treaty to assert its role in oversight, yet oversight behind closed doors does not enable citizens to gain a better understanding or have clarity on allocation of responsibilities on what the European Union does and whether these decisions are made at the national or European level.

Another key aspect of the European Parliament is that it has a unique role in fostering public deliberation in the EU. Hence, Parliamentary oversight is not merely about giving account, but also has a significant role to ensure space for citizens' participation. The key question, then, becomes to what extent the European Parliament is fostering processes of oversight, but also ensuring its deliberation function and bringing secrecy practices more into citizens' view. The necessity of openness for deliberation creates a higher threshold on the question of the extent to which secrecy should be limited because it requires that some information is available to the citizens. The European Parliament is yet to make serious efforts to develop its public deliberation function, and in doing so, to also bring attention to possible extensive secrecy practices. Significantly, closed oversight as it is conducted now could have the effect of making the European Parliament seem as part of an overall system of keeping EU official secrets that legitimises secrecy, but that creates a (further) separation and distance from the citizens whose rights and interests the European Parliament is constitutionally obliged to protect.

70 Wolfgang Wessels et al, *Democratic Control in the Member States of the European Council and the Euro Zone Summits* (2013), Study requested by the European Parliament's Committee on Constitutional Affairs, 14 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO\\_ET\(2013\)474392\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET(2013)474392_EN.pdf)> accessed 10 February 2016.

71 Curtin (n 22).

# The EU's Competence Gap in Public Health and Non-Communicable Disease Policy

*Oliver Bartlett\**

## Abstract

The European Union (EU) has had a Treaty competence in the field of public health since 1993, however the slow development of this competence has not kept up with the rate at which the EU's policy ambitions in public health have developed, especially in the field of non-communicable disease (NCD) prevention. This has led the EU to rely on alternative legal bases in order to realise these ambitions, leading to a 'competence gap' between the legal bases that authorise EU action on NCD prevention and the policies the EU would like to pursue.

This paper will explore, in three stages, how this competence gap might be addressed. First, it will examine the arguments for and against giving the EU public health competences. Second, it will analyse the EU's specific public health competence in Article 168 of the Treaty on the Functioning of the European Union (TFEU) and the general internal market harmonisation competence in Article 114 TFEU, in order to explore the precise boundaries of each competence as legal bases for EU public health action. Third, it will explore the legal relationship between Articles 168 and 114 and explain why, despite a more powerful specific public health competence being a theoretically neat solution to the competence gap, the likelihood of the EU being given increased public health powers is low.

## Keywords

Public health, Non-communicable diseases, EU public health competences

---

## 1 Introduction

Under the principle of conferral expressed in Article 5(2) of the Treaty on European Union (TEU), the European Union (EU or Union) must be able to identify specific

\* Lecturer in Law, Liverpool School of Law and Social Justice; PhD Candidate, Durham Law School (UK).

The author would like to thank the anonymous reviewers for their constructive and helpful comments on an earlier draft of this article. All mistakes and misinterpretations are the sole responsibility of the author.



powers or competences conferred upon it by the EU Treaties in order to adopt legal acts.<sup>1</sup> If the EU cannot show that the power to adopt a legal act has been conferred upon it, then, in accordance with Article 4 TEU, that competence remains with the Member States. The EU has possessed powers to act in the field of public health since the Maastricht Treaty entered into force in 1993.<sup>2</sup> Article 129 EC TEU was enacted to provide a modest complementary competence for the EU to encourage 'cooperation between the Member States (...) and, if necessary, lend support to their action' in the field of public health.<sup>3</sup> This 'represented a compromise between those governments of Member States who did not want any EU mandate in health, and those who wanted to go further'.<sup>4</sup>

Even with no formal competence in the area, health concerns were part of EU political activity. Health ministers had been meeting since the 1970s and several European level public health programmes had already been set up—for example, the Europe Against Cancer Programme.<sup>5</sup> Thus, the granting of competence to the EU might be viewed as either 'setting limits to the expansion of EU-level activities in the public health field,'<sup>6</sup> or as 'little more than a formalization of earlier arrangements'.<sup>7</sup> Either way, from the time that the Maastricht Treaty entered into force onwards, the EU was to have a legal basis upon which to support the actions of the Member States in public health. This competence was updated by the Treaty of Amsterdam,<sup>8</sup> yet, the new Article 152 EC was not substantively different from the previous provision. The Treaty of Lisbon<sup>9</sup> updated the competence again, however

1 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).

2 Maastricht Treaty [1992] OJ C191/1 (later, the Maastricht Treaty became known formally as the TEU).

3 TEU (n 1) art 129.

4 Tamara Hervey, 'Mapping the Contours of European Union Health Law and Policy' (2002) 8(1) *European PL* 69, 72.

5 Decision 88/351/EEC of the Council and Representatives of the Governments of the Member States of 21 June 1988 adopting a 1988 to 1989 plan of action for an information and public awareness campaign in the context of the 'Europe against cancer' programme [1988] OJ L160/52.

6 Hervey (n 4) 72.

7 Martin McKee and others, 'The Influence of European Law on National Health Policy' (1996) 6(4) *J Eur Social Policy* 263, 267.

8 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/1.

9 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1.

the latest version—Article 168 Treaty on the Functioning of the European Union (TFEU)<sup>10</sup>—remains complementary.

Although the evolution of the EU's formal competence in public health has therefore been slow, the evolution of its policy ambitions for public health has been far more pronounced.<sup>11</sup> This is particularly so when it comes to contributing to the prevention of non-communicable diseases (NCDs). NCDs constitute one of the most pressing public health challenges we face today—they account for 86% of deaths in the World Health Organization (WHO) European Region<sup>12</sup> and 63% globally.<sup>13</sup> This has led to global recognition of the need for action, with the World Health Assembly unanimously approving the Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013–2020.<sup>14</sup> The EU has followed suit, expressing the desire to 'accelerate progress on combatting unhealthy lifestyle behaviours'.<sup>15</sup>

In this context, the complementary nature of the EU's public health competence is often seen as a hindrance to these ambitions and alternative legal bases are sought. This has created a rather uncomfortable and disjointed relationship between the objectives of the EU with respect to NCD prevention, the competences it possesses in public health, and the competences it actually uses to realise these objectives. I refer to this situation as the EU's *competence gap* in public health and NCD prevention.

In this paper, I will examine how this competence gap could be addressed. In Section 2, I will examine the arguments for and against giving the EU competence in public health in the first place. In Sections 3 and 4 respectively, I will analyse the

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

11 See Scott Greer and others, 'Health Law and Policy in the European Union' (2013) 381 *The Lancet* 1135.

12 WHO, 'Action Plan for the Implementation of the European Strategy for the Prevention and Control of Noncommunicable Diseases 2012-2016' (WHO European Office 2012) EUR/RC61/12, para 6.

13 Political Declaration of the UN high-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases (16 September 2011) A/66/L.1, para 14.

14 WHO, 'Draft action plan for the prevention and control of noncommunicable diseases 2013–2020' (6 May 2013) A66/9.

15 Council of the European Union, 'Council Conclusions on Closing Health Gaps within the EU Through Concerted Action to Promote Healthy Lifestyle Behaviours' (9 December 2011) 2011/C359/05, para 9; for more information on the EU's NCD policy ambitions see: Alberto Alemanno & Amandine Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets' (2013) 50(6) *CML Rev* 1745.

EU's specific public health competence and its general internal market competence in order to explore the precise boundaries of how each competence might be used by the EU in order to fulfill its role in NCD prevention. In Section 5, I will examine the legal relationship between these two competences and explain why, despite an increase in specific competence being the theoretically neatest solution to the EU's NCD competence gap, the likelihood of greater public health powers being given to the EU is low.

## 2 Should the EU possess competence in public health?

It should not be taken for granted that the EU should be entitled to act in the field of public health and NCD prevention. Seeking to alter the lifestyles and behaviours of citizens is a controversial use of law-making power for any institution, especially one such as the EU that functions on the basis of conferred powers. As such, opinion is divided on whether the EU should have a public health competence at all. This section will analyse arguments for and against the existence of EU public health powers in order to explore why the EU should be entitled to participate in NCD prevention.

### 2.1 Arguments against giving the EU powers to intervene in public health

Those who argue that the EU should have limited, if any, power to act in public health do so with fair reason. Member States attempt to 'keep the EU out of a core area of their welfare states' because they are unwilling to allow external interests to influence sensitive national choices regarding how they look after the health of their own nationals.<sup>16</sup> After all, as the Court of Justice of the European Union (CJEU) first set out in the case of *Aragonesa*, in the absence of harmonised rules, and within the limits set by general principles of EU law, 'it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved'.<sup>17</sup>

16 Scott Greer, 'Uninvited Europeanization: Neofunctionalism and the EU in Health Policy' (2006) 13(1) *J Eur Public Policy* 134, 135.

17 Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4179, para 16.

Several sensible concerns could be said to underlie this principle, for instance, the fact that ‘local culture and attitudes influence regulations.’<sup>18</sup> Many practices that can lead to serious public health problems—for example, smoking, drinking, the consumption of particular foods—are an intrinsic part of the vast majority of western cultures. The CJEU has even acknowledged in its jurisprudence concerned with alcohol that consumption of such products ‘is linked to traditional social practices and to local habits and customs,’ and that this will be liable to affect the interaction of consumers with these products.<sup>19</sup> Consequently, due to the diversity between Member States in terms of ‘the culture and tradition that affect private attitudes’<sup>20</sup> towards these types of lifestyle practices, different and specific pressures on each Member State government will be generated regarding the extent to which citizens approve of government intervention. In such situations, governments do not want their ability to respond sensitively to cultural concerns circumscribed by interference from outsiders who do not understand the particular cultural dynamics at play. From this perspective, it is understandable that Member States are uncomfortable allowing the EU to use its law-making power to intervene in public health matters.

Member States are also unwilling to allow EU intervention in public health due to the EU’s perceived lack of institutional capacity properly to understand and act on social concerns, such as public health issues. Such arguments build upon the fact that the EU has ‘for all its political importance, traditionally focussed on essentially economic tasks,’<sup>21</sup> and that its role in social matters, such as public health, is ‘weak and circumscribed.’<sup>22</sup> This situation is both generated by, and illustrative of, ‘the member states’ lack of interest in losing control over those aspects of politics.’<sup>23</sup> Beliefs that the EU, as a supranational organisation, lacks ‘technical expertise, a reputation for neutrality, superior skill and vision, greater legitimacy, [and] consistently accurate political intelligence,’<sup>24</sup> have helped to entrench the

18 Marsha Echols, ‘Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws’ (1998) 4 *Columbia J Eur L* 525, 525.

19 Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I-1816, para 21.

20 Echols (n 18) 528.

21 Greer (n 16) 134.

22 *ibid.*

23 *ibid.*

24 Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell UP 1998) 479.

conviction that complex issues of public health should remain matters of national politics. Most Member States particularly consider the European Commission, the principal driver of EU policy, to be an inappropriate institution through which to make public health policy. This might be due, for instance, to the Commission's 'absence of budgetary resources'<sup>25</sup> in health, the fact that it is 'lacking the political authority to provide effective leadership'<sup>26</sup> in difficult social matters, and the fact that it is viewed as having 'limited expertise in the field of public health.'<sup>27</sup> Governments are unwilling to hand over responsibility for the protection of the health of their population to institutions that they feel are ill-equipped to serve their populations. From this perspective also, it is understandable why Member States would not want the EU intervening in public health.

## 2.2 Arguments for giving the EU powers to intervene in public health

While strong arguments exist for affording the EU limited or no power to act in public health, there are stronger arguments that highlight the utility of the participation of EU institutions in the discussion and formulation of public health policy, and NCD policy in particular. I argue that these reasons justify affording the EU public health powers. These arguments stem from the fact that several important factors in NCD causation are cross-border issues. Stuckler and others note that the leading root causes of NCDs are 'unhealthy commodities, their producers, and the markets that power them.'<sup>28</sup> These are all factors that have significant cross-border elements and that no single Member State is able to solve.

Multinational corporations that produce products linked to NCDs are a critical factor driving the increase in NCDs. They act as 'vectors of disease'<sup>29</sup>

25 Wolfram Lamping and Monika Steffen, 'European Union and Health Policy: The "Chaordic" Dynamics of Integration' (2009) 90(5) *Social Science Q* 1361, 1368.

26 Laura Cram, 'Calling the Tune Without Paying the Piper? Social Policy Regulation: The Role of the Commission in European Community Social Policy' (1993) 21(2) *Policy and Politics* 135, 143.

27 Sebastiaan Princen and Mark Rhinard, 'Crashing and Creeping: Agenda-setting Dynamics in the European Union' (2006) 13(7) *J Eur Public Policy* 1119, 1124.

28 David Stuckler and others, 'Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol and Tobacco' (2012) 9(6) *PLOS Medicine* e1001235, 7.

29 Anna Gilmore and others, 'Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?' (2011) 33(1) *J Public Health* 2, 2.

through relentless marketing activities and insidious exercises of power that inhibit policy efforts.<sup>30</sup> These corporations are global entities, which make them seriously powerful—their size means that they can generate more revenue, produce larger marketing campaigns, manufacture more products, and act more consistently across markets and jurisdictions.<sup>31</sup> Importantly, the market dominance of multinational alcohol, tobacco, fast food and other corporations means that they are able to present unified arguments in global policy discussions, which appear representative of their particular market segment, whereas groups of countries may be divided on the issues at hand. Multinationals are able to use the collective resources of the corporation in a bid to oppose national rules. They are even able to infiltrate the highest levels of political discourse simultaneously across multiple states. Such tactics are extremely difficult, in many cases impossible, for individual states to tackle alone as they are executed at the supranational level. For an effective response that will make a difference to NCD prevention, states must therefore meet these challenges at the same level. This highlights the importance of involving supranational organisations, such as the EU in public health policy.

Many of the products marketed by these corporations, particularly alcohol and unhealthy foods, are still treated as ordinary tradable commodities.<sup>32</sup> The way in which such dual-natured commodities are allowed to circulate within markets can serve to mitigate or exacerbate the risk that they pose to public health. At present, as Sihto and colleagues note:

(...) rather than articulating how economic, industrial and trade policies could contribute to the health and wellbeing of European citizens, health policies (...) are scrutinized themselves in terms of their compliance with and contribution to industry, trade and economic policies.<sup>33</sup>

The way in which products are allowed to circulate within the European internal market can have substantial consequences for Member State public health activities.

30 Rob Moodie and others, 'Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol and Ultra-Processed Food and Drink Industries' (2013) 381 *The Lancet* 670, 672.

31 For examples in relation to the alcohol industry, see David Jernigan, 'The Global Alcohol Industry: An Overview' (2009) 104 (Suppl. 1) *Addiction* 6.

32 See Thomas Babor and others, *Alcohol: No Ordinary Commodity: Research and Public Policy* (2nd edn, OUP 2010).

33 Marita Sihto and others, 'Principles and challenges of Health in All Policies' in Timo Stahl and others (eds), *Health in All Policies: Prospects and Potentials* (Eur Observatory on Health Systems and Policies 2006) 10.

An example of this influence has recently been provided by the CJEU in its *Scotch Whisky Association* judgment on the implementation of minimum unit pricing for alcohol.<sup>34</sup> The Court in that case suggested that minimum unit pricing strategies pursuing a twofold objective of reducing alcohol consumption, specifically by harmful and heavy drinkers and generally within the population, are contrary to internal market law on the basis that less intrusive measures that attain the twofold objective equally well are available.<sup>35</sup> Thus, due to the commodification of products, such as tobacco, alcohol and unhealthy foods, the Member States cannot avoid the fact that the operation of the internal market for goods and services will have an impact on the NCD prevention efforts within the Member States. The Member States must therefore work alongside, rather than against, the EU on how best to integrate health concerns into European level economic policy, if the operation of the European internal market is to favour the reduction of NCDs rather than to hinder it.

In summary, there are good arguments for and against affording the EU powers to contribute to public health policy-making. Member States are justifiably proud of their public health systems, are entitled to decide the level of protection they would like to secure for their population and take decisions on public health matters that affect their own nationals. However, when it comes to protecting the public from the problem of NCDs, many of the issues facing governments do not have causes that are specific to any one country's culture or traditions, do not affect solely that country's nationals, and have implications that can be similarly understood and experienced by every European. Therefore, to argue that the EU should be kept out of public health policy-making and NCD prevention in particular is to ignore the crucial transnational factors of NCD causation, which should be addressed at a transnational level. It is necessary, even if not always desirable, for the EU institutions to have some competence in public health so that they can fulfil the role they are needed to play in coordinating the transnational level response to NCDs in Europe. Having concluded that NCD prevention would benefit from the involvement of the EU, the next section turns to address the manner in which this involvement should be articulated. I will analyse the EU's current specific competence in public health and its utility in NCD prevention, as well as how the

34 Case C-333/14 *Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland* [2015] ECR I-1.

35 *ibid* para 50.

EU's general competence to adopt rules on the functioning of the internal market has been turned to NCD prevention purposes. Through this analysis, I will aim to build a precise picture of the EU's abilities to act upon the role that it aims to, and should, play in NCD prevention.

### **3 The EU's public health competence and its utility for NCD prevention**

As noted in the introduction to this piece, the EU has possessed competence in the field of public health since 1993. This section will start by explaining the complementary nature of this competence, and will proceed to analyse the powers most relevant to NCD prevention. In doing so, I hope to explore exactly how useful these powers can be to the EU.

#### **3.1 The complementary nature of Article 168**

The EU's current powers to act in the field of public health are contained in Article 168 TFEU, which is an area of complementary competence according to Article 6 TFEU. The nature of complementary competences was explored in 2002 by Working Group V of the European Convention as part of the preparations for drafting the Constitutional Treaty. They identified the nature of a complementary competence (which they suggested should be renamed 'supporting measures') as:

(...) treaty provisions giving authority to the Union to adopt certain measures of low intensity with respect to policies which continue to be the responsibility of the Member States.<sup>36</sup>

This understanding of complementary competence may suggest that the scope for strong action on NCDs under Article 168 is limited. Affording such a competence to the EU seemingly confirms 'the primacy of the responsibility of the [M]ember

36 Final Report of Working Group V 'Complementary Competencies' (2002) CONV 375/1/02, 3 <<http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00375-re01.en02.pdf>> accessed 2 March 2016.



[S]tates in health care matters',<sup>37</sup> and has led some to remark that '[t]here is very limited room for manoeuvre in public health law at Union level'.<sup>38</sup> However, I argue the powers held by the Union in public health can still allow the adoption of decisive and effective measures to stimulate the development of NCD policy in Europe. The fact that measures flowing from a complementary competence are of low intensity does not mean that they cannot be effective or indeed binding. Furthermore, the fact that the EU cannot create common standards itself does not mean that it cannot inspire others to create them.

### 3.2 Exploring the potential of Article 168(5) TFEU

Article 168(5) TFEU provides the most promising set of powers for future EU action on NCDs. It reads:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure (...) may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges (...) and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.<sup>39</sup>

This is 'the first explicit reference to tobacco and alcohol ever made in the EU Treaties'.<sup>40</sup> This reflects the fact that the EU should be taking on increased responsibility for matters of NCD prevention to which it can contribute effectively. Article 168(5) TFEU provides the EU with important powers that can help it to achieve this. In order properly to understand the extent of these powers, three interpretative tasks must be undertaken: first, unravelling what 'incentive measures' are; second, establishing what constitutes a 'direct objective' of promoting public health; and third, understanding what 'harmonisation' of the laws and regulation of the Member States prohibits.

37 Sjeff Gevers, 'Health Law in Europe: From the Present to the Future' (2008) 15 *Eur J Health L* 261, 268.

38 Andrea Faeh, 'Obesity in Europe: The Strategy of the European Union from a Public Health Law Perspective' (2012) 19 *Eur J Health L* 69, 86.

39 TFEU (n 10) art 168(5).

40 Alemanno and Garde (n 15) 1760.

## 3.2.1 Understanding ‘incentive measures’

Imprecise drafting has resulted in the terms ‘incentive measures’ and ‘measures’ both being used in Article 168(5) TFEU, although it is clear that, within this particular provision, they refer to the same type of act. The preceding version, Article 152(4)(c) of the Treaty of Nice used only the term ‘incentive measures’ and excluded harmonisation.<sup>41</sup> On the other hand, only the term ‘measure’ was used in provisions that did not exclude harmonisation.<sup>42</sup> Thus, as Hervey and McHale point out, ‘measures’ were supposed to include harmonising acts, while ‘incentive measures’ were not.<sup>43</sup> The distinction between the intensity of these two types of legislative act has been maintained in the latest version of the public health competence—Article 168(5), previously Article 152(4)(c) of the Treaty of Nice, continues to refer first of all to incentive measures. Article 168(4)(a)–(c) TFEU continues to refer to just ‘measures’ and, in fact, derogates from the complementary nature of the public health competence imposed according to Article 2(5) TFEU, in order to allow the possibility for harmonisation. Thus, the Treaty continues to envisage two different intensities of action. The fact that in Article 168(5) both the terms ‘incentive measures’ and ‘measures’ are used interchangeably is simply an example of poor drafting—within Article 168(5) TFEU they both refer to the same intensity of action.

Some argue that such incentive measures must be non-binding.<sup>44</sup> Others point out that, if adopted in the form of regulations or decisions, incentive measures can be binding.<sup>45</sup> As Grimonprez points out in the context of the EU’s complementary education competence in Article 165 TFEU, if the target of the incentive is an actor within a state, then ‘Member States may be obliged, first, to adapt their legislation so that beneficiaries can satisfy the conditions [to obtain the incentive] and, secondly, to take all other necessary implementing measures’ that are required in order to set up the incentive.<sup>46</sup>

41 Treaty of Nice, Amending the Treaty of the European Union [2001] OJ C80/1.

42 Maastricht Treaty (n 2) art 152(4)(a) and (b).

43 Tamara Hervey and Jean McHale, *Health Law and the European Union* (CUP 2004) 79.

44 See, eg, Karen Heard-Laureote, ‘Europeanization of Health Policy: The Role of EU Institutions’ in Charlotte Bretherton and Michael Mannin (eds), *The Europeanization of European Politics* (Palgrave Macmillan 2013) 127.

45 Kris Grimonprez, ‘The European Dimension in Citizenship Education: Unused Potential of Article 165 TFEU’ (2014) 39 *Eur L Rev* 3, 11.

46 *ibid* 12.

This might be thought to conflict with the prohibition on harmonisation of Member States' laws and regulations. Grimonprez explains that this is not the case, though, because 'there is no pre-emption. Member States keep their basic competence (...) but they have to exercise it in compliance with EU law containing incentive measures'.<sup>47</sup> Harmonisation involves the *substitution* of national policy for European policy. Requiring Member States to comply with the imposition of 'procedural obligations to report within certain timeframes [or] provide information within certain parameters',<sup>48</sup> for example, involves no such substitution.

The convenience of using incentive measures compared to traditional command and control legislation is also appealing to policy makers. For a start, incentive measures are 'considered ethically less problematic than coercive measures or threats',<sup>49</sup> and thus are easier for policy-makers to justify in politically sensitive fields. Non-binding incentive measures are also attractive when negotiating policy in controversial areas for a number of further reasons, including lower contracting and sovereignty costs, accommodation of diversity, flexibility, speed and incrementalism.<sup>50</sup>

The variety of incentive measures available offers some potentially effective ways of achieving policy goals. For example, take the strongest incentive of all—money. Since 'public health will always turn on allocational decisions',<sup>51</sup> financial incentives are likely to have a significant impact on how health concerns are incorporated into policy design. EU level laws play 'a crucial role in legitimating the disbursement of EU funding',<sup>52</sup> and 'although the EU's budget is modest, the EU institutions have traditionally used the provision of financial incentives to promote the integration process'.<sup>53</sup> As McKee and others note, 'even if the term "incentive measures" is interpreted as purely programmes designed to stimulate activity, if

47 *ibid.*

48 Tamara Hervey, 'The European Union and the Governance of Health Care' in Gráinne de Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006) 179, 197.

49 Nancy Kass, 'An Ethics Framework For Public Health' (2001) 91(11) *American J of Public Health* 1776, 1780.

50 For a good summary, see David Trubek and others, "'Soft Law", "Hard Law" and EU integration' in Gráinne de Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006) 73–74.

51 Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press 2008) 493.

52 Hervey (n 47) 198.

53 *ibid.*

these are accompanied by funds, as is likely, then national policies will inevitably be influenced.<sup>54</sup> By using its own budget, and by leveraging ‘the wealth of governing institutions’,<sup>55</sup> the EU can act as a ‘supranational policy entrepreneur to cultivate shifts towards a particular idea’,<sup>56</sup> encouraging domestic actors to act as agents of EU policy ambition.<sup>57</sup> The creation of structures to manage such incentives could be put in place under the powers granted by Article 168 TFEU.

Incentive measures could therefore be powerful tools for NCD policy, and should not be underestimated. As Levitt and Dubner remind us, ‘people respond to incentives (...) Understanding the incentives of all the players in a given scenario is a fundamental step in solving any problem.’<sup>58</sup> Governments under political, budgetary and time constraints are more likely voluntarily to adopt courses of action that offer them appealing solutions for difficult situations, and well-constructed incentive measures have the potential to achieve exactly this.

### 3.2.2 Understanding ‘direct objective’

Article 168(5) TFEU provides authority to adopt ‘measures which have as their *direct objective* the protection of public health regarding tobacco and the abuse of alcohol’. As yet, no case law on the interpretation of what constitutes a ‘direct objective’ of NCD prevention has come before the CJEU. However, alternative case law suggests that the phrase ‘direct objective’ allows acts to have a more substantial impact on public health than merely facilitating more effective Member State laws. In the *ABNA* case, the CJEU gave a ruling on several measures adopted in the wake of the Bovine Spongiform Encephalopathy (BSE) crisis, which required more detailed information on the labelling of animal foodstuffs.<sup>59</sup> These measures were justified under ex-Article 152(4)(b) of the Treaty of Nice, which allowed the EU to adopt ‘by way of derogation from Article 37, measures in the veterinary and

54 McKee and others (n 7) 266.

55 Hervey (n 48) 198.

56 Agnes Batory and Nicole Lindstrom, ‘The Power of the Purse: Supranational Entrepreneurship, Financial Incentives, and European Higher Education Policy’ (2011) 24(2) *Governance: An Intl J of Policy, Administration and Institutions* 311, 312.

57 For an example of how this has actually worked in the education context, with universities as the agent of EU education policy, see *ibid* 313.

58 Steven Levitt and Stephen Dubner, *Think Like a Freak* (Penguin 2015) 106.

59 Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others v Produktschap Diervoeder* [2005] ECR I-10468, para 5.

phytosanitary fields which have as their direct objective the protection of public health.' The Court held that these measures did have as their direct objective the protection of public health.

The process by which the Court arrived at this decision is instructive. The above measures were adopted following pressure on the Union to do more to prevent further outbreaks of BSE. The Court upheld their validity despite concerns over the directness of the link to protecting public health,<sup>60</sup> and despite the Directive having been enacted against substantial opposition.<sup>61</sup> Furthermore, the Court was willing to accept that the contested provisions of the Directive did have as their direct objective the protection of public health after merely examining the recitals of the Directive, which set out the Union legislature's rationale for the contested measures. This judgment therefore suggests that a similar margin of discretion might be afforded in relation to whether certain aspects of alcohol and tobacco control constitute direct objectives of public health—especially when the Union legislature is facing similar intense pressure to do more in alcohol control. This may afford the EU more independence in driving forward policy in the field of tobacco and alcohol control than might have been suspected under a complementary competence.

### 3.2.3 Understanding 'harmonisation' of the laws and regulations of the Member States

Two views exist on the precise meaning of 'harmonisation'. The first is that '[Union] legislation must not modify existing national public health legislation'<sup>62</sup> to the extent that Union laws 'not merely *displace* but *replace* individual national political choices.'<sup>63</sup> In other words, any EU act that substitutes policy decisions made at Member State level for those made at Union level is a harmonising act. The second interpretation is that only 'de jure'<sup>64</sup> harmonisation, which has as its direct purpose

60 See the concerns voiced by Davis J in the national court when the applicants originally applied for judicial review of the national implementing legislation: *R. (on the application of ABNA Ltd and Others) v The Secretary of State for Health and another* [2004] 2 CMLR 39, para 51.

61 See again the background to the adoption of the directive as summarised by Davis J (n 60) paras 40–47.

62 Robert Schütze, 'Cooperative Federalism Constitutionalised: The Emergence of Complementary Competences in the EC Legal Order' (2006) 31(2) *Eur L Rev* 167, 181.

63 Michael Dougan, 'Legal Developments' (2010) 48 *J Common Market Studies* 163, 178 (emphasis added).

64 Schütze, 'Cooperative Federalism Constitutionalised' (n 62) 181.

the homogenisation of specific national rules, should count as harmonisation for the purpose of competences that prohibit its use. Lenaerts has supported this position in the context of the Union's competence in education, arguing that if a measure has the 'indirect effect of harmonizing the content of teaching or the organization of the educational system [it] does not necessarily mean that it conflicts with the prohibition on harmonization'.<sup>65</sup>

The first, wider understanding of harmonisation is supported by case law. In *UK v Parliament and Council*, the Court indicated that harmonisation should be understood by the term 'measures for the approximation', as it is described in the Treaties, and that the Union legislature has discretion 'as regards the harmonisation technique most appropriate for achieving the desired result'.<sup>66</sup> In view of this, we should understand 'harmonisation' as a process that encompasses a variety of methods of pre-empting national legislative initiative, all of which are intended to fall within the prohibition in Article 168(5) TFEU. Consequently, it must be concluded that the prohibition on harmonisation means that Article 168(5) TFEU confers no authority upon the EU to engage in any type of NCD prevention that would prevent the Member States from enacting their own policy on the same topic.

### 3.3 Summary

The above analysis reveals that the specific public health competence contained in Article 168(5) TFEU could be a useful and effective tool for enabling a wide range of EU action on NCDs. It should be viewed as more than just an inhibition upon the EU's ability to enact, command and control legislation. However, it is also clear that Article 168(5) TFEU could not, in its current format, accommodate all of the EU's ambitions in NCD policy, which do extend to European level standard-setting in order to drive the pace of NCD prevention. Achieving this objective is made more difficult by the fact that, no matter how many academic interpretations are proffered, the definitive meaning of Article 168(5) will remain unclear until interpreted by the CJEU. Ensuring that the EU can properly discharge the role that it is now required

65 Koen Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1994) 1 Columbia J Eur L 1, 15.

66 Case C-66/04 *United Kingdom v European Parliament and Council of the European Union* [2005] ECR I-10574, para 45.

to play in NCD prevention would not necessarily, however, 'require a new Treaty provision' on public health.<sup>67</sup> Alternative legal bases are available. The next section therefore explores the use of the EU's general harmonising competence in Article 114 TFEU for just such a purpose.

#### **4 The EU's internal market competence and its potential for use in NCD prevention**

Responses to cross-border NCD issues are most effective when taken by states uniformly and simultaneously. In these circumstances, it would be advantageous if the EU could harmonise national laws—a good example is the work that the EU has already done in relation to cross-border tobacco advertising. However, the EU's public health competence in Article 168 TFEU does not confer a power to harmonise, so such powers must be found elsewhere in the Treaties if the EU is to fulfil its role in NCD prevention. The suitable candidate to date has been the EU's general competence to harmonise national laws for the purpose of ensuring the functioning of the internal market, a power conferred by Article 114 TFEU as follows:

The European Parliament and the Council shall (...) adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.<sup>68</sup>

Article 114 has already been used to bridge the EU's NCD competence gap, mainly in tobacco control, with directives being adopted on Tobacco Products and Tobacco Advertising.<sup>69</sup> In this section, I will explore how wide a bridge the EU legislature has been permitted to build by the CJEU in its case law, and what future applications this may have in NCD prevention.

67 Cristinela-Ionela Velicu, 'Health Policy Governance in the EU: Composing a Jigsaw Puzzle?' (2011) (Suppl. 3) *EUROLIMES* 171, 187.

68 TFEU (n 10) art 114(1).

69 Council Directive (EU) 2014/40 concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L127/1 and Council Directive (EC) 2003/33 relating to the advertising and sponsorship of tobacco products [2003] OJ L152/16.

## 4.1 The use of Article 114 TFEU for public health purposes

The limits of the power conferred by Article 114 TFEU were first identified in a public health case, the now infamous *Tobacco Advertising* saga. This subsection will explain the test that was laid down, the consequences of how that test has been applied, and how any potential checks on the expansion of the competence have been side-lined by the Court.

### 4.1.1 The test for recourse to Article 114 TFEU laid down in *Tobacco Advertising*

The competence in Article 114 is granted to the Union for the specific purpose of building the internal market, and the Court has laid down certain conditions for its use to ensure that this purpose is respected by the EU legislature. This occurred in the *Tobacco Advertising 1* case, in which Germany complained that ex-Article 100a EC, now Article 114 TFEU, provided insufficient competence for the adoption of Directive 98/43/EC which sought to prohibit the advertising and sponsorship of tobacco products in most media.

The Court in *Tobacco Advertising 1* was keen to emphasise that the power in Article 114 TFEU is granted specifically for internal market *building*, not internal market *regulation*. It asserted in its judgment that:

To construe [Article 114] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle (...) that the powers of the Community are limited to those specifically conferred on it.<sup>70</sup>

The Court went on to declare that, to be based on Article 114, a Union measure must be ‘intended to improve the conditions for the establishment and functioning of the internal market’;<sup>71</sup> must, ‘genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market’;<sup>72</sup> and must ‘in fact [pursue] the objectives stated by the community legislature’.<sup>73</sup> Thus, in

70 Case C-376/98 *Germany v European Parliament and Council of the European Union* [2000] ECR I-8498 (*Tobacco Advertising I*), para 83.

71 *ibid*.

72 *ibid* para 84.

73 *ibid* para 85.



order to rely on Article 114 TFEU, the Union legislature must show that a measure is genuinely intended to, and in fact will, improve the conditions under which the internal market functions.

The Court then added a number of qualifying statements to this test, both in *Tobacco Advertising 1* and the follow up case of *Tobacco Advertising 2*. These included variously: that the exclusion of harmonisation in Article 168(5) TFEU 'does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health'<sup>74</sup>; that 'health requirements are to form a constituent part of the Community's other policies'<sup>75</sup> and that, provided the test for recourse to Article 114 TFEU is fulfilled, 'the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.'<sup>76</sup>

These qualifying statements make it fairly easy to rely on Article 114 for a purpose that is not in any meaningful sense connected to internal market building. Their cumulative effect is that, as long as the positive conditions pertaining to internal market building are fulfilled, a measure relying on Article 114 as its legal basis may pursue any other objective it wants.

#### 4.1.2 Erosion of the limits set by Tobacco Advertising test

This interpretation of the *Tobacco Advertising* test has been confirmed by its application in a string of cases that have steadily eroded the apparent rigour of the original test in *Tobacco Advertising 1* to a 'threshold so apparently low and potentially subjective as to no longer guarantee that a given proposal manifests any meaningful and demonstrable connection to the internal market'.<sup>77</sup> This process will not be rehearsed in any detail here, having already been given thorough treatment in the literature dedicated to this task.<sup>78</sup> The essential outcome, though,

74 *ibid* para 78.

75 *ibid*.

76 *ibid* para 88.

77 Dougan (n 63) 177.

78 See, eg, Dougan (n 63); Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years After *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German LJ 827; Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 CML Rev 395.

has been a drastic relaxation of the Court's inquiry into whether a proposed measure actually removes any internal market barriers in practice. With each case, the Court has become increasingly prepared 'to find some connection between national disparities and the four freedoms so as to trigger Article 114, without too close an inquiry as to the reality of the impact on those freedoms'.<sup>79</sup> The effect of this case law has been that, 'provided the drafting is well-chosen, the Court has no plausible basis on which to set aside the legislative act'.<sup>80</sup> On this basis, the EU may benefit from the law-making powers in Article 114, yet is 'effectively free to base both its desire to regulate, and the actual content of that regulation, upon the pursuit of policy objectives extraneous to the establishment or functioning of the internal market'.<sup>81</sup>

One might think that the primary line of defence against flagrant abuse of this power should be the application of general principles of EU law, such as proportionality and subsidiarity. However, as the analysis below will demonstrate, diligent application of these principles by the Court to the exercise of competence in Article 114 has also been sorely lacking. The Court's approach to Article 114 and proportionality was first seen in the *Swedish Match* case, in which the Court upheld the adoption of a total ban on the marketing of snus (an oral tobacco product) under Article 114.<sup>82</sup> The Court held that 'only if a measure adopted in this field is manifestly inappropriate in relation to the objective' can its legitimacy be called into question.<sup>83</sup> More recently, the Court has addressed the issue of proportionate use of Article 114 in the *Vodafone* case, where Article 114 was the legal basis for regulation on mobile phone roaming charges. Here, the CJEU admitted that it has:

accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic or social choices and in which it is called upon to undertake complex assessments and evaluations.<sup>84</sup>

With this, the Court confirmed its choice to defer to the judgment of the Union legislature on all political, economic or social decisions relating to why and how

79 Craig (n 78) 410.

80 Weatherill (n 78) 828.

81 Dougan (n 63) 177.

82 Case C-210/03 *Swedish Match v Secretary of State for Health* [2004] ECR I-11900.

83 *ibid* para 48.

84 Case C-58/08 *Vodafone v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECRI-5026, para 52.

to use its harmonising powers, and the value of examining whether the actual reasons for resorting to harmonisation are proportionate is all but eliminated. This deference was confirmed even more recently by Advocate General Kokott in her Opinion, delivered on 23 December 2015, on the challenge brought by Poland to Directive 2014/40/EU, the revised Tobacco Products Directive. She emphasised that 'legislative competence no longer plays such a central role as it previously did. Interest is focussed on the question (...) of proportionality'.<sup>85</sup> It is disappointing, however, that she followed this up by reinforcing the Court's previous approach by declaring '[t]hat discretion means that an infringement of the principle of proportionality by the Union legislature can be taken to exist only where the EU measure concerned is *manifestly disproportionate*'.<sup>86</sup> Thus, the Union legislature now seems to have a broad discretion in how to exercise its broad discretion, which places very few limits indeed on the use of Article 114.

Turning to subsidiarity, since the subsidiarity review can be understood as an enquiry into 'federal proportionality'<sup>87</sup>—whether the Union has been proportionate in assessing that the EU level will be the most effective for achieving the objectives sought—there is reason to suspect that the Court's lax approach to substantive proportionality in the context of Article 114 will be replicated in its approach to federal proportionality. *Vodafone* again provides evidence that this is indeed the case—the Court dedicates a mere two paragraphs to evaluating subsidiarity, and in similar fashion to its proportionality analysis, tamely accepts the reasoning put forward by the Union legislature in the contested Regulation itself. An actual enquiry into the added value of action at Union level was not even attempted.

This weak approach to subsidiarity is again confirmed by Advocate General Kokott. She writes that subsidiarity scrutiny 'is exercised primarily at political level, with the participation of national parliaments'.<sup>88</sup> Therefore 'the Court can reasonably review only whether the Union's political institutions have kept within the limits of the discretion conferred on them in the exercise of their competences in the light of the principle of subsidiarity'.<sup>89</sup> Thus, subsidiarity also constitutes few real checks on the Union's use of Article 114.

85 Case C-358/14 *Poland v European Parliament and Council of the European Union* [2015] ECLI:EU:C 2015:848, Opinion of Advocate General Kokott, para 2.

86 *ibid* para 89 (emphasis in original).

87 Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68(3) CLJ 525, 533.

88 Case C-358/14, Opinion of Advocate General Kokott (n 84) para 146.

89 *ibid* para 147.

Thus, Article 114 appears to have indeed become the general regulatory power that the Court was so at pains to prevent it from becoming. To use my earlier metaphor, as long as it uses the competence judiciously, there is now little to stop the EU from using the tools provided by Article 114 to build bridges that span the EU's NCD competence gap. Some would identify this development as an unfortunate shift in the balance of regulatory power within the EU towards the Union legislature.<sup>90</sup> I argue, though, that this can be seen as a positive result for NCD policy. The EU is under a legal obligation to ensure that all of its policies should contribute to public health protection, and that it has an increasingly important role to play in tackling the transnational causes of NCDs. To date, the EU has not always been able to fulfil these obligations. Through the judicial development of the power in Article 114, the EU now finds itself in a position to change this. In the last few paragraphs of this section, I therefore aim to explore ways in which Article 114 might be used in future NCD prevention activities.

## 4.2 Potential uses of Article 114 TFEU in NCD policy

One example of an effective NCD intervention is a ban on the marketing of products that are causal factors for NCDs, whether this consists of bans on advertising, point-of-sale display, or the sale of a product entirely.<sup>91</sup> Advertising bans were of course the subject of the *Tobacco Advertising* litigation itself, with the Court clearly of the opinion, even before it set down its test, that '[i]n principle, therefore, a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of [Article 114] of the Treaty'.<sup>92</sup> The Court has also addressed more stringent marketing measures. In *Swedish Match*, it stated plainly that 'requiring all the Member States to authorise the marketing of the product or products concerned (...) or even provisionally or definitively prohibiting the marketing of a product'<sup>93</sup> may be an appropriate response under Article 114 to divergent national measures likely to result in trade obstacles. In

90 See Derrick Wyatt, 'Community Competence to Regulate the Internal Market' in Michael Dougan and Samantha Currie (eds), *50 Years of European Treaties* (Hart 2009) 93.

91 For evidence and analysis on marketing and marketing interventions, see Oliver Bartlett and Amandine Garde, 'Time to Seize the (Red) Bull by the Horns: the EU's Failure to Protect Children from Alcohol and Unhealthy Food Marketing' (2013) 38(4) *Eur L Rev* 498.

92 *Tobacco Advertising I* (n 70) para 98.

93 *Swedish Match* (n 82) para 34.

*Alliance for Natural Health* and *Arnold André* the Court also upheld total marketing bans adopted under Article 114.<sup>94</sup> Consequently, the adoption of marketing measures can be a legitimate exercise of Article 114. This line of case law may be especially useful in advocating for more stringent regulation of alcohol advertising by the EU where, as we saw above, there have been numerous calls for the EU to intervene to a greater extent. The case law indicates that any product may be the subject of advertising bans of varying intensity, as long as the conditions for recourse to Article 114 are met and the general principles of EU law are complied with. This suggests that the most pressing obstacle to more stringent EU action on alcohol advertising will not be a lack of competence itself, but a lack of political resolve to use the competence.

Further indications of the potential applications for Article 114 in NCD policy are provided by the recent Opinion of Advocate General Kokott in *Poland v Parliament and Council*, where she stated that 'tak[ing] account separately of each market segment regulated in an internal market harmonisation measure (...) must be rejected. Instead, the relevant factor is whether the Directive as a whole may be based on Article 114 TFEU'.<sup>95</sup> Her Opinion indicates that Article 114 may be used to regulate a number of similar varieties of a particular class of product, while only having to show the likelihood of divergences in national laws for the product class. This may make it substantially easier to tackle novel product developments that could present threats to public health, without having to spend time specifically demonstrating the trade obstacle generated by each novel variant.

A final example of where Article 114 could be useful to future NCD prevention efforts is in the control of irresponsible practices by corporations. At present, it is difficult formally to investigate and assess the behaviour of corporations that market products such as alcohol and tobacco against international legal standards, such as the right to health.<sup>96</sup> The ability to set up conduct scrutiny authorities for such purposes would undeniably be useful for NCD prevention efforts, and the Court has again addressed the possibility of achieving this through Article 114, albeit not in the context of public health. In the recent case of *C-270/12 UK v Parliament*,<sup>97</sup> the

94 Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others v Secretary of State for Health* [2005] ECR I-6485; Case C-434/02 *Arnold André v Landrat des Kreises Herford* [2004] ECR I-11869.

95 Case C-358/14, Opinion of Advocate General Kokott (n 84) para 47.

96 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 12.

97 Case C-270/12 *United Kingdom v European Parliament* [2014] ECLI:EU:C:2014:18.

Court held that Article 114 supported the enactment of a Regulation that allocated certain powers to the European Securities and Markets Authority that could be used with regard to natural and legal persons. The Court stated that ‘nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States.’<sup>98</sup> Thus, on the basis of this judgment, Article 114 could potentially be used to create a corporate conduct scrutiny authority at the European level, which could monitor the compliance of corporations with international legal standards, such as the right to health, and which would then be empowered to initiate appropriate legal action should a possible infringement be found.

### 4.3 Summary

In this section, I have attempted to show that the EU’s internal market competence can and has been used as a useful tool of EU NCD policy, enabling it to fulfil the role that it is needed to play in NCD prevention when the powers in Article 168 TFEU prove insufficient. The use of the powers granted by Article 114 has, however, provoked continued opposition from the Member States, showing that, although this strategy is useful from a public health standpoint, it is politically controversial. The final section of this piece discusses the relationship between Articles 114 and 168 in more detail, firstly asking how the use of one might be affected by the other, and secondly, exploring the likelihood that the Member States will agree to expand the scope of these powers.

## **5 Bridging the competence gap — the relationship between Articles 168 and 114 TFEU and the likelihood of further EU public health powers**

This final section aims to argue that, while the EU can and should use both its specific and general powers in tandem in order to fulfil its responsibilities in NCD prevention, any hopes of expanding these competences in order to allow the EU to play a larger role in NCD prevention are slim, due to the lack of political desire to transfer any more powers to the EU in this sensitive social field.

98 *ibid* para 107.

## 5.1 The textual relationship between Articles 168 and 114 TFEU

A reading of the text of the Treaty makes it clear that the EU's specific public health competence and general harmonisation competence should both be used in making public health policy. Article 168(1) provides that 'a high level of human health protection shall be ensured in the definition and implementation of *all* Union policies and activities',<sup>99</sup> and Article 114(3) states that internal market harmonisation proposals concerning health 'will take as a base a high level of protection, taking account in particular of any new development based on scientific facts'. It is obvious, therefore, that the Treaties envisage that public health policy will be advanced through the use of both measures, not just through the specific public health competence. If this is the case, then we must understand the legal relationship between the two provisions, so that they may be used together in an effective way.

First, it is clear from case law that the exclusion of harmonisation in Article 168(5) applies only to use of the public health power in Article 168, and does not apply to the exercise of other powers provided by the Treaties for public health purposes. In *Tobacco Advertising II*, the Court clearly states that 'that provision does not mean, however, that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health'.<sup>100</sup> This point has been reinforced recently by Advocate General Kokott in another Opinion on the revised Tobacco Products Directive, this time in *Phillip Morris Brands*, where Advocate General has said that 'Directive 2014/40 is not a public health measure, but an internal market harmonisation measure'.<sup>101</sup> Questions of legitimacy over legislation adopted under Article 114 that has public health effects cannot be answered by referring to the construction of other competences in the Treaty. Clearly, then, the fact that the EU lacks harmonisation power for public health purposes under Article 168(5) is not relevant to the question of how the harmonisation power in Article 114 is used, and use of Article 114 for public health purposes does not constitute unconstitutional circumvention of Article

99 (emphasis added).

100 Case C-380/03 *Germany v European Parliament and Council of the European Union* [2006] ECR I-11631, para 95.

101 Case C-547/14 *Phillip Morris Brands and Others* [2015] ECLI:EU:C:2015:853, Opinion of Advocate General Kokott, para 123.

168(5), since the two provisions are to be analysed from the perspective of two distinct mandates.

Second, it is clear that use of Article 114 for public health purposes does not require any kind of prior authorisation under Article 168. The mainstreaming provisions, cited regularly in case law on the use of Article 114, suggests that the promotion of high levels of health in other policy areas must be sought irrespective of what can and cannot be done under Article 168. For example, in *British American Tobacco* the Court holds specifically that Article 114(3) ‘explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed.’<sup>102</sup> Interestingly, Advocate General Kokott says in her Opinion in *Poland v Parliament and Council* that ‘the Union legislature had to be allowed broad discretion in respect of the assessments underlying the Directive, not least with regard to the measures which are best able to achieve the high level of health protection.’<sup>103</sup> She refers to Article 168(1) as authority for this statement, suggesting that the mainstreaming obligation there even requires the EU to use Article 114 in ways that will most effectively protect public health. It follows that recourse to Article 114 for public health purposes may be sought solely on the basis that use of the internal market competence is considered necessary to protect health, without the need to seek prior authorisation or exhaust possibilities for action under Article 168.

The legal relationship between Articles 168 and 114 is therefore such that both powers may be used independently of each other in pursuit of public health goals. Given then that either power may be used, yet Article 114 gives vastly more power, should the EU favour use of Article 114 over Article 168 in the future? There is little doubt that Article 114 TFEU offers considerable potential for developing European-level NCD policy. Article 114 occupies ‘a position of unusual strength *vis-à-vis* the other legal bases contained in the Treaties’<sup>104</sup> and could potentially ‘undermine the principle of attributed powers as regards those policy fields where dedicated Union competences are either weak or non-existent’.<sup>105</sup> This supposition is certainly relevant in the case of public health. It is therefore only natural to

102 Case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11550, para 62.

103 Case C-358/14, Opinion of Advocate General Kokott (n 84) para 88.

104 Dougan (n 63) 176.

105 *ibid.*



question whether the allure of Article 114 will diminish the role of Article 168 in the development of EU-level NCD policy.

Vague as it might be, though, Article 168 is not a weak competence. As I have argued above, it has a key role to play in developing EU NCD policy—it is the only dedicated power in public health matters that the EU possesses. Moreover, since, as I will elaborate upon below, formal harmonising powers specifically for public health are not yet on the table, the new governance mechanisms that Article 168 does authorise should be seen as important tools for the EU. We must remember that, powerful as Article 114 is, it must ultimately remain tied in some way to internal market-making, which means that it must be linked in some manner to the free movement of goods, services, persons or capital. An internal market dimension is not always a necessary or desirable feature of an effective NCD policy, and there are important NCD causal factors that are unrelated to the operation of the market. Article 168 provides the necessary power to be able to adopt any measure or incentive measure that is directly relevant to protecting public health against tobacco and excessive alcohol consumption, without having to tie in secondary elements.

It would therefore be naïve to dismiss the opportunities afforded by fuller use of Article 168 simply because another way of demonstrating the competence to harmonise in pursuit of public health goals exists. There is no doubt that Article 114 is a powerful competence, and that this is surely attractive to policymakers. However, common standard setting is not always necessary for effective NCD policy, and command and control regulation that lacks proper targeting is likely to be ineffective and unpopular. Instead, we should aim to develop European-level NCD policy using both Articles 168 and 114, matching the various objectives sought to the most suitable powers to be found in either competence. It is acknowledged in the NCD literature that ‘only a multi-level approach, with mechanisms ensuring the effective co-ordination between the different levels of intervention, will effectively reverse the current surge of NCDs’<sup>106</sup>—we need what both Articles 168 and Article 114 have to offer.

Having reached the above conclusions, the final question to ask in order to draw together all of the analysis conducted thus far relates to the balance of the relationship between Articles 168 and 114. For all the utility of both competences, one cannot ignore that Article 168 offers much less power than Article 114. The last section of this paper turns to examine the likelihood of the EU being able to secure

106 Alemanno and Garde (n 15) 1749.

an increase in the public health power it already holds, to lessen the pressure that is placed on the internal market competence.

## 5.2 Political feeling on the use of the EU's public health competences

Theoretically, the most elegant way in which to resolve the EU's NCD competence gap is to transfer the legislative powers that the EU is already claiming for itself under its internal market competence to the public health competence. Constitutionally speaking, this would alleviate much controversy, as the EU would be using the correct power for the correct purpose. This would take the form of a further amendment to the Treaty, furnishing the Union with greater legislative powers for the specific purpose of protecting public health. The analysis below explains, though, why the Member States are unlikely to transfer any further public health powers to the EU any time soon.

### 5.2.1 Differences in public health provision between the Member States

Practically speaking, it would be hard for the Member States ever to settle on an agreement to transfer public health competences to the EU because it is difficult to identify the precise responsibilities that should be transferred in the first place. This issue is caused by significant differences in how the Member States conceive of public health, how they provide for it, and how they finance it. Firstly, the Member States understand 'public health' very differently. Kaiser and Mackenbach have conducted a survey of the use of the term 'public health' in eight EU Member States and concluded that 'a consensus on either the organization of public health or public health terminology is non-existent. Public health in Europe is characterized by the diversity of concepts, systems and terminology'.<sup>107</sup> Their study shows that eight core terms are used in varying frequencies and with various linguistic subtleties across the eight Member States. For instance, the term 'health of populations' is used primarily in Sweden and the Netherlands,<sup>108</sup> whereas 'health promotion' was one of only two core terms that were universal to all countries.<sup>109</sup> This diversity suggests

107 Sanja Kaiser and Johan Mackenbach, 'Public Health in Eight European Countries: An International comparison of terminology' (2008) 122 *Public Health* 211, 211.

108 *ibid* 214.

109 *ibid* 215.

that it will be difficult for Member States to agree on what comprises 'public health' powers, and consequently, even more difficult to agree on a concrete set of such powers that should be transferred to the EU.

The Member States also differ considerably in their capacities for public health provision. A review for the (then) Directorate-General for Health and Consumers concluded that 'the capacity of some countries was much better developed than in others'.<sup>110</sup> For example, while only two countries were found to lack administrative units responsible for health promotion and disease prevention, seven states lacked units with responsibility for addressing socio-economic factors of public health.<sup>111</sup> This study suggests that the abilities of Member States to act effectively in public health are different. We should therefore expect that States with more developed public health systems will be reluctant to cede any significant level of control over those systems to the EU if they feel that doing so would lower the level of protection that they could offer their own citizens.

Finally, the Member States also spend different amounts of money on public health. The Organisation for Economic Co-operation and Development figures from 2010 show that the percentage of Gross Domestic Product spent on health ranged from 6% all the way up to 12%,<sup>112</sup> reflecting the Member States' varying levels of ability and desire to spend on health. This generates the opposite problem to that which was indicated in the paragraph above—namely, giving further powers to the EU would result in more common standard setting, which may put pressure on some Member States with smaller health budgets. This will make those Member States unwilling to consider transferring greater powers to the EU, as they may feel that greater EU involvement in public health would force them to spend more money on public health than they can afford.

Clearly, the differences between the Member States in how public health is understood, provided for, and financed could make identifying and transferring further public health powers to the Union a difficult exercise. Despite the more flexible Treaty amendment procedure introduced at Lisbon, any revision requires unanimous agreement between the Member States. In this situation, it is extremely unlikely that all Member States would be able to agree on the nature of, and process

110 Christoph Aluttis and others, *Review of Public Health Capacity in the EU* (DG Health and Consumers 2013) para 13.

111 *ibid* 42–43.

112 OECD, 'Health Expenditure in Relation to GDP' in *Health at a Glance: Europe 2012* (OECD Publishing 2012) 123.

by which, new powers should be added to Article 168. Even if further EU powers in public health would go some way towards resolving the competence gap and that this would, in turn, result in greater protection for the health of European citizens, the level of effort required to procure unanimous agreement on what these powers should be makes such an exercise distinctly unappealing to Member States. As a result, political ambivalence has set in, the evidence of which I shall examine below.

### 5.2.2 Political ambivalence to greater EU involvement in public health

Political sentiment among the European political community is clearly against any transfer of public health legislative power to the EU. With states so unwilling to consider the issue, it is unlikely that enough momentum can be generated to force a review of the EU's public health competence. An excellent case study is the wide-ranging consultation exercise that the UK Government launched into the balance of competences between the UK and the EU.<sup>113</sup> These reviews were conducted across a range of sectors, and the review conducted in the health sector reveals a significant amount about the UK Government's attitude towards EU competences in the field of health. The published results of the Health Review explicitly state that 'whilst supportive of EU work on public health in general and certain voluntary initiatives, the UK Government believes that the current balance of competence is broadly appropriate and therefore does not need to extend further'.<sup>114</sup> The report was equally conclusive on the attitudes of the (primarily) UK-based stakeholders who responded to the consultation. Although 'stakeholders strongly supported more input from the EU on public health',<sup>115</sup> the consultation found that 'most would prefer to see progress under existing competence'.<sup>116</sup> This shows that, in the UK at least, there is little appetite for a large transfer of public health competence to the EU, but rather, for increased effort on the part of the EU under its existing competences.

The absence of any desire for significant revision of the EU's public health competence is also evident from the consistency of attitudes expressed by the

113 See the announcement by Foreign Secretary William Hague at HC Deb 12 July 2012, vol 548, cols 468–70.

114 Department of Health, *Review of the Balance of Competences between the UK and the European Union: Health* (Department of Health 2013) 8.

115 *ibid.*

116 *ibid.*

holders of the rotating Presidency of the Council of Ministers. In 2000, the French presidency indicated in its priorities for public health that it would like to encourage 'closer cooperation between the Member States, with the support of the Commission'.<sup>117</sup> This view, given some three years after Article 152 EC had been adopted, indicates satisfaction with the complementary nature of the revised competence, and a desire for the EU to continue to play a supporting role. Some 15 years later, the attitude of Member States seems not to have changed. In a recent speech to a meeting of the Committee on the Environment, Public Health and Food Safety, the Latvian health minister set out the public health priorities of the incoming Latvian Presidency. In that speech were some revealing comments on EU competence. He specifically mentioned that alcohol policy 'remains the competence of the Member States'.<sup>118</sup> More generally, he remarked that health 'falls within the purview of the Member States'.<sup>119</sup> Consequently, it appears that, even after 15 years of progressive public health action by the EU in the 21<sup>st</sup> century, there is still limited appetite amongst the Member States for updating the EU's formal public health competence.

Even within the EU institutions there is ambivalence towards a transfer of public health powers. For example, a 2011 European Parliament motion calling for more action on health inequalities<sup>120</sup> does not once mention the possibility of updating the EU's public health competence, even though various actions in public health were advocated that might benefit from an increase in EU competence, including a 'call on the Commission to mainstream an approach based on the economic and environmental determinants of health'.<sup>121</sup> Instead, there are various calls for the EU institutions to play supporting roles, for instance, a call 'on the Commission to support actions financed under the current and future Public Health Action Plans to address the social determinants of health'.<sup>122</sup> Given the minimal desire within even the European Parliament to initiate debate on

117 Dominique Guillot, 'Public Health Priorities for the French Presidency' (2000) 6(4) *Eurohealth* 3.

118 Speech by Guntis Belevics in the Committee on the Environment, Public Health and Food Safety, 21 January 2015 <[www.europarl.europa.eu/ep-live/en/committees/video?event=20150121-1500-COMMITTEE-ENVI](http://www.europarl.europa.eu/ep-live/en/committees/video?event=20150121-1500-COMMITTEE-ENVI)> accessed 29 August 2015.

119 *ibid.*

120 Committee on the Environment, Public Health and Food Safety, *Report on Reducing Health Inequalities in the EU* [2010] 2089 (INI).

121 *ibid* para 67.

122 *ibid* para 70.

competence reform in public health, it is difficult to see where large-scale political momentum would come from for initiating a serious review of the EU's public health competence.

In summary, political feeling is that the current powers of the EU in public health are sufficient, and that greater and more effective use should be made of the specific complementary competence already conferred upon the EU in public health. If this much was not clear from remarks in political discourse, it is certainly obvious from the recent legal challenges to the EU's revised Tobacco Products Directive—adopted under Article 114—on the grounds of lack of competence, which were examined above. This actually leaves the EU in a slightly awkward position since the EU's specific competence might still be considered too vague to allow the EU to step up its involvement in public health as desired by the political community. With the Member States unwilling to extend, or perhaps even to clarify, the powers in Article 168, the EU will continue to experience a conflict between its powers and its ambitions in NCD policy, and will continue to have reason to turn, not to Article 168, but to Article 114. Thus, the competence gap between the EU's ambitions and its powers in public health looks set to be maintained.

## 6 Concluding remarks

There are strong reasons why the EU should be involved in the fight against NCDs. The transnational nature of many of their most important root causes means that there must be some form of transnational response, and the EU is well placed to coordinate and perhaps at times even lead this response. The competences given to the EU in order to carry out this role provide a considerable amount of law-making power. They are not, however, without their weaknesses and vagaries. Despite the potential of Article 168, its already well-known limits as a complementary competence remain, as do uncertainties surrounding the newly added powers on tobacco and alcohol. Where these limits are reached, Article 114 TFEU provides the necessary authority for the EU to drive NCD policy forward. However, as recent case law demonstrates, the appropriateness of this strategy is still highly contested and thus, still politically challenging to employ.

It is evident, though, that the Member States would find it difficult to agree upon how to establish a stronger legal basis from which the EU could pursue its ambitions in NCD prevention, or at least, to clarify the ambiguities in its current legal basis for public health. This is disappointing, as effort expended now in order to clarify exactly what the EU should and should not be doing in NCD prevention

may prevent the competence gap from becoming any more unstable. At present, realising the potential of Article 168 would still not be enough to accommodate the EU's ambitions in NCD prevention. The EU is clearly not afraid to use Article 114 in order to bridge this gap, and nor should it be, as the internal market competence offers a legitimate outlet that enables the EU to play its part in the multi-level approach that is required for effective NCD prevention. However, as long as the EU is willing to use Article 114 in this manner, it seems from the proliferation of case law that one or more Member States will always be willing to challenge such use. This pattern surely cannot be sustainable. The outcome of the next challenge may do more to upset the balance of competence between the Member States and the EU than if the Member States made the effort required clearly to establish the specific powers that the EU needs in order freely to play its part in NCD prevention.

If we are to expect the Member States to make efforts to resolve the current competence gap, the EU must first make efforts to demonstrate that it still exists. Thus, the first step must be for the EU to answer the calls of the Member States (and others) for more effective action in key areas of NCD prevention, making full and effective use of Article 168, which still holds untapped potential for European level NCD policy. Only then will it be possible to demonstrate the necessity of albeit carefully limited, public health harmonisation powers that will enable the EU to fulfil its role in the field of NCD prevention.

# An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union

*Carlos Arrebola,\* Ana Júlia Maurício\*\* and Héctor Jiménez Portilla\*\*\**

## Abstract

This article contributes to a more comprehensive understanding of the role of the Advocate General in the makeup of the Court of Justice of the European Union. The article measures the influence of the Advocate General on the judgments of the Court of Justice through an econometric study using a probit model with data from annulment procedures of the last twenty years (1994–2014). Despite the acknowledged limitations in establishing the influence of the Advocate General on the case law of the Court of Justice via a quantitative analysis, the regression models used in this article give a statistically significant measure of such influence, improving previous attempts in the literature. The findings suggest that the Court of Justice is approximately 67 per cent more likely to annul an act (or part of it) if the Advocate General advises the Court to annul than if it advises the Court to dismiss the case or declare it inadmissible. These results raise several questions as regards judicial independence and the relevance of the figure of the Advocate General, providing a grounded basis for future discussions and judicial reform.

## Keywords

European Union, Court of Justice of the European Union, Advocate General, Influence, Econometrics

---

\* PhD Candidate at the Faculty of Law of the University of Cambridge.

\*\* PhD Candidate at the Faculty of Law of the University of Cambridge.

\*\*\* Development Economist and Overseas Development Institute Fellow at the Ministry of Health in Ethiopia.

The authors would like to thank Advocate General Eleanor Sharpston, Dr Albertina Albers-Llorens and Professor Kenneth Armstrong for the elucidating discussions on this topic. The authors would also like to thank Professor Eleanor Spaventa for the thoughtful comments on a previous version of this article, as well as Professor Robert Schütze, the participants at the Durham-Cambridge Doctoral Workshop in EU Law—‘Igniting European Union Law: Frameworks for the Future’ for the helpful discussion, and the anonymous peer reviewers of the CJICL. All errors remain ours. The database and STATA file with the econometric analysis used in this study can be accessed via email request to Héctor Jiménez Portilla: <hectorjp@gmail.com>.



# 1 Introduction

This article attempts to measure the influence of the Advocate General on the judgments of the Court of Justice of the European Union (the Court of Justice or the Court) innovatively using an econometric model to expand the academic literature on this topic and to inform the debate on the role of the Advocate General. The role of the Advocate General is to assist the Court in some of the cases presented before it by delivering reasoned submissions, which are known as opinions.<sup>1</sup> These opinions are not binding on the Court of Justice. Nevertheless, scholars often assume that these opinions influence the final decisions made by the Court.<sup>2</sup> In reality, however, the fact that the deliberations of the Court are secret makes it difficult to test this assumption.<sup>3</sup>

Some authors have tried to measure the influence of the Advocates General in the development of the case law of the Court of Justice by using descriptive statistics.<sup>4</sup> However, such statistics merely identify the frequency with which the opinions of the Advocates General (AG opinion(s)) and the decisions of the Court of Justice coincide for a particular sample. Although frequency may indicate correlation, it cannot determine causality.<sup>5</sup> Moreover, these works do not account for the influence that other variables have in the Court's decisions. There are two

- 1 Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU) art 19(2); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 252.
- 2 See Section 2 of this paper.
- 3 Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ C326/13 (CJEU Statute) arts 2, 35.
- 4 Alan A Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 LS 202; Takis Tridimas, 'The Role of the Advocate General in the Development of Community Law: Some Reflections' (1997) 34 CML Rev 1349; Kamiel Mortelmans, 'The Court Under the Influence of its Advocates General: An Analysis of the Case Law on the Functioning of the Internal Market' (2005) 24 YB Eur L 127; Cyril Ritter, 'A New Look at the Role and Impact of Advocates-General—Collectively and Individually' (2006) 12 Columbia J Eur L 751; Adam Lazowski, 'Advocates General and Grand Chamber Cases: Assistance with the Touch of Substitution' (2012) 14 Cambridge YB Eur L Studies 635; Roman Zakharenko, 'Invisible Influence? The Role of the Advocate General in the European Court of Justice on the Development of Community Law' (University Honors in International Studies, 2012) <<http://aladinrc.wrlc.org/bitstream/handle/1961/10724/Zakharenko, Roman - Spring 12.pdf>> accessed 20 February 2015.
- 5 Brian Haig, 'Spurious Correlation' in Neil J Salkind (ed), *Encyclopedia of Measurement and Statistics* (SAGE 2007).

studies, though, which had a different goal but also carried out an econometric analysis and used the AG opinion as a control variable, reaching a similar conclusion to ours.<sup>6</sup> Although these studies provide interesting information regarding the influence of the AG opinion on the Court, the authors were unable to determine whether their findings were due to the presence of the AG opinion. In this article, we have undertaken an econometric analysis that builds on the latter studies, and which aims to overcome the shortcomings of the existing literature specifically directed at measuring the influence of the Advocates General on the judgments of the Court of Justice. Aiming to explore the correlation and causation between the AG opinions and the Court's decisions, we have conducted an econometric study using a probit model with data from annulment procedures of the last twenty years (1994–2014). We have considered the AG opinion variable, as well as other variables that might also influence the Court of Justice's decisions. Our findings are statistically significant. In particular, the average marginal effects measure for our sample suggests that the Court of Justice is approximately 67 per cent more likely to annul an act (or part of it) if the Advocate General advises the Court to annul than if it advises the Court to dismiss the case or declare it inadmissible.

Although it is acknowledged that using a quantitative analysis to establish the influence of the Advocate General on the case law of the Court of Justice has limitations, we believe that a carefully designed econometric study will contribute to a more comprehensive understanding of the role of the Advocate General. This article is organised in the following manner: Section 2 elaborates on the existing literature on this topic, summarising the studies conducted and their findings, and identifies the original contribution of this study to the literature. Section 3 describes and justifies the chosen methodology: it explains the shortcomings of descriptive statistics, and the adequacy of using regressions, namely a probit model, to provide a more accurate measure of the influence of the AG opinions on the judgments of the Court of Justice. Section 4 explains and analyses the results, showing that our probit model is robust and a reliable predictor of the behaviour of the Court of Justice in actions for annulment. Having established the influence of the Advocate General on the Court of Justice, Section 5 explores some of the issues raised. It

6 Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 *American Political Science Rev* 435; Clifford J Carrubba and Matthew J Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (CUP 2015) 93–95.

raises the implications that this influence might have for the independence of the Court. More generally, this article aims to contribute to a more informed debate on the role and future of the figure of the Advocate General.

## 2 Literature Review

According to the Treaties, the Court of Justice of the European Union ‘shall be assisted by Advocates-General.’<sup>7</sup> Advocates General must act ‘with complete impartiality and independence.’<sup>8</sup> The Advocate General’s duty is ‘to make, in open court, reasoned submissions on cases which (...) require his involvement’, ‘in order to assist the (...) Court in the performance of its task.’<sup>9</sup> The literature has described the assistance of the Advocates General as including the following functions: providing assistance to the Court of Justice with the preparation of a case; proposing solutions to cases before the Court of Justice; providing ‘legal grounds to justify that solution, in particular, relating it to the existing case law’; opining ‘on such points of law incidental to the case’; and making ‘a critical assessment of the case law or comment[ing] on the development of the law in the area in issue.’<sup>10</sup>

The reasoned submissions of the Advocates General, known as opinions, might play a role in the outcome of the cases before the Court of Justice. Put differently, an opinion may *influence* the actual decision taken by the Court. However, AG opinions are not binding on the Court of Justice, the Advocates General do not

7 TEU (n 1) art 19(2); for a comprehensive account of the literature on the Advocate General, see Rosa Greaves, ‘Reforming Some Aspects of the Role of Advocates General’ in Anthony Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 162–66.

8 TFEU (n 1) art 252.

9 *ibid*; CJEU Statute (n 3) art 49.

10 Tridimas (n 4) 1358; see also, eg, Dashwood (n 4); Kirsten Borgsmidt, ‘The Advocate General at the European Court of Justice: A Comparative Study’ (1988) 13 EL Rev 106; Martin Vranken, ‘The Role of the Advocate General in the Law-Making Process of the European Community’ (1996) 25 Anglo-American L Rev 39; Ruiz-Jarabo Colomer and López Escudero, ‘The Institution of Advocate General at the Court of Justice of the European Communities’ in Rodríguez Iglesias and others (eds), *Mélanges en Hommage à Fernand Schockweiler* (Nomos 1999); Francis G Jacobs, ‘Advocates General and Judges in the European Court of Justice: Some Personal Reflections’ in David O’Keeffe and Antonio Bavasso (eds), *Judicial Review in European Union Law*, vol 1 (Kluwer Law International 2000); Philippe Léger, ‘Law in the European Union: The Role of the Advocate General’ (2004) 10 J Legislative Studies 1; Mortelmans (n 4); Ritter (n 4); Noreen Burrows and Rosa Greaves, *The Advocate General and EC Law* (OUP 2007).

take part in the Court's deliberations—which are secret—and the Court's decisions do not usually give an account of the various elements that influenced them.<sup>11</sup> This has caused difficulties in measuring the influence of the AG opinions on the Court's case law. Nevertheless, evaluating the relevance of this mechanism in the makeup of the Court of Justice of the European Union and its case law has frequently been attempted by scholars. This level of attention is reflective of the fact that the issue is open for discussion and warrants attention, since the influence of AG opinions could affect the legitimacy and independence of the Court of Justice.

Influence generally means the capacity to have an effect on someone or something. The discourse of influence has been commonly used to study how courts respond to external factors, including the executive power and war,<sup>12</sup> and threats of executive noncompliance and legislative override.<sup>13</sup> It has also been used in the European legal literature in the context of the relationship between the AG opinions and the decisions of the Court of Justice. In this ambit, the concept of influence has been given different meanings, which have led scholars to distinct conclusions. For instance, influence has been interpreted to mean 'the power of the Advocate General to *persuade* the Court' or, more generally, the significance of the AG opinions in the decision-making of the Court of Justice.<sup>14</sup> Despite the precise definition of influence, it is widely accepted that the AG opinions have an effect on the decision-making of the Court of Justice.<sup>15</sup> However, it is discussed whether it

11 CJEU Statute (n 3) arts 2, 35.

12 Tom S Clark, 'Judicial Decision Making During Wartime' (2006) 3 J Empirical L Studies 397.

13 Carrubba, Gabel and Hankla (n 6).

14 Albertina Albors-Llorens, 'Securing Trust in the Court of Justice of the EU: The Influence of the Advocates General' (2012) 14 Cambridge YB Eur L Studies 509, 515–16 (emphasis in original).

15 See, mainly, Dashwood (n 4); Vranken (n 10); Tridimas (n 4); Anthony Arnall, *The European Union and Its Court of Justice* (2nd edn, OUP 2006) 15; Colomer and Escudero (n 10); Jacobs (n 10); Léger (n 10); Mortelmans (n 4); Ritter (n 4); Eleanor Sharpston, 'The Changing Role of the Advocate General' in Anthony Arnall, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP 2008); Greaves (n 7); Iyiola Solanke, "'Stop the ECJ?": An Empirical Analysis of Activism at the Court' (2011) 17 Eur LJ 764; Albors-Llorens (n 14); Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' (2012) 14 Cambridge YB Eur L Studies 529; Laure Clément-Wilz, 'The Advocate General: A Key Actor of the Court of Justice of the European Union' (2012) 14 Cambridge YB Eur L Studies 587; Lazowski (n 4); Iyiola Solanke, 'The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy' (2012) 14 Cambridge YB Eur L Studies 697; Sophie Turenne, 'Advocate Generals' Opinions or Separate Opinions? Judicial Engagement in the CJEU' (2012) 14 Cambridge YB Eur L Studies 723; Zakharenko (n 4).

is possible to evaluate the effect of the AG opinions in the case law of the Court of Justice, namely, quantitatively.

Dashwood affirmed that the ‘received wisdom is that the Court follows the Advocate General in about 70 per cent of cases’, although his experience at the Court of Justice led him to believe that the percentage was lower.<sup>16</sup> However, Dashwood did not provide information as to the methodology used to obtain the figure he advanced. Tridimas was one of the first to attempt measuring the influence of the AG opinions.<sup>17</sup> He adopted a ‘material criterion’, ie, ‘the proportion of cases within a given period in which the Court followed the opinion’, using a six-month period in 1996, and looking at any type of procedure. Tridimas concluded that the opinions were followed in 88 per cent of the cases.<sup>18</sup> He explored another possible criterion—identifying the main developments in the Court’s case law and verifying if the AG opinions were followed in those cases—but did not present any results.<sup>19</sup> This interesting study could have provided an explanation of Tridimas’ understanding of the concept *follow* to further elucidate the readers of the methodology used.

There have been qualitative and mixed-methods (quantitative and qualitative) studies of the influence of the AG opinions on the Court of Justice. One was conducted by Mortelmans, who focused on the role played by the Advocates General in the case law regarding the functioning of the internal market.<sup>20</sup> He resorted to purposive sampling, and then used two approaches to determine whether an opinion had been followed by the Court of Justice. He used a ‘direct route’, ie, cases in which the Court expressly states that it concurred with the AG opinion, and an ‘indirect route’, ‘comparing the judgment with the Opinion to establish whether or not the Opinion has been embraced.’<sup>21</sup> On the basis of both a quantitative and qualitative analysis, Mortelmans concluded that being followed is only one aspect of having influence. He identified specific periods of time, and stated whether the Court agreed with the views of the Advocates General on a majority of cases, highlighting the useful role of the Advocate General.<sup>22</sup>

16 Dashwood (n 4) 212.

17 Tridimas (n 4).

18 *ibid* 1362.

19 *ibid* 1363.

20 Mortelmans (n 4).

21 *ibid* 140.

22 *ibid* 140–72.

Ritter also completed a study on this topic, testing the degree of influence of the Advocate General on the decision-making of the Court.<sup>23</sup> He used a two-year period (2004–05), analysed cases stemming from all types of procedures, and used two criteria to evaluate if the Court followed the AG opinions.<sup>24</sup> Ritter identified decisions citing the AG opinion at least once, and decisions citing the AG opinion for each legal issue in question. Interestingly, Ritter also determined which Advocates General were cited more frequently.<sup>25</sup> Nevertheless, and despite acknowledging that his methodology is a mere ‘proxy for the actual number of times when the Court followed the opinion’, he simply verified the frequency with which an opinion was cited, providing a ratio of citation to opinions for 2004 and 2005.<sup>26</sup>

Other attempts include Lazowski’s purposive sampling and qualitative study of a small number of Grand Chamber preliminary reference procedure cases, where the Court of Justice concurred with or ignored the Advocate General, in order to ‘demonstrate the usefulness of the opinions of those Advocates General who lay down the foundations for the Court of Justice and offer true assistance’, in some cases ‘with the touch of substitution’.<sup>27</sup> Another quantitative and qualitative analysis was conducted by Zakharenko, who measured the influence of the Advocates General via an investigation of infringement procedure cases decided between 1961–77.<sup>28</sup> Providing an account of the methodology followed—ie, verifying if the Court ruled in the same way as proposed by the Advocate General—the author claimed that the Court followed the AG opinions in 91 per cent of the infringement procedure cases during the selected time period.<sup>29</sup> Furthermore, Zakharenko also concluded that in 76.5 per cent of the cases the ‘wording and phrasing used in the concluding statements were *identical*’.<sup>30</sup>

Some academics have criticised these interesting contributions because it is not simple to ascertain whether the Court of Justice *followed* the AG opinion in a given case. As mentioned, the deliberations of the Court are secret, and the Court

23 Ritter (n 4).

24 *ibid* 764–70.

25 *ibid* 767–70.

26 *ibid* 767, 774.

27 Lazowski (n 4) 635, 643, 654.

28 Zakharenko (n 4).

29 *ibid* 22.

30 *ibid* 25 (emphasis in original).

does not systematically cite the AG opinion, even if it follows it.<sup>31</sup> In fact, the Court rarely states expressly that it has followed the AG opinion. In the cases where the opinion is mentioned, the Court usually refers to it merely as evidence offered to support one of its conclusions.<sup>32</sup> Furthermore,

The opinion may have been followed to a greater or lesser extent. The Court may reach the same result but on the basis of different reasoning and, in some cases, it may not be obvious which parts of the advocate general's reasoning the Court has endorsed.<sup>33</sup>

In fact, some scholars feel that those difficulties render it impossible to measure the 'power of the Advocate General to *persuade* the Court'.<sup>34</sup> They justify it on the basis that

Even if an exhaustive statistical analysis was carried out of the number of cases where the Court 'followed' the Advocate General, this would not be accurate because in cases where the same conclusion is reached by the Court, the reasoning might well be different. Such a view of the influence of the Advocate General would be, at any rate, extremely narrow-minded and confined to the analysis of perceived results instead of encompassing the full extent of the contribution of the Advocate General to the development of EU law.<sup>35</sup>

This view mirrors that of Tridimas, who criticised the two criteria of result he advanced, since 'the influence of the advocate general goes beyond his contribution to the individual case'.<sup>36</sup> Instead of determining the influence of an AG opinion on an individual case, Tridimas was more interested in the 'dialectical interplay between opinions and judgments', trying to evaluate the influence of the Advocate General on the development of European Union (EU) law more broadly.<sup>37</sup> This seems to be the opinion of this strand of the scholarship, which prefers not to focus

31 CJEU Statute (n 3) arts 2, 35; see Ritter (n 4) 767; Solanke, "Stop the ECJ?": An Empirical Analysis of Activism at the Court' (n 15) 769; Albors-Llorens (n 14) 515.

32 Ritter (n 4) 757.

33 Tridimas (n 4) 1363; expressing similar concerns: Dashwood (n 4) 211–12; Arnall (n 15) 15; Jacobs (n 10) 22; Ritter (n 4) 766; Greaves (n 7) 165–66, 169; Albors-Llorens (n 14) 510–16; Zakharenko (n 4) 29–30.

34 Albors-Llorens (n 14) 515 (emphasis in original).

35 *ibid* 515–16.

36 Tridimas (n 4) 1363; similarly, Carrubba and Gabel (n 6) 93–95.

37 Tridimas (n 4) 1364; similarly, Vranken (n 10) 40–61; Ritter (n 4) 770–71; Greaves (n 7) 163–64, 168–70; Solanke, "Stop the ECJ?": An Empirical Analysis of Activism at the Court' (n 15) 771.

on the influence of the Advocates General on the case law of the Court of Justice, but to look at ‘their potential ability to *improve* the quality of that case law’.<sup>38</sup> It is also argued that the AG opinions promote trust in the Court of Justice—trust as the belief that the Court makes the right decisions—which ultimately improves the Court’s legitimacy.<sup>39</sup>

We agree that the influence of the Advocate General in the development of the case law of the Court of Justice and, more generally, in the makeup and legitimacy of the Court of Justice cannot be fully evaluated on the basis of a quantitative analysis. Such an endeavour would merit a broader analysis of the figure of the Advocate General, including: its opinions; the influence of its opinions in the case law of the Court of Justice; the clarity offered by the opinions to a fuller understanding of the case law; the sociological impact of having Advocates General for the judges of the Court of Justice, for the other EU and national institutions, and for the individuals of the Member States. Nevertheless, enquiries like ours, quantitatively measuring the effect that an AG opinion has on the Court’s solution of a case, are necessary and extremely valuable contributions to a comprehensive understanding of the role and implications of the figure of the Advocate General, and should be carried out in their own right. Furthermore, we feel that the doubts expressed in the literature can be minimised by conducting more refined econometric analysis, such as the probit model used here, which can accurately determine and predict the influence of the AG opinions on the decisions of the Court in relation to other possibly influential variables. The present study provides a methodological improvement over previous contributions that used descriptive statistics, which can only identify the frequency with which the AG opinions and the decisions of the Court of Justice coincide in a determined sample, and cannot account for the influence that other variables have in the Court’s decisions.

A quantitative analysis of influence, as the one proposed here, was encouraged by Carrubba, Gabel and Hankla, who carried out thorough econometric analyses in slightly different topics, using the AG opinion as a control variable for their measurement.<sup>40</sup> One of the studies identified that the AG opinion had a systematic positive influence on the decisions of the Court of Justice in the period of 1987–97,

38 Clément-Wilz (n 15) 588 (emphasis in original).

39 Albers-Llorens (n 14); Alicia Hinarejos, ‘Social Legitimacy and the Court of Justice of the EU: Some Reflections on the Role of the Advocate General’ (2012) 14 Cambridge YB Eur L Studies 615.

40 Carrubba, Gabel and Hankla (n 6); Carrubba and Gabel (n 6).



namely, that the AG opinion ‘shifts the likelihood of a pro-plaintiff ruling by 60 percentage points.’<sup>41</sup> In a later analysis using data from 1960–99, Carrubba and Gabel indicated that the AG opinions and decisions of the Court of Justice ‘coincide on 86 percent of the legal issues’, and that the likelihood of a pro-plaintiff decision by the Court increases between 49 per cent and 66 per cent if the opinion of the Advocate General is pro-plaintiff.<sup>42</sup> However, the probit models designed and used in these studies were not directed at measuring the influence of the AG opinions in the decisions of the Court of Justice. Instead, the 2008 study aimed at estimating the degree to which threats of override and noncompliance influenced judicial decision-making in the Court of Justice,<sup>43</sup> whereas the 2015 one addressed the issue of government compliance with international law and international courts’ rulings, using the Court of Justice as a case study.<sup>44</sup> In both works, introducing the AG opinion as a variable had the sole objective of controlling for ‘the quality of the legal argument.’<sup>45</sup> In fact, its authors expressly acknowledged that they could not determine whether their control variable findings were due to the presence of the AG opinion.<sup>46</sup> Nevertheless, the authors believed that their preliminary findings regarding the Advocate General control variable were significant, and showed that further research specifically focused on measuring the influence of the AG opinion in the Court of Justice was necessary.<sup>47</sup>

We are, therefore, building on Carrubba, Gabel and Hankla’s analyses, having confirmed their findings using a different dataset and regressions, and with a model specifically tailored towards measuring the influence of the Advocate General on the Court of Justice. In sum, we have focused specifically on the Advocate General and used refined econometric tools, with variables that particularly aim at exploring the correlation and causation between the AG opinions and the Court’s decisions, isolating this variable from others. The design of our research project and the selected methodology are described and justified in the following section.

41 Carrubba, Gabel and Hankla (n 6) 449.

42 Carrubba and Gabel (n 6) 95, 101–02, 123–24.

43 Carrubba, Gabel and Hankla (n 6) 435–36.

44 Carrubba and Gabel (n 6) 11–15.

45 Carrubba, Gabel and Hankla (n 6) 447–48; similarly, see Carrubba and Gabel (n 6) 86–124.

46 Carrubba, Gabel and Hankla (n 6) 449; similarly, see Carrubba and Gabel (n 6) 95, n 10. In the latter, the authors declare that ‘[d]emonstrating (...) influence is complicated’, and that ‘[f]or [their] purposes, the question is beside the point’.

47 Carrubba, Gabel and Hankla (n 6) 449; see also Carrubba and Gabel (n 6) 95 fn 10.

### 3 Methodology

The existing literature specifically analysing the relationship between the Advocate General and the Court of Justice only provides a measure for descriptive statistics, as we have explained in the previous section. Descriptive statistics only allow us to explain the correlation between the Advocate General and the Court, but not a potential causal relationship.<sup>48</sup> For that reason, and building on different studies,<sup>49</sup> we have designed several regressions that help us obtain a more refined measure of the actual influence of the Advocate General.<sup>50</sup> In this section, we have focused, firstly, on how causal effects can be explained in particular situations, and why it is adequate to use regressions in this case. Secondly, the variables that have been included in our models are introduced. Finally, this section elaborates on the type of regression chosen, ie, a probit regression.

#### 3.1 Proving causal effects

Econometric models have been widely used in applied economic literature to disentangle the causal effects of different factors on the outcomes of specific interventions.<sup>51</sup> For example, Miguel and Kremer used econometrics to uncover the causal link between deworming students in some villages in Kenya and their academic results.<sup>52</sup> In this case, the causal link could be understood by the use of randomised controlled trials. Essentially, the authors compared the outcomes of a treatment group and of a control group. The deworming intervention was only applied to the treatment group. Any difference between the two groups could only be attributed to the tested intervention, ie, the deworming policy. All other

48 Haig (n 5).

49 Carrubba, Gabel and Hankla (n 6); Carrubba and Gabel (n 6).

50 A 'regression' can be defined as '[a] tool for numerical data analysis that summarizes the relationship among the variables in a data set as an equation, where the variable of interest, or the dependent variable, is expressed as a function of one or several explanatory variables': John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics* (4th edn, OUP 2012) 346.

51 For those interested, the J-PAL website compiles many projects that used econometrics as the tool to uncover causal effects: <[www.povertyactionlab.org](http://www.povertyactionlab.org)> accessed 20 January 2015.

52 Edward Miguel and Michael Kremer, 'Worms: Identifying Impacts on Education and Health in the Presence of Treatment Externalities' (2004) 72 *Econometrica* 159.

possible known and unknown factors were equivalent across the treatment and control groups due to the randomisation.

Randomised controlled trials are considered the cleanest method to estimate treatment effects as it removes the selection bias.<sup>53</sup> However, many issues are not suited to a randomised controlled trial approach. In the present study, it is not possible to create a randomised controlled trial to define the causal effect of the AG opinion on the Court of Justice. This would require having the ability to design empirical experiments using the Court of Justice as a laboratory, which is unfeasible in practice.<sup>54</sup> Even if that were possible, it might not be the best use of the resources of the European judiciary.

For cases that are not amenable to randomised controlled trials, regression estimates can provide a partial solution.<sup>55</sup> Essentially, by controlling for all the covariates correlated with both participation and outcome, one can find a reliable estimate of the causal effect of interest.<sup>56</sup> For example, in the study on the effect of deworming, if there was no control group because deworming had been offered to the whole village, families would have self-selected into treatment. Comparing the

53 Esther Duflo, Rachel Glennerster and Michael Kremer, 'Using Randomization in Development Economics Research: A Toolkit' [2007] Development Economics, Discussion Paper No 6059, 7 <[http://scholar.harvard.edu/files/kremer/files/randomization\\_toolkit\\_dev\\_economics.pdf](http://scholar.harvard.edu/files/kremer/files/randomization_toolkit_dev_economics.pdf)> accessed 21 January 2015.

54 For that to be viable, we would need to have the same case be subject to different AG opinions, and two chambers of the Court ruling independently after each of those opinions. Only then could we compare the rulings of the Court and estimate the causal effect of the AG opinion. This would require deception of two different chambers into thinking they were exclusively ruling the case. Additionally, it would require having the same Advocate General generating two opposing opinions and presenting them in each of the chambers. Alternatively, we could explore the causal effect by submitting the same case to two chambers within the Court, where only one of them would have access to the AG opinion. However, this is still unfeasible since the judges would have to be deceived into thinking that only their chamber was ruling on the case. Even if one succeeded in conducting such unfeasible experiments, there would still be biases that could undermine the conclusions reached. This is because there could be important factors determining the decision of the Court that were independent of the AG opinion and difficult to measure. This could be the case, since similar cases may sometimes lead to different judicial results. Therefore, even if we designed the same case and gave it to two different compositions of the Court under similar conditions, other unknown factors could affect the results, such as judges' prejudices and/or presumptions. For a discussion about the factors that might affect judicial decisions, see Richard A Posner, *How Judges Think* (HUP 2008).

55 Rajeev H Dehejia and Sadek Wahba, 'Causal Effects in Nonexperimental Studies: Reevaluating the Evaluation of Training Programs' (1999) 94 J American Statistical Association 1053.

56 *ibid.*

outcomes of beneficiaries and non-beneficiaries in that case would be contaminated by selection bias. This is because the families that followed the treatment could also be those who, for example, were more responsible and concerned about their children's prospects. In that case, those children could have done better at school even in the absence of the deworming initiative. Hence, if only considering participation in the deworming programme, one would be overestimating the effect of the deworming pills. To solve this overestimation, a regression that accounted for how responsible the family was and whether the deworming took place could be designed.

For the purposes of the present study—measuring the influence of the AG opinion on the decisions of the Court of Justice—it is not possible to conduct a randomised controlled trial. Therefore, we have decided to estimate regressions including other variables that could potentially be biasing the results if we only looked at what the Advocate General said and whether the Court followed the Advocate General's position. In particular, one of the bias factors is the clarity of the law in a given case. For example, the Court and the Advocate General could reach the same result in a case, not because the Court decided to follow the AG opinion, but because the law was clear on what the outcome should be, and there was no room for different interpretations. Therefore, not accounting for the clarity of the case could overestimate our measure of the influence of the Advocate General.

### 3.2 Variables included in the regressions

Estimating our regression in order to establish the influence of the Advocate General on the Court of Justice, we have collected data from 20 years of actions for annulment procedures before the Court of Justice.<sup>57</sup> Every case from January 1994 to January 2014 has been included, with the exception of appeals from the General Court and those cases that do not have an AG opinion. We collected a total of 285 observations. For these cases, we have examined the behaviour of the Court and the Advocate General as regards to their decision to annul or not to annul the legal act in question.

57 The database is available upon request. It has been obtained collecting data from a search using the Curia database available at the website of the Court of Justice of the European Union: <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL#>> accessed 20 November 2014. We selected the period 1 January 1994 to 31 January 2014 and the procedure action for annulment.

This means that we have created two dichotomous (also called dummy or binary) variables: ECJannulment and AGannulment. ECJannulment is the one that we have considered as the dependent variable. It takes the value of 1 if the Court decided to annul or partially annul an act, and 0 if it dismissed the case or deemed it inadmissible. AGannulment is the variable that we have considered independent. It takes the value of 1 if the Advocate General issued an opinion recommending the Court to annul or partially annul an act, and 0 if it recommended dismissing the case or declaring it inadmissible.

AGannulment is our covariate of interest, because it is the one used to measure the influence of the Advocate General on the Court of Justice. Henceforth, for the purposes of this article, the term *influence* means the effect that the AG opinion has on the Court's solution of a case. Influence does not refer to the effect that other elements related to the Advocate General have on the Court, such as gender, nationality, height, age, etc. Neither is it a measurement of the effect of the presence of the Advocate General in the proceedings, as opposed to cases that are solved without Advocate General participation. Influence simply means the effect of the AG opinion on the judgment of the Court of Justice.

This is the reason why we have chosen data from the action for annulment procedure.<sup>58</sup> Actions for annulment are a commonly used procedure, in which it is possible to measure influence in the mentioned terms. It allows for a fairly clear result, which can be more easily coded, as there are only four possible decisions: declare the action inadmissible; dismiss the action; declare the partial annulment of the legal act; or declare the total annulment of the legal act.<sup>59</sup> Both the Court and the Advocate General have to provide one of those answers. Therefore, the behaviour of the Court and of the Advocate General can be consistently compared. As a result, we could predict with our regressions if the Court of Justice would change its decision from dismissal or inadmissibility to annulment if the Advocate General changed its decision, *ceteris paribus*—every other variable that may affect the decision of the Court remaining constant.

This simplicity in coding is not available for other commonly used procedures before the Court of Justice, such as preliminary references, in which it is not

58 TFEU (n 1) art 263.

59 Carrubba, Gabel and Hankla (n 6) 440: with a similar objective in mind, these authors accounted for each 'legal issue disposed of by the ECJ when it decided a case' as individual observations in their dataset.

predictable what the result of a case could be. In preliminary references, even if one could compare the response given by the Court and the Advocate General, the national court may have referred several preliminary questions. The Court and the Advocate General may agree as to the decision regarding some of the questions referred, but disagree as regards others. In such cases, how can one code the AG opinion and the judgment of the Court in a manner that objectively displays whether they agree or disagree? An objective comparison between judgment and opinion in preliminary references is certainly more complicated.<sup>60</sup> In any case, we acknowledge that neither actions for annulment nor preliminary reference procedures are well suited to objectively define whether the Court of Justice and the Advocate General follow the same *legal reasoning*.<sup>61</sup> Although we are unable to account for legal reasoning, we believe that the annulment procedure, with its finite number of possible results, is generally adequate for this study because it allows us to consistently track the results of the opinions and judgments.

Despite the general adequacy of actions for annulment for our study, we have encountered several complexities in coding the variables ECJannulment and AGannulment that should be acknowledged here. First, inadmissibility and dismissal are sometimes used as interchangeable terms, although technically the substance of the case is not analysed in cases of inadmissibility, whilst it is in cases that are dismissed. Similarly, the words partial and total annulment are used with a different meaning depending on the case. Sometimes, partial annulment referred to annulling part of the whole act that had been contested, whereas other times it referred to annulling part of the provisions that the claimant had requested to be annulled.

Due to these complexities, and the fact that the proportion of judgments in the sample that declared a partial annulment was relatively small, we decided to simplify the measurement of our two main variables by creating two binary variables that only account for whether annulment of some kind had been requested. For both total and partial annulment, ECJannulment and AGannulment are equal to 1, otherwise they are equal to 0. This does not seem to alter the results substantially, and it makes it easier to interpret. In our view, this simplification is justified because the regression still allows us to determine whether a movement towards some kind

60 *ibid.*

61 Note the concerns expressed in Albors-Llorens (n 14) 515–16.

of annulment in the AG opinion would influence any movement of such kind in the Court's decision, regardless of the specific type of annulment that is requested.

### 3.3 Other independent variables

As explained above, regression estimates can uncover causal effects if all the variables that affect the regressor of interest and/or the outcome are included. In that spirit, this econometric model includes, as well as AGannulment, other variables in an attempt to control for all the relevant factors underlying a Court's decision.<sup>62</sup>

When constructing an econometric model, a researcher should aim to include the following two groups of covariates. First, all the variables correlated both with the AG opinion and the Court's ruling should be included. Otherwise, our estimators would be flawed due to omitting variable biases. Second, by incorporating other variables that could potentially explain the Court's ruling, the accuracy of the model is improved. In other words, regressors with explanatory power reduce the standard errors of the estimates, and therefore make them more significant. Finally, there is another group of covariates that one should try to avoid. These are variables that are almost completely unrelated to the outcome of interest. Including these could over-dimension our model and increase the standard errors, impairing the significance of our estimates.

In sum, this analysis tries to account for the effect of the AG opinion, as well as that of other variables that would explain the behaviour adopted by the Court (and the Advocate General). This makes the results more reliable, in the sense that not all of the decision of the Court is being attributed to the variable AG opinion. Instead, it provides a more accurate estimate of the actual size of that influence. Thus, we feel that the legal scholarship will be in a better position to discuss whether and/or why the Court of Justice follows the Advocate General, and the present and future meaning of the role of the Advocate General within the Court of Justice. Table 1 below summarises the covariates that have been included alongside AGannulment, and provides a justification for the effect each of the independent variables is trying to capture.<sup>63</sup>

62 We have thus attempted to address the concerns expressed in Carrubba and Gabel (n 6) 95, n 10; Carrubba, Gabel and Hankla (n 6) 449.

63 Compare with the variables selected in Carrubba, Gabel and Hankla (n 6) 446.

**Table 1**

Group/Topic	Variables	Rationale for inclusion
CLAIMANT <sup>64</sup>	Member State	The group of the variable Claimant controls the biases related to who requests the annulment. The logic behind this set of variables comes from the idea that the Court (and the Advocate General) may be more inclined to side with EU institutions or individual claimants than with Member States. This could be the case because the Court might share a common goal of furthering European integration with other institutions, which might not be apparent in the interventions of the Member States before the Court of Justice. Therefore, the Court could subjectively be siding with claimants that share its vision of the EU.
	Institution	
	Semi-privileged claimant	
	Non-privileged claimant (natural or legal person) <sup>65</sup>	
ADVOCATE GENERAL <sup>66</sup>	Alber	The block of the variables Advocate General removes the effect related to the identity of the Advocate General in each case. These binary variables remove the bias caused by some Advocates General who are intrinsically more prone to ask for the annulment of a legal act, and whose personality or skills make him more capable of convincing the Court. This interpretation would include these variables into the category of potential confounders. Therefore, we are essentially trying to isolate the effect of the AG opinion on the Court from the subjectivity involved in each Advocate General's personality, reputation or ability.
	Bot	
	Cosmas	
	Darmon	
	Elmer	
	Fennelly	
	Geelhoed	
	Gulmann	
	Jaaskinen	
	Kokott	
	La Pergola	
	Leger	

- 64 This group of variables is formed by four binary variables that take the value 1 if the claimant of the case is that indicated on the name of the variable, and 0 otherwise. See TFEU (n 1) art 263 for a list of possible claimants in actions for annulment; also, to understand what is meant by privileged, semi-privileged, and non-privileged, see, eg, Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 485–518.
- 65 For clarification purposes, it should be noted that, although currently non-privileged applicants exercise their actions for annulment before the General Court, and our study does not cover appeals from the General Court, there was a period in our sample when non-privileged applicants could exercise this type of actions before the Court of Justice. This competence was only granted to the General Court (the Court of First Instance at the time) by the Council Decision of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (93/350/ECSC, EEC, Euratom) [1993] OJ L144/21.
- 66 This group of variables is formed by 25 binary variables that take the value 1 if the Advocate General of the case is that indicated on the name of the variable, and 0 otherwise. The full list of Advocates General is available in the Curia search form at the website of the Court of Justice: <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL#>> accessed 20 November 2014. The Advocates General that did not issue any opinion during the period selected in our sample have been excluded.



	Lenz	Even if Advocates General are completely neutral and do not have individual biases towards annulment, this variable could still be important to reduce the standard errors of our model.
	Mazak	
	Mengozzi	
	Mischo	
	Poiares Maduro	
	Ruiz-Jarabo Colomer	
	Saggio	
	Sharpston	
	Stix-Hackl	
	Tesauro	
	Tizzano	
	Trstenjak	
	Van Gerven	
COMPOSITION OF THE COURT OF JUSTICE <sup>67</sup>	Full Court	The composition of the Court could potentially be a proxy for, or be correlated with, the clarity of the case because the number of judges normally increases in important cases. Cases that are complex, novel, controversial or with an unclear result are considered important for the purposes of the model. Therefore, in a Grand Chamber or Full Court judgment, one would expect the Court to be more likely to disagree with the Advocate General, simply because the law is probably unclear and open to multiple interpretations.
	Grand Chamber	
	Five judges	
	Three judges	
SUBJECT-MATTER <sup>68</sup>	Agricultural and Fisheries	The subject-matter of the case could be relevant to this analysis from different points of view. First, certain topics might have solid prior rulings and then both the AG opinion and the Court's ruling
	Approximation of laws	
	Closer cooperation	
	Competition	

67 This group of variables is formed by four dummies that take the value 1 if the formation of the Court is that indicated on the name of the variable, and 0 otherwise. The different formations of the Court are explained in CJEU Statute (n 3) art 16; although the number of judges in the Court has changed over time and in some periods of the sample there are not any Grand Chamber judgments, we have limited ourselves to follow the classification made in the Curia database provided in the Court of Justice website: <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL#>> accessed 20 November 2014. This means that some of the older cases are classified as Full Court despite the fact that the number of judges is less than that of a Grand Chamber in present time. We believe that this does not curtail the validity of using this variable.

68 This group of variables is formed by 26 binary variables that take the value 1 if the subject matter of the case is that indicated on the name of the variable, and 0 otherwise. The full list of subjects is available in the Curia search form at the website of the Court of Justice: <<http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL#>> accessed 20 November 2014. The subjects that were not addressed in any case in our sample have been excluded. Sub-classifications of subjects have not been taken into account.

	Economic and monetary policy	are highly correlated because they are simply following well-established case law. If that is true, then both the Advocate General and the Court are compelled independently to decide on the same solution on the grounds of previous decisions. Secondly, some subjects could generate more controversy than others, and then the Court following the AG opinion would just be a result of the simplicity of the case. Accordingly, the ruling would not have been altered even in the absence of the Advocate General in the proceeding.
	Economic social and territorial	
	Energy	
	Environment	
	European Social Fund	
	External relations	
	Financial provisions	
	Free movement of goods	
	Freedom of establishment	
	Freedom of movement for workers	
	Freedom to provide services	
	Industrial policy	
	Justice and home affairs	
	Overseas countries and territories	
	Principles objectives	
	Provisions governing the institutions	
	Social policy	
	Social security	
	Staff regulations of officials	
	Taxation	
	Trans-European networks	
REVIEWABLE ACT <sup>69</sup>	Transport	The type of reviewable act may affect the decision of the Court and of the Advocate General because of the political legitimacy and relevance that the different acts entail. For example, in order to pass a regulation or a directive, the ordinary legislative procedure is normally used. This procedure includes the participation of several institutions. By contrast, many decisions are acts simply passed by the Commission, and they only have an impact on a limited number of individuals. These differences may make the justices of the Court unconsciously to think that annulling a decision is less problematic than annulling a directive or a regulation.
	Regulation	
	Directive	
	Decision	
	Other	

69 This group of variables is formed by four binary variables that take the value 1 if the legal act under review is that indicated on the name of the variable, and 0 otherwise. See TFEU (n 1) art 263 in combination with art 288 to understand which acts are reviewable in actions for annulment.

Finally, the reader should bear in mind that, although we have carefully thought of which variables affect the outcome of actions for annulment and have included all the variables we could objectively extract from the database, it is not possible to include all of them. For example, we have not considered many psychological or sociological aspects that may affect judges in their decision-making.<sup>70</sup> In that sense, our analysis has limitations. We acknowledge them, and draw our conclusions cautiously. Nevertheless, this study has taken an innovative approach that sheds some light on our research question and helps expand the academic literature in this topic.

### 3.4 Probit regression

In this study, we have used a type of regression that is well suited to capture the behaviour of binary dependent variables: the probit model. The probit model is a regression that explains the predicted probability of the dependent variable adopting the value 1. In our case, it outputs the predicted probability of the Court annulling an act, subject to the value given to the other variables included. Therefore, the probit model provides a simple way to interpret the results in terms of predicted probability from 0 to 1. Instead, if we had chosen a linear regression model, the result would not be enclosed between 0 and 1, making the interpretation impossible, as it could yield some predicted probabilities to be negative or above the unit.

Another possibility would be to use a logistic model. The logistic model likewise approximates a cumulative distribution function and allows an easy interpretation as well. It is beyond the scope of this article to determine which of the two—probit or logit models—is more suitable. The choice of using the probit model does not alter the results. Nevertheless, we have also estimated a linear regression and the logistic equivalent.<sup>71</sup> For these alternative models, only negligible differences were observed on the estimated marginal effects of the variable of interest. Therefore, we proceed to explain our results based on six probit regressions estimated using the software, STATA.

## 4 Results

This section presents the results of six probit models created with STATA using the data collected over 20 years of actions for annulment before the Court of

70 See Posner (n 54).

71 Available upon request.

Justice. First, we explain the different regressions created, in order to explore the behaviour of the Court on actions for annulment and the accuracy of the results that these regressions offer. Second, three different measures of the influence of the AG opinions on the Court's decisions are shown, looking at the effect of the variable AGannulment on ECJannulment. These measures are: (i) the coefficient of AGannulment; (ii) the marginal effect at means of AGannulment on ECJannulment; and (iii) the average marginal effect of AGannulment on ECJannulment. Finally, this section describes the influence of other variables on the behaviour of the Court of Justice. Table 2 below summarises the results.

#### 4.1 Accuracy of the estimated probit models

In order to establish the influence of AGannulment on ECJannulment, we have considered six probit models (models 1–6 presented in the columns in Table 2). In all the models, the dependent variable is ECJannulment. The independent variables vary from model 1 that only includes the covariate of interest in this study (AGannulment) to models 2–6 that progressively add one more group of variables.<sup>72</sup> Thus, model 2 includes AGannulment and the group of variables Claimant. Model 3 considers AGannulment and the blocks of variables Claimant and Advocate General. Model 4 incorporates AGannulment and the blocks of variables Claimant, Advocate General and Composition of the Court of Justice. Model 5 includes AGannulment and the group of variables Claimant, Advocate General, Composition of the Court of Justice and Subject-Matter. Finally, model 6 considers AGannulment and the groups of variables Claimant, Advocate General, Composition of the Court of Justice, Subject-Matter and Reviewable Act.

All of these models are an improvement on its predecessor, according to the information provided by the pseudo R-squared available in the last row of Table 2. We can observe the pseudo R-squared increase as we move columns towards the right. This means that model 2 explains ECJannulment more accurately than model 1, model 3 more accurately than models 2 and 1, and so forth. Therefore, model 6 is our most accurate estimate of the behaviour of the Court of Justice. In other words, more of the variation on the behaviour of the Court is explained as we add blocks of variables. The most accurate model (model 6) shows a pseudo

72 Note that, for each block of dummies, the one containing the most observations is dropped to avoid multicollinearity. Therefore, their effects are incorporated into the constant term. For those interested, alternative constant terms can be made available. Nevertheless, none of these alternative models change the coefficients of the covariate of interest.

R-squared of 50.2 per cent. This means that 50.2 per cent of the variation observed on the dependent variables (ECJannulment) is explained by the covariates included on this model. If the new blocks were adding noise to the simple model (model 1), we would not observe a solid pattern of increase on the explanatory power of our models. Moreover, had those variables been spurious to the relationship examined, the significance of our covariate of interest could have faded. Consequently, we can conclude that the decision to add more variables was adequate.

Furthermore, the command *estat classification* in STATA provides another method to test the accuracy of regressions with binary dependent variables. This command runs the model for each one of the cases provided in the sample to create the model. In this way, the model produces a predicted outcome for each observation. As the actual value for the dependent variable in the sample is known, prediction and reality can be compared. In our case, we have run the *estat classification* command for model 6. Therefore, for each action for annulment considered in our sample, STATA inputs all the information it has about AGannulment and the groups of variables Claimant, Advocate General, Composition of the Court of Justice, Subject-Matter and Reviewable Act. It then gives a predicted probability of the Court actually annulling the act. Predicted probabilities above 0.5 are considered as predicting annulment (ECJannulment = 1), while those below 0.5 are deemed dismissal (ECJannulment = 0). Using this benchmark, we can calculate the percentage of the outcomes of cases correctly predicted for model 6. For our sample, we found out that model 6 predicts 81 per cent of the outcomes of the cases correctly. Only 19 per cent are misclassified.

Finally, there is another indicator that strengthens the confidence in our model. This is a comparison of the sample mean of the outcome variable with the mean of the predicted probability for ECJannulment in model 6. In this study, these two measures are almost identical: 0.35 for the sample and 0.36 for the prediction.

In sum, model 6 seems to provide a reliable prediction of the behaviour of the Court of Justice in actions for annulment. Having asserted the general validity of our approach, the following sections explain the results obtained as regards the influence of the AG opinion on the Court of Justice.

## 4.2 Measuring the influence of AGannulment on ECJannulment

To measure the influence of the AG opinions on the decisions of the Court of Justice, we now look at: (i) the coefficient of AGannulment; (ii) the marginal effect at means of AGannulment on ECJannulment with all other variables at their means;

and (iii) the average marginal effect of AGannulment on ECJannulment. All the results obtained for these three measures are significant at a level of 1 per cent.

#### 4.2.1 Coefficient of the variable AGannulment

The first row in Table 2 shows the coefficients of the covariate of interest (AGannulment) for the six probit models. The coefficient of a variable in a probit model represents the change in the z-value of the cumulative normal distribution.<sup>73</sup> The only conclusion that we can draw from the value of the coefficient of a variable of a probit model is whether that variable makes a particular outcome on the dependent variable more or less likely. In this study, since the six columns show positive magnitudes, we can state that when an Advocate General recommends either total or partial annulment it is more likely that the Court of Justice adopts such an outcome in its decision.

#### 4.2.2 Marginal effect at means of AGannulment on ECJannulment

The second row provides a more comprehensive way to interpret the coefficients than in the previous row. It shows the marginal effect at means of AGannulment, which is the method that is widely used to provide intuitive interpretations for the results obtained from probit models.<sup>74</sup> To compute it, STATA first predicts the probability when AGannulment equals 1 and sets the other covariates at their sample means values. The software then does the same operation giving AGannulment the value of 0. Subtracting these probabilities yields the marginal effect at means. This process gives us a number between 0 and 1 for each independent variable. That number shows the increase in the probability of ECJannulment annulling the act (ECJannulment = 1) if the independent variable changes. Thus, for AGannulment, it shows the increase in the probability of the Court of Justice annulling the act if the Advocate General changes its opinion from dismissal to annulment, as long as the other variables that affect ECJannulment remain constant.

Accordingly, the marginal effect at means of AGannulment in model 6 indicates that when the Advocate General recommends the annulment of an act,

73 For further insight on binary dependent variable models, see, eg, James H Stock and Mark W Watson, *Introduction to Econometrics* (3rd edn, Prentice Hall 2010).

74 Richard Williams, 'Using the Margins Command to Estimate and Interpret Adjusted Predictions and Marginal Effects' (2012) 12 *Stata J* 308, 323–24.

the Court is almost 80 per cent more likely to annul the act than if the Advocate General had not proposed its annulment.<sup>75</sup> We also observe that the inclusion of new variables increases the magnitude of the marginal effect without damaging its significance.<sup>76</sup> From model 1 to model 6 the marginal effect changes from 67 per cent to almost 80 per cent. This trend might suggest that our simplest model only represents correlation, and it does not show a causal link between the Court and the Advocate General because it is omitting variables.

However, according to Williams, some scholars prefer not to use this method of calculating marginal effects for probit models in which all the dependent variables are dichotomous, like the ones in our study.<sup>77</sup> This is because inputting the sample means (which is a value between 0 and 1) in binary variables could be an arbitrary solution, since there is obviously no observation taking this specific value (since they can only take the value of either 0 or 1).<sup>78</sup> Consequently, the use of the average marginal effect measure is preferred.<sup>79</sup>

#### 4.2.3 Average marginal effect of AGannulment on ECJannulment

The average marginal effect (AME), instead of inputting the sample mean for the covariates, uses each of the actual values for each observation to find the marginal effect of AGannulment on that observation; then, it makes the average of the marginal effects of all the observations.<sup>80</sup> For all our six models, the AME is robustly around 67 per cent. This means that, when the Advocate General recommends annulment, the Court is 67 per cent more likely to annul. This result contrasts with that of marginal effects at means in two aspects. First, it yields different numbers of what the marginal effect is. Although in other studies this methodological alternative does not produce different results to marginal effects at means, the change matters for our setting.<sup>81</sup> Bartus points out the underlying mathematical

75 See the second row of column 6 in Table 2.

76 See the second row in Table 2. Note that the trend is similar to that in row 1.

77 Williams (n 74) 324.

78 *ibid.*

79 *ibid.*

80 *ibid.* 325. The command used is 'margins, dydx(\*)'.

81 Marija Bockarjova and Mihails Hazans, 'Marginal Effects Distribution in Logit Models of Labour Markets' (Labour Markets, Work and Welfare during the Transition and Integration Processes Seminar, Vilnius, April 2000) <<http://www.ibrarian.net/navon/page.jsp?paperid=279715&searchTerm=marginal+models>> accessed 14 February 2015.

reason for the different results we encounter between average marginal effects and marginal effects at means.<sup>82</sup> According to the author, for marginal effects at means to provide an asymptotically valid approximation for average marginal effects several conditions must be satisfied.<sup>83</sup> The models used in this study do not fulfil those conditions, and marginal effects at means are actually overestimating average marginal effects.

Second, the magnitude of the AME of AGannulment is similar for all six models. It can be said that the AME is robustly around 67 per cent. The lack of variation in the AME indicates that the blocks of variables progressively included are actually not causing omitted variable bias. They indeed improve the fit of the model, but they are not affecting our measure of the influence of the Advocate General. Conversely, analysing the marginal effects at means, we conclude that the measure increased from 67 per cent to around 80 per cent. This indicates the opposite, ie, it suggests that there is a downwards bias, and that the influence of the Advocate General is actually larger than a measure of correlation is able to prove.

For the purpose of this article, we are proceeding with the most cautious of our results: that of the average marginal effects. In short, we conclude that when the Advocate General proposes the annulment of an act in its opinion, the Court of Justice is around 67 per cent more likely to decide to annul the act or part of it.

#### 4.3 Influence of other variables on ECJannulment

Finally, our results show that other variables influence the Court of Justice at a significant level. As one sees in Table 2, these are the variables: Advocate General Darmon and Grand Chamber. Advocate General Darmon is a significant variable consistently across all the models in which it is accounted for. It captures the presence of this Advocate General in a case, and shows that when he was present in a case, the Court was around 50 per cent more likely to annul the challenged act than if he was not present.<sup>84</sup> Moreover, our results in models 4 and 6 show that the Court of Justice is 20 per cent less likely to annul the act if it is sitting in a Grand Chamber formation than if it sits in any other type of formation.<sup>85</sup>

82 Tamás Bartus, 'Estimation of Marginal Effects Using Margeff' (2005) 5 *Stata J* 309.

83 *ibid* 312–15.

84 This refers to the average marginal effects.

85 This also refers to the average marginal effects.



Table 2

	AGannulment (1)	AGannulment + Claimant (2)	AGannulment + Claimant + Advocate General (3)	AGannulment + Claimant + Advocate General + Composition of the Court of Justice (4)	AGannulment + Claimant + Advocate General + Composition of the Court of Justice + Subject-Matter (5)	AGannulment + Claimant + Advocate General + Composition of the Court of Justice + Subject-Matter + Reviewable Act (6)
Probit coefficient of covariate of interest	1.99*** (0.185)	1.93*** (0.189)	2.10*** (0.214)	2.17*** (0.228)	2.31*** (0.252)	2.58*** (0.289)
Conditional marginal effect of covariate of interest at means	0.672*** (0.046)	0.657*** (0.049)	0.699*** (0.051)	0.716*** (0.052)	0.748*** (0.053)	0.799*** (0.052)
Average marginal effect of covariate of interest	0.672*** (0.046)	0.654*** (0.050)	0.667*** (0.051)	0.672*** (0.050)	0.684*** (0.050)	0.682*** (0.048)
Other variables with significant average marginal effects	-	None	Darmon 0.5***	Darmon 0.5*** G.Chamber -0.18**	Darmon 0.53***	Darmon 0.4*** G.Chamber -0.21**
Pseudo R-squared	0.359	0.364	0.411	0.426	0.440	0.502

Note: Standard errors in parentheses. \* = significant at the 10 per cent level, \*\* = significant at the 5 per cent level; \*\*\* = significant at the 1 per cent level

## 5 Discussion

In the previous section, we have shown that for our estimated regressions the AG opinions exert an influence on the Court of Justice, so that in actions for annulment the Court is more likely to annul an act if the Advocate General has suggested it. In particular, the average marginal effects measure for our sample suggests that the Court is approximately 67 per cent more likely to annul an act (or part of it) if the Advocate General advises to annul than if it advises to dismiss the case or declare it inadmissible.

We acknowledge that this measure is not a perfect representation of causality, because many elements may be missing from the quantitative analysis that was carried out of the relationship between the Advocate General and the Court. Furthermore, future research could expand this sample further than 20 years, or include different variables, to check if the results are still valid. Nevertheless, we consider that we have improved the measures offered in the existing literature by applying a more refined methodology, and building on econometric studies that used the AG opinion as a control variable for its measurement.<sup>86</sup>

Given the results of this research, it is difficult to reject the proposition that the Advocate General exerts some influence on the Court. Our results have been consistently significant for the variable AGannulment, and they have always shown a positive relationship between the Court and AGannulment. The addition of new variables does not eliminate this pattern, and highlights that AGannulment is the most influential of the significant variables. Furthermore, the accuracy of the regressions seems to increase as we add variables. Therefore, we believe that, even if the number of 67 per cent of increased probability is called into question, it is difficult to deny that there is some level of influence. In our methodology, we have defined the term influence as the ability to alter the decision of the Court, everything else remaining constant. For that reason, our results make it difficult to support attempts to underestimate what influence means, such as that of Advocate General Léger, who wrote:

The Advocate General is impartial, independent, influential, yet at no point does the AG usurp the most fundamental judicial prerogative of deciding cases. No matter how eloquent, how persuasive an Opinion may be, it may be disregarded for, after all, Judges are grown-ups capable of making up their own minds.<sup>87</sup>

<sup>86</sup> Carrubba, Gabel and Hankla (n 6); Carrubba and Gabel (n 6).

<sup>87</sup> Léger (n 10) 8.

Despite judges being adults who are free to choose and reason independently, our analysis shows that there is some component in the making of a decision that is simply attributed to what the Advocate General recommended.

This section discusses the implications that this conclusion may have in several on-going debates in the literature. We will briefly point out the potential consequences for two issues: judicial independence and the role of the Advocate General. The aim is not to suggest any solutions to these issues, but simply to foster the debate and provide it with new elements for discussion. These topics merit a thorough consideration, which is not within the scope of this article. As such, they are interesting topics for future research. Moreover, there may be other implications of our results that we have not yet identified.

## 5.1 Judicial independence

Judicial independence is a debated concept.<sup>88</sup> Different definitions of the concept may lead to different aspects from which a court ought to be independent.<sup>89</sup> A common understanding is one that defines independence as the separation of powers.<sup>90</sup> In that sense, the judiciary has to be independent from the executive and the legislative powers, but not necessarily from internal elements within the judiciary.<sup>91</sup> Per this definition, judicial independence is not necessarily put into jeopardy simply because the Advocate General influences the Court. The Advocate General is considered a full member of the Court of Justice of the European Union.<sup>92</sup> As such, it would be expected to exert some influence on the outcome of cases.

One of the elements that allow the preservation of the independence of the Court is the secrecy of the deliberations.<sup>93</sup> Member States do not know which judge(s) supported which arguments within a judgment. Thus, when judges

88 For example, Lewis A Kornhauser, 'Is Judicial Independence a Useful Concept?' in Stephen B Burbank (ed), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE 2002).

89 *ibid* 48.

90 *ibid* 46–47.

91 *ibid* 48.

92 See, eg, Craig and De Búrca (n 64) 62, for the common interpretation that the Advocate General is a full member of the Court of Justice based on TEU (n 1) art 19(2); TFEU (n 1) arts 252–53; CJEU Statute (n 3) art 8.

93 CJEU Statute (n 3) arts 2, 35; see Mark A Pollack, 'The New EU Legal History: What's New, What's Missing?' (2013) 28 *American U Intl L Rev* 1257, 1285.

perform their duties, they will not be thinking about pleasing Member States in order to get re-elected in subsequent terms. In contrast, Advocates General are much more exposed.<sup>94</sup> Their opinions are given in their personal capacity, and Member States can monitor their reasoned submissions.<sup>95</sup> It could be argued that this might taint the impartiality of Advocates General that seek to be re-appointed or have professional aspirations that depend on their governments.<sup>96</sup> In fact, Carrubba and Gabel have highlighted the fact that the ‘institutional setting does not fully insulate the AG from potential political pressure’,<sup>97</sup> and found that the governments of the Member States can, in some cases, influence their Advocates General.<sup>98</sup> By contrast, previous to that study, most authors seem to be confident about the many institutional checks and balances that help to ensure the independence of Advocates General.<sup>99</sup>

If the claim that Member States influence the AG opinions were proven valid, and we have asserted that these in turn influence the Court, one might question whether and to what extent that affects the independence of the Court itself. The conclusion that the AG opinion influences the judgments of the Court of Justice could mean that its own independence is linked to some extent with that of the entire Court of Justice of the European Union. More studies on this topic would be welcome to bring some clarity to the issue of judicial independence.<sup>100</sup> If it were confirmed that judicial independence is at risk, the following aspects might

94 Carrubba and Gabel (n 6) 89.

95 *ibid.*

96 *ibid.*

97 *ibid.* 95.

98 *ibid.* 89, 95–97, 112–13, 120.

99 For example: Borgsmidt (n 10) 107, 119; L Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (5th edn, Sweet & Maxwell 2000) 71; Burrows and Greaves (n 10) 4–7, 23, 49; Albors-Llorens (n 14) 512–13.

100 Such studies could build on the work of Carrubba and Gabel (n 6) 86–124; future research could also build on the studies that try to explain how Member States (and other actors) directly influence the Court of Justice via, *inter alia*, their observations. See, for instance, Lisa Conant, ‘Review Article: The Politics of Legal Integration’ (2007) 45 *J Common Market Studies* 45; Alec Stone Sweet and Thomas Brunell, ‘The European Court of Justice, State Noncompliance, and the Politics of Override’ (2012) 106 *American Political Science Rev* 204; Carrubba, Gabel and Hankla (n 6); Clifford J Carruba, Matthew Gabel and Charles Hankla, ‘Understanding the Role of the European Court of Justice in European Integration’ (2012) 106 *American Political Science Rev* 214; Daniel Naurin and others, ‘Coding Observations of the Member States and Judgments of the Court of Justice of the EU under the Preliminary Reference Procedure 1997–2008’ [2013] Centre for European Research (CERGU) Working Paper No 1, 2 <[http://cergu.se/digitalAssets/1438/1438554\\_2013-1.pdf](http://cergu.se/digitalAssets/1438/1438554_2013-1.pdf)> accessed 2 March 2015.

need to be reconsidered: (i) the way in which the AG opinions are issued; (ii) the procedure of the Advocates General election and possible re-election; and (iii) the implications of the European Convention on Human Rights and the Charter of Fundamental Rights on the lack of judicial independence.<sup>101</sup>

## 5.2 The role of the Advocate General

There is much discussion about the role of the Advocate General.<sup>102</sup> Many reasons have been put forward to explain the value of having a figure of this type in the Court of Justice. Some argue that it is valuable to have the AG opinion because the judgments of the Court do not provide enough details of the legal reasoning behind a decision.<sup>103</sup> Differently, the AG opinion is generally more detailed and can be complementary to understanding the legal questions at stake in a specific case and the case law.<sup>104</sup> Another suggestion is that the AG opinion may give an alternative interpretation of the law, which may be useful for future reference.<sup>105</sup> Others also suggest that the Advocate General can be viewed as some sort of first instance with a compulsory appeal.<sup>106</sup>

The way in which our results impact this debate is not clear. These points may still be valid, even if there is a relationship of influence between the Court and the Advocate General. Potentially, the above statements could be tested in future quantitative research. For example, an analysis of the kind that was conducted in this article could be replicated for the General Court to find out the influence of its judgments on appeal cases decided by the Court of Justice. This would allow

101 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, amended by Protocols Nos 3, 5, 8 and 11) 213 UNTS 222 (European Convention on Human Rights); Charter of Fundamental Rights of the European Union [2000] OJ C364/01. We are grateful to the participants at the Durham-Cambridge Doctoral Workshop in EU Law—‘Igniting European Union Law: Frameworks for the Future’ for raising these issues.

102 See the literature cited in Section 2 above.

103 For example, Vranken (n 10) 39; Albors-Llorens (n 14) 510; Hinarejos (n 39) 625.

104 *ibid.*

105 Ritter (n 4) 763; on the idea that the AG opinion could be thought of as a ‘dissenting opinion’, see Julia Laffranque, ‘Dissenting Opinion in the European Court of Justice—Estonia’s Possible Contribution to the Democratisation of the European Union Judicial System’ (2004) IX *Juridica Intl* 14, 18–19.

106 Borgsmidt (n 10) 107; Dashwood (n 4) 213.

comparing the influence of the General Court with that of the Advocate General in the decisions of the Court of Justice.

## 6 Conclusion

This article examines the existing literature on the influence of the Advocate General on the Court of Justice. Aiming to overcome shortcomings found in the literature and building on relevant studies in circumfluent topics, we conducted an econometric analysis, designing a probit model to quantitatively measure the influence of the AG opinions in the decisions of the Court of Justice. Our conclusion is that the Court of Justice is approximately 67 per cent more likely to annul an act (or part of it) if the Advocate General advises the Court to annul than if it advises the Court to dismiss the case or declare it inadmissible. Finally, this article briefly discusses the implications that this conclusion may have in several on-going debates in the literature—namely, judicial independence and the role of the Advocate General. We hope to have contributed to the better understanding of the influence of the Advocate General on the Court of Justice and to a more informed debate on the role and future of the figure of the Advocate General. This article hopes to foster further research in this topic, which ultimately may reveal the need for judicial reform.

# Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society

Ioanna Pervou\*

## Abstract

The recent jurisprudence of the European Court of Human Rights has dealt with a number of cases on the issue of the Greek economic crisis. It has considered the reduction of salaries and retirement pensions of public servants as a result of the State's obligations under the Memorandum of Understanding with its lenders (*Koufaki & ADEDY v Greece*), the reduction of wage supplements and allowances due to public servants' change of contractual position (*Giavi v Greece*), while proceedings for the bonds haircut of individual investors are pending (applications submitted on October 2014). In all these cases, the Court has not found a violation of the applicants' right to property, or economic interests. In addition, the Court enlarged the respondent State's margin of appreciation regarding the measures needed to cope with the crisis, on the grounds of the principle of subsidiarity. In these judgments, the Court reiterates the dicta of the national courts in support of its rationale, a practice introduced rather recently. In the above cases, the Court applied the three-part test, and justified the limitations of the applicants' right to property as 'necessary in a democratic society', according to its established terminology. The decisions received excessive criticism because the Court's judgments are considered heavily politicised. The economic crisis brings the right to property to the forefront of legal discussions, further revealing its association with the democratic rule.

## Keywords

Human Rights, Right to Property, Greece, Crisis, European Court of Human Rights, Democracy, Margin of Appreciation, Proportionality

---

\* Dr. Ioanna Pervou is currently an Adjunct Lecturer at the International Hellenic University (IHU). The author is indebted to Professor Konstantinos Tsitselikis, President of the Hellenic League for Human Rights, for providing material from the League's Annual Conference, as well as for his helpful comments. The usual disclaimers apply.

# 1 Introduction

For the last six years, the Greek state has experienced a severe economic crisis, which has resulted in cuts to public expenditure. Despite the international character of the economic crisis, Greece has found itself at the heart of the austerity measures that followed it. Unfortunately, this long period of economic recession has not left the legal protection of human rights intact. Due to the current crisis, questions regarding the legality of the state's intervention in individuals' peaceful enjoyment of possessions have already reached international courts. Taking an inductive approach, this article attempts to assess the response of the European Court of Human Rights (ECtHR, or Strasbourg Court) to the Greek 'crisis cases'. The recent judgment in the case, *Koufaki & ADEDY v Greece*,<sup>1</sup> is the starting point of this analysis, further examining how the ECtHR treated similar cases that occurred in other states (like Portugal and Hungary). The second case study (*Giavi v Greece*)<sup>2</sup> builds upon the preceding analysis of *Koufaki & ADEDY v Greece*, recognising an emerging judicial pattern regarding the crisis cases.

In the next section, this article explores the long-established margin of appreciation doctrine and notes its expansion. It then examines the institutions of property and democracy, arguing that the latter's realisation is attainable only through the former's effective protection. Finally, it suggests that the European jurisprudence in the crisis cases is devastating for democracy, because the timid approach of the Strasbourg Court effectively permits the curtailment of human rights. Subsidiarity, the legal equivalent of this timidity, is the major characteristic of the ECtHR's jurisprudence, both in the crisis cases, and more generally in cases appertaining to the right to property. This article concludes that the principle of subsidiarity has become a 'Trojan horse' that renders the ECtHR ineffective, which is also detrimental to democracy, as the protection of human rights is not the first option when there are certain economic implications for the impugned state.

## 2 *Koufaki & ADEDY v Greece*: Institutionalised destitution

On 7 May 2013, the First Section of the ECtHR gave a judgment which, despite seeming *prima facie* typical in terms of legal reasoning, became one of the seminal

1 *Koufaki & ADEDY v Greece* App nos 57665/12 and 57657/12 (ECtHR, 7 May 2013).

2 *Giavi v Greece* App no 25816/09 (ECtHR, 3 October 2013).



decisions regarding the repercussions of the economic crisis for the protection of human rights. Regardless of its limited legal interest, the decision had serious consequences for subsequent petitions regarding austerity measures taken by the Council of Europe member states that were most affected by the economic crisis, with significant implications for a considerable number of Greek citizens.<sup>3</sup>

In particular, the case refers to the joint examination of the petitions filed by Ioanna Koufaki and the Confederation of Public Sector Trade Unions (ADEDY) against the Greek state for the reduction in remuneration, benefits, bonuses, and retirement pensions of public servants.<sup>4</sup> The first applicant was a lawyer serving in the public sector under a private law fixed-term contract. Under this contract, the applicant was not allowed to practise as a lawyer while in the public service. Nevertheless, taking into consideration the average earnings for state employees, the salary of Koufaki reasonably placed her in the range of the most highly paid public servants. The first applicant alleged that the Greek laws, which indiscriminately provided for a 20 per cent reduction in the earnings of all public servants, had led to a 'drastic fall in her standard of living'.<sup>5</sup> These Greek laws were enforced in compliance with the state's obligations under the Memorandum of Understanding (MoU) with its lenders—namely, the European Commission, the European Central Bank and the International Monetary Fund.<sup>6</sup> Koufaki's argumentation relied exclusively on the protection of possessions, under art 1(1) of the First Additional Protocol (AP1) to the European Convention on Human Rights (ECHR, or Convention).<sup>7</sup> Apart from claiming the disconformity between the national legislation and ECHR provisions, due to the severe cuts it introduced, the applicant also attempted to put forward a holistic approach to art 1(1) AP1. That is, Koufaki claimed that it was not solely the permanent and retroactive cuts in her monthly salary that violated the respective provision, but rather, those reductions coupled with the absence of

3 *Koufaki* (n 1).

4 *Müller v Austria* (1975) 3 DR 25.

5 *Koufaki* (n 1), para 26.

6 Directorate-General for Economic and Financial Affairs, *European Economy: The Economic Adjustment Programme for Greece*, Attachment II: '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 17 February 2016; Law 3845/2010 (FEK A65/6-5-2010) on 'Measures to implement a mechanism to support the Greek economy by the Member States of the Euro area and the International Monetary Fund' (Greece).

7 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Additional Protocol 1.

compensation, the lack of auxiliary legislation to alleviate public servants from the economic effects of those reductions, and finally the rise in taxation, in the price of goods and, more generally, in the cost of living.

The second applicant filed a petition representing the vast majority of public servants—both those in service and those already retired. ADEDY's complaint highlighted the fixed percentage cuts to public servants' salaries, irrespective of their absolute value. That is, it was claimed that the impugned legislation was unjust, in that it treated equally disparate circumstances indiscriminately, applying the same percentage reduction to all salary scales. Moreover, the second applicant put special emphasis on the abolition of the thirteenth and fourteenth salary payments, as well as the reduction in the thirteenth and fourteenth pension payments.<sup>8</sup> ADEDY correctly pointed out that any kind of indiscriminate treatment, even if the law is appropriately abstract, places a disproportionate burden on the most vulnerable groups of public servants, namely those with the lowest remuneration. In this respect, the term proportionality is a qualitative factor as far as respect for the principle of equality is concerned. Beyond the arguments relating to art 1(1) API, ADEDY connected the protection of possessions with the right to respect for family life,<sup>9</sup> further claiming that severe cuts for the low-level salaries were detrimental for the families of those affected, thus interfering with the 'family unit' concept by leading to its dissolution.

The factual background of the case left no doubt as to the legal questions at stake. There are, however, two issues that require further analysis. First, the national legislation in question was enacted by the government under the emergency procedure, with almost no parliamentary debate, due to the state's obligation to satisfy its lenders' fiscal claims. Under these circumstances, the decision of the Greek Supreme Administrative Court (Greek Council of State or *Symvoulío tis Epikrateias*) was almost predetermined. The Greek Council of State significantly lowered the threshold of the constitutionality test it applied, and deemed the reductions of public employees' earnings constitutional. In this respect, the Greek Council of State incorporated political factors in its decision. The second issue that requires further analysis is the unquestioned, almost axiomatic, decision of the ECtHR jointly to examine the petitions filed by Koufaki and ADEDY.

8 *Koufaki* (n 1) para 28.

9 ECHR art 8.

## 2.1 *Koufaki & ADEDY v Greece*: Mapping the decision

Moving to the first point of consideration, the Greek Council of State concluded with its momentous Decision 668/2012<sup>10</sup> that all reductions in the public service did not contravene the Greek Constitution. The reasoning for this decision was that they were necessary, given the then existing intense public interest in reducing public spending, in order for the Greek state to fulfil its obligations under the first MoU. Decision 668/2012 attracted great attention, not to mention criticism, from Greek scholars, because it justified austerity measures on the basis of the state's cash flow and fiscal interests. In other words, the Greek Council of State covertly conceded the unconstitutionality of the respective measures, and the disproportionate interference with the plaintiffs' rights, but nonetheless accepted their necessity on the basis that the Greek state found itself in financial jeopardy.

In this respect, the Greek judiciary opened the backdoor to human rights curtailments, first on the grounds of a state's fiscal and economic needs, and secondly on the basis of its international obligations. The Greek Council of State held that:

reduction in remuneration and bonuses of employees in the public service, as well as cuts in pensions forms part of the general program of fiscal consolidation, also serving the promotion of structural reforms in the Greek economy, which are designed to address overall (...) the instant need to cover the state's fiscal needs, and to improve for the future its financial rates. (...) In this regard (...) the impugned measures are not manifestly inappropriate for the accomplishment of the set purposes, nor can they be considered unnecessary, taking in mind that the appraisal of the legislative with regards to the measures needed for this difficult fiscal conjuncture is subject only to marginal judicial review.<sup>11</sup>

Two points follow from the above excerpt. On the one hand, the Greek Council of State deemed the measures necessary in terms of public interest, irrespective of the level of interference with the applicants' human rights. Thereby, the Greek Council of State elevated the 'public interest' to the level of a principle permeating the state's Constitution, further legitimising the policies of the executive. On the other hand, the public interest comes inevitably as an interpretative tool for the permissible curtailments of human rights, rendering the judicial review of human rights contingent on the changing needs of the Greek executive. The Greek Council

10 Greek Council of State (Grand Chamber) Decision 668/2012 of 2 March 2012.

11 *ibid* para 35 (author's translation).

of State allowed the relativisation of the constitutional control of human rights. From this point of view, it could be argued that the public interest can expand the executive's discretion and margin of appreciation to implement any legislation it deems necessary, irrespective of fundamental human rights. The emphasis of the national judiciary on the notion of public interest was anticipated, albeit to the detriment of the standard of human rights protection. After all, the Greek Council of State is not a human rights court, but rather, a juridical organ vested primarily with the power to guarantee constitutional conformity.

Moving to the second issue requiring analysis, the ECtHR examined jointly the petition filed by Koufaki and ADEDY, which were amongst the complainants before the Greek Council of State. Although the Strasbourg Court has a discretionary power to join applications, the joint examination of the two petitions begets questions regarding the ability of applicants successfully to accomplish their claims, given that, in this case, the claims of the first applicant essentially contested those of the second. In particular, the ECtHR decided to examine the two petitions jointly because of the common legal framework to which they referred. The Strasbourg Court's choice lies within the boundaries of its discretion, yet it caused disarray in the substance of the applicants' claims, affecting in turn the verdict. In particular, in the *Koufaki & ADEDY v Greece* case, the ECtHR did not distinguish at any point between the reductions in salaries and pensions, contrary to its settled case law,<sup>12</sup> where such a distinction had been drawn because pensions arise from already established rights. In other words, the amount of money someone receives as their pension depends on the legislation existing at the time the pension was awarded, alongside the deductions applied to their standard monthly salary.

Furthermore, pensions, as opposed to salaries, are of a compensatory character; therefore, pensioners have a legitimate expectation that they will receive the same amount of money periodically. On the contrary, public service employees are not in the position to make such a claim. Moreover, the compensatory character of pensions reveals their protective scope to guarantee a decent living for those retired, irrespective of the exact amount of money they receive. This means that there is a stricter threshold concerning probable reductions in pensions, also covering the permissible percentage of such reductions. This ratio between deductions and the amount of the pension received, proves that high-income pensioners were affected the most by the imposed measures. Unfortunately, this argument was not highlighted by ADEDY, which insisted on the horizontal character of the measures

12 *Azinas v Cyprus* ECHR 2004–III 428, para 44.

taken. ADEDY missed the argument that flat reductions by fixed percentage to pensions, as compared to regressive rates in cuts, affected high-income pensioners the most.

Finally, and most importantly, the joint examination of the two applicants' complaints increased, or even predetermined, the risk that the claims would be deemed inadmissible. This is because of the Strasbourg Court's difficulty in considering ADEDY a victim under art 34 ECHR. The Court's confusions about ADEDY, as a legal entity, and whether it falls within the definition of 'victim' according to the Convention was abundantly clear in this decision. More specifically, the ECtHR raised doubts as to the exact number of employees represented by ADEDY: in order for the Confederation to prove its legal standing, it ought to demonstrate that the measures affect the rights of each and every one of its members. Generally, there are very few cases of legal persons whose members are numerous before the ECtHR. In this instance, the ECtHR seems to have intentionally bypassed this procedural aspect, although it referred directly to it. The ECtHR mentioned in particular that:

A question arises at the outset as to whether the second applicant can claim the status of 'victim' within the meaning of Article 34 of the Convention. However, the Court considers that it is unnecessary to address this issue since, even assuming that the applicant has 'victim' status, the complaints it raises are in any case inadmissible (...).<sup>13</sup>

## 2.2 Inadmissibility as the ECtHR's best-case scenario

All in all, the Strasbourg Court seems to have opted for diminishing any possibility of proceeding to the substantive part of the claims raised by the applicants. Inadmissibility on grounds of the respondent state's wide margin of appreciation, alongside the well-known social and political implications of the impugned measures, was enough for the ECtHR to declare the applications inadmissible.<sup>14</sup> Without further justification, the ECtHR emphasised that art 1(1) AP1 is not an absolute right, recalling states' ability to introduce restrictions in pursuance of the public interest. In other words, the greater the public interest, the greater a state's margin of appreciation; in turn, the greater the public interest, the narrower a right's

<sup>13</sup> *Koufaki* (n 1) para 30.

<sup>14</sup> *ibid* paras 31, 34.

field of application. That is, the Strasbourg Court evaluated the public interest in the respondent state to decide on the legality of the interference with the rights in question. Instead, as a human rights court, the ECtHR ought to have used the right's field of application as its starting point, and then assessed the extent of the interference. After all, interference should be the exception, while human rights protection is the rule in the ECHR system.

Additionally, the ECtHR's decision on inadmissibility was also prompted by its understanding of property as a welfare right.<sup>15</sup> Although the ECtHR does not characterise it directly as a welfare right, it perceives property as a right guaranteeing one's standard of living. It notes:

According to [its] well-established case-law (...) [t]he first and most important requirement of Article 1 of Protocol No 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim 'in the public interest'. Any interference must also be reasonably proportionate to the aim sought to be realised. In other words, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.<sup>16</sup>

This 'fair balance' is the line between the individual's interests and those of the community, the so-called 'general interest' which, in legal terms, corresponds either to a proportionate interference, or to a state's margin of appreciation. In this context, a right's resilience to restrictions signifies a state's wide margin of appreciation. In other words, it indicates the extent of the Strasbourg Court's elasticity while adjudicating upon a measure's proportionality. Therefore, a state's margin of appreciation is inversely proportional to the permissible restrictions to which a right is subject. In turn, a wide margin of appreciation increases the possibility that the ECtHR will find a measure proportionate; moreover, if the ECtHR considers a state's margin of appreciation *a priori* wide with respect to a particular right, then the chances that those interferences will be considered disproportionate are minimised.

15 Council of Europe, 'Implementing the European Convention on Human Rights in Times of Economic Crisis' (Dialogue between Judges, Seminar, Strasbourg, 25 January 2013) <[http://www.echr.coe.int/Documents/Dialogue\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Dialogue_2013_ENG.pdf)> accessed 17 February 2016.

16 *Koufaki* (n 1) para 32 (citation omitted).

More specifically, and as far as property is concerned, restrictions or limitations are by definition proportionate if the right is perceived as a luxury the individual owns.<sup>17</sup> Yet, the realisation of property as a welfare right is skin-deep, adhering to an obsolete interpretation, where possessions used to be indicative of the person's comfort or richness. Property may also be considered a subsistence right. This view is supported by the reasoning in other strands of ECtHR jurisprudence. For example, the Strasbourg Court subsumes, under art 1 AP1, pensions or disputes arising from loans and rental contracts.<sup>18</sup> The notions of prosperity (welfare) and subsistence offer, by way of extrapolation, an excellent scheme as to the range of occasions covered by the right to property. In other words, property is traditionally considered to be the primary indicator of welfare; at the same time, though, it guarantees people's decent living. For this reason, it is aptly pointed out that the scope of 'property' is almost boundless.<sup>19</sup> Therefore, there is a strong societal underpinning that has not been demonstrated in the present case study by the Strasbourg Court. Nevertheless, the European Committee of Social Rights made this connection, and highlighted the social character that property has, especially in times of economic austerity and widespread transnational crisis.<sup>20</sup> It concluded, in five cases, that restrictions in the national security system might, under certain conditions, violate the European Social Charter.<sup>21</sup> Put simply, the

- 17 See generally ECtHR, 'Implementing the European Convention on Human Rights in Times of Economic Crisis: Background Paper' (Dialogue between Judges, Seminar, Strasbourg, 25 January 2013) <[http://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf)> accessed 17 February 2016.
- 18 Achilles Skordas and Linos-Alexander Sicilianos, 'Does Article 1 of the First Additional Protocol to the ECHR protect minimum pension rights?' (2000) 48 *Nomiko Vima* 1221 (original in Greek, title translated by the author).
- 19 On the drafting history of the right to property, see, eg, Arjen Van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions (Article 1 of Protocol No 1)' in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006).
- 20 Ellie Palmer, 'Protection of Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) *Erasmus L Rev* 397, 402; see also Marc Bossuyt, 'Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations' (2007) 28 *Human Rights L J* 321.
- 21 European Social Charter (European Social Charter, as amended) (ESC); see *Federation of employed pensioners of Greece (IKA-ETAM) v Greece* (Complaint) European Committee of Social Rights No 76 (16 January 2012); *Panhellenic Federation of Public Service Pensioners (POPS) v Greece* (Complaint) European Committee of Social Rights No 77 (7 December

Committee recognises that the right to property bears positive aspects, which were not put forward by the Strasbourg Court.

### 2.3 *Koufaki & ADEDY v Greece* as the paradigm of public expenditure reductions case law

*Koufaki & ADEDY v Greece* has served as a paradigm for the ECtHR in subsequent crisis cases. The ECtHR remains reluctant to interfere with respondent states' actions, an approach that is almost prohibitive of the protection of socio-economic rights under art 1(1) AP1 and the ECHR in general. In cases emanating from the crisis which have affected both Portugal<sup>22</sup> and Lithuania,<sup>23</sup> Strasbourg has shown consistent restraint through the expansion of the respondent states' margin of appreciation. The key to the ECtHR's reasoning lies in the principle of subsidiarity, which takes the form of a super-principle that allows the ECtHR to intervene only in circumstances where the measures taken by a state are 'manifestly without reasonable foundation'.<sup>24</sup> In this context, it is highly unlikely that the ECtHR will proclaim the incompatibility of measures that affect a state party's economy with the ECHR, although there are exceptions to this trend. Despite these exceptions being considered on an ad hoc basis—while there is not a particular pattern—they test the Strasbourg Court's reflexes to measures that are 'manifestly irrational' to the naked eye.<sup>25</sup> Overall, the *Koufaki & ADEDY v Greece* decision exemplifies the ECtHR's approach to the current crisis, albeit there were few cases previously

2012); *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece* (Complaint) European Committee of Social Rights No 78 (7 December 2012); *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece* (Complaint) European Committee of Social Rights No 79 (7 December 2012); *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* (Complaint) European Committee of Social Rights No 80 (7 December 2012).

22 *Da Conceição Mateus & Santos Januário v Portugal* App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013).

23 *Savickas and Others v Lithuania* App nos 66365/09, 12845/10, 28367/11, 29809/10, 29813/10 and 30623/10 (ECtHR, 15 October 2013).

24 *Tkachevy v Russia* App no 35430/05 (ECtHR, 4 April 2013) para 37 (citation omitted).

25 See *NKM v Hungary* App no 66529/11 (ECtHR, 14 May 2013); *RSz v Hungary* App no 41838/11 (ECtHR, 2 July 2013); see also *Nencheva and Others v Bulgaria* App no 48609/06 (ECtHR, 18 September 2013); *Samaras and Others v Greece* App no 11463/09 (ECtHR, 9 January 2013).



showing an emerging trend in the ECtHR's jurisprudence.<sup>26</sup> From this perspective, the Strasbourg Court's decision on the potential violation of the right to property of the Greek state bondholders is anticipated with great interest. If it decides in accordance with its previous jurisprudence, then the stakes are on the applicants' side.<sup>27</sup> Yet, this scenario is most unlikely.

### 3 *Giavi v Greece*: Lessons learned by the respondent state

Unlike the uniqueness of the *Koufaki & ADEDY v Greece* case, the case of *Giavi v Greece*<sup>28</sup> is added to the long list of cases regarding state procedural privileges provided in the Greek legal order and the equality of arms principle. Furthermore, although the factual background of the case is not directly related to the economic crisis, the timing of the decision, along with the ECtHR's approach—which bears significant resemblance to that of *Koufaki & ADEDY v Greece*—renders it worth analysing. More specifically, the case refers to the alleged violation of a series of ECHR provisions, including art 1 AP1. The applicant claimed that the two year short-term mandatory period provided to public servants in order to institute proceedings against the public sector violated the right to property and was discriminatory, given that the state was provided with a five-year time period in which to bring claims against public servants. To bolster her case, Ms Giavi added that the impugned national provisions lacked proper justification, and consequently, their establishment did not serve the public interest.

26 See, eg, *Valkov and Others v Bulgaria* App nos 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05 (ECtHR, 25 October 2011) para 91; see also the decisions in *Frimu and Others v Romania* App nos 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11 (ECtHR, 13 November 2012); *Panfile v Romania* App no 13902/11 (ECtHR, 20 March 2012).

27 See the Russian cases before the ECtHR on the redemption of state bonds: *Yuriy Lobanov v Russia* App no 15578/03 (ECtHR, 2 December 2010); *Andreyeva v Russia* App no 73659/10 (ECtHR, 10 April 2012); *Fomin and Others v Russia* App no 34703/04 (ECtHR, 26 February 2013). The ECtHR found Russia in violation of art 1 AP1 for not converting Soviet securities (including bonds) into special Russian promissory notes, and adjudicated that the state's continuous failure to provide the applicants with the means to redeem their bonds entitled them to compensation.

28 *Giavi* (n 2).

Being aware of the Strasbourg Court's relevant jurisprudence regarding the very same national provisions,<sup>29</sup> the judgment in *Giavi v Greece* was expected to be routine. However, the respondent state's argumentation, for fear of further financial loss, was for the first time backed with the necessary data, a feature which determined the decision. The Greek state claimed that this divergence between the limitation periods for public servants and for the government served the public interest, and, in particular, the public sector's fiscal interest, since it aimed at the protection of public property through the clearance of public servants' claims in due time. Furthermore, the Greek Government supported its argumentation by adducing data which showed that, at the time of adjudication, 257 lawsuits of similar content were pending before national courts. Finally, the respondent state referred implicitly to the economic crisis, mentioning repeatedly how devastating the state's current fiscal conditions are.

The ECtHR made a historic shift in the relevant jurisprudence by accepting the state's arguments.<sup>30</sup> This reversal of position is primarily attributable to the economic crisis, although the ECtHR did not comment explicitly on the fiscal conditions in Greece. There was no other apparent justification for the shift in its jurisprudence.

There are two major points to consider with respect to the ECtHR's reasoning. Firstly, the ECtHR accepted a very wide definition of what qualifies as the public interest. The fiscal interests of the public sector are far from the public interest notion, since they are of a purely monetary value, and also because the public sector does not represent the interests of the nation as a whole. Secondly, by accepting this approach, the ECtHR excessively expanded the state's margin of appreciation. The ECtHR's decision shows a greater tolerance for fiscal grounds as an excuse to depart from human rights standards.

#### **4 On the margin of appreciation: Seeking a stable human rights-oriented interpretation**

The final comment regarding *Giavi v Greece*, as well as the previous observations on *Koufaki & ADEDY v Greece*, raises questions over the substance of the term

29 *Zouboulidis v Greece* (no 2) App no 36963/06 (ECtHR, 25 June 2009) paras 30–35; *Meïdanis v Greece* App no 33977/06 (ECtHR, 22 May 2008) paras 30–32; *Platakou v Greece* ECHR 2001–I 111, paras 52–57.

30 *Giavi* (n 2) paras 57–65.

‘margin of appreciation.’ In general terms, the European jurisprudence is built on the following notion. When referring to the term ‘margin of appreciation,’ the Strasbourg Court has traditionally recognised the principle that ‘[s]tate authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.’<sup>31</sup> The state’s logical prerogative to decide how to regulate their domestic legal order is an undeniable truth for the ECtHR, beyond all doubt. This is because:

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. This view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions (...).<sup>32</sup>

Evidently, the concept emanated from the Court’s need to standardise its jurisprudence vis-à-vis the wide spectrum of legal traditions of the contracting states to the ECHR.<sup>33</sup> The margin of appreciation clause has served as a tool for the ECtHR to lay down minimum criteria with respect to the consistency of national measures with the ECHR. Further, the notion is also a safety valve, so that the ECtHR does not delve into non-legal terms and attempt to deal with ‘public morals’.<sup>34</sup>

Yet, the margin of appreciation doctrine attains a totally different meaning in the preceding case studies. Apart from an economic interpretation, according to the cases’ particularities and factual background, the ‘margin of appreciation’ is tightly connected to the principle of subsidiarity and the public interest. Therefore, the ECtHR does not seek a stabilising agent to replace its case-by-case approach;

31 *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 48.

32 *ibid.*

33 Yukata Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 65–68.

34 Steven Greer, ‘The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights’ (2000) Council of Europe Human Rights Files No 17, 5, 11 <[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)> accessed 17 February 2016; Steven Greer, ‘The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?’ (2010) 3 UCL Human Rights Rev 1, 9.

rather, this approach broadens the state's prerogative to escape from decisions with certain economic and political implications. Moreover, the margin of appreciation doctrine comes hand in hand with the public interest. At this point, it is imperative to underline that, by attributing only a fiscal character to the latter, one reduces the notion of public interest. This is why Greek theorists have objected to the rationale of the Greek Council of State, mentioning that public interest does not correspond to economic terms only.<sup>35</sup> On the contrary, it encompasses all those values that provide the best options for the public. Therefore, a substantial reduction of the term public interest is equivalent to the state's ability to introduce harsh measures under the excuse of fiscal hardship. In legal terms, and as far as the European jurisprudence is concerned, this substantial reduction signifies the widening of a state's margin of appreciation,<sup>36</sup> or the enhancement of the principle of subsidiarity.

## 5 The effects of the Strasbourg approach on a democratic society

The progressive expansion of Member States' margin of appreciation, or conversely, the ECtHR's timidity, bears significant results both at a legal and a social level. The Strasbourg Court has confined itself through the application of a subsidiarity policy, which leaves domestic courts at the forefront of legal developments, encumbering them with a burden they are unable to carry. On a fictitious sliding scale regarding the international protection of human rights, a constantly swelling margin of appreciation runs contrary to an efficient human rights protection, or, adversely, it leads to their gradual curtailment. Of course, this scheme is just a generic proposition, which exceeds the limits of the present analysis.

Given that the preceding case studies revolve around art 1 AP1, this proposition may be reduced to four sub-arguments: (a) the right to property qualifies both as a civil liberty and as a human need; (b) the inclusion of property in art 1 AP1 requires a liberal reading of the ECHR; (c) the institution of property has long been attracting negative connotations; and finally, (d) the right to property is not only a pillar of western democracies, but also a cornerstone of democratic societies. The first three arguments relate to the philosophical underpinnings of the right to property, while the fourth sheds light on the relationship between

35 Matina Yannakourou, 'Austerity Measures Reducing Wage and Labour Costs before the Greek Courts: A Case Law Analysis' (2014) 11 Irish Employment L J 36, 36.

36 *Koufaki* (n 1) para 31.

property and democracy, further suggesting that the former invigorates the latter. For that reason, these arguments are based on the necessary condition that one fully comprehends the notion of property, as well as its stipulation as a legal right.

### 5.1 In defence of property

Property is ‘the idea of one person being in charge of a resource and free to use or dispose of it as she pleases,’<sup>37</sup> or a person or entity’s attachment to any kind of asset. In the absence of an authoritative legal interpretation of the term ‘property’, this definition brings some descriptive force. The definitional difficulty regarding property is not new: the plain wording of art 17(1) of the Universal Declaration of Human Rights (UDHR) which provides that ‘[e]veryone has the right to own property alone as well as in association with others’ has not been endorsed by subsequent general human rights treaties, either internationally or regionally.<sup>38</sup> The provision is straightforward, as it introduces only the term ‘property’—while others refer more generally to ‘possessions’—and moreover, it does not include restrictions. Evidently, the fate of the right to property was interwoven with the ideological debates of the Cold War. The debate on whether property is an individual right or a good with a communitarian nuance affected the inclusion of the right in legally binding documents, like the International Covenant on Civil and Political Rights.<sup>39</sup> The *travaux préparatoires* to the ECHR elucidate the drafters’ deliberations regarding the incorporation of the right. The drafters considered that:

Any supervision over a State’s respect for its nationals’ rights to own property would inevitably bring before the Council of Europe domestic political questions of a particularly burning nature (...). [Furthermore,] the public would be puzzled by anxiety being shown for the respect of private property when social rights are not mentioned.<sup>40</sup>

37 Jeremy Waldron, ‘Property, Justification and Need’ (1993) 6 Canadian J L & Jurisprudence 185, 188.

38 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)).

39 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

40 Council of Europe, ‘Preparatory work on Article 1 of the First Protocol to the European Convention on Human Rights’ (Doc CDH 76(36), 13 August 1976) 6 <[http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf)> accessed 17 February 2016.

Moreover, the international community's confusion with respect to the economic aspects<sup>41</sup> of property added to the troubled course of the right. In this regard, the wording of art 17(1) UDHR, according to which '[e]veryone has the right to own property alone as well as in association with others,' is relatively unambiguous, and as such, it stands alone in the international legal order.<sup>42</sup> Had it not been for the ECtHR jurisprudence, individual property would be a legally neglected institution.<sup>43</sup> As a result, the right to property finds little space in legal documentation.

The classification of the right to property as a human right was never doubted. The right to hold property is one of the fundamental civil liberties, or a first generation right, for it provides the right-holder with an absolute and categorical interest in creating a firewall against the interference of state authorities with their possessions.<sup>44</sup> That is, it imposes on states, as well as third parties (the duty-bearers), the negative obligation to refrain from any action that would intervene in the individual's sphere of personal interests.<sup>45</sup> Although the right's categorisation is undisputed, it is historically important, for it triggered the western realisation of human rights.<sup>46</sup> In this regard, the right to property is unique because, unlike other civil liberties, it is not a purely restrictive norm. More specifically, the legal stipulation of civil liberties follows a pattern of negative stipulation—for instance, no one shall be subjected to torture, no one shall be arbitrarily deprived of his liberty, etc). They offer instructions to the duty-bearers to abstain from entering the

41 Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff 2012) 15–19.

42 See, eg, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 arts 11(1), 15(1)(c); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 21; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 26363 art 14.

43 Apart from the protection of individual property by international judicial fora, the term is also at the epicentre of investor-state treaties. In this regard, the term's substance has been heavily affected by the developments of this legal field, with the view to protecting public property from the activities of the investors: UN Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (UN 2007) 57.

44 Jeremy Waldron, *Liberal Rights: Collected Papers 1981–91* (CUP 1993) 7.

45 Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale L J 710.

46 Theo RG van Banning, *The Human Right to Property* (Intersentia 2001) 134; Richard A Epstein, 'The "Necessary" History of Property and Liberty' (2003) 6 Chapman L Rev 1, 7.

right-holder's sphere of protection. Property, though, is two-fold: on the one hand, it addresses the duty-bearers by imposing a restriction of their actions, while on the other hand, this restriction depends on the right-holder's use and exploitation of property to their benefit.

It is particularly this second function of property that has, over years, become the right's Trojan horse. This is due to two reasons. First, from a philosophical standpoint, property was linked to a utilitarian reasoning. Second, from a legal point of view, the right-holder's positive obligation to capitalise on their possessions permitted control over the use of property, thus allowing state interference. As far as the first aspect is concerned, the right to property was, and still is, considered an individualistic right, promoting the interests of the individual. Property in its most categorical form became a synonym of atomistic behaviours by the right-holder to the detriment of the society: the prosperity and flourishing resulting from property for the individual contravened the common good. This hypothesis stems from the fact that property is an exclusionary concept.<sup>47</sup> The logical leap, though, is putting the individual in juxtaposition with the community, and not with the state. There is no better defence for the concept of property than to consider it as a counterweight to state monopoly. All in all, this misunderstanding that property is an exclusive concept, relies on the influence of property use on a state's political and economic system, and in particular, on its connection 'with a specific social form of capitalism.'<sup>48</sup> In other words, property as a central tenet of capitalism has received criticism for the ills of the latter (thesis c).

From a legal perspective, the right to property incorporates the western perception of human rights, therein deemed as its emblem. Its understanding through the spectrum of capitalism, coupled with the power it vests in the individual, have led to the subjugation of the right.<sup>49</sup> The absolute character that a civil liberty entails at a theoretical and philosophical level is not the reality in legal terms. The individual's right to property may be restricted, since it does not entail the right-holder's freedom of action. To this end, the Strasbourg jurisprudence

47 Jeremy Waldron, 'Community and Property—For Those Who Have Neither' (2009) 10 *Theoretical Inquiries in Law* 161, 161; Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 65.

48 Howard Davis, 'Democratic Disablement and the Right to Property in the European Convention for the Protection of Human Rights' (1996) 1 *J Civil Liberties* 125, 127.

49 Laurent Sermet, *The European Convention on Human Rights and Property Rights* (Council of Europe 1998) 32–36.

has proved instrumental. The ECtHR has transformed the weak wording of art 1 AP1 into a powerful tool, allowing it to enlarge the right's regulatory ambit. As such, its jurisprudence balances between the states' margin of appreciation and the individual's well-being, attempting to find a compromise between national and individual interests, testing the norm's resilience,<sup>50</sup> and rendering it at times a curbed civil liberty.

The expansion of the content of the right to property leads inevitably to the liberal comprehension of the ECHR (thesis b). This thesis is self-sustained: the application of the 'living instrument doctrine' to the European legal order cannot ignore the socio-political reality that the majority of the contracting parties to the ECHR are 'western liberal democracies'.<sup>51</sup> Hence, the shared legal culture of the ECHR contracting parties predetermines to a great extent the Strasbourg Court's interpretation. In this framework, the provision of a definition for 'western liberal democracies' seems necessary. However, such an attempt would stumble on the particularities of political theory discourse; in turn, the analysis of the concept of 'western liberal democracies' is relevant only in as much as human rights are concerned. Therefore, liberal democracies are marked by 'a struggle for human rights, [and it is precisely the addition of this] adjective [ie liberal] [that] has built human rights into the definition.'<sup>52</sup> Accordingly, human rights became an integral part of the notion of a 'democratic state' when the 'western liberal democracies' arose. In this formula, democracy attests the recognition and enjoyment of human rights, which subsequently serve as a guarantee for people's welfare. As such, liberal democracies are also referred to as 'liberal democratic welfare states', a term that ideally denotes the 'balance (...) between the competing demands of democratic participation, market efficiency, and internationally recognized human rights'.<sup>53</sup> Overall, the liberal reading of the ECHR is the only option, or else the European system of human rights protection will be deficient.

50 Waldron, 'Property, Justification and Need' (n 37) 188–90.

51 George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 121–22.

52 Jack Donnelly, 'Human Rights, Democracy, and Development' (1999) 21 Human Rights Q 608, 621.

53 *ibid* 630.



## 5.2 Property and the clashing of welfare and needs

The liberal and utilitarian implications of the right to property led ultimately to its perception as a welfare right. Once again, there is nothing wrong with the characterisation of the right to property as a welfare right, for it is consistent with the right's objective, namely, to permit the right-holder's uninhibited enjoyment of economic liberty. In this regard, property is the foundation of one's well-being, a prerequisite for the enjoyment of other human rights.<sup>54</sup> Although this reasoning seems to overestimate *prima facie* the significance of property for the international human rights regime, it is consistent with European legal culture, since the constitutions of most European states subsume property under one's right to freely develop their personality. Their common denominator is that they 'provide space for the individual in which to grow'.<sup>55</sup> Besides the broad spectrum of benefits covered by the right to property, which includes wages and pensions, economic recession demonstrates the necessity of property for human beings as a means of subsistence.<sup>56</sup> Consequently, it is aptly observed that 'the Convention as a whole does not include general rights to welfare, yet (...) these may be morally essential corollaries to the legitimate existence of fundamental property rights'.<sup>57</sup>

Apparently, either as a welfare right or as a human need, property is one facet of a life with dignity. Although the classification of property as a welfare right, as well as a human need, are not mutually exclusive concepts (thesis a), the connection between property and a life with dignity is more easily conceivable when it is characterised as a human need. In this context, a person's ability to acquire property, or more generally, possessions, is equivalent to their ability to participate in the economic growth of the society to which they belong—an approach which enhances the proposition that property is not an institution that dissolves societal structures (thesis c).

From this point of view, property involves securing the individual's inclusion in socio-economic growth, rather than functioning as an exclusionary concept: a feature of economic inclusion and social involvement associating property with

54 For the difference between human rights and human needs, see Johan Galtung, *Human Rights in Another Key* (Polity Press 1994).

55 Wiktor Osiatyński, *Human Rights and Their Limits* (CUP 2009) 191.

56 Azinas (n 12) para 44.

57 Davis (n 48) 132.

democratic governance, and more specifically, with democratic societies. All the same, the establishment of their interconnection excuses a brief digression from this thesis and a brief analysis of the role of democracy in the European legal order.

### 5.3 Democratic governance, state and society

Democracy is cardinal to the European human rights regime, as shown in the preamble of the ECHR, according to which ‘fundamental freedoms which are the foundation of justice and peace in the world and are best maintained (...) by an effective political democracy’. The ECHR drafters relied heavily upon the UDHR, and the historical interpretation of both documents reveals the importance of the democratic rule for national reconstruction after the Second World War.<sup>58</sup> Human rights and democracy have been considered as interdependent institutions since then.<sup>59</sup> Of course, the realisation of democracy relies on the respect for political rights by the Strasbourg Court, as well as on the initiatives taken by Council of Europe.<sup>60</sup> The ECtHR elaborated further on the principle of democracy, whilst treating the ECHR as a living instrument. The ECtHR expressly mentioned that:

Democracy is without doubt a fundamental feature of the European public order (...). That is apparent, firstly, from the Preamble to the Convention, which [affirms] that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court (...) has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society. (...) Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.<sup>61</sup>

In this dictum, the ECtHR firstly reaffirms its commitment to the political model of democracy, and secondly distinguishes between the democratic rule and a

58 Arthur H Robertson, ‘The Political Background and Historical Development of the European Convention on Human Rights’ (1965) 11 Intl & Comp L Q 24, 26–27; see also Arthur H Robertson, ‘The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights’ (1968–69) 43 British YB Intl L 21.

59 Donnelly (n 52) 621.

60 European Committee on Democracy and Governance, ‘Terms of Reference’ (1 January 2014) <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2469391&SecMode=1&DocId=2113496&Usage=2>> accessed 17 February 2016.

61 *United Communist Party of Turkey and Others v Turkey* ECHR 1998-I 3346, para 45 (citations omitted).

democratic state, as the latter is the accumulation of 'political tradition, ideals, freedom and the rule of law'.<sup>62</sup> The general idea is that it 'calls for a democracy (...) not only (...) justified by votes, but also by values'.<sup>63</sup> In this regard, the ECtHR applies democratic values to ensure human rights protection; or vice versa, the protection of human rights in the European regime 'circumscribe[s] the national political discourse in most Member States, to a greater or a lesser extent (...)'.<sup>64</sup>

The interplay between democratic governance and human rights protection for the formation of the democratic state became clear with the *Greek Case*. This case was commenced via interstate applications lodged by European states against the Greek government due to the latter allegedly taking dictatorial measures. The report of the European Commission of Human Rights (ECommHR) established a causal link between the derogation from human rights norms and human rights restrictions with the form of governance. Such causation also appeared in the respondent state's allegations, which claimed that the imposed human rights constraints were a measure to defend the state's 'democratic order'.<sup>65</sup> The same argumentation recurred a few years later after interstate applications regarding the human rights implications of the political situation in Turkey. There, the respondent state claimed that human rights derogations were necessary because of a political paralysis, that is, 'political parties were no longer in a position to perform their task as they should be able to do in a true democracy'.<sup>66</sup>

Two conclusions follow from these cases. First, the interrelation of the form of governance and human rights becomes unambiguous in the event of internationally isolated political regimes. Additionally, on the above occasions there was recourse to an ECHR derogation clause, and a formal denouncement of the ECHR.<sup>67</sup> In effect, the severity of human rights violations prompted interstate action. Second and most importantly, the European legal order is primarily a human rights system, evaluating the form of governance through a human rights lens, as the opposite

62 *ibid.*

63 Gerhard van der Schyff, 'The Concept of Democracy as an Element of the European Convention' (2005) 38 *Comp & Intl L J of South Africa* 355, 356.

64 Conor Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal' (2000) 51 *Northern Ireland L Q* 381, 385.

65 *Denmark and Others v Greece ('The Greek Case')* (1970) 12 CD 186, para 168.

66 *France and Others v Turkey* (1983) 35 DR 143, para 154.

67 Committee of Ministers of the Council of Europe, Res DH 70(1) (15 April 1970), paras 18–19 <[http://www.cvce.eu/content/publication/2004/3/5/56b2427e-7703-48b7-8aa3-acfa868af60a/publishable\\_en.pdf](http://www.cvce.eu/content/publication/2004/3/5/56b2427e-7703-48b7-8aa3-acfa868af60a/publishable_en.pdf)> accessed 17 February 2016.

would relativise their effective protection. The ECtHR espouses this view and places human rights above the rhetoric of democracy. Therefore, the ECtHR has also rejected restrictions introduced under the veil of restoring democratic legality.<sup>68</sup>

It comes naturally that a state's abrogation of democracy is easily detected, testing the reflexes of the European legal order.<sup>69</sup> However, the ECtHR is neither in a position, nor willing, to attribute the characterisation of a 'democratic state' to Member States. The ECtHR is extremely cautious, since direct characterisations would jeopardise the implementation of its decisions. After all, 'democratic state' is an abstract term, encompassing all of the constituting elements of a national legal order. To overcome this hurdle, the ECtHR introduced the criterion of 'necessity in a democratic society' to assess the legitimacy of national measures.<sup>70</sup>

To this end, a 'democratic society' is simply a refined term for a 'democratic state', serving as an added value to the general principle of necessity applied by international bodies in the second limb of the Strasbourg Court's three-part test. Despite the two terms being identical in practical terms, their equation would lead to an oversimplification. There is a genus-species relationship between them: a democratic state exists in order to serve the goals of a democratic society, or a democratic state is a function of its democratic society.<sup>71</sup> From this angle, the reference to a 'democratic society' covers non-structural deficiencies of democratic states. The ECtHR is able to look beyond a state's national legislation and exert its jurisdiction over the state's actual compliance with the ECtHR values. This is the reason why democratic legitimacy ensures the criteria of prescription by law and foreseeability in the ECtHR three-part test. The concept of 'democratic society' extracts the ECtHR from strict legal positivist confines, allowing it to interpret the ECHR as a living instrument and adjust to the factual background of each case. Of course, the extent to which the Strasbourg Court employs the 'democratic society' criterion to decide on alleged human rights violations is a matter of a judicial margin of appreciation. Accordingly, necessity in a democratic society—alongside proportionality—defines the limits of the ECtHR's elasticity.

68 *Stran Greek Refineries & Stratis Andreadis v Greece* (1994) Series A no 301-B, para 46.

69 Most recently, the ECtHR expressed concerns regarding the absence of democratic governance in the Northern Caucasus region, where systematic human rights violations occur: *Aslakhanova and Others v Russia* App nos 2944/06, 332/08, 42509/10, 50184/07 and 8300/07 (ECtHR, 29 April 2013) para 214.

70 See, eg, *United Communist Party of Turkey* ECHR 1998-I 3346, para 45.

71 See van der Schyff (n 63) 364–65; Conor Gearty, 'Spoils for which Victor? Human Rights within the Democratic State' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012).

## 5.4 Democracy through the lens of property

The accomplishment of a democratic society through property (thesis d) is a provocative proposition. Although property has long been, and still is, considered a source of power and a determining factor of sovereignty—what is called ‘a property-owing democracy’ in the words of Rawls—thus closely related to the patterns of governance, there is little literature pointing to the relationship between the two institutions.<sup>72</sup> The proposition that the right to property is cardinal to a democratic society is not a novelty. As a first generation right, property is included in the concept of personal autonomy and guarantees basic subsistence needs, both of which are foundational elements of a democracy—taking for granted that the subjects’ autonomy and well-being are at the epicentre of the democratic model. Evidently, if there were no negative connotations as regards the right to property, thesis d would be self-evident, emanating directly from theses b and c. The interrelation of the two institutions becomes doctrinally intriguing in light of the ongoing international economic crisis.

## 5.5 Democracy and property trapped in the economic crisis, or the economics of an institutional crisis

Generally, it may be suggested that economic recession is an historically repeating phenomenon with a visible impact on norms; the greater the economic crisis, the harsher the negative effects on the impugned legal order. Even though an appraisal of its results would be manifestly premature, a few safe conclusions with particular focus on the Greek legal order may be drawn, given that Greece is at the heart of the current crisis.

In legal terms, the crisis has highlighted two points: first, that the proclamation of a state of emergency due to a sovereign debt crisis is politically unpalatable, and second, that the right to property is the most vulnerable to economic fluctuations. Contrary to other states that experienced similar crises,<sup>73</sup> the Greek state vehemently refused to adopt emergency legislation for the fear of forfeiting

72 John Rawls, *Justice as Fairness: A Restatement* (HUP 2001) 139.

73 Michael Waibel, ‘Iceland’s Financial Crisis—Quo Vadis International Law’ (2010) 14 ASIL Insights <<https://www.asil.org/insights/volume/14/issue/5/icelands-financial-crisis---quo-vadis-international-law>> accessed 17 February 2016.

its negotiating power. Nevertheless, the Greek Council of State spoke of the state's 'fiscal derailment'<sup>74</sup> using the same language as the Greek Prime Minister in 1897 when the state defaulted. The Greek state's rejection of a state of emergency logic is assessed positively by theory,<sup>75</sup> since the enjoyment of human rights is not affected by the crisis, at least formally. Nevertheless, the adoption of a state of emergency policy would offer to the national judge a straightforward justification for the restrictions suffered, preventing the use of ambiguous legal edifices. Still, it is noted that derogation from, or restrictions of, the right to property are rarely invoked in cases of emergency. The norm's vulnerability *vis-à-vis* economic austerity is undoubted: tax increases, coupled with cuts in pensions and wages, have led to a sharp decrease in the standard of living.

With regard to political life, the results of recession are even more devastating. Although Greece is politically stable, the emergence of radical political parties and their increased popularity is alarming. The rise of extremist parties has raised international concern for the recession's dilutive effect on the rule of democracy in Greece: even though the Greek state remains constitutionally a parliamentary democracy, there are certain doubts on whether Greek society is still a democratic society. This divergence between democratic state and democratic society could be described as the 'polarisation' of democracy.<sup>76</sup> Accordingly, the Council of Europe's Commissioner for Human Rights reported that there is an:

increase in manifestations of intolerance and racist violence [that] takes place in Greece in a context marked by an acute economic and social crisis, ongoing since 2009. Severe fiscal austerity plans have adversely affected living standards and social welfare in the country. In October 2012 unemployment reached 26.8% and youth unemployment culminated at 57.6%, the highest rates in the EU. This situation appears to act as a strong magnifier of an already existing problem of intolerance and racism in the country.<sup>77</sup>

In this regard, the economic crisis is expressed in terms of property. Unemployment is the individual's exclusion from participation in the state's economic growth, or

74 Greek Council of State Decision 668/2012 (n 10).

75 Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 Cambridge J Intl & Comp L (forthcoming) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2633065](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633065)> accessed 17 February 2016.

76 See, eg, Takis S Pappas, 'Why Greece Failed' (2013) 24 J of Democracy 31, 40–42.

77 Commissioner for Human Rights of the Council of Europe, 'Report' (CommDH (2013) 6, 16 April 2013), para 6 <<https://wcd.coe.int/ViewDoc.jsp?id=2053611>> accessed 17 February 2016.

the inability to obtain the necessary means of subsistence. Here, the association of the economic crisis with the democratic one is clear. Overall, the economic crisis is, for the Greek society, a crisis of property, affecting the democratic society as a whole, and testing its resistance to phenomena of radicalisation. To give the big picture, the economic crisis is a crisis of legal and political institutions: namely, property and the democratic society.

## 6 The economic crisis and the ECtHR: Two approaches

An evaluation of the ECtHR's handling of the economic crisis refers essentially to the weighting of human rights and the public (fiscal) interest or, in other terms, to drawing a fine line between a state's margin of appreciation and a society's basic demands in order to remain democratic. The Strasbourg Court deviated from its standards, and did not hesitate openly to address the economic crisis. At this point, there are at least two readings of ECtHR jurisprudence: either that its approach is circumstantial, or that its attitude has deep roots.

The first view suggests that the ECtHR adjusted its reasoning due to the crisis. Christos Rozakis, the former Vice-President of the ECtHR notes respectively that:

One could support that the European Court in the two occasions of states in a crisis [Greece and Portugal] definitely favoured the crisis state, ignoring the personal implications of the crisis for parts of these populations. Of course, this hypothesis could be deemed wrong, and rejected on the basis of the applicants' inability to substantiate the degree to which their personal interests are affected by the crisis. By comparing these cases to the previous ones delivered under ordinary circumstances, the final conclusion is that the Court did not adhere to judicial coherence; these cases constitute a setback to its jurisprudence, which allows us to talk of a 'crisis jurisprudence' different from the 'non-crisis' one.<sup>78</sup>

Rereading the crisis decisions, this outcome is anticipated. For a long time now, the Strasbourg Court has systematically chosen to 'dilute its own authority with a democratically tactful commitment to subsidiarity';<sup>79</sup> put simply, this is not an

78 Christos L Rozakis, 'ECHR and the Crisis' (original speech in Greek, Annual Conference of the Hellenic League for Human Rights, June 2014, translated by the author).

79 Gearty, 'Democracy and Human Rights in the European Court of Human Rights' (n 64) 389–90.

occasional jurisprudential retrogression, but rather, a shift to an enhanced margin of appreciation.<sup>80</sup>

Even if the constant expansion of states' margin of appreciation is of no significance for the decisions issued in the above case studies, and if one concedes that the applicants' claims were manifestly ill-founded in both cases, then there are certain shortcomings in the ECtHR rationale. In *Koufaki & ADEDY v Greece* in particular, the ECtHR did not take into consideration the number of people represented by the trade union and potentially affected by the cuts to public spending. The quantitative factor is not always decisive for Strasbourg rulings;<sup>81</sup> yet, in this case, it was consciously ignored. Moreover, the ECtHR overlooked the humanitarian aspects of the economic crisis in Greece, as it did not confer a subsistence quality to the right to property. The final consideration is whether this judicial approach contributes to the deterioration of the democratic rule in the European legal order. An expansion of states' margin of appreciation at the expense of the standards of human rights protection is harmful to democratic governance and, more specifically, to the preservation of democratic societies. Ultimately, the European jurisprudence does not involve a clash between civil liberties and the margin of appreciation, but rather a confrontation between the principles of democracy and subsidiarity.

80 See, eg, John P Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (2013) 31 *Nordic J Human Rights* 28; Council of Europe, 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond' (Directorate General Human Rights and Rule of Law, March 2014) <[http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014_en.pdf)> accessed 17 February 2016.

81 *Broniowski v Poland* (2004) ECHR 2005-IX 928.



# Constitutionalising the International Legal Order through Case Law? Judgment No 238/2014 from the Italian Constitutional Court

*Maria Elena Gennusa*<sup>\*</sup>

## Abstract

Judgment No 238/2014 of the Italian Constitutional Court held that the customary international law on State immunity, insofar as it covers war crimes and crimes against humanity, has not entered the domestic legal order, and therefore has no effect therein. It also declares unconstitutional Article 1 of Law No 848/1957 and Article 3 of Law No 5/2013, which aimed to ensure the compliance of Italy with the decisions of the International Court of Justice. In its judgment, the CC asserts its aspiration to ‘contribute to a desirable—and desired by many—evolution of international law itself’. By analysing the legal reasoning of the CC, this paper infers the real purpose behind Judgment No 238/2014 and evaluates the appropriateness of the approach used to reach its objectives.

## Keywords

State immunity, Italian Constitution, Counter-limits, Italian Constitutional Court, Dualism

## 1 Judgment No 238/2014 in context: The Italian saga of state immunity and war crimes

On 22 October 2014 the Italian Constitutional Court (CC) delivered its now well-known Judgment No 238<sup>1</sup> on State immunity and war crimes. This represented a crucial moment in the so-called ‘*Ferrini* saga’, which concerns the long-standing

<sup>\*</sup> Associate Professor of Constitutional Law at the University of Pavia, Italy. The author is grateful to Stefania Ninatti, Lorenza Violini, Maurizio Arcari, Antonia Baraggia and Paolo Zicchittu for their insightful observations and valuable suggestions. Thanks are also due to the anonymous CJICL reviewers for their critical comments on the first draft of this article and to Massimo Lando for his patient and accurate help in editing the final version. The usual disclaimers apply.

<sup>1</sup> Italian Constitutional Court, Judgment No 238 (2014) (Judgment No 238/2014).

issue of Germany's refusal to pay compensation for damage to the victims of Nazi atrocities carried out on Italian soil during the final stages of World War II.

Beginning with the *Ferrini v Federal Republic of Germany* decision of 11 March 2004 by the Court of Cassation (*Corte di Cassazione*),<sup>2</sup> the Italian courts affirmed their jurisdiction over the question of compensation, even though the respondent in civil proceedings was a foreign State. The Court of Cassation did not, however, decide to assert its jurisdiction over a foreign State with the aim of deliberately disregarding the international customary norm on State immunity. Instead, the Court had presumed that *jus cogens* (and, therefore, the protection of some essential human rights) had taken on such importance in international law as to make immunity in cases like the one at stake inapplicable under international law.<sup>3</sup> Under the Court's interpretation, an exception to immunity for war crimes and crimes against humanity was 'already embedded in the international legal order' and all that remained was to bring it to light.<sup>4</sup>

This assertion of jurisdiction by the Italian courts was subsequently challenged by Germany before the International Court of Justice (ICJ). In *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*,<sup>5</sup> the ICJ found against Italy and ordered it to ensure that, 'by enacting appropriate legislation, or by resorting to other methods of its choosing', the decisions of its courts infringing the immunity of Germany 'cease to have effect'.<sup>6</sup> Following a substantial, albeit somewhat selective,<sup>7</sup> survey of State practice and *opinio juris*,<sup>8</sup> the ICJ categorically excluded the existence of an exception to the rule of State immunity from civil suits relating to *acta jure*

2 Italian Court of Cassation, *Ferrini v Repubblica Federale di Germania* (2004) ILDC 19; translated in (2004) 128 ILR 658 (Judgment No 5044/2004).

3 For more on this judgment, see Pasquale De Sena & Francesca De Vittor, 'State Immunity and Human Rights: The Italian Court Decision on the Ferrini Case' (2005) 16 EJIL 89.

4 Italian Court of Cassation, *Repubblica Federale di Germania v Mantelli* (2008) ILDC 1037 [11] (emphasis added); see also Carlo Focarelli, 'Federal Republic of Germany v Giovanni Mantelli and Others' (2009) 103 AJIL 122, 125 and sourced from Filippo Fontanelli, 'Criminal Proceedings Against Albers' (2013) 107 AJIL 632.

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

6 *ibid* [139(4)].

7 See, eg, Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of the United States Practice in *Jurisdictional Immunities of the State*' (2012) 21 Italian YIL 143.

8 The survey of State practice and *opinio juris* takes a large part of Judgment *Jurisdictional Immunities* [55]–[97]; with regard to the territorial tort principle, see more specifically [62]–[69]; to the argument concerning the gravity of the violations, [80]–[91]; to the relationship between *jus cogens* and the rule of immunity, see [92]–[97].

*imperii* carried out by armed forces during conflicts in the territory of the forum State.<sup>9</sup> The ICJ made this exclusion for cases involving war crimes or crimes against humanity as well as cases involving victims who were otherwise only able to seek a remedy in the forum State.

The reaction of the Italian Parliament to the ICJ's decision was immediate and deferential. With unusual swiftness, the Italian Parliament approved Law No 5 of 14 January 2013 (Law No 5/2013),<sup>10</sup> authorising accession to the *United Nations Convention on Jurisdictional Immunities of States and Their Property*.<sup>11</sup> Article 3<sup>12</sup> of Law No 5/2013 was drafted to ensure full compliance with the ICJ's *Jurisdictional Immunities* judgment,<sup>13</sup> and to 'avoid unfortunate situations such as those created by the dispute before the Court of The Hague'.<sup>14</sup> The Court of Cassation—in *Criminal Proceedings against Albers and Others*<sup>15</sup>—no longer insisted on the original approach of its *Ferrini* judgment<sup>16</sup> and acknowledged Germany's immunity.

This deferential approach to the ICJ's decision, however, was not replicated by the Italian judiciary. On 21 January 2014 the Tribunal of Florence, a first instance court, faced with yet another claim for compensation for harm suffered by Italian citizens captured in Italy and deported to concentration camps,<sup>17</sup> requested a

9 *ibid* [107]–[108].

10 The Chamber of Deputies and the Senate of the Republic, *Accession of the Italian Republic to the United Nations Convention on the Immunity Courts of States and their Property*, Law No 5 of 13 January 2013, (Law No 5/2013) <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013;5>> accessed 22 January 2015.

11 (adopted 2 December 2004 UNGA Res A/59/38).

12 Law No 5/2013 (n 10) art 3, para 5.1, '1. For the purposes of Art 94, para 1, of the United Nations Charter, (...) when the ICJ, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting certain specific conducts of another state to civil jurisdiction, the judge before whom a dispute concerning the same conducts has been brought shall declare *ex officio* at any stage of the proceedings their lack of jurisdiction, even when they have already rendered a final judgment on a procedural matter in which they upheld their jurisdiction. 2. The final judgments contrary to the judgment of the ICJ referred to in para 1, even when the latter has been passed subsequently, can be impugned for revision for lack of civil jurisdiction'.

13 *Jurisdictional Immunities* (n 5).

14 House of Representatives, XVI Legislature, Commissions Service, Foreign and Community Affairs, Ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property, (26 September 2012, AC No. 5434/XVI) <<http://documenti.camera.it/leg16/dossier/testi/SA5434.htm>> accessed 10 March 2015.

15 Italian Court of Cassation, *Military Prosecutor v Albers and others and Germany* (2012) ILDC 1921.

16 Judgment No 5044/2004 (n 2).

17 *Simoncioni and Others v Germany*, Application No 8879/2011 (Tribunal of Florence).

preliminary ruling by the CC concerning the conformity of the following legal norms with the Italian Constitution: (1) the domestic norm incorporating into the Italian legal order the international custom on State immunity from civil jurisdiction as interpreted by the ICJ in its *Germany v Italy* judgment;<sup>18</sup> (2) Article 1 of Law No 848 of 17 August 1957,<sup>19</sup> (Law No 848/1957) which gave ‘full execution’ to the Charter of the United Nations<sup>20</sup> by obliging the national judge to comply with the ICJ’s judgments; and (3) Article 3 of Law No 5/2013, which had incorporated the ICJ’s *Jurisdictional Immunities* judgment<sup>21</sup> into the domestic order. In all three questions, the constitutional norms potentially affected were Articles 2 and 24 of the Italian Constitution,<sup>22</sup> the former aiming to protect inviolable human rights<sup>23</sup> and the latter guaranteeing the right to have recourse to a judge for the protection of rights and legitimate interests.<sup>24</sup>

The CC’s response to these questions of constitutionality was clear-cut. First, the customary rule of international law on State immunity for war crimes and crimes against humanity ‘has not entered the Italian legal order and, therefore, does not have any effect therein.’<sup>25</sup> Second, the CC held that Article 3 of Law No 5/2013 and Article 1 of Law No 848/1957 were unconstitutional, the latter exclusively to the extent that it obliges an Italian judge to comply with the *Jurisdictional Immunities* judgment.<sup>26</sup>

18 *Jurisdictional Immunities* (n 5).

19 The Chamber of Deputies and the Senate of the Republic, *Statute Execution of the United Nations*, Law No 848 of 17 August 1957 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1957-08-17;848>> accessed 16 February 2015.

20 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

21 *Jurisdictional Immunities* (n 5).

22 Constitution of the Italian Republic. Official English translation by the Senate of the Italian Republic at <[www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)> accessed 22 February 2015 (hereafter Italian Constitution).

23 Italian Constitution (n 22) art 2: ‘[t]he Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups within which human personality is expressed. The Republic expects that the fundamental duties of political, economic, and social solidarity be fulfilled’.

24 Italian Constitution (n 22) art 24: ‘[a]nyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceedings’.

25 Judgment No 238/2014 (n 1) [3.5].

26 *ibid* paras 1, 2 and 3 of the operative part of the Judgment.

## 2 Challenging, deferential and confusing: The CC's attitude towards international law

Although Judgment No 238/2014<sup>27</sup> has stirred scholarly debate relating to both constitutional and international law,<sup>28</sup> the aim of this paper is to analyse the CC's decision only from the perspective of the Court's attitude towards international law. This analysis is not, however, a straightforward undertaking. While the CC makes the final objective of Judgment No 238/2014 relatively clear,<sup>29</sup> its attitude towards international law and the overall intentions of the judgment lack such clarity. Is it the aim of the CC to challenge international law and the ICJ, or, rather, does the CC mean to show deference to the authority of the latter? What is the purpose of the CC proclaiming that it intends to 'contribute to a desirable—and desired by many—evolution of international law itself'?<sup>30</sup>

On closer scrutiny, the legal reasoning deployed by the CC in Judgment No 238/2014 can be seen to be dualistic, in that it is both deferential and subversive, depending on the perspective chosen. This dualistic approach is seen in the well-known Court of Justice of the European Union (CJEU) judgment, *Kadi I*<sup>31</sup>—to which Judgment No 238/2014 expressly refers.<sup>32</sup> In the *Kadi I* judgment, the CJEU refused to follow the UN Security Council (SC), while simultaneously affirming that the

27 *ibid.*

28 Literature on this judgment is extensive, with recent commentators including Riccardo Pavoni, '*Simoncioni v Germany*' (2015) 109 AJIL 400; Massimo Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court' (2015) 78 MLR 1028; see also Francesco Francioni, 'From Deference to Disobedience: The Uncertain Fate of Constitutional Court Decision No 238/2014' (2015) 24 Italian YIL 1; Riccardo Pisillo Mazzeschi, 'Access to Justice in Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court' (2015) 24 Italian YIL 7; Michael Bothe, 'The Decision of the Italian Constitutional Court Concerning the Jurisdictional Immunities of Germany' (2015) 24 Italian YIL 25; Giuseppe Cataldi, 'A Historic Decision of the Italian Constitutional Court on the Balance Between the Italian Legal Order's Fundamental Values and Customary International Law' (2015) 24 Italian YIL 37; Paolo Palchetti, 'Can State Action on behalf of Victims be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?' (2015) 24 Italian YIL 53.

29 See section 3, below.

30 Judgment No 238/2014 (n 1) [3.3].

31 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (*Kadi I*).

32 Judgment No 238/2014 (n 1) [3.4].

annulment of the European Union (EU) measure implementing a SC resolution did not entail ‘any challenge to the primacy of that resolution in international law’.<sup>33</sup> The result in *Kadi I* was extremely challenging—the SC resolution had been deprived of any effect within the EU legal order—but this outcome had been pursued without explicitly contesting the validity of the resolution on the international plane. Similarly,<sup>34</sup> in Judgment No 238/2014 the CC used dualism and the separation between legal orders in order to pay lip service to the ICJ with regard to the role played by it in the international order, while at the same time disobeying an international obligation by asserting the primacy of domestic law.

On the one hand, the CC’s decision could be interpreted as deferential.<sup>35</sup> That is, the CC refused to scrutinise the interpretation of the norm on State immunity supplied by the ICJ on the basis that the norm is international in character, and therefore outside the Italian system.<sup>36</sup> In making its decision, the CC invoked the principle of conformity, which holds that a principle may only be understood as it exists in the order in which it originated—namely the international legal order.<sup>37</sup> That is, the CC held that the ICJ, in interpreting international law, is ‘particularly qualified and does not allow further examination by national governments and/or judicial authorities, including this Court’.<sup>38</sup> In this sense, the CC claimed that it was limited simply to acknowledging that, at the international level, the immunity rule covers even the most serious of crimes, such as war crimes or crimes against humanity, but that the rule did not have any effect at the domestic level.<sup>39</sup>

On the other hand, the CC asserts resolutely that, while the ICJ has authority to interpret international law, the CC is entitled to decide whether international norms interpreted by the ICJ can be applied within the domestic legal order.<sup>40</sup> In Italy, the role played by international custom within the domestic order is regulated under Article 10 of the Constitution, which provides that ‘[t]he Italian legal order

33 *Kadi I* (n 31) [288].

34 One difference is that, while the CC looked directly at international custom (in order to evaluate the admissibility of its entry into the domestic order), the CJEU focused its review on the Community regulation implementing the SC resolution.

35 Although the CC did not entirely cease its criticisms of the ICJ’s line of reasoning, for example, it commented that ‘it would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection.’ See Judgment No 238/2014 (n 1) [3.4].

36 Judgment No 238/2014 (n 1) [3.1].

37 *ibid.*

38 *ibid.*

39 *ibid* [3.5].

40 *ibid* [3.3].

conforms to the generally recognised rules of international law.’<sup>41</sup> Article 10 introduces a mechanism of automatic adjustment of the national order to generally recognised international norms. This means that customary international rules are incorporated into the domestic system as soon as they are formed, acquiring the same rank as the norms of the Italian Constitution. In Judgment No 238/2014,<sup>42</sup> however, the CC states clearly that this mechanism cannot allow for the automatic integration of all customary norms without distinction.<sup>43</sup> Article 10 is a selective compliance mechanism that opens the doors of the Italian legal system only to those external norms not conflicting with the highest principles of the Italian Constitution.<sup>44</sup> If such a conflict arises, international customary norms cannot enter the domestic legal order regardless of whether they pre-date the entry into force of the Italian Constitution.<sup>45</sup> Such a conflict is precisely what happened in Judgment No 238/2014. Evidently, the CC’s deference to the ICJ ceases here because the outcome achieved by concluding that the international norm does not exist within the domestic order is highly subversive.

A comparison of Judgment No 238/2014 with the earlier *Ferrini* decision handed down by the Court of Cassation<sup>46</sup> is illuminating. The consequence of both judgments—namely, the non-application within the domestic order of the

41 Italian Constitution (n 22) art 10.

42 Judgment No 238/2014 (n 1).

43 *ibid* [3.4].

44 *ibid*.

45 *ibid* [2.1]. The CC achieved this outcome by relying on its Judgment No 1 (1956), in which the Court stated that ‘[t]he assumption that the new notion of “unconstitutionality” concerns *only laws subsequent* to the Constitution, and not laws prior to it, *cannot be accepted*’ (translation provided by the author; emphasis added), and on Judgment No 48 (1979), concerning the jurisdictional immunity of diplomatic officials. The reference to the latter is more controversial, because, if it is accepted that, in it, the CC examined the customary norm on immunity of State agents, the Court also clearly affirmed therein that ‘it should be noted, more generally, with regard to the generally recognised norms of international law *that came into existence after the entry into force of the Constitution*, that the mechanism of automatic incorporation envisaged by Article 10 of the Constitution cannot allow the violation of the fundamental principles of our constitutional order, as it operates in a constitutional system founded on popular sovereignty and on the rigidity of the Constitution’ (Judgment No 48 (1979) [3], translation provided by the CC in the text of Judgment No. 238/2014; emphasis added), so seemingly admitting judicial review only over customs crystallised after the entry into force of the Constitution. Therefore, according to many authors, in Judgment No 238/2014, through relying on Judgment No 48 (1979), the CC definitively overruled its precedent (see also Italian Constitutional Court, Judgment No 73 (2001)); see, eg, Massimo Luciani, ‘I controlimiti e l’eterogenesi dei fini’ (2015) 1 *Questione Giustizia* 84, 87–88.

46 Judgment No 5044/2004 (n 2).

immunity rule when war crimes or crimes against humanity are at stake—was the same. In the *Ferrini* judgment, this outcome was achieved because the Court of Cassation was persuaded that immunity for war crimes and crimes against humanity were no longer applicable under international law.<sup>47</sup> Accordingly, the Court of Cassation rejected the application of the immunity rule domestically. Conversely, in Judgment No 238/2014, while the CC recognised the application of the immunity rule under international law, it chose to disregard an international obligation incumbent upon Italy in the name of the domestic Constitution. Thus, ‘the major challenge posited by the reasoning of the CC lies in the idea that a State can maintain some leeway, by invoking some essential principles of its internal (constitutional) order, in deciding how and when international law obligations can be admitted or not.’<sup>48</sup> It is also perceptible that the dualism employed in Judgment No 238/2014 led ‘to a sort of murder of international law through municipal law’<sup>49</sup> by undermining and delegitimising the authority of the ICJ.<sup>50</sup>

### 3 The objective of Judgment No 238/2014: The protection of the primacy of the Italian Constitution

According to the CC, the scope of immunity, as ascertained by the *Jurisdictional Immunities* judgment,<sup>51</sup> would necessitate a total sacrifice of the right to judicial protection of the Constitution. Judgment No 238/2014 represents a concrete

47 *ibid* [7.3]–[7.4].

48 Maurizio Arcari, ‘Colliding Legal Systems or Balancing of Values? International Customary Law on State Immunity vs Fundamental Constitutional Principles in the Italian Constitutional Court Decision No 238/2014’ (2014) QIL Zoom Out II 1, 2.

49 Robert Kolb, ‘The Relationship between the International and the Municipal Legal Order: Reflections on the Decision No 238/2014 of the Italian Constitutional Court’ (2014) QIL Zoom Out II 5, 11.

50 The same Tribunal of Florence that had requested the preliminary ruling of the CC has already accepted the ‘invitation’ of the CC not to comply with the ICJ’s *Jurisdictional Immunities* (above n 5) judgment, by ordering Germany to compensate the victims of Nazi crimes in civil proceeding for damages suffered. See Tribunale ordinario di Firenze, sez II civile, Judgment No 2468 (nrg 14049/2011) (6 July 2015) <[www.lider-lab.sssup.it/lider/dbfiles/allegati/Tribunale\\_Firenze\\_06.07.2015\\_n.\\_2468\\_omissata.pdf](http://www.lider-lab.sssup.it/lider/dbfiles/allegati/Tribunale_Firenze_06.07.2015_n._2468_omissata.pdf)> accessed 20 February 2016; Tribunale ordinario di Firenze, sez II civile, Judgment No 2469 (nrg 8879/2011) (6 July 2015) <[www.lider-lab.sssup.it/lider/dbfiles/allegati/Trib\\_Firenze\\_06.07.2015\\_n.\\_2469omissata.pdf](http://www.lider-lab.sssup.it/lider/dbfiles/allegati/Trib_Firenze_06.07.2015_n._2469omissata.pdf)> accessed 20 February 2016.

51 *Jurisdictional Immunities* (n 5).



application of the CC's 'doctrine of counter-limits', traditionally invoked by the CC since the 1970s when dealing with issues relating to the applicability of external norms in the domestic legal order.

According to the CC's jurisprudence, 'counter-limits' are supreme constitutional principles, respect for which is an inescapable condition for the openness of the domestic legal order to external legal orders.<sup>52</sup> Article 11 of the Italian Constitution provides that 'Italy agrees, on condition of its equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations.'<sup>53</sup> 'Counter-limits' may be considered, accordingly, as limits that the Italian State sets in order to safeguard its sovereignty by means of external legal rules. Italy is permitted by the Constitution to limit its sovereignty only as long as this limitation does not threaten core constitutional principles.<sup>54</sup> The CC originally drafted its 'counter-limits doctrine' with regard to the relationship between domestic and EU law. The 'doctrine of counter-limits' was established in Judgment No 183 of 18 December 1973 as follows:

On the basis of Article 11, limitations of sovereignty have been allowed solely for the attainment of the goals indicated there; and it must therefore be ruled out that those limitations concretely delineated in the Treaty of Rome (...) may in any case entail for the organs of the Community an inadmissible power of violating the basic principles of our constitutional order, or the inalienable rights of the human being. And it is obvious that, should this happen, the guarantee of the judicial review of this Court would always be ensured regarding the long-lasting compatibility of the Treaty with the aforesaid fundamental principles.<sup>55</sup>

Remarkably, the same 'counter-limits' to external law are also limits to the internal parliamentary power of constitutional reform, as the CC has often reiterated, beginning with Judgment No 1146 of 15 December 1988.<sup>56</sup> However, the CC has not concretely made use of 'counter-limits' against EU law so far. Indeed, the CC applied them for the first time in Judgment No 238/2014, when the CC prevented State immunity from the jurisdiction of foreign courts from entering into the

52 See, amongst others, CC's Judgments No 183/1973, No 170/1984, No 232/1989, No 129/2006, 284/2007, No 80/2011.

53 Italian Constitution (n 22) art 11.

54 Italian Constitutional Court, Judgment No 183 (1973).

55 *ibid.* English translation taken from Vittoria Barsotti et al (eds), *Italian Constitutional Justice in Global Context* (OUP 2016) 215–16.

56 Italian Constitutional Court, Judgment No 1146 (1988).

domestic legal system in order to protect the supreme values of the Constitution. This sheds some light on the ultimate objective of Judgment No 238/2014: the protection of the primacy of the Constitution.

Kolb has argued that ‘dualism is protective of State sovereignty’.<sup>57</sup> This notion can also be applied in the present discussion. Since constitutional sovereignty is an essential component of State sovereignty, the protection of the latter can be seen to rest on safeguarding the integrity of the former. Accordingly, the dualism employed in Judgment No 238/2014 may be interpreted as protecting the sovereignty of the Italian State through the guarantee of the primacy of its domestic Constitution. This approach, however, only partially captures the many facets of the complex relationship between the sovereignty of the State and the sovereignty of the Constitution. That is, within the domestic legal order, the primacy of the Constitution is different from, and superior to, the supreme political will of the sovereign people as expressed through the political institutions of the State. Article 1 of the Italian Constitution proclaims that ‘sovereignty belongs to the People and is exercised by the People *in the forms and within the limits* of the Constitution’.<sup>58</sup> This means that, under a rigid Constitution, ordinary legislation encounters an insuperable limit in the general observance of the Constitution. It also means that, as noted above, even a constitutional amendment cannot alter the essential constitutional core as expressed in the most fundamental choices taken by the constituent power. That core is, therefore, untouchable and non-modifiable, even by the sovereign people.

In this sense, the protection of the primacy of the Constitution may be seen as the ultimate aim of Judgment No 238/2014. This protection effectively allowed the CC both to use ‘counter-limits’ against the entry of the customary norm of State immunity<sup>59</sup> and also to quash two laws aimed at complying with the *Jurisdictional Immunities* judgment.<sup>60</sup> In this regard, the CC is in open conflict with other Italian institutions—a conflict likely to continue after Judgment No 238/2014,<sup>61</sup> and which may not be resolved even if the laws quashed by the CC were passed as constitutional

57 Kolb (n 49) 8.

58 Italian Constitution (n 22) art 1 (emphasis added).

59 Judgment No 238/2014 (n 1) para 3 of the operative part of the Judgment.

60 *ibid*, paras 1 and 2 of the operative part of the Judgment.

61 On 25 November 2014, just one month after Judgment No 238/2014, the Italian Government reiterated its willingness to deposit its declaration of acceptance of the ICJ’s compulsory jurisdiction under the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 36(2). See Francioni (n 28) 2.

laws. Indeed, as they violate the same highest constitutional principles considered to be ‘counter-limits’ to external norms, they would be declared unconstitutional. Interestingly, if the protection of the primacy of the Italian Constitution can be found to be the ultimate objective of Judgment No 238/2014, the second question—whether the CC intended to challenge international law or to be deferential to it—becomes irrelevant. The Court seemingly set out solely to protect the constitutional core, irrespective of the manner or the means.

#### 4 Constitutionalising the international order through case law?

That said, the CC did declare its intention to ‘contribute to a desirable—and desired by many—evolution of international law itself’.<sup>62</sup> Judgment No 238/2014 seems situated within an emerging judicial trend in which domestic courts reveal a general propensity towards disregarding international obligations when the protection of fundamental human rights is at stake.<sup>63</sup> This inclination is often interpreted as a manifestation of the will of courts to constitutionalise the international legal order, or for the international legal order to evolve towards a Constitution-oriented structure in which some basic values (for example, the observance of the rule of law and the protection of fundamental rights) prevail.<sup>64</sup> However, given the considerations above, is the approach pursued by the CC in Judgment No 238/2014 an appropriate one with which to constitutionalise the international legal order? Moreover, is the constitutionalisation of the international legal order really an objective of the CC?

The CC challenged State immunity law by looking solely at the Italian Constitution. Further, it condemned the rule of State immunity, if only in cases of the most serious crimes, exclusively on the basis of interests that the Constitution renders worthy of protection and in light of the consequences of immunity on

62 Judgment No 238/2014 (n 1).

63 See, in particular, *Kadi I* (n 31); see also *Al-Jedda v United Kingdom* (App No 27021/08) [2011] ECHR 1092; *Nada v Switzerland* (App No 10593/08) [2012] ECHR 1691.

64 See, eg, Marise Cremona et al (eds), *Reflections on the Constitutionalisation of International Economic Law* (Martinus Nijhoff 2014); Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011); Jan Klabbbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009); Esme Shirlow, ‘Taking Stock: Assessing the Implications of the Kadi Saga for International Law and the Law of the European Union’ (2014) 15 MJIL 2.

supreme constitutional rights. However, the Court could have more fruitfully contextualised the Italian Constitution within the international legal framework by exalting the universality of some of the values that, while enshrined in the Constitution, are equally embedded in international law. For instance, the right to judicial protection at stake in Judgment No 238/2014 is also protected under numerous international instruments, such as the European Convention on Human Rights (Article 6), the International Covenant on Civil and Political Rights (Article 14) and the Universal Declaration of Human Rights (Article 14). Nevertheless, only once does the CC admit that ‘there is little doubt that the right to adjudicate and to affect judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times.’<sup>65</sup> In all other instances, the CC depicts this right as a distinctive trait of the Italian Constitutional ‘identity’.<sup>66</sup> Furthermore, highlighting tenets common to domestic and international law does not necessarily mean a rejection of dualism. It simply means acknowledging that legal orders, although separate and distinct, may share some fundamental values upon which the foundation for positive development can be fruitfully laid. The CC could have admitted such a commonality of values while continuing to follow its traditional dualistic approach.

Moreover, it is certainly true that the primary task of the CC is to exercise its authority over domestic constitutional issues within the limits fixed by the Constitution. Nonetheless, the CC might have emphasised the universal character of the domestic values that are at the heart of the Italian Constitution. Giving weight to this universal character could have been of great significance in international law, especially in the light of the gravity of the crimes for which immunity was claimed.

Responsibility for the crimes discussed in Judgment No 238/2014 had been admitted without objection by Germany, while those claiming damages were undoubtedly the victims of those crimes (or their descendants). However, compensation for these crimes has been repeatedly denied.<sup>67</sup> The injustice of the situation was so obvious that even the ICJ expressed ‘surprise and regret’.<sup>68</sup> International law can no longer fail to tackle situations of this kind. Immunity alone has already been shown to be inadequate in cases like this, but other

65 Judgment No 238/2014 (n 1) [3.4].

66 *ibid.*

67 For some details concerning German civil proceedings where compensation was denied, see the ECtHR case concerning *Associazione Nazionale Reduci dalla Prigionia, dall’Internamento e dalla Guerra di Liberazione and 275 Others v Germany* (Application No 45563/04).

68 *Jurisdictional Immunities* (n 5) [99], [143].

approaches may be viable. For instance, immunity could be declared inapplicable when war crimes are at issue and no alternative remedies to ensure compensation exist. Otherwise, other mechanisms could be established under international law to operate jointly with immunity in order to prevent the most serious violations of fundamental procedural rights. A solution needs to be found at the international level, and it is hoped that the CC might have contributed to identifying the need for such a solution. The CC missed this opportunity, however, by maintaining an exclusively inward-looking perspective.

The CC's inward-looking focus raises doubts about the potential of Judgment No 238/2014 to constitutionalise international law. A rule such as that of immunity, which is universal (albeit controversial), is likely to change in line with the protection of values that are universal as well. Therefore, no serious attempt to constitutionalise the international legal order can be achieved by limiting discussion to the consideration of only one national Constitution. Accordingly, the choice to base its decision on constitutional law grounds casts a shadow on the real intention of the CC. Does the CC really seek to constitutionalise international law? Or, is the CC simply interested in deciding a constitutional law case, with a distant hope that this might also lead to a development in international law? It has since been conjectured that the CC 'essentially gave up trying to change the state of injustice registered at the international level, and limited itself to preserve the domestic order from the effect of this injustice'.<sup>69</sup>

Doubts remain, nonetheless. First, the CC referred to the CJEU's *Kadi I* judgment,<sup>70</sup> which could bring about some development at the international level,<sup>71</sup> while simultaneously maintaining a similarly dualistic approach and inward-looking perspective. The Court also relied on its own previous decision, Judgment No 232/1989,<sup>72</sup> asserting that it had led the CJEU to change its jurisprudence in a more constitutionally oriented way.<sup>73</sup> Indeed, Judgment No 232/1989 had been as inward-looking and dualistic as Judgment No 238/2014, and, through it, the

69 Filippo Fontanelli, 'I Know It's Wrong but I Just Can't Do Right: First Impressions on Judgment No 238 of 2014 of the Italian Constitutional Court' [2014] *Verfassungsblog on Constitutional Matters* <<http://verfassungsblog.de/know-wrong-just-cant-right-first-impressions-judgment-238-2014-italian-constitutional-court/>> accessed 20 February 2016.

70 Judgment No 238/2014 (n 1) [3.4]; *Kadi I* (n 31).

71 Indeed, it is mainly thanks to this judgment that the figure of Ombudsperson for delisting was established by UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904.

72 Italian Constitutional Court, Judgment No 232 (1989).

73 Judgment No 238/2014 (n 1) [3.4].

CJEU had similarly been threatened with ‘counter-limits’—though these had not ultimately been used. Overall, the CC appears quite confident in its capacity to play some part in constitutionalising international law.<sup>74</sup> The real intent of the CC in this regard is not completely clear. Further developments may clarify this still controversial point.

74 Note, though, that the Italian version of Judgment No 238/2014 is more forceful than its English translation. In the former, the CC affirms that the result of its review of the compatibility of the customary norm with the supreme constitutional principles shall be that of reducing the scope of the norm solely within the domestic order, and also asserts that this reduction ‘*is capable of [tale da] contributing*’ to a desirable evolution of international law. Compare with the English version: ‘The result is a further reduction of the scope of this norm, with effects in the domestic legal order only. At the same time, however, this *may also contribute* to a desirable—and desired by many—evolution of international law itself’. See Judgment No 238/2014 (n 1) [3.3] (emphasis added).

## ***The UK and European Human Rights: A Strained Relationship?***

Edited by Katja S Ziegler, Elizabeth Wicks and Loveday Hodson. Oxford, Hart Publishing, 2015. 544 pp. £70 (hardcover).

*Mark Retter\**

Against the backdrop of growing concerns in the UK about the influence of European human rights law and current Conservative proposals to repeal and replace the Human Rights Act 1998 (HRA) with an independent bill of rights, this book brings together a collection of papers exploring the reasons behind these antagonistic developments. The approach is wide-ranging and multi-faceted, drawing on some impressive contributors to treat: the nature of the emergent relationship between UK institutions and the Strasbourg Court and whether it is characterised by compliance, cooperation and/or conflict; the specific issues of conflict between the UK and Strasbourg; the relevance of EU institutions and law to the evolving relationship; the comparative relationship of other jurisdictions to Strasbourg; and the formative role of the media in public debate about human rights. This thematic breadth means the volume cannot examine any specific issue in great detail, and fails to develop an effective dialogue between different viewpoints. However, notwithstanding this, a number of insightful essays are on offer, and the editors make a valiant attempt to integrate the different issues and identify and disentangle the actual and perceived sources of strain in the relationship.

The relationship between the UK and the Strasbourg Court is considered from different angles. There is an interesting exchange of views from two judicial protagonists on relations between the domestic courts and Strasbourg. Judge Mahoney examines the extent and development of judicial dialogue, advocating a more cooperative relationship. Lord Kerr provides a perspective from the UK Supreme Court, with an emphasis on the separate judicial competences, and a critical examination of developments in domestic case law on the effect of Strasbourg

\* PhD Graduant, Trinity Hall, University of Cambridge.

decisions. The effect of the *Ullah* or mirror principle—which binds national courts to a clear and consistent line of Strasbourg jurisprudence—on the relationship with Strasbourg is subject to extended scrutiny, not only by Lord Kerr, but also by Clayton; both of whom identify the emergence of a more flexible approach in recent UK jurisprudence. From a ‘long view’ perspective, Bates provides historical and constitutional context to the current tensions by charting the UK’s position on the European Convention on Human Rights (ECHR) over the past 60 years. O’Meara takes a closer look at prospects for reform to the Strasbourg Court to enhance subsidiarity and judicial dialogue, particularly through Protocols 15 and 16. Dickson considers the potential for common law rights to cover the gap should the HRA 1998 be repealed and Donald compares the level of hostility levelled at Strasbourg, with the empirical data on implementation of Strasbourg decisions.

A number of contributors point to the formative role of specific areas of political sensitivity in the strained relations with Strasbourg. The volume attempts to identify and consider each of these conflicts. Ziegler takes on the issue of prisoners’ voting rights head on, arguing for a more stringent approach by the Strasbourg Court, allowing a wide margin of appreciation for choices in electoral system, but not in voting eligibility. Fenwick looks at the increased flexibility, dialogue and subsidiarity in recent Strasbourg jurisprudence, applying human rights law to public order and counter-terrorism measures. Ockelton provides a judicial perspective on the application of the right to family life in immigration law and Ovey traces the development of a more principled approach from Strasbourg to the application of the ECHR to international armed conflicts.

Another major issue concerns the interaction between EU law, the ECHR, and domestic human rights law, and the association in public discourse of scepticism about human rights law with Euroscepticism. Douglas-Scott considers the misconceptions and realities concerning the role of the EU Charter of Fundamental Rights in UK law. Gragl looks at the effect of EU accession to the ECHR and Müller considers the relative success of the Austrian system in its constitutional integration of rights under the EU Charter, the ECHR and domestic law.

To shed light on what is particular to the UK experience, the volume delves into the approaches to compliance with the ECHR taken by other state parties. Guerra provides a general empirical overview of compliance amongst state parties. This is followed by a series of articles on perspectives from France, Germany, Italy and Russia. The main point the editors draw from these comparisons is that political hostility to European human rights within the UK is quite distinctive due to the traditional importance of parliamentary sovereignty and lacunae in constitutional protection for fundamental rights.



The shortcomings in the public culture of human rights in the UK are then traced through the role of the media in forming public debates about human rights. Uerpmann-Wittzack provides a useful summary of the judicially recognised role of the media as a public watchdog within democratic societies, and the extent and limits of protection afforded to this role by the right to freedom of expression, especially in relation to unfounded criticisms of judicial institutions. A typology of misreporting on human rights is developed by Mead. This is complemented by Gies' article on how public perceptions of deserving claimants, worthy of the community's compassion, are formed—perhaps contrary to the principle of universal human dignity upon which human rights are purportedly grounded.

The multi-faceted approach is particularly successful for introducing the reader to the range of interconnected issues explaining UK/Strasbourg relations. Although there is some overlap between the contributions, each has its specific strand to add to the tapestry. The tapestry itself is also integrated through the skilful weaving by the editors of a narrative that attempts to disentangle the separate issues at stake and distinguish misconceptions from legitimate concerns in the public debate. Four general elements to the apparent strain are identified.

First, there are concerns relating to state sovereignty, which interact with, but are often confused with, issues pertaining to parliamentary sovereignty, and the proper role of the judiciary. There is, secondly, a general scepticism about rights, which may relate to their legitimacy in moral discourse, or reflect a cynicism about bureaucratic or judicial overreach, or the worthiness of those afforded protection. Thirdly, human rights are often portrayed in the UK as a foreign imposition and connected to a general Euroscepticism that can conflate the EU with the ECHR. This characterisation of rights as foreign leads to their externalisation from public culture. Fourthly, the public debate in the UK has a distinct all or nothing character, which may arise from the central importance attributed to questions about the proper role of courts and legislature, the absence of a constitutional tradition of fundamental rights and the distinct influence of the media in forming and misinforming the debate.

What are the editors' solutions for relieving the strain? There is the emergent and potential role for dialogue between courts, legislature and public. They also argue for greater sensitivity to the vital role of independent institutional mechanisms for protecting human rights, whether through courts or parliamentary processes. They welcome the opportunities for nurturing a home-grown culture of human rights through a domestic bill of rights, to operate in tandem and dialogue with international standards. Overall, they hope such developments might cultivate a

public culture of human rights in the UK, which can be fruitfully combined with external mechanisms for accountability to international standards.

The editors wish to contribute to the public debate by reframing and reorienting it towards ‘an informed approach to human rights, both by those in power and by ordinary citizens, an “owning” of human rights as a valuable achievement of the polity and citizens, and good quality human rights reasoning in the legal sphere, derived from principle.’<sup>1</sup> However, there is a critical problem with this integrated narrative. There is little dialogue between competing viewpoints on the main themes, which would be helpful to uncover suppressed presuppositions and potential problems with the views of the contributors and narrative of the editors. Let me consider some theoretical issues which, on the whole, are not adequately considered but are critical to some of the opinions.

There is a propensity to conflate moral human rights with legal human rights, as if the latter were necessarily determinative of the former. The editors rightly place the moral legitimacy of the ECHR system in a more general and constructive light by noting that good case law goes largely unreported by the UK press. However, evaluation of whether that institutional framework is efficacious at embodying moral human rights standards in general can remain open to political discourse, lest we unquestioningly accept the moral authority of the institution and crowd out moral discourse with regulation. The editors caution that ‘constructive engagement with the interpretation of a particular right is far removed from a sweeping rejection of the very concept of rights under the ECHR.’<sup>2</sup> Indeed, they ostensibly foreclose the possibility that the political importance of particular judicial decisions can be a catalyst for reasonable dialogue about the efficacy of the system as a whole. Perhaps this ultimately rests on the claim that ‘the significance of human rights and their persuasiveness must speak for themselves—that is, under the proverbial Rawlsian veil of ignorance, abstracting from specific situations.’<sup>3</sup> This suggests a commitment to a ‘political conception’ of human rights which eschews any necessary connection between the emergent human rights practice and specific moral foundations; instead emphasising the importance of the role or function of human rights as a whole, within international political and legal practice. Suffice it to say, while this view is becoming increasingly influential, it is not uncontroversial. To sustain that

1 Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 513.

2 *ibid* 505.

3 *ibid* 512.

view, the editors would need to delve deeper into the distinctly political conception of justice it draws upon, and the debates it implicates with rival understandings of human rights. Another problem is that human rights tend to be spoken of as entitlements we possess by virtue of our humanity, which should not be taken away from us, as if we possess them in the abstract. Indeed, concerns about the desert of human rights claimants are dismissed as clearly contrary to the universal scope of human rights based on human dignity. This may entail an implicit detachment of human rights from broader considerations of substantive justice and the common good. It can lead us to think about rights in a way that commits what Joseph Raz calls the individualist fallacy. Essentially, we can focus too narrowly on the abstract articulation of rights in manifesto form ('right to X'), and over-emphasise the potential value of the right to the claimant as a conclusive consideration. As a consequence, the potential value of the right to the claimant is presumed to ground an adequate reason to impose duties, without due consideration of the constitutive social commitments necessary to make that value a matter for common concern and action, including institutional enforcement. Ultimately, this confuses the universal attribution of human dignity with questions about the proper value response of other agents, and especially state institutions, to that dignity.

Jacques Maritain once said, '[f]or the peoples to agree on the means of securing effective respect for Human Rights, they would need to have in common, however implicitly, not necessarily the same speculative concept, but at least the same practical concept, of man and life, the same "philosophy of life"'.<sup>4</sup> Human rights decisions can be controversial because they implicate divergent practical understandings of the common good, which may be hotly disputed within a community and not just by the government of the day. This connects up with concerns about subsidiarity. Although attention is given to the potential for subsidiarity through the margin of appreciation doctrine and enhanced dialogue, very little is devoted to the value of subsidiarity within a human rights context. Yet, this is central. The editors believe 'an effective guarantee of individual rights necessitates external oversight' and this must come 'from somewhere outside the UK'.<sup>5</sup> But this begs the question for anyone who thinks, like Maritain, that quality human rights reasoning rests on an implicit understanding of the common good,

4 UNESCO 'Human Rights: Comments and Interpretations' (25 July 1948) UNESCO/PRS/3, IX (emphasis removed).

5 Ziegler, Wicks and Hodson (n 1) 514.

nurtured by common practical commitments within communal life. Whatever one's views, much more needs to be said on why subsidiarity is to be valued or not.

Without consideration of these foundational issues, the editors' narrative is unable to attain an adequate critical perspective on the public debates to reframe them for anyone who does not already accept their underlying assumptions. Nevertheless, the volume does contain a valuable collection for readers wanting to become more acquainted with current debates on human rights in the UK.

## ***The Law and Politics of the Kosovo Advisory Opinion***

By Marko Milanović and Michael Wood (editors).  
Oxford, Oxford University Press, 2015.  
384 pp, £70 (hardcover).

Gaiane Nuridzhanian\*

Much has been said and written on the *Kosovo Advisory Opinion* delivered by the International Court of Justice (ICJ or the Court) in 2010<sup>1</sup> and on the Kosovo situation in general.<sup>2</sup> *The Law and Politics of the Kosovo Advisory Opinion*, edited by Marko Milanović and Sir Michael Wood, makes a significant and well-timed contribution to the existing debate. The book is notable for several reasons: its outstanding selection of contributors; its big picture perspective; and its consideration of the *Kosovo Advisory Opinion* in the light of the more recent allegedly analogous developments, such as Crimea's secession.

A unique feature of this book is that it brings together contributions by leading experts in international law and international relations who, in recent years, have been participating in one way or another in shaping the debate on Kosovo. Many of the authors, including James Crawford, Harold Hongju Koh, Marko Milanović, Alain Pellet and Sir Michael Wood, acted as either counsel or advisor for the United Kingdom, the United States, Serbia, France and Kosovo, respectively, in the advisory proceedings before the ICJ.

\* MPhil/PhD Student, University College London.

1 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

2 Among the books dedicated to Kosovo in general and the *Kosovo Advisory Opinion*, see Peter Hilpold (ed), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Martinus Nijhoff 2012); James Summers (ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff 2011); Kushtrim Istrefi, *Secession, Statehood and the Recognition of Kosovo: An Examination of Kosovo's Statehood under International Law* (Lambert Academic Publishing 2010); Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009).

*The Law and Politics of the Kosovo Advisory Opinion* discusses in detail various legal issues arising from the political situation and the Advisory Opinion, as well as arguments submitted by the parties to the advisory proceedings. However, as reflected by its title, the book is not limited to legal analysis. An idea that runs through every chapter of the book is the interplay between the law and politics. The book examines the *Kosovo Advisory Opinion* in the broader context of the interests and motivations of the states involved, of the politics behind the ICJ's decision, its reasoning and its choice to remain silent on certain matters. It also looks at the implications of the *Kosovo Advisory Opinion* for resolution of the conflict between Serbia and Kosovo, and for international law in general.

The book consists of four parts and 18 chapters which tell the story of the *Kosovo Advisory Opinion*, starting with Serbia's decision to bring the matter before the ICJ, continuing with the discussion of the ICJ's opinion and closing with an examination of the impact of the *Kosovo Advisory Opinion* on the relations of Kosovo and Serbia both between themselves and with the rest of the world. This review follows the general structure of the publication, and gives a more detailed account of particularly engaging chapters of the book.

Part I, 'The Advisory Proceedings in Context', opens with a chapter explaining Serbia's decision to react to Kosovo's Declaration of Independence ('DoI') by bringing the issue before the ICJ and its choice of the particular question to pose to the Court.<sup>3</sup> Serbia dismissed the idea of challenging the lawfulness of recognition by other states of Kosovo's DoI in contentious proceedings before the ICJ, as it was not willing to pursue a case against the US or any of the key EU members. At the same time, it thought that bringing a case against a small state would be considered as a sign of weakness. Bringing a case against Kosovo was naturally out of the question since it was not party to the Statute of the ICJ<sup>4</sup> and, in any case, doing so would have amounted to tacitly recognising Kosovo's statehood. Belgrade was mindful of the risk of an unfavourable outcome of advisory proceedings, which affected its choice of question eventually put to the Court. It nonetheless considered that referring the matter to the ICJ would aid in its effort to quell internal discontent by showing that decisive steps were being taken at the international level to defend

3 James Ker-Lindsay, 'Explaining Serbia's Decision to go to the ICJ' in Marko Milanović and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 9.

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

Serbia's interests, as well as to slow down the process of international recognition of Kosovo. Both aims were achieved.

Advisory proceedings before the ICJ generated considerable interest among states. In addition to Serbia and the authors of Kosovo's unilateral declaration of independence, who were allowed to make submissions before the Court, 42 states participated in the proceedings. Chapter 3 examines in detail how the states participating in the proceedings before the ICJ chose to argue the case.<sup>5</sup> Like the remainder of the book, it is not confined to legal analysis. Chapter 3 examines the motives behind the choice of specific arguments by states participating in the proceedings. For instance, Chapter 3 analyses the reason why the pro-Kosovo states decided to make only limited arguments based on self-determination and secession. In addition, it addresses the manner in which the *sui generis* argument, as well as arguments about the identity of the authors of the DoI, the legal nature of the Constitutional Framework of Provisional Self-Government and the binding force of Security Council resolutions with regard to non-state actors emerged and developed throughout the proceedings.

The evolution of the *sui generis* argument can be taken as an example. As suggested by the author of Chapter 3, Kosovo being a *sui generis* situation was the main political argument underlying the uniqueness of the circumstances and served to discourage others from following Kosovo's example. However, in order for the argument to gain cogency in the proceedings, it needed to be translated into a general legal proposition. The pro-Kosovo states largely avoided arguing the issue as one of a conflict between the right to self-determination and the principle to respect territorial integrity. First, they realised that the ICJ would be reluctant to engage with the self-determination argument, and the wording of the question would allow the ICJ to avoid it. Secondly, supporting Kosovo's independence based on self-determination was too large a commitment for the greatest powers in the pro-Kosovo camp. Doing so would require them to act consistently with regard to any other oppressed group in future. As a result, they chose to argue that the principle of territorial integrity did not apply to non-state actors. Thus, the application of the principle of territorial integrity within a state became one of the key issues argued by the participants as the proceedings developed. The author's opinion on the matter is supported by a number of illustrative tables, which usefully trace the parties' arguments through the various stages of the proceedings.<sup>6</sup>

5 Marco Milanović, 'Arguing the Kosovo Case' in Milanović and Wood (n 3) 21.

6 *ibid* 37–42, 49–55.

Part II, 'The Opinion', is dedicated to the advisory opinion itself. Most of the chapters within Part II provide detailed legal analysis of various aspects of the ICJ's opinion, such as jurisdiction, the Court's discretion not to give an advisory opinion,<sup>7</sup> the question the ICJ chose to answer,<sup>8</sup> and the interpretation of the meaning and legal effect of the Security Council resolution establishing the United Nations Mission in Kosovo (UNMIK).<sup>9</sup> These chapters also keep sight of the broader context in which the ICJ's opinion was delivered and they anticipate its ramifications. Contributions in Part II also point out relevant issues that, for various reasons, were left unanswered by the ICJ. By narrowly interpreting the question put before it, a matter discussed in Chapter 7 as 'The Question Question',<sup>10</sup> the ICJ was able to avoid touching on certain important and controversial issues in international law, such as the consequences of a unilateral declaration of independence in general, as well as Kosovo's statehood and the effects of its recognition by other states in particular. The ICJ's approach was nonetheless justified by the considerations of judicial policy and economy, by its role as a judicial organ and the need to ensure the respect for its opinion by those directly concerned. Chapter 10 elaborates extensively on questions of secession and self-determination, issues that the ICJ essentially chose to bypass but which were discussed in some of the judges' separate and dissenting opinions nonetheless.<sup>11</sup> This chapter also discusses the consequences of the ICJ's silence for international law.

Reactions to the advisory opinion, its wider implications as well as its consequences for Serbia-Kosovo relations are discussed in Part III, 'Reactions and Implications', and Part IV, 'The Road Ahead'. Chapter 11 in Part III provides an interesting reflection on the *Kosovo Advisory Opinion* from the perspective of the ICJ's need to address interests of its multiple constituencies.<sup>12</sup> The chapter discusses an institutional perspective that is based on the ICJ's function, which is to give legal advice to bodies requesting its opinion, as well as its role as the principal UN judicial organ. Another perspective is that of dispute settlement, and is related to

7 Vladimir Djerić, 'Questions of Jurisdiction and the Discretion to Decline a Request for an Advisory Opinion' in Milanović and Wood (n 3) 99.

8 Daniel Müller, 'The Question Question' in Milanović and Wood (n 3) 118.

9 Sean Murphy, 'Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)' in Milanović and Wood (n 3) 134.

10 Müller (n 8) 119–23.

11 Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the *Kosovo Opinion*' in Milanović and Wood (n 3) 187.

12 André Nollkaemper, 'The Court and Its Multiple Constituencies: Three Perspectives on the *Kosovo Advisory Opinion*' in Milanović and Wood (n 3) 219.



the ICJ's contribution to the settlement of a contentious dispute by rendering an advisory opinion. A third perspective is called the 'guardian perspective' and relates to the ICJ's more general role in developing international law. The *Kosovo Advisory Opinion* cannot be studied in isolation from the political context in which it was given. Assessing the *Kosovo Advisory Opinion* from these constituency-oriented perspectives, as suggested by the author, assists in understanding why the Court chose to give the opinion in the first place, and having done so, why it gave the opinion that it did and which interests it catered to by doing so.

A separate chapter in Part III discusses another issue, which remained unaddressed by the ICJ, namely Kosovo's statehood.<sup>13</sup> Chapter 14 argues that Kosovo does comply with the frequently invoked Montevideo<sup>14</sup> criteria of statehood,<sup>15</sup> as well as with, in its author's opinion, the more useful indicator of statehood—formal and factual independence of a given territorial community. The chapter is followed by a contribution that examines claims of a precedential nature of the *Kosovo Advisory Opinion* which, despite persistent affirmation of the *sui generis* nature of the Kosovo situation by some, is used to justify other secessionists' aspirations and which, in its author's opinion, the Court did nothing to discourage.<sup>16</sup> Crimea is a prime example of the use of such 'Kosovo rhetoric'.

Several chapters in the two final parts deal with the implications of the *Kosovo Advisory Opinion* for the resolution of the conflict between Kosovo and Serbia, and the increased acceptance of Kosovo's statehood by the international community. The current state of relations between Kosovo and Serbia and ideas for further settlement of the tensions are also discussed in this context. It is interesting to note that the contributors of these chapters hold opposing views on the effect of the *Kosovo Advisory Opinion* on the resolution of the conflict between Serbia and Kosovo. Some believe, for example, that the ICJ's opinion has contributed to mitigate the conflict,<sup>17</sup> whereas others state that it left the problem exactly where

13 James Crawford, 'Kosovo and the Criteria for Statehood in International Law' in Milanović and Wood (n 3) 280.

14 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

15 'A permanent population', 'a permanent territory', 'a government' and the 'capacity to enter into relations with other States'.

16 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 Milanović and Wood (n 3) 291.

17 Tatjana Papić, 'The Political Aftermath of the ICJ's *Kosovo Opinion*' in Milanović and Wood (n 3) 240.

it was and they propose fresh and innovative ideas regarding Kosovo's future development.<sup>18</sup>

Considerable attention is paid in these chapters to the EU's efforts to facilitate normalisation of the relationship between Kosovo and Serbia, including by the use of EU accession as a powerful leverage in this process. Immediately after the *Kosovo Advisory Opinion* was delivered, Serbia made an attempt to re-open discussion concerning Kosovo's status before the UN General Assembly. However, political pressure from other states and other bodies, especially the EU, made it give up on the idea to pursue another of its major foreign policy goals—joining the EU. The *Kosovo Advisory Opinion* in fact created an opportunity for the opening of a dialogue between Belgrade and Pristina.

The final chapter of the book, Chapter 18, reflects on the legacy of the *Kosovo Advisory Opinion*, which its author suggests is the creation of a precedent in international law as regards the international lawfulness of declarations of independence and not of an unfortunate precedent or a *sui generis* case as some may claim.<sup>19</sup> The chapter puts the *Kosovo Advisory Opinion* in the context of the most recent developments and refutes any claims of analogy between Kosovo and Crimea. According to the author of the chapter, what is equally important in terms of the *Kosovo Advisory Opinion*'s legacy is what the Court refrained from doing—it did not reverse the process of creating an independent entity whose statehood was in fact nurtured by the UN system itself, a conclusion that once again illustrates the interplay between law and politics in the Kosovo saga.

It may seem to readers that some of the chapters of the book overlap. It is indeed the case that various chapters elaborate on similar or effectively the same issues. However, each and every chapter treats those issues from a different perspective or reflects each of the authors' distinct views on the matter. *The Law and Politics of Kosovo Advisory Opinion* will satisfy the demands of a wide and varied audience, including practising lawyers, academics, students or governmental officials interested in a thorough legal analysis of the *Kosovo Advisory Opinion* by eminent international lawyers. It will also appeal to those who are eager to learn about the influence of politics in shaping the law in the Kosovo situation and to gain insight into the broader implications of the *Kosovo Advisory Opinion*.

18 James Gow, 'Old Problems, Fresh Frameworks' in Milanović and Wood (n 3) 332.

19 Harold Hongju Koh, 'Reflections on the Law and Politics of the *Kosovo Case*' in Milanović and Wood (n 3) 350.